October 15, 2018

Ropes & Gray's Investment Management Update – August-September 2018

The following summarizes recent legal developments of note affecting the mutual fund/investment management industry:

CCO Representations May Replace Routine Quarterly Board Determinations

In an October 12, 2018 no-action letter (the "Letter") to the Independent Directors Council (the "IDC"), the SEC staff agreed not to recommend enforcement action if a fund's board of directors receives a quarterly written representation from the chief compliance officer ("CCO") that fund transactions effected pursuant to Rules 10f-3, 17a-7 or 17e-1 under the 1940 Act (each, an "Exemptive Rule") complied with written procedures adopted by the board pursuant to the Exemptive Rules, instead of the board itself determining compliance with the Exemptive Rules.

Background. The 1940 Act's affiliated transaction provisions protect investors from the fund's insiders using the fund to benefit themselves at the expense of the fund. However, over time, the SEC has recognized that a blanket prohibition on fund transactions with affiliated persons would preclude transactions that would involve no conflict of interest and would benefit a fund. Therefore, the SEC adopted the Exemptive Rules, each containing conditions and limitations designed to protect a fund from overreaching by affiliated persons and to ensure that fund transactions effected in reliance on an Exemptive Rule are in the fund's best interest.

- In addition to regulating certain affiliated transactions with a fund, each Exemptive Rule requires a *board to determine* at least quarterly that all fund transactions effected pursuant to the Exemptive Rule during the preceding quarter complied with board-adopted written procedures that are reasonably designed to provide that the transactions comply with the conditions of the Exemptive Rule.

- The SEC issued each of the Exemptive Rules well before its 2003 promulgation of Rule 38a-l.

The No-Action Letter. In the Letter, the SEC staff stated that Rule 38a-1 was adopted to enhance the effectiveness of a fund's compliance program by, among other things, "assigning the responsibility for the administration of the program to the CCO." The SEC staff also expressed its agreement with the IDC's positions (stated in its incoming letter) that (i) in adopting Rule 38a-1, the SEC "expressed a view that the proper role of the board with respect to compliance matters is to oversee the fund's compliance program without becoming involved in the day-to-day administration of the program" and (ii) the no-action assurances requested by the IDC were "consistent with the [SEC's] approach in adopting Rule 38a-1 and would allow boards to avoid duplicating certain functions commonly performed by, or under the supervision of, the CCO."

Finally, the SEC staff stated that, notwithstanding the Letter, its position regarding a board's *oversight* role with respect to a fund's compliance program was unchanged.

Observations. Modernization of board directors' responsibilities has been a recent priority of the IDC and the SEC's Division of Investment Management.

- In an October 2017 letter to Dalia Blass, Director of the SEC's Division of Investment Management (the "Division"), the IDC urged Ms. Blass to "modern[ize] fund directors' regulatory responsibilities." The IDC letter notably referred to the Exemptive Rules' quarterly board determinations as "Ritualistic Requirements," and urged Ms. Blass to initiate a comprehensive review of directors' responsibilities with a goal of modifying those responsibilities to enhance directors' effectiveness.

- In the December 2017 keynote address to the ICI Securities Law Developments Conference, Ms. Blass announced the Division's "board outreach initiative" as a first step to determine whether "funds could benefit from recalibrating the 'what' and the 'how' of board responsibilities." Members of the Division staff subsequently met with individual boards to solicit input from directors.

The Letter is plainly the first step, and a welcome step, in the Division's recalibration efforts. We will keep you apprised of material developments.

- Boards that choose to rely on the Letter should see a modest reduction in their workloads, giving boards more flexibility to focus on matters in which they believe they have a meaningful role to play. Advisers should similarly benefit from a reduction in the amount of information required to be provided to a board.

- Advisers and boards that intend to rely on the Letter should consider any necessary amendments to existing written policies and procedures related to the Exemptive Rules to reflect the quarterly representations that will be required from CCOs.

SEC Imposes Significant Fines for Alleged Errors in Quantitative Investment Models and Alleged Cover-Up

In an August 27, 2018 Order, the SEC agreed to settle an administrative enforcement proceeding against one AEGON and three Transamerica entities (collectively, "Transamerica") concerning alleged violations of the federal securities laws during a four-year period beginning in July 2011. The SEC alleged that the violations occurred while Transamerica was offering, selling and managing 15 mutual funds, variable life insurance investment portfolios and variable annuity investment portfolios (each of which was a registered investment company and, collectively, the "Products") that pursued investment strategies based on quantitative models. The SEC asserted that Transamerica marketed the Products as being managed using proprietary quantitative models, including a description of how the models were intended to operate. The SEC alleged that Transamerica's marketing implied that the proprietary models worked as intended when, in fact, the Products had been launched without Transamerica confirming that the models worked as intended and/or without adequately disclosing the risks associated with the models.

In particular, the SEC made the following allegations. In 2013, Transamerica discovered that certain of its models contained errors and concluded that the errors rendered at least one of the models "to not be fit for purpose." Transamerica stopped using at least one of the models later in the year, but failed to disclose the models' errors and its decision to stop using the faulty model to the board of trustees of the Transamerica Funds. Further, Transamerica failed to disclose to investors and the board of the Transamerica Funds that an inexperienced quantitative research analyst in fact acted as the day-to-day manager of certain of the Products and, instead, initially disclosed that an experienced senior manager was the sole portfolio manager of the Products. In addition, in 2011, Transamerica added volatility guidelines (the "Volatility Overlays") to the variable life insurance and variable annuity Products, but failed to disclose to investors or the board of trustees of the Transamerica Series Trust that the Volatility Overlays controlled the portfolios' asset allocations and, in certain market conditions, could reduce their exposure to equity securities below stated target percentages. Finally, Transamerica did not take reasonable steps to check the accuracy of the Volatility Overlays and, in 2013, when errors were discovered in the Volatility Overlays, Transamerica failed to disclose the errors to investors in the portfolios or to the board of the Transamerica Series Trust.

In settling the SEC proceeding, and without admitting or denying the findings in the order, Transamerica agreed to pay $97.6 million, consisting of $53.3 million in disgorgement, $8 million in interest and a $36.3 million civil penalty.

We believe it is instructive to put the Transamerica order in the context of an earlier high-profile settlement involving quantitative models:

- The facts underlying the Transamerica order are similar to a 2011 settled enforcement proceeding (the "AXA Order") instituted by the SEC against AXA Rosenberg Group LLC, AXA Rosenberg Investment Management LLC, and Barr Rosenberg Research Center LLC (collectively, "AXA").

- The AXA Order involved an institutional money manager specializing in quantitative investment strategies that allegedly violated the federal securities laws by concealing from investors a material error in the computer code for its quantitative investment model used to manage client portfolios.

- The AXA Order contained these additional allegations. In 2009, two years after the faulty code was implemented, AXA personnel detected the error and reported it to senior officers. However, a senior officer did not insist that the error be corrected and did not disclose its existence within the organization for some months. Later in 2009, the error was reported to the CEO of the AXA parent company and was investigated by outside counsel. The error was not disclosed to the SEC until after the SEC announced that it would commence an inspection in 2010. In settling the SEC proceeding, and without admitting or denying the findings in the AXA Order, AXA agreed to pay injured clients almost $217 million, to adopt numerous compliance enhancements and to pay a civil penalty of $25 million.

The Transamerica order shows a continuing focus by the SEC on quantitative models. Careful and continuous monitoring of the such models is critical, especially because the resolution of issues with and errors by quantitative models can be subject to significant second-guessing in hindsight concerning whether a model error reflects errors in judgement or, instead, errors in coding or data entry.

Pre-Arranged Cross-Trades

In a September 14, 2018 Order, the SEC agreed to settle an administrative enforcement proceeding against Cushing Asset Management, LP ("Cushing"), an investment adviser to private and registered funds. The SEC alleged that Cushing caused a hedge fund client to sell units of a master limited partnership (the "MLP") on the day the units became unrestricted. On the same day, Cushing allegedly caused a registered closed-end fund and a registered open-end fund to purchase the units of the MLP. Cushing placed the sell order for the hedge fund with Broker A on an agency basis at approximately 2:30 p.m. and, the same day, a Cushing trader approached Broker B about a sell order that the trader characterized as a "private trade." Broker A subsequently contacted Broker B. At approximately 3:30 p.m., a Cushing trader placed a buy order for the registered funds with Broker B, also on an agency basis, for the same number of units sold through Broker A, and instructed Broker B to allocate the units to the registered funds. The trade was executed almost instantaneously, and the Cushing clients incurred total brokerage fees of approximately $125,000.

The SEC alleged that Cushing knowingly caused its hedge fund to cross trade the MLP units to the registered funds in violation of Section 17(a) of the 1940 Act. In settling the SEC proceeding, and without admitting or denying the findings in the Order, Cushing agreed to pay a civil penalty of $100,000.

SEC Settles Matter with Adviser Concerning Results Presented in Advertisements of Strategy's Hypothetical Performance

In an August 31, 2018 Order, the SEC agreed to settle an administrative enforcement proceeding against an investment adviser (the "Adviser") based on alleged material misstatements and omissions in its advertisements concerning hypothetical returns associated with "blended" research strategies, which combined research ratings from the Adviser's fundamental analysts and its ratings based on quantitative models. The Adviser advertised the hypothetical returns to institutional and prospective institutional clients, financial intermediaries and consultants.

The SEC alleged that, from approximately 2006 to 2015, the adviser advertised that blending fundamental ratings and quantitative model stock ratings could, over time, achieve greater returns than either type of rating alone. Specifically, in

its marketing materials, the Adviser showed the results of a hypothetical portfolio of stocks rated "buy" by both its fundamental analysts and quantitative models. The results showed that the hypothetical portfolio had annualized returns from 1995 through 2015 that exceeded the annualized returns of hypothetical portfolios that relied exclusively on either fundamental analysts' "buy" rated stocks or quantitative models' "buy" rated stocks.

The SEC alleged that the Adviser's advertisements were misleading because they failed to disclose that some of the quantitative ratings included in a portion of the period used to create the hypothetical portfolio's performance were determined using a retroactive, back-tested application of the Adviser's quantitative model, rather than actual performance results of its quantitative model ratings. In some advertisements, the SEC alleged, the Adviser also claimed that the hypothetical portfolio was based on the Adviser's quantitative model stock ratings as far back as the mid-1990s, notwithstanding the fact that the Adviser did not have a quantitative research group before 2000.

In settling the SEC proceeding, and without admitting or denying the findings in the Order, the Adviser agreed to pay a civil penalty of $1.9 million. The Adviser also voluntarily agreed to retain a consultant to review the Adviser's written compliance policies and procedures with respect to the publication, circulation or distribution of advertisements concerning the Adviser's investment models, research ratings or strategies.

The SEC's April 2018 Regulatory Agenda indicates that the SEC is considering recommending amendments to Rules 206(4)-1 and 206(4)-3 under the Advisers Act and, in September 2017, the OCIE issued a Risk Alert titled *The Most Frequent Advertising Rule Compliance Issues Identified in OCIE Examinations of Investment Advisers*. Prominent enforcement actions may play into the SEC staff's thinking in proposing rule amendments, although it is difficult to predict the result.

SEC Sanctions Adviser/Broker-Dealer for Cybersecurity Breaches

In a September 26, 2018 Order, the SEC agreed to settle an administrative enforcement proceeding against a corporation dually registered as an investment adviser and a broker-dealer (the "Registrant"). The SEC alleged that the Registrant violated Rule 30(a) of Regulation S-P (the "Safeguards Rule") and Rule 201 of Regulation S-ID (the "Identity Theft Red Flags Rule").

- The Safeguards Rule requires broker-dealers and investment advisers to develop and implement written policies and procedures that are reasonably designed to (i) insure the security and confidentiality of customer records and information, (ii) protect against any anticipated threats to the security of customer records and information and (iii) protect against unauthorized access to customer records or information that could result in substantial harm or inconvenience to any customer.

- The Identity Theft Red Flag Rule requires registered broker-dealers and investment advisers to develop and implement a written "Identity Theft Prevention Program" that, among other things, must include reasonable policies and procedures to (i) identify red flags for individuals accounts and incorporate them into the Identity Theft Prevention Program, (ii) detect red flags that have been included in the Identity Theft Prevention Program, (iii) respond reasonably to any red flags that are detected and (iv) ensure that the Identity Theft Prevention Program is updated periodically to reflect changes in risks to customers from identity theft.

The SEC alleged that, between 2013 and 2017, the Registrant gave its independent-contractor representatives (the "contractor representatives") access to the Registrant's proprietary Internet portal, through which the contractor representatives accessed the personally identifiable information ("PII") of the Registrant's customers. In addition, the SEC alleged that, over six days in 2016, persons impersonating contractor representatives called the Registrant's technical support line and successfully requested a reset of three contractor representatives' passwords for the Internet portal used to access customer information. The technical support staff reset the passwords and provided temporary

passwords over the telephone and, on two of three occasions, also provided a contractor representative's username. The impersonators used the contractor representatives' usernames and passwords to access the PII of a large number of the Registrant's customers. However, despite the impersonators' activities, no known unauthorized transfers of funds or securities from customer accounts resulted.

The SEC concluded that, while the Registrant's written policies and procedures applied to the contractor representatives, these policies and procedures were not reasonably designed to apply to the systems they used and suffered from other alleged defects described in the Order. In settling the SEC proceeding, and without admitting or denying the findings in the Order, the Registrant agreed to pay a civil penalty of $1 million and to retain an independent compliance consultant to conduct a comprehensive review of the Registrant's policies and procedures for compliance with Regulation S-P and Regulation S-ID.

Excessive Fee Claim Examined in Summary Judgment Decision

A federal district court recently issued a decision in a lawsuit brought pursuant to Section 36(b) of the 1940 Act. On October 10, 2018, in *Redus v. Tarchis v. New York Life Investment Management*, Judge William Walls of the District of New Jersey granted summary judgment in favor of New York Life Investment Management LLC ("NYLIM"). Overall, this case is a positive development for advisers, particularly to the extent that it rejects several attacks on the board process that are often raised by plaintiffs' counsel in Section 36(b) cases, and to the extent that it breaks the trend of cases in the District of New Jersey (*AXA*, *Hartford*, *BlackRock*) denying summary judgment.

The claims in *Redus-Tarchis* were brought on a "manager-of-managers" theory. Specifically, the plaintiffs alleged that NYLIM delegated substantially all of its responsibilities to subadvisers while retaining a disproportionate share of the advisory fees. The plaintiffs brought suit with respect to four mutual funds, the MainStay Large Cap Growth Fund, the MainStay Marketfield Fund, the MainStay High Yield Corporate Bond Fund, and the MainStay High Yield Opportunities Fund, each of which has at least one subadviser. Two of the funds were discontinued while the case was pending – one merged into another of the at-issue funds, and the other was reorganized with a new adviser. Because two of the funds were discontinued during the pendency of the suit, the court addressed whether the claims with respect to those funds needed to be dismissed for lack of continuous ownership. Applying Delaware law, the court held that dismissal was required because the surviving entities were no longer substantively the same as the prior funds.

The background section of the opinion is helpful because it recognized that NYLIM, as the sponsor of the subadvised fund, has substantial responsibilities that are *not* delegated to the subadviser. Those responsibilities include "develop[ing] new funds' investment strategies, market[ing] them, and assum[ing] related entrepreneurial risks." NYLIM helps select a subadviser, "monitor[s] a Fund's performance, riskiness, and portfolio attributes against relevant benchmarks on an ongoing basis, and issue[s] quarterly reports to the Board," provides compliance services and supports the funds' board. The court also noted that NYLIM provides services to the funds that are not expressly required by the agreements between NYLIM and the funds.

Judge Walls then addressed each of the *Gartenberg* factors. He continued the recent, regrettable trend of approaching the Section 36(b) standard as a checklist of the *Gartenberg* factors, rather than looking at the question of liability *vel non*: whether a challenged fee is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining.

- ***Nature & Quality of Services***. Judge Walls determined that this factor slightly favored NYLIM. He expressed some mild frustration that neither party had introduced much evidence to permit the court to evaluate the funds' performance, beyond some evidence that the funds exceeded their peers' performance but also may have lagged the benchmark at times.

- ***Profitability***. Noting (in the unsealed, public opinion) that NYLIM's profit margins for the funds ranged from 46% to 53%, Judge Walls concluded quickly that, based on case law endorsing far higher profitability rates, this factor favored NYLIM.

- ***Fallout Benefits***. Judge Walls held that this factor favored NYLIM because the plaintiffs' evidence of fallout benefits was "scant" and plaintiffs "made no effort to describe or quantify" the benefits.

- ***Economies of Scale***. As to one fund, Judge Walls found that plaintiffs had adduced no evidence that economies of scale could be realized when AUM were flat. As to the other fund, for which AUM did increase, he found that plaintiffs had not adduced evidence of economies of scale, but Judge Walls expressed skepticism, holding that "even evidence of reduced costs would be insufficient" to show economies of scale. This factor thus favored NYLIM.

- ***Comparability of Fees to Similar Funds***. Judge Walls relied on a third-party consultant's reports on NYLIM's fees. Using the public versions of the reports, which were less favorable to NYLIM, the court found that the fees – 5.6 bps above the median for one fund, 2.7 bps below for the other – were within the range charged by comparable funds. The court applied the favorable *JP Morgan* opinion, commenting that the fact that even "one or two" funds paying lower fees did not necessarily mean that the fees were outside the arm's-length range. Thus, this factor favored NYLIM.

- ***Trustee Independence and Conscientiousness***. Judge Walls' analysis of this *Gartenberg* factor was the lengthiest of his factor analyses. He rejected the plaintiffs' attempt to use cherry-picked deposition testimony from a board member about, *inter alia*, the board-adviser relationship being a "fiduciary partnership" as evidence that the board was not independent. Judge Walls largely rejected the plaintiffs' challenges to the Section 15(c) process. Citing a recent decision (*BlackRock*) in favor of the adviser on board process, Judge Walls emphasized that the plaintiffs needed to show that "supposedly withheld or misleading information would have altered the board's review or negotiation process," and he did not agree with the plaintiffs' claims regarding deficiencies in the board's process and analyses. Judge Walls rejected, as the courts in the *AXA* and *Hartford* cases rejected, the plaintiffs' claim that profitability was required to be reported with subadvisory fees treated as contra-revenue rather than as expenses. Finally, Judge Walls held that there was a minor question of material fact regarding whether the board sufficiently reviewed the funds on a fund-by-fund basis, but he held that question to be insufficient to preclude summary judgment.

OTHER DEVELOPMENTS

Since the last issue of our Investment Management Update, we have also published the following separate Alerts of interest to the investment management industry:

Notable September Developments in the Cryptocurrency Space

September 28, 2018

Three notable developments occurred in September in the cryptocurrency space: in *U.S. v. Zaslavskiy*, a federal judge permitted a criminal case to proceed based on a finding that digital tokens issued in an initial coin offering could constitute securities for purposes of federal securities laws; in *In the Matter of Crypto Asset Management, LP et al.*, the SEC announced its first enforcement action against a hedge fund manager for violating provisions of the Securities Act, the Advisers Act, and the 1940 Act in connection with the sale of interest in a private investment fund focused on digital assets; and in *In The Matter of TokenLot LLC et al.*, the SEC announced its first case charging unregistered broker-dealers for selling digital tokens.

OCC Opens Door for Fintech National Banks

September 27, 2018

Following the Office of the Comptroller of Currency's (the "OCC") July issuance of a policy statement and supplement to its licensing manual relating to special purpose national charters for non-deposit-taking financial technology ("fintech") companies that are engaged in the business of banking, as well as the Treasury Department's support in its July report, fintech firms across the country are looking into what this process entails and the potential benefits accompanying a special purpose national bank charter.

After 10 Years of Litigation, Ninth Circuit Dismisses *Northstar v. Schwab* Class Action

September 21, 2018

On September 14, 2018, the United States Court of Appeals for the Ninth Circuit put an end to the long-running *Northstar Financial Advisors v. Schwab Investments* class action. In a much anticipated ruling, a panel of three Ninth Circuit judges held that Northstar's ten-year-old lawsuit against Schwab was barred in its entirety by the federal Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), giving Schwab a complete victory. The decision is of profound importance to the mutual fund industry, because if the panel had ruled the opposite way and allowed the *Northstar* case to go forward, it potentially could have sparked a new wave of class action litigation against mutual fund advisers and trustees. One caveat though – on September 28, 2018, Northstar filed a petition requesting either the panel re-hear the case, the full Ninth Circuit review the case *en banc* or, alternatively, Northstar be given permission to amend its complaint.

ISDA Publishes 2018 U.S. Resolution Stay Protocol: Considerations for the Buy Side

September 20, 2018

ISDA recently published the ISDA 2018 U.S. Resolution Stay Protocol (the "Protocol"), which is now open for adherence. This Alert provides further information about the Protocol and considerations for buy-side entities in respect of the Protocol and the applicable rules to which the Protocol relates.

SEC Withdraws Two No-Action Letters Regarding Use of Proxy Advisory Firms – Chairman Clayton Issues Statement Regarding Staff Views

September 19, 2018

On September 13, 2018, the Division of Investment Management (the "Division") issued an Information Update (the "Update") in which it announced the withdrawal of two no-action letters concerning the circumstances under which a third-party proxy advisory firm may be considered independent under Rule 206(4)-6 under the Advisers Act. That Rule was adopted by the SEC in 2003 to ensure that investment advisers vote proxies in the best interest of their clients and provide clients with information about how their proxies are voted. This Alert explains that, notwithstanding the Division's withdrawal of the two no-action letters, the Update should not have any practical effect at this time on investment advisers that rely on proxy advisory firms. In addition, on the same day that the Division issued the Update, SEC Chairman Clayton issued a public statement in which he reiterated the SEC's "longstanding position . . . that all staff statements are nonbinding and create no enforceable legal rights or obligations of the Commission or other parties."

SEC Ratifies Appointment of ALJs and Lifts Stay on Pending Administrative Proceedings

August 24, 2018

The SEC has issued an order clearing the way for cases to proceed before its own administrative law judges ("ALJs"), notwithstanding a Supreme Court decision issued earlier this year that declared the SEC's prior appointment of ALJs to be unconstitutional. Respondents in nearly 200 SEC proceedings with pending cases will now be granted the opportunity

to have their case reheard by a different ALJ. Through the ratification order, the SEC has also attempted to comply with the Appointments Clause of the Constitution. Whether this passes constitutional muster, however, remains to be tested in the courts.

SEC Adopts Inline XBRL Requirements for Operating Companies and Open-End Funds

August 16, 2018

On June 28, 2018, the SEC voted 4-to-1 to adopt a final rule to require operating company financial information and fund risk/return summary information in Inline XBRL format. The Inline XBRL format permits filers to embed XBRL data directly into an HTML document, which is both human-readable and machine-readable (i.e., allowing for the automated extraction and analysis of embedded XBRL data). The final rule was adopted substantially in the form in which it was proposed in March 2017, except for several changes that are described in this Alert.

New Disclosure Requirements for NFA Members Engaging in Virtual Currency Activities—Action Required

August 14, 2018

On August 9, 2018, the National Futures Association ("NFA") announced that, effective October 31, 2018, NFA members are required to make additional disclosures in connection with their virtual currency activities in accordance with recently adopted Interpretive Notice 9073 (the "Interpretive Notice"). The Interpretive Notice applies not only to asset managers that use virtual currency derivatives, but also to asset managers that use spot market virtual currencies. The disclosure requirements apply to promotional materials, disclosure documents and other offering documents.

Treasury Department Issues Regulatory Report on Fintech and Innovation

August 8, 2018

Reforms that expand horizons for nonbank financial companies were recently recommended in the Treasury Department's July 31, 2018 report entitled "A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation" (the "Report"). With the Treasury Department's support, the pace of technological advances in the delivery and digitization of financial services and the economy, and capital inflows to the financial technology ("fintech") sector, will accelerate. This Alert highlights elements of the Report that are of special interest to investment and asset management professionals.

Ropes & Gray Files Comments on SEC's Proposed Interpretation of Advisers Act Fiduciary Duty

August 7, 2018

On August 7, 2018, Ropes & Gray filed a comment letter with the SEC regarding the SEC's April 18, 2018 "Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers" ("Interpretation"). The proposed Interpretation was approved by the Commission by a 4-1 vote on April 18, 2018, along with proposed Regulation Best Interest and Form CRS.

If you would like to learn more about the developments discussed in this Update, please contact the Ropes & Gray attorney with whom you regularly work or any member of the Ropes & Gray Investment Management group listed below.

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