XIV. Clean Energy for America Act: Analyzed Under the Tax Principles of Equity and Fairness, Certainty, Economic Efficiency, Administrability, and Simplicity

A. Introduction

The Senate has been introduced S. 1298, *A Bill to Amend the Internal Revenue Code of 1986 to Provide Tax Incentives for Increased Investment in Clean Energy*, known as the Clean Energy for America Act ("CEAA").[1] Senator Ron Wyden (OR) introduced the bill with aim to "overhaul the federal energy tax code, create jobs, and combat climate change."[2] This bill seeks to replace over 40 different energy tax incentives in use today with three categories of technology-neutral tax credits that incentivize clean electricity, clean transportation, and energy efficiency.[3] Further, the bill aims to make jobs in renewable energy desirable by requiring projects receiving these tax benefits comply with federal labor requirements. The credits provided by the CEAA will help realize the Biden administration's goal of achieving a 50% reduction in greenhouse gas emissions by 2030.[4] The legislation was offered as a crucial piece of the puzzle necessary to effectuate proper climate policy.[5] This paper will first look at the existing clean energy incentives

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[1] Press Release, U.S. Senate Comm. on Fin., Wyden, Colleagues Introduce Legislation to Overhaul Energy Tax Code, Create Jobs, Combat Climate Crisis (Apr. 21, 2021), https://www.finance.senate.gov/chairmans-news/-wyden-colleagues-introduce-legislation-to-overhaul-energy-tax-code-create-jobs-combat-climate-crisis [perma.cc/UZ5X-VDJK].

[2] *Id.*

[3] *Id.*

[4] Fact Sheet, The White House, President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (Apr. 22, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/ [perma.cc/2VXF-WE8J] (referencing a White House press release stating the administrations climate goals)

[5] Trevor Higgins, *Clean Energy Tax Incentives Will Help Fight the Climate Crisis*, CENTER FOR AMERICAN PROGRESS (June 11, 2021), https://www.americanprogress.org/issues/green/news/2021/06/11/500429/clean-energy-tax-incentives-will-help-fight-climate-crisis/ [perma.cc/52GM-VKXL] ("This is essential, but there is no single climate policy that can serve

and some of their shortfalls. Next will be a summary of the CEAA's provisions with analysis about how the proposed incentives under the act will address some of the inefficiencies of existing clean energy benefits. Next, I will analyze the bill under the five tax principles of equity and fairness, certainty, economic efficiency, administrability, and simplicity as laid out by Adam Smith in *The Wealth of Nations*. Finally, I will provide various bill improvements that may be used to help more adequately address any problems in the current clean energy tax structure and better meet the five tax principles used to guide good tax policy.

B. Existing Clean Energy Incentives

Currently incentives to produce clean energy includes a patchwork of incentives that contain several temporary provisions that have different rules and expirations, making it difficult for project developers and companies to plan and develop large-scale projects.[6] While clean energy tax credits have recently been extended under Covid-19 relief legislation, they are set to expire in a couple of years, which can lead to uncertainty from developers.[7] The incentives that are currently available can mostly be characterized as benefits for: (1) the production of clean electricity; (2) the production of clean transportation; and (3) building energy efficiency.

1. Existing Clean Electricity Incentives

There are currently several different incentives to produce clean electricity. This includes the section 45 production tax credit and section 48 investment tax credit, along with provisions for accelerated

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as a simple litmus test, as success will require investments across the economy.")

[6] John Feldmann, Devashree Saha, & Rajat Shrestha, *How the Clean Energy for America Act Improves Tax Credits*, WORLD RESOURCES INSTITUTE (Apr. 30, 2021), https://www.wri.org/insights/how-clean-energy-america-act-improves-tax-credits [perma.cc/Y99X-ZTM9] (examining what is wrong with existing clean energy tax credits and how to better the system).

[7] Allan Marks, *Big Stimulus for Clean Energy: Covid Relief Bill to Include Bipartisan Support for Green Tax Credits*, FORBES (Dec. 21, 2020), https://www.forbes.com/sites/allanmarks/2020/12/21/clean-energy-investments-get-a-bipartisan-boost-from-congress-in-relief-bill/?sh=47a54a0e36f2 [perma.cc/432Z-Z9PU] (covering the effects of stimulus packages on clean energy).

depreciation, tax-favored bonds, and allocated credits. [8] While the production and investment tax credits have been beneficial for developing solar and wind projects, they have largely been available only for these technologies and have differing rules and expirations making it harder for developers to properly plan large scale projects.[9] Further, current clean electricity incentives provide different incentive levels for technologies with similar emissions profiles and omit several new and emerging technologies.[10]

2. Existing Clean Transportation Incentives

Current clean transportation incentives are limited to a few specified types of fuels and provide only a restrictive incentive to low- and middle-income consumers, who struggle to claim the full value of the credits.[11] Similar to current incentives for clean electricity, clean transportation incentives are temporary and have largely expired.[12] The inaccessibility of current tax credits in the clean transportation sector is further shown by the non-refundability of the electric vehicle tax credit, which does not allow full claim of the benefit if a tax-payer does not owe in federal taxes than what the credit is worth.[13] Lastly, under existing incentives, the number of vehicles that can qualify for the tax credit from each manufacturer is capped, so large-scale manufacturers of electric vehicles are disincentivized from producing the vehicles.[14]

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[8] *Renewable Energy Explained: Incentives,* U.S. ENERGY INFORMATION ADMINISTRATION (Nov. 20, 2020), https://www.eia.gov/energy explained/renewable-sources/incentives.php [perma.cc/3MN3-V5V5] (reviewing the administration's energy incentives).

[9] Feldmann, *supra* note 7 ("As the proposed new legislation points out, existing clean energy tax credits are a
patchwork of outdated and intermittently available incentives that do not allow companies and developers sufficient time to plan and develop large-scale projects").

[10] Press Release, *supra* note 1 ("To encourage clean transportation fuel, the bill would provide long-term incentives for battery and fuel cell electric vehicles and electric vehicle charging ... To incentivize energy conservation, the bill would provide a performance-based tax incentives for energy efficient homes and for energy efficient commercial buildings").

[11] *Id.*

[12] *Id.*

[13] Feldman, *supra* note 7.

[14] *Id.* ("There is also a cap on the number of vehicles that can qualify for the tax credit from each manufacturer").

3. Existing Energy Efficiency Incentives

Current energy efficiency incentives for residential buildings are largely incentivizing specific types of improvement, using standards that are out of date.[15] These incentives are subject to short-term extensions usually only being granted a year or two at a time, which leads to a lack of development and innovation due to developer uncertainty.[16] The current single major incentive for commercial building energy efficiency is section 179D energy efficient commercial buildings reduction, which provides a per-square-foot tax deduction for certain energy efficient building components.[17] The 179D deduction has been criticized for being unviable for large properties, providing inadequate savings, and being subject to short term and retroactive extensions.[18]

C. CEAA Incentives

1. Clean Electricity Incentives under CEAA

The CEAA provisions create technologically neutral incentives for clean electricity.[19] Any power facility of any technology can qualify

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[15] Press Release, *supra* note 1 (This bill would drive energy efficiency into homes and buildings across the country").

[16] Feldman, *supra* note 7 ("Similar short-term extensions have historically led to boom and bust cycles of clean energy technologies").

[17] David McGuire, Handling of 179D is Emblematic of Larger Tax Code Problems, FORBES, (Feb. 28, 2019, 9:00 AM), https://www.forbes.com/sites/forbesfinancecouncil/2019/02/28/handling-of-179d-is-emblematic-of-larger-tax-code-problems/?sh=5b40e5946d5f [perma.cc/7JH6-MVSA] ("Because the deduction is tied to square footage, only properties with substantial square footage can justify the investment and engineering time required").

[18] *Id.*

[19] Todd Lowther, Larry Crouch, Ryan Bray & Julia Pashin, US Senate to Consider Tax Credit Legislation Under Clean Energy for America Act, SHEARMAN & STERLING PERSPECTIVES, (June 2, 2021), https://www.shearman.com/Perspectives/2021/06/US-Senate-to-Consider-Tax-Credit-Legislation-Under-Clean-Energy-for-America-Act?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration [perma.cc/E9HN-K9QR] ("To incentivize clean electricity, the CEAA would provide an emissions-based, technology-neutral tax credit for electric generation facilities that achieve a net zero or net negative carbon emissions standard").

for the credits, so long as the facility is net zero.[20] Taxpayers are able to choose between a production tax credit or an investment tax credit, provided based on the carbon emissions of the electricity generated.[21] Production tax credits are available for up to "2.5 cents per kilowatt hour of electricity produced and sold while investment tax credits are available for up to 30 percent of the amount invested in the facility."[22] These credits are designed to be accessible to more projects and facilities, including an option to receive the credits as a direct payment.[23]

2. Clean Transportation Incentives under CEAA

The CEAA further creates a technology-neutral incentive for the domestic production of clean fuels and provides for more electric transportation incentive options.[24] This includes a 30% credit for the purchase price of medium and heavy-duty electric vehicles as well as a production tax credit for domestic production of clean transportation fuel of up to $1 per gallon, dependent on the lifecycle carbon emissions of a given fuel.[25]

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[20] *Id.*

[21] *Id.* ("Any qualifying electric generation facility would be eligible to claim a production tax credit of up to 2.5 cents (as adjusted for inflation) per kilowatt hour ("KWh") produced or an investment tax credit of up to 30 percent of the qualifying cost for the new facility").

[22] Anna Fero, Senate Finance Committee Advances Emissions-Based Overhaul of U.S. Energy Tax Code, DAVIS WRIGHT TREMAINE LLP ENERGY AND ENVIRONMENTAL LAW BLOG (June 2, 2021), https://www.dwt.com/blogs/energy--environmental-law-blog/2021/06/clean-energy-for-america-act-tax-incentives [perma.cc/LWS3-NXWP] ("Any new zero emission facility may elect either a production tax credit (PTC) of up to 2.5 cents per kilowatt hour of electricity produced and sold or an investment tax credit (ITC) of up to 30 percent of the amount invested in the facility").

[23] *Id.* ("To make incentives more accessible, power projects and grid improvement projects have the option to receive the tax credits as 'direct payments'").

[24] Feldman, *supra* note 7 ("Doing so would also spur domestic clean energy manufacturing across the country").

[25] Fero, *supra* note 23.

3. Energy Efficiency Incentives under CEAA

Finally, the CEAA reforms residential and commercial building energy efficiency incentives.[26] The Act seeks to promote conservation in new and existing buildings and provides tax credits for energy efficient new homes and for energy efficient improvements to existing homes, as well as tax deductions for energy efficient building components added to commercial buildings.[27] The value of the tax incentives would increase as more energy is conserved.[28] In order to qualify for these credits, new homes must meet the latest Energy Star requirements.[29]

4. General Evaluation of the CEAA

This bill is seen by many experts as a much-needed modernization of an outdated tax regime.[30] Replacing over 40 existing energy tax incentives with the three categories of technology neutral tax benefits makes the system much more friendly to innovation.[31] However, there are still a couple ways that the CEAA could be improved before the tax regime is voted on and potentially put into law. There are mainly concerns regarding: 1) the transition from the current tax system to the simplified CEAA system; 2) the lack of a sunset provision in the CEAA which could potentially lock in outdated policy; and particularly

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[26] Press Release, *supra* note 1 ("To incentivize energy conservation, the bill would provide a performance-based tax incentives for energy efficient homes and for energy efficient commercial buildings").

[27] Fero, *supra* note 23 ("Provides tax credits for energy efficient new homes and for energy efficient improvements to existing homes, as well as tax deductions for energy efficient building components added to commercial buildings. The value of the tax incentives would increase as more energy is conserved").

[28] *Id.*

[29] Press Release, *supra* note 1.

[30] Feldmann, *supra* note 7 ("As the proposed new legislation points out, existing clean energy tax credits are a
patchwork of outdated and intermittently available incentives").

[31] *Id.* ("This bill proposes replacing the more than 40 existing clean energy tax credits with three categories of technology-neutral tax credits to incentivize clean electricity, clean transportation, and energy efficient homes and commercial buildings").

3) the availability of the electric vehicle credit, which could be changed so that it becomes available for a greater number of people.[32]

This Article will address these concerns and considerations in greater detail, evaluating the CEAA under the five tax principles of equity and fairness, certainty, economic efficiency, administrability, and simplicity.

D. CEAA Analyzed under the Five Tax Principles

The tax principles analyzed below are the maxims of taxation described by Adam Smith in *The Wealth of Nations*.[33] These tax principles of equity and fairness, certainty, economic efficiency, administrability, and simplicity are commonly used as indicators for good tax policy and to analyze legislation to ensure it is adequate in achieving its purpose.[34]

1. Equity and Fairness

The tax principle of equity and fairness stands for the idea that "similarly situated taxpayers should be taxed similarly."[35] This principle is typically defined in terms of horizontal and vertical equity.[36] Horizontal equity stands for the idea that "taxpayers with the same ability to pay should pay the same amount of tax", while vertical equity provides that "if two taxpayers do not have the same ability to pay, the person with greater taxpaying ability should pay more tax."[37] This concept is typically viewed in terms of fairness, meaning that ones with

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[32] Feldmann, *supra* note 7; Medina, *supra* note 4 (reviewing the policy concerns).

[33] Adam Smith, WEALTH OF NATIONS (1776).

[34] *Guiding Principles of Good Tax Policy: A Framework for Evaluating Tax Proposals*, ASS'N OF INT'L CERTIFIED PRO. ACCT. (2017), https://us.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/tax-policy-concept-statement-no-1-global.pdf [perma.cc/2JAF-JQRE] [hereinafter *Guiding Principles*].

[35] *Id.*; *see also* Adam Smith, WEALTH OF NATIONS (1776).

[36] *Guiding Principles*, *supra* note 34 ("The concept of horizontal equity provides that two taxpayers with equal abilities to pay should pay the same amount of tax. If a taxpayer has a greater ability to pay than another taxpayer, the concept of vertical equity comes into play, which means that the person with the greater ability to pay should pay more tax").

[37] *Id.*

greater ability to pay should have higher tax burdens.[38] The overhaul of clean energy incentives included in the CEAA viewed in terms of equity and fairness seems to achieve this policy for the most part.[39] The incentives provided are technology neutral, which allows the benefits to be claimed by numerous different energy sources and allows the adoption of future technologies not currently available.[40] However, a fairness issue presents itself as the current cap on electric vehicles of $80,000 incentivizes manufacturers to produce vehicles that an average American will be unable to afford.[41]

2. Certainty

The tax principle of certainty requires that tax rules clearly specify how the amount of payment is determined, when the payment of tax should occur, and how payment is made.[42] Taxpayers should have the ability to determine their tax benefits or liabilities with reasonable certainty based on the nature of their transactions.[43] "If the transactions providing tax benefits and liabilities are easily identified and valued, certainty as a tax principle is more likely to be attained."[44]While the CEAA viewed through the lens of certainty is much improved from the old system of clean energy incentives, there is still some room for improvement before the bill becomes law. First, there is an uncertainty surrounding the transition from the current tax regime toward the CEAA

[38] *Id.*
[39] *Id.*
[40] Lowther, *supra* note 20 ("The CEAA proposes a new technology-neutral tax credit program").
[41] Feldmann, *supra* note 7 ("While the revised bill places an $80,000 cap on the vehicle price in order to qualify for the EV credit, this high price cap is still well above the median price of new vehicle sales").
[42] *Guiding Principles*, *supra* note 34 ("The tax rules should clearly specify how the amount of payment is determined, when payment of the tax should occur, and how payment is made").
[43] *Id.* ("Taxpayers should have the ability to determine their tax liabilities with reasonable certainty based on the nature of their transactions").
[44] *Id.*

tax regime.[45] Second, the CEAA does not provide any end date.[46] These uncertainties could potentially lock in outdated policy and could make it difficult for the bill to move through the Senate in the event of a budget reconciliation process.[47]

3. Economic Efficiency

The tax principle of economic efficiency requires that a tax system not "unduly impede or reduce the productive capacity of the economy."[48] While all taxes create market distortions, good tax policy will minimize the effects of this.[49] This can be done by ensuring that the goals of a tax policy are aligned with the goals of society.[50] "Economic growth and efficiency are impeded by tax rules that favor a particular industry or investment, thereby causing capital and labor to flow to such areas for reasons not supported by economic factors."[51] Such action can "potentially harm other industries and investments, as well as the economy as a whole."[52] The CEAA does a good job addressing some of the efficiency issues of the old tax regime, including the availability of incentives for limited technologies and fuels.[53] By making the incentives technology neutral, no particular clean energy industry or investment will be favored over another which would lead to the inefficient flow of capital and labor towards investments determined by statute.[54]

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[45] Medina, *supra* note 4 ("While the CEAA provides for a very broad extension and expansion of available tax credits
and other benefits, certain aspects of the proposal seem likely to raise concerns and may potentially require further refinement").
[46] *Id.* ("There is no fixed end date for any of the tax credits included in the CEAA").
[47] *Id.* ("While tying the available benefits to the achievement of greenhouse gas emissions goals makes sense, if budget reconciliation process is required to move the legislation through the Senate, the open-end termination date could present a problem").
[48] *Guiding Principles*, *supra* note 34.
[49] Smith, *supra* note 35 (summarizing the main points of the book).
[50] *Id.*
[51] *Guiding Principles*, *supra* note 34.
[52] *Id.*
[53] Lowther, *supra* note 18 ("Currently, the Code contains a number of tax incentives to encourage energy efficiency").
[54] *Id.* (analyzing the tax effects along with the article).

4. Administrability

The tax principle of administrability requires administrative and compliance costs of a tax be kept to a minimum for both the government and taxpayers.[55] This tax principle seems irrelevant for the analysis of the CEAA as it is not requiring the payment of taxes, it is rather the offering of benefits for certain clean energy investments.[56] However, there are some ways to ensure the provision of the incentives. For example, the electric vehicle incentive as current is available as a refund that requires extra steps taken by the purchaser of a vehicle to receive the credit.[57] Allowing the refund to be made available at the point of sale in the form of a rebate would ensure compliance and improve the administrability of the bill as the benefit is realized immediately.[58]

5. Simplicity

Simplicity as a tax goal requires simple tax laws so that "taxpayers understand the tax rules and can comply with them correctly and in a cost-efficient manner."[59] Complex tax laws lead to confusion and can reduce compliance.[60] Simplicity as a tax goal also helps consumers and developers better plan for the future.[61] The CEAA drastically simplifies the current clean energy incentive regime.[62] The tech-neutrality of the CEAA, along with the applicability of the tax regime being the same across technologies results in simpler tax

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[55] *Guiding Principles*, *supra* note 34 ("Compliance costs for taxpayers and administrative costs for the tax authorities should be minimized as far as possible").
[56] *Id.*
[57] Feldmann, *supra* note 7 ("First, making the EV tax credit refundable in the form of a rebate at the point of sale—the most effective form of refundability—would ensure the greatest level of availability").
[58] *Id.*
[59] *Guiding Principles*, *supra* note 34.
[60] *Id.*
[61] Fero, *supra* note 21 ("The Clean Energy for America Act is designed to streamline the energy provisions of the tax code and make clean energy tax credits more effective and accessible. The expansion and extension of these tax credits and the ability for project sponsors to receive direct cash payments in lieu of credits are all significant changes that could vastly simplify the financing of clean energy and storage projects").
[62] *Id.*

incentives that will not only be available to more investors and consumers, but also more readily understood by society.[63]

E. Potential Bill Improvements

1. Increasing the Availability of the Electric Vehicle Tax Credit

In an effort to achieve greater adoption of eco-friendly vehicles it has been suggested that the tax refund be made available at the point of sale in the form of a rebate.[64] Other possibilities to increase electric vehicle availability include subsidies in the used electric car market, investing in charging facilities, and the extension of battery warranties.[65] Lastly, by making the cap for electric vehicles lower than the $80,000 cap in the current version of the CEAA, Congress could incentivize electric vehicle manufacturers to prioritize rollouts of more affordable models that would be available to more people.[66] Addressing this weakness in the CEAA would improve the bill's standing under the tax goal of equity and fairness and economic efficiency.[67]

2. Clarifying Transition and Expiration to the CEAA

In its current form, the CEAA would provide the new investment tax credits and production tax credits for electricity generation projects placed in service after 2022, and any projects that are finished before then will receive the existing lower tax credits." [68] This could result in developers delaying projects to cash out on the new

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[63] *Id.*

[64] Feldmann, *supra* note 7 ("First, making the EV tax credit refundable in the form of a rebate at the point of sale—the most effective form of refundability—would ensure the greatest level of availability").

[65] *Id.* ("In addition to tax credits, providing support for the used vehicle market through subsidized financing, supporting charging infrastructure, and extending battery warranties would make EVs affordable for more Americans").

[66] *Id.* ("A lower price cap would drive automakers to manufacture more affordable vehicles and focus the credit on moderately priced vehicles").

[67] *Guiding Principles*, *supra* note 34. (circling back to one of the main purposes of the article and the bill as a whole).

[68] Medina, *supra* note 4.

credits. [69] The CEAA does not provide much clarity on how the transition from existing tax incentives to the proposed incentives would take place, but there is a provision in the act that restricts developers from claiming both the new tax credits and currently available tax credits.[70] Addressing these concerns would improve the bill's certainty and economic efficiency.[71]

Further, the absence of an end date in any of the incentive provisions could lead to inefficiencies in the future.[72] A clearer sunset provision in the act would allow proper phaseout when better policies become available and better align the bill with its emphasis on innovation.[73] Further, there are concerns that the open-endedness of the act could make it difficult to move through the Senate in a budget reconciliation process.[74] In addition to making the bill more likely to make it through this process, a sunset provision will also improve the bill's standing under the tax goal of certainty and economic efficiency.[75]

F. Conclusion

The CEAA will simplify the current convoluted system of clean energy tax incentives. This will be done mostly by making incentives technology-neutral and therefore inclusive of not just current technology excluded from tax benefits, but also future technologies. Incentivizing clean electricity, clean transportation, and energy efficiency will further the goal of combatting climate change by decreasing U.S. emissions by 50% by 2030.Analysis of the bill under the five tax principles of fairness and equity, certainty, economic efficiency, administrability, and simplicity, shows that the bill seems to certainly help modernize and simplify the inconsistent system of benefits currently in place. However, there is still room for improvement

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[69] *Id*. ("This arbitrage is likely to make some developers consider delaying certain projects").
[70] *Id.* ("The bill has provisions that bar claiming both the new tax credits and tax credits under existing law").
[71] *Guiding Principles*, *supra* note 34.
[72] Feldmann, *supra* note 5. ("Phaseout criteria should contain provisions that reduce or eliminate tax credit incentives when more effective and efficient policies are implemented, such as sector- or economy-wide decarbonization policies like a clean energy standard or a carbon tax").
[73] *Id.*
[74] Medina, *supra* note 4.
[75] *Guiding Principles*, *supra* note 34. (clarifying the argument along with the article's purpose).

such as increasing the equity and fairness of the bill by making the electric vehicle tax credit accessible to more people and clarifying exactly how the transition from existing benefits to the proposed benefits will be carried out as well as by providing explicit expiration and phaseout guidance in order to bolster the bill's certainty.

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