

Implementing CFP Board's Revised Ethical Standards: Transcript of July 1, 2008 Q&A with Compliance Professionals

Since CFP Board's May 31, 2007 adoption of revised *Standards of Professional Conduct*, CFP Board has worked to educate CFP® professionals and other stakeholders on the meaning and application of the new ethical standards. On July 1, 2008, CFP Board invited compliance professionals from firms around the country to participate in a live Webinar to discuss the application of the revised *Standards* in a firm environment.

The Webinar was presented by Marilyn Capelli Dimitroff, CFP®, 2008 Chair-Elect of CFP Board's Board of Directors, whose long involvement with CFP Board's ethical standards has included service as Chair of CFP Board's Board of Practice Standards and Chair of the Ethics Task Force involved in the development of the revised Standards, and Nancy Johnson Jones, CFP®, a nationally-recognized expert on compliance issues who is also a member of CFP Board's Board of Directors. Michael Shaw, Esq., CFP Board's Managing Director of Professional Review and Legal, moderated the Webinar.

After a presentation on the revised *Standards* designed to address the specific needs of compliance officers and other employer representatives of firms that have CFP® certificants as employees or associates, the Webinar included time for participants to ask questions to the panel. A recording of the Webinar is available online at: <https://www2.gotomeeting.com/register/856799410>. The following is a transcript of the question and answer session.

Michael P. Shaw: At this point, I would like to raise some questions that have come in during the presentation. We have several questions oh and, by the way, if any of our participants would like to ask a question, you may do so on the question and answer function on the right side of the screen. We will do our best to answer all of the questions that have come in. If we miss any, as I indicated before, CFP Board staff will respond to the questions via email in the next few days.

Okay. The first question, Nancy: what is your response to the concern that the revised standards may result in increased liability for firms?



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Nancy Johnson Jones: Anyone in compliance or serves as legal counsel to a broker dealer or an investment advisor is always concerned about liability but we hope that our revised standards actually give a framework for the certificant to work within, to provide additional disclosure, to acknowledge to the client that they're putting the client's interest first. We hope that doesn't increase liability; actually, we hope it reduces it and that the client becomes even happier with the certificant because they feel comfortable that their interests are ahead of the certificant's or ahead of the advisor's. We think that's very important.

Marilyn Capelli Dimitroff: Michael, in our disciplinary hearings, an enormous number of the complaints result from misunderstandings and situations that appear to be a misunderstanding of services and situations. Having now more requirements in writing and more disclosures should serve to reduce misunderstanding and, therefore, lower complaints.

Michael P. Shaw: Thank you. A second question of Marilyn is: do you think that the revised ethical standards will lead some certificants to drop their certification?

Marilyn Capelli Dimitroff: Well, we don't know but we certainly hope not. We know that for firms, CFP® certificants are usually very valued employees in the organization and we know, given the enormous effort to get certified and the competitive edge that they receive,

that most certificants are very reluctant to drop their certification; however, even if they were to drop it, they can't unlearn the things that they learned. In terms—let me just address—CFP Board did a survey in October of 2007 of certificants. We hired West Data Rockdale, Maryland to do a survey and there was an 87% response rate, which I think is pretty extraordinary. Of - and I'll address the CFP® certificants at large firms - 91% said that they were satisfied, highly satisfied with their career choice and 93% of CFP® certificants with large firms said that CFP® certification contributes directly to career success. Seventy-eight percent of them said highly contributes to career success. Ninety-two percent of the certificants at large firms said that the CFP® mark is rewarding in professional terms and provided a competitive edge and 94% said it's rewarding in personal terms. Those are extraordinarily high satisfaction numbers with CFP® certification.

Michael P. Shaw: Thank you, Marilyn. Let me stay with you for a minute and ask another question. Is it possible for a certificant to complete the six steps of the financial planning process and not be doing financial planning?

Marilyn Capelli Dimitroff: Yes. The six steps in themselves are not financial planning. The six steps are six steps of a process; however, it's the integration of those six steps with the multiple financial subject areas that determine financial planning. On the

other hand, it's possible to do a few steps of the financial planning process and actually be part of a financial planning engagement.

Michael P. Shaw: Nancy, let me direct the next question to you. If written disclosures are not required when a certificant is providing services other than financial planning, then why has CFP Board posted on its website the disclosure document for this purpose?

Nancy Johnson Jones: Simply for guidance—I know many disclosure or many compliance officers are going to want that information disclosed in writing anyway. It's just there for guidance and, if nothing else, it's there as a checklist for the certificant to use when they're actually meeting with a client so that they make sure they don't miss anything.

Michael P. Shaw: Thank you, Nancy. The next question relates to our new fiduciary standard and it asks: the only difference between "best interest" and fiduciary is "utmost good faith". That doesn't seem to be a significant difference. Can you please elaborate?

Marilyn Capelli Dimitroff: Well, first of all, I take a bit of exception with the underlying statement there because there is a difference.

The first part of it says the certificant shall at all times place the interest of the client ahead of his or her own. It doesn't say best interest. Because we have certificants who are mortgage brokers or teachers or one who works for an auto company or delivering

(indiscernible) course, there's still a requirement to put the client's interest ahead of your own so you're not taking advantage of the client and so the kinds of care in that statement in that statement are delivered; however, in doing financial planning, we do have the—owing the care of fiduciary, which is utmost good faith in a manner reasonably believed to be in the best interest of the client. It's not just interest ahead, it's best interest. It may be somewhat a matter of semantics. There are folks who say that the first putting the client interest ahead is a definition of fiduciary. There's no way to argue with that. Again, I go back to the fact that, for CFP Board standards, this is the definition of fiduciary that we have and the one on which are rulings will remain.

Michael P. Shaw: --so the legal definition, then, of fiduciary does not enter into our standards?

Marilyn Capelli Dimitroff: No and again, there are a variety of legal definitions. We could pull it. One time, I actually saw something—over 100 different legal definitions of fiduciary.

Michael P. Shaw: Thank you, Marilyn. Nancy, let me ask you the next question. Do you expect the firm's compliance officer will be auditing the individual's in the firm or CFP® certificants as to compliance with the new standards?

Nancy Johnson Jones: I don't think—certainly not a requirement from the CFP Board's point of view. I don't expect that it will be

from a regulator's point of view, although that could change because as a compliance officer, we certainly have responsibility for things we don't even realize sometimes that our advisors do, whether it's an outside business activity or whatever. I think that's where the annual certification or annual attestation and then sort of Q & A that we ask them at the end of the year, I think that might be a good place to limit our oversight but make that they understand it's their responsibility.

Michael P. Shaw: Thank you, Nancy. Let me stay with you for the next question. This question pertains to registered representatives of a broker dealer. Does the registered representative have to disclose the CFP standards once during the creation of the client relationship or does the registered rep have to make CFP Board's required disclosure at every transaction? In other words, is the CFP[®] certificant's disclosure relationship based or transaction based?

Nancy Johnson Jones: To me, it appears it would be more relationship based. Now, that's not to say that it starts off as a transaction relationship with the client and then changes into a relationship and a financial planning relationship, at that.

If you made the disclosure way back at the beginning just sort of to cover yourself but it's six months down the road and now you actually start to do financial planning or a financial planning engagement with the client, it might be a good idea to give the

disclosures a second time. I think it's not as difficult as people are trying to make it seem. I think it will become more of an even flow of the relationship with the client, than that it has to be given right now at this particular moment and no other moment is the right time.

Michael P. Shaw: Thank you, Nancy. The participant who asked this question may also want to review frequently asked question # 27, which relates to the question. Marilyn, what are the real changes and differences between the revised standards and the way things were before?

Marilyn Capelli Dimitroff: A few main differences: one is in the duty of care, the new standard and we've talked about that at significant extent. Rule 1.4, that lays out the Duty of Care for all certificants and for certificants in financial planning engagements.

The second big change, I would say, is the things that are things that are required to be in writing. There are significantly more things required now. For instance, in the old code, the agreement did not have to be in writing. In the revised code for financial planning services, the agreement needs to be in writing. The best answer to that, I think, is to look on the website and there is literally a side-by-side comparison of the old code to the new code and you can look practically line-by-line and see what the changes are.

Michael P. Shaw: Thank you, Marilyn. The next question is: how is "perspective client" defined? I can answer that one. I can tell

you this: we do not currently define "perspective client" in our standards of professional conduct. We certainly can provide guidance on this and I'll set this aside in the pile where we're going to do that. Nancy, next question—

Marilyn Capelli Dimitroff: Michael, just before you go on, that is a change, too. The former code only addressed clients and said nothing about perspective clients, which is hard to believe in retrospect. The new code addresses how the CFP® certificant addresses perspective clients, as well.

Michael P. Shaw: Thank you, Marilyn. Nancy, as a practical matter, it appears that if you are stating that this disclosure could be verbal, then one would surmise that the disclosure must not be lengthy or complex or highly detailed but more general in nature. Is it fair to say that the disclosure need not be more than a few bullet points that would fit on a single sheet of paper?

Nancy Johnson Jones: As long as you have a fairly simple number of conflicts of interest that you had to disclose or your compensation was very simple, I would say that's very possible. We don't have to have disclosures that are voluminous and that are pages and pages long. As long as we give the client the information they need to make a decision and to make an informed decision, then I think it's fine. It can be one page or it can be multiple pages.

Michael P. Shaw: Thank you very much, Nancy. The next question: why don't the FAQs come straight out and state that the standards are not intended to be admissible in an arbitration or litigation? What our standards do provide is that the standards are not designed to be the basis for legal liability to any third party.

Nancy Johnson Jones: Michael, I'm not an attorney but could we—I don't know that we could say any more than that, could we?

Michael P. Shaw: We don't really have control over what is or is not admissible in an arbitration or litigation.

Nancy Johnson Jones: --or what that attorney writes in their complaint.

Marilyn Capelli Dimitroff: --but we have stated in more than one spot exactly what you said, that it's designed for CFP Board purposes only and not to be the basis of any third party action.

Michael P. Shaw: Nancy, the next question: if services are financial planning but are provided by an insurance agent or a security agent and not on behalf of the firm's affiliated investment advisor, does the firm's Form ADV have any application other than providing language that can be incorporated into disclosure documents that will be provided by the insurance agent or security agent financial planner? That's a rather long one. Do you want me to reread that?

Nancy Johnson Jones: I think—I'm going to assume that that insurance agent or securities agent has its own investment advisory

firm. That would be my assumption. In that case, the broker dealer or the life insurance company's Form ADV is probably not applicable but you're right. There is probably disclosure information there that you can adapt for your own Form ADV that will save you trying to decipher all of that, plus help you go through your own checklist to make sure that you've gotten everything disclosed that needs to be. I'm working under the assumption that there is another ADV involved; it's just not the broker dealer's.

Michael P. Shaw: Thank you, Nancy. This is more of a statement than a question: additional FAQs should be based on the questions that are asked today during the webinar. We'll certainly listen to the recording again and, to the extent possible, we'll develop additional FAQs. Let's see. I think I'll just offer this one up to either Nancy or Marilyn. Will we receive CFP Board Continuing Ed Ethics Credit for this call? If so, do we need to do anything to receive credit?

Marilyn Capelli Dimitroff: We talked about this right before the call, actually. For the two hours of credit, I believe that the program has to be at least 50 minutes times two, or 100 minutes long and I don't believe today's call, certainly, it won't be because it's designed to go, to the latest, an hour and a half.

Michael P. Shaw: You know, I have—well, I will confirm that and we will respond by email to all participants.

Marilyn Capelli Dimitroff: All right.

Nancy Johnson Jones: I'm happy to hear there are other compliance officers out there who are CFP® certificants. Not many years ago, there wasn't hardly any of it.

Michael P. Shaw: Good.

Marilyn Capelli Dimitroff: That's a good question. Thank you.

Michael P. Shaw: Let's see. Marilyn, let me ask you the next question. What are the real—oh, I'm sorry. I've asked that one already.

Marilyn Capelli Dimitroff: Do you want me to answer it again?

Nancy Johnson Jones: See if we get the same answer.

Michael P. Shaw: Would your answer be different? Nancy, let me ask you this one. Are you suggesting that only someone acting for an investment advisor, i.e. not an insurance agent or securities agent, will be considered to be a financial planner under the CFP Board rules?

Nancy Johnson Jones: Under my background as a compliance officer, I think, to provide financial planning clearly would fall under the investment advisor rule. I don't know how—I'm not sure that our answer could be any different than what the regulator's rules are in that case and I would say they certainly would need to be registered, whether it's with the state or the SEC. I get the feeling that was a trick question but that's how I would answer it.

Michael P. Shaw: I'll offer this question up to either one of you. What separates fact-finding—I think it should be what separates

fact-finding from cross-selling in a suitability environment from fact-finding for broad planning recommendations? In both cases, I need to quantify a need. Is it merely by not holding out as a planner?

Marilyn Capelli Dimitroff: Again here, all financial services require data gathering. There's nothing you can do that doesn't require that. It goes to, again, looking at those guidelines that contribute to whether or not this is planning. What is the client's intent and perception? How broad is your data gathering? If it's collecting data—for instance, to sell a life insurance policy, that—and by itself, that's what you're doing. There's a lot of data that you need to collect and the firm questionnaires today are quite lengthy on that. There's a broad base of data being collected. The ultimate goal there is to deliver life insurance. If that's the case and nothing beyond, then the data gathering does not imply financial planning.

It's a combination of those guidelines that would determine whether or not material elements of financial planning have been delivered. I'm sorry if that sounds like a hedging answer but the fact is each of these situations is unique and we can only provide the broad guidelines here. If the intent is not to do financial planning, then it probably is a good idea to make sure that the client understands that.

Michael P. Shaw: Thank you, Marilyn. We're down to our last few questions. Nancy, we have a hypothetical.

Nancy Johnson Jones: Of course.

Michael P. Shaw: In year one, you conduct a suitability review under NASD Rule 28.21 and sell a variable annuity. In year two, you conduct a suitability review and sell a long-term care policy. Have you engaged in the material elements of financial planning?

Nancy Johnson Jones: There may be some material elements there but I don't think you've engaged in selling a financial plan or involved in the financial planning process. I mean, I think you're clear that that's just two separate engagements. It was not designed to be a financial plan for the client or through an entire financial planning process. I would think that you're fairly clear on that.

Michael P. Shaw: Okay. Doesn't this question also relate, again, to the understanding—

Marilyn Capelli Dimitroff: Yeah.

Nancy Johnson Jones: --of the client, right.

Michael P. Shaw: --of the client so that when the individual meets with the client the first time, that's the opportunity to find out what it is a client really wants.

Nancy Johnson Jones: It's also one of those things that you review for. It's to make sure that you don't imply that you're giving financial planning when you're not really intending to do that. If the intent is to sell a life insurance policy but you think it's a better marketing idea to say you do financial planning, then you're clearly

putting yourself in a box and that client has every right to expect financial planning when they come into the office.

If your intent is to sort of switch that around and only sell them a product and not provide the financial planning, you're putting yourself in a box and I think that your certificant or your advisor needs to be very careful of that. That's probably a role that compliance officers can pay very careful attention to.

Michael P. Shaw: Thank you very much, Nancy. The participant who asked this question may also want to look at FAQs 32 and 31, which just went live on our website last week.

Nancy Johnson Jones: Remember that the FAQs, if you printed them off before—we did more than just added a couple of extra questions at the end. We did make changes through the first 25 or so questions that were out there originally because every time we get questions from you or from certificants, it helps us clarify some of our answers. There's not a red-lined version out there but don't rely on an earlier version. Go to the newest one.

Michael P. Shaw: Thank you, Nancy. Marilyn, let me ask you the next question. May a CFP® certificant who is not a company, who is not a company-approved financial planner and who may not offer a written financial plan engage in material elements of financial planning?

Marilyn Capelli Dimitroff: Yes. There's no requirement that financial plans need to be in writing. It is possible that they would

be engaging in material elements or in financial planning, again, depending on the circumstances.

Michael P. Shaw: Thank you and, again—

Marilyn Capelli Dimitroff: --and what the client believes.

Nancy Johnson Jones: Yeah.

Michael P. Shaw: I'm sorry—

Marilyn Capelli Dimitroff: --and what the client believes.

Michael P. Shaw: The participant who asked this question may want to look at FAQs six, eight, thirty-one and thirty-two, which relate. Nancy, let me ask you the next question. Do the revised standards require a client's signature be obtained when the disclosures are provided to the client or perspective client?

Nancy Johnson Jones: No, I don't believe so, on either one. Again, that could be best business practice, certainly one I would like to have in place at my firm but not a requirement for us.

Michael P. Shaw: What if it, say, if it's a financial planning relationship and there's obviously an agreement. Is there a signature required then?

Nancy Johnson Jones: On an agreement for financial planning engagement, yes but not on the disclosure if it's a separate document.

Michael P. Shaw: Okay.

Marilyn Capelli Dimitroff: Again, it's a good business practice. I know certainly we have clients sign that we gave them the ADV. It's just an important protection.

Michael P. Shaw: Marilyn, what guidance do you have for large financial institutions with CFP® certificants providing other than financial planning in an inbound call center? The participant goes on to state, "Verbal disclosures for a high volume of phone calls negatively impacts sufficiency. Written disclosures would be difficult to deploy, as well. Are there any best practices here?"

Marilyn Capelli Dimitroff: This is, again, probably an area where best practices will develop. Again, this is a person not delivering financial planning.

Michael P. Shaw: Right. What guidance do you have for a large financial institution with CFP® certificants providing other than financial planning—

Marilyn Capelli Dimitroff: --other than financial planning.

Michael P. Shaw: --and an inbound call center.

Marilyn Capelli Dimitroff: Right. Again, it would be—these disclosures look at that OPS. The disclosures could be very—I would think in a situation like this they could be very sustained.

Nancy Johnson Jones: That might be a question that, if whoever submitted that sends us a little bit more information, we might be able to give a better answer on that, just so we know—I'm sure you've got

your own disclosures, that you have them passed along anyway, depending on the type of service or a recorded mike in the background or whatever. That may help us give you some additional guidance on that one.

Michael P. Shaw: That's a great point.

Marilyn Capelli Dimitroff: Yeah, there may be things that could be posted on the site that bring the call in. There may be a recording on the line that could do it. Again, having that information would be helpful.

Michael P. Shaw: If the participant would like to provide more information, you can do that on our website. There's a standard email box you can submit your question to. Let's see. Nancy, can you provide an example of appropriate disclosure, which will satisfy the compensation disclosure requirement?

Nancy Johnson Jones: Oh, boy. I haven't read my ADV recently enough to quote it but I would say standard and ordinary commissions maybe aren't on mutual funds as defined in their perspective. The trading charge of \$29.95 at Fidelity is not shared by us as a firm or by myself as a certificiant. Reasonable and standard insurance commissioning could be earned by the firm but as a certificiant, I am paid a salary. I don't share in that. (indiscernible) fees—I think fairly standard disclosures. I don't think it's a lot of details.

Michael P. Shaw: You know, on the insurance end of it, let me ask a question. Obviously, the method of compensation for insurance is to receive a commission the first year and then renewals for a period of time. Would the agency be expected under our standards to disclose that information? The agent receives the first year in addition to what the agent receives for the renewal period?

Marilyn Capelli Dimitroff: --what you described first, saying that the agent is paid in the first year and then has ongoing renewals-- offers that arrangement.

Michael P. Shaw: Would specific dollar amounts be required under our--

Marilyn Capelli Dimitroff: --no. Specific dollar amounts are not something that we've listed anywhere as a requirement because it's virtually impossible to keep up with as a firm or as a certificant. It changes all the time. I think we would just trap ourselves into automatically being out of compliance if we did that.

Michael P. Shaw: Nancy, let me ask you this question. If a financial advisor working for a broker dealer uses analysis programs specifically to determine such financial needs as education, retirement planning, et cetera but not part of a total financial plan, is that considered material elements of financial planning? The second question: is there a heightened fiduciary responsibility involved?

Nancy Johnson Jones: I think yes but it depends on the guidelines we've listed.

Marilyn Capelli Dimitroff: Michael, could you read the first part again?

Michael P. Shaw: Sure. If a financial advisor working for a broker dealer uses analysis programs specifically to determine such financial needs as education, retirement planning, et cetera but not part of a total financial plan, is that considered material elements of financial planning?

Marilyn Capelli Dimitroff: Yes, I agree with Nancy. Obviously, education and retirement are very big goals, retirement in particular. That's very broad based and requires significant data gathering and discussion. It was very likely that that would meet the definition of material elements of financial planning and therefore would require the higher Duty of Care.

Michael P. Shaw: Thank you, Marilyn.

Nancy Johnson Jones: What if the certificant takes that information, gathers it, enters it into the program and spits it out and sort of hands it off to the client and does nothing further with it - no implementation, no monitoring? Is there a difference there?

Marilyn Capelli Dimitroff: No and, again, this is an example of a case where a certificant is not doing all six steps but doing three or four steps and yet the client is very likely to think that is financial

planning. It would be highly unlikely that that would not be considered material elements.

Michael P. Shaw: Thank you. Let me offer this question to either one of you. In regards to CFP Board Rule 2.2C, the 2.2C requirement to disclose any information about the certificant or the certificant's employer that could reasonably be expected to materially affect the client's decision to engage—are there other examples that you can think of that advisors should be including besides area of expertise?

Nancy Johnson Jones: The first thought that comes to my mind is if the individual advisor or certificant had filed bankruptcy in a fairly recent time frame, I would say that is something that, as a potential client, I would find that very significant. If he couldn't manage his own money, how could he manage mine? I know that that's not always a requirement on some of the other disclosure documents that we deal with but I would say that would be something that would be very critical and very important.

Michael P. Shaw: Marilyn, did you have anything to add to that?

Marilyn Capelli Dimitroff: That's a good example. Again, off the top of my head, I can't think of a specific example.

Michael P. Shaw: I totally have two final questions, which will probably take us to the end of our time period. While I'm awaiting those questions, let me go ahead and thank everyone for participating in today's webinar. For those wanting a hard copy of today's

presentation, it will be available on CFP Board's website later today at www.CFP.net and again, if we get any questions - I believe we've covered them all - but if we receive any after today's webinar, we'll certainly respond to those by email. Here's another question. If the certificant is a registered rep through a securities firm, would the asset gathering, gathering of suitability information and finding investments to meet income or retirement goals and needs followed by the sale of appropriate investments—would this be considered financial planning? There would be no charge for the time prior to the transaction being made. Shall I read that again? It's rather long.

Nancy Johnson Jones: I think we—no, I think we have it.

Marilyn Capelli Dimitroff: From the (indiscernible), it's possible and perhaps likely that it's not financial planning or material elements of financial planning. Again, there might be circumstances that would move it that way, depending on what the client thought and depending on the kinds of information that went into finding those investments that are suitable for retirement. That's the only thing that might chip it to planning, if the client thought it was retirement planning. From that set of facts, it very well could be simply finding the right investments and not financial planning.

Michael P. Shaw: Thank you both. I believe we have one final question.

Nancy Johnson Jones: We fully understand that more questions are going to come up in the next six months as all of us actually start to implement this. Before, we've been sort of doing it in our heads and on paper and trying to hand it out but when we actually give it to the advisors and the certificants and the clients, I think that's when other questions are going to come up, so don't forget that email box because we'll keep monitoring that and answer questions as they come up after today's call, as well.

Marilyn Capelli Dimitroff: Understand, too, that we know that consumers want advisors that they can trust and they want disclosure. They want competence. They want professionalism. CFP Board wants consumers to know that when they engage the services of a CFP® certificant, that that consumer will get those qualities that they're seeking.

Michael P. Shaw: Again, while I'm waiting for the last question to arrive, we do not currently have another webinar scheduled but we may very well do just that, especially if compliance officers believe it would be helpful to them. As we continue to work with firms over the next six months, if we get that sense that another one of these would be helpful, we'll certainly schedule it and we'll let you know.

Nancy Johnson Jones: Michael, firms that answered they were interested in workshops or study groups or whatever, would it helpful

if they sent a quick email to the same email box and let us know if they were interested in one in person and where they are located?

Michael P. Shaw: Sure.

Nancy Johnson Jones: We could sort of help—if we do anything in person, we could centralize those.

Michael P. Shaw: Absolutely. Again, that would be the standards email box on the CFP Board website. If you have anything—any details that you can provide in terms of how we could structure it would be most helpful.

Okay, folks, I believe that is it. We have no further questions. Let me thank you all very much again for participating. Let me thank our two panelists, **Nancy Johnson Jones** and **Marilyn Capelli Dimitroff**. We hope you found this webinar helpful and we look forward to talking with you during the next six months as you become more familiar with our revised standards. Thank you very much.

Nancy Johnson Jones: Have a wonderful Fourth of July.

Marilyn Capelli Dimitroff: Thank you.

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