



ESSENTIAL ELEMENTS OF FCTC ARTICLE 5.3 IMPLEMENTING MEASURES

INTRODUCTION

This resource is provided to assist lawyers, advocates, and government officials involved in developing effective measures for tobacco control. It provides a framework for analyzing and drafting Article 5.3 implementing legislation and policies that reflect FCTC Article 5.3, the Guidelines for its implementation (“Guidelines”), and lessons learned from a review of Article 5.3-specific laws and policies and those related or relevant to implementing Article 5.3.

Relevant good governance measures, such as the United Nations General Assembly’s International Code of Conduct for Public Officials, the United Nations Convention against Corruption, various Organization for Economic Cooperation and Development Principles and Recommendations, and measures adopted domestically to implement these instruments, can be used to implement Article 5.3 where they align with Article 5.3 and the Guidelines. Where they do not, these measures still can provide guidance for drafting Article 5.3-specific measures since they share some common objectives with Article 5.3. Domestic laws addressing the right to information, lobbying, political contributions, and other Article 5.3-relevant topics also can be used in these ways.

Effective Article 5.3 implementing measures, at a minimum, fully incorporate the Guidelines and best practices.¹ At their core, successful Article 5.3 implementing measures isolate tobacco control policy from the influence and interference of the tobacco industry and ensure transparency in the operations and actions of both governments and the tobacco industry. Isolation and transparency are required because of the fundamental and irreconcilable conflict of interest between the goals of tobacco control and those of the tobacco industry, arising from the inherently deadly nature of tobacco products. The tobacco industry’s longstanding and relentless actions to subvert effective tobacco control policies also demonstrate the need isolation and transparency.²

Successful Article 5.3 implementing laws and policies:

1. provide clear objectives that support the most effective Article 5.3 implementing legislative and/or policy measures;
2. define key terms in accordance with FCTC Article 1;
3. apply, at a minimum, provisions that:
 - limit interactions between government and the tobacco industry to only those strictly necessary for effective regulation of the tobacco industry or tobacco products;
 - ensure transparency in the operations and actions of government and of the tobacco industry, especially the interactions, communications, and contacts between them;

- prevent tobacco-related conflicts of interest within government, including on its bodies, boards, commissions, working groups, and in its delegations to the FCTC Conference of the Parties and other relevant international forums, and their subsidiary bodies;
- prohibit government from entering into any partnerships or non-binding or unenforceable agreements with the tobacco industry, and from accepting any voluntary codes of conduct in the place of legally enforceable measures;
- prohibit government action that provides the tobacco industry with preferential treatment of any kind or any incentives to operate;
- require the government to raise awareness about tobacco-related harms, the operations of the tobacco industry, and the tactics it uses to subvert and undermine effective tobacco control, including its commercially driven undertaking of “corporate social responsibility” (CSR) activities;
- require the government to de-normalize and regulate the industry’s CSR activities; and
- ensure all of the above measures apply equally to state-owned tobacco industries, where applicable.

4. impose legal duties of compliance on all businesses in the tobacco industry and on all government and quasi-government authorities, institutions, and bodies in all branches and at all levels of government, and on their officials, representatives, employees, and any other persons or entities working on their behalf or to further their interests, as applicable;

5. specify the authority or authorities responsible for oversight and enforcement and ensure its/their competence to carry out these duties;

6. provide a range of deterrent sanctions proportionate to the seriousness of the violation and commensurate with the duty of the violator;

7. empower and enable civil society to make complaints and undertake legal action to compel compliance, and provide legal protection against retaliation for “whistleblowers”;

8. require evaluation of the effectiveness of the measures enacted and adopted, and of their implementation and enforcement; and

9. provide the appropriate authorities or oversight bodies with broad regulatory powers to address implementing details and any other matters necessary or appropriate for implementation of the legislation.

FCTC ARTICLE 5.3 AND ITS GUIDELINES

FCTC Article 5.3 requires Parties to act to protect the development and implementation of public health policies with respect to tobacco control from the commercial and other vested interests of the tobacco industry, in accordance with national law. The Guidelines, established to assist Parties in meeting their legal obligations under Article 5.3, recommend agreed-upon measures to ensure that efforts to protect tobacco control from tobacco industry interference are comprehensive and effective.

Parties to the FCTC have a legal obligation to perform their treaty obligations in good faith in accordance with Article 26 of the Vienna Convention on the Law of Treaties. The Guidelines are a subsequent agreement between the Parties and must be taken into account in interpreting the scope and content of Parties’ obligations, in accordance with Article 31 of the Vienna Convention.

Incorporating the Guidelines into domestic legislation and policies and imposing stricter measures than those required by the Convention and the Guidelines, as encouraged in FCTC Article 2(1) and strongly urged in Guidelines para.12, will establish the foundation for effectively protecting tobacco control policies from tobacco industry influence and interference. It will also facilitate proper implementation of the treaty as a whole since tobacco industry influence and interference cut across a number of FCTC policy areas and jeopardizes the government's ability to enact and implement the effective tobacco control measures required by the treaty.

1. PROVIDING CLEAR OBJECTIVES FOR THE LEGISLATIVE AND/OR POLICY MEASURES

Clear articulation of the legislation's objectives can play an important role in justifying the provisions of the law or policy, especially in the face of any legal challenge that may be brought by the tobacco industry or other person.

Article 5.3 objectives should highlight, for example:

- the inherent and irreconcilable conflict of interests between the goals of public health policies for tobacco control and the interests of the tobacco industry on account of the addictive and deadly nature of tobacco products and the resulting social ills and the longstanding history of the tobacco industry acting to subvert the role of government in implementing effective tobacco control policies;
- the importance of isolating the government from tobacco industry influence and interference and ensuring transparency in the operations of government and of the tobacco industry in order to protect tobacco control policy making and implementation and to fulfill the state's obligations under the WHO FCTC; and
- the importance of using the Guidelines for implementing Article 5.3 since the Guidelines recognize that tobacco industry interference cuts across a number of tobacco control policy areas of the Convention.

2. DEFINING KEY TERMS

FCTC Article 1 provides key definitions for implementing Article 5.3 requirements:

- "tobacco industry" means tobacco manufacturers, wholesale distributors, and importers of tobacco products;³
- "tobacco control" means a range of supply, demand, and harm reduction strategies that aim to improve the health of a population by eliminating or reducing their consumption of tobacco products and exposure to tobacco smoke.⁴

The Guidelines use the term "occupational activity" and, while not defining the term, make it clear that it includes activities whether they are gainful or not. A proposed definition this term is: "any kind of employment, contract, consulting, or other work, or service activity, whether it is gainful or not."⁵

It also would be useful to define the term "conflict of interest" in relation to tobacco control. A proposed definition for this term is: "a conflict between the public duties and private interests of a person working on behalf of government in any capacity who has responsibility for tobacco control where that person has

tobacco-related interests which could improperly influence the performance of his or her official duties and responsibilities.⁶

Implementing measures should, as a preliminary matter, make it clear that:

- reference to the “tobacco industry” includes entities and persons working on behalf of or to further the interests of any business in the tobacco industry;⁷
- reference to “tobacco control ” includes policies, laws, regulations, or programs relevant or related to tobacco control, such as but not limited to tax, price, and trade;
- the term “government” includes quasi-or semi-governmental authorities, institutions, organs, bodies, boards, commissions, working groups and other entities in all branches and at all levels of government;⁸
- reference to the phrase “responsible for tobacco control” includes contributing to or being in a position to contribute to the formulation, implementation, administration, or enforcement of tobacco control policies, laws, regulations, programs, or initiatives; and
- reference to “government officials, employees, or representatives” includes contractors, consultants, and any other persons or entities working on their behalf or to further their interests.⁹

Use of these terms in this document should be understood as having the same inclusions.

3. APPLYING PROVISIONS TO IMPLEMENT FCTC ARTICLE 5.3

The treaty itself provides no implementing details for giving effect to the Article 5.3 mandate that Parties act to protect their tobacco control policies from the commercial and other vested interests of the tobacco industry. Rather, these details are provided in eight recommendations and multiple sub-recommendations elaborated in the Guidelines. This section addresses the provisions that should go into legislation and/or policies to effectively implement Article 5.3 and discusses the options for enacting or adopting Article 5.3 implementing measures. The provisions are based on the recommendations of the Guidelines and in some respects go beyond explicit terms of Guidelines recommendations, as encouraged in FCTC Article 2(1) and strongly urged Guidelines para.12.

Provisions in legislation and/or policy to effectively implement FCTC Article 5.3

- **Limit interactions between government and the tobacco industry to only those strictly necessary for effective regulation of tobacco products or the tobacco industry¹⁰**

Interactions between the tobacco industry and government should be allowed only if, and only to the extent, strictly necessary for effective regulation of the tobacco industry or tobacco products.¹¹

Necessary interactions

Necessary government-tobacco industry interactions would include, for example, those having to do with:

- licensure
- compliance inspections
- identifying contraband tobacco products
- enforcement actions
- proactive or defensive litigation
- mandated tobacco industry reporting

It may be constitutionally required in some jurisdictions for government to allow all sectors of society to participate in the policy decision-making process. In a case like that, it would be important to determine whether such a constitutional requirement would be subordinated to the state's treaty obligations.

Where government-tobacco industry interactions are necessary, they should be subject to strict controls, and they should be carried out in a manner that avoids the creation of any perception of a partnership or collaboration. If any such perception may have been created by an interaction, the government should act immediately to correct the perception.¹²

Unnecessary interactions

There are a wide range of interactions the tobacco industry pursues with governments in an effort to influence, undermine, and subvert effective tobacco control.¹³ Some examples of interactions, communications, and contacts that are not necessary for effective regulation and that should fall under the prohibition against unnecessary interactions include, for example:

- working with the tobacco industry or accepting its assistance to draft or implement legislative, regulatory, or policy proposals;¹⁴
- otherwise engaging in any way with the tobacco industry in any of its attempts to influence tobacco control policy, subject to prevailing constitutional requirements, if any;
- participation in or attendance at industry-initiated or funded meetings, seminars, dialogues, or other forums addressing tobacco control;
- allowing the tobacco industry to play any role that is properly a government function in carrying out implementation of tobacco control policies, including monitoring or enforcement; and
- working in partnership with the tobacco industry or accepting or endorsing tobacco industry involvement in any tobacco control or public health programs, such as public education and youth tobacco use prevention campaigns.¹⁵

It will be important for governments to develop and implement policies and procedures, standards of conduct, and/or guidelines elaborating criteria and establishing safeguards for ensuring the determination about whether an interaction is necessary is properly made. If a national coordinating mechanism for tobacco control has been established pursuant to FCTC Article 5.2(a) and is functional and effective, it may be able to play a role in guiding and overseeing the necessity determination.

IN PRACTICE

LIMITING INTERACTIONS UNDER PHILIPPINES POLICY

The Philippines is an early implementer of Article 5.3, with its Joint Memorandum Circular Number 2010-01. The Circular applies to the executive branch and largely tracks the Guidelines language on limiting interactions to only those strictly necessary for effective regulation. An annex (Annex A) provides rules that are to be written into codes of conduct to be adopted by the various ministries, including rules applicable to meetings between government and the tobacco industry. Other types of government-industry interactions are not addressed, however, and the policy does not apply beyond the executive branch.

- **Ensure transparency in the operations and actions of government and of the tobacco industry, especially the interactions, communications, and contacts between them.**¹⁶

Transparency of government-tobacco industry interactions

Where interactions between government and the tobacco industry are necessary, they should be required, whenever possible, to be conducted through public hearings with advance notice and public disclosure of records of the interactions at a minimum.¹⁷ While not explicitly recommended in the Guidelines, consideration should be given to affirmatively requiring government and the tobacco industry to document and disclose all interactions, communications, and contacts.¹⁸ Such a requirement could encourage more diligent attempts at making a correct determination about necessity of interactions. At the very least, the documentation would provide some measure of transparency when unnecessary interactions do occur, either as a result of a mistake in judgment or as an intentional violation.

It will be important for governments to develop and implement policies and procedures, standards of conduct, and/or guidelines elaborating criteria for how necessary interactions are to be carried out in order to strictly limit the scope of the interaction, to avoid any appearance of partnership or collaboration with or endorsement of the tobacco industry, and to ensure transparency, including rules for providing notice and records of interactions, communications, and contacts, and similar matters.

Canada's Lobbying Act provides an example of documentation requirements imposed on individuals or organizations undertaking any communication or seeking a meeting with public officers in an effort to influence policy.

OECD's Principles for

Transparency and Integrity in Lobbying, highlighted below, provide an example of requiring government to disclose consultation with lobbyists on legislative initiatives.

IN PRACTICE

TRANSPARENCY OF INTERACTIONS UNDER CANADA'S LOBBYING ACT

Canada's Lobbying Act provides that any individual, who for payment on behalf of any person or organization, undertakes any *communication or arranges a meeting* with a public office holder or between a public office holder and any other person regarding:

- the development of any legislative proposal by the Government or legislature;
- the introduction, passage, defeat or amendment of any bill or resolution that is before the legislature;
- the making or amendment of any regulation;
- the development or amendment of any policy or program; or
- the awarding of any grant, contribution or other financial benefit by or on behalf of the Government

must file a return within 10 days containing details that identify:

- the subject-matter of the communication undertaken or meeting sought and any other subject-matter information prescribed;
- any relevant legislative proposal, bill, resolution, regulation, policy, program, grant, contribution, financial benefit or contract;
- the public office holder/institution; and
- any communication technique the individual used or expects to use, including grass-roots communications of the undertaking.

The Commissioner of Lobbying may follow up with any key decision maker referenced in a return to verify the information provided. Monthly reports on the undertakings are also required. Records of all returns and other documents are then retained in a registry which is open to public inspection and is available on the Internet.

(Lobbying Act (R.S.C., 1985, c. 44 (4th Supp.)), Secs. 5, 7, 9. Available at: <http://laws-lois.justice.gc.ca/eng/acts/L-12.4/page-1.html#h-1>).

Periodic tobacco industry reporting

To help ensure transparency of the tobacco industry's operations and activities, Article 5.3 implementing measures should impose comprehensive reporting requirements on the industry.¹⁹ Periodic reports should be required to contain information, whether compiled in one report or separate reports, mandated under both Article 5.3 and other FCTC Articles. The reports should be required to contain information that will help inform government programs and activities, such as:

- public awareness and education campaigns about tobacco-related harms and tobacco industry operations pursuant FCTC Article 12 and Guidelines Recommendation 1;
- monitoring the tobacco industry's expenditures on tobacco advertising, promotion, and sponsorship not banned or not yet banned, as required by FCTC Article 13.4(d);²⁰ and
- product regulation, including information on the contents and emissions of tobacco products, as required by Article 10.

Information that will help inform governments of the tobacco industry tactics and activities for undermining and interfering with tobacco control policies includes, for example:

- identity of, payments to, and activities of lobbyists, front groups and others working to further the interests of the tobacco industry;
- political and philanthropic contributions, including to whom and when made, and the amount;
- identity of, payments to, and activities of scientists, economists, trade experts, and others who conduct research, publish papers, or undertake other activities that support the industry's policy and public relations- related positions and activities ;
- dates, locations, agendas, speakers, and attendees of policy-related conferences, seminars, and other forums for which the tobacco industry provided funding or was involved in any manner in its planning, organizing, or execution;
- interactions, contacts, and communications with government; and
- other industry tactics and activities, such as those detailed by the World Health Organization.²¹

Suggested content for comprehensive tobacco industry reports is provided in the Appendix.

Information from these reports should be readily publicly available.²² Exclusions may be necessary, however, for information protected by law, if any.²³ Exclusions may also be necessary to prevent any misleading or promotional information that may be contained in the reports from being publicized.

Registration of tobacco industry lobbyists

IN PRACTICE

OECD LOBBYING DISCLOSURES

The OECD Principles require registration of lobbyists; information on lobbyists, lobbying, the ordering party and other beneficiaries, and target public offices; funding sources; and disclosure by the government regarding lobbyist consultation on legislative initiatives. (OECD Principles for Transparency and Integrity in Lobbying, Principles 5, 6).

The Guidelines provide that disclosure or registration of tobacco industry entities, affiliated organizations, and individuals acting on their behalf, including lobbyists, should be required.²⁴

OECD Principles for Transparency and Integrity in Lobbying provide an example of lobbyist registration and disclosure requirements.

Other transparency requirements

Other documentation and disclosure requirements on the part of government and the tobacco industry arise in the context of preventing conflicts of interest, discussed below.

➤ **Prevent tobacco-related conflicts of interest within government.**²⁵

Tobacco-related conflicts of interest within government can arise in a variety of circumstances, including but not limited to:

- undertaking current, recent past, or near future tobacco-related occupational activities;
- holding shares of tobacco company stock;
- solicitation or acceptance of contributions, gifts, favors, or perks from the tobacco industry by public office holders; and
- solicitation or acceptance of contributions from the tobacco industry by government institutions.

To meet their FCTC Article 5.3 obligations, governments should enact measures prohibiting conflicts of interest, imposing transparency requirements to help prevent conflicts of interest and shed light on them when they do occur. It will be important for governments to elaborate criteria for determining the circumstances under which conflicts of interest would be considered to exist, to establish specific safeguards to protect against them, and to remedy them if they nonetheless arise.

Measures for preventing and addressing conflicts of interest should include the following, at a minimum:

- *Prohibiting persons with tobacco-related conflicts from serving on government bodies, boards, commissions, or work groups.* Persons employed by the tobacco industry or with other disqualifying tobacco affiliations, such as described in the bullets below, should not be nominated to, allowed to serve on, or participate in any government body, board, commission, committee, advisory group, or other working group with responsibility for tobacco.²⁶ For example, this could include anyone, depending on the circumstances, who:²⁷
 - is or was engaging in any kind of occupational activity with the tobacco industry within a certain period of time;
 - is a contractor or consultant who has a conflict of interest with established tobacco control policies;²⁸
 - has tobacco holdings;²⁹ or
 - has some other affiliation with the tobacco industry that could create a conflict of interest.³⁰
- *Prohibiting persons with tobacco-related conflicts from serving on FCTC Conference of the Parties (COP) delegations.* Persons employed by the tobacco industry or with other disqualifying tobacco affiliations should not be nominated to, allowed to serve on, or participate in any way on delegations to meetings of the COP, its subsidiary bodies, or any other bodies established pursuant to decisions of the COP,³¹ or on any other international delegation where the scope of work includes policies or issues involving, relevant, or related to tobacco control.
- *Requiring applicants for government service to disclose any tobacco industry affiliation.* Any person who applies for a government position with responsibility for tobacco control or who bids on a government contract for work involving tobacco control should be required to disclose any tobacco industry occupational activities or other tobacco industry affiliations currently or within a specified previous period of time.³² Hiring or contracting with persons who have current or previous tobacco industry affiliations that could create a conflict of interest should be prohibited.

- *Prohibiting tobacco industry affiliation while serving in government.* Government officials, representatives, and employees should be prohibited, once in government service, from engaging in any occupational activity with the tobacco industry or having any other disqualifying tobacco industry affiliation while working in or with government in any position. Immediate reporting of any newly discovered conflict should be required and appropriate should be taken to eliminate the conflict, which may include termination of the government service or, in appropriate cases, correction of the conflict.
- *Regulating government officials' post-government employment with the tobacco industry.* Government officials, representatives, and employees with responsibility for setting or implementing tobacco control policies who intend to engage in occupational activity with the tobacco industry within a certain time after leaving government service should be required to disclose that intent.³³ In addition, these persons should be prohibited from working for the tobacco industry in specified positions within a certain period of time after leaving government.³⁴ For example, the United Nations Convention against Corruption (UNCAC) provides for imposing restrictions, for a reasonable period of time after leaving government service, on the professional and occupational activities of former public officials (defined broadly to include any persons who perform a public function or provide a public service) where the activities relate directly to the functions they held or supervised during their government tenure.³⁵ Canada's Conflict of Interest Code is an example of a domestic law containing such a restriction on public office holders.

IN PRACTICE

CLOSING THE REVOLVING DOOR IN CANADA

Canada's Conflict of Interest Code prohibits public office holders (defined as certain higher level government officials), within one year after leaving office (two years for Ministers) from accepting services contracts, appointment to a board of directors, or employment with an entity with which they had direct and significant official dealings during the period of one year immediately prior to the termination of their service in public office. (Conflict of Interest Code. Sec. 28. Available at: <http://pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=code/code-conflict-eng.htm#cataloguing>).

- *Prohibiting payments, services, gifts, and perquisites from the tobacco industry.* Government officials, representatives, and employees, whether or not they have responsibility for tobacco control, should be prohibited from accepting any payment, service, gift, or perquisite offered by any business in the tobacco industry.³⁶ Businesses in the tobacco industry should be prohibited from making such offers.³⁷ Any offer or acceptance of a tobacco industry payment, service, gift, or perquisite should be required to be reported by the tobacco industry and government persons involved.³⁸

IN PRACTICE

TOBACCO INDUSTRY POLITICAL CONTRIBUTIONS BAN IN TASMANIA

The Commonwealth Electoral Amendment (Tobacco Industry Donations) Bill 2011 pending in Tasmania, Australia amends the state's electoral law to make it unlawful for a tobacco manufacturer or wholesaler, or their agents, to make a gift to or on behalf of a political party, candidate, member of a group, or person or entity acting on their behalf. The law also makes it unlawful for a political party, candidate, member of a group, or person or entity acting on their behalf to accept such a gift. (Commonwealth Electoral Amendment (Tobacco Industry Donations) Bill 2011, Secs. 303AC and 303 AA. Available at: <http://www.comlaw.gov.au/Details/C2011B00102>).

- *Prohibiting tobacco industry contributions to government institutions or bodies.* Government institutions and bodies, whether or not they have responsibility for tobacco control, should be prohibited from accepting contributions of any kind, including financial and in-kind contributions, from the tobacco industry.³⁹ Businesses in the

tobacco industry should be prohibited from offering or providing such contributions.⁴⁰ Any offer or acceptance of a contribution should be required to be reported by the tobacco industry and the government institution or bodies involved.⁴¹

- *Prohibiting tobacco industry contributions to political parties, candidates, or campaigns.* The tobacco industry should be prohibited from offering or making contributions to political parties, candidates, or campaigns, subject to any applicable constitutional considerations, and these persons/entities should be prohibited from accepting contributions from a business in the tobacco industry. Disclosure of contributions should be required on the part of the person offering or making the contribution and on the part of the person receiving the offer or contribution.⁴²
- *Prohibiting government investment in any business in the tobacco industry.* Government institutions and bodies should be prohibited from investing in any business in the tobacco industry. If they have such holdings, they should be required to divest as soon as possible.^{43 44}
- **Prohibit government from entering into any partnerships or non-binding or unenforceable agreements with the tobacco industry, and from accepting any voluntary codes of conduct.**⁴⁵

The tobacco industry uses voluntary agreements and codes of conduct as a strategy for avoiding or delaying effective, enforceable regulatory measures.⁴⁶ Therefore, Governments should be prohibited from entering into any unenforceable agreement to achieve tobacco control policy objectives with any business in the tobacco industry.⁴⁷

- **Prohibit any government action that provides the tobacco industry with preferential treatment of any kind.**⁴⁸

Implementing measures should prohibit the government from granting special assistance, incentives, privileges, or benefits to tobacco companies to establish or run their businesses, including preferential tax treatment.⁴⁹ The Guidelines remind Parties that they should respect their commitments to tobacco control, suggesting that any such incentives, privileges, or benefits granted, even if applied to businesses at large, should not apply in the case of businesses in the tobacco industry.⁵⁰

- **Require the government to raise awareness about tobacco-related harms, the operations of the tobacco industry, and the tactics it uses to undermine effective tobacco control.**⁵¹

Awareness raising campaigns can be carried out in conjunction with FCTC Article 12 (Education, communication, training and public awareness) and should target all branches of government and the public, informing them, at a minimum, about:

- the wide range of tobacco-related harms and risks;
- front groups the tobacco industry uses for advancing its influence and interference tactics; and
- tobacco industry tactics for undermining public health and tobacco control policies, especially the tobacco industry's commercially driven use of "corporate social responsibility" activities to improve its image and to prevent, delay, and undermine effective tobacco control policies and programs.⁵²

- **Require the government to de-normalize and regulate the industry's so-called "corporate social responsibility" (CSR) activities.**

In addition to awareness raising activities about tobacco industry CSR activities, the government should prohibit tobacco industry CSR contributions. This prohibition should apply to both government

recipients, as discussed in the section on preventing conflicts of interest on the previous page, and to any other individual or entity pursuant to the ban on tobacco sponsorship under FCTC Article 13.2 and 13.4(f). As explained in the Article 13 Guidelines, para. 26, tobacco companies' financial or in-kind contributions to community, health, welfare, environmental or other organizations fall within the definition of tobacco sponsorship in FCTC Article 1(g). Accordingly, they should be prohibited as part of a comprehensive tobacco advertising, promotion, and sponsorship ban, because the aim, effect or likely effect of such a contribution is to promote a tobacco product or tobacco use either directly or indirectly.

Regulation of tobacco industry CSR should, at a minimum, prohibit public disclosure of tobacco industry CSR funding and other activities, except to the extent this information is legally required to be reported, such as in annual reports.⁵³

➤ **Apply all of the above measures equally in the case of state-owned tobacco industries.**⁵⁴

In the case of state-owned tobacco industries, implementing measures should require, at a minimum, separating regulatory functions related to tobacco control policy development and implementation from those related to overseeing or managing the tobacco business.⁵⁵ In addition, all other requirements and prohibitions contained in the Guidelines recommendations should apply equally to any state-owned tobacco industry.⁵⁶

Options for enacting or adopting Article 5.3 implementing measures

As a first step, an inventory of existing measures that might be applicable to implementing the Guidelines' recommendations should be made (e.g., lobbying and political contributions laws, anti-corruption and prevention of conflicts of interest laws and policies, right to information laws, and others). Whether these can be used to fulfill any part of Parties' Article 5.3 obligations or whether they can help inspire and inform the drafting of comprehensive Article 5.3-specific implementing measures can then be determined. Finally, whether specific Guidelines recommendations should be implemented through legal measures, policies, or both, would need to be determined. Most measures incorporating the Guidelines recommendations can take the form of either legal enactments or government policies/codes of conduct, or some combination of these. Recommendations that call for regulating the conduct of the tobacco industry or third parties, such as mandated tobacco industry reporting, prohibitions on contributions, and lobbying prohibitions or restrictions, will have to be enacted through legal measures to be enforceable, however.

Several considerations will inform the decision about whether to implement specific recommendations as legal or policy measures, or both. Legal measures can apply civil and criminal penalties such as fines and imprisonment, among others, as sanctions for violations of legal duties. Legal measures also may have the advantage of being capable of binding all government institutions and bodies across all branches of government, whereas it may not be possible for one governmental body to bind all branches or all ministries and other government bodies through policy measures, absent existing legislative authority to do so. Legal enactments tend to be subject to less discretion and tend to provide less flexibility in implementation, which may be desirable for some measures but undesirable for others. Finally, a high degree of political will is likely to be necessary for the enactment of legal measures.

Administrative policies, on the other hand, would likely be limited in their sanctioning authority to employment disciplinary actions, which may not have the same deterrent effect as the threat of monetary penalties or imprisonment. Each branch of government and/or each ministry or body may have to enact its own policies if there is no legal authority in place granting one overarching body with policy-making power over all of government. Policies are likely to allow more flexibility and discretion in

implementation, which may be desirable for measures for which grey areas in implementation are inherent.ⁱ Adopting policies may not require as much political will as enacting laws would, but a high degree of political will still would be necessary for effective implementation.

In all likelihood, a combination of legal enactments and policy measures will be required to implement many of the Guidelines recommendations in a way that makes the most sense under the circumstances in a given jurisdiction. Striking the most effective balance is best done by persons with in-depth knowledge of the legal and political environments and a clear understanding of the practical considerations at play.

4. IMPOSING LEGAL DUTIES OF COMPLIANCE

Legal duties of compliance should be placed on all businesses in the tobacco industry. This would include, but not be limited to, lobbyists and front groups working on behalf of the tobacco industry.⁵⁷ On the government side, most duties of compliance will only apply to government institutions, bodies, officials, representatives, and employees with responsibility for tobacco control. Some duties of compliance should apply government-wide, however. An example would be the prohibitions on accepting contributions and granting preferential treatment to the tobacco industry.

5. SPECIFYING THE BODY OR BODIES RESPONSIBLE FOR OVERSIGHT

The Guidelines provide that Parties should put in place enforcement mechanisms or, to the extent possible, use existing enforcement mechanisms to meet their obligations under Article 5.3 and the Guidelines.⁵⁸ The Guidelines also encourage Parties to establish mechanisms for bringing an action to court and to use complaint procedures such as an ombudsman system.ⁱⁱ Providing legal protection to persons who report violations or other wrongdoing, as recommended in Guidelines para. 34, should help ensure the effectiveness of any complaint mechanism established.

Many jurisdictions have established national tobacco control coordinating mechanisms pursuant to FCTC Article 5.2(a). These bodies

IN PRACTICE

HONG KONG'S ANTI-CORRUPTION COMMISSION AND ITS OPERATIONAL MECHANISMS

Hong Kong's Independent Commission Against Corruption (ICAC) is empowered with a strong, clear and effective legal framework and has three functional departments: investigation, prevention, and community relations. The investigation department investigates alleged law violations and refers violations for prosecution. The prevention department helps identify strategies for preventing corruption, funds studies of corruption, conducts seminars, and regularly reviews laws, suggesting revisions on the basis of conclusions from its studies. The community relations department builds awareness of the dangers of corruption through public campaigns and dramatizes the investigation and apprehension of corrupt officials.

The ICAC submits regular reports following clear procedural guidelines to Hong Kong's Special Regional Administrator, the ICAC Director, and three oversight committees. Each of these oversight committees corresponds to the three ICAC departments. In particular, the Operations Review Committee (ORC) examines reports of investigations and of specified cases, enforcing accountability through its supervisory and advisory role over investigations.

ICAC homepage is available at: http://www.icac.org.hk/en/about_icac/os/index.html. See also, John R. Heilbrunn Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption?. World Bank. Washington, D.C. 2004. Available at: <http://siteresources.worldbank.org/WBI/Resources/wbi37234Heilbrunn.pdf>.)

ⁱ For example, whether a particular relationship or activity gives rise to a conflict of interest may fall within a gray area.

ⁱⁱ An ombudsman is defined as "an official appointed to investigate individuals' complaints against a company or organization, especially a public authority." Oxford Dictionaries. Available at <http://oxforddictionaries.com/definition/ombudsman?q=ombudsman>.

may be able to serve an oversight function with regard to Article 5.3 implementation if they have independent status that can prevent them from being beholden to any one branch of government or ministry, if they have clear legal authority to conduct oversight activities and investigations, and if they have the technical, human, and financial capacity to undertake such a role.

Many jurisdictions also will have established anti-corruption commissions pursuant to the United Nations Convention against Corruption. Where they have been established, these commissions may already have responsibility for some portion of Article 5.3 implementing measures enacted or adopted, especially those addressing conflicts of interest. Otherwise, leading anti-corruption commissions, human rights commissions, and similar bodies may be a source of guidance for establishing an overarching Article 5.3 implementing body, with appropriate adaptation.

6. PROVIDING A RANGE OF DETERRENT SANCTIONS PROPORTIONATE TO THE SERIOUSNESS OF THE VIOLATION AND COMMENSURATE WITH THE DUTY OF THE VIOLATOR

The Guidelines are silent on sanctions for non-compliance with Article 5.3 implementing measures. For Article 5.3 measures enacted through law, the full range of civil and criminal penalties recommended in the Articles 8, 11, and 13 Guidelines should apply. For measures enacted by policies to govern public sector institutions and bodies and their officials, representatives, and employees, employment disciplinary action may be the only applicable penalty, unless penalties could be written into employment agreements and contracts. In either case, sanctions should be sufficiently large or stringent to deter violations and proportionate to the nature and seriousness of the violation and commensurate with duties of the violator. Sanctions should increase for repeat violations.

7. EMPOWERING AND ENABLING CIVIL SOCIETY TO MAKE COMPLAINTS AND TAKE LEGAL ACTION TO COMPEL COMPLIANCE WITH THE LEGAL REQUIREMENTS.

The Guidelines acknowledge that non-governmental organizations and other members of civil society not affiliated with the tobacco industry can play an essential role in monitoring the activities of the tobacco industry.⁵⁹ Consistent with provisions in the Articles 8, 11, and 13 Guidelines, civil society should be authorized to file complaints and bring legal actions.⁶⁰ Providing the public with access to the information required to be disclosed, reported, and published under the Article 5.3 implementing measures will help civil society fulfill a monitoring role. Information required to be reported and disclosed under Article 5.3 implementing measures should be made readily publicly available through a searchable government registry accessible through the internet, if possible, as well as upon reasonable request.

8. REQUIRING EVALUATION OF THE EFFECTIVENESS OF MEASURES ENACTED OR ADOPTED AND OF THEIR ENFORCEMENT

Consistent with the Articles 8 and 11 Guidelines, monitoring compliance and implementation, including enforcement, and requiring evaluation of the impact of Article 5.3 implementing measures should be undertaken and results should be made readily publicly available.⁶¹ Monitoring and evaluation will enable the government to identify and take or recommend action to correct any barriers to oversight and enforcement and any weaknesses in the measures.

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Appendix

Tobacco Industry Reporting Contents

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| <ul style="list-style-type: none">• tobacco product revenues and profits, broken down by region and sector and, in the case of tobacco manufacturers, by wholesaler and retailer;• registration or disclosure of tobacco industry entities and affiliated organizations and individuals acting on their behalf (Guidelines, Recommendation 5.1) including, location, address and corporate name of all tobacco and non-tobacco subsidiaries, affiliates, joint ventures, partners, suppliers, and licensees;• litigation in which the corporation or a subsidiary is a party;• legal violations committed by or prosecuted against the corporation or any of its officers;• corporate taxes owed and paid;• market share for all brands and brand families in all markets in the territory and globally;• specified information on tobacco product imports and on import and export partners and locations;• all activities undertaken or attempted to influence the formulation or implementation of any policy or legislation directly or indirectly related to tobacco control or public health;• the identification of lobbyists and lobbying firms and all other persons, including employees, used for the purpose of taking or attempting action to influence the formulation or implementation of any policy or legislation directly or indirectly related to tobacco control or public health, including issue advocacy advertising, along with an itemisation of all costs incurred and payments made in regard to these activities;• membership in any trade associations, payments made to any trade associations, and the purpose(s) of any such payments;• payments made to any persons that engaged in any advocacy concerning tobacco control or public health policy or legislation; | <ul style="list-style-type: none">• conferences, seminars, workshops, training events, and other forums related directly or indirectly to tobacco, tobacco products, or tobacco control organised or supported in whole or in part, along with any other required information about the forums as may be specified;• payments provided to scientists, researchers, journalists, and any other specified persons and the purposes of the payments;• payments, gifts, contributions of any kind, or perquisites made, given, or offered directly or indirectly to any official, representative, or employee of any government or semi- or quasi-governmental institution or body responsible for tobacco control and the purpose of the payment or contribution;• contribution or payment of any kind to any government or semi- or quasi-governmental institution, body or entity, and the purpose of the contribution or payment;• contacts initiated and interactions with any official, employee or representative of any governmental or semi- or quasi-governmental institution, body or entity responsible for tobacco control;• payments made to any political party, candidate, campaign, or any person acting on the entity or person's behalf;• the identity of all entities involved in the advertising, promotion and sponsorship of tobacco products, including advertising and production companies;• in the case of cross-border advertising, promotion or sponsorship of tobacco products originating from a Party's territory, the territory or territories in which it is intended to be, or may be, received;• the amount of financial or other resources used for the advertising, promotion or sponsorship of tobacco products⁶²; and• any other information as may be prescribed in regulations. |
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Endnotes

¹ Guidelines para. 12 “strongly urges” Parties to implement measures beyond those recommended in the Guidelines.

² Guidelines Guiding Principle 1.

³ FCTC Article 1(e).

⁴ FCTC Article 1(d).

⁵ Guidelines Recommendations 4.4 and 4.

⁶ This proposed definition is based on the OECD definition of “conflict of interest”. See OECD September 2005 Policy Brief. Available at <http://www.oecd.org/dataoecd/51/44/35365195.pdf>.

⁷ Guidelines para. 11.

⁸ Guidelines paras. 7, 10.

⁹ Guidelines para. 10.

¹⁰ Guidelines Recommendation 2 (Establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur).

¹¹ Guidelines Recommendation 2.1.

¹² Guidelines para. 20.

¹³ See e.g., World Health Organization (WHO). Tobacco industry interference with tobacco control. Geneva: WHO; 2009. Available at: http://www.who.int/tobacco/resources/publications/tob_ind_int_cover_150/en/index.html. See also, Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization. A Report of the Committee of Experts on Tobacco Industry Documents. July 2009. Available at: http://www.who.int/tobacco/en/who_inquiry.pdf.

¹⁴ Guidelines Recommendation 3.4.

¹⁵ Guidelines Recommendations 3, 3.2, and 6.2.

¹⁶ Guidelines Recommendation 2.2 (Establish measures to ensure the transparency of government-tobacco industry transactions; Recommendation 5 (Apply measures to ensure that all operations and activities of the tobacco industry are transparent); Guidelines Recommendation 4.1 (Mandate a policy on the disclosure and management of conflicts of interest).

¹⁷ Guidelines Recommendation 2.2. Public participation or attendance and prior notice would not be possible in all cases, for example, with respect to compliance inspections. The inspection records should be made publically accessible at the appropriate time after the inspection, however.

¹⁸ A requirement like this applicable to government can be inferred from the language in Guidelines Recommendation 4.1, which provides, “Parties should mandate a policy on the disclosure *and management of conflicts of interest...*” (emphasis added). A similar requirement applicable to the tobacco industry can be inferred from the language in Guidelines Recommendation 5.2, which provides, “Parties should introduce and apply measures to ensure that all operations and activities of the tobacco industry are transparent.”

¹⁹ Guidelines Recommendation 5 (Require that information provided by the tobacco industry be transparent and accurate); Guidelines Recommendation 5.3 (Require rules for the disclosure or registration of the tobacco industry entities, affiliated organizations and individuals acting on their behalf, including lobbyists); Guidelines Recommendation 5.2 (Require the tobacco industry and those working to further its interests to periodically submit information on tobacco production, manufacture, market share, marketing expenditures, revenues and any other activity, including lobbying, philanthropy, political contributions and all other activities not prohibited or not yet prohibited under Article 13 of the Convention (Require that information provided by the tobacco industry be transparent and accurate); Guidelines Recommendation 5.5 (Implement effective measures to ensure public access, in accordance with Article 12(c) of the Convention, to a wide range of information on tobacco industry activities as relevant to the objectives of the Convention, such as in a public repository).

²⁰ See also, Article 13 Guidelines, para. 41.

²¹ See e.g., World Health Organization (WHO). Tobacco industry interference with tobacco control. Geneva: WHO; 2009. Available at: http://www.who.int/tobacco/resources/publications/tob_ind_int_cover_150/en/index.html. See also, Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization. A Report of the Committee of Experts on Tobacco Industry Documents. July 2009. Available at: http://www.who.int/tobacco/en/who_inquiry.pdf.

²² Guidelines Recommendation 5.5; Article 13 Guidelines, para. 42.

²³ Guidelines, footnote to Recommendations 5.1 and 5.2.

²⁴ Guidelines Recommendation 5.3.

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- ²⁵ Guidelines Recommendation 4 (Avoid conflicts of interest for government officials and employees).
- ²⁶ Guidelines Recommendations 4.8 provides that “Parties should not allow any person employed by the tobacco industry or any entity working to further its interests to be a member of any government body, committee or advisory group that sets or implements tobacco control or public health policy.”
- ²⁷ Here we are going beyond the Guidelines by including persons with any other disqualifying tobacco affiliations, exemplified by the bulleted items based on other examples of conflicts of interest provided in the Guidelines under Recommendation 4.
- ²⁸ Guidelines Recommendation 4.3. This recommendation addresses avoiding conflicts of interest in awarding contracts. It should apply as well to service on government boards or other working groups.
- ²⁹ Guidelines Article 4.6. Conflict of interest laws/policies in some jurisdictions impose a threshold amount of stock holdings before a conflict of interest prohibition would be triggered.
- ³⁰ For example, officers or board members of companies that have close or extensive business relationships with the tobacco industry might be determined to have conflicts of interest that could disqualify them. Similarly, it might be determined that close family members with tobacco industry affiliations could create a conflict of interest.
- ³¹ Guidelines Recommendation 4.9. Here, again, we are going beyond the Guidelines by including international forums relevant or related to tobacco control and persons with any other disqualifying tobacco affiliations. Consideration should be given to imposing broader disqualifying criteria, such as those discussed in the sub-section addressing service on government bodies, boards, or commissions.
- ³² Guidelines Recommendations 4.5, 4.6. These recommendations require disclosure of current or previous occupational activity with and direct investment in the tobacco industry.
- ³³ Guidelines Recommendation 4.4.
- ³⁴ Though not specifically provide in the Guidelines, restricting post-government employment is consistent with Guidelines Recommendation 4.2 which provides that parties should mandate a policy on disclosure *and* management of conflicts of interest applicable to all persons involved in setting and implementing tobacco control policies.
- ³⁵ United Nations Convention against Corruption. Art. 12(2)(e). Available at: http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf.
- ³⁶ Guidelines Recommendation 4.10.
- ³⁷ FCTC Article 13.2 and 13.4(f).
- ³⁸ Although government disclosure of offers or acceptance of gifts is not specifically provided in the Guidelines, it can be implied under Recommendation 4.1 for a policy on the disclosure and management of conflicts of interest.
- ³⁹ Recommendation 6.4. This would not apply to compensations due to legal settlements or mandated by law or legally binding and enforceable agreements.
- ⁴⁰ FCTC Article 13.2 and 13.4(f).
- ⁴¹ Although government disclosure of offers or acceptance of tobacco industry contributions is not specifically provided in the Guidelines, it can be inferred under Recommendation 4.1 for a policy on the disclosure and management of conflicts of interest.
- ⁴² Guidelines Recommendations 4. 11, 5.3; FCTC Article 13.2; FCTC Article 13 Guidelines, paras. 26 and 28.
- ⁴³ Guidelines Recommendation 7.2.
- ⁴⁴ State owned tobacco companies are addressed in the discussion under Recommendation 8.
- ⁴⁵ Guidelines Recommendations 3 and 6.2.
- ⁴⁶ By establishing its own voluntary codes, the tobacco industry has been able to successfully argue that government regulations, therefore, are not necessary. These codes, according to an internal Phillip Morris document, “can be used as both a lobbying lever and an argument against not [sic] introducing formal legislation.” Philip Morris. Pakistan- Meeting in London, 1994. Available at: <http://legacy.library.ucsf.edu/tid/dzz32e00>.
- ⁴⁷ Guidelines Recommendations 3.1, 3.3.
- ⁴⁸ Guidelines Recommendations 7, 8
- ⁴⁹ Guidelines Recommendations 7.1,7.3.
- ⁵⁰ Guidelines Recommendation 29.
- ⁵¹ Guidelines Recommendations 1, 6.
- ⁵² See, for example, Oliver J. BAT Industries (1998). Note to Heather Honour from Julian Oliver, re corporate responsibilities programme. Bates number 322121448. Available at <http://legacy.library.ucsf.edu/tid/yoz82a99/pdf>.
- ⁵³ Guidelines Recommendation 6.3.

⁵⁴ Guidelines Recommendation 8 (Treat State-owned tobacco industry in the same way as any other tobacco industry).

⁵⁵ Guidelines Recommendation 8.2.

⁵⁶ This would be subject to the exception noted in Recommendation 4.7 with regard to government financial interests in the tobacco industry.

⁵⁷ Guidelines Recommendation 11.

⁵⁸ Guidelines para. 31.

⁵⁹ Guidelines para. 33.

⁶⁰ Article 8 Guidelines para. 45; Article 11 Guidelines para. 65; Article 13 Guidelines paras. 66, 67.

⁶¹ Article 8 Guidelines paras. 46-48; Article 11 Guidelines paras. 66-69, 71.

⁶² Pursuant to FCTC Article 13 Guidelines.