6/30/97
ETS Mtg.

DRAFT #2a ENVIRONMENTAL TOBACCO SMOKE

INTRODUCTION

The Administration is trying on several fronts to reduce the incidence of lung cancer and cardiovascular disease by reducing exposure to Environmental Tobacco Smoke. Title IV of the settlement contains provisions addressing the same goal. There are some clarifications and additions needed to Title IV, as are discussed below.

Title IV would ban smoking in buildings except in areas with separate ventilation. There are exemptions for the hospitality industry and prisons. Title IV does not discuss residential housing.

On balance, the legislation contemplated by the settlement appears to be a positive step towards reducing disease caused by ETS because it will finally address the dangers of exposure to second-hand smoke.

BENEFITS OF THE TOBACCO SETTLEMENT

1. It would actually go into effect. The Congressional direction to implement regulations restricting smoking in buildings within one year would overcome the administrative difficulties in promulgating an OSHA standard and the uncertain fate of any standard in the judicial system.

2. It would cover more places.

    Unlike OSHA's standard, this one covers:

        Locations with state and local government employees
        Small businesses with fewer than 10 employees, but more people who enter the establishment
        Buildings that are regulated by other safety and health agencies [4 (b) (1)], such as Department of Energy facilities and mines
        Private contractors

3. The settlement would allow more protective state and local restrictions to remain in effect because unlike OSHA's standard, it doesn't pre-empt.

DISADVANTAGES OF THE TOBACCO SETTLEMENT

1. Clarify the jurisdiction issues between EPA and OSHA. done

2. Hospitality exemption is very broad and these are the people at the greatest risk from exposure. The hospitality industry is the most potent political group on record opposing any ban on smoking in their establishments.

3. It may pre-empt OSHA's ability to protect employees in the hospitality industry and prisons.

4. It does not protect people in facilities which have 10 or fewer people per day in a given week.

5. There is no money earmarked for enforcement. The state of Maryland already has a state law restricting smoking; using a formula of comparing the percentage of complaints related to smoking that their safety and health agency receives overall, we can postulate how many complaints OSHA will need to respond to yearly, and how many additional inspectors OSHA will need to respond to those complaints.

6. Realistically, this will make it impossible for OSHA to complete and implement a final Indoor Air Quality standard. This means that OSHA will be unable to regulate the other indoor air contaminates which cause diseases such as Legionaires, etc.

ADDITIONS

1. Clarify OSHA jurisdiction

2. Strengthen section on pre-emption:

    No state or local law pre-emption
    Any further activity on issues addressed in settlement
    Any new action on any issue not specifically mentioned in settlement

3. Clarify OSHA's enforcement role

4. Add money for educational program

Federal contractors should refrain from smoking in federal workspace.

Mention ETS upfront in the preamble.

Jurisdiction over transportation (boats, trains) — anything not a bldg. — mines

What @ docus. the tob ind has on 2d hand smoke?

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
The responsible entity for each public facility (entered by 10 or more individuals at least one day per week) shall adopt and implement at such facility a smoke-free environment policy."	Appears to come from **sec. 2701 of HR 3434. Although the bill's authors apparently intended to refer to any building entered by 10 or more individuals per week, the vague language could** create a small employer exemption for at least some small employers. A small employer in a large office building appears to be subject to the provisions (although the lessee provision makes this unclear), but an employer with 9 employees in a free-standing building may not be covered. "Responsible entity" is defined in Sec. 2706 as meaning, "with respect to any public facility, the owner or lessee." The lessee provision applies where any facility or portion thereof is leased. This provision appears to render employers liable for the actions of subcontractors on the premises, since subcontractors will not have "leased" a portion of the facility." Does not sufficiently address whether, in a "public" facility, the "less than 10" exemption would apply to the specific offices of the "lessee employer." May render the "lessee" employer liable for the actions of someone smoking in the hallway outside its door, as the employer has "leased" that premises.	Clarify that this is an OSHA, not an EPA, responsibility. (EPA is OK w/this) Clarify treatment of small employers, both in office buildings and in their own free-standing facilities. Clarify that "individuals" includes <u>any</u> persons who enter at any time during the week, including delivery persons, postal workers, the public, etc. Define "building." Clarify that the provision renders the hiring entity liable for the actions of subcontractors--the building owner if it hires the subcontractor, or the lessee if it does so.
Residential Homes applicability unclear define resid. homes & apt. bldgs.	The definitions of "responsible entity" and "public facility" exempt residential homes--**sec. 2706(2) and (3)**. The text of the agreement does not specify whether these definitions are contemplated. Neither sufficiently addresses the residences and public corridors in apartment buildings.	Add explicit exemption for residential homes that addresses apartment building issues. Clarify how home-based businesses are affected. Nursing Homes.

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
Policies must ensure that no employee shall be required to enter a designated smoking area while smoking is occurring. Cleaning and maintenance work in such area shall be conducted while no smoking is occurring. Includes requirements for exhaust to the outside, "negative pressure" and preventing recirculation within the facility.	Appears to relate to **sec. 2701(b) of HR 3434**. However, silent on paragraph (1) provision that renders a responsible entity--i.e. owner or lessee--to control others who may smoke around its entrance. Subjects lessee employer in an office building to assessment of fines for employees/tenants not in that employer's control. Includes vague definition of "immediate vicinity" of the doorway What happens to employees/janitors, etc in residential apartment buildings or other such facilities that are exempted? Ventilation provisions come from **Sec. 2701 (c)(1) and (2)**. Does not prohibit children under the age of 15 from entering the area, unlike HR 3434.	Clarify when a tenant or building owner is liable, or allow OSHA to do this through regulation. OSHA must have authority to enforce and draft standards on varying ventilation needs/specifications in differing types of workplaces, and protect minors. Must address the costs to small businesses in complying with provisions requiring ventilation and designated smoking areas (?) no costs, ventillation not required. "Immediate vicinity" should be defined by OSHA as anywhere from 20 to 50 feet away. Should prohibit smoking outside the building from occurring in the vicinity of air intakes for the building's ventilation system.

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
Exempt restaurants (**excluding** fast food) and bars (**including** hotel bars), private clubs, hotel guest rooms, casinos, bingo parlors, tobacco merchants and prisons.	These are defined in **sec. 2706 of HR 3434,** with the exception of bingo parlors, casinos and hotel guest rooms. Therefore, the proposal goes beyond HR 3434. These need further definition. Allows states to enact standards or legislation covering such facilities, but not OSHA Does not address ventilation or other requirements related to tobacco merchants located in malls or other buildings with multiple employers. "Private Club" may be difficult to define in a way that can not be easily manipulated by restaurants and other businesses in order to avoid coverage. Look at public accomodation law	The major purpose of a building in which bingo is played should determine coverage. Bingo parlors are generally established in buildings used for other purposes. Define whether individuals operating bingo parlors are volunteers or employees covered by OSHA. Better define casinos, fast food, private clubs to avoid abuses. *Define tobacco merchant as selling primarily tobacco products. Address separate ventilation requirements for tobacco merchants in facilities with multiple businesses. Do not preempt state laws re prisons.
Allows OSHA to issue regulations clarifying the definition of a "fast food" restaurant to the extent necessary to ensure that the intended inclusion of establishments catering largely to minors is achieved.	**HR 3434 did not include** a fast food exemption. While this could enable OSHA to prohibit smoking in a greater number of "fast food" restaurants, the definition of "fast food" is not sufficiently clear. For example, this might exempt cafeterias. waitresses, casino wkers, prisoners are at ↑ risk for lung cancer.	Clarify definition of "fast food," to ensure that cafeterias are not exempt. Clarify that OSHA can conduct regulatory efforts to protect employees in restaurants, bars, the most high risk establishments, from exposure to environmental tobacco smoke short of a complete ban. (?) Maybe require ventilation in hospitality industry.

We need to preserve rt. of sts. to ban it in the hospitality industry.

Hospitality places aimed at kids aren't exempt (ice cream parlor, Chuck E Cheese)

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
Direct OSHA to issue, within one year, regs implementing and enforcing these provisions, with enforcement costs paid out of the Industry Payments. However, the restrictions take place regardless of whether regulations have actually been promulgated.	Directly conflicts with **HR 3434.** HR 3434 defines Administrator as the EPA administrator. The summary of the proposed resolution only refers to OSHA, and is silent on EPA's involvement. OSHA and EPA roles inside and outside buildings must be defined. We assume, consistent with OSHA's traditional responsibilities, that the intention here is for OSHA, not EPA, to have sole jurisdiction over workplaces.	OSHA may not have sufficient resources to promulgate the final standard within one year, unless "enforcement money" is designated to assist with the standards-writing process. (?)
No preemption of state or local laws or regulations that are more restrictive. No preemption of federal rules that restrict smoking in federal facilities.	Although preemption is not explicitly stated, could preempt OSHA action on the tobacco-related aspects of its Indoor Air Quality rule as it relates to anything other than federal facilities. This would **expand preemption beyond that proposed in HR 3434,** which did not "preempt or otherwise affect any other Federal, State or local law which provides protection from health hazards from ETS." May allow states to preempt localities from enacting more strict standards	Do not preempt OSHA from taking additional action to establish tobacco-related standards in the workplace. Preempt states from prohibiting localities from enacting more strict enforcement standards.
OSHA may issue regulations implementing and enforcing standards.	This provision is silent on penalties. HR 3434 provided for civil penalties of $5000 per day of violation. The bill also allowed any aggrieved person to file a court action. The settlement summary is silent regarding OSHA's ability to assess penalties to enforce the prohibitions. HR 3434 did not contemplate assessment of fines by EPA. This might only provide a remedy if an aggrieved individual files suit. The most appropriate remedy would be OSHA citation and penalties	Clarify that OSHA may conduct all of its traditional enforcement activities, including the issuance of penalties, in connection with the settlement.
Other issues	The settlement could limit the practical ability of OSHA to protect workers from other airborne hazards which would be implicated by its proposed Indoor Air Quality rule.	Direct OSHA to include with its tobacco regulations other indoor air quality issues that jeopardize worker health.

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
Clarifications Needed	References to HR 3434, WISHA workplace smoking rule and state law exemptions for the "hospitality sector" are confusing. It is unclear whether the provisions of these laws/policies would apply without explicit statements to the contrary.	Confusing references should be stricken.

JUL 30 1997

MEMORANDUM FOR: ELENA KAGAN
ELIZABETH DRYE

FROM: EMILY SHEKETOFF Emily Sheketoff

SUBJECT: TOBACCO SETTLEMENT

The Public Health Service of HHS has raised an objection to the Environmental Tobacco Smoke Work Group comments on the Settlement.

They completely disagree with our recommendation to exempt the Hospitality Industry; i.e. restaurants, bars, hotel bars, private clubs, hotels, casinos, bingo parlors; tobacco merchants and prisons. Ripley Forbes felt that the public health community would not be supportive of our position and would criticize us for not trying to be more protective. They would understand if the Congress exempted these groups, but that we should at least try to have them included in the restrictions.

I am attaching the final draft document and the side by side as you last saw it. If you agree with the public Health Service proposal, I will change these two documents to reflect the change. I have checked those passages which would be affected.

cc: Ripley Forbes

FINAL DRAFT ENVIRONMENTAL TOBACCO SMOKE WORKING GROUP

INTRODUCTION

The Administration is trying on several fronts to reduce the incidence of lung cancer and cardiovascular disease by reducing exposure to Environmental Tobacco Smoke. Title IV of the Tobacco Settlement contains provisions addressing the same goal. There are some clarifications and additions needed to Title IV, which are discussed below.

Title IV would restrict smoking in buildings to areas with separate ventilation. There are exemptions for the hospitality industry and prisons. Title IV does not discuss residential housing.

On balance, the legislation contemplated by the settlement appears to be a positive step towards reducing disease caused by ETS because it will finally address the dangers of exposure to second-hand smoke.

BENEFITS OF THE TOBACCO SETTLEMENT

1. It would actually go into effect. The Congressional direction to implement regulations restricting smoking in buildings within one year would overcome the administrative difficulties in promulgating an OSHA standard and the uncertain fate of any standard in the judicial system.

2. It would cover more places.

 Unlike OSHA's standard, this one covers:

 Locations with state and local government employees
 Small businesses with fewer than 10 employees, but more people who enter the establishment
 Buildings that are regulated by other safety and health agencies [4 (b) (1)], such as Department of Energy facilities and mines
 Private contractors

3. The settlement would allow more protective state and local restrictions to remain in effect because unlike OSHA's standard, it doesn't pre-empt more protective coverage.

DISADVANTAGES OF THE TOBACCO SETTLEMENT

1. Clarify the jurisdiction issues between EPA and OSHA (EPA agrees OSHA is the logical agency to enforce this).

2. Hospitality exemption is very broad and these are the people at the greatest risk

from exposure. The hospitality industry is the most potent political group on record opposing any ban on smoking in their establishments.

3. It may pre-empt OSHA's ability to protect employees in the hospitality industry and prisons.

4. It does not protect people in facilities which have 10 or fewer people enter per day in a given week.

5. There is no money earmarked for enforcement. The state of Maryland already has a state law restricting smoking; using the formula of comparing the percentage of complaints related to smoking that their safety and health agency receives overall, we can postulate how many complaints OSHA will need to respond to yearly, and how many additional inspectors OSHA will need to respond to those complaints.

6. Realistically, this will make it impossible for OSHA to complete and implement a final Indoor Air Quality standard. Which means that OSHA will be unable to regulate the other indoor air contaminates which cause diseases such as Legionaires, etc.

ADDITIONS

1. Clarify OSHA jurisdiction

2. Strengthen section on pre-emption:

    No state or local law pre-emption of a more protective standard
    Any further OSHA activity on issues addressed in settlement
    Any new OSHA action on any issue not specifically mentioned in settlement

3. Clarify OSHA's enforcement role

4. Add money for educational program

July 7, 1997

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
The responsible entity for each public facility (entered by 10 or more individuals at least one day per week) shall adopt and implement at such facility a smoke-free environment policy."	Appears to come from **sec. 2701 of HR 3434. Although the bill's authors apparently intended to refer to any building entered by 10 or more individuals per week, the vague language could** create a small employer exemption for at least some small employers. A small employer in a large office building appears to be subject to the provisions (although the lessee provision makes this unclear), but an employer with 9 employees in a free-standing building may not be covered. "Responsible entity" is defined in Sec. 2706 as meaning, "with respect to any public facility, the owner or lessee." The lessee provision applies where any facility or portion thereof is leased. This provision appears to render employers liable for the actions of subcontractors on the premises, since subcontractors will not have "leased" a portion of the facility." Does not sufficiently address whether, in a "public" facility, the "less than 10" exemption would apply to the specific offices of the "lessee employer." May render the "lessee" employer liable for the actions of someone smoking in the hallway outside its door, as the employer has "leased" that premises.	Clarify treatment of small employers, both in office buildings and in their own free-standing facilities. Clarify that "individuals" includes <u>any</u> persons who enter at any time during the week, including delivery persons, postal workers, the public, etc. Define "building." What about ships, trains, mines, etc.? Clarify that the provision renders the hiring entity liable for the actions of subcontractors--the building owner if it hires the subcontractor, or the lessee if it does so.
Residential Homes applicability unclear	The definitions of "responsible entity" and "public facility" exempt residential homes--**sec. 2706(2) and (3)**. The text of the agreement does not specify whether these definitions are contemplated. Neither sufficiently addresses the residences and public corridors in apartment buildings.	Add explicit exemption for residential homes that addresses apartment building issues. Clarify how home-based businesses are affected. Clarify how Nursing Homes should be addressed.

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
Policies must ensure that no employee shall be required to enter a designated smoking area while smoking is occurring. Cleaning and maintenance work in such area shall be conducted while no smoking is occurring. Includes requirements for exhaust to the outside, "negative pressure" and preventing recirculation within the facility.	Appears to relate to **sec. 2701(b) of HR 3434**. However, silent on paragraph (1) provision that renders a responsible entity--i.e. owner or lessee--to control others who may smoke around its entrance. Subjects lessee employer in an office building to assessment of fines for employees/tenants not in that employer's control. Includes vague definition of "immediate vicinity" of the doorway What happens to employees/janitors, etc in residential apartment buildings or other such facilities that are exempted? Ventilation provisions come from **Sec. 2701 (c)(1) and (2)**. Does not prohibit children under the age of 15 from entering the area, unlike HR 3434.	Clarify when a tenant or building owner is liable, or allow OSHA to do this through regulation. OSHA must have authority to enforce and draft standards on varying ventilation needs/specifications in differing types of workplaces, and protect minors. Must address the costs issue. Clarify there are no costs, ventilation not required. "Immediate vicinity" should be defined by OSHA as anywhere from 20 to 50 feet away. Should prohibit smoking outside the building from occurring in the vicinity of air intakes for the building's ventilation system.

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
Exempt restaurants (**excluding** fast food) and bars (**including** hotel bars), private clubs, hotel guest rooms, casinos, bingo parlors, tobacco merchants and prisons.	These are defined in **sec. 2706 of HR 3434,** with the exception of bingo parlors, casinos and hotel guest rooms. Therefore, the proposal goes beyond HR 3434. These need further definition. Allows states to enact standards or legislation covering such facilities, but not OSHA Does not address ventilation or other requirements related to tobacco merchants located in malls or other buildings with multiple employers. "Private Club" may be difficult to define in a way that can not be easily manipulated by restaurants and other businesses in order to avoid coverage.	The major purpose of a building in which bingo is played should determine coverage. Bingo parlors are generally established in buildings used for other purposes. Define whether individuals operating bingo parlors are volunteers or employees covered by OSHA. Better define casinos, fast food, private clubs to avoid abuses. Define tobacco merchant as selling primarily tobacco products. Address separate ventilation requirements for tobacco merchants in facilities with multiple businesses. Do not preempt state laws re prisons. Allow states and/or localities to pass more protective laws. May include this legislation's excluded entities.

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
Allows OSHA to issue regulations clarifying the definition of a "fast food" restaurant to the extent necessary to ensure that the intended inclusion of establishments catering largely to minors is achieved.	**HR 3434 did not include** a fast food exemption. While this could enable OSHA to prohibit smoking in a greater number of "fast food" restaurants, the definition of "fast food" is not sufficiently clear. For example, this might exempt cafeterias.	Clarify definition of "fast food," to ensure that cafeterias are not exempt. Include language which broadly interprets those establishments <u>not</u> <u>exempt</u>. Clarify that OSHA can conduct regulatory efforts to protect employees in restaurants, bars, the most high risk establishments, from exposure to environmental tobacco smoke short of a complete ban. Maybe require more ventilation in hospitality industry.
Direct OSHA to issue, within one year, regs implementing and enforcing these provisions, with enforcement costs paid out of the Industry Payments. However, the restrictions take place regardless of whether regulations have actually been promulgated.	Directly conflicts with **HR 3434.** HR 3434 defines Administrator as the EPA administrator. The summary of the proposed resolution only refers to OSHA, and is silent on EPA's involvement. OSHA and EPA roles inside and outside buildings must be defined. We assume, consistent with OSHA's traditional responsibilities, that the intention here is for OSHA, not EPA, to have sole jurisdiction over workplaces.	Clarify that this is an OSHA, not an EPA, responsibility.
No preemption of state or local laws or regulations that are more restrictive. No preemption of federal rules that restrict smoking in federal facilities.	Although preemption is not explicitly stated, could preempt OSHA action on the tobacco-related aspects of its Indoor Air Quality rule as it relates to anything other than federal facilities. This would **expand preemption beyond that proposed in HR 3434,** which did not "preempt or otherwise affect any other Federal, State or local law which provides protection from health hazards from ETS." May allow states to preempt localities from enacting more strict standards	Do not preempt OSHA from taking additional action to establish tobacco-related standards in the workplace. Preempt states from prohibiting localities from enacting more strict enforcement standards.

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
OSHA may issue regulations implementing and enforcing standards.	This provision is silent on penalties. HR 3434 provided for civil penalties of $5000 per day of violation. The bill also allowed any aggrieved person to file a court action. The settlement summary is silent regarding OSHA's ability to assess penalties to enforce the prohibitions. HR 3434 did not contemplate assessment of fines by EPA. This might only provide a remedy if an aggrieved individual files suit. The most appropriate remedy would be OSHA citation and penalties	Clarify that OSHA may conduct all of its traditional enforcement activities, including the issuance of penalties, in connection with the settlement. OSHA will need money from the trust fund for inspectors to enforce these provisions.
Other issues	The settlement could limit the practical ability of OSHA to protect workers from other airborne hazards which would be implicated by its proposed Indoor Air Quality rule.	Strong pre-emption ban.
Clarifications Needed	References to HR 3434, WISHA workplace smoking rule and state law exemptions for the "hospitality sector" are confusing. It is unclear whether the provisions of these laws/policies would apply without explicit statements to the contrary.	Confusing references should be stricken.

More o obacco Dea

By Peter Baker
Washington Post Staff Writer

The White House yesterday rejected another key provision in the proposed $368.5 billion settlement with the tobacco industry, complaining that the deal would not impose tough-enough penalties against cigarette makers if they do not reduce underage smoking in the next 10 years.

During a meeting at the White House, Clinton administration officials told industry lawyers they were concerned that tobacco companies were not serious about meeting specified goals for curbing youth smoking as set out in the agreement and insisted on more stringent financial costs for failure.

"We made clear that we intend to strengthen the penalty area," said Rahm Emanuel, a senior adviser to President Clinton who participated in the meeting.

The decision to revise that section of the agreement marks the second time the White House has demanded changes to win its endorsement and signals that it will continue to cast a skeptical eye as the administration proceeds with its 30-day review. Last week, Clinton ruled out the plan's proposed restrictions on government authority to regulate nicotine in cigarettes, and aides are working on alternative provisions.

The tobacco lawyers who came to the White House yesterday repeated their preference that the deal be left as they negotiated it with state attorneys general and a coalition of trial attorneys. However, according to Clinton aides, they did not take a hard line ruling out any changes either.

"It's a great proposal," J. Phil Carlton, a tobacco lawyer from North Carolina, said as he left the meeting. "It's getting very close scrutiny . . . as it should."

Hammered out after months of tense talks, the settlement was intended to resolve dozens of lawsuits by state governments and individual smokers seeking compensation for medical costs of smoking. Any agreement would have to be translated into legislation, passed by Congress and signed by Clinton.

Among the many concessions agreed to by tobacco companies was a system intended to motivate them financially to prevent minors from picking up the habit. Under the proposal, if youth smoking does not drop by 30 percent in five years, 50 percent in seven years and 60 percent in 10 years, the industry would face fines of $80 million for each percentage point short of the goal. The figure was derived from estimates of how much profit tobacco companies would make from the increase in sales.

Public health groups have singled out that provision as one of the agreement's fundamental flaws. Clinton aides said they concur and suspect tobacco executives may have agreed to what one called a "phony" system knowing the goals would not be reached. However, the aides said they are not yet sure how they will toughen the arrangement.

"We . . . gave them a clear message to bring back to New York, which is if the settlement is going to work, they've got to look out for our bottom line, which is reducing smoking by kids," said Bruce Reed, Clinton's chief domestic policy adviser. "I think they recognize that we're not just going to rubber stamp this."

Yet in another area that has provoked criticism by public health advocates, the administration seemed to soften its position.

Until yesterday, Health and Human Services Secretary Donna E. Shalala had expressed deep reservations that the settlement would be tax-deductible, essentially reducing the industry costs by about one-third. After the meeting, though, she noted that it is "standard business practice" for corporations to deduct the cost of settling lawsuits. "That's part of the law," she said.

ıwyers Assail Secondhand Smoke Risks

vidence 'Weak' in Lawsuit Brought by Flight Attendants

:stion in the landmark $5 billion ithout specific scientific evi- Hardy said.

re's no study that says that tendants get more lung or heart other people," he said.

in ry's opening state- were presented after the imposed a gag order barring ides from talking about the ıtside court.

uit Judge Robert Kaye had usly told the plaintiffs and de- its to discuss the merits of obviously are not ing the court ruling," he said as the gag order after court today. The gag order was red by an impromptu news ence Monday by Daniel nahue, senior vice president of R.J. Reynolds Tobacco Co., after the flight attendants' attorney, Stanley M. Rosenblatt, had completed his opening statement. Donahue said the evidence will support the defendants.

> *"They knew that secondhand smoke caused disease."*
>
> —Stanley M. Rosenblatt, attorney for flight attendants

Rosenblatt had accused the industry of deceiving and misleading the public by saying the hazards of smoking and secondhand smoke are still in dispute. Donahue responded, "That's the same old refrain that we have heard on every single case we have tried."

Rosenblatt said testimony by two former surgeons general, renowned doctors and researchers and tobacco executives themselves will convince jurors that secondhand smoke is deadly and that its danger has been covered up.

"They knew that secondhand smoke caused disease in nonsmokers," Rosenblatt said of tobacco companies. "They could have been honest with the American people."

The suit blames cigarette smoke on airliners for lung cancer, respiratory problems, heart disease and other illnesses.

It could be the only major tobacco case to be decided by a jury because the proposed $368 billion nationwide settlement would eliminate such suits.

Op'nion Eases Way for Veterans' Sn ok'ı g-Re ated I lness C aims

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

To: Elizabeth Drye
DPC

Telephone#: 456-5573

Fax#: 456-7431

From: Emily Sheketoff
DOL

Telephone#: 219-6104

Fax#: 219-6064

Comment(s) and/or Special Instructions: 12 pages

DRAFT #1c Environmental Tobacco Smoke

What are we trying to accomplish

Baseline

why home?

Reduce to no more than 20 percent the proportion of children aged 6 and younger who are regularly exposed to tobacco smoke at home.

Background
- The major source of smoke exposure for young children is their home.[1]
- The children of parents who smoke are more likely to develop lower respiratory tract infections, to be hospitalized or see a doctor for these condition during the first year of life, and to develop middle ear infections than children of parents who do not smoke.[1]
- The amount smoked in the same room or vehicle or even the same house as the infant was the major predictor of infants' urinary cotinine levels.[1]
- Children's exposure to environmental tobacco smoke at home ranges from 35.7% (12-16 year olds) to 43.6% (4-11 year olds). Among children between 2 months and 3 years old, 40.8% have reportedly been exposed to ETS at home.[2]
- Detectable levels of serum cotinine (a measure of exposure to tobacco smoke) are more often found in non-tobacco using young children than non-tobacco using adults.[2]

Establish tobacco-free environments in schools.

Background
- Tobacco-free environments in schools reinforce student knowledge of the health hazards of tobacco use and exposure to environmental tobacco smoke, promote a tobacco-free environment as the norm, and discourage students from starting to use tobacco.[1]

Increase to 100 percent the proportion of worksites with a formal smoking policy that prohibits or severely restricts smoking at the workplace.

Background
- Epidemiological studies have shown an increased risk of lung cancer in nonsmokers consistently exposed to tobacco smoke.[1]
- For people from non-smoking households, the workplace is the greatest source of ETS exposure.[1]

Q
State laws

Enact in 50 States and the District of Columbia comprehensive laws on clean indoor air that prohibit smoking or limit it to separately ventilated areas in the workplace and enclosed public places.

Background

- Smoking restrictions in public places and at work protect people from the harmful effects of ETS exposure and may also help to reduce the smoking prevalence by changing the attitudes and behavior of current and potential smokers.[3]
- A public place is defined as any enclosed area to which the public is invited or in which the public is permitted.[3]
- Approximately 87.9% of non-tobacco users have detectable levels of serum cotinine.[2]
- Most non-smokers who report that they have not been exposed to ETS at home or work still have detectable levels of serum cotinine. Approximately 47.7% of working adults (non-tobacco users) report exposure to ETS at home or at work.[2]

Reduce to zero the number of States that have clean indoor air laws preempting stronger clean indoor air laws on the local level.

Background

- Preemptive laws prevent local jurisdictions from enacting more stringent restrictions than the State law or restrictions that vary from the State law.[4]
- Consequences of preemptive laws have included weaker public health standards; loss of community education involved in the passage of local ordinances; more difficulty with enforcement at the local level; and lower compliance with the laws.[5]

References

1. U.S. Department of Health and Human Services. Healthy People 2000 Review 1995-1996. U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, National Center for Health Statistics. 1996.

2. Pirkle, JL, Flegal, KM, Bernert, JT, Brody, DJ, Etzel, RA, Maurer, KR. Exposure of the US population to environmental tobacco smoke. Journal of the American Medical Association, 275:1233-1240. 1996.

3. U.S. Department of Health and Human Services. Reducing the health consequences of smoking: 25 years of progress. A Report of the Surgeon General. U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health. 1989.

4. U.S. Department of Health and Human Services. State laws on tobacco control: United States, 1995. MMWR 44 (SS-6). U.S. Department of Health and Human Services, Centers for Disease Control and Prevention. 1995.

5. Jordan, J, Pertschuk, M, Carol, J. Preemption in tobacco control: history, current issues, and future concerns. The California Preemption Project. 1995.

Attachment 1

Goals 2000

(To be suppled by Dept of Education)

What Settlement covers

The last paragraph (pg 31) of the Environmental Tobacco section mentions The Waxman Bill, H.R. 3434. This paragraph should be dropped. The Waxman Bill talks about EPA and the EPA Administrator setting regulation and deciding compliance. This would be confusing to employers and building owners.

The settlement, as currently written may also pre-empt OSHA from going forward on their Indoor Air Quality Standard.

Attachment 2

Summary

The settlement appears intended to legislate an OSHA standard for ETS exposure, while precluding OSHA (but not states and municipalities) from issuing a broader standard. The effect of such legislation would depend on its actual wording. In principle, it would be possible to draft legislation that would establish an ETS standard while permitting later regulatory action by OSHA.

Background

The proposed settlement (Title IV, pp. 30-31) envisions federal legislation that would "direct OSHA to issue . . . regulations implementing and enforcing" a specified standard governing indoor smoking in "public facilities." Smoking would be permitted only in ventilated areas meeting certain requirements. Employees could not be required to enter smoking areas while smoking was occurring. Notably, restaurants, hotels, and the rest of the so-called hospitality industry would be exempted from the standard.

Effect on OSHA's Ability to Regulate Workplace Exposures

The scope of the settlement is different from -- and at first blush narrower than -- OSHA's proposal. OSHA's rule would apply to "all indoor or enclosed workplaces under OSHA jurisdiction" whereas the draft tobacco settlement appears to call for restrictions on indoor smoking in "public facilities" (defined as any building which is regularly entered by 10 or more individuals at least one day per week). This latter language is also contained in the 1993 Waxman bill (H.R. 3434, cited in the settlement proposal). In addition, the settlement, unlike OSHA's proposal, specifically exempts the hospitality industry (non-fast food restaurants, bars, Attachment 2

Tobacco Agreement	OSHA Interpretation	Needed Change

The responsible entity for each public facility (regularly entered by 10 or more individuals at least one day per week) shall adopt and implement at such facility a smoke-free environment policy."	Appears to come from **sec. 2701 of HR 3434.** Appears to create a small employer exemption for at least some small employers. A small employer in a large office building appears to be subject to the provisions (although the lessee provision makes this unclear), but an employer with 8 employees in a free-standing building would not be covered. "Responsible entity" is defined in Sec. 2706 as meaning, "with respect to any public facility, the owner or lessee." The lessee provision applies where any facility or portion thereof is leased. This provision appears to render employers liable for the actions of subcontractors on the premises, since subcontractors will not have "leased" a portion of the facility." Does not sufficiently address whether, in a "public" facility, the "less than 10" exemption would apply to the specific offices of the "lessee employer." May render the "lessee" employer liable for the actions of someone smoking in the hallway outside its door, as the employer has "leased" that premises. This provision exempts residential homes, per **sec. 2706(2) of HR 3434.**	Clarify treatment of small employers, both in office buildings and in their own free-standing facilities. Clarify how the provision affects a business that neither owns, nor leases a facility. Clarify that this is an OSHA, not an EPA, responsibility.

Policies must ensure that no employee shall be required to enter a designated smoking area while smoking is occurring. Cleaning and maintenance work in such area shall be conducted while no smoking is occurring. Includes requirements for exhaust to the outside, "negative pressure" and preventing recirculation within the facility.	Appears to relate to **sec. 2701(b) of HR 3434**. However, silent on paragraph (1) provision that renders a responsible entity--i.e. owner or lessee--to control others who may smoke around its entrance. Subjects lessee employer in an office building to assessment of fines for employees/tenants not in that employer's control. What happens to employees/janitors, etc in residential apartment buildings or other such facilities that are exempted? Ventilation provisions come from **Sec. 2701 (c)(1) and (2)**. Does not prohibit children under the age of 15 from entering the area, unlike HR 3434.	Clarify when a tenant or building owner is liable, or allow OSHA to do this through regulation. OSHA must have authority to enforce and draft standards on varying ventilation needs/specifications in differing types of workplaces. Must address the costs to small businesses in complying with provisions requiring ventilation and designated smoking areas.
Exempt restaurants (**excluding** fast food) and bars (**including** hotel bars), private clubs, hotel guest rooms, casinos, bingo parlors, tobacco merchants and prisons.	These are defined in **sec. 2706 of HR 3434**, with the exception of bingo parlors, casinos and hotel guest rooms. Therefore, the proposal goes beyond HR 3434. These need further definition. Allows states to enact standards or legislation covering such facilities, but not OSHA	The major purpose of a building in which bingo is played should determine coverage. Bingo parlors are generally established in buildings used for other purposes. Define whether individuals operating bingo parlors are volunteers or employees covered by OSHA. Clarify that

Direct OSHA to issue, within one year, regs implementing and enforcing these provisions, with enforcement costs paid out of the Industry Payments. However, the restrictions take place regardless of whether regulations have actually been promulgated.	Directly conflicts with **HR 3434.** HR 3434 defines Administrator as the EPA administrator. The summary of the proposed resolution only refers to OSHA, and is silent on EPA's involvement. OSHA and EPA roles inside and outside buildings must be defined. We assume, consistent with OSHA's traditional responsibilities, that the intention here is for OSHA, not EPA, to have sole jurisdiction over workplaces.	
No preemption of state or local laws or regulations that are more restrictive. No preemption of federal rules that restrict smoking in federal facilities.	Preempts any OSHA action on its Indoor Air Quality rule as it relates to anything other than federal facilities. This **expands the preemption provision in HR 3434,** which did not "preempt or otherwise affect any other Federal, State or local law which provides protection from health hazards from ETS."	

private clubs, hotel guest rooms, casinos, tobacco merchants and prisons).

Analysis

The effect of legislation arising out of the tobacco settlement would, of course, depend on the actual wording of a statute. We assume that the statute would specifically address the scope and preemption issues discussed below. Failure to do so would leave OSHA's own statutory authority unchanged. But this would also result in a great deal of litigation, if parties believe that OSHA is acting in a way that is inconsistent with the legislation.

Congressional restrictions on OSHA's authority.

Certainly, Congress has the authority both to direct OSHA to take specific regulatory action and to limit OSHA's regulatory authority. In the past, Congress has required OSHA to adopt specific standards, including the Hazardous Waste Operations and Emergency Response standard, which was promulgated in accord with a timetable and an outline contained in the 1987 Superfund Amendments and Reauthorization Act (SARA). OSHA's Process Safety Management and Lead in Construction standards were also promulgated in response to Congressional directives. And on the other side, Congress on other occasions has prohibited OSHA from engaging in rulemaking to address particular hazards, for example, ergonomics and motor vehicle safety. In this case, Congress could resolve these issues in a number of ways. It could, for example, use a mechanism similar to that it used in enacting the Federal Mine Safety and Health Act of 1977. There, Congress adopted a series of interim safety and health standards, while granting MSHA the authority to supersede them with improved standards, so long as existing protections to miners were not reduced.

Scope issues.

The scope of the restrictions proposed in the settlement is not clear. Normally OSHA only has authority to regulate "employers" and "employees," as those terms are defined in the OSH Act, in industries where other Federal agencies do not exercise regulatory authority over safety and health conditions. This means, for example, that OSHA does not enforce its standards in a number of areas, including mines, most forms of public transportation, state and local government operations, or some workplaces staffed by volunteers. OSHA regulations also are intended to protect workers, not members of the public who may be present in workplaces. No similar restrictions are contained in the settlement, which could imply that it is intended to provide OSHA, for purposes of enforcing this requirement, with broader authority than it otherwise has. This is an issue that should be clarified in any legislation.

Preemptive intent of the settlement.

The proposed settlement states that the legislation would not "preempt or otherwise affect any other state or local law or regulation that restricts smoking in public facilities in an equal or stricter manner." This may be read to imply that the legislated OSHA standard would preempt any further action by OSHA itself--including the proposed Indoor Air Quality standard, to the extent that it addresses ETS. By disclaiming an intent to preempt state and local law, the settlement can be read to suggest that it does mean to preempt a broader and/or stricter OSHA standard--for example, a standard covering the hospitality industry. Leaving states and municipalities free to act, however, is an important concession. The Supreme Court has made clear that OSHA standards preempt more stringent state regulations in most situations, and OSHA itself has been trying to find a way to preserve state and local authority in this area.

Alternatively, it is also possible to read the settlement merely as stating that further regulation by OSHA (or any other Federal agency) would not be subject to the other provisions of the settlement. Under this interpretation, OSHA could promulgate a standard restricting smoking in the hospitality industry. But the regulation would be promulgated in the normal course of OSHA rulemaking, it would preempt more restrictive state and local mandates in non-state plan states, and it would apply only where OSHA would otherwise exercise jurisdiction. For example, if an OSHA standard allowed smoking areas in restaurants, that standard would preempt a local ordinance that prohibited smoking in restaurants, but it might not apply to a "public building" staffed by volunteers.

What happens if there's no settlement

OSHA is currently working on a comprehensive indoor air quality standard. The proposal (published April 1994) focused on the proper operation and maintenance of heating, ventilation, and air conditioning (HVAC) systems. The proposal also had provisions for the control of specific contaminant sources, mainly environmental tobacco smoke (ETS), bacteria, molds, and volatile organic chemicals. In addition, training and recordkeeping requirements were specified. The objective of the regulation is to reduce health effects in workers caused by indoor air pollution, such as asthma, allergy, and Legionnaires' Disease, and the cancer and cardiovascular disease risks posed by ETS. OSHA's proposal is more detailed than the language in the settlement (for example, it requires that the employer must post signs informing anyone entering the workplace that smoking is restricted to clearly designated areas, and it specifically states that smoking is prohibited even in designated areas when the exhaust ventilation system is not operating properly). However, these or similar modifications could presumably be included in the implementing regulations contemplated by the settlement.

OSHA is currently analyzing over 120,000 public comments received on the proposal, so it is impossible to discuss in detail how a final standard would or would not differ from the language in the settlement. In general terms, OSHA expects to: (1) restrict smoking to separately-ventilated areas in most workplaces under its jurisdiction; (2) provide for some exposure reduction in bars, restaurants, etc., though perhaps not using the same requirements as would apply elsewhere; and (3) require employee training and recordkeeping.

OSHA anticipates finalizing action on the indoor air quality regulation whether or not Congress acts to implement the tobacco settlement, but there is no target date for the final rule. Obviously, the pace of work on the standard will need to increase dramatically if Congressional action mandates that OSHA finalize a regulation in one year. However, if Congress takes no action, than OSHA hopes to finalize the Comprehensive Indoor Air Quality standard by the end of calendar year 1999.

Federal Building Issue
(To be supplied by GSA)

Other actions recommended

__General__

Restaurants, bars, bingo, halls, prisons, casinos, private clubs are typically the places with the highest ETS exposure levels. Restaurants have the additional burdens of polyaromatic hydrocarbon (PAH) emission from food cooking. Even if H.R. 3434 does exempt these place from the "negatively vented" smoking room restrictions, **we feel that OSHA should still require that a Permissible Exposure Level (PEL) be established to protect these hospitality workers,** based on either respiratory suspended particulates (RSPs), or airborne nicotine.

Legislation needs to clarify what "fast food" restaurant is, OSHA does not have jurisdiction to protect children.

__Specifics.__

The definition of "immediate vicinity" of the doorway is vague. At the OSHA hearing it was suggested anywhere from 20 to 50 feet away. This is avoid intrusion of the smoke into the building once the door is opened. Also, many employers were sensitive to the 'negative' image of having people huddled outside around the entrances in all sorts of weather.

An additional issue, not brought up in H.R. 3434 is that smoking outside should not be done by the air intakes for the building's ventilation system. The smoke is literally sucked into the building by this inappropriate placement of the smoking areas by the air intakes.

"Children under the age 15 are prohibited form entering". We think this should be **under age 18**. The health effects of ETS studied for children usually through age 17. To switch to age 15 to exclude some young workers is, we feel an abrogation of OSHA's responsibility.

Section 2702 (b) __Venue and Citizen Action Suits__. If a local Agency or citizen is seeking enforcement, why must they go to Federal District Court? Surely, as an additional remedy, there must be some state or local health or environmental agency with authority to levy fines without overly burdening the Federal Court system. We believe there should be language for "Concurrent jurisdiction" of OSHA's responsibility.

Section 2702(a) __EPA vs OSHA jurisdiction__. Obviously Title IV of the settlement and H.R. 3434 disagree on federal jurisdictional authority. Considering OSHA's current authority with workers, OSHA is the more logical choice.

Section 2702 (d) Costs. For a court to award costs to the defendant if the citizen loses a citizen action suit would seriously dampen the enthusiasm for bringing such a suit. Furthermore, the language in 2702 (g) (10 "shall not be considered violations--if such violations are *isolated incidents* that are not part of a pattern of violations of such prohibition" actually puts the argument between the aggrieved and the actual perpetrator (or employer against employee) rather than the owner or employer. This language would further endanger citizen suits. We suggest that an OSHA compliance officer be empowered to cite at his/her discretion, and that the language be removed or modified.

Section 2703 Preemption. We feel the preemption clause as stated is too permissive of other jurisdictions' laws, which may be less restrictive. Specifically, some states already have preemption clauses which preempt localities from passing more stringent smoking restrictions than are in the state laws. We suggest that language in H.R. 3434 should explicitly allow more smoking restrictive language by any state, local or Federal law.

Section 2704. Regulations.
"Administrator" should be changed to "Assistant Secretary of Labor for OSHA"

Section 2706 (2). Definitions. "Public facility" does not include any building or portion thereof regularly used for residential purposes". We believe prisons should be included as should nursing homes, and other facilities which require workers to maintain. The U.S. Supreme Court has already upheld the rights of prisoners to sue for the hazard of passive smoking. Also, "building" is not defined. For example, is an attached decked or porch part of the building?

Public transportation and some outdoor gathering facilities: These are not included in H.R. 3434. For example taxicabs and stadia should be included as a section, maybe even outdoor escalators. **"Building"** is not defined.

(In enacting local and state smoking restriction ordinances, governmental legislatures have always encountered stiff opposition form tobacco industry lobbyists, usually acting through some local restaurant association. Here these lobbyists have always used the argument of "level playing field", so that competitors across the line do not get an advantage. A national OSHA standard would eliminate this argument. Maryland used a compromise, which seems to be working. This allows smoking only in restaurants with liquor licenses, and only within six feet of the bar areas, unless there are partitioned rooms.)

Questions for Environmental Tobacco Smoke Group

1. What are our goals with respect to ETS? Kids? Workplace smokers? Public buildings (CDC)

2. What is the scope of the pending OSHA workplace smoking rule? Timing? Costs and benefits?
(OSHA)

3. How do the scope/costs/benefits compare to the Waxman legislation included in the settlement?
(OSHA)

4. Which approach or combination of approaches best meets public health goals?
(OSHA)

5. What are the critical issues raised by the Waxman legislation? What fixes should we consider? (One key question is who has jurisdiction to set standards -- OSHA or EPA.)
(OSHA)

6. What is the status of our EO in Federal buildings? What's its scope? What are the next steps and how quickly could we complete it? (I've let this group know we should be prepared to move ahead on the EO in short order.)
(GSA/HHS)

JUL 7 1997

MEMORANDUM FOR: ELENA KAGAN
ELIZABETH DRYE

FROM: EMILY SHEKETOFF Emily Sheketoff

SUBJECT: TOBACCO SETTLEMENT

At the last meeting of the Environmental Tobacco Smoke Working Group, Elena asked for a list of those who had opposed OSHA's Indoor Air Quality Standard, not including the tobacco interests.

Attached is a list of groups who opposes any smoking restriction. Many small businesses, such as beauty salons and nursing homes wrote in opposing the smoking control provision in the proposal. Many of these businesses are represented by national organizations and small business representatives.

I also edited the two draft papers that were distributed at the last meeting to reflect the comments expressed at that meeting.

National Representatives of Businesses that may Oppose OSHA Regulation of ETS.

Group	Representative	Phone
Bowling Proprietor's Associations	Kurt Brose	817-649-5105
U.S. Chambers of Commerce and state chapters	Richard L. Lesher	202-659-6000
Small Business Representatives, SBA	Anita Drummond	202-205-6532
Some unions, such as the Bakery, Confectionary, and Tobacco Workers		
Clean Air Device Manufacturing Association[2]	Dennis Lauchner	703-691-4612
Billiard Congress of America	Bruce Cottew	319-351-2112
Health Care Financing Administration[3]	Bruce Vladeck	410-786-3000
National Funeral Directors Association[4]	?	1-800-228-6332 1-414-541-2500

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[2]This group represents manufacturers of air filtration equipment. They may not be in favor of the language in Title IV that states that air from the smoking rooms shall not be recirculated (thus reducing the perceived need for filtration equipment).

[3]HCFA did not comment directly on the proposal. Many nursing homes wrote in form letters opposed to the smoking provision. HCFA may be involved in this whole settlement issue since the states Attorneys General sued to be reimbursed for Medicare payments. Is it possible that they could require smoke-free nursing homes as part of the Medicare payment requirement?

[4]The Agency received many form letters from Funeral Home Directors opposing the smoking provision.

National Cosmetology Association[5]	?	1-800-527-1683
Some State governments, such as North and South Carolina, Louisiana, Alabama, Mississippi, and North and South Dakota.		

[5]The Agency received many form letters from owners of beauty salons opposing the smoking provision.

FINAL DRAFT ENVIRONMENTAL TOBACCO SMOKE WORKING GROUP

INTRODUCTION

The Administration is trying on several fronts to reduce the incidence of lung cancer and cardiovascular disease by reducing exposure to Environmental Tobacco Smoke. Title IV of the Tobacco Settlement contains provisions addressing the same goal. There are some clarifications and additions needed to Title IV, which are discussed below.

Title IV would restrict smoking in buildings to areas with separate ventilation. There are exemptions for the hospitality industry and prisons. Title IV does not discuss residential housing.

On balance, the legislation contemplated by the settlement appears to be a positive step towards reducing disease caused by ETS because it will finally address the dangers of exposure to second-hand smoke.

BENEFITS OF THE TOBACCO SETTLEMENT

1. It would actually go into effect. The Congressional direction to implement regulations restricting smoking in buildings within one year would overcome the administrative difficulties in promulgating an OSHA standard and the uncertain fate of any standard in the judicial system.

2. It would cover more places.

Unlike OSHA's standard, this one covers:

Locations with state and local government employees
Small businesses with fewer than 10 employees, but more people who enter the establishment
Buildings that are regulated by other safety and health agencies [4 (b) (1)], such as Department of Energy facilities and mines
Private contractors

3. The settlement would allow more protective state and local restrictions to remain in effect because unlike OSHA's standard, it doesn't pre-empt more protective coverage.

DISADVANTAGES OF THE TOBACCO SETTLEMENT

1. Clarify the jurisdiction issues between EPA and OSHA (EPA agrees OSHA is the logical agency to enforce this).

2. Hospitality exemption is very broad and these are the people at the greatest risk

from exposure. The hospitality industry is the most potent political group on record opposing any ban on smoking in their establishments.

3. It may pre-empt OSHA's ability to protect employees in the hospitality industry and prisons.

4. It does not protect people in facilities which have 10 or fewer people enter per day in a given week.

5. There is no money earmarked for enforcement. The state of Maryland already has a state law restricting smoking; using the formula of comparing the percentage of complaints related to smoking that their safety and health agency receives overall, we can postulate how many complaints OSHA will need to respond to yearly, and how many additional inspectors OSHA will need to respond to those complaints.

6. Realistically, this will make it impossible for OSHA to complete and implement a final Indoor Air Quality standard. Which means that OSHA will be unable to regulate the other indoor air contaminates which cause diseases such as Legionaires, etc.

ADDITIONS

1. Clarify OSHA jurisdiction

2. Strengthen section on pre-emption:

    No state or local law pre-emption of a more protective standard
    Any further OSHA activity on issues addressed in settlement
    Any new OSHA action on any issue not specifically mentioned in settlement

3. Clarify OSHA's enforcement role

4. Add money for educational program

July 7, 1997

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
The responsible entity for each public facility (entered by 10 or more individuals at least one day per week) shall adopt and implement at such facility a smoke-free environment policy."	Appears to come from **sec. 2701 of HR 3434. Although the bill's authors apparently intended to refer to any building entered by 10 or more individuals per week, the vague language could** create a small employer exemption for at least some small employers. A small employer in a large office building appears to be subject to the provisions (although the lessee provision makes this unclear), but an employer with 9 employees in a free-standing building may not be covered. "Responsible entity" is defined in Sec. 2706 as meaning, "with respect to any public facility, the owner or lessee." The lessee provision applies where any facility or portion thereof is leased. This provision appears to render employers liable for the actions of subcontractors on the premises, since subcontractors will not have "leased" a portion of the facility." Does not sufficiently address whether, in a "public" facility, the "less than 10" exemption would apply to the specific offices of the "lessee employer." May render the "lessee" employer liable for the actions of someone smoking in the hallway outside its door, as the employer has "leased" that premises.	Clarify treatment of small employers, both in office buildings and in their own free-standing facilities. Clarify that "individuals" includes <u>any</u> persons who enter at any time during the week, including delivery persons, postal workers, the public, etc. Define "building." What about ships, trains, mines, etc.? Clarify that the provision renders the hiring entity liable for the actions of subcontractors--the building owner if it hires the subcontractor, or the lessee if it does so.
Residential Homes applicability unclear	The definitions of "responsible entity" and "public facility" exempt residential homes--**sec. 2706(2) and (3)**. The text of the agreement does not specify whether these definitions are contemplated. Neither sufficiently addresses the residences and public corridors in apartment buildings.	Add explicit exemption for residential homes that addresses apartment building issues. Clarify how home-based businesses are affected. Clarify how Nursing Homes should be addressed.

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
Policies must ensure that no employee shall be required to enter a designated smoking area while smoking is occurring. Cleaning and maintenance work in such area shall be conducted while no smoking is occurring. Includes requirements for exhaust to the outside, "negative pressure" and preventing recirculation within the facility.	Appears to relate to **sec. 2701(b) of HR 3434**. However, silent on paragraph (1) provision that renders a responsible entity--i.e. owner or lessee--to control others who may smoke around its entrance. Subjects lessee employer in an office building to assessment of fines for employees/tenants not in that employer's control. Includes vague definition of "immediate vicinity" of the doorway What happens to employees/janitors, etc in residential apartment buildings or other such facilities that are exempted? Ventilation provisions come from **Sec. 2701 (c)(1) and (2)**. Does not prohibit children under the age of 15 from entering the area, unlike HR 3434.	Clarify when a tenant or building owner is liable, or allow OSHA to do this through regulation. OSHA must have authority to enforce and draft standards on varying ventilation needs/specifications in differing types of workplaces, and protect minors. Must address the costs issue. Clarify there are no costs, ventilation not required. "Immediate vicinity" should be defined by OSHA as anywhere from 20 to 50 feet away. Should prohibit smoking outside the building from occurring in the vicinity of air intakes for the building's ventilation system.

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
Exempt restaurants (**excluding** fast food) and bars (**including** hotel bars), private clubs, hotel guest rooms, casinos, bingo parlors, tobacco merchants and prisons.	These are defined in **sec. 2706 of HR 3434,** with the exception of bingo parlors, casinos and hotel guest rooms. Therefore, the proposal goes beyond HR 3434. These need further definition. Allows states to enact standards or legislation covering such facilities, but not OSHA Does not address ventilation or other requirements related to tobacco merchants located in malls or other buildings with multiple employers. "Private Club" may be difficult to define in a way that can not be easily manipulated by restaurants and other businesses in order to avoid coverage.	The major purpose of a building in which bingo is played should determine coverage. Bingo parlors are generally established in buildings used for other purposes. Define whether individuals operating bingo parlors are volunteers or employees covered by OSHA. Better define casinos, fast food, private clubs to avoid abuses. Define tobacco merchant as selling primarily tobacco products. Address separate ventilation requirements for tobacco merchants in facilities with multiple businesses. Do not preempt state laws re prisons. Allow states and/or localities to pass more protective laws. May include this legislation's excluded entities.

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
Allows OSHA to issue regulations clarifying the definition of a "fast food" restaurant to the extent necessary to ensure that the intended inclusion of establishments catering largely to minors is achieved.	**HR 3434 did not include** a fast food exemption. While this could enable OSHA to prohibit smoking in a greater number of "fast food" restaurants, the definition of "fast food" is not sufficiently clear. For example, this might exempt cafeterias.	Clarify definition of "fast food," to ensure that cafeterias are not exempt. Include language which broadly interprets those establishments not exempt. Clarify that OSHA can conduct regulatory efforts to protect employees in restaurants, bars, the most high risk establishments, from exposure to environmental tobacco smoke short of a complete ban. Maybe require more ventilation in hospitality industry.
Direct OSHA to issue, within one year, regs implementing and enforcing these provisions, with enforcement costs paid out of the Industry Payments. However, the restrictions take place regardless of whether regulations have actually been promulgated.	Directly conflicts with **HR 3434.** HR 3434 defines Administrator as the EPA administrator. The summary of the proposed resolution only refers to OSHA, and is silent on EPA's involvement. OSHA and EPA roles inside and outside buildings must be defined. We assume, consistent with OSHA's traditional responsibilities, that the intention here is for OSHA, not EPA, to have sole jurisdiction over workplaces.	Clarify that this is an OSHA, not an EPA, responsibility.
No preemption of state or local laws or regulations that are more restrictive. No preemption of federal rules that restrict smoking in federal facilities.	Although preemption is not explicitly stated, could preempt OSHA action on the tobacco-related aspects of its Indoor Air Quality rule as it relates to anything other than federal facilities. This would **expand preemption beyond that proposed in HR 3434,** which did not "preempt or otherwise affect any other Federal, State or local law which provides protection from health hazards from ETS." May allow states to preempt localities from enacting more strict standards	Do not preempt OSHA from taking additional action to establish tobacco-related standards in the workplace. Preempt states from prohibiting localities from enacting more strict enforcement standards.

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
OSHA may issue regulations implementing and enforcing standards.	This provision is silent on penalties. HR 3434 provided for civil penalties of $5000 per day of violation. The bill also allowed any aggrieved person to file a court action. The settlement summary is silent regarding OSHA's ability to assess penalties to enforce the prohibitions. HR 3434 did not contemplate assessment of fines by EPA. This might only provide a remedy if an aggrieved individual files suit. The most appropriate remedy would be OSHA citation and penalties	Clarify that OSHA may conduct all of its traditional enforcement activities, including the issuance of penalties, in connection with the settlement. OSHA will need money from the trust fund for inspectors to enforce these provisions.
Other issues	The settlement could limit the practical ability of OSHA to protect workers from other airborne hazards which would be implicated by its proposed Indoor Air Quality rule.	Strong pre-emption ban.
Clarifications Needed	References to HR 3434, WISHA workplace smoking rule and state law exemptions for the "hospitality sector" are confusing. It is unclear whether the provisions of these laws/policies would apply without explicit statements to the contrary.	Confusing references should be stricken.

DRAFT #2a ENVIRONMENTAL TOBACCO SMOKE

INTRODUCTION

The Administration is trying on several fronts to reduce the incidence of lung cancer and cardiovascular disease by reducing exposure to Environmental Tobacco Smoke. Title IV of the settlement contains provisions addressing the same goal. There are some clarifications and additions needed to Title IV, as are discussed below.

Title IV would ban smoking in buildings except in areas with separate ventilation. There are exemptions for the hospitality industry and prisons. Title IV does not discuss residential housing.

On balance, the legislation contemplated by the settlement appears to be a positive step towards reducing disease caused by ETS because it will finally address the dangers of exposure to second-hand smoke.

BENEFITS OF THE TOBACCO SETTLEMENT

1. It would actually go into effect. The Congressional direction to implement regulations restricting smoking in buildings within one year would overcome the administrative difficulties in promulgating an OSHA standard and the uncertain fate of any standard in the judicial system.

2. It would cover more places.

Unlike OSHA's standard, this one covers:

Locations with state and local government employees
Small businesses with fewer than 10 employees, but more people who enter the establishment
Buildings that are regulated by other safety and health agencies [4 (b) (1)], such as Department of Energy facilities and mines
Private contractors

3. The settlement would allow more protective state and local restrictions to remain in effect because unlike OSHA's standard, it doesn't pre-empt.

DISADVANTAGES OF THE TOBACCO SETTLEMENT

1. Clarify the jurisdiction issues between EPA and OSHA.

2. Hospitality exemption is very broad and these are the people at the greatest risk from exposure. The hospitality industry is the most potent political group on record opposing any ban on smoking in their establishments.

3. It may pre-empt OSHA's ability to protect employees in the hospitality industry and prisons.

4. It does not protect people in facilities which have 10 or fewer people per day in a given week.

5. There is no money earmarked for enforcement. The state of Maryland already has a state law restricting smoking; using a formula of comparing the percentage of complaints related to smoking that their safety and health agency receives overall, we can postulate how many complaints OSHA will need to respond to yearly, and how many additional inspectors OSHA will need to respond to those complaints.

6. Realistically, this will make it impossible for OSHA to complete and implement a final Indoor Air Quality standard. This means that OSHA will be unable to regulate the other indoor air contaminates which cause diseases such as Legionaires, etc.

ADDITIONS

1. Clarify OSHA jurisdiction

2. Strengthen section on pre-emption:

    No state or local law pre-emption
    Any further activity on issues addressed in settlement
    Any new action on any issue not specifically mentioned in settlement

3. Clarify OSHA's enforcement role

4. Add money for educational program

- compliance assistance
- educational programs.

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
The responsible entity for each public facility (entered by 10 or more individuals at least one day per week) shall adopt and implement at such facility a smoke-free environment policy."	Appears to come from **sec. 2701 of HR 3434. Although the bill's authors apparently intended to refer to any building entered by 10 or more individuals per week, the vague language could** create a small employer exemption for at least some small employers. A small employer in a large office building appears to be subject to the provisions (although the lessee provision makes this unclear), but an employer with 9 employees in a free-standing building may not be covered. "Responsible entity" is defined in Sec. 2706 as meaning, "with respect to any public facility, the owner or lessee." The lessee provision applies where any facility or portion thereof is leased. This provision appears to render employers liable for the actions of subcontractors on the premises, since subcontractors will not have "leased" a portion of the facility." Does not sufficiently address whether, in a "public" facility, the "less than 10" exemption would apply to the specific offices of the "lessee employer." May render the "lessee" employer liable for the actions of someone smoking in the hallway outside its door, as the employer has "leased" that premises.	Clarify that this is an OSHA, not an EPA, responsibility. EPA ok Clarify treatment of small employers, both in office buildings and in their own free-standing facilities. Clarify that "individuals" includes <u>any</u> persons who enter at any time during the week, including delivery persons, postal workers, the public, etc. Define "building." Clarify that the provision renders the hiring entity liable for the actions of subcontractors--the building owner if it hires the subcontractor, or the lessee if it does so.
Residential Homes applicability unclear	The definitions of "responsible entity" and "public facility" exempt residential homes--**sec. 2706(2) and (3)**. The text of the agreement does not specify whether these definitions are contemplated. Neither sufficiently addresses the residences and public corridors in apartment buildings.	Add explicit exemption for residential homes that addresses apartment building issues. Clarify how home-based businesses are affected. Nursing Homes.

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
Policies must ensure that no employee shall be required to enter a designated smoking area while smoking is occurring. Cleaning and maintenance work in such area shall be conducted while no smoking is occurring. Includes requirements for exhaust to the outside, "negative pressure" and preventing recirculation within the facility.	Appears to relate to **sec. 2701(b) of HR 3434**. However, silent on paragraph (1) provision that renders a responsible entity--i.e. owner or lessee--to control others who may smoke around its entrance. Subjects lessee employer in an office building to assessment of fines for employees/tenants not in that employer's control. Includes vague definition of "immediate vicinity" of the doorway What happens to employees/janitors, etc in residential apartment buildings or other such facilities that are exempted? Ventilation provisions come from **Sec. 2701 (c)(1) and (2)**. Does not prohibit children under the age of 15 from entering the area, unlike HR 3434.	Clarify when a tenant or building owner is liable, or allow OSHA to do this through regulation. OSHA must have authority to enforce and draft standards on varying ventilation needs/specifications in differing types of workplaces, and protect minors. Must address the costs to small businesses in complying with provisions requiring ventilation and designated smoking areas (?) no costs, ventillation not required. "Immediate vicinity" should be defined by OSHA as anywhere from 20 to 50 feet away. Should prohibit smoking outside the building from occurring in the vicinity of air intakes for the building's ventilation system.

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
Exempt restaurants (**excluding** fast food) and bars (**including** hotel bars), private clubs, hotel guest rooms, casinos, bingo parlors, tobacco merchants and prisons.	These are defined in **sec. 2706 of HR 3434,** with the exception of bingo parlors, casinos and hotel guest rooms. Therefore, the proposal goes beyond HR 3434. These need further definition. Allows states to enact standards or legislation covering such facilities, but not OSHA Does not address ventilation or other requirements related to tobacco merchants located in malls or other buildings with multiple employers. "Private Club" may be difficult to definein a way that can not be easily manipulated by restaurants and other businesses in order to avoid coverage.	The major purpose of a building in which bingo is played should determine coverage. Bingo parlors are generally established in buildings used for other purposes. Define whether individuals operating bingo parlors are volunteers or employees covered by OSHA. Better define casinos, fast food, private clubs to avoid abuses. Define tobacco merchant as selling primarily tobacco products. Not Drug stores, etc. Address separate ventilation requirements for tobacco merchants in facilities with multiple businesses. Do not preempt state laws re prisons.
Allows OSHA to issue regulations clarifying the definition of a "fast food" restaurant to the extent necessary to ensure that the intended inclusion of establishments catering largely to minors is achieved.	**HR 3434 did not include** a fast food exemption. While this could enable OSHA to prohibit smoking in a greater number of "fast food" restaurants, the definition of "fast food" is not sufficiently clear. For example, this might exempt cafeterias.	Clarify definition of "fast food," to ensure that cafeterias are not exempt. Clarify that OSHA can conduct regulatory efforts to protect employees in restaurants, bars, the most high risk establishments, from exposure to environmental tobacco smoke short of a complete ban. (?) Maybe require ventilation in hospitality industry.

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
Direct OSHA to issue, within one year, regs implementing and enforcing these provisions, with enforcement costs paid out of the Industry Payments. However, the restrictions take place regardless of whether regulations have actually been promulgated.	Directly conflicts with **HR 3434.** HR 3434 defines Administrator as the EPA administrator. The summary of the proposed resolution only refers to OSHA, and is silent on EPA's involvement. OSHA and EPA roles inside and outside buildings must be defined. We assume, consistent with OSHA's traditional responsibilities, that the intention here is for OSHA, not EPA, to have sole jurisdiction over workplaces.	OSHA may not have sufficient resources to promulgate the final standard within one year, unless "enforcement money" is designated to assist with the standards-writing process. (?)
No preemption of state or local laws or regulations that are more restrictive. No preemption of federal rules that restrict smoking in federal facilities.	Although preemption is not explicitly stated, could preempt OSHA action on the tobacco-related aspects of its Indoor Air Quality rule as it relates to anything other than federal facilities. This would **expand preemption beyond that proposed in HR 3434,** which did not "preempt or otherwise affect any other Federal, State or local law which provides protection from health hazards from ETS." May allow states to preempt localities from enacting more strict standards	Do not preempt OSHA from taking additional action to establish tobacco-related standards in the workplace. Preempt states from prohibiting localities from enacting more strict enforcement standards.
OSHA may issue regulations implementing and enforcing standards.	This provision is silent on penalties. HR 3434 provided for civil penalties of $5000 per day of violation. The bill also allowed any aggrieved person to file a court action. The settlement summary is silent regarding OSHA's ability to assess penalties to enforce the prohibitions. HR 3434 did not contemplate assessment of fines by EPA. This might only provide a remedy if an aggrieved individual files suit. The most appropriate remedy would be OSHA citation and penalties	Clarify that OSHA may conduct all of its traditional enforcement activities, including the issuance of penalties, in connection with the settlement.
Other issues	The settlement could limit the practical ability of OSHA to protect workers from other airborne hazards which would be implicated by its proposed Indoor Air Quality rule.	Direct OSHA to include with its tobacco regulations other indoor air quality issues that jeopardize worker health.

ISSUE	OSHA INTERPRETATION	NEEDED CHANGES
Clarifications Needed	References to HR 3434, WISHA workplace smoking rule and state law exemptions for the "hospitality sector" are confusing. It is unclear whether the provisions of these laws/policies would apply without explicit statements to the contrary.	Confusing references should be stricken.