HOUSING JUSTICE
National Housing Law Project
Newsletter January - March 2017

HUD Issues Final Rule Implementing VAWA 2013

On November 16, 2016, HUD issued a final rule implementing the housing provisions of the Violence Against Women Reauthorization Act of 2013 (VAWA rule). The VAWA rule's critical provisions include (but are not limited to): (1) extending VAWA protections to survivors of sexual assault; (2) defining the term "affiliated individual"; (3) extending VAWA protections to all HUD programs listed in VAWA 2013, as well as to the Housing Trust Fund, which was not included in the statute; (4) requiring covered housing providers to provide a notification of VAWA rights to existing tenants and applicants; (5) outlining what is a "reasonable time" for survivors to establish eligibility for a covered HUD program in cases where, due to VAWA crimes, the tenant that established eligibility is no longer a member of the survivor's household; (6) permitting housing providers to request documentation from tenants who wish to obtain an emergency transfer; (7) establishing an 180-day period for housing providers to complete an emergency transfer plan; and (8) revising and creating conforming regulations for the covered housing programs. HUD has also released a notice of occupancy rights under VAWA, a model emergency transfer plan, and a VAWA self-certification form. The final rule is available at: https://www.gpo.gov/fdsys/pkg/FR-2016-11-16/pdf/2016-25888.pdf

In our next quarterly newsletter, the National Housing Law Project (NHLP) will provide a summary and analysis of HUD's VAWA rule. Additionally, please register for our webinar on March 1 covering the VAWA rule. In the meantime, please contact NHLP with any questions regarding the VAWA rule or other queries concerning VAWA's housing protections. ▪

HUD, HHS, and DOJ Issue Letter on Immigrants' Rights to Access Programs to Protect Life or Safety

On August 5, 2016, the U.S. Department of Justice (DOJ), Department of Health and Human Services (HHS), and Department of Housing and Urban Development (HUD) issued a joint letter addressed to recipients of federal financial assistance to remind recipients that they may not withhold services that are necessary to protect life or safety based on the immigration status of the person seeking such services. The letter reiterates long-standing federal policy that recipients of federal funds may not deny immigrants critical, life-saving services, such as emergency shelter, short-term housing assistance, counseling, and intervention programs. The purpose of the joint letter is to dispel misconceptions among recipients who mis-

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takenly believe that they cannot provide these types of services to individuals who are not U.S. citizens or legal permanent residents, or who cannot produce documentation that verifies their immigration status.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) restricted immigrant access to certain public benefits, but established critical exceptions to these limitations. Importantly, PRWORA made exceptions for "[p]rograms, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) … which (i) deliver in-kind services at the community level, including through public or private non-profit agencies; (ii) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (iii) are necessary for the protection of life or safety."

In 2001, the Attorney General issued Order No. 2353-2001 reiterating PRWORA's three-prong exemption test, and specified the types of programs, services, or assistance that are necessary for the protection of life or safety. Such programs, services, or assistance include:

- Crisis counseling or intervention programs, services and assistance relating to child protection, adult protective services, violence and abuse prevention, or victims of domestic violence or other criminal activity;
- Short-term shelter or housing assistance for the homeless, victims of domestic violence, or for runaway, abused, or abandoned children;
- Soup kitchens, community food banks, and senior nutrition programs (meals on wheels);
- Medical and public health services (including treatment and prevention of diseases and injuries, mental health, disability, and substance abuse services) necessary to protect life or safety;
- Activities designed to protect the life or safety of workers, children and youths, or community residents; and
- Any other programs, services, or assistance necessary for the protection of life or safety.

The Attorney General emphasized that these government-funded services and programs must remain accessible to all eligible individuals, regardless of immigration status.

On August 16, 2016, HUD determined that the following forms of assistance met the three-part test and were not subject to PRWORA's immigration-based restrictions: street outreach services, emergency shelter, safe haven, and rapid rehousing. HUD also stated that transitional housing must be provided to individuals without regard to immigration status, when the recipient or subrecipient owns or leases the building used to provide transitional housing. However, in transitional housing programs where the recipient or subrecipient provides rental assistance payments on behalf of program participants, this type of program does not fall within the life or safety exemption because the rental assistance provided is required by regulation to be based on the program participant's income and, therefore, does not meet the 3-part test. HHS also issued guidance to highlight the eligibility of battered immigrant survivors and their children for HHS-funded shelters and programs.

The joint letter is a reminder for recipients of federal funds administering programs that meet PRWORA's exemptions that they are required to provide services to eligible persons without regard to citizenship, nationality, or immigration status.

In addition, PRWORA's prohibitions on providing benefits to immigrants do not apply to all government-funded programs, since not all programs

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provide "federal public benefits" or "state or local public benefits. For example, DOJ's Office for Victims of Crime specified that Victims of Crime Act (VOCA) victim compensation benefits are not considered federal public benefits and, therefore, should not be denied to anyone on the basis of immigration status. HUD has also determined that benefits under the Lead Hazard Control Program are not considered federal public benefits.

Additionally, PRWORA includes an exemption for nonprofit charitable organizations, which are not required to verify the immigration status of applications for federal, state, or local public benefits. Therefore, for instance, a nonprofit that is administering permanent supportive housing does not have to verify the immigration status of individuals who apply for the program.

Finally, organizations and agencies receiving federal funding may not discriminate against individuals on a basis prohibited by applicable nondiscrimination laws, such as Title VI of the Civil Rights Act of 1964, the Fair Housing Act, the Violence Against Women Act, the Family Violence Prevention and Services Act, and Section 109 of Title I of the Housing And Community Development Act of 1974. Denying services or benefits to individuals on the basis of race or national origin may constitute discrimination under one or more of these laws. Singling out individuals with names that sound "foreign," or requiring certain individuals to provide additional documentation of citizenship or immigration status may also constitute discrimination. Furthermore, benefits providers must be careful not to engage in practices that deter eligible persons from accessing benefits based on national origin (for example, where members of a family are of mixed immigration status, with one person eligible for all benefits and other eligible for a limited subset of benefits).

HUD, HHS, and DOJ can enforce these laws and may sanction recipients who violate the rights of individuals who seek access to emergency shelter, transitional housing, or other services. For individuals who would like to report discrimination, the joint letter includes contact information for each federal agency. ▪

Resources

DOJ, HHS & HUD, Joint Letter on Immigrant Access to Programs to Protect Life or Safety (Aug. 5, 2016), https://www.hudexchange.info/resources/documents/HUD-HHS-DOJ-Letter-Regarding-Immigrant-Access-to-Housing-and-Services.pdf

HUD, *The Personal Responsibility and Work Opportunity Act of 1996 and HUD's Homeless Assistance Programs* (Aug. 16, 2016), https://www.hudexchange.info/resources/documents/PRWORA-Fact-Sheet.pdf

HUD Issues Regulations and Guidance Regarding Fair Housing and Equal Access

Survivors of domestic violence, dating violence, sexual assault, and stalking often face difficulties obtaining and maintaining safe, decent, and affordable housing. A significant barrier in finding or maintaining stable housing is the prevalence of housing discrimination. This can play out in a variety of contexts. For example, survivors of domestic violence, who are overwhelmingly women, may be threatened with eviction for calling the police due to local nuisance laws. Or, transgender survivors may experience discrimination on the basis of gender identity when trying to access emergency shelter services by being subject to intrusive questioning. Survivors may also receive unwanted sexual advances or be subjected to other harassment by housing providers, jeopardizing their housing security. Survivors who may have criminal records because of self-defense or because of the criminal activity of an abuser may

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face great difficulty when trying to locate housing because of that criminal record. Limited English proficient survivors may experience discrimination by housing providers who do not wish to rent to someone with a limited ability to communicate in English. Recently, HUD has issued a series of important regulations and guidance documents relating to fair housing and equal access to housing opportunities. The following briefly summarizes each of these regulations and guidance documents.

HUD Guidance on Local Nuisance Ordinances and Crime-Free Housing Ordinances

Nuisance ordinances and crime-free housing ordinances are a tool used by local governments to penalize landlords who fail to address "nuisance" or criminal activity at their properties. For example, a local government may fine a landlord whose property calls the police a certain number of times during a three-month period. Such nuisance ordinances have been used to penalize landlords whose tenants are survivors of domestic violence, including those who call the police for assistance. Landlords, in turn, are pressured to evict tenants from "nuisance" properties. Similarly, crime-free housing ordinances place pressure on landlords to evict tenants for criminal activity at the property, even if one of the persons being evicted is actually a victim of crime. Such ordinances have jeopardized housing security for survivors and their families by making survivors choose between calling the police for protection and assistance, or maintaining their housing. In September 2016, HUD issued guidance that examines how the enforcement of nuisance ordinances and crime-free housing ordinances could violate the Fair Housing Act, under certain circumstances. Since the overwhelming majority of domestic violence survivors are women, for example, any policies or practices that affect survivors may constitute sex discrimination under the Fair Housing Act. This HUD guidance focuses on the effect that the enforcement of nuisance and crime-free housing

ordinances may have on survivors of domestic violence.

The guidance first discusses how nuisance and crime-free ordinances can have a disproportionate effect on certain groups, which may violate the Fair Housing Act, even when there was no intent to discriminate. The guidance notes that various data sources (including police records or resident data) can be used to show that such ordinances disproportionately affect groups protected by the Fair Housing Act, such as women. The guidance also states that local governments cannot rely upon stereotypes about persons who have been described as engaging in nuisance or criminal activities to defend such ordinances. The guidance also notes that it is not likely that a legitimate, core governmental interest can be served by preventing access to essential emergency services for those who have a significant need for such services, such as domestic violence survivors or other crime victims.

The guidance also discusses how jurisdictions can violate the Fair Housing Act by intentionally using the adoption or enforcement of a nuisance or crime-free ordinance to discriminate. For instance, jurisdictions can have discriminatory motives for adopting a nuisance ordinance. Factors that may indicate an intent to adopt a discriminatory ordinance include considerations such as historical context, the sequence of events leading up to the adoption of the ordinance, the administrative or legislative record, and the ordinance's impact. Another way a jurisdiction can use nuisance and crime-free ordinances is in selective enforcement. Selective enforcement has been shown by,

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for example, providing evidence that a housing provider sought eviction of female tenants shortly following domestic violence incidents. The guidance concludes by suggesting that local governments can further fair housing objectives by repealing nuisance or crime-free ordinances that penalize survivors or other crime victims for calling 911 or other emergency services.

In November 2016, several divisions of the Department of Justice – Office on Violence Against Women, the Office on Community Oriented Policing Services, and the Office of Justice Programs – issued a joint statement about the HUD guidance. The joint statement notes that ordinances that include exceptions for survivors calling the police may still negatively affect survivors because incidents of domestic violence may be mischaracterized as excessive noise or property damage. The statement calls upon local governments and law enforcement agencies to be aware of such concerns when enforcing existing ordinances, or when considering whether to pass such ordinances, "particularly when they affect vulnerable populations, such as victims of domestic violence or people with disabilities."

The joint statement calls upon local governments, housing providers, law enforcement, and other stakeholders to review the HUD guidance and examine nuisance and crime-free ordinances, as well as crime-free housing programs, to ensure that these local approaches are not discriminatory. Federal financial assistance recipients from DOJ can contact the Office of Civil Rights for the Office of Justice Programs with questions regarding compliance with non-discrimination requirements.

Equal Access in Community Planning and Development Programs

In September 2016, HUD issued a regulation that amends the agency's 2012 Equal Access Rule, which prohibits housing discrimination against lesbian, gay, bisexual, or transgender (LGBT) persons and requires equal access to HUD-funded and HUD-insured programs regardless of an individual's sexual orientation, gender identity, or marital status. The 2016 regulation further specifies obligations under the Equal Access Rule for programs funded by HUD's Office of Community Planning and Development (CPD), which includes the Emergency Solutions Grants and the Continuum of Care programs.

The final regulation amends how "gender identity" is defined, to differentiate between the concepts of one's actual gender identity and perceived gender identity; the regulation also updates the existing definition of "sexual orientation." Furthermore, the regulation eliminates the prohibition against program participants and housing providers from asking about an individual's gender identity or sexual orientation. Therefore, program participants and housing providers can ask questions about an individual's gender identity or sexual orientation so as to determine the number of bedrooms a household is entitled to receive and for data reporting purposes. However, program participants and housing providers are still prohibited from determining housing eligibility based upon an individual's perceived or actual gender identity, sexual orientation, or marital status.

The regulation creates a new section requiring equal access to CPD programs in accordance with an individual's gender identity. These CPD programs include the HOME program, the Community Development Block Grant (CDBG) program, Housing Opportunities for Persons with AIDS (HOPWA) program, the Emergency Solutions Grants (ESG) program, the Continuum of Care (CoC) program, the Housing Trust Fund program,

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and the Rural Housing Stability Assistance Program. The new section applies to funding "recipients and subrecipients, as well as to owners, operators, and managers of shelters and other buildings and facilities and providers of services" partially or entirely funded by any CPD program. The regulation requires that policies and procedures related to admissions, occupancy, and operations, including those that protect health, security, safety, and privacy must be established, amended, and administrated in a way that does not discriminate on the basis of gender identity. In addition, equal access to shelters, other covered facilities, CPD programs, and benefits must be afforded consistent with a person's gender identity and in a way that provides access to that individual's family. Furthermore, the regulation mandates that an individual seeking access be "placed, served, and accommodated" in accordance with an individual's gender identity. This includes placement and accommodation in temporary, emergency shelters or other facilities with shared sleeping areas and bathroom facilities. Eligibility determinations must be made, and access to assisted CPD housing programs provided, without regard to a person's actual or perceived gender identity.

Importantly, the regulation requires that individuals not be subjected "to intrusive questioning" or not be "asked to provide anatomical information or documentary, physical, or medical evidence of the individual's gender identity." Furthermore, program participants and housing providers subject to this regulation "must take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by residents or occupants and, as needed, update its admissions, occupancy" consistent with the HUD regulation. Program participants and housing providers must also keep records to demonstrate compliance with this regulation for 5 years.

VAWA Housing Protections Strengthened in Justice for All Act

On December 16, 2016, an amendment to VAWA 2013's housing provisions was signed into law as part of the Justice for All Reauthorization Act of 2016. This amendment clarifies that lease bifurcations and post-lease bifurcation protections apply to both survivor tenants and residents. Under VAWA 2013, a covered housing provider, such as a public housing authority, owner or manager of federally subsidized housing can bifurcate a lease by removing a perpetrator from the lease and permitting the survivor to stay in the unit. If the survivor is not included on the housing assistance, then the survivor, regardless of whether their name is on the lease, has the right to establish eligibility for the assistance, apply for another covered housing program, or find alternative housing. The amendment reflects Congress's intent to provide lease bifurcation safeguards for survivors who are living in federally assisted units covered by VAWA, but whose names do not appear on housing assistance contracts or leases because of the power and control of their abusers, or due to issues related to immigration status. ▪

HUD Regulation Regarding Harassment

Note to OVW Grantees: The Office of Violence Against Women, U.S. Department of Justice, does not handle issues regarding sexual harassment.

In September 2016, HUD issued a final regulation about harassment in housing. The regulation states that harassment can violate the Fair Housing Act (FHA)—a federal law that protects individuals and families from housing discrimination. Importantly, the regulation covers sexual harassment, as well as harassment directed at a person or family because of race, color, national origin,

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disability, religion, or familial status. The regulation defines two types of harassment: "quid pro quo" harassment and "hostile environment" harassment.

HUD defines "quid pro quo" harassment as referring to an "unwelcome request or demand to engage in conduct" where submitting to this request or demand (implicitly or explicitly) is made a condition of accessing housing. For example, if a housing provider demands sexual favors in exchange for reduced rent, making repairs, or delaying an eviction, doing so would constitute quid pro quo harassment because the housing provider has made an unwanted demand in exchange for a housing benefit (e.g., reduced rent, repairs, delayed eviction). It does not matter if a victim actually engages in the conduct demanded of him or her for the purposes of demonstrating quid pro quo harassment.

HUD defines "hostile environment" harassment as unwelcome conduct that is so severe that it interferes with the victim's ability to access housing. The regulation outlines some of the factors to consider in order to determine whether a hostile environment exists. These factors include the type of conduct at issue; the context of the incident(s); the "severity, scope, frequency, duration, and location of the conduct"; and the relationships of anyone involved. For example, if a landlord keeps coming by the victim's apartment to ask the victim out on dates despite repeated refusals, the number of times the landlord makes the request, the fact that the landlord is coming by the victim's apartment (as opposed to another location), and the frequency of these unwanted visits are all relevant to the question of whether a hostile environment exists.

Importantly, the regulation acknowledges that either quid pro quo harassment or hostile environment harassment can be written or verbal, and that physical contact is not required. A single incident of harassment can violate the Fair Housing Act if that incident is sufficiently severe, or if there is evidence of quid pro quo harassment.

Finally, the regulation also outlines how to evaluate who can be held legally responsible for violations of the Fair Housing Act more generally.

HUD Guidance Regarding the Use of Criminal History in Housing Decisions

In April 2016, HUD issued guidance on the relationship between the use of criminal records in housing decisions and the Fair Housing Act. Because African Americans and Hispanics are "arrested, convicted, and incarcerated at rates disproportionate to their share of the general population," the use of criminal records and history in housing decisions are likely to disproportionately impact minority populations. The guidance focuses on the potential fair housing issues associated with using criminal histories in housing decisions. HUD had previously issued guidance about the use of arrest records by HUD housing providers. Importantly, because this guidance is based upon a Fair Housing Act analysis, the guidance itself applies to all housing otherwise covered by that statute, including both federally assisted and private housing. Therefore, this guidance is much broader in scope than the previous HUD guidance regarding the use of arrest records in housing decisions.

The guidance discusses how the use of criminal

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history in housing decisions can have a disproportionate effect on certain groups, which may violate the Fair Housing Act, even in the absence of an intent to discriminate. HUD explains that local, state, and even national statistics (when there is no reason to suspect they would significantly differ from local or state statistics) can be used to illustrate a discriminatory effect concerning disparities in the criminal justice system. Housing providers cannot justify a policy of using criminal history in housing decisions based on generalizations or stereotypes about persons with criminal backgrounds. Instead, a housing provider must be able to demonstrate that its use of criminal history in housing decisions "actually assists in protecting resident safety and/or property." Importantly, the guidance explains that an arrest alone (in the absence of a conviction) is not sufficient to prove that an individual violated the law. Therefore, the guidance states that the housing provider would be unable to show that using arrests in housing decisions protects other residents or property. Furthermore, the guidance explains that housing providers who impose blanket bans on individuals with convictions (regardless of factors such as the passage of time or the nature of the offense) could not justify policies or practices using criminal history in housing decisions.

The guidance indicates that housing providers must distinguish between criminal conduct that poses a "demonstrable risk" to the safety of residents or property, and conduct that does not. Housing provider policies regarding criminal history that fail to consider factors such as the nature of the offense, or how recently the offense occurred, are unlikely to be justifiable even if the housing provider is not imposing a blanket ban. Conversely, a case-by-case assessment of an individual's criminal history that considers mitigating circumstances is less likely to have a discriminatory impact.

The guidance also discusses evaluating criminal history policies that intentionally discriminate in violation of the Fair Housing Act. Intentional discrimination occurs when a housing provider

Resources

HUD, "Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services" (Sept. 2016), http://portal.hud.gov/hudportal/documents/huddoc?id=FinalNuisanceOrdGdnce.pdf

DOJ, "HUD Issues Fair Housing Act Guidance to Help Domestic Violence Victims" (Nov. 2016), https://www.justice.gov/opa/blog/hud-issues-fair-housing-act-guidance-help-domestic-violence-victims (Joint Statement from DOJ's Office on Violence Against Women, the Office on Community Oriented Policing Services, and the Office of Justice Programs)

HUD, "Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs," Final Rule, 81 Fed. Reg. 64,763 (Sept. 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-09-21/pdf/2016-22589.pdf

HUD, "Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act," Final Rule, 81 Fed. Reg. 63,054 (Sept. 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-09-14/pdf/2016-21868.pdf

HUD, "Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions" (Apr. 2016), https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHAStandCR.pdf

HUD, "Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency" (Sept. 2016), http://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf.

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"treats an applicant or renter differently" because of membership in a protected class, such that the housing provider is using one's criminal history as pretext. Note that the exception for convictions for the illegal manufacture or distribution of a controlled substance does not apply in instances of intentional discrimination. For example, a housing provider who rejects African-American applicants who have been convicted of distributing a controlled substance, but does not similarly reject white applicants convicted of the same conduct, is engaging in impermissible intentional discrimination.

HUD Guidance Regarding Limited English Proficiency

In September 2016, HUD issued guidance regarding how discrimination against persons with limited English proficiency may violate the Fair Housing Act. Even though limited English proficiency is not a protected category under the Fair Housing Act, HUD's guidance says that housing providers cannot use a person's limited English proficiency as a pretext for unlawful discrimination. The guidance also acknowledges that housing decisions that are based on a person's limited English proficiency "generally relate to race or national origin."

First, the guidance discusses how certain policies and practices can constitute intentional fair housing discrimination. Since limited English proficiency is often used as a proxy for discrimination based on national origin, the guidance states that the justification for language-related restrictions must be scrutinized. HUD's guidance identifies as suspect practices ads containing blanket statements that all tenants must speak English and turning away all LEP applicants. HUD also points to bans on non-English languages being spoken at the property as not having a justification under the Fair Housing Act. Furthermore, the guidance states that citing cost to justify a refusal to engage an LEP person, if low-cost or free language assistance is available, is "immediately suspect." Other practices which may violate the Fair Housing Act include: selectively enforcing certain policies or practices on the basis of language (e.g., refusing to rent to a person who speaks a certain language); targeting LEP individuals "for unfair or illegal housing-related services" (e.g., home loan modifications); and, importantly, failing to provide housing-related language assistance services that are required by law or contract.

The guidance also addresses policies or practices related to limited English proficiency that may violate the Fair Housing Act by having an unjustified discriminatory effect. HUD states that housing providers cannot rely on stereotypes about LEP persons to show that a particular policy or practice is justified. The guidance also says that in a landlord-tenant context, English language requirements are unlikely to be necessary where communication is not complex or frequent, or where the housing provider has multilingual staff or access to language assistance. An alternative to an English-only requirement would be to allow a tenant, home buyer, or borrower reasonable time to have necessary documents (e.g., a lease) translated. Other alternatives include: using translation services; utilizing multilingual staff to assist in communication; and allowing the tenant, home buyer, or borrower to bring a family member or other person to interpret.

In a footnote, the guidance explains that requiring tenants in HUD-assisted housing to rely on family members for interpretation may be impermissible under another federal law, Title VI of the Civil Rights Act of 1964. Another footnote states that recipients of federal financial assistance have "greater obligations to provide meaningful access" to LEP persons under Title VI. ▪

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