

June 19, 2018

VIA ELECTRONIC SUBMISSION

Monica Jackson  
Office of the Executive Secretary  
Consumer Financial Protection Bureau  
1700 G Street, NW  
Washington, D.C., 20552

**Re: Request for Information Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities, Docket No. CFPB-2018-0011**

The Electronic Transactions Association (“ETA”) respectfully submits these comments in response to the Bureau of Consumer Financial Protection’s (“the Bureau’s”) Request for Information (“RFI”) Regarding the Bureau’s Adopted Regulations and New Rulemaking Authorities. ETA is an international trade association representing more than 500 companies that offer electronic transaction processing products and services. ETA’s membership spans the breadth and scope of the payments industry and includes bank and nonbank providers of prepaid accounts, service providers that process prepaid account transactions, and other technology companies that are developing new mobile and digital payment options.

ETA specifically comments on the Bureau’s final rule governing Prepaid Accounts (“Prepaid Rule”) under the Electronic Fund Transfer Act (“EFTA”) and the Truth in Lending Act (“TILA”), and their implementing regulations (Regulation E and Regulation Z, respectively).<sup>1</sup> While our members support the Prepaid Rule’s goal of establishing effective consumer protections for prepaid products and services, ETA believes that the Prepaid Rule should be revised as described below to provide the industry with clearer and more practical guidance; promote innovation and consumer access to new products and services; and preserve the benefits consumers expect when they purchase and use prepaid products and services.

**GENERAL COMMENTS**

ETA appreciates the opportunity to provide comments in response to the Bureau’s RFI Regarding its Adopted Regulations and New Rulemaking Authorities. The Dodd-Frank Act transferred to the Bureau rulemaking authority under existing federal consumer financial laws, transferred responsibility for existing regulations implementing those laws, and provided new rulemaking authorities to the Bureau to administer and carry out the purposes and objectives of the Federal

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<sup>1</sup> The Bureau published its final Prepaid Rule in 2016. 81 Fed. Reg. 83,934 (Nov. 22, 2016). A year later, the Bureau extended the general effective date of the Prepaid Rule, 82 Fed. Reg. 18,975 (Apr. 25, 2017), and then amended the Prepaid Rule, 83 Fed. Reg. 6,364 (Feb. 13, 2018), (collectively the “Prepaid Rule”). The Prepaid Rule will be codified to various provisions of 12 C.F.R. parts 1005 and 1026.

consumer financial laws, including prohibitions against unfair, deceptive or abusive acts or practices under the Dodd-Frank Act.<sup>2</sup>

The Bureau should evaluate its Adopted Regulations to ensure that such rules are consistent with the Bureau’s mission to “[h]elp[] consumer finance markets work by regularly identifying and addressing outdated, unnecessary, or unduly burdensome regulations, by making rules more effective, by consistently enforcing federal consumer financial law, and by empowering consumers to take more control over their economic lives.”<sup>3</sup> Bureau regulations should promote innovation in the consumer finance market and protect consumer choice and access to a range of financial products and services. When regulation is deemed necessary, the Bureau’s rules should be narrowly tailored to achieve the Bureau’s goal while minimizing unnecessary burdens on the affected industries.

## RECOMMENDED REVISIONS TO THE PREPAID CARD RULE

The Bureau should reopen and revise the Prepaid Rule, which is currently scheduled to become effective on April 1, 2019. Prepaid products provide cost-effective, convenient, and innovative payment options for millions of consumers, particularly for the approximately 68 million lower-income and unbanked consumers who may not have access to other financial services. As explained in ETA’s initial comments,<sup>4</sup> and repeated in public comments spanning industry participants, consumer representatives, and consumers themselves, the Prepaid Rule risks chilling or eliminating products or services that are important to the consumer financial marketplace. Moreover, the Prepaid Rule is overly broad and reduces the ability of companies to provide consumers with innovative products and services. Changes are required to conform the Prepaid Rule to the Bureau’s purpose and mission.

### A. The Bureau Should Narrow the Definition of a Prepaid Account

The stated purpose of the Bureau’s original 2012 Advance Notice of Proposed Rulemaking (“ANPR”) was to seek information about GPR cards.<sup>5</sup> Commenters advised the Bureau during the rulemaking to tailor the definition of GPR cards carefully so that other types of prepaid cards, digital wallets, virtual currencies, and money transmitter accounts were not included within scope. Notwithstanding these comments, the Bureau finalized a Prepaid Rule with a *much broader scope*

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<sup>2</sup> 12 U.S.C. § 5512(b)(1).

<sup>3</sup> See, e.g., Press Release, CFPB Issues Request For Information On Adopted Regulations and New Rulemaking Authorities (Mar. 14, 2018), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-request-information-adopted-regulations-new-rulemaking-authorities/>.

<sup>4</sup> ETA’s prior comments on the Bureau’s Prepaid rulemaking may be located:

- 2012 ANPR: <https://www.regulations.gov/document?D=CFPB-2012-0019-0170>.
- 2014 NPRM: <https://www.regulations.gov/document?D=CFPB-2014-0031-3721>.
- 2017 NPRM: <https://www.regulations.gov/document?D=CFPB-2017-0015-0023>.

<sup>5</sup> 77 Fed. Reg. 30923 (May 24, 2012).

than initially proposed in the ANPR, which raises a number of concerns of potential unintentional consequences for consumers and industry, as described in ETA's prior comments, and further noted below. ETA therefore encourages the Bureau to revisit its initial ANPR and consider revising the Prepaid Rule to more closely conform to the original proposal, which will benefit consumers by ensuring they have access to innovative and competitive prepaid products and services, without over-regulating and over-burdening industry participants. Additionally, exclusions to the applicability of the rule should not be limited to payroll or health/employee benefits accounts. Rather there should be more of a principled approach to the exclusions. For example, the principles underlying those stated exceptions also apply to cards made available as distribution options for funds from 529 college and ABLE Act savings plans.

The Bureau's Prepaid Rule amended the definition of "account" in Regulation E to include "prepaid account," a newly defined term that spans a wide range of products that extend beyond GPR cards, including non-reloadable accounts, digital wallets, virtual currencies, and peer-to-peer ("P2P") payment systems.<sup>6</sup> Many of the products now included in the definition are not marketed to the public as an account substitute or reloadable (as is the case with GPR cards). ETA encourages the Bureau to limit the Prepaid Rule to conventional GPR cards.

### **1. P2P Products**

P2P products and services are used for transactions between consumers and are therefore fundamentally different from GPR cards, which more directly involve the participation of a business or financial institution. In addition, P2P products and services operate on a different technical basis, exchange different types of information, and involve different methods by which consumers obtain and activate P2P services compared to GPR cards.<sup>7</sup> For these reasons, P2P products do not present the same risks to consumers; therefore, it makes little sense to impose sweeping regulations designed for the GPR market on these developing products and services.

### **2. Digital Wallets**

The final version of the Prepaid Rule, as amended in February 2018, continues to regulate digital wallets capable of holding a balance of funds and other mobile products as "prepaid accounts," including through the imposition of pre-acquisition disclosure requirements and limitations on the ability to attach certain credit products even if such products do not constitute overdraft protection. ETA's members encourage the Bureau to revise the Prepaid Rule by excluding digital wallets from the Rule's coverage entirely, or, at a minimum, from the pre-acquisition disclosure requirements and restrictions on linked credit (as discussed below).

The broad definition of the term "prepaid account" is an example of the risks inherent in over-regulation, in that it sweeps in mobile products and digital wallets that have little in common with

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<sup>6</sup> 81 Fed. Reg. 83934, 83956 (Nov. 22, 2016).

<sup>7</sup> See Oz Shy, *Person-to-Person Electronic Funds Transfers: Recent Developments and Policy Issues*, Fed. Reserve Bank of Boston, No. 10-1, 5-6 & tbl.1 (Mar. 2, 2010).

traditional GPR cards. Digital wallets include applications on mobile phones or remote servers that store payment credentials or otherwise allow a consumer to pay for purchases without presenting the payment credential. In this regard, digital wallets are used primarily to access linked payment credentials such as credit and debit cards and bank accounts rather than to spend balance stored directly in a prepaid account. The Prepaid Rule ignores that fact that the motivating factors for consumers to acquire GPR cards are different from those underlying consumers' acquisition of digital wallets, the methods for acquiring the two products are different, and the coverage of the two offerings under existing regulations (primarily Regulation E and Regulation Z) is readily distinguishable.

The Bureau acknowledged in this rulemaking that digital wallets capable of holding a balance would be covered in its expansive definition of a regulated "prepaid account," but did not cite evidence to support the expansion, nor provide a justification of why the expansion was necessary. The Bureau's administrative record is limited to GPR cards, and lacks evidence or studies regarding the features and functionalities of digital wallets capable of holding a balance and other products and services that are nonetheless subject to the Prepaid Rule. It remains unclear how many of the Prepaid Rule's requirements, such as disclosures, would apply to products that use barcodes, QR displays, and other mobile and digital products and applications. Moreover, the Bureau never considered how consumer behavior and expectations differ when purchasing products or services online compared to in a retail store—thus, there is no indication that the Prepaid Rule's requirements would be effective in their intended purpose, and without countervailing impacts on consumer access and industry innovation.

### **3. Non-Reloadable Prepaid Cards Not Marketed to the General Public**

Prepaid card programs are often non-reloadable and not marketed to the general public as an "account" substitute. Such products include, among others, utility refunds, security deposit refunds, warranty payments, loan disbursements, one-time property and casualty payments, customer service payments (e.g., apology cards), merchandise returns, payments in lieu of coupons or product samples, compensation for distressed passengers, and disbursement of charitable contribution. These prepaid card programs deliver significant value to both consumers and businesses. Consumers benefit from these programs because they do not need to cash or deposit a check—which can involve check cashing fees or take time to "clear"—and consumers can use the funds on the card immediately. Businesses and governmental entities benefit from these programs because of efficiencies and fraud reduction associated with delivering an electronic payment product into the hands of consumers.

These prepaid card programs should qualify for the same exemption provided to loyalty, award, or promotional cards because they are (i) non-reloadable, (ii) not marketed to the general public, (iii) not used by consumers as primary transaction accounts, (iv) typically loaded with small amounts (often less than \$100), and (v) have a short duration. As the Federal Reserve Board noted in its 2006 prepaid card rulemaking, consumers "[d]erive little benefit from receiving full Regulation E protections for a card that may only be used on a limited, short-term basis and which

may hold minimal funds.”<sup>8</sup> However, the costs of complying with these rules is quite significant for the issuer.<sup>9</sup>

ETA believes exempting these products from the definition of “prepaid account” is appropriate because subjecting these products to the Prepaid Rule would significantly increase the cost of offering these products due to the need to create and maintain the required pre-acquisition disclosures and the posting and filing requirements envisioned by the Rule. These aspects of the Prepaid Rule do not benefit consumers in this context because consumers do not comparison shop for these types of prepaid cards. There is great potential for consumer benefit stemming from new and innovative types of prepaid disbursement products, which the Bureau should not stifle through over-regulation.

Accordingly, the Bureau should limit the definition of “prepaid account” to GPR cards, as was originally contemplated in the ANPR. At a minimum, the definition of “prepaid account” should exclude digital wallets, virtual currencies, P2P services and non-reloadable prepaid cards not marketed to the general public, which are distinct from GPR cards. In this regard, a rule originally intended for GPR cards and based on rules written for checking accounts and credit cards does not effectively protect consumers using online and mobile products and services, including digital wallets, while enabling development and expansion of consumer choice.

## **B. Overdraft Protections Will Limit Consumer Choice and Access to Credit**

### **1. General Comments**

ETA urges the Bureau to reconsider the Prepaid Rule’s overdraft provisions that subject prepaid products that offer overdraft features to the requirements of Regulation Z, effectively eliminating overdraft features in the prepaid market. The Prepaid Rule’s approach is inconsistent with the regulatory structure for similar overdraft features on other consumer asset accounts, including traditional bank accounts.

Prepaid cards provide significant value to consumers who do not have access to traditional banking accounts by providing them with convenient access to credit. Prepaid cards are especially beneficial as consumers are neither required to cash a check, deposit a check, or wait for the funds to clear. ETA recommends that the Bureau amend the rule to protect consumer choice and access to products. The Prepaid Rule should not make products cost prohibitive nor limit consumer choice. For example, many consumer use prepaid accounts to avoid the fees traditionally associated with other financial products. The restrictions on overdraft and credit have the potential to discourage prepaid issuers from offering these products and limit consumers’ access to short term liquidity dampening the accessibility of prepaid products to the more than 10 million unbanked consumers in the United States.

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<sup>8</sup> 71 Fed. Reg. 51437, 51441 (Aug. 30, 2006).

<sup>9</sup> *See id.*

As ETA noted in its comments on the Bureau's Notice of Proposed Rulemaking ("NPRM"), consumer responses to the Bureau's proposal indicate that many prepaid card users value the option to have overdraft protection. Overdraft options can provide financial stability and continuity, especially to consumers that use prepaid products to avoid the higher costs associated with traditional bank accounts or because they cannot access traditional banking services or other credit products. Thus, ETA encourages the Bureau to consider an opt-in approach to overdraft services consistent with existing rules and guidance on similar bank products.

## **2. Mobile Products/Digital Wallets**

The Bureau's decision to include mobile products and other online-based services, including digital wallets, within the definition of prepaid account has the potential to restrict consumer access to credit. Such products allow existing credit account to be linked to the mobile wallet, a feature distinct from non-credit GPR cards and non-linked credit products. However, if the independent linked credit products are issued through a "business partner" of the mobile product/digital wallet provider, the Prepaid Rule's credit restrictions apply. ETA believes the Prepaid Card overreaches when it attempts to regulate such products in the same manner as GPR cards with non-linked credit features. Unfortunately, the Bureau's recent amendments to the Prepaid Rule's credit provisions do not address all of the problems associated with the 2016 final rule.

The Bureau's purported solution, a five-prong carve-out from the definition of "business partner" is problematic because it limits the ability of digital wallet providers and credit card issuers to develop consumer-friendly innovations. For instance, the requirement for identical treatment of linked and non-linked credit products discourages digital wallet providers and credit card issuers from developing and offering additional consumer benefits or rewards programs even if those rewards could only be offered as a result of the linked offerings.

As noted above, the problems with the credit requirements in the Prepaid Rule can be corrected by excluding digital wallets and other mobile products from the definition of "prepaid account." At a minimum, the Bureau should amend the Prepaid Rule to exclude the application of the credit provisions to credit products accessed by a digital wallet when such credit products are already subject to Regulation Z as it exists today. ETA is concerned that reducing consumer access and choice will harm consumers and the industry as a whole, and requests that the Bureau reevaluate the Prepaid Rule's effect on overdraft services.

## **C. Disclosure Requirements Remain Overly Broad and Should Be Tailored**

### **1. Avoid Unnecessary Disclosures**

ETA supports the Bureau's efforts to implement disclosure requirements for GPR cards. In reconsidering the Prepaid Rule, however, the disclosure requirements should be narrowly tailored. Disclosures should provide consumers with a clear and adequate description of products. ETA is concerned that the disclosure requirements will not foster consumer involvement in their financial affairs. ETA urges the Bureau to implement a rule that fully protects consumers while reducing consumer confusion.



### **i. Pre-Acquisition Disclosures**

The Prepaid Rule’s disclosure requirements fail to address the different ways prepaid products are acquired by consumers. The Bureau’s singular approach to disclosures, combined with the overbroad scope of the Prepaid Rule result in a cumbersome and potentially confusing regulation. In its NPRM, the Bureau asserted that “standardizing pre-acquisition disclosures across all possible acquisition channels will make it easier for consumers to compare different types of prepaid account products.”<sup>10</sup> Standardizing disclosures across diverse products, however, applies a one-size-fits-all solution that can result in complex or overly-detailed disclosures. These types of disclosures can overwhelm consumers, who are forced to contend with similar looking disclosures for products that are inherently very different. As a result, consumers may misunderstand how a product works or the amount of fees, or have troublemaking accurate comparisons because of the wide variety and variation in prepaid products.

One of the most burdensome provisions in the Prepaid Rule is the requirement that short form and long form disclosures be provided to consumers before they acquire prepaid accounts, including digital wallets capable of holding balance. Obviously, mobile and online-based products, including digital wallets, contain no packaging and there is no document containing terms and conditions that is physically enclosed with the product. Moreover, all applicable terms and conditions of digital wallets are easily accessible online before account opening in the initial disclosures already required under Regulation E. Traditional GPR prepaid cards and mobile products/digital wallets are too different to effectively standardize disclosures across both products—attempting to do so may confuse or mislead consumers rather than facilitate comparison shopping, or result in consumers abandoning the signup process.

### **ii. Additional Fee Type Disclosure**

The Prepaid Rule’s requirement to disclose the number of additional fee types provides an example of unnecessary and potentially confusing disclosures. Such a disclosure unduly impacts prepaid products and services that offer the greatest amount of consumer choice and flexibility, through optional features that consumers may use, if desired—resulting in a high number of fee “types.” Products and services with fewer features will thus disclose fewer fee “types,” but are not inherently more affordable or beneficial to consumers. ETA believes that the Bureau should remove this disclosure requirement from the Prepaid Rule, to eliminate both an unnecessary and burdensome disclosure requirement and a potential source of consumer confusion.

### **iii. Revenue-Based Fee Disclosure**

The Prepaid Rule’s disclosure requirements regarding additional fees provides an example of ETA’s concerns about over-broad and potentially confusing disclosure requirements. The Prepaid Rule requires that the short-form disclosure include the two fee types that generate the highest

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<sup>10</sup> 81 Fed. Reg. at 77149.

revenue from consumers for a given prepaid account program or across similar prepaid account programs, *in addition* to prescribed “static” fee disclosures. As ETA has previously commented, disclosing fees that *might* be charged is of no practical benefit to consumers in evaluating prepaid products. Calculating and providing such disclosures nonetheless presents a substantial hurdle to companies providing prepaid products and services.

Accordingly, ETA encourages the Bureau to re-work or eliminate such disclosures. Incidence-based fees will vary based on consumer usage behaviors and patterns. As the Bureau noted in its NPRM, the incidence-based fees disclosed on the *same* prepaid product may differ between the online and retail versions.<sup>11</sup> Given that consumer usage of prepaid accounts has changed rapidly and will continue to evolve, tying incidence fees to consumer use will result in disclosures that change too often to be of any use to consumers.

#### **iv. Highest-Fee Disclosure**

ETA also reiterates its concern regarding the Prepaid Rule’s requirement to disclose the “highest-fee.” For a tiered fee structure, the Prepaid Rule requires that prepaid products disclose the highest possible fee, and inform consumers through a caveat that the actual fees may be lower.<sup>12</sup> Calculating such incidental fees for a company’s various prepaid card programs and service variations is prohibitively difficult. And the utility to consumers (if any) is minimal. Such disclosures even pose a potentiality of steering consumers into higher-cost service options, when lower cost options are available, but obscured by the Prepaid Rule’s disclosure requirements.

Rather than disclosing the highest possible fee, ETA recommends that the Bureau consider requiring the disclosure of the standard fee, with a notation that the fee could be higher, or a fee range that encompasses the different possible fees within a category. Fee disclosures should provide accurate information to consumers, who use fee information not only to compare prepaid products, but also to evaluate whether a prepaid product is a good fit for their financial needs. Thus, as ETA has noted in its prior comments, the fees disclosed should indicate to consumers what they are most likely to pay.

## **2. Reconsider Online Posting and Submission of Agreements to the Bureau**

The Prepaid Rule’s requirement that covered entities post their agreements online and submit them to the Bureau places a burden on industry without any clear benefit to consumers—in fact, consumers may find such information overwhelming and difficult to understand. ETA estimates that some prepaid issuers would be required to post and submit to the Bureau thousands of agreements under the proposed rule given that some products have sub-types which carry different agreements. Moreover, there is no comparable requirement applicable to traditional bank accounts. Once again, the Prepaid Rule applies more burdensome requirements to prepaid account issuers than are applicable to other providers of financial services.

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<sup>11</sup> 79 Fed. Reg. 77101, 77149 & n.249 (Dec. 23, 2014).

<sup>12</sup> 81 Fed. Reg. at 84064; 83 Fed. Reg. at 6428.



In addition, the public posting of account agreements would likely discourage industry from introducing new and innovative products because competitors would quickly and easily be able to replicate each other's products, reducing competition. This would slow the development of the prepaid market, which is focused on providing new and distinct products. Additionally, consumers are unlikely to read the agreements and then visit the Bureau's site to re-read the agreement. Posting the agreements two places will not only create an administrative burden but add administrative costs. The Bureau's reconsideration of this requirement should focus on promoting innovation in the market rather than limiting growth. ETA therefore recommends that the Bureau reconsider the requirement that prepaid account agreements be posted online and then submitted to the Bureau.

### **3. Reconsider Machine-Readable Text Requirements**

The Prepaid Rule addresses the acquisition of prepaid accounts through electronic means, including via a website or mobile application, and includes requirements applicable to long form disclosures that are provided electronically through a website when a financial institution is offering prepaid accounts at a retail location pursuant to the retail location exception. Both the short form and long form disclosures must be provided in a manner that is reasonably expected to be accessible in light of how a consumer is acquiring the prepaid account. The disclosures must be in a responsive form and use *machine-readable* text that is accessible via web browsers, mobile applications, and via screen readers. Although the Bureau has not yet specified the format issuers will be required to use when submitting account agreements to the Bureau, it appears to be leaning toward a machine-readable requirement.<sup>13</sup>

Effectively, the Prepaid Rule requires that issuers provide the required electronic disclosures using an HTML or similar solution and, as noted above, may require issuers to submit prepaid account agreements to the Bureau using a similar format. Note that credit card issuers, which must also submit consumer credit card agreements to the Bureau are not required to submit agreements using machine-readable text.<sup>14</sup> It is unclear why the Prepaid Rule would impose more burdensome requirements on prepaid card issuers than are applicable to credit card issuers or traditional issuers of deposit accounts.

Furthermore, the search engine accessibility requirement is overly burdensome. ETA is concerned that creating the required disclosures and submitting account agreements to the Bureau in an HTML or similar format will require an unreasonable amount of unnecessary development work, especially given that the PDF solution available to credit card issuers would be sufficient. PDF files are screen reader accessible, work well with all devices, are printer friendly, and can be saved or e-mailed easily. And consumers are familiar with receiving disclosures in this format.

The utility to consumers of requiring search engine accessible disclosures is extremely limited. An overwhelming variety of long and short form disclosures will result from any search and many of

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<sup>13</sup> 81 Fed. Reg. at 84,142.

<sup>14</sup> 12 C.F.R. §§ 1026.58(c), (d).

the related programs likely will not be available to the consumer conducting the search either because it is not offered in the consumer's immediate vicinity, which the consumer would have no way of knowing, or because the consumer does not meet other qualification criteria applicable to the program. Because the machine-readable requirement will be of limited use to consumers and unduly burdensome for the prepaid industry, ETA recommends that this requirement be eliminated.

**D. The Bureau Should Reconsider the Effective Date and Provide the Industry With Additional Time to Implement the Proposed Changes.**

In conjunction with its reconsideration of the substantive provisions of the Prepaid Rule, ETA urges the Bureau to extend the implementation Prepaid Rules. Preparing to comply with regulatory provisions that are in flux creates unnecessary burdens and is tantamount to hitting a moving target. Extending the effective date will ensure the industry has the ability to fully comment on the Prepaid Rule, as well as sufficient time to adequately comply with any finalized requirements. Accordingly, ETA recommends that the Bureau stay the effective date of the Prepaid Rule pending its evaluation of responses to its RFI, and any further notice and comment periods. A new effective date should be proposed that takes into account the scope of the changes to the Prepaid Rule, and allows industry sufficient time to update their systems to ensure compliance.

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We appreciate you taking the time to consider these important issues. If you have any questions or wish to discuss any issues, please contact me at [Stalbott@electran.org](mailto:Stalbott@electran.org).

Respectfully submitted,



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