Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	From Jeffrey D Goldstein To Julie T Bosland (2 pages)	10/18/2000	P5

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Julie Bosland
OA/Box Number: 21677

FOLDER TITLE:
CS [Child Support]---Program [3]

Rich Sheridan
2012-0440-S
ms471

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Jeffrey D. Goldstein 10/18/2000 04:58:02 PM

Record Type: Record

To: Julie T. Bosland/OPD/EOP@EOP

cc:
Subject: FW: White House Domestic Policy Council Inquiry

Julie --

As we discussed. I have taken out some of the less relevant forwards, etc...

An interesting point made in the memo - if a service member refuses to provide the sample, they are forced out of the military. In the past, the reason for the refusal was concerns over privacy.

Again, please treat this with care.

Thanks
-Jeff

---------- Forwarded by Jeffrey D. Goldstein/OMB/EOP on 10/18/2000 04:55 PM ----------

"Martin, William, LTC, OASD(HA)/TMA" <William.Martin@ha.osd.mil>
10/18/2000 04:11:11 PM

Record Type: Record

To: Jeffrey D. Goldstein/OMB/EOP@EOP

cc:
Subject: FW: White House Domestic Policy Council Inquiry

Mr. Casciotti: FYI, if you and LTC Martin have not yet spoken or corresponded about this.

Bill: There's an additional angle that I know only because Mr. Casciotti told me about it, and that is implicit in COL Smith's memo, namely, that the restrictive rules in DoDD 5154.24 regarding DNA bloodstain cards are the result of DoD assuring Congress in the early to mid 1990s that we would allow only narrow access to these cards, so as to forestall legislation that would have accomplished the same thing or something even more restrictive. Congress was interested because of the hue and cry from service members about privacy and potential misuse of the cards, and because some of the acts of disobedience and courts-martial and civil cases on this issue were percolating around that time. In other words, what we have in 5154.24 today is roughly indicative of Congressional sentiment earlier this decade, and any attempt by the President to liberalize it through executive order could

provoke a reaction from Congress, although perhaps times have changed enough to make that no longer true. Mr. Casciotti can clarify my presentation here as needed, and can provide more and better information about this aspect of the matter if he hasn't already, but I thought maybe you'd want to know this piece of it.

LTC Steve Bross
AFIP Legal Counsel
(202) 782-2124

 - HA Memo 100300.doc

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	From Marty Lederman To William Marshall (2 pages)	10/12/2000	P5
002. memo	From Director of Legislation To Administrator; RE: personal info [partial] (1 page)	09/19/2000	P6/b(6)

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Julie Bosland
OA/Box Number: 21681

FOLDER TITLE:
Substance Abuse and Mental Health Services Administration Reauthorization

Rich Sheridan
2012-0440-S
ms391

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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9:45 am

"Lederman, Marty" <Marty.Lederman@usdoj.gov>
10/12/2000 06:18:32 PM

Record Type: Record

To: William Marshall/WHO/EOP@EOP

cc: "Moss, Randolph D" <Randolph.D.Moss@intmail.usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)

Subject: SAMHSA signing statement language

Bill, Paul: Here's what Randy and I have come up with. When you receive our Opinion (which should be tomorrow), you'll see why we are unable to give the unqualified advice that funding may not constitutionally be provided to "pervasively sectarian" organizations. In short, we conclude that, at least with respect to nonmonetary aid, the lesson of the opinions in Helms is that the multi-factor "p.s." test (as well as the "p.s." label) is obsolete, and has, in effect, been replaced with a simple question concerning whether the organization can ensure the segregation necessary to ensure nondiversion of funds -- which, in our view, means no "specifically religious" activities in the funded substance-abuse program. However, when it comes to monetary aid, we concede that there might be a more categorical ban with respect to certain institutions. Our conclusion on that point is the following:

However, when the aid in question is in the form of direct funding, the constitutional question remains somewhat more uncertain. Indeed, in her controlling opinion in Mitchell, Justice O'Connor suggests that a more categorical rule might apply with respect to financial grants to certain religious institutions. In that opinion, Justice O'Connor noted that there are "special dangers associated with direct money grants to religious institutions," and that the "concern with direct monetary aid is based on more than just diversion [of the aid to religious activities]." 120 S. Ct. at 2566; see also id. at 2559-60; Agostini v. Felton, 521 U.S. 203, 228 (1997) (emphasizing that "[n]o Title I funds ever reach the coffers of religious schools"); Mitchell, 120 S. Ct. at 2546-47 (plurality opinion) (acknowledging that "[o]f course, we have seen 'special Establishment Clause dangers,' Rosenberger, 515 U.S., at 842, when money [as opposed to nonmonetary aid] is given to religious schools or entities directly") (emphasis in original). "In fact," Justice O'Connor cautioned, "the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition." Id. at 2566 (O'Connor, J., concurring in the judgment). Thus, while Kendrick holds that the government can provide direct monetary aid to certain religious organizations, it remains unresolved after Mitchell whether there are some sorts of religious institutions, such as churches, to which a government may not provide direct monetary aid under any circumstances.

DRAFT

Given our druthers, we would not label these additional possibly ineligible organizations (which O'Connor has not identified, but which must include, at the very least, churches) "pervasively sectarian." But we understand the desire to retain that phrase in some form. Also, as the passage from our draft Opinion indicates, funding to such organizations definitely raises very serious questions; but we can't say for certain that it's flatly "unconstitutional." Accordingly:

The Department of Justice advises, however, that this provision would be unconstitutional to the extent it were construed to permit governmental funding of organizations that do not or cannot ~~segregate~~ separate their religious activities from the ~~secular~~ substance-abuse treatment and prevention activities that are supported by the SAMHSA aid, and would raise serious constitutional questions to the extent it were construed to permit funding of certain other religious organizations that are pervasively sectarian. Accordingly, I construe the Act as forbidding the funding of such organizations and as permitting Federal,

Marcy wider

sectarian worship, instruction, or proselytization

State, and local governments involved in disbursing SAMHSA funds to take into account the structure and operations of a religious organization in determining whether such an organization is constitutionally and statutorily eligible to receive funding.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. paper	Santorum Charitable Choice Proposals (10/6/00) Analysis as of 10/9/00 (5 pages)	10/9/2000	P5
002. paper	Santorum Charitable Choice Proposals (10/6/00) Analysis as of 10/9/00 (6 pages)	10/10/2000	P5

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Julie Bosland
OA/Box Number: 21682

FOLDER TITLE:
CC [Charitable Choice] Essentials [2]

Rich Sheridan
2012-0440-S
ms485

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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Santorum Charitable Choice Proposals (10/6/00)
Analysis as of 10/9/00

1. Educational requirements:

- House/Administration agreement:

"In determining whether personnel of a program participant that has a record of successful drug treatment for the preceding three years have satisfied State or local requirements, a State or local government shall not discriminate against education and training provided to such personnel by a religious organizations so long as such education and training includes basic content substantially equivalent to the content provided by nonreligious organizations that the State would credit for purposes of determining whether the relevant requirements have been satisfied."

- Santorum proposal – Replace the language above with the following language (from Watts/Talent):

Limitation on Educational Requirements—
(1) Treatment of Religious Education – If State or local gov't imposes formal educational qualifications on providers, they "shall treat religious education and training of personnel as having a critical and positive role in the delivery of program services." In applying educational qualifications, State or local gov't "shall give credit for religious education and training equivalent to credit given for secular course work in drug treatment or any other secular subject that is of similar grade level and duration."
(2) Restriction of Discrimination Requirements – Subject to paragraph 1 (findings that formal educational qualifications may undermine the effectiveness of drug treatment programs or hinder/prevent the provision of services), a State or local gov't "may establish formal educational qualifications for personnel in organizations providing program services that contribute to success in reducing drug use among program beneficiaries." However, "the Secretary shall waive the application of any educational qualification...for an individual religious organization, if the Secretary determines that the religious organization has a record of prior successful drug treatment for at least the preceding three years; the educational qualifications have effectively barred such religious organization from becoming a program provider; the organization has applied to the Secretary to waive the qualifications; and the State or local government has failed to demonstrate empirically that the educational qualifications in question are necessary to the successful operation of a drug treatment program."

- Major differences: The Santorum proposal accepts a broader range of religious education and training and does not require that this education/training have substantially the same content as secular courses (in fact, does not even specify that the training must be in drug treatment). Santorum also would require the Secretary to waive educational qualifications altogether for religious programs with three years of success who would otherwise be barred from participation; in these cases, the burden of (empirical) proof for why the education requirements are necessary is on the State or local government.

- Our view: No. We could not accept this language in our negotiations with the House. It would preempt state law regarding licensing and educational qualifications – an area where states have traditionally had responsibility. It would undermine the significant efforts that have occurred nationwide to establish science-based credentialling for addiction treatment providers. The substance abuse community is adamantly opposed and HHS could not accept this language. Furthermore, a test that favors religious organizations over non-religious organizations (by only preempting state requirements for religious organizations) makes this

provision particularly vulnerable to a legal challenge. The language that was carefully negotiated in the House agreement should stand.

2. **Voucher language:**

- House/Administration agreement:

"The term 'financial assistance' means a grant, cooperative agreement, or contract."

A religious organization, "on the same basis as any other nonprofit private providers, may receive financial assistance under a designated program; and may be a provider of services under a designated program."

- Santorum proposal – add the following language (from Watts/Talent):

"The term 'financial assistance' means a grant, cooperative agreement, contract, or voucherized assistance."

"The term 'voucherized assistance' means a system of selecting and reimbursing program services in which the beneficiary is given a document or other authorization that may be used to pay for program services; the beneficiary chooses the organization that will provide services to him or her according to rules specified by the designated award recipient; and the organization selected by the beneficiary is reimbursed by the designated award recipient for program services provided; or any other mode of financial assistance to pay for program services in which the program beneficiary determines the allocation of program funds through his or her selection of one service provider from among alternatives."

- Major differences: The House agreement did not allow vouchers; Santorum's proposal would extend charitable choice to voucherized drug treatment programs.

- Our view: No. The use of the term 'vouchers' for religious organizations raises broader policy concerns and issues of legal precedent. Term not needed to effectively implement charitable choice for substance abuse funds – not used in SAMHSA reauthorization or in House agreement.

to a lesser extent an issue of precedent for more controversial voucher programs

3. **Funds not aid to institutions:**

- House/Administration agreement:

A religious organization, "on the same basis as any other nonprofit private providers, may receive financial assistance under a designated program."

- Santorum proposal – add the following language (from Watts/Talent):

"Funds Not Aid to Institutions – Financial assistance under a designated program provided to or on behalf of program beneficiaries is aid to the beneficiary, not to the organization providing program services. The receipt by a program beneficiary of program services at the facilities of the organization shall not constitute federal financial assistance to the organization involved."

(although not explicitly)

- Major differences: While the House agreement indicates that funds going to the religious organizations would be financial assistance, the Santorum proposal would ~~clarify that this is~~ the financial assistance ~~would be~~ as aid to individual beneficiaries, not to the religious organizations.

to the organization

characterize

- Our view – No. ~~By declaring that aid is to individuals rather than organizations, religious providers would not be subject to important federal requirements, including civil rights protections. This could open the door to~~ direct federal aid to religious organizations for religious purposes. ~~This language has become particularly important in light of Mitchell v. Helms. Furthermore, this is a constitutional interpretation that is best left to courts. [WHC – pls review/revise]~~ Moreover, by declaring that aid is to individuals rather than orgs, rel. providers ~~that apply to participate~~ receiving aid to participate.

4. **Private cause of action:**

- House/Administration agreement:

"With respect to compliance with this section by an agency, a religious organization may obtain judicial review of agency action in accordance with chapter 7 of title 5, United States Code."

- Santorum proposal – add the following language (from S. 2779):

"A party alleging that the rights of the party under this section have been violated by a State or local government may bring a civil action pursuant to section 1979 against the official or government agency that has committed such violation. A party alleging that the rights of the party under this section have been violated by the Federal government may bring a civil action for appropriate relief in an appropriate Federal district court against the official or government agency that has allegedly committed such violation."

- Major differences – [What are differences between review processes?]
- Our view – ~~[Maybe. White House Counsel – pls check.]~~ No.

Civ. rights action can get attorneys fees & damages

This might impose liab. for civ. damages on State + local gov'ts

Marty will look Fyes.

5. **Mixing of federal and state funds:**

- Santorum proposal – add the following language (from S. 2779):

"Effect on State and Local Funds – If a State or local government contributes State or local funds to carry out a program described in subsection (c), the State or local government may segregate the State or local funds from the Federal funds provided to carry out the program or may commingle the State or local funds. If the State or local government commingles the State or local funds, the provision of this section shall apply to the commingled funds in the same manner, and to the same extent, as the provisions apply to the federal funds."

- Major differences – This proposal would be added to the House agreement.
- Our view – This is a proposal that we could probably accept. (Note: this provision is also in the Frist language, which we found acceptable.)

6. Referrals:

- House/Administration agreement:

  If a program beneficiary or prospective beneficiary objects to the religious character of the program participant, "within a reasonable period of time after the date of such objection such program participant shall refer such individual to, and the appropriate Federal, State, or local government that administers a designated program or is a program participant shall provide to such individual (if otherwise eligible for such services), program services that are from an alternative provider that is accessible to, and has the capacity to provide such services to, such individuals; and have a value that is not less than the value of the services that the individual would have received from the program participant to which the individual had such objection."

- Santorum proposal – change to the following language (from S. 2779):

  If a program beneficiary objects to the religious character of the program participant, "the appropriate Federal, State or local government entity shall provide to such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection, assistance that is from an alternative organization that is accessible to the individual; and has a value that is not less than the value of the services that the individual would have received from such organization."

- Major differences – The House Agreement states that *the religious organization would refer* and the government would provide program services from an alternative provider. Santorum is proposing that the government would have the full responsibility for referral and provision of program services by an alternative provider.

- Our view – In practice, doesn't it make sense for the religious organization to make the referral while the individual is in contact with them? The House agreement includes a requirement that the state or local govt will make a list of alternative providers available to the religious organization and holds the public agency responsible for ensuring that alternative services are provided. We would want to run this past HHS at a minimum, and need to understand what Randy's trying to achieve. We should be able to work something out. [MW/JB – are you OK w/ this as rewritten?]

7. Audit:

- House/Administration agreement:

  Fiscal Accountability —
  (1) In General – Except as provided in paragraph (2), any religious organization that is a program participant shall be subject to the same regulations as other recipients of awards of Federal financial assistance to account, in accordance with generally accepted auditing principles, for the use of the funds provided under such awards."
  (2) Limited Audit – With respect to the award involved, *if* a religious organization that is a program participant maintains the Federal funds in a separate account from non-Federal funds, then only the Federal funds shall be subject to audit.

- Santorum proposal – change to the following language (from S. 2779):

  Fiscal Accountability —
  (1) In General – Except as provided in paragraph (2), any religious organization providing assistance under any program described in subsection (c) shall be subject to the same regulations as other nongovernmental organizations to account in accord with generally accepted accounting principles for the use of the funds provided under such awards."
  (2) Limited Audit – Such organization *shall* segregate government funds provided under such program into a separate account. Only the government funds shall be subject to audit be the government.

- Major differences – The House Agreement would limit the Federal audit to Federal funds if the religious organization chose to segregate funds. Santorum would require that religious organizations segregate funds and would limit Federal audits to these Federal funds.

- Our view – We should probably not accept this change. Better to leave it up to religious organization to decide, and keep it consistent with welfare reform. [what do others think?]

8. Notice to beneficiaries about rights under charitable choice:

- House/Administration agreement:

  "Appropriate Federal, State, or local governments that administer designated programs or are program participants shall ensure that notice is provided to program beneficiaries or prospective program beneficiaries of their rights under this subsection."

- Santorum proposal – change to the following language (from S. 2779):

  "The appropriate Federal, State, or local governmental entity shall ensure that notice is provided to individuals described in paragraph (3) of the rights of such individuals under this section.

  (3) Individuals described – An individual described in this paragraph is an individual who receives or applies for assistance under a program described in subsection (c).

- Major differences – None.

- Our view – As there is no major difference here, what is the intent of the proposed change? Assuming intent is the same, why change House language?

10/10

Santorum Charitable Choice Proposals (10/6/00)
Analysis as of 10/9/00

*NOTE: Comments in "Our View" are intended as **internal** talking points only.*

1. Educational requirements:

- House/Administration agreement:

  "In determining whether personnel of a program participant that has a record of successful drug treatment for the preceding three years have satisfied State or local requirements, a State or local government shall not discriminate against education and training provided to such personnel by a religious organizations so long as such education and training includes basic content substantially equivalent to the content provided by nonreligious organizations that the State would credit for purposes of determining whether the relevant requirements have been satisfied."

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- Our view: No. We could not accept this language in our negotiations with the House. It would preempt state law regarding licensing and educational qualifications – an area where states have traditionally had responsibility. It would undermine the significant efforts that have occurred nationwide to establish science-based credentialling for addiction treatment providers. The substance abuse community is adamantly opposed and HHS could not accept this language. Furthermore, a test that favors religious organizations over non-religious

organizations (by only preempting state requirements for religious organizations) makes this provision particularly vulnerable to a legal challenge. The language that was carefully negotiated in the House agreement should stand.

2. **Voucher language:**

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"The term 'voucherized assistance' means a system of selecting and reimbursing program services in which the beneficiary is given a document or other authorization that may be used to pay for program services; the beneficiary chooses the organization that will provide services to him or her according to rules specified by the designated award recipient; and the organization selected by the beneficiary is reimbursed by the designated award recipient for program services provided; or any other mode of financial assistance to pay for program services in which the program beneficiary determines the allocation of program funds through his or her selection of one service provider from among alternatives."

- Major differences: The House agreement did not allow vouchers; Santorum's proposal would extend charitable choice to voucherized drug treatment programs.

- Our view: No. The use of the term 'vouchers' for religious organizations raises broader policy concerns and, to a lesser extent, an issue of precedent for more controversial voucher programs. Term not needed to effectively implement charitable choice for substance abuse funds – not used in SAMHSA reauthorization or in House agreement.

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- Major differences: While the House agreement indicates (although not explicitly) that funds going to the religious organizations would be financial assistance to the organization, the

Santorum proposal would characterize the financial assistance as aid to individual beneficiaries, not to the religious organizations.

- Our view – No. The proposed language is an attempt to rewrite reality in a way designed to avoid important Constitutional limitations on direct federal aid to religious organizations for religious purposes. Moreover, by declaring that aid is to individuals rather than organizations, religious providers would not be subject to important federal requirements, including civil rights protections, that apply to organizations receiving federal financial participation.

4. Private cause of action:

- House/Administration agreement:

"With respect to compliance with this section by an agency, a religious organization may obtain judicial review of agency action in accordance with chapter 7 of title 5, United States Code."

- Santorum proposal – add the following language (from S. 2779):

"A party alleging that the rights of the party under this section have been violated by a State or local government may bring a civil action pursuant to section 1979 against the official or government agency that has committed such violation. A party alleging that the rights of the party under this section have been violated by the Federal government may bring a civil action for appropriate relief in an appropriate Federal district court against the official or government agency that has allegedly committed such violation."

- Major differences – White House Counsel is checking further, but it appears that this change would allow religious organizations who feel they have been discriminated against to pursue a civil rights action against state and local governments for damages and attorneys' fees.

- Our view – No. Pending further review, but we are strongly opposed to imposing liability for civil damages on State and local governments. The House agreement provides an appropriate mechanism for religious organizations who may have encountered discrimination to seek judicial review.

5. Mixing of federal and state funds:

- Santorum proposal – add the following language (from S. 2779):

"Effect on State and Local Funds – If a State or local government contributes State or local funds to carry out a program described in subsection (c), the State or local government may segregate the State or local funds from the Federal funds provided to carry out the program or may commingle the State or local funds. If the State or local government commingles the State or local funds, the provision of this section shall apply to the commingled funds in the same manner, and to the same extent, as the provisions apply to the federal funds."

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- Our view – This is a proposal that we could probably accept. (Note: this provision is also in the Frist language, which we found acceptable.)

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- Santorum proposal – change to the following language (from S. 2779):

  If a program beneficiary objects to the religious character of the program participant, "the appropriate Federal, State or local government entity shall provide to such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection, assistance that is from an alternative organization that is accessible to the individual; and has a value that is not less than the value of the services that the individual would have received from such organization."

- Major differences – The House Agreement states that *the religious organization would refer* and the government would provide program services from an alternative provider. Santorum is proposing that the government would have the full responsibility for referral and provision of program services by an alternative provider.

- Our view – We should be able to work something out that reduces burden on religious organization while ensuring that vulnerable individuals seeking substance abuse treatment get the services they need. In practice, we believe it is important, as the House agreement reflects, for the religious organization to make the referral while the individual is in contact with them, rather then sending the individual back to the public agency where they could risk falling through the cracks. The House agreement includes a requirement that the state or local govt will make a list of alternative providers available to the religious organization and holds the public agency responsible for ensuring that alternative services are provided. At the same time, we agree that religious organizations shouldn't be solely responsible for making the referral. In addition, some individuals may feel more comfortable expressing their desire for an alternative provider to someone other than the religious organization.

- Therefore, we would propose revised language below to share responsibility for referrals with (1) public agencies who administer substance abuse funds and (2) other public agencies who may refer clients to substance abuse treatment but are not the administering agency.

Similarly, the second group of public agencies could also play a greater role in providing notice of beneficiary rights. We will need to run any proposed changes past HHS to check program implications, as well as to offer drafting suggestions.

- It would be helpful to get a better understanding of what Randy's trying to achieve.

Proposed changes to House language:
Sec 582(f)(1) If an individual who is a program beneficiary or prospective beneficiary objects to the religious character of the program participant, within a reasonable period of time after the date of such objection such program participant, or a public agency who administers, is a program participant, or refers individuals to a designated program, shall refer such individual to, and the appropriate Federal, State, or local government that administers a designated program or is a program participant shall provide to such individual (if otherwise eligible for such services), program services that: (A) are from an alternative provider that is accessible to, and has the capacity to provide such services to, such individuals; and (B) have a value that is not less than the value of the services that the individual would have received from the program participant to which the individual had such objection.

Sec 582(f)(2) NOTICES – Appropriate Federal, State, or local governments that administer designated programs or are program participants, or public agencies who refer individuals to such programs, shall ensure that notice is provided to program beneficiaries or prospective program beneficiaries of their rights under this subsection.

7. Audit:

- House/Administration agreement:

Fiscal Accountability —
(1) In General – Except as provided in paragraph (2), any religious organization that is a program participant shall be subject to the same regulations as other recipients of awards of Federal financial assistance to account, in accordance with generally accepted auditing principles, for the use of the funds provided under such awards."
(2) Limited Audit – With respect to the award involved, *if* a religious organization that is a program participant maintains the Federal funds in a separate account from non-Federal funds, then only the Federal funds shall be subject to audit.

- Santorum proposal – change to the following language (from S. 2779):

Fiscal Accountability —
(1) In General – Except as provided in paragraph (2), any religious organization providing assistance under any program described in subsection (c) shall be subject to the same regulations as other nongovernmental organizations to account in accord with generally accepted accounting principles for the use of the funds provided under such awards."
(2) Limited Audit – Such organization *shall* segregate government funds provided under such program into a separate account. Only the government funds shall be subject to audit by the government.

- Major differences – The House Agreement would limit the Federal audit to Federal funds if the religious organization chose to segregate funds. Santorum would require that religious organizations segregate funds and would limit Federal audits to these Federal funds.

- Our view – We should probably not accept this change. Better to leave it up to religious organization to decide, and keep it consistent with welfare reform. [what do others think?]

8. **Notice to beneficiaries about rights under charitable choice:**

- House/Administration agreement:

  "Appropriate Federal, State, or local governments that administer designated programs or are program participants shall ensure that notice is provided to program beneficiaries or prospective program beneficiaries of their rights under this subsection."

- Santorum proposal – change to the following language (from S. 2779):

  "The appropriate Federal, State, or local governmental entity shall ensure that notice is provided to individuals described in paragraph (3) of the rights of such individuals under this section.

  (3) Individuals described – An individual described in this paragraph is an individual who receives or applies for assistance under a program described in subsection (c).

- Major differences – None.

- Our view – As there is no major difference here, what is the intent of the proposed change? Assuming intent is the same, why change House language?

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Meeting Notes; RE: phone number (3 pages)	ca. 2000	P5, P6/b(6)
002. briefing paper	Factual Background (2 pages)	n.d.	P5
003. memo	To Gene Sperling and Al Larson From Bill Corbett (4 pages)	11/02/2000	P5
004. memo	To Gene Sperling From Al Larson and Bill Corbett (5 pages)	11/29/2000	P5
005. memo	To Gene Sperling From Al Larson and Bill Corbett (5 pages)	12/06/2000	P5

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FOLDER TITLE:
Tobacco---Korea

Rich Sheridan
2012-0440-S
ms341

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

To brief you quickly on the Korea tobacco trade issue:

Factual Background
In the Korean tobacco market, a state-run monopoly controls domestic cigarette production while foreign manufacturers have market access at a lenient 0% tariff rate. In the 1980's, the U.S. negotiated a Record of Understanding (ROU) with Korea to provide for "open and non-discriminatory access" for imported cigarettes. Under the terms of the ROU, Korea could raise its tariffs only if it permitted foreign investment in domestic Korean cigarette production without restriction on the form of investment. This ROU was updated in 1995 without essentially changing these terms.

This August, Korea announced its intention to privatize the state tobacco monopoly and raise tariffs to 40% by January 1, 2001. While licensed foreign manufacturers will be allowed to invest, their investment must exceed 50 billion won, or $46 million USD. In addition, minimum annual production must be 10 billion cigarettes. In addition, it appears that health protections that were previously in the ROU will be eliminated because they are also in other health legislation. The Korean legislature will likely pass legislation to enact these changes within the next week or two unless the U.S. decides to intervene. [check on cabinet action?]

The tobacco companies have raised the complaint that this represents trade discrimination and note that: 1) it will take 1-3 years to build a manufacturing plant, but the tariff will be implemented in January 2001; and 2) the entire foreign share of the cigarette market is currently only 9 billion cigarettes (with three major foreign companies), so each is currently selling far less than the required 10 billion per year.

As you know, the Doggett amendment attached each year to the CJS appropriations bill prohibits U.S. actions to promote tobacco exports. The Doggett language does make an exception for actions taken to enforce trade laws and trade agreements to ensure non-discriminatory treatment of U.S. products.

Interagency Process
Throughout September and into October, USTR facilitated a normal interagency process involving HHS, USDA, State, Commerce, and others to decide on appropriate U.S. response to Korea. This process resulted in a decision not to go forward based on concerns about the Doggett language prohibiting U.S. actions to promote tobacco exports. The group did, however, decide to submit a number of questions, including several health-related points raised by HHS, to the Korean government. Bob Boynton, the State Department contact on tobacco economy issues was out of town at the conclusion of this process. His colleagues signed off on the decision to refrain from action.

Upon Boynton's return, he became concerned that not acting in this instance would set a standard for trade discrimination in the tobacco context that differed from the standard applied to other goods. He contacted State department counsel, who took the position that the Doggett language did not bar U.S. action in this instance. Boynton then drafted

a cable indicating U.S. intentions to pursue enforcement of the ROU against the Korea's announced tobacco measures. This cable was cleared by Undersecretary Al Larson (who also happens to be serving now as the NEC deputy on international issues) but is currently on hold. Meanwhile, USTR had cleared their original decision not to pursue enforcement with Ambassador Barshefsky.

Proponents and Opponents

State obviously favors intervention and USTR clearly disagrees. Commerce General Counsel agrees with USTR, though policy staff lean towards State [CHK]. USDA is noncommittal [CHK]. HHS would like health protections to continue to be included in the ~~trade policy~~ legislation, but was also comfortable with the USTR approach of not ~~intervening [check--did they sign off]~~.

Phillip Morris has been contacting members of Congress, asking them to weigh in on the side of intervention. We hear that Robb, Edwards, Helms, and possibly others contacted USTR, asking them to reconsider their position. While we do not know Doggett's specific views, he likely has an interest in the interpretation of his language, particularly with this year's CJS appropriations report language still open for modification.

Next Steps

After our "listening meeting" yesterday with USTR, HHS, and State, NEC felt it was necessary to hold a deputies process to resolve this interagency dispute. Gene Sperling may contact you soon to arrange this. As the appropriate NEC deputy, Al Larson will probably lead the process.

Based on our preliminary information, DPC and NEC staff recommend that the U.S. intervene only on the health questions at present. By asking for consultations on those concerns, we can at least begin to address our health priorities and secure some input in the legislation that will very rapidly be finalized, while also buying some more time to resolve the interagency disagreements on our trade position.

There are several other dimensions to this issue that we would like to discuss further with you, so let us know if and when you would like to meet briefly on this! Thanks.

Memorandum

November 2, 2000

To: Gene Sperling
Al Larson

From: Bill Corbett

Subject: Korea's Possible Legislative Changes on Tobacco

Al asked me to begin an NEC-led process to decide what action, if any, should be taken regarding possible legislative changes by Korea on tobacco. Gene has asked for a review of agency positions.

This is to report briefly on an initial interagency discussion chaired today by Domestic Policy Council (Christina Ho) and NEC (Corbett) staff on October 30. The possible actions steps suggested below are from me alone, based on what was said at the meeting. I told the group, in closing the meeting with Christina, only that I would recommend convening a deputies meeting to consider what actions should or should not be taken. Of the three issues and associated actions steps discussed (see below), possible USG action to consult with Korea on the changes in Korean health regulation would appear to be most important and least controversial.

A separate report of the meeting, from Christina to Bruce Reed, is attached. It includes useful background that I will omit here.

Agencies represented at the DPC/NEC meeting were Center for Disease Control, DPC, HHS, NEC, NSC, State, USTR and White House Counsel. Agriculture and Commerce were invited (on short notice) but did not intend.

Action by the Korean cabinet on the new tobacco legislative package is reportedly imminent.

Background

Korea's proposed legislation is expected to receive cabinet consideration shortly. In brief, it would raise the current tariff on imported cigarettes from 0% currently to 40% as of 1/1/2001. It would also end the current prohibition on foreign investment in Korea's tobacco manufacturing sector, but by requiring a minimum foreign investment roughly equal to Korea's entire current domestic manufacturing capacity for cigarettes. It may be that the two measures are intended to attract (heretofore-scanty) foreign investor interest in the privatization of KTG, the government-owned firm with a monopoly on domestic production of tobacco products.

Dogget amendment - State and USTR are in disagreement over whether the effect of proposed legislative changes in Korea would result in "discrimination" against U.S. producers as defined under the Doggett Amendment. If the proposed Korean legislative change is found to be discriminatory, the law would permit action to prevent or end the discriminatory measure by Korea. State asserted that discrimination is evident; USTR the opposite; and, we did not use the meeting to sort out the different interpretations.

- *Possible action step:* Both agencies indicated at the meeting their willingness to have DOJ's Office of Legal Counsel review the matter. USTR subsequently has contacted me to ask that any OLC review be delayed until after a discussion among NEC deputies.

Health regulation – HHS indicated concern that Korea's proposed legislation would reduce the current level of public health regulation of tobacco products in Korea. Agencies agreed there is confusion over whether Korea intends to drop certain health regulatory protections or, instead, the intention is to transfer the legislative authority for certain tobacco regulations to health and safety legislation to be proposed later. HHS argued that the prospects for enforcement of health regulation are generally better when such regulation is mandated in an industry-specific law, rather than in a general health and safety law.

- *Possible action step*: Encouraging tougher public health regulation of tobacco products is the Administration's top tobacco policy priority internationally. It might be appropriate to register concern with the Korean government over whether its impending legislation will have the negative public health consequences of encouraging tobacco consumption. (Some officials of State and USTR registered concern that such a step would be unprecedented and asked if we would intend to take such steps with other countries in similar circumstances, e.g., Uruguay appears to be poised to weaken tobacco regulation.)

Investment requirement – NSC pointed out that Korea's impending investment liberalization step, on its face, would appear to encourage increased global production capacity for tobacco products at a time when the United States aims to discourage tobacco production and consumption globally. Other agencies pointed out that the Korean investment requirement might actually be intended to make Korea's government-owned monopoly tobacco producer (KTG) a more attractive property for privatization purposes.

- *Possible action* step: It might be appropriate, and consistent with the Doggett Amendment to discourage Korea from liberalizing foreign investment in any way. It was pointed out that, if this step was taken, the USG could be drawn into a negotiation over the level of Korea's new foreign investment requirement. Such a negotiation could be contrary to the Doggett Amendment's prohibition against the use of USG funds to promote the sale or export of tobacco products.

To brief you quickly on the Korea tobacco trade issue:

Factual Background
In the Korean tobacco market, a state-run monopoly controls domestic cigarette production while foreign manufacturers have market access at a lenient 0% tariff rate. In the 1980's, the U.S. negotiated a Record of Understanding (ROU) with Korea to provide for "open and non-discriminatory access" for imported cigarettes. Under the terms of the ROU, Korea could raise its tariffs only if it permitted foreign investment in domestic Korean cigarette production without restriction on the form of investment. This ROU was updated in 1995 without essentially changing these terms.

This August, Korea announced its intention to privatize the state tobacco monopoly and raise tariffs to 40% by January 1, 2001. While licensed foreign manufacturers will be allowed to invest, their investment must exceed 50 billion won, or $46 million USD. In addition, minimum annual production must be 10 billion cigarettes. In addition, it appears that health protections that were previously in the ROU will be eliminated because they are also in other health legislation. The Korean legislature will likely pass legislation to enact these changes within the next week or two unless the U.S. decides to intervene.

The tobacco companies have raised the complaint that this represents trade discrimination and note that: 1) it will take 1-3 years to build a manufacturing plant, but the tariff will be implemented in January 2001; and 2) the entire foreign share of the cigarette market is currently only 9 billion cigarettes (with three major foreign companies), so each is currently selling far less than the required 10 billion per year.

As you know, the Doggett amendment attached each year to the CJS appropriations bill prohibits U.S. actions to promote tobacco exports. The Doggett language does make an exception for actions taken to enforce trade laws and trade agreements to ensure non-discriminatory treatment of U.S. products.

Interagency Process
Throughout September and into October, USTR facilitated a normal interagency process involving HHS, USDA, State, Commerce, and others to decide on appropriate U.S. response to Korea. This process resulted in a decision not to go forward based on concerns about the Doggett language prohibiting U.S. actions to promote tobacco exports. The group did, however, decide to submit a number of questions, including several health-related points raised by HHS, to the Korean government. Bob Boynton, the State Department contact on tobacco economy issues was out of town at the conclusion of this process. His colleagues signed off on the decision to refrain from action.

Upon Boynton's return, he became concerned that not acting in this instance would set a standard for trade discrimination in the tobacco context that differed from the standard applied to other goods. He contacted State department counsel, who took the position that the Doggett language did not bar U.S. action in this instance. Boynton then drafted

a cable indicating U.S. intentions to pursue enforcement of the ROU against the Korea's announced tobacco measures. This cable was cleared by Undersecretary Al Larson (who also happens to be serving now as the NEC deputy on international issues) but is currently on hold. Meanwhile, USTR had cleared their original decision not to pursue enforcement with Ambassador Barshefsky.

Proponents and Opponents

State obviously favors intervention and USTR clearly disagrees. Commerce agrees with USTR. USDA has not raised this to their GC or Department leadership; policy staff prefer consultations with Korea but generally defer to USTR. HHS would like to ensure that enforceable language regarding health protections is included in either trade or health legislation, but were comfortable with the USTR approach of not having formal trade consultations.

Phillip Morris has been contacting members of Congress, asking them to weigh in on the side of intervention. We hear that Robb, Edwards, Helms, and possibly others contacted USTR, asking them to reconsider their position. While we do not know Doggett's specific views, he likely has an interest in the interpretation of his language, particularly with this year's CJS appropriations report language still open for modification.

Next Steps

After our "listening meeting" yesterday with USTR, HHS, and State, NEC felt it was necessary to hold a deputies process to resolve this interagency dispute. Gene Sperling may contact you soon to arrange this. As the appropriate NEC deputy, Al Larson will probably lead the process.

Based on our preliminary information, DPC and NEC staff recommend that the U.S. intervene only on the health questions at present. By asking for consultations on those concerns, we can at least begin to address our health priorities and secure some input in the legislation that will very rapidly be finalized, while also buying some more time to resolve the interagency disagreements on our trade position.

There are several other dimensions to this issue that we would like to discuss further with you, so let us know if and when you would like to meet briefly on this! Thanks.

Memorandum

November 29, 2000

To: Gene Sperling

From: Al Larson and Bill Corbett

Subject: Tobacco Issues – Korea, Singapore/Chile

This is to update you on developments since Al Larson hosted a deputies discussion re the Korea tobacco issue on November 8. So far, we perceive no need to make changes to a six-part interagency-agreed course of action. A list of those actions, with relevant updates, is attached for your background. The key decision, specific to Korea, was to defer decision on Administration action under a 1988 bilateral tobacco trade agreement with Korea until we have sufficient information on new investment rules for production of cigarettes and other tobacco products. We continue to recommend that wait-and-see stance.

Taking advantage of what we have learned in reviewing the Korea matter, this memo also makes tobacco-related suggestions for review in the interagency preparatory processes for the Singapore and Chile FTA negotiations.

For your background in considering our approach to tobacco in all these matters, the Doggett Amendment to the FY 2000 CSJ appropriations legislation states (which is still in effect under the CR) states as follows:

> "None of the funds provided by this Act shall be available to promote the sale or export of tobacco or tobacco products, or to seek the reduction or removal by any foreign country of restrictions on the marketing of tobacco or tobacco products, except for restrictions which are not applied equally to all tobacco or tobacco products of the same type."

Korea

Agencies agreed on November 8 to adopt a wait-and-see approach to an impending tariff increase (from zero to a new rate of 40%) and investment liberalization Korea is contemplating for its tobacco sector. The tariff increase is likely to come in December, before we know the investment rules (in January or later). A 1998 U.S.-Korea tobacco trade agreement permits the 40% tariff increase if "...the Korean government permits foreign investment in the manufacture of cigarettes in Korea without restriction on the form of such investment."

The tariff increase will be accomplished by a change to Korea's Tobacco Business Act, which also will eliminate public health provisions that Korean officials indicate are redundant of provisions in Korea's Public Health Act. HHS is actively reviewing the proposed legislation to ensure no weakening of current public health policies applicable to tobacco products. The investment liberalization will be accomplished by a presidential decree to be issued next year.

The U.S. Embassy in Seoul has been instructed to obtain and forward us a draft of that decree as soon as it is available.

Singapore and Chile

More broadly, the Singapore and Chile FTA negotiations will confront us with the question of what requests to make concerning tariffs on tobacco products, a question which was implicated over the past year in consultations with Members of Congress on the China PNTR legislation and the Jordan FTA. We suggest that in the interagency preparatory processes for Singapore and Chile FTAs we review (and endorse) the position USTR ultimately took in Jordan FTA negotiations, i.e., that the United States make no request regarding tobacco product tariff reductions.

China PNTR and Jordan FTA developments figure in this recommendation. First, some Members of Congress were disappointed to learn that China would decrease tariffs on tobacco products as part of its WTO accession. It was pointed out that China's action was in response to an across-the-board formulaic U.S. request for tariff reductions that was made prior to enactment of the Doggett Amendment. Also, as other nations had made similar requests of China, the Administration was not able unilaterally to undo China's tobacco product tariff reduction in its WTO accession package. In part as a result of these discussions, DPC is working on an Executive Order to lay out plans for strong action to address the potential global epidemic of diseases caused by tobacco use.

Second, in the Jordan FTA negotiations, Members of Congress questioned whether a request to Jordan for decreased tobacco product tariffs could be consistent with the Doggett Amendment, which is ambiguous on this point. It is ambiguous because, at one level, tariffs are non-discriminatory measures relative to all imported goods, i.e., tariffs satisfy a Most-Favored-Nation test for discrimination. At another level, tariffs fundamentally discriminate in favor of domestic products over imported goods, i.e., they fail a National Treatment test for discrimination. The Doggett Amendment does not distinguish between MFN and National Treatment as forms of discrimination.

In response, USTR suggested to Jordan at one point in the FTA negotiations that an increase in excise taxes, rather than high tariffs, was the best (and most non-discriminatory) way to address public health and revenue policy goals in the tobacco sector. Unfortunately, recent tax reforms in Jordan made an excise tax increase infeasible, which contributed to a USTR decision to drop the matter of tobacco product tariffs in the FTA talks.

At the 11/8 deputies discussion, agencies agreed that higher tobacco prices are good from a public health perspective. Excise taxes, which apply equally to all domestic and imported tobacco or tobacco products of the same type, rather than high tariffs are the best way to address public health and revenue policy goals. However, excise taxes of no nation involved (U.S., Singapore or Chile) would be a topic for negotiation in the upcoming FTA discussions.

Attachment: Summary of interagency-agreed actions on Korea tobacco issue (11/8/00), with updates (as of 11/29/00)

Clearance: DPC – Christina Ho and Julie Bosland, NEC – Jay Bruns and Bill Kissinger

Summary of interagency-agreed actions on Korea tobacco issue (11/8/00), with updates (as of 11/29/00)

Six courses of action agreed *ad ref* at the 11/8 interagency meeting (and subsequently okayed to NEC by Agriculture, Commerce, Domestic Policy Council, HHS, Treasury, USTR and White House Counsel's office) are listed below, with indented updates below each item.

1. Share among agencies any information from industry, Congress and others on this dispute.

   Update: U.S. Embassy Seoul is keeping in close touch with Korean agencies on their plans to (1) increase the tariff on cigarette and other tobacco products from 0% to 40% through legislative action at any time; and, (2) issue a presidential decree next year that will liberalize foreign investment in the tobacco sector.

   The United States' current stance is to take no action regarding the proposed tariff increase absent information that the new investment rules will infringe on the 1988 U.S.-Korea tobacco agreement. *The tariff increase is permitted by that agreement, if foreign investment is liberalized without restrictions.* Notwithstanding a legislative gridlock in the Korean National Assembly over the last ten days, it is expected soon to increase the tariff on certain tobacco products from its current level of zero to a new level of 40%, effective January 1, 2001.

   We do not have confidence that we know what to expect the Koreans to do on the new investment rules. Original indications that Korea will take a restrictive approach on the investment rules have been contradicted by at least one embassy report that suggests the rules will not be unreasonably restrictive. The U.S. Embassy is alert to our desire to see the new investment rules as soon as they are issued in draft, which could be after January 1, 2001.

   Korean officials have requested but not received any (to our knowledge) official or unofficial representations regarding what should be the new tariff or investment rules and what the United States' reaction would be under one scenario or another.

2. Continue to seek information from Korea and share among agencies information on Korea's (still-unformulated) plan for liberalizing investment (for foreigners and domestics) in production of cigarettes and other tobacco products. Get translated copies of public health provisions (e.g. warnings on labels, advertising restrictions) that may be deleted from the Tobacco Business Act and those in existing health laws for HHS's review to determine whether the elimination of provisions in the Tobacco Business Act will have a negative public health impact.

   U.S. Embassy Seoul has provided for HHS's review translated copies of public health provisions (e.g. warnings on labels, advertising restrictions) that may be deleted from the Tobacco Business Act and comparable provisions in existing health laws. HHS drafted a series of questions to determine whether the elimination of provisions in the Tobacco

Business Act will have a negative public health impact. Those questions were provided to U.S. Embassy Seoul, which posed them to the government. We received the Korean response on November 29 and passed it to HHS for their review.

Depending on HHS's evaluation of the Korean response, we may want to approach the Korean government to express public health concerns about the proposed legislation. (This is the same legislation that will increase tobacco product tariffs.)

3. Defer decision on Administration action under trade agreements with Korea until we have sufficient information on new investment rules for production of cigarettes and other tobacco products.

See item one above.

4. Check on whether we have trade agreements or past disputes with other countries on tobacco or other products that involve any tariff/investment trade-off similar to the bilateral tobacco agreement with Korea.

USTR has searched and so far found no analogies to the circumstances in Korea at present. They are still researching.

5. Continue discussion of whether or not we agree that higher tariffs leading to higher domestic prices for cigarettes and other tobacco products is a positive outcome from a public health perspective. General agreement that higher tobacco prices are good from a public health perspective; ongoing discussion about the most appropriate mechanisms (e.g. tariffs, excise taxes, etc.)

DPC and NEC staff (Christina Ho and Bill Corbett) discussed this issue in an 11/9 conference call to brief HHS offices (Tom Novotny of International Affairs, Linda Bailey of CDC and Ripley Forbes of the Surgeon General's office) on the 11/8 interagency discussion of the Korea tobacco issue. HHS officials agreed that higher tobacco prices are good from a public health perspective. They noted that the United States indicated at one point in the Jordan FTA negotiations that an increase in excise taxes, rather than high tariffs, was the best (and most non-discriminatory) way to address public health and revenue policy goals. Unfortunately, recent tax reforms in Jordan made an excise tax increase infeasible, which contributed to a USG decision to drop the matter of tobacco product tariffs in the FTA talks.

6. Agencies will consider what clarifications, if any should be made in tobacco trade policy guidance based on the Korea case and other recent developments. No decision yet on whether to embark on clarifying/improving the existing guidance, which is issued by State to embassies abroad.

USTR (Bob Novick) favored a clarification at the 11/8 meeting at least with respect to how to handle tobacco product tariffs in future trade negotiations. (The cover memo address that question.)

Memorandum

December 6, 2000

To: Gene Sperling

From: Al Larson and Bill Corbett

Subject: Tobacco Issues Arising Under a 1998 U.S.-Korea Trade Agreement and in Upcoming FTA Negotiations with Singapore and Chile

This is to update you on developments since Al Larson hosted a deputies discussion re the Korea tobacco issue on November 8. So far, we perceive no need to make changes to a six-part interagency-agreed course of action re Korea. A list of those actions, with relevant updates, is attached for your background. The key decision was to defer any Administration action under a 1988 bilateral tobacco trade agreement with Korea until we have sufficient information (probably in January) on new investment rules for production of cigarettes and other tobacco products. We continue to recommend that wait-and-see stance.

Taking advantage of what we have learned in reviewing the Korea matter, this memo also suggests an approach to tobacco tariff reductions in the Singapore and Chile FTA negotiations. We suggest that agencies review (and endorse) the position USTR ultimately took in Jordan FTA negotiations, i.e., that the United States make no request regarding tobacco product tariff reductions.

Factoring public health policy into tobacco-related trade actions

For your background in factoring public health policy into tobacco-related trade matters, the Doggett Amendment to the FY 2000 CSJ appropriations legislation (which is still in effect under the CR) states as follows:

> "None of the funds provided by this Act shall be available to promote the sale or export of tobacco or tobacco products, or to seek the reduction or removal by any foreign country of restrictions on the marketing of tobacco or tobacco products, except for restrictions which are not applied equally to all tobacco or tobacco products of the same type."

You should also be aware that DPC is working on an Executive Order to reinforce and strengthen Administration policy to consider global tobacco consumption during tobacco-related trade actions. As currently envisioned, it would direct certain federal agencies to provide consultation, research and technical assistance to other nations in addressing the potential epidemic of diseases caused by tobacco. DPC staff expects to coordinate a draft text with NEC and trade agencies.

Korea

Agencies agreed on November 8 to adopt a wait-and-see approach to an impending tariff increase (from zero to a new rate of 40%) and investment liberalization Korea is contemplating for its tobacco sector. The tariff increase is likely to come in December, before we know the details of investment liberalization (in January or later). A 1988 U.S.-Korea tobacco trade agreement permits the 40% tariff increase if "...the Korean government permits foreign investment in the manufacture of cigarettes in Korea without restriction on the form of such investment." The tariff increase would be consistent with Korea's WTO commitments.

The tariff increase will be accomplished by a change to Korea's Tobacco Business Act, which also will eliminate public health provisions that Korean officials indicate are redundant of provisions in Korea's Public Health Act. HHS is actively reviewing the proposed legislation to ensure no weakening of current public health policies applicable to tobacco products. The investment liberalization will be accomplished by a presidential decree to be issued next year. The U.S. Embassy in Seoul has been instructed to obtain and forward us a draft of that decree as soon as it is available.

Singapore and Chile

More broadly, the Singapore and Chile FTA negotiations will confront us with the question of whether to make requests for elimination of tariffs on tobacco products. Tobacco tariff reductions were implicated over the past year in consultations with Members of Congress on the China PNTR legislation and the Jordan FTA.

With respect to China PNTR, some Members of Congress were disappointed to learn that China would decrease tariffs on tobacco products as part of its WTO accession. It was pointed out that China's action was in response to an across-the-board formulaic U.S. request for tariff reductions that was made prior to enactment of the Doggett Amendment. Also, as other nations had made similar requests of China, the Administration was not able unilaterally to undo China's tobacco product tariff reduction in its WTO accession package.

As for the Jordan FTA negotiations, Members of Congress questioned whether a request to Jordan for decreased tobacco product tariffs could be consistent with the Doggett Amendment, which is ambiguous on this point. It is ambiguous because, at one level, tariffs are non-discriminatory measures relative to all imported goods, i.e., tariffs satisfy a Most-Favored-Nation test for discrimination. At another level, tariffs fundamentally discriminate in favor of domestic products over imported goods, i.e., they fail a National Treatment test for discrimination. The Doggett Amendment does not distinguish between MFN and National Treatment as standards of discrimination.

In response, USTR suggested to Jordan at one point in the FTA negotiations that an increase in excise taxes, rather than high tariffs, was the most non-discriminatory way to address public health and government revenue goals in the tobacco sector. Unfortunately, recent tax reforms in Jordan made an excise tax increase infeasible, which contributed to a USTR decision to drop the matter of tobacco product tariffs in the FTA talks.

At the 11/8 deputies discussion, agencies agreed that higher tobacco prices are good from a public health perspective. There was no conclusion as to whether foreign excise tax measures should be substituted for tariffs as a means to this end. However, insofar as no nation's excise taxes would be a topic for negotiation in the upcoming FTA discussions, we suggest that agencies review (and endorse) the position USTR ultimately took in Jordan FTA negotiations, i.e., that the United States make no request regarding tobacco product tariff reductions.

Attachment: Summary of interagency-agreed actions on Korea tobacco issue (11/8/00), with updates (as of 11/29/00)

Clearance: DPC – Christina Ho and Julie Bosland, NEC – Jay Bruns, Rick Samans and Bill Kissinger

Summary of interagency-agreed actions on Korea tobacco issue (11/8/00), with updates (as of 11/29/00)

Six courses of action agreed *ad ref* at the 11/8 interagency meeting (and subsequently okayed to NEC by Agriculture, Commerce, Domestic Policy Council, HHS, Treasury, USTR and White House Counsel's office) are listed below, with indented updates below each item.

1. Share among agencies any information from industry, Congress and others on this dispute.

> Update: U.S. Embassy Seoul is keeping in close touch with Korean agencies on their plans to (1) increase the tariff on cigarette and other tobacco products from 0% to 40% through legislative action at any time; and, (2) issue a presidential decree next year that will liberalize foreign investment in the tobacco sector.
>
> The United States' current stance is to take no action regarding the proposed tariff increase absent information that the new investment rules will infringe on the 1988 U.S.-Korea tobacco agreement. *The tariff increase is permitted by that agreement, if foreign investment is liberalized without restrictions.* Notwithstanding a legislative gridlock in the Korean National Assembly over the last ten days, it is expected soon to increase the tariff on certain tobacco products from its current level of zero to a new level of 40%, effective January 1, 2001.
>
> We do not have confidence that we know what to expect the Koreans to do on the new investment rules. Original indications that Korea will take a restrictive approach on the investment rules have been contradicted by at least one embassy report that suggests the rules will not be unreasonably restrictive. The U.S. Embassy is alert to our desire to see the new investment rules as soon as they are issued in draft, which could be after January 1, 2001.
>
> Korean officials have requested but not received any (to our knowledge) official or unofficial representations regarding what should be the new tariff or investment rules and what the United States' reaction would be under one scenario or another.

2. Continue to seek information from Korea and share among agencies information on Korea's (still-unformulated) plan for liberalizing investment (for foreigners and domestics) in production of cigarettes and other tobacco products. Get translated copies of public health provisions (e.g. warnings on labels, advertising restrictions) that may be deleted from the Tobacco Business Act and those in existing health laws for HHS's review to determine whether the elimination of provisions in the Tobacco Business Act will have a negative public health impact.

> U.S. Embassy Seoul has provided for HHS's review translated copies of public health provisions (e.g. warnings on labels, advertising restrictions) that may be deleted from the Tobacco Business Act and comparable provisions in existing health laws. HHS drafted a series of questions to determine whether the elimination of provisions in the Tobacco Business Act will have a negative public health impact. Those questions were provided

to U.S. Embassy Seoul, which posed them to the government. We received the Korean response on November 29 and passed it to HHS for their review.

Depending on HHS's evaluation of the Korean response, we may want to approach the Korean government to express public health concerns about the proposed legislation. (This is the same legislation that will increase tobacco product tariffs.)

3. Defer decision on Administration action under trade agreements with Korea until we have sufficient information on new investment rules for production of cigarettes and other tobacco products.

See item one above.

4. Check on whether we have trade agreements or past disputes with other countries on tobacco or other products that involve any tariff/investment trade-off similar to the bilateral tobacco agreement with Korea.

USTR has searched and so far found no analogies to the circumstances in Korea at present. They are still researching.

5. Continue discussion of whether or not we agree that higher tariffs leading to higher domestic prices for cigarettes and other tobacco products is a positive outcome from a public health perspective. General agreement that higher tobacco prices are good from a public health perspective; ongoing discussion about the most appropriate mechanisms (e.g. tariffs, excise taxes, etc.)

DPC and NEC staff (Christina Ho and Bill Corbett) discussed this issue in an 11/9 conference call to brief HHS offices (Tom Novotny of International Affairs, Linda Bailey of CDC and Ripley Forbes of the Surgeon General's office) on the 11/8 interagency discussion of the Korea tobacco issue. HHS officials agreed that higher tobacco prices are good from a public health perspective. They noted that the United States indicated at one point in the Jordan FTA negotiations that an increase in excise taxes, rather than high tariffs, was the best (and most non-discriminatory) way to address public health and revenue policy goals. Unfortunately, recent tax reforms in Jordan made an excise tax increase infeasible, which contributed to a USG decision to drop the matter of tobacco product tariffs in the FTA talks.

6. Agencies will consider what clarifications, if any should be made in tobacco trade policy guidance based on the Korea case and other recent developments. No decision yet on whether to embark on clarifying/improving the existing guidance, which is issued by State to embassies abroad.

USTR (Bob Novick) favored a clarification at the 11/8 meeting at least with respect to how to handle tobacco product tariffs in future trade negotiations. (The cover memo addresses that question.)