

I N S I D E T H E M I N D S

International White Collar Enforcement

*Leading Lawyers on Understanding Cross-Border
Regulations, Developing Client Compliance Programs,
and Responding to Government Investigations*



ASPATORE

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The Prevalence of
International Money
Laundering Crimes and the
Best Practices to Avoid It

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Among the crimes that stretch across borders, the most frequent are the group of crimes generally under the heading of money laundering. Money laundering is the taking of proceeds of criminal activity and placing it into the financial and monetary system of the world to make it look like it has come from a legitimate source. Money laundering occurs for two principal reasons. First, the disguising of criminal proceeds as legitimate helps to conceal the underlying criminality. Second, in order to enjoy the fruits of their labors, criminals need to conceal its true source and convert it into a form that appears to be mainstream and legal. The types of offenses that regularly give rise to international money laundering are extremely varied and widespread. They include all species of fraud—accounting, bank, bankruptcy, securities and tax fraud, for example. Mail and wire fraud are often employed during the commission of other types of fraud. Bribery, racketeering, environmental, and labor offenses are also frequently committed across international borders. The proceeds of all these offenses, and most others, lead inexorably to laundering activity.

These offenses are generally prosecuted by the national and local authorities in different countries throughout the world. So you have the FBI in the United States, all of the various law enforcement agencies in the United States and their counterparts in other parts of the world, such as Scotland Yard and the major frauds office in England, and the police agencies throughout the world. Then there is Interpol, which really is not an investigative agency but the international clearinghouse for criminal investigations throughout the world. Interpol, headquartered in Lyon, France, but with offices throughout the world, acts as both a centralized intelligence repository and coordinates international police and investigative activities for its 188 member countries. Interpol personnel do not themselves catch criminals, but Interpol greatly assists police agencies through the world in doing so.

These agencies can and do work together, depending on the actual investigation underway and the historic level of cooperation between agencies involved. For example, within the English-speaking world, which includes the United States, England, Canada, and other countries that speak English, there has been excellent cooperation among the national police forces. The FBI, the Royal Canadian Mounted Police, and Scotland Yard will often help and cooperate with each other in investigations across their

respective borders. An example of the high level of cooperation between the FBI and Scotland Yard was recently seen in the Madoff Ponzi scheme case. Within days of Madoff's arrest by the FBI in the United States, Scotland Yard was acting to shut down and secure the Madoff securities operations in London. The traditional comfirt level between the FBI and Scotland Yard enabled a rapid sharing of intelligence and a willingness to act with dispatch. The apprehension and subsequent prosecution of the so-called shoe bomber, Richard Reid, in 2001 is another fine example of the high level of cooperation between U.S. and British law enforcement.

On the other hand, among countries with which the United States has had more difficult relations, the law enforcement agencies are not always cooperative in investigations. However, despite that and depending on the crime being investigated, there may be a high level of cooperation in the investigation. I had a case many years ago involving cooperation between the FBI and the federal security forces of Russia, the successor to the KGB. They cooperated in the investigation and prosecution of a person who was located in the United States, who was suspected of being a leader of Russian organized crime. You can have cooperation among police forces where you ordinarily would not expect them to cooperate with each other when it is to both of their benefits. On the other hand, you will not find cooperation between police agencies in the United States and Iran, or the United States and North Korea, for example, no matter how much it might benefit both sides.

Investigations of white collar crimes are becoming more and more prevalent. There is a widespread perception that crimes committed with a pen or computer rather than a gun have not been pursued vigorously enough in the past. That perception, together with the worldwide economic downturn precipitated by mistakes and misdeeds in the financial services sector, has intensified the investigation and prosecution of white collar offenses. The shift is such that the FBI has actually transferred 2,500 agents from terrorism to mortgage fraud.

Insider trading is the buying or selling of securities based upon knowledge of material, non-public information. Material means information that a reasonable investor would want to know in coming to a decision about whether to buy or sell a security. So if public Company A is considering

acquiring public Company B, that would be material to anyone contemplating buying or selling the stock of either Company A or B. On the other hand, if Company A is contemplating increasing its employee 401(k) contributions by \$10 a week, that is most likely immaterial to the trading public.

In the U.S., insider trading is investigated and prosecuted as securities fraud and carries penalties of up to twenty years in prison. In many other countries in the world, acting upon material, non-public information is not prohibited. For the international investor it can make for a very complicated legal landscape. There is a case right now involving an Italian citizen who resides in Switzerland and is under investigation by the United States SEC for insider trading. This individual has virtually no business contacts with the United States, other than the fact that he was involved in trading of securities listed on United States exchanges.

The SEC is increasingly reaching beyond the borders of the United States to investigate and sue people involved in what they believe is securities fraud, even though these people have no physical presence in the United States. The justification is the notion that securities markets across the world are interrelated. Acting upon material, non-public information while sitting at a computer screen in Zurich, Singapore or Moscow is seen as deleterious to the ideal of a level playing field as it would be if done in New York or Chicago. By the same token, the FBI and other U.S. law enforcement agencies are increasingly going after individuals and groups and syndicates involved in criminal activity that has its genesis outside the United States and reaches into the United States. All sorts of Internet and fraud schemes have their genesis in Third World countries and reach into developing nations, because that is where the money is. For example, the various Nigerian assets scams, where people get e-mails claiming to be from a government official or a lawyer in Nigeria saying some long-lost relative of the e-mail recipient had assets there. Eventually money must be exchanged to facilitate the transfer of assets, and of course, once the money is sent that is the last anyone hears from those people. The FBI and other law enforcement agencies are increasingly going after the people attempting to commit those types of offenses. The record of detecting the perpetrators of these types of scams and bringing them to justice is spotty, at best. Despite widespread cooperation from U.S.-based victims, official

corruption in locales such as Nigeria presents formidable obstacles to successfully identifying and prosecuting the fraudsters.

Environmental crime, ranging from illegal ocean dumping, improper disposal of used electronic components, and cross-border contamination of air, water, and soil, is also increasingly being investigated internationally, especially when there is a demonstrable effect in the United States. Plus, other Internet schemes such as pyramid or multi-level marketing (MLM) scams and phishing for identity information necessary for Internet theft, and, of course, child pornography—a major focus of U.S. law enforcement—are increasingly the subjects of international investigation since almost all are produced outside the U.S. borders. The enforcement strategy is similar to that employed in narcotics enforcement—the consumption end is targeted rather than the more difficult to find and control source of production.

Criminal antitrust violations under both the Sherman and Clayton Acts (15 U.S.C. §§ 1 et seq. (West 2009), and 15 U.S.C. §§ 12 et seq. (West 2009), respectively) are also increasing. U.S. companies with multinational operations are subject to U.S. and foreign antitrust and competition statutes. Just recently, the European Union brought and prevailed in a civil restraint of competition suit against Microsoft. Under the Obama Administration, it is expected that both civil and criminal antitrust enforcement will be stepped up. Natural targets are large U.S.-based multinationals. There are increasing efforts by U.S. investigators to go after those types of activities. Prosecutions are also becoming more prevalent under the Foreign Corrupt Practices Act (FCPA), Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1 et seq.), which was enacted in the late '80s to make it illegal for U.S. companies to pay bribes abroad for the purpose of acquiring business, especially if it involves paying bribes to foreign officials. The increase in cross-border, white collar investigation and prosecution is the result of many different forces. Not insignificantly, the recognition that criminality in one jurisdiction may have adverse economic and political consequences in many countries has spurred international cooperation. Also, the sheer weight and influence of the U.S., both politically and economically, is an important factor in the breadth of cooperation that is taking place. The recent agreement by UBS to provide the IRS with previously secret Swiss bank

account information for 55,000 U.S. customers of the bank is a telling example of the type of pressures that may be exerted by the U.S. government on both foreign governments and companies. Until the UBS agreement, it was quite rare for foreign companies to cooperate in investigations of alleged violations of U.S. tax laws. Now, as in other areas as well, a new day appears to have dawned.

Enforcement

In some respects, the laws against international white collar crimes vary from jurisdiction to jurisdiction. However, there are certain types of crimes that are prosecuted almost universally such as crimes against theft, fraud, and money laundering. Activities such as bribery and environmental crimes are increasingly widely prosecuted. In the past, bribery has not been widely prosecuted internationally for many reasons. First, bribery is the *sine qua non* of corruption. Where corruption is rampant, and that includes much of the Third World but also virtually anywhere that is despotic, bribery is endemic. Second, bribery is generally hard to detect. Presumably, both the briber and bribe receiver are satisfied co-conspirators. No other party is generally privy to the corrupt scheme. Hence, the secret remains intact. Finally, in many parts of the world bribery is so pervasive as to be almost part of the cultural tapestry. It is simply not viewed as a blameworthy activity, much less criminal. Certainly organized crime, bank robbery, and fraud—virtually any kind of scheme or activity in which someone is deceived or forced into parting with their money—are prosecuted all over the world.

As a general matter, the complexity or challenges in international white collar crime enforcement lies in the fact that laws vary from jurisdiction to jurisdiction. What might be unlawful in the United States might not be unlawful in another country. There may be gross differences or there may be nuanced differences, but even nuanced differences can result in difficulties in conducting cross-border investigations. For example, in the U.S., the mail and wire fraud statutes are generally interpreted by the courts quite broadly thereby giving prosecutors great discretion and wide reach. In other parts of the world fraud offenses are more narrowly circumscribed. An obvious difference is that, what is routinely prosecuted in the U.S. as what has been called “honest services” fraud—a public (or corporate) official who is accused of some manner of misconduct that allegedly

deprives the taxpayers (or shareholders) of her honest services—would not be prosecutable for such an offense in most of the rest of the world.

The standards of proof and the kinds of investigative methods that can be used in one country might not be acceptable in another country. In the U.S., wiretaps and “bugs” must be judicially authorized and supported by a finding of probable cause. In the European Union, such techniques may be authorized by investigating magistrates upon police request and are granted based upon a lower threshold of probable cause, a standard closer to what we view as reasonable suspicion. The constitutional protections that you have in the United States, you do not have in most other parts of the world, in terms of search and seizure, free speech, and other things of that nature. This makes international investigations that much more complex than purely domestic investigations.

To handle these complexities and pitfalls in dealing with international business and the threat of international white collar crime, in general lawyers need to keep their clients apprised of their risks and compliance requirements. United States authorities will undertake to investigate criminal activity on behalf of a U.S. company, even if it is committed abroad. And U.S. companies doing business abroad have to not only be concerned about complying with United States law, but they have to be concerned with being in compliance with the laws of the jurisdictions in which they do business. Their lawyers’ function is to keep them informed as best as they can on what those requirements are.

Internal White Collar Crime Prevention

The first step in developing practices to protect against white collar crimes is for companies to identify the potential problem areas. These can vary from company to company. Because of the prevalence of money laundering as a focus of law enforcement throughout the world, and since all companies that do business abroad have to move money between the United States and other countries, companies have to be on their guard in that area. Not only must they ensure they do not practice money laundering themselves, but they must take steps to ensure they are not used inadvertently as a conduit for money laundering.

I had a case not too long ago of a sausage casing manufacturer in the United States. They happen to be one of the leading companies in the world that produces this commodity and had contracts with companies all over the world, including in Colombia. They found themselves under investigation for facilitating money laundering by drug lords in Colombia, because they were willing to accept payment from third parties for money owed them by companies ordering their products in Colombia. The third parties, of course, were receiving money from accounts in banks in Mexico and other places in Latin America—part of an effort by drug sellers to launder their money and make it look legitimate—used to pay this company in the United States. This U.S. company had no idea that was happening, and they did not question why the payments due them from the Columbia companies were coming to them through third parties in other countries. It did not occur to them what might be happening, but that is the kind of activity companies need to be attuned to.

Companies need to be alert to unusual payment channels. If a company has foreign operations, they have to be attuned to ensure offshore branches are not violating the Foreign Corrupt Practices Act by paying government officials, even though that might be a fairly routine business practice in a particular locality. They need to be aware. They need to be able to audit where the money is going, to ensure it is not being used for illicit purposes or paying bribes. There is a virtually infinite range of potential problems that may vary from industry to industry, and it is important that companies doing business abroad be aware of the pitfalls and what measures need to be taken to keep themselves in compliance and on the right side of the law.

Of course, banks are among the most highly regulated business entities. They are also among the most susceptible to potential money laundering problems, because banks move money. The same kind of training that U.S. banks give their employees—know your customers, know where the deposits are coming from, and ask for the kinds of identification now required under the USA Patriot Act (Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of U.S.C.)—should be taught to companies and instituted internationally. Both law firms with substantial white collar practices and certain consulting firms, such as Kroll, FTI, and Navigant, regularly provide this type of training to

businesses. Large multinationals—i.e., GEE, pharmaceutical companies, Boeing, etc.—have internal training operations.

Utilizing Consultants and Performing Due Diligence

When considering an international investment, companies need to institute specific practices to investigate the situation and protect against possible investigation and indictment. As a general matter, they need internal controls—people in management who are aware of the particular potential problem areas a company may face in a particular jurisdiction, in addition to the broader problems such as potential money laundering. Responsible companies will periodically consult with outside consultants, both lawyers and investigative firms, to give them updates on changes, on trends, and particular areas to go through and help them come up with best practices manuals. This is an ongoing process that responsible companies take seriously.

These consultants, investigative firms, and lawyers are both in the United States and abroad. Many will be former government officials, now in the private sector, who have ongoing relationships with their counterparts in the government. It is wise to retain the services of those kinds of people to do training in your company, keep their ear to the ground on behalf of your company, and to intercede when problems arise. Having someone who can pick up the phone and call their successor or their counterpart at the government agency and offer cooperation will make it clear that the company for whom they work is serious about staying within the bounds of the law, and that is an invaluable thing to be able to do.

White collar lawyers also play an invaluable part in international matters for their clients. Their duties involve ongoing training, updates, best practices, and review of internal controls, which are all things that responsible companies do on an ongoing basis.

It is always wise to do due diligence on the jurisdictions where they plan on conducting business. Find out the problem areas, how they can be dealt with, and the people who should be retained as consultants in a particular area. There is no company in the world today that does not know that if they are sending ships through the Gulf of Aden in the vicinity of Somalia

that those ships are at risk and they have to take measures to protect them. It is highly publicized and in the news all the time that there are pirates in the vicinity. However, when problems and situations are not that highly publicized, companies have to do their own research and look into it on an individual basis, especially if they are going into a new market or setting up operations in a new country.

Companies need to be aware of a wide swath of things, such as labor laws and the wage and rates laws of a particular country. Some of this does not apply in well-developed countries where a company will do business. European Union countries, for example, have laws similar to this country and they are well known. However, if you plan to go to a Third World country, where labor is cheap, to set up offshore operations, then you really have to do due diligence into virtually every possible area of the law to make sure your company stays within the bounds of the law and does not bring problems upon itself.

Understanding the FCPA's Role

The intent behind the Foreign Corrupt Practices Act is that American companies, as a matter of basic morality, should not be involved in giving bribes and payments to foreign officials for the purposes of securing business in foreign countries. Of course, in many parts of the world, those kinds of payments are almost routine. Corruption in many parts of the world is par for the course. The Act was signed into law soon after Watergate, at a time when anti-corruption measures were considered very important. This is not to say that they should not have always been considered very important, but that is the historical time frame for the Act.

The notion was that companies in this country clearly are not permitted to bribe government officials. So why should they be permitted to do that in foreign countries? The response has always been that it puts the U.S. companies at a competitive disadvantage, if companies from other countries that do not have an analog to the FCPA are allowed to make those kinds of bribes. There has always been tension from that standard. Some companies rather than developing effective strategies to both comply with the FCPA and conduct business, seek methods of avoiding the FCPA's mandates. Toward that end, some companies have been known to endeavor to utilize

local surrogates to make prohibited payments. Or, some may go to great lengths to disguise payments in the garb of consulting fees, pre-paid licensing fees or even charitable contributions. The problem, of course, is that the more elaborate the reuse, the more people there are involved. As a consequence, the risk of exposure increases in direct proportion to the number of persons privy to the secret. Companies are much better served by devoting their resources to compliance rather than avoidance.

In recent years, there has been an increased number of prosecutions brought under the FCPA, and also more developed countries in the world have passed similar kinds of laws. With the passage of similar laws by other developed nations, such as the European Union, competitive disadvantages diminish. But, at the same time, new competitions, unconstrained by FCPA analogues, come onto the scene. Such is the case with developing economic potential mega powers, such as India and China. While such FCPA type schemes have not yet been widely reported as emanating from Chinese or Indian companies, it may be expected that efforts to obtain competitive advantage will result in such activity.

Bribery by its nature is, in some respects, not a victimless crime. The victim of bribery is the public. Corruption undermines the basic notions of democracy, which is that everybody starts out on a level playing field and gets treated the same. So bribery makes the playing field uneven; the person paying the bribes derived benefits that others do not. On the other hand, by its nature bribery is secretive and remains secretive, because both the briber and the bribe receiver are satisfied with the deal struck, so it is hard to uncover these deals and to say how much bribery is still taking place in the course of companies trying to obtain foreign business by paying off foreign officials.

That is why the prosecutions that do occur are important for the enforcement of any criminal law, but more so in the white collar area where that determined effect is greater. People who commit violent crimes because they do not know where their next drug fix is coming from, or they are enraged because they got into an argument with someone, or they find their spouse in bed with another person—those people are not considering the consequences, for the most part, when they commit a criminal act. White collar criminals, for the most part, do not commit acts impulsively.

They are well thought-out, especially in the context of business. They are often considered part of the cost of doing business. As a result of that, the deterrent effect—the prosecution and punishment in the white collar area—is much greater than in the non-white collar area, so that a few prosecutions under the FCPA can go a long way toward helping to resolve the problem that the Act is designed to deal with.

Behind the Scenes of an Investigation

There is no typical timeline for an investigation, but because white collar investigations involve the invocation of international treaties and the use of international law, they take longer than the same investigation might take in the United States. The mere fact that documents may require translation, that different time zones are involved, and investigators may have cultural differences, all can result in the lengthening of international investigations. Likewise, multiple government bureaucracies only serve to lengthen international white collar investigations.

Almost any white collar case often begins with looking at documents and records. Say U.S. authorities are investigating money laundering, or the SEC is investigating fraudulent trading or insider trading, and through international channels will request documents that may be relevant to the investigation. If they are looking at money laundering, they will request the financial documents of a company. With a U.S. company, that will not be that difficult, but for an international company, they may have to go through treaties. We have treaties with about 120 different countries that allow U.S. authorities to request foreign countries to assist them in obtaining evidence abroad. Likewise these treaties allow foreign countries to request mutual assistance from U.S. authorities.

Investigators look in many places for evidence of white collar crimes. Sometimes in the books of the company; sometimes evidence has turned up as a result of audits of the company by outside auditors. Investigators sometimes target particular types of industries or businesses where they believe there is widespread criminality or corruption, and do sweeps of those businesses. The most common sweeps are those performed by government regulators within a regulated industry. The SEC may review the books and records of securities and financial companies under their

jurisdiction. Similarly, the FDA and EA have the authority to regulate and inspect pharmaceutical companies and drug manufacturing companies without any special justification. Any goods or products entering the U.S. from abroad are subject to inspections by the U.S. Customs and, in the case of meat and produce comestibles, by the Department of Agriculture.

Whistle-blowers are a big part of triggering investigations, especially in the FCPA. I am never reluctant to tell clients or potential clients a secret is only a secret when only you know it. As soon as the second person knows it, almost by definition it is no longer secret. When bribes are paid, there may be people within the company who know that it is wrong and blow the whistle. There could be government officials who believe they are not getting their fair share of the bribe, or are not being cut in on the deal, and they blow the whistle. In the money laundering area, when people get in trouble for one kind of crime, they try to help themselves by providing information about other crimes. So cooperating witnesses help to uncover crime.

Investigators start with the documents and review the documents. There may be efforts to question individuals. Again, treaties provide for people to come in for questioning. Sometimes the questions are posed by the investigators in that country, and sometimes U.S. authorities are entitled under the treaty to go to the foreign country and conduct questioning themselves. Increasingly over the last ten or fifteen years, there has been a broad effort to increase the ability for one country to obtain evidence in other countries. We have seen that most recently in the investigation involving the allegations of Swiss bank accounts for high net worth individuals in the United States. Traditionally, Switzerland has had very strict secrecy over bank accounts in Switzerland, but as a result of mutual treaties between the United States and Switzerland, U.S. authorities were able to request and ultimately Switzerland agreed to provide account information concerning thousands of U.S. citizens with Swiss bank accounts. Ten or fifteen years ago that cooperation would have been unheard of. Those U.S. depositors opened up those accounts when they did because they believed their accounts would be held strictly secret. It is the belief of the IRS that the vast majority of those heretofore secret Swiss accounts were opened and maintained for the purpose of evading U.S. tax laws. These suspicions are given credence because it appears that most of

those maintaining such accounts have not disclosed their existence when asked to do so on standard tax returns. Those returns all have a question asking taxpayers if they maintain any foreign bank accounts. Based upon the information obtained to date from Switzerland, the vast majority of accounts held by U.S. citizens were not disclosed. Secrecy is no longer the norm, either in Switzerland or in most other jurisdictions. There are still some jurisdictions that have very strict bank secrecy laws, but the U.S. is constantly trying to put economic and legal pressure on those jurisdictions to change their laws, to require them to cooperate in international investigations.

Changing Motives, Changing Economies, Changing Prosecution Methods

I do not know if the current economic crisis has impacted the trend for investigation of international white collar crimes. Economic turmoil always affects the types of crimes being committed. However, to a certain extent, the economy has had an impact. A perfect example is the Madoff case, which came to light essentially because of the economic problems at the end of last year. Enough investors sought redemption in much greater numbers than they ever had before, which caused the collapse of the Ponzi scheme. Once that happened, it became clear that the Ponzi scheme had international implications and that there were investors from all over the world—individuals and business investors—and the investigation quickly spread throughout the world. When economic times cause crimes to come to light that otherwise would not have, the international focus also comes to light as a consequence.

As mentioned earlier, money laundering is the most prominent white collar crime today, by the simple fact that for the proceeds of any illegal activity to benefit the person committing the offense, the profits have to appear to come from legitimate sources. So whether it is a fraud case, drug dealing, bribery, environmental offenses, or FCPA violations, money that results from those practices has to be made to look like legitimate money. So almost every crime committed eventually entails money laundering.

There has always been money laundering, but the methods of laundering money have become much more diverse than they used to be. Also the

focus on money laundering is much greater than it used to be. Law enforcement authorities understand that if you go after the proceeds of the criminal activity and eliminate the proceeds, that will eliminate the activity. White collar criminals do not commit crimes for any purpose other than to make money. Only by removing the profit will white collar law enforcement efforts be successful. We have tried to interdict drugs coming into the country. We have tried to eliminate the users of the drugs by arresting them and sending them to jail, so you eliminate the purchase of the drugs. None of that has successfully put much of a damper on the level of drug dealing across the world.

On the other hand, prosecuting money laundering as it relates to drug dealing has had an effect, because if the drug dealers cannot reap the benefits, there is no purpose in being involved in dealing drugs. The same goes for virtually every other illegal activity. If you can find the proceeds, eliminate the proceeds, and prevent the criminal from getting the proceeds as legitimate or apparently legitimate money, you can go a long way toward eliminating the offense. The same thing with the FCPA. If the company knows a whole line of their business was established as a result of a bribe paid abroad—for example, a pharmaceutical company established to manufacture one of their hot-selling drugs—and if ultimately that bribe is discovered, the profits will go out the window. That could be billions of dollars lost if that bribe is discovered. And the incentive to pay the bribe in the first place goes away.

The focus over the last ten or fifteen years has been to go after the proceeds in trying to halt crime, and that seems to be the right focus.

Conclusion

For any lawyer dealing with this area of law, the best resources include experience in handling international matters, and establishing and maintaining contacts abroad in legal and law enforcement communities. The longer you practice in this area, the better you get at it.

Lawyers need to stay on top of developments in this area because my prediction for the next year is for increased international enforcement by the SEC of securities-related crimes. The SEC is revamping in the wake of

the Madoff scandal. The new director of enforcement of the SEC is a former assistant U.S. attorney in New York. He has a law enforcement background and is a highly respected investigator. I think we are already seeing an uptick in enforcement efforts by the SEC internationally because the vast majority of securities flow through one American exchange or another at some time. The SEC has very broad jurisdiction as a result of that.

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