MARASHLIAN & DONAHUE, LLC
THE COMMLAW GROUP

FCC Regulatory Compliance Training

October 3, 2013

Federal Telecom Laws and Regulations

- Communications Act of 1934
  - Amended by the Telecommunications Act of 1996

- FCC Regulations
  - Rulemaking
    - Notice of Inquiry
    - Notice of Proposed Rulemaking
  - Important FCC releases
    - Public Notices
    - Declaratory Rulings
    - Orders
    - Notices of Apparent Liability
    - Forfeiture Orders

Federal Definitions and Regulatory Classifications

- Telecommunications
  - "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

- Telecommunications Service
  - "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.“

Federal Definitions and Regulatory Classifications

- Common Carrier
  - "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy…"
- Telecommunications Carrier
  - "any provider of telecommunications services…"
- The two are effectively synonymous = regulated telecommunications service provider

Federal Definitions and Regulatory Classifications

- Enhanced Services
  - “services, offered over common carrier transmission facilities used in interstate communications, which 1) employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; 2) provide the subscriber additional, different, or restructured information; or 3) involve subscriber interaction with stored information.”

- Information Services
  - “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service”

Federal Definitions and Regulatory Classifications

- Long standing FCC policy of not regulating information or enhanced services
  - FCC also preempted state regulation of information services
- Title I ancillary jurisdiction
  - FCC can impose regulations on information/enhanced services if necessary
  - Examples:
    - Adjunct-to-basic and telecommunications management exception (caller id, call forwarding)
    - Interconnected VoIP

Federal Definitions and Regulatory Classifications

- Interconnected VoIP
  - "a service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network"
- Non-interconnected VoIP
  - "a service that (i) enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and (ii) requires Internet protocol compatible customer premises equipment"
  - Does not include any service that is an interconnected VoIP service

Federal Definitions and Regulatory Classifications

- Definitions are very broad
  - Many types of services can be considered a regulated telecommunications service
    - Not limited to voice services (can include data services)
    - Use of VoIP "in the middle" covered
  - Resellers can be considered telecommunications carriers
    - No equipment or facilities needed
  - Level of regulation depends on which definitions apply

Federal vs. State Jurisdiction

- Interstate vs. Intrastate Telecommunications Services
  - Typically determined using an end-to-end analysis (origination and termination)

- FCC has jurisdiction over interstate and international telecommunications services

- State Public Utilities Commissions (PUCs)
  - Jurisdiction over intrastate telecommunications services
  - Providers required to obtain a state authorization or "certificate of public convenience and necessity" (CPCN)
  - State compliance, reporting, filing and contribution requirements apply

- Reality is that most carriers are subject to combined FCC and state telecommunications regulatory jurisdiction

Overview of FCC Compliance (non-filing) Obligations

- Domestic and International Section 214 Authorization
  - Discontinuance of service under Section 214 also requires application
- D.C. Registered Agent
- Communications Assistance for Law Enforcement Act (CALEA)
- Customer Proprietary Network Information (CPNI)
- FCC "Price List"
  - FCC rules require non-dominant (interexchange) telecommunications carriers to make available to the public all rates, terms and conditions for all interstate and international services in at least one location during regular business hours
  - If the company has a website, such information must be available there in an easily accessible manner, and updated regularly
  - Must be submitted to FCC upon request

Overview of FCC Compliance (non-filing) Obligations

- Provide "readily achievable" access by persons with disabilities
  - "A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable"
- Retention of Telephone Toll Records
  - Minimum of 18 months
  - Basically, any records necessary to reconstruct a bill
  - Effective retention period will be longer due to USF requirements (5 years)
- Recording of telephone conversations between a carrier and public not allowed unless all parties consent, or a notification recorded as part of call
- Required to pass "Calling Party Information"
  - Spoofing of caller ID with intent to defraud is prohibited

Overview of FCC Compliance (non-filing) Obligations

- Truth-in-Billing
  - Bills must be clearly organized and must:
    - Display the name of the service provider associated with each charge
    - Separate charges by service provider if there is more than one
    - Identify any change in service provider, including charges from any new provider
  - Charges on bills must be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered
    - Affects how regulatory recovery/pass-through charges can be billed
  - Bills must contain clear and conspicuous disclosure of any information that the subscriber may need to make inquiries about, or contest, charges on the bill

Overview of FCC Compliance (non-filing) Obligations

- Truth-in-Advertising
  - FCC and FTC jointly adopted policy for telecommunications services; policy based on FTC Act
    - Recent penalties against prepaid calling card providers (totaling over $25 million) based in part on violations of "truth-in-advertising" principles
  - General principles:
    - Advertising must not be misleading; and
    - Advertisers must be able to substantiate all objective product claims.
  - Factors considered in determining whether advertising is misleading
    - Net Impression (even if truthful, net effect can mislead)
    - Material Information disclosed clearly and conspicuously
    - Limitations must be disclosed clearly and conspicuously
  - Factors considered in determining whether necessary information has been disclosed "clearly and conspicuously"
    - Prominence, proximity and placement of disclosures
    - Absence of distracting elements; and
    - Clarity and understandability of disclosures

Section 214 Authorization and Compliance

- Section 214 of the Act
  - Requires any entity seeking to "construct a new line, or acquire or operate any line, or engage in transmission over or by means of such additional line for the provision of common carrier communications services…" to obtain authorization prior to providing service
    - All entities automatically possess "domestic" 214 authorization to provide domestic interstate services without having to apply
  - Also requires applications for discontinuance of service
- Separate application process required for "international" 214 authorization to provide international telecommunications services originating or terminating in the U.S.

Section 214 Authorization and Compliance

- Assignments and Transfers of Control
  - FCC authorization required prior to closing on any transaction in which direct or indirect control over the Section 214 authorization would be assigned or transferred
    - Assignment
      - Section 214 authorization of one company is assigned to another
      - Sale of customer base (or portion thereof) also an assignment
    - Transfer of Control
      - Section 214 authorization retained by the same company, but there is a change to the entity/entities that own/control the company
      - Change from less than 50% ownership to 50% or more ownership (and vice versa) is always considered a transfer of control
      - In all other situations, whether the interest being transferred is controlling must be determined on a case-by-case
    - Substantive (not pro forma) transactions require FCC approval prior to consummation
      - Separate applications must be filed to transfer/assign domestic and international authorization

Section 214 Authorization and Compliance

- Pro Forma Transactions
  - Transfers or assignments that do not result in a change to the actual controlling party
    - Do not require prior FCC approval, but must notify FCC within 30 days of consummation
  - Examples of pro forma transactions
    - Transfer of Control: Parent company transfers ownership of wholly owned subsidiary (the 214 authorization holder) to another wholly owned subsidiary
    - Assignment: Operating company (214 authorization holder) creates a new wholly owned subsidiary and all assets (and the 214 authorization) are assigned to the new subsidiary, which becomes the new operating company
  - FCC rules list transactions that are presumptively pro forma; other transactions must be evaluated on a case-by-case basis to determine whether pro forma or substantive

Section 214 Authorization and Compliance

– Other changes/transactions for which notifications are required

- Company becomes affiliated with a foreign carrier (*e.g.*, through a common parent company or common indirect ownership), or acquires an interest in a foreign carrier
  - Notification within 30 days of the transaction in certain cases
  - Otherwise, 45 day prior notification required

- If there is a substantive change to the company's operations, a notification should be submitted to the Executive Branch Agencies (DOJ, DHS, FBI, DoD) with respect to Letter of Assurances.

- File notification to update the company's international Section 214 authorization if any of the following company information changes:
  - name; address; contact person; DBA names

Overview of FCC Filing and Reporting Obligations

- Registration filing
  - FCC Form 499-A registration
    - Due date: prior to the date a company begins providing services and within a week of changes to information
    - Required of all telecommunications providers
    - Used to obtain a Filer 499 ID
    - Serves as registration with the various federal funding programs (USF, TRS, LNP, NANP)
    - Designates the company's D.C. Registered Agent
  - FCC Registration Number ("FRN") required to for many FCC filings
    - FRN obtained and updated online using the Commission Registration System (CORES); different from Filer 499 ID

Overview of FCC Filing and Reporting Obligations

- FCC Form 499-Q
  - Due dates: February 1st, May 1st, August 1st and November 1st
    - Revisions due within 45 days of original deadline
  - Reports historical (past quarter) and projected revenue (next quarter) revenue for USF contribution determination
  - Form 499-Q not required for companies qualifying as "de minimis" (annual USF liability less than $10,000)
  - Must keep supporting documentation for 5 years

- FCC Form 499-A
  - Due date: April 1st
    - Revisions due by following March 31st
  - Reports prior year telecommunications revenue
  - Applies even if a company is considered De Minimis
  - Revenue used as a "true-up" for USF contributions
  - Revenue also utilized to determine contributions to other federal funds (LNPA Fund, TRS Fund, NANPA Fund, and FCC Regulatory Fees)
  - Must keep supporting documentation for 5 years

Overview of FCC Filing and Reporting Obligations

- CALEA Systems Security and Integrity Plan (SSI Plan)
  - Due date: Prior to the start of service or when SSI Plan information changes.
  - Written policies a carrier uses to comply with the procedural requirements of CALEA, including ensuring proper authorization is received, recordkeeping, and providing necessary contacts
  - (CALEA requirements covered in more detail in separate slides)

- CPNI Certification and Statement
  - Due date: March 1st
  - Provider must certify compliance with CPNI rules and provide statement of how its CPNI policies ensure compliance
  - Filing must include an explanation of any actions taken against data brokers and a summary of all customer complaints received in the previous year concerning the unauthorized release of CPNI.

Overview of FCC Filing and Reporting Obligations

- Certification of Rate Integration and Geographic Averaging
  - Due date: May 1st.
  - The Commission requires interexchange (long distance) carriers certify compliance with rate integration and geographic averaging requirements
  - Essentially, requires carriers to use the same rate-making methodology when setting call rates for all points in the United States (which includes Alaska, Hawaii and all five U.S. territories

- International Telecommunications Traffic Report
  - Due date: July 31st.
  - Reports consolidated data on the number of international calls, minutes, and revenue for international services provided from the U.S. during the previous calendar year
  - Report must also include a checklist which includes all international points to which calls were placed

Overview of FCC Filing and Reporting Obligations

- FCC Form 159 - FCC Regulatory Fees
  - Due date: Changes annually, but typically in August or September.
  - Telecommunications service providers must make annual contributions to FCC Regulatory Fees by filing an FCC Form 159-W and Form 159, to fund FCC operations
  - FCC Regulatory Fees are not invoiced directly; providers need to remit payment independently via credit card, check, ACH or wire transfer
  - Required to use the FCC's Fee Filer System in order to generate FCC Regulatory Fee bills and accompanying Forms 159
  - Late payment of carries an automatic penalty of 25% of the amount owed

- Section 255 Disability Agent
  - Due date: At time of providing service and when information changes
  - Telecommunications service providers are required to identify contact information for one or more agents to handle formal and informal customer complaints regarding accessibility by persons with disabilities

FCC Contribution Obligations

- Telecommunications carriers are required to contribute to the Telecommunications Relay Services ("TRS") Fund, Local Number Portability Administration ("LNPA") Fund, North American Numbering Plan Administration ("NANPA") Fund, FCC Regulatory Fees, and the Universal Service Fund ("USF").

- All contribution obligations ultimately based upon revenue reported on the FCC Form 499-A and Form 499-Q

- Timely payment of contributions critical to avoid potentially severe penalties

FCC Contribution Obligations

- TRS Fund
  - Based on interstate and international end-user telecommunications revenue
    - New for 2011 and 2012, also applies to revenue from "non-interconnected VoIP" services (as defined earlier)
    - Non-interconnected VoIP revenue must be segregated out from regular telecommunications revenue.
  - Current contribution factor (1.058% in 2011, but adjusted annually)
  - Contributions invoiced annually if the total owed is $1,200 (or less) or monthly
  - Invoices are emailed directly to the company billing contact listed on Form 499-A and payments made through online portal
  - Current administrator: Rolka Loube Saltzer Associates, LLC ("RLSA")

FCC Contribution Obligations

- LNPA Fund
  - Based on intrastate, interstate and international end-user telecom revenue
  - Contribution amount varies by region
    - Based upon calculated share of actual costs incurred in each region
  - Monthly/quarterly paper invoices
  - Current administrator: Neustar

- NANPA Fund
  - Based on intrastate, interstate and international end-user telecom revenue
  - Current contribution factor (0.0022% in 2011, but adjusted annually)
  - Annual invoices
  - Current administrator Welch LLP

FCC Contribution Obligations

- FCC Regulatory Fees
  - Based on interstate and international end-user telecom revenue
  - Current contribution factor (0.361% in 2011, but adjusted annually)
  - Typically due in August or September (actual date varies annually)
  - No invoices sent, must independently remit payment
  - Use FCC Fee Filer System in order to generate FCC Regulatory Fee bills
  - Late payment of carries an automatic penalty of 25%

Federal Universal Service Fund Compliance

- USF Basics
  - Typically based on interstate and international end-user telecom revenue
  - Current contribution factor (17.4% in Q2 2012, adjusted quarterly)
  - Invoices sent monthly (unless company is de minimis)
    - Invoices based upon projected revenue for the quarter, as reported on the prior quarter's Form 499-Q
  - Current administrator: Universal Service Administrative Company (USAC)

Federal Universal Service Fund Compliance

- Limited International Revenue Exception (LIRE)
  - If a carrier's international revenue is 88% or more of its total interstate and international revenue, the carrier is only assessed USF contributions on its interstate revenue
    - In other words, LIRE applies if interstate revenue is 12% or less of total interstate and international revenue
  - Example 1 (does not qualify for LIRE):
    - $100 total interstate and international end-user telecom revenue
    - $20 of the total is interstate
    - $80 of the total is international
    - Since interstate revenue is 20%, LIRE does not apply
    - USF applies to the entire $100 (both interstate and international)
  - Example 2 (qualify for LIRE):
    - $100 total interstate and international end-user telecom revenue
    - $11 of the total is interstate
    - $89 of the total is international
    - Since interstate revenue is 11%, LIRE applies
    - USF only applies to the interstate revenue of $11
  - Note: LIRE calculations only apply to determining direct contribution obligations to the USF; indirect USF pass-through charges assessed by an underlying provider are determined based upon the underlying provider's USF obligations

Federal Universal Service Fund Compliance

- De Minimis Exception
  - Providers are not required to contribute directly to USF for a given year if calculated assessment for that year is less than $10,000
    - De minimis determination is calculated using an "estimation factor", which is adjusted periodically by the FCC
    - Current estimation factor: 14.4%
    - LIRE is taken into account when determining de minimis qualification
    - Qualification can change on a quarterly basis
  - De minimis qualification is determined on a quarterly basis prior to each Form 499-Q filing
    - Determination is made on a projected revenue basis
      - For example, May 1st Form 499-Q filing reports historical revenue for Q1 and projected revenue for Q3
      - Projected Q3 revenue is multiplied by 4 to determine estimated annual revenue
      - The USF estimation factor is applied to the estimated annual revenue to derive an estimated annual contribution amount
      - Qualify as de minimis if the estimated contribution amount is less than $10,000

Federal Universal Service Fund Compliance

- Companies must complete the "de minimis worksheet" in the Form 499-Q instructions each quarter to make determination (Keep a copy of the worksheet and all supporting documentation for at least 5 years)

- Sample de minimis calculation 1 (no LIRE):
  - May 1st Form 499-Q filing
  - Projected interstate revenue for Q3 is $25,000
  - Estimated annual revenue would be $100,000 interstate
  - Apply USF estimation factor of 14.4% to $100,000 = $14,400
  - Does not qualify as de minimis
    - Company must file May 1st Form 499-Q
    - Company will be invoiced by USAC for USF contributions in Q3
- Sample de minimis alculation 2 (LIRE):
  - May 1st Form 499-Q filing
  - Projected interstate revenue for Q3 is $2,500
  - Projected international revenue for Q3 is $22,500
  - Estimated annual revenue: $10,000 interstate; $90,000 international
  - Interstate revenue is 10%, qualifies for LIRE
  - Only interstate revenue is subject to USF
  - Apply USF estimation factor of 14.4% to $10,000 = $1,440
  - Qualifies as de minimis
    - Does not need to file May 1st Form 499-Q
    - Will not be invoiced by USAC for USF contributions in Q3

Federal Universal Service Fund Compliance

- Very few true “exemptions” from USF
  - USF program follows typical tax exemption model for resale services
    - If a reseller is not contributing directly to USF, it is then treated as an “end-user” by its underlying provider (the company the reseller is purchasing telecommunications services from) for revenue reporting purposes
      - Creates USF liability for the underlying provider
      - Underlying provider can then assess USF pass-through charges to the reseller
  - A company that contributes directly to USF is “exempt” from paying USF pass-through charges to its underlying providers
  - A company that is de minimis is “exempt” from paying USF directly to the government, but would be subject to its underlying providers’ USF pass-through charges
    - The amount of USF pass-through charges billed by an underlying provider depends on what the underlying provider ultimately pays based on its revenue reporting
    - The LIRE and de minimis exception are used to determine a company’s direct contribution to the USF program, but does not necessarily apply to determining USF pass-through charges billed by underlying providers
  - USF “Exemption Certificates” are used by underlying providers to determine a reseller’s USF contributor status
    - USF contributor status is also verified through FCC’s Form 499 database

Federal Universal Service Fund Compliance

- Form 499 Revenue Reporting
  - Generally, a two step process

- Step 1 (category)
  - Assign revenue to specific reporting categories (represented by different Line numbers on the Forms 499)
    - Telecommunications services, non-telecommunications services or non-interconnected VoIP?
    - If telecommunications services, determine which type of service (Line) to report under
    - If revenue is for a "bundled" product, and attributed to both a telecommunications and non-telecommunications service, follow rules for reporting "bundled" revenue

Federal Universal Service Fund Compliance

- Step 2 (jurisdiction)
  - Apportion revenue between intrastate, interstate and international jurisdiction
  - For long distance usage-based revenue, jurisdiction can be directly determined based on origination and termination points of a call
  - For revenue based on monthly recurring fixed fee, can use a reasonable estimation methodology (which must be justifiable or supported by specific documentation)
    - Example: Apportion revenue based upon weighted (to account for differences in call rates) percentages of intrastate, interstate and international usage
    - $10 monthly plan; 50 minutes interstate usage, 25 minutes international; international rates are double those of interstate rates so the weighted allocation would be 50/50; report $5 interstate, $5 international

Federal Universal Service Fund Compliance

- Reporting revenue from “bundled” services
  - Some service plans may include both a telecommunications service (subject to USF) and non-telecommunications service (not-subject to USF) component offered at a fee lower than if the two components were purchased separately
  - Can report in two ways:
    - Report the entire bundled fee as subject to USF
    - Report the undiscounted fee for the telecommunications service component if it were purchased separate
      - Example: Internet fee = $60, Phone service = $50; purchased together the discounted fee is $100. Telecommunications service revenue can either be reported as $50 or $100.

Federal Universal Service Fund Compliance

- Non-interconnected VoIP
  - New classification of service recently created by Congress
    - "a service that (i) enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and (ii) requires Internet protocol compatible customer premises equipment"
  - Potentially encompasses "one-way" VoIP services such as Skype & Google Voice which may only be used for outbound calls
    - Contrast with "interconnected VoIP" services (subject to all the federal assessments), which have the capability to place calls to and receive calls from the PSTN
  - Currently only subject to TRS Fund contribution requirements
    - Any associated revenue must be segregated so it does not get included in the contribution base for calculating other assessments

Federal Universal Service Fund Compliance

- USF Program Undergoing Complete Overhaul

- FCC released Further Notice of Proposed Rulemaking ("FNPRM") April 30, 2012
  - Proposes substantial reforms to USF contribution methodology
  - The final rules and effective dates are still to be determined
    - Rules will be shaped by public comments

- Some proposals under consideration include:
  - Adding to the types of services and service providers subject to USF (*e.g.*, one-way VoIP, broadband Internet, etc.)
  - Eliminating exceptions like LIRE and raising the de minimis threshold to $50,000
  - Assessing USF contributions based on different methodologies, such as the number of connections or phone numbers in use
  - Applying USF to all revenue, intrastate, interstate and international

Communications Assistance for Law Enforcement Act (CALEA) - Assistance Capability Requirements

- Generally, CALEA requires all telecommunications carriers with equipment or services that provide a subscriber the ability to originate, terminate or direct communications must be capable of:
  - allowing a lawfully authorized government agency to intercept all wire and electronic communications carried to or from a subscriber of the carrier;
  - allowing such government agency to access call-identifying information reasonably available to the carrier (e.g., via "trap and trace" devices);
  - providing the information to the government off-premises unobtrusively and with minimum interference; and
  - doing so in a manner that involves minimum interference to subscribers' service and protects the privacy and security of subscribers, while at the same time protects information regarding the government's interception and access to information.

Communications Assistance for Law Enforcement Act (CALEA) - Assistance Capability Requirements

– Resellers are subject to the same requirements with respect to any equipment (including soft-switches) that can originate, terminate or direct (route) communications

– "Call-identifying information" is defined as "dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier."

Communications Assistance for Law Enforcement Act (CALEA) - Assistance Capability Requirements

- Typically, carriers must be able to provide access to the following types of signaling information:
  - content of subject-initiated conference calls (including the content of parties on hold);
  - party hold, join, drop on conference calls (i.e., identify the active parties of a multiparty call);
  - subject-initiated dialing and signaling information (i.e., provide access to all dialing and signaling information available from a subject including a subject's use of features such as flash-hook and other feature keys);
  - in-band and out-of-band signaling (i.e., notification that a line is ringing or busy);
  - timing information (to correlate call identifying information with call content of an interception); and
  - dialed digit extraction, with a toggle feature that can activate/deactivate this capability (i.e., provide digits dialed by a subject after the initial call "cut-through" is completed to another carrier).

Communications Assistance for Law Enforcement Act (CALEA) - Procedural Requirements (Systems Security and Integrity)

- CALEA Systems Security and Integrity Plan ("SSI Plan")
  - Written procedures to ensure that any interception of communications or access to call-identifying information is only activated in accordance with lawful authorization and with the affirmative intervention of an individual officer or employee of the carrier
- Among other things, the SSI Plan:
  - Designates the "SSI Representative" responsible for overseeing CALEA compliance (available 24/7)
  - Defines required legal and company authorization
    - Legal authorization: typically subpoena or court order
    - Company authorization: signed authorization by the SSI Representative
  - Sets forth recordkeeping requirements and procedures
    - Records kept for minimum of 2 years
    - Legal authorization, Company authorization, Signed certification containing details of intercept/access
- Contact persons (must update if changed)
  - SSI Representative in CALEA SSI Plan
    - Eduard Romanov
  - Technical point of contact pursuant to LOA with the DOJ
    - Andres Collazos

FCC Enforcement Overview

- Letters of Inquiry
  - Data request typically used to initiate an investigation
  - Opportunity to negotiate settlement and mitigate potential liability
- Notices of Apparent Liability for Forfeiture (NALs)
  - Proposes a penalties (forfeitures) for discovered violations
  - Opportunity to negotiate settlement or reduction of proposed forfeitures
  - More difficult to negotiate at this stage
- Order of Forfeiture
  - Assesses forfeiture amount proposed in NAL
  - Typically requires remittance of full amount within set number of days
- Formal and Informal Complaints
  - Filed by third parties with the FCC
  - Can often lead to investigations and/or penalties if not properly addressed

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