U.S. Department of Labor
Occupational Safety and Health Administration
Office of the Assistant Secretary
200 Constitution Avenue, N.W.
Room S-2315
Washington, D.C. 20210

Facsimile Transmission

Date: Dec 11

To: Tom Friedman

Phone: 456-5587

Fax: 456-7431

Number of Pages (including cover sheet): 18 pgs

From: Emily Sheketoff, Deputy Assistant Secretary

Phone: 202-219-6104

Fax: 202-219-4761

Message:

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.

OSHA ON ENVIRONMENTAL TOBACCO PART OF SETTLEMENT

1. OSHA supports the tobacco settlement, with the recommended changes because it is the best opportunity to protect workers from environmental tobacco smoke.

2. Based on the activity from the State of Maryland which has a state law similar to the proposal to restrict smoking in buildings, OSHA will have increased needs to enforce this regulation. Maryland found that 17 % of their complaints were for smoking in the workplace. Using their data, OSHA anticipates needing an increase in its budget and FTE allocation for 5 additional Compliance Officers nationwide. This would mean $415,000 additionally each year.

July 21, 1997

MEMORANDUM FOR EMILY SHEKETOFF
JENNIFER O'CONNOR

FROM: ANN ROSENTHAL
SUSAN SHERMAN
JOHN COLWELL

SUBJECT: Proposed Tobacco Litigation Settlement and OSHA Preemption

This memorandum analyzes the possible effect of the proposed settlement of tobacco litigation on the authority of OSHA, states, and localities to regulate workplace exposures to environmental tobacco smoke (ETS). It supplements our June 27, 1997 memorandum to you.

Under the proposal, it appears that a legislated OSHA standard--comparable to a rule already proposed by OSHA--would preempt further action by OSHA, but would preserve state and local authority to regulate ETS. Under current law, in contrast, if OSHA issued a standard addressing ETS, state and local regulations likely would be preempted.

Provisions of the Proposed Settlement

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."

This standard is similar to a proposed rule addressing indoor air quality issued by OSHA in April 1994, with one major distinction: the settlement's standard would exempt restaurants, hotels, and similar businesses (the "hospitality industry"). In other respects, the settlement's standard offers broader coverage than OSHA's proposed rule. Unlike the proposed rule, the standard would cover: locations with state and local government employees, small businesses with fewer than 10 employees, buildings regulated by other federal safety and health agencies, and private contractors.

The proposal 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" (p. 31). By implication, further action by OSHA to address ETS would be preempted. (The effect of the legislation would, of course, depend on the actual wording of a statute.)

The proposed bargain, then, would offer an OSHA standard narrower in some ways than OSHA's proposed rule, in exchange for preserving state and local regulatory authority. This bargain turns on the fact that issuing an OSHA standard likely would preempt stricter state and local regulation of ETS. We discuss the legal background below.

Preemption of State and Local Authority under the OSH Act

Section 18 of the Occupational Safety and Health Act (OSH Act), 29 U.S.C. §667, generally precludes states from enforcing occupational protections directed at a hazard also addressed by an OSHA standard. That section requires a state that wishes to assume such responsibility for enforcing its own occupational safety and health standards to implement a "state plan" that is at least as effective at assuring occupational safety and health as the OSH Act. About half the states currently have state plans approved by OSHA in effect. There is no mechanism for a state to implement a plan addressing only certain hazards.

In Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 112 S. Ct. 2374 (1992), the Supreme Court held that Congress intended the OSH Act to be broadly preemptive, so that any federal OSHA standard results in "exclusive" federal coverage of the hazard addressed by that standard.1 505 U.S. at 101; 112 S. Ct. at 2383. Specifically, the Court stated that the OSH Act evinced a Congressional intent "to promote occupational safety and health while at the same time avoiding duplicative, and possibly counterproductive regulation." It concluded that allowing a State "selectively to 'supplement' certain federal regulations with ostensibly nonconflicting standards would be inconsistent with this federal scheme." 505 U.S. at 103; 112 S. Ct. at 2385.

The Gade Court also held that the fact that a state law may be intended both to protect workers and to serve the nonoccupational purposes of protecting the environment and public health and safety does not save it from preemption. For purposes of preemption analysis, a state law is an occupational safety or health standard if it "directly, substantially, and specifically regulates occupational safety and health," even if the law also has an additional purpose. This inquiry looks to the state law's effect, not only to its purpose. "The key question is thus at what point the state regulation sufficiently interferes with federal regulation that it should be deemed preempted under the Act." 505 U.S. at 107; 112 S.Ct. at 2387. Under this holding, even a state law that does not articulate an occupational safety or health purpose at all could be preempted if it directly and substantially regulates occupational safety and health. Id.

The issue is not completely clear, however, because the Gade Court also stated that "state laws of general applicability (such as laws regarding traffic safety or fire safety)" would not be preempted as long as they do not directly conflict with an OSHA standard, even if they have a "'direct and substantial' effect on worker safety." 505 U.S. at 107; 112 S.Ct. at 2387-2388. The Court did not provide much guidance on how to classify state laws that might not be classified easily as either laws of general applicability or occupational safety and health standards. It is likely that a number of state and local smoking restrictions would fall into this gray area. Whether particular restrictions would be preempted by an OSHA standard would have to be determined on a case-by-case basis. This inquiry could occur either in a state court, in the context of a state enforcement action, or in federal court, in the context of a declaratory judgment, mandamus, or injunction action directed at declaring the state law unenforceable. Neither OSHA nor the federal government would be a necessary party to these cases.

State Smoking Regulations - State Government Worksites*

	Restrictions				Penalties	
State (state-plan states highlighted)	100% Smokefree	Designated Smoking Areas with Separate Ventilation	Designated Smoking Areas Required or Allowed	None	To Businesses	To Smokers
Alabama				✔		
Alaska			✔		✔	✔
Arizona			✔		✔	✔
Arkansas				✔		
California		✔[1]			✔	✔
Colorado	✔[3]				✔	✔
Connecticut			✔[4]			
Delaware			✔		✔	✔
D.C.			✔		✔	✔
Florida			✔[4]		✔	✔
Georgia				✔		
Hawaii			✔		✔	
Idaho	✔[3]					
Illinois			✔			
Indiana			✔			
Iowa			✔		✔	✔
Kansas			✔		✔	✔
Kentucky				✔		
Louisiana			✔			
Maine			✔		✔	
Maryland		✔				
Massachusetts			✔			
Michigan	✔[3]					
Minnesota			✔			✔
Mississippi				✔		
Missouri			✔		✔	✔
Montana			✔			
Nebraska			✔			✔
Nevada			✔		✔	✔
New Hampshire			✔		✔	✔
New Jersey			✔			✔
New Mexico			✔		✔	✔
New York			✔		✔	✔

	Restrictions				Penalties	
State (state-plan states highlighted)	100% Smokefree	Designated Smoking Areas with Separate Ventilation	Designated Smoking Areas Required or Allowed	None	To Businesses	To Smokers
North Carolina				✔		
North Dakota			✔		✔	
Ohio	✔[3]					
Oklahoma			✔			
Oregon			✔			
Pennsylvania			✔		✔	✔
Rhode Island			✔		✔	
South Carolina			✔		✔	✔
South Dakota	✔[3]				✔	✔
Tennessee				✔		
Texas				✔		
Utah	✔				✔	✔
Vermont			✔		✔	
Virginia			✔		✔	✔
Washington	✔[3]					
West Virginia				✔		
Wisconsin			✔		✔	✔
Wyoming		✔[3]				

*Adapted from State Tobacco Control Highlights---1996. Published by the U.S. Department of Health and Human Services, Centers for Disease Control.
[1]Restricts smoking in government buildings but does not specifically address worksites
[2]No smoking allowed or designated smoking areas allowed if separately ventilated
[3]By executive order
[4]Restricts smoking in government buildings but does not specifically address worksites.

State Smoking Regulations -Private Worksites*

	Restrictions				Penalties	
State (state-plan states highlighted)	100% Smokefree	Designated Smoking Areas with Separate Ventilation	Designated Smoking Areas Required or Allowed	None	To Businesses	To Smokers
Alabama				✔		
Alaska				✔		
Arizona				✔		
Arkansas				✔		
California		✔			✔	✔
Colorado				✔		
Connecticut			✔			
Delaware			✔		✔	✔
D.C.			✔		✔	✔
Florida			✔		✔	✔
Georgia				✔		
Hawaii				✔		
Idaho				✔		
Illinois			✔			
Indiana				✔		
Iowa			✔		✔	✔
Kansas				✔		
Kentucky				✔		
Louisiana			✔			
Maine			✔		✔	
Maryland		✔			✔	
Massachusetts				✔		
Michigan				✔		
Minnesota			✔			✔
Mississippi				✔		
Missouri			✔		✔	✔
Montana			✔		✔	
Nebraska			✔			✔
Nevada				✔		
New Hampshire			✔		✔	✔
New Jersey			✔			
New Mexico				✔		
New York			✔		✔	✔

	Restrictions				Penalties	
State (state-plan states highlighted)	100% Smokefree	Designated Smoking Areas with Separate Ventilation	Designated Smoking Areas Required or Allowed	None	To Businesses	To Smokers
North Carolina				✔		
North Dakota				✔		
Ohio				✔		
Oklahoma				✔		
Oregon				✔		
Pennsylvania			✔		✔	✔
Rhode Island			✔		✔	
South Carolina				✔		
South Dakota				✔		
Tennessee				✔		
Texas				✔		
Utah			✔		✔	✔
Vermont			✔		✔	
Virginia				✔	✔	✔
Washington	✔		✔			
West Virginia				✔		
Wisconsin			✔		✔	✔
Wyoming				✔		

*Adapted from State Tobacco Control Highlights---1996. Published by the U.S. Department of Health and Human Services, Centers for Disease Control.
[1]Restricts smoking in government buildings but does not specifically address worksites
[2]No smoking allowed or designated smoking areas allowed if separately ventilated
[3]By executive order
[4]Restricts smoking in government buildings but does not specifically address worksites.

State Smoking Regulations -Restaurants*

	Restrictions				Penalties	
State (state-plan states highlighted)	100% Smokefree	Designated Smoking Areas with Separate Ventilation	Designated Smoking Areas Required or Allowed	None	To Businesses	To Smokers
Alabama				✔		
Alaska			✔		✔	✔
Arizona				✔		
Arkansas				✔		
California		✔[2]			✔	✔
Colorado				✔		
Connecticut			✔			✔
Delaware			✔		✔	✔
D.C.			✔		✔	✔
Florida			✔		✔	✔
Georgia				✔		
Hawaii			✔		✔	✔
Idaho			✔		✔	✔
Illinois			✔			✔
Indiana				✔		
Iowa			✔		✔	✔
Kansas			✔		✔	✔
Kentucky				✔		
Louisiana				✔		
Maine			✔		✔	
Maryland			✔		✔	
Massachusetts			✔			
Michigan			✔		✔	
Minnesota			✔			✔
Mississippi				✔		
Missouri			✔		✔	✔
Montana			✔		✔	
Nebraska			✔			✔
Nevada			✔		✔	✔
New Hampshire			✔		✔	✔
New Jersey				✔		
New Mexico				✔		

	Restrictions				Penalties	
State (state-plan states highlighted)	100% Smokefree	Designated Smoking Areas with Separate Ventilation	Designated Smoking Areas Required or Allowed	None	To Businesses	To Smokers
New York			✔		✔	✔
North Carolina				✔		
North Dakota			✔		✔	
Ohio				✔		
Oklahoma			✔			
Oregon			✔		✔	
Pennsylvania			✔		✔	✔
Rhode Island			✔		✔	✔
South Carolina				✔		
South Dakota				✔		
Tennessee				✔		
Texas				✔		
Utah	✔				✔	✔
Vermont	✔					
Virginia			✔		✔	✔
Washington				✔		
West Virginia				✔		
Wisconsin			✔		✔	✔
Wyoming				✔		

* Adapted from State Tobacco Control Highlights--1996. Published by the U.S. Department of Health and Human Services, Centers for Disease Control.
[1]Restricts smoking in government buildings but does not specifically address worksites
[2]No smoking allowed or designated smoking areas allowed if separately ventilated
[3]By executive order
[4]Restricts smoking in government buildings but does not specifically address worksites.