

DSWD OPINION NO. 40 S. 2024

DRN: LS-L-LO-24-05-84481-C

MEMORANDUM FOR THE SECRETARY

THROUGH : **ATTY. HURJAE S. LUBAG, Rpm**
Head Executive Assistant

FROM : **THE ASSISTANT SECRETARY FOR GENERAL**
ADMINISTRATION AND SUPPORT SERVICES GROUP, AND
CONCURRENT OFFICER-IN-CHARGE, LEGAL SERVICE

SUBJECT : **DRAFT LETTER TO THE DEPARTMENT OF JUSTICE (DOJ)**
REQUESTING FOR OPINION ON THE ACCEPTANCE OF
DONATION FROM TOBACCO INDUSTRY

DATE : **07 May 2024**

This has reference to the proposed donation by PMFTC INC. of three (3) mobile clinics in favor of Department of Social Welfare and Development.

In our Memorandum, dated 19 February 2024, we recommended that the Department decline the offer or the proposed donation by PMFTC, INC., a cigarette manufacturer in the Philippines, as the acceptance of donation from tobacco industry is expressly prohibited under **Joint Memorandum Circular (JMC) No. 2010-01 of the Civil Service Commission (CSC) and Department of Health (DOH)**. Said act is also a ground for administrative disciplinary action. This was issued pursuant to **World Health Organization Framework Convention on Tobacco Control (WHO FCTC)**, which the Philippines is a signatory. In compliance with the directives of the said JMC, the DSWD, through its former administration, was compelled to adopt the same policy and issued **DSWD Administrative Order (AO) No. 2018-007¹ and AO No. 2019-011²**

However, it is our considered view that the existing laws do not absolutely prohibit the sponsorship, donations or goodwill from the tobacco industry, as part of their corporate social responsibility-related activity and program. The laws merely provide certain regulations on, among others, the advertisement, promotion and sponsorship of their products, but not to entirely prohibit them.

The CSC and DOH issued Joint Memorandum Circular (JMC) No. 2010-01 which expressly prohibits the acceptance of gifts, donations and sponsorships from any person or business related to the tobacco industry, which we do not find in existing laws on tobacco regulations.

On the other hand, we are also of the view that the rationale of the CSC-DOH policy is to stop or prevent "tobacco Industry interference". Tobacco Industry Interference is defined as an array of tactics and strategies used by the tobacco industry to interfere

¹ Attached as ANNEX "C"

² Attached as ANNEX "D"

with the setting and implementing of tobacco control measures. However, we believe that the interactions prohibited between the tobacco industry and the government officials and employees are those which may create a misconception that they have a real or potential partnership or cooperation, and not the mere acceptance of donations based on the goodwill of the industry to assist the government in the performance of its duties, particularly for humanitarian assistance.

In this regard, this Level respectfully recommends that the Department seek the guidance of the Department of Justice (DOJ) as to **whether or not the DSWD may legally accept the donation to be made by a tobacco company to this Department.**

If the SECRETARY is amenable to the recommendation, attached is a DRAFT LETTER to DOJ³ for the SECRETARY's approval and signature.

For the consideration and/or further instructions, if any, of the SECRETARY.

Thank you.


ATTY. GINA V. WENCESLAO
9/22/24

CMUG/JAV/10035
✕

Approved by:


ATTY. EDWARD JUSTINE R. ORDEN
Undersecretary, GASSG ✕

³ Attached as ANNEX "1"

ATTY. JESUS CRISPIN C. REMULLA
Secretary
Department of Justice (DOJ)
Padre Faura Street, Ermita, Manila 1000

Subject: REQUEST FOR DOJ OPINION ON THE LEGALITY OF ACCEPTANCE OF DONATION FROM TOBACCO INDUSTRY

Dear Secretary Remulla:

The Department of Social Welfare and Development (DSWD) has an offer from a company engaging in the tobacco industry for the **donation of three (3) mobile clinics** for the use of social welfare and disaster response operations.

Under the existing laws regulating the tobacco industry and products, we find no absolute prohibition on the donation from any person or business related to the tobacco industry. However, we are constrained from accepting the donation from the said company because of the policy of the government, particularly **Joint Memorandum Circular (JMC) No. 2010-01 of the Civil Service Commission (CSC) and Department of Health (DOH)¹**, which prohibits and even penalizes the said act. The said JMC was issued pursuant to **World Health Organization Framework Convention on Tobacco Control (WHO FCTC)**, which the Philippines is a signatory. In compliance with the directives of the said JMC, the DSWD, through its former administration, was compelled to adopt the same policy and issued **DSWD Administrative Order (AO) No. 2018-007² and AO No. 2019-011³**

Thus, we humbly request for your guidance on the **legality of the donation to be made by a tobacco company being offered to this Department.**

Existing Policies Prohibiting Donations from Tobacco Industry

The prohibition from receiving donations from tobacco industry are clearly and unequivocally provided in the **Joint Memorandum Circular (JMC) No. 2010-01, or the “Protection of the Bureaucracy Against Tobacco Industry Interference”** of the Civil Service Commission (CSC) and the Department of Health (DOH) which covers **all government officials, regardless of status in the national or local government including government-owned and**

¹ “Protection of the Bureaucracy Against Tobacco Industry Interference”, attached as Annex “A”

² Attached as ANNEX “B”

³ Attached as ANNEX “C”

controlled corporations, with original charters, state colleges and universities.⁴ Item 3.0 thereof states:

“3.0 Prohibitions

3.1 Unnecessary interaction with Tobacco Industry

Public officials and employees shall interact with the tobacco industry only when strictly necessary for the latter’s effective regulation, supervision or control.

Transparency in all interactions with the tobacco industry shall be observed. Any necessary interaction with the tobacco industry should be carried out in such a way as to avoid the creation of any perception of a real or potential partnership or cooperation resulting from or on account of such interaction. In the event the tobacco industry engages in any conduct that may create such a perception, public officials and employees shall act to prevent or correct this perception.

3.2 xxx

3.3 Accepting Gifts, Donations and Sponsorship

Public officials and employees shall not solicit or accept, directly or indirectly, any gift, gratuity favor, entertainment, loan or anything of monetary value in the course of their official duties or in connection with any operation being regulated by, or any transaction which may be affected by the functions of their office from any person or business related to the tobacco industry.

xxx" (emphasis and underscoring supplied)

Annex A of JMC No. 2010-01 provides for the “Rules which shall be included in the Amendment of the Code of Conduct of Each Agency,” stating therein the manner on how meetings and interactions with the tobacco industry shall proceed. Rule (iv) is herein quoted for reference:

- (iv) Public officials and employees shall not demand or receive any contribution from the tobacco industry for themselves, their families, relatives, friends, or any other persons or organizations. Contributions shall include, but are not limited to, payments, gifts and services, monetary or in-kind, research funding, financial aid, policy drafts and legal advice.

⁴ Article 1.0 on COVERAGE, JMC No. 2010-01

JMC No. 2010-01 also explicitly stated that a violation of the Circular shall be considered a **ground for administrative disciplinary action** pursuant to Rule XIV (Discipline) of the Omnibus Rules Implementing Book V of Executive Order No. 292, without prejudice to the filing of criminal as well as civil actions under existing laws, rules and regulations.

This Department's Position

We respectfully submit that the **acceptance of donation from the tobacco industry is not prohibited**, and that CSC and DOH, by issuing JMC No. 2010-01, overstretched their construction of the regulations provided under WHO FCTC and the existing national laws over tobacco products and industry.

Arguments and Authorities in Support of the Position

When the law is clear and free from any doubt or ambiguity, there is no room for construction or interpretation

Existing national laws on tobacco, such as **Republic Act No. 9211**, or the "**Tobacco Regulation Act of 2003**" and **Republic Act No. 11900**, or the "**Vaporized Nicotine and Non-Nicotine Products Regulation Act**", are not explicit as to the restriction or regulation of donations to government agencies like the DSWD.

Regulations laid down for tobacco advertisement and promotion generally involve restrictions on the display of a tobacco product or manufacturer's name, trademark, logo, etc. Republic Act No. 9211 provides:

SECTION 23. Restrictions on Tobacco Promotions⁵. — *The following restrictions shall apply on all tobacco promotions:*

XXX

c. All stalls, booths, and other displays concerning tobacco promotions must be limited to point-of-sale locations or adult-only facilities.

XXX

⁵ "Promotion"—refers to an event or activity organized by or on behalf of a tobacco manufacturer, distributor or retailer with the aim of promoting a brand of tobacco product, which event or activity would not occur but for the support given to it by or on behalf of the tobacco manufacturer, distributor or retailer. It may also refer to the display of a tobacco product or manufacturer's name, trademark, logo, etc. on non-tobacco products. This includes the paid use of tobacco products bearing the brand names, trademarks, logos, etc. in movies, television and other forms of entertainment. For the purpose of this Act, promotion shall be understood as tobacco promotion;

h. No name, logo, or other indicia of a cigarette brand or element of a brand-related marketing activity, may appear on items that are marketed to or likely to be used by minors such as, but not limited to, sports equipment, toys, dolls, miniature replicas of racing vehicles, video games, and food. The manufacturer or company must take all available measures to prevent third parties from using the company's brand names, logos, or other proprietary material on products that are directed toward minors.

The same law also provides for Restrictions on Sponsorships, thus:

SECTION 25. Restrictions on Sponsorships.—Beginning 1 July 2006:

- a. No sponsorship⁶ shall be provided for:
- 1) an event or activity which bears a tobacco product brand name, unless there is reasonable basis to believe that all persons who compete, or otherwise take an active part, in the sponsored events or activities are persons eighteen (18) years of age or older;
 - 2) xxx
 - 3) a sponsored event or activity reasonably believed to be of particular appeal to persons under eighteen (18) years old.

Meanwhile, the **Implementing Rules and Regulations (IRR) of RA No. 11900** provides:

Rule VI - RESTRICTIONS ON PRODUCT COMMUNICATIONS, ADVERTISEMENTS, AND SPONSORSHIPS

Section 3. Restrictions on Sponsorship. *The following restrictions shall apply only to all Vaporized Nicotine and Non-Nicotine Product or Novel Tobacco Product promotional sponsorships:*

xxx

h. These restrictions shall only apply to commercial sponsorships and shall not prevent a company from conducting corporate social responsibility-related activities and programs; Provided, that such activities shall not bear a Vaporized Nicotine and Non-Nicotine Product and Novel Tobacco Product brand name and logo.

Thus, it is our considered view that the **existing laws do not absolutely prohibit the sponsorship, donations or goodwill from the tobacco industry**, as part of their corporate social responsibility-related activity and program. The laws merely provide

⁶ "Sponsorship"—refers to any **public or private contribution** to a third party in relation to an event, team or activity made with the aim of promoting a brand of tobacco product, which event, team or activity would still exist or occur without such contribution. For the purpose of this Act, sponsorship shall be understood as tobacco sponsorship;

certain regulations on, among others, the advertisement, promotion and sponsorship of their products, but not to entirely prohibit them.

The JMC cannot go beyond what is provided under the laws

“The spring cannot be higher than the source.”

The CSC and DOH issued Joint Memorandum Circular (JMC) No. 2010-01 which expressly prohibits the acceptance of gifts, donations and sponsorships from any person or business related to the tobacco industry, which we do not find in existing laws on tobacco regulations.

The Supreme Court said in the *Miners Association of the Philippines, Inc. v. Factoran*⁷:

We reiterate the principle that **the power of administrative officials to promulgate rules and regulations in the implementation of a statute is necessarily limited only to carrying into effect what is provided in the legislative enactment.** The principle was enunciated as early as 1908 in the case of *United States v. Barrias*, The scope of the exercise of such rule-making power was clearly expressed in the case of *United States v. Tupasi Molina*, decided in 1914, thus: “Of course, the regulations adopted under legislative authority by a particular department must be in harmony with the provisions of the law, and for the sole purpose of carrying into effect its general provisions. **By such regulations, of course, the law itself cannot be extended.** So long, however, as the regulations relate solely to carrying into effect its general provisions. By such regulations, of course, the law itself cannot be extended. So long, however, as the regulations relate solely to carrying into effect the provision of the law, they are valid.” (emphasis supplied)

On the other hand, the CSC-DOH JMC No. 2010-01 appears to be issued to operationalize Article 5.3 of World Health Organization Framework Convention on Tobacco Control (WHO FCTC). The WHO FCTC, to which the Philippines is a signatory, aims to protect present and future generations from the health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco for its objective. Article 5.3 thereof states:

“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.”

In our reading of the WHO FCTC provision, there is nothing therein which compels the parties to the WHO FCTC, the Philippines included, to restrict donations, directly or

⁷ G.R. No. 98332, January 16, 1995, 310 PHIL 113-139

indirectly, in favor of the government. The FCTC merely encourages the implementation of policies but in accordance with the parties' national law.

In this case, we find DOJ Opinion No. 41, series of 2023 relevant which discussed the nature of a treaty and its relationship vis-à-vis existing domestic laws in our jurisdiction in relation to the issue of non-inclusion of the tobacco industry representative in the Inter-Agency Committee Tobacco (IAC-Tobacco). May we cite the relevant portion thereof:

*"The supremacy of statutes over treaties/international agreements is, in fact, recognized by the WHO FCTC itself, when it provided in its **Article 5.3** that **"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 interest of the tobacco industry, in accordance with national law."** Thus, even with the ratification by the Philippine Senate of the WHO FCTC, the latter is still subject to local laws, particularly Section 29(h) RA No. 9211, which mandates the participation of a representative from the tobacco industry as a member of the IAC-Tobacco. In other words, regardless of the ratification of WHO FCTC, this did not automatically result in the repeal of Section 29(h) of RA No. 9211.*

If the tobacco industry were to be excluded from the IAC-Tobacco, Congress must enact the corresponding law expressly This is consistent with the **Department's Opinion No. 28, s. 2011**, which found **Article 5.3 of the WHO FCTC to be not self-executing**, to wit:

'[The] parties [to the WHO FCTC], the Philippine government included, are not absolutely prohibited or precluded from entering into partnership with or participating in activities of those in the tobacco industry.

Besides, apart from recognition of the parties' sovereign right to determine and adopt the imposable tobacco control polices, the FCTC merely encourages the implementation of the adopted policies in accordance with the parties' national law.'" (underscoring supplied)

In the discussion above, DOJ Opinion No. 28, s. 2011 was then mentioned and we underscored the relevant statement, that is, that there is no absolute prohibition on the Philippine Governments to enter into partnership with or participating in activities of those in the tobacco industry.

Applying the same logic, it can, therefore, be said that **WHO FCTC** did not prohibit tobacco industry to conduct their corporate social responsibility activity or program, such as in the form of donations of goods to government agencies which the latter may utilize to perform their mandates.

We are also of the perception that the rationale of the CSC-DOH policy is to stop or prevent "tobacco industry interference". Tobacco Industry Interference is defined as an array of tactics and strategies used by the tobacco industry to interfere with the setting and implementing of tobacco control measures. However, we believe that the interactions prohibited between the tobacco industry and the government officials and employees are those which may create a misconception that they have a real or potential partnership or cooperation, and not the mere acceptance of donations based on the goodwill of the industry to assist the government in the performance of its duties, particularly for humanitarian assistance.

The DSWD seeks the legal guidance of DOJ as our hands are tied because of the CSC-DOH policy prohibiting government agencies to accept donations from any person or company in the tobacco industry. Our Department is working passionately to perform its mandate that supports a large population of poor, vulnerable and/or disadvantaged families and individuals. For the first semester of 2023, the Philippine Statistics Authority (PSA) has reported a poverty incidence estimated at 16.4% among families or the proportion of Filipino families with incomes that are not sufficient to buy their minimum basic food and non-food needs, and a poverty incidence estimated at 22.4% among individuals or 25.24 million poor Filipinos⁸.

This Administration, through the DSWD, has focused its thrust to help the poor, and all donations, gifts, or grants that the Department will receive from private corporations, non-government organizations, people's organizations, and from other government agencies/offices will provide significant support in the continuous implementation of the Department's statutory and special programs and will redound to the benefit of the poor, vulnerable and disadvantaged sector. The DSWD also believes that the government should work hand-in-hand with the private sector, including those from the tobacco industry, subject to the conditions or restrictions set forth in the aforementioned laws, in the provision of basic services to the Filipino people.

Your guidance on the matter, particularly on the legality of the donation to be made by a tobacco company to this Department, will be highly appreciated.

Thank you very much.

Very truly yours,


REX GATCHALIAN,
Secretary

Date: MAY 13 2024

⁸ <https://www.psa.gov.ph/system/files/phdsd/2023%201st%20Sem%20Official%20Poverty%20Statistics%20Report.pdf>. retrieved on 08 May 2024.