

# The Complete Compliance and Ethics Manual 2024

## U.S. Antiboycott Laws: Understanding the Impact and Ensuring Compliance

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### Introduction

The United States antiboycott laws are complex and sometimes overlooked in the field of global trade compliance.<sup>[2]</sup> Their complexity, in part, is because these laws and regulations are administered by two separate government agencies: The U.S. Department of Commerce (DOC) and the U.S. Department of Treasury.

Provided below is an in-depth review of the U.S. antiboycott laws and regulations (with primary focus on those regulations administered by the DOC) including their legislative history, scope, objectives, and impact on U.S. companies. Furthermore, this article addresses the specific activities that are prohibited under the regulations, the exceptions to such prohibitions, the reporting requirement/process, and the penalties that may be incurred by people and companies that violate the laws.

The article provides examples of prohibited boycott language and recent examples of antiboycott violations. Finally, recommendations and best practices are provided for helping ensure compliance with the U.S. antiboycott laws and regulations.

While not specifically addressed in this article, it should be noted that the laws have encountered criticism and scrutiny in recent years from, among other sources, the Boycott, Divestment and Sanctions (BDS) movement<sup>[3]</sup> and free speech organizations, such as the American Civil Liberties Union (ACLU).<sup>[4]</sup>

### Legislative History

In the 1970s, the United States adopted two laws that bar and penalize American people and companies from participating in other countries' economic boycotts of countries that are allies of the U.S.<sup>[5]</sup> These pieces of legislation, collectively referred to as the antiboycott laws, are the Ribicoff Amendment to the 1979 Tax Reform Act, found in § 999 of the IRS Code, and the 1977 Amendments to the Export Administration Act (EAA), found in § 8 of the EAA.<sup>[6]</sup> The antiboycott provisions of the Export Administration Regulations (EAR), within 15 C.F.R. § 760, implement the antiboycott provisions in the EAA.<sup>[7]</sup>

Enacted on August 13, 2018, as part of the John S. McCain National Defense Authorization Act, the Anti-Boycott Act of 2018, Part II of the ECRA, Title XVII, Subtitle B of Pub. L. 115-232, 132 Stat. 2208, provides the current statutory basis for the Office of Antiboycott Compliance (OAC) to administer and enforce the U.S. antiboycott laws and regulations.<sup>[8]</sup> This article will primarily address the U.S. Department of Commerce antiboycott provisions, found in the EAR and administered by the OAC.

### Objective and Impact of Antiboycott Compliance

The antiboycott provisions of the EAR encourage and often require U.S. persons (defined below) to refuse to

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participate in unsanctioned foreign boycotts.<sup>[9]</sup> In effect, they prevent U.S. people and companies from supporting the foreign policies of nations that conflict with U.S. policy.<sup>[10]</sup>

According to a training module from the OAC, part of the Bureau of Industry and Security (BIS) within the DOC, “The impetus for the establishment of the antiboycott laws was the Arab League boycott of Israel.”<sup>[11]</sup> The Arab League boycott seeks to economically isolate Israel through the denial of imports from and exports to Israel and by blacklisting companies which do business with Israel.<sup>[12]</sup> The Arab League boycott of Israel is the principal foreign boycott addressed in the U.S. antiboycott laws, however, the laws apply to all foreign boycotts that the U.S. does not endorse.<sup>[13]</sup>

## **Office of Antiboycott Compliance (OAC)**

The OAC administers and enforces the U.S. antiboycott laws.<sup>[14]</sup> In furtherance of the laws, the OAC discourages and often prohibits U.S. people and companies from taking certain actions that support economic boycotts against a country or countries which are friendly to the U.S.<sup>[15]</sup> U.S. people and companies must report to the OAC requests that they receive to engage in boycott-related activities or to otherwise further or support an unsanctioned foreign boycott.<sup>[16]</sup> The OAC website<sup>[17]</sup> includes examples of antiboycott warning letters that the agency has issued in recent years<sup>[18]</sup> as well as examples of actions brought for alleged antiboycott violations.<sup>[19]</sup>

## **Scope: To Whom Do the Antiboycott Laws Apply?**

The antiboycott provisions administered by the OAC apply to certain activities of “U.S. persons,” undertaken with “boycott intent,” in the “interstate or foreign commerce of the United States.”<sup>[20]</sup>

### **U.S. persons**

“U.S. persons” includes: “All individuals, including foreign nationals, who are resident in the United States, and corporations and unincorporated associations that are resident in the United States, including the permanent domestic establishments of foreign concerns.”<sup>[21]</sup> The term also includes U.S. citizens residing abroad (except when employed by non-U.S. persons) and “the ‘controlled in fact’ foreign subsidiaries, affiliates or other permanent foreign establishments of domestic concerns. The test for ‘controlled in fact’ is the authority or ability to establish the general policies or to control the day-to-day operations of the foreign subsidiary, affiliate, partnership, branch, office, or other permanent foreign establishment.”<sup>[22]</sup> The complete definition of “U.S. persons,” along with illustrative examples, is found in Section 760.1(b) of the EAR.<sup>[23]</sup>

### **Boycott intent**

A violation of the antiboycott provisions of the EAR requires that a U.S. person have “intent to comply with, further, or support an unsanctioned foreign boycott.”<sup>[24]</sup> Intent is present where the boycott is at least one of the reasons for the action taken.<sup>[25]</sup> The U.S. person does not have to intend to violate U.S. laws, nor does the person need to agree with the political/economic reasons for the boycott, nor even be aware that the antiboycott laws exist.<sup>[26]</sup> If at least one reason for taking a prohibited action is to comply with, further, or support an unsanctioned foreign boycott, the person is deemed to have the intent required under the law.<sup>[27]</sup> The definition and illustrative examples of “intent” are found in the EAR in Section 760.1(e).<sup>[28]</sup>

## **Interstate or foreign commerce of the United States**

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This term includes activities involving the sale, purchase, or transfer of goods (including information) or services between two or more U.S. states or between a U.S. state and a foreign country.<sup>[29]</sup> The complete definition along with illustrative examples is found in Section 760.1(d) of the EAR.<sup>[30]</sup>

## Reporting Requirement and Process

A U.S. person, as defined above, who receives a request to take an action which has the effect of furthering or supporting an unendorsed foreign boycott must report such a request to the OAC.<sup>[31]</sup> The reporting requirement applies even if it is legal for that person to comply with the request<sup>[32]</sup> and regardless of whether the person intends to comply with the request.<sup>[33]</sup> A request is “reportable” if the U.S. person “knows or has reason to know that the purpose of the request is to enforce, implement, or otherwise further, support, or secure compliance” with the unsanctioned foreign boycott.<sup>[34]</sup> All reporting requirements can be found in Section 760.5 of the EAR.<sup>[35]</sup>

Reports may be filed electronically or by mail (form BIS 621-P for single transactions or form BIS 6051P for multiple transactions) for boycott requests that have been received in the same calendar quarter.<sup>[36]</sup> If located in the U.S., U.S. persons must postmark or electronically date stamp their reports by the last day of the month following the calendar quarter in which the request was received.<sup>[37]</sup> If the recipient of the request is located outside the U.S., the deadline to submit the report is two months after the end of the quarter in which the request was received.<sup>[38]</sup> Forms for both electronic transmission and mail submission are accessible via the forms request page on the OAC website.<sup>[39]</sup> Failing to report the receipt of a boycott request within the mandated time period is a violation under the antiboycott regulations.<sup>[40]</sup>

All reports received by the OAC are made available for public inspection, however, information may be withheld from public disclosure where the person making the report certifies that the public disclosure of information as to quantity or value of items being shipped would place a U.S. person to whom the report relates at a competitive disadvantage.<sup>[41]</sup> Non-disclosure requests require that the person furnishing the information provide two copies: an unedited version and one in which the information to be withheld is redacted.<sup>[42]</sup>

Recordkeeping requirements provide that the U.S. person submitting the report maintains all records containing information relating to a reportable boycott request, including a copy of any documents in which the request appears, for a five-year period after the receipt of the request.<sup>[43]</sup>

U.S. persons who are unsure as to whether a boycott request is reportable/prohibited or who require guidance on how to submit a report can contact the OAC via the Antiboycott Advice Helpline (202-482-2381) or online by submitting an Antiboycott Inquiry Form.<sup>[44]</sup>

## Voluntary Self-Disclosures (VSDs)

If a U.S. person believes they may have violated the EAR antiboycott provisions, it may be appropriate and recommended to file a voluntary self-disclosure (VSD) with the OAC.<sup>[45]</sup> Section 764.8 of the EAR outlines the procedures by which a U.S. person should voluntarily disclose violations of the antiboycott regulations, including: the timing of filing, the contents of the initial notification of a VSD; the subsequent narrative account of the violation(s); certification of any representations made in connection with the VSD; and any supporting documentation to accompany the filing.<sup>[46]</sup>

After receipt, review, and investigation, the OAC will inform the filing party of any action it intends to take.<sup>[47]</sup> The criteria used by the OAC to determine whether to pursue an action and what penalties it may recommend are described in Supplement 2 of part 766 of the EAR.<sup>[48]</sup> A filing party should consult these criteria prior to drafting and submitting its VSD. The OAC encourages VSDs by giving the filing party “great weight” mitigation in the assessment of appropriate penalties.<sup>[49]</sup>

Voluntary self-disclosures of antiboycott violations can be submitted to the following address:

Office of Antiboycott Compliance

1401 Constitution Avenue, NW

Room 6098

Washington, DC 20230

Tel: (202) 482-2381<sup>[50]</sup>

## **Penalties**

Violations of the antiboycott laws can result in both administrative and criminal penalties, dependent on the factual circumstances, history, and intent of the offending party.

### **Administrative Penalties**

In the case of administrative antiboycott violations, the following penalties may be imposed:

- A monetary penalty in the amount of the greater of approximately \$300,000 per violation or twice the value of the underlying transaction, as appropriate;
- Denial of export privileges; and/or
- Revocation of any Commerce Department export licenses.<sup>[51]</sup>

### **Criminal Penalties**

In the case of criminal antiboycott violations, a criminal penalty of up to \$1 million may be imposed on individuals or companies.<sup>[52]</sup> Additionally (or alternatively) individuals may face up to 20 years of imprisonment.<sup>[53]</sup>

## **Primary, Secondary, and Tertiary Boycotts**

While the term “boycott” generally refers to different types of non-violent coercion or intimidation, in the context of the U.S. antiboycott laws the term is used to refer to economic coercion associated with such tactics as refusing to engage in business transactions or conditioning business transactions on agreements that a party will not do business with another party or country.<sup>[54]</sup>

There are three levels of boycotts: primary, secondary, and tertiary.<sup>[55]</sup> Only the latter two (secondary and tertiary) are regulated under the U.S. antiboycott laws.<sup>[56]</sup>

**Primary Boycott:** A primary boycott is where one country refuses to trade with another—for example, an Arab League country’s refusal to trade directly with Israel is a primary boycott.<sup>[57]</sup> Because primary boycotts are a “recognized tool of international trade and politics,” the intent of the U.S. antiboycott laws are not to interfere with primary boycotts, as the U.S. recognizes these Arab countries’ sovereign right to refuse to trade with Israel.<sup>[58]</sup>

**Secondary Boycott:** A secondary boycott refers to a situation where a country refuses to trade with any person or company who does business with the country being targeted in the boycott.<sup>[59]</sup> This is the type of boycott covered under the U.S. antiboycott laws, e.g., an Arab country’s refusal to do business with a person or company which does business with Israel.<sup>[60]</sup>

**Tertiary Boycott:** A tertiary boycott exists where a country refuses to trade with anyone who does business with companies or firms on their “blacklist.”<sup>[61]</sup> This type of boycott is also covered by the U.S. antiboycott laws.<sup>[62]</sup>

## **Prohibited Activities**

Prohibited activities under the antiboycott laws include the following:<sup>[63]</sup>

- Refusing or knowingly agreeing to refuse to do business with a boycotted country or blacklisted companies pursuant to a requirement of, an agreement with, or a request from or on behalf of, a boycotting country.<sup>[64]</sup>

According to the OAC, a “knowing agreement to refuse” can be inferred from explicit terms or conditions—for example, a clause that reads “do not ship on blacklisted vessels” or “do not use blacklisted suppliers.”<sup>[65]</sup> The OAC takes a conservative stance in interpreting this prohibition—for example, a response to a tender document that contains a term or condition which calls for a prohibited refusal is deemed by the OAC as an agreement to refuse.<sup>[66]</sup>

- Furnishing or knowingly agreeing to furnish information about business relationships with a boycotted country or with blacklisted companies.<sup>[67]</sup>

Furnishing information about business relationships in Israel accounts for more OAC enforcement actions than any other form of activity.<sup>[68]</sup> Providing information that relates to a person’s past, present or future business relations, including a broad range of commercial relations (e.g., sales, purchasing relationships, supply relationships, legal or commercial representation, etc.) can be problematic.<sup>[69]</sup>

A frequent example of furnishing prohibited information about business relationships is providing a negative certificate of origin, wherein a party certifies that a shipment contains no items made in a boycotted country, such as Israel.<sup>[70]</sup> Other examples are boycott-related requests for supplier lists and requests to confirm that one is not related to a certain firm.<sup>[71]</sup>

- Refusing or requiring any other person to refuse to employ or otherwise discriminate against any U.S. person based on race, religion, sex, national origin, or nationality.<sup>[72]</sup>

This prohibition on discrimination applies regardless of whether the discriminatory act is taken in response to a specific request.<sup>[73]</sup>

- Furnishing information or agreements to furnish information about the race, religion, sex, or national

origin of a U.S. person.

- Implementation of letters of credit containing prohibited boycott terms or conditions.
- Taking actions with the intent to evade Part 760 of the EAR.

## Exceptions to the Prohibited Activities

If a prohibited activity is performed by a U.S. person, with boycott intent, in the interstate or foreign commerce of the U.S., the activity may still be allowable if an exception applies.<sup>[74]</sup> The purpose of these exceptions are to “recognize the legitimacy of international primary boycotts” as well as to address concerns of applying U.S. law to persons residing in other nations and the impact of certain prohibitions on trade with boycotting countries.<sup>[75]</sup> These exceptions<sup>[76]</sup> include:

1. U.S. persons may comply with certain boycotting country shipping requirements concerning importing goods or using carrying vessels.<sup>[77]</sup>

This exception allows for U.S. persons to comply or agree to comply with the import restrictions of a boycotting country that prohibit imports from the boycotted country or firms organized under the laws of or owned by nationals of the boycotted country.<sup>[78]</sup> When shipping goods to a boycotting country, a U.S. person may comply or agree to comply with the requirements of the boycotting country which may prohibit the shipment of goods on a vessel of the boycotted country, or via a route other than that ordered by the boycotting country or the recipients of the shipment.<sup>[79]</sup> The agreement can be stated in either positive or negative terms.<sup>[80]</sup> However, this exception does not authorize an agreement to refrain from using blacklisted vessels nor to “only use vessels eligible to enter Arab waters.”<sup>[81]</sup>

2. U.S. persons may comply with certain shipping document requirements.<sup>[82]</sup>

This exception allows a company to provide certain information which would otherwise be prohibited in order to comply with the import and shipping document requirements of the boycotting country.<sup>[83]</sup> The information a company may furnish under this exception includes: a positive certificate stating the origin of the goods; a positive statement of the name of the supplier of the goods or the provider of the services; and a positive or negative statement as to the route of the shipment or the name of the carrier of the goods.<sup>[84]</sup> This exception only applies to information that is provided on the shipping documents.<sup>[85]</sup>

3. A U.S. person may furnish positive certificates of origin of goods and may certify concerning their own blacklist status.<sup>[86]</sup>

This final exception allows statements in positive terms only, apart from the allowance of statements about the route of the shipment (“will not call at Israeli ports”) and the name of a carrier (“not shipped on Israeli vessels”).<sup>[87]</sup> Positive certifications provide confirmation that goods are of a particular country or countries of origin.<sup>[88]</sup> Companies may, however, provide a negative *self*-certification, as certifying one’s own blacklist status (“we are not on the blacklist”) is permissible since it does not disclose information about business relationships with another person/company.<sup>[89]</sup>

## Examples of Prohibited Boycott Language

The following are real examples (listed by the document type in which they have appeared) of prohibited boycott

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requests and conditions that have been reported to the OAC. <sup>[90]</sup> These examples are illustrative, but not exhaustive.

### **Purchase Order**

- “In the case of overseas suppliers, this order is placed subject to the suppliers being not on the Israel boycott list published by the central Arab League.”
- “Supplies of our purchase order should never be consigned or shipped by steamers included on Israel Boycott list.”
- “All shipments under this order shall comply with Israel Boycott Office Rules and Regulations.”
- “Goods must not be shipped on vessels/carriers included in the Israeli Boycott list.”
- “The vendor should not involve any person or representatives that carries the Israeli nationality in importing or exporting the software or hardware mentioned in this contract and its appendices and the vendor should provide all documents that support the above information.”
- “The vendor must ensure that all products supplied do not contravene the regulations in force with regard to the boycott of Israel.”
- “Commercial invoice, duly signed by shipper covering value of the goods and containing statement ‘The goods are neither Israeli origin, nor do they contain any Israeli material.’”
- “Goods/equipment subject to Israeli Boycott terms, must not be quoted.”
- “A declaration that the goods contracted upon have no Israeli origin and that no Israeli raw materials is used in its producing manufacturing or preparing of the goods.”
- “Following statement should appear at foot of invoice: We hereby certify that these goods are not of Israeli Origin nor do they contain materials of Israeli origin and they are manufactured by . . . .”
- “Applicable Laws/Boycott of Israel: All relevant laws, rules and regulation of all duly constituted government authorities, including laws with respect to boycott of Israel shall apply in the performance of this purchase order.”

### **Certificate of Origin**

“The goods being exported are of national origin of the producing country and the goods do not contain any components of Israeli origin, whatever the proportion of such component is. We, the exporter, declare that the company producing the respective commodity is not an affiliate to or mother of any company that appears on the Israeli boycott blacklist and also, we the exporter, have no direct or indirect connection with Israel and shall act in compliance with the principles and regulations of the Arab boycott of Israel.”

### **Letter of Credit**

- “Buyer shall in no way contravene the regulations issued by Bahrain Government and or Israel Boycott Office. Buyer shall not nominate a vessel blacklisted by the said office.”
- “We hereby certify that the beneficiaries, manufacturers, exporters and transferees of this credit are

neither blacklisted nor have any connection with Israel, and that the terms and conditions of this credit in no way contravenes the law pertaining to the boycott of Israel and the decisions issued by the Israel Boycott Office.”

- “Original commercial invoice signed and certified by the beneficiary that the goods supplied are not manufactured by either a company or one of its subsidiary branches who are blacklisted by the Arab boycott of Israel or in which Israeli capital is invested.”
- “Certificate issued by the air company/agent that it is not blacklisted by the Arab League boycott committee.”
- “Under no circumstances may a bank listed in the Arab Israeli Boycott Black List be permitted to negotiate this Documentary Credit.”
- “On no conditions may a bank listed on the Arab Israeli Boycott list be permitted to negotiate this credit.”

### **Instructions to Contract Bidders**

- “No produced commodity shall be eligible for ... financing if such commodity contains any component or components which were imported into the producing country from Israel and countries not eligible to trade with ... the People’s Republic of Bangladesh. The equipment and materials must not be of Israeli origin. The supplier/bidder who are not black listed by Arab boycott of Israel will be allowed to participate in this bid.”

### **Questionnaire**

- “Do you have or ever have had a branch or main company, factory or assembly plant in Israel or have sold to an Israeli?”
- “Do you have or ever have had general agencies or offices in Israel for your Middle Eastern or international operations?”
- “Have you ever granted the right of using your name, trademarks royalty, patent, copyright or that of any of your subsidiaries to Israeli persons or firms?”
- “Do you participate or ever participated or owned shares in an Israeli firm or business?”
- “Do you render now or ever have rendered any consultative service or technical assistance to any Israeli firm or business?”
- “Do you represent now or ever have represented any Israeli firm or business or abroad?”
- “What companies in whose capital are your shareholders? Please state the name and nationality of each company and the percentage of share of their total capital.”
- “What companies or shareholders in your capital? Please state the name and nationality of each company and the percentage of share of their total capital.”

### **Contract**

- “Israeli Clause: The Seller shall not supply goods or materials which have been manufactured or processed in Israel nor shall the services of any Israeli organization be used in handling or transporting the goods or
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materials.”

- “The (tenders) committee may also exclude any bid that does not abide by the provisions of the commercial and economic laws and the provisions of the law of boycott of Israel applicable in the state.”
- “[A certificate required stating] that the items have not been manufactured in Israel and that any of the components thereof have not been manufactured in Israel.”
- “The vendor (as person or organization) or his representatives should not be an Israeli national. So the vendor should not be owned, managed, or represented by any companies that carry an Israeli nationality and there should not be any sub-contractors that carry Israeli nationality.”
- “The bill of lading shall bear a note that the vessel delivering the cargo is not on the ‘Black List’ and does not call at Israeli ports.”
- “Boycott Provisions: The Contractor shall observe and comply with all the provisions and decisions concerning the boycott to Israel or any other country the same is valid. The Contractor shall secure the respect of such boycott by any other party he might have subcontracted with him.”
- “Certificate issued by the manufacturer or exporter stating that the goods are not of Israeli origin, have not been exported from Israel, and do not contain any Israeli materials.”
- “The certificate of origin must contain the following statement: We certify that the goods are neither of Israeli origin nor do they contain any Israeli materials.”
- “Buyer shall adhere to and implement the Arab Embargo and Boycott Regulations issued and revised from time to time by the [Arab country].”
- “Tenderer shall verify on his own responsibility the laws and regulations which apply to the performance of the services, including the boycott of Israel.”
- “Vendor shall comply with the Israel boycott laws in performing his contractual obligations.”
- “Israeli Boycott: The Contractor shall apply all rules of the Israeli Boycott.”
- “He shall not be boycotted whether in his personal capacity or as a company or establishment because of the violation of the Israeli Boycott Provisions in respect of establishments and companies operating abroad or contracts concluded through correspondence.”
- “Boycott of Israel: The Contractor shall observe and abide by all rules and regulations concerning the boycotting of Israel.”

## Repair Order

- “Invoices must be endorsed with a certificate of origin that goods are not of Israeli origin and do not contain any Israeli material and are not shipped from any Israeli port.”

## Customs Document

- “[The vessel entry document asks the ship’s captain to certify that,] no goods, dry cargo, or personal effects listed on the document of Israeli origin or manufactured by a blacklisted firm or company are to be landed as they will be subject to confiscation.”

## Tender

- “The supplier must comply with the Israel boycott conditions.”
- “Declaration and Israel Boycott Certificate: We \_\_\_\_\_ (Name of Company) on behalf of all branches, declare that we are a company which is not owned by any companies that have violated the approved rules of the Boycott and that we do not own or participate in companies that are in violation of the approved rules of the Boycott.”
- “Boycott of Israel: Seller and his assignees shall abide by and strictly observe all regulations and instructions in force from time to time by the League of Arab States regarding the Boycott of Israel especially those related to blacklisted companies, ships and persons.”
- “Engineer shall at its own expense and at all times comply with all laws, rules, regulations or requirements and any bodies having jurisdiction over the site and the access thereto and there from including, but not limited to, the Boycott of Israel Regulations.”

## Trademark Application Form

- “Do you or any of your subsidiaries now or ever had a branch of main company factory or assembly plant in Israel? ....do you have or any of your subsidiaries now or ever had general agencies or offices in Israel for your Middle Eastern or international operations? . . . what companies are you shareholders in their capital? State the name of each company and the percentage of share to their total capital – and the nationality of each one? . . . ”

## Letter of Credit Application

- “We certify that neither the beneficiaries nor the suppliers of goods and services are subject to boycott.”

## Invitation to Bid

- “Documents to accompany tenders [include] the declaration and Israel boycott certificate. It states the tenderer must accompany his offer with the following, written signed declaration. We declare that we are a company which is not owned by any companies that have violated the approved rules of the boycott and that we do not own or participate in companies that are in violation of the approved rules of the boycott. Further, we do not have, nor does any of the companies that are considered to be a parent company or a branch of ours, any dealings with any Israeli party, whether directly or indirectly. Furthermore, a certificate issued by the Israel boycott office confirming that neither the supplier nor the manufacturer are blacklisted, should also be accompanied.”

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