

Appendix A

PRINCIPLES, BEST PRACTICES AND REQUIREMENTS RELATING TO THE RELATIONSHIP BETWEEN A UW UNIVERSITY OR UW COLLEGE AND ITS PRIMARY FUNDRAISING FOUNDATION AND ANY REAL ESTATE FOUNDATION***

Memorandum of Understanding

Each UW University and UW College (hereinafter referred to as “University”) must have a memorandum of understanding (MOU) with its primary fundraising Foundation, and with any Real Estate Foundation, that lays out the respective responsibilities of the University and the Foundation as well as other necessary provisions. A list of operational practices follows, as does a general checklist for necessary provisions that must be included in each MOU.

Operational Practices:

1. Ensure that both parties (University and Foundation) understand the separate and legally independent nature of the Foundation and the core competencies the Foundation needs to operate (i.e. legal, audit, governance, etc.).
2. Ensure that both parties understand, in light of the highly visible and critical role of the Foundation, and the strong association that alumni, friends, and the public make between the University and the Foundation, that the University has an important and legitimate interest in the Foundation’s policies and actions.
3. Ensure that there is a conflict of interest policy for the Foundation.
4. Ensure the Foundation has appropriate articles of incorporation, bylaws, and board member criteria, including term limits, expectations, and minimum qualifications.
5. Ensure that Foundation Board members understand their fiduciary duty to the Foundation.
6. Ensure that Foundation Board members understand that the Foundation’s purpose is to support the University’s mission.

General Checklist:

Maintain a MOU between the University and Foundation that:

1. Clearly establishes the working relationship between the University and Foundation.

2. Assures the preservation of mission alignment over time.
3. Is periodically reviewed, assessed, and adapted in keeping with changing circumstances and the passage of time.
4. Ensures that the Foundation has policies, resolutions, and/or controls that define the circumstances, if any, in which University employees can approve transactions and enter into obligations on behalf of the Foundation. These policies, resolutions, and/or controls must define circumstances (e.g., dollar limits, long-term contracts) for which formal pre-approval and/or post-transaction review by the Foundation's Board is required.
5. Ensures that the Foundation and the University define the services and support to be provided by the Foundation, including any fundraising activities, and the services and support to be provided by the University. Specific details regarding the services and support provided respectively by the Foundation and the University may be contained in a separate, operational agreement between the University and the Foundation that is reviewed and renewed annually.
6. Outlines methodology for any additional compensation or benefits to be paid to University leaders (compensation, housing, car, etc.) and that it be evaluated by both the University and Foundation to be appropriate, at market value, and defensible. The methodology chosen should express the clear understanding that the additional compensation or benefits is intended as remuneration for activities, such as fundraising, undertaken on behalf of the Foundation. (Note: This methodology needs to be included in MOU's only if applicable, i.e. if university chancellors or other leaders are paid (or are contemplated to be paid) any additional compensation or benefits.)
7. Establishes guidelines and conditions under which the MOU may be terminated and outlines a process for an orderly separation as well as the distribution of Foundation assets consistent with its articles of incorporation and bylaws.
8. Defines reciprocal responsibilities and mutual expectations regarding the frequency, content, and method of reporting between the University and Foundation, including a requirement for an annual independent audit of the Foundation be provided to the University if the Foundation receives annual contributions of \$500,000 or more. MOUs with Foundations that have annual contributions over \$300,000 and less than \$500,000 must require the Foundation to provide to the University a financial statement reviewed by an independent CPA. MOUs with Foundations that have annual contributions less than \$300,000 must state that the Foundation will provide an annual financial report to the University for informational purposes and potential review.
9. Describes generally the terms and processes by which Foundation funds and gifts, including gifts-in-kind, will be provided to and accepted by the University. Specific details regarding these terms and processes may be contained in a separate, operational agreement between the University and the Foundation that is reviewed and renewed annually.

10. Defines terms for the Foundation's use of the University's name, branding, and other University intellectual property.
11. Requires Foundation books and records be maintained in a professional manner and be available for review by the University.

Governance

Legal Separation of the University and its related Foundation: A public University Foundation provides fundraising and development operations as a separate non-profit organization. As a separately incorporated entity, the Foundation's primary purpose is to support the University it serves through receiving, investing, and guaranteeing good stewardship of gifts. Having its own articles of incorporation, bylaws, board of directors, and officers, the Foundation must maintain a legal distance between itself and the public University it supports.

A Foundation has no formal or legal role in the governance of the University, the setting of academic priorities, or other matters that are part of the University's responsibilities. As with any other citizen board, the Foundation Board is free to express its opinions and, in some cases, the University may ask for the Foundation Board's thoughts about certain issues. Likewise, the University does not have a formal or legal role in the governance of the Foundation but may have representation on its board of directors, or otherwise provide input and advice on Foundation matters.

It is important to establish and maintain independence between the University and its related Foundation. Blurring of these lines could lead to the conclusion that the Foundation is insufficiently separate from the University and is, therefore, subject to statutes and rules governing the University.

University Employees on Foundation Board: It is common and reasonable for University employees to be members of the Foundation Board because of their official connection to the University, which the Foundation is formed to support. However, these employees must be ex-officio and non-voting members of the Foundation Board. This arrangement helps to demonstrate independence by ensuring that University employees have no voting control over governance of the Foundation. Under this approach, if the ex-officio member of the Board is paid by the University, then he/she must not have voting power.

As with any other non-voting, ex-officio member of the Foundation Board, the University Chancellor can nominate individuals for Board membership, but the final decision on new members (and officers) is the prerogative of the voting members of the Board. Foundations should have membership or nomination committees, or similar processes, for nominating Board members. To further demonstrate Foundation independence from the University, the number of University employees on the Board must be kept to a minimum and preferably should not exceed two or three members depending on the size of the Board. In no circumstance may University employees constitute a majority of the Foundation Board.

Oversight by the Board of Regents, System President, and Chancellors of Foundation Real Estate Projects: The Board of Regents, System President, and Chancellors must have oversight responsibility over real estate projects undertaken by Foundations, particularly where state resources such as real property or funding are involved in the projects.

Since Foundations exist solely to support the University with whom they are affiliated, such real estate projects require the involvement and support of the University Chancellor. Real estate projects for which the Chancellor would have otherwise needed to seek Board of Regents or System President approval had they been University projects must be brought to the attention of the Board and System President by the Chancellor before the planning process begins and before commitments are made by the University or Foundation.

Projects that are planned to occur on state land, with state bonding, or with other state resources requiring approval of the Department of Administration or Governor, and legislative support, must also be brought to the attention of the Board of Regents and System President by the Chancellor before the planning process begins and before commitments are made by the University or Foundation. Such projects likely will require involvement by DOA, the Governor's Office, and/or legislators as they are being developed.

Ethical Obligations of University Employees Serving on a Foundation Board: University personnel serving on a Foundation Board are covered by conflict of interest laws applicable to directors of non-profit organizations (Section 181.0831, Wisconsin Statutes) and any requirements imposed by the Foundation Board's bylaws, articles of incorporation, or resolutions. These ethical obligations are in addition to those contained in UWS Chapter 8, Wisconsin Administrative Code (Unclassified Staff Code of Ethics), and for University employees who are public officials, those contained in Subchapter III of Chapter 19 of the Wisconsin Statutes (Code of Ethics for Public Officials).

Personnel

Hiring of a New Chancellor: The hiring of a new Chancellor is a responsibility of the Board of Regents and the UW System President. Foundation Board members may be asked by the System President to serve as community members on the University search and screen committee. Additionally, during the University interview process, a courtesy meeting between candidates and Foundation representatives would be appropriate. The Foundation cannot have controlling involvement in hiring a new Chancellor.

Provision of Additional Chancellor Compensation: Upon approval of the Foundation Board, it is acceptable for the Foundation to provide income supplements to fund a portion of the Chancellor's salary.

Any supplement or compensation provided to a Chancellor by a Foundation must be approved by the Board of Regents and the System President to ensure that the Chancellor is not in violation of University policies and state law. The Board of Regents and System President hire Chancellors

and set their compensation levels, and they must approve in advance any compensation provided to a Chancellor from the Foundation. Total compensation, including that provided by the Foundation, must be within the Board approved compensation ranges and will depend on those factors used by the Board and President to set and adjust Chancellor compensation. Foundation payments must be deposited with the University. The University then uses the funds to payroll the Chancellor. Direct payment of compensation by a Foundation to a Chancellor is not permitted.

Provision of Additional Compensation for Other University Employees: Upon approval of the Foundation Board, it is acceptable for the Foundation to fund a portion of a University employee's salary. This includes such practices as endowing chairs and faculty positions, or augmenting the compensation provided to coaches. Again, any supplement or compensation provided to a University employee must be approved by the University hiring authority to ensure compliance with University policies and state law. In those situations, Foundation payments are deposited with the University. The University then uses the funds to payroll the individual. Direct payment of compensation by a Foundation to a University employee is not permitted.

Hiring and Evaluating the Executive Director of the Foundation: The Foundation Board is typically responsible for hiring and evaluating the Executive Director of the Foundation. When the Executive Director position is completely separate from the University, Foundations are encouraged to obtain input from the University in the hiring and evaluation process in order to preserve or build the close relationship that needs to exist between both entities.

It is preferred that the Executive Director of the Foundation be hired and paid for by the Foundation. However, the expense required to do this for modest and growing Foundations may render this option difficult. Thus the dual-role title is a common practice, in Wisconsin and elsewhere, but must be managed to minimize potential conflicts.

At times, a University employee (e.g., the Vice Chancellor for Advancement/Chief Advancement Officer) is given the title of Executive Director of the Foundation. This dual title means that a state employee is hired (and paid) as the executive leader of a separate nonprofit organization in order to perform necessary administrative functions. It might be possible to designate a University employee as an official liaison to the Foundation to assist with the logistics involved in managing and operating the Foundation without naming that employee Executive Director, but appropriate care should be taken in accounting for the services provided to the Foundation. A Foundation may fund the portion of the University employee's time that is spent undertaking activities directly tied to the role as Executive Director of the Foundation. Any funding arrangement must be documented and may be done via a direct transfer of Foundation funds to the University or through an in-kind arrangement spelled out in the MOU or in the separate, related annual operational agreement that is in place between the University and the Foundation.

The University Chancellor holds full and sole authority to hire and evaluate the Vice Chancellor for Advancement/Chief Advancement Officer when that person is employed by the University and also serves as the Foundation Executive Director. The University is the employer and therefore has this responsibility. The Foundation does have an interest in who fills the Executive

Director position and how well they perform the Foundation-related administrative duties assigned to them. As such, it is desirable that the Foundation Board have a non-decision-making role in the hiring and evaluation when the individual holds both titles.

Hiring and Evaluating Other University Personnel Whose Positions Are Funded from Foundation Resources: Resources provided through the Foundation commonly fund, in whole or in part, a number of University positions (e.g. endowed chairs, coaches, and administrative positions that support development and development related activities such as accounting). The University is the employer and therefore has sole hiring, supervision, and evaluation responsibilities. In most cases, the University employee will have no direct relationship with the Foundation outside of funding for the position, and the Foundation will not have a role in the hiring or evaluation of the employee. Where the employee does have a direct role in assisting with Foundation-related activities, the University may request that the Foundation communicate with the Chancellor or Chief Advancement Officer regarding the employee's performance.

University Employees Must Not Directly Receive Any Payments from the Foundation for Services or Honoraria: For accounting and tax reasons, payments to University employees for services, including any awards or honoraria, must be made through the University's payroll system. If the Foundation in a separate transaction has provided funds to the University to cover such payments, the Foundation should be acknowledged as the source of funds.

Reimbursements to University Employees from the Foundation: University employee business expenses that are allowable under University rules and guidelines should preferably be reimbursed through the University's business expense systems rather than through direct reimbursement from the Foundation. The Foundation, in a separate transaction, may provide funds to the University that cover such expenses generally. If a University employee seeks direct reimbursement from a Foundation for a business expense, in accordance with University or state rules and requirements, the Foundation should ensure proper accounting for reimbursements in accordance with IRS rules.

Universities and Foundations are required to adopt guidelines that assist in determining which reimbursements will be acceptable.

Finances

Funds Donated to a Foundation: If a check is made payable to the Foundation, the funds belong to the Foundation. If a gift instrument names the Foundation, or the gift instrument or other documented extrinsic evidence otherwise indicate the donor's intent to gift to the Foundation, the gift must be deposited with the Foundation. When funds are donated to the Foundation, it is important to understand that the intent of the donor is to give to projects of the University. Thus these funds are managed by the Foundation but for support of the University. However, only the Foundation Board can approve a transfer of Foundation funds to the University, and the University has no authority to direct the Foundation to transfer funds to the University. It is also important to recognize that once Foundation funds are deposited in

University accounts, they are state funds and are fully subject to all state law requirements and restrictions.

Funds Donated to a University: Wisconsin Statutes, Section 36.29(4) prohibits reassignment of donations from the University to the Foundation. Thus, if a check is made payable to the University, or a gift instrument names the University, the funds presumptively belong to the University, and must be deposited accordingly in University accounts. However, for any donation, it is necessary to establish donor intent. If a check or gift instrument names the University, but there is documented extrinsic evidence establishing donor intent to direct the check or gift to the Foundation, then the check or gift are Foundation funds and must be deposited with the Foundation. If a check or gift instrument names the University, and there is no documented extrinsic evidence establishing donor intent to direct the check or gift to the Foundation, then the check or gift are University funds and must be deposited in University accounts. It is very important to recognize that once funds are received by the University, they are state funds and are fully subject to all state law requirements and restrictions. Such funds must not be deposited with the Foundation or transferred to the Foundation, as a means of avoiding state law requirements and restrictions on the use of state funds.

Funds Derived from University Revenue Producing Activities: Funds derived from University revenue producing activities, such as fees for services or use of university facilities, revenues from ticket sales, registration fees, and similar activities, or from grants, contracts or business arrangements, belong to the University and all such funds must be deposited directly with the University into appropriate accounts. Such funds must not be deposited with the Foundation or transferred to the Foundation, as a means of avoiding state law requirements and restrictions on the use of state funds.

University funds cannot be transferred, gifted or loaned to the Foundation: The University cannot transfer, gift, or loan state funds to the Foundation. University funds are “state” funds regardless of the funding source (e.g., General Purpose Revenue, Program Revenue, gifts and grants, tuition, etc.) This includes Foundation funds that have passed through the University. State funds include funding generated by the University, funding provided by the state, and also funding given to the University by the Foundation. As stated above, all University funds, regardless of source, are subject to the same restrictions that govern use of “state” funds. The University only may make such funding available to the Foundation in exchange for specific related services or other forms of consideration that the Foundation might provide.

Use of State Funds for the Hiring of University Personnel to Raise Funds for the University through the Foundation: Personnel hired and paid by the University in order to raise funds for the University are in the employ of the University, not the Foundation. If successful, these employees are a good investment for the University’s future. It is common practice for Universities to pay for these individuals from University budgets. The total state resources used to support fundraising personnel and activities need to be weighed against the benefits to the University derived from the investment, as well as alternative demands on those resources.

Direct Purchases by a Foundation for Equipment, Services or Other Purposes on the University’s Behalf: Nearly all the funds raised and deposited in Foundation accounts will

eventually be transferred to the University's gift fund budget and spent strictly according to state requirements and donor intent. In unusual circumstances, funds may be spent directly by the Foundation for equipment, services, or other purposes on the University's behalf. When this is done, it is important that the University and Foundation are aware of UW policies and guidance that may govern or affect such expenditures and that appropriate accounting measures are in place. Adequate justification must be provided for why University funds could not be used to make the expenditure, and documentation must be provided supporting the expenditure. The request for payment of the expenditure must be approved by the Chancellor or designee. Foundations also must have clearly defined internal policies and procedures guiding this type of direct payment using donor funds. If applicable, internal Foundation legal, finance, and fund administration departments should be consulted and should provide approval.

The University Cannot Allow Direct Payments to Student Recipients of Scholarships, Fellowships or Similar Awards: The University cannot allow direct payments to students for scholarships, fellowships, prizes, and similar awards. Federal financial aid reporting rules require accounting for financial aid payments by the University and its affiliates. Foundations are unlikely to have the processes in place necessary to assure compliance.

Use of Foundation Funds Obviously Must Comply Strictly with Donor Intent: Funds that are deposited in restricted accounts at the Foundation to be used for specified purposes such as scholarships must not be used, even temporarily, for any purpose other than that which the donor intended. The Foundation must not borrow, loan, or transfer monies from restricted accounts for any purpose.

Use of University Space and Assets

University Allocation of Space at the University for a Foundation's Business Activities: Ideally, a Foundation would have its own office space, showing a physical separation from the University. If the Foundation is allocated space at the University, which is common across the country, the MOU between the University and Foundation, or the related operational agreement between the University and Foundation, must include the rent the Foundation will pay for use of the space, or that the Foundation may use such space rent-free as an "in-kind" payment by the University for specified services rendered by the Foundation. Rent or in-kind payments must be documented by the University at the fair market rate for the space.

University Assets Cannot be Gifted or Loaned to the Foundation: The University cannot "gift" or loan equipment, personnel time, or other assets to a Foundation. The University may make such assets available to the Foundation in exchange for specific related services, payments, and other forms of remuneration that the Foundation might provide as described in the MOU or related operational agreement. University assets (equipment, etc.) are "state" assets regardless of the funding source (General Purpose Revenue, Program Revenue, Foundation gifts, etc.) used to secure the asset.

Public Records

Maintenance of a Foundation in accordance with these principles and practices should mean that a UW Foundation is not subject to the Wisconsin Public Records Law. While a Wisconsin appellate court has not ruled on this issue, some courts in other states have found their public university foundations to be entities subject to their public records laws. Even if the Wisconsin Public Records Law were found to apply, the law contains protection for specific records where the public interest in confidentiality outweighs the public interest in release of the record.

Requests for records of the Foundation should be reviewed with both Foundation and University legal counsel so that the appropriate decisions can be made regarding records release. To place the Foundation in the best possible position, requests for donor confidentiality should be well-documented.

Capital Projects and Related Debt

A University Must Not Secure or Guarantee a Foundation's Debt: A Foundation cannot legally obligate the University to secure the financing of a capital project for the benefit of the University. As a state agency, the University cannot secure or guarantee the debt or obligations of a private entity like the Foundation. Any such guarantee violates the state constitution and state statute.

Foundation Undertaking and Paying for a Capital Project: If the project will require commitment of state funding or income streams for maintaining the project or otherwise obligate the University in the future, a discussion between the Foundation and the University must occur as the project is being planned. If it appears that the University will not be able to maintain the facility, then the project must not continue unless maintenance will be paid for through other Foundation resources. **Foundation's Role in Capital Projects That Include Gift Funding:** Gift funds provided by a Foundation may be a source of revenue for cash deposits into a state capital project. The gift funds can cover the full cost of the project or any portion. The UW System Gift Funding Policy for capital projects is available at: <https://www.wisconsin.edu/regents/policies/funding-of-university-facilities-capital-costs/>

A Foundation May Hold and Develop Property for the Benefit of the University: Foundations may acquire property for the benefit of the University, either directly or through the creation of a subsidiary real estate Foundation. Such property may subsequently be given to the University, or made available for University use through a use or management agreement or other appropriate arrangement. If a Foundation funds a development on private land that will be of benefit to the University (e.g., a private residence hall adjacent to the University), competitive bidding procedures must be used in constructing the project. Foundations and subsidiaries may construct, own, and operate such facilities without Board of Regents or State Building Commission approval if the facility is financed and operated independently of the University. If the facility has financial or operational ties to the University, the University advancement and planning offices must consult with the UW System Office of Capital Planning and Budget (and with the UW System Office of General Counsel) to determine an appropriate arrangement.

Dummy Building Corporation Concerns with Respect to Foundation Building Projects:

Prior to the amendment of Article VIII, Section 7(2)(d) of the Wisconsin Constitution in 1969, the state was prohibited from incurring debt except in very limited circumstances. This created significant problems with respect to financing large construction projects and led to the use of "dummy building corporations." Dummy building corporations were non-profit shell corporations, where state officials acted as the corporate officers. Both the Regents of the University of Wisconsin (the predecessor to the current Board of Regents) and the Regents of the 10 State Colleges (the former governing board of the comprehensive campuses) created dummy corporations in order to finance construction projects for the campuses. The dummy corporations would enter into a lease for a facility with the University and use the lease to secure financing from banks and other financial institutions. The state would be neither a guarantor nor cosigner of the debt, but would, in effect, pay off the corporation's debt.

In 1969, the Constitution was amended to permit the state to contract public debt, while prohibiting the use of dummy building corporations. Section 7(2)(d) of the Constitution, as amended, reads as follows:

(d) No money shall be paid out of the treasury, with respect to any lease, sublease or other agreement entered into after January 1, 1971, to the Wisconsin State Agencies Building Corporation, Wisconsin State Colleges Building Corporation, Wisconsin State Public Building Corporation, Wisconsin University Building Corporation or any Similar entity existing or operating for similar purposes pursuant to which such nonprofit corporation or such other entity undertakes to finance or provide a facility for use or occupancy by the state or an agency, department or instrumentality thereof.

Interpreting this amended provision of the constitution in *State ex. rel. Warren v. Nusbaum*, 59 Wis.2d 391, 208 N.W.2d 780 (1973); the Wisconsin Supreme Court held:

The purpose of this section [Art. VIII, Sec. 7(2)(d)] was to prevent the utilization of state money to liquidate the construction debts of nonprofit corporations established to provide facilities for the use or occupancy of the state. * * *

Sec. 7(2)(d), art. VIII, Wis. Const., does not prevent all nonprofit organizations or corporations established for a public purpose, from carrying on that purpose. It prohibits the type of indirect financing [used by dummy building agreements]. Where no state money is appropriated out of the state treasury for the purpose of meeting the state's obligations under such an agreement, sec. 7(2)(d), art. VIII is not violated.

Nusbaum, 59 Wis.2d at 427, 208 N.W.2d at 802.

Over the past few years, as demand for facilities has increased faster than available state funds, additional emphasis has been placed upon the use of external monies to fund University facilities. Various arrangements have been proposed, but in general, any attempt to utilize the state's credit or state funds as collateral and any attempt to guarantee or otherwise secure a loan

based upon the state purchasing or otherwise acquiring a facility has been rejected as inconsistent with the constitution and cannot be allowed.

Additionally, it is quite clear that any lease-purchase arrangement with a non-profit would violate the Constitution and cannot be allowed. Any attempt to have a non-profit build a building and have the University buy the building for the amount of the indebtedness would be constitutionally impermissible.

In general, it appears that the only viable way to accept the financial assistance of a private nonprofit foundation is if the assistance is provided with no strings attached, thereby ensuring that no money is paid out of the state treasury to the foundation to directly or indirectly fund a capital project. The transaction as a whole has to be examined and a number of questions would have to be answered.

Periodic Reports and Accounting Requirements

Periodic Reports to the University: The Foundation must provide to the University periodic information regarding funds raised by the Foundation. Language must be included in the MOU between the Foundation and the University stating that the Foundation will submit an annual financial statement and annual independent audit to the University. Except that, as provided for in Wis. Stats., Section 202.11, the MOU with a Foundation that receives annual contributions of less than \$500,000 and over \$300,000 must state that the Foundation will submit to the University a financial statement reviewed by an independent CPA. Foundations that receive annual contributions equal to or less than \$300,000 must submit an annual financial report to the University for informational purposes and potential review.

Applicability of GASB Standards: The authority of the Governmental Accounting Standards Board (GASB) to establish standards for determining when affiliated organizations must be included within the financial statements of a public university or other governmental entity must be recognized by the Foundation in the MOU between the Foundation and the University. Accordingly, the Foundation must agree in the MOU to provide the University, upon request, all information required to be in compliance with pronouncements from GASB or with any applicable state law.

Data/Public Records Law

Data Sharing Agreement: It is a best practice for a University and related Foundation to agree in writing (preferably in the MOU) regarding location, ownership and sharing of student, alumni, and donor data and records. These types of information routinely are shared among Foundation and University employees. Without a clear understanding regarding data location, ownership and sharing, risks increase for liability and/or compliance issues under the state public records law and the federal Family Educational Rights and Privacy Act (FERPA). It should be understood that records held by the University are generally subject to the state public records law.

Tax Law Compliance

Federal and state tax law create complexities with gift acceptance, payments to both UW and foundation employees (even if indirect), and tax exempt status. Both UW institutions and Foundations should seek help from legal counsel and controllers regarding any transactions that could have tax implications.

NOTE This document is substantially based on a draft document entitled “General Considerations and Discussion of Commonly-asked Questions Concerning Advancement, Fundraising, Development, and Foundations,” dated October 9, 2013, and prepared by Don Gray, former Senior Special Assistant, UW System and Chris Ashley, former Deputy General Counsel, UW System.

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