



# PROPOSED TREATY GUIDELINES THREATEN RIGHTS AND CONSUMER CHOICE

by  
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Activist groups in recent years have increasingly turned to international treaties as a means of effecting changes in U.S. laws that they cannot bring about through the normal American legislative processes. A significant number of existing treaties signed by U.S. negotiators would, if ever ratified by the U.S. Senate, usher in wholesale changes by incorporating large swathes of international law into our domestic law. One of the less-well publicized examples of this effort is the Framework Convention on Tobacco Control (FCTC), adopted in 2003 through the World Health Organization (WHO) and signed by 168 countries (including the U.S.).

The FCTC is an effort to reduce tobacco consumption by “delegitimizing” and demonizing the industry. Backers of the treaty are now attempting to expand its scope by proposing “guidelines” that could have a major impact on nations that have ratified the FCTC. The proposed guidelines are coming up for a vote at the third session of the Conference of the Parties to the FCTC, to take place November 17-21 in Durban, South Africa. Particularly troublesome are guidelines that would require ratifying nations to ban all advertising and promotion for tobacco products (Article 13), to require that they be sold in generic (“plain”) packaging (Article 11), and to bar the tobacco industry (including both its employees and its supporters) from making suggestions with respect to government policy regarding smoking-control measures (Article 5.3). The proposed guidelines are highly problematic; they are antithetical to protections traditionally afforded to speech and property rights by the U.S. Constitution.

*Three Controversial Draft Guidelines.* The Article 11 guidelines would require substantial expansion in the size of health warnings on tobacco packaging. Warnings would be required to take up a majority of the display space on both the front and back of packaging and to include color pictures to illustrate health risks. The warnings are not to be limited to factual information; the guidelines state that warnings are more effective if designed to elicit “unfavorable emotional associations” by the reader. The remainder of the labeling would be plain white – it would state nothing more than the name of the product and could include none of the trademarked designs that consumers have come to associate with particular brands. Moreover, no matter how extensive the health warnings on the packaging, consumers would still be permitted to sue manufacturers based on claims that the manufacturers failed to warn them sufficiently regarding the health dangers of smoking.

The Article 13 guidelines would ban all forms of advertising and promotion of tobacco products. The ban would include all point-of-sale displays (including even a prohibition against making cigarettes visible to shoppers), Internet sales, sponsorships of public events, and depiction of a tobacco brand name in a movie (regardless whether the movie producer has been given a product placement fee). The proposed guidelines go so far as to prohibit publicizing any socially responsible business practices engaged in by the tobacco industry; the guidelines argue that any publicity for such activities (such as steps designed to protect the environment or industry support of charitable causes) is really nothing more than a cynical effort to increase tobacco sales.

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The Article 5.3 guidelines would bar negotiations between government officials at all levels and the tobacco industry (including anyone outside the industry who is deemed to be “working to further [the industry’s] interests”). The proposed guidelines declare that there exists an “irreconcilable” conflict of interest between public health and the interests of the tobacco industry, and thus that any efforts by government to work cooperatively with tobacco industry leaders are counterproductive and lead to unwarranted interference in establishing increased tobacco control measures. Governments would be required to take steps to “denormalize” industry activities that might be viewed as demonstrating “corporate social responsibility.” Those employed by the industry would be barred from making political contributions. All government officials, including government pension plans, would be required to divest all financial interests in firms with tobacco-related holdings, presumably including mutual funds that own tobacco stock.

**European Responses.** The FCTC has received scant attention in the U.S. to date. In Europe, however, there has been a greater degree of activity. For example, Great Britain’s Department of Health in May 2008 issued a “Consultation Paper” regarding the future of tobacco control in that nation. . The document requested feedback on the suggestion that all tobacco products should be marketed in “plain packaging.”

**Serious Constitutional Concerns.** Should the FCTC’s draft guidelines be adopted in this form in the U.S., they would raise serious constitutional concerns. Most prominently, the guidelines are wholly inconsistent with First Amendment protections afforded to commercial speech. Federal and state governments already possess ample authority, of course, to prohibit false or misleading labeling and promotion by the tobacco industry, but the FCTC’s speech ban would extend even to truthful labeling/promotion. The draft Article 13 guidelines opine that there should be no legitimate constitutional objections to a speech ban because there is little value in speech promoting tobacco use. But the Supreme Court has made clear that, so long as a product may be sold legally, there is no “vice” exception to the First Amendment. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995). Moreover, there can be no argument that an all-encompassing speech ban (as opposed to more narrowly tailored speech restrictions, such as a ban on labeling/ads directed to children) is “narrowly tailored” to serve some important government interest. Such an argument is foreclosed because a broad range of sales restrictions have been proven effective in reducing tobacco sales without the need to resort to speech restrictions – which the Supreme Court has said should always be the *last* tool resorted to. *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002). Ironically, plain packaging requirements and promotion bans would likely lead to *increased* availability of tobacco products, as producers would be forced to compete by lowering prices.

The proposed guidelines also raise serious property rights issues. Manufacturers of best-selling tobacco products have developed immensely valuable trademarks used in connection with their products. Any government effort to prohibit use of those trademarks without simultaneously providing compensation to trademark owners would violate the Fifth Amendment, which prohibits government confiscation of private property without “just compensation.” Moreover, counterfeiting of cigarettes – already a serious problem that results in huge losses in government tax revenues – will greatly increase if plain packaging is mandated; such packaging is much cheaper and easier for counterfeiters to copy.

**A Slippery Slope.** The potential use of international law as a backdoor method of restricting the sales of disfavored products is not, unfortunately, confined to tobacco products. The WHO has already put in place procedures for a “global strategy” to reduce alcohol consumption. The WHO has promulgated a “draft strategy” for addressing alcohol sales, modeled on its strategy for tobacco sales. The draft strategy is scheduled to be presented to the Executive Board of WHO in January 2010 and then to the World Health Assembly in May 2010 for adoption.

Those who decry a worldwide “obesity epidemic” are not far behind. It will take only a short stroll down the slippery slope before one begins to hear calls for increased international control over a broad range of consumer-choice issues that heretofore have been left largely to the discretion of the political process within individual nations. Those who care about individual freedom should be increasingly concerned.