

Commonwealth of Massachusetts

# Annual Report of Multi- Agency Illegal Tobacco Task Force

03/01/2019

Report and update on the work of the Multi-Agency Illegal Tobacco Task Force to combat illegal tobacco distribution and the resulting loss of revenue to the Commonwealth of Massachusetts

**Members of the Multi-Agency Illegal Tobacco Task Force**

**Kajal K. Chattopadhyay, *Co-Chair***  
Department of Revenue Designee

**Major Steven Fennessy, *Co-Chair***  
Department of State Police Designee

**Thomas Bocian**  
Attorney General Designee

**Amber Villa**  
Attorney General Designee

**David Solet**  
Executive Office of Public Safety and Security  
Designee

**Patricia Henley**  
Department of Public Health Designee

**Christy Fedor**  
Department of Public Health Designee

**Michael Sweeney**  
Office of State Treasurer and Receiver General  
Designee

**Table of Contents**

I. Task Force Creation and Legislative Background..... 3

II. Results and Trends..... 4

III. Summary of Task Force Activities ..... 7

IV. Legislative Proposals ..... 11

V. Anticipated Barriers..... 16

VI. Conclusion and Next Steps..... 16

## **I. Task Force Creation and Legislative Background**

As part of the Fiscal Year 2014 General Appropriations Act<sup>1</sup>, the Massachusetts Legislature created the Commission on Illegal Tobacco (Commission) to study the magnitude and economic impact of the illegal tobacco market in the Commonwealth. On March 1, 2014, the Commission issued its Report of Commission on Illegal Tobacco, which provided a general overview of the illicit tobacco market in Massachusetts and contained a series of findings and recommendations.<sup>2</sup> Pertinently, one of the Commission's primary recommendations was the creation of a Multi-Agency Illegal Tobacco Task Force. The Commission recognized that enforcement of the Commonwealth's tobacco laws was spread across multiple agencies and envisioned the Multi-Agency Illegal Tobacco Task Force as the vehicle by which information and resources could be shared across agencies in order to maximize the effectiveness of enforcement efforts.<sup>3</sup> In addition to the formation of the Multi-Agency Illegal Tobacco Task Force, the Commission recommended a number of statutory changes and updates as well as process improvements designed to increase compliance as well as tobacco excise and sales tax collections.

The Multi-Agency Illegal Tobacco Task Force (Task Force) was created pursuant to section 71 of the Fiscal Year 2016 (FY16) General Appropriations Act.<sup>4</sup> According to its enabling statute, the Task Force is co-chaired by the Colonel of the State Police and the Commissioner of Revenue or their designees and additionally consists of the Secretary of Public Safety and Security, State Treasurer, Attorney General, and Commissioner of Public Health, or their respective designees. The Task Force has been designated with the following responsibilities:

The task force shall coordinate efforts to combat contraband tobacco distribution, including efforts to foster compliance with the law and conduct targeted investigations and enforcement actions against violators....

The task force shall: (i) facilitate timely information sharing among state agencies in order to advise or refer matters of potential investigative interest; (ii) dedicate not less than an aggregate of 20 personnel from member agencies to carry out enforcement and investigative strategies; (iii) identify where illegal tobacco distribution is most prevalent and target task force members' investigative and enforcement resources against those in violation of [chapter 64C] and chapter 62C, including through the formation of joint investigative and enforcement teams; (iv) assess existing investigative and enforcement methods in the commonwealth and in

---

<sup>1</sup> St. 2013, c. 38, § 182.

<sup>2</sup> <http://www.mass.gov/dor/docs/dor/cigarette/pdfs/commissionreportonillegaltobacco.pdf> (accessed on February 20, 2019) (hereafter "Commission Report").

<sup>3</sup> Commission Report at pp. 5-6, 26-27.

<sup>4</sup> St. 2015, c. 46, § 71; M.G.L. c. 64C, § 40.

other jurisdictions and develop and recommend strategies to improve those methods; and (v) solicit the cooperation and participation of other relevant enforcement agencies and establish procedures for referring cases to prosecuting authorities as appropriate.<sup>7</sup>

The Task Force is required to meet at times and places determined by the Co-Chairs as “deemed necessary to carry out its mandate” and to submit a report by March 1 of each year “on the results of its findings, activities and recommendations from the preceding year...”<sup>5</sup> Specifically, the report shall include: (i) a description of the task force’s efforts and activities during the year; (ii) identification of any administrative or legal barriers, including any barriers to multi-agency action or enforcement efforts; and (iii) proposed legislative or regulatory changes necessary to strengthen operations and enforcement efforts and reduce or eliminate any impediments to those efforts.<sup>6</sup> The report is to be filed with the clerks of the Senate and House of Representatives, the Chairs of the Joint Committee on Revenue, the Chairs of the Senate and House Committees on Ways and Means, and the Chairs of the Joint Committee on Public Safety and Homeland Security. The Task Force is filing this Annual Report of the Multi-Agency Illegal Tobacco Task Force (Annual Report) in compliance with its March 1, 2019, reporting obligation.<sup>7</sup>

## II. Results and Trends

Over the course of Fiscal Year 2019 (FY19), the Task Force has significantly expanded the scope of its investigations by restructuring its criminal investigative teams and dedicating additional law enforcement officers to investigations and enforcement operations. The restructuring was accomplished mid-way through FY19 and its effects are now beginning to show results. The Task Force has continued to rely on its partnerships with federal officials and law enforcement agencies from neighboring states to successfully disrupt and intercept sophisticated multi-state smuggling operations. While these efforts have shown tangible results in the form of increased tobacco excise collections in the segment of the market on which the Task Force has focused its efforts (so called “other tobacco products” or “OTP”), they have also exposed limitations in the Commonwealth’s regulatory regime as it relates to OTP and nicotine-delivery systems commonly known as “vape” or “vapor products.”<sup>8</sup> As will be discussed later in this Annual Report, enhanced regulatory oversight will enable the Task Force to increase the effectiveness of its law enforcement efforts.

---

<sup>5</sup> St. 2015, c. 46, § 71; M.G.L. c. 64C, § 40.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* For the Task Force’s prior reports, see <https://www.mass.gov/info-details/dor-illegal-tobacco-task-force> (tab entitled “Reports”) (accessed on February 20, 2019). The FY17 Annual Report was filed on March 1, 2017, and the FY18 Annual Report was filed on March 1, 2018.

<sup>8</sup> Other tobacco products (OTP) include cigars, smoking tobacco (commonly used in pipes), and smokeless (chewing) tobacco (commonly sold in hockey puck-shaped tins).

As reported in the last several of its Annual Reports<sup>9</sup>, the Task Force’s enforcement actions have revealed a disproportionate amount of smuggling activity involving OTP relative to OTP’s share of the overall Massachusetts tobacco market. As previously noted, the level of OTP smuggling is driven, in part, by the perception that there is a lower risk of detection and apprehension of smuggled OTP due to historically lax enforcement and by the Commonwealth’s high tax rates on OTP relative to other states, which provide smugglers a strong incentive to import such products from other low-tax states and sell them to in-state buyers willing to illegally evade payment of the applicable Massachusetts tobacco excise.<sup>10</sup> Figure 1 below shows the amount of tobacco excise taxes collected by the Commonwealth on cigarettes and OTP over the past several fiscal years.<sup>11</sup> Measured as a share of overall revenue collections, OTP represented approximately 4.5% - 4.7% of total tobacco excise collections from FY13 through FY16. Significantly, however, that figure rose to 6% in FY17 and to 6.6% in FY18.

**Figure 1: MA Tobacco Excise Collections On Cigarettes and OTP**

<b>Collections by Type (in Millions of Dollars)</b>	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>
Cigarette	532.5	628.9	617.5	610.0	582.7	554.6
All Other Tobacco Products (OTP)	25.8	31.1	29.6	30.4	36.8	39.4
<b>Total</b>	<b>558.3</b>	<b>660.0</b>	<b>647.1</b>	<b>640.4</b>	<b>619.5</b>	<b>594.0</b>

Meanwhile, Figure 2 below breaks down the amount of tobacco excise collected on OTP based on product type over the same period.

**Figure 2: MA Tobacco OTP Excise Collections Broken Down By Product Category**

<b>Collections by Type (in Millions of Dollars)</b>	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>
Cigar & Smoking Tobacco	13.4	14.1	14.1	13.7	15.0	16.5
Smokeless Tobacco Products	11.4	17.0	15.5	16.7	21.8	22.9
<b>Total</b>	<b>24.8</b>	<b>31.1</b>	<b>29.6</b>	<b>30.4</b>	<b>36.8</b>	<b>39.4</b>

Interestingly, the revenue figures from FY17 revealed some emerging longer-term trends in the marketplace, which continued throughout FY18. First, the amount of tobacco excise collected in FY18 from the sale of cigarettes experienced a significant (\$25.5 million) decrease,

<sup>9</sup> FY17 Annual Report at pp. 5-6; FY18 Annual Report at pp. 5-6.

<sup>10</sup> The Massachusetts tobacco excise rate on smokeless tobacco products is 210% of wholesale price (highest in the nation) and the rate on cigars and smoking tobacco is 40% of wholesale price. See <https://www.tobaccofreekids.org/us-resources/fact-sheet/state-excise-tax-rates-for-non-cigarette-tobacco-products> (accessed on January 29, 2018) (updated as of January 2, 2019).

<sup>11</sup> The Massachusetts tobacco excise rates on cigarettes and OTP rose substantially effective July 31, 2013. The amount collected for FY13 reflect the prior excise rates while the total for FY14 (which began July 1, 2013) and subsequent years reflect the increases in the tobacco excise rates. It is important to note that all collections figures cited in this Annual Report *exclude* sales taxes collected on sales of tobacco products. The Department of Revenue does not separately track sales taxes collected on sales of tobacco products.

representing a 4.38% decline from the previous year. FY17 excise collection figures showed a very similar \$27.3 million (or 4.4%) decrease from FY16.<sup>12</sup> These collection figures are not surprising as they correspond with a broader national trend of declining cigarette sales<sup>13</sup> and decreasing numbers of smokers.<sup>14</sup> In fact, the percentage of Massachusetts adults who currently smoke cigarettes declined from 16.6% in 2013 to 13.7% in 2017.<sup>15</sup>

While excise collections from cigarette sales softened in FY17 and FY18, excise collected from sales of OTP in FY17 and FY18 experienced a notable increase. In FY18, OTP excise collections increased by \$2.6 million (or 7%) compared to FY17, which showed a \$6.4 million (or 21%) increase over FY16. *See* Figure 1. The total increase in OTP excise collections from the past two fiscal years (FY17 and FY18) was predominantly attributable to a higher volume of taxed sales of smokeless tobacco products (from \$16.7 million in 2016 to \$22.9 million in FY18 – an increase of \$6.2 million or 37.1%) over that period. The data also showed a smaller, but significant, increase in excise collections from taxed sales of cigars and smoking tobacco products over the last two fiscal years (from \$13.7 million in 2016 to \$16.5 million in FY18 – an increase of \$2.8 million or 20.4%). *See* Figure 2. Unlike with cigarettes, the excise collection figures relating to OTP do not correspond with and are not explained by user or sales trends. In fact, the latest available data show that smokeless tobacco usage in Massachusetts has steadily remained near the lowest of all states for the past few years.<sup>16</sup>

As outlined in the FY18 Annual Report, given the lack of a demographic explanation, the most likely reason for the dramatic increase in OTP excise collections is the increased tobacco enforcement activity coordinated by the Task Force.<sup>17</sup> This conclusion is not based on data confirming the causal link (which is not available and would be very difficult to gather), but rather on anecdotal evidence from the Task Force's stepped up civil and criminal enforcement

---

<sup>12</sup> Massachusetts tobacco excise rates did not change during this period. In fact, they have remained the same since July 31, 2013.

<sup>13</sup> [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/economics/econ\\_facts/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/economics/econ_facts/index.htm) (citing Maxwell J.C., *The Maxwell Report: Year End & Fourth Quarter 2017 Cigarette Industry*, Richmond, VA (2018) (accessed on January 30, 2019) (reporting a 3.5% decrease in the number of cigarettes sold in the United States from 2016 to 2017).

<sup>14</sup> [https://www.cdc.gov/mmwr/volumes/67/wr/mm6702a1.htm?s\\_cid=mm6702a1\\_w](https://www.cdc.gov/mmwr/volumes/67/wr/mm6702a1.htm?s_cid=mm6702a1_w) (Centers for Disease Control and Prevention, *Cigarette Smoking Among Adults – United States, 2016*, Morbidity and Mortality Weekly Report; 67(2); 53-59 (dated January 19, 2018) (accessed on January 29, 2019) (reporting decline in current smokers nationwide from 20.9% in 2005 to 15.5% in 2016).

<sup>15</sup> [https://nccd.cdc.gov/STATESystem/rdPage.aspx?rdReport=OSH\\_STATE.Highlights&rdRequestForwarding=Form](https://nccd.cdc.gov/STATESystem/rdPage.aspx?rdReport=OSH_STATE.Highlights&rdRequestForwarding=Form) (citing Behavioral Risk Factor Surveillance System (BRFSS)).

<sup>16</sup> [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/smokeless/use\\_us/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/smokeless/use_us/index.htm) (citing Centers for Disease Control and Prevention, *Behavioral Risk Factor Surveillance System: Prevalence and Trends Data*) (accessed on January 30, 2019). In 2017, the rate of current adult smokeless tobacco use in Massachusetts was 2.3% while the usage rate in the District of Columbia (the lowest in the nation) was 1.3% followed by Rhode Island (1.5%), Maryland (1.6%) and California (1.7%). Conversely, the highest usage rate in the country was in Wyoming (9.8%) followed by West Virginia (8.5%).

<sup>17</sup> FY18 Annual Report at p. 7.

activities. The Task Force's efforts have focused primarily on OTP and have consisted of a blend of increased civil inspections of tobacco retailers along with criminal investigations targeting sophisticated smuggling operations. As a result of this robust enforcement model, the Task Force has suspended tobacco licenses of retailers selling illegal (untaxed) tobacco products; seized and confiscated illegal tobacco products; issued civil assessments for unpaid tobacco excise taxes and penalties; and prosecuted large-scale smugglers for violations of the Commonwealth's tobacco tax laws. This has resulted in a spike in tobacco excise collections -- both from violators that have been caught and punished by the Task Force and from an increase in voluntary compliance by those who have not been apprehended by the Task Force but have previously illegally avoided paying the required Massachusetts tobacco excise.

Despite these notable successes, the illegal tobacco market in Massachusetts continues to operate, which serves to deprive the Commonwealth of millions of dollars of revenue in the form of tobacco excise taxes lost to the illegal market. It has become abundantly clear that the problem of illegal tobacco smuggling is widespread and requires meaningful legislative and policy action at the state level to effectively control and ultimately defeat it. This will require a combination of changes in state regulatory oversight of tobacco products and substantial revisions to the state's existing statutory framework governing tobacco products to give law enforcement officials additional tools to identify and punish current offenders and to ultimately deter future putative offenders. The Task Force's legislative recommendations will be discussed in Section IV of this Report.<sup>18</sup>

### **III. Summary of Task Force Activities**

Following the Task Force's submission of its FY18 Report this past March, the Task Force has continued to meet on a regular basis to share information with member agencies, hear about recent developments in tobacco taxation and enforcement at the federal level and in other states, and to discuss important policy issues. The Task Force has convened eight public meetings over the past several months. These meetings took place on the following dates:

April 24, 2018

June 6, 2018

September 26, 2018

December 11, 2018

January 15, 2019

February 14, 2019

February 26, 2019

March 1, 2019

---

<sup>18</sup> Governor Baker has also filed legislation as part of his House 1 budget reflecting some of these recommendations and proposing a 40% excise tax on vapor products. See <https://malegislature.gov/Budget/FY2020/GovernorsBudget> at sections 13-14, 16, 24, 28-29, 31-33, 35, 40 & 81-82.



At these meetings, members discussed methods to improve tobacco compliance and enforcement. Over the course of several meetings, the Task Force heard presentations from stakeholders regarding the proposal to expand the Commonwealth's encrypted tax stamping program to include tins of smokeless tobacco in addition to packs of cigarettes (which are already being stamped). Representatives from tobacco manufacturers; the vendor that administers the Commonwealth's encrypted tobacco tax stamping program (SICPA); stamping machine manufacturer United Silicone Inc. (USI); tobacco wholesalers and distributors; and other interested parties attended the Task Force's public meetings. All of the aforementioned attendees were invited to make presentations on the smokeless tobacco stamping proposal and contributed to the discussions on the topic.

In addition, the Task Force heard two separate panel presentations on vaping and e-cigarettes with an emphasis on the impact of their use on the tobacco market and illegal tobacco enforcement. The first panel consisted of government and public health officials and discussed regulatory oversight and enforcement actions involving vape manufacturers and retailers. That panel focused on the impact of vape product availability and marketing on the dramatic increase of youth use of these products and possible strategies for oversight of this industry. Thereafter, the second panel consisted of representatives from industry and academia who spoke about the potential harm reduction benefits from adult use of vape products instead of combustible tobacco and the industry perspective on compliance and enforcement.

Pursuant to the Massachusetts Open Meeting Law, detailed minutes of each Task Force meeting were taken, including all votes, presentations and discussions, and these minutes were published for the public according to the requirements of G.L. c. 30A, §§ 18-25.

In addition to its regular public meetings, the Task Force increased the scope and scale of its investigative and enforcement activities over the past year. As mentioned earlier, the Task Force restructured its investigative operations midway through FY19 and those changes are now beginning to show tangible results. Through the restructuring, the State Police has dedicated numerous additional officers and equipment to assist with tobacco investigations. This has allowed the Task Force to substantially increase the breadth of its enforcement and investigative activities. Collectively, these enforcement actions have resulted in disrupting and/or shutting down tobacco smuggling operations; removing illegal contraband tobacco from circulation and increasing tobacco tax collections from sales of OTP, primarily smokeless tobacco products; and suspending or revoking the licenses of tobacco retailers found to be in violation of the Commonwealth's tobacco laws. All of these efforts were the result of successful collaboration among Task Force agencies and enforcement action undertaken by the State Police and the Department of Revenue. While some of these efforts were conducted exclusively by Task Force member agencies, the Task Force also collaborated with federal law enforcement partners as well as other law enforcement agencies in several joint investigations. The Task Force strives to maintain a balance of larger and smaller enforcement cases in its active inventory at all times. Below are some highlights from the past year:

- Pursuant to a Task Force investigation, the State Police and Department of Revenue assisted in uncovering and dismantling a smuggling operation in which large amounts of smokeless tobacco products, cigars and smoking tobacco were being purchased in

Pennsylvania, transported into Massachusetts and sold to unscrupulous retailers in southeastern Massachusetts without payment of the required Massachusetts tobacco excise tax. Following the investigation, the Attorney General's Office sought and obtained indictments against the ringleader of the illegal tax evasion scheme. The revenue loss to the Commonwealth from this smuggling operation is currently estimated at over \$13 million over the course of several years. The Task Force was assisted in this investigation by law enforcement authorities in Rhode Island and Pennsylvania. In terms of revenue loss, this is the largest tobacco-related prosecution ever brought in a Massachusetts state court.

- Pursuant to a Task Force investigation, the State Police and Department of Revenue dismantled a smuggling operation in which a cigar retailer purchased nearly \$1 million worth of untaxed cigarettes from Hanscom Air Force Base and New Hampshire and then resold them at his Massachusetts tobacco retail location without paying the required Massachusetts tobacco excise tax. Following the investigation, the Attorney General's Office sought and obtained indictments against the store owner for his role in the tax evasion scheme. The store owner pleaded guilty to all the charges in Suffolk Superior Court. As part of the plea, the store owner was sentenced to a term of probation and was ordered to make a lump sum restitution payment of over \$400,000 to the Department of Revenue, which represented the total amount of revenue loss to the Commonwealth from this illegal scheme over the course of several years.
- In a joint Task Force/federal law enforcement collaboration, the State Police and Department of Revenue assisted in an investigation which resulted in the arrest of a licensed tobacco distributor who was smuggling extremely large amounts of untaxed smokeless tobacco products and cigarettes from New Hampshire into Massachusetts. Following the investigation, the leader of the scheme was indicted for financial crimes in federal court. The revenue loss to the Commonwealth from this vast smuggling enterprise was determined to be approximately \$12.3 million over the course of several years. The defendant pleaded guilty to the charges in January, 2019, and sentencing is scheduled to take place in April. The case is being prosecuted by the U.S. Attorney's Office for the District of Massachusetts.
- Pursuant to a Task Force investigation, the State Police and Department of Revenue executed a search warrant at an illegal tobacco warehouse in Western Massachusetts. The investigation revealed that the warehouse operator was purchasing tobacco products from Pennsylvania and distributing the products to Springfield-area retailers without reporting and remitting the required Massachusetts tobacco excise tax. The Massachusetts search warrant resulted in the seizure of a large quantity of illegal (untaxed) tobacco products. The Task Force was assisted in this investigation by the Pennsylvania State Police and the Pennsylvania Department of Revenue, who assisted in the execution of a search warrant of a Pennsylvania supplier. The investigation is ongoing.
- Pursuant to a Task Force investigation, the State Police and Department of Revenue executed search warrants at multiple locations south of Boston where illegal tobacco products were being stored. The investigation revealed that the tobacco products were being distributed to numerous Boston-area retailers and then being sold without payment

of the required Massachusetts tobacco excise tax. The search warrants resulted in the seizure of a large quantity of illegal (untaxed) tobacco products. The investigation is ongoing.

- Pursuant to a Task Force investigation, the Department of Revenue's Criminal Investigations Bureau (CIB) conducted investigations of two licensed Boston-area tobacco distributors that were significantly underreporting tax liabilities relating to sales of OTP. Following the investigations, CIB referred the matter to the Department of Revenue's Audit Division, which resulted in the subsequent issuance of \$530,000 in delinquent tax assessments for the tobacco products at issue.
- Pursuant to a Task Force investigation, the State Police and Department of Revenue executed a search warrant at the location of a Western Massachusetts tobacco retailer selling pre-rolled cigarettes that did not bear the legally required Massachusetts tobacco stamps and which were, therefore, untaxed. The investigation revealed that these illegal sales had occurred over a period of several years and revenue loss to the Commonwealth over that period is estimated to be more than \$650,000.
- Pursuant to Task Force compliance and enforcement operations, the Department of Revenue's Miscellaneous Excise Bureau has discovered and seized contraband OTP from twenty-two (22) tobacco retailers as a result of routine tobacco compliance inspections in FY19 thus far. Three of these inspections resulted in the seizure of nearly 700 tins (in total) of untaxed smokeless tobacco and a large quantity of premium cigars. These matters are being investigated for further civil enforcement actions and potential criminal prosecution.
- Pursuant to Task Force compliance and enforcement operations, the Department of Revenue's Miscellaneous Excise Bureau suspended the tobacco licenses of three tobacco retailers over a four-month period in FY19. During routine compliance inspections, these retailers were each found to be in possession of over three hundred (300) packs of illegal (unstamped) cigarettes in their stores. These matters are being investigated for further civil enforcement actions and potential criminal prosecution.

Many of the aforementioned enforcement actions have generated additional, related "spin-off" investigations which, together with federal, state and local law enforcement, the Task Force is now pursuing in locations throughout the Commonwealth.

Finally, over the past year, the Department of Public Health has rolled out an improved Retail Data Management System (RDMS), a database used to track local tobacco retailers and their compliance with tobacco laws and local regulations. The new system, called Point of Sale Toolkit (POST), enables real-time tracking of enforcement and compliance actions undertaken by Task Force member agencies. Specifically, the new system allows member agencies to monitor actions undertaken with respect to particular entities or areas of the state so they can strategically plan and track their own enforcement activities throughout the state for maximal impact. The product vendor, Counter Tools, offered a live demonstration of the system to the Task Force at a recent meeting and will conduct trainings with member agencies as needed. POST will serve to greatly

facilitate communications among Task Force member agencies and further enhance the collective impact of the Task Force's enforcement activities.

#### **IV. Legislative Proposals**

Pursuant to its statutory mandate,<sup>19</sup> the Task Force recommends specific measures to address the illegal tobacco market and specifically OTP smuggling, the segment where the black market is most active. These measures, which are attached to this Report, expand upon legislative recommendations previously submitted by the Task Force and are discussed in detail below.

##### **A. Smokeless Tobacco Stamping**

The Task Force has added statutory language that would grant the Commissioner of Revenue the authority to stamp smokeless tobacco – which is absent from the version of the statute that is currently in effect – and to implement the smokeless tobacco stamping proposal. As previously mentioned, the Task Force's enforcement actions have revealed a disproportionate amount of smuggling activity involving OTP relative to OTP's share of the overall Massachusetts tobacco market with the greatest amount of that illegal activity involving smokeless tobacco products.<sup>20</sup> Task Force investigators have encountered serious challenges in identifying illegal smokeless tobacco products because they do not currently bear a tax stamp indicating that the appropriate Massachusetts tobacco excise has been paid. In fact, the only way to determine whether the tax has been paid on smokeless tobacco products is through a laborious and time-consuming examination of a tobacco retailer's purchase invoices (which are often not stored at the retailer's premises). Moreover, the invoice reconciliation method does not adequately address a practice known as "blending," whereby tobacco retailers report and remit the requisite tobacco excise to the Department of Revenue on only a portion of their overall tobacco sales. In these situations, retailers blend lawful (taxed) tobacco products with unlawful (untaxed) products in the inventory sold to their customers. The retailers can produce legitimate invoices to Task Force investigators which show that tobacco excise was paid on OTP such as smokeless tobacco. However, the paperwork does not allow investigators to verify that excise was paid on the specific product observed on the shelves because the product does not bear a unique, unit-specific tracking number. In some cases, the proffered invoices relate to different tobacco products (albeit perhaps the same brand and type seen on the shelves) that were previously purchased and sold by the retailer.

In light of the issues relating to OTP, the Task Force has been exploring methods to facilitate identification of illegal (untaxed) OTP. These methods – including tightening record-keeping requirements, expanding search authority for tobacco enforcement officials, strengthening licensing provisions for tobacco licensees and prohibiting cash transactions between tobacco retailers and their suppliers – were included in the package of legislative recommendations that were previously submitted by the Task Force and ultimately introduced in the last legislative session as *SB1614: An Act Combatting Illegal Tobacco and Preventing Further Loss of Revenue*

---

<sup>19</sup> M.G.L. c. 64C, § 40(b)(4), (d).

<sup>20</sup> See *infra* at pp. 5-7; FY18 Annual Report at pp. 5-7; FY17 Annual Report at pp. 5-6.

to the Commonwealth.<sup>21</sup> The bill was referred to the Joint Committee on Revenue for review. After a hearing and inclusion of several amendments requested by the Task Force, the bill was reported favorably by the Joint Committee on Revenue and referred to the House Committee on Ways and Means, where it remained through the end of the session.<sup>22</sup> Passage of the bill would be an important first step in addressing the problem of OTP smuggling; however, it is not a complete solution to the problem.

With this in mind, the Task Force has been exploring the feasibility of expanding the Commonwealth's encrypted stamping program to include tins of smokeless tobacco in addition to packs of cigarettes (which are currently stamped). For more than two years, the Task Force has devoted significant time at a number of its public meetings to discuss legal and technical issues relating to the smokeless tobacco proposal. Similar to packs of cigarettes, smokeless tobacco is mostly packaged in standardized units (the familiar hockey puck-shaped tins) which makes automated, high volume machine stamping of these products practicable.<sup>23</sup> During the course of its exploratory process, the Task Force has invited representatives from interested parties to make presentations and offer comment – both in favor and in opposition – regarding the proposal. At the outset, stamping machine manufacturer USI engaged a team of its engineers to design a prototype machine in order to determine whether automated, machine application of a tax stamp to individual tins of smokeless tobacco could be accomplished in a cost-effective manner. Working together with the vendor that administers the Commonwealth's encrypted tax stamping program (SICPA), USI produced a prototype machine which is capable of stamping approximately eighty (80) tins of smokeless tobacco per minute. SICPA has worked with USI to ensure that it can attach all the necessary components to enable application of an encrypted Massachusetts tax stamp to each tin of smokeless tobacco that is fed through the machine.

Once the most pressing technical aspects relating to the machine were resolved, the Task Force engaged with officials at the U.S. Food and Drug Administration's (FDA) Center for Tobacco Products to discuss potential legal and regulatory issues with the smokeless stamping proposal. Through a series of email exchanges and telephone calls, the Task Force submitted a list of questions relating to a host of concerns raised by tobacco manufacturers, wholesalers/distributors and Task Force members. More specifically, the questions involved federal labeling requirements relating to warning labels for tobacco products; placement of the tax stamp on the product packaging as it relates to federal warning label requirements; and the regulatory treatment of wholesalers/distributors that would operate the stamping machines. While the FDA officials did offer informal guidance and general responses to the Task Force's questions, the officials indicated that FDA process and protocol would preclude them from offering pre-approval of the smokeless stamping proposal. However, the FDA officials did review photographic images of some tins of smokeless that had been stamped by the prototype machine and indicated that they had no concerns about the placement of the tax stamps on the product

---

<sup>21</sup> *SB1614* was sponsored by Senator Michael Rodrigues. Sen. Rodrigues was an original member of the Commission on Illegal Tobacco, the predecessor group of the Task Force.

<sup>22</sup> Once it was referred to the House Committee on Ways & Means, the bill was assigned a new number: *HB4065*.

<sup>23</sup> Smokeless tobacco represents the largest product category within the OTP market. Other products in the OTP market, such as cigars and smoking tobacco, are not sold in uniform quantities or in packages of similar shape and size, making automated stamping of such products in a cost-effective manner nearly impossible.

package or the clear plastic bags into which the stamped tins were placed after they were stamped as they did not obscure any federally mandated labels.

Meanwhile, the Task Force requested the Department of Revenue to prepare a revenue analysis of the smokeless tobacco stamping proposal. As part of this analysis, the Department of Revenue's Office of Tax Policy Analysis (OTPA) attempted to estimate the projected revenue gain to the Commonwealth if the proposal were implemented. Among other things, OTPA reviewed U.S. Census population data, state-level smokeless tobacco usage figures published by the Centers for Disease Control and Prevention (CDC), Massachusetts excise collections data for smokeless tobacco and information relating to the price elasticity of demand for smokeless tobacco products. After thorough examination of the data, OTPA estimates that implementation of the smokeless tobacco stamping proposal would generate between \$11 million - \$74 million in additional tobacco excise tax collections per year once fully implemented.<sup>24</sup>

After its lengthy and deliberate investigation into the issue, the Task Force now recommends that the Commonwealth require that tins of smokeless tobacco sold in the Commonwealth be required to bear a Massachusetts tobacco tax stamp.<sup>25</sup> The Task Force recognizes that numerous legal and regulatory issues remain unresolved, but believes that such remaining issues can be resolved with continued cooperation among all interested parties and federal regulators at the FDA. At this point in time, it has been shown that automated, machine stamping of smokeless tobacco can be accomplished in a cost-effective manner. A tax stamp will greatly facilitate the work of Task Force investigators in identifying and seizing illegal smokeless tobacco products. Moreover, the increased ease of detection of illegal smokeless tobacco will serve to deter putative smugglers from participating in the sale of illegal (untaxed) smokeless tobacco products.

## **B. Vapor Products**

The Task Force's recommendations also include language that would require vape retailers and vape distributors to register and obtain appropriate licenses from the Department of Revenue and, also, to be subject to the same administrative inspection and compliance requirements as current tobacco licensees. The Task Force has discussed the rapid growth in sales of vape products and its impact on the illegal tobacco trade. More specifically, the growth in the market for vape products has led to an increase in the number of vape retailers and distributors operating in the Commonwealth. However, under current law, neither vape retailers nor vape distributors are required to register and to obtain licenses from the Department of Revenue. Since they are not licensed at the state level, Task Force investigators are unable to determine the names and locations of vape retailers and distributors and their authority to conduct compliance and enforcement inspections is limited.<sup>26</sup> Accordingly, the Task Force recommends that vape retailers

---

<sup>24</sup> Given the inherent uncertainty in the available data and the difficulty in predicting smokeless tobacco usage rates in the future, OTPA provides a wide range of potential revenue impact and suggests that its estimates be used with caution.

<sup>25</sup> The Governor's House 1 budget includes a similar proposal as section 32.

<sup>26</sup> In deference to the new legislative commission on vapor products (*see* Ch. 157 of the Acts of 2018, sec. 21), the