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CREATOR: Richard L. Hayes (CN=Richard L. Hayes/OU=WHO/O=EOP [WHO])

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SUBJECT: Affirmative action rollout

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TO: Gene B. Sperling (CN=Gene B. Sperling/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

Attached are draft materials that we are preparing to support the opportunities/affirmative action announcement rollout . As you will see, they are too long and need to be edited down. Please send me any comments or edits you might have and I will incorporate them. I also have attached Ann's draft one pager. We are also preparing a brief (english) description of the model and results, as well as a longer technical paper that will not be generally circulated. If you can think of anything else that would be useful to have, e.g., charts, figures, etc., please let me know. Thanks.

===== ATTACHMENT 1 =====
ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert ARMS_EXT: [ATTACH.D47]MAIL436066554.026 to ASCII,
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Ann Lewis draft, February 24, 1998/anmessag.wpd

President Clinton has directed his administration to consider carefully existing federal affirmative action policies, pursuant to his goal of "mend it, don't end it" and recent Supreme Court rulings, such as the Adarand decision.

In accordance with that direction, the following recommendations represent narrowly tailored policies, targeted to areas in which disparities, arising from discrimination, continue to exist:

- Develop and expand mentoring programs, encouraging large businesses across the country to partner with smaller, locally owned businesses located in distressed communities to engage in a range of activities, from advice and guidance to subcontracting. As part of this process the President will issue an Executive Order directing the Vice President as chair of the Community Empowerment Board to oversee an administration-wide initiative to develop and promote the federal government's efforts on mentoring.
- Strengthen and improve the SBA 8(a) process, including permitting two or more firms to jointly venture on particular procurements; establishing a new 8(a) mentoring program; and streamlining the 8(a) program to be more effective; clarifying eligibility, including permitting more non-minorities to qualify; and deleting burdensome and obsolete regulations.
- Build on the successful program enacted by the Congress and operated by the Department of Defense, which enables minority firms to compete in industries in which the data demonstrate that the procurement playing field is still not even, by expanding DoD's price credits system to government wide use using market driven benchmarks to ensure appropriate targeting.

Note: What does market driven mean? Need to emphasize more the reform/mend it aspect of the proposal.

- Help distressed communities by publishing proposed regulations launching the HUBZone program, that will provide federal procurement opportunities for small businesses that do significant business in, hire significant numbers of residents from, or directly generate economic activity in general areas of economic distress. The program will serve as a supplement — and not compete with — existing federal procurement programs, such as the 8(a) program.

Draft: February 25, 1998, document: pro_Q&A.wpd

AFFIRMATIVE ACTION PROCUREMENT REFORM Q&As

Q. WHAT IS THE PURPOSE OF THE CLINTON ADMINISTRATION'S NEW REGULATIONS

TO REFORM AFFIRMATIVE ACTION IN FEDERAL PROCUREMENT?

- A. These regulations are a serious and thoughtful effort to ensure that federal affirmative action procurement programs comply with the standards set in the Supreme Court's 1995 decision in *Adarand v. Peña*. They also fulfill the President's commitment to "mend, not end" these programs. These regulations continue this country's efforts to eliminate the effects of past and continuing discrimination against minority-owned firms lawfully, without eliminating affirmative action entirely.

Q. HOW DOES THIS NEW PROGRAM DIFFER FROM THE SDB PROGRAMS PREVIOUSLY IN EFFECT?

- A. There are several significant differences. First, the proposal would tighten certification requirements for SDB's. Second, agencies would be required to implement procurement mechanisms that do not rely on race to broaden the opportunities for small, minority firms. Third, a series of "benchmarks" estimated by the Department of Commerce would tie the use various SDB procurement mechanisms to statistical data demonstrating that minority-owned firms have been disadvantaged in particular industries. The proposed system would only use SDB set-asides as a last resort. Instead, contracts would be open to all firms and agencies would be able to use price evaluation adjustments as part of the bidding process, a tool that was previously authorized only at the Department of Defense.

Q. DOESN'T THE SUPREME COURT'S *ADARAND* DECISION PROHIBIT THIS TYPE OF AFFIRMATIVE ACTION PROGRAM?

- A. No. The Supreme Court confirmed that the federal government can use affirmative action to remedy the effects of racial discrimination, but held that we must narrowly tailor such programs to serve a compelling government interest. After a thorough review of federal affirmative action programs and the legislative history and justifications for them, the Justice Department concluded that there still exists a compelling need for federal procurement programs that benefit disadvantaged minority businesses. However, agencies must change the manner in which they use affirmative action in federal procurement to meet the requirements of *Adarand*.

Q. WHAT MAKES THIS NEW SYSTEM NARROWLY TAILORED?

- A. The Supreme Court identified six relevant factors when using race and ethnicity to award federal contracts, which these regulations address.
- First, agencies must always use race-neutral alternatives, such as outreach and training, to the maximum extent possible.

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- Second, race cannot be the sole factor in SDB procurement decisions — all firms obtaining federal contracts, must show that they qualify to perform the work.
- Third, SDB procurement mechanisms will be used only when the data on procurement show that the effects of discrimination against minority businesses continue.
- Fourth, the authorized SDB procurement mechanisms and price evaluation adjustment percentages, by major SIC group, will be based on an annual analysis of the use of SDB firms as related to the number of qualified SDBs to perform the work in question.
- Fifth, as SDB firms are more successful in obtaining federal contracts, the authorized price evaluation adjustment level will decrease automatically and end altogether, as the effects of discrimination dissipate in various sectors of the economy.
- Finally, the new program will not over burden non-SDB businesses. The overwhelming percentage of federal procurement money will continue to flow, as it does now, to non-minority businesses.

Q. IS THERE REALLY ANYWAY TO JUSTIFY A “RACIAL PREFERENCE” PROGRAM?

A. This is not a racial preference program. Minority firms are not getting a price credit to help them win more contracts than similar firms are winning. Price credits merely help level the playing field for small disadvantaged firms, where data suggested that they continue to suffer the effects of discrimination, and are not winning a fair share of contract dollars. [Affirmative action programs are race-based not to show preference for one race over another but to resolve that problem.]

Q. WHAT DO THE BENCHMARKS MEASURE?

A. For each industry, the benchmarks measure the “capacity” compared to the “utilization” of small disadvantaged businesses. ~~The “capacity of small disadvantaged businesses is their share of contracting dollars typically obligated in 1996 to firms, ready and willing to contract with the federal government, controlling for the size and age of the firms. “Utilization” is the actual small disadvantage business’s share of contracting dollars obligated.~~

The capacity of small disadvantaged businesses is their share of firms ready, willing, and able to contract with the Federal government, controlling for the size and age of the firms. Utilization is the SDB’s actual share of contract dollars received in any given fiscal year.

Q. WHAT FIRMS WERE THE SMALL DISADVANTAGED BUSINESSES COMPARED TO?

A. The U.S. Department of Commerce gathered data from three sources on firms that were ready and willing to contract with the federal government in fiscal year 1996: a representative sample of firms that either won or lost bids on competitive government contracts; all other firms that had new definitive contract actions let in that year; and all firms certified for participation in the

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Small Business Administration's 8(a) program for 1996.

Q. IF THERE IS A DIFFERENCE BETWEEN THE DOLLARS WON BY SMALL DISADVANTAGED BUSINESSES, AND THE DOLLARS THEY WERE EXPECTED TO WIN, DOES THAT MEAN THE FEDERAL GOVERNMENT IS DISCRIMINATING AGAINST SMALL DISADVANTAGED BUSINESSES?

A. No. Differences between dollars won, and dollars typically awarded to firms of similar size and age, likely reflect the effects of discrimination in the private sector on the competitiveness of small disadvantaged businesses in the federal sector.

Q. COULD THE DIFFERENCES BETWEEN SMALL DISADVANTAGED BUSINESSES AND OTHERS, IN THEIR FEDERAL CONTRACTING EXPERIENCE, BE THE RESULT OF GREATER EFFICIENCY FOR OTHER FIRMS? AND IF SO, IS THIS PROGRAM JUST REWARDING THE INEFFICIENCY OF SMALL DISADVANTAGED FIRMS?

A. No. The program is aimed at leveling the playing field for small disadvantaged businesses. Because the benchmarks compare firms of equal age, and size, any remaining differences in the amount of government contract bids won between small disadvantaged firms and others, are likely to be related, directly or indirectly, to some factor of discrimination like access to working capital or price discrimination from suppliers.

Q. WHY SHOULD THE GOVERNMENT CARE IF THIS PARTICULAR GROUP OF FIRMS IS "UNDERUTILIZED," AS OPPOSED TO ANY OTHER GROUP OF FIRMS?

A. The President is committed to removing any remaining vestiges of racial discrimination, that block full participation of all Americans in our society and economy.

Small disadvantaged businesses play a significant role in making the competitive bid process more competitive.

➤ SDB firms represent about 16 percent of all firms in the competitive bid process, with higher shares in some industries

➤ In many industries, SDB presence is vital to the competitive process. For instance, in the standard industrial code for repair services, almost 10 percent of solicitations would have resulted in only one bidder, if SDB firms had not also bid.

Q. GIVEN THE SMALL BUSINESS ADMINISTRATION'S 8(a) PROGRAM, DOESN'T THIS PROGRAM CREATE ADDITIONAL ADVANTAGES FOR THE SAME FIRMS?

A. No.

➤ We have taken 8(a) contracts into account in determining whether the level of minority participation in government contracting in each industry justifies using price credits. Basically, if 5 percent of contracts in an industry went to SDBs under 8(a), that would

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be included in utilization.

- The price credit program will be offered to a set of small disadvantaged business owners virtually distinct from the set of firms in the 8(a) program. Fewer than 10 percent of the small disadvantaged businesses who bid on contracts, outside the 8(a) program, are 8(a) firms.
- Slightly more small disadvantaged businesses are participating in the competitive bid process (estimated to be about 7,000, excluding 8(a) firms that participate in the non-8(a) competitive bid process) than are in the 8(a) program (around 6,200).
- While still small, these non-8(a) small disadvantaged businesses, tend to be larger, slightly older, and appear to have higher productivity than 8(a) firms.

Q. WHY HAVE TWO PROGRAMS AIMED AT MINORITY BUSINESSES? CAN'T THIS PROGRAM JUST REPLACE THE SMALL BUSINESS ADMINISTRATION'S 8(a) PROGRAM?

A. No. The price credit addresses fair utilization of existing disadvantaged businesses. The 8(a) program seeks to foster new minority competitors. It addresses the low number of minority firms. Because the problems faced in firm creation are different from the problems existing firms face in being successful, one program is not suitable for both.

Q. DOESN'T THIS PROGRAM CREATE NEEDLESS ARGUMENTS OVER RACE, WHEN THE GAPS IN CONTRACTING FACED BY MINORITY FIRMS IS SMALL?

A. No. The gaps between the amount of contracting dollars awarded to small disadvantaged businesses, and the average size of contracts typically won by firms of their size, can be large. For instance, in the industrial classification for engineering, accounting and management related services, SDBs won about x percent of contracting dollars, though given their firm size, SDBs might have won about x percent of contracting dollars. On a national scale, SDBs won about x percent of contract dollars in competitive bids for general construction, while given their firm size they might have won about x percent.

Q. WON'T THIS PRICE CREDIT MEAN THE COST TO THE FEDERAL GOVERNMENT WILL BE HIGHER?

A. No.

- ~~The price credit may make all firms bid more competitively. The experience the Department of Defense had with its authority to use a price credit showed that in the industries, where we are applying the price credit, the price credit did not increase costs for the Department of Defense for the contracts won by small disadvantaged businesses. Almost all small disadvantaged businesses that won contracts were the low bid.~~

The price credit may make all firms bid more competitively. The DOD experience with its price credit authority reveal that the price credits did not increase costs in contracts won by small

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disadvantaged businesses. Almost all small disadvantaged businesses that won contracts were the low offeror.

- Price is only one factor in determining a winning contractor. The low price is not the automatic winning offer. Only a small share of government contracting is subject to full, and open competition bids where award is based on low price.
- Over time, the government's interest is in maintaining a competitive process. Small disadvantaged firms have proven themselves important to keeping the process competitive. So, in the end, a viable, small disadvantaged business community helps keep costs down.

Q. WHY DO MINORITY FIRMS GET PRICE CREDITS IN INDUSTRIES WHERE THEY ALREADY MAKE UP A LARGE SHARE OF CONTRACTS, FOR INSTANCE, AS IN STANDARD INDUSTRY CODE 73?

A. This program is not a racial preference program, and it is not a racial quota. The price credits are being used to level the playing field for small disadvantaged firms, where the data show they are not winning their fair share of contract dollars, when compared to otherwise similar firms. The purpose of the benchmarks is not to preordain a limit on minority contracting, but to establish a fair and level playing field. On that fair and level playing field, minority contracting may be at a high, or a low level. Overall, small disadvantaged firms make up 25 percent of the firms identified in the data base used to create the benchmarks. Adjusting for the age and size of those firms, it could be expected that they could handle 12 percent of all contracting. So, in some industries that number will be higher, and in other industries it will be lower.

~~Minority firms face discrimination that makes the type of industries they start businesses in differ from the types of industries non-minorities start businesses.~~ Minority firms face discrimination that make the type of businesses they start different from the type of businesses non-minorities start. Consequently, they will be more concentrated in some industries than others. Because of differences in access to clients, perhaps because of overt discrimination, perhaps because of differences in the ability to network, minority firms can also have different attitudes toward public sector contracting than non-minority firms. Unlike employment, civil rights laws do not cover business contracts with other businesses. Because the public sector is so small compared to the private sector, minority firms may show up as a disproportionate share of businesses in the public sector.

Q. WON'T THIS PROGRAM RESTRICT OPPORTUNITIES FOR NON-DISADVANTAGED FIRMS?

A. No.

- In 1996, only 6.4 percent of the federal government's purchasing was conducted with disadvantaged businesses even with the use of affirmative action programs. Thus, 93.5 percent of the government's business goes to non-SDB firms. The President's review of affirmative action programs did find that the use of set-asides has created some concentrations of SDB awards in some industries and regions. The Defense department

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suspended use of the rule of two set-aside program in October 1995.

- The new regulations open participation in the SDB program to more women and nonminorities.
- Second, firms that do not participate in SDB programs received more than 94 of the government's contracting business in FY 1996, and that will likely continue under the new proposal.
- Third, contracts will be awarded in competitive bidding, with price evaluation adjustments, rather than being set aside for bidding only by SDB firms.
- Finally, the regulations are designed to ensure that SDB awards will not be unduly concentrated in particular industries and geographic markets. The benchmark limitations will limit the use of SDB procurement mechanisms to circumstances where discrimination has reduced SDB participation in contracting.

Q. WE HAVE HAD AFFIRMATIVE ACTION IN FEDERAL PROCUREMENT FOR TWO DECADES. WHY DO WE STILL NEED MINORITY BUSINESS PROGRAMS? DO THEY REALLY SERVE A "COMPELLING INTEREST?"

A. Yes. In the 1970's, small minority-owned firms received only 1 of the federal contracting dollar. With affirmative action programs, small minority businesses have been able to make progress in breaking into a government procurement system that had effectively locked them out before. The evidence today demonstrates, however, that discriminatory practices continue to create additional hurdles for minority firms competing for government contracts. The available evidence of discrimination paints a compelling picture for remedial action in government procurement, a need that was reaffirmed by Congress in 1994 when it enacted FASA.

Q. WHAT EVIDENCE DO YOU HAVE TO BACK UP YOUR CONTENTION?

A. The evidence is overwhelming and has been thoroughly documented in an analysis of the legislative history and available empirical data conducted by the Department of Justice. For example,

- the typical white-owned business receives three times as many loan dollars as the typical black-owned business with the same amount of equity capital.
- In construction, white-owned firms receive fifty times as many loan dollars as black-owned firms with identical equity. Once formed, the exclusion of minority firms from "old boy" business networks deprives them of critical information about potential contracts and places them at a competitive disadvantage.
- Difficulties in obtaining bonding also hinder minority firms who want to participate in

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government procurement. One Louisiana study found that minority firms were nearly twice as likely to be rejected for bonding, three times more likely to be rejected for bonding for more than \$1 million, and on average were charged higher rates for the same bonding policies than white firms with the same experience level.

Q. IS THE SBA 8(a) BD PROGRAM AFFECTED BY THE NEW REGULATIONS?

A. Yes, but the 8(a) program would remain in effect. The 8(a) program is a business development program that is distinct from the other SDB programs.

- It is more narrowly tailored because of its more stringent requirements for eligibility and certification, especially with respect to whether participating firms are economically disadvantaged.
- Firms in the 8(a) program must develop business plans and may only stay in the program for a limited time. The Justice Department will continue to defend the constitutionality of the program on that basis.

Q. WHAT IMPACT WILL THE BENCHMARKS HAVE ON SBA'S 8(a) BUSINESS DEVELOPMENT PROGRAM?

A. The Administrator will review the benchmarks and determine how to implement them for the 8(a) program. For example, if the level of minority contracting in an industry exceeds the benchmark calculation, the SBA Administrator could take several steps, including: (1) limiting entry of new firms into the program in that industry for some time; (2) accelerating graduation for firms that do not need the full period of sheltered competition; or (3) limiting the number of 8(a) contracts awarded in particular industries or in specific geographic areas where contracts may be unduly concentrated.

Q. HOW WILL THE BENCHMARK LIMITATIONS WORK?

A. The benchmark limitations will represent the level of minority participation in federal procurement that would be expected in the absence of discrimination. They are a measure of the capacity of minority contractors to perform the work in a particular industry — or what it would be, absent discrimination. Benchmark limitations have been determined for major SIC groups at the two-digit (or, where appropriate four-digit) level and by region (if any). If in an industry, SDB participation/ utilization in federal procurement matches or exceeds the capacity of SDB firms to do the work, the authorized price evaluation would be eliminated or decreased.

Q. HOW WILL THE PRICE EVALUATION ADJUSTMENTS WORK IN PRACTICE?

A. In competitive, negotiated competitions, contracting officers will be able — but not required — to award a contract to an SDB if the SDB is qualified to perform the work and its bid is within a

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certain percentage of the fair market value of the contract. The Federal Acquisition Streamlining Act ("FASA") passed by Congress in 1994 authorizes credits of up to 10 percent. Under the new regulations, price evaluation adjustments will be anywhere from 0 to 10 percent, depending upon the analysis conducted by the U.S. Department of Commerce. Prime contractors, who commit to using SDB subcontractors, may also be eligible to receive an adjustment based on an analysis Commerce is now undertaking.

Q. ARE THE BENCHMARK LIMITATIONS QUOTAS?

No. A quota is a fixed number that must be achieved despite the availability of qualified individuals. It lacks flexibility and disregards merit. The benchmark limitations are precisely the opposite. They impose limitations on the use of SDB procurement mechanisms. They provide a price credit, making race indirectly one of many factors considered in the award of a contract, and only then is ... there is a showing of discrimination. As minority firms are more successful in obtaining federal contracts, reliance on price credits will decrease. The benchmark limitations provide a means to measure success in providing opportunities for SDBs, but they do not set a minimum or a maximum level of minority contracting that must be achieved. An agency would never be required to award a contract to an unqualified firm simply to meet a benchmark.

Q. WILL SDB SET-ASIDES BE PERMITTED UNDER THESE REGULATIONS?

A. Agencies would only be authorized to award price evaluation adjustments under the new program. Only if these mechanisms do not eliminate the vestiges of discrimination in particular industrial sectors, will the use of set-asides then be considered.

Q. WHO IS ELIGIBLE TO PARTICIPATE IN THIS PROGRAM? IS THE PROGRAM RESTRICTED TO MINORITIES? HOW MANY FIRMS DO YOU EXPECT TO APPLY?

A. Any business owned and controlled by one or more socially and economically disadvantaged is eligible to participate in the program. Although the statute enacted by Congress presumes certain racial and ethnic minorities to be disadvantaged, the regulations permit others to be included as well. For example, a poor Appalachian white person who has never had a quality education or the ability to expand his or her cultural horizons may be eligible to participate. In order for a non-minority firm to establish their eligibility, the new regulations permit them to establish that they are socially and economically disadvantaged under a lower standard of proof — a preponderance of the evidence test rather than a clear and convincing test.

Q. WHAT IS THE PROCESS FOR CERTIFYING DISADVANTAGED AND ECONOMIC STATUS? WHAT EVIDENCE WILL SBA RELY UPON?

A. In determining whether an individual is socially disadvantaged, SBA will consider the totality of the circumstances experienced by the individual, such as their education, employment and business history, as it demonstrates such disadvantage. In evaluating whether an individual is

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economically disadvantaged, SBA will consider the extent to which a disadvantaged individual's ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities.

Q. IS THE NEW PROGRAM A RETREAT FROM CURRENT AFFIRMATIVE ACTION PROGRAMS? WILL IT RESULT IN A REDUCTION IN MINORITY CONTRACTING?

A. The new regulations implement the authority extended to federal agencies by FASA to promote opportunities for SDBs, including the use of the measures such as price evaluation adjustments for SDB in a manner consistent with the Supreme Court's decision. Previously, only DoD had this authority. Agencies are also being encouraged to make even greater efforts to use tools that do not explicitly rely on race in procurement decisions, such as outreach and training for SDB contractors.

Q. WHAT EFFECT WILL THESE REGULATIONS HAVE ON WOMEN-OWNED BUSINESSES?

A. These new regulations may increase opportunities for women and other non-minorities. By lowering the standard of proof that women-owned businesses, among others, must meet to establish that they are socially and economically disadvantaged, qualifying as SDBs will be easier for them.

➤ This proposal does not alter the current goal for the inclusion of women in federal contracting, nor does it alter the Department of Transportation's Disadvantaged Business Enterprise program, which includes women in its procurement goals. Neither of these programs provide for price evaluation adjustments or sheltered competition.

Q. DOES THIS PROPOSAL ATTEMPT TO COMBAT FRAUD?

A. Yes.

➤ For the first time, firms must present a certification from entities approved by SBA that the identified socially and economically disadvantaged individuals in fact own and control the company.

➤ The new rules also require prime contractors to verify the SDB status of their subcontractors by consulting the SBA list of certified firms in order to receive a monetary incentive for exceeding the subcontract targets under the incentive subcontracting program.

➤ Also, the rules allow for challenges as to the veracity of a firm's representation of being an SDB.

➤ In addition, the Department of Justice and SBA are committed to identifying and prosecuting to the full extent of the law individuals who misrepresent their SDB status.

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Q. DOES THIS PROGRAM CREATE BENEFITS FOR UNQUALIFIED FIRMS?

A. No. Every firm is required to meet all quality and performance standards in order to be selected for any contract award.

Q. DO THESE NEW REGULATIONS AFFECT THE DEPARTMENT OF TRANSPORTATION'S DBE PROGRAMS?

No. DOT's DBE program is covered by a separate statute. The proposed regulation does not affect the Transportation Department's Disadvantaged Business Enterprise Program authorized by the Intermodal Surface Transportation Efficiency Act (ISTEA). Under this program, state and local recipients of federal highway, transit, and airport grants are required to establish affirmative action goals for the participation of DBEs in DOT-assisted contracting. The Transportation Department recently published a supplemental notice of proposed rulemaking that modifies the way that this program operates to help ensure that it too comports with Adarand, while improving its overall effectiveness and reduce burden.

Q. WON'T THESE REGULATIONS REPRESENT A GREAT DEAL OF ADDITIONAL WORK FOR PRIME CONTRACTORS?

A. No. These regulations will not require significant contractor investment or a long implementation period, nor will they be particularly complex to carry out, particularly for contractors who have experience dealing with DOD. Price credits have been used in DOD for some time. In extending the procurement mechanisms to civilian agencies, they have been simplified to the maximum extent possible and should not cause unnecessary difficulties as non-DOD contractors try to comply with them. Outreach and training of procurement officials and contractors will be essential to successful implementation of the SDB reform program.

Q. WHAT IS THE PROCESS FOR DETERMINING WHEN ADDITIONAL OR ALTERNATE SDB PROCUREMENT MECHANISMS WILL BE AUTHORIZED?

A. ~~If an agency feels a particular industry category to bear a disproportionate share of the contracts awarded by a contracting activity's goals for SDB concerns, requests for a determination, including supporting rationale, including any peculiarities related to industry, regions, or demographics, may be submitted to Commerce for a determination. If approved by commerce, a contracting office will be permitted to limit the use of the approved SDB mechanism in future solicitations.~~

~~Further, the Department of Commerce is not limited to the SDB procurement mechanism identified in this section where the Department has found substantial and persuasive evidence of (1) a persistent and significant underutilization of minority firms in a particular industry, attributable to past or present discrimination; and (2) a demonstrated incapacity to alleviate the problem by using those mechanisms.~~

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Note: INSERT ANSWER FOR THE QUESTION THAT READS: WILL SDB SET-ASIDES BE PERMITTED UNDER THESE REGULATIONS.

- Q. HOW ARE YOU GOING TO KEEP PRIME CONTRACTORS FROM MISREPRESENTING THEIR SDB UTILIZATION?
- A. These new regulations require firms claiming an SDB procurement benefit to be certified and included on a SBA-maintained register. By requiring prime contractors to check that register before treating their subcontractors as SDBs, they will know that they are using legitimate SDB firms. Moreover, the government will review the accuracy of any reports submitted by prime contractors as part of the normal contract oversight.
- Q. DO THE BENCHMARKS FACTOR IN THE LEVEL OF SUBCONTRACTING? HOW IS THIS DONE, WHEN THERE IS NO SUCH DATA BASE TO DO IT WITH?
- A. No. (Elaborate).
- Q. IN ITS MAY 23, 1996 PROPOSED RULE, THE DOJ INDICATED IT INTENDED TO STEP UP OUTREACH AND TECHNICAL ASSISTANCE. ARE THERE ANY SUCH INITIATIVES BEING PURSUED?
- A. ????????????
- Q. ARE AFFIRMATIVE ACTION PROCUREMENT PROGRAMS STILL NEEDED?
- A. Yes. Disadvantaged business programs were enacted in response to specific findings that discrimination has impeded the ability of minority-owned and other disadvantaged firms from developing in our economy. Affirmative action has closed many gaps in economic opportunity, but the need remains. THIS QUESTION APPEARS TO BE DUPLICATIVE OF THE QUESTION THAT READS: We have had affirmative action in procurement for two decades. Why do we still need minority business programs? Doe they really serve a compelling interests?
- Q. AREN'T AGENCY GOALS FOR AWARDING CONTRACTS TO SDBS REALLY QUOTAS?
- A. No. Goals are not a numerical straight-jacket -- they reflect an aspiration that a certain percentage of contracting will be with small disadvantaged firms, not a guarantee that it will happen. Indeed, until 1993, even the 5 goal was not achieved. The only consequence of failure to meet a goal is that an agency will be expected to continue to make a good faith effort. Similarly, the 5 goal is not a cap.

Draft:February 25, 1998, document: pro_Q&A.wpd

Q. WHAT OTHER CHANGES ARE YOU MAKING TO THE SBA 8(A) BD PROGRAM?

A. SBA is working hard to improve the efficiency of the program and have already carried out important changes in this regard. In the future, we hope the program can give meaningful help to a greater number of eligible participants. (More)

Q. WHAT MUST AN SDB DO TO BE ELIGIBLE FOR THE PROGRAM?

A. To be eligible for a price credit, an offeror must submit a certification, obtained within the past three years, that the business is owned and controlled by one or more socially disadvantaged persons. Members of designated minority groups seeking to participate in SDB programs fall within the statutorily mandated presumption of social and economic disadvantage established in Section 8(d) of the Small Business Act. Non-presumed offerors who do not fall within the statutory presumption can qualify by submitting evidence proving their social and economic disadvantage status.

Q. WHO IS RESPONSIBLE FOR CERTIFYING SDBS?

A. The Small Business Administration's Office of Government Contracting and Minority Enterprise Development will administer the new SDB Certification program. In particular, they will:

- certify all qualified concerns requesting SDB certification;
- decide protests and appeals;
- establish and oversee a nationwide network of private certifiers who will help SBA process applications, ensure that they are complete and correct in form, and make a determination that the applicant firm is in fact owned and controlled by the individuals identified as the owner; and
- maintain a national public on-line registry of certified SDBs.

Q. WHAT IS THE STATUTORY AUTHORITY FOR THE PRICE CREDIT PROGRAM?

A. Section 1207, Public Law 99-661 (10 U.S.C. 2323 (e)) authorizes awards to small disadvantaged

Draft:February 25, 1998, document: pro_Q&A.wpd

businesses (SDBs) at a price not exceeding fair market price (FMP) by not more than 10 percent.

- The price evaluation program is one of two prime contract tools authorized under the statute aimed at increasing awards going to SDBs. The other was the SDB set-aside (i.e., "Rule of Two" program) that was suspended in response to the Supreme Court's Adarand decision.
- Originally the program applied to DOD contract awards conducted under full and open solicitation procedures, based on price only. After suspension of the Rule of Two SDB set-aside, DOD expanded the program to include awards based on price and other factors (e.g., best value procurements).
- During fiscal years 1994, 1995, and 1996, DOD awarded \$356 million, \$215, and \$198 million, respectively, to SDBs under the evaluation program.
- Analysis of the FY 1994 data shows that DOD most often made SDB evaluation preference awards in connection with oil refining, engineering services, equipment maintenance and repair, and equipment installation contracts.

TALKING POINTS
AFFIRMATIVE ACTION IN FEDERAL PROCUREMENT
February 24, 1998 Draft

THE CLINTON ADMINISTRATION HAS TAKEN ANOTHER STEP FORWARD IN REFORMING AFFIRMATIVE ACTION. WE WILL SOON ANNOUNCE SEVERAL PROPOSALS THAT WILL MODIFY THE WAY IN WHICH THE GOVERNMENT CAN USE RACE-BASED AFFIRMATIVE ACTION MEASURES IN OBTAINING GOODS AND SERVICES FROM CONTRACTORS

- **President Clinton's efforts to mend affirmative action programs. Under President Clinton's leadership, his administration has considered carefully existing federal affirmative action programs to make sure that they are fair, effective and balanced. In July 1995, the President called for America to "mend not end" affirmative action programs and for the Justice Department to ensure that Federal procurement programs comply with strict judicial scrutiny, as required by the Supreme Court's Adarand decision, while preserving his commitment to enhancing equal opportunity.**

- **Affirmative action still needed. After more than two years of careful study, that review has concluded that:
-- affirmative action is still necessary to expand economic and educational opportunity and that societal discrimination has had and continues to have a profound impact on minorities' opportunities in the private sector and has affected their ability to participate in government procurement.
-- Currently, only about 7 percent of the value of all federal contracts with private firms (\$10 billion of \$151 billion) goes to small disadvantaged businesses. Research conducted by the U.S. Department of Commerce shows that the gaps between the amount of contracting dollars awarded to small disadvantaged businesses, in the competitive process, and the average size of contracts typically won by firms of their size and age, can be large.
-- Barriers to entry, like discrimination in the credit market, may also have reduced the presence of minority firms in some industries. The existence of ongoing discrimination justifies the government's interest in race-conscious decisionmaking, but government efforts to remedy past discrimination must be narrowly tailored.**

- **Measured, government response to the lingering effects of racial discrimination.** With these challenges in mind, the President is announcing four (three?) narrowly tailored proposals, targeted to areas in which disparities, arising from discrimination, continue to exist. His proposals are intended to:
 - help small businesses become successful entrepreneurs;
 - improve and strengthen the Small Business Administration 8(a) business development program;
 - restore opportunities to small businesses' own and controlled by disadvantaged individuals;
 - and help small businesses in distressed communities (do we want to save this until later?)

*HERE IS HOW THE PRESIDENT'S PROPOSALS WILL HELP
RESTORE OPPORTUNITIES*

- **Helping small businesses become successful entrepreneurs.** To make the dream of being a successful entrepreneur a reality, President Clinton will issue an Executive Order directing the Vice President in his capacity as chair of the Community Empowerment Board to oversee an Administration-wide initiative to develop and promote Federal government efforts on business mentoring. Lead by Treasury Secretary Rubin and Small Business Administration Administrator Alvarez, this initiative will also seek to:
 - encourage more private-sector businesses across the country to partner with small businesses and to bring to bear on government programs the field's best practices.
 - help locally owned businesses in distressed communities and provide them with a wide a range of badly needed support, from management consulting, and one-on-one technical assistance, to peer group support and subcontracting opportunities.
- **Improve and strengthen the Small Business Administration 8(a) program.** President Clinton strongly supports the 8 (a) program, and believes that it significantly increases opportunities for the more than 6,000 firms in the program seeking to develop their competitive skills. The 8(a) program is a business development program designed to help eligible small firms reach a point of self-sufficiency and competitive viability and eligibility for the program is not limited to members of minority groups. The President's proposals build upon efforts SBA has already instituted to strengthen and improve its effectiveness in encouraging firms to develop in ways that will ensure their success in the competitive marketplace after program completion. His plans include:
 - encouraging more equitable distribution of 8(a) contracts by placing a limit on the

amount
of sole-source contracting any single firm can receive and also encouraging
participating 8(a) firms to compete more effectively for contracts.

- waiving restrictions against small businesses seeking to affiliate with other companies to create joint ventures on particular procurements, and in doing so, enhance their ability to obtain larger prime contracts than they would otherwise qualify for and still be viewed as small businesses for purposes of qualifying for the 8(a) program.
- add significant developmental assistance for 8(a) firms by establishing a mentor-protégé program. Firms in the early years of 8(a) program participants will be able to tap into the expertise and capital of 8(a) graduates or more experienced firms and take advantage of their knowledge and practical experience, thus enhancing their abilities to be viable businesses after they leave the 8(a) program.
- Streamline the operation of the 8(a) program by standards set by the National Partnership for Reinventing Government, to ease certain restrictions perceived to be burdensome on program participants, and deleting obsolete regulations. We are also changing the program's eligibility requirements to permit more non-minorities to qualify for the program.

▪ *Restoring government opportunities.* To enable minority firms to compete in industries in which the data show that the procurement playing field is still not even, the President will build on a successful Department of Defense program, first authorized by Congress in 1994, and extend to other federal agencies the use of price evaluation credits to help increase minority procurement.

To ensure the program passes Constitutional muster, the Justice Department is requiring:
-- federal agencies avoid any undue burden on nonbeneficiaries of the program.
-- federal agencies to use race-neutral means such as outreach and technical assistance to increase

opportunities for minorities in federal procurement to the maximum extent possible.
-- stepped up enforcement to crack down on individuals who misrepresent their disadvantaged status or their ownership and control of a business to ensure that the benefits of affirmative

action go only to individuals and businesses that are deserving.
-- that race not be relied upon as the sole factor in SDB procurement decisions. Firms, obtaining

federal contracts, have to demonstrate that they are qualified to perform the work.
-- that the U.S. Department of Commerce identify and target those industries where the effects of

discrimination continue to marginalize minority firms — to ensure that race-conscious procurement is not used unnecessarily.
-- that firms seeking to be recognized under this program certify to the Small Business

Administration that the firm is indeed owned and controlled by one or more disadvantaged persons before the government awards then a contract. Also, future uses of the 8(a) program will be guided by the Commerce Department's analyses.

These procurement reforms represent real and substantial change. This program will expand the government's use of price evaluation credits to help restore opportunities for small businesses owned and controlled by socially and economically disadvantaged persons, who are seeking to be government contractors. Any credits provided to these firms would be available to SDBs in industries in which SDBs are demonstrably underutilized, as judged by a set of industry-specific benchmarks prepared by the U.S. Department of Commerce.

Small
by
--
Contracting
SDB
determine that

➤ Eligibility for a price credit. To be eligible for a price credit, an offeror must submit a certification, obtained within the past three years, that the business is owned and controlled by one or more socially disadvantaged persons. Members of designated minority groups seeking to participate in SDB programs fall within the statutory presumption of social and economic disadvantage established in Section 8(d) of the Small Business Act. Offerors who do not fall within the statutory presumption can qualify by proving their social and economic disadvantage based on a preponderance of evidence instead of the current clear and convincing standard. This change will open SDB participation to more women and nonminorities.

➤ Benefits will go only to those who are eligible. SBA's Office of Government and Minority Enterprise Development will certify all qualified concerns requesting certification before a contract award being made. SBA will also:
-- decide protests and appeals;
-- establish and oversee a nationwide network of private certifiers who will help SBA process applications, ensure that they are complete and correct in form, and determine that the applicant firm is in fact owned and controlled by the individuals identified as the owner; and
-- maintain a national public on-line registry of certified SDBs.

➤ Benchmarks to measure the capacity of minority firms to undertake government contracts. To ensure that race-conscious procurement is not used unnecessarily, the Commerce Department has estimated a set of benchmarks for each of 72 two-digit major industrial

gathered
federal
lost
benchmarks
businesses:
dollars
dollars

groups. In developing the capacity estimates, **the U.S. Department of Commerce data from three sources on firms that were ready and willing to contract with the government in fiscal year 1996: a representative sample of firms that either won or bids on competitive government contracts; all other firms that had a new definitive contract action let in that year, and; all firms certified for participation in the Small Business Administration's 8(a) program for 1996. For each industry, the measure the "capacity" compared to the "utilization" of small disadvantaged**

-- The "capacity of small disadvantaged businesses is their share of contracting typically obligated in 1996 to firms, ready and willing to contract with the federal government, controlling for the size and age of the firms.

-- "Utilization" is the actual small disadvantage business's share of contracting obligated.

- Provide price credits in those industries where the government's utilization of minority firms in a given industry fall below the industry benchmark. The program will work as follows:
- in competitive, negotiated competitions, contracting officers will be able — but not required — to award a contract to an SDB if the SDB is qualified to perform the work and its bid is within a certain percentage of the fair market value of the contract. The Federal Acquisition Streamlining Act passed by Congress in 1994 authorizes credits of up to 10 percent.
 - the bids of qualified SDBs will be adjusted from 0 to 10 percent of fair market value, depending upon the analysis conducted by the U.S. Department of Commerce and published by the Office of Federal Procurement Policy.
 - prime contractors, who commit to using SDB subcontractors, may also be eligible to receive an adjustment based on an analysis Commerce is now undertaking.
 - **the industries in which price credits are authorized will be adjusted annually and as small disadvantaged businesses are more successful in obtaining federal contracts, reliance on the price credit will decrease automatically.**
 - The Administrator of SBA will review the benchmarks and determine how to implement them for the 8(a) program. For example, if the level of minority contracting in an industry exceeds the benchmark calculation, the SBA Administrator could take several steps, including limiting entry of new firms into the program in that industry for some time, accelerating graduation for firms that do not need the full period of sheltered competition, or limiting the number of 8(a) contracts awarded in particular industries or in specific geographic areas where contracts may be unduly concentrated.

- **Helping Distressed Communities.** (Do we want to save this until later?) Last year, the President issued his Executive Order on Empowerment Contracting aimed at helping disadvantaged people

and distressed communities. Implementing his order, the Administration is sending to Federal Register proposed regulations launching the HUBZone program, that will provide federal procurement opportunities for small businesses that do significant business in, hire significant numbers of residents from, or directly generate economic activity in general areas of economic distress. The program will serve as a supplement — and not compete with — existing federal procurement programs, such as the 8(a) program.

- As we approach the 21st century, the President believes we must restore the American dream of opportunity; find common ground amid our great diversity of opinion and experience; and strengthen the American commitment to equal opportunity for all, special treatment for none.

- **We believe that these carefully crafted policies will enable us to meet the challenges**

articulated by

the Supreme Court about when the federal government is justified in using affirmative action

in

federal procurement. Simultaneously, these policies reaffirm the President's long standing personal commitment to close the opportunity gap by adopting policies aimed at ensuring a fundamental fairness in the marketplace so that all Americans have a chance to participate in

our

nation's economy.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Michael Cohen (CN=Michael Cohen/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:25-FEB-1998 09:49:27.00

SUBJECT: meeting with Clay

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:
Should have copied you last night.

The discussion about national testing was particularly depressing, especially after I thought about it over night.

Clay appears to believe that, given the family circumstances many poor and minority kids face, that either the kids truly can't learn, or the schools are so bad that they can't be trusted to teach them. Remarkably enough, this was the prevailing view in the late 60's and 70's--that family background made all the difference for student achievement, and that there was nothing schools could do to overcome the disadvantages of poverty. We've got almost two decades of good solid research that proves that wrong, but Clay doesn't appear to buy it. If only he realized that in the past the view that "schools don't make a difference" was the reason people used for not investing in them.

----- Forwarded by Michael Cohen/OPD/EOP on 02/25/98
09:43 AM -----

Michael Cohen
02/24/98 06:12:09 PM
Record Type: Record

To: Janet Murguia/WHO/EOP
cc:
Subject: meeting with Clay

As we discussed, Riley, Scott Fleming and I met with Clay this afternoon. Here's what happened:

1. National Tests: Riley started by thanking Clay for his help on the Goodling vote (and hoped to move on to other issues right away). Clay wanted to talk about the tests, to make sure we understood that no one had changed their positions. Riley suggested to Clay that he put together a testing bill that the CBC and CHC could support; Clay didn't say this directly, but his response (about the kind of resources and help poor kids need) suggested that he couldn't think of any version of a national testing bill that the caucuses would support. Clay was not overly impressed with our proposed historic increase in K-12 funding, and was unmoved by the argument that smaller classes, modern buildings, reading tutors, well trained teachers, High Hopes mentors and other \$ targeted to high poverty communities would help kids learn to read--at least not moved enough to think we should test the kids to find out if they could read.

It was useful to have the conversation, and of course we agreed to keep working with each other. I actually thought it was a tactical error to ask Clay to take the lead on this; we would be better off with our strategy of getting George Miller to put together a testing bill that the caucuses won't flat out oppose. I've asked Scott Fleming to set up a meeting with Miller or his staff on this.

2. HSI's/HBCU's. Clay brought this one up--he asked Riley what he thought of Clay's compromise proposal (I don't know the details of this one). Riley told him he liked it, but when Clay pushed for his support, Riley said he supported Clay's proposal and the CHC proposal--we just wanted them to work this one out, because we all agree that we don't want an open fight on this. Clay was adamant that there would be no Republican support, and no non-CHC support on his committee for the CHC position. He's apparently met several times with CHC members, indicated that Becerra and others thought the Clay proposal was a good idea, and that Hinajosa was the only one blocking an agreement.

We didn't do much more than indicate that it would be really great if they could work this one out.

3. Education Opportunity Zones. We discussed these briefly, and gave Clay and his staff a copy of the spec's we've developed. We will meet with them in the next few days to go over substance. In our brief conversation on this topic, I ticked off a handful of his ideas we incorporated in our bill, indicated that we wanted to use as much as possible from his bill last year, hoped that he would be interested in our ideas so he could take the lead on this bill. Given the conversation we had just had on testing, I didn't think it was a good time to seek his views on ending social promotions.

Otherwise, it was a great meeting.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Richard Socarides (CN=Richard Socarides/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:25-FEB-1998 14:29:44.00

SUBJECT: Draft PIR / Phoenix Letter - Report

TO: Julie A. Fernandes (CN=Julie A. Fernandes/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Minyon Moore (CN=Minyon Moore/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:

You will recall that we have begun a process whereby after each Board Meeting, Dr. Franklin has sent a letter-report to the President (drafted by PIR staff) on behalf of the Board making certain recommendations in the issue area of the previous meeting. Attached is the Employment letter relating to the Phoenix meeting, in draft form. Following our receipt of the final letter it becomes public and we draft a response on behalf of the President.

----- Forwarded by Richard Socarides/WHO/EOP on 02/25/98
02:24 PM -----

John M. Goering
02/25/98 09:54:24 AM
Record Type: Record

To: Richard Socarides/WHO/EOP
cc:
Subject: Your review of Draft Phoenix Letter

Greetings. I look forward to learning your thoughts and suggestions on the attached draft letter to the President re the Phoenix meeting. (I'm sure Judy mentioned she, in general, likes the letter but don't let that sway you). John Goering

===== ATTACHMENT 1 =====
ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert ARMS_EXT: [ATTACH.D59]MAIL48266655U.026 to ASCII,
The following is a HEX DUMP:

FF57504370040000010A020100000002050000008C2C00000002000002210D6852341C4504DAA80
DE41FF173E05C21CFA0A012382FA118E1222CC32E43F9D3E3A397BB2EC73A194EF9220DFAE2893
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6BEFDF446DF6FF56105FE16443855FDDA325A6A442907293356E86B07BE35C8DB186B659E28942

President William J. Clinton
The White House
Washington, DC 20503

Automated Records Management System
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Dear Mr. President:

I am pleased to be able to provide you with an overview of the key issues and recommendations which emerged from your Advisory Board's two days of meetings in Phoenix, Arizona on January 13 and 14th, 1998. I will briefly highlight the key findings and reactions which I and other Board members had as well as our recommendations.

The subject of the two days of meetings was Race in the Workplace. We used the opportunity to visit several promising practices in the local area as well as to convene a major panel discussion with experts on the subject of disparities and opportunities in employment. We also convened, for the first time, a Community Forum which permitted residents from the Phoenix community to share their race-related concerns and recommendations with the Board. Each of the meetings and activities we engaged in were successful in pointing towards improved approaches to and strategies for equal opportunity and racial reconciliation.

Central to our findings and appreciation of race in America are the major ways in which all racial minorities experience some basic and comparable racial disadvantages, such as discrimination in employment, and the concomitantly strong commitments all persons of color have to achieve and succeed. There is firm and lasting commitment to the ideals of equal opportunity even amongst those long deprived of its full realization and a powerful commitment to the goals of civil rights for all.

We were, once again, struck by the incredible commitment, pride, and energy which the young people of America, including representatives of all minority groups, make to the issue of racial progress and achievement. For example, at the Opportunities Industrialization Center in Phoenix we met individuals from the Latino, American Indian, and African American communities who have made effective use of job training programs to make significant economic progress in their lives.

Virtually all of the people with whom we met stressed that truly effective job and career training requires counseling efforts aimed at addressing the professional

needs and deficits of each client. Employment training and counseling appears to be most effective when the total circumstances and needs of the individual and their family are considered and addressed. In addition, it is critical that the design of such programs be sensitive to the different strengths and needs which different racial and ethnic communities can bring to such programs. While there are of course substantial commonalities among all racial and ethnic groups, there are some notable differences in the ways in which neighborhood associations, churches, and other non-profit groups work to assist local clients in their search for improved employment training and opportunities. Given the critical importance of welfare-to-work training programs, I am sure that agencies such as the Department of Health and Human Services and the Department of Labor are planning evaluations of the relative effectiveness of various employment training programs for different minority and immigrant communities that will highlight the commonalities and, where they exist, the differences in their training needs.

We were also impressed by the powerful role which television and the media in general play in creating perceptions and biases about race which affect workplace opportunities. A black fireman in Phoenix, for example, told us that when he joined the Department, 26 years ago, he was the first minority person his co-workers had ever met and that the only images they had of blacks were previously gained through movies, television, and rumors. Programs that were established to help integrate employment settings in Phoenix have served to dispel some of the misperceptions and myths carried through the media about people of color. The steady progress which the Phoenix black firefighters union has made in advancing an affirmative employment position in Phoenix is a credit to the city.

The meeting we held with regional American Indian tribal leaders highlighted for us the powerfully important difference which their sovereign status plays in thinking about economic development options. There is a clear feeling that one of the major forms of racism that American Indians experience is a result of the lack of respect, in both the public and private sector, for their governments. Of particular concern to us is the considerable difficulty which tribes interested in economic development and access to credit continue to face, even today, in gaining access to credit and investment resources due to confusion by investors about the jurisdictional rules or conditions for adjudicating mortgages and foreclosure procedures. It appears imperative for the Bureau of Indian Affairs to make every effort to address this issue through the voluntary cooperation of major lenders and secondary market actors, including Fannie Mae and Freddie Mac. Memoranda of Understanding could be executed with major tribal associations, as well as

individual tribes, which foster the necessary long-term process of building programs to inform and educate investors and lenders about the range of realistic, culturally sensitive lending and investment opportunities available in Indian Country.

The Advisory Board is concerned by the complexity and persistence of disadvantages in Indian country. We ask that you recommend that the Bureau of Indian Affairs fund a major, independent assessment of the fairness and effectiveness of all federal program resources intended to assist tribes and Alaska Native villages with their economic future. This assessment should also address the possibility that a single centralized, independent agency might provide a better method of resolving the high levels of poverty and disadvantage in Indian country than the current system which divides program responsibilities among several federal agencies, such as the Department of the Interior, the department of Housing and Urban Development and the Indian Health Service.

We began our meetings on January 14th with very useful information on race and the labor market presented to us by Dr. Janet Yellen. Dr. Yellen provided us a compelling portrait of both improvements and continuing disparities affecting most minority groups. One clear shortcoming of the data presented was the lack of systematic information on many key measures for Asian Americans and American Indians. The information Dr. Yellen was able to make use of, from the U.S. Census and other Federal surveys, is based heavily on data from African-Americans and Hispanics, but lacks systematic information on many key measures of the labor market, income, and other socio-economic characteristics for Asians and American Indians. We therefore recommend that all Federal statistical data gathering agencies make every effort to create large enough periodic samples of all minority groups so that post censal information on race is systematically available for all groups. This could be achieved by over-sampling Asians and American Indians as part of such key annual data series as the Current Population Surveys.

Following Dr. Yellen's presentation, we held a spirited, analytic discussion of Race in the Workplace involving such experts as Glenn Loury, Harry Holzer, Paul Ong, Jose Juarez, and James Smith, as well as program directors such as Claudia Withers, from the Washington Fair Employment Council, and Ms. Lorenda Sanchez, of the California Indian Manpower Coalition. All of the speakers agreed that racial and ethnic discrimination continues to play a role in limiting people's ability to obtain employment. They also agreed that this fact points to the need for increased or strengthened enforcement by such agencies as the Equal Employment

Opportunity Commission and the Office of Federal Contract Compliance Programs at the Department of Labor. We commend you for your recently announced increase in funding for these two agencies and their testing programs. We also commend and support the forthcoming conference on racial discrimination and testing in the areas of employment, housing, credit and other areas of social life to be convened on March 6, 1998 by the Urban Institute, with funding and support from HUD.

We ended our two days of meetings with a very useful forum which permitted local residents to express their fears, anger and concerns about a variety of race related issues of local concern. We in particular learned of an on-going investigation of allegations of mistreatment of American citizens of Hispanic descent by the Immigration and Naturalization Service and local police in Chandler, Arizona. This investigation is, I understand, still several weeks away from completing its initial report but we are certain the Justice Department will carefully and fully investigate this case and will make general policy recommendations that will help avoid the actual or perceived misuse of police and Border Patrol authority in the future.

My best wishes.

Yours truly,
John Hope Franklin

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Melissa N. Benton (CN=Melissa N. Benton/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME: 25-FEB-1998 10:05:22.00

SUBJECT: LABOR Report on HR2888 Sales Incentive Compensation Act

TO: US@2=TELEMAIL@5=JMD@7=Deborah@6=Clifton@mrx@lngtwy (1=US@2=TELEMAIL@5=JMD@7=Deb
READ: UNKNOWN

TO: Alice E. Shuffield (CN=Alice E. Shuffield/OU=OMB/O=EOP@EOP [OMB])
READ: UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP@EOP [OPD])
READ: UNKNOWN

TO: Larry R. Matlack (CN=Larry R. Matlack/OU=OMB/O=EOP@EOP [OMB])
READ: UNKNOWN

TO: clrm (clrm @ doc.gov @ inet [UNKNOWN])
READ: UNKNOWN

TO: Karen Tramontano (CN=Karen Tramontano/OU=WHO/O=EOP@EOP [WHO])
READ: UNKNOWN

TO: Debra J. Bond (CN=Debra J. Bond/OU=OMB/O=EOP@EOP [OMB])
READ: UNKNOWN

TO: Barry White (CN=Barry White/OU=OMB/O=EOP@EOP [OMB])
READ: UNKNOWN

CC: Janet R. Forsgren (CN=Janet R. Forsgren/OU=OMB/O=EOP@EOP [OMB])
READ: UNKNOWN

TEXT:
Total Pages: _____

LRM ID: MNB106
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Tuesday, February 24, 1998

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Janet R. Forsgren (for) Assistant Director for Legislative
Reference

OMB CONTACT: Melissa N. Benton

PHONE: (202)395-7887 FAX: (202)395-6148

SUBJECT: LABOR Report on HR2888 Sales Incentive Compensation Act

DEADLINE: COB Thursday, February 26, 1998

In accordance with OMB Circular A-19, OMB requests the views of your
agency on the above subject before advising on its relationship to the

program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: The introduced bill follows the draft letter.

DISTRIBUTION LIST

AGENCIES:

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- 61-JUSTICE - Andrew Fois - (202) 514-2141
- 76-National Economic Council - Sonyia Matthews - (202) 456-6630

EOP:

- Barry White
- Larry R. Matlack
- Debra J. Bond
- Elena Kagan
- Karen Tramontano

OMB LA

Janet R. Forsgren

LRM ID: MNB106 SUBJECT: LABOR Report on HR2888 Sales Incentive Compensation Act

RESPONSE TO LEGISLATIVE REFERRAL MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Melissa N. Benton Phone: 395-7887 Fax: 395-6148
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: _____ (Date)
 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of _____ pages, attached to this response sheet

The Honorable Robert E. Andrews
U.S. House of Representatives
Washington, D. C. 20515

Dear Congressman Andrews:

I am pleased to respond to your request for the Department of Labor's views on H.R. 2888, the Sales Incentive Compensation Act, which would amend the Fair Labor Standards Act (FLSA) by providing a minimum wage and overtime exemption to all sales people who meet certain criteria.

H.R. 2888 has no provision requiring additional compensation for sales employees who may be forced to work long hours. This would deny FLSA protection for significant numbers of often low-paid workers who have long received such protection. The Department's opinion that expansion of the FLSA's exemptions would seriously erode one of the most basic principles of the FLSA -- to limit excessive hours of work by employees and provide them just compensation for working beyond 40 hours in a week -- remains unchanged.

You indicate that H.R. 2888 incorporates several important worker protections and guarantees, and in this regard we agree that the bill represents an improvement over previous bills with such purpose. Our careful review of the proposal, however, raises several concerns regarding these protections, including:

The overall design of the expanded exemption clearly shifts business risk from employers to employees. Employees who work long hours but are unable, for whatever reason, to make significant sales will receive little or no additional pay for the extra hours they work. The employer can not lose in this situation, but the employees certainly will.

The requirement that the exempt employee's position requires specialized or technical knowledge related to products or services being sold, and whether further defined by regulation or in the legislative history, is so vague and subject to differences in understanding and application that there will undoubtedly be an increase in the already high levels of private litigation involving sales employment.

Determining when and how this complicated, multi-test exemption applies will be very difficult for employers, employees and the Department of Labor. This difficulty too will undoubtedly lead to misunderstandings, disputes and litigation.

Proper application of the exemption will require employers to maintain extensive and complicated records, potentially including: (1) the

specialized or technical knowledge required to sell each product and/or service; (2) the amount and timing of training provided to each salesperson on each product and/or service; (3) the identity of each customer contacted by each salesperson and whether the salesperson had an established relationship with that customer or an indication that the salesperson did not initiate sales contacts; (4) the amount of incentive-based compensation received by each salesperson relative to their required base pay during the base period; and (5) the rate of incentive-based compensation paid to each salesperson for each sale after the 40% of base pay incentive-based compensation requirement has been met.

For these reasons, the Department opposes expansion of the FLSA sales exemptions to sales employees in all industries. Thank you for soliciting and considering our views on this important worker protection issue. The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely

Bernard Anderson
Sales Incentive Compensation Act (Introduced in the House)

HR 2888 IH

105th CONGRESS

1st Session

H. R. 2888

To amend the Fair Labor Standards Act of 1938 to exempt from the minimum wage recordkeeping and overtime compensation requirements certain specialized employees.

IN THE HOUSE OF REPRESENTATIVES

November 7, 1997

Mr. FAWELL (for himself and Mr. ANDREWS) introduced the following bill; which was referred to the Committee on Education and the Workforce

A BILL

To amend the Fair Labor Standards Act of 1938 to exempt from the minimum wage recordkeeping and overtime compensation requirements certain specialized employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Sales Incentive Compensation Act'.

SEC. 2. EXEMPTION.

Section 13(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)) is amended by striking the period at the end of paragraph (17) and inserting a semicolon and by adding at the end the following:

- (18) any employee employed in a sales position if--
- (A) the employee's position requires specialized or technical knowledge related to products or services being sold;
 - (B) the employee's sales are predominantly to persons or entities to whom the employee has made previous sales or the employee's position does not involve initiating sales contacts;
 - (C) the employee receives--
 - (i) base compensation, determined without regard to the number of hours worked by the employee, of not less than an amount equal to 1 1/2 times the minimum wage multiplied by 2,080; and
 - (ii) in addition to the employee's base compensation, compensation based upon each sale attributable to the employee;
 - (D) the employee's aggregate compensation based upon sales attributable to the employee is not less than 40 percent of the amount specified in subparagraph (C) (i);
 - (E) the employee receives a rate of compensation based upon each sale attributable to the employee which is beyond sales required to reach the compensation required by subparagraph (D) which rate is not less than the rate on which the compensation required by subparagraph (D) is determined; and
 - (F) the rate of annual compensation or base compensation for any employee who did not work for an employer for an entire calendar year is prorated to reflect annual compensation which would have been earned if the employee had been compensated at the same rate for the entire calendar year.'.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Ingrid M. Schroeder (CN=Ingrid M. Schroeder/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME:25-FEB-1998 16:42:32.00

SUBJECT: HHS on DOJ Tobacco Antitrust Letter

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

CC: James J. Jukes (CN=James J. Jukes/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TEXT:

Looks like HHS is going to give you a call regarding the Justice antitrust letter (specifically regarding the paragraph that we talked about earlier).

Either Jim O'Hara (Dep. Asst. Sec. for Health), Andy Heiman (Special Asst. to the GC), or Harriet Rabb (GC) will give you a call to discuss the paragraph.

Keep me posted and I will get a copy of the redrafted letter to you as soon as Justice sends it over.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Cynthia A. Rice (CN=Cynthia A. Rice/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME: 25-FEB-1998 14:44:18.00

SUBJECT: Two McCain Q&As for you to look at ASAP

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ: UNKNOWN

CC: Thomas L. Freedman (CN=Thomas L. Freedman/OU=OPD/O=EOP @ EOP [OPD])

READ: UNKNOWN

CC: Mary L. Smith (CN=Mary L. Smith/OU=OPD/O=EOP @ EOP [OPD])

READ: UNKNOWN

CC: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])

READ: UNKNOWN

TEXT:

Elena -- here, is the missing Q&A that you wanted to see

XVIII. APPLICABILITY TO NEW ENTRANTS IN TOBACCO INDUSTRY

1. Under the agreement, and the implementing legislation, what is the assurance that new entrants into the tobacco industry will comply with the statute and any related consent agreements not to challenge the legality of the agreement implementation legislation?

The proposed settlement and legislation do not deal expressly with new entrants into the tobacco industry. It appears that new entrants would be treated similar to non-participating manufacturers under Title VI and thus would be subject to advertising and access restrictions, regulatory oversight, and the payment provisions, but would not receive the benefit of any limitations on liability. There are no provisions in the legislation that would prevent new entrants from challenging the constitutionality of the legislation.

And here is our revised proposed international q&a (which reflects only previously stated positions)

XIII. EXEMPTION OF EXPORTS

1. Does the Administration support this exemption? If so, why? If not, why not?

The Administration strongly believes that comprehensive tobacco legislation should strengthen international efforts to control tobacco. The President indicated his support for this effort in his statement of September 17, 1997. This month the Administration also issued guidance to American posts abroad encouraging them to assist and promote tobacco-control efforts in host countries. Legislation that does not affirmatively address international concerns is not consistent with Administration policy. The Administration looks forward to working with the Committee on this issue.

2. What ramifications does this provision have in the area of foreign relations?

See response to XIII.1. above.

3. What changes in legislative language, if any, does the Administration recommend regarding this provision? Please provide specifics.

See response to XIII.1. above.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Ronald E. Jones (CN=Ronald E. Jones/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME:25-FEB-1998 11:26:28.00

SUBJECT: Treasury (Larry Summers) testimony for today

TO: Lisa M. Kountoupes (CN=Lisa M. Kountoupes/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Mary C. Barth (CN=Mary C. Barth/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Randolph M. Lyon (CN=Randolph M. Lyon/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Philip R. Dame (CN=Philip R. Dame/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Richard P. Emery Jr. (CN=Richard P. Emery Jr./OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Ronald M. Cogswell (CN=Ronald M. Cogswell/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Barry White (CN=Barry White/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Peter G. Jacoby (CN=Peter G. Jacoby/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

TO: Donald H. Gips (CN=Donald H. Gips/O=OVP@OVP [UNKNOWN])
READ:UNKNOWN

TO: Jerold R. Mande (CN=Jerold R. Mande/OU=OSTP/O=EOP@EOP [OSTP])
READ:UNKNOWN

TO: Christopher C. Jennings (CN=Christopher C. Jennings/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

TO: Cynthia A. Rice (CN=Cynthia A. Rice/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

TO: Charles Konigsberg (CN=Charles Konigsberg/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Joshua Gotbaum (CN=Joshua Gotbaum/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Joseph J. Minarik (CN=Joseph J. Minarik/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Edward M. Rea (CN=Edward M. Rea/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Kathleen Peroff (CN=Kathleen Peroff/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Alan B. Rhinesmith (CN=Alan B. Rhinesmith/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Rosalyn J. Rettman (CN=Rosalyn J. Rettman/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Toby Donenfeld (CN=Toby Donenfeld/O=OVP@OVP [UNKNOWN])
READ:UNKNOWN

TO: Sherman G. Boone (CN=Sherman G. Boone/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

TO: Sarah A. Bianchi (CN=Sarah A. Bianchi/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

TO: Thomas L. Freedman (CN=Thomas L. Freedman/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

CC: Jill M. Blickstein (CN=Jill M. Blickstein/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: James J. Jukes (CN=James J. Jukes/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: Alice E. Shuffield (CN=Alice E. Shuffield/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: James C. Murr (CN=James C. Murr/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TEXT:

We are advised that Summers' testimony has already been sent to the Hill. We would nevertheless appreciate hearing from you ASAP if you see any major inconsistencies between the testimony and the President's Budget. We will bring any major inconsistencies to the Director's attention as soon as possible.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Steven M. Mertens (CN=Steven M. Mertens/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME: 25-FEB-1998 18:28:44.00

SUBJECT: Re: White House Immigration Working Group

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP@EOP [OPD])
READ: UNKNOWN

TEXT:

----- Forwarded by Steven M. Mertens/OMB/EOP on 02/25/98
06:28 PM -----

Steven M. Mertens

02/25/98 06:19:59 PM

Record Type: Record

To: Michael Deich/OMB/EOP@EOP, Elena Kagan/OPD/EOP@EO
cc: Julie A. Fernandes/OPD/EOP@EOP, Kenneth L. Schwartz/OMB/EOP@EOP, David
J. Haun/OMB/EOP@EOP
Subject: Re: White House Immigration Working Group

Booz sent over a rough draft of the report last Friday night. Julie Fernandez and I meet with Booz, Justice, the Commissioner and INS staff for four hours this morning to discuss the draft findings and what the INS/Administration want from Booz as a final report. The meeting was constructive and we will meet with this Senior Policy Board again tomorrow afternoon to continue the discussion.

Booz has spent considerable time "drilling down" to what a possible local office -- enforcement and services -- would look like (this was an INS request to ensure that the enforcement/services split is workable). This made up most of today's briefing. INS is still kicking with muted screaming about the service/enforcement split from headquarters to the field. They kept focusing on the need for integration and at what levels integration needed to be accomplished. Booz has been very good at defending the functional split rationale and stressing that integration can be accomplished through process and technology NOT organizational structure and reporting relationship.

Julie and I have one organizational problem with the Booz package and a presentation question we would like your guidance on prior to the meeting tomorrow:

Organization -- The draft organization Booz has drawn up establishes an "enforcement operations," "service operations" and "shared services" organization under a Commissioner. The shared services function would include all the administrative functions (personnel, information resources management, etc.). I told INS and Booz that we believed the administrative support function should be a staff responsibility reporting to the Commissioner (this is how it was portrayed on the strawman). From an optics point of view we wanted the INS restructuring to focus on the mission driven operations of enforcement and services -- with no other subagency head of comparable stature. We also need to address the role of HQ administrative services since the success of the operational components

depends on competent execution (some administrative operations such as IRM might be better placed under operations with admin services providing R&D and ensuring consistency across the agency -- this was the thrust of the strawman). Booz, on Monday agreed with me, but today indicated that their organizational proposal was similar to the corporate world and it would be their recommendation.

If you agree, Julie and I will raise this issue again tomorrow and seek this change. We would tell INS/Booz that as a policy issue DPC/OMB believe a restructured INS should focus on an enforcement and services split as the preeminent sub-commissioner functional breakout with shared or administrative services reporting to the commissioner as a staff support function.

Presentation -- The detail of the Booz product or report will be the focus of the discussion tomorrow. The draft shared with us (and which we will share with you) was 50+ pages of charts and graphs showing how Booz arrived at this organizational structure and briefing explaining how it would work. They planned to develop a 10-20 page executive summary and append the charts as their final product. There was discussion of the proper level of detail we should provide to Congress by April 1 and questions about whether an executive summary document with a minimum number of charts and milestones for implementation should serve as the Booz report. The concern was whether providing too much documentation (and detailed organizational proposal that had not been fully developed at this stage of the process) may open the Administration up to Congressional criticism. We were leaning towards a more minimalist approach -- an executive summary document that explains the Administration's proposal, specifically address Congressional concerns (performance measures related to lines-of-authority, consistency, professionalism and accountability) and a milestone chart showing how the INS planned to move from its current organizational structure to the restructured entity.

Do you have a preference on the final report format -- Executive Summary or Executive Summary plus appendices?

DOJ plans to extend the Booz contract until March 10th so they can complete this effort. A revised draft report (one of the options above) will be recirculate either Friday or Monday.

Julie and I will keep you posted on the outcome of the meeting tomorrow. If you have any questions or need additional information, please contact either of us. Thanks.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Andrea Kane (CN=Andrea Kane/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:25-FEB-1998 17:38:37.00

SUBJECT: Republicans to Announce Fatherhood Block Grants TOMORROW

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Cynthia A. Rice (CN=Cynthia A. Rice/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

CC: Lisa M. Mallory (CN=Lisa M. Mallory/O=OVP @ OVP [UNKNOWN])
READ:UNKNOWN

TEXT:

I just heard that these will be unveiled at a press conference at 10 a.m. tomorrow ! Sounds like Shaw will introduce a bill, with strong encouragement from Archer. This comes as quite a surprise given that no one seems to have had any specifics as of a week ago. HHS Congressional folks are trying to track down more information.

February 25, 1998

MEMORANDUM FOR THE PRESIDENT

Automated Records Management System
Hex-Dump Conversion

FROM: Bruce Reed
Gene Sperling

SUBJECT: **Auto Choice**

Overview

The purpose of the memorandum is to provide you with information on auto-insurance reform and the "Auto Choice" legislation introduced last April by a bipartisan coalition of Members of Congress. Over the last several months, a NEC-DPC inter-agency working group has spent considerable time analyzing the Auto Choice proposal and reviewing other auto-insurance reform options. It is the strong view of the working group that the benefits of the various Auto Choice proposals considered by the working group do not justify the cost.

Despite the claims by proponents of Auto Choice that it will reduce insurance premiums by approximately \$250 per year for the average driver, the working group found little support that no-fault insurance would lead to lower rates. The three states that currently mandate insurance companies to offer no-fault insurance plans (New Jersey, Kentucky, and Pennsylvania), have some of the highest rates in the country. Auto Choice will also benefit bad drivers at the cost of good drivers. In addition, economists argue that if Auto Choice does induce some reduced premiums, more people will drive leading to more accidents, increased environmental degradation, and greater strain on our infrastructure.

Background

"No-fault" insurance, in its broadest sense, is defined as any auto insurance program that allows policyholders to recover financial losses *from their own insurance company, regardless of fault*. In its strictest form, no-fault applies only to state laws that both provide for the payment of no-fault first-party benefits *and* restrict the right to sue. "Pure" no-fault proposals go one step further, abolishing the right to sue in the majority of cases.

Under current state-level no-fault laws, motorists may sue for severe injuries and for pain and suffering only if the case meets certain conditions. These conditions, known as a "threshold," relate to the severity of injury. They may be expressed in verbal terms (a descriptive or verbal threshold) or in dollar amounts of medical bills (a monetary threshold). Some laws also include the days of disability incurred as a result of the accident.

Analysis

The working group has considered three options. The first is the Auto Choice legislation introduced by Senators McConnell and Moynihan and Representative Arney. Under this proposal, drivers in states who accept the new federal legislation have a choice between the existing system in their state and a strict no-fault plan (called 'personal protection insurance' (PPI). A driver who chooses the PPI option gets first-party coverage for economic damages (mostly medical and lost wages), without regard to fault; a PPI driver can sue or be sued for economic damages above policy limits. PPI drivers cannot sue or be sued for non-economic damages ('pain and suffering'), although exceptions are made for accidents involving drug or alcohol abuse. A driver who opts to stay in the state's current tort system must purchase tort maintenance coverage (TMC) to cover accidents with PPI drivers.

The second proposal was developed by CEA to achieve the same ends as Auto Choice -- lower premiums -- but to do so while reducing environmental and human costs. The CEA proposal would amend the Auto Choice to require insurance companies to offer premiums on a per-mile basis. Per-mile premiums would be charged based on an estimate of miles, with a rebate or surcharge issued every year after an odometer reading. Odometers could be read at existing emissions or safety inspections or by firms under contract with insurance companies. Insurance companies would compete in their per-mile premium, subject to current regulations; premiums would consequently vary with region, driving record, type of car, and safety features, much as premiums vary now.

The third proposal would attack the major reason for high insurance costs, fraud. Under this proposal, we would announce support for legislation that would 1) increase penalties on lawyers and doctors who participate in auto insurance fraud claims, including possibly taking away licenses to practice law or medicine; 2) encourage insurance companies to install V-Chips into odometers so they could check the mileage of drivers at random and reduce premiums for those who drive less and increase premiums for those who drive more.

One problem with all three proposals is that none of them guarantee that insurance companies will pass on savings to consumers. In many states that currently have no-fault insurance systems, there is little evidence that over the long-term consumers saved compared to the period when no-fault was not mandated. In addition, the Per-Mile Premium and V-Chip proposals could be perceived as big government intervention into insurance regulation while the Auto Choice and Per-Mile Premium proposals represent Federal involvement in an area that traditionally has been the responsibility of states governments.

The McConnell-Arney legislation will be strongly opposed by the trial lawyers, and possibly State governments. We expect environmentalists and auto safety groups to also oppose this legislation. Opponents may attack the legislation for creating a national auto insurance system like New Jersey's (with the highest rates in the country). Proponents of the legislation will argue the legislation will give every driver a \$200 break on their auto insurance rates.

Polling does not indicate strong support for Auto Choice legislation.

Recommendation

The NEC, DPC, Office of White House Counsel, and the Office of the Vice President recommend you withhold (oppose ?) support for Auto Choice legislation.

Decision

Agree

Discuss Further

Automated Records Management System
Hex-Dump Conversion

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Andrea Kane (CN=Andrea Kane/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:25-FEB-1998 18:31:36.00

SUBJECT: More on Fatherhood Block Grants

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Cynthia A. Rice (CN=Cynthia A. Rice/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

CC: Lisa M. Mallory (CN=Lisa M. Mallory/O=OVP @ OVP [UNKNOWN])
READ:UNKNOWN

CC: Jessica L. Gibson (CN=Jessica L. Gibson/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TEXT:

Apparently Ron Haskins is keeping this very close. He only mentioned it to Deborah Coulton at 4 p.m, who in turn mentioned it to HHS congressional office. Ron has promised to share a 2 pager with Deborah late tonight or first thing tomorrow a.m. She'll pass along to HHS who will share with us. The only new information is that the press conference will take place at a community center here in D.C. (possibly one of Charles Ballard's programs??).

Andrea Kane
02/25/98 05:38:21 PM
Record Type: Record

To: Cynthia A. Rice/OPD/EOP, Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP
cc: Lisa M. Mallory/OVP @ OVP
Subject: Republicans to Announce Fatherhood Block Grants TOMORROW

I just heard that these will be unveiled at a press conference at 10 a.m. tomorrow ! Sounds like Shaw will introduce a bill, with strong encouragement from Archer. This comes as quite a surprise given that no one seems to have had any specifics as of a week ago. HHS Congressional folks are trying to track down more information.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Thomas L. Freedman (CN=Thomas L. Freedman/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:25-FEB-1998 13:01:12.00

SUBJECT: fwd: Press conference on int'l tobacco -- has been scheduled !

TO: Cynthia A. Rice (CN=Cynthia A. Rice/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Mary L. Smith (CN=Mary L. Smith/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Jerold R. Mande (CN=Jerold R. Mande/OU=OSTP/O=EOP @ EOP [OSTP])
READ:UNKNOWN

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:

International tobacco press conference on hill Thursday.
----- Forwarded by Thomas L. Freedman/OPD/EOP on 02/25/98
12:59 PM -----

Sherman G. Boone
02/24/98 08:14:29 PM

Record Type: Record

To: Thomas L. Freedman/OPD/EOP
cc: Mary L. Smith/OPD/EOP
Subject: fwd: Press conference on int'l tobacco -- has been scheduled !

fyi

----- Forwarded by Sherman G. Boone/OPD/EOP on 02/24/98
08:14 PM -----

ahyman @ os.dhhs.gov
02/24/98 05:36:00 PM

Record Type: Record

To: Sherman G. Boone
cc:
Subject: fwd: Press conference on int'l tobacco -- has been scheduled !

Just wanted to make sure you were aware of this.

Original Text

From: Kevin Burke@ASL@OS.DC, on 2/24/1998 1:05 PM:
To: Andrew D. Hyman@OGC.IO@OS.DC, INTERNET [JOHara@OSOPHS.DHHS.GOV] ,
INTERNET [MLarkin@HRSA.DHHS.GOV]

FYI

 From: Dan_O'Grady@durbin.senate.gov (Dan O'Grady), on 2/24/98 9:31 AM:
 To: <AAPI@aol.com>, <andy_mcdonald@wellstone.senate.gov>,
 <Cathy_Carpino@lautenberg.senate.gov>, <ctchikes@erols.com>,
 <dan_katz@lautenberg.senate.gov>, <dan_o'grady@durbin.senate.gov>,
 <dana_jones@wyden.senate.gov>, <EEP0@cdc.gov>,
 <faith.weiss@mail.house.gov>,
 <ilisa.halpern@apha.org>, <jackie_williams@durbin.senate.gov>,
 <jbloom@tobaccofreekids.org>, <jcooper@lungusa.org>,
 <jonathan_halpern@labor.senate.gov>, <Karen.Lightfoot@mail.house.gov>,
 <kburkel@os.dhhs.gov>, <klewis@advocacy.org>, <lcat@erols.com>,
 <mary_dietrich@agriculture.senate.gov>, <matthew.miller@mail.house.gov>,
 <mhpalmer@erols.com>, <michael_knipe@agriculture.senate.gov>,
 <michele_chang@harkin.senate.gov>, <mml4@cdc.gov>,
 <ray.squitieri@TREAS.SPRINT.COM>, <rhamburg@amhrt.org>,
 <rob@essential.org>,
 <sballin@tobaccofreekids.org>, <spalmer.ceche.dc@worldnet.att.net>,
 <spolan@cancer.org>, <Stephanie_Kennan@wyden.senate.gov>,
 <susan_goodman@graham.senate.gov>, <tom_faletti@durbin.senate.gov>,
 <Tom_Mahr@conrad.senate.gov>, and others...

We have a confirmed date/time/location for the press conference to announce our international tobacco initiatives:

--> Thursday, February 26, 1:00 p.m., in room 608 of the Dirksen Senate Office Building.

Every organization that supports the initiatives is encouraged to attend and join the sponsoring Members of Congress behind the podium when the Members speak. (The statement of the initiatives, drafted by Matt Miller, is attached.) Each organization should also feel free to bring its own press statement, even though most organizations will not be able to speak during the press conference because of the size of our group.

Hope to see you Thursday.

===== ATTACHMENT 1 =====
 ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert ARMS_EXT: [ATTACH.D31]MAIL49545555R.026 to ASCII,
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```

Statement on International Tobacco Initiatives Hex-Dump Conversion

Tobacco use is a growing threat to global public health. Today, tobacco products account for three million deaths worldwide each year; by 2025, that number is expected to rise to ten million per year, with over 70 percent of tobacco-related deaths occurring in developing nations.

As the world's leading exporter of tobacco products, the United States has a moral responsibility to address the adverse impact of its products on global public health. As a part of any effort to address tobacco use, Congress should establish a responsible international health policy by enacting these five proposals:

1. **End U.S. Government Support for Tobacco Abroad.** The federal government should be prohibited from promoting the sale or export of tobacco or tobacco products abroad. It should also be prohibited from attempting to weaken a foreign tobacco regulation unless the regulation discriminates against U.S. products in an arbitrary and unjustifiable manner and is not a reasonable means of protecting the public health.
2. **Adequately Fund Global Nongovernmental Tobacco Control Efforts.** A private, nonprofit organization should be established to assist public health organizations in other countries through public education programs, technical assistance to health professionals, mass media campaigns, grants and other general assistance.
3. **Establish a Code of Conduct for Labeling and Advertising Overseas.** U.S. tobacco companies should be required to print health warning labels on tobacco products sold overseas that are as stringent as those required in the United States. U.S. tobacco companies should also be prohibited from selling, advertising or marketing tobacco products to children in other countries, with the same standards applied to their overseas conduct as at home.
4. **Stop International Tobacco Smuggling.** The Bureau of Alcohol, Tobacco and Firearms, which currently regulates alcohol smuggling, should be given authority to deter tobacco smuggling through, among other things, a system of export permits and increased record keeping.
5. **Fund International Tobacco Control Through a Licensing Fee.** Every U.S. tobacco company should pay a two-cent fee for each package of cigarettes it sells overseas. The money raised through such a fee should be used for tobacco control efforts by governmental and non-governmental entities.

The United States has the opportunity to act as a world leader in promoting public health. If Congress passes any measure to confront domestic tobacco use, it must also tackle the health problems caused by the use of American tobacco products abroad. We strongly endorse these proposals to establish a responsible U.S. policy for the promotion of global public health.

Events

McCain letter release (Thurs)

VPOTUS-Shalala ad campaign announcement (Fri)

POTUS speech to Attorneys General March 12th

Other ideas for POTUS, VPOTUS, Shalala (see attached calendar)

Outreach

Editorial Boards -- Shalala (Skolfield)

Network Anchors -- VP (Klain/Attie)

Hill Events --

 Countdown -- days to enact comprehensive legislation/lives lost per day of delay

 Document release -- (Coordinate with Waxman)

Key Regional Papers

Coordination

Daily call

Rapid response team

Paper

 Paper on our position -- key facts, key supporting statements

 Paper refuting opponents' best arguments

KEY TOBACCO DATES

Automated Records Management System
Hex-Dump Conversion

On-going events

4th Circuit U.S. Court of Appeals FDA tobacco regulation case -- argued 8/11/97, decision pending (one judge died, one is ill).

State of Minnesota and Blue Cross/Blue Shield of Minnesota vs. tobacco industry on state civil charges of consumer fraud, deceptive and unlawful trade practices, false advertising, antitrust conspiracy, etc.

February

24th -- Senate Labor Committee hearing on tobacco regulation (Jeffords)

24th -- Senate Commerce Committee hearing (McCain) -- industry witnesses

25th -- House Commerce Subcommittee hearing (Tauzin) -- businesses excluded from settlement (smokeless, cigar, vending)

26th -- Senate Commerce Committee hearing (McCain)

27th -- Industry documents to be posted on internet

28th -- One year anniversary of implementation of FDA rule establishing 18 as minimum age for purchasing tobacco products and requiring retailers to check photo id of anyone appearing younger than 27.

March

2nd -- 2 year anniversary of death of Victor Crawford, Tobacco Institute lobbyist who was the first tobacco company official to speak out against the industry.

3rd -- Senate Commerce Committee hearing -- possible markup (McCain)

3rd -- Senate Labor Committee -- possible markup (Jeffords)

4th -- Senate Indian Affairs Committee markup (Campbell)

8th-10th -- AMA in town; possible POTUS speech

12th -- POTUS speech to Attorneys General

16th -- Deadline Nickles set for GOP chairman to submit proposals to leadership

17th -- Senate Commerce Committee hearing (McCain)

Automated Records Management System
Hex-Dump Conversion

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Thomas L. Freedman (CN=Thomas L. Freedman/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME: 25-FEB-1998 14:58:35.00

SUBJECT: Re: Tobacco Communications Agenda

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])

READ: UNKNOWN

TO: Cynthia A. Rice (CN=Cynthia A. Rice/OU=OPD/O=EOP @ EOP [OPD])

READ: UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ: UNKNOWN

CC: Mary L. Smith (CN=Mary L. Smith/OU=OPD/O=EOP @ EOP [OPD])

READ: UNKNOWN

TEXT:

We can reconfigure the theme. I'd argue for keeping second-hand smoke in our list because it is the largest single bump in increasing support for legislation -- above youth smoking, advertising, and more money for research and anti-cessation programs. Of course, they are all popular. But seems very popular and is the only one that appeals directly to non-smokers w/o children.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Steven M. Mertens (CN=Steven M. Mertens/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME:25-FEB-1998 18:20:05.00

SUBJECT: Re: White House Immigration Working Group

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP@EO [OPD])
READ:UNKNOWN

TO: Michael Deich (CN=Michael Deich/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: Kenneth L. Schwartz (CN=Kenneth L. Schwartz/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: David J. Haun (CN=David J. Haun/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: Julie A. Fernandes (CN=Julie A. Fernandes/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

TEXT:

Booz sent over a rough draft of the report last Friday night. Julie Fernandez and I meet with Booz, Justice, the Commissioner and INS staff for four hours this morning to discuss the draft findings and what the INS/Administration want from Booz as a final report. The meeting was constructive and we will meet with this Senior Policy Board again tomorrow afternoon to continue the discussion.

Booz has spent considerable time "drilling down" to what a possible local office -- enforcement and services -- would look like (this was an INS request to ensure that the enforcement/services split is workable). This made up most of today's briefing. INS is still kicking with muted screaming about the service/enforcement split from headquarters to the field. They kept focusing on the need for integration and at what levels integration needed to be accomplished. Booz has been very good at defending the functional split rationale and stressing that integration can be accomplished through process and technology NOT organizational structure and reporting relationship.

Julie and I have one organizational problem with the Booz package and a presentation question we would like your guidance on prior to the meeting tomorrow:

Organization -- The draft organization Booz has drawn up establishes an "enforcement operations," "service operations" and "shared services" organization under a Commissioner. The shared services function would include all the administrative functions (personnel, information resources management, etc.). I told INS and Booz that we believed the administrative support function should be a staff responsibility reporting to the Commissioner (this is how it was portrayed on the strawman). From an optics point of view we wanted the INS restructuring to focus on the mission driven operations of enforcement and services -- with no other subagency head of comparable stature. We also need to address the role of HQ administrative services since the success of the operational components depends on competent execution (some administrative operations such as IRM might be better placed under operations with admin services providing R&D and ensuring consistency across the agency -- this was the thrust of the

strawman). Booz, on Monday agreed with me, but today indicated that their organizational proposal was similar to the corporate world and it would be their recommendation.

If you agree, Julie and I will raise this issue again tomorrow and seek this change. We would tell INS/Booz that as a policy issue DPC/OMB believe a restructured INS should focus on an enforcement and services split as the preeminent sub-commissioner functional breakout with shared or administrative services reporting to the commissioner as a staff support function.

Presentation -- The detail of the Booz product or report will be the focus of the discussion tomorrow. The draft shared with us (and which we will share with you) was 50+ pages of charts and graphs showing how Booz arrived at this organizational structure and briefing explaining how it would work. They planned to develop a 10-20 page executive summary and append the charts as their final product. There was discussion of the proper level of detail we should provide to Congress by April 1 and questions about whether an executive summary document with a minimum number of charts and milestones for implementation should serve as the Booz report. The concern was whether providing too much documentation (and detailed organizational proposal that had not been fully developed at this stage of the process) may open the Administration up to Congressional criticism. We were leaning towards a more minimalist approach -- an executive summary document that explains the Administration's proposal, specifically address Congressional concerns (performance measures related to lines-of-authority, consistency, professionalism and accountability) and a milestone chart showing how the INS planned to move from its current organizational structure to the restructured entity.

Do you have a preference on the final report format -- Executive Summary or Executive Summary plus appendices?

DOJ plans to extend the Booz contract until March 10th so they can complete this effort. A revised draft report (one of the options above) will be recirculate either Friday or Monday.

Julie and I will keep you posted on the outcome of the meeting tomorrow. If you have any questions or need additional information, please contact either of us. Thanks.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Thomas L. Freedman (CN=Thomas L. Freedman/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:25-FEB-1998 19:10:08.00

SUBJECT: Phil Barnett request

TO: Mary L. Smith (CN=Mary L. Smith/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Cynthia A. Rice (CN=Cynthia A. Rice/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:

Waxman's office would like to sit down with CDC, Treasury, and DOJ. Treasury and DOJ they have no bill-writing agenda with -- they have questions on immunity (what is the incentive for a company to contest a lawsuit under the legislation they lose the money either way) and Treasury they just want to meet. They are planning on re-writing performance standard legislation and want to talk to CDC about performance and technical surveys. They'd like to talk to CDC Friday.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Thomas L. Freedman (CN=Thomas L. Freedman/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:25-FEB-1998 12:30:04.00

SUBJECT: Re: Tobacco Communications Agenda

TO: Mary L. Smith (CN=Mary L. Smith/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Cynthia A. Rice (CN=Cynthia A. Rice/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:

I think the agenda is good. I think we need a couple of tangible products that can be distributed to officials speaking for the Administration: (1) a common theme statement that everyone uses on why we need the bill -- like Medicare, Medicaid, Education, and the Environment (a crack at it is below); (2) uniform responses to common attacks on the bill that we know from polling works; and (3) being prepared for rapid response generally -- including creating lists of issues and target reporters to get materials and responders to.

1. Identify a common theme.

The most popular list of reasons for a bill I have is: ads, FDA, second hand smoke, and \$1.50 with net lives saved.

"We need strong comprehensive legislation that stops advertising to kids, regulates nicotine under the FDA like the drug it is, and restricts deadly second-hand smoke that kills non-smokers. If we do these things and raise the cost of cigarettes by \$1.50 a pack with tough penalties on companies we can save XX million kids over the next 5 years."

2. Need Defenses on Issues such as:

-- Drugs

-- Lawyers Fees

-- Black market

-- Immunity

-- Medicare, tax cuts, other spending ideas

-- skinny bill would work fine

3. Rapid Response-- monitoring, preparation of answers, and response to targeted reporters

4. Background to Communications

* People want stern measures

* Saying our bill does everything a skinny bill does and more, beats the skinny bill (simple but true).

* Public believes we need more than a \$1 a pack increase.

* Tying opposition to the tobacco industry controlling Congress or R's playing politics works but might cut against bipartisanship so should be used carefully.

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I. BAN ON OUTDOOR ADVERTISING, INCLUDING IN STADIA AND ARENAS

1. What data does the Administration have to substantiate that a ban on outdoor advertising, including stadia and arenas, will reduce smoking and, in particular, youth smoking?

The FDA tobacco rule prohibits outdoor advertising within 1,000 feet of public playgrounds and elementary and secondary schools. All other outdoor advertising is restricted to black text on a white background, devoid of color and imagery. FDA's regulations are based on the agency's finding that children and adolescents spend a great deal of time in areas around schools and playgrounds and these areas, therefore, should be free of tobacco product advertising. All other outdoor advertising should be restricted to text information only, which generally is not appealing to young people. (See response to question II, below.) Data supporting this conclusion are detailed at 61 Fed. Reg. 44501-08.

2. To what extent do you believe such restrictions can be expected to reduce smoking?

FDA's advertising restrictions are based on quantitative and qualitative studies of cigarette advertising that show that a causal relationship exists between tobacco advertising and tobacco use by young people and that stringent advertising restrictions, when combined with a comprehensive program designed to reduce initiation and use among young people, will have a positive effect on reducing smoking rates and youth tobacco use.

FDA's findings regarding the ability of advertising restrictions to reduce youth tobacco use are summarized at 60 Fed. Reg. 41330-34 and 61 Fed. Reg. 44466-500.

3. **Does the Administration support such a ban. If so, why? If not, why not?**

The Administration supports appropriate restrictions on outdoor advertising, as evidenced by the FDA tobacco rule (21 C.F.R. 897.30(b)) which prohibits outdoor advertising for cigarettes and smokeless tobacco, including billboards, posters, or placards, from being placed within 1,000 feet of the perimeter of any public playground or playground area in a public park, elementary or secondary school. All other outdoor advertising is limited to black text on a white background (21 C.F.R. 897.32(a)).

The prohibition set forth in Section 101(a)(1), however, would prohibit "any form of outdoor tobacco product advertising, including bill boards, posters, or placards." It does not contain the exception for tombstone advertising in certain locations that is included in the FDA regulation. Because that exception ensures that the FDA regulations are appropriately tailored to serve the government's substantial interest in reducing teenage smoking, Section 101(a)(1)'s broader restriction on all outdoor tobacco advertising raises significant constitutional concerns

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that are not presented by the FDA regulations. We believe, however, that ~~voluntary~~ limits of this kind would be of significant value to the public health and the Administration would like to work with you and others to minimize constitutional difficulties.

4. **What specific changes, if any, in the legislative language implementing the ban would the Administration propose? Please provide specifics.**

As discussed above, the Administration's efforts have been focused on supporting the restrictions now codified in FDA regulations. The Administration urges Congress to provide statutory confirmation of the existing authority of the FDA to regulate the outdoor advertising of tobacco products. The resources of the Administration are available to assist the Committee in determining whether further restrictions are constitutional and otherwise appropriate.

II. BAN ON HUMAN FIGURES AND CARTOON FIGURES IN ADVERTISING

1. What data does the Administration have to substantiate that barring the use of human figures and cartoon advertising will reduce smoking, in particular youth smoking?

FDA's regulations restrict advertising, with certain exceptions, to black text on a white background. No color or imagery is permitted. These restrictions encompass a prohibition of human figures and cartoon characters. The restrictions apply to billboards, publications, in-store advertising, and direct mail advertisements. FDA's findings in this area are summarized at 60 Fed. Reg. 41335-36 and 61 Fed. Reg. 44466-68, 44508-13. FDA's *Federal Register* documents contain specific evidence and summaries of studies. See 60 Fed. Reg. 41333-34 and 61 Fed. Reg. 44475-82. A new study, published in the February 18th edition of The Journal of the American Medical Association (JAMA), found that tobacco industry advertising and promotional activities influence teens to start smoking and that 34 percent of teen smoking could be attributed to tobacco promotional activities.

2. To what extent do you believe such restrictions can be counted on to reduce youth smoking?

See response to I.2., above.

3. What entity would you propose to determine what constitutes a human image or cartoon character?

Under the FDA's regulations, the requirement that tobacco advertisements under most circumstances use black text on a white background is enforced by the Food and Drug Administration and the Department of Justice under the provisions of the Food, Drug, Cosmetic

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Act. That Act provides for the imposition of civil penalties, 21 U.S.C. § 333(f), injunctive relief, 21 U.S.C. § 332, and/or criminal prosecution, 21 U.S.C. § 333(a).

4. What penalty do you believe is appropriate and should accrue for a violation of the prohibition on material containing figures determined to be human or cartoon?

Under the FDA's regulations, the requirement that tobacco advertisements under most circumstances use black text on a white background is enforced by the Food and Drug Administration and the Department of Justice under the provisions of the Food, Drug, Cosmetic Act. That Act provides for the imposition of civil penalties, 21 U.S.C. § 333(f), injunctive relief, 21 U.S.C. § 332, and/or criminal prosecution, 21 U.S.C. § 333(a).

5. Does the Administration support this ban? If so, why? If not, why not?

The Administration supports appropriate advertising restrictions, as evidenced by the FDA tobacco rule. The Administration also supports enactment of legislation confirming the existing authority of the FDA to regulate the use of images in the advertising of tobacco products. This regulatory approach would ensure that the FDA would be authorized, based on existing and future research, to develop necessary and appropriately tailored supplements to its current restrictions, if and when such supplements are needed.

Section 101(b) of S. 1414 provides that "[n]o manufacturer, distributor, or retailer may use a human image or a cartoon character or cartoon-type character in its advertising, labeling, or promotional material with respect to a tobacco product." This restriction would go beyond the FDA regulation restricting the use of images in the advertising of tobacco products, which provides that, in general, tobacco advertising must take the form of tombstone advertising but permits images to be used without restriction in an "adult publication," one whose readership is at least 85 percent adult and includes less than two million children. 21 C.F.R. § 897.32(a)(2)(i)-(ii). The provision's broader restriction on the use of images in the advertising of tobacco products would raise significant constitutional concerns that the FDA regulation does not present. We believe a ~~voluntary~~ industrywide ban would be of significant value to the public health and the Administration would like to work with you and others to minimize constitutional difficulties.

6. What specific changes, if any, in the legislative language implementing the ban would the Administration propose? Please provide specifics.

As discussed above, the Administration's efforts have been focused on the restrictions now codified in FDA regulations. The resources of the Administration are available to assist the Committee in discussing how these restrictions will be implemented and the associated penalties, and whether further restrictions are constitutional and otherwise appropriate.

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III. BAN ON INTERNET ADVERTISING

1. Does the Administration support such a ban? If so, why? If not, why not?
2. How can and should a ban on Internet advertising of cigarettes be enforced?
3. What, if any, concerns does the Administration have regarding the constitutional free speech issues raised by any such ban?
4. What specific changes, if any, in the legislative language implementing the ban would the Administration propose?

In response to III.1 - III.4, the Administration believes that, because there may be more narrowly tailored means of achieving the government's underlying interest in restricting the advertising of tobacco products on the Internet, the categorical prohibition that Section 101(c) of S.1414 would impose raises significant constitutional concerns. See Reno v. ACLU, 117 S.Ct. 2329,2348 (1997) (explaining that compelled tagging schemes are obvious less restrictive alternative to banning Internet transmission of content harmful to minors). ~~While we would applaud a voluntary limit of this kind, w~~ We therefore caution the Congress about adopting such a broad measure at this time and would like to work with you and others to minimize constitutional difficulties.

In order to ensure that the government retains necessary flexibility to regulate the advertising of tobacco products on the Internet, we recommend that the Congress provide express statutory confirmation of the FDA's existing authority to regulate such advertising. This regulatory approach will ensure that any future restrictions are targeted at the right forms of Internet advertising and are fashioned in a manner that is appropriately sensitive to First Amendment concerns. Alternatively, we are prepared to work with Congress to fashion a more narrowly focussed Internet restriction.

IV. BAN ON POINT-OF-SALE ADVERTISING

1. What data does the Administration have to substantiate that a ban on point-of-sale advertising would reduce smoking, in particular, youth smoking?

See responses to I.2. and II.1., above, regarding FDA's proposal restricting point-of-sale advertising. In its tobacco rulemaking, FDA found that young people get their information and product imagery from all types of advertising, including at the point of sale. See 61 Fed. Reg. 44509 - 44510. Point-of-sale advertising presents the child with an enticement at the time when purchase is immediately available.

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Manufacturers and retailers limited to text-only advertising at point of sale will not be prohibited from promoting products at retail. Adult consumers looking for price and product information will be able to find that information even without imagery and colors, which are particularly attractive to children. While text-only advertising can still be effective with adults, it will have less allure and be less appealing to young people. Children and adolescents, who are less willing than adults to process print information in a leisurely setting (such as reading a magazine), will find textual material even less appealing in the few moments spent at the retail counter.

2. Does the Administration support such a ban? If so, why? If not, why not?

The Administration supports appropriate restrictions on point of sale advertising, as evidenced by the FDA tobacco rule. As discussed above, its efforts have been focused on supporting the restrictions now codified in FDA regulations. The resources of the Administration are available to assist the Committee in determining whether further restrictions are constitutional and otherwise appropriate.

3. Is the exemption of point-of-sale advertisement for adult stores and tobacco outlets appropriate?

The Administration's focus has been on preventing children and adolescents from using tobacco products. Restrictions on the advertising that makes these products appealing to young people is a vital component of these efforts. FDA's regulations exempt adult-only locations and publications read primarily by adults because the evidence then available showed that advertising in locations where children are never present, such as adult-only locations, or are rarely exposed, as is the case with publications with an insignificant youth readership, would not have a significant adverse effect on efforts to reduce youth tobacco use.

4. **Is it appropriate to grant companies with greater cigarette market share additional point-of-sale advertising rights? If so, why? If not, why not?**
5. **Does such a privilege constitute a statutorily granted competitive advantage? If so, why? If not, why not?**
6. **Does the Administration support this grant? If so, why? If not, why not?**
7. **What specific changes, if any, in the legislative language implementing the ban would the Administration propose? Please provide specifics.**

Section 101(d) would impose a general prohibition on the use of what is termed "point-of-sale advertising" of tobacco products but would include a significant exception for "adult-only stores and tobacco outlets." Sec. 101(d)(2). The FDA regulations contain

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restrictions that are targeted at point-of-sale advertising, however, they are not as broad as those set forth in S.1414 primarily because they do not prohibit tombstone advertising. See 21 C.F.R. §§ 897.32, 897.16. The resources of the Administration are available to assist the Committee in crafting restrictions on point-of-sale advertising that avoid any significant constitutional concerns that the restrictions on point-of-sale advertising in S.1414 would raise.

Section 101(d)'s exception permitting manufacturers with a greater market share to engage in more point of sale advertising than their competitors appears inconsistent with the government's asserted interest in restricting such advertising. Granting manufacturers point-of-sale advertising opportunities consonant with market share is unrelated to the objective of reducing youth tobacco use; indeed, it may run counter to that goal. Moreover, the proposal presents constitutional and anti-competitive concerns that should be addressed. The resources of the Administration are available to assist the Committee in exploring those concerns.

V. LIMITATIONS ON POINT-OF-SALE ADVERTISING

1. What data does the Administration possess to suggest that such limitations will reduce smoking, particularly among youth?

See response to IV.1., above.

2. Does the Administration support this provision? If so, why? If not, why not?

The Administration supports appropriate restrictions on point of sale advertising, as evidenced by the FDA Tobacco Rule. As discussed above, its efforts have been focused on supporting the restrictions now codified in FDA regulations. The resources of the Administration are available to assist the Committee in determining whether further restrictions are constitutional and otherwise appropriate.

VI. BAN ON ADVERTISING RESTRICTION AGREEMENTS

1. **Are such agreements currently against federal or state law? If so, is such a provision necessary?**

Ordinarily, under the free market system, retailers are permitted to decide from whom and to whom they will buy and sell, and on what terms. While an agreement of the sort described -- between a manufacturer and a retailer to limit the ability of a competing manufacturer to display advertising on the retailer's premises -- might be anticompetitive under certain circumstances, such agreements are usually not condemned under the federal antitrust laws. The Administration has not undertaken a review of state laws to determine whether such an arrangement would violate the law of any state.

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- 2. Does the Administration support such a provision? If so, why? If not, why not?**

The Administration's primary concern is not the relationship of retailers, manufacturers, and distributors between or among one another with respect to advertising. Rather, the Administration wants to ensure that point-of-sale advertising and promotional material, whatever their source, consist only of black text on a white background.

- 3. Does the Administration support the limitation. If so, why? If not, why not?**

See answer to question 2 above.

- 4. What specific changes, if any, in the legislative language implement the ban would the Administration propose? Please provide specifics.**

See answer to question 2 above.

VII. GLAMORIZATION OF TOBACCO

- 1. What data does the Administration possess to indicate whether and to what extent this provision will reduce smoking, particularly among youth?**

A number of studies (Tye 1990; Terre, Drabman, and Speer 1991; Hazan, Lipton, and Glantz 1994; Thumbs Up! Thumbs Down! 1997) show that depictions of tobacco use in the entertainment media, particularly feature films, are on the increase and exaggerate greatly the actual prevalence of tobacco use in the U.S. population. Research also suggests that adolescents are highly susceptible to pro-smoking messages and images conveyed in entertainment media (Signorielli 1993; Davies 1993; Basil 1997). Focus group research found that young people are able to recall virtually no anti-smoking messages on TV or in the movies, yet they are able quite readily to recall specific movies that portray smoking and to identify actors and actresses who smoke in their entertainment roles (Mermelstein 1997). Deglamorizing tobacco use in the entertainment media can be achieved both by decreasing pro-smoking cues and by increasing anti-smoking cues. A study by researchers at the University of California at Irvine suggests that anti-smoking ads before movies can help inoculate young people against the positive images of smoking that appear in movies. Ninth graders who watched the movie "Reality Bites" (in which the cast smokes in about one-third of the scenes) preceded by a California Department of Health Services anti-smoking ad were much less likely to find smoking exciting compared with teens who watched the movie without the counter-advertisement (Pechmann, 1996).

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2. **What entity does the Administration propose will determine what activity constitutes promoting the image or use of a tobacco product?**
3. **How does the Administration envision such a ban will be enforced?**
4. **Does the Administration support such limitations?**
5. **What specific changes, if any, in the legislative language would the Administration propose? Please provide specifics.**

In response to Questions VII.2 - VII.5, the Administration believes that the scope of the restriction on glamorization in S. 1414 is unclear. For example, is the provision intended only to restrict attempts to promote certain brand names of tobacco products or is it intended to restrict the promotion of smoking generally? If the latter were the case, then the provision would appear to reach some noncommercial speech, raising significant constitutional concerns. It is also not clear what is meant by the use of the word "promoting." Finally, the phrase "appeals to individuals under 18 years of age" could be subject to challenge on vagueness grounds.

Alternatively, no such constitutional concerns would be raised if Congress enacted legislation that would confirm the authority of the FDA to regulate the advertising of tobacco products through such indirect means as the use of product placement agreements.

VIII. RESTRICTIONS ON COLOR ADVERTISEMENTS

1. **What data does the Administration have to substantiate that a ban on color ads, except in publications with limited youth readership, will reduce smoking particularly youth smoking?**

See response to II.1., above.

2. **Does the Administration believe that the threshold for the restriction of two million readers is the appropriate threshold?**

FDA's tobacco rule requires that advertising be restricted to black and white text, except in publications that are read primarily by adults or in adult-only facilities. The text-only requirement is intended to reduce the appeal of cigarettes and smokeless tobacco advertising on young people without unduly affecting the informational messages conveyed to adults. Therefore, FDA proposed in its rulemaking that advertising in publications that are read primarily by adults should be allowed to use imagery and color because the effect of such advertising on young people should be nominal. The agency set the definition of adult publication as those whose readers age 18 or older constitute 85 percent or more of the publication's total readership, or those which are read by two million or fewer people under age

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18, whichever method results in the lower number of young people. (Magazines with small readership numbers but which appeal to young people may not attract two million young readers but may still be primarily youth oriented; that is, 15 percent or more of their readers are under 18.) In addition, the agency noted that at some point, the number of underage readers is so great that the publication can no longer be considered to be of no interest to those under 18, regardless of the percentage of the readership. For example, a magazine with a large total readership base may attract as many as 5 million young people, or more, but those numbers would still not be 15 percent of the magazine's readership. See 60 Fed. Reg. 41335-36 and 61 Fed. Reg. 44513-19.

3. How does the Administration envision readership demographics being determined?

In its tobacco rulemaking, FDA explained that readership demographics would be determined by measuring the total number of people that read any given copy of a publication. Readership demographics would be measured according to industry standards and, at a minimum, would be based on a nationally projectable survey of people. Two examples of currently available surveys are Simmons's STARS and MediaMark Research Inc.'s (MRI's) TEENMARK. FDA also indicated that it would be willing to work with industry on this issue. See 61 Fed. Reg. 44516-19.

4. How would this restriction be enforced?

The restriction would be enforced by the Food and Drug Administration and the Department of Justice under the provisions of the Federal Food, Drug and Cosmetic Act which provides for the imposition of civil money penalties, 21 U.S.C. § 333(f), injunctive relief, 21 U.S.C. § 332, and/or criminal prosecution, 21 U.S.C. § 333(a).

5. Does the Administration support this restriction? If so, why? If not, why not?

The Administration supports the regulation in the FDA rule based upon the findings of the Food and Drug Administration regarding the role and attractiveness of images and color in advertising to young people. See, e.g., 61 Fed. Reg. 44467-68, 44509 (1996).

6. What specific changes, if any, in the legislative language implementing the restriction does the Administration propose? Please provide specifics.

As discussed above, the Administration supports effective restrictions on the use of color and imagery in tobacco advertising. The Administration urges Congress to provide statutory confirmation of the existing authority of the FDA to regulate the advertising of tobacco products.

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IX. GENERAL QUESTION REGARDING MARKETING/ADVERTISING BAN

1. **Can the marketing and advertising restrictions envisioned in the settlement be constitutionally imposed, with or without the industry's consent? Please discuss.**

The answers to Parts I-VIII above address the government's authority to impose restrictions on advertising and marketing without the industry's consent. As noted, we believe that certain of those restrictions raise significant constitutional concerns. We address here the degree to which "the industry's consent" may affect the constitutional analysis of the advertising restrictions.

Voluntary commitments to restrict advertising are of course constitutional. For this reason, we believe that the inclusion of such restrictions in state court consent decrees between states and tobacco manufacturers -- rather than in federal legislation -- would significantly increase the likelihood that the restrictions would be upheld if challenged in the future. However, the inclusion of such restrictions in a federal statute that made adherence to such restrictions a condition of the receipt of certain federal benefits would continue to raise substantial constitutional questions. Such a statute, depending on how it were framed, could be subject to substantial challenge under the unconstitutional conditions doctrine. The resources of the Administration are available to assist the Committee in crafting legislation designed to minimize this potential problem.

X. WARNING LABELS

1. Does the Administration believe that these are appropriate warning labels?

The Administration supports the concept of strengthening warning label statement requirements. Several recent studies (Health Canada 1996; Borland, Cappiello, and Hill 1996; Robinson and Killen 1997) and literature reviews (USDHHS 1994; IOM 1994) are available concerning the effectiveness of warning labels in conveying information to consumers. The Administration's resources are available to help the Committee evaluate possible improvements to warning label requirements.

2. Does the Administration possess data suggesting that these warnings will effectively reduce smoking, particularly youth smoking?

See response to X.1., above.

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3. What data suggests that the various new warnings will be as or more effective than the current warning requirements?

See response to X.1., above.

4. Does the Administration support the provisions authorizing specific new labels? If so, why? If not, why not?
5. What specific changes, if any, in the legislative language implementing this provision would the Administration propose? Please provide specifics?

As stated above, the Administration is available to work with the Committee in determining whether changes to the warning statement requirements are appropriate.

IX. WARNING LABEL SIZE AND LOCATION REQUIREMENTS

1. What data does the Administration have to suggest that these specifications will reduce smoking, particularly youth smoking?

See response to X.1., above.

2. Does the Administration support these particular specification? If so, why? If not, why not?
3. Does the Administration support the exception provided for flip-top cigarette packages? If so, why? If not, why not?
4. What specific changes, if any, in the legislative language to implement these restrictions would the Administration propose? Please provide specifics.

The Administration, as discussed above, has focused its efforts on supporting the restrictions now codified in FDA regulations. The resources of the Administration are available to assist the Committee in determining whether further restrictions are appropriate.

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X. SMOKELESS TOBACCO ALTERNATIVE LABELS

1. What data does the Administration have to suggest that the various new warning labels will effectively reduce the use of smokeless tobacco, particularly among youth?

See response to X.1., above.

2. Does the Administration support the use of these alternative labels?
3. What changes, if any, to the legislative language implementing this provision would the Administration propose? Please provide specifics.

The Administration, as discussed above, has focused its efforts on supporting the restrictions now codified in FDA regulations. The resources of the Administration are available to assist the Committee in determining whether further restrictions are appropriate.

XI. ENFORCEMENT OF ADVERTISING, MARKETING AND LABELING RESTRICTIONS

1. **Does the Administration support the enforcement provisions regarding advertising, marketing and labeling? If so why? If not, why not?**

Section 114 of the bill provides FTC with the authority to enforce sections 111 and 112, the provisions relating to warning statement requirements. Section 114 also contains a penalty provision for violations of section 113, the requirement that companies provide ingredient information to the Secretary of HHS pursuant to a new provision of the Federal Food, Drug, and Cosmetic Act, and authorizes the FTC to bring actions to enforce that provision. With respect to sections 111 and 112, section 114 appears to maintain the status quo with respect to warning label enforcement issues. Some other proposed bills would shift that authority to FDA. The Administration is available to assist in the Committee in considering these differing approaches. With regard to section 113, which relates to a provision of FDA law, the Administration would be pleased to assist the Committee in evaluating whether enforcement authority for the ingredient disclosure requirements may be more appropriately vested entirely in FDA.

2. **What changes in legislative language, if any, does the Administration recommend regarding these provisions? Please provide specific language.**

As discussed above, the Administration would be pleased to assist the Committee in evaluating issues related to the enforcement of advertising, marketing, and labeling restrictions, and in developing modifications, if appropriate, to legislative language.

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XII. PREEMPTION OF STATE AND LOCAL ACTION

- 1. Does the Administration support such preemption? If so, why? If not, why not?**
- 2. What changes in legislative language, if any, does the Administration recommend regarding this provision? Please provide specific language?**

The Administration generally supports the limited preemption of state and local requirements related to the packaging of cigarettes or smokeless tobacco, but does not support the preemption of state and local restrictions on advertising. FDA's current regulations address advertising. Although the regulations are preemptive, the Federal Food, Drug and Cosmetic Act allows states and localities to apply for waivers to be exempted from federal thresholds. This would allow states and localities to enact or retain existing advertising restrictions that would be more stringent.

The Administration is available to work with the Committee with respect to the broader issues of preemption raised by other provisions of the bill. The Administration is committed to allowing states and localities the maximum flexibility practicable to develop strong public health policies to prevent and reduce youth tobacco use.

XIII. EXEMPTION OF EXPORTS

- 1. Does the Administration support this exemption? If so, why? If not, why not?**

The Administration strongly believes that comprehensive tobacco legislation should strengthen international efforts to control tobacco. The President indicated his support for this effort in his statement of September 17, 1997. This month the Administration also issued guidance to American posts abroad encouraging them to assist and promote tobacco-control efforts in host countries. The Administration looks forward to working with the Committee on this issue.

- 2. What ramifications does this provision have in the area of foreign relations?**

See response to XIII.1. above.

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3. What changes in legislative language, if any, does the Administration recommend regarding this provision? Please provide specifics.

See response to XIII.1. above.

XIV. RESTRICTIONS ON ACCESS TO TOBACCO PRODUCTS

1. Does the Administration support these provisions? If so, why? If not, why not?

The Administration supports access restrictions based upon FDA's findings regarding the ability of persons under 18 to purchase tobacco products in the absence of a photo identification requirement. See, e.g., 61 Fed. Reg. 44437-39 (1996).

2. How does the Administration envision that this provision will be enforced, and can it be enforced effectively?

FDA currently is enforcing aspects of its restrictions on youth access to tobacco products embodied in the FDA tobacco rule (21 C.F.R. §§ 897.14, 897.16). FDA is enforcing the age and photo ID provisions cooperatively with state and local officials. Because of the enormous number of retailers that sell tobacco, FDA has adopted a cooperative model. By way of comparison, this is how FDA regulations are enforced for dairy farm and retail food inspections in communities across the country—by commissioning the services of state and local officials.

In its initial enforcement efforts, FDA contracted with 10 states. Under these contracts, states are conducting between 200 and 330 unannounced retail compliance checks each month over a period of eight months. Information about the compliance checks is sent to FDA, which issues a warning for the first violation to retailers found selling to the adolescents. These retailers will be subject to repeat inspections. FDA will seek a fine of \$250 for the second violation and greater fines for subsequent violations. FDA is in the process of contracting with additional states.

FDA anticipates that state and local contracts will provide effective mechanisms to check compliance with other access restrictions, such as the requirement that all transactions be face-to-face, without the assistance of any electronic device. Commissioned state and local officials will be able to determine compliance with these and similar provisions by visiting facilities, and appropriately documenting observations.

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XV. PROHIBITION ON SALE OF LESS THAN A FULL PACK OF CIGARETTES

- 1. Does the Administration support this prohibition? If so, why? If not, why not?**

The Administration supports this prohibition based upon FDA's findings regarding the ability of persons under 18 to obtain cigarettes when they are sold in units of less than a full pack. See, e.g., 61 Fed. Reg. 44443, 44445-48.

- 2. What change in legislative language, if any, does the Administration recommend regarding this provision? Please provide specifics.**

The Administration does not recommend any changes in the legislative language.

XVI. STATE LICENSURE TO SELL TOBACCO

- 1. What data, if any, does the Administration have to indicate that licensure will effectively reduce access to tobacco by minors?**

Licensure of retailers will give authorities the means of identify those retailers who sell tobacco. States that do not require licensure are having difficulty complying with the Synar amendment, because they have difficulty identifying outlets that sell tobacco products. In addition to providing a list of retailers, the threat of license revocation for noncompliance is extremely motivating to retailers. Furthermore, license fees can be used to cover the cost of enforcement, which is an important determinant of compliance.

- 2. What entity does the Administration envision would enforce the licensure requirement if a state should be unable or unwilling to implement the licensure program?**

The Administration supports a licensing program that primarily operates at the state or local levels. The Administration is available to work with the Committee on issues concerning the relationship of such programs to federal standards or registration activities.

- 3. Has the Administration developed or formulated the cost of the licensure program? If so, why? If not, why not?**

The Administration has not completed work regarding the cost of a licensure program.

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- 4. Does the Administration support the licensure program? If so, why? If not, why not?**

The Administration supports an effective licensing program. Federal legislation that calls upon states to establish regulatory programs must be sensitive to federalism concerns. Section 131 would provide two incentives for states to establish licensing programs for retail distributors of tobacco products. States that establish satisfactory licensing programs (1) would avoid imposition of a federal ban on retail distribution of tobacco products within their borders; and (2) would qualify for block grants under section 502. Congress possesses authority, under principles discussed in New York v. United States, 505 U.S. 144, 173-74 (1992), to "offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." Congress also possesses authority, under Spending Clause principles discussed in South Dakota v. Dole, 483 U.S. 203 (1987), to condition the receipt of federal funds by states on their implementation of certain regulatory measures. Accordingly, although the section 131 incentives for state licensing may give rise to constitutional challenges, we believe that they are consistent with the Constitution.

- 5. What changes in legislative language, if any, does the Administration recommend regarding this provision? Please provide specifics.**

The resources of the Administration are available to work with the Committee in evaluating provisions for a licensing program.

XVII. ANTI-TRUST EXEMPTION

- 1. Does the Administration support such an exemption? If so, why? If not, why not?**

The antitrust laws are the most important protector of the free-market economy against anticompetitive actions that would undermine its integrity to the detriment of consumers. Accordingly, exceptions to the antitrust laws should be made only in rare instances, when the fundamental free market values underlying the antitrust laws are overwhelmed by a paramount policy objective; and a proposed exemption must be necessary to permit the paramount policy objective to be pursued. The proponents of broad antitrust exemptions -- for example, an exemption that allowed companies to set prices jointly -- have not yet met this heavy burden.

- 2. Could such an exemption be used to set prices beyond those necessary to deter youth smoking, but to increase profits for the industry?**

An antitrust exemption that allowed tobacco firms to set prices jointly could be used by firms to increase prices beyond what is necessary to deter youth smoking and thereby to increase

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profits at the expense of consumers. It would be very difficult to restrict use of the exemption to its intended purpose, because the tobacco companies would have both the opportunity and the incentive to effect unnecessary price increases and to conceal them under the guise of restrictions on youth smoking. While the resulting collusive price increase would be likely to reduce demand for tobacco products, it would also increase profits for the tobacco companies, at least to the point at which they are collectively charging the "monopoly price." The tobacco companies would thereby be able to use an antitrust exemption to enrich themselves at the expense of those confirmed with smoking habits.

3. What changes in legislative language, if any, does the Administration recommend regarding this provision? Please provide specifics.

Before any exemption is considered for enactment, the proponents of the exemption need to meet the burden of demonstrating that this is one of the rare instances in which the antitrust laws are incompatible with a clearly paramount policy objective. The Administration is extremely skeptical that the proponents of this case will be able to meet that burden, except perhaps to support agreements to restrict advertising to children.

Even in those rare instances in which that burden is met, any antitrust exemption should be carefully and narrowly crafted to address that objective in the least anticompetitive manner available. If Congress should decide to move forward with consideration of antitrust exemptions for the tobacco industry, the Administration would assist in crafting them as narrowly and precisely as possible to achieve their purpose without creating unnecessary anticompetitive effects.

XVIII. APPLICABILITY TO NEW ENTRANTS IN TOBACCO INDUSTRY

1. Under the agreement, and the implementing legislation, what is the assurance that new entrants into the tobacco industry will comply with the statute and any related consent agreements not to challenge the legality of the agreement implementation legislation?

The proposed settlement and legislation do not deal expressly with new entrants into the tobacco industry. It appears that new entrants would be treated similar to non-participating manufacturers under Title VI and thus would be subject to advertising and access restrictions, regulatory oversight, and the payment provisions, but would not receive the benefit of any limitations on liability. There are no provisions in the legislation that would prevent new entrants from challenging the constitutionality of the legislation.

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ADDITIONAL REFERENCES

VII. GLAMORIZATION

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X. WARNING LABELS

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Health Canada. Effectiveness of health warning messages. Toronto, Ontario: Tandemar Research Inc., 1996.

Institute of Medicine. Warnings and packaging. Growing up tobacco free: preventing nicotine addiction in children and youths. Washington, DC: National Academy Press, 1994:236-246.

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U.S. Department of Health and Human Services. Warning labels on tobacco products. In Preventing tobacco use among young people: a report of the Surgeon General. Atlanta, GA: Centers for Disease Control and Prevention, 1994:257-264.

Draft 2/25/98 -- 6:15 pm

January 26, 1998

Dear Mr. Chairman:

The Clinton Administration looks forward to working with you and others in Congress to develop comprehensive, bipartisan legislation that will reduce teen tobacco use. In addition to the enclosed responses to your questions, we are prepared to provide the appropriate staff to give the Committee the technical assistance you request. We also are providing you with a number of resource documents cited below that we hope will be of assistance as you work to develop comprehensive legislation to protect our nation's children from tobacco related disease and death.

As you know, the President has called on Congress to enact comprehensive legislation that raises the price of cigarettes by up to \$1.50 a pack over the next ten years, gives the FDA full authority to regulate tobacco products, gets tobacco companies out of the business of marketing to children, furthers public health research and goals, and protects tobacco farmers and their communities. A piecemeal approach will not meet our overriding goal, which is to cut teen smoking.

As part of such a comprehensive effort, the Administration has long recognized the importance of restricting the advertising and marketing of tobacco products to young people. Two recent studies underscore what we have said before -- that tobacco advertising aimed at young people is a significant factor in their decision to start smoking. Comprehensive tobacco legislation, ~~especially if combined with even further voluntary agreements to restrict advertising,~~ is an opportunity for Congress to reaffirm FDA's efforts in this area.

Many of the provisions included in S.1414 would codify the comprehensive regulations on nicotine-containing tobacco products that the FDA adopted in its final Tobacco Rule issued August 28, 1996. The FDA restrictions were carefully crafted on the basis of a multi-year investigation, and resulted from the analysis of myriad studies and research on the effects of advertising, specifically tobacco advertising, on young people and the consideration and analysis of more than 700,000 comments submitted in response to the proposed FDA rule. As you know, the Administration believes strongly that the FDA has jurisdiction and authority to issue such advertising restrictions and that comprehensive tobacco legislation should provide express statutory confirmation of this power.

The Administration also believes, as the Department of Justice has explained at length in the FDA litigation, that the FDA's regulations that restrict the advertising of tobacco products are consistent with the First Amendment, under the currently controlling framework for First Amendment review of restrictions on advertising, set out by the Supreme Court in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), and subsequent cases. The FDA restrictions would, if implemented, substantially advance the Government's wholly legitimate and compelling interest in curtailing minors' demand for and use of tobacco products by reducing minors' exposure to tobacco product advertising. Moreover, the FDA's regulations are tailored to serve this objective. For these reasons, we believe the advertising restrictions in S.1414 that track the FDA regulations are constitutional.

Other restrictions contained in S.1414 give rise to constitutional concerns that are not presented by the FDA regulations, such as whether such restrictions would be sufficiently tailored to serve the governmental interest in reducing teenage smoking. The enclosed responses detail these ~~concerns~~ constitutional issues. Such limits on advertising nonetheless may be ~~extremely~~ valuable in reducing youth smoking and protecting the public health, and the Administration ~~once again challenges the tobacco industry to adopt them voluntarily~~ would like to work with you and others to minimize constitutional difficulties.

To assist the committee in developing legislation regulating tobacco products, including legislation restricting the advertising of tobacco products, we have provided with this response copies of the two documents which detail the analysis and findings on which the FDA regulations are based: the FDA's proposed rule and preamble published in 60 Fed. Reg. 41314 (August 11, 1994); and the FDA's final rule and preamble published in 61 Fed. Reg. 44396 (August 28, 1996). Our answers to your questions include citations to these documents where appropriate. In addition, the FDA's administrative record contains the studies described in those documents as well as public comments received by the agency. That record is contained on 5 CD's, which are also provided with this response.

We hope this material is helpful and we look forward to providing you and the members of the Committee with any additional assistance that may be needed.

Sincerely,

Enclosure

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Andrea Kane (CN=Andrea Kane/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:25-FEB-1998 18:25:19.00

SUBJECT: Update on WtW Formula Grant announcement

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Cynthia A. Rice (CN=Cynthia A. Rice/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

CC: Diana Fortuna (CN=Diana Fortuna/OU=OPD/O=EOP [OPD])
READ:UNKNOWN

CC: Lee Ann Brackett (CN=Lee Ann Brackett/O=OVP @ OVP [UNKNOWN])
READ:UNKNOWN

TEXT:

Looks like there won't be any announcements by VP next week. Secretary Herman will likely announce HI, KA, and MN at NAPIC on Monday. TN has been a little delayed--when it's ready, the VP will do a press release (Lee Anne and Lynn Jennings have discussed this). GA has been more delayed--apparently DOL had 'defunded' the Atlanta PIC under JTPA so they cannot receive WtW funds. The state plan needs to be revised to address this issue. Tomorrow afternoon, DOL will have a better idea of the revised time frame for TN and a firm fix on whether the other 3 will be ready for Monday.