



June 6, 2023

VIA ELECTRONIC SUBMISSION

The Honorable Richard Revesz  
Administrator, Office of Information and Regulatory Affairs,  
White House Office of Management and Budget  
1650 17<sup>th</sup> Street NW  
Washington, D.C. 20500

**Re: Implementation of Executive Order 14094, Modernizing Regulatory Review**

Dear Administrator Revesz:

On April 6, 2023, President Joe Biden signed Executive Order (EO) 14094 entitled, “Modernizing Regulatory Review.”<sup>1</sup> This EO changes the scope of the existing EO 12866 regulatory review process conducted by the Office of Information and Regulatory Affairs, (OIRA), calls for measures to promote inclusivity in regulatory policy, and requires OIRA to revise OMB Circular A-4 on regulatory analysis.

In response to section 2(e) of the EO, OIRA published for comment a draft guidance implementing the public meeting provisions of section 6(b)(4) EO 12866.<sup>2</sup> Concurrently, OIRA is requesting comment on a draft revision to OMB Circular A-4.<sup>3</sup> This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the implementation of EO 14094, including these requests for comment.

Advocacy seeks to ensure that OIRA remains aware of the impacts of regulations on small businesses. Advocacy has the following recommendations to ensure that the voice of small business is heard in the rulemaking process. First, OIRA should continue to conduct interagency reviews of regulations that are likely to significantly impact small entities. Second, meetings held under EO 12866 should be welcoming for small businesses and considerate of their time and effort to attend. Third, economic analyses in support of regulations should provide as clear a picture as possible of the costs imposed on small businesses and the trade-offs.

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<sup>1</sup> Exec. Order No. 14,094, 88 *Fed. Reg.* 21,879 (Apr. 11, 2023).

<sup>2</sup> 88 *Fed. Reg.* 20916 (Apr. 7, 2023), regulations.gov Docket ID OMB-2022-0011.

<sup>3</sup> 88 *Fed. Reg.* 20915 (Apr. 7, 2023), regulations.gov Docket ID OMB-2022-0014.

## I. Background

### A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>4</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>5</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>6</sup> The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.<sup>7</sup>

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."<sup>8</sup>

### B. Executive Order 12866

On September 30, 1993, President Bill Clinton signed EO 12866, "Regulatory Planning and Review," forming the basis of the system of centralized regulatory review that remains in effect today.<sup>9</sup> In revoking its predecessor, EO 12991, this EO limited the scope of interagency review to "significant regulatory actions," defining this term as:

"(f) "Significant regulatory action" means any regulatory action that is likely to result in a rule that may:

"(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

"(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

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<sup>4</sup> 5 U.S.C. §601 et seq.

<sup>5</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

<sup>6</sup> Small Business Jobs Act of 2010 (PL. 111-240) §1601.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Exec. Order 12,866, 58 *Fed. Reg.* 51735 (Oct. 4, 1993).

“(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or  
“(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.”<sup>10</sup>

The EO also required OIRA to document and disclose meetings with outside parties. Although the EO limited receipt of outside communications to the OIRA Administrator or designee, over time, the EO 12866 meetings have come to be held almost entirely at the staff level. Similarly, these EO 12866 meetings have become commonplace, offering a wide range of interested parties, including small businesses, the opportunity to present their views to OIRA.

### **C. Executive Order 13272**

On August 13, 2002, President George W. Bush signed EO 13272, “Proper Consideration of Small Entities in Agency Rulemaking.”<sup>11</sup> This EO clearly established the role of Advocacy in the interagency review process established by EO 12866. Section 2(c) authorizes Advocacy to “provide comment on draft rules to the agency that has proposed or intends to propose the rules and to the Office of Information and Regulatory Affairs of the Office of Management and Budget (OIRA).”

In addition, section 3(b) requires agencies to “notify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities under the [RFA]. Such notifications shall be made (i) when the agency submits a draft rule to OIRA under Executive Order 12866 if that order requires such submission, or (ii) if no submission to OIRA is so required, at a reasonable time prior to publication of the rule by the agency[.]”

### **D. OMB Circular A-4**

On September 13, 2003, OMB issued Circular A-4.<sup>12</sup> Circular A-4 defines good regulatory analysis and standardizes the way benefits and costs of federal regulatory actions are measured and reported, promoting transparency and public participation in the regulatory process. By promoting a clear understanding of regulatory impacts accessible to the public, A-4 encourages more productive public feedback on regulatory proposals and improves agency decisionmaking.

For the presentation of costs and benefits over time, Circular A-4 said that agencies should present annualized benefits and costs using real discount rates of 3 and 7 percent. The 3 percent discount rate was intended to reflect the “social rate of time preference,” and the 7 percent discount rate was intended to reflect the opportunity cost of capital.<sup>13</sup>

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<sup>10</sup> *Id.*, § 3(f).

<sup>11</sup> Exec. Order 13,272, 67 *Fed. Reg.* 53461 (Aug. 16, 2022).

<sup>12</sup> OMB, Circular A-4, Regulatory Analysis (Sept. 17, 2003), *available at* [https://www.whitehouse.gov/wp-content/uploads/legacy\\_drupal\\_files/omb/circulars/A4/a-4.pdf](https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf) (last accessed June 5, 2023)

<sup>13</sup> *Id.* at 33.

Circular A-4 also addresses distributional effects. It recommends a separate description of distributional effects, with special consideration for circumstances in which a regulation could cause significant and disparate changes in outcomes across different groups.

#### **E. Executive Order 14094**

On April 6, 2023, President Biden signed EO 14094, “Modernizing Regulatory Review.” The EO amends several portions of EO 12866 and includes directives for strengthening public participation in the rulemaking process. One such amendment to EO 12866 changes the factors that are considered when determining if a rulemaking is a “significant regulatory action” and thus subject to OIRA review. Two of these amended factors are relevant to Advocacy’s comments:

“(1) have an annual effect on the economy of \$200 million or more (adjusted every 3 years by the Administrator of OIRA for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities; . . .

“(4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in this Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.”<sup>14</sup>

The EO further discusses that to the extent practicable, regulatory actions should be informed by the public. The EO directs federal agencies, including OIRA, to evaluate ways to make public participation in the rulemaking process more accessible.<sup>15</sup> Among these provisions, the EO directs agencies to engage with interested parties when developing regulatory agendas and offer additional transparency regarding petitions for rulemakings.<sup>16</sup>

The EO also directs OIRA to review and amend its procedures by which members of the public can request and have EO 12866 meetings to discuss rulemakings under interagency review. The EO lists possible reforms to include:

- (1) Ensure access for meeting requesters who have not historically requested such meetings.
- (2) Discourage duplicative meeting requests.
- (3) Consolidate meetings by requester, subject matter, etc.
- (4) Disclose data in an accessible format.<sup>17</sup>

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<sup>14</sup> 88 Fed. Reg. 21879.

<sup>15</sup> *Id.* at 21881.

<sup>16</sup> *Id.* at 21880.

<sup>17</sup> “Draft Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review),” (Apr. 6, 2023), available at <https://www.whitehouse.gov/wp-content/uploads/2023/04/ModernizingEOSection2eDraftGuidance.pdf> (last accessed June 5, 2023).

Finally, EO 14094 directs agencies to consider distributive impacts and equity within its regulatory analysis.<sup>18</sup>

On April 7, 2023, OIRA published notices requesting public comment on a draft guidance discussing options for reform to EO meetings and a draft revision to OMB Circular A-4.

## **II. Advocacy’s Small Business Concerns**

Advocacy spoke with several small business representatives regarding EO 14094 and its impacts on small business. Many small businesses were concerned about the impact the EO would have on their ability to comment on future rules that may have a significant impact on small entities. They raised concerns about rules that have historically gone through OIRA review no longer being included in this process. Advocacy has the following additional comments on the guidance and implementation of the EO.

### **A. OIRA should continue to require interagency review for those rules that have a significant economic impact on small entities.**

EO 14094 modifies the tests for significant regulatory action in two substantial ways. First, it increases the monetary threshold for significant rules under section 3(f)(1) from \$100 million to \$200 million. Second, it restricts the applicability of section 3(f)(4), from rules that raise novel issues, to those specifically authorized by the OIRA Administrator. Advocacy is concerned that this change will reduce OIRA’s consideration of rules that will have a significant economic impact on small entities without a revitalization of non-monetary triggers for review in section 3(f)(1).

Historically, for all but independent regulatory agencies, OIRA has reviewed under EO 12866 rules which are likely to have a significant economic impact on small entities. When these rules were not considered economically significant because they did not exceed the \$100 million threshold under EO 12866 section 3(f)(1), OIRA would identify them as “significant” under section 3(f)(4). Similarly, when Advocacy identified small entity concerns not otherwise addressed by the agency, OIRA would classify them as “significant” under section 3(f)(4) to allow for consideration of these concerns.

This is consistent with the notification procedures in EO 13272, since Advocacy is advised through the EO 12866 review process of rules with small business impacts and can engage agencies on the consideration of these impacts during review. Participation in interagency review also gives Advocacy the opportunity to advise OIRA of circumstances in which the agency may not have fully considered small business impacts, as required by the RFA, and recommend changes to ensure compliance.

Although EO 13272 does require agencies to inform Advocacy “at a reasonable time prior to publication” if there is a need for an RFA analysis and no OIRA review, this does not guarantee

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<sup>18</sup> *Id.*

Advocacy can engage with the agency in advance of publication, and no such notice is made if the agency has not adequately considered small entity impacts. Advocacy believes that it is in the best interest of any Administration for issues with RFA compliance or analysis to be discussed within the Executive Branch before materials are released to the public.

In addition, OIRA should require interagency review for rules with a significant economic impact on small entities to promote consideration of distributive impacts. EO 14094 specifically directs agencies to consider distributive impacts, which include the disproportionate impacts of regulation on small entities and the anti-competitive results when regulations create artificial disadvantages for small entities. Review of regulations that agencies or Advocacy believe will have significant impacts on small entities is consistent with this mandate and will encourage agencies to consider the impacts on small entities more fully prior to EO review.

Rules that have a significant impact on small businesses should be subject to OIRA review also as a matter of equity and accessibility. As discussed below, small entities value the opportunity to present their views through the EO 12866 process to OIRA and, by extension, the White House. Excluding rules that harm small businesses from EO review denies them that public opportunity and communicates apathy towards their concerns.

Finally, if OIRA relies solely on the highest monetary threshold to require EO review of rules that will affect small entities, OIRA will be excluding a large portion of the rules that require analyses under the RFA. By their nature, for a small business, even a small monetary impact can have outsized harms. Very few rules with analyses required by RFA §603 and §604 cross the \$100 million threshold, let alone \$200 million. OIRA could be excluding rules that threaten small business survival in an industry. This problem is magnified for rules where economic impacts have not or cannot be quantified or for rules that can adversely affect future rights and responsibilities of small businesses. Although these rules may not have an immediate direct impact, they can nonetheless be very harmful to small business interests.

Advocacy therefore recommends that OIRA state clearly that it will interpret section 3(f)(1) of EO 12866, as amended by EO 14094, to include significant economic impacts on small entities in its evaluation of adverse effects on the economy, sectors of the economy, competition, or local communities. Small businesses are a crucial element of many sectors of the economy and are the backbone of small communities around the country.

**B. OIRA should give special consideration to the needs of small businesses in its reforms to the EO 12866 meeting process.**

EO 14094 directs OIRA to take several actions to modify the EO 12866 meeting process. OIRA's guidance offers several key actions that OIRA could take to implement the EO. Advocacy has recommendations to address small business concerns.

**1. OIRA should structure EO 12866 meetings to offer broad flexibility for participation, including both in-person and virtual options.**

During the COVID-19 pandemic, OIRA shifted EO 12866 meetings to a fully virtual format. This change gave small businesses around the country greater access to the interagency review

process and expanded accessibility. This was particularly welcome for small businesses that could not afford the time or expense of travel to Washington, D.C.

However, Advocacy recognizes that there is much lost in a purely virtual environment. Many stakeholders, particularly those in rural or remote areas, do not have access to reliable broadband and other utility services. Stakeholders that can participate via computer prefer video conferencing to ensure their comments are being received or properly heard. Also, as a matter of accessibility, some participants need to be able to rely on visual as well as auditory sensory inputs.

Advocacy therefore suggests that OIRA consider offering a range of meeting options for participants: in-person, hybrid, and virtual. Stakeholders should be given options that best match their needs, are inclusive of all interested parties, and present the greatest opportunity for meaningful discussion. Where the participant requests a hybrid or virtual format, OIRA staff should endeavor to create a more collaborative and inviting format that mimics an in-person meeting to the extent possible.

OIRA's draft guidance does not mention the format of EO 12866 meetings moving forward. However, Advocacy feels that clarity on the availability of multiple formats is an important part of making EO 12866 meetings more open and accessible.

**2. Participants in OIRA meetings should be given proper notification when a requested meeting is cancelled or rescheduled.**

Many small business stakeholders noted that they were confused by the current notification process for EO 12866 meetings. They noted receiving cancellation notices for meetings without any explanation. While the review timeline and completion date are part of the deliberative process, notifying a stakeholder that a meeting has been cancelled because the rule is no longer under active review should not be considered deliberative. Therefore, Advocacy suggests including a brief explanation in any cancellation notice why a meeting has been canceled, particularly if the rule is no longer under review. This would help the public to understand the process and offer greater transparency. OIRA should also consider other notifications that may help to make the process less confusing for the public.

**3. If EO meetings are consolidated, OIRA should ensure that small businesses have an equal opportunity to present their views.**

EO 14094 suggests that one possible reform of the EO 12866 process could be “consolidation of meetings by requester, subject matter, or any other consistently applied factors deemed appropriate to improve efficiency and effectiveness[.]” Advocacy appreciates that for some rules the volume of meetings can be taxing on OIRA and agency resources and that involuntary consolidation of meetings may be necessary. However, Advocacy cautions that small business interests are often distinguishable from interests of larger entities in the same industry. Even where the issues presented may seem similar at first glance, small businesses have a different perspective on regulatory issues that deserves to be heard, particularly since small businesses are often disproportionately impacted.

In many instances, large businesses may be in favor of a particular rulemaking because they do not have the same cost implications or may be better placed to comply with prospective regulation than their competition. Small businesses can feel intimidated to share their perspective when there are large business competitors present. OIRA should also be aware that an involuntary consolidated meeting among competitors could create antitrust concerns and discourage sharing of relevant business information. For these reasons, OIRA should avoid involuntary consolidation of small businesses and large businesses into a single meeting, even if in the same industry.

**C. OIRA should ensure that OMB Circular A-4 continues to require a clear and transparent presentation of costs to small entities.**

Advocacy welcomes the effort to improve regulatory analysis so it can continue to be a useful tool for agency decision-making. Advocacy is concerned that some of the proposed changes to Circular A-4 will obscure impacts on small businesses.

More robust distributional analysis could provide more detailed information to regulatory decisionmakers on the impacts of their rules on different groups and individuals. This is welcome when different types of small firms may be impacted differently by a regulation. When firms must comply with requirements that impose high upfront costs, certain entities may struggle to absorb or spread out those costs if they have limited cash reserves, limited access to capital markets, experience unfavorable credit market outcomes, or have a short or uncertain lifespan. For example, research by Advocacy shows that minority-owned businesses are more likely to be denied credit, receive less credit than they sought, become discouraged from applying for credit, and use more expensive sources of credit.<sup>19</sup> Small businesses with lower revenues may experience a greater economic impact as a percentage of their total revenue when complying with a rule than businesses with higher revenues. These firms may provide important benefits to the economy while not contributing to the risk or externality being addressed. In these cases, in line with analyses done under the RFA, distributional analysis could be used to assess the distribution of costs and identify alternative approaches for different types of affected small entities, such as by business owner demographic or size class, that minimize unnecessary costs in achieving the benefits and intended outcomes of the rule.

While distributional analysis could lead to more robust information, the proposed changes to distributional weighting and discounting may introduce inefficiencies, make it more difficult for the public to understand the estimated impacts and provide input, and may not adequately consider the impacts and tradeoffs of the regulated community, especially small entities.

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<sup>19</sup> Office of Advocacy, *Minority-Owned Employer Businesses and Their Credit Market Experiences In 2017*, (2020), available at <https://advocacy.sba.gov/2020/07/23/minority-owned-employer-businesses-and-their-credit-market-experiences-in-2017/>.



**1. Circular A-4 should provide stronger guidance on the use of weighted distributional analysis and require that unweighted analysis also be presented and clearly delineated.**

The proposed changes to Circular A-4 would give agencies the discretion to apply distributional weights to estimates of costs or benefits. Agencies may choose to apply a higher weight to benefits relative to costs. If presented without an unweighted analysis, the agency could be presenting as having net benefits a regulation that could be less efficient than simply transferring resources directly from those bearing the costs to those receiving the benefits.

For example, suppose a proposed regulation costs \$100 million and produces benefits worth \$90 million to the recipients. The value of the resources consumed by the regulation exceeds the value produced by the proposed regulation, so the proposal would have negative net benefits of \$10 million. However, by applying a distributional weight of 1.2 to the benefits, the agency can report positive net benefits of \$8 million ( $1.2 * \$90 \text{ million} - \$100 \text{ million}$ ).

Under normal circumstances, an analysis of a proposed rule demonstrating negative net benefits would reveal inefficiencies that should be understood or potentially rectified during the regulatory development process. Using distributional weights to report positive net benefits instead would conceal this inefficiency and potentially decrease the cost effectiveness of the rule. Under the proposed changes, the net benefits reported by agencies would no longer reliably indicate whether the benefits of regulations justify the costs, which is critical for decision-making.

Therefore, Advocacy recommends OIRA develop a stronger set of guidelines for the use of distributional weighting and propose a range of acceptable parameters than can be used in various circumstances. Advocacy also recommends that if weighting is used on benefit or cost estimates, unweighted net benefit calculations should still be clearly presented to the public. Net benefits calculated using distributional weights should not be presented as the sole primary estimate of net benefits.

**2. Circular A-4 should continue to encourage the use of a discount rate relevant to small business investment.**

Another proposed change that may distort the relationship between costs and benefits is a significant reduction in the discount rate. Discount rates help understand the relative value of money in the future compared to today, reflecting a social and economic reality that a dollar today is worth more than it is tomorrow. Getting access to resources sooner is valuable, and the discount rate reflects the rate at which we are willing to trade off resources over time. Under the current Circular A-4, net benefits are calculated twice, using a discount rate of both 3 percent and 7 percent to reflect the potential changes to consumption and capital displacement. The proposed revision would replace those rates with a single rate of 1.7 percent.

For small businesses, the trade-off between the availability of resources today and money available in the future to purchase those resources is the interest rate at which they borrow to finance those resources. The proposed discount rate of 1.7 percent is an estimate of the average rate at which the federal government has borrowed in recent decades after adjustment for

inflation. However, small business borrowing is different from federal government borrowing. Federal debt is traded in a highly liquid market, one where investors can sell on short notice at a fair price. That liquidity is valuable, and investors pay for it by receiving lower interest rates. Some large businesses have access to capital markets upon which their debt is traded, but most other business debt is not traded in such liquid markets and faces significantly higher interest rates.

The discount rate for regulatory impacts should reflect the interest rates faced by regulated entities rather than the federal rate. Small businesses typically face interest rates 3 percentage points higher than the federal rate, with some experiencing even higher rates.<sup>20</sup> For example, 17 percent of new employer firms use credit cards to finance their businesses,<sup>21</sup> and the average credit card interest rate is over 20 percent.<sup>22</sup>

Regulations typically impose costs in the near future and generate benefits in the more distant future. Because costs precede benefits, lowering the discount rate means discounting benefits less relative to costs. Using a discount rate lower than the rate at which stakeholders trade off resources over time raises estimates of net benefits and masks the trade-offs society faces. Increasing benefits relative to costs has the same effect on net benefits as ignoring some of the costs imposed on small businesses and others. OMB should specify a discount rate for federal agencies to use that matches the trade-offs regulated entities make. This view would provide important information to agencies and the public on the potential impacts of proposed rules.

### **III. Conclusion**

Advocacy appreciates efforts to improve regulatory review and regulatory analysis. As OIRA pursues these efforts, Advocacy seeks to ensure that the impacts on small businesses and other small entities remain key considerations. For this reason, Advocacy recommends that regulations that are likely to have a significant economic impact on small businesses continue to be subject to interagency review. Advocacy also recommends that OIRA ensure meetings held under EO 12866 are welcoming for small businesses, considerate of their time and effort to attend, and recognize their unique perspectives. Finally, Advocacy recommends that OIRA ensure analyses in support of regulations provide as clear a picture of the costs imposed on small businesses and the economic trade-offs of regulation.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel David Rostker at (202) 205-6966 or by email at david.rostker@sba.gov.

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<sup>20</sup> See, e.g., Federal Reserve Bank of Kansas City, *Small Business Lending Survey*, available at <https://www.kansascityfed.org/surveys/small-business-lending-survey/>.

<sup>21</sup> Office of Advocacy, *Frequently Asked Questions About Small Business Finance, 2022* (2022), available at <https://advocacy.sba.gov/2022/02/15/frequently-asked-questions-about-small-business-2022/>.

<sup>22</sup> Daniel De Visé, *A Growing Number of Americans Face Potentially Crippling Credit-Card Debt*, The Hill, Jan. 21, 2023, available at <https://thehill.com/business/3821799-a-growing-number-of-americans-face-potentially-crippling-credit-card-debt/>.

Sincerely,

/s/

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Office of Advocacy

/s/

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