II. Measuring "Significance" in Billions

A. Introduction

One of the pillars of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) was the introduction of the Financially Significant Institution or the SIFI designation.[1] While the Financial Stability Oversight Council was tasked with designating certain nonbank firms, such as insurance companies, as financially significant, any bank holding company (BHC) with total consolidated assets of $50 billion or more is automatically considered financially significant and subject to systemic risk oversight by the Federal Reserve Board (the Fed).[2] Thirty-eight of the over 6,000 banks in the United States, totaling less than 1 percent of banks in the U.S., are above this threshold and subject to increased regulatory scrutiny by the Fed.[3] Through a series of rulemaking procedures in accordance with Dodd-Frank, the Fed has set out exactly how it applies the standards outlined in Section 165(a) of Dodd-Frank.[4] The statute mandates that any BHC above the $50 million threshold must be subject to capital requirements and leverage limits, liquidity requirements, risk management requirements, resolution plan and credit exposure requirements, concentration limits, and annual stress tests.[5] Standards that the Fed may apply and may tailor include contingent capital requirements, enhanced public disclosures, limitations on short term debt, and other prudential standards as the board may determine to be appropriate.[6] Under Section 165(a), the Fed may also establish enhanced standards

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[1] *See* Patricia A. McCoy, Knightian Uncertainty, Systemic Risk Regulation, and The Limits of Judicial Review 7–8 (unpublished manuscript) (on file with author).
[2] *Id*. at 8 ("Congress classified all bank holding companies with total consolidated assets of $50 billion or more as SIFIs . . . .").
[3] *Fact Sheet: Everything You Need to Know About the $50 Billion Threshold*, BETTER MKTS. 1–3 (2014) [hereinafter *Fact Sheet: Everything You Need to Know*], https://bettermarkets.com/sites/default/files/Fact%20Sheet-Everything%20You%20Need%20To%20Know%20About%20the%20$50%20Billion%20Threshold[1]_0.pdf [perma.cc/M4CL-PLBC].
[4] *Id*. at 2 ("The statute requires the Fed to apply certain standards and also provides the Fed with full discretion in applying other enhanced standards.").
[5] 12 U.S.C. § 5365 (2010).
[6] *Fact Sheet: Everything You Need to Know*, *supra* note 3.

for BHCs with totals over $50 billion in assets.[7] Indeed, the larger the BHC, the more regulations that apply.[8]

In an effort to roll-back Dodd-Frank era regulation, the House and Senate proposed bills aimed at reducing the number of banks that are subject to enhanced regulation.[9] Although the Senate bill targets multiple areas of Dodd-Frank, both bills attempt to alter the current SIFI designation in order to address concerns that the current threshold imposes heightened regulation on too many small banks.[10] The House bill attempts to alter which banks are subject to regulation by changing the determination from a threshold standard to a qualitative approach,[11] while the Senate bill attempts to raise the quantitative threshold to $250 billion in total consolidated assets.[12]

This article examines the attempts by both the House and Senate to roll back the Dodd-Frank SIFI designation in response to growing concerns that the current SIFI designation is misplaced and ineffective. First, Section II discusses the regulatory debate leading up to the introduction of the House and Senate bills. Second, Section III examines the substance of the proposed legislation. Lastly, Section IV discusses the arguments for and against raising the threshold and the argument for implementing a subjective standard pursuant to the House proposal.

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[7] 12 U.S.C § 5365 (2010).

[8] *Fact Sheet: Everything You Need to Know*, *supra* note 3.

[9] *See* Systemic Risk Designation Improvement Act of 2017, H.R. 3312, 115th Cong. (2017); Economic Growth, Regulatory Relief, and Consumer Protection Act, S. 2155, 115th Cong. (2017).

[10] *See generally* Dave Kovaleski, *House Advances Bill to Change Criteria for Systemically Important Financial Institutions*, FIN. REG. NEWS (Dec. 21, 2017), https://financialregnews.com/house-advances-bill-change-criteria-systemically-important-financial-institutions/ [perma.cc/EDD4-UMGU] ("The U.S. House of Representatives voted this week to pass the Systemic Risk Designation Improvement Act of 201 (H.R. 3312), would change the criteria for determining a systemically important financial institution."); *Senate Banking Committee Passes Bipartisan Reg Reform Bill*, ABA BANKING J. (Dec. 5, 2017), https://bankingjournal.aba.com/2017/12/senate-banking-committee-passes-bipartisan-reg-reform-bill/ [perma.cc/62WC-83EU].

[11] Kovaleski, *supra* note 10 ("[The House bill] subjects the institutions to a series of standards that more accurately measure systemic importance.").

[12] *See Senate Banking Committee Passes Bipartisan Reg Reform Bill*, *supra* note 10.

B. Background

U.S. Representative Blaine Luetkemeyer introduced the House bill on July 19, 2017.[13] Representative Luetkemeyer posits the bill "supports economic growth throughout the country because it will free commercial banks to make loans while allowing financial regulators the ability to apply enhanced standards on banks based on actual risk posed to the financial system—rather than on arbitrary asset size alone."[14] The Senate bill, titled the Economic Growth, Regulatory Relief, and Consumer Protection Act, was introduced by Senators Mike Crapo and Jim Risch on November 16, 2017.[15] On March 1, 2018, at a committee hearing on the Semiannual Monetary Policy Report, Senator Crapo contended "[t]he primary purpose of the bill is to make targeted changes to simplify and improve the regulatory regime for community banks, credit unions, midsize banks and regional banks to promote economic growth."[16] In November 2017, Senator Risch noted that "[a]gencies like the Consumer Financial Protection Bureau have consistently ignored the effects of their regulations on main street America, which has devastated small financial businesses and eliminated access to capital for entrepreneurs," and that "[t]his bill is one step in the right direction to force regulators to consider the . . . impacts of their rules on small businesses."[17]

In short, under the current regime, banks that cross the $50 billion threshold are subject to enhanced federal oversight, which they

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[13] Press Release, Office of Rep. Blaine Luetkemeyer, Luetkemyer Introduces Legislation to Promote Risk-Based Regulation for Banks (July 19, 2017) [hereinafter Rep. Luetkemeyer Press Release], https://luetkemeyer.house.gov/news/documentsingle.aspx?DocumentID=398933 [perma.cc/33TJ-A292] (announcing the introduction of the Systemic Risk Designation Improvement Act and explaining its purpose).

[14] *Id*.

[15] Press Release, Office of Sen. Mike Crapo, Crapo Risch Introduce Economic Growth, Regulatory Relief and Consumer Protection Act (Nov. 17, 2017) [hereinafter Sen. Crapo Press Release], https://www.crapo.senate.gov/media/newsreleases/crapo-risch-introduce-economic-growth-regulatory-relief-and-consumer-protection-act- [perma.cc/MFN3-EEQ4].

[16] Press Release, Office of Sen. Mike Crapo, Crapo Statement at Monetary Policy Hearing (Mar. 1, 2018), https://www.crapo.senate.gov/media/newsreleases/crapo-statement-at-monetary-policy-hearing- [perma.cc/AUA6-L9EH].

[17] Sen. Crapo Press Release, *supra* note 15.

unsurprisingly do not favor.[18] In light of this, the House and Senate have proposed legislation that attempts to limit those banks that are subject to increased regulation.[19]

C. Pending Legislation in the House and Senate

1. The House Bill

In December 2017, the Republican controlled House voted to pass the Systemic Risk Designation Improvement Act of 2017 in an effort to roll back Obama-era financial regulations.[20] The legislation eliminates the SIFI threshold altogether; the pertinent language of the statute is as follows: "Section 116(a) of . . . Dodd-Frank . . . is amended by striking 'with total consolidated assets of $50,000,000,000 or greater' and inserting 'which has been identified as a global systemically important bank holding company . . . .'"[21] The bill replaces the threshold with a qualitative approach that requires the Fed to review an institution's size, interconnectedness, global cross-jurisdictional activity, and complexity before determining the institution to be a SIFI.[22] A similar sort of qualitative approach is currently used to designate non-bank financially significant institutions.[23] While a qualitative approach does do away with an artificial threshold, a qualitative approach can present a variety of complications. An example of such complications is demonstrated by an ongoing battle between MetLife, a non-bank SIFI, and the Financial Stability Oversight Council over MetLife's SIFI designation which was determined under a qualitative standard.[24] It is certainly possible that some of the complications of a qualitative

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[18] *See* Jim Puzzanghera, *Small and Midsized Banks Could Get Regulatory Relief From Senate. Wall Street? Probably Not*, L.A. TIMES (June 16, 2017), http://www.latimes.com/business/la-fi-dodd-frank-senate-20170616-story.html (reporting on regional bank managers complaints in regards to regulatory requirements).

[19] *See* Rep. Luetkemeyer Press Release, *supra* note 13; Sen. Crapo Press Release, *supra* note 15.

[20] Kovaleski, *supra* note 10.

[21] Systemic Risk Designation Improvement Act of 2017, H.R. 3312, 115th Cong. (2017).

[22] Kovaleski, *supra* note 10 (explaining H.R. 3312).

[23] McCoy, *supra* note 1, at 13 (describing the categories taken into consideration in designating a non-bank SIFI).

[24] *See generally id*. (outlining the battle between MetLife and FSOC regarding MetLife's appeal of its SIFI designation).

approach in SIFI designation led the Senate to pass their more streamlined version of the House bill.

2. *The Senate Bill*

The Senate bill passed the Senate Committee on Banking, Housing, & Urban Affairs in December 2017 in a 16-7 bipartisan vote.[25] The bill was cosponsored by 10 Republicans, 11 Democrats, and one independent.[26] The Senate bill, however, deviates from the qualitative approach of the House bill and simply raises the threshold for SIFI classification from $50 billion to $250 billion in total consolidated assets.[27] As of March 15, 2018, the bill has passed the Senate and has been received in the House.[28] It is unknown whether the House and Senate will come to an agreement on which approach to use. Clearly a purely qualitative approach would be difficult to incorporate with an approach that uses quantitative thresholds. Even if a quantitative approach is the most leniency that can be granted to banks at the moment, supporters of eliminating the threshold system praise the threshold increase as a step in the right direction.[29]

D. Debate

Both the House and Senate bills have garnered support and opposition. However, it is more likely that the Senate version will become law as it has recorded bipartisan backing, and the Senate seems to be attempting to avoid a conference to implement portions of

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[25] *Senate Banking Committee Passes Bipartisan Reg Reform Bill*, *supra* note 10.
[26] *Id*.
[27] Economic Growth, Regulatory Relief, and Consumer Protection Act, S. 2155, 115th Cong. (2017).
[28] Economic Growth, Regulatory Relief, and Consumer Protection Act, S. 2155, 115th Cong., Bill Tracking (2017), https://www.govtrack.us/congress/bills/115/s2155.
[29] *Top Trump Advisor Hints at $200 Billion-Plus New SIFI Threshold*, ABA BANKING J. (Oct. 16, 2017), https://bankingjournal.aba.com/2017/10/top-trump-adviser-hints-at-200-billion-plus-for-new-sifi-threshold/ [perma.cc/G2LT-6SG9] ("ABA President and CEO Rob Nichols emphasized that ABA is 'pushing to get rid of these artificial asset thresholds ultimately,' but noted that raising them now would be a positive 'interim step.'").

the House bill.[30] Despite this, there are adamant supporters of the House version who believe any arbitrary benchmark, regardless of how low, is ineffective.[31]

1. Support for Raising the Threshold

A variety of regional banks just above the $50 billion threshold have encouraged and heavily lobbied for raising the threshold.[32] These banks and their supporters claim enhanced regulations lead to unnecessary increases in technology and personnel costs, limit the ability of regional banks near the threshold to engage in mergers, and have "made it increasingly difficult to do business."[33] Supporters argue mid-size banks are hit harder than larger banks as compliance costs associated with enhanced prudential regulation are largely fixed.[34] In some cases, enhanced compliance costs have forced

[30] Bob Bryan, *The Senate Just Quietly Passed the Biggest Rollback of Wall Street Regulations Since the Financial Crisis*, BUS. INSIDER (Mar. 14, 2018), http://www.businessinsider.com/crapo-wall-street-bank-deregulation-bill-vote-will-it-pass-senate-2018-3 ("To us, this suggests that Senate GOP leaders want the House to simply approve the Senate bill as written rather than adopt changes that would require a conference."); Aaron Klein, *Bipartisanship in Banking Is Back*, BROOKINGS INST. (Mar. 4, 2018), https://www.brookings.edu/research/bipartisanship-in-banking-is-back/ [https://perma.cc/NM9E-8XAH] ("This set of edits to Dodd-Frank has assembled bipartisan backing with a group of moderate Democrats joining most if not all Republicans, providing the bill enough votes to likely pass.").

[31] *See infra* Section D2.

[32] Puzzanghera, *supra* note 18 (reporting on a variety of regional banks lobbying for a dampening of current financial regulations).

[33] *Id.*; Peter Rivas, *Potential Adjustment to Dodd-Frank SIFI Threshold*, NAT'L L. REV. (Oct. 19, 2017), https://www.natlawreview.com/article/potential-adjustment-to-dodd-frank-sifi-threshold; *Senate Committee on Banking, Housing, & Urban Affairs*, SIFMA (Mar. 24, 2015), https://www.sifma.org/resources/general/senate-banking-on-the-regulatory-regime-for-regional-banks/ [perma.cc/K7ZU-UZBT] ("[S]tress testing leads to expenses in technology and personnel.").

[34] Peter Ryan, *Raising the Bank 'SIFI Threshold' Would Make the Financial System Safer*, BIPARTISAN POLICY CENTER (Apr. 16, 2014), https://bipartisanpolicy.org/blog/raising-sifi-threshold-would-make-financial-system-safer/ [perma.cc/2FLJ-ERPH] (stating "mid-sized banks . . . are hit relatively harder than their larger counterparts by the by the [sic] largely fixed compliance costs associated with enhanced prudential supervision").

regional banks to close branches.[35] Robert Hill, a chief executive of a regional bank in South Carolina, claimed while testifying in front of the Senate Banking Committee that annual stress tests forced the bank to close 10 of its 80 branches.[36] However, regional thrifts and credit unions are not the only banks that stand to gain if the proposed bill is passed. "Large" BHCs that will not be subject to enhanced systemic oversight with consolidated assets in between $50 and $250 billion include the likes of BB&T, SunTrust, American Express, Fifth Third Bank, and Citizens.[37] Proponents of raising the threshold contend that "banks with assets of around $50 billion are relatively small."[38] To put the numbers in perspective, the combined assets of the 22 BHC's between the $50 billion threshold and $250 billion proposed threshold equal the asset size of the largest bank in the country.[39] Further, the six largest banks hold an average of ten times the amount of assets than those banks between the $50 and $250 billion range.[40] Proponents of raising the threshold also contend that banks within the $50 and $250 billion dollar range pose less risk to the financial system as they are less interconnected and engage in traditional "boring banking" such as taking deposits and lending.[41]

2. *Opposition to Raising the Threshold*

Critics posit the bill is not aimed, as claimed, to assist community banks and credit unions, but is instead targeted at eliminating substantial oversight for some of the biggest banks in the country.[42] Senator Elizabeth Warren in a Bloomberg op-ed noted that "taxpayers spent nearly $70 billion bailing out institutions that currently have

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[35] *See* Rep. Luetkemeyer Press Release, *supra* note 13.
[36] Puzzanghera, *supra* note 18.
[37] JAMES BARTH & MOUTUSI SAU, MILKEN INST., DESIGNATING BANK SIFIS: AN ARBITRARY THRESHOLD FOR RISK 2 (Nov. 2015), http://assets1b.milkeninstitute.org/assets/Publication/Viewpoint/PDF/Designation-of-Bank-SIFIs-WP-FORMATTED.pdf [perma.cc/RXW3-7HKS].
[38] Ryan, *supra* note 34 ("First, when measured in terms of asset size, banks with assets of around $50 billion are relatively small.").
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] Elizabeth A. Warren, *Elizabeth Warren: Don't Let Big Banks Escape the Fed's Scrutiny*, BLOOMBERG VIEW (Oct. 26, 2017), https://www.bloomberg.com/view/articles/2017-10-26/elizabeth-warren-don-t-let-big-banks-escape-the-fed-s-scrutiny [perma.cc/4GYC-953Q].

between $50 billion and $500 billion in assets."[43] Senator Warren also notes that under the current statute, the Fed "has imposed tougher standards overall, but it has aggressively tailored them, so that banks with just over $50 billion in assets are subject to much more lenient rules than banks with more than $250 billion in assets . . . ."[44] On a broader scale, Democratic Senators on the Senate Banking Committee have posited that given the 2008 financial crisis, "[p]roposals to weaken oversight of the biggest banks have no place in this committee's process."[45] In the same committee hearing, Senator Elizabeth Warren noted that banks have previously asked for a reduction in the rules, only to be bailed out by taxpayers when things go wrong.[46] Those opposed to raising the SIFI threshold to $250 billion in consolidated assets have further pointed out that there were three emergency transactions during the financial crisis involving institutions with assets between $100 and $250 billion, and reigning in regulations on banks similar in size today "ignores lessons of past crises."[47] Indeed, in 2008, the Federal Reserve approved a variety of emergency acquisitions and conversions that led to significant losses and bailout assistance.[48] This includes Bank of America's emergency acquisition of Countrywide, a thrift holding company with $200 billion in assets, which led to $120 billion of asset guarantees by the Federal Government.[49] Other Federal Reserve approvals leading to government assistance include the approval of PNC's emergency acquisition of National City, a $145 billion BHC, which required $7.7 billion in federal assistance as well as the approval of the emergency conversion of General Motor's financing arm with $120 billion in assets, that

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[43] *Id.*
[44] *Id.*
[45] Puzzanghera, *supra* note 18.
[46] Warren, *supra* note 42 ("'Whenever things are going OK, the banks come in here and say, "Yay, let's reduce the rules. What could possibly go wrong?"' Warren said. 'And then when things go wrong, banks like yours line up and say to the taxpayers, "Bail me out." Our job is to make sure that we do not permit the next failure to happen because it helps short-term bank profits.'").
[47] Arthur Wilmarth, Jr., *Raising SIFI Threshold to $250B Ignores Lessons of Past Crises*, AM. BANKER (Feb. 7, 2018), https://www.americanbanker.com/opinion/raising-sifi-threshold-to-250b-ignores-lessons-of-past-crises [perma.cc/UED3-DCPG].
[48] *Id.* (describing certain instances during the financial crisis that involved banks with asset sizes between $50 and $250 billion).
[49] *Id.*

required $17.2 billion in federal assistance.[50] Further, it has been observed that "[b]ig regional banks and the largest money center banks have held highly correlated risk exposers during every U.S. banking crisis since 1980."[51]

3. *The Case for a Subjective Standard*

While the Senate bill only reduces the threshold for enhanced regulation, the House bill sets forth a qualitative standard in designating SIFIs.[52] As noted above, the chances of the Senate version of the bill passing as opposed to the current House version seems to be higher.[53] Regardless, the Senate bill to some has been regarded as only a stepping stone to abolishing the threshold standard altogether, and it is possible that the qualitative approach is the future direction of SIFI classification.[54] In October 2017, the Office of Financial Research (OFR) released a paper entitled "Size Alone is Not Sufficient to Identify Systemically Important Banks."[55] The OFR is an agency created by the Dodd-Frank Act and is housed within the Treasury Department.[56] The agency is tasked with "improv[ing] the quality of financial data available to policy makers and facilitat[ing] [a] more robust and sophisticated analysis of the financial system."[57] In its paper, the OFR proposed that size alone may not be optimal to identify financially significant institutions and recommends a multiple factor test to accurately analyze a bank's systemic importance.[58] In devising a multifactor

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[50] *Id*.
[51] Wilmarth, *supra* note 47.
[52] Kovaleski, *supra* note 10.
[53] Klein, *supra* note 30.
[54] *Top Trump Advisor Hints at $200 Billion-Plus New SIFI Threshold*, *supra* note 29 (describing the current legislation as a step in the right direction).
[55] OFFICE OF FIN. RESEARCH, 17-04, SIZE ALONE IS NOT SUFFICIENT TO IDENTIFY SYSTEMICALLY IMPORTANT BANKS (2017) [hereinafter SIZE ALONE IS NOT SUFFICIENT].
[56] U.S. DEP'T OF THE TREASURY, OFFICE OF FINANCIAL RESEARCH CREATED UNDER THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: FREQUENTLY ASKED QUESTIONS (2010), https://www.treasury.gov/initiatives/wsr/Documents/FAQs%20-%20Office%20of%20Financial%20Research%20-%20October%202010%20FINAL.pdf.
[57] *Id*.
[58] SIZE ALONE IS NOT SUFFICIENT, *supra* note 55, at 1 ("This analysis suggests that using such a multifactor approach to identify non-G-SIB U.S. banks for

test, the OFR relies on the current approach that the Basel Committee uses to identify global systemically important banks (G-SIBs).[59] The framework suggested by the OFR, while not parallel, is similar to that proposed in the House bill, and includes analysis of a bank's size, interconnectedness, substitutability, complexity, and cross-jurisdictional liability, with size being measured by exposure as opposed to total assets.[60] The OFR argues "such an approach could identify a much smaller group of non G-SIB banks for enhanced prudential standards."[61] The OFR further contends a multifactor approach could identify a smaller group of banks for enhanced prudential regulation, relieve certain large, less systemic, banks from regulatory scrutiny, and identify smaller banks that "play unique roles in U.S. markets, are more complex, or rely on short term wholesale funding," and subject them to higher regulatory standards.[62] While a multifactor approach may be more fitting to determine a bank's financial importance than an arbitrary asset threshold, such classification schemes are complex and present implementation problems a simple threshold does not.[63] The OFR concedes the current G-SIB approach "still do[es] not address the concentration of critical services in a bank that substitutability indicators need to capture."[64]

E. Closing

The future is unclear as to how many "big banks" will no longer be subject to increased federal regulations. After the 2008 financial crisis, Dodd-Frank created the Financially Significant Institution classification subjecting certain firms to increased regulatory requirements, including stress tests, liquidity requirements, and credit requirements.[65] In order to be subject to these requirements, Congress

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enhanced regulation—one focused on systemic importance—would be an improvement on the asset-size thresholds now used.").

[59] *Id*. at 3 ("Regulators use a multifactor approach to identify G-SIBs.").

[60] Richard Berner, *Bank Size Does Not Tell the Whole Story in Measuring Systemic Importance*, OFFICE OF FIN. RESEARCH (Oct. 26, 2017), https://www.financialresearch.gov/from-the-director/2017/10/26/bank-size-does-not-tell-whole-story/ [perma.cc/ZV9W-HPL7].

[61] *Id*.

[62] *Id*.

[63] SIZE ALONE IS NOT SUFFICIENT, *supra* note 55, at 16.

[64] *Id*.

[65] *See supra* Section A.

laid out certain thresholds that led to enhanced regulations.[66] Given the pending legislation in the House and Senate, it is clear there is an attempt to dismantle or greatly dilute the post-2008 financial crisis regulations. Both the House and Senate are attempting to reduce the number of banks subject to federal regulations by applying either a qualitative or quantitative approach. Those against raising the threshold contend Republican lawmakers have collective amnesia about the financial crisis.[67] Those in favor see opportunity for regional banks to support their local economies.[68] Those in favor of a qualitative standard feel that an arbitrary threshold cannot adequately measure systemic risk posed by banks.[69] Regardless of whether a qualitative or quantitative approach is chosen, if the House and Senate can come to an agreement on which version of the bill to send to the President such legislation would benefit banks big and small.

Ryan DiLorenzo[70]

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66 *Id.*

67 *See supra* Section D.

68 *Id*.

69 *Id*.

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