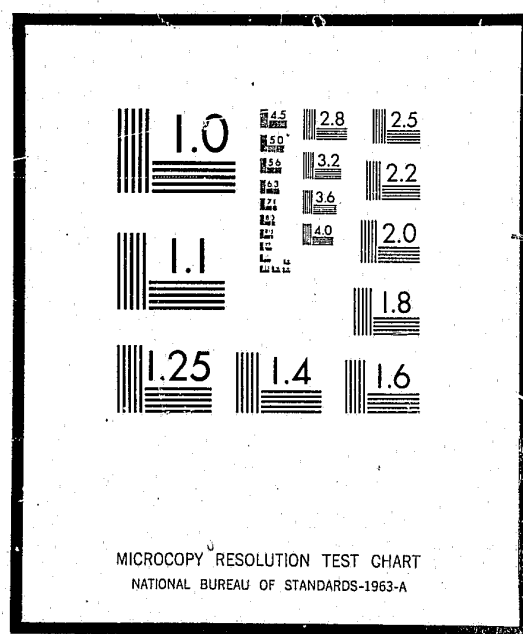


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LAW ENFORCEMENT GUIDE

COMBATTING CIGARETTE SMUGGLING

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FOREWORD

This guide to agencies seeking to cope with the problem of criminal interstate cigarette smuggling activities was prepared with the cooperation of state revenue agencies, state attorneys general offices, and many state and local police departments. The personnel of these agencies and departments generously assembled and provided information to assist this project, and their advice was of great value in shaping a final product which would be of practical use to law enforcement agencies coping with this criminal problem.

Michael Maltz, Ph.D., Project Director

I. INTRODUCTION: Background and Impact of the Cigarette Smuggling Problem

Cigarette smuggling is a national problem with serious criminal law enforcement implications. This activity has been receiving increasing attention in our newspapers and magazines because of the magnitude of these criminal enterprises and their impact on state revenues. In scope, size, and methods, the enterprises to be addressed here are clearly distinguishable from small-scale and petty violations of the criminal law that one often associates with cigarette smuggling. While law enforcement agencies are more and more responsive to the problem, the general public and, in particular, the business community appear to ignore it or look upon it as a benign though illicit way of evading state taxes. This public apathy poses serious problems for criminal justice system enforcement, as well as for state tobacco tax administrators who are responsible for collection of state taxes on cigarettes and other forms of tobacco.

A. Impact of Cigarette Smuggling Activities

Organized cigarette smuggling is a deliberate and wilful criminal act. It is a form of theft, and should be recognized as theft. It places legitimate cigarette wholesalers, distributors, transporters, and retailers at a competitive disadvantage. Their businesses suffer and in some cases fail^{1/} due to this smuggling. The citizens of the defrauded states also suffer because they have to bear a greater tax burden to make up for these stolen revenues. The amounts stolen are significant; it is estimated that ten states incur losses amounting to more than ten million dollars each year due to the theft of state revenue by cigarette smugglers.

^{1/}A 1972 report on cigarette smuggling issued by the State of New York State Commission of Investigation details how a trucking company was forced out of business due to hijacking of cigarette laden trucks. In addition, it reported that over 100 tobacco retailers went out of business in 1971, a direct result of declining cigarette sales due to competition from smugglers.

There are secondary impacts of cigarette smuggling which contribute to the overall problem of crime in our society. Cigarette smuggling is a modern form of organized criminal enterprise. Bribery and corruption of enforcement officials are used to protect these operations; hijacking of truckloads of cigarettes is not an uncommon occurrence; and even murders^{2/} are associated with these enterprises. These are some of the "side effects" of the smuggling of cigarettes. State tobacco tax administrators, responsible for the collection of state taxes on cigarettes and other forms of tobacco are unable to cope with these problems, and are understandably concerned when people look upon cigarette smuggling as a harmless form of artful dodging of the law.

With state taxes varying from two cents to twenty-one cents per pack of cigarettes, between states a few hours travel from each other, the economic incentive for this criminal enterprise is obvious.^{3/} This incentive should increase in the future because states, counties, and cities are likely to turn more and more to excise taxes on non-necessities (especially on possibly harmful substances) such as cigarettes. Faced with increasing costs for providing municipal services and welfare benefits at the very time when there is increasing resistance to increases in state income taxes, in property taxes, and in sales taxes on necessities such as food and clothing, cigarette taxes can be expected to rise. Disparities in cigarette taxes between states where cigarettes are produced and those in which they are consumed, which are more significant to the enforcement problem, may well be expected to widen.

Since cigarette smuggling is based on tax disparities, many people feel that the simplest solution would be for all states to set the tax at the same rate, or for the federal government to take over the imposition and collection of all cigarette taxes, and then to distribute the tax revenue to the states. These seemingly simple solutions are unrealistic. If all states are to impose the same tax, should it be North Carolina's 2 cents per pack or Connecticut's 21 cents per pack? Even if a median tax is suggested, some states will realize revenue windfalls while others

^{2/}E.g., "Probe Cop, Cigarette Ring Linked to Trunk Killing," Chicago Daily News, December 12, 1973; "Rub Out Accused Hitman En Route to His Hearing," New York Daily News, November 19, 1975.

^{3/}In some states the problem is compounded by additional cigarette taxes imposed by counties and municipalities.

experience revenue shortfalls. And the political problem of getting fifty state legislatures to agree on a single tax rate is clearly close to impossible.

If the Federal Government were to take over the imposition and collection of all cigarette taxes, some of these same problems would exist. If the revenue was to be shared based on population, windfalls and shortfalls would still exist. If it was based on previous cigarette tax revenues, citizens in low tax states would be paying more, but a significant fraction of the income would not stay in the state. In other words, these seemingly simple solutions are illusory. They would have been of value had they been implemented prior to the imposition of taxes by individual states, but they are not feasible now.

States with the highest cigarette taxes are usually those whose citizens already bear the highest total tax burden, and there is increasing pressure to raise the cigarette tax still further. Such an increase can be expected to increase the amount of cigarette smuggling disproportionately. This will put a much greater burden on tobacco tax administrators and on agencies charged with enforcing collection of cigarette taxes. Furthermore, the fiscal pressures on states often preclude enforcement agencies from hiring additional personnel to control cigarette smuggling. Administrators more and more find themselves caught in this fiscal vise, watching increasing amounts of state revenue lost to smuggling but unable to hire sufficient staff to prevent it. This causes them to turn away from their standard approaches to the problem, and to enlist aid from federal, state and local law enforcement agencies in developing new approaches and techniques to combat cigarette smuggling.

B. Criminal Law Enforcement in the Area of Smuggling

Many law enforcement agencies are not aware of the criminal nature of cigarette smuggling and what they can do to control it. Large-scale cigarette smuggling is an organized criminal enterprise. Police departments must realize that they will be called upon increasingly to deal with these forms of crime in the future. They cannot turn their backs

on them by saying, "it's a revenue problem" or "the prosecutor handles these cases" or "I don't know the first thing about that type of crime." Police must learn "the first thing" about these crimes. This guide should serve as a starting point to orient police departments about the nature of one form of such crimes and what they can do to cope with this increasingly important societal problem. It has been prepared to assist law enforcement agencies in detecting and investigating criminal violations arising out of cigarette smuggling.

Revenue enforcement agencies are slowly but perceptibly moving toward invocation of applicable criminal remedies, but are not well oriented in the criminal implications of violations in this field, or they feel that criminal sanctions are more a promise than an actuality. These perceptions do not seem rooted in reality, since occasional determined efforts to invoke criminal sanctions appear to have met with success, and have been hampered by a minimum of evidentiary or technical legal problems. What has limited these efforts among state and local police agencies is the low priority they have given to crimes involving cigarette smuggling. This is due primarily to lack of knowledge of the nature and impact of these crimes and of what law enforcement agencies can do to detect, investigate, and prosecute these crimes.

This guide is intended to make available the heretofore scattered bits and pieces of law enforcement information and expertise in this field^{4/}

^{4/}There is very little data available on criminal enforcement in this area, and what has been available in the past has largely consisted of newspaper and magazine stories, and bits and pieces of local experience related in documents such as applications by police and other law enforcement agencies for funds to support anti-smuggling efforts.

In preparing this guide it was necessary to collect data from many diverse sources. The National Tobacco Tax Association and its Committee on Tax Evasion provided a firm base of information. Newspaper and magazine articles from various parts of the country were reviewed. Questionnaires were sent to state criminal justice planning agencies, to state investigative agencies, and to state revenue departments requesting information about the smuggling problem in their state, the characteristics of smugglers, the nature of their enforcement effort, and the state laws relating to cigarette smuggling. Although responses were not received from every agency, the information was sufficient to provide a reasonably accurate picture of the cigarette smuggling problem throughout the nation: its impact, its criminal justice implications, the nature and modus operandi of cigarette smuggling activities, and measures which might be taken to combat it.

and to provide criminal justice personnel with a resource for investigation and prosecution of violations. In order to do this, the following chapters will address the nature of the problem and modus operandi of criminal violations; will describe a basic analytic tool to be used for analysis and prediction of unlawful cigarette smuggling activity; and will discuss investigative and prosecutive strategies and potentials in this significant criminal justice area.

In this developing criminal justice area, the approaches of today may well be inappropriate to meet tomorrow's challenges. Therefore, this guide is intended to be a skeleton outline, to be revised and improved as more investigative and prosecutive experience is made available.

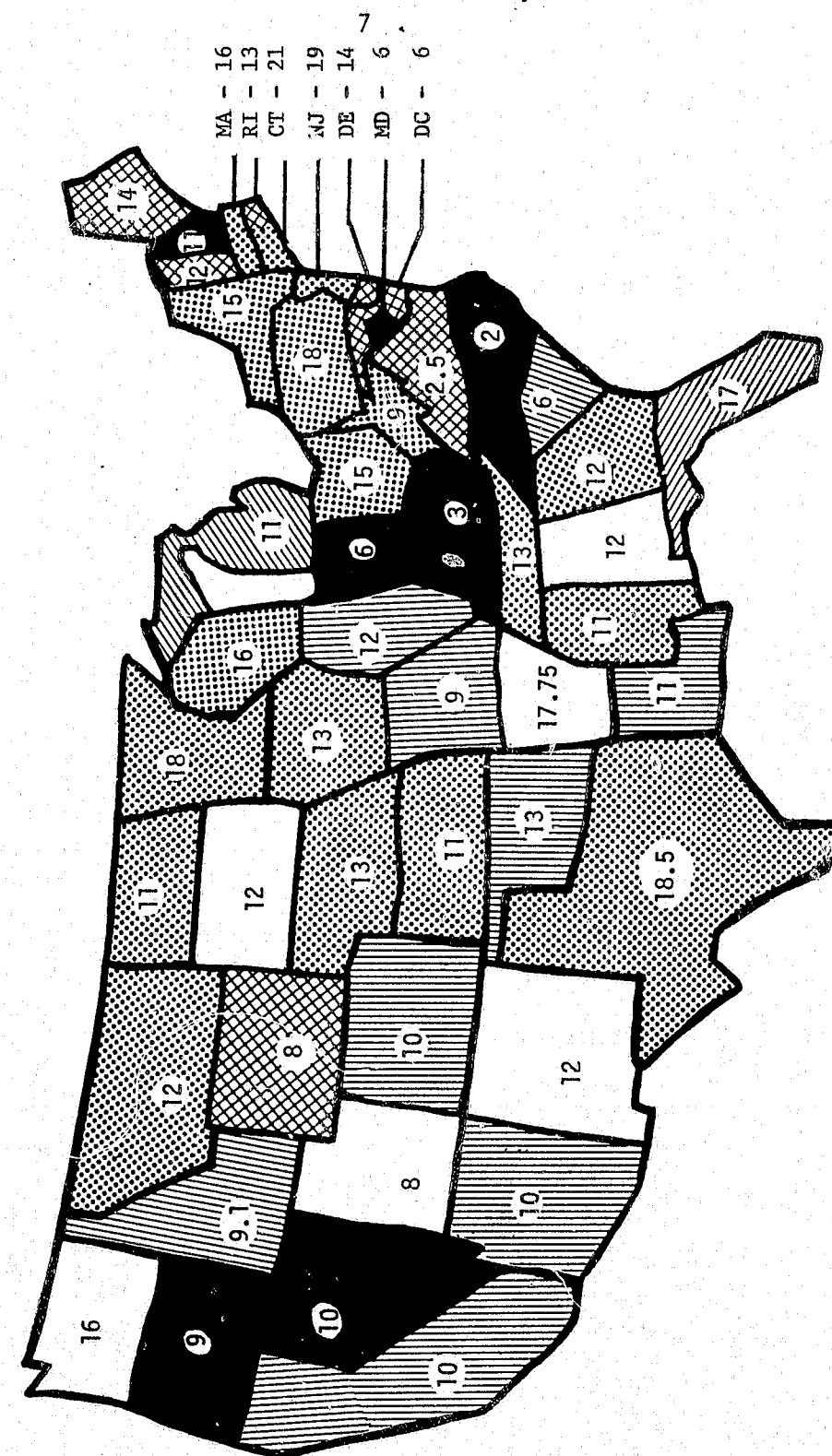
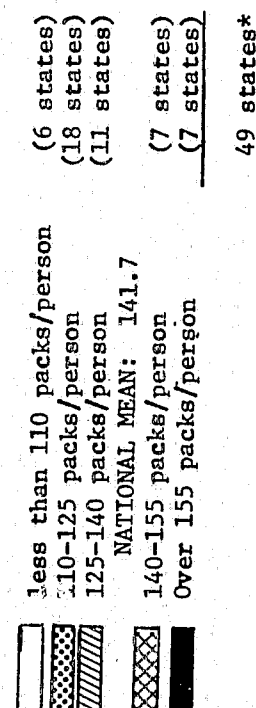
II. THE NATURE OF CONTEMPORARY CIGARETTE SMUGGLING ACTIVITIES

Black market smuggling is caused by market pressures created by unmet demands for a commodity that cannot be legally filled. Cigarette smuggling can be termed a "gray market" form of smuggling because cigarettes are neither illegal (as is heroin) nor rationed (as were tires during World War II) but are taxed at substantially different rates by the states. A tractor-trailer that can hold 1000 cases of cigarettes^{5/} bought legally in North Carolina with a state tax of 2¢/pack (or 20¢/carton) and sold at retail prices in Connecticut or Massachusetts with state taxes of 21¢/pack will bring a gross profit of over \$100,000 from just one shipment. Smuggling into New York City, which adds city taxes amounting to about 7¢/pack to the state tax of 15¢/pack, is an even more profitable venture. Figure 1 depicts, and the following table lists, the per capita cigarette sales and tax rate for each state.

Tax differences among the states are not the only factors affecting the extent of smuggling into a state. Also important are the state's populations (and its smoking habits), the cigarette taxes imposed by the bordering states, the number of roads crossing these borders, the laws relating to cigarettes and cigarette taxes, and the nature of the enforcement effort. Obviously, no two states have the same smuggling problem.

Despite these dissimilarities among the states, certain patterns begin to emerge in their cigarette smuggling problems. In particular, there appear to be four distinct types of problems with which states must deal. These are casual cigarette smuggling, organized cigarette smuggling, mail-order purchase of cigarettes, and purchase of cigarettes through tax-free outlets.

^{5/}A case holds sixty cartons of ten packs each.



SOURCE: Tobacco Tax Council (1974)

FIGURE 1. Per Capita Cigarette Sales and Tax Rate For Each State (FY 1974 data)

*Included DC; excludes Alaska and Hawaii

TABLE 1: State Taxes and Tax-Paid Per Capita
Cigarette Sales (FY 1974 data)

State	1974 Tax Rate (\$/Pack)	1974 Per Capita Sales (Packs/Person)
Alabama	12	108.2
Alaska	8	130.4
Arizona	10	133.1
Arkansas	17.75	109.7
California	10	126.7
Colorado	10	132.8
Connecticut	21	112.4
Delaware	14	151.3
D.C.	6	182.7
Florida	17	136.0
Georgia	12	123.7
Hawaii	10	89.3
Idaho	9.1	125.6
Illinois	12	131.9
Indiana	6	159.6
Iowa	13	116.1
Kansas	11	118.6
Kentucky	3	212.4
Louisiana	11	129.9
Maine	14	142.1
Maryland	6	144.8
Massachusetts	16	124.3
Michigan	11	138.8
Minnesota	18	110.6
Mississippi	11	117.1
Missouri	9	135.4
Montana	12	121.9
Nebraska	13	110.5
Nevada	10	204.7
New Hampshire	11	269.8
New Jersey	19	121.4
New Mexico	12	100.3
New York	15	121.6
North Carolina	2	227.3
North Dakota	11	110.5
Ohio	15	122.1
Oklahoma	13	130.5
Oregon	9	155.8
Pennsylvania	18	114.2
Rhode Island	13	146.1
South Carolina	6	129.7
South Dakota	12	108.4
Tennessee	13	114.8
Texas	18.5	114.7
Utah	8	75.6
Vermont	12	151.8
Virginia	2.5	149.6
Washington	16	98.6
West Virginia	12	119.9
Wisconsin	16	111.8
Wyoming	8	145.8

[Source: Tobacco Tax Council, 1974]

The most important smuggling type from the standpoint of criminal law enforcement is organized cigarette smuggling; however, casual cigarette smuggling also poses similar enforcement problems. Violations stemming from mail-order and tax-free purchases pose different types of enforcement problems. They are included to furnish a complete picture of the nature of cigarette smuggling, and because of their potential for criminal abuse. Each of these is described below, along with the tactics and procedures used to evade the payment of state cigarette taxes, and avoid detection and prosecution.

A. Casual Cigarette Smuggling

Casual cigarette smuggling usually takes place across the borders of neighboring states. An individual who may live in one state and work across the border in another state can take advantage of a cigarette tax differential between the two states to purchase cigarettes in the low-tax state. He may take orders from and furnish cigarettes either to friends and neighbors or to co-workers, depending upon the relative tax of the two states. He does not make money on the transaction, or he adds to the prices of the cigarettes only enough to pay for his expenses and inconvenience. If this is the case, he is and remains a casual cigarette smuggler.

On the other hand, he may add on to the price he pays as much as he feels he can without losing customers or having them turn him in. He may base his prices for cigarettes on what he feels the market will bear, and go beyond his circle of acquaintances to broaden his base of customers. In such a case, the smuggler is no longer just doing it as a convenience to friends and as a means of saving them money or a trip to the other state. In this situation he is looking upon his illegal activity as a

business; it has become an organized criminal enterprise, of the kind described in Section B below.

Other forms of casual smuggling are less regular and less frequent. A person on vacation or on business in a state where cigarette taxes are low (North Carolina, Virginia, or Kentucky) may bring home lower-cost cigarettes, and one state refers to the "occasional truck driver who picks up cigarettes for friends." This long-distance casual smuggling is not dependent on the low-tax state bordering on the state in which the consumption takes place.

Casual cigarette smuggling is the primary smuggling problem in four states; in seven states it is the second greatest cigarette smuggling problem. States which increase their taxes relative to surrounding states can expect disproportionate increases in casual cigarette smuggling.

B. Organized Cigarette Smuggling

There are many different levels at which organized cigarette smuggling can occur, depending upon the degree of sophistication of the smugglers and of the enforcement agents. The most common form is the regular purchase of cigarettes in wholesale lots (from a few cases to truckloads) from a cigarette distributor in a low-tax state, their transportation to a high-tax state, and their resale in the high-tax state. As has been described, many organized smugglers start out as casual smugglers and develop their activity into lucrative illegal sidelines; some such operations may evolve into large-scale organized smuggling operations. With total taxes on cigarettes (state, local, and sales taxes) over twenty cents per pack in some states and as low as two cents per pack in others, a person who can smuggle 4000 cartons of cigarettes in a van or a camper and add only ten cents to each pack (\$1 per carton) rather than the 18-cent tax differential will make a gross profit of \$4000 on one trip. The obvious necessity for such an enterprise is a market for the 4000 cartons at a savings of eight cents per pack.

1. Retail sale of smuggled cigarettes. Naturally, if a larger market exists a larger truck could be used with a lower transportation cost and a much higher per-trip profit. But the markup will be lower because one

more level of distributor is needed to market the cigarettes. This will be true only if the cigarettes are marketed through illegal channels to customers who realize that they are dealing in merchandise that is in some sense "hot." If the smuggler has access to the normal (legal) cigarette distribution system, he can charge the full price. Legal and smuggled cigarettes can be co-mingled in warehouses, vending machines, and retail outlets. Cigarette tax stamps ("fusons", so-called because the stamps are fused onto the cellophane wrapper of a cigarette pack and cannot be removed) may be stolen or counterfeited, or metered cigarette stamping machines may be stolen, tampered with or duplicated, in order to make it appear that the state cigarette taxes have been paid. An enforcement agency reports: "A recent investigation by this department uncovered a large-scale operation, in which 30,000 cartons were seized (unstamped); in addition, three Pitney-Bowes [metered] machines and inks were seized. This group was using forged stamping machine head, using tax number of large distributor. Investigation indicates that cigarettes when stamped were being disposed of through licensed wholesalers and retailers [sic]."

To aid smugglers, wholesalers in North Carolina are alleged to have "run their meters [used to place the North Carolina stamp] without stamping the cigarettes. In this way the state got its tax money and I got cigarettes without any stamps," according to one smuggler. In addition, in a number of states "bootlegged cigarettes are sold without any attempt to conceal the fact that they are not tax paid." These are just some of the ways of selling smuggled cigarettes through retail outlets.

Large-scale smugglers may also integrate their operation vertically. They may control retail outlets and vending machines in the high-tax state, and acquire a cigarette distributorship as well. In addition, one state reports, "it is alleged that organized smugglers have 'bought into' legitimate sources of supply in low tax states."

2. Techniques of smugglers for reducing the risk in transport. Movements of large amounts (e.g., trailer-truck size) of cigarettes are risky. Unless the smuggler can move these smuggled cigarettes into normal channels, more people are involved in their distribution and the requisite secrecy of the operation becomes harder to control. The seizure

by enforcement agents of a camper filled with cigarettes can be made up in four or five trips, but the seizure of a large truck is costlier. In one jurisdiction, "most smugglers in the area have switched from large truck shipments to vans containing 4000-4500 cartons, thereby limiting potential loss in arrest situations." In addition to the risk of seizure of the smugglers, if the activity is traceable to a legitimate distributor his business license is placed in jeopardy.

Organized smugglers also use legitimate transportation facilities to move cigarettes from low tax states to high tax states. Confederates in low tax states purchase cases of cigarettes, wrap and send them to associates in the high tax states, using interstate buses, railways, and parcel post. Although transportation expenses are higher than for bulk shipments, there are advantages in not having to worry about interdiction and confiscation of the bulk shipments and the vehicles transporting them.

There are three ways a large-scale smuggler can reduce his risk when smuggling large truckloads of cigarettes. As mentioned, he can steal, forge, or counterfeit tax stamps and/or co-mingle the smuggled cigarettes with properly purchased cigarettes (or with properly stamped but hijacked cigarettes).

A second alternative is to corrupt enforcement agents. Three states have reported that investigators within their states were dismissed or indicted because they were paid off to turn a blind eye toward smuggling activity or to steal tax stamps for distributors.

A third method used to reduce the risk of seizure of large loads of cigarettes is to employ classical smuggling stratagems: purchases of cigarettes are made in cash, so that no records exist of the transaction; waybills are forged or doctored to disguise the true size of the load of cigarettes in the truck, if a common carrier is used; cigarettes are loaded at night or in secret, into trucks, vans, campers, mobile homes, or cars. (It is alleged that even boats and airplanes have been used to transport cigarettes.) Vans and campers used for smuggling have been found with bicycles and boats lashed outside the vehicles and with young children inside, to give the appearance of having been on a vacation trip.

License plates are switched, signs on the trucks are changed, loads are camouflaged, tractors are switched, trucks are off-loaded at pre-designated drop points for reloading onto other trucks, back roads

are taken, and lead and tail cars are used to protect the cargo and spot attempts by enforcement agents to trail it. One state enforcement agency has had problems with smugglers' "highly sophisticated communications system which they use to alert drivers en route into _____ of check points or surveillance operations." Trucks are often rented, to minimize the risk of seizure of the smugglers' vehicles. The types of precautions taken by the smugglers depends on the nature and extent of the enforcement effort.

Cigarettes are sometimes off-loaded into smaller trucks and vans, into secret warehouses, or into private homes, if it is necessary to store them for a while. Smuggled cigarettes even have been found in a "hidden passageway behind wall in home."

Despite the fact that cigarettes are a legal commodity, in many states with smuggling problems the bulk of the bootlegged cigarettes never come to light in legitimate commerce. In these states cigarettes are distributed literally off the tailgate of the trucks and vans, wherever the smuggler finds a group of customers eager for a bargain: apartment houses, office buildings, factories, and taverns. In these cases the purchasers as well as the smugglers are evading the law and are liable to criminal prosecution.^{6/}

One factor should be recognized concerning cigarette smuggling. There is a paucity of reliable information on the subject, and the descriptions given in this report may only be the tip of the iceberg. To determine the full extent of smuggling is a real challenge for law enforcement agencies. Although many states report that most of their smuggling is casual smuggling, there may also be a significant amount of organized smuggling which never surfaces. Ten states report that organized cigarette smuggling is a major problem for them; this may be the case in other states which are unaware that the smuggling is going on.

^{6/}This would apply in states where cigarette tax evasion is a crime. In some states it is a civil matter. See Chapter IV for a summary of state laws.

C. Mail Order Purchase of Cigarettes

In order to run their businesses effectively, both casual and organized smugglers must know how to avoid detection in the state in which they make their sales; they must know how to distribute the cigarettes quickly in the state; and they must be able to build up a sufficient clientele for bootleg cigarettes surreptitiously, without stirring up law enforcement or state revenue officials. All of these considerations make it more likely that the smugglers will be residents of the high tax states; an outsider "doesn't know the territory."

However, residents of low tax states have seen and taken the opportunity to cash in on the bootleg cigarette business. Many cigarette mail-order houses have been set up, primarily in North Carolina, specifically to avoid taxes in high tax states.^{7/} Advertising campaigns are mounted in these states, using leaflets containing a list of prices for cartons of cigarettes considerably lower than the retail price. The leaflets may include some statement to the effect that the state and local taxes have not been included in the price, and that the customer is liable for these taxes. In other words, this scheme is a con game which relies on the greed of the customers and their willingness to try to avoid paying the cigarette taxes.

The Jenkins Act (15 USC 375-378), enacted in 1949, was passed to prevent this form of tax evasion. It requires persons who ship cigarettes to other states to notify the tobacco tax administrators in these states of the names and addresses of the recipients, and of the quantities, brands, and dates of mailing.^{8/} In the late 1960s, when state cigarette

^{7/} Although residents of the low tax states are necessarily involved in these businesses, it has been discovered that many of them were set up by residents of the high tax states.

^{8/} The Jenkins Act also requires a business to provide tobacco tax administrators with its name, principal place of business, and the names of officers of the business. This was apparently done to prevent people or businesses prohibited from doing business in a state from setting up shop in another state and conducting their business by mail without the knowledge of the administrator, who normally controls the licensing of these businesses.

taxes began to climb appreciably, federal authorities in some jurisdictions began to prosecute violations under the statute (a misdemeanor); they have also begun to prosecute violators for mail fraud (a felony) in those cases in which recipients have not been advised of their liability for state and local taxes.

Of course, once the customers pay state and local taxes on the mail order cigarettes, the advantage of mail order is eliminated.^{9/} If the customer list is transmitted to the state tobacco tax administrator, who follows up by letter, telephone, and/or a visit, most of the taxes will be forthcoming and the mail order business dries up.

Three states have indicated that this is their major cigarette tax evasion problem.

D. Purchase of Cigarettes Through Tax-Free Outlets

Although tax-free purchases are treated separately from casual and organized smuggling in this report, they often overlap. Large truckloads of untaxed cigarettes may cross the border between a state and a tax-free jurisdiction within it, for example, an Indian reservation, just as they cross the border between two states with different tax rates. Other tax-free cigarette outlets may also become smuggling sources. This section gives an overview of the types of tax-free outlets and their relation to cigarette smuggling.

There are three primary avenues of avoiding taxes by purchasing cigarettes from tax-free jurisdictions. They can be purchased at international ports of entry, at military post exchanges (PXs), or on Indian reservations at "smoke shops."

No state has reported on any major smuggling effort through international ports of entry, although some violations may occasionally occur.

^{9/} Considering the costs of postage and handling, the retail cost is probably lower than the mail-order when all the taxes are paid.

One state has found that there is a significant amount of cigarette smuggling from across the border in Mexico. Apparently cigarettes are shipped from the producing states to distributors across the border from which they are smuggled in.

Cigarettes purchased through PXs are presently untaxed by states. Most such purchases are small-scale, on the order of a few cartons for consumption by military personnel and their families, but are also purchased for friends. Although most individual violations are minor, in some states the aggregate violations constitute a serious problem. There have also been major abuses of the PX privilege, both by customers and employees of PXs. Cases of cigarettes have been purchased from military PXs for resale to civilian customers. Because of the potential for abuse, and because military pay increases have made these PX tax exemptions superfluous, the Advisory Commission on Intergovernmental Relations^{10/} concluded on September 19, 1975, that "the current exemption of on-base sales to military personnel should be removed. The Commission therefore recommends that the Congress give early and favorable consideration to legislation amending the Buck Act to allow the application of state and local sales and excise (including tobacco and liquor) taxes to all military store sales in the United States."

The third form of tax-free purchase of cigarettes, from Indian smoke shops on Indian reservations, is a major problem in the western states. State tax revenue laws are not applicable on Indian reservations.^{11/} Court cases in Idaho, Montana, Nevada, New Mexico, and Washington have reaffirmed this exemption. In addition, injunctions have been issued by

^{10/}The Advisory Committee on Intergovernmental Relations is an independent bipartisan body, consisting of representatives of federal, state, and local government, as well as public representatives, which has responsibility for identifying and analyzing the causes of intergovernmental conflicts and recommending ways of strengthening and improving the American federal system. Its work is supported by funds from the federal budget.

^{11/}It should be noted that purchasers not residing on reservations may be subject to state use taxes when they leave reservations with their purchases.

state and federal courts enjoining states from interfering with trade on Indian reservations. In some places, political pressure has prevented states from setting up roadblocks at reservation borders to apprehend non-Indian smugglers who make large-volume purchases.

Major purchases of cigarettes from Indian smoke shops operate in much the same manner as smugglers from low tax states: frequent route changes, using back roads, distributing the cigarettes quickly from changing distribution points. Some five or six states consider this form of smuggling to be their major cigarette tax evasion problem.

* * *

In summary, then, there are a number of forms of cigarette smuggling. Casual smuggling, especially into a contiguous state, is a problem in all parts of the country, from Washington to Texas to Massachusetts to Florida. If left unchecked, it will often escalate into a major criminal enterprise. Large-scale and highly organized smuggling has manifested itself most clearly in northeastern and midwestern states. Because of increased federal attention, mail-order tax evasion is on the decline, but still is prevalent throughout the country. Among the types of tax evasion due to the existence of legitimate tax-free sellers of cigarettes, PX violations can be reduced by implementing the ACIR recommendation; but sales through smoke shops on Indian reservations are a growing problem in the western states, especially in the Northwest. This problem leads to major casual or organized smuggling activity in these states. In other words, over half of the states experience considerable losses of revenue due to criminal cigarette smuggling, sometimes amounting to tens of millions of dollars per year -- losses which require states to reduce their services to their citizens or compensate by raising revenue in other ways.

III. ESTIMATING THE PREVALENCE OF CIGARETTE SMUGGLING, HOW AND WHY

Police and prosecutors will be called upon to devote investigative and prosecutive resources to the cigarette smuggling area, and tax collection agencies will have to make similar decisions with respect to the detection and investigation of cases with criminal potential. Decisions as to whether to devote resources to this enforcement problem, and how much, will necessarily depend on judgments as to the magnitude of the problem within one's own state.

All crimes are not reported to police. If this is the case when a person has been the victim of a robbery or burglary, it is even more the case when all the parties in a particular illegal transaction want it to remain a secret. In other words, in the absence of victims who themselves complain to the police, one cannot rely on this means of determining the nature and extent of cigarette smuggling.

One could perhaps look to other forms of smuggling to see how law enforcement officials determine their nature and extent; in particular, one could look at the smuggling of alcoholic beverages during Prohibition and/or narcotics at present. In both cases indicators of the smuggling used were limited to measures of enforcement activity: number and size of seizures or number of arrests. These are poor indicators of the extent of smuggling. What they actually indicate is the priority attached to the criminal activity by law enforcement officials; the higher the priority, the greater the enforcement effort. For example, if heroin seizures decrease from one year to the next, it does not necessarily indicate that enforcement agencies are more successful in reducing heroin traffic; it may mean that there is less heroin traffic, but it may also mean that the traffic is getting harder to stop.

In some cases these indicators, seizures and arrests, may be the only available measures because of the inherent difficulty in obtaining any other reliable first-hand information bearing on the extent of smuggling. But this is not the case for cigarette smuggling. Unlike alcohol (during Prohibition) and narcotics, cigarettes are not illegal. Therefore we have reliable data on sales: we know how many cigarettes are sold annually

in the entire United States and in each state, based on statistics compiled by the U.S. Department of Agriculture and the Tobacco Tax Council. Thus we have a starting point of relatively reliable data to help in estimating cigarette smuggling.

A. A General Indicator of Cigarette Smuggling

One general indicator used by state tobacco tax administrators to estimate the value of cigarette smuggling is to compare the state per capita tax-paid cigarette sales with the national rate. For example, in FY 1974 the per capita sales of cigarettes in the United States was 141.7 packs per person. Utah's per capita sales were 75.6 packs per person, the lowest in the United States. Thus, people are buying fewer than average cigarettes in Utah, and the assumption might be made that Utah residents are buying an average of 66.1 (141.7 minus 75.6) packs per person on which taxes were not paid.

Care must be taken in interpreting this indicator in any such way. A lower than average per capita cigarette sales in a state does not always mean that the citizens are smuggling cigarettes into the state, and a higher than average per capita cigarette sales does not always mean that people are buying cigarettes there to be smoked elsewhere. One must include other factors in interpreting the indicator. For example, the population of Utah is predominantly Mormon, and a very high proportion of Mormons do not smoke.

The state with the next lowest per capita cigarette sales rate is Hawaii (89.3), which has a much higher proportion of its population in the military than any other state; thus, a large fraction of cigarettes consumed in Hawaii might well be untaxed sales which do not appear in the statistics. The next lowest state tax-paid per capita cigarette sales is for the state of Washington, with 98.6 packs per person. In this instance there is a strong case for assuming that the bulk of the difference between the state sales rate and the national rate is due to smuggling: Washington's tax on cigarettes is 16¢/pack, while neighboring Oregon and Idaho have taxes of 9¢ and 9.1¢, respectively; and there are a number of Indian smoke shops which sell about 35 million packs of cigarettes a year, predominantly to non-Indian customers.

Three states have tax-paid per capita sales greater than 200 packs per person: New Hampshire (269.8), North Carolina (227.3); and Kentucky (212.4).

It is well-known that a substantial fraction of cigarette sales in North Carolina and Kentucky are to people who smuggle them to high-tax states. New Hampshire's high per capita sales can probably be explained by: the 5¢ tax difference between it and Massachusetts, the closeness of its southern border to the Boston metropolitan area, and a significant amount of tourism year-round. A list of state taxes and tax-paid per capita sales for FY 1974 is given in the table at page 8, above.

The per capita sales indicator, when properly interpreted, is a useful guide in evaluating the effect that enforcement activity has on smuggling. For example, merely finding that per capita tax-paid sales has increased (or decreased) in a state does not mean that enforcement is improving (or declining). There are several preliminary inquiries which must first be made. Has that state increased its cigarette tax? This would normally decrease per capita sales. Have neighboring states or producer states (North Carolina, Kentucky and Virginia) increased their taxes? This would normally decrease the smuggling into that state. Or has there been a national change in per capita sales? This would presage a general change in smoking habits, due to demographic changes in population or possibly to cigarette or anti-cigarette advertising campaigns. Changes in a state's per capita tax-paid cigarette sales should not automatically be assumed to be due to enforcement activity.

One can also use a more sophisticated general indicator of smuggling than merely comparing tax-paid cigarette sales rates. A computer model of the smuggling process has been developed^{12/} which takes into account each state's population, cigarette tax rate, bordering states' tax rates, and geographic location (i.e., relative proximity to low-tax states). This model can be used to estimate the amount smuggled into and out of each state and its impact on a state's revenue. It can also help determine the effect that a change in a state's cigarette tax rate (or in the tax rate of another state) will have on its revenue and smuggling patterns into and out of the state.

^{12/}A computer program has been developed which can be obtained from the LEAA Criminal Justice Reference Service. The underlying mathematics are described in a paper by M.D. Maltz, "On the Estimation of Smuggling in a 'Gray Market' Commodity," Operations Research (in press).

B. Specific Indicators of Smuggling Activity

Aside from this general indicator of smuggling, the tax-paid per capita cigarette sales rate, a law enforcement officer should be aware of specific indicators of smuggling activity which may be encountered in his jurisdiction.

If one state borders on another state which has a significantly lower tax (3¢ to 4¢ per pack), there are probably cigarette retailers just over the border in the low tax state. If smuggling is prevalent, many of the vehicles parked in front of the premises of these over-the-border retailers will be trucks, campers or vans licensed in the higher tax state.

Although it will not be openly advertised, the availability of cigarettes at "bargain prices" will be circulated by word of mouth, in bars, factories, office buildings, apartment houses, and other population concentrations. The need for a large number of customers to buy cigarettes all but eliminates the possibility of keeping the transactions secret. Using routine investigative techniques, law enforcement officials should be able to determine whether and where this is occurring in their jurisdictions.

In many states contraband cigarettes are mixed with tax-paid cigarettes in retail outlets and vending machines, either stamped with counterfeit or forged tax stamps or in some instances with no stamp or with the tax indicia of another state. Although it is difficult for a non-expert to spot counterfeit or forged stamps, cigarettes which are unstamped^{13/} or stamped by another state are blatantly illegal.^{14/} Merely turning a pack of cigarettes over to see whether it is properly stamped is a simple but effective means of determining whether this type of cigarette smuggling activity is occurring.

To summarize, the general indicator described in this chapter is useful in determining the extent of the cigarette smuggling problem; the specific indicators described above can assist in determining the nature of the problem. Together these indicators can be helpful in determining the degree to which enforcement activities may be needed. The following chapter deals with enforcement activities employed to combat different forms of cigarette smuggling.

^{13/}Three states, Michigan, Hawaii and Alaska do not require cigarette packs to be stamped.

^{14/}Cities and counties which impose additional taxes on cigarettes often require additional stamps on cigarette packs.

IV. COMBATTING CIGARETTE SMUGGLING

The previous chapters have described the differing forms of cigarette smuggling and indicators which can be used to determine whether it is prevalent in a state or local jurisdiction. This chapter looks at strategies and tactics which are employed to combat smuggling. The methods used depend upon the forms of smuggling and upon the point of interdiction in the smuggling "pipeline." Described below are the means used by state and local enforcement agencies, the types of interstate efforts initiated, the merits of liaison with Federal enforcement agencies, and the results of such enforcement efforts.

A. Enforcement Activity Within States

In some states, tax enforcement agents do not have the power of arrest. They must rely on obtaining the cooperation of other state agencies or of local law enforcement agencies to effect arrests. Since contraband cigarettes are transported and distributed as quickly as possible to minimize the risk of apprehension, this cooperation is essential. Also essential is the knowledge by these law enforcement officials of the type of enforcement activity which can prove useful.

State investigators use a number of different methods to counter cigarette smuggling. In general, it is easiest to detect the smuggling at the points where it emerges from hiding, either before the crime is committed (that is, at the legal source) or when the cigarettes are distributed to the customers. If a neighboring state is a source, surveillance may be kept of vehicles parked in front of cigarette distributors and outlets in the neighboring state. License plate numbers can be telephoned ahead to enforcement agents who wait for the vehicles to recross the border loaded with cigarettes to arrest the occupants, seize the contraband cigarettes, and, often, confiscate the vehicle. Similar methods can be used in combatting smuggling from smoke shops on Indian reservations. It should be noted that these tactics do not violate Fourth Amendment prohibitions against illegal search and seizure. See Section V, D, below.

The larger the load of cigarettes, the greater the risk of being caught. Informants can be helpful in ascertaining when and where trucks are to be loaded in the low tax state. Law enforcement officials in the low tax states are also good sources of information, although some hesitate to offer this cooperation for fear of hurting the legal business of local sellers. Others feel that unless they cooperate to eliminate smuggling their (low tax) states will become a haven for these smugglers, whose criminal behavior does not stop at evading the taxes of the high tax states. Although the smugglers' initial activity may seem fairly harmless (to the low tax states), once a foothold is gained they are difficult to dislodge.

Informants are also helpful in ascertaining when and where cigarette deliveries are to be made. Since customers must be notified of the location and time at which their orders can be picked up, they can also be a fruitful source of information.

Surveillance and arrest of vehicles on the road is another enforcement practice. Since it involves interstate operations, this practice is discussed in Section B below.

Coordination among enforcement agencies within the state is necessary, especially if it is suspected that the smuggler is part of a larger organization. This coordination should involve law enforcement agencies at the local, state and Federal levels. Most local police departments cannot be expected to have the legal and technical expertise to uncover a large-scale smuggling operation. On the other hand, local police agencies, with their knowledge of local people and conditions, are in a position to make unique and essential contributions to the detection, investigation, and prosecution of such smuggling activities.

Coordination among the different agencies that comprise a state's criminal justice system is also necessary. Interagency cooperation requires a broad base of common understanding of the significance of this crime problem. Such a base does not necessarily exist in every jurisdiction. For example, one state reports, "Judges are extremely lenient." From another state: "Since criminal cases are handled at the county level (prosecutor and judges), exposure to any individual is very limited. The largest problem [in interagency

coordination] arises from lack of knowledge of our law by individual judges and/or prosecutors." From a third state: "We have attempted to educate and indoctrinate the prosecutors in this state to the large financial profits reaped from these illegal ventures. Their cooperation has become increasingly better." The payoff from cooperation was expressed by a state revenue office in this way: "About forty percent of our cases result from assistance or information from other law enforcement agencies." Special efforts must be made to orient prosecutors with respect to the smuggling problem, and court presentations should be carefully designed to convey the full significance of these cases to judges who preside over them.

To achieve this coordination among law enforcement agencies, the New Jersey Division of Taxation enlists the help of every police department in the state. Its staff lecture regularly at the state police academy, where local police are also trained, so that all new police officers are reached. Also, New Jersey statutes provide that any fines that are assessed are retained by the jurisdiction in which the violation takes place, which helps immeasurably in obtaining (and retaining) local police cooperation.

B. Interstate Enforcement Activity

Planning operations to counter cigarette smuggling is less complex than parallel anti-narcotics operations because cigarettes are produced, sold, and consumed within the borders of the United States. However, the very nature of the problem, which arises from differences in states' tax rates, makes interstate cooperation all the more desirable. Such cooperation has been the rule rather than the exception; coordination among states has been accomplished on an informal state-to-state basis and through the National Tobacco Tax Association. In addition, two interstate organizations have been formed to coordinate enforcement activity directed against cigarette smuggling. The Eastern Seaboard Interstate Cigarette Tax Enforcement Group (ESICTEG) consists of nine members -- Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New York State, New York City, the Northern Virginia Tax Commission, and Pennsylvania. It was

created in August 1974. The Interstate Revenue Research Center (IRRC) is an LEAA-funded consortium of five states -- Illinois, Indiana, Michigan, Minnesota, and Ohio -- which started operations in early 1975.

The ESICTEG is engaged in joint surveillance operations using manpower and equipment provided by its member states. Operations are conducted in producer states and in the states into which the cigarettes are smuggled, with the cooperation of local authorities. Information is obtained about major purchases of cigarettes by suspected smugglers. Surveillance is maintained on cigarette distributors who have a large volume of transactions with out-of-state customers. Teams of investigators from the member states follow vehicles with large loads of cigarettes, and inform the appropriate law enforcement officials of the whereabouts of the truck and its presumed route. Arrests may be made by the investigators or by the local authorities, depending on whether a member of the investigative team is authorized to make arrests in that state. Although the ESICTEG has already met with some measure of success, it has been hampered to some extent by its multi-state character: each state has its own radio communication frequencies and, for example, a New York car cannot communicate with a Pennsylvania car when tailing a truck through New Jersey; nor can either car communicate with New Jersey state enforcement officials.

The IRRC does not make use of enforcement personnel from its member states, but hires and controls its own field staff, who are predominantly retired Federal investigators. It also employs liaison officers in each state, to assist in the exchange of information and to foster cooperation between the local police departments, state enforcement agencies, and the IRRC. The investigators spend the bulk of their time in the producer states, North Carolina, Kentucky and Virginia, building up contacts with informants and with law enforcement authorities. Their method of operation is similar to that of the ESICTEG, but they have no power of arrest. This makes it essential to have strong liaison with the member states. Communications between the field investigators and the member states are funnelled through IRRC and the liaison officers.

Although most of their investigative activity is understandably focused on cigarette smuggling into their respective member states, both

the ESICTEG and the IRRRC occasionally come across information about smuggling into non-member states. Both organizations share such information with the appropriate law enforcement agencies in these non-member states.

As in the case of intra-state enforcement, inter-state cooperation is necessary in suppressing organized cigarette smuggling. For example, an agency investigating an illegal distribution network within its state would want to track all shipments entering the state. If the agency does not have the cooperation of agencies in neighboring states through which the shipments travel, it will find it difficult to track the shipment. In addition, a major drive for arrests within these neighboring states will make it harder to trace the distribution network since the smugglers would then take greater pains to cover their tracks. Therefore, cooperation among neighboring states is not only desirable, but essential.

C. Federal Liaison and Sources of Assistance

By virtue of its responsibility for enforcing the federal tobacco laws, the Alcohol, Tobacco and Firearms Bureau of the U.S. Treasury Department is a good source of information concerning state cigarette tax violations. Many state tobacco administrators maintain contact with the ATF Bureau. Also, it should be noted that the U.S. Postal Inspection Service investigates mail fraud violations arising from the operations of mail order houses; the basis of these investigations is the failure of the sellers to advise their customers that ordering by mail does not relieve them of their cigarette tax liability.^{15/} Misdemeanor convictions have also been obtained for violation of the Jenkins Act (18 USC 375-378), requiring mail order houses to supply lists of customers and quantities shipped to the tobacco tax administrators in the recipient states.

Cigarette smugglers identified in state investigations should be made known to the Intelligence Division of the Internal Revenue Service, even if all the elements of a smuggling violation cannot be proved. Cigarette

^{15/} "Uniformity Urged in Cigarette Levy," New York Times, October 20, 1975, p. 26.

smugglers are liable for criminal prosecution for tax evasion if the income from cigarette smuggling is not reported.

The federal wire fraud statute may also help to combat cigarette smuggling. If cigarettes are ordered by telephone from legitimate cigarette distributors in North Carolina, telephone toll records and distributors' testimony can be used as evidence that the interstate telephone system was used to defraud a state of tax revenue. The Federal Bureau of Investigation has investigative jurisdiction with respect to the federal wire fraud statute.

D. Results of Recent Enforcement Efforts

Even when differences in states' tax rates and revenue losses are taken into account, there is a great deal of variation in the impact state enforcement efforts have made on cigarette smuggling. Not all states with significant cigarette tax revenue shortfalls perceive the problem equally or give it the same enforcement priority; other enforcement problems may appear more pressing than cigarette smuggling.

Those states which have made the suppression of cigarette smuggling a high priority enforcement objective have had mixed results. Where major enforcement efforts have been made, some states have had significant numbers of convictions and others have had little to show for their efforts. While criminal charges almost always lead to convictions, according to the reports we have received from revenue departments throughout the country, few smugglers are charged with criminal offenses.^{16/} Local and state police show a low level of awareness of the criminal aspects of cigarette smuggling. Despite extensive powers to seize and confiscate vehicles, and much discussion of this power on the part of revenue agencies, in only a few states does this power appear to have been used to any great extent.

^{16/} In fairness, it could well be that the revenue departments are loath to press criminal charges because of the known or suspected lenience of judges in sentencing convicted cigarette smugglers. Criminal charges may be invoked only in cases of flagrant and repeated violations or only when there is some collateral charge, e.g., bribery, which they are sure will result in a conviction. Invoking the criminal remedy in all cases in which it could be applied might well be counter-productive.

In one jurisdiction which has achieved significant numbers of convictions in this area, its chief enforcement officer made the point that an important step to achieving results is to "get agents with law enforcement backgrounds, not tax examiners who are intrigued with law enforcement," and to "train the agents as you would policemen in all phases of investigation and constitutional law with emphasis on search and seizure."

A number of states which have devoted major efforts to the task have found the result to be a substantial number of arrests, seizures and convictions. However, there seems to be no clear-cut relationship between increased enforcement effort and decreased revenue losses. These states appear to be successful in interdicting major organized smuggling efforts and hindering their growth, but they seem overall to have little effect on the totality of cigarette smuggling.

This does not mean that enforcement agencies should abdicate their responsibility to enforce the criminal laws in this area. The detection, prosecution, and conviction of smugglers is and will remain an important part of any strategy dealing with cigarette smuggling, especially with respect to the suppression of organized smuggling. In those jurisdictions which have what appears to be a significant organized smuggling problem, revenue agencies will have to learn more about criminal law enforcement and give it high priority; police agencies will have to respond by working with revenue agents and bringing their investigative expertise to bear on this growing crime problem. If both revenue agencies and police work together on this problem, enforcement efforts are likely to have a significant impact on organized cigarette smuggling.

E. Enforcement Checklist

A checklist has been prepared as an aid to law enforcement personnel in combatting cigarette smuggling. It is shown in Figure 2. It lists various types of cigarette smuggling, sources of possible information about the presence of smuggling, and appropriate measures which can be taken against the various types of smuggling. The list is doubtless incomplete, but should serve as a useful starting point for initiating anti-smuggling law

enforcement activity. Law enforcement agencies are urged to check with their state revenue enforcement agencies as well in specific cases. Coordination and sharing of information is essential to prevent one agency from making a low-level arrest and thus spoiling the chances of making a case against high-level smugglers.

FIGURE 2. ENFORCEMENT CHECKLIST

	INDICATORS	ENFORCEMENT MEASURES
<u>Cigarette Sources</u>		
Contiguous States	Cigarette outlets just across border	Surveillance, radioing license plates ahead, informants in other state, law enforcement cooperation in other state
Indian Reservations	Smokeships, Jenkins Act reports from other states	Surveillance, radioing license plates ahead
Military PXs	Word-of-Mouth Informants	Surveillance, Request Post Commander to limit sales
Mail Order	Leaflets, Order Blanks, Word-of-Mouth Informants	Prosecution under Jenkins Act or Mail Fraud Statute, if applicable
Producer States	Large Tax Losses (general indicator)	Interstate action to obtain law enforcement cooperation in producer states and to develop informants.
<u>Cigarette Outlets</u>		
Surreptitious Distribution	Word-of-Mouth Informants	Surveillance and arrest*
Vending Machines Retail Outlets	Check packs for correct stamps and for forgeries	Seizure of vending machines* and contraband cigarettes* Check invoices to determine supply outlet*
<u>Cigarettes in Transit</u>		
Targets of Opportunity	Traffic stops, etc., in which large quantities of cigarettes are visible	Check for proper paperwork. Notify state revenue enforcement agencies. If there is probable cause to believe that a criminal violation has occurred (under state law) the vehicle may be impounded as an instrumentality of the crime, or for forfeiture as carrier of contraband (when state laws authorize).

*Coordinate with State Revenue Enforcement Agency

V. LEGAL CONSIDERATIONS FOR THE INVESTIGATOR OF CIGARETTE SMUGGLING

States are far from uniform in their treatment of cigarette smuggling. There is a great degree of variation in the laws prohibiting direct smuggling, and in the jurisdiction and powers of the agencies charged with enforcing these prohibitions. These variations are described below as are the legal considerations relating to search and seizure and to informants' testimony.

A. Survey of State Cigarette Acts

There are significant differences among state criminal codes; this lack of uniformity is also true of state laws dealing with cigarette smuggling and related offenses. Law enforcement authorities dealing with this crime problem should therefore carefully review all applicable legislation in their own states, and call on the expertise of police department legal advisors, prosecutors, and cigarette tax revenue officials. Despite the variances between states' laws, there are some common statutory patterns which can be seen in most state cigarette tax legislation. Awareness of these patterns or elements is a good starting point in a survey and analysis of these laws.

Smuggling cigarettes is punishable in most states. "Smuggling" implies a fraudulent transporting of contraband. It is important, however, to be aware of activities connected with smuggling which are prosecuted by law. In most states it is a crime, punishable by fine and/or imprisonment to possess or transport or deliver or sell unstamped cigarettes. The penalties range from a fine of a few hundred dollars, e.g., in Massachusetts, Idaho and New Mexico, to fines of several thousand dollars and imprisonment for several years, for example, in Texas, Pennsylvania, and New York.

Those states which deal with cigarette tax violations primarily at the misdemeanor level tend to punish possession, sale and delivery of unstamped cigarettes without fraudulent intent in a like fashion. However, those jurisdictions which deal with cigarette smuggling primarily at the felony level usually attach misdemeanor penalties for possession or sale

of unstamped cigarettes where the intent to defraud the state cannot be proved, and felony penalties where such intent can be proved. For example, the Pennsylvania Cigarette Tax Act makes it a crime punishable by "a fine of not less than twenty-five dollars (\$25) nor more than one thousand dollars (\$1,000)" to "sell any pack of cigarettes which does not have affixed thereto the proper amount of . . . tax stamps" This same Pennsylvania act makes it a felony punishable by "a fine of not more than five thousand dollars (\$5,000) and . . . imprisonment for a term of not more than five years" to "falsely or fraudulently, maliciously, intentionally or wilfully with intent to evade the payment of the Pennsylvania cigarette tax" sell or possess "any pack of cigarettes which do not have affixed thereto the proper amount of tax stamps"

Furthermore, many states which handle cigarette smuggling as a felony matter also distinguish, for purposes of penalty, between first offenders and repeated offenders. First offenders are punished as misdemeanants and repeat offenders as felons. For example, in Nevada the first offense is a misdemeanor but subsequent violations are felonies punishable "by a fine of not more than \$5,000, or by imprisonment . . . [for not] more than 10 years, or by both fine and imprisonment."

Some states which deal with cigarette smuggling on primarily a felony level do not punish differently possession and sale with fraudulent intent, and possession and sale without fraudulent intent. These states prefer instead to distinguish, for purposes of penalty, between first offenders and repeat offenders. There are advantages to this approach. It avoids difficult problems of proof with respect to fraudulent intent while at the same time imposing a more severe sanction upon the repeat offender who in all likelihood is acting with fraudulent intent. New York, for example, punishes first offense possessors and transporters of unstamped cigarettes as misdemeanants liable for "a fine of not more than two thousand dollars, or [imprisonment] for not more than one year or both" Persons previously convicted of two or more offenses under the Cigarette Act are punished as felons.

While states are not uniform in their treatment of sellers, transporters and possessors of unstamped or unlawfully stamped cigarettes, there is greater uniformity in their treatment of persons who counterfeit, alter, or forge tax stamps or tax meter impressions. In many jurisdictions such offenders are punished as felons, and nearly always these persons are punished more severely than other cigarette tax violators. For example, counterfeiters in Texas face a possible twenty years in prison, and the maximum penalty for counterfeiters in Pennsylvania, Arizona, Kentucky and Wisconsin is ten years. In most other states the maximum prison penalty for counterfeiting, altering or forging tax stamps or tax meter impressions is five years or less. In a few states, for example, South Carolina, New Mexico and Nevada, the criminal penalty for counterfeiting tax indicia is comparatively minor.

In addition to imposing criminal penalties for cigarette tax violations, many states have statutory provisions for the confiscation and forfeiture of unstamped or unlawfully stamped cigarettes. Furthermore, many jurisdictions have statutory provisions for the confiscation and forfeiture of motor vehicles used to smuggle cigarettes. Forfeiture, taken together with criminal and civil penalties, can amount to a severe penalty even in jurisdictions which grade cigarette smuggling at the misdemeanor level.

B. Proposed Federal Legislation

Many government officials, both state and federal, feel that additional criminal laws are needed to suppress this criminal enterprise and, accordingly, have called for federal legislation. The U.S. Congress has evidenced a willingness to listen to this call.^{17/} Over several sessions of the Congress, remedial legislation has been introduced to provide specific Federal criminal sanctions with respect to this activity. A bill introduced in 1975,^{18/} for example, has as its stated purpose "To eliminate

^{17/} For example, see Elimination of Cigarette Racketeering, Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 92nd Congress, 2nd Session (September 28, 1972). These hearings describe the seriousness and complexity of the cigarette smuggling problem.

^{18/} H.R. 701, 94th Congress.

racketeering in the sale and distribution of cigarettes and to assist State and local governments in the enforcement of cigarette taxes." The bill provides for up to ten thousand dollars fine and two years imprisonment for the transportation of contraband cigarettes in interstate commerce. "Contraband cigarettes" are defined as more than one hundred cartons in the possession of anyone other than a person legally permitted to possess them. In September, 1975, the National Tobacco Tax Association, an association of state tobacco tax administrators, unanimously adopted a resolution favoring such federal contraband legislation.

C. Jurisdiction and Powers of Agencies

The 1975 report of the Committee on Tax Evasion of the National Tobacco Tax Association describe the jurisdiction and powers of state agencies which deal with cigarette smuggling. Not all states are represented in the following compilation, but the data are representative of the variation in state powers relating to cigarette smuggling.

Fifteen states permit residents to import cigarettes for their own consumption. Two states have no restrictions while thirteen limit the amount, from three packages to five cartons. The median for these states is two cartons.

Thirty-four state revenue agencies reported that they have enforcement staff assigned to enforce their cigarette tax laws. Two states indicated no specialized enforcement programs, and two states reported having no enforcement program whatsoever. In thirteen states the enforcement agencies are authorized to carry firearms and to make arrests; in another three states the investigators have arrest powers but are not authorized to carry firearms.

Three states permit confiscated vehicles to be used for law enforcement purposes. Thirty-five states reported not having such authorization.

D. Search and Seizure: Some Legal Considerations

Many of the measures taken by law enforcement agencies relate to the search of vehicles transporting contraband cigarettes for which warrants

may or may not have been obtained. The following general discussion of the law of search and seizure relates to the warrantless searches of motor vehicles. Law enforcement officers are encouraged to check the statutes and case law of their own states, but this discussion should provide a helpful starting point by identifying ways in which searches of motor vehicles can be conducted without violating constitutional rights.

Given the presumption of unlawfulness which attaches to warrantless searches, it is always preferable to secure a warrant prior to a vehicular search. Despite this preference for search warrants, the U.S. Supreme Court has described several circumstances in which a search may be permissible without a warrant. In a series of cases over a period of several decades the Court has reaffirmed the principle that if a law enforcement officer has probable cause to believe that a motor vehicle contains that which is subject to seizure (contraband, instrumentalities of crime, stolen property, or evidence of crime) and "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought," the vehicle may be stopped and searched without a warrant. Carroll v. United States, 267 U.S. 132, 153.(1925). This principle has two elements: (1) the officers must have probable cause to search, and (2) there must be some possibility that a delay to obtain a warrant will result in removal of the vehicle to an unknown location, resulting in the concealment or destruction of evidence.

Once the possibility of removal of the vehicle no longer exists, the right to search without a warrant terminates. If a vehicle has been damaged so badly that it cannot be driven or if the vehicle is in police custody, then it is no longer considered impracticable to secure a warrant. However, a parked vehicle is considered mobile: it can be moved by the owner or others who have keys, thus making it impracticable to obtain a search warrant. Nor does the arrest of the owner or driver necessarily make the vehicle immobile -- others may move the vehicle. However, where particular suspects have been under investigation for some period of time

and surveillance reveals that the use of a particular vehicle follows an almost habitual pattern, a search warrant must be secured before conducting a search of the vehicle.

It is important to note that the principles discussed above apply regardless of whether there exists probable cause to arrest the operator of the vehicle. If, however, there is probable cause to arrest the vehicle operator, this can provide another basis for searching the vehicle without a warrant. The general principle is that if a person is arrested in a motor vehicle he is driving or in which he is a passenger, those parts of the vehicle under the arrestee's "immediate control" may be searched as an incident to the arrest. In most cases, this principle would not authorize a search of the enclosed rear part of a truck. In particular situations, this principle may justify a search of the back seat of a car and even a portion of the back part of a van. It is important to remember in connection with searches incident to lawful arrests that they can often produce evidence establishing probable cause to search the entire vehicle. Furthermore, officers should remember that anything subject to seizure which is in "plain view" may be seized without a warrant.

Of perhaps greater importance to the law enforcement officer than the right to search incident to a lawful arrest is the right to inventory an impounded vehicle. The arrest of the driver of a vehicle very often gives rise to a right to impound the vehicle. Vehicles may also be impounded as evidence of crime. And since most states have statutes providing for confiscation and forfeiture of vehicles used to transport unstamped cigarettes, the vehicle can be seized and impounded as an instrumentality of crime. Once impounded, the officer may inventory the contents of the vehicle and seize anything in "plain view" which is subject to seizure. But this right to inventory the contents of a vehicle may not be employed as a device to conduct a general exploratory search of the vehicle.

In those cases where a warrant is sought and the vehicle leaves the jurisdiction before the search warrant can be executed, it should be remembered that while the warrant may have no lawful effect in the

neighboring jurisdiction or a warrantless search of a motor vehicle based on probable cause as outlined above.

In those cases where probable cause to either arrest or search does not exist, there may be suspicious circumstances short of probable cause sufficient to justify law enforcement officers to stop the vehicle and question its operator. In the absence of probable cause a search of the vehicle is prohibited, but the officer's questioning may uncover probable cause to either arrest the operator or search the vehicle.

E. Informant Testimony

Often the information which gives rise to the suspicion that a particular vehicle is carrying contraband cigarettes comes from an informant. In order for such information to reach the level of probable cause which would justify a warrantless search under the principles discussed above, and if the informant is from the criminal milieu, the law enforcement officer must be prepared to reveal: (1) the underlying circumstances showing reason to believe that the informant is a credible person; and (2) the underlying circumstances showing the basis of the conclusions reached by the informant. If the informant is not from the criminal milieu it is not necessary for the officer to establish the informant's credibility, but he must still explain the underlying circumstances behind the conclusions reached by the informant.

If the officer lacks sufficient information about the informant and/or the reasons for the informant's conclusions to establish probable cause, the officer may cure this deficiency by corroborating some of the informant's information himself. For example, an officer may receive a tip that unstamped cigarettes are being transported in a particular vehicle. Through independent surveillance the officer may himself perceive indications of criminal activity. Separately, the tip and the officer's own surveillance might not constitute probable cause, but taken together, they very well could establish probable cause to search.

CONCLUSION

This guide represents a first step in assembling law enforcement experience and techniques necessary for agencies engaged in enforcement of criminal statutes directed against organized interstate cigarette smuggling activities. This form of criminal enterprise is receiving ever increasing attention from the law enforcement community, and it is to be hoped that the techniques described in this guide will provide a base for the development of further and improved methods for dealing with this criminal activity.

END