Precedent for supp TANF?

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

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Copy to Diane F -
Lets set up a meeting with USDA and push them to approve Wash and deny Maryland - Ken

MEMORANDUM TO KEN APFEL

THROUGH: Barry White KH for
Keith Fontenot KH for

FROM: Stacy Dean SD

RE: Use of Food Stamp Coupons for State Funded Programs

Issue: Washington State has requested to be allowed to issue Food Stamps to legal immigrants, at State expense, after the Food Stamp benefit ban goes into effect this year. The State has agreed to pay any additional costs for printing, issuing, storing and redeeming the State coupons, in addition to paying for the face value of the coupons. Washington uses coupons and not electronic benefit transfer (EBT) to provide benefits. They would prefer to issue Food Stamps rather than a State food coupon because it would be administratively easier for the State, Food Stamps are an understood currency widely accepted by retailers and banking institutions and Food Stamps are more fraud resistant than a new State issued coupon would be. Maryland has recently requested to be allowed to provide its legal immigrants with benefits at State expense as well. (Washington and Maryland could only provide this benefit to immigrants currently in the country since the welfare law prohibits States from providing means tested benefits to new entrants.) Legal immigrants will loose their food stamp eligibility during the period of April 1 to August 22, 1997.

What Has Happened to Date?: USDA initially denied the State's request on November 21, 1996 on the grounds that it violated the Food Stamp Act. On December 6, 1996 the State and advocates asked USDA to reconsider its position. In mid-December, USDA apprised OMB of the Washington request and asked for policy input on whether the State's request should be granted. USDA told the outgoing Governor's office on January 9, 1997 that the Department could not give the State a final decision on the request at that time. Washington's new Governor is reported to have mentioned a need to help this population in his inaugural address, although it is not clear if the standing request from the former Governor still applies to the new Governor.

cc Stacy Jill

Is It Legal?: While we have not consulted with OMB General Counsel, our view is that the Food Stamp Act (FSA) does not <u>explicitly</u> permit a State to issue benefits to ineligible households at its own expense, i.e. there is no State supplementation or food stamp contract option under the Act. Section 7(a) of the Act states, *"Coupons...shall be issued only to households which have been duly certified as eligible to participate in the food stamp program."* In fact, benefits issued to ineligible households are considered to be issued in error and States are held financially liable for such erroneous issuance.

While the FSA does not provide explicit authority for an optional State funded food stamp benefit, some have argued that the Act does provide the Secretary with certain authorities which could be interpreted as sufficient to grant Washington's proposal. Under Section 15, which governs retailer violations and enforcement, the Secretary is granted authority to "*the issuance ...of coupons to such person or persons, and at such times and in such manner, as the Secretary deems necessary or appropriate to protect the interests of the United States...*" This authority is intended to provide the Food Stamp Program with the ability to provide coupons to law enforcement officials for use during their undercover investigations. Nothing precludes the Secretary from using this authority for other purposes. USDA GC advises that this argument is plausible, although not persuasive. Please find attached a copy of USDA's and the Center on Budget and Policy Priorities position papers on this issue.

The mechanism by which the State would repay the Federal government has not been clearly identified yet. However there are several options available, particularly if the State does not have to repay the Food Stamp appropriation and instead repays the Treasury. Also, other Departments have authorities to receive payments from States or individuals under a general "Gifts and Bequests" authority. USDA may have to search further on this question.

Issues to Consider --

Welfare Reform: The Administration strenuously opposed eliminating food stamps as well as other benefits for legal immigrants during the welfare reform debates. While the Administration is not proposing a permanent fix to the food stamp benefit ban for legal immigrants, the President has expressed deep concern with the alien provisions of the Welfare Reform bill. The Administration has already taken steps to delay the implementation of the ban by allowing some States to opt to defer removing legal immigrants from the program for several months. Providing States with another tool to quickly implement a State program for legal immigrants would further support the President's commitment to "soften the blow" of the impact of the food stamp ban on this group. States, advocacy groups and retail trade associations are likely to support approval of the Washington request.

Reaction from the Hill: With the exception of Senator Helms, the food stamp cuts to legal immigrants were generally not endorsed by either the House or Senate Agriculture authorizing committees. However, there were many members of Congress outside the Committees who might consider approval of the Washington proposal as a purposeful attempt to undermine the welfare reform bill. In addition, it is not clear how the Agriculture Appropriators would react. If USDA is unable to find statutory authority which permits the State to repay the Food Stamp appropriation, this proposal could be perceived as the Administration spending FY97 funds on "ineligible households" under what some would consider a specious argument.

On the other hand, it is possible to consider approval of Washington's request as USDA providing a service to the State. Without EBT, Washington is unable to easily provide a food only benefit to legal immigrants. Food Stamps has a certain "brand name value" which the State is requesting to purchase. Because a food stamp coupons are the vehicle by which the State transfers its State benefit, the Food Stamp Program is not necessarily compromised.

State Supplementation: Aside from their uneasiness about the explicit legal authority for this proposal, USDA appears to be concerned about the precedent the Washington proposal sets for Food Stamp State supplementation. The Washington case is a simple one because the State is offering to provide benefits to an indigent category of people banned from receiving Food Stamps. The Administration opposed this ban and presumably would support a State's effort to pay benefits to this group. However, if the Washington State request is granted the question arises as to whether it sets a precedent only for immigrants or for any situation where a State chooses to provide benefits to ineligible households or more benefits to eligible households? For instance, what if a State chose to provide a voucher to a TANF family that had reached the time limit by supplementing food stamps. USDA might be more uncomfortable approving this type of proposal. A positive decision on Washington does not have to set a precedent for State supplementation and could be thought of simply in terms of USDA contracting a service to the State.

Department policy officials have not yet resolved their thinking about state supplementation in the food stamp program. The subject raises many issues about the adequacy of the federal benefit and whether residents in one State require more food than in another. If the Administration approves the Washington request, it should consider the request in a broader context and decide whether it will only approve State requests to provide benefits to immigrants and ineligible 18-50's or whether it would consider broader proposals to supplement the food stamp benefit.

Parallel System or Not: We assume that Washington State will provide benefits to all legal immigrants according to the same eligibility standards provided for under the Food Stamp Act. But it is possible that the State would establish different eligibility standards and different terms and conditions for the coupons. It is not clear what type of implementing legislation the State would need under its own laws and if that legislation would require the State coupon to follow all the rules prescribed in the FSA as prohibiting the use of benefits for anything other than food, i.e. alcohol or tobacco. This issue could be resolved by USDA agreeing to the proposal as long as State implementing legislation requires any State funded benefit to follow the FSA.

Food Stamp Integrity: USDA has raised concerns that their ability to monitor and enforce retailer integrity if there were a commingling for Federal and State coupons. In an effort to avoid a sanction a store under investigation might be able to effectively argue that State coupons, not Federal, were trafficked. Effectively, USDA is not sure whether the limitations on the usage of food stamps would apply if the State rather than the Federal government funded the benefit. Again, this issue could be resolved with State or Federal legislative language. Washington could be required to provide notification to all authorized retailers in the State and neighboring areas that for retailer and redemption purposes there are no differences between State funded and Federal coupons. Also, the Administration may want to consider a budget amendment to the food stamps appropriation's language if it approves Washington's request asserting the FSA requirements for all coupons.

Size of the Proposal: A preliminary estimate from USDA indicates that Washington issues approximately $15 million in Food Stamps annually to about 13,500 households with non-citizens. Given that the Food Stamp appropriation will have a $3 billion unobligated expiring balance at the end of FY97, there are sufficient funds to provide Washington with the additional benefits. Maryland's proposal would cost approximately $10 million annually. However, if the proposal were approved and no authority can be found to repay the Food Stamp appropriation, the Administration might want to consider FY98 Food Stamp appropriation's language allowing a direct repayment.

Precedent for other States: USDA plans on denying Maryland's request because Maryland has a Statewide EBT system in place. Therefore, Maryland can easily (although not without some costs) establish a separate food-only EBT account for legal immigrants. Essentially, the "brand name" value of the federal food stamp coupon is unnecessary. Maryland can acquire all of the protections it needs via EBT. Retailers and recipients will be unaware of any difference between benefits. We concur with USDA's distinction between EBT and coupon States. EBT States have the flexibility to provide a food-only benefit to immigrants or any other population with no involvement from USDA. This will become more of an issue as States begin to elect food-only vouchers for TANF families who have reached the time limit. Also, if the Administration elects to provide the service to Washington but not Maryland, it further supports the argument that Washington is contracting a service which it cannot provide on its own.

Recommendation:

Unless they are otherwise directed by a White House or OMB policy official, USDA's position is to deny Washington and Maryland's requests. Although he is expected to do so, our understanding is that the new Governor of Washington has not yet contacted USDA to formally renew the State's request. Therefore the Administration may have some more time to consider this matter. However, Maryland's request is still pending with USDA. <u>We recommend denying Maryland's request on the basis that it is an EBT State</u> and can issue a food only benefit on its own without using the Food Stamp appropriation.

You have expressed a strong interest in further pursuing the State's request. We recommend that you meet with USDA policy officials in order to review the policy implications of approving the request. We believe it is critical that the Department be directed to further research its statute in order to establish whether the State could directly reimburse the Food Stamp Program. If not, Treasury will need to be contacted in order to make certain whether or not they could accept the State's payment. In addition, if a decision is made to approve Washington's proposal, we recommend that legislation be sent to Congress to ensure that all Food Stamp benefits, whether State or Federally funded, are a secure instrument to be used for food only. This legislation could also allow States to reimburse the Food Stamp Program directly.

Attachments

USDA

USE OF FOOD STAMP COUPONS FOR STATE FUNDED PROGRAMS

ISSUE: The Washington State Agency requested to be allowed to purchase food coupons from FCS for use in operating a State-funded program for qualified aliens made ineligible by the food stamp welfare reform provisions. The State has agreed to pay any additional costs for printing, issuing, storing and redeeming the State coupons, in addition to paying for the face value of the coupons. FCS denied the State's request on November 21, 1996, on the grounds that it violates section 7(a) of the Food Stamp Act. That Section states that the coupons shall be issued only to households which have been duly certified as eligible to participate in the Food Stamp Program. In addition, appropriations law prohibits cash receipts from being deposited in the appropriations account; rather, the payments from the State would have to be deposited in the general Treasury account. Thus, when the State coupons are redeemed, draw downs would be made from the food stamp redemption account, but the appropriations account could not be credited with the State's payment to offset the expenditure.

On December 6, 1996, the State requested FCS to reconsider its position. Furthermore, Bob Greenstein has intervened on the State's behalf. He refers us to Sec. 15(a) of the Act which gives the Secretary authority to issue coupons to anyone if the Secretary deems it necessary or appropriate to protect the interests of the United States. OGC advises us that this argument, while not persuasive, is plausible.

FACTORS FOR CONSIDERATION:

Political - The President has expressed concern with the alien provision of Welfare Reform. Providing the States with a tool to quickly implement a State program for legal immigrants would align with the President's commitment to "soften the blow" of the impact of welfare reform on this group. Advocacy groups and the retail trade associations would also support this action. Also, food stamp coupons are an already established secure non-cash instrument which can only be used to purchase food. The outgoing Governor is anxious to present this opinion to the legislature before his successor takes office. His successor, a more moderate Democrat, is expected to support a similar proposal, but to limit it to a smaller group of immigrants.

Washington's approval could be controversial in that it is likely to be perceived by the public and members of Congress as undermining the intent of the legislation by continuing a program abolished by law.

<u>Legal</u> - There are various legal issues relative to the fiscal accounting process involved in selling the coupons to States. We looked into the possibility of a reimbursable agressment with the State, but OGC has advised that the Economy Act applies to Federal agencies only. Also, the Intergovernmental Cooperation Act allows technical assistance to States, but would not cover selling coupons tot States.

<u>Administrative</u> - There would be an impact on retailer compliance issues due to the commingling of Federal and State coupons. A store's Food Stamp Program redemption history would be comprised which would have an impact on our store monitoring system. In addition, in the case of high redeemers, a store could effectively argue we could not prove whether it was State or Federal coupons being trafficked and thus possibly avoid a Federal sanction. OIG has also expressed concerns about the impact.

We have surveyed the regions and, except for Maryland which wants to use the EBT system for such a program (issues involved in using a State's LBT system are different), no other State has yet expressed on interest similar to Washington's. Washington and other States have other options available to them, including development of State-specific voucher systems or cash payments.

CBPP

December 6, 1996

THE LEGALITY OF WASHINGTON STATE'S PROPOSAL TO PURCHASE FOOD STAMPS FOR LEGAL IMMIGRANTS

Washington State has requested USDA's approval for an arrangement by which it would purchase food stamps from USDA and issue them to legal immigrants who are being made ineligible for federally-funded food stamps under the new welfare law. The State would reimburse USDA for the additional costs of printing, distributing, and redeeming the food stamp coupons used in this project. USDA has expressed several legal concerns about this proposal and may have policy issues as well. Whatever policy determination is made, however, it appears that USDA does have the legal authority to enter into the arrangement that Washington State proposes.

Section 7(a). USDA's letter rejecting Washington State's proposal identified one legal basis for its decision: section 7(a) of the Food Stamp Act. Section 7(a) provides that food stamp "[c]oupons ... shall be issued only to households which have been duly certified as eligible to participate in the food stamp program." USDA interpreted this to prohibit issuance of food stamps to households ineligible for food stamps, such as the legal immigrants Washington State wishes to assist.

Although this is a plausible interpretation of the statute, another interpretation would be that section 7(a) applies only to the operation of the food stamp program, not to separate arrangements such as the one Washington is proposing. Under this view, Washington's program would be analogized to the emergency food stamps issued under section 5(h) of the Food Stamp Act, the commodity program for Indian Reservations authorized under section 4(b), and the nutrition assistance programs for Puerto Rico and American Samoa, none of which operate consistently with section 7(a).

In fact, however, it probably does not matter which reading of section 7(a) one adopts. This is because even if section 7(a) would otherwise bar Washington's proposal, it can be overridden under section 15(a) of the Food Stamp Act. Section 15(a) provides, in pertinent part, that "[n]otwithstanding any other provision of this Act, the Secretary may provide for the issuance . . . of coupons to such person or persons, and at such times and in such manner, as the Secretary deems necessary or appropriate to protect the interests of the United States or to ensure enforcement of the provisions of this Act or the regulations issued pursuant to this Act." Therefore, the Secretary could authorize Washington's proposal if he determines that it is "in the interests of the United States."

The Secretary could readily find that Washington's proposal serves the United States' interests in any of several respects:

- First, the President has repeatedly and vehemently insisted that the new welfare law cuts both food stamps and aid to poor legal immigrants much too deeply. Washington's proposal, by providing food stamps to those immigrants, responds to the interests the President has identified. This is not inconsistent with Congress's enactment of restrictions on immigrants' eligibility for food stamps in section 402(a) of the new welfare law. That section, part of a budget reconciliation act, sought to save money for the federal government. Nothing Washington has proposed would erode any of those savings. During its consideration of the immigration law, Congress weighed but ultimately rejected a proposal that would have prohibited ineligible legal immigrants from being the representative payee for benefits provided to citizens and eligible immigrants: Congress was not adverse to legal immigrants handling food stamps; it simply did not wish to pay for them in most cases.

- Also, section 412(a) of the new welfare law provides that "a State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien. . . ." Approving Washington's proposal therefore furthers the congressionally recognized interest of allowing states to determine the needs of legal immigrants within their borders.[1]

- Moreover, if Washington is denied use of federal food stamp coupons but continues to wish to provide food assistance to these immigrants, it will be forced to establish its own system for printing, issuing and redeeming scrip. It is highly unlikely that Washington will be able to design a system as efficient, and as counterfeit-resistant, as the federal food stamp coupon system. It is in the interests of the United States to prevent the crime that could result from Washington having to implement an inferior scrip system. Indeed, counterfeiting and trafficking gangs that get their start abusing the system that Washington sets up could sharpen their skills and move on to threaten the integrity of the federal food stamp system. In addition, experience has shown that people who abuse the food stamp system often are involved with illegal drugs. If Washington is forced to establish a scrip system that proves vulnerable to abuse, the likely result will be to benefit persons engaged in federal drug crimes.

- Finally, it is in the interests of the United States to establish a mechanism by which the state fully reimburses the federal government for coupons it issues to legal immigrants rendered ineligible under section 402(a) of the

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[1] Section 411(d) of the welfare law requires states to pass affirmative legislation prior to serving undocumented immigrants with state funds. The immigrants affected by section 411(d), however, were ineligible for food stamps under section 6(f) of the Food Stamp Act long before the new welfare law passed. It appears that Washington is only interested in serving those immigrants newly disqualified from food stamps under section 402(a) of the new welfare law. Section 411 therefore apparently is not implicated.

new welfare law. If benefits were issued to these households without this arrangement, USDA's routine mechanism for seeking to recover the costs would be the quality control (QC) system. QC penalties, however, take years to collect and, unless the state already has an error rate twice the national average, provide the federal government with less than one dollar for every dollar of food stamps issued to an ineligible household. Although USDA could ask the Attorney General to sue a state to compel its compliance — or could even eject the state from the food stamp program — USDA has never attempted either of these approaches in the history of the program. Even if USDA sought dollar-for-dollar reimbursement from a state by alleging fraud or ineffective and inefficient state administration of the program, the necessary litigation could be far more costly than negotiating the amicable arrangement proposed here.

Section 15(a)'s authorization for coupons to be issued to serve the "interests of the United States" is separate from its authority to use them to enforce the Act and regulations; the "interests" involved need not be related to preserving the food stamp program's integrity. Indeed, this would not be the first time section 15(a) has been invoked to serve interests of the United States that go beyond the food stamp program. Although section 15(a) is often used to make food stamps available for "sting" investigations, it often has been used in cases where the primary crimes under investigation did not involve food stamps but drugs, explosives, or firearms. By offering to purchase contraband with food stamps, federal and state investigators gain credibility with criminal organizations that may not otherwise be involved with food stamps.

This application of section 15(a) would not open the door to arbitrary nullification of provisions of the Act that prove distasteful to the Secretary. Section 15(a) affects only issuance and redemption activities, and this interpretation of it would not purport to allow the Secretary to spend federal funds for purposes not approved in appropriations acts. The entire cost of Washington's project will be born by Washington. It is difficult to imagine an important congressional policy that an Administration could circumvent solely by changing issuance and redemption practices *in a way that expends no federal funds*. If, of course, Congress becomes dissatisfied with the degree of authority it has delegated through section 15(a), it could amend the Food Stamp Act or enact an appropriations rider to limit the types of interests the Secretary may consider.

Transfers of Federal Funds. Although section 7(a) was the only legal concern identified in USDA's letter to Washington, the Department also may be concerned about the mechanism by which Washington's reimbursement would be provided. Food stamp redemptions by law are paid from the food stamp account; unless otherwise provided by law, funds received by the federal government go into the General Fund. Therefore, even if Washington was fully reimbursing the federal government for the cost of its program, the food stamp account could be drained of funds not authorized by Congress, with Washington's checks being deposited in the General Fund. Although the amounts Washington is contemplating — perhaps $20 million a year — are tiny compared with the size of the food stamp program, theoretically if these amounts are expended from the food stamp account, insufficient funds could remain to pay federally-authorized food stamp benefits, requiring across-the-board reductions under section 18(b).

Fortunately, several mechanisms exist for ensuring that the food stamp account is held harmless. First, instead of writing a check to the federal government for the cost of the food stamps it uses, Washington could simply agree to have USDA reduce the reimbursements it otherwise would receive for its costs of administering the federal food stamp program. This method could account for any likely cost of the proposed program: in fiscal year 1994, for example, Washington received $34 million in federal administrative reimbursements for the food stamp program. Thus the food stamp account would be making higher expenditures for coupon redemptions originating in Washington State (and for printing and distributing coupons to Washington) but its expenditures for administrative reimbursements to that state would be lower by the same amount.

Alternatively, Washington's agreement to reimburse the federal government for the coupons it uses could be treated as a claim against the state. Section 13(a)(1) of the Food Stamp Act grants the Secretary wide authority to assert, settle, adjust, and collect claims against households, stores, and state agencies "including, but not limited to, claims arising from fraudulent and nonfraudulent overissuances to recipients . . . ." Claims collections are deposited into the food stamp account. A contract under which Washington agrees to reimburse the federal government for benefits issued through this program would certainly give USDA the legal basis for asserting a claim against the state, which the state could then pay through section 13(a)(1). Although the procedures sections 13 and 14 establish for collections can be somewhat time-consuming, they were designed for contested claims. Washington could agree to make contemporaneous reimbursements, which USDA could accept pursuant to its authority to "settle and adjust any claim."

Setting a Reimbursement Rate. Although USDA rejected Washington's proposal in concept without seeking to negotiate about the specifics, it may be worth addressing briefly some of the issues involved in establishing the financial relationship between the State and USDA. Washington explicitly offered to pay a reasonable amount to compensate for USDA's additional costs of printing, transporting, and redeeming food stamp coupons. In addition, Washington could not seek USDA reimbursements for administrative time spent certifying ineligible immigrants for the state-funded food assistance benefits. Both of these calculations should be relatively easy: USDA already estimates the costs of operating the coupon system for purposes of establishing into cost neutrality standards for states' electronic benefit transfer (EBT) systems. In addition, some states use the same eligibility workers to administer the food stamp program and state general assistance programs; USDA already requires states to employ accounting procedures to separate time spent on food stamps from that spent on other activities.

Since not all food stamps that are issued ever get redeemed, presumably some modest credit should be applied to reflect non-redemption of the coupons Washington is purchasing. Again, national data is readily available to compute the rate of non-redemption.

Although Washington will be using a retailer network established, maintained and policed with federal funds, this imposes no additional costs on the federal government and hence should not be considered in establishing Washington's reimbursement rate. Indeed, by preventing as severe a reduction in food stamp volume as might otherwise take place at stores in areas with large numbers of immigrants, Washington's program could conceivably encourage some stores to stay in the food stamp program and hence remain available to recipients of federally-funded food stamps.

Some households, containing both immigrants and citizens, may receive both federally- and state-funded food stamps. Should these households later prove ineligible for reasons unrelated to their immigrant status (*e.g.*, unreported income or misvalued resources), both the federal and state programs could have claims against the household. The federal claim would be collected through established federal procedures; the state would be left to its own devices to collect its claim. If the household was eligible for some food stamps but fewer than it was issued, the federal program again would need only to concern itself with collecting back the difference between the federally-funded food stamps the household received and the federally-funded food stamps it was eligible to receive: Washington already would have reimbursed USDA for any food stamps issued under its program, with that reimbursement unaffected by whether or not the household eventually turned out to be eligible for the full amount under the state's rules. Because both USDA and Washington would have an interest in preventing trafficking in food stamps, it might well be in the state's interest to enter into a cooperative law enforcement agreement with federal agencies.

Section 17(b) Waiver Authority. Although it appears the regular provisions of the Food Stamp Act provide ample authority for USDA to approve Washington's proposal, this proposal also is approvable through a waiver under section 17(b) of the Food Stamp Act. Although section 17(b) contains a list of provisions that may not be waived, section 7(a) does not appear on that list. (It is unclear whether USDA could waive the restrictions on legal immigrants in sections 402(a) and 403 of the welfare law: although section 17(b)(1)(A) only explicitly references waivers of the provisions of the Food Stamp Act, the general grant of authority for USDA to conduct demonstration projects could be construed to imply authority to disregard any contrary provision of law.)

Similarly, USDA could waive the claims collection procedures of section 13 to the extent necessary to ensure that the funds received from Washington are properly deposited to make the food stamp account whole.

USDA quite properly is loath to use section 17(b) as license to disregard willy-nilly any provisions of the Food Stamp Act that it or a state agency might deem unwise. On the other hand, if the waiver authority can never override rules that Congress has established for the general operation of the food stamp program, it has no meaning at all. Clearly the very same Congress that established the new restrictions on immigrants also sought to expand greatly USDA's authority to accommodate states' requests to deviate from generally applicable program rules.

A waiver to permit Washington to implement its proposal would not open the door to a dismantling of the food stamp program's national standards through the waiver process. Unless USDA intends to give no waivers at all, it presumably will want to identify priorities among possible waivers. The President's oft-stated two major concerns about the welfare bill have been the depth of the cuts affecting legal immigrants and the severity of the food stamp cuts. The waiver Washington is seeking directly addresses both of those presidential priorities at no cost to the federal government. Even congressional opponents of spending federal funds on legal immigrants will be hard-pressed to find a basis for criticizing a waiver that assists these immigrants without incurring any federal costs. Indeed, the reimbursement system Washington has proposed constitutes one of the most reliable and timely cost-neutrality guarantees USDA is ever likely to see.

Although some states are likely to cite a waiver granted to Washington as a precedent for projects they would like to propose, USDA can readily distinguish the Washington project as responding to priorities recognized by *both* the state *and* the President.

STATE FUNDED FOOD ASSISTANCE FOR LEGAL IMMIGRANTS

Problem

Lack of authority to accept funds from Washington State in return for food stamps to be issued to legal ineligible aliens under the Food Stamp Act of 1977, 7 U.S.C. 2011, et. seq.

No authority for reimbursement cf funds under Section 601 of the Economy Act 31 U.S.C. 1535-36 which applies only to transactions between Federal entities.

Laws

None of the following laws would enable USDA to accept funds from non Federal entities:

- There is no authority to accept funds other than gifts and bequests from a non Federal entity under the USDA Organic Act, 7 U.S.C. 2201, et. seq.;

- There is no such authority under the Inter Governmental Cooperation Act of 1968, 31 U.S.C. 6601, et. seq.;

- Most legal aliens are not eligible to participate in the Food Stamp Program as a result of the Personal Responsibility and Work Opportunity Reconciliation Act, P.L. 104-193, Section 402. P.L. 104-193 forbids legal aliens from participating in the Food Stamp Program. The Food Stamp Program Appropriation is to carry-out the Food Stamp Act. Therefore, the use of funds for the benefits to people ineligible for benefits under the Food Stamp Act would violate the appropriations law as to purpose.

- Section 7(a) of the Food Stamp Act of 1977, as amended, states that coupons "...shall be issued only to households which have been duly certified as eligible to participate in the food stamp program".

- Section 15(a) of the Food Stamp Act of 1977, as amended, states that "Notwithstanding any other provision of the Act, the Secretary may provide for the issuance or presentment for redemption of coupons to such person or persons, and at such times and in such manner, as the Secretary deems necessary or appropriate to protect the interests of the United States." The regulations clearly address to what entity coupons can be sold – "FNS may sell coupons at face value to any authorized retail food store which wishes to use coupons to conduct internal checks of coupon transactions."

- The Secretary is authorized to accept gifts and bequests under 7 U.S.C. 2269. However, in the case of gifts, there would be no consideration given for the act or promise of one party to another party in return for an act or promise. Bequests are another form of a gift given by a deceased person (see attached). It has been suggested that Washington State could offset it's food stamp state administrative costs. This would eliminate the reimbursement of funds to USDA. However, it appears to be a circumvention of the law. The General Accounting Office decision(s) states that you can <u>not</u> do indirectly what you can not do directly.

FOOD STAMP ACT OF 1977

[As Amended Through P.L. 104–193, August 22, 1996]

(References [ ] in brackets are to title 7, United States Code)

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ticipate in the food stamp program if, during a 30-day period, the individual—

(i) works 80 or more hours;

(ii) participates in and complies with the requirements of a work program for 80 or more hours, as determined by a State agency; or

(iii) participates in and complies with the requirements of a program under section 20 or a comparable program established by a State or political subdivision of a State.

(B) MAINTAINING ELIGIBILITY.—An individual who regains eligibility under subparagraph (A) shall remain eligible as long as the individual meets the requirements of subparagraph (A), (B), or (C) of paragraph (2).

(C) LOSS OF EMPLOYMENT.—

(i) IN GENERAL.—An individual who regained eligibility under subparagraph (A) and who no longer meets the requirements of subparagraph (A), (B), or (C) of paragraph (2) shall remain eligible for a consecutive 3-month period, beginning on the date the individual first notifies the State agency that the individual no longer meets the requirements of subparagraph (A), (B), or (C) of paragraph (2).

(ii) LIMITATION.—An individual shall not receive any benefits pursuant to clause (i) for more than a single 3-month period in any 36-month period.

(6) OTHER PROGRAM RULES.—Nothing in this subsection shall make an individual eligible for benefits under this Act if the individual is not otherwise eligible for benefits under the other provisions of this Act.

ISSUANCE AND USE OF COUPONS

SEC. 7. [2016] (a) Coupons shall be printed under such arrangements and in such denominations as may be determined by the Secretary to be necessary, and shall be issued only to households which have been duly certified as eligible to participate in the food stamp program.

(b) Coupons issued to eligible households shall be used by them only to purchase food in retail food stores which have been approved for participation in the food stamp program at prices prevailing in such stores: *Provided,* That nothing in this Act shall be construed as authorizing the Secretary to specify the prices at which food may be sold by wholesale food concerns or retail food stores: *Provided further,* That eligible households using coupons to purchase food may receive cash in change therefor so long as the cash received does not equal or exceed the value of the lowest coupon denomination issued.

(c) Coupons issued to eligible households shall be simple in design and shall include only such words or illustrations as are required to explain their purpose and define their denomination. The name of any public official shall not appear on such coupons.

(d) The Secretary shall develop an appropriate procedure for determining and monitoring the level of coupon inventories in the hands of coupon issuers for the purpose of providing that such inventories are at proper levels (taking into consideration the historical and projected volume of coupon distribution by such issuers).

(16) If the court determines that such administrative action is invalid, it shall enter such judgment or order as it determines is in accordance with the law and the evidence.

(17) During the pendency of such judicial review, or any appeal therefrom, the administrative action under review shall be and remain in full force and effect, unless on application to the court on not less than ten days' notice, and after hearing thereon and a consideration by the court of the applicant's likelihood of prevailing on the merits and of irreparable injury, the court temporarily stays such administrative action pending disposition of such trial or appeal.

(18) SUSPENSION OF STORES PENDING REVIEW.—Notwithstanding any other provision of this subsection, any permanent disqualification of a retail food store or wholesale food concern under paragraph (3) or (4) of section 12(b) shall be effective from the date of receipt of the notice of disqualification. If the disqualification is reversed through administrative or judicial review, the Secretary shall not be liable for the value of any sales lost during the disqualification period.

(b) In any judicial action arising under this Act, any food stamp allotments found to have been wrongfully withheld shall be restored only for periods of not more than one year prior to the date of the commencement of such action, or in the case of an action seeking review of a final State agency determination, not more than one year prior to the date of the filing of a request with the State for the restoration of such allotments or, in either case, not more than one year prior to the date the State agency is notified or otherwise discovers the possible loss to a household.

VIOLATIONS AND ENFORCEMENT

SEC. 15.[15-1] [2024] (a) Notwithstanding any other provision of this Act, the Secretary may provide for the issuance or presentment for redemption of coupons to such person or persons, and at such times and in such manner, as the Secretary deems necessary or appropriate to protect the interests of the United States or to ensure enforcement of the provisions of this Act or the regulations issued pursuant to this Act.[15-2]

(b)(1) Subject to the provisions of paragraph (2) of this subsection, whoever knowingly uses, transfers, acquires, alters, or possesses coupons, authorization cards, or access devices in any manner contrary to this Act or the regulations issued pursuant to this Act shall, if such coupons, authorization cards, or access devices are of a value of $5,000 or more, be guilty of a felony and shall be fined not more than $250,000 or imprisoned for not more than twenty years, or both, and shall, if such coupons or authorization cards are of a value of $100 or more, but less than $5,000, or if the item used, transferred, acquired, altered, or possessed is an access device that

[15-1] Section 1956(c)(7)(D) of title 18, United States Code, includes within the definition of "special unlawful activity", as used in such section (relating to laundering of monetary instruments), any felony violation of this section involving a quantity of coupons having a value of not less than $5,000.

[15-2] Section 1337 of the Food Stamp and Commodity Distribution Amendments of 1981 (7 U.S.C. 2270) permits an employee of the Office of the Inspector General of the Department of Agriculture who conducts investigations of alleged felony criminal violations of the Food Stamp Act of 1977 (7 U.S.C. 2011 et seq.), under certain conditions, to make a warrantless arrest, execute an arrest warrant, and carry a firearm.

BR
from Elena

Diana:
Whatever happened to This?
Are we too late?
Elena

TO: Elena Kagan
Ken Apfel
Emily Bromberg
Steve Warnath
Keith Fontenot
Wendy White

FR: Diana Fortuna Diana

DATE: January 15, 1997

Attached FYI is an analysis from USDA on the issue of whether Washington State should be permitted to purchase and reimburse us for Federal food stamps for use by legal immigrants.

Bruce —

FYI, FCS denied the request already on the ground that it was illegal. Since then, Bob Greenstein has offered a new — and apparently plausible — legal theory. Under this theory, the Secretary would have to determine that sale of the food stamps to the State "protects the interests of the US."

I've begun to change my mind on this. Given that (1) A state wants to mitigate the effects of the welf. law on legal immigrants and (2) we want states to do exactly this — why not make it as easy for the state as possible? I don't even think we'll take much of a political hit — after all, the State is paying. We're ~~[illegible]~~ just providing the State with a kind of administrative convenience.

What do you think?

Elena

Fine, BR

USE OF FOOD STAMP COUPONS FOR STATE FUNDED PROGRAMS

ISSUE: The Washington State Agency requested to be allowed to purchase food coupons from FCS for use in operating a State-funded program for qualified aliens made ineligible by the food stamp welfare reform provisions. The State has agreed to pay any additional costs for printing, issuing, storing and redeeming the State coupons, in addition to paying for the face value of the coupons. FCS denied the State's request on November 21, 1996, on the grounds that it violates section 7(a) of the Food Stamp Act. That Section states that the coupons shall be issued only to households which have been duly certified as eligible to participate in the Food Stamp Program. In addition, appropriations law prohibits cash receipts from being deposited in the appropriations account; rather, the payments from the State would have to be deposited in the general Treasury account. Thus, when the State coupons are redeemed, draw downs would be made from the food stamp redemption account, but the appropriations account could not be credited with the State's payment to offset the expenditure.

On December 6, 1996, the State requested FCS to reconsider its position. Furthermore, Bob Greenstein has intervened on the State's behalf. He refers us to Sec. 15(a) of the Act which gives the Secretary authority to issue coupons to anyone if the Secretary deems it necessary or appropriate to protect the interests of the United States. OGC advises us that this argument, while not persuasive, is plausible.

FACTORS FOR CONSIDERATION:

Political - The President has expressed concern with the alien provision of Welfare Reform. Providing the States with a tool to quickly implement a State program for legal immigrants would align with the President's commitment to "soften the blow" of the impact of welfare reform on this group. Advocacy groups and the retail trade associations would also support this action. Also, food stamp coupons are an already established secure non-cash instrument which can only be used to purchase food. The outgoing Governor is anxious to present this opinion to the legislature before his successor takes office. His successor, a more moderate Democrat, is expected to support a similar proposal, but to limit it to a smaller group of immigrants.

Bad [illegible] policy

Washington's approval could be controversial in that it is likely to be perceived by the public and members of Congress as undermining the intent of the legislation by continuing a program abolished by law.

Legal - There are various legal issues relative to the fiscal accounting process involved in selling the coupons to States. We looked into the possibility of a reimbursable agressment with the State, but OGC has advised that the Economy Act applies to Federal agencies only. Also, the Intergovernmental Cooperation Act allows technical assistance to States, but would not cover selling coupons tot States.

Administrative - There would be an impact on retailer compliance issues due to the commingling of Federal and State coupons. A store's Food Stamp Program redemption history would be comprised which would have an impact on our store monitoring system. In addition, in the case of high redeemers, a store could effectively argue we could not prove whether it was State or Federal coupons being trafficked and thus possibly avoid a Federal sanction. OIG has also expressed concerns about the impact.

We have surveyed the regions and, except for Maryland which wants to use the EBT system for such a program (issues involved in using a State's LBT system are different), no other State has yet expressed on interest similar to Washington's. Washington and other States have other options available to them, including development of State-specific voucher systems or cash payments.

Even knowing of Washington's request?

Diana Fortuna 02/06/97 07:23:41 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:
Subject: Washington state wanting to buy food stamps

I am delinquent in getting back to you on a question you asked about Washington's request that we sell them food stamps. You asked what was happening, and if it is too late to pursue with USDA the notion of allowing this.

It's not too late. The new Governor still hasn't formally communicated to USDA whether he likes the old Governor's proposal in this area or not, but informally they hear he will probably want it, perhaps in modified form. So there's no rush and it's still active. USDA continues to have major legal doubts and some policy doubts. Ken agrees with you that he'd like to try it if possible. I have a memo from his staff that I will pass along to you. And, as you can see from the attached, Ken is setting up a meeting for next Wednesday with USDA to pursue this further. So, while my slowness may have caused OMB to get the upper hand again in scheduling meetings, perhaps we can make progress together with them on the substance.

(FYI, I suspect a lot of the issue at the meeting will be whether this can be done from a legal perspective.)

--------------------- Forwarded by Diana Fortuna/OPD/EOP on 02/06/97 05:32 PM ---------------------------

Jill M. Pizzuto

02/06/97 04:12:30 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: meeting w/ USDA on Food Stamps / Washington State

Diana –
Make sure
Randy Moss +
Wendy White
are there.
Thanks.

fyi -- we've scheduled a meeting w/ Yvette Jackson's office (plus one or two) for next Wed, Feb. 12th @3:00p. Meeting will be in Ken's office, RM 260.

Message Sent To:

TO: Elena Kagan
Ken Apfel
Emily Bromberg
Steve Warnath
Keith Fontenot
Wendy White

FR: Diana Fortuna Diana

DATE: January 15, 1997

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