EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:
[September 2005]

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ELECTRONIC CASE FILING

Rules Recommended for Approval and Transmission

The Advisory Committees on Appellate, Bankruptcy, and Civil Rules submitted proposed uniform amendments to Appellate Rule 25, Bankruptcy Rule 5005, and Civil Rule 5 with a recommendation that they be approved and transmitted to the Judicial Conference. (Federal Rule of Criminal Procedure 49(d) incorporates by reference the filing procedures in Civil Rule 5.) The proposed amendments authorize a court to require electronic case filing by local rule. The amendments were published for public comment for a three-month period beginning November 10, 2004, and expiring on February 15, 2005. Public hearings were scheduled to coincide with hearings earlier scheduled for other proposed rules amendments, and a separate hearing was set for the amendment to the Appellate Rules, which had no other proposed amendments. Only one person asked to testify. Several written comments were received on the proposals.

In August 2004, the Committee on Court Administration and Case Management (CACM) requested that the federal rules of practice be amended on an expedited basis to authorize federal courts to adopt local rules that require parties to file papers electronically. The existing rules authorize a court to adopt local rules that "permit" a party to file papers by electronic means. Although many courts have adopted local rules that require electronic filing, some courts have been reluctant to do so without a more explicit grant of authority.

CACM urged the Committee to recommend these rules amendments to promote broader use of the Case Management/Electronic Case Files system now being deployed in the courts nationwide. CACM concluded that mandatory electronic case filing would achieve significant cost savings for the federal courts.

Several major bar organizations, including the American Bar Association, expressed concern during the public comment period that mandatory electronic case filing would pose hardships for litigants who do not have access to a personal computer and suggested that the national rules require that any local rule include appropriate exceptions. Such a provision was not included in the version published for public comment because a study of existing local court rules requiring parties to file papers electronically confirmed that each set of rules already excepted pro se litigants and others for good cause. Nonetheless, in light of the public comment and concerns, the advisory committees revised the proposed amendments to authorize a court to require electronic case filing by local rule only if reasonable exceptions are allowed. The Appellate Rules Committee added a provision in its proposed Committee Note to recognize that a local rule may direct a party to also file a hard copy of a paper that must be filed by electronic means. This provision responds to distinctive features of appellate practice and is not included in the other proposed rules.

The Committee concurred with the advisory committees' recommendations.

Recommendation: That the Judicial Conference approve proposed amendments to Appellate Rule 25(a)(2)(D), Bankruptcy Rule 5005(a)(2), and Civil Rule 5(e) and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 16, 26, 33, 34, 37, 45, 50, Supplemental Rules A, C, and E, and a new Supplemental Rule G (with conforming amendments to Rules 9(h), 14, 26(a), and 65.1), and revisions to Form 35 with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and bar for comment in August 2004. Three public hearings were held at which 74 witnesses testified; many of these witnesses also submitted written comments. An additional 180 written comments were submitted.

Discovery of Electronically Stored Information

The proposed amendments to Rules 16, 26, 33, 34, 37, 45, and revisions to Form 35 are aimed at discovery of electronically stored information. The advisory committee first heard about problems with computer-based discovery at a discovery conference in 1996. In 1999, the then-chair laid out the advisory committee's daunting mission to devise "mechanisms for providing full disclosure in a context where potential access to information is virtually unlimited and in which full discovery could involve burdens far beyond anything justified by the interests of the parties to the litigation." The advisory committee began intensive work on this subject in 2000. Since then, bar organizations, attorneys, computer specialists, and members of the public have devoted much time and energy in helping the rules committees understand and address the serious problems arising from discovery of electronically stored information. The advisory committee's study included several mini-conferences and one major conference, bringing together lawyers, academics, judges, and litigants with a variety of experiences and viewpoints.

The advisory committee also heard from experts in information technology who provide technical electronic discovery services to lawyers and litigants.

The discovery of electronically stored information raises markedly different issues from conventional discovery of paper records. Electronically stored information is characterized by exponentially greater volume than hard-copy documents. Commonly cited current examples of such volume include the capacity of large organizations' computer networks to store information in terabytes, each of which represents the equivalent of 500 million typewritten pages of plain text, and to receive 250 to 300 million e-mail messages monthly. Computer information, unlike paper, is also dynamic; merely turning a computer on or off can change the information it stores. Computers operate by overwriting and deleting information, often without the operator's specific direction or knowledge. A third important difference is that electronically stored information, unlike words on paper, may be incomprehensible when separated from the system that created it. These and other differences are causing problems in discovery that rule amendments can helpfully address.

The advisory committee monitored the experiences of the bar and bench with these issues for several years. It found that the discovery of electronically stored information is becoming more time-consuming, burdensome, and costly. The current discovery rules, last amended in 1970 to take into account changes in information technology, provide inadequate guidance to litigants, judges, and lawyers in determining discovery rights and obligations in particular cases. Developing case law on discovery into electronically stored information under the current rules is not consistent and is necessarily limited by the specific facts involved. Disparate local rules have emerged to fill this gap between the existing discovery rules and practice, and more courts are considering local rules. Without national rules adequate to address the issues raised by electronic discovery, a patchwork of rules and requirements is likely to develop. While such

inconsistencies are particularly confusing and debilitating to large public and private organizations, the uncertainty, expense, delays, and burdens of such discovery also affect small organizations and even individual litigants.

The costs of complying with unclear and at times vague discovery obligations, which vary from district to district in ways unwarranted by local variations in practice, are becoming increasingly problematic. Unless timely action is taken to make the federal discovery rules better able to accommodate the distinctive features of electronic discovery, those rules will become increasingly removed from practice, and similarly situated litigants will continue to be treated differently depending on the federal forum.

Electronic Discovery in Historical Perspective

Before the civil rules became effective in 1938, discovery in both law and equity cases in the federal courts was extremely limited. The 1938 civil rules provided for liberal discovery, further expanded by amendments in 1946 and 1970. Since then, the discovery rules have been amended in 1980, 1983, 1993, and 2000 to provide more effective means for controlling overuse and occasional misuse of the discovery devices. Each of these proposed sets of discovery amendments was vigorously opposed both by those who perceived any narrowing of discovery as inimical to the basic premise of American litigation, and by those who protested that the rules committees had not gone far enough to control discovery and the attendant costs and delays. The present proposals have prompted similar reactions.

The present electronic discovery proposals grew out of the advisory committee's work on the 2000 amendments, which focused on the "architecture of discovery rules" to determine whether changes could be effected to reduce the costs of discovery, to increase its efficiency, to increase uniformity of practice, and to encourage the judiciary to participate more actively in

case management when appropriate. The proposed amendments to make the rules apply better to electronic discovery problems share the same focus.

The historical perspective shows that any proposal to add or strengthen rule provisions for discovery containment produces significant debate. Such debate is not in itself a sign that the proposals are fundamentally flawed. It is right to be concerned if the proposals are supported only by a narrow segment of the bench or bar. But it is not surprising to find that proposals to increase judicial involvement in discovery or to encourage the application of the existing proportionality factors — which require a court to limit discovery if the costs and burdens outweigh its likely benefits — would be opposed more by one side of the bar than the other.

In general, there is a high level of support for rules changes to recognize and accommodate electronic discovery. The American Bar Association Section on Litigation, the Federal Bar Council, and the New York State Bar Association Commercial and Federal Litigation Section, all submitted comments generally supporting the proposed electronic discovery amendments and made helpful criticisms during the public comment period. The Department of Justice, which both brings and defends civil actions, also favors the proposals. To achieve yet a larger consensus, specific aspects of the published proposal that had been criticized during the public comment period were revised.

The advisory committee unanimously approved the amendments proposed to Rules 16, 26(a), 26(b)(5), 26(f), 33, 34, and Form 35. All but two members of the advisory committee voted in favor of recommending approval of the amendments to Rule 37(f) and Rule 26(b)(2), including the parallel provisions in the proposed amendment to Rule 45. The Committee supported all but two of the proposed amendments unanimously. The only exceptions were the proposed amendments to Rule 26(b)(5) and the parallel provisions in the proposed amendment to Rule 45, as to which four members withheld their support, and the proposed amendment to Rule

37(f), as to which one member abstained. The Committee Note has been revised to address certain of the concerns raised about Rule 26(b)(5).

Proposed Amendments to Rules 16, 26(a), 26(f), 33, 34, 45, and Form 35

The proposed amendments to Rule 16, Rule 26(a) and (f), and Form 35 present a framework for the parties and the court to give early attention to issues relating to electronic discovery, including the frequently-recurring problems of the preservation of evidence and the assertion of privilege and work-product protection.

The amendment to Rule 16 is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation, if such discovery is expected to occur. Rule 16 is amended to invite the court to address the disclosure or discovery of electronically stored information in the Rule 16 scheduling order. The amendment also gives the court discretion to enter an order adopting any agreements the parties reach for asserting claims of privilege or protection as trial-preparation material after inadvertent production in discovery.

The proposed amendment to Rule 26(a) clarifies a party's duty to include in its initial disclosures electronically stored information by substituting "electronically stored information" for "data compilations." The amendment makes the rule consistent with disclosure practices in the courts and with the proposed electronic discovery amendment. It was not published for public comment and is recommended as a conforming amendment.

Under the proposed amendment to Rule 26(f), the parties' conference is to include discussion of any issues relating to disclosure or discovery of electronically stored information. The topics to be discussed include the form of producing electronically stored information, a distinctive and recurring problem in electronic discovery resulting from the fact that, unlike paper, electronically stored information may exist and be produced in a number of different

forms. The parties are to discuss preservation, which has new importance in this context because of the dynamic character of electronic information. The parties are also directed to discuss whether they can agree on approaches to asserting claims of privilege or work-product protection after inadvertent production in discovery.

The problems that can result from efforts to guard against privilege waiver often become more acute when discovery of electronically stored information is sought. The volume of the information and the forms in which it is stored may make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming, yet less likely to detect all privileged information. Inadvertent production is increasingly likely to occur. Because the failure to screen out even one privileged item may result in an argument that there has been a waiver as to all other privileged materials related to the same subject matter, early attention to this problem is more important as electronic discovery becomes more common. Under the proposed amendments to Rules 26(f) and 16, if the parties are able to reach an agreement to adopt protocols for asserting privilege and work-product protection claims that will facilitate discovery that is faster and at lower cost, they may ask the court to include such arrangements in a case-management or other order.

The proposed amendments to Rules 33 and 34 clarify how these discovery workhorses are to apply to electronically stored information. The proposed amendment to Rule 33 clarifies that a party may answer an interrogatory involving review of business records by providing access to the information if the interrogating party can find the answer as readily as the responding party can.

Under the proposed amendment to Rule 34, electronically stored information is explicitly recognized as a category subject to discovery that is distinct from "documents" and "things." The term "documents" should not continue to be stretched to accommodate all the differences

between paper and electronically stored information. Distinguishing in the rules between documents and electronically stored information makes it clear that there are differences between them important to managing discovery. Rule 34 is also amended to authorize a requesting party to specify the form of production, such as in paper or electronic form, and for the responding party to object. The rule provides an electronic discovery analogue to the existing language that prevents massive "dumps" of disorganized documents by requiring production of documents as they are ordinarily maintained or labeled to correspond with the categories in the request. Under the proposed amended rule, absent a court order, party agreement, or a request for a specific form for production, a party may produce responsive electronically stored information in the form in which the party ordinarily maintains it or in a reasonably usable form. Absent a court order, the party need only produce the same electronically stored information in one form.

The proposed amendment to Rule 45 conforms the provisions for subpoenas to changes in other discovery rules related to discovery of electronically stored information.

Form 35 is amended to add the parties' proposals regarding disclosure or discovery of electronically stored information to the list of topics to be included in the parties' report to the court.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 16, 26(a), 26(f), 33, 34, 45, and Form 35 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed Amendment to Rule 26(b)(5)

The proposed amendment to Rule 26(b)(5) provides a procedure for asserting privilege after production that is parallel to the similar proposals for Rules 16 and 26(f). As noted in

describing Rules 16 and 26(f), the volume of electronically stored information searched and produced in response to discovery can be enormous, and certain features of the forms in which such information is stored make it more difficult to review for privilege and work-product protection than paper. The inadvertent production of privileged or protected material is a substantial risk. The proposed amendment to Rule 26(b)(5) clarifies the procedure to apply when a responding party asserts a claim of privilege or of work-product protection after production.

Under the proposed amendment, if a party has produced information in discovery that it claims is privileged or protected as trial-preparation material, it may notify the receiving party of the claim, stating the basis for it. After receiving notification, the receiving party must return, sequester, or destroy the information, and may not use or disclose it to third parties until the claim is resolved. If the receiving party disclosed the information before being notified, the receiving party also must take reasonable steps to retrieve the information. The receiving party has the option of submitting the information directly to the court to decide whether the information is privileged or protected as claimed and, if so, whether a waiver has occurred. A producing party is not free to give belated notice of privilege or protection at any point in the litigation; courts will continue to examine whether a privilege or work-product protection claim was made at a reasonable time when delay is part of the substantive law on waiver.

Because the proposed amendment only establishes a procedure for asserting privilege or work-product protection claims after production and does not attempt to change the rules that determine whether production waives the privilege or protection asserted, it does not trigger the special statutory process for adopting rules that modify privilege. By providing a clear procedure to allow the responding party to assert privilege after production, the amendment

helpfully addresses the parties' burden of privilege review, which is particularly acute in electronic discovery.

The proposed amendment to Rule 26(b)(5) did not attract controversy or much comment during the public comment period. However, it was the occasion of considerable debate at the Committee meeting. The four members who voted against the amendment to Rule 26(b)(5) expressed the view that the new procedure could be used to disrupt litigation, particularly if the claim of privilege or work-product was made late in the case. The majority of the Committee did not share the concern that parties would deliberately delay a claim of privilege or work product because to do so might waive the protection under the applicable substantive law. Moreover, bad faith litigation tactics are subject to sanctions and control by the court.

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 26(b)(5) and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed Amendment to Rule 26(b)(2)

The proposed amendment to Rule 26(b)(2) clarifies the obligations of a responding party to provide discovery of electronically stored information that is not reasonably accessible, an increasingly disputed aspect of such discovery. Under the amendment, a party need not produce electronically stored information that is not reasonably accessible because of undue burden or cost. While the features that may make it burdensome or costly to access electronically stored information vary from system to system and with the progress of electronic storage systems over time, examples under current technology include deleted information, information kept on some backup-tape systems for disaster recovery purposes, and legacy data remaining from systems no longer in use.

The amendment requires the responding party to identify the sources of potentially responsive information that it has not searched or produced because of the costs and burdens of accessing the information. This is an improvement over the present practice, in which responding parties simply do not produce electronically stored information that is difficult to access. Under the amended rule, if the requesting party moves for the production of such information, the responding party has the burden to show that the information is not reasonably accessible. Even if the responding party makes this showing, a court may order discovery for good cause and may impose appropriate terms and conditions. The proposed amendment codifies the best practices of parties and courts with experience in these issues.

The proposed amendment to Rule 26(b)(2) responds to distinctive problems encountered in discovery of electronically stored information that have no close analogue in the more familiar discovery of paper documents. Although computer storage often facilitates discovery, some forms of computer storage make it very difficult to access, search for, and retrieve information. The difficulties may arise for a number of different reasons primarily related to the technology of information storage, reasons that are likely to change over time. The information contained on easily accessed sources — whether computer-based, paper, or human — may be all that is reasonably useful or necessary for the litigation, particularly given the voluminous amounts of information characteristically available on computers. Lawyers sophisticated in these problems are developing a two-tier practice in which they first obtain and examine the information that can be provided from easily accessed sources and then determine whether it is necessary to search the difficult-to-access sources.

The relationship between the proposed rule and preservation is specifically addressed in the Committee Note, which states that the rule does not undermine or reduce common-law or statutory preservation obligations. A party is reminded that it may be obliged to preserve

information stored on sources it has identified as not reasonably accessible, but the amendment does not attempt to define, and does not change, the preservation obligations that arise from independent sources of law. The amended rule requires that the information identified as not reasonably accessible must be difficult to access by the producing party for all purposes. A party that makes information "inaccessible" because it is likely to be discoverable in litigation is subject to sanctions now and would still be subject to sanctions under the proposed amendment.

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 26(b)(2) and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed Amendment to Rule 37(f)

The proposed amendment to Rule 37(f) responds to a distinctive and necessary feature of computer systems — the recycling, overwriting, and alteration of electronically stored information that attends normal use. This is a different problem from that presented by information kept in the static form that paper represents; such information is not destroyed without an affirmative, conscious effort. By contrast, computer systems lose, alter, or destroy information as part of routine operations, making the risk of losing information significantly greater than with paper. Even when litigation is anticipated, it can be very difficult to interrupt or suspend the routine operation of computer systems to isolate and preserve discrete parts of the information they overwrite, delete, or update on an ongoing basis, without creating problems for the larger system. Routine cessation or suspension of these features of computer operation is also undesirable; the result would be even greater accumulation of duplicative and irrelevant data that must be reviewed, making discovery more expensive and time-consuming. At the same time, a litigant's right to obtain evidence must be protected. There is considerable uncertainty as

to whether a party must, at risk of severe sanctions, interrupt the operation of the electronic information systems it is using to avoid any loss of information because of the possibility that the information might be sought in discovery. The advisory committee has heard strong arguments in support of better guidance in the rules.

The proposed amendment provides limited protection against sanctions under the rules for a party's failure to provide electronically stored information in discovery. The proposed amendment states that absent exceptional circumstances, sanctions may not be imposed under the civil rules if electronically stored information sought in discovery has been lost as a result of the routine operation of an electronic information system, as long as that operation is in good faith. The proposed rule recognizes that all electronic information systems are designed to recycle, overwrite, and change information in routine operation, not because of any relationship between the content of particular information and litigation, but because they are necessary functions of regular business operations. The proposed rule also recognizes that suspending or interrupting these features can be prohibitively expensive and burdensome, again in ways that have no counterpart in managing hard-copy information. Using an example from current technology, many large organizations routinely recycle hundreds of backup tapes every two or three weeks; placing a hold on the recycling of these tapes for even short periods can result in hundreds of thousands of dollars of expense. Similarly, the regular purging of e-mails or other electronic communications is necessary to prevent a build-up of data that can overwhelm the most robust electronic information systems.

Systems must also be able to filter other types of communications in order to continue operations. Sophisticated and often custom-designed databases may be functional only if they continually revise the information they manage. Such information destruction features are an integral part of computer system design and operation. The amended rule applies only to

information lost due to the "routine operation of an electronic information system" — the ways in which such systems are generally designed and programmed to meet the party's technical and business needs.

Sanctions are not avoided simply by showing that information was lost in the routine operation of an information system. It also must be shown that the operation was in good faith. The proposed amendment does not provide a shield for a party that intentionally destroys specific information because of its relationship to litigation, or for a party that allows such information to be destroyed in order to make it unavailable in discovery by exploiting the routine operation of an information system. Depending on the circumstances, good faith may require that a party intervene to modify or suspend certain features of the routine operation of a computer system to prevent the loss of information, if that information is subject to a preservation obligation. When such a preservation obligation arises depends on the substantive law of each jurisdiction, which is not affected by the proposed rule. If a party is under a duty to preserve information because of pending or reasonably anticipated litigation, such intervention in the routine operation of an informational system is one aspect of what is often called a "litigation hold."

By stating that, absent exceptional circumstances, sanctions may not be imposed under the discovery rules for electronically stored information lost because of the routine good faith operation of a computer system, the proposed rule provides guidance in a troublesome area distinctive to electronic discovery.

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 37(f) and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed Amendment to Rule 50

Present Rule 50(b) allows a party to renew after trial a motion for judgment as a matter of law under Rule 50(a) made only at the close of all the evidence. The proposed amendment deletes the requirement that the Rule 50(a) motion be made again at the close of all the evidence, allowing renewal of a Rule 50(a) motion made at any time during trial. Many reported appellate decisions continue to wrestle with the problems that arise when a party has moved for judgment as a matter of law before the close of all the evidence but has failed to renew the motion at the close of all the evidence. The proposed amendment recognizes that a motion made at any time before the case is submitted to the jury fills the functional needs served by a motion made at the close of all the evidence. As now, the post-trial motion renews the trial motion and can be supported only by arguments that had been made to support the trial motion.

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 50 and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed New Supplemental Rule G on Forfeiture Actions and Conforming Amendments to Supplemental Rules A, C, E, and Civil Rules 9, 14, 26(a)(1)(E), 65.1

Proposed new Supplemental Rule G establishes comprehensive procedures governing in rem civil forfeiture actions. The new rule consolidates the procedures located in several admiralty rules and sets up a unified procedural framework solely intended to address civil asset forfeiture cases. Conforming amendments cross-referencing the new Rule G are also proposed to Supplemental Rules A, C, and E and Civil Rules 9, 14, 26(a)(1)(E), and 65.1. Representatives from the Department of Justice and the National Association of Criminal Defense Lawyers worked with the advisory committee in developing the rule. Because of the helpful participation

of these two organizations during the drafting of the rule, the published rule attracted no significant comment.

Forfeiture actions are presently litigated under various Supplemental Rules, which are primarily designed to handle admiralty actions and present difficult issues when applied to asset forfeiture actions. Moreover, the Supplemental Rules have not been revised to take account of the Civil Asset Forfeiture Reform Act of 2000, which made comprehensive changes affecting civil forfeiture proceedings. Nor have the Supplemental Rules been revised to take account of the constitutional jurisprudence dealing with adequate notice that has developed since the rules were last revised. The disconnect between the Supplemental Rules and in rem forfeiture procedures has become acute because the number of forfeiture actions has increased. The proposed new rule addresses these problems in an integrated and coherent fashion.

Among other things, the proposed rule sets out procedures governing the filing and response to complaints involving in rem forfeitures, requires judicial authorization of arrest warrants in some cases, specifies notice requirements — including provisions for personal notice to potential claimants and anticipating the use of the internet to provide a designated government forfeiture web site as a more reliable means of publishing notice, clarifies the timing and scope of certain discovery requests, and establishes procedures to ensure early determination of a claimant's standing. The proposed amendments to Rules 9, 14, and 65.1 are technical conforming amendments, which were not published for public comment.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Supplemental Rules A, C, E, and new Rule G and conforming amendments to Civil Rules 9, 14, 26(a)(1)(E), 65.1 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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