July 11, 2014

VIA* electronic submission to *http://www.regulations.gov

Bernadette Wilson
Acting Executive Officer
Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Re: Response to Advance Notice of Proposed Rulemaking
79 Fed.Reg. 27,824 - 27,826; RIN 3046-AA94

Dear Ms. Wilson:

The National Employment Lawyers Association (NELA) respectfully submits the following comments in response to the Equal Employment Opportunity Commission's Advance Notice Of Proposed Rulemaking, published in the Federal Register on May 15, 2014, 79 Fed.Reg. 27,824 -27,826, RIN 3046-AA94.

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws, as well as undertaking other advocacy actions on behalf of workers throughout the United States. A substantial number of NELA members' clients are federal employees and/or represent federal employees in employment law matters, and thus we have an interest in potential modifications to the Commission's federal sector regulations.

NELA appreciates the opportunity to provide suggestions concerning potential modifications to the Commission's regulations protecting federal employees and applicants with disabilities. NELA applauds the Commission's interest in focusing on finding best practices for making the federal government a model employer for individuals with disabilities. Based on the experiences of our member attorneys representing federal sector employees and applicants, NELA believes that there is a need for stronger protections in this area. Rather than prescribing a "once-and-done" set of modifications, NELA believes that the Commission's efforts in this area should be iterative, and urges the Commission to build into this process specific steps for further refinements to its regulations. In NELA's view, the goal of the federal government as a model employer means serving as a standard-bearer in continually developing and evolving best practices for employment of persons with disabilities.

Various disability rights organizations will likely provide comments regarding the substantive goals for the federal government as a model employer, as noted in Request for Comments Nos. 2, 3, 4, and 5 from the Advance Notice Of Proposed Rulemaking.

NELA will focus its specific suggestions on the procedural and remedial issues responsive to the Commission's Request for Comments Nos. 1 and 6. We also ask that the Commission consider NELA's comments to be responsive to Request No. 7.[1]

Request No. 1: "What barriers do individuals with disabilities face in the federal recruitment and hiring process?"

NELA believes that the present "Schedule A" hiring authorities under 5 C.F.R. § 213.3102(u) are difficult to enforce. Under present regulations, an applicant with a disability whose Schedule A hiring preferences are denied by an agency can only seek redress through an ordinary disability discrimination nonselection complaint. In such cases, a non-class complainant rarely receives redress unless he or she can show both intentional discrimination in the hiring process and that he or she would have been the ultimate selectee. NELA is convinced that ensuring that applicants with disabilities receive their full Schedule A preferences requires the ability for an applicant to press a cause of action for the violation, even if intentional discrimination is not ultimately proven.

As a model, the Commission should look at the statutes, regulations, and Merit Systems Protection Board precedent concerning enforcement of the Veterans' Employment Opportunity Act (VEOA). VEOA applies a strict liability standard for violations of veterans' preferences; the issue of the intent behind the violation merely goes to the quantum of remedies rather than to whether or not a violation is found. **NELA urges the Commission to establish a *per se* enforcement mechanism analogous to VEOA for violations of Schedule A hiring preferences, which would better ensure that agencies fully enforce the Schedule A preferences for disabled employees, as a supplement to the existing disability nonselection remedies.** This is consistent with existing Commission procedures for enforcement of aspects of the Rehabilitation Act of 1973 (Rehabilitation Act): the Commission already applies a strict liability, *per se* violation standard in its existing Rehabilitation Act regulations concerning collection, archival, and dissemination of confidential medical information. *See* 29 C.F.R. §§ 1630.13, 1630.14; *see, e.g., Munford v. U.S. Postal Service,* EEOC Appeal No. 01A60384 (July 12, 2006); *Clark v. U.S. Postal Service,* EEOC Appeal No. 01992682 (November 20, 2001); *Jones v. Dept. of the Air Force,* EEOC Appeal No. 07A10033 (June 25, 2001); *Hampton v. U.S. Postal Service,* EEOC Appeal No. 01A00132 (April 13, 2000). This second, VEOA-type remedial theory would complement the existing claim for nonselection on the basis of disability. Specifically, rather than focusing on after-the-fact remedies, it would help ensure that applicants with severe disabilities have a fair opportunity to compete for positions despite their disabilities.

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[1] Request No. 7 is a "catch-all" query: "What requirements, other than those described above and the existing requirement not to discriminate based on disability, should be included in the proposed regulation to better clarify what it means to be a model employer of individuals with disabilities?"

<u>Request No. 6</u>: "Are there any policies or practices related to reasonable accommodation, other than policies and practices that are already required by EEOC regulations, that federal agencies should be required to adopt to become model employers of individuals with disabilities?"

NELA is convinced that present enforcement mechanisms for reasonable accommodations have several key flaws that need to be fixed. These problems are all caused by processing delays tolerated by the current system. When an employee requests reasonable accommodation, they often need the reasonable accommodation *immediately.* NELA attorneys, however, have long observed agencies sandbagging reasonable accommodations in several ways, including lengthy delays in responding to requests for reasonable accommodation and not engaging in the interactive process. The employee is thereby forced to work with an unaccommodated disability. This situation often rapidly degenerates into adverse action proceedings. In one common fact pattern, the employee is forced to expend significant amounts of leave since he or she is unable to perform his or her duties without the requested accommodation. This excessive leave use prompts the agency to place the employee on leave restriction, then potentially AWOL status and culminates in an adverse action for attendance reasons. In another fact pattern, the employee's ability to perform his or her duties suffers due to the unaccommodated disability (e.g., the stresses of attempting to perform without accommodation or limitations on performance caused by the failure to accommodate). As a result, the employee's performance evaluation suffers and the employee is placed on a Performance Improvement Plan (PIP), and then subjected to performance-based adverse actions. In a third fact pattern, the stresses caused by the unaccommodated disability may escalate workplace tensions to the level where interpersonal disputes arise between managers who are refusing to accommodate and the employee who needs the accommodation. With tensions high and tempers flaring, disciplinary incidents can lead to adverse actions.

The law is already clear that delays can result in an actionable failure to accommodate by any employer. But present reasonable accommodation enforcement mechanisms inevitably fail in these situations. It often takes months—and sometimes years—for agencies to issue decisions on reasonable accommodation requests, and then years more for the denial of a reasonable accommodation request complaint to wend its way through the informal and formal complaint processes. There will be an additional delay if the agency improperly dismisses the claim, forcing an appeal to the Office of Federal Operations (OFO). The process may drag on indefinitely as an employee may wait perhaps a year or more for a hearing with an Administrative Judge, then potentially several more years if the agency files for summary judgment before a hearing occurs, and even longer if the agency rejects the Administrative Judge's finding and the matter is appealed to OFO. These prolonged delays harm an employee if the situation is deteriorating in the interim, resulting in an adverse action up to removal. After all, "justice delayed is justice denied." In short, **NELA recommends that the remedial mechanisms for reasonable accommodations be tightened at all stages of the complaint processes, with a goal of effective adjudication within a reasonable timeframe**.

One problem area concerns the lack of uniform timeframes for agency processing of requests for reasonable accommodation. Under present Commission guidance, federal agencies are not required to respond to requests for reasonable accommodation by a time certain and, as a result, agency response times vary widely across the federal government. Today, agencies are held to an indeterminate standard requiring only that they respond to requests "expeditiously" or "as quickly as possible," based on a multifactor test for determining whether there has been

"unnecessary delay." *See, e.g.,* EEOC Enforcement Guidance *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*[2] at Question 10 and fn. 38. Even though Executive Order 13164 requires a deadline for decisions on reasonable accommodation requests, the Commission's existing policy has been to allow federal agencies discretion on setting these deadlines. *See* EEOC *Policy Guidance On Executive Order 13164: Establishing Procedures To Facilitate The Provision Of Reasonable Accommodation*[3] at § II.C. In practice, this has resulted in an inconsistent patchwork of reasonable accommodation policies across the various federal agencies—with varying internal deadlines and varying standards for excusing those deadlines. *See* EEOC *Procedures For Providing Reasonable Accommodation For Individuals With Disabilities*[4] at § 2.F, (EEOC); HUD Handbook § 7855.1[5] at Ch. 6, sub-§ 6-2 (Dept. of Housing and Urban Development); *see also* SBA SOP 37 13 3 at Ch. 5, § 2.d (Small Business Administration Standard Operating Procedure); DOJ *Manual and Procedures for Providing Reasonable Accommodation*[6] at § A, (Dept. of Justice); USDA Departmental Manual 4300-002[7] at § 9 (Dept. of Agriculture).

NELA members have observed that these deadlines are often honored only in the breach, and that in practice many agencies will delay issuing decisions on reasonable accommodation requests for months if not years, chiefly through bureaucratic unresponsiveness or through abusing their authority to make repetitive and duplicative requests for supplemental medical documentation and/or by overly declaring "extenuating circumstances" to exceed processing deadlines. Further, although current Commission policy requires agencies to look at alternate interim accommodations, if there is a delay in providing final accommodations, NELA members have often observed agencies ignoring this requirement, leaving employees to languish with no accommodation whatsoever. *See, e.g.,* EEOC *Policy Guidance On Executive Order 13164: Establishing Procedures To Facilitate The Provision Of Reasonable Accommodation* at § II.C.14 ("If there is a delay, the agency must investigate whether there are temporary measures that could be taken to assist the individual with a disability").

These abuses document why the Commission should standardize processing deadlines for responding to reasonable accommodation requests. **NELA urges that any such standards—to be effective—should at a minimum:**

(1) prohibit agencies from delaying processing on reasonable accommodation requests due to alleged funding delays for paying for requested accommodations;
(2) cap the number of supplemental medical document requests that an agency can make for a given reasonable accommodation request;
(3) require agencies to provide requesting employees a reasonable minimum turn-around time for responding to requests for supplemental medical information, reflecting the practical realities of the delays involved in scheduling supplemental medical appointments and procuring records from medical providers;

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2 *See* http://www.eeoc.gov/policy/docs/accommodation.html.
3 *See* http://www.eeoc.gov/policy/docs/accommodation_procedures.html.
4 *See* http://www.eeoc.gov/eeoc/internal/reasonable_accommodation.cfm.
5 *See* http://portal.hud.gov/hudportal/documents/huddoc?id=78551c6SECH.pdf.
6 *See* http://www.justice.gov/jmd/eeos/ddaccomprocfinal081502.htm.
7 *See* http://www.ocio.usda.gov/sites/default/files/docs/2012/DM4300-002.htm.

(4) provide a date-certain deadline for a merits decision on the reasonable accommodation request, with written notice to the requesting employee confirming receipt of the reasonable accommodation request and advising the employee of their right to raise a denial of reasonable accommodation request in the Equal Employment Opportunity (EEO) complaints process if no final action is taken within a specified number of calendar days from the date of receipt of the request;
(5) restrict and specify the permissible reasons for "extenuating circumstances" exceptions to response deadlines to a fixed list;
(6) provide written notice to the requesting employee confirming invocation of an "extenuating circumstances" exception, stating with particularity the reasons for invoking the "extenuating circumstances" exception, and advising the employee of their right to raise a denial of reasonable accommodation request in the EEO complaints process; and
(7) expressly require agencies to assess promptly—and, if necessary, grant—interim accommodations in the event of a delay in responding to the general reasonable accommodation request.

NELA members have also observed agencies abusing their authority by requesting supplemental medical documentation as part of the interactive process, specifically through making improperly invasive requests for medical documentation. Agencies may require these employees, for example, to produce their entire medical file or to authorize agency *ex parte* access with unlimited HIPAA waivers to allow agency personnel to speak directly with the employee's medical providers about the employee's medical condition. NELA members have experienced instances where supervisors have called employees' medical providers directly—even without a HIPAA release—and tricked the medical providers into disclosing the employees' confidential medical information. These tactics violate clear Commission policy. In some cases, the demand for supplemental medical documentation appears to be used for delay, or worse, ignite an overreaction based on bias or stereotypes. *See, e.g.,* EEOC Enforcement Guidance *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* at Question 6.

Because of these abuses, **NELA urges the Commission to tighten its regulations to limit agency authority to request such supplemental medical documentation to the absolute minimum necessary, upgrading these rules from Guidance to a new provision in 29 C.F.R. § 1630.14 and made enforceable through the *per se* violation cause of action applicable to that provision. NELA also recommends that, because of the potential for abuse and the sensitivity of the issues involved, all medical documentation for reasonable accommodation requests ought to be kept in the custody of an agency medical officer, reasonable accommodation coordinator, or EEO office, and should be kept to the maximum extent practicable out of the hands of the direct supervisory chain of the requesting employee.**

NELA has observed that many agencies do not accord a right to representation to employees during the reasonable accommodation request process (other than accepting initial reasonable accommodation requests from counsel, as required under EEOC *Policy Guidance On Executive Order 13164: Establishing Procedures To Facilitate The Provision Of Reasonable Accommodation* at § II.A.6 and other authorities). Knowledgeable counsel can greatly facilitate the interactive process by helping employees and their medical providers to organize their responses to requests for supplemental medical information and play an important role in reaching amicable resolutions of reasonable accommodation requests. Accordingly, **NELA suggests that the Commission modify its reasonable accommodation regulations to**

grant expressly a right to representation at all stages of the agency's deliberations on the employee's reasonable accommodation request.

NELA strongly supports a true interactive process as the most effective way to identify effective reasonable accommodations quickly and with the least acrimony. NELA members have often observed that denial of reasonable accommodation issues are uniquely amenable to resolution through in-person discussions and alternative dispute resolution mechanisms. Both Executive Order 13164 and current Commission policy support the use of ADR to handle reasonable accommodation issues. *See, e.g.,* EEOC *Policy Guidance On Executive Order 13164: Establishing Procedures To Facilitate The Provision Of Reasonable Accommodation* at §§ II.B.10, II.H.29-II.H.31. To strengthen this effective mechanism and further implement the provisions of Executive Order 13164, **NELA strongly recommends that the Commission incorporate into its regulations a requirement that the agency offer live interactive meetings (in-person or telephonic) to discuss reasonable accommodations at all stages in the process: as part of the initial interactive process after receipt of the reasonable accommodation request, as a mandatory step imposed on the agency in both the informal and formal complaints process, and at the start of the hearing process before a Commission administrative judge as well.** NELA believes that these discussions will facilitate a more timely resolution of the reasonable accommodation request. Of course, the policy should recognize that live, direct communications would not be required if the employee or applicant does not want them or if the employee or applicant is prevented from participating in them because of a disability. In the latter situation, participation in this process may itself require an accommodation or may need to be excused, if needed, as a reasonable accommodation to the employee.

For similar reasons, NELA believes that an agency's denial of a particular accommodation should not end the interactive process. NELA members have observed that agencies tend to treat reasonable accommodation requests as once-and-done requests to respond to, as opposed to looking at them as part of a continuing process in a long-term effort to try to keep accommodations calibrated to the medical needs of employees with disabilities. Accordingly, many agencies will often simply deny the requested accommodation, failing to then take the next step of independently looking at alternate accommodations before declaring accommodation impossible. Similarly, some agencies will react poorly to follow-on requests for accommodation from an employee in situations, for example, where (1) the originally-requested accommodation was granted but proved less than fully adequate and in need of further modification, or (2) where an older preexisting reasonable accommodation is no longer sufficient due to intervening changes in the employee's medical condition. To address this "once-and-done"' mindset and the resulting problems, **NELA urges the Commission to require agencies to engage in an ongoing interactive process after denial of a particular requested accommodation to exhaust all other reasonable avenues for alternate accommodations before an agency can declare an accommodation denied.** This is already required by law, but having concrete written policies may lessen the need for lengthy and time-consuming enforcement actions. **NELA also suggests that the Commission should clearly direct agencies—as opposed to providing mere guidance—to include in their own policies that reasonable accommodations are a long-term continuing process, one which contemplates the likelihood of follow-on requests for modification and calibration of accommodations over the long term as part of the agencies' continuing obligation to reasonably accommodate employees.**

Under both Executive Order 13164 and current Commission policy, an agency that denies a reasonable accommodation is required to provide a detailed explanation for why the agency

believes the specific accommodation is an undue hardship. *See, e.g.,* EEOC *Policy Guidance On Executive Order 13164: Establishing Procedures To Facilitate The Provision Of Reasonable Accommodation* at § II.F. NELA members have observed that agencies often fail to adhere to this requirement, instead issuing terse denials of accommodation with no substantive explanation as to why a particular accommodation was denied. While an agency would be required to proffer some explanation once challenged through the denial of a reasonable accommodation complaint, getting this mandatory explanation should not require the filing of an EEO complaint. Agencies' failure to provide this mandatory explanation impairs transparency in the reasonable accommodation process, leading not only to distrust in the reasonable accommodation mechanisms, but also unnecessary litigation in cases where the agency actually does have a legitimate argument for denying the accommodation and has simply refused to communicate it to the employee. To give force to the requirement of Executive Order 13164, **NELA urges the Commission to make issuance of a detailed written explanation for denial of the reasonable accommodation a procedural condition precedent to (1) an agency's ability to assert an undue hardship defense, or (2) an agency's ability to claim "good faith efforts" for purposes of 42 U.S.C. § 1981a(a)(3).**

NELA also urges the Commission to revisit the issue of reasonable accommodation reassignments to alternate supervisors and/or offices for employees who acquire physiological or psychological disabilities due to the effects of harassment (either from a hostile supervisor or a hostile work environment more generally) and/or discrimination. Under Commission guidance predating the ADA Amendments Act of 2008 (ADAAA), the Commission had taken the position that reasonable accommodation did not require reassignment to alternate supervisors as a reasonable accommodation. *See* EEOC Enforcement Guidance *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* at Question 33. This guidance instead stated that the "ADA may require that supervisory methods be altered as a form of reasonable accommodation." NELA members, however, have found that this accommodation is for the most part unworkable in practice, as harassing and/or discriminating supervisors are unlikely to change their harassing methods (at least, absent a finding of discrimination).[8]

In the pre-ADAAA period, the Commission based its position on this issue upon its interpretations of the major life activities of concentration and working, specifically relying on cases such as *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), which Congress expressly repudiated in Section 2 of the ADAAA. *See, e.g., Ceralde v. U.S. Postal Service,* EEOC Appeal No. 07A00038 (August 3, 2001). OFO's post-ADAAA cases, however, have never reassessed the effects of the ADAAA on this prior policy, for example to look at whether *Ceralde* and its kin would be negated by ADAAA Section 4 and the inclusion of impairments of major bodily functions into the definition of major life activities. Instead, OFO's post-ADAAA decisions on this issue appear to apply mechanically Question 33 from the pre-ADAAA Commission Enforcement Guidance or to cases governed by the pre-ADAAA definitions. *See, e.g., Belton v. Dept. of Veterans Affairs,* EEOC Petition No. 0320120052 (April 2, 2013); *Holly v. Dept. of Homeland Security,* EEOC Appeal No. 0120121041 (July 12, 2012); *Slate v. Dept. of Labor,* EEOC Appeal

[8] Practical limitations to the real-world effectiveness of modification of supervisory methods as a reasonable accommodation include, but are not limited to, the lack of agreed-upon standards for modification of supervisory methods, the difficulty in attempting to teach any individual to change their methods of supervision, and the impracticability of continual monitoring of implementation of such accommodations to render them inadministrable.

No. 0120103760 (February 18, 2011) at fn.1; *Bergren v. Dept. of Commerce,* EEOC Appeal No. 0120080260 (August 5, 2010); *Bates v. Dept. of Veterans Affairs,* EEOC Appeal No. 0120080540 (April 30, 2010).

NELA urges the Commission to reexamine its policies and guidance on reasonable accommodation to assess the extent to which the ADAAA should now call for reasonable accommodation in this situation. After all, any qualified employee who develops or acquires a disability is entitled by statute to receive a reasonable accommodation absent undue hardship, and an employer should not get a free pass from their duty under the Rehabilitation Act to give a reasonable accommodation just because the employer itself caused the disability through harassment (and/or other discrimination).[9] **NELA encourages the federal government, as a model employer, to take the lead on creating an expansive view of possible reasonable accommodations in appropriate circumstances rather than creating bright-line rules on this issue.**

Finally, **NELA urges the Commission to reexamine its procedural mechanisms for enforcing denial of reasonable accommodation complaints and consider expediting schedules for these complaints.** As discussed above, denials of reasonable accommodation issues are uniquely time-sensitive, and the often years-long delays in having those claims adjudicated in the current federal sector complaints process results in an often ineffective enforcement mechanism. It is not useful for the EEOC or a court to find that a reasonable accommodation was unlawfully denied six years earlier if, one year after the denial, the unaccommodated disability snowballed into the employee's removal, resignation, or retirement

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[9] The Commission, in its proposed revisions to Management Directive 110 (MD-110), has expressly indicated that the remedy of reassignment away from a harassing and/or discriminating supervisor is appropriate as a form of equitable relief. *See* Proposed Revised MD-110, Ch. 11, § V, at 11-8 and 11-9, *available at* http://www.regulations.gov/#!documentDetail;D=EEOC-2014-0001-0001.

This mechanism, however, is under inclusive from the perspective of reasonably accommodating employees with disabilities, as it only provides assistance to employees who have already litigated a full EEO Complaint through hearing and received a finding of discrimination. Further, federal agencies' obligation under the Rehabilitation Act to reasonably accommodate disabilities is not predicated on a finding of liability or intentional discrimination against them, but instead is based upon the sound public policy flowing from the statutory direction to plan to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities, 29 U.S.C. § 791(b). Accordingly, the benefits of this reasonable accommodation should not be limited to only those situations where intentional discriminatory animus is found. Additionally, this mechanism is also inferior to reasonable accommodation because of the time and expense involved in such litigation, which significantly delays any such reassignment—leading in many cases to further medical or psychological harm to the employee during the time required for litigation, and preventing employees of lesser financial means from effectively seeking the reassignment. Finally, the reasonable accommodation mechanism is superior as it is faster than the often years-long delays required to obtain a finding of discrimination; while the continuing harassment and/or discrimination could give rise to an expanded compensatory damages award, it would be far better for the employee to receive a reasonable accommodation reassignment earlier and not suffer the compensable harm in the first place.

from federal service. In that situation, the employee who was denied accommodation can try to reverse the removal and obtain accommodations by simultaneously appealing the removal action in a mixed-case at the MSPB while litigating the underlying denial of accommodation claim at the Commission. But this multi-front litigation is wasteful for the government and beyond the financial means and personal stamina of many federal employees. Further, once the employee is removed, and while the appeal and complaint are pending, the employee would be forced to request disability retirement—which, if granted, leaves the employee with a reduced income and the government paying the employee a pension for no work rather than receiving the full benefit of an accommodated employee's efforts in performing the work.

In conclusion, **NELA suggests that the Commission fast-track denial of federal reasonable accommodations complaints.** This may require creation of a *sui generis* set of complaint processing deadlines and mechanisms. NELA is convinced that the effort would more than pay off in terms of net burden to the federal government, through reduced complexity of cases (due to lesser accrual of follow-on harassment and reprisal claims), fewer "snowballed" mixed cases going to the MSPB, increased workforce productivity, less stress and aggravation across the federal workforce generally, lower costs incurred for having to acquire and train new staff, and for litigation and adjudication overall, and reducing the number of disability retirements. To implement this suggestion, **NELA recommends that the Commission publish a supplemental Request for Public Comment in the Federal Register specifically seeking comments from stakeholders on specific formats for this *sui generis* complaint track.**

Again, NELA appreciates the opportunity to respond to the Advance Notice of Proposed Rulemaking, and wishes to thank the Commission for its attention and consideration.

Respectfully submitted,

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