

Undertaking a Prepackaged Plan Solicitation

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This Practice Note addresses the solicitation process for a prepackaged plan, including considerations for companies and their counsel when preparing for and soliciting a prepackaged plan with the assistance of a solicitation agent. This Note also discusses basic timelines, processes, and procedural requirements for launching and managing the solicitation process.

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Local Bankruptcy Rules: Prepacks

A prepack is a **Chapter 11** bankruptcy in which the debtor negotiates the terms of and solicits votes on a **plan of reorganization** before it files its bankruptcy petition. In theory, the case is "prepackaged" because certain significant debtor-creditor and intercreditor disputes are resolved and necessary votes are solicited before the debtor files its bankruptcy petition. Ideally, only the procedural steps required to confirm the plan remain in the bankruptcy proceeding. However, a prepackaged plan must still comply with all the same requirements for plan **confirmation** as a traditional Chapter 11 plan (see [Practice Note, The Prepackaged Bankruptcy Strategy](#)).

This Note addresses the solicitation process for a prepackaged plan, including considerations for companies and their counsel when preparing for and soliciting a prepackaged plan with the assistance of a solicitation agent. It also discusses basic timelines, processes, and procedural requirements for launching and managing the solicitation process.

Preliminary Considerations

Key Differences Between Prepackaged and Traditional Plans

The purpose of a prepack is to use the bankruptcy process to implement an out-of-court restructuring agreement between a debtor and its major creditors. Unlike traditional Chapter 11 cases, prepacks are generally not used to restructure a debtor's business operations. Instead, they are more appropriate for restructuring the financial debt on a debtor's **balance sheet**, with non-financial claims (such as those of trade vendors or employees) typically being paid in full and otherwise legally unaffected by the bankruptcy.

A successful prepack is generally faster, more efficient, and less costly than a traditional Chapter 11 case. Prepacks are less common than traditional bankruptcies, as they are only appropriate when the fulcrum constituencies can agree in advance on a restructuring solution. Disclosure about the proposed prepackaged plan to those voting on the plan and voting solicitation procedures must comply with applicable non-bankruptcy law (securities laws, for example), in addition to the requirements of the **Bankruptcy Code** (see [Practice Note, The Prepackaged Bankruptcy Strategy: Disclosure and Solicitation](#)).

Best Prepack Conditions

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While a prepack may be an attractive bankruptcy path, they are not possible for all distressed companies. A prepack is ideally used when there is:

- A simplified capital structure, with few classes of equity or debt.
- A limited number of necessary constituents (holders of these securities) involved in negotiating and approving the transaction.
- No fluctuation in the claims of creditors (such as the claims of holders of debentures and bonds).
- Unimpairment of trade and general unsecured creditors so that they would not receive a vote on the plan.

If the debt is fairly concentrated, it may be easier to reach the terms of an agreement with a sufficient number of creditors holding the requisite amount of debt before filing for bankruptcy. Prepacks are also more likely to succeed in this situation if unsecured creditors (such as trade vendors, employees, and landlords) are unimpaired by the prepack (§ 1124(1), [Bankruptcy Code](#) and see [Practice Note, Reinstatement of Prepetition Loans in Bankruptcy: What Is Impairment?](#)). **Unimpaired** creditors are deemed to have accepted the plan and are not entitled to vote (§ 1126(f), [Bankruptcy Code](#) and see [Practice Note, Chapter 11 Plan Process: Overview: Who Can Vote on a Plan?](#)). This likely eliminates a class of creditors who could block confirmation of the plan.

For more on the potential challenges of prepacks, see [Practice Note, The Prepackaged Bankruptcy Strategy: Potential Challenges to Prepacks](#).

The Prepack Process

Following the negotiation of a plan between the debtor and its major creditors, a prepack can generally be thought of as a two-phase process. The prepack process consists of the:

- **Prepetition** phase, including disclosure to voting creditors about the proposed prepackaged plan and the solicitation of their votes (see [Prepetition Phase](#)).
- **Postpetition** phase, including the notice of the combined hearing to consider approval of the plan and disclosure statement and objections, and obtaining the bankruptcy court's approval of the plan and the **disclosure statement** used in the prepetition solicitation (see [Postpetition Phase](#)).

Prepetition Phase

In a standard prepack, the debtor typically does not file its bankruptcy petition until it has received enough votes to confirm the prepackaged plan (at least two-thirds in dollar amount and more than one-half in number of claims actually voting in each class (§ 1126(c), [Bankruptcy Code](#))). This involves:

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- Providing disclosure about the proposed plan to those voting on the plan (see [Nature of Disclosure](#)).
- Soliciting votes on the proposed plan (see [Solicitation Documents and Procedures](#)).
- Providing notice to voting parties (see [Notice](#)).
- Tabulating votes (see [Voting and Tabulation](#)).

Postpetition Phase

If the plan receives the necessary accepting votes required by the Bankruptcy Code within the prepetition solicitation period, the debtor generally files its proposed prepackaged plan, disclosure statement, and ballots together with its bankruptcy petition. If the debtor's situation suddenly deteriorates and it must file for bankruptcy protection before it can complete the solicitation process, then it may file a straddle prepack (see [Solicitation Period](#)) and continue soliciting votes postpetition (§ 1125(g), [Bankruptcy Code](#)).

The postpetition phase is condensed and typically involves only the following key hearings:

- **"First day" hearings.** Aside from the typical motions made in a traditional Chapter 11 case, like approval of **DIP financing**, retention of counsel, and other procedural motions (see [Practice Note, First Day Motions: Overview](#)), it may also include requests for relief that are only typical in prepackaged cases. For example, a prepackaged debtor may seek approval to pay trade creditors or unimpaired general **unsecured creditors** in the ordinary course of business (on the assumption that creditors voting in a prepack have already approved a plan providing for those claims to be unimpaired).
- **Confirmation Hearing.** Debtors typically request a joint hearing to approve the adequacy of the disclosure statement and confirmation of the plan. By collapsing what is normally a two-step process in a traditional Chapter 11 case into a one-step process in a prepack, the process is shortened by at least 28 days. This 28-day notice period applies to both filing objections to the disclosure statement and to confirmation of the plan, and if the hearings are combined, only one 28-day notice must be given rather than two ([Fed. R. Bankr. P. 2002\(b\)](#)). In addition, the debtor may obtain an expedited hearing, depending on the circumstances ([Fed. R. Bankr. P. 9006\(c\)](#)). At least two courts have held that the Federal Rules of Bankruptcy Procedure (Bankruptcy Rules) do not require 28 days' notice after the petition date; instead under appropriate circumstances the notice period can start prepetition (see *In re FullBeauty Brands Holdings Corp.*, No. 19-22185 (Bankr. S.D.N.Y. Feb. 5, 2019); *In re Mood Media Corporation*, No. 20-33768 (Bankr. S.D. Tex. July 31, 2020)).

For more information on the postpetition phase of a prepackaged bankruptcy, see [Practice Note, The Prepackaged Bankruptcy Strategy: Postpetition: the Chapter 11 Case](#).

Initial Solicitation Considerations

At a disclosure statement hearing, the bankruptcy court must consider the procedures used in soliciting votes on the plan ([Fed. R. Bankr. P. 3017\(e\)](#)). Solicitation procedures used in prepacks are governed by applicable nonbankruptcy law (for example, securities laws), in addition to the requirements of the Bankruptcy Code. The Bankruptcy Rules deem votes valid that have been solicited prepetition if certain procedural requirements are satisfied ([Fed. R. Bankr. P. 3018\(b\)](#)). These procedural requirements address issues, including:

- The information disclosed (see [Nature of Disclosure](#)).
- Who should be solicited (see [Parties Solicited and Entitled to Vote](#)).
- Transmission of solicitation materials and solicitation period (see [Solicitation Documents and Procedures](#)).
- Voting and tabulating (see [Voting and Tabulation](#)).

Nature of Disclosure

The Bankruptcy Code provides that a prepetition solicitation is proper only if it complies with "any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation" ([§ 1126\(b\)\(1\), Bankruptcy Code](#)). In the absence of any applicable nonbankruptcy law (for example, because the plan does not involve an offer to publicly buy or sell securities), the solicitation must comply with the "adequate information" standard generally applicable to disclosure statements in traditional Chapter 11 cases ([§ 1126\(b\)\(2\), Bankruptcy Code](#) and see [Practice Note, Chapter 11 Plan Process: Overview: Adequacy of Disclosure](#)). The purpose is to prevent parties from evading the Bankruptcy Code's disclosure and solicitation requirements by soliciting votes prepetition.

No particular body of nonbankruptcy law governs the adequacy of disclosure in a prepack. However, if the plan contemplates the public issuance of debt or equity securities, the debtor must comply with the federal and state securities laws before soliciting votes on the plan.

For more information on disclosure requirements in prepacks, see [Practice Note, The Prepackaged Bankruptcy Strategy: Nature of Disclosure](#).

Parties Solicited and Entitled to Vote

In a prepackaged plan solicitation, typically only parties entitled to vote on the plan receive solicitation materials. These parties generally fall into three broad categories:

- Lenders.

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- Noteholders.
- Equity holders.

And it is often some combination of the three depending on the company's capital structure.

While the voting parties are most likely **secured creditors**, they can be unsecured creditors agreeing to less favorable treatment when compared to other trade or general unsecured creditors that will not be impacted by the bankruptcy filing.

Record Holders of Publicly Held Securities

Although the Bankruptcy Rules require that votes obtained prepetition be solicited from the record holder of securities ([Fed. R. Bankr. P. 3018\(b\)](#)), many courts have adopted a ruling from case law requiring votes to be solicited only from **beneficial owners** (or their authorized agents whose authority is established under bankruptcy law) (see *In re Southland Corp.*, 124 B.R. 211, 227 ([Bankr. N.D. Tex. 1991](#))). However, because of confidentiality concerns, in practice a "master ballot" procedure is often used in which the record holder:

- Collects each beneficial owner's vote on the plan.
- Completes a master ballot reporting beneficial owner votes by including:
 - a unique identifier for each beneficial owner (sometimes the customer account number); and
 - the principal amount held by each beneficial owner as of the record date.

This allows the solicitation agent to tabulate whether the plan receives the required number and amount of votes, while preserving confidentiality (see [Practice Note, Chapter 11 Plan Process: Overview: Required Votes](#)).

Voting Record Date

A company has flexibility to determine the voting **record date** in a prepackaged plan solicitation. The voting record date is typically set one or two business days in advance of the launch. However, setting the voting record date also depends on:

- The number and type of parties to be solicited.
- The availability of record date information that must be provided to the solicitation agent (see [Records for Solicitation](#)).

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When public securities are being solicited, the solicitation agent must have sufficient notice of the voting record date to ensure solicitation using accurate records and the company should plan accordingly.

Timing of Solicitation

The prepack solicitation process often begins following the execution of an out-of-court restructuring support agreement and the negotiation of a plan between the debtor, its major creditors, and other parties in interest (see [Practice Note, Restructuring Support Agreements in Bankruptcy](#) and [Standard Document, Restructuring Support Agreement](#)). To avoid delays and unnecessary costs to the company, the company typically only launches the solicitation of a prepackaged plan if it is confident that the plan will be accepted by parties entitled to vote on the plan.

Because of the limited number of parties required to receive the solicitation materials (see [Parties Solicited and Entitled to Vote](#)), the solicitation agent typically requires no more than one to two business days to complete the mailing, which is measured from the time the company provides finalized documents for distribution.

Solicitation Documents and Procedures

Records for Solicitation

Depending on the parties solicited, the company and solicitation agent rely on different records for soliciting the correct parties. For:

- **Lenders.** The solicitation agent relies on a register provided by the [administrative agent](#), which lists the lenders as of the record date.
- **Noteholders and equity holders.** The solicitation agent relies on registers provided by the [indenture trustee](#) or [transfer agent](#), which lists the directly registered holders holding the applicable securities in their own names as of the record date.
- **Public securities.** The solicitation agent relies on reports obtained from [The Depository Trust Company](#) (DTC) for voting and noticing information relating to which nominees are the holders of record of the applicable securities on behalf of underlying beneficial owners of the applicable securities. Companies with non-U.S. securities should consult the solicitation agent as each jurisdiction may have varying methods to obtain voting records, if available at all.

Solicitation Documents Included in Solicitation Package

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The solicitation packages distributed to holders entitled to vote on a prepackaged plan typically include the following materials:

- Disclosure statement, with all exhibits, including the plan.
- An applicable ballot to cast a vote on the plan.
- A pre-paid, pre-addressed return envelope (unless the solicitation is handled entirely by electronic means).

Companies may also choose to include a cover letter with the materials.

The plan and disclosure statement must be distributed to substantially all members of every voting class that the debtor solicits prepetition or the court may invalidate any votes received from members of that class ([Fed. R. Bankr. P. 3018\(b\)](#)).

Method of Distribution Packages

Companies traditionally distribute hard copy solicitation packages by first class mail to ensure that the solicitation complies with established bankruptcy court precedent. Over time, certain bankruptcy courts have approved distribution of voluminous documents (for example, the disclosure statement and exhibits) on other media like CD-ROMs, or more recently, USB flash drives.

While first class mail remains the most commonly used method of service, in certain circumstances companies have successfully used electronic mail as the exclusive method of distribution of solicitation packages (or a combination of electronic mail distribution and hard copy distribution if not all holder email addresses are known). For example, when lenders are the only parties entitled to vote, a company may consider exclusively soliciting by electronic mail because lenders are known parties that are reflected on a register maintained by a centralized administrative agent. Certain companies, on advice of counsel and the solicitation agent, may also choose to distribute voluminous documents in an electronic format. In all cases, the company must seek retroactive approval of the form and manner of its prepetition solicitation after it files its petition for relief.

Voting Deadline

A company has flexibility when determining the voting deadline for a prepackaged plan solicitation and should consider several factors in making this determination, including:

- The type of holders voting on the plan.
- Whether the company has been in communication with all, or a portion of, the voting parties before launching the solicitation.

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- Whether the voting parties previously reviewed the solicitation materials.
- Whether the voting parties agreed to support the plan under a restructuring support agreement or other form of agreement.
- The method of service of the solicitation materials to the voting parties.
- The method for submitting ballots to the solicitation agent.

Solicitation Period

Apart from complying with any relevant securities laws requirements regarding the time permitted to respond to the solicitation, the debtor must ensure that this period is not unreasonably short under bankruptcy law standards ([Fed. R. Bankr. P. 3018\(b\)](#)). The Bankruptcy Code and the Bankruptcy Rules do not set out any specific minimum periods for obtaining votes on a prepackaged plan. Compliance with the securities laws (such as the **tender offer** rules, which in practice debtors often look to for guidance) may not be sufficient under bankruptcy law (see [In re Southland](#), 124 B.R. 211, 227 (Bankr. N.D. Tex. 1991)). Some commentators have suggested that 28 days is an appropriate amount of time, as this is the amount of time given to consider a disclosure statement ([Fed. R. Bankr. P. 2002\(b\)](#)). However, the SDNY Prepack Guidelines and the EDNY Prepack Guidelines presume that a period ranging from 14 to 21 days is reasonable, depending on if the security is publicly traded (see [Box, Local Bankruptcy Rules: Prepacks](#)).

In practice, solicitation time periods vary depending on the parties solicited:

- **Lenders and privately held debt and securities.** When lenders are the only parties entitled to vote on a prepackaged plan, the company may determine that a short time period between the solicitation launch and the voting deadline is sufficient because lenders are directly known parties reflected on the administrative agent's register. The timing between launch and the voting deadline may be less than a week (or in extreme cases as short as a few hours) if service of all solicitation materials and the vote submission is permitted through electronic means. The same shortened solicitation period may apply to holders of privately held debt or equity securities because these are known parties registered directly in the name of the ultimate holder on the register of the indenture trustee or transfer agent.
- **Public securities.** If soliciting holders of public securities that are held through intermediary nominees, the time between the solicitation launch and the voting deadline is usually longer, typically at least 20 business days. Hard copy solicitation materials generally take approximately seven to ten business days to reach the ultimate beneficial owner of publicly held securities because:
 - first, the solicitation agent must distribute the materials to the intermediary nominees as they are the only known party to the solicitation agent; and
 - next, the nominees must forward the materials down the chain of custody to the underlying beneficial owners.

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The timing may vary if the beneficial owner previously provided its consent to the nominee to receive correspondence electronically. Hard copy materials are always distributed to those holders that have not given such consent. After the materials are received, the beneficial owners must return their vote back through the chain of custody for the intermediary nominee to receive the ballots and submit the votes to the solicitation agent on the master ballot. Even beneficial owners that receive their solicitation packages in hard copy format are generally given the ability to submit their vote electronically, which may extend their time for reviewing the solicitation materials before casting their vote.

Straddle Prepacks

In cases for which both lenders and holders of publicly held securities are solicited, companies may set two voting deadlines:

- An earlier voting deadline for lenders.
- A later deadline for public securities holders.

A voting deadline may occur after the filing of the petition for some, or all, solicited classes. This is called a "straddle prepack" because the solicitation launch occurs prepetition, but the voting deadline for at least one group of voting parties occurs postpetition.

Notice

Timing of Confirmation Hearing Notice

After the petition date, the company generally seeks retroactive approval of its:

- Prepetition solicitation on the prepackaged plan.
- Form of notice of a combined hearing to consider approval or the disclosure statement and confirmation of the plan. The combined hearing notice is typically served broadly on:
 - the voting parties;
 - the entire creditor matrix; and
 - all notice parties in the case.

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Depending on the circumstances of the case and the company's need to emerge from bankruptcy in the shortest time possible, companies may consider distributing the combined hearing notice to the broader group of notice parties before filing for bankruptcy to start the clock on the required notice period. However, this approach is not currently common practice and, among other things:

- It requires advance coordination with the bankruptcy court to secure a hearing date.
- Is not guaranteed to be approved as sufficient notice when it is presented to the bankruptcy court for retroactive approval.

Publication Notice

Unless a company decides to issue a press release regarding the launch of its prepackaged plan solicitation, there is typically no formal public announcement or publication in any newspapers or periodicals regarding the solicitation launch.

However, after filing the bankruptcy petition, a company may seek approval to publish notice of a combined hearing on approval of the disclosure statement and plan as **constructive notice** for any parties that do not appear in the company's notice records and are not mailed the applicable notice in paper format.

Voting and Tabulation

Voting Requirements

[Section 1126 of the Bankruptcy Code](#) provides that a class of claims accepts a plan if it is approved by creditors holding at least two-thirds in dollar amount and more than half in number of the allowed claims in that class that are actually voting on the plan ([§ 1126\(c\), Bankruptcy Code](#)). A class of interests accepts a plan if it is approved by parties holding at least two-thirds in number of the allowed interests actually voting on the plan ([§ 1126\(d\), Bankruptcy Code](#)).

While results are generally tabulated according to the same standards in a prepackaged plan and traditional postpetition solicitation, a company typically requires both:

- The voting results regarding those parties that voted on the plan to meet the threshold requirements of [section 1126](#).
- An analysis of the voting results regarding the total outstanding claims or interests entitled to vote on the plan. This additional analysis allows a company to determine the risk that a party who did not vote will come forward and object to plan confirmation.

Ballot Submission

Similar methods of ballot submission apply to both prepackaged plan and traditional postpetition solicitations.

Voting parties may generally submit ballots through:

- Regular or first-class mail.
- Overnight mail.
- Hand delivery.
- Online voting portal, if an available service is provided by the solicitation agent.

Ballots may also be accepted by electronic mail, but submission through an online balloting portal is a preferred and more secure method of ballot submission because, among other things:

- Only holders entitled to vote on the plan are provided with unique login information to access the ballot portal, which displays the holders' specific customized ballot.
- It allows a controlled voting environment when there is a significant number of voting parties. Submission by electronic mail is not always reliable and delivery is not guaranteed due to firewalls, spam rules, and other technological issues.

Voting Tabulation

The voting report may be filed on the petition date or shortly after if the voting deadline occurred prepetition. However, if the voting deadline straddles the petition date (see [Straddle Prepacks](#)), a solicitation agent may be required to file:

- A preliminary voting report at the outset of the case and a final report once the voting deadline has passed.
- A final voting report after the voting deadline has passed.

In each case, the final voting report will be filed with the bankruptcy court before the combined hearing date.

Local Bankruptcy Rules: Prepacks

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The following Chart contains links to summaries of the local rules for prepacks in certain jurisdictions, allowing attorneys to compare rules across different bankruptcy courts.

Alabama	
• Middle District of Alabama	Practice Note, Local Bankruptcy Rules: Alabama (M.D. Ala.): Prepacks: Local Rules.
• Northern District of Alabama	Practice Note, Local Bankruptcy Rules: Alabama (N.D. Ala.): Prepacks: Local Rules.
• Southern District of Alabama	Practice Note, Local Bankruptcy Rules: Alabama (S.D. Ala.): Prepacks: Local Rules.
Arizona	Practice Note, Local Bankruptcy Rules: Arizona: Prepacks: Local Rules.
California	
• Central District of California	Practice Note, Local Bankruptcy Rules: California (C.D. Cal.): Prepacks: Local Rules.
• Eastern District of California	Practice Note, Local Bankruptcy Rules: California (E.D. Cal.): Prepacks: Local Rules.
• Northern District of California	Practice Note, Local Bankruptcy Rules: California (N.D. Cal.): Prepacks: Local Rules.
• Southern District of California	Practice Note, Local Bankruptcy Rules: California (S.D. Cal.): Prepacks: Local Rules.
Colorado	
	Practice Note, Local Bankruptcy Rules: Tennessee (M.D. Tenn.): Prepacks: Local Rules.
• Western District of Tennessee	Practice Note, Local Bankruptcy Rules: Tennessee (W.D. Tenn.): Prepacks: Local Rules.
Texas	
• Eastern District of Texas	Practice Note, Local Bankruptcy Rules: Texas (E.D. Tex.): Prepacks: Local Rules.

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• Northern District of Texas	Practice Note, Local Bankruptcy Rules: Texas (N.D. Tex.): Prepacks: Local Rules.
• Southern District of Texas	Practice Note, Local Bankruptcy Rules: Texas (S.D. Tex.): Prepacks: Local Rules.
• Western District of Texas	Practice Note, Local Bankruptcy Rules: Texas (W.D. Tex.): Prepacks: Local Rules.
Vermont	Practice Note, Local Bankruptcy Rules: Vermont: Prepacks: Local Rules.
Virginia	
• Eastern District of Virginia	Practice Note, Local Bankruptcy Rules: Virginia (E.D. Va.): Prepacks: Local Rules.
• Western District of Virginia	Practice Note, Local Bankruptcy Rules: Virginia (W.D. Va.): Prepacks: Local Rules.
Washington	
• Eastern District of Washington	Practice Note, Local Bankruptcy Rules: Washington (E.D. Wash.): Prepacks: Local Rules.
• Western District of Washington	Practice Note, Local Bankruptcy Rules: Washington (W.D. Wash.): Prepacks: Local Rules.
West Virginia	
• Northern District of West Virginia	Practice Note, Local Bankruptcy Rules: West Virginia (N.D. W. Va.): Prepacks: Local Rules.
• Southern District of West Virginia	Practice Note, Local Bankruptcy Rules: West Virginia (S.D. W. Va.): Prepacks: Local Rules.
Wisconsin	
• Eastern District of Wisconsin	Local Bankruptcy Rules: Wisconsin (E.D. Wis.): Prepacks: Local Rules.
• Western District of Wisconsin	Local Bankruptcy Rules: Wisconsin (W.D. Wis.): Prepacks: Local Rules.
Practice Note, Local Bankruptcy Rules: Colorado: Prepacks: Local Rules.	

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