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CONVENTION

DRAFT

October 14, 1999

MEMORANDUM TO THE INTERAGENCY WORKING GROUP ON TOBACCO

SUBJECT: Concurrence on International Tobacco Guidelines

The attached guidelines represent interagency consensus on issues relating to U.S. participation in the World Health Organization (WHO)'s International Framework Convention on Tobacco Control (FCTC). As you know, the guidance has been developed through an interagency process coordinated by the Domestic Policy Council. This guidance will be updated and revised as the WHO process proceeds. The attached memorandum explains some of the issues considered by the working group in developing the guidelines.

The White House requests your concurrence with the attached guidelines by noon on Tuesday, October 19th. Please indicate your concurrence to me in writing. This deadline is firm, and is necessary to ensure adequate guidance to U.S. representatives attending a WHO working group meeting in Geneva October 25th-29th.

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SUMMARY OF KEY ISSUES RELATED TO GUIDELINES FOR FRAMEWORK CONVENTION ON TOBACCO CONTROL

SUBJECT

International tobacco policy

PURPOSE

To provide guidance to U.S. representatives participating in the World Health Organization (WHO)'s International Framework Convention on Tobacco Control (FCTC) Working Group.

RECOMMENDATION

The attached policy guidance has been thoroughly vetted at the staff level through an interagency process. The agencies should concur in this policy guidance for U.S. representatives participating in the FCTC Working Group, subject to ongoing interagency consultation as necessary as the process moves from the working group phase to the negotiating phase.

INTERAGENCY PROCESS

In preparation for the negotiation of the FCTC, the Domestic Policy Council has been convening weekly interagency meetings over the past few months including NSC, NEC, USTR, OMB, HHS, State, Agriculture, Commerce, Justice, and Treasury.

BACKGROUND ON FRAMEWORK CONVENTION

In May 1999, the 191-member nation World Health Assembly (WHA), the governing body for the World Health Organization (WHO), unanimously adopted a resolution calling for negotiation of a FCTC. Secretary Shalala announced U.S. support for negotiation of this convention. Prior to the May meeting, the State Department authorized the U.S. participation, and the White House Domestic Policy Council pledged to coordinate an interagency policy process following the May meeting to agree on negotiation guidance.

The WHO resolution calls for adoption of the framework convention and possible related protocols by May 2003. Later this month, the WHO will hold the first meeting of the FCTC Working Group. The mission of the FCTC Working Group is to prepare proposed draft elements of the convention and possible protocols, and to submit a report to the 53rd World Health Assembly in May 2000. Formal negotiations will commence after May 2000 with the first meeting of the Intergovernmental Negotiating Body, which will negotiate the text of the convention and related protocols.

A convention is a treaty, an international agreement, which entails more general or limited legal obligations. A protocol, also a form of treaty, involves more specific legal obligations and supplements, clarifies, amends, or qualifies an existing international agreement such as a convention.

FACTORS CONSIDERED IN DEVELOPMENT OF GUIDELINES

Consistency with Administration Tobacco Policy

Position Recommended in Guidelines

In devising the attached guidelines, the interagency group applied the Administration's established policy positions, keeping in mind that tobacco control strategies are most effective when tailored to the political, social and cultural circumstances of each country.

Summary of Administration Tobacco Policy

The Administration has a series of well-established positions on tobacco policy. These policies were established during the development of the Food and Drug Administration tobacco regulations, published in 1995 and 1996, in five principles articulated by the President in September 1997, and in the negotiations over Congressional legislation in 1997 and 1998. These positions have been reflected in numerous Administration documents, including the President's budget, letters to Congress, and State of the Union addresses, and have included supporting:

- Comprehensive efforts to reduce teen smoking, including increasing the price of tobacco products so fewer young people will smoke, public education campaigns to discourage youth smoking, and efforts to reduce access and limit the appeal of tobacco to youth
- Full authority for the Food and Drug Administration to regulate tobacco products
- Changes in the way the tobacco industry does business, including an end to marketing and promotion of tobacco products to children
- Public health efforts, including efforts to treat tobacco dependence and reduce environmental tobacco smoke
- Protection for tobacco farmers and tobacco dependent communities

Implications of Applying the Administration's Established Tobacco Policy to FCTC

Pursuing these established positions in framework convention negotiations ought to be unobjectionable with the Congress. However, alarmism among the industry and/or pro-tobacco members of Congress concerned by the concept of an FCTC may prompt appropriation riders attempting to limit or forbid U.S. participation in the convention process. Depending on the outcome of the negotiations, and the future composition of the Senate, negotiation of a treaty that conforms to these established positions may also face obstacles to ratification.

To avoid these difficulties, the Administration seeks a more general framework convention, with minimal legal obligations on States Parties, leaving more contentious issues to be negotiated later in protocols (see discussion below). We also plan to consult on a regular basis with key member of Congress as well as public health groups, growers, manufacturers, and state and local governments.

Legal Obligations Under Convention and Protocols

Position Recommended in Guidelines

The attached guidelines direct U.S. representatives to seek a framework convention with guiding principles and general obligations. The U.S. representatives will oppose efforts to negotiate a treaty with detailed obligations that would require specific changes in U.S. law. For example, the United States will seek a convention that includes general objectives, such as protecting youth from exposure to and use of tobacco products, preventing and treating tobacco dependence, and improving the exchange of information at national and international levels. The United States will oppose treaty provisions that would dictate precisely how these objectives are to be accomplished but instead will seek a convention that permits us to choose policy solutions crafted to meet the specific situation in the United States.

Summary of Legal Obligations in the Framework Convention

The proposed framework convention would likely create international legal obligations requiring Member States to accomplish generalized policy objectives, typically through domestic legislation implementing the obligation. An example of a general obligation would be a requirement that each Member State take steps to ensure the public is warned about the dangers of smoking. The United States, or any other party, would have to take steps to accomplish this objective, or would be in breach of an international legal obligation.

Related protocols on specific subjects might impose further, more specific obligations. An example of a more detailed obligation created by a protocol might be a requirement that each signatory State have a warning label on each package of cigarettes of a certain size and type with a specific message. States Parties to a framework convention normally have the option of joining the convention without being required to adhere to any protocols, though such a requirement is subject to negotiation.

Documents from the WHO, as well as conversations with WHO staff, indicate that some States may seek a convention and/or protocols which could prescribe detailed legal requirements for tobacco control, binding on all States Parties. Ratification of such a treaty by the United States would have the effect of obliging the United States to modify existing relevant U.S. law.

Implications of Position Recommended in the Guidance

This position has the advantage of maintaining flexibility during the negotiating process, and will be less likely to provoke Congressional action opposing U.S. participation in the process. However, it may be criticized by other Member States and by public health advocates for being too incremental.

Does it undermine credibility to demand such tailoring?

GUIDELINES FOR FRAMEWORK CONVENTION ON TOBACCO CONTROL

October 14, 1999

BACKGROUND: In May 1999, the World Health Organization (WHO) adopted a resolution calling for the negotiation of a Framework Convention on Tobacco Control (FCTC). According to the WHO background documents, the FCTC will produce two types of negotiated instruments: (1) the framework convention, or introductory provisions, that may include a preamble, general obligations, institutions, implementation mechanisms, law-making processes, and final clauses; and (2) protocols, or subsidiary agreements for extending the Framework, that may cover such areas as prices, smuggling, tax-free tobacco products, advertising and sponsorship, the Internet, test methods, package design and labeling, agriculture, and information sharing.

ROLE OF THE U.S. TEAM: The United States should take a leadership role in seeking a broadly acceptable Framework Convention on Tobacco Control to which the United States can become a party. The objective should be to secure an agreement that facilitates and encourages national governments to take coordinated or compatible steps to reduce the harmful effects of tobacco use. The Framework Convention must recognize that tobacco control strategies are most effective when tailored to the political, social and cultural circumstances of each State. Accordingly, the United States should not support or encourage the negotiation of an Agreement that purports to impose binding, prescriptive or uniform requirements on States Parties.

FRAMEWORK CONTENTS

The negotiators should seek adoption of an FCTC that reflects the following objectives and principles:

- 1. Tobacco use is a global problem, requiring global solutions.** Tobacco use will be the leading global cause of premature death and preventable illness early in the 21st century. The worldwide marketing of tobacco products has particularly deleterious health outcomes for the world's children and other vulnerable populations. The FCTC should help governments to promote policies to reduce the consumption of tobacco and tobacco products, help treat tobacco dependence, and improve the public's health.
- 2. Support an FCTC Implemented Through Domestic Legislation.** The United States should seek an FCTC that includes guiding principles and general obligations. The FCTC and related protocols should commit States to accomplish policy objectives, but should leave to each State the accomplishment of those objectives through domestic legislation specifying whatever means the State deems appropriate. The U.S. representatives should oppose efforts to negotiate an FCTC with detailed obligations that would require specific changes in U.S. law, or that would dictate precisely how objectives are to be accompanied.
- 3. Oppose Inclusion of Protocols in FCTC:** The United States should seek the broadest convention, with minimal obligations, and a structure that encourages adoption. It is likely that other Parties and the WHO will support the inclusion of language about a few protocols -- such as price (including tax), advertising and sponsorship, information sharing, and prevention and treatment. The FCTC

should not include language committing member States to negotiate protocols on specific topics. As a fallback position, the United States could support proposals for protocols on prevention and treatment, information sharing, and protection of children. A protocol on price (including tax) is an acceptable inclusion if paired with any of these three topic areas.

4. Protect Children: The FCTC should include a comprehensive statement of the importance to international public health goals that will result if governments each adopt strategies and policies that restrict the availability and appeal of tobacco products to young people. The FCTC should encourage governments to adopt policies to increase the price of tobacco products, deglamorize the use of tobacco, and prohibit the sale of tobacco products to minors. The FCTC should include a description of the impact of tobacco products on the health of children, including prenatal exposure, environmental tobacco smoke, and the identification of tobacco products as the leading ignition source in fatal house fires.

5. Support for Prevention and Treatment Strategies and Policies: The FCTC should include a comprehensive statement of the problem and emphasize the public health goals of the Convention. The United States should further support proposals that encourage governments to promote evidence-based prevention and treatment strategies and policies such as community-based programs, data collection and evaluation, and access to and availability of treatment for nicotine dependence.

6. Increasing the Price of Tobacco Products: The United States should support proposals to increase the price of cigarettes and other tobacco products (by tax increases or other methods) as an effective method of reducing tobacco use, particularly among children. Price increases should be tailored to the political, social and cultural circumstances of each State. The United States should oppose imposition of an international tax.

7. Protect Nonsmokers from Environmental Tobacco Smoke: The FCTC should include a comprehensive statement regarding the adverse health effects of environmental tobacco smoke on nonsmokers and a statement identifying for consideration by individual governments the variety of policies and strategies that have been shown to protect non-smokers, particularly infants, children and pregnant women, from the adverse health effects of environmental tobacco smoke exposure.

8. Support for Economic Policies to Protect Tobacco Dependent

Communities: The United States should support proposals to minimize economic disruptions for tobacco dependent communities, in particular farmers and farming communities, while continuing to seek the reduction of tobacco consumption. When considering these proposals, it will be essential for each government to assess and address for itself the economic impact of these proposals on tobacco growing and manufacturing communities.

9. Support for International Cooperation and Information Sharing: The FCTC should include a statement encouraging information sharing and

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cooperation among governments with the aim of supporting efforts by individual governments to design and implement more effective policies to discourage smoking and other tobacco use.

10. Support for Controls on Distribution Systems and Smuggling: The United States should also support inclusion of language that encourages international cooperation in the adoption of enforcement tools to reduce smuggling such as tracking of tobacco products. Additionally, the United States should support the inclusion of language that encourages individual governments to adopt control systems that include licensing and regulatory controls over the producers and distributors of tobacco products.

11. Respect for Domestic Law and International Obligations of the United States: The U.S. should seek an FCTC that achieves the key health objectives in ways that do not conflict with the U.S. Constitution or international or domestic legal obligations, such as those in the areas of trade and investments.

12. Avoidance of Extraterritorial Application of Law: The United States should oppose proposals that would require the extraterritorial application of U.S. law, e.g., proposals that would require that the United States regulate the activities of U.S. companies or their subsidiaries in the territory of another State. The United States should urge that the Convention be structured such that each State is responsible for enforcing its own laws within its borders.

13. Avoidance of Discriminatory Application of Law: The FCTC should support adoption of policies by governments to ensure that foreign and domestic tobacco firms face the same restrictions and have equal market access. The United States should oppose language in the FCTC that would result in discrimination against U.S. tobacco exporters and their products. Moreover, the United States should oppose language that limits our ability to address trade violations and discriminatory practices by other countries.

14. Oppose Limitations on Routine Business Facilitation Services Provided by U.S. Government: The United States should oppose language in the FCTC that limits or prohibits the provision of routine business facilitation services by the U.S. Government to U.S. tobacco manufacturers. Routine business facilitation services include, for example, providing publicly available information on foreign country conditions and policies, information or assistance that may help U.S. firms comply with foreign government laws or regulations, and assistance in resolving business problems.

15. Support Diplomatic Resolution of Disputes: The United States should support inclusion of mechanisms in the FCTC to address problems of noncompliance with FCTC requirements and dispute resolution that facilitates resolution of such problems, via bilateral or multilateral consultations and diplomatic means, rather than by creation of binding dispute resolution mechanisms.

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16. Support Customary Treaty Practice: The United States should seek inclusion of final clauses in the FCTC that accord with customary U.S. treaty practice.

17. Recognition of the Importance of Involving Interested Parties: The United States should support appropriate cooperation and involvement in the FCTC process by international and regional organizations, non-governmental organizations, and interested stakeholders.