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MEMORANDUM

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From: Mark Barenberg, Professor of Law, Columbia University
To: The Honorable John Baldacci, Governor, State of Maine
Re: State Consortium for Sweat-Free Procurement

On February 28, 2006, you invited other governors to join you in establishing a coalition of governors to explore ways to ensure that states do not purchase from sweatshops. More specifically, you proposed that governors explore the creation of a multi-state consortium on the model of the consortium that universities have established to ensure that collegiate merchandise is not made in sweatshops. (I have attached your February 28th letter to other governors.)

The possible functions of the proposed multi-state consortium include: formulating a code of conduct for contractors that produce goods for the states; investigating the workplaces of contractors and mandating corrective action to ensure compliance with the code of conduct; and consolidating the states' purchasing power to support sweat-free factories.

This Memorandum responds to your request to describe recent developments in state laws against sweatshops and systems for investigating sweatshops, including a description of the university consortium you cited as a possible model for the states. I hope the Memorandum is useful to you and to other governors and public officials who contemplate joining your exciting initiative.

First, a few words about my expertise: My research and teaching focus on public and private efforts to improve workplace conditions, domestically and internationally. For twenty years I have been a Professor of Law at Columbia University, where I teach domestic labor law, international labor law, the comparative labor law of other countries, and constitutional law. I have also taught these subjects at the universities of Yale, Cologne, Tokyo, Rome, and Beijing.

In addition, I helped establish the Worker Rights Consortium (WRC), the university consortium you cited. I drafted the WRC by-laws and the WRC protocols for

investigation, and I conducted several investigations of factories that supply university merchandise. I was also the independent expert for the International Labor Organization (ILO) in its recent research project on monitoring global sweatshops. (The ILO is the UN agency that promulgates and monitors international labor rights.) I have also drafted several anti-sweatshop laws at the local, state, and federal levels.

State and Local Anti-Sweatshop Laws

In the last decade, many state and local governments have enacted laws that prohibit procurement from sweatshops. Some of these anti-sweatshop laws take the form of state or local legislation. Others are executive orders. Still others are regulations or policies promulgated by specific government agencies.

The laws require that state and local contractors and (in some cases) subcontractors meet a set of labor and employment standards. The precise set of standards varies from state to state, and locality to locality. Among the standards that contractors and subcontractors must meet are: child labor standards; workplace safety and health standards; building codes; employment discrimination laws; and minimum wage laws, prevailing wage standards, or living wage standards.

The initial anti-sweatshop laws, enacted in the mid-1990s, applied to local construction companies or service providers such as cleaning or catering firms that contract with state and local governments. Subsequent laws cover a wider range of state and city contractors, private firms that receive government subsidies or tax abatements, and firms that operate under government concessions. Others cover public employees or all private employees within the locality's boundaries.

More recently, states and localities have enacted laws that apply to employees of contractors and subcontractors that manufacture goods such as police and firefighter uniforms, gowns for public hospitals, or public school uniforms. The factories of contractors or subcontractors may be located not just in the United States but overseas as well. Hence, these laws may require the state or locality to monitor or investigate working conditions in factories located in countries around the world. Your new initiative applies most obviously to this category of anti-sweatshop laws, but it also applies to the other categories.

Enforcement Challenges

Anti-sweatshop laws pose challenges for enforcement and compliance. Typically, the anti-sweatshop requirements are implemented through existing systems of procurement and public contracting. These systems often vest procurement authority in many different officials, across many different agencies or departments. Typically, the laws have not provided additional funding for enforcement functions. Existing procurement officers must enforce the laws with their existing budget and staff.

Existing procurement officers, spread across many agencies, without additional funding, are not well-suited to enforce the new anti-sweatshop requirements, especially when the requirements extend to contractors and subcontractors overseas -- for example, factories in Mexico making police uniforms or in Indonesia making public school uniforms.

Even if anti-sweatshop laws provide additional funding for enforcement and clearly designate officials dedicated to enforcement, there are advantages to enforcement through a multi-state consortium. The next section discusses these advantages.

Recent Experience with Procurement Consortia

A multi-state consortium has several obvious advantages for ensuring compliance with state and local anti-sweatshop laws. States would avoid duplication of budgets and staff in conducting investigations of contractors and subcontractors. The consortium staff would have special expertise in investigating compliance with labor standards in factories around the world – expertise in comparative labor law, international labor rights, occupational safety and health, standards for prevailing wages or living wages, and so on. Contractors and subcontractors could rely on uniform application of labor standards across states – through the consortium’s formulation of a code of conduct, based on best practices. If the consortium undertakes joint purchasing on behalf of member states, the states will have greater leverage to protect against sweatshop conditions.

As you mentioned in your invitation to other governors, there is a successful existing model for a procurement consortium. One hundred and fifty U.S. universities have joined a consortium to ensure that collegiate merchandise is not produced in sweatshops around the world. The Worker Rights Consortium (WRC) has a staff that receives complaints about factories, investigates the complaints, and issues reports about the investigations. The reports contain findings of fact and remedies -- including specific corrective action that factories must take to come into compliance with university anti-sweatshop codes. The universities then act on those reports and recommendations. Universities can use their purchasing leverage to ensure that factories come into compliance. If necessary, the universities can cut off their contracts with suppliers that remain non-compliant.

The WRC has great credibility in the eyes of university administrators, the media, labor unions, and manufacturers themselves. One key reason is that the WRC is independent of manufacturers. The WRC takes no funding from manufacturers, and the WRC board of directors is comprised of university stakeholders with no financial stake in the industries that produce collegiate merchandise. The WRC is instead funded by the universities, by foundations, and by public grants. Manufacturers, either individually or through their own consortia, sometimes undertake monitoring or “labor auditing” of their supplier factories; but their audits are generally ineffective or lack credibility because of the obvious conflict of interest – the “fox guarding the henhouse.”

The WRC’s base in the universities provides the WRC not only with independence. It also enables the WRC to tap the expertise, neutrality, and credibility of

professors of labor law and occupational health. As a result, the WRC's methods of investigation have set the benchmark for best practices in the monitoring of global sweatshops. If the WRC makes a positive finding about conditions in a factory, large brands such as Adidas incorporate the positive finding in their self-reports on corporate social responsibility – showing that approval by the WRC serves as a credible seal of approval, precisely because the WRC is financially and administratively independent of the manufacturers.

A “State Consortium for Sweat-Free Procurement,” along the lines you proposed, would have advantages that are similar to the WRC's. (Note that the WRC already includes public entities – namely, the public universities.) Like the universities, the states are collective consumers of manufactured goods, with the right to make ethical purchasing decisions and the power to influence working conditions in “upstream” production. The states, of course, have much greater power of this kind than do universities, in light of the greater volume of state purchases. A multi-state consortium would therefore have greater impact and visibility.

Made up of public entities, a state consortium would be independent of the contractors and subcontractors that the consortium would investigate, akin to the university consortium. Its findings would therefore achieve credibility and legitimacy to a degree that the manufacturers' own individual and group monitoring have failed to achieve. A state consortium would likely achieve even greater credibility and legitimacy than the university consortium, in light of the democratic legitimacy of the affiliated states. Like the WRC, the state consortium would set highly visible benchmarks for best practices in the investigation of sweatshops. The state consortium might well become a model for a national anti-sweatshop program, should the federal government someday have the political will to implement such a program.

The state consortium, as indicated in your letter to other governors, would have the advantage of learning from the WRC's investigative protocols and experience. Various local governments – including Los Angeles, San Francisco, and Ontario public schools – are already in discussions with the WRC to conduct pilot projects for enforcing their anti-sweatshop laws.

Of course, a state consortium would not be a mere public-sector replication of the WRC. The state consortium would necessarily have a governance structure that differs from the WRC's. The Board of the WRC comprises representatives of three constituencies – university administrators, students, and an “advisory council” made up of professors, non-university experts, and advocates for labor rights. The governing board of the state consortium would presumably comprise representatives of the participating states, including public officials, and might well include citizen groups and an advisory council of labor-rights experts, organizations, and advocates akin to the WRC's advisory council.

While funding for the WRC comes from universities, foundations, and federal grants, the funding for a state consortium would likely come from state and perhaps federal resources.

When the WRC issues reports about factories, each WRC-affiliated university is free to act on the report as it sees fit. Presumably, the reports of a state consortium would be acted on by each state or locality according to the legal requirements of the respective state or locality.

But there is no need to speculate at this point about the precise structure and operation of a state consortium, and it goes without saying that I have no mandate to offer a blueprint. My purpose in making these few points about the possible similarities and differences between the university consortium and a state consortium is merely to suggest that the creation of a state consortium seems well worth exploring.

Certainly, a state consortium would mark a significant breakthrough in efforts to address the problem of global sweatshops. For that reason, it would doubtless receive much attention and support from the academic community, labor organizations, and many other constituencies concerned with the problem.