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## OSHA SMOKING-BAN UPDATE ASO OF 8/22/94

- The Occupational Safety and Health Administration (OSHA) has issued a "notice of proposed rulemaking" regarding indoor-air quality in workplaces nationwide. Part of the proposal would require virtually all U.S. employers to ban smoking on their premises.
- OSHA asked for public input on its sweeping proposal. It required that responders submit all replies in quadruplicate by June 29 — later moved back to August 13.
- Normally, OSHA receives only dozens or perhaps a few hundred written replies when it seeks input on proposed new rules. And the comments come mostly from labor unions, industry associations, and public-interest groups. But as of August 12, the day before the deadline, OSHA had received literally thousands of comments on its smoking-ban plan. OSHA staffers hadn't yet finished counting entries, but they projected that they would receive between 45,000 and 50,000 replies all told!
- So far, most of the comments have expressed strong opposition to the smoking ban.
- OSHA's next step is a series of public hearings, which it has scheduled to start September 20. But the agency must first plow through all written responses to its proposal. And agency staffers fear they won't have time to do that before Sept. 20. OSHA is literally overwhelmed by the anti-ban mail it has received.
- A complete rulemaking resulting in a final agency rule will likely take one to two years, perhaps longer. Meanwhile, OSHA staffers have heard the public's message loud and clear: "Don't overstep your bounds! Don't ban smoking!"

## FDA CIGARETTE-REGULATION UPDATE AS OF 8/22/94

- For years, the Food and Drug Administration has insisted that tobacco products do not come under its jurisdiction. But this February, Dr. David Kessler, the FDA's activist chief, began considering whether his agency could indeed assert regulatory authority over tobacco.
  - To justify this change of heart, Kessler cited anti-smoking groups' claims that tobacco companies manipulate nicotine levels to "hook" smokers.
  - Ample evidence exists to refute these extremist claims. But Kessler apparently feels he can use such claims as the basis for an FDA power-grab.
- To build his case for regulating tobacco, Kessler convened an eight-member advisory panel, with members drawn from such fields as psychology, addiction research, pharmacology, epidemiology, and psychiatry.
- Recently, the panel held an intensive two-day meeting to consider nicotine as an "addictive" substance. On August 2, it presented its finding that yes, nicotine is addictive.
- But at once, this announcement came under attack — not only from tobacco-industry representatives but also from independent scientists.
  - Critics contended that the FDA panel had defined "addiction" too broadly — so broadly that it would have to classify coffee drinking and overeating as "addictive," too, under the same criteria.
  - Plus, critics pointed out that millions of Americans have successfully quit smoking, most on their own, without professional help. The same isn't true for people genuinely addicted to hard drugs like heroin.
- Meanwhile, the FDA has its work cut out for it. Before it can assert control over tobacco sales and marketing, it must determine:
  - Whether there is a "safe" level of nicotine consumption, and if so, what that level is; AND ...
  - Whether tobacco marketers intend to "affect the structure and functioning of the human body" — that is, whether they do indeed deliberately "spike" cigarettes with nicotine.
- The second question — whether tobacco companies try to addict smokers — could prove especially thorny for the FDA. The agency will have a hard time proving that marketers manipulate nicotine levels, given the fact that nicotine content in cigarettes has dropped steeply over the past 30 years!
- Meanwhile, though, the FDA's newest bid for regulatory power poses a real threat. If the agency decides it has answered its questions to its own satisfaction, it can go ahead and impose sweeping new restrictions on tobacco

FDA

products. It wouldn't even need to get clearance from Congress. It could:

- Require detailed ingredient labeling with every pack of cigarettes ... much like the ingredient listings in the package inserts that now accompany prescription drugs;
  - Force cigarette makers to reduce the amount of nicotine in cigarettes to about 0.6 milligrams per cigarette;
  - Raise the minimum age for buying cigarettes;
  - Require different classifications of cigarettes, wiping out the "light" and "ultralight" categories;
  - Even require prescriptions for cigarettes, a move that would amount to a tobacco ban.
- Though Kessler does not need congressional approval for FDA actions, he seems reluctant to proceed without guidance from Congress. Some in Congress seem only too ready to give him the green light:
    - A bill sponsored by Rep. Mike Synar (D-Okla.) would let the FDA regulate tobacco without technically banning it.
    - Right now, the bill has stalled in the House Energy and Commerce Committee's Subcommittee on Health and the Environment. But three anti-ban subcommittee members will retire this year, so the bill could still pass in '95.
  - As of this date, the FDA has not yet made a final ruling declaring nicotine a "controlled substance." A ruling could come at any moment. But the agency "has no artificial timetable for what is a very important public-health and regulatory issue," according to FDA Associate Commissioner Jim O'Hara.
  - If the FDA does formally rule that it has authority to regulate cigarettes, it will likely face an immediate court challenge.

## H.R. 3434 UPDATE AS OF 8/22/94

- Rep. Henry Waxman (D-Calif.) has introduced H.R. 3434, which seeks a nationwide smoking ban. Specifically, H.R. 3434 ...
  - Urges a smoking ban in "every public facility" — that is, any building that 10 or more people regularly enter at least one day per week.
  - Also seeks to ban smoking in the "immediate vicinity of the [facility's] entrance" ... in other words, *outdoors!*
  - Imposes fines of up to \$5,000 per day on anyone failing to comply with the ban within 60 days after receiving notice of violation.
- The bill does allow exceptions to its rigid ban. But to qualify for these exceptions, building proprietors must meet impossibly strict requirements.
  - H.R. 3434 allows public facilities to set up "one or more" designated smoking areas ONLY IF they:
    - Directly vent air to the outside;
    - Ensure that air cannot drift into the facility's other areas;
    - Can guarantee that nonsmoking employees will *never* have to enter the designated smoking section for *any* purpose.
  - Few employers could install such costly ventilation, and even fewer could ensure that nonsmokers would never enter smoking-permitted zones. In effect, then, these exceptions are meaningless. The bill is a ban, period.
- H.R. 3434 first came up for debate in the Health and the Environment Subcommittee of the House Energy and Commerce Committee.
  - Chaired by Rep. Waxman, this powerful subcommittee heard loud and clear from constituents opposed to the bill.
  - Result: The subcommittee amended the bill to exempt restaurants, bars, prisons, and tobacco shops from the ban.
  - Recently the subcommittee reported out the marked-up bill — with amendments — to the full Energy and Commerce Committee.
- H.R. 3434 now sits in Energy and Commerce, where it seems to have stalled. The reason: a crowded agenda. As Congress grapples with crime and health-care legislation, it lacks time to deal with lesser issues. But the bill's not dead. Even if it doesn't see floor action this year, it may come up again in '95.

## FET UPDATE AS OF 8/22/94

As of late August, we don't know whether Congress will pass a huge cigarette-tax increase to fund health-care reform. Here's where the issue stands:

- The Clinton health-care plan, with its 75-cent-a-pack tax hike, is effectively dead.
- The U.S. House and Senate have both reported out alternative bills.
  - The House bill, sponsored by Majority Leader Dick Gephardt, closely mirrors the original Clinton plan, but with even more spending and bureaucracy.
  - The Senate bill, sponsored by Majority Leader George Mitchell:
    - modifies the Clinton plan, yet has won White House backing;
    - promises to drop the coercive "employer mandate" (payroll tax) only if voluntary measures achieve close to universal coverage;
    - relies heavily on government subsidies to extend coverage to more Americans;
  - Both bills call for a 45-cent-a-pack increase in the federal cigarette tax.
  - Both bills are in trouble.
- In both House and Senate, moderates and conservatives are pushing alternative plans:
  - In the House, the Rowland-Bilirakis plan has drawn numerous supporters. Like Bob Dole's Senate GOP plan, Rowland-Bilirakis calls for modest insurance reforms, with NO new taxes.
  - In the Senate, Republican John Chafee's bipartisan "mainstream" group has hastily crafted a compromise bill. As of this date, it is unclear whether this "moderate" plan will include cigarette taxes.
- Pundits say the "mainstream" group's plan may represent the White House's best hope for passing health-care legislation this year. But the situation is fluid, and many observers feel no major bill will pass during this Congress.
- After the August recess, lawmakers will have only one month to vote on health reform before they adjourn in October.