

DEPARTMENT OF JUSTICE**Bureau of Prisons****28 CFR Part 551****[BOP-1084-P]****RIN 1120-AA79****Smoking/No Smoking Areas****AGENCY:** Bureau of Prisons, Justice.**ACTION:** Supplemental notice of proposed rule.

SUMMARY: In this document, the Bureau of Prisons is proposing a supplemental notice of proposed rule pertaining to smoking/no smoking areas in Bureau of Prisons facilities. The supplemental notice retains the requirement to have a designated area for smoking as part of an authorized religious activity. The supplemental notice makes clear that the Warden may designate only outdoor smoking areas for general use and that these areas must be clearly identified. The supplemental notice also requires the concurrence of the Regional Director if the Warden chooses not to designate smoking areas for general use. Once this occurs, the Regional Director's concurrence is also required if the Warden later chooses to designate smoking areas for general use at the institution. The notice is intended to promote a clean air environment and to protect the health and safety of staff and inmates.

DATES: Comments due by July 6, 1999.**ADDRESSES:** Rules Unit, Office of General Counsel, Bureau of Prisons, HOLC Room 754, 320 First Street, NW., Washington, DC 20534.**FOR FURTHER INFORMATION CONTACT:** Roy Nanovic, Office of General Counsel, Bureau of Prisons, phone (202) 514-6655.

SUPPLEMENTARY INFORMATION: The Bureau of Prisons is proposing a supplemental notice of its proposed rule on smoking (28 CFR part 551, subpart N). The proposed rule previously published on this subject on November 25, 1998 (63 FR 65502) eliminated indoor smoking in all institutions except when smoking is part of an authorized religious activity. The Bureau received comment from nine respondents. As part of the Bureau's response to comment, this supplemental notice of proposed rule making allows the Warden, with the Regional Director's concurrence, to choose not to designate any smoking areas for general use. Once this occurs, the Regional Director's concurrence is required if the Warden later chooses to designate

smoking areas for general use at the institution.

The commenters, all current inmates except one, believe that prohibiting smoking within Bureau facilities will have little impact on reducing smoking and improving the air quality. Specifically, four commenters stressed that the current restrictions on smoking are rarely enforced. One commenter alleging that most staff are smokers believes the proposed regulations are not clear whether staff must also adhere to the ban on indoor smoking. This commenter included statements from four individuals concurring with the above-noted conclusions. In response, the Bureau notes that staff are responsible for ensuring that Bureau rules are followed. Maintaining a smoke-free environment necessarily means that staff will be bound by the restrictions. The Bureau is committed to investigate reported violations of the smoking policy whether by staff or inmates. As a further instance of the seriousness of the Bureau's commitment, the Bureau published a proposed amendment to its discipline policy which elevated violations of the smoking policy from a low category prohibited act to a moderate category prohibited act on February 25, 1999 (64 FR 9432).

As a practical alternative, three commenters support non-smoking units instead of a total prohibition against indoor smoking. The Bureau has an obligation to its employees and to the inmates in its custody to provide the safest and healthiest environment possible. That is why the Bureau is proposing that the Warden be permitted, with the Regional Director's concurrence, to choose not to designate smoking areas for general use, or in the alternative, restricting smoking to only visibly designated outdoor locations with the exception that an indoor smoking area may be designated to be used exclusively for authorized religious activities. Dividing the living units between smoking and non smoking will not eliminate the health risks associated with passive inhalation of second-hand smoke. Two commenters suggest that all tobacco products be banned and no tobacco products be sold in federal prisons. The supplemental notice will assist the Bureau in evaluating the merit of these comments. The commissary at smoke-free institutions will not offer tobacco products for purchase.

One commenter suggests installing smoke detectors in all cells. The Bureau is in compliance with fire safety codes on smoke detectors in its housing units. The Bureau does not believe additional

smoke detectors are necessary because a total ban on indoor smoking simplifies enforcement.

One commenter expressed concern that tobacco use not be restricted for religious purposes. The supplemental notice includes a revision to clarify that smoking as part of an authorized religious activity is to be allowed.

One commenter addressed the lack of health services support to those wishing to quit smoking. He feels health services should offer nicotine patches and nicotine gum. The Bureau understands that quitting smoking, under the best of circumstances, is a difficult task. That is why the Bureau will offer smoking cessations programs and nicotine patches will be available at inmate expense. These programs are available through normal health care programs offered to inmates.

Four commenters are against eliminating the Warden's authority to designate indoor smoking areas that provide smokers protection from adverse weather. They also expressed concern that the proposed rule does not provide for erection of a protective environment from adverse weather. The Bureau's primary goal is to protect inmates and staff from the hazards of tobacco smoke. The proposed regulations do not preclude the Warden from making some provision to accommodate outdoor smokers in adverse weather conditions.

Interested persons may participate in this proposed rulemaking by submitting data, views, or arguments in writing to the Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW., HOLC Room 754, Washington, DC 20534. Comments received during the comment period will be considered before final action is taken. Comments received after the expiration of the comment period will be considered to the extent practicable. All comments received remain on file for public inspection at the above address. The proposed rule may be changed in light of the comments received. No oral hearings are contemplated.

Executive Order 12866

This rule falls within a category of actions that the Office of Management and Budget (OMB) has determined not to constitute "significant regulatory actions" under section 3(f) of Executive Order 12866 and, accordingly, it was not reviewed by OMB.

Executive Order 12612

This regulation will not have substantial direct effects on the States, on the relationship between the national

government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

The Director of the Bureau of Prisons, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact upon a substantial number of small entities for the following reasons: This rule pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse

effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Plain Language Instructions

We try to write clearly. If you can suggest how to improve the clarity of these regulations, call or write Roy Nanovic, Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First St., Washington, DC 20534; telephone (202) 514-6655.

List of Subjects in 28 CFR Part 551

Prisoners.

Kathleen Hawk Sawyer,

Director, Bureau of Prisons.

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons in 28 CFR 0.96(p), part 551 in subchapter C of 28 CFR, chapter V is proposed to be amended as set forth below.

SUBCHAPTER C—INSTITUTIONAL MANAGEMENT

PART 551—MISCELLANEOUS

1. The authority citation for 28 CFR part 551 is revised to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 1512, 3621, 3622, 3624, 4001, 4005, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161-4166 (Repealed as to offenses committed on or after November 1, 1987), 5006-5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; Pub. L. 99-500 (sec. 209); 28 CFR 0.95-0.99; Attorney General's May 1, 1995 Guidelines for Victim and Witness Assistance.

2. Subpart N is revised to read as follows:

Subpart N—Smoking/No Smoking Areas

Sec.

551.160 Purpose and scope.

551.161 Definitions.

551.162 Designated smoking areas.

Subpart N—Smoking/No Smoking Areas

§ 551.160 Purpose and scope.

To promote a clean air environment and to protect the health and safety of staff and inmates, the Bureau of Prisons prohibits smoking in its institutions unless the Warden authorizes smoking in a designated smoking area.

§ 551.161 Definitions.

For purpose of this subpart, *smoking* is defined as carrying or inhaling a lighted cigar, cigarette, pipe, or other lighted tobacco products.

§ 551.162 Designated smoking areas.

(a) The Warden must designate a smoking area for use in instances where smoking is to be part of an authorized religious activity.

(b)(1) The Warden may designate only outdoor smoking areas for general use (that is, for smoking which is not part of an authorized religious activity). These smoking areas must be clearly identified.

(2) The Warden, with the Regional Director's concurrence, may choose not to designate smoking areas for general use. Once this occurs, the Regional Director's concurrence is required if the Warden later chooses to designate smoking areas for general use at the institution.

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