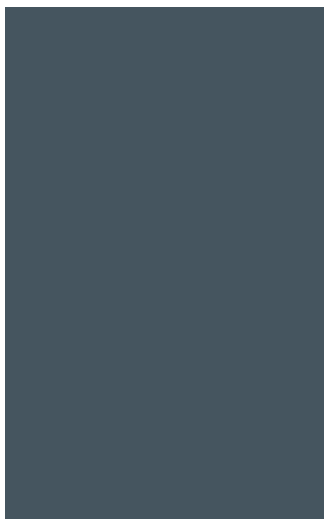


# THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL

AN IMPLEMENTATION GUIDE FOR U.S. STATE AND LOCAL OFFICIALS



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TOBACCO CONTROL  
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INTRODUCTION

Tobacco use is still the number one preventable cause of death in the U.S., killing about 480,000 people each year; it is responsible for over 20% of all American deaths. Tobacco kills about half of its long-term users. With approximately 44 million adult smokers, we can expect the death toll to continue for decades to come. And every day, about 3,200 children smoke their first cigarette. Over 1,000 of those children will eventually be killed by tobacco.<sup>1</sup>

The United States has made serious strides in combating the death and disease caused by tobacco. The federal government, states, and localities have enacted many effective laws and programs, severely limiting cigarette advertising, banning smoking in public places, and raising taxes on cigarettes. These actions have led to a decrease in cigarette consumption and averted many premature deaths. We’ve come a long way, but there is still a lot left to do.

To combat this epidemic, countries around the world negotiated and then, in 2003, adopted the first international treaty on health, the Framework Convention on Tobacco Control (FCTC). Since that time, 178 countries and the European Union have become party to the FCTC,<sup>2</sup> and countries all over the globe have begun implementing its life-saving measures. The FCTC sets out specific steps for governments on how to address tobacco use, including how to adopt tax and price measures to reduce tobacco consumption; ban or restrict tobacco advertising, promotion and sponsorship; create smoke-free work

1 U.S. Department of Health and Human Services, The Health Consequences of Smoking- 50 Years of Progress: A Report of the Surgeon General (2014), available at <http://ash.org/wp-content/uploads/2014/01/full-report.pdf> [hereinafter SG Report 2014].  
2 Action on Smoking & Health, A half Century of Avoidable Death: A Global Perspective on Tobacco in America 5 (2014), available at [http://ash.org/wp-content/uploads/2014/06/US-TOBACCO-REPORT\\_FNL-WEB1.pdf](http://ash.org/wp-content/uploads/2014/06/US-TOBACCO-REPORT_FNL-WEB1.pdf). [hereinafter ASH Avoidable Death Report].

and public spaces; put prominent health warnings on tobacco packages; and limit tobacco industry interference when setting public health policies. In addition to the FCTC, the parties have drafted guidelines for implementation for many of the relevant articles, including Articles 5.3, 8, 12, 13, and 14. These guidelines were designed to give countries assistance when implementing the FCTC, to make sure the measures contained in the treaty are implemented as effectively as possible. The FCTC measures have had an immensely positive effect in countries that have ratified and implemented the treaty.

The United States negotiated and signed the FCTC on May 10th, 2004 but unfortunately, the U.S. has not yet ratified the treaty and is not a party to the FCTC.<sup>3</sup> Action on Smoking and Health strongly encourages the United States to become a party. However, regardless of whether the United States ever ratifies the treaty, the FCTC still provides excellent lessons and examples that federal, state, and local governments can adopt in order to further protect the health of the U.S. population.

Now that most nations of the world have become parties to the FCTC, the focus on implementation is at the national level. In federal systems such as the United States, significant sovereign powers reside with state governments, which to varying degrees empower local governments to regulate in the public interest. While tribes and territories are not the target audience for this guide due to the wide variance in laws and sovereign status, many of the lessons would be applicable to those jurisdictions as well. This guide and the associated [database](#) are intended to help state and local officials adopt effective strategies, based on the FCTC, in their home jurisdictions.

3 ACTION ON SMOKING & HEALTH, *supra* note 2, at 5.

An Overview of Relevant FCTC Articles

When discussing the FCTC, it is very helpful to have an overview of the articles<sup>4</sup> and a description of what each article (and its guidelines<sup>5</sup> ) covers. This chart covers the Articles that are discussed in this guide; please feel free to refer back to it at any time.

- Article 5.3
- Article 5.3 of the FCTC requires parties to defend their public health policies from tobacco industry interference. According to Article 5.3, parties should not invest in the tobacco industry, partner with the tobacco industry, treat tobacco corporations as “stakeholders” in public policy, or accept so-called corporate social responsibility schemes.<sup>6</sup>
- Article 6
- Article 6 encourages parties to implement price and tax measures to reduce the demand of tobacco. Article 6 commits parties to treat tobacco taxation as a health measure, not simply as a fiscal measure.<sup>7</sup>
- Article 8
- Article 8 obliges parties to adopt effective national smoke free legislation that requires 100% smoke-free environments in all indoor public places, indoor workplaces, and on public transport. Article 8 also asks parties to actively promote smoke free air laws at the sub-national level; i.e. state and local. The Guidelines urge parties to implement smoke free air laws in outdoor environments where there is a risk of exposure (beaches, parks, etc).<sup>8</sup>
- Article 12
- Article 12 provides for education, communication, training, and public awareness measures. In order to effectively implement Article 12, the guidelines suggest raising public awareness by creating a wide range of education, communications, and training programs on tobacco control issues.<sup>9</sup>
- Article 13
- Article 13 requires that all parties ban all tobacco advertising, promotion, and sponsorship (TAPS). Countries, such as the United States, who are limited by their constitution, must restrict TAPS as comprehensively as legally possible.<sup>10</sup>
- Article 14
- Article 14 requires parties to promote the cessation of tobacco use and provide treatment for tobacco dependence. Article 14 also states that tobacco dependence programs should be implemented in concordance with other tobacco control measures and that treatment should be accessible and affordable.<sup>11</sup>
- Article 16
- Article 16 prohibits the sale of tobacco to and by minors. Article 16 also prohibits or limits sales from vending machines, accessibility at point of sale, manufacturing candy or toys in the form of tobacco products, and single/ small pack cigarette sales.<sup>12</sup>
- Article 17
- Article 17 provides that Parties shall promote, as appropriate, economically viable alternatives for tobacco growers and workers.<sup>13</sup>
- Article 18
- Article 18 requires the parties to do their part to protect the environment with respect to tobacco cultivation and manufacture. This also extends to protecting the health of people in regard to the environment.<sup>14</sup>

4 World Health Organization Framework Convention on Tobacco Control, May 21, 2003-June 29, 2004, WHA56.1, 2302 U.N.T.S. 166, 42 I.L.M. 518. [hereinafter FCTC].  
5 WHO Framework Convention on Tobacco Control Guidelines for Implementation (2008) [hereinafter WHO Guidelines], available at [http://apps.who.int/iris/bitstream/10665/80510/1/9789241505185\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/80510/1/9789241505185_eng.pdf).  
6 Corporate Accountability International, The Global Tobacco Treaty- Protecting Against Tobacco Industry Interference, [http://www.stopcorporateabuse.org/sites/default/files/resources/article\\_5.3\\_fact\\_sheet\\_english\\_corporate\\_accountability\\_international.pdf](http://www.stopcorporateabuse.org/sites/default/files/resources/article_5.3_fact_sheet_english_corporate_accountability_international.pdf) (last visited Aug. 28, 2014).  
7 Campaign for Tobacco Free Kids, Overview of Key FCTC Articles and their Implementing Guidelines, [http://global.tobaccofreekids.org/files/pdfs/en/fctc\\_implementation\\_guide.pdf](http://global.tobaccofreekids.org/files/pdfs/en/fctc_implementation_guide.pdf) (last visited Aug 28, 2014).  
8 *Id.*  
9 *Id.*  
10 *Id.*  
11 *Id.*  
12 *Id.*  
13 FCTC, *supra* note 4.  
14 *Id.*

Many of the most crucial advancements in tobacco control in the U.S. began at the local level. **National ratification of the FCTC is not a prerequisite for greater action.**

INCREMENTAL APPROACH/  
PRIORITY LIST

Tobacco control laws exist at the federal, state, and local level, and sometimes those laws conflict. Which law takes precedence? Where should a state or locality start? This guide intends to answer these questions.

PREEMPTION

Before beginning on any new tobacco control programs, several important issues must be considered, and preemption may be the most important. The power of any lawmaking body is best understood in two parts. The first part is the power that has been *granted* to the particular body. The second part is whether that power has been *limited or preempted* by any higher authority. Lawmaking power in the United States occurs at multiple levels, and in general, lawmaking bodies at each level have the authority to limit, or even override, the laws made by the levels below. The U.S. Constitution specifies how lawmaking power is divided between the United States Congress and the individual states.<sup>15</sup> Congress is the lawmaking body of the federal government, and generally, its power to make law is limited only by the U.S. Constitution. However, powers reserved to the states can be limited by the U.S. Constitution, federal laws, federal

regulations, and by the state’s own constitution. Finally, the lawmaking power of local governments such as cities, counties, towns, and villages is generally granted by the state. This power may be limited by the laws, regulations, and constitutions set by any of the higher levels of government. Preemption refers to the precedence of state law over local law, or of federal law over state law.

This is an ongoing issue for tobacco control, because **preemption weakens the authority of the lower level of government.**

The Supreme Court has held that Congress has the authority to preempt state law and that this preemption can be express or implied.<sup>16</sup> Express preemption is when a law clearly states that it takes precedence over the lower law; implied preemption can be determined by a

court even if the law does not explicitly state that it takes precedence.

**Tobacco corporations have used preemption as a strategy to combat tobacco control programs.** Documents that were uncovered during the tobacco Master Settlement Agreement (MSA) quote a Philip Morris executive as saying “*while we’re not married to any particular form of preemption language, we’re dead serious about achieving preemption in all 50 states.*”<sup>17</sup>

16 See, e.g., *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76–77 (2008) (noting that courts interpreted the Supremacy Clause, U.S. CONST. art. VI, cl. 2, to permit Congress to preempt state or local law, either expressly or impliedly).  
17 Americans for Non-Smoker’s Rights, The Tobacco Industry on Why It Needs Preemption, [http://articles.mcall.com/2002-06-19/opinion/3402583\\_1\\_tobacco-industry-tobacco-control-master-tobacco-settlement-funds](http://articles.mcall.com/2002-06-19/opinion/3402583_1_tobacco-industry-tobacco-control-master-tobacco-settlement-funds) (last visited July 31, 2014).

In a 2009 report, several groups (including the American Cancer Society, the American Heart Association, the American Lung Association, the American Public Health Association, and Americans for Non-smokers Rights) strongly stated that law makers should “never agree to preemption. If you are working on a law at the state or county level, the opposition may try to add a preemption provision to your language. **Preemption is unacceptable and should be avoided at all costs.**”<sup>18</sup> Because it can be challenging to find all of the places in state law where local governments have been granted power to act, consultation with a local attorney is recommended.

ENFORCEMENT

Enforcement is another essential aspect to consider in drafting tobacco control laws. A law may be perfectly drafted, with excellent aspirations, but if it is not enforced, it will have no effect on public health. Effective enforcement varies widely across each article. For example, if a state or locality banned coupons under Article 6, then the enforcing agency would need to prevent coupons from being valid in that city or state and ensure that store owners were not accepting them. If a locality or state were to include electronic cigarettes in its smoke free air laws, effective enforcement would be a fine or arrest for vaping in those places. The right mechanism for enforcement can vary by state, county, city, or by type of law.

First, the enforcing agency should be “completely free of any connection to the tobacco industry, competent and sufficiently trained to enforce the legislation effectively, and committed to its success.”<sup>19</sup> After those

18 Tobacco Control Legal Consortium, Fundamentals of Smokefree Workplace Laws, (2009), <http://publichealthlawcenter.org/sites/default/files/tclc-slides-Consortium-Preemption-Webinar-2013.pdf> (last visited Aug. 1, 2014).  
19 World Health Organization, Tobacco Free Initiative, Implementation and Enforcement of Legislation, <http://www.who.int/tobacco/control/legislation/implementation/en/> (last visited Aug. 1, 2014).

conditions are met, the locality passing the law must determine which organization would be in the best position to enforce the law. For some, it will be the commissioner of public health. For others, it may be the police department.

The next essential step for enforcement is funding. The WHO suggests that “partial funding for enforcement could potentially come from fining violators, licensing fees, filing fees, or earmarked tobacco tax revenues.” **Without enforcement, the impact of any new tobacco control law is greatly diminished.**

Preemption and enforcement will be essential issues to consider for any FCTC measures that states and localities choose to adopt. This guide will discuss in depth how and why states can and should implement and enforce legislation to help prevent tobacco industry interference, raise tobacco prices, protect citizens from exposure to tobacco smoke, effectively educate the public, limit tobacco advertising, promote cessation, and limit youth access to tobacco products. These are the FCTC measures discussed in this guide: Article 5.3 (Protection of Public Health Policies from Tobacco Industry Interference), Article 6 (Price and Tax Measures), Article 8 (Protection from Exposure to Tobacco Smoke), Article 12 (Education, Communication, Training, and Public Awareness), Article 13 (Tobacco Advertising, Promotion and Sponsorship), Article 14 (Reduction Measures Concerning Tobacco Dependence and Cessation), and Article 16 (Sales to and by Minors).

Several articles of the FCTC have not been addressed in this guide, namely Articles 9, 10, 11, and 15. Articles 9 and 10 discuss disclosure and the regulation of the contents of tobacco products. Article 11 discusses the packaging and labeling of tobacco products. Article 15 covers the illicit trade of tobacco products,

15 U.S. Const. art. 1.

which is outside the scope of state and local authority. These are all areas that have been “occupied” by the federal government, which means that federal laws in these areas take precedence over state and local laws. In addition, the 2009 Family Smoking and Tobacco Prevention Act<sup>20</sup> gave the Food and Drug Administration authority over these areas. States and localities cannot legislate on these issues, and therefore Articles 9, 10, 11, and 15 have not been included. Along with this guide, ASH has created a [database](#) of legal resources, including case law and sample legislation from states, localities, and other countries to aid lawmakers and public health officials. Please feel free to utilize this resource; the [database](#) is available [here](#). In this way, we can learn from the successes of FCTC measures being implemented around the world and make strides toward eradicating the addiction, disease, and death associated with tobacco use in the United States.

## ASPIRATIONAL COMMITMENTS

One step that a state or local government can take is to pass a resolution in support of the FCTC. This is called symbolic ratification or an “aspirational commitment.” States, counties, cities, and towns have undertaken this type of resolution for several other international treaties, including the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Universal Declaration on Human Rights.<sup>21</sup>

While largely symbolic and not legally binding, resolutions and proclamations offer an opportunity to articulate the valuable role of state and local government in tobacco control and to emphasize that the standards set out in the FCTC are local priorities. For sample resolutions on aspirational commitments, please see our [database](#).

<sup>20</sup> Family Smoking Prevention and Tobacco Control Act, § 904, Pub. L. No. 111-131, 123 Stat. 1776, 1790 (2009) (codified at 21 U.S.C. § 387d).

<sup>21</sup> To see specific states and localities that have undertaken aspirational commitments and model language, please visit our database. ([ash.org/USFCTCImplementationGuide](http://ash.org/USFCTCImplementationGuide)).

## PROTECTION OF PUBLIC HEALTH POLICIES FROM TOBACCO INDUSTRY INTERFERENCE *WHO FCTC ARTICLE 5.3*

## WHY DO IT?

Annually in the U.S., the tobacco industry contributes over \$1.6 million to federal candidates and spends approximately \$16.6 million lobbying Congress.<sup>22</sup> This money buys the tobacco industry access to government officials and influence over laws. This is a serious problem, because there is **“a fundamental and irreconcilable conflict between the tobacco industry’s interest and public health.”**<sup>23</sup> A WHO report provides a particularly poignant quote on this point. “Tobacco use is unlike other threats to global health. Infectious diseases do not employ multinational public relations firms. There are no front groups to promote the spread of cholera. Mosquitoes have no lobbyists.”<sup>24</sup> Industries that threaten public health should have no control over public health policy.

In 2012, California provided an example of the power of industry interference. During the presidential primary, there was an additional question on the ballot about raising the cigarette tax by \$1.00 to fund cancer research and tobacco control efforts. As will be discussed in the Article 6 section to come, it is widely accepted in the public health community that **tax increases are one of the most effective ways to decrease smoking.** In a poll taken a few weeks before the 2012 vote, most Californians supported the increase. In the ensuing weeks, the tobacco industry led a

## Tobacco Industry Interference Around the World

The tobacco industry interferes with policy in many ways, both domestically and internationally, using a wide range of tactics. Some of these tactics include:

- Subverting legislation and exploiting loopholes
- Demanding a seat at the table
- Promoting voluntary regulation
- Drafting and distributing tobacco-friendly sample legislation
- Promoting and funding so-called “youth smoking prevention” programs
- Challenging government timelines for implementing laws
- Attempting to bribe legislators
- Gaining favor by bankrolling government health initiatives on other issues
- Providing funds directly to government regulatory bodies
- Taking advantage of governments’ financial interest in tobacco
- Hiding behind farmers, retailers, and other interest groups with a more favorable public image
- Pushing corporate social responsibility PR efforts<sup>25</sup>

22 Campaign for Tobacco Free Kids, Toll of Tobacco in the United States of America, <http://www.tobaccofreekids.org/research/factsheets/pdf/0072.pdf> (last visited Aug. 1, 2014).

23 WHO Guidelines, *supra* note 5.

24 WHO Report of the Committee of Experts on Tobacco Industry Documents (2000), available at [http://www.who.int/tobacco/media/en/who\\_inquiry.pdf](http://www.who.int/tobacco/media/en/who_inquiry.pdf).

25 Corporate Accountability International, Tobacco Industry Interference In Health Policy and Measures in the Global Tobacco Treaty to Prevent It (2007) available at <http://www.stopcorporateabuse.org/sites/default/files/resources/report-on-fctc-article-5.23-english-2007.pdf>.

\$46.8 million dollar campaign to defeat the measure. Proposition 29 failed by a slim margin, and the tobacco tax was not increased.<sup>26, 27</sup>

## FCTC ASPIRATION

When the FCTC was drafted, it attempted to limit industry interference in Article 5.3. That article reads, “In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.”<sup>28</sup>

## BEST PRACTICE

Because Article 5.3 covers a broad span of activities, best practices can vary widely. Oftentimes, practices around the world are limited by constitutional requirements. For example, in Mauritius, tobacco industry corporate social responsibility has been banned completely. However, such a ban would not likely be upheld in the U.S. Therefore, several options under Article 5.3 are discussed below.

### LOBBYING

One option under Article 5.3 is to restrict lobbying. While a complete ban on lobbying is prohibited in the U.S.<sup>29</sup>, there are measures that states can undertake to help prevent tobacco industry interference.

For example, states can focus on improving lobbying disclosure. The State Integrity Investigation recently gave California an A

26 Marisa Lagos, Prop. 29 Cigarette Tax Backers Concede Defeat, SF GATE, June 22, 2012 available at <http://www.sfgate.com/politics/article/Prop-29-cigarette-tax-backers-concede-defeat-3656640.php>.

27 Adam Nagourney, A \$1 Cigarette Tax Starts a \$47 Million Brawl in California, N.Y. TIMES, June 3, 2012 available at <http://www.nytimes.com/2012/06/04/us/in-california-a-battle-over-a-plan-for-1-a-pack-cigarette-tax.html>.

28 FCTC, *supra* note 4.

29 Lobbying is protected by the 1<sup>st</sup> amendment- see Public Affairs Council, Explaining Lobbying, <http://pac.org/ethics/Response-to-Abramoff-Scandal> (last visited Aug. 1, 2014).

grade in this area. This grade included six sub parts:

- Is there a clear definition of lobbyist in the state?
- Are lobbyists required to register with the state?
- Are lobbyists required to disclose spending?
- Are lobbyists’ employers or principals required to disclose spending?
- Can citizens access the information reported from lobbyists to the state government?
- Is there effective monitoring of lobbying disclosure requirements?<sup>30</sup>

All of these are important in order to ensure transparency in the lobbying process. Definitions should be clear, and the law should be enforced. If tobacco companies are going to be allowed to lobby, the rules should be clear, and disclosures should be frequent and complete. The ASH [database](#) includes documents that further discuss lobbying disclosure.

### BAN OR LIMIT SO-CALLED “CORPORATE SOCIAL RESPONSIBILITY” SCHEMES

The Article 5.3 Guidelines also recommend a ban on “corporate social responsibility” (CSR) programs sponsored by tobacco corporations. Corporate social responsibility refers to philanthropy that corporations undertake, in an effort to be better corporate citizens. However, in the case of the tobacco industry, it is often simply another form of marketing. The WHO refers to tobacco CSR as **“an inherent contradiction.”**<sup>31</sup> You can read more about tobacco CSR around the world on ASH’s tobacco marketing webpage ([ash.org/tobacco-marketing-map/](http://ash.org/tobacco-marketing-map/)).

In 2008, Mauritius passed a law that banned tobacco industry CSR as well as other forms of marketing.<sup>32</sup> According to the International

30 State Integrity, California Lobbying Disclosure, [http://www.stateintegrity.org/california\\_survey\\_lobbying\\_disclosure](http://www.stateintegrity.org/california_survey_lobbying_disclosure) (Last visited Aug. 1, 2014).

31 WHO, Tobacco Industry and Corporate Social Responsibility (2004) available at [http://www.who.int/tobacco/communications/CSR\\_report.pdf](http://www.who.int/tobacco/communications/CSR_report.pdf).

32 Public Health Act, Section 193-194 (2008) (Mauritius) available at [http://www.who.int/fctc/reporting/Annex2\\_Public\\_Health\\_Regulations\\_2008.pdf](http://www.who.int/fctc/reporting/Annex2_Public_Health_Regulations_2008.pdf).

Tobacco Control Evaluation Project (ITC), there is evidence “that restrictions on advertising, promotion and sponsorship have been effective in reducing smokers’ exposure to the marketing of tobacco products via advertising campaigns, industry sponsored events, and brand stretching.”<sup>33</sup>

While a complete ban would be prohibited by the U.S. Constitution, states can enforce some limits on CSR. Maryland, for example, passed the first “benefit corporation” legislation in the United States in the spring of 2010<sup>34</sup> and several other states have recently adopted or are considering similar legislation.<sup>35</sup> These laws encourage socially responsible corporations to incorporate in the state. In order to be eligible, the corporation must have “a material positive impact on society and the environment, as measured by a third-party standard, through activities that promote some combination of specific public benefits.”<sup>36</sup> Tobacco corporations should be expressly banned from receiving these benefits.

DIVESTMENT

Several states and localities have already complied with one aspect of Article 5.3; divestment. Divestment laws require that no state funds are used to invest in companies that make a certain percentage of revenue from tobacco. The laws require that if the states already invest in these companies, the state divest (or sell) those interests within a certain time frame. Internationally, Norway provides an excellent example. In 2010, Norway fully divested its national government pension fund from tobacco. The

33 The International Tobacco Control Policy Evaluation Project, Mauritius Report (2012) available at [http://www.itcproject.org/files/ITC\\_Mauritius\\_NR\\_W3-Oct19v27-web.pdf](http://www.itcproject.org/files/ITC_Mauritius_NR_W3-Oct19v27-web.pdf).  
34 Md. Code Ann., Corps & Ass'ns §§5-6C-01 to 08 (2010).  
35 Vt. Stat. Ann. tit. 11, § 21 (2010); S. 7855, 2009 Leg., 233<sup>rd</sup> Sess. (N.Y. 2010).  
36 Md. Code, *supra* note 34.

total divestment was over \$2 billion.<sup>37</sup> Within the U.S., seven states - Maryland, New York, Florida, Massachusetts, Vermont, Minnesota, and California - have undertaken either full or partial divestment from tobacco. Several cities and counties have done this as well, including Philadelphia, San Francisco (City and County) and LA County.<sup>38</sup> **This is an excellent tobacco control option for localities**, as it is not subject to preemption and helps to prevent tobacco industry interference and conflicts of interest in local governments. In order to avoid financial conflicts of interest when creating public health policy, individuals in public office should divest as well. The ASH [database](#) has sample legislation available for states and localities considering divestment.

PREEMPTION

There are many federal and state laws that touch on the areas identified in the guidelines for Article 5.3, including those that address transparency, disclosures, open government, and conflicts of interest. Some of these laws might prohibit local regulations to protect public health policies from the vested interests of the tobacco industry, especially in states with strong, uniform, open government laws. In states which grant strong power to localities, local governments are likely to have more leeway in establishing strong ethics codes and conflict of interest laws to encourage transparency. The most significant constraints to implementation of Article 5.3 will likely come from the state and federal constitutions protecting speech and access to government. Generally, laws which limit tobacco industry access to government and

37 Framework Convention Alliance, Norway Divests \$2 Billion From Tobacco Companies, <http://www.fctc.org/publications/media-releases-blog-list-view-of-all-24/industry-interference/261-norway-divests-2-billion-from-tobacco-companies> (last visited Aug. 21, 2014).  
38 Council For Responsible Public Investment, Factsheet- Public Funds With Restrictions on Tobacco Investments, <http://www.socialfunds.com/education/pdf/public.pdf> (last visited Aug. 1, 2014).

CROP DIVERSIFICATION/ BUY OUT  
WHO FCTC ARTICLE 17

Article 17 of the FCTC encourages parties to provide support for economically viable alternative activities to tobacco cultivation, in order to help workers, growers, and sellers find a financially viable alternative to tobacco. This can be considered under Article 5.3 because it is essentially another form of divestment - removing government’s financial interest in tobacco.

The state of Maryland provides an example of a diversification program. The Maryland Cigarette Restitution Fund (CRF) was established using funds from the Master Settlement Agreement (MSA).<sup>39</sup> The tobacco buyout component is a voluntary program that provides funds to (1) support all eligible Maryland tobacco growers who choose to give up tobacco production forever while remaining in agricultural production; and (2) restrict the land from tobacco production for 10 years, should the land transfer to new ownership.<sup>40</sup>

The Maryland Tobacco Buy Out was an overwhelming success. 86% of the 1998 eligible tobacco was taken out of production forever. 877 growers took Maryland’s Tobacco Buyout by 2005.<sup>41</sup> This represented 7.80 million pounds of tobacco and 94% of the tobacco producers in the state of Maryland.<sup>42</sup> States that have tobacco farms could consider funneling some of their MSA payments into a similar type of program.

This approach has worked abroad as well. Recently, there has been successful diversification in Malawi and India, two major tobacco producing countries.<sup>43</sup> Small scale tobacco farmers in these countries have successfully shifted to growing other crops including groundnuts and cotton, and into alternative industries including textiles and tourism.<sup>44</sup>



39 Department of Legislative Services, Overview of the Cigarette Restitution Fund (2010) available at [http://disciplinary.state.md.us/publications/OPA/IOCRF\\_2010.pdf](http://disciplinary.state.md.us/publications/OPA/IOCRF_2010.pdf).  
40 *Id.* at 14.  
41 Southern Maryland Agriculture Development Commission, The Tobacco Buyout, <http://smadc/buyout.html> (last visited Aug. 1, 2014).  
42 *Id.*  
43 John C. Keyser, Crop Substitution and Alternative Crops for Tobacco (Study conducted as a technical document for the first meeting of the Ad Hoc Study Group on Alternative Crops, February 2007).  
44 Framework Convention Alliance, Briefing Paper: Economically Viable Alternatives to Tobacco Crops (2007), available at <http://www.fctc.org/images/stories/2007/fca-2007-cop-alt-crops-cop2-briefing-en.pdf>.

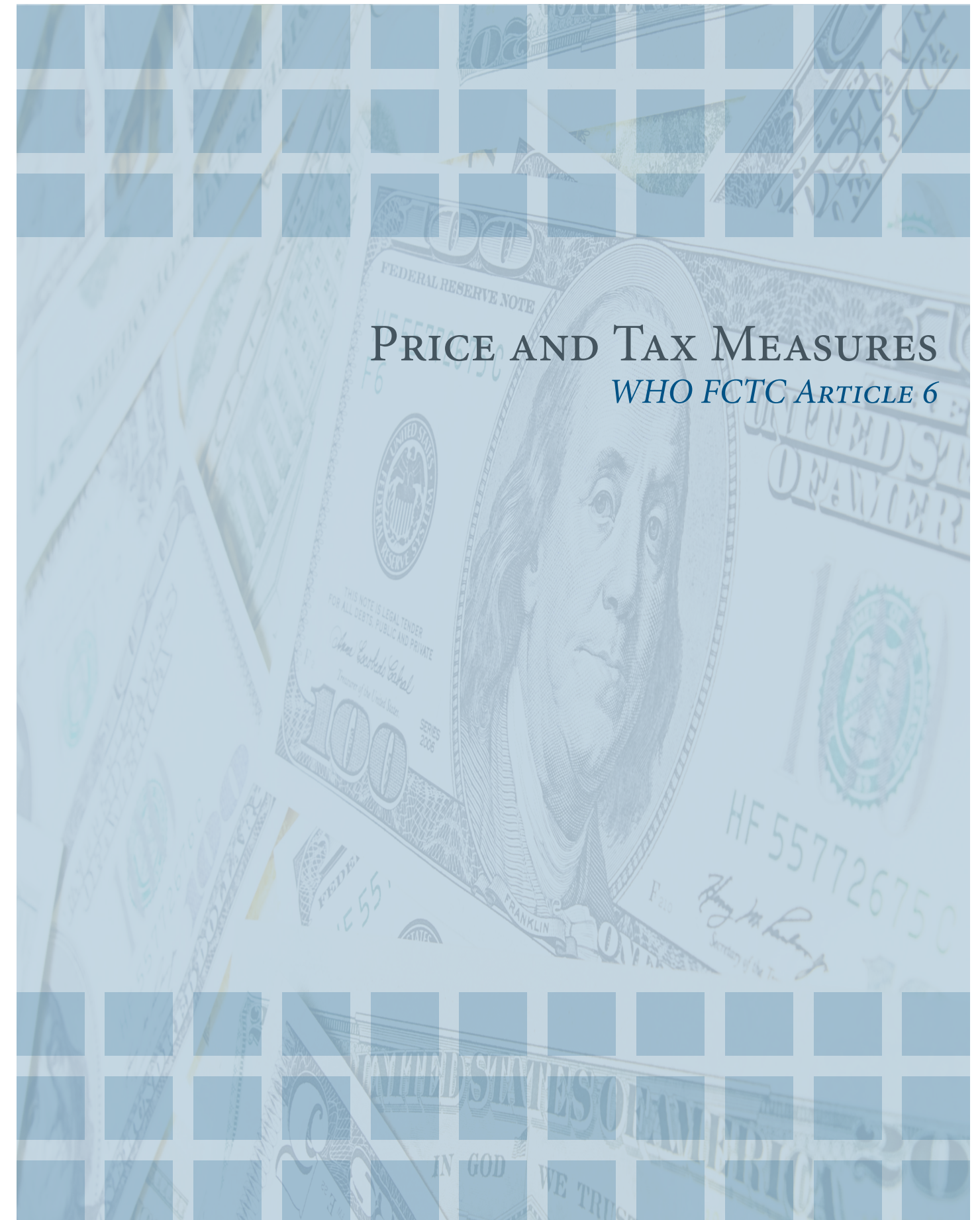
the lawmaking process are more likely to be preempted or face legal challenge. Laws which promote transparency and open government are less likely to face such barriers. However, as each state is different, and because court cases interpreting First Amendment protections can be very complicated, consultation with local counsel is essential.

## WHAT STATE AND LOCAL GOVERNMENTS CAN DO

States could consider many new laws and programs in an attempt to prevent industry interference. Lobbying restrictions, CSR limits, divestment, and crop diversification are all discussed above. Also, states could implement other suggestions from the FCTC Guidelines, including rejecting partnerships with the tobacco industry and avoiding conflicts of interest. States could also strengthen existing laws by implementing stricter lobbying restrictions or conflict of interest laws.

The ASH [database](#) includes links to guides and sample legislation on these topics:

- Lobbying restrictions
- Preventing conflicts of interest
- Banning or limiting CSR
- Divesting
- Diversifying/Buying out tobacco crops



WHY DO IT?

Increasing the price of tobacco products is the single most effective way to prevent initiation among nonsmokers and to reduce consumption.<sup>45</sup> The International Agency for Research on Cancer has concluded that a 50% increase in price lowers consumption by 20%.<sup>46</sup> **Raising tobacco taxes is particularly effective in reducing youth smoking**, as youth often have less disposable income and shorter smoking histories than adults. In high-income countries, a 10% increase in tobacco prices will reduce consumption by about 4% among adults and 7% among youth.<sup>47</sup>

Furthermore, state cigarette taxes increase state revenues, which can provide funding for tobacco control and cessation programs such as the ones in this guide.

“Raising tobacco taxes is particularly effective in reducing youth smoking”

45 Center for Disease Control and Prevention (CDC), Best Practices for Comprehensive Tobacco Control Programs (2014), available at [http://www.cdc.gov/tobacco/stateandcommunity/best\\_practices/index.htm?s\\_cid=cs\\_3281](http://www.cdc.gov/tobacco/stateandcommunity/best_practices/index.htm?s_cid=cs_3281) [hereinafter CDC Best Practices].

46 WHO, International Agency for Research on Cancer, Effectiveness of Tax and Price Policies for Tobacco Control (2011), available at <http://www.iarc.fr/en/publications/pdfs-online/prev/handbook14/handbook14-0.pdf>.

47 WHO, MPOWER- Raise Taxes on Tobacco, [http://www.who.int/tobacco/mpower/publications/en\\_tf\\_mpower\\_brochure\\_r.pdf](http://www.who.int/tobacco/mpower/publications/en_tf_mpower_brochure_r.pdf) (last visited Aug. 1, 2014).

FCTC ASPIRATION

Article 6 of the FCTC addresses tax. It provides that “Price and tax measures are an effective and important means of reducing tobacco consumption... Each party should... adopt... tax policies and... price policies on tobacco products, so as to contribute to the health objectives aimed at reducing tobacco consumption.”<sup>48</sup>

BEST PRACTICE

There is a wealth of commentary on suggested best practices for tobacco tax. The World Bank recommends that at least 67% of the retail price of tobacco products comes from taxes.<sup>49</sup> The 2014 Surgeon General’s report called for an increase in cigarette prices to at least \$10 a pack.<sup>50</sup> Currently, the average cost of a pack of 20 cigarettes in the United States is \$6.36, although this varies widely by state.<sup>51</sup> **For example, a pack of Marlboro’s costs \$10.08 in New York, but only \$4.20 in Georgia.**<sup>52</sup> By contrast, in London a pack of Marlboro’s costs \$14. In Norway, it costs \$15.11. In Australia, within the next five years, it will cost about \$20 to buy a pack of cigarettes.<sup>53</sup> The U.S. is lagging behind on tobacco taxes.

South Africa provides an excellent example of the power of tax increases. In 1994, the government aimed to raise tobacco taxes to 50% of the retail price.<sup>54</sup> The price of cigarettes increased from 6.68 South African Rand in 1993 to 20.82 Rand in 2009.<sup>55</sup> While this

48 FCTC, *supra* note 4, at Art. 6.

49 WHO, Tobacco Tax Levels and Structure, [http://www.who.int/tobacco/publications/en\\_tf\\_tob\\_tax\\_chapter2.pdf](http://www.who.int/tobacco/publications/en_tf_tob_tax_chapter2.pdf) (last visited Aug. 1, 2014).

50 SG Report 2014, *supra* note 1.

51 World Lung Foundation, American Cancer Society, The Tobacco Atlas (4<sup>th</sup> ed.) available at <http://www.tobaccoatlas.org/>.

52 Campaign for Tobacco Free Kids, State Excise and Sales Taxes Per Pack of Cigarettes, <http://www.tobaccofreekids.org/research/factsheets/pdf/0202.pdf> (last visited Aug. 29, 2014).

53 Sean Parnell, Smokers Set to be Taxed Out of Habit, The Australian, Jan. 4, 2013, available at <http://www.theaustralian.com.au/national-affairs/health/smokers-set-to-be-taxed-out-of-habit/story-fn59nokw-1226547381195#>.

54 Framework Convention on Tobacco Control, Tobacco Success Story- South Africa, available at [http://www.fctc.org/images/stories/success\\_SoAfrica\\_en.pdf](http://www.fctc.org/images/stories/success_SoAfrica_en.pdf).

55 *Id.*

increase is still below the recommend 67% tax, and the cost is still lower than cigarettes in the U.S., this increase had a dramatic effect on smoking in South Africa. Total cigarette sales between 1993 and 2009 decreased by a third.<sup>56</sup> Per capita consumption decreased by 50%.<sup>57</sup> Smoking prevalence among adults decreased from 32% in 1993 to 20.5% in 2008.<sup>58</sup> This, and many other examples around the world, illustrate the lifesaving outcome of tax increases.

PREEMPTION

States have broad authority to implement the recommendations in Article 6 of the FCTC by enacting tobacco tax policies to promote public health. Generally, federal law will not pose a barrier because states can set their own state taxes, and state laws will be subject only to general constitutional principles such as equal protection and the protection of interstate commerce. Local governments, however, often face a much larger challenge in implementing tobacco taxes, although several have done so successfully. Many states significantly restrict local taxing authority. As such, local governments are encouraged to consult with an attorney before considering new tax policies.

56 *Id.*

57 *Id.*

58 *Id.*

WHAT STATE AND LOCAL GOVERNMENTS CAN DO

Due to state preemption laws, what states and localities can do in terms of tobacco taxes will vary widely. Many organizations work with advocates to help pass state laws, particularly on price and tax issues. For example, the American Lung Association and Tobacco Free Massachusetts worked to help pass a 2013 \$1.00/pack increase in Massachusetts cigarette excise taxes.<sup>59</sup> At the time the law was passed, the increase made Massachusetts cigarette taxes the 2nd highest in the country.<sup>60</sup>

State and local governments should also consider raising taxes on other tobacco products. The ASH [database](#) includes links to guides and sample legislation created by some of those organizations, including examples from the Tobacco Control Legal Consortium and The Campaign for Tobacco Free Kids.

59 American Lung Association, State of Tobacco Control: Massachusetts, <http://www.stateoftobaccocontrol.org/state-grades/massachusetts/highlights.html> (last visited Aug. 1, 2014).

60 *Id.*

# PROTECTION FROM EXPOSURE TO TOBACCO SMOKE

WHO FCTC ARTICLE 8

## WHY DO IT?

2.5 million American nonsmokers have died because of secondhand smoke over the last 50 years since the release of the 1964 Surgeon General’s Report.<sup>61</sup> Before the report’s release which illustrated the damaging effects of tobacco to tobacco users, smoke-free air laws were non-existent. It wasn’t until more than 20 years later, with the release of the 1986 Surgeon General’s Report: *The Health Consequences of Involuntary Smoking*, that the devastating effects of second-hand smoke were recognized.<sup>62</sup>

There is **“no risk-free level of exposure to secondhand smoke.”**<sup>63</sup> Nonsmokers inhale the same poisons as cigarette smokers and roughly 88 million nonsmokers in the U.S., including 54% of children between the ages of 3-11, are exposed to secondhand smoke.<sup>64</sup> Annually, an estimated 3,000 lung cancer deaths and 46,000 heart disease deaths are associated with exposure to secondhand smoke.<sup>65</sup> There are 22 U.S. states that do not provide comprehensive protection from secondhand smoke despite the evidence that smoke-free air laws improve health and reduce smoking rates.<sup>66</sup>

## FCTC ASPIRATION

Article 8 of the FCTC addresses protection from exposure to tobacco smoke. It provides that Parties recognize that **“scientific evidence has unequivocally established that exposure to tobacco smoke causes death,**

**disease and disability.”**<sup>67</sup> Parties should adopt measures to protect people from exposure to tobacco smoke in indoor workplaces, public transportation, indoor public places, and other places where the public convenes.

## BEST PRACTICE

There are many examples of states and localities with comprehensive smoke free air laws. State and local laws ban smoking in workplaces, schools, restaurants, bars, childcare facilities, casinos, stores, and recreational facilities. The best of these laws include measures for enforcement and penalties, and they do not allow for preemption.

For example, Maryland has a state law which provides: “Smoking is prohibited in indoor areas open to the public; indoor places in which meetings are open to the public; a government-owned or government-operated means of mass transportation, including buses, vans, trains, taxicabs, and limousines; or an indoor place of employment. This includes restaurants, bars, casinos/gaming establishments and private clubs.”<sup>68</sup> The law goes on to allow for even stronger local restrictions. “Stronger local laws/ordinances further restricting smoking are specifically allowed, see below. Nothing in this subtitle shall be construed to preempt a county or municipal government from enacting and enforcing more stringent measures to reduce involuntary exposure to environmental tobacco smoke.”<sup>69</sup>

There are several international examples of effective smoke free air laws as well. In 2004, Ireland became the first country to ban smoking in all indoor public places including pubs.

61 U.S. Department of Health and Human Services. Let’s Make the Next Generation Tobacco-Free: Your Guide to the 50th Anniversary Surgeon General’s Report on Smoking and Health. (2014).  
62 U.S. Department of Health and Human Services. The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General. (2006)[hereinafter Involuntary Exposure].  
63 *Id.*  
64 Centers for Disease Control and Prevention, Tobacco Use (2012)<http://www.cdc.gov/chronicdisease/resources/publications/aag/osh.htm> (lasted visited June 2,2014).  
65 Involuntary Exposure, *supra* note 62.  
66 ASH Avoidable Death Report, *supra* note 2.

67 WHO Guidelines, *supra* note 5.  
68 MD. CODE ANN., HEALTH-GEN. §§ 24-501 to 24-511 (2008) & MD. CODE ANN., LAB. & EMPLOY. §§ 5-101 & 5-608 (2008).  
69 MD. CODE ANN., HEALTH-GEN. § 24-510 (2008).

Ireland has been covered by national smoke-free legislation which has been assessed as complete. All public places are completely smoke-free (or at least 90% of the population is covered by complete sub national smoke-free legislation).<sup>70</sup>

PREEMPTION

Generally, federal preemption should not be a concern for state and local governments seeking to implement laws which promote smoke-free air. However, many state laws contain language that will preempt localities from taking action. From 1987 to 2007 there were 21 cases decided across 19 states in the federal and state appellate courts “determining whether preemption doctrine affected the validity of . . . local smoke free ordinances.”<sup>71</sup> Given the pervasiveness of state-level preemption and the prevalence of legal challenges to these kinds of laws, local governments are encouraged to consult an attorney when developing smoke-free air laws.

WHAT STATE AND LOCAL GOVERNMENTS CAN DO

Because of some state preemption laws, certain jurisdictions may face hurdles when implementing strong local smoke-free air legislation. Localities can check the ASH [database](#) to determine whether or not their state law preempts their local tobacco control laws on smoke-free indoor air. Consult the American Lung Association's State Legislated Action on Tobacco Issues ([SLATI](#)) pages, Center for Disease Control and Prevention ([CDC](#)) Tobacco Control State Highlights ([STATE](#)), and Americans for Nonsmokers' Rights ([ANR](#)) for state preemption, and then

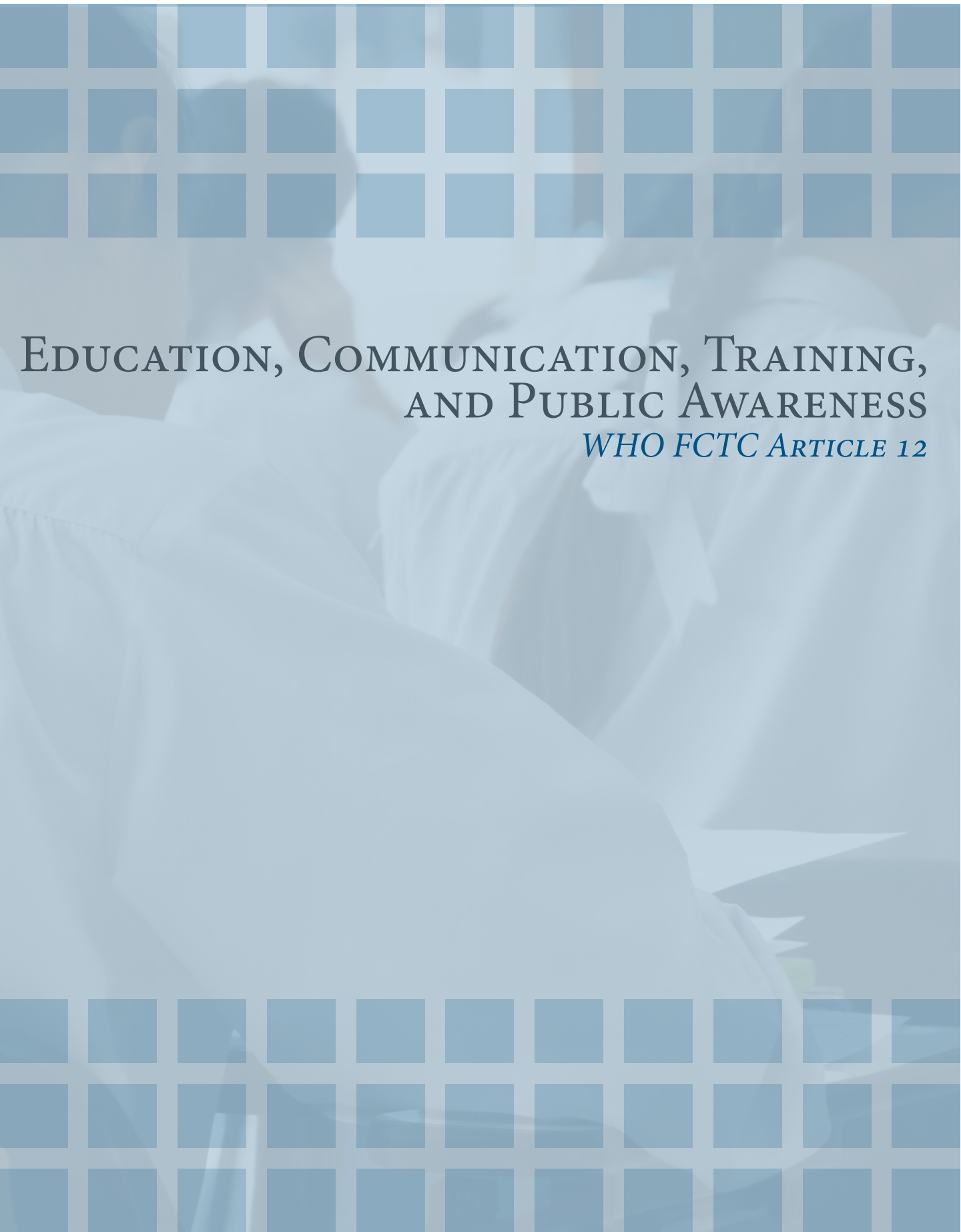
70 WHO Report on the Global Tobacco Epidemic (2013) [http://www.who.int/tobacco/surveillance/policy/country\\_profile/irl.pdf?ua=1](http://www.who.int/tobacco/surveillance/policy/country_profile/irl.pdf?ua=1) last visited Aug. 1, 2014.  
71 Jean C. O'Connor et al., Preemption of Local Smoke-Free Air Ordinances: The Implications of Judicial Opinions for Meeting National Health Objectives, 36 J.L. MED. & ETHICS 403, 404 (2008).

double-check against state law. Results will vary; talk to an attorney.  
  
Although no states passed comprehensive smoke free laws in 2013,<sup>72</sup> some local communities, for example, Excelsior Springs, Sedalia, and Washington, Missouri were all able to pass new comprehensive ordinances that protect their citizens from secondhand smoke.<sup>73</sup>

Numerous cities around the country have expanded smoke-free air laws to cover locations like beaches and parks. The following cities are just a few of the locations that now prohibit smoking on the beach- Dewey Beach, DE; Braintree, MA; Dexter, MI; Battle Lake, MN; Shawnee, OK; and Seattle, WA. A link to a full list of municipalities that now have smoke-free beaches can be found in our [database](#).<sup>74</sup>

Until or unless the vapor from electronic cigarettes is conclusively proven to be safe, states and localities should ensure that electronic cigarettes are covered within smoke-free air laws as well. North Dakota, New Jersey, and Utah have the most complete restriction; electronic cigarettes are restricted in 100% of the venues that restrict cigarette smoking.<sup>75</sup> There are 188 localities that restrict electronic cigarette use in 100% of smoke-free venues. A few of them are Clay, AL; Chatham County, GA; Indianapolis, IN; St. Joseph, MO; and Philadelphia, PA.<sup>76</sup> The link to the entire list can be found in our [database](#).

72 American Lung Association, State of Tobacco Control (2014) <http://www.stateoftobaccocontrol.org/at-a-glance/state-governments/> last visited Aug. 1 2014).  
73 Tobacco Free Missouri, Smokefree Laws in Missouri (2013) <http://www.tobaccofreemo.org/wp-content/uploads/2012/07/Smokefree-Laws-in-Missouri1.pdf> (last visited July 20, 2014).  
74 Americans for NonSmokers Rights, Smoke Free Beaches, <http://www.no-smoke.org/pdf/SmokefreeBeaches.pdf>, (last visited Aug. 28, 2014).  
75 Americans for Nonsmokers Rights, U.S. State and Local Laws Regulating the Use of Electronic Cigarettes, <http://www.no-smoke.org/pdf/ecigslaws.pdf> (last visited Aug. 28, 2014).  
76 *Id.*



WHY DO IT?

“Public education, through tobacco prevention and education programs, saves lives and saves money.”<sup>77</sup>

Every day in the U.S. approximately 3,200 children smoke their 1st cigarette and 2,100 become daily smokers.<sup>78</sup> The most effective and successful youth tobacco prevention campaigns are part of all encompassing tobacco control programs that include ads to inspire negative emotions about tobacco use, provide new information about the health risks to smokers and nonsmokers, engage with youth-focused graphics, utilize multiple media channels, and expose children to the messages over an extended period of time.<sup>79</sup>

Comprehensive mass media education programs, as recently as 2012, have demonstrated the harm caused by tobacco and are proven to help smokers quit. The CDC launched its “Tips from Former Smokers” media campaign in the spring of 2012.<sup>80</sup> The "Tips" campaign is designed to increase public awareness of the health damage caused by smoking and encourages smokers to quit.<sup>81</sup> A study in the journal The Lancet illustrated that at least 100,000 people successfully quit smoking as a result of the campaign.<sup>82</sup> The "Tips" campaign is ongoing and help for smokers that want to quit can be found via **1-800-QUIT-NOW**.

There is also evidence that exposure to counter-tobacco measures may reduce the likelihood of relapse by those who have

successfully quit.<sup>83</sup> Comprehensive mass media education programs also save money. The CDC’s Best Practices 2014 recommends that \$532 million be invested annually for mass-reach health communication interventions.<sup>84</sup> Each day in the United States, the tobacco industry spends nearly \$23 million to advertise and promote cigarettes,<sup>85</sup> and annually tobacco use costs the United States \$289-332.5 billion in direct health care costs and productivity losses.<sup>86</sup> It would take just 15% of state tobacco revenue to fund comprehensive tobacco prevention and education programs at the level the CDC recommends.<sup>87</sup>

FCTC ASPIRATION

Parties should “promote and strengthen public awareness of tobacco control issues,” including the implementation of measures to educate the public on the addictive characteristics of tobacco consumption, the health risks of consumption and exposure, and the benefits of cessation and tobacco-free lifestyles.<sup>88</sup>

Parties should promote education on the adverse effects of tobacco consumption on health, on the economy, and on the environment. Parties should provide access and training for educators, policy makers, health professionals, social workers, and other concerned persons.

83 Wakefield MA, et al., Does tobacco-control mass media campaign exposure prevent relapse among recent quitters? *Nicotine & Tobacco Research* 2013;15(2):385–92. . See also Wakefield MA, et al., Does tobacco-control mass media campaign exposure prevent relapse among recent quitters? *Nicotine & Tobacco Research* 2013;15(2):385–92.  
84 CDC: Best Practices, *supra* note 45.  
85 CDC, Fact Sheet- Tobacco Industry Marketing [hereinafter Tobacco Industry Marketing] [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/tobacco\\_industry/marketing/index.htm?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+cdc%2FGELa+\(CDC+-+Smoking+and+Tobacco+Use+-+Main+Feed\)](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/tobacco_industry/marketing/index.htm?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+cdc%2FGELa+(CDC+-+Smoking+and+Tobacco+Use+-+Main+Feed)). (last visited Aug. 1, 2014)  
86 *Id.*  
87 *Id.*  
88 FCTC, *supra* note 4.

BEST PRACTICE

One example of a successful media campaign designed to promote public awareness is a California mass media campaign from the early 1990’s. Research indicates that from the inception of the California campaign in 1990, “per capita cigarette consumption significantly declined 16% over the 1989-1993 period...”<sup>89</sup> and smoking prevalence “in 1996, was 18% in California” versus “22.4% in the rest of the nation.”<sup>90</sup>

PREEMPTION

Generally, federal preemption should not be a concern for state and local governments seeking to implement education campaigns. However, there are several programs that already exist on the national level such as the CDC’s “Tips from Former Smokers” Campaign and Legacy’s "Truth" and "Finish it" series. While these do not preempt state and local governments conducting their own, separate educational programs, it may be advised to take a slightly differentiated approach from these campaigns, in order to educate the public on as many aspects of tobacco control as possible.

Another option is for state or local government to coordinate with or augment national campaigns to ensure those campaigns are reaching their constituents.

89 Liu, H & Tan, W, The Effect of Anti-Smoking Media Campaign on Smoking Behavior: The California Experience, *Annals of Economics and Finance* 10-1, 29-47, (2009).  
90 *Id.*

Sharing content already created by the CDC, Legacy, and ASH is another cost effective way to educate your constituents without investing in an entirely new campaign.

WHAT STATE AND LOCAL GOVERNMENTS CAN DO

State and community coordinated interventions can help promote effective tobacco control education and outreach.



States can utilize tools such as the CDC: Best Practices guide for definitions of the “specific annual investment needed” and the media campaign resource center ([MCRC](#)) for effective existing media campaigns.



# TOBACCO ADVERTISING, PROMOTION, AND SPONSORSHIP

WHO FCTC ARTICLE 13

## WHY DO IT?

Each day in the United States, the tobacco industry spends nearly \$23 million to advertise and promote cigarettes.<sup>91</sup> And each day, more than 3,200 youth under 18 years of age smoke their first cigarette.<sup>92</sup> **Research shows that there is a causal relationship between advertising and promotional efforts of the tobacco companies and the initiation and progression of tobacco use among young people;** approximately one-third of underage experimentation with smoking can be attributed to tobacco industry advertising and promotion.<sup>93</sup>

## FCTC ASPIRATION

Article 13 of the FCTC binds parties to comprehensively ban tobacco advertising, promotion and sponsorship (TAPS) in accordance with its constitution or constitutional principles. Any party not in a position to adopt a comprehensive ban due to its constitution or constitutional principles would have to apply restrictions on all TAPS.<sup>94</sup>

## BEST PRACTICE

According to the FCTC and extensive research, the best practice would be a complete ban on tobacco advertising, promotion and sponsorship. In some places around the world, this is a reality. In 2010, Norway banned all TAPS, including the display of tobacco packages in stores.<sup>95</sup> Philip Morris sued the government over the point-of-sale display ban under the European Free Trade Agreement. In 2012, the court upheld Norway’s ban.<sup>96</sup> According to studies, in jurisdictions like

Norway that have implemented display restrictions, fewer youth have started smoking.<sup>97</sup> To date, 13 countries require that tobacco products be kept out of sight behind the counter.<sup>98</sup>

Mauritius not only implemented a complete ban on TAPS; they also extended their ban to include “corporate social responsibility” (CSR) schemes implemented by tobacco companies. The CSR ban is discussed earlier in this guide, under Article 5.3.

A complete TAPS ban may be difficult under the U.S. Constitution. However, several states and localities have made strides in an attempt to limit TAPS. For example, the New York City Board of Health passed a resolution in 2009 that required health warnings and cessation information at every point of sale for tobacco in New York City.<sup>99</sup> Preliminary research with adult current smokers and recent quitters both before and after the signs were posted shows an 11% increase in respondents thinking about quitting smoking.<sup>100</sup> Unfortunately, in June 2010, the regulation was challenged in court by tobacco corporations. The court ruled that the warnings were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA) and that the city cannot require the retailers to post signs.<sup>101</sup> However, the Board of Health continues to encourage retailers to do so voluntarily. See more about the proposed legislation and the litigation on our [database](#).

It also may be possible for states to limit the use of coupons. Coupons are a way for

91 Tobacco Industry Marketing, *supra* note 85.  
92 CDC Best Practices, *supra* note 45.  
93 *Id.*  
94 FCTC, *supra* note 4.  
95 WHO FCTC, Norway: Prohibition on the Visible Display of Tobacco Products at the Points of Sale [http://www.who.int/fctc/implementation/news/news\\_nor/en/](http://www.who.int/fctc/implementation/news/news_nor/en/) (last visited Aug. 1, 2014).  
96 *Id.*  
97 Public Health Law Center, Tobacco Product Display Bans <http://publichealthlawcenter.org/sites/default/files/nycenr-syn-tobproductdisplaybans-2013.pdf> (last visited Aug. 1, 2014).  
98 ASH Avoidable Death Report, *supra* note 2, at 29.  
99 Coady, MD et al. Awareness and Impact of New York City’s Graphic Point-of-Sale Tobacco Health Warning Signs Tob Control. (e1):e51-6. doi: 10.1136/tobaccocontrol-2011-050261. Epub 2012 Jun 23, available at <http://www.ncbi.nlm.nih.gov/pubmed/22730446>.  
100 *Id.*  
101 23-34 94th St. Grocery Corp. v. New York City Bd. of Health, 757 F. Supp. 2d 407, 409 (S.D.N.Y. 2010) *aff’d*, 685 F.3d 174 (2d Cir. 2012).

the tobacco industry to offset the increased tobacco taxes for their customers. That way, despite the rise in taxes designed to decrease smoking rates, consumers prices do not actually change. In 2013, New York City passed a law (Local Law 1021-A-2013) that sets a minimum price for cigarettes sold in the city.<sup>102</sup> The law also prohibits the use of coupons or promotional discounts to lower that price.<sup>103</sup> Tobacco companies challenged the law on the grounds that it violated their First Amendment right to free speech. Recently, the U.S. District Court for the Southern District of New York upheld New York’s law, which makes limiting or banning the use of coupons a valid option for state or local governments.<sup>104</sup>

## PREEMPTION

There are potential barriers for a local or state government seeking to implement the recommendations of Article 13 which restrict tobacco advertising, health warnings, promotions, and sponsorship. The First Amendment to the U.S. Constitution generally protects the public, including the tobacco industry, from undue restrictions on speech.<sup>105</sup> However, as discussed earlier, there may be ways to restrict industry influence without unduly restricting speech, for example, with voluntary health warnings at sales counters.

Second, the FCLAA generally prohibits state and local regulation of cigarette labeling or advertising based on concerns related to health.<sup>106</sup> However, there is an exception that allows for localities to craft laws on the “time, place and manner” of tobacco promotions or

advertising.<sup>107</sup> Third, a local government must evaluate whether any state laws explicitly or implicitly restrict local regulation.

After evaluating federal level-preemption and constitutional challenges, a local government seeking to implement advertising, promotion or sponsorship restrictions can use databases provided by [SLATI](#) and [CDC STATE](#) to find any explicit preemption details in state laws. Because preemption is not always explicit, local governments should also research state laws on tobacco, advertising, consumer protection, and any other topics related to the proposed regulation. Finally, a local government should

**“To counter aggressive pro-tobacco influences, communities are encouraged to change the knowledge, attitudes, and practices of tobacco users and nonusers”**

<sup>107</sup> *Id.*

contact an attorney to conduct legal research of cases on the topic, as court opinions are often necessary to understand the text of a law.

## WHAT STATE AND LOCAL GOVERNMENTS CAN DO

The CDC best practices suggest that **“To counter aggressive pro-tobacco influences, communities are encouraged to change the knowledge, attitudes, and practices of tobacco users and nonusers**, and also engage in strategies to address the manner in which tobacco is promoted; the time, manner, and place in which tobacco is sold; and how and where tobacco is used.”<sup>108</sup>

One major project that states and localities can undertake is counter marketing campaigns, to “change the knowledge” of tobacco users. There is “extensive evidence that tobacco counter marketing campaigns curbed smoking initiation in youth and promoted smoking cessation in adults...”<sup>109</sup> And a 2013 study found that “greater exposure to tobacco control mass-media campaigns may reduce the likelihood of relapse among quitters.”<sup>110</sup>

States can also encourage retailers to voluntarily display graphic health warning signs at every tobacco point of sale. Jefferson County, Alabama recently pioneered a program based on the voluntary commitments of store owners to post signs.<sup>111</sup> The signs were created based partially on the new graphic health warning labels required by the 2009 FDA Act. Fifty one convenience store owners voluntarily agreed to post the warning signs

<sup>108</sup> CDC Best Practices, *supra* note 45.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> CDC, Communities Putting Prevention to Work: Jefferson County, Alabama [http://www.cdc.gov/nccdphp/dch/programs/CommunitiesPuttingPreventiontoWork/communities/profiles/both-al\\_jefferson-county.htm](http://www.cdc.gov/nccdphp/dch/programs/CommunitiesPuttingPreventiontoWork/communities/profiles/both-al_jefferson-county.htm) (last visited Aug.1,2014).

in their place of business. Due in large part to this program, the number of callers to the tobacco quit line has more than doubled.<sup>112</sup>

States and localities may also be able to limit or ban free samples or coupons being distributed within their jurisdictions. Please consult the sample legislation in our [database](#) for more information.

<sup>112</sup> *Id.*

<sup>102</sup> Nat’l Ass’n of Tobacco Outlets, Inc. v. City of New York 14 Civ. OO577 (S.D.N.Y. June 18, 2014), 2014 WL 2766593.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> U.S. CONST. amend. I.

<sup>106</sup> 15 U.S.C. § 1334(c).

# DEMAND REDUCTION MEASURES CONCERNING TOBACCO DEPENDENCE AND CESSATION

WHO FCTC ARTICLE 14

## WHY DO IT?

Article 14 of the FCTC requires that governments initiate effective measures to promote cessation of tobacco use and to provide adequate treatment for tobacco dependence.<sup>113</sup> The Guidelines for Implementation of Article 14 state, “there is clear scientific evidence that tobacco dependence treatment is effective and that it is a cost-effective health-care intervention, and thus that it is a worthwhile investment for health-care systems.”<sup>114</sup>

### THE AFFORDABLE CARE ACT AND TOBACCO CESSATION

In the U.S., tobacco cessation programs now fall under the Affordable Care Act (ACA). The ACA notes that tobacco cessation must be provided at no cost to the recipient under most types of health insurance as of January 1, 2014.<sup>115</sup> However, the definition of “tobacco cessation” varies widely from state to state, by type of insurance (e.g., Medicaid vs. private insurance), and by insurance provider (e.g. Aetna vs. BlueCross).<sup>116,117</sup>

For example, insurance may cover some, all, or none of the following:

- Counseling
- Prescription cessation medications
- Over-the-counter nicotine replacement therapies (NRTs), such as nicotine patches or gum<sup>118</sup>

However, scientific evidence has shown that a combination of these therapies is the most

likely to yield a successful quit attempt; “using a combination of behavioral support and medication might typically increase the chances of a person successfully quitting smoking by 70 -100% compared to their chance of success if they just received brief advice or support”.<sup>119</sup>

### ACA PROGRAMS

The ACA also created several programs that address tobacco control, generally within a broader scope of chronic disease. Some examples include:

- The Prevention and Public Health Fund – an investment of up to \$2 billion per year in prevention, wellness, and public health activities including community-based tobacco prevention programs and the CDC’s *Tips From Former Smokers* campaign.<sup>120</sup>
- The Medicaid Incentives for Chronic Disease Prevention Program – through this grant program, states can apply for funds to incentivize Medicaid recipients to prevent chronic disease.<sup>121, 122</sup>

### TOBACCO USER SURCHARGE

The ACA also imposes a surcharge on tobacco users.<sup>123</sup> Tobacco users are defined as someone who uses any tobacco product other than for religious or ceremonial use, on average four or more times a week, within no longer than the past six months.<sup>124,125</sup> Tobacco users can be charged

113 FCTC, *supra* note 4.  
114 WHO Guidelines, *supra* note 5, at Art. 14.  
115 Patient Protection & Affordable Care Act, Pub. L. No. 111-148, § 2713, 124 Stat. 119 (2010) (codified at 42 U.S.C. §300gg-13).  
116 TCLC, How the Affordable Care Act Affects Tobacco Use and Control, [http://publichealthlawcenter.org/sites/default/files/tclc-fs-aca-%26-tobacco-control-2014\\_0.pdf](http://publichealthlawcenter.org/sites/default/files/tclc-fs-aca-%26-tobacco-control-2014_0.pdf) (last visited Aug. 1, 2014) [hereinafter TCLC ACA].  
117 American Lung Association, What is Covered?<http://www.lung.org/stop-smoking/tobacco-control-advocacy/reports-resources/2012/hsq-what-is-covered-2012.pdf> (last visited Aug.1, 2014).  
118 TCLC ACA, *supra* note 116.

119 Stead LE, et al. *Does A Combination of Smoking Cessation Medication and Behavioural Support Help Smokers Stop?* <http://summaries.cochrane.org/CD008286/does-a-combination-of-smoking-cessation-medication-and-behavioural-support-help-smokers-to-stop#sthash.prlIWNIM.dpuf> (last visited Aug.1, 2014).  
120 Centers for Medicare and Medicaid Services, State Ratings <http://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/state-rating.html> (last visited Aug.1,2014) [hereinafter CMS].  
121 Public Law 111-148 § 4108.  
122 TCLC ACA, *supra* note 116.  
123 *Id.*  
124 *Id.*  
125 For these purposes, tobacco product does not include electronic cigarettes.

up to 50% more than non-tobacco users for health insurance premiums.<sup>126</sup>

**The American Lung Association, the American Cancer Society, and other organizations are opposed to the use of tobacco surcharges for several reasons.**<sup>127</sup> First, tobacco surcharges have not been proven effective in reducing tobacco use. Furthermore, the increased cost may cause tobacco users to remain uninsured. Tobacco users without insurance would not only be without support or coverage to help them quit, but they also will not have coverage for any tobacco-caused illnesses that arise, such as cancer, stroke, or heart disease. The surcharges may also cause their families to remain uninsured.<sup>128</sup>

## PREEMPTION

Federal and state laws are unlikely to preempt state or local governments seeking to implement Article 14 by establishing tobacco cessation programs, because many cessation programs are conducted at the local level. Such programs could include public education campaigns, counseling programs, and quit-lines. On the state and local level, this type of program likely fits within existing authority to promote and protect public health. Challenges in implementation of such a policy will likely be related to the individual government's budgeting system and the ability to obtain necessary funding for a particular program.

However, where cessation coverage is provided by health insurance, the question is more

<sup>126</sup> TLCACACA, *supra* note 116.

<sup>127</sup> American Lung Association, Tobacco Surcharges, <http://www.lung.org/stop-smoking/tobacco-control-advocacy/reports-resources/2013/factsheet-tobacco-surcharges-v2.pdf> (last visited Aug.1,2014).

<sup>128</sup> *Id.*

complicated. The ACA requires a minimum level of health insurance coverage for cessation services, but it specifically allows states to go above and beyond these minimums.<sup>129</sup> Therefore, states are likely able to require insurance companies to cover additional cessation options.

However, local governments are unlikely to have the authority to require health insurance coverage of cessation programs. Insurance is heavily regulated at the state-level, and a court might find that such regulations preempt the entire field of health insurance regulation. This implied preemption would leave local governments without the authority to act. As always, state and local governments are encouraged to consult a local attorney when considering any new laws.

**“States can also define or redefine tobacco cessation in the broadest possible terms in their state-run insurance programs”**

<sup>129</sup> TLCACACA, *supra* note 116.

## WHAT STATE AND LOCAL GOVERNMENTS CAN DO

While the ACA is federal legislation and therefore binding on states, cities, and towns, there are some actions that can be taken at the state and local level. Regardless of the ACA's implications, state and local governments can put in place cessation tools that are funded from other sources. For example, state quitlines could assist smokers who want to quit, regardless of whether they have insurance or if it is covered by their insurance. This is an area in which many states could improve.

The American Lung Association gives out grades for many areas of tobacco control, and on cessation, there were no A's. Only New Mexico received a B. Hawaii, North Dakota, Oklahoma, Vermont, and Wyoming received C's and the rest of the nation came in at a D or lower.<sup>130</sup>

A state could also apply for funding for cessation programs through existing ACA-supported programs, such as the Medicaid Incentives Program. Six states currently receive funding for tobacco cessation programs through the Medicaid Incentive Program: California, Connecticut, New Hampshire, New York, Texas, and Wisconsin.<sup>131</sup>

States can also define or redefine “tobacco cessation” in the broadest possible terms in their state-run insurance programs. Because the U.S. Department of Health and Human Services has not officially defined tobacco cessation benefits, the level of coverage can be

<sup>130</sup> American Lung Association, State of Tobacco Control- Cessation, <http://www.stateoftobaccocontrol.org/state-grades/state-rankings/cessation.html> (last visited Aug. 28,2014).

<sup>131</sup> For specific information on these programs, see CENTERS FOR MEDICARE AND MEDICAID SERVICES, MIPCD: The States Awarded, available at <http://innovation.cms.gov/initiatives/MIPCD/MIPCD-The-States-Awarded.html>.

determined by the state.<sup>132</sup> Tobacco cessation programs should be inclusive of behavioral support (counseling), over the counter medications (nicotine patch, gum), and prescription medications.

To see model definitions of “tobacco cessation,” model limits on tobacco surcharges, the scope of coverage for tobacco cessation programs in your state, and other important information related to FCTC Article 14, please visit our [database](#).

<sup>132</sup> TLCACACA, *supra* note 116.

# SALES TO AND BY MINORS

WHO FCTC ARTICLE 16

## WHY DO IT?

5.6 million American children alive today will die prematurely as a result of smoking.<sup>133</sup> Each day, more than 3,200 youth (under the age of 18 years) smoke their first cigarette and 2,100 youth and young adults who are occasional smokers progress to become daily smokers.<sup>134</sup> **Approximately 90% of smokers have already started smoking by age 18, according to the Surgeon General.**<sup>135</sup>

## FCTC ASPIRATION

The FCTC attempts to combat youth smoking through Article 16. Article 16 states, “each Party shall adopt and implement effective legislative, executive, administrative or other measures at the appropriate government level to prohibit the sales of tobacco products to persons under the age set by domestic law, national law or eighteen.”<sup>136</sup>

## BEST PRACTICE

Alabama, Alaska, New Jersey, and Utah have raised their state minimum legal sale age for tobacco to 19.<sup>137</sup> Utah has the lowest smoking rate in the country (12.2% of the population).<sup>138</sup> Alaska and New Jersey’s rates are below the national average.<sup>139</sup> Notably, Alaska is the state with the most improved smoking rate, down 6.5% since 2008.<sup>140</sup>

Some localities have increased the legal sale age as well, either to 19 or 21. The first locality to increase the minimum sales age

to 21 was Needham, Mass., a suburb of Boston, in 2005.<sup>141</sup>

Following implementation of the law, smoking rates among Needham high-school students dropped almost in half between 2006 and 2010, far outpacing the decline in surrounding communities.<sup>142</sup> This suggests that increasing the minimum sales age can be an effective tool to reduce youth tobacco use, even when neighboring communities do not take the same action. In a confidential memo, a Philip Morris strategist once wrote, **“Raising the legal minimum age for cigarette purchase to 21 could gut our key young-adult market (17-20).”**<sup>143</sup>

Several other localities have raised the age to 21. Recently, New York City became the largest jurisdiction by population to raise the age, and new age limits of 21 were recently approved in Suffolk County, NY and Hawaii County, HI.<sup>144</sup> Several states, including Colorado<sup>145</sup>, Utah<sup>146</sup>, and Washington<sup>147</sup>, are also considering passing laws raising the minimum age to 21.

## PREEMPTION

In order to mitigate youth access laws, one tobacco industry strategy has been to lobby for the inclusion of language in state laws that preempt local governments from passing

133 SG Report 2014, *supra* note 1.  
134 *Id.*  
135 *Id.*  
136 FCTC, *supra* note 4.  
137 Gallup, Smoking Rates, [http://www.gallup.com/poll/167771/smoking-rate-lowest-utah-highest-kentucky.aspx?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=in-u-s-smoking-rate-lowest-in-utah-highest-in-kentucky-smoking-rate-in-alaska-has-dropped-the-most-since-2008](http://www.gallup.com/poll/167771/smoking-rate-lowest-utah-highest-kentucky.aspx?utm_source=rss&utm_medium=rss&utm_campaign=in-u-s-smoking-rate-lowest-in-utah-highest-in-kentucky-smoking-rate-in-alaska-has-dropped-the-most-since-2008) (last visited Aug.1, 2014).  
138 *Id.*  
139 *Id.*  
140 *Id.*

141 Berman, M. Raising Tobacco Sales to 21 Would Cut Smoking, Save Lives (2013) available at <http://webcache.googleusercontent.com/search?q=cache:http://www.dispatch.com/content/stories/editorials/2013/11/13/raising-tobacco-sales-age-to-21-would-cut-smoking-save-lives.html>.  
142 *Id.*  
143 Campaign for Tobacco Free Kids, Increasing the Minimum Legal Sale Age for Tobacco Products to 21, <http://www.tobaccofreekids.org/research/factsheets/pdf/0376.pdf> (last visited Aug. 1, 2014).  
144 Campaign for Tobacco Free Kids, Increasing the Sale Age, <http://www.tobaccofreekids.org/research/factsheets/pdf/0376.pdf> (last visited Aug. 1, 2014).  
145 Kurtis Lee, Raising Age to 21 for Purchase of Cigarettes in Colorado Rejected, DENVER POST, Mar. 19, 2014, available at [http://www.denverpost.com/news/ci\\_25377056/raising-age-21-purchase-cigarettes-colorado-tough-climb](http://www.denverpost.com/news/ci_25377056/raising-age-21-purchase-cigarettes-colorado-tough-climb).  
146 Michelle Price, Utah Lawmakers Kill Bill Raising Smoking Age to 21, AP, Mar. 4, 2014, available at <http://bigstory.ap.org/article/utah-lawmakers-kill-bill-raising-smoking-age-21>.  
147 Maya Rhodan, New Push to Raise Tobacco Age in Washington State, TIME, April 23, 2014, available at <http://time.com/74400/tobacco-age-21-washington-state-proposal/>.

more stringent laws. Therefore, there is a significant amount of preemption in this area.<sup>148</sup> The Centers for Disease Control and Prevention have identified 22 states with youth access laws that include preemptive language relating to local authority over sales of tobacco products.<sup>149</sup>

It is important, particularly for local jurisdictions, to assess whether a state tobacco control law might limit local authority to increase the minimum legal age to buy tobacco. It is also important to consider the scope of these restrictions (e.g., does the state law only limit local authority to pass tobacco control laws with criminal sanctions, but local governments can pass laws that only impose civil sanctions?).<sup>150</sup>

WHAT STATE AND LOCAL GOVERNMENTS CAN DO

After checking [SLATI](#) and consulting an attorney, states and localities might consider several options. States, counties, cities, and towns could raise the minimum age to purchase tobacco products. States and localities could also consider stricter penalties for retailers that sell to minors; for example, increase fines or suspension/ revocation of sales licenses. Finally, states and localities should make sure to enforce new and existing laws consistently. Youth access should be monitored by the delegated agency and violations should be handled consistently, quickly, and to the full extent of the law.

148 American Lung Association, Laws that Prevent Stronger Local Tobacco Control Laws, <http://www.lungusa2.org/slati/appendix.php> (last visited Aug. 1, 2014).

149 TLC, Raising the Minimum Legal Sale Age for Tobacco and Related Products, [http://publichealthlawcenter.org/sites/default/files/re\\_mmwrhtml/mm6033a2.htm](http://publichealthlawcenter.org/sites/default/files/re_mmwrhtml/mm6033a2.htm), [http://tobaccopreventionnetwork.com/downloads/cdc\\_preemption\\_fact\\_sheet.pdf](http://tobaccopreventionnetwork.com/downloads/cdc_preemption_fact_sheet.pdf) source<http://www.cdc.gov/mmwr/preview/es/tlc-guide-minimumlegal-saleage-2014.pdf> (last visited Aug. 1, 2014).

150 *Id.*

To see sample state and local laws on youth access and other important information related to FCTC Article 16, please visit our [database](#).

PROTECTION OF THE ENVIRONMENT AND THE HEALTH OF PERSONS  
*WHO FCTC ARTICLE 18*

WHY DO IT?

Cigarette butts are the most littered item worldwide. Smokers litter cigarette butts rather than disposing of them properly 65% of the time, which results in approximately 845,000 tons (1.69 Billion pounds) of cigarette butts as toxic trash each year.<sup>151</sup> Data shows that “in 2010, over one million (1,181,589) cigarettes or cigarette filters—enough to fill 94,626 packs—were removed from American beaches and inland waterways.”<sup>152</sup>

Cigarette related litter is an enormous problem, both in the United States and worldwide. **Littered cigarette butts are not just unsightly, they’re unhealthy.** A single cigarette butt in a liter of water containing minnows is toxic enough to kill half of the fish within 96 hours.<sup>153</sup> These hazardous chemicals leach into water and soil and are often ingested by wildlife and pets, not to mention small children, who suffer serious health problems as a result.

FCTC ASPIRATION

In carrying out their obligations under this Convention, the Parties agree to have due regard for the protection of the environment

ARTICLE 18

ORIGINAL INTENTIONS

While legislation related to cigarette litter is an important option for state and local governments to consider, this was not what was originally envisioned under Article 18 of the FCTC. The original intent of Article 18 was to diminish the environmental harm of the cultivation of tobacco. The cultivation and farming of tobacco causes soil and water degradation, vegetation and biodiversity losses, and human diseases caused by pesticide poisoning, green tobacco sickness, and inhalation of biomass particles. Read more about how tobacco is a barrier to sustainable development on our website:  
<http://ash.org/programs/tobacco-poverty/>.

and the health of persons in relation to the environment, while respecting tobacco cultivation and manufacturing within their respective territories.<sup>154</sup>

While this obviously relates to Article 17 (tobacco cultivation and crop diversification), this can also apply to the manufacture and consumption of cigarettes.

BEST PRACTICE

There are several new laws, with aspirations similar to Article 18 of the FCTC; they are designed to help solve the environmental problem. One approach is to create more smoke-free environments, including smoke-free beaches and parks. Among other benefits, smoke-free beaches and parks help prevent litter in these locations. These laws have a big impact: smoke-free beach laws help reduce butts on beaches by 45% according to the Audubon Society.<sup>155</sup>

**Another approach is to create or increase penalties for anyone who litters a cigarette butt.** A recent update to Illinois’ Litter Control Act will subject anyone who tosses a cigarette on the ground to increased penalties.<sup>156</sup> The first offense is a class B misdemeanor and a fine up to \$1,500. The second offense is a class A misdemeanor, and the third offense is a felony that can carry a one to three year jail sentence and up to a \$25,000 fine.<sup>157</sup>

Some states are considering a different tactic, one that would fall within Article 18 of the FCTC. Maryland and New York have proposed legislation that would prevent anyone from

selling cigarettes unless the cigarette and filter are biodegradable.<sup>158</sup> California has proposed legislation that would prohibit the sale of single use filter cigarettes.<sup>159</sup>

PREEMPTION

These types of laws are probably not preempted. It is unlikely that the FDA would adopt a regulation relating to cigarette butt litter. However, state and local governments seem more promising in this arena.<sup>160</sup> As with any law, consult a local attorney before moving forward.

WHAT STATE AND LOCAL GOVERNMENTS CAN DO

States and localities could adopt one of the previously mentioned approaches to protecting the environment. A state, county, or city could use the Illinois Act as a model and focus on increased penalties for litter. Alternatively, law makers could consider legislation, like the laws pending in Maryland, New York, and California that require filters to be biodegradable or ban filters entirely. Sample legislation is also available on our [database](#).



151 Thomas Novotny, et al, Cigarette Butts and the Case for Environmental Policy on Hazardous Waste (2009) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2697937/>.  
152 Legacy, The Impact of Tobacco on the Environment, [http://www.legacyforhealth.org/content/download/583/6932/version/2/file/Fact\\_Sheet-The\\_Impact\\_of\\_Tobacco\\_on\\_the\\_Environment.pdf](http://www.legacyforhealth.org/content/download/583/6932/version/2/file/Fact_Sheet-The_Impact_of_Tobacco_on_the_Environment.pdf) (last visited Aug. 1, 2014).  
153 Elli Slaughter, et al., Toxicity of Cigarette Butts and Their Chemical Components, to Marine and Freshwater Fish (2011), available at [http://tobaccocontrol.bmj.com/content/20/Suppl\\_1/i25.full.pdf+html](http://tobaccocontrol.bmj.com/content/20/Suppl_1/i25.full.pdf+html).

154 FCTC, *supra* note 4, at Art. 18.

155 Natacha LeCours, et ak, *Environmental Health Impacts of Tobacco Farming: A Review of the Literature* (2011) available at <http://tobaccocontrol.bmj.com/content/21/2/191.full>.  
156 FCTC, *supra* note 4, at Art. 18.  
157 Americans for Non-Smokers Rights. Cigarette Butt Waste, <http://www.no-smoke.org/learnmore.php?id=731> (last visited Aug. 4, 2014).

158 415 ILL.COMP.STAT.105/1-14 (2014).  
159 *Id.*  
160 For an excellent discussion of preemption in the context of Cigarette butt litter regulation, see <http://publichealthlawcenter.org/sites/default/files/resources/article-freiberg-cigarette-litter-hamlinelawreview-2014.pdf>.

## CONCLUSION

In 1900, the Supreme Court of the United States declared in *Austin v. Tennessee*<sup>161</sup> that it was within the power of states to regulate or potentially prohibit the sale, possession, or use of tobacco products. While that power has changed over time, with the passage of federal laws like the Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA) and the Family Smoking Prevention and Tobacco Control Act (FSPTCA), states and localities have continued to be the most progressive in promoting effective tobacco control strategies. Cities have increased the minimum age to purchase tobacco; states have increased tobacco taxes; and counties have divested from tobacco funds. As the CDC points out, **“it is the policies, partnerships, and intervention activities that occur at the state and local levels that ultimately lead to social norm and behavior change.”**<sup>162</sup>

It’s not possible to solve the tobacco epidemic without action at the state and local level. With the tools available from this guide and the ASH [database](#), we hope state and local governments can make tobacco a topic of history, not health policy.

At the other end of the scale, action against the tobacco epidemic at the global level has led to the world’s 1st public health treaty, the WHO Framework Convention on Tobacco Control (FCTC). At the outset of negotiations for the FCTC, many experts from foreign jurisdictions came prepared with best practice regulations and legislation from U.S. states, hoping to use them as models for FCTC obligations. Largely because of the new global consensus created by passage of the FCTC, it is now rare for foreign governments to look to the U.S. for inspiration in combating the death and disease caused by tobacco. Instead, new global champions have emerged that have superseded our attempts at home.

The United States has not yet ratified the FCTC, but the federal system still allows for implementation of much of the FCTC at the state and local levels. **The U.S. taught the world what to include in the FCTC; now the world can return the favor and show us the next steps forward.**

<sup>161</sup> *Austin v. Tennessee*, 179 U.S. 343 (1900).


<sup>162</sup> CDC Best Practices, *supra* note 45.

## WHEN TO SEEK COUNSEL

Throughout this guide, we often suggest that you seek the advice of a local attorney before undertaking tobacco control policy changes. While it is nearly always advisable to have an attorney who understands your state and local laws assist with the drafting of new legislation, it is particularly necessary to consult an attorney when:

- Preemption is a concern
- Constitutional principles are involved (specifically free speech)
- Courts have ruled on previous laws on the same topic

If your state or locality is looking for an attorney who specializes in tobacco control, the [Tobacco Control Legal Consortium](#) may be able to help.



To read more about the WHO Framework Convention on Tobacco Control and state and local implementation please visit the ASH [database](#):

 [ash.org/usfctcimplementationguide](http://ash.org/usfctcimplementationguide)

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