

## BRIEFLY NOTED

# Unleashing Manufactured Housing

BY ARICA YOUNG

**N**early every US politician is talking about improving housing affordability, and most of them are looking intently for villains to blame for today's high home prices. Despite rhetoric to the contrary, the price escalations in recent years have not been driven primarily by "speculators" or short-term rentals, and there

does not appear to be a bubble. Rather, there is a fundamental imbalance between housing supply and market demand, especially in the for-sale market.

The United States presently has an estimated shortage of 3–5 million housing units. That shortage is most acute in the market for entry-level homes, typically defined as those that are 1,400 square feet or smaller. Since the late 1970s, builders have produced roughly the same number of these homes on an annual basis, even as the US population has increased by over 50 percent.

With tight labor markets, surging materials costs, and now high interest rates, the cost of on-site home construction has increased sharply. Consequently, some developers have turned to manufactured housing, where the dwelling is constructed in a factory and then installed on the building site, to meet demand for entry-level homes. While many people associate manufactured housing with mobile homes and trailer parks, modern production methods and design improvements have made today's manufactured homes look nothing like their antecedents. Yet, land and construction regulations that were written to restrict house trailers limit the deployment of modern manufactured housing. A few policy changes and zoning fixes could bolster its use and provide more options for Americans who want to become homeowners.

**No longer a trailer** / Today's manufactured home is the only form of housing subject

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to federal regulation under the Manufactured Home and Construction and Safety Act, overseen by the Department of Housing and Urban Development. These homes must be permanently placed on a steel chassis and consist of a minimum of 320 square feet and be at least 8 feet in width. (Trendy "tiny homes" are not considered manufactured housing.) The federal standard also has guidelines for room size, fire safety, heating, cooling and plumbing systems, framing, insulation, wind load, and installation. They are certified and labeled in the production factory. Without the label, the homes cannot be called manufactured housing. Other factory-built rooms, interior spaces including garages, and homes—often referred to as prefabricated or modular—are not deemed manufactured houses under the act and are subject to local and state building codes.

To monitor compliance, HUD has delegated authority to 13 states and private sector organizations that inspect manufactured housing factories. Since the 1990s, the department has periodically upgraded its standards. Recently, both HUD and the Department of Energy have begun rulemaking to impose new energy and safety standards to reduce utility bills and carbon pollution.

States can require more stringent requirements beyond the federal standards. For example, in the aftermath of Hurricane Andrew in 1992, Florida mandated a specific manner and number of ties to affix manufactured housing. Many manufactured homes now perform as

well as site-built homes during extreme weather events.

**Been here before** / Manufactured housing has been an important source of housing in the United States for a long time. These homes have their roots in the early travel campers of the 1920s and were used as temporary housing for public works employees during the Great Depression and World War II. After the war, as the United States faced a severe housing shortage, families turned to manufactured housing. The industry responded by creating innovative models with more spacious layouts



and modern amenities such as washing machines.

Around this time, many manufactured housing communities had their start. Households could purchase and finance a home through the dealer, much like buying a car. Quickly, however, the sector had to compete with a recovered and robust residential housing sector using site-built construction for homes that could qualify for federally backed home financing—unlike manufactured housing.

Manufactured housing stock currently consists of 6 million units and constitutes the largest share of unsubsidized low-in-

come housing in the nation. Today's manufactured homes have tight building envelopes (that is, a well-made exterior that protects the interior), energy-efficient appliances, and often have features such as porches, garages, and bay windows akin to local housing design.

Historically, the ability to produce homes has relied on locally available land, labor, and building materials. Regulations have caused land prices to skyrocket, often because of artificial scarcity driven by restrictive zoning categories and land-use regulations. (See "Build, Baby, Build!" p. 64.) Layers of environmental

and tightening immigration policies. Factory-produced homes can address many of these challenges: a recent study from Harvard University's Joint Center for Housing Studies found that manufactured homes can be as much as 46 percent cheaper than site-built.

If policymakers want to use manufactured housing to improve housing affordability, they must reform two areas of regulation: discriminatory zoning and the titling of manufactured housing.

**Zoning** / Today, zoning and land-use regulations are under increasing scrutiny, as

stringent exclusionary design prerequisites, or require obtaining special permits that are not imposed upon site-built single-family homes. For example, one common statute, especially in municipalities, prohibits the placement of single-wide manufactured homes even though they could easily work as in-fill for many cities struggling to replace aging housing stock.

While several states have prohibited such bans at the local level, other communities have adopted or are considering regulations that would de facto push out the dwellings. For instance, some places require that manufactured homes be situated on parcels of land ranging from one to 10 acres even if such a minimum requirement does not apply to site-built homes. Other restrictions on manufactured housing include limits on the home's age or requirements for specific architectural design features that do not apply to site-built single-family homes.

**Titling** / Given their legacy as travel campers, some states only allow manufactured housing to be titled as personal property, not real property, even if the home is affixed to a foundation on owner-occupied land. This has significant implications for financing, as traditional mortgage financing is limited largely to real property. Personal property financing (also called chattel financing or lending) does not have the full range of consumer protections available to traditional mortgage borrowers.

Further complicating matters is that more than 50 percent of manufactured homes are financed through personal property loans, which often have relatively high interest rates and fees. Many consumers are not aware that there are other (albeit limited) options: Fannie Mae and Freddie Mac have a statutory mission mandate under Duty-to-Serve that requires them to create products and programs to serve the manufactured housing market.

Finally, titling has tax implications that can affect the affordability of the homes. Some states levy taxes on personal property. For example, in some states, vehicle owners must pay a personal property tax

review, special purpose permitting, rezoning requirements, and often contentious rounds of public hearings add expense and uncertainty that discourage developers from building entry-level homes. The National Association of Homebuilders has estimated that regulations account for nearly one-fourth of the final price of a new single-family home.

Other factors have raised housing costs of late. Higher capital costs have increased the costs of developing new projects, and ongoing labor shortages in the building professions will probably continue because of demographic shifts

they have a significant effect on the ability to develop various forms of housing, such as duplexes, rowhomes, and multifamily buildings. Many states and cities explicitly ban manufactured housing, typically motivated by long-held stigmas about the social and economic effects manufactured homes (and their occupants) have on neighboring properties.

Land-use legal scholar Daniel Mandelker of the Washington University School of Law has outlined 18 common zoning and land-use categories of regulation that either outright forbid the placement of manufactured housing, impose



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levied on the value of their car. The tax rate for personal property differs from the rate levied on real property. Depending on the location, the personal property rate may be significantly higher than for a site-built home. To address the titling issues, states must examine their titling regulations for both real and personal property. New Hampshire broadly allows manufactured housing to be titled as real property, and it offers a model for other states looking to review their titling regulations.

**Unleashing change and growing supply /**

There are innovations in the residential sector that can boost the creation of new housing. One of these is manufactured housing. But for potential homebuyers to take advantage of this, policymakers must liberalize land-use and zoning regulations and states must reform titling policies regarding manufactured housing.

And as long as the federal government remains intensely involved in subsidizing home ownership—albeit with questionable effects on home ownership rates—it is worth asking whether its policies should continue to effectively exclude manufactured homes from this largesse—or put traditional homes and manufactured homes on the same financial footing by reducing such subsidies. R

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# Using AI to Boost Patent Quality and Equity

BY COLLEEN V. CHIEN AND CHRISTOPHER COTROPIA

Patents have been back in the news, and not in a good way. The unsuccessful five-year-long attempt of a Black entrepreneur, Katrina Parrott, to get patent protection for emojis with different skin tones, as reported in a February 2023 *Buzzfeed* article, has drawn attention to the substantial hurdles that small and underrepresented innovators face in getting patents. As Sen. Elizabeth Warren (D-MA) and Rep. Sheila Jackson Lee (D-TX) noted in a February 2023 letter to U.S. Patent and Trademark Office (USPTO) director Kathi Vidal, while Parrott’s patent application continues to pend, Apple Inc., whom Parrott successfully sued for copyright infringement, was granted more than 2,500 patents in 2021 alone.

While small firms often have trouble getting patents, large firms are under fire for getting *too many* patents—for example, covering different versions of the same pharmaceutical drug. AI-enabled innovation has also generated concerns about a flood of patent applications for items that are obvious variations of existing innovations. This February, a Senate committee heard testimony about how marginal patents are being used to delay competition and drive up prescription drug prices.

All of this prompts a question that Mark Lemley, Doug Lichtman, and Bhaven Sampat asked in the title of a *Regulation* article nearly 20 years ago: “What to Do About Bad Patents?” (Winter 2005–2006).

**Quality vs. access /** If the problem is low-quality patents crowding out high-quality ones, the solution would seem straightforward: increase the quality of patents before they are issued. And indeed, the USPTO is working to do that.

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The agency has begun to devote more time to the upfront examination of patents and, in a 2022 *Federal Register* Request for Comment, signaled its exploration of new responsibilities to ensure that applications filed are “robust and reliable” through greater clarity and support for submitted claims.

But there’s a catch: there is a tension between high patent quality and broad access to the patent system for first timers and entrepreneurs like Parrott. That’s because improving patent quality takes time and money. It takes effort on behalf of patent applicants to define the terms they’re using and clearly delineate what they consider the invention. It takes time to do prior-art searches and ensure the claimed subject matter is truly novel and nonobvious. And solutions like the one Lemley et al. proposed in *Regulation* of “paying for a thorough examination of their inventions” take, well, money.

Unsurprisingly, members of the patent bar, through their responses to the *Federal Register* notice, have expressed concern over the prospect of having to do more work for an initial patent filing while getting paid the same price of around \$10,000 that has been in place for over 20 years. Some have lamented the disproportionate burdens expected on first timers and under-resourced inventors. The data show that women, underrepresented minorities, and self-represented applicants already experience less success in converting their applications into patents. Raising the examination bar risks further exacerbating these disparities and the extreme skew



in the distribution of who gets patents. In 2020, 50 percent of new US patents went to the top 1 percent of patentee.

Raising additional hurdles to patenting by first-time and underrepresented innovators is problematic given the stakes. Patenting by new entrants unlocks hiring, financing, and social mobility. And the real possibility of patenting incentivizes invention in the first place. If women, underrepresented minorities, and people of low-income backgrounds invented at the same rate as wealthy white men, researchers estimate, there would be four times as many inventors in America as there are today. For those reasons, the USPTO and its counterparts around the world are focused on increasing access to the patenting process and, in the words of Vidal, getting people off the bench and bringing innovation to impact.

**Harnessing AI/** To do so, Congress recently increased the discounts on USPTO application fees for small and “micro” applicants that fall under a certain threshold. Unfortunately, the bulk of the cost of filing for and successfully pursuing a patent is in the form of legal, not administrative, fees. To achieve the twin goals of patent validity and equity will require a different approach than USPTO discounts. Nor do we think it is tenable, as Lemley et al. argued, to just weaken the presumption of validity for the majority of filers.

We suggest a new approach: to dramatically promote the quality of patents, the USPTO should dramatically promote access to patent-quality technology and make it available to all who need it.

Patent law, and in particular 35 U.S.C. §§102 and 103, requires innovations to be truly novel and nonobvious to be eligible for patent protection. But too often patent applications are filed without adequate attention to what similar innovations came before, and what will be required of the present application to qualify. These prior-art searches are important because they save time and money downstream by reducing the risk that an application ultimately won't pass muster.

Patent claims must also, under 35 U.S.C. §112, be supported by the language of the body of the patent application. But too often, it is less than clear what words in a claim actually mean, especially when they don't otherwise appear in the specification. Other errors abound, such as invalid claim numbering, grammatical errors, and inconsistencies between the drawings that are part of the patent specification and the words describing those drawings. That wastes examiner and applicant time. Unfortunately, previous work by one of us in the *Iowa Law Review* demonstrated that such errors disproportionately befall small and micro entities.

But what is hard for humans is easier for technology and those who have access to it. In particular, tasks like conducting prior-art searches and ensuring consistency and clarity are increasingly being assisted by technology. A growing number of third-party vendors like ClaimMaster, Harrity, PatentBots, and others are utilizing artificial intelligence in its various forms to automate patent application drafting and error-check the results. Tools on the market can also assist in distinguishing filed patent claims from what came before, flag mismatches between the specification and the claimed invention, provide first-draft specification language, and place a patent application in a better condition for being granted.

The idea of providing access to “technology” to level the patent playing field is not new. The earliest patent system allowed applicants to submit their applications by mail, so that rural inventors would not be at a disadvantage. The USPTO eventually allowed submission of patent applications by fax and later facilitated e-filings, electronic records access, and even remote interviews to broaden (and reduce the expense of) participation.

Continuing this trend, the USPTO recently adopted the DOCX format for patent applications, which uses XML that is both universally used and easily machine-readable. This format allows the USPTO to analyze the data and pro-

vide instantaneous feedback on common mistakes. Rather than waiting a year or more for a human patent examiner to kick the application back to the inventor for non-compliance, DOCX immediately notifies the inventor, regardless of sophistication or attorney representation, of specific errors and even provides guidance for remediation. Time is money. In future iterations of the tool, the USPTO could flag not only ministerial issues (e.g., forgetting to put a period at the end of a patent claim) but substantive ones (e.g., ensuring the disclosure requirements under §112, mentioned above, are met).

And to help applicants meet their burdens under §§102 and 103, the USPTO has floated the idea of using newly introduced AI search tools to help micro-entity applicants get their application in better shape before they start the evaluation process. Generative AI language processing systems being used in an increasing number of domains provide another set of potential tools for improving patent quality.

Treating expanded and equitable access to technology as an instrument for patent quality reform has at least three major benefits.

First, it works. Technology can improve patent application quality. Technology can provide not only pre-submission validation of the application's contents, but also recommendations on how to correct an application's shortcomings. The early assessment of the novelty and nonobviousness of a patent's claims, before legal and filing fees are spent, should improve the quality of the applications filed.

Second, technology can improve the quality of patent examination. Automation via a universal document format like DOCX allows examiners to spend less time on identifying technical errors and resolving ambiguities, and more time on substantive patent questions such as novelty and nonobviousness. AI systems, as they become stronger and more reliable, can assist in finding the most relevant and salient prior art, ensuring all applications get a thorough review.

Finally, and most importantly, broad

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access to technology facilitates equity and efficiency. While enhanced patent quality benefits all, leveling the playing field through technology benefits the most those who have the least experience and are therefore likely to need the most help conforming their applications to the intricacies and technicalities of the law.

**Going further/** To be sure, the idea of the government developing and deploying technology may feel fraught. For example, the USPTO's move toward DOCX and pre-application review has had its hiccups, prompting doubters. But technology improves. While change is hard, the USPTO's past record, for example, of overcoming initial headaches to move to digital records through its Electronic Filing System (EFS-Web), demonstrates the benefits of pushing through. Lower costs, greater access, and the dramatic expansion of the ability to systematically analyze the patent system's performance followed the transition from paper to e-records.

Further, the USPTO need not necessarily become a technology vendor to dramatically increase access. Following the lead of the Internal Revenue Service in providing tools for tax preparation, for patent application preparation the USPTO could enter into public-private partnerships with software companies to make their products available at a discount or for free (as noted in the *Iowa Law Review* article listed at the end of this article). Or, like the IRS, the USPTO could explore certifying or authorizing certain vendors that provide assistive technologies whose services meet a certain quality threshold. It could also subsidize or support discounts like those offered by the USPTO to small and micro-entities, in effect supporting "means testing" between applicants. Price differentiation and sales to smaller filers who wouldn't otherwise be able to afford access would enable technology firms to expand, rather than risk cannibalizing, their markets. A small-scale pilot undertaken with technology firms to test the value of doing so would be an excellent first step.

Another step the USPTO could take is to facilitate the development of customized technology solutions to meet the needs of less experienced filers. Rigorous analysis has shown that targeted assistance for novice users works and can reduce disparities in the patent grant process. The USPTO's network of pro bono providers also reaches a distinct set of filers with specific needs. Development of effective assistive technology drawing upon what has worked for these populations in the past may go even further than general purpose technology to close the patent grant gap. Those interested and invested in equity could incentivize such special purpose technology through an advanced purchase commitment or prize mechanism.

At the very least, as the USPTO rolls out new requirements or technologies, it could

pay more attention to how the changes affect new and small inventors given their unique needs. Rigorous evaluation and iteration can help ensure that the potential of patent quality technologies to improve the system for all is realized. As computer automation and AI create efficiencies in the patent system, the patent system should seize this opportunity to advance the twin goals of quality and equity through broad access, for the benefit of all inventors and the public at large. R

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## Is the Federal Trade Commission Serious About Premerger Notification?

BY ALEX R. REINAUER

The 1976 Hart-Scott-Rodino (HSR) Antitrust Improvements Act requires certain firms that are pursuing a merger to submit a Premerger Notification and Report Form, also called an HSR Form, to the Federal Trade Commission and the Justice Department's Antitrust Division so they can investigate whether the merger would violate antitrust law. FTC officials claim the information reported on the current form is insufficient for this purpose and have proposed changes to the form and its instructions. They say the new requirements would create a more effective and efficient screening for anti-competitive transactions.

There is no reason to believe the proposed changes would accomplish this. Instead, they would impose unnecessary

compliance costs on the least troubling transactions, with little to no improvement in the agencies' ability to screen for anti-competitive mergers.

The proposed rulemaking comes on the heels of last year's highly anticipated release of new Draft Merger Guidelines, which were finalized this past December. As guidelines, they are not rules and thus not enforceable, but they will function as guidance for businesses and courts. The guidelines signal a pivotal shift in the chief antitrust enforcers' priorities, though it remains to be seen if the courts will ultimately follow them.

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The HSR Form rules, on the other hand, will be enforceable and would dramatically increase the volume of documents and data to be submitted by parties seeking to merge. The FTC estimates that the burden per filer will quadruple from the current 37 hours per filing to 144 hours under the changes, resulting in an additional \$350 million in labor costs. Several law firms contend the burden would be much higher. Further, the FTC's estimates fail to consider the costs of delaying transactions or abandoning them altogether.

**Deterrence** / Such abandonments may be in line with FTC chair Lina Khan's intentions in changing the HSR Form. Khan, along with her counterparts at the DOJ, treat mergers and acquisitions as inherent threats to competition rather than opportunities to innovate.

On October 5, 2023, the Brookings Institution hosted a conversation on antitrust enforcement with Khan and Assistant Attorney General Jonathan Kanter, head of the DOJ's Antitrust Division. While discussing the FTC's administration of the HSR Act, Khan said, "As a law enforcer, a key goal is deterrence." That certainly appears to be the goal of the proposed HSR rules, as both the HSR Form rules and the Merger Guidelines send a clear message to businesses: Do not attempt to merge.

Khan claims that she is returning to the text of the antitrust statutes and ensuring that the FTC is abiding by the goals of Congress when passing them. However, when Congress passed the HSR Act, procedural deterrence was not the goal. In the *Congressional Record* of 1976, while discussing the act, cosponsor Rep. Peter Rodino stated that "lengthy delays and extended searches should consequently be rare" and that "the prospect of protracted delays" might kill most mergers. This concern prompted Congress to limit the initial review period for proposed mergers under the HSR Act to just 30 days, a time limit to which Khan has expressed strong discontent.

**Mini second request** / The FTC cited and quoted statements from Rodino in the



when deciding to merge. Companies would be required to submit narratives on all strategic rationales for the transaction and a competitive effects analysis for existing or potential supply and vertical relationships. Further, the new HSR Form includes several labor market narratives that would require merging parties to provide explanations and data about potential labor effects that may arise from the proposed transaction.

Much of this information isn't assembled by merging parties in the ordinary course of business. Instead, the proposed rule would turn the HSR Form into a "mini second request," to quote former FTC attorney Amanda Wait in a comment to a *Bloomberg Law* reporter. Second requests are used to obtain additional information from merging parties when the FTC or DOJ have lingering antitrust concerns after the parties' initial filings. Descriptive accounts regarding labor mar-

kets and other business relationships have typically been obtained using these second requests.

Some antitrust experts contend that the FTC's rulemaking authority under the HSR Act should be read in light of the statutory authority to issue second requests. The pertinent language under the Clayton Act specifies that "documentary material and information relevant to a proposed acquisition as is *necessary and appropriate* to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws." The key words here are "necessary and appropriate."

These terms are best read together, according to Justin Hurwitz of the International Center for Law and Economics and the University of Pennsylvania's Carey Law School. In a *Regulatory Review* article last year, he wrote, "Given that all necessary information could be acquired through a second request, 'appropriateness' is a question of whether 'necessary' information

notice of proposed rulemaking on the HSR Form—in fact, the notice quoted language from the same page in the *Congressional Record* as the language above—but it omitted his statements on avoiding unnecessary delays. Instead, in a footnote, the notice quoted the sentence immediately prior:

The House conferees contemplate that, in most cases, the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them. If the merging parties are prepared to rely on it, all of it should be available to the Government.

Khan seems to consider this an open invitation for antitrust officials to probe firms' own merger analysis, but that is neither what the legislative history nor the text of the statute says. The proposed changes to the HSR Form include several new narratives and compilations of data that parties do not ordinarily prepare



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should be requested of all transactions subject to premerger notification or only of those subject to second requests.”

Right now, the FTC and DOJ issue second requests for only 3 percent of transactions, according to Logan Billman and Steven Salop in a 2023 article in the *Antitrust Law Journal*. Of those transactions receiving a second request, over 70 percent were either settled with consent decrees or never completed. This suggests that second requests are an efficient tool for the antitrust agencies to challenge the most worrisome mergers within their allotted budgets without placing undue burden on all merging parties.

**More effective and efficient?** Khan claims that the increased paperwork on the front end of the premerger filing process would increase efficiency and help businesses on the back end. She suggests that a transaction that would have ordinarily received a second request might be allowed to close sooner thanks to the additional information obtained under the new form.

But her claim makes little sense when one considers historical HSR enforcement trends. Every year, the FTC and DOJ publish an *HSR Annual Report* that includes total HSR reportable transactions, the number of second requests issued, and the percentage of transactions receiving “early termination.” Early termination is granted when the agencies see no anti-competitive concerns with a transaction, and the parties are then allowed to close the deal before the end of the 30-day mandatory waiting period. Of the 32,647 transactions reported under the HSR Act from 2001 to 2020, 19,716 were granted early termination. That means the current HSR Form was sufficient to determine that over 60 percent of reportable transactions posed no anti-competitive threats. Under the proposed changes to the HSR Form, the large percentage of transactions posing no anti-competitive concern would bear significantly higher compliance costs.

Khan’s purported benefits make even less sense in light of the number of transactions receiving second requests that are

ultimately cleared as is. According to Billman and Salop, of the 969 second requests issued between 2001 and 2020, 274 were cleared as is.

All told, if the proposed HSR Form had been put in place in 2000, nearly 20,000 transactions that were judged to pose no anti-competitive concern would have needlessly faced quadrupled compliance burdens. The benefits Khan envisions would have come from only 274 transactions over the 20-year period. It’s hard to align those numbers with her statements on the benefits and costs of the proposed changes.

Not one of the 44 *HSR Annual Reports* was cited in the proposed HSR Rules, which raises questions as to whether the FTC has good-faith intentions of creating a more effective and efficient merger review process. The FTC seems more interested in creating additional regulatory hurdles for merging parties. The congressional mandate for the *HSR Annual Report* expired in 2000, but the FTC and DOJ continue to publish it. It is unreasonable for the FTC to ignore its own data on HSR enforcement when promulgating an HSR rule.

The text and legislative history of the HSR Act clearly demonstrate the statutory goal of balancing the FTC and DOJ’s ability to gather necessary information for premerger review with the need to not inappropriately burden merging parties with unnecessary delays. The proposed changes to the HSR Form overemphasize the former while disregarding the latter. The FTC essentially suggests using a sledgehammer to drive an assortment of small screws. R

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# YEARS BOLD

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