

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 129

[Docket No. 26460; Amdt. No. 129-22]

RIN 2120-AD94

## Foreign Air Carrier Security Programs

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

**SUMMARY:** The FAA is amending the Federal Aviation Regulations to require foreign air carriers that land or take off in the United States to provide passengers a level of protection similar to the level of protection provided by U.S. air carriers at the same airport. To ensure that foreign air carrier security programs contain procedures which provide a similar level of protection, the Administrator could amend those programs according to the procedures in this rule. This action is needed to ensure that appropriate security measures are implemented by foreign air carriers operating into and out of the United States. This action also implements Congressional legislation enacted on November 16, 1990. The intended effect of this rule is to increase the safety and security of passengers aboard foreign air carriers on flights to and from the United States by reducing the risk of fatalities and property damage attributable to criminal acts against civil aviation.

EFFECTIVE DATE: July 31, 1991.

**FOR FURTHER INFORMATION CONTACT:** Max D. Payne, Civil Aviation Security Policy and Standards Division (ACP-110), Federal Aviation Administration, 800 Independence Ave. SW., Washington, DC 20591; telephone (202) 267-7839.

## SUPPLEMENTARY INFORMATION:

## Background

*Statement of the Problem*

Attacks against civil aviation have increased in sophistication over the past decade. As a result, security has become an even greater concern of the aviation community. Over 1,000 passengers on civil aircraft from 14 different member states of the International Civil Aviation Organization (ICAO) have died as the result of criminal acts against civil aviation in the last 10 years. Sabotage and hijacking of civil aircraft are worldwide problems requiring a unified, global solution.

*History*

The FAA's present Civil Aviation Security Program was initiated in 1973. part 129 of the Federal Aviation Regulations (FAR) governs the operations of foreign air carriers that hold a permit issued by the Department of Transportation (DOT) under section 402 of the Federal Aviation Act or that hold another appropriate economic or exemption authority issued by DOT. The foreign air carrier security regulations were promulgated in 1976 (41 FR 30106; July 22, 1976).

The FAA issued an amendment to FAR § 129.25(e) in 1989 (54 FR 11116; March 16, 1989) that requires foreign air carriers flying to or from the U.S. to submit their security programs to the FAA for acceptance by the Administrator. The programs must describe the procedures, facilities, and equipment that foreign air carriers will use to ensure the safety of persons and property traveling by air. The rule applies to foreign air carrier operations at United States airports and at foreign airports that are last points of departure prior to landing in the United States.

With respect to that portion of a security program dealing with airports that are identified as last points of departure to the United States, foreign air carriers may refer the FAA to the appropriate foreign government authorities that implement security procedures (54 FR 25551; June 15, 1989).

Currently, 138 foreign air carriers are required to submit security programs, and all have done so. The programs contain sensitive security procedures and are not available to the public, in accordance with 14 CFR Part 191 (41 FR 53777; December 9, 1976), which establishes the requirements for withholding security information from disclosure under the Air Transportation Security Act of 1974 (Pub. L. 93-366).

On January 29, 1991, the FAA issued a notice of proposed rulemaking (NPRM) (56 FR 4328; February 4, 1991) that set forth a proposed amendment to FAR § 129.25(e). In the NPRM, the FAA proposed to provide procedures to amend foreign air carrier security programs to ensure those programs provide passengers with a level of protection similar to that provided under the security programs of U.S. air carriers serving the same airports.

Terrorism and other criminal acts against civil aviation are global in nature. Access to the air transportation system may be attempted through airports in countries far from the terrorist's intended target where the perceived threat to that nation's interests is not high and the security

measures accordingly are less stringent. To prevent terrorist acts, aviation security standards must be raised worldwide. The Secretaries of State and Transportation are committed to both multilateral and bilateral consultations and negotiations to strengthen and improve aviation security standards in all countries. The United States has already reached agreement with 57 countries on the addition of aviation security articles to their bilateral air transport agreements.

*Aviation Security Improvement Act of 1990*

On November 16, 1990, the President signed the Aviation Security Improvement Act of 1990 (Pub. L. 101-604) (the Act). It permits the Administrator of the FAA to accept a foreign air carrier security program only if the Administrator determines that the security program provides passengers with a level of protection similar to that provided under the security programs of U.S. air carriers serving the same airports.

*Background of the Rule*

The FAA is amending part 129 to ensure that all foreign air carriers that land or take off in the United States adopt and use a security program that provides passengers a level of protection similar to the level of protection provided by U.S. air carriers serving the same airport.

The FAA is also amending part 129 to provide procedures to amend foreign air carrier security programs in the interest of safety in air transportation or in air commerce and in the public interest. The procedures for the amendment of foreign air carrier security programs closely parallel the procedures in part 108 for the amendment of U.S. air carrier security programs. Except in an emergency, proposed amendments will be issued to the foreign air carrier for comment prior to adoption. A specified period of time would be set aside for the submission of comments and the implementation of any amendment adopted. In an emergency, when it is impractical or contrary to the public interest to follow normal procedures providing time for comments, the Administrator may amend a security program effective on the date it is received by the foreign air carrier.

Foreign air carrier security programs may be amended to implement enhanced security procedures at airports where the FAA has identified an increased risk to passengers and the Administrator determines that such

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procedures are necessary to provide passengers a similar level of protection.

#### Discussion of Comments

The FAA received comments from nine foreign air carriers, one U.S. air carrier association, one foreign air carrier association, five U.S. crewmember organizations, and a United States Senator. A diplomatic note jointly submitted by 15 foreign governments was also placed in the docket. Several of the comments from foreign air carriers contained virtually identical arguments. The foreign commenters were generally opposed to the proposed rule or concerned that it could supersede the process of bilateral consultation and negotiation. Comments from interested parties in the United States generally argued that the proposed rule should be modified to require identical, rather than similar, security procedures for foreign air carriers and U.S. air carriers.

The predominant theme of comments opposing the proposed rule was the impact on relationships between the United States and other countries. Nine comments and the diplomatic note expressed concerns for the legality and consistency of the rule with the Convention on International Civil Aviation (Chicago Convention), in particular Annex 17; the legality and consistency of the proposed rule with current bilateral air transport agreements; and the possible effect on the sovereignty of foreign countries. These concerns focused primarily on the application of the proposed rule to foreign air carrier operations at foreign airports.

Nine commenters argued that the rule is inconsistent with the Chicago Convention and its Annex 17. The United States has been a leader in developing the International Civil Aviation Organization's (ICAO) multilateral Security Standards and Recommended Practices, which are incorporated into Annex 17 of the Chicago Convention. These standards are continually reviewed and updated. The United States actively engages in bilateral consultations to coordinate and improve aviation security policies and procedures and attempts to resolve disagreements with foreign governments as quickly and amicably as possible.

More important, this rule is consistent with the precepts of the regime established by the Chicago Convention. Article 1 of the Convention recognizes the complete and exclusive sovereignty of each State over the airspace above its territory. Inherent in this sovereignty is the right of each State to protect its inhabitants from possible threats to

their safety from foreign aircraft entering that airspace. An aircraft not subjected to adequate security controls at the last point of departure in another country may well be the target of an act of unlawful interference or sabotage, posing a hazard to the safety of the inhabitants of the country into which that aircraft operates. The Chicago Convention recognizes this fundamental right in Article 11. This Article provides that

the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, \* \* \* shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.

Nothing in the rule detracts from the basic right established by the Convention.

Six foreign air carriers commented that the rule should require the Administrator to consult with foreign governments prior to, or in lieu of, amending the procedures in a foreign air carrier's security program applicable at a foreign airport. Three commenters expressed their concern that foreign air carriers would not be able to comply with the rule when a foreign government and the United States Government disagree as to the appropriate security procedures. The diplomatic note also urged the FAA to add a clause to the proposed regulation that would affirm the intention of the United States Government to consult with foreign governments whenever enhanced security procedures are envisaged at a foreign airport.

The FAA is acutely aware of the United States obligations under its bilateral air transport agreements, the Chicago Convention, and other international agreements. United States policy, established by section 201(a)(1) of the Act, is to seek bilateral agreements with foreign governments to achieve aviation security objectives. The FAA stated in the preamble of the NPRM that, except in an emergency, it will consult with the concerned foreign government authorities whenever enhanced security procedures are deemed necessary at a foreign airport. The United States Government reemphasizes its intention to consult with foreign government authorities and seek bilateral and multilateral agreements in accordance with United States policy.

A restatement of United States policy would not, however, be appropriate in the language of the regulation itself. FAR part 129 regulates the operations of

foreign air carriers only. A requirement placed in FAR part 129 should not regulate the FAA or the Department of State in the conduct of relations with foreign governments.

Five other commenters raised the question of consistency with United States bilateral air transport agreements. These commenters argued that the proposed rule is inconsistent with bilateral air transport agreements or is superseded by a particular bilateral agreement and would, therefore, have no effect in that country. United States bilateral air transport agreements are not identical in all their provisions but are uniform with respect to certain provisions. Among the uniform provisions is an obligation, consistent with the requirement of Article 11 of the Chicago Convention, that States require their airlines to comply with the rules governing entry into, departure from, and operation within the territory of the other contracting States. This is such a rule.

The applicability of the rule to foreign air carrier operations at foreign airports that are last points of departure to the United States is necessary in order for the FAA to ensure that foreign air carrier operations into U.S. territory provide a level of protection similar to that provided by U.S. air carriers at those airports. The FAA also recognizes that government authorities, and not air carriers, perform security procedures at many foreign airports.

The notice of implementation policy published on June 15, 1989 (54 FR 25551) sets forth a policy that foreign air carriers could refer the FAA to the appropriate government authorities for information regarding the implementation of security procedures. That policy remains in effect. The FAA will look first to the foreign government authorities named by the foreign air carrier to obtain the information necessary to determine if a foreign air carrier's security program is acceptable.

Eight foreign air carriers objected to the proposed procedures by which the Administrator could amend a foreign air carrier's security program. Six foreign air carriers argued that the FAA should give notice of the specific deficiencies identified in a foreign air carrier's security program and an opportunity to address those deficiencies, prior to the Administrator's amending its security program. The proposed rule clearly stated that the Administrator would notify the foreign air carrier, in writing, of a proposed amendment and fix a period of not less than 45 days for the foreign air carrier to submit comments, unless there is a finding of an emergency

requiring immediate action with respect to safety in air transportation.

The proposed rule also included procedures by which the foreign air carrier, except in an emergency, may request the Administrator to reconsider an amendment to its security program, and may submit its own amendment for acceptance. The FAA's mandate to exercise regulatory authority over air carriers also provides that an exemption may be granted when the air carrier can demonstrate that an alternative procedure will provide an equivalent level of safety. The FAA will not act unilaterally to amend foreign air carrier security programs except in an emergency. In those instances where the implementation of an amendment would require significant activities occurring outside of United States territory, the United States Government will endeavor to consult in advance with the foreign government in whose territory such activities would occur.

Two foreign air carriers specifically objected to the proposed rule on the grounds that Congress had not included any provision to amend foreign air carrier security programs in the Act. The Act provides that the Administrator "shall require" foreign air carriers to employ equivalent procedures where such procedures are necessary to ensure passengers are provided a similar level of protection. The Act further provides that the Administrator "shall take such action as may be necessary" to ensure that previously accepted foreign air carrier security programs also provide passengers a similar level of protection. The rule implements statutory authority and establishes regulatory authority to implement these provisions of the Act.

One commenter observed that the proposed rule did not specify, and foreign air carriers were not apprised of, the security procedures that might be required by an amendment to a foreign air carrier's security program. The commenter said that foreign air carriers could not meaningfully comment on the NPRM without knowing what substantive changes to their security programs were being contemplated by FAA. The specific security procedures to be used by a foreign air carrier are sensitive, not available under FAR part 191, and not disclosed in public documents such as the NPRM. The FAA has developed enhanced security procedures to be implemented by foreign air carriers where the FAA has identified an increased risk to passengers. The procedures to be implemented may be modified or selectively implemented to address the situation at hand. The FAA will notify

the foreign air carrier of any proposed amendments to its security program in accordance with the procedures established by the rule.

Five commenters recommended, but seven commenters objected to, identical security procedures for U.S. air carriers and foreign air carriers. One commenter asserted that the proposed rule fell short of FAA's mandate. The Act does not specify identical procedures as the means of providing a similar level of protection. The Act also requires bilateral and multilateral negotiations to achieve security objectives.

The threat to air carriers from different countries varies widely and may change at any time at any airport. Rigid application of identical security procedures at all airports may not necessarily improve the security posture of each foreign air carrier and would impose a burden not reasonably related to the threat. The FAA will require, in consultation with foreign governments, equivalent procedures at airports where the Administrator has determined that such procedures are necessary to provide passengers a similar level of protection.

Two commenters also took issue with the FAA's statement in the NPRM that "the perceived—and often the actual—threat directed at the air carriers of various nations varies widely." These commenters asserted that the FAA is fostering a "misperception" that it is safer to fly on foreign air carriers than it is to fly on U.S. air carriers. The FAA has implemented a security system second to none to ensure that passengers may safely travel aboard U.S. air carriers anywhere in the world. The proposed rule did not mean to imply that passengers are at greater risk flying on U.S. air carriers, for such is not the case. Rather, the intent of the rule is to ensure that passengers are not at greater risk flying on foreign air carriers.

The risk to passengers traveling aboard a foreign air carrier must be compared with the risk to passengers flying U.S. air carriers at the same location. It is unwarranted to assume that passengers on all foreign air carriers are equally at risk wherever they may fly. Many foreign air carriers have never experienced an act of unlawful interference or sabotage, but could be threatened at an airport if the security posture at that airport deteriorates. Other foreign air carriers face a high threat but have implemented security procedures that reduce the risk. The FAA does not believe that equivalent security procedures are needed for all foreign air carriers at all

airports to provide passengers a similar level of protection.

One commenter questioned the FAA's cost estimates as seriously understated. The enhanced procedures do not require sophisticated technology or lengthy training that would be difficult or excessively costly to implement. The FAA believes that the cost estimates may well be overstated both in terms of the scope of application of the enhanced procedures and the cost of labor to implement them at foreign airports.

Another commenter stated that the costs estimated by FAA were so low that it would be an "insignificant burden" to require identical security procedures for all air carriers. The FAA does not believe that security procedures should be required only for the sake of uniformity. The objective of the rule is to achieve a similar level of protection, not a similar level of expenditure.

#### Regulatory Evaluation Summary

This section summarizes the full regulatory evaluation prepared by the FAA that provides more detailed estimates of the economic consequences of this regulatory action. This summary and the full evaluation quantify, to the extent practicable, estimated costs to the private sector, consumers, Federal, State and local governments, as well as anticipated benefits.

Executive Order 12291, dated February 17, 1981, directs Federal agencies to promulgate new regulations or modify existing regulations only if potential benefits to society for the regulatory change outweigh potential costs. The order also requires the preparation of a Regulatory Impact Analysis of all "major" rules except those responding to emergency situations or other narrowly defined exigencies. A "major" rule is one that is likely to result in an annual increase in consumer costs, a significant adverse effect on the economy of \$100 million or more, a major increase in consumer costs, or a significant adverse effect on competition.

The FAA has determined that this rule is not "major" as defined in the executive order; therefore, a full Regulatory Impact Analysis, which includes the identification and evaluation of alternatives to this rule, has not been prepared. Instead, the agency has prepared a more concise document termed a regulatory evaluation that analyzes only this rule without identifying alternatives. In addition to a summary of the regulatory evaluation, this section also contains the Regulatory Flexibility Determination

required by the Regulatory Flexibility Act and an International Trade Impact Analysis. If more detailed economic information is desired, the reader may refer to the full regulatory evaluation contained in the docket.

Comments on the NPRM for this rule were received from a total of eighteen individuals, air carriers, governments, and associations. Only one commenter, an association of foreign air carriers, addressed the economic evaluation of the proposed rule. The FAA does not find any of the comments on the preliminary regulatory evaluation to be compelling, and as such, no changes have been made here. Again, the reader is referred to the full regulatory evaluation contained in the docket for the complete response to comments regarding the economic evaluation.

#### *Cost/Benefit Comparison*

Under the authority of the amendment, existing foreign air carrier security programs may be amended by adding enhanced security procedures for flights departing to the United States. The enhanced procedures would be activated when and where the FAA identifies an increased risk, and the Administrator, in consultation with the foreign government whenever possible, determines that such procedures are necessary to provide passengers a similar level of protection as that provided by U.S. air carriers serving the same airport.

Since the extent to which these enhanced procedures will be activated is dependent on unknown future risk conditions, a definitive estimate of the total costs attributable to the rule is not possible. Accordingly, this evaluation includes estimates of the unit costs that would be incurred to employ the enhanced procedures for a range of application levels.

Work-load estimates for twelve enhanced security procedures were developed by the FAA. The unit costs for each procedure were multiplied by appropriate operations data to determine the expected cost per departure and the average annual costs per station, per foreign air carrier, and for all carriers that are subject to the provisions of the rule.

On average, the FAA estimates that the enhanced security procedures will increase costs by \$349 per airplane departure during the first year at those stations where the procedures are applied. The average annual costs for larger aggregations are estimated at \$238,000 per station, \$510,000 per foreign air carrier, and a maximum potential total of \$49.5 million if the enhanced procedures are activated for all foreign

air carrier flights into the U.S. for 1 year. The worldwide risk conditions that would be necessary to activate these procedures for all flights by all foreign air carriers are unprecedented and are considered to be unlikely.

Based on previous experience, the FAA estimates that not more than 10 percent of foreign air carrier stations are likely to operate under the enhanced security procedures at any given time. Applying this assumption, the most likely cost of the amendment will not exceed \$4.9 million per year.

For comparison purposes, it is estimated that the average economic valuation of a terrorist explosion incident ranges between \$94 and \$104 million, not counting injuries or secondary effects. These data support the position that the rule will be cost-beneficial if one terrorist explosion incident resulting in damages consistent with the above average monetary estimate is prevented over a 20-year period at the expected level of costs, or over a 2-year period at the maximum estimated potential cost where the enhanced security procedures would be implemented by all affected foreign air carriers for all flights to the United States. The determination that the rule is cost-beneficial is further supported by the fact that the enhanced security procedures will only be applied in those cases where the FAA has identified an increased risk to passengers and the Administrator has determined that they are necessary.

#### **Regulatory Flexibility Determination**

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily or disproportionately burdened by Government regulations. The RFA requires a Regulatory Flexibility Analysis if a rule has a significant economic impact, either detrimental or beneficial, on a substantial number of small business entities. FAA Order 2100.14A, Regulatory Flexibility Criteria and Guidance, establishes threshold cost values and small entity size standards for complying with RFA review requirements in FAA rulemaking actions.

The FAA has determined that this rule will not directly affect U.S. enterprises and, therefore, it will not have an economic impact on small domestic entities. This evaluation has not considered the impact on small foreign entities, on the basis that they are external to the scope of the RFA.

#### **International Trade Impact Analysis**

The provisions of this rule will not affect U.S. entities, but could affect the existing access to U.S. markets by foreign interests. The rule requires that the security programs of foreign air carriers provide passengers a level of protection similar to the level of protection provided by U.S. air carriers serving the same airports. The most likely cost of the amendment will not exceed \$4.9 million per year—an average of \$51,000 per year per foreign air carrier providing services to the United States from airports that are also served by U.S. air carriers. U.S. air carriers are already subject to the enhanced security procedures associated with this rule.

#### **Federalism Implications**

The regulations herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that these regulations do not have sufficient federalism implications to warrant the preparation of a Federalism statement.

#### **Conclusion**

For the reasons discussed in the preamble, and based on the findings in the Regulatory Flexibility Determination and the International Trade Impact Analysis, the FAA has determined that this rule is not major under Executive Order 12291. In addition, the FAA certifies that this rule will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This rule is not considered significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). A regulatory evaluation of this rule, including a Regulatory Flexibility Determination and Trade Impact Analysis, has been placed in the docket. A copy may be obtained by contacting the person identified under "**FOR FURTHER INFORMATION CONTACT**".

#### **List of Subjects in 14 CFR Part 129**

Aircraft, Air carrier, Airports, Aviation safety, Weapons.

#### **The Amendments**

In consideration of the foregoing, the Federal Aviation Administration amends part 129 of the Federal Aviation Regulations (14 CFR part 129) as follows:

**PART 129—OPERATIONS: FOREIGN AIR CARRIERS AND FOREIGN OPERATORS OF U.S.-REGISTERED AIRCRAFT ENGAGED IN COMMON CARRIAGE**

1. The authority citation for part 129 is revised to read as follows:

Authority: 49 U.S.C. 1346, 1354(a), 1356, 1357, 1421, 1502, and 1511; 49 U.S.C. 106(g) [Revised Pub. L. 97-449, January 12, 1983].

2. Section 129.25(e) is revised to read as follows:

**§ 129.25 Airplane security.**

\* \* \* \* \*

(e) Each foreign air carrier required to adopt and use a security program pursuant to paragraph (b) of this section shall have a security program acceptable to the Administrator. A foreign air carrier's security program is acceptable only if the Administrator finds that the security program provides passengers a level of protection similar to the level of protection provided by U.S. air carriers serving the same airports. Foreign air carriers shall employ procedures equivalent to those required of U.S. air carriers serving the same airport if the Administrator determines that such procedures are necessary to provide passengers a similar level of protection. The following procedures apply for acceptance of a security program by the Administrator:

(1) Unless otherwise authorized by the Administrator, each foreign air carrier required to have a security program by paragraph (b) of this section shall submit its program to the Administrator at least 90 days before the intended date of passenger operations. The proposed security program must be in English unless the Administrator requests that

the proposed program be submitted in the official language of the foreign air carrier's country. The Administrator will notify the foreign air carrier of the security program's acceptability, or the need to modify the proposed security program for it to be acceptable under this part, within 30 days after receiving the proposed security program. The foreign air carrier may petition the Administrator to reconsider the notice to modify the security program within 30 days after receiving a notice to modify.

(2) In the case of a security program previously found to be acceptable pursuant to this section, the Administrator may subsequently amend the security program in the interest of safety in air transportation or in air commerce and in the public interest within a specified period of time. In making such an amendment, the following procedures apply:

(i) The Administrator notifies the foreign air carrier, in writing, of a proposed amendment, fixing a period of not less than 45 days within which the foreign air carrier may submit written information, views, and arguments on the proposed amendment.

(ii) At the end of the comment period, after considering all relevant material, the Administrator notifies the foreign air carrier of any amendment to be adopted and the effective date, or rescinds the notice of proposed amendment. The foreign air carrier may petition the Administrator to reconsider the amendment, in which case the effective date of the amendment is stayed until the Administrator reconsiders the matter.

(3) If the Administrator finds that there is an emergency requiring immediate action with respect to safety

in air transportation or in air commerce that makes the procedures in paragraph (e)(2) of this section impractical or contrary to the public interest, the Administrator may issue an amendment to the foreign air carrier security program, effective without stay on the date the foreign air carrier receives notice of it. In such a case, the Administrator incorporates in the notice of amendment the finding and a brief statement of the reasons for the amendment.

(4) A foreign air carrier may submit a request to the Administrator to amend its security program. The requested amendment must be filed with the Administrator at least 45 days before the date the foreign carrier proposes that the amendment would become effective, unless a shorter period is allowed by the Administrator. Within 30 days after receiving the requested amendment, the Administrator will notify the foreign air carrier whether the amendment is acceptable. The foreign air carrier may petition the Administrator to reconsider a notice of unacceptability of the requested amendment within 45 days after receiving notice of unacceptability.

(5) Each foreign air carrier required to use a security program by paragraph (b) of this section shall, upon request of the Administrator and in accordance with the applicable law, provide information regarding the implementation and operation of its security program.

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Issued in Washington, DC, on June 21, 1991.

**James B. Busey,**  
*Administrator.*

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