



INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

www.iiac.ca

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Dear M^e Normandeau and M^e Lebel,

Re: Bourse de Montréal Inc. – Request for comments - Amendments to Part 4 of the Rules of the Bourse: Investigation Process

The Investment Industry Association of Canada (the "IIAC") and its members would like to take this opportunity to express their views on the proposed amendments (the "Proposal") to the Rules (the "Rules") of Bourse de Montréal Inc. (the "Bourse") regarding the Investigation Process of the Regulatory Division as per Circular 074-20 (the "Circular") issued on April 30, 2020.

The IIAC is the national association representing the position of 115 IIROC-regulated dealer member firms on securities regulation, public policy and industry issues. We work to foster a vibrant, prosperous investment industry driven by strong and efficient capital markets.

We remind Bourse de Montréal Inc. that this comment letter, in its entirety, can be published on the Bourse's website.

Objectives of the Bourse and Market Integrity

The IIAC agrees with the stated objectives of the Bourse in drafting the Proposal:

...to make the investigative process of the Division more transparent and predictable to market participants, and improve efficiency during an investigation.

The IIAC and its members also fully support the Regulatory Division of the Bourse in its:

...responsibility to prohibit and counter market abuse, market manipulation, fraud and deceptive trading, and to promote the integrity of the derivatives market.

The IIAC also welcomes the following mentions that:

...the Division aims to encourage collaboration with the various stakeholders in order to foster a compliance culture.

...the Division considers that its investigation process should be fair, while being flexible where applicable.

Our members acknowledge that the Regulatory Division must obtain a thorough understanding of the facts and circumstances to make measured decisions regarding the appropriateness of enforcement activity. However, the process employed should take into consideration the significant associated costs and burdens on the firm being investigated, relative to the quality of the information likely to be obtained.

Recently, members have observed that an increasingly burdensome approach to information gathering has been taken by the Regulatory Division, including requests for multiple interviews for which investigators often seem ill-prepared and unfamiliar with the basic operation and functioning of the capital markets.

While other regulators reserve the right to conduct interviews, this authority has typically been exercised judiciously. The more recent actions by the Regulatory Division seem to represent a departure from this approach.

It is unclear how these interviews—for which members must prepare and incur significant costs—contribute to the appropriate governance and integrity of the derivatives market.

Questions from Members and Amendments to the Investigation Process

The Proposal states that “the [Regulatory] Division has received questions from Approved Participants regarding the powers of the Division during an investigation”. We believe these questions arose from recent changes in rule interpretation, application and in the investigation process of the Regulatory Division. Our members were concerned, in the recent past, about the possible inconsistencies stemming from the Regulatory Division in regard to its investigation process.

Due to a certain confusion amongst our members, the IIAC believes that the investigation process does require some amendments. Serious issues have arisen in the past, notably with the Regulatory Division’s decision to prevent Chief Compliance Officers from attending investigation interviews.

Such “misunderstandings” should not occur in the future and the investigation process, when applied, should consistently respect the rights of members. We welcome the Regulatory Division’s attempt to make the investigation process more fair, transparent, and predictable to participants.

Clarity Needed to the Circular – Information Presented for Comments

The IIAC believes that the format in which the proposed amendments are presented can cause confusion for market participants.

- **Section II. Proposed Amendments (The second “Page 2” of the Circular):**
Section II states: “Please refer to the proposed amendments described in the attached Annex 1”

versus

- Section III. Analysis, b. Objectives (The second “Page 2” of the Circular):
Section III, on Page 3 of the Circular states:
“The Division is therefore proposing to make the following amendments to the Rules.”
and goes on to mention that Article 4.2 “...is currently a “reserved” slot of the Rules and the Division proposes to add the following provisions: ...”

The IIAC received comments on these provisions listed on Page 3, which do not have the same wording as the Articles proposed in Annex 1. The IIAC believes the format and information presented in the Circular to be confusing as some members commented on what we believe may have been “additional information” provided on Page 3 and not the actual proposed provisions.

We decided to include the comments received regarding Page 3 of the Circular below as they give further insight into the members’ views on the Proposal and, to a certain extent, diverge from what we believe to be the actual proposed amendments to the Rules which are included under Annex 1.

The comments relating to Annex 1 will be presented further below as well as the differences between the proposed wording given in Annex 1, and the Regulatory Division’s explanations regarding Annex 1, as outlined in Section III on Page 3.

<p style="text-align: center;">INDUSTRY COMMENTS – SECTION III OF THE PROPOSAL, PAGE 3 (not the official proposed amendments)</p>

Wording Needing Further Clarity – Powers of the Division

Article 4.2 in the Proposal (Page 3) currently states:

- a. Powers of the Division during an investigation: This section describes how the personnel of the Division can request information during an investigation. Such requests can be made in writing or in digital form. Information or data submitted can be in a form acceptable to the Division. For example, by providing the Division access to files and records, and by providing copies of files, records or documents. The personnel of the Division can also request an interview with any person it determines may have relevant information regarding the matter under investigation. The interviews can be recorded or transcribed.

We believe that the wording needs further clarity and should be amended to the following:

- a. Powers of the Division during an investigation: This section describes how the personnel of the Division can request information during an investigation. Such requests can be made in writing **and** in digital form. Information or data submitted can be in a form acceptable to the Division. For example, by providing the Division access to files and records, and by providing copies of files, records or documents. The personnel of the Division can also request an interview with **any employee of an Approved Participant or Approved Person** it determines may have relevant information regarding the matter under investigation. The interviews can be recorded **and** transcribed.

Due to the COVID-19 outbreak, we believe that all requests for information should be made, at a minimum, in digital form. Mailroom staff may currently be overwhelmed, and a mailed request may not be processed in the allotted time.

In addition, our members believe the rule should be restated to ensure that members are guaranteed access to recordings and transcriptions upon request. This would ensure the accuracy, completeness and fairness of the materials to which the Regulatory Division may refer in the event of an enforcement proceeding.

Furthermore, only persons under the Bourse's jurisdiction should be involved in an interview. Including "any person" would therefore be inappropriate.

Wording Needing Further Clarity – Obligations Upon Receiving a Request for Information ("RFI")

Article 4.2 in the Proposal (Page 3) currently states:

- b. Obligations upon receiving a Request for Information ("RFI"): Any person who receives an RFI in the course of an investigation must adhere to the requirements set out under this section: (i) the obligation to cooperate and respond to the RFI from the Division; (ii) the obligation to provide the information within the time specified in the RFI; and (iii) the prohibition to withhold, destroy or falsify information relevant to the investigation.

We believe that the wording needs further clarity and should be amended to the following:

- b. Obligations upon receiving a Request for Information (“RFI”): **Any employee of an Approved Participant or Approved Person** who receives an RFI in the course of an investigation must adhere to the requirements set out under this section: (i) the obligation to cooperate and respond to the RFI from the Division; (ii) the obligation to provide the information within **a reasonable period of time as** specified in the RFI; and (iii) the prohibition **against withholding, destroying or falsifying** information relevant to the investigation.

Once again, we believe that only persons under the Bourse’s jurisdiction should be receiving an RFI during the course of an investigation and the time period allotted to respond to this RFI should be reasonable based on the circumstances. For example, pulling together data from a remote location (such as in “work from home” situations) may require more time than the “usual” timeframe for such a request.

Also, the Regulatory Division should send a copy of the RFI to the Chief Compliance Officer of the firm.

Wording Needing Further Clarity – Other Provisions

Article 4.2 in the Proposal (Page 3) currently states:

- c. Other provisions: The Rules also provide for the following:
 - (i) The right to have counsel’s assistance during an investigation and/or a representative of the Approved Participant (such as the Chief Compliance Officer or a designated compliance personnel). The presence of counsel or a representative of the Approved Participant at an interview conducted by the personnel of the Regulatory Division must not cause prejudice to the conduct of the investigation;

We believe that the above wording needs further clarity and should be amended to the following:

- c. Other provisions: The Rules also provide for the following:
 - (i) **An Approved Participant, any employee of an Approved Participant or any Approved Person shall have** the right to **legal assistance and representation** during an investigation **and any subsequent disciplinary proceedings. Any employee of an Approved Participant or any Approved Person shall also have**

the right to have a representative of the Approved Participant (such as the Chief Compliance Officer **or designated** compliance personnel) **attend any interview conducted under Section 4.2(a).**

**INDUSTRY COMMENTS – ANNEX 1
(official proposed amendments)**

As explained above, you will find below the industry’s comments regarding Annex 1 of the Circular.

Including Article 4.1 in Annex 1

Since the Regulatory Division is proposing to amend the title of Article 4.1 from “Obligation to Respond to Inspection” to “Obligation to Respond” and to therefore include Investigations and Enforcement in the “Obligation to Respond”, we believe Article 4.1 should have been included in the Circular for proper review by industry participants.

In order to provide comments on Article 4.1, we are including excerpts below:

Article 4.1 Obligation to Respond to Inspection

Approved Participants, their employees, and Approved Persons must comply with the obligation to provide information as set forth in this Chapter.

- (a) Upon the request of the Regulatory Division or of one of its representatives, such Persons must provide without delay all information related to their business, Trades, positions or conduct as well as to the identity, business, Trades or positions of any of their customers and employees and customers of Persons for whom they provide account maintenance services. To this end, these Persons must submit and give to the Regulatory Division access to any records, registers, data, data bases, files, documents, papers and information for examination, and allow the Regulatory Division or its representative to obtain a copy thereof on demand.

Since the Regulatory Division did not include Article 4.1 in Annex 1 of the Circular, we believe that the section above will remain as currently drafted, only mentioning examinations. We agree with the paragraph above.

Article 4.1, which is not included in Circular 074-20, continues:

- (b) For the purposes of any investigation or examination, the Regulatory Division or its representative may obtain such information from any source whatsoever, including any of the customers of any Approved Participants.

Since the Regulatory Division did not include Article 4.1 in Annex 1 of the Circular, we believe that the section above will remain as currently drafted. We believe that “may obtain such information” refers to the information listed in the prior paragraph. If so, the Approved Participant “must provide without delay all information related to their business, Trades, positions or conduct as well as to the identity, business, Trades or positions of any of their customers and employees and customers of Persons for whom they provide account maintenance services”. We find the wording to be quite different than the wording proposed by the Regulatory Division in regard to Article 4.2 in its current proposal. The wording in the current proposal is so general that it may give free access to the Regulatory Division to information outside the scope of an investigation.

Wording Needing Further Clarity – Article 4.2 Conducting an Investigation

Article 4.2 in the Proposal (Annex 1) currently states:

- (b) In the course of an investigation, the personnel of the Regulatory Division may request, in writing or otherwise, from an Approved Participant, an Approved Person and any other person where authorized under the Rules or by law, to produce any document or information that the personnel of the Regulatory Division deems relevant to the investigation.

We believe that the wording needs further clarity and should be amended to the following:

- (b) In the course of an investigation, the personnel of the Regulatory Division may request, in writing **and in digital form**, from an Approved Participant, an Approved Person and any other person where authorized under the Rules or by law, to produce any document or information that the personnel of the Regulatory Division deems relevant to the investigation. **A copy of the request must be sent to the Chief Compliance Officer. In cases where the Approved Participant does not deem the document or information requested to be relevant, the Regulatory Division will provide written justification for its request.**

As previously mentioned in this comment letter, due to the COVID-19 outbreak, we believe that all requests for information should be made, at a minimum, in digital form. Mailroom staff may currently be overwhelmed, and a mailed request may not be processed in the allotted time. Furthermore, employees working remotely have access to email, not to physical documents that may be delivered to the office.

We believe that the Chief Compliance Officer must be made aware of all requests and should therefore be receiving a copy of any requests the Regulatory Division makes to the firm.

We also strongly believe that the Regulatory Division should, in cases where the Approved Participant does not deem the document or information requested to be relevant to an investigation, provide written justification for its request. We believe this would make the process more transparent to all market participants. Such justification should also confirm the Regulatory Division's role in protecting market integrity.

Article 4.2 in the Proposal (Annex 1) currently states:

- (c) Without limiting the generality of paragraph (b) and Article 4.1, any person who receives a request pursuant to paragraph (c) shall:
 - (i) comply with the request within the time prescribed therein;

We believe that the wording needs further clarity and needs to consider current working circumstances and should therefore be amended to the following:

- (c) Without limiting the generality of paragraph (b) and Article 4.1, any person who receives a request pursuant to paragraph (c) shall:
 - (i) comply with the request within the time prescribed therein **which will be based on current conditions and should be deemed reasonable by the Approved Participant;**

Once again, work conditions have changed drastically since the beginning of 2020. Approved Participants may require a longer period of time to gather the relevant information due to remote working conditions.

Also, we believe that a copy of all requests should be sent to the Chief Compliance Officer of the firm.

Article 4.2 in the Proposal (Annex 1) continues with:

- (ii) give free access to and provide any records, registers, data, databases, files, documents, papers and information, in his possession or under his control, that the personnel of the Regulatory Division may require, regardless of the nature of the medium and the form in which such information, register, data, file, documents or exhibit can be accessed;

We strongly agree with the part above that has been underlined. Members recall that in the recent past, the Regulatory Division has made requests for some information that was not under the control of Approved Participants, such as the client information surrounding “give-up” transactions where data can be extremely sensitive.

We would like to reiterate that when the Regulatory Division is seeking end-client information in give-up transactions, it should request this type of information from the firm obtaining the “give-up”, since the client belongs to that firm, and not from the firm executing the “give-up”. Requesting the client information from the executing firm may lead to a breach of privacy policies and procedures.

Also, we disagree with the mention of “free access”. Approved participants should provide information and documents requested in order for the Regulatory Division to conduct an investigation. However, the term “free access” implies that the Regulatory Division should be allowed to access an Approved Participant’s systems and to access any information stored on such systems, whether related to an investigation or not. We strongly disagree with this and ask that the sentence be reworded to the following:

- (ii) **provide** any records, registers, data, databases, files, documents, papers and information, **in his/her possession or under his/her control**, that the personnel of the Regulatory Division may require, regardless of the nature of the medium and the form in which such information, register, data, file, documents or exhibit can be accessed. **The Approved Participant may also provide access to the requested documents or information. In cases where the Approved Participant does not deem the document or information requested to be relevant to the investigation, the Regulatory Division will provide written justification for its request;**

As mentioned above, we believe that the Regulatory Division should provide written justification to the Approved Participant for its request, in cases where the Approved Participant does not deem the document or information requested to be relevant to an investigation. We believe this would make the process more transparent to all market participants. As previously mentioned, such written justification should also confirm the Regulatory Division’s role in protecting market integrity.

Article 4.2 in the Proposal (Annex 1) continues with the following:

- (iii) provide copies of files and documents referred to in paragraph (c)(ii), in the manner and form required by personnel of the Regulatory Division, including in recorded form or electronically;

Once again, we must stress that the current working conditions due to the COVID-19 outbreak make it easier to process requests when they are submitted electronically to our members. It is also easier to provide information electronically. The Regulatory Division should have taken this fact into consideration when drafting the Proposal.

Article 4.2 in the Proposal (Annex 1) continues:

- (iv) appear in person for an interview with the personnel of the Regulatory Division, or by any other means determined by the Regulatory Division, to answer questions from the personnel of the Regulatory Division. This interview may be transcribed or recorded electronically, on audiotape or videotape, as determined by the personnel of the Regulatory Division;

We believe that the wording needs further clarity and should be amended to the following:

- (iv) appear in person **or electronically (such as by videoconference)** for an interview with the personnel of the Regulatory Division, or by any other means determined by the Regulatory Division, to answer questions from the personnel of the Regulatory Division. This interview may be transcribed **and** recorded electronically, on audiotape or videotape, as determined by the personnel of the Regulatory Division;

Due to the COVID-19 outbreak, we believe that in-person interviews may be difficult to perform for the foreseeable future. We believe that interviews conducted electronically, such as by using videoconferencing technology, may be warranted and also much less expensive to conduct. We believe that interviews should be recorded **and** transcribed to provide for a proper audit trail. Approved Participants should have access to the recordings and transcriptions. This may be needed if the file is escalated to higher authorities for further investigation.

Article 4.2 in the Proposal (Annex 1) continues with:

- (v) cooperate fully with the personnel of the Regulatory Division conducting the investigation. The Approved Participant is responsible for ensuring that its Approved Persons, employees, partners, directors, officers and clients cooperate fully with the personnel of the Regulatory Division and comply with any request received in the course of an investigation;

We firmly believe that the Approved Participant cannot be held responsible if its clients refuse to cooperate with the Regulatory Division. The Approved Participant has no control over its clients in this case. Furthermore, we believe that any request should be justified in writing by the Regulatory Division if an Approved Participant does not believe the request to be reasonable or justifiable. Creating a dialogue in this way would have the effect of achieving the stated goals of the Regulatory Division for greater transparency and fairness for industry participants.

Therefore, we believe the paragraph should be amended to read:

- (v) cooperate fully with the personnel of the Regulatory Division conducting the investigation. The Approved Participant is responsible for ensuring that its Approved Persons, employees, partners, directors **and** officers cooperate fully with the personnel of the Regulatory Division and comply with any request received in the course of an investigation. **Such requests will be justified in writing if the Approved Participant submits a request to the Regulatory Division.**

Article 4.2 in the Proposal (Annex 1) goes on with paragraph (d). We believe the paragraph includes an error. The Regulatory Division should review the portion of the sentence as underlined below:

- (d) A person whom the personnel of the Regulatory Division has informed of the conduct of an investigation shall not conceal or destroy any information, record, data, file, document, exhibit or **object thing** that contains information that may be useful to the investigation, or request or encourage another person to do so.

Article 4.2 in the Proposal (Annex 1) continues:

- (e) Any person responding to a request in the course of an investigation pursuant to this Article may be assisted by counsel.

We believe that the wording is incomplete if compared to the explanations provided on Page 3 of the Circular. It requires further clarity and should be amended to the following:

- (e) Any person responding to a request in the course of an investigation pursuant to this Article, **and during any subsequent disciplinary proceedings,** may be assisted by counsel **and/or by representatives of the Approved Participant.**

A Chief Compliance Officer, having the responsibility to oversee compliance, must have the right to attend interviews and to be involved in any subsequent disciplinary proceedings. Any other representative of an Approved Participant should also be allowed to attend. The paragraph should be amended to reflect this and to be consistent with the explanations provided by the Regulatory Division on Page 3 of the Circular.

Article 4.2 in the Proposal (Annex 1) continues with the following regarding confidentiality of requests:

- (f) All requests, documents and information pertaining to an investigation shall be treated as confidential and any person who receives a request under this Article, who participate or assist in the course of an investigation, shall not disclose any information in relation to the investigation except:
 - (i) to counsel providing assistance in the course of the investigation;
 - (ii) to a person responsible for compliance or supervision with the Approved Participant;
 - (iii) to a representative of the Approved Participant for purposes of supervision or to inform a partner, director or officer of the Approved Participant;
 - (iv) as required by law; or
 - (v) where the Regulatory Division provides a written authorization to disclose following a request made.

We believe the Circular contains a grammatical error and the wording should be amended to the following:

- (f) All requests, documents and information pertaining to an investigation shall be treated as confidential and any person who receives a request under this Article, who **participates** or **assists** in the course of an investigation...

Furthermore, we agree that investigations should mostly remain confidential. However, requests made to an Approved Participant which are deemed unfair, unjustifiable, unreasonable or which demonstrate a lack of knowledge from a regulator, should not have to remain confidential.

In order for the investigation process to be “more transparent and predictable to market participants” as well as “fair, while being flexible where applicable” as stated in the Circular, the Approved Participant should be able to receive from the Regulatory Division, a written justification for a request deemed unfair, unjustifiable or unreasonable.

If, after receiving a written justification from the Regulatory Division, the Approved Participant still believes that the request is unfair, unjustifiable, unreasonable or exhibits a serious lack of knowledge from the regulator, the Approved Participant must be able to discuss some general information concerning the investigation with their IIAC representative, and be able to share the complete information with the Autorité des marchés financiers as well as with any organization that is a gatekeeper for investor protection and/or market integrity. This would ensure the stated goals of the Regulatory Division of transparency and fairness to market participants, while proving the Regulatory Division's role of maintaining market integrity.

Crucially, members need to be able to count on a regulator that is educated in the underlying complexities specific to their industry. If there is a perception from members that this is lacking, this information must, for the benefit of the market and all participants, be conveyed to the proper gatekeepers and must not remain confidential. Transparency is essential.

Ensuring the Division and its representatives are accountable and well-informed is also relevant with respect to Article 4.6 (not included in the Circular) which states that "the costs and expenses paid or incurred by the Regulatory Division in connection with any examination or investigation ... and all proceedings relating thereto or steps taken as a result thereof shall be a debt owed to the Bourse by the Approved Participant or Approved Person who must pay the amount thereof upon demand".

Article 4.2 in the Proposal (Annex 1) continues:

(g) Failure to comply with any provision of this Article shall be deemed a violation of Article 4.1.

We believe that an Approved Participant's intention must be assessed in order to conclude a violation has occurred. If the Approved Participant is intentionally violating provisions in order to cover up, withhold, destroy or falsify information relevant to the investigation, the Regulatory Division must intervene. However, if the Approved Participant is "failing to comply" with any provision, and such failure can be explained and is justified, it should not be deemed a violation. For example, if the Regulatory Division sends a Request for Information by mail during the current "work from home" situation, it may be normal that an Approved Participant did not receive the request and therefore did not comply within the allotted time.

As stated above, the current situation where employees are working from home or remotely, may cause delays in the completion of tasks: employees may become ill, or may have to take care of children, spouses, parents or other family members. The Regulatory Division should be mindful of this fact when assessing potential violations.

Furthermore, the industry requires more information regarding the impact of a “failure to comply” in order to properly comment on item (g). We believe that this needs to be better explained, either within the provision itself or with reference to another section in the Rules.

<p style="text-align: center;">DISCREPANCIES – PAGE 3 AND ANNEX 1 (unofficial and official proposed amendments)</p>

As previously stated, we believe the format of this Circular creates confusion. We have noticed some important discrepancies between the official proposed amendments in Annex 1 and the explanations provided by the Regulatory Division relating to these amendments (Page 3 of the Circular).

The explanations on Page 3 refer to “any person who receives an RFI” while Annex 1, if we are understanding it correctly, refers to the Regulatory Division requesting documents or information from an Approved Participant, an Approved Person or “any other person where authorized under the Rules or by law...”. As mentioned above, we do not believe that the Regulatory Division could request information from “any person”.

The explanations on Page 3 provide for the right to have a representative of the Approved Participant, “such as the Chief Compliance Officer or a designated compliance personnel”, attend an interview. However, we note this is not included in the official proposed amendments in Annex 1. Also, if the mention is to be included in Article 4.2, it should be amended to read: “such as the Chief Compliance Officer or designated compliance personnel”.

Conclusion

The IIAC and its members generally agree with the Proposal and strongly agree with the Regulatory Division’s stated objective to make “the investigative process of the Division more transparent and predictable to market participants and improve efficiency during an investigation”.

We do, however, believe that the Proposal should have a different format and clearer wording to avoid confusion, as detailed in our comments above. We also believe that important information is missing from the Circular – information that would allow Approved Participants to provide *complete* comments on the matter.

Many amendments have been suggested in this letter. We wish to reiterate that the Proposal should be amended to clearly state that representatives of the Approved Participant can be involved in the investigation process (such as attending an interview) and in any subsequent disciplinary proceedings.

Furthermore, we hope that Requests for Information (RFI) will be sent only when warranted in order to preserve market integrity, and that a clear process will be adhered to in order to make the investigative process more efficient. **When an Approved Participant deems an RFI to be unfair, unjustifiable, unreasonable or displaying a lack of knowledge, we strongly believe the Regulatory Division should justify its request in writing to the Approved Participant.** Such transparency would be welcomed by industry participants.

If such written justification provided by the Regulatory Division is not deemed reasonable, the Approved Participant should have the right to discuss general information contained in the RFI with its IIAC representative, and to share the complete details of the request with the Autorité des marchés financiers or any other organization that acts as a gatekeeper for investors, markets and the industry. Sharing information in this way ensures that the process remains fair and transparent for investors and market participants.

Furthermore, **we believe that our members should have access to recordings and transcriptions of all interviews to ensure the accuracy, completeness, and fairness of the materials.** This access would also increase the transparency of the enforcement process.

Lastly, we believe that consistency in rule interpretation, application and investigation process is the key to fostering a vibrant, prosperous investment industry driven by strong and efficient capital markets.

Please note that the IIAC and its members, as always, remain available for further consultations.

Yours sincerely,



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