

*Is there a constituency for OIRA?*

# Lessons Learned, Challenges Ahead

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Why do you think they hate you so much?" a senator asked me during a courtesy visit on a late summer day in 2006, soon after President George W. Bush nominated me to be administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). She was referring to a coalition of advocacy organizations that were opposing my confirmation. I told her that I didn't think it was me they hated, but the office itself. I had not been on most of the groups' radar until my name was mentioned as a possible nominee to head the office, and my predecessor, respected Harvard professor John Graham, had also been vilified during his confirmation process. (My nomination made at least one organization look fondly on the John Graham days, though, commenting that "Susan Dudley makes John Graham look like Ralph Nader.") Even President Barack Obama's nominee for the office, Cass Sunstein, has been met with skepticism because his writings expressed support for novel regulatory approaches and analysis of a regulation's likely effects before imposing it on the American people; in other words, because he supports the function of OIRA.

With progress on my confirmation stalled, I joined the OMB as a "counselor" at the end of January 2007 and was appointed OIRA administrator during the April 2007 recess. This article offers some reflections on the next two busy, challenging, and fascinating years in what I believe is the best job in Washington. It reviews some lessons learned regarding regulatory analysis and oversight during the almost three decades that OIRA has existed, and the challenges that lie ahead.

## LESSONS LEARNED

Little known outside the Beltway, OIRA is an office of about 50 professional staff (down from 90 when it was first formed)

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who oversee the regulatory, information collection, and statistical activities of federal executive branch agencies. It operates within the Office of Management and Budget in the Executive Office of the President and provides a function similar to the OMB's oversight of department and agency fiscal budgets. Its role, like that of the budget divisions, is to provide the president with a tool to check agencies' natural proclivity to want more (whether it's more budget resources or more regulatory authority). This institution of regulatory oversight is important but, not surprisingly, not always appreciated by the agencies being overseen. The office scrutinizes agencies' planned regulations and collections of information, along with the analysis supporting them.

**LESSON 1: OIRA has no constituency.** Economic theory suggests (and evidence collected by public choice economists persuasively demonstrates) that regulatory agencies tend to shape their decisions to accommodate the interest groups that are most directly affected by them. OIRA's mandate is to advance the general public interest instead. Hence there is no concentrated constituency for OIRA, yet presidents of both parties have relied on it to oversee and coordinate executive branch regulations since its formation in 1981. The office was created by the Paperwork Reduction Act of 1980, but it was President Ronald Reagan's Executive Order 12291 that first gave OIRA the mandate to analyze regulations. E.O. 12291 required, to the extent permitted by law, that administrative decisions be based on adequate information concerning the need for and consequences of proposed government action, and that regulatory actions maximize net benefits to society.

When President Bill Clinton took office in 1993, he replaced E.O. 12291 with Executive Order 12866. OIRA's opponents were disappointed that, in many ways, E.O. 12866 mirrored its predecessor. It reinforced the philosophy that regulations should be based on an analysis of the costs and benefits of all available alternatives, and that agencies should select regulatory approaches that maximize net benefits to society, unless otherwise constrained by law. When President Bush



took office in 2001, he continued to operate under E.O. 12866, though he did later make some amendments.

While OIRA now can look back on a 28-year history (and the institution of executive oversight of regulation goes back even further — to the early 1970s), its survival was not always clear. Throughout the 1980s, groups charged OIRA with improperly interfering in agency decisions and providing inappropriate access for special interests, and Congress held numerous hearings regarding the appropriate role of regulatory oversight. In 1986, those concerns led administrator Wendy L. Gramm to issue a memo clarifying procedures for disclosing contacts between OIRA staff and individuals outside the government. Subsequently, the 1986 legislation that reauthorized OIRA appropriations and amended the 1980 Paperwork Reduction Act expanded the disclosure requirements related to paperwork proposals, and for the first time required Senate confirmation of future OIRA administrators.

The disclosure requirements have been positive. Speaking from my experience as a member of the career staff at OIRA in

the mid-1980s, the criticisms of extensive contact with the regulated community were unsupported. OIRA staff then had little interaction with people outside the government and the Gramm memo mainly reinforced existing practices (which were later formalized in President Clinton's E.O. 12866). President George W. Bush took advantage of the Internet to further increase transparency by posting on the OMB website meetings with outside parties on matters under review, as well as materials provided at those meetings.

The requirement that OIRA administrators be confirmed by the Senate, however, has had a less desirable effect. Because there is no organized constituency for OIRA or its oversight function, nominees can languish without confirmation. Since Congress required Senate confirmation of the OIRA administrator, OIRA has operated without a politically appointed leader for one third of the time. George H. W. Bush's nominee was never confirmed, and OIRA was headed by a career civil servant serving in an "acting" capacity for his entire administration. By the time I was appointed to the position through a recess appointment in April 2007 (eight months after my nomination, the Homeland Security and Government Affairs Committee had not yet brought my nomination to a vote), OIRA had been without a political leader for over a year. As of this writing, OIRA is still operating with an acting administrator. While OIRA's acting administrators have all been knowledgeable

and skilled analysts and managers, it is difficult for a career civil servant to have the necessary influence when interacting with political appointees, particularly within the White House, and the ability of OIRA analysts to conduct their coordination and review function effectively is diminished.

**LESSON 2: Institutions matter.** As Rufus Miles (an alumnus of the OMB's predecessor, the Bureau of the Budget) famously said, "Where you stand depends on where you sit." Take a bright young lawyer, scientist, economist, or other professional and, depending on whether she works in OIRA, or the Department of Homeland Security, the Environmental Protection Agency, the Occupational Safety and Health Administration, or another agency, her perspective and behavior will vary dramatically. The staff at the Department of Homeland Security, for example, is focused on its stated mission, to "prevent and deter terrorist attacks and protect against and respond to threats and hazards to the Nation." While the agency hopes to do this "while welcoming lawful immigrants,

visitors, and trade,” those latter aspects of its mission are clearly secondary.

The value of an institution like OIRA lies in its cross-cutting perspective and its focus on understanding tradeoffs and consequences, intended and unintended. OIRA not only coordinates regulatory policy, minimizing conflict and duplication among agencies, but, as President Obama observed recently, it provides “a dispassionate and analytical ‘second opinion’ on agency actions.” Each president for the last 28 years has assigned it the responsibility for understanding the consequences of different regulatory options before they are put in effect, and ensuring that the selected option maximizes net benefits to the public. This clear mission attracts very capable and principled people. OIRA’s career staff is a smart, motivated group of analysts who truly believe in getting the analysis right so that regulations are issued only when needed and, when they are, that they make the public better off.

Regulatory agencies have equally smart and motivated people, but their single-issue missions lead to different incentives and staff behavior. As Justice Stephen Breyer observed in his 1993 book *Breaking the Vicious Circle*, “well-meaning, intelligent regulators, trying to carry out their regulatory tasks sensibly, can nonetheless bring about counterproductive results.” Breyer referred to this institutional phenomenon as “tunnel vision,” when agencies single-mindedly pursue a particular goal to a point that “the regulatory action imposes high costs without achieving significant additional safety benefits.”

Each department or agency behaves as if its mission was the most important to the country, and each has its own culture that has evolved over time. The different cultures can clash, and alliances and animosities among career staff have hardened over years and sometimes decades of repeat interactions. A shift in responsibilities, such as occurred when the Supreme Court directed the EPA to regulate greenhouse gas emissions from vehicles under the Clean Air Act, can bring those differences to a head. Since the primary tool for reducing greenhouse gas emissions from vehicles is through improved fuel economy, and fuel economy standards have been the purview of the Department of Transportation for decades, the Court’s action forced the Transportation Department and the EPA to attempt to work together. Not only did the EPA office that regulates vehicle emissions approach the problem differently than the Transportation office that regulates fuel economy, but the cultures of the two agencies were dramatically different. While Transportation staff had developed models that relied on car company-provided inputs to project fuel-efficient fleet scenarios, EPA staff felt compelled to substitute their inputs and judgment for those of the car manufacturers. Some of the differences in approach reflected different statutory frameworks, but agency attitudes and culture played an important role as well. For example, Transportation career staff are more likely to accept guidance from policy officials than EPA staff who behave as if following political leaders’ direction is unprincipled. EPA staff are notorious for leaking to the media or allies in Congress any decision with which they don’t fully agree.

The Hatfield-and-McCoy relationships of the professional career staff at different agencies are often shared by the polit-

ical staff, who are not immune from Breyer’s “tunnel vision.” Those at Homeland Security, for example, are just as single-minded in their focus on security at the expense of other interests as the career staff are, and those at the U.S. Department of Agriculture see their mission as supporting American farmers. When this focus conflicts with other priorities, such as open trade and economic growth, political officials at the Department of Commerce, Small Business Administration, and U.S. Trade Representative do not hesitate to weigh in. Add to this mix the policy offices within the White House (such as the National Economic Council, Domestic Policy Council, and Homeland Security Council) that have overlapping jurisdictions but different constituencies and allegiances, and the dynamics become interesting, to say the least.

The Obama administration is adding more “czars” with narrowly focused missions to the White House staff, which seems likely to bring tunnel vision into the Executive Office of the President. Like the previous Bush administration’s Homeland Security Council, which generally aligned with Homeland Security in policy disputes, White House officials that share a single mission focus will be less effective at providing checks on agencies’ tunnel vision. To the extent the president relies on his czars, rather than officials with cross-cutting perspectives and experience, he is less likely to get a balanced understanding of the tradeoffs involved in particular matters, and policy decisions will ultimately suffer.

**LESSON 3: Benefit-cost analysis isn’t perfect, but it’s the best we have.** Regulatory analysis, particularly benefit-cost analysis, has emerged as an integral part of government accountability – a nonpartisan tool for understanding the likely effects of regulation. There are those who still object to attempts to quantify the effects of regulation, and certainly there are those who object to OIRA’s role in regulatory coordination, but nevertheless, entities with widely different views on the merits and consequences of regulation are increasingly relying on regulatory impact analysis to make their cases.

President Obama signaled his intent to revisit the regulatory review process in a January 30, 2009 memorandum to federal departments and agencies, but in that memo he recognized that centralized review is “legitimate and appropriate.” He gave the OMB 100 days to develop recommendations for changing the regulatory review process. In response to a request from OIRA, various groups and individuals have offered their views on regulatory analysis and suggestions for improvement. While a few have used the opportunity to make the case against regulatory analysis and oversight, most supported OIRA’s role and offered suggestions for improving regulatory accountability.

Other countries are emulating the U.S. approach to regulatory analysis and oversight. The European Commission recently established an Impact Assessment Board that evaluates new legislation before it is implemented, and in January 2009 updated its guidance on analyzing regulatory impacts.

This widespread acceptance of regulatory analysis has its drawbacks, however. Sometimes in our zeal for better quantification of costs and benefits, we lose sight of the more fun-

damental question of whether each problem we seek to address really calls for regulation. Most regulators don't fully appreciate that government intervention, no matter how well intentioned or carefully analyzed, can never be as dynamic or responsive to individual choices and preferences as market forces.

It is easy for regulators to fall prey to the "planner's paradox" (see "The Planner's Paradox," Summer 2003) without appreciating that efforts to address perceived problems often have unintended consequences. Planned solutions always look better on paper than unplanned solutions because the planner sees only his "data, assumptions, biases, and understandings of the way the world works.... All of the unseen difficulties with the planned solution — the data, assumptions, biases, and understandings of the world that turn out to be wrong — are invisible to the analyst because the data he considers are his own." The most carefully analyzed regulations may result in unanticipated changes in behavior that undermine the desired effects of the regulation.

Almost by definition, regulatory policies substitute the judgment of government regulators for those of individuals, yet it is easy to succumb to Friedrich Hayek's "fatal conceit." For example, the bipartisan enthusiasm for fuel economy standards and appliance efficiency standards is driven by the desire to save consumers money on fuel and energy, but it does not appear to appreciate other factors consumers might value, such as safety, purchase price, and convenience. By looking at average prices and usage patterns, and applying a discount rate, regulators paradoxically conclude, without any apparent irony, that by taking away consumers' choices, we can make them better off.

**LESSON 4: The pressure to regulate is powerful.** By any measure, regulatory activity has been on the increase since the early 1970s. Even administrations perceived to believe in free markets find themselves under pressure to support more restrictions on private sector activity. The Bush administration issued some of the most far-reaching regulations addressing air quality, food labeling, and (of course) homeland security. Politicians and policy officials face strong incentives to "do something," and issuing regulations demonstrates action. Whether the regulatory action ultimately produces the desired outcomes is less important, in large part because those effects are not immediately apparent, but also because action simply appears more constructive than inaction. There's no glory in doing nothing or in averting policy mistakes before they occur. Even my colleagues who were skeptical of the effectiveness of regulatory actions find that when they leave government, the stories people can understand are those of new regulatory actions they supported rather than bad ideas their action or analysis helped to stop.

Another reason for the increasing regulatory state is that politicians and policy officials, regardless of party, feel they owe something to their constituents — those who helped them attain their positions of influence. The conventional wisdom is that Democrats work to help labor unions, environmental interests, etc., and that Republicans are more likely to look out for business interests. Republicans are perceived to be less regulatory than Democrats because businesses are

thought to oppose regulation, but the evidence suggests otherwise. For decades, economists who study regulation have observed that regulation can provide competitive advantage, so it is often in the self-interest of regulated parties to support it. During my tenure at OIRA, I saw tobacco companies supporting legislation requiring that cigarettes receive Food and Drug Administration pre-marketing approval, food and toy companies wanting more regulation to ensure their products' safety, and energy companies supporting cap-and-trade for greenhouse gas emissions. Particularly when regulatory demands appeal to popular interests, politicians and policy officials find pursuing them hard to resist.

Bruce Yandle's insight regarding "bootleggers and Baptists" coalitions still rings true. (See "Bootleggers and Baptists," May/June 1983.) I watched biotechnology companies successfully join with food safety activists to encourage stricter regulation of new foods involving genetic engineering. U.S. testing laboratories argued aggressively on safety grounds against European requests to permit manufacturers of low-risk workplace electrical products to self-certify compliance with regulations rather than subject them to third-party testing. We managed to resist the temptation to restrict foreign-owned cruise line activities despite pressure from a domestic cruise line and worker organizations. And despite strong lobbying from the pesticide industry, I returned a draft regulation that would have mandated recycling of used pesticide containers because the claims of health and environmental benefits were unsubstantiated. The mother of all bootlegger-and-Baptist stories, though, is likely to emerge from regulations to address climate change and encourage renewable fuels. Energy companies have joined with national environmental organizations to push for cap-and-trade, which will confer financial benefits on the holders of grandfathered emission allowances. Agricultural interests that support regulations and subsidies for renewable fuels have had the support of environmental interests until recently, when the life-cycle environmental effects of ethanol fuels have come into question.

The pressure to regulate is never more evident than at the end of an administration. Historically, the regulatory activity between Election Day and Inauguration Day is 17 percent greater, on average, than during that period in non-election years. (See "Bush at Midnight," Spring 2008.) Joining the administration in its final two years, I was fully aware of this tendency and was determined to resist it. To that end, I worked closely with agencies from the time I started as OIRA administrator in April 2007. Bush's chief of staff, Josh Bolten, issued a memorandum to agencies in May 2008 admonishing them to "resist the historical tendency of administrations to increase regulatory activity in their final months" and setting a November 1 deadline for completing rules except in extraordinary circumstances.

We faced powerful objections to the deadlines, and not only from political appointees who were turning into pumpkins on January 20, 2009. Career employees, who had worked hard on many of the regulations, were disappointed when they did not get them across the finish line before the end of the administration. The fate of regulations not issued by January

20th would be determined by the incoming administration, and I expect the career staff knew there would be delays, if not policy changes, and did not relish having to break in a new crew of political appointees before completing their projects.

In the end, OIRA completed review of 100 significant final regulations between November 1, 2008 and January 20, 2009, significantly more than the average of 62 during a typical three-month period, but much less than previous administrations have reviewed in their final three months. As always with regulation, the less visible story relates to the regulations that were not issued, and I can attest that the efforts to minimize last-minute regulations, while by no means eliminating them, had an effect. The OIRA staff worked intensely to resist the midnight phenomenon, and by any objective measure the George W. Bush administration issued fewer regulations during the post-election quarter than the previous administration. Regulatory agencies made hard decisions (albeit reluctantly) and did not complete numerous regulations caught by the memo's deadlines, including some high-profile agency priorities such as the Department of Labor's risk assessment rule, the EPA's new source review rule for electric utility generators, the Interior Department's alternative energy rule, Transportation's fuel economy rule, and the Treasury Department's alcohol labeling rule.

Nevertheless, the pressure to regulate is powerful. The Bush administration issued over 2,000 significant final regulations over its eight years, imposing estimated costs totaling over \$50 billion per year.

### **FUTURE CHALLENGES**

Those who care about responsible regulatory policy face many challenges in the coming years. How can elected representatives control the growing army of bureaucrats, with their single-mission focus and demanding constituencies? Can we respond to concerns as diverse as threats to our homeland, warming temperatures, and unstable financial and housing markets, without succumbing to hasty and imprudent actions that may have unintended consequences for decades to come? Can we enjoy the benefits of free trade in an increasingly integrated world economy without compromising American values such as respect for property rights and the rule of law? And can we engage the public constructively in regulatory policy, so American citizens are not as quick to support one-size-fits-all regulation to address anecdotal problems?

#### **CHALLENGE 1: Ensuring accountability of the executive branch.**

Not only is the number of regulations growing, but the budgets and staffing of the agencies that write and enforce them are growing as well. According to the Mercatus and Weidenbaum Centers' evaluation of annual fiscal budget requests, on-budget expenditures on regulations have been growing in real terms since tracking began in the 1960s. The Bush administration was no exception, and judging by President Obama's proposed budget, we are unlikely to see a reduction in this growth in the near future.

Maintaining control over the increasing bureaucracy is challenging. Agencies have their own constituencies, in

Congress as well as in the non-government and private sectors, making it difficult for presidential appointees, to say nothing of the president himself, to exert policy oversight. Rep. Henry Waxman (D-Calif.) held a hearing at which he expressed outrage over possible "White House interference" in agency rule-making and threatened to hold EPA administrator Stephen Johnson and me in contempt. What was our crime? We sought resolution from the president of a disagreement over the format of an ozone air quality standard.

The legislative branch tends to provide the executive branch vague statutory authority for regulatory action with little guidance or oversight, but then objects when the chief executive exercises any oversight over unelected officials' implementation of those authorities. When statutes combine those vague authorities with tight deadlines for issuing regulations, this effectively precludes analysis of likely effects or unintended consequences. Non-governmental organizations are only too happy to engage in sweetheart lawsuits when statutory deadlines are not met, resulting in judicial decisions and deadlines that further restrict a president's ability to ensure well-thought-out policy.

Furthermore, the questionable status of "independent agencies," such as those that regulate financial markets, electric utilities, and housing finance, makes them more difficult for the president to oversee. Those agencies have not been subject to OIRA oversight under E.O. 12866 (or E.O. 12291 before it), so not only are the presidential checks and balances weaker than for executive branch departments and agencies, but the analytical support for their regulations tends to be weaker as well.

Treasury secretary Timothy Geithner has proposed to establish a new independent super-regulatory agency with authority over financial regulation (talk about systemic risk!), but that's moving in the wrong direction. Regulatory competition, combined with oversight from executive branch bodies with cross-cutting perspective and expertise (such as OIRA), will be more likely to address Geithner's concerns. The new administration should subject independent agencies to OIRA oversight and centralized inter-agency review.

**CHALLENGE 2: Understanding consequences of action before it's taken.** Although analytical tools for estimating benefits and costs are getting more and more sophisticated, our analysis doesn't seem to be getting better at predicting actual outcomes.

E.O. 12866 and OMB guidance direct agencies first to identify the core problem they are trying to address and then examine alternatives that address that core problem. Too often, agencies conduct analyses after decisions have been made, to comply with legislative and executive branch requirements rather than developing the analysis to inform policy decisions. An after-the-fact analysis of a selected option may be helpful for understanding the likely consequences of the regulation, but is not as useful as an *ex ante* analysis of the consequences of several alternative approaches to achieving policy goals. Many statutes that grant agencies regulatory authority still don't call for analyses of the impacts of those regulations, and some expressly preclude consideration of the likely costs and benefits.

Furthermore, novel problems, such as efforts to improve homeland security, pose new analytical challenges. These regulations not only involve a difficult balancing of security and privacy goals, but many regulations to improve homeland security have benefits that are difficult to quantify. Consider that benefits are a function of the likelihood and severity of a hypothetical future terrorist attack and you can easily understand that forecasting, quantifying, and monetizing those benefits present a major challenge. Behavioral responses to government action often result in unintended consequences, but this problem is magnified when the target of regulation is not an inanimate bad (like a chemical), but sentient beings who can change behavior in response to regulatory constraints. Just as other agencies with more experience have become proficient at justifying their regulations using benefit-cost analysis, the Department of Homeland Security is increasingly attempting to address this challenge by performing break-even analysis — estimating the security enhancement a proposal would have to provide to justify estimated costs.

While the Department of Homeland Security is getting more sophisticated at justifying its regulations, it has a long way to go to reach the level the EPA has achieved. Each year, when OIRA sums up agencies' estimates of the benefits and costs of the year's economically significant rules, EPA regulations contribute the lion's share of the benefits. Most of those estimated benefits are the result of reductions in a single pollutant: particulate matter. The EPA estimates the benefits associated with reducing exposure to particulates to be greater than \$500 billion per year, or between 65 and 90 percent of the total estimated benefits of all regulations. Those surprisingly large benefit estimates are not based on any known explanation for causality, but on statistical associations and "protective" assumptions that hide great uncertainty in the dose-response relationship. They assign large dollar values to relatively short extensions of life-expectancy, particularly when compared to other life-saving interventions like those associated with occupational or traffic safety. Nevertheless, since ancillary reductions in particulate matter occur with many air-related regulations, the EPA finds itself able to justify restrictions on mercury emissions, hazardous air pollution emissions from vehicles, cement kilns, and others, not on their own merits, but because they also reduce particulates.

These analytical approaches to estimating benefits contribute to the planner's paradox, where government actions appear on paper to be superior to actions taken by individuals and groups on their own behalf. If we continue down this road, we are susceptible to Hayek's fatal conceit, substituting the judgment of government regulators for the decentralized wisdom of crowds.

**CHALLENGE 3: Minimizing unnecessary regulatory differences internationally without compromising American values.** The global consequences of domestic regulations are increasingly important. As tariffs and other explicit barriers to international trade and investment have fallen, differences in regulatory requirements are emerging as more significant barriers to trade than they were in the past. The agenda of the Transatlantic Economic

Council, established by then-European Union president (and current German chancellor) Angela Merkel and President Bush in April 2007, includes regulatory coordination goals such as better information-sharing on regulatory activities, risk assessment, and sector-specific coordination and mutual recognition. During my tenure at OIRA, I worked with our European counterparts in an attempt to take into account international trade and investment effects when developing new regulations, and to minimize unnecessary regulatory differences going forward.

The dialogue between OIRA and its counterparts in other countries is an important supplement to ongoing activities between regulators who focus on the same areas and who are likely to fall prey to Breyer's tunnel vision. While we should try to minimize unnecessary differences that could hinder free trade, some regulatory competition is likely to be beneficial, and converging on poorly designed regulations will harm businesses and consumers in all of our countries.

**CHALLENGE 4: Engaging the public to be more aware of the actual effects of regulation.** As former OIRA administrator Wendy Gramm used to say, "One anecdote makes a regulation, two anecdotes make a law." This tendency to jump to government solutions as a response to anecdotal problems, without understanding that government solutions also are not perfect and often have unintended consequences, is widespread.

The immediate reaction to the recent financial meltdown has been a call for increased regulation, with little skepticism in the media or general public as to why the answer to failures in an industry as heavily regulated as the financial sector should be more regulation. How can we overcome this fatal conceit and raise awareness of the Hayekian insight that decentralized market processes are better able than centralized government to focus dispersed information — information that no one individual (not even a regulator) can obtain — and convey it efficiently to market participants? There are inklings of concern over the increasing role of government in private markets, which may present an opportunity to encourage greater appreciation among voters and taxpayers of the benefits of economic freedom. We need to build a constituency for the kind of questions OIRA asks and for transparent analysis of the likely consequences of regulations before they are issued. Only then will we be able to combat the "there ought to be a law" mentality and generate a healthy skepticism regarding the government's ability to solve problems that are better addressed by individuals acting in their own interests. **R**

### Readings

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