

The Public Benefit of Benefit Corporations

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The provision of public goods and services increasingly involves intersectoral collaboration; government is no longer a necessary—much less sufficient—condition for creating and implementing public policy¹ (Vaughan and Arsneault 2014). Although nonprofit organizations and governments have a long history of partnering in the public interest, the more recent influx of for-profit firms to the arena of social benefit has further blurred the lines between the sectors (Cummings 2012; Marquis, Glynn, and Davis 2007; Salamon 2002; Smith 2008). For corporate entities, however, this foray into public and/or social benefit can be considered problematic because the general perception among for-profit board members and managers is that shareholder wealth maximization is a legal mandate (Chu 2012; Cummings 2012; Murray 2012; Reiser 2011). Whereas this notion of shareholder primacy is a source of debate in the community of corporate legal scholars (Chu 2012; Cohn and Ames 2014; Murray 2012; Neubauer 2016), the common perception in corporate boardrooms is that their primary fiduciary responsibility is to produce shareholder wealth (Murray 2012). In an era of growing interest in producing both profit and public benefit, shareholder primacy has led to a conundrum for business leaders: How to protect their business while at the same time pursuing public benefit?

One response has been the rise of hybrid “for-benefit” organizations such as a low-profit limited liability company (L3C), a certified B-Corp[®], or a benefit corporation. Benefit corporations and L3Cs are formally established under state statutes that specifically allow for-profit entities to pursue a dual mission of profits and social purpose. Certified B-Corps are companies formally organized under traditional corporate forms (e.g., LLC) that pursue certification of their social-purpose mission from the nonprofit B Lab; they exist independently of any legislative action. As a nonprofit organization, B Lab sets the standards and process for certification and ensures compliance from those companies that voluntarily accept those standards as requirements for their business operation. Benefit corporations and L3Cs, conversely, exist only when legislative action has been taken to expand the legal options for business incorporation in a particular state.

These hybrid forms of corporate structure are growing in number, and most US states have created policies that ensure legal status for for-benefit businesses. Questions remain,

however, about the implications of these new corporate structures, particularly with regard to public participation and who defines the public interest (Nickel, this issue). This article, therefore, explores the nature and extent of the public benefit of hybrid corporate structures—specifically, benefit corporations and certified B Corps.

ORGANIZED INTERESTS AND PUBLIC BENEFITS

Traditionally, public policy has been defined as what the government says and does about perceived problems (Ripley and Franklin 1980), reflecting the view that government action is synonymous with and essential for public policy. However, recent trends challenge this view. The nonprofit sector has experienced tremendous growth in recent decades and continues to increase its scope of influence regarding the delivery of public goods and services. Similarly, the number of for-profit entities with an emphasis on social responsibility also has increased recently, causing some in the nonprofit sector² to argue that nonprofits cannot always be assumed to be better than for-profits at doing good in the world (Jones 2013). A growing literature on the blurring of the lines between the three economic sectors reflects these changes in public service delivery (Billis 2010; Dees and Anderson 2003; Smith 2010). This sector blurring raises further doubts about the validity of always defining public policy as *government* action. All of this suggests that greater scrutiny is warranted regarding the extent to which government is both necessary and sufficient for the pursuit of the “public good.”

In addition to the growing literature on sector blurring (also known as sector bending and hybridization), there is a longer-standing literature on the nature of public organizations’ “publicness” in contrast to private organizations’ “privateness” (for early examples, see Appleby 1945; Allison 1979; Bozeman 2007; Bozeman and Moulton 2011; Pesch 2008; and Waddell 2000), as well as newer ideas of “non-profitness” (Robichau et al. 2015). *Publicness* is generally defined by the degree to which an organization provides public goods or pursues public interest and is constrained by political forces.³ *Privateness* reflects the degree to which an organization has pure market motives (i.e., no concern for the public interest) and is constrained by market forces⁴ (Bozeman 2007; Bozeman and Moulton 2011). Robichau et al. (2015) added to this a theory of *nonprofitness*, defined by the degree to which an organization is constrained by moral authority and nonprofit values as well as endowed

with resources related to expression of those values and the support of stakeholders.

Theories of publicness, privateness, and nonprofitness fit well with the literature on hybridization and sector blurring because there has been increased recognition of the changing relationships between the sectors in the past two decades. Scholars have noted a growing penchant among corporations to emulate the moral functions and values of nonprofits (Robichau et al. 2015); however, there remain questions about how much public benefit a for-profit organization can or should pursue.

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DOING WELL AND DOING GOOD

Since the turn of the twentieth century, for-profit corporations have created philanthropic foundations to do, as Andrew Carnegie said, “real and permanent good in this world” (Carnegie Corporation, n.d.). In their corporate forms, however, for-profit organizations became leery of engaging in activity that might benefit the public over their shareholders. Murray (2012) pointed to a 1919 Michigan Supreme Court case, *Dodge v. Ford*, as driving the idea of a “shareholder wealth-maximization norm.” In the case, Henry Ford argued “that he wished to use the excess capital in the corporation to benefit society” rather than distribute it to the company’s shareholders (Murray 2012, 10). Ford lost, the court ordered the company to distribute profits to its shareholders, and the case has served as a warning to socially-minded corporations for nearly a century.⁵ As for-profit organizations began to engage in socially beneficial activities on a much wider scale in the 1980s, the earliest arguments were that good corporate citizenship was good for business (Burt 1983; Marquis et al. 2007). Many legal scholars argue that if Henry Ford had used this rationale—that is, pursuing social benefit increases long-term company profits—he could have won his case in *Dodge v. Ford* (Murray 2012).

Cases such as those involving Ben & Jerry’s and eBay⁶ have heightened concerns in the business community regarding companies’ ability to focus on long-term public benefits if there is a perceived cost to shareholders. They continue to serve as cautionary tales in the world of socially-responsible business. The sale of Ben & Jerry’s formed the rationale for certified B Corps, which also influenced the model benefit corporation statutes; both cases have been cited by for-benefit advocates seeking state legislation (Murray 2012).

As noted previously, scholars debate the actual extent of legal restriction imposed by the principle of shareholder primacy. Most identify the business judgment rule as allowing leeway for boards and managers to use factors other than the immediate benefit to shareholders when making decisions. However, they maintain that the general perception among

board members and managers is that maximizing shareholder value is a legal mandate (Chu 2012; Cummings 2012; Murray 2012; Reiser 2011). Whereas the for-profit sector’s narrow focus on profit-making has long been criticized as damaging to the broader public interest, a growing cadre of companies focuses on the broader view of stakeholder value in making operational decisions. They refute the myth of shareholder primacy (Mac Cormac and Haney 2012) and focus on the triple bottom line of people, planet, and profits (Murray 2012; Slaper and Hall 2011). For these companies, shareholders are only one set of stakeholders and profits are not more important

than social mission (Bend and King 2014; Surowiecki 2014; Taylor 2016).

These changes, along with the blurring of sector boundaries, have led members of both the scholarly and practitioner communities to argue that we are at the threshold of a new type of organizational unit: the hybrid “for-benefit” organization. Because hybrids lie somewhere outside of the traditional three economic sectors, some contend that they exist in a new fourth sector, which represents the convergence of the public, nonprofit, and for-profit spheres (Fourth Sector n.d.; Yoskowitz 2013). Hybrid companies are commonly understood as for-profit entities that are not required to focus solely on the maximization of shareholder value but also can consider the social and environmental impacts of their business decisions (Hasler 2014). This suggests that consideration of the public interest is an important component of operations for many businesses as well as public and nonprofit organizations.

However, the emergence of these various hybrid corporate forms illustrates the complexity of the US system. Increasingly, social entrepreneurs and young philanthropists (e.g., Mark Zuckerberg) are choosing for-profit companies as their preferred venue to promote social change. Accordingly, it is becoming more difficult for the average citizen to know where government ends and the nonprofit and for-profit sectors begin when it comes to serving the public interest.

Pursuing social and/or environmental benefits is nationally and even globally important today, both to consumers (Bend and King 2014; Taylor 2016) and to employees (Surowiecki 2014). As a result, many for-profits are choosing a hybrid organizational form that allows them to incorporate the pursuit of social benefits into their corporate missions (see also Webb Farley, Goss, and Smith, this issue, and Webb Farley, this issue). Bend and King (2014) asserted that hybrids, therefore, can differentiate themselves from other for-profits in order to appeal to environmentally and socially conscious consumers and employees. Increased reporting rules that accompany both B Corps certification and benefit corporation status further enhance that appeal.

As with most issues of public policy, however, the implications of the new corporate structures are not straightforward. The remainder of this article explores the nature and extent of the public benefit of hybrid corporate structures, specifically B-Corps and benefit corporations—both of which are for-profit corporations that voluntarily promote the public interest values of social and environmental responsibility, transparency, and accountability, as much as they seek profit.

NONPROFITS, FOR-PROFITS, AND PUBLIC POLICY

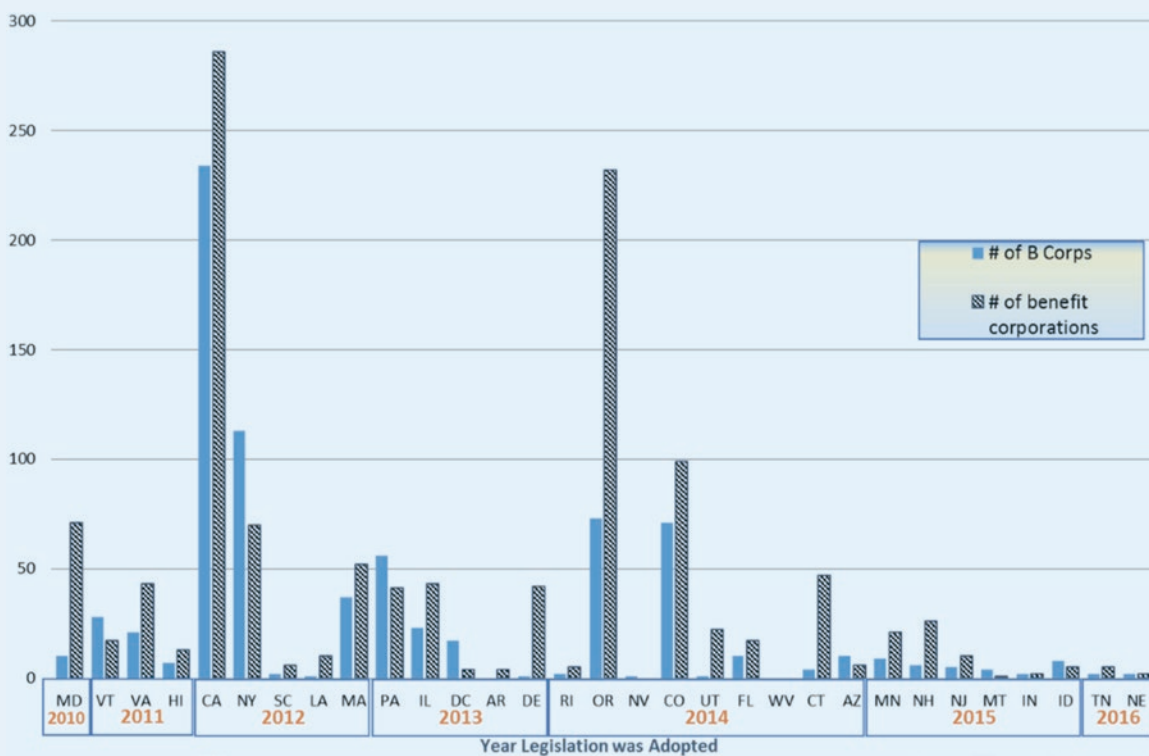
Benefit corporations exist as a legal corporate structure largely because of the efforts of a nonprofit organization: B Lab.[®] B Lab is a 501(c)(3) tax-exempt entity launched in 2006 to serve “a global movement of people using business as a force for good[™]” (B Lab 2016). The founders developed a set of standards to measure businesses’ performance on a series of attributes that can be considered high in publicness (Bozeman 2007; Bozeman and Moulton 2011; Jorgensen and Bozeman 2007; Pesch 2008). These standards include social and environmental actions as well as the extent to which the companies are committed to transparency and accountability. They used these standards to establish the process by which they certify B Corps as well as to develop and advocate model legislation across the country that would allow companies to choose benefit corporation status. B Lab’s mission includes

the development and dissemination of an impact assessment available to all companies, not only certified B-Corps, and the promotion of their vision of companies that compete to be the Best for the World[®] through B the Change Media (B Lab 2016). All of this offers companies the ability to focus on public benefits as well as private profits.

B Lab serves for-profit companies in ways that are similar to how the nonprofit National Children’s Alliance (NCA) assists nonprofit child advocacy centers and how the nonprofit Governmental Accounting Standards Board (GASB) works with government entities. NCA and GASB, like B Lab, develop and maintain model standards and best practices to improve the delivery of services to the public. As nonprofits, they generally rely on voluntary compliance (e.g., via accreditation) to enforce those standards in the absence of compelling legislation; however, they often develop and advocate model legislation to formally codify the standards and support best practices (Vaughan and Arsneault 2008; 2014).

In 2010, the first benefit corporations were established when Maryland became the first state to adopt legislation. As of June 30, 2016, 30 states and the District of Columbia have adopted legislation allowing benefit corporations; seven additional states⁷ had bills in session or recently considered legislation. Figure 1 depicts the number of benefit corporations in contrast to the number of B-Corps⁸ in the states that

Figure 1
B Corps[®] and Benefit Corporations by State in 2016



Source: B Lab, <http://benefitcorp.net/policymakers/state-by-state-status>; <https://www.bcorporation.net/community/find-a-b-corp>

have adopted benefit corporation legislation.⁹ The states are ordered along the x-axis according to the year in which the legislation took effect.

At the heart of the benefit corporation is the concept of public interest. The B Lab model requires preparation and dissemination of an annual benefit report. Legislation adopted by each state (and the District of Columbia) requires that a benefit corporation compile a benefit report each year describing how it pursued *general* public benefit and the extent of its success in providing that benefit. All states except Florida also require demonstration of efforts to achieve a *specific* public benefit. However, only four states—Florida, New Hampshire, New Jersey, and Minnesota—stipulate consequences for those benefit corporations that do not file annual reports (Wirth 2015).

As shown in figure 2, few benefit corporations make their public benefit reports readily available online. Of the 1,566 benefit corporations identified, only 40 (2.55%) had public benefit reports readily accessible through the B Lab website.¹⁰ Because only half of the states require benefit corporations to file their benefit reports with a designated state office, concerns regarding transparency exist with this emerging form of market-based philanthropy.

that protect the socially responsible mission of a business—even if such decisions do not maximize shareholder value—without risking a lawsuit. Because these efforts further blur the lines between the public, nonprofit, and for-profit sectors, it is important to ask: What are the public policy implications if an increasing number of businesses choose this dual-purpose corporate form?

State governments must formally recognize benefit corporations as a legal option for corporate structure, therefore policy change is a necessary condition. Inherent in the concept of a benefit corporation is demonstration of the provision of a general and/or specific public benefit by the hybrid for-profit. This stipulation raises two questions. The first involves who defines a public benefit. Government provides and protects public goods as a means of putting into effect the will of citizens via the democratic process; in benefit corporations, a corporate board defines public benefit. Second is the question regarding enforcement; successful implementation will require states to allocate resources to ensure compliance with both reporting requirements and public benefit outcomes.

Critics debate not only whether benefit corporations are necessary to protect the social purpose mission of for-profits (Chu 2012; Cohn and Ames 2014; Murray 2012; Neubauer 2016)

Because these efforts further blur the lines between the public, nonprofit, and for-profit sectors, it is important to ask: What are the public policy implications if an increasing number of businesses choose this dual-purpose corporate form?

PUBLIC POLICY IMPLICATIONS

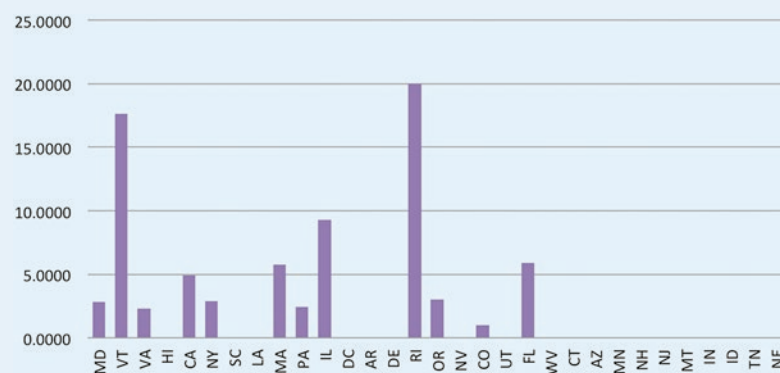
Regarding the merits of for-benefit hybrids, they embody what we say that we want businesses to do: to be socially responsible, to be good stewards of the environment, and to take care of their employees. Managers and members of the board of directors should be able to legally make decisions

but also whether current legislation is sufficient to compel companies to continue to meet their public benefit goals and prevent “greenwashing.”¹¹ Proponents (e.g., McDonnell 2014; Stecker 2016) argue that benefit corporation legislation has achieved the “Goldilocks” balance by providing sufficiently stringent requirements to prevent greenwashing without unduly constricting the ability of directors and officers to act in the company’s overall best interests.

It is reasonable to believe that despite fears of greenwashing, most companies that seek a hybrid corporate structure are motivated primarily by the desire to “do good while doing well.” Conversely, few public benefit reports are readily accessible online, which is likely the result of a lack of sanctions on benefit corporations that fail to disseminate them. This makes it difficult to measure their actual public impact; additionally, the connections between philanthrocapitalism and effective philanthropy explored by Eikenberry and Mirabella (this issue) raise other questions about measuring how for-profits facilitate the public interest. Furthermore, corporate commitment to the provision of

Figure 2

Percentage of Benefit Corporations with Public Benefit Reports Online, 2016



Source: B Lab 2016, <http://benefitcorp.net/businesses/find-a-benefit-corp>

public benefit typically is not the primary consideration of most consumers when selecting a market good or service,¹² hence the extent that market forces ensure accountability for public impact is questionable. Likewise, there is no electoral mechanism to ensure that corporate management is accountable to the general public for their public interest promises.

In contrast to benefit corporations, legislation is not necessary for certified B Corps. Rather, B Lab requires annual reports and assigns scores to each of the certified B Corps based on their performance on public benefit impact measures.¹³ In addition, the accountability and transparency requirements for B Corps certification go well beyond the public reporting mandates included in most benefit corporation legislation. Model benefit corporation legislation calls for standards to be set by an independent third party, not a government entity. B Lab is well situated to serve the role of third-party standard-setter, but other independent groups could qualify to serve as well (Reiser 2011). Scholars disagree about whether a third-party standard-setter enhances (Stecker 2016) or impedes (Reiser 2011) accountability and transparency.

The implications of B Lab itself are interesting. By setting the standards for certification and conducting the impact-assessment scoring system, B Lab facilitates self-regulation as well as the third-party assessment stipulated by the model legislation. Standards for certification are more stringent than the reporting mandates in the model legislation; therefore, certification by B Lab is likely more effective than the legislative requirements (e.g., annual public-benefit reports) at facilitating achievement of social and/or environmental goals.

Without state regulation or sanctions for noncompliance, it is not clear how many hybrids exist primarily to advance the public good and how many are a marketing gimmick.

It is interesting that in areas with enabling legislation, there are few organizations that are both a benefit corporation and a certified B Corp. On average, 8.8% of organizations in a state are both; in nine states (plus the District of Columbia), none of the organizations is both. For this and other reasons, empirical comparison of B Corps versus benefit corporations deserves future study.

In addition, and perhaps more compelling, B Corp certification allows companies to reap the benefits of benefit corporation status in the absence of enabling legislation. B Lab developed a legal framework by which certified B Corps amend their Articles of Incorporation to require managers, directors, and officers to consider employees, the environment, and the community in their decisions; shareholders cannot compel decision makers to ignore mission in favor of profit (B Lab 2009). It seems that B Lab has the infrastructure in place to certify these hybrid for-profits and is likely better situated than government to develop and evaluate the ability of these new corporate forms to generate real public benefit.

Unfortunately, there simply is not enough evidence at this point to assess how much the public actually benefits from benefit corporations. As noted previously, the diffusion of legislation has been quite rapid—that is, more than 30 states within six years of the first adoption—and the number of benefit corporations has grown to 1,566 nationwide,¹⁴ but we know little about the social and environmental benefits accrued by these organizations. In terms of accountability and transparency, the lack of easily accessible annual public benefit reports is not encouraging. Without state regulation or sanctions for noncompliance, it is not clear how many hybrids exist primarily to advance the public good and how many are a marketing gimmick.

Hybrid corporate structures are new enough that their implications are largely unknown. If organizations that would typically incorporate as a 501(c) become benefit corporations in large numbers, public tax coffers could be improved because fewer organizations have tax-exempt status. Conversely, the ability to hold benefit corporations responsible for their social missions is significantly limited vis-à-vis public and nonprofit organizations.

Policy implementation traditionally has been the realm of professional public administrators—that is, government employees charged with executing and enforcing the formal policies passed by elected officials. Bureaucratic discretion in the public sector, both heralded and maligned by scholars, is nonetheless subject to restraint from democratic forces. The Internal Revenue Service¹⁵ has the ability to exercise regulatory pressure and accountability mechanisms over nonprofits

but has no control over benefit corporations. State governments seem to have little control over them as well. Until more benefit corporations improve access to their annual benefit reports and/or empirical research can be done on the outcomes of their public impact, we may have to simply trust that those pursuing the benefit corporation model are truly committed to public benefit.

SUPPLEMENTARY MATERIAL

To view supplementary material for this article, please visit <https://doi.org/10.1017/S1049096517001391>

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NOTES

1. Whereas our initial work focused on the symbiotic relationship between nonprofits and public policy, subsequent research has broadened our focus to include consideration of the similar role of hybrid for-profits with regard to public policy. Hybrids such as B-Corps® and benefit corporations have policy relationships similar to those in our nonprofit-policy framework, in which we consider the various ways in which nonprofits make, influence, are affected by, and are subject to public policy (Vaughan and Arsneault 2014).
2. For example, Saul Garlick of ThinkImpact.
3. Jorgensen and Bozeman's (2007) inventory of public values involved an extensive literature review that found that public values include serving all, maintenance of human dignity, sustainability/concern for future generations, civic involvement, transparency, and compromise.
4. Bozeman and Moulton (2011) provided the example of the early tobacco industry as scoring high in "privateness" via market success while scoring very low in "publicness" because it is considered a complete public interest failure.
5. Corporate caution has persisted following *Dodge v. Ford* despite subsequent court rulings including *A.P. Smith Manufacturing Co. v. Barlow* (1953) and *Union Pacific Railroad Co. v. Trustees, Inc.* (1958), which affirmed that philanthropic activities designed to promote a positive view of the company are in the best interest of shareholders and therefore within the legal power of corporations (Pearce 2015).
6. Details of these cases are included in the online appendix.
7. Kentucky, Alaska, Iowa, Oklahoma, Ohio, Georgia, and Michigan. See the B Lab website (<http://benefitcorp.net/policymakers/state-by-state-status>).
8. Data are based on counts and information collected by B Lab. Its website states that the list is its "best effort to create an accurate accounting of benefit corps and is inclusive of all data collated by B Lab from state agency reports. Many states do not currently track the names or number of benefit corporations. B Lab continuously collects these data; however, each state has a different level of reporting capabilities." Available at <http://benefitcorp.net/businesses/find-a-benefit-corp>.
9. Nevada is an interesting case that deserves further discussion. As Stecker (2016) indicated, establishment as a benefit corporation in Nevada is accomplished by checking a box on its corporation form. Examination of the list of Nevada benefit corporations reveals many actually are organized as 501(c)(3) public charities, eligible to receive tax-deductible donations. As such, the number of Nevada benefit corporations is treated as missing data and not reflected in figure 1.
10. The B Lab website is believed to be the most comprehensive source currently available.
11. Greenwashing occurs when companies want to appear socially and environmentally responsible to gain competitive advantage but do not actually make the necessary effort to provide the requisite public benefits.
12. Many may not even be aware when their purchase comes from a benefit corporation.
13. Impact assessment scores for each certified B Corp are available on B Lab's website (www.bcorporation.net). A company must score a minimum of 80 points of a possible 200 to be certified, and B Lab audits 20% of certified B Corps every two years (Reiser 2011).
14. Total benefit corporations as of June 30, 2016, based on data collected by B Lab.
15. The Internal Revenue Service is the de facto regulatory agency of the nonprofit sector.

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