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- Deciding whether the collections are necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the collections, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond, which includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Addresses: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at www.regulations.gov by selecting Docket ID No. ED 2018–OCR–0064 or via postal mail, commercial delivery, or hand delivery. Please specify the Docket ID number and indicate “Information Collection Comments” on the top of your comments if your comment(s) relate to the information collection for this rule. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW, LBJ 216–36, Washington, DC 20202–4537. Comments submitted by fax or email and those submitted after the comment period will not be accepted. **FOR FURTHER INFORMATION CONTACT:** Electronically mail ICDocketMgr@ed.gov. Please do not send comments here.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79 because it is not a program or activity of the Department that provides federal financial assistance.

Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. “Federalism implications” means 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. The proposed regulations in 34 CFR 106.34 and 34 CFR 106.35 may have federalism implications, as defined in Executive Order 13132. We encourage State and local elected officials to review and provide comments on these proposed regulations.

Accessible Format

Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotope, or compact disc) on request to the person listed under **FOR FURTHER INFORMATION CONTACT**.

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List of Subjects in 34 CFR Part 106

Education, Sex discrimination, Civil rights, Sexual harassment.

Dated: November 15, 2018.

Betsy DeVos,
Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend part 106 of title 34 of the Code of Federal Regulations as follows:

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

■ 1. The authority citation for part 106 continues to read as follows:

Authority: 20 U.S.C. 1681 *et seq.*, unless otherwise noted.

■ 2. Section 106.3 is amended by revising the section heading and paragraph (a) to read as follows:

§ 106.3 Available remedies.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has violated this part, such recipient shall take such remedial action as the Assistant Secretary deems necessary to remedy the violation, which shall not include assessment of damages against the recipient. Nothing herein prohibits the Assistant Secretary from deeming necessary equitable relief to remedy a violation of this part.

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■ 3. Section 106.6 is amended by revising the section heading and adding paragraphs (d), (e) and (f) to read as follows:

§ 106.6 Effect of other requirements and preservation of rights.

* * * * *

(d) *Constitutional protections.* Nothing in this part requires a recipient to:

(1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;

(2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or

(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

(e) *Effect of Section 444 of General Education Provisions Act (GEPA)/ Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g and 34 CFR part 99.* The obligation to comply with this part is not obviated or alleviated by the FERPA statute or regulations.

(f) *Title VII of the Civil Rights Act of 1964.* Nothing in this part shall be read in derogation of an employee’s rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder.

■ 4. Section 106.8 is revised to read as follows:

§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

(a) *Designation of coordinator.* Each recipient must designate at least one employee to coordinate its efforts to comply with its responsibilities under this part. The recipient must notify all its students and employees of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated pursuant to this paragraph (a).

(b) *Dissemination of policy—(1) Notification of policy.* Each recipient must notify applicants for admission and employment, students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to employment and admission (unless subpart C of this part does not apply to the recipient) and that inquiries about the application of title IX and this part to such recipient may be referred to the employee designated pursuant to paragraph (a) of this section, to the Assistant Secretary, or both.

(2) *Publications.* (i) Each recipient must prominently display a statement of the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (b)(1) of this section.

(ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Adoption of grievance procedures.* A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and of formal complaints as defined in § 106.30. A recipient must provide notice of the recipient's grievance procedures, including how to report sex discrimination and how to file or respond to a complaint of sex discrimination, to students and employees.

(d) *Application.* The requirements that a recipient adopt a policy and grievance procedures as described in this section apply only to exclusion

from participation, denial of benefits, or discrimination on the basis of sex occurring against a person in the United States.

§ 106.9 [Removed and Reserved]

■ 5. Section 106.9 is removed and reserved.

■ 6. Section 106.12 is amended by revising paragraph (b) to read as follows:

§ 106.12 Educational institutions controlled by religious organizations.

* * * * *

(b) *Assurance of exemption.* An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of the exemption from the Assistant Secretary.

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■ 7. Add § 106.30 to read as follows:

§ 106.30 Definitions.

As used in this subpart:

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment. Imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is also the respondent. The mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to

institute corrective measures on behalf of the recipient.

Complainant means an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint. For purposes of this definition, the person to whom the individual has reported must be the Title IX Coordinator or another person to whom notice of sexual harassment results in the recipient's actual knowledge under this section.

Formal complaint means a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the recipient's grievance procedures consistent with § 106.45.

Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Sexual harassment means:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

(3) Sexual assault, as defined in 34 CFR 668.46(a).

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that

maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

■ 8. Add §§ 106.44 and 106.45 to read as follows:

§ 106.44 Recipient's response to sexual harassment.

(a) *General.* A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

(b) *Specific circumstances.* (1) A recipient must follow procedures consistent with § 106.45 in response to a formal complaint. If the recipient follows procedures (including implementing any appropriate remedy as required) consistent with § 106.45 in response to a formal complaint, the recipient's response to the formal complaint is not deliberately indifferent and does not otherwise constitute discrimination under title IX.

(2) When a recipient has actual knowledge regarding reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint. If the Title IX Coordinator files a formal complaint in response to the reports, and the recipient follows procedures (including implementing any appropriate remedy as required) consistent with § 106.45 in response to the formal complaint, the recipient's response to the reports is not deliberately indifferent.

(3) For institutions of higher education, a recipient is not deliberately indifferent when in the absence of a formal complaint the recipient offers and implements supportive measures designed to effectively restore or preserve the complainant's access to the recipient's education program or activity. At the time supportive measures are offered, the recipient must in writing inform the complainant of the right to file a formal complaint at that time or a later date, consistent with other provisions of this part.

(4) If paragraphs (b)(1) through (3) of this section are not implicated, a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must, consistent with paragraph (a) of

this section, respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

(5) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

(c) *Emergency removal.* Nothing in this section precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision shall not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or title II of the Americans with Disabilities Act.

(d) *Administrative leave.* Nothing in this section precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of an investigation.

§ 106.45 Grievance procedures for formal complaints of sexual harassment.

(a) *Discrimination on the basis of sex.* A recipient's treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX. A recipient's treatment of the respondent may also constitute discrimination on the basis of sex under title IX.

(b) *Grievance procedures.* For the purpose of addressing formal complaints of sexual harassment, grievance procedures must comply with the requirements of this section.

(1) *Basic requirements for grievance procedures.* Grievance procedures must—

(i) **Treat complainants and respondents equitably.** An equitable resolution for a complainant must include remedies where a finding of responsibility for sexual harassment has been made against the respondent; such remedies must be designed to restore or preserve access to the recipient's education program or activity. An equitable resolution for a respondent must include due process protections

before any disciplinary sanctions are imposed;

(ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(iii) Require that any individual designated by a recipient as a coordinator, investigator, or decision-maker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. **A recipient must ensure that coordinators, investigators, and decision-makers receive training on both the definition of sexual harassment and how to conduct an investigation and grievance process, including hearings, if applicable, that protect the safety of students, ensure due process protections for all parties, and promote accountability. Any materials used to train coordinators, investigators, or decision-makers may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment;**

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

(v) Include reasonably prompt timeframes for conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals if the recipient offers an appeal, and a process that allows for the temporary delay of the grievance process or the limited extension of timeframes for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities;

(vi) Describe the range of possible sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) Describe the standard of evidence to be used to determine responsibility;

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal if the recipient offers an appeal; and

(ix) Describe the range of supportive measures available to complainants and respondents.

(2) *Notice of allegations—(i) Notice upon receipt of formal complaint.* Upon receipt of a formal complaint, a

recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance procedures.

(B) Notice of the allegations constituting a potential violation of the recipient's code of conduct, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the specific section of the recipient's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient's code of conduct, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must also inform the parties that they may request to inspect and review evidence under paragraph (b)(3)(viii) of this section and inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

(ii) *Ongoing notice requirement.* If, in the course of an investigation, the recipient decides to investigate allegations not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties, if known.

(3) *Investigations of a formal complaint.* The recipient must investigate the allegations in a formal complaint. If the conduct alleged by the complainant would not constitute sexual harassment as defined in § 106.30 even if proved or did not occur within the recipient's program or activity, the recipient must dismiss the formal complaint with regard to that conduct. When investigating a formal complaint, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties;

(ii) Provide equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence;

(iii) **Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;**

(iv) Provide the parties with the same opportunities to have others present

during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, and not limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) Provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate;

(vi) For recipients that are elementary and secondary schools, the recipient's grievance procedure may require a live hearing. With or without a hearing, the decision-maker must, after the recipient has incorporated the parties' responses to the investigative report under paragraph (b)(3)(ix) of this section, ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses. If no hearing is held, the decision-maker must afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, all such questioning must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. The decision-maker must explain to the party proposing the questions any decision to exclude questions as not relevant;

(vii) For institutions of higher education, the recipient's grievance procedure must provide for a live hearing. At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at a hearing must be conducted by the party's advisor of choice, notwithstanding the discretion of the recipient under paragraph (b)(3)(iv) of this section to otherwise restrict the

extent to which advisors may participate in the proceedings. **If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination.** All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions. The decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant. If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;

(viii) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence, and the parties shall have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject herein to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(ix) Create an investigative report that fairly summarizes relevant evidence and, at least ten days prior to a hearing (if a hearing is required under this section) or other time of determination

regarding responsibility, provide a copy of the report to the parties for their review and written response.

(4) *Determination regarding responsibility.* (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.

(ii) The written determination must include—

(A) Identification of the section(s) of the recipient's code of conduct alleged to have been violated;

(B) A description of the procedural steps taken from the receipt of the complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient's code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any sanctions the recipient imposes on the respondent, and any remedies provided by the recipient to the complainant designed to restore or preserve access to the recipient's education program or activity; and

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal, if the recipient offers an appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. If the recipient does not offer an appeal, the determination regarding responsibility becomes final on the date that the recipient provides the parties with the written determination. If the recipient offers an appeal, the determination regarding responsibility becomes final at either the conclusion of the appeal process, if an appeal is filed, or, if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(5) *Appeals.* A recipient may choose to offer an appeal. If a recipient offers an appeal, it must allow both parties to appeal. In cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity, a complainant is not entitled to a particular sanction against the respondent. As to all appeals, the recipient must:

(i) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(ii) Ensure that the appeal decision-maker is not the same person as any investigator(s) or decision-maker(s) that reached the determination of responsibility;

(iii) Ensure that the appeal decision-maker complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(iv) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(v) Issue a written decision describing the result of the appeal and the rationale for the result; and

(vi) Provide the written decision simultaneously to both parties.

(6) *Informal resolution.* At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient—

(i) Provides to the parties a written notice disclosing—

(A) The allegations;

(B) The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any; and

(C) Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and

(ii) Obtains the parties' voluntary, written consent to the informal resolution process.

(7) *Recordkeeping.* (i) A recipient must create, make available to the complainant and respondent, and maintain for a period of three years records of—

(A) Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Informal resolution, if any; and

(D) All materials used to train coordinators, investigators, and decision-makers with regard to sexual harassment.

(ii) A recipient must create and maintain for a period of three years records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not clearly unreasonable, and document that it has taken measures designed to restore or preserve access to the recipient's educational program or activity. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

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