Illegal Tobacco Task Force

Notice of Public Meeting

Meeting Date: Thursday, December 10th, 2015
Meeting Time: 10:00 AM
Meeting Location: 100 Cambridge Street, 2nd floor, Room D, Boston, MA

Task Force members will hear from representatives of Altria Client Services regarding illegal tobacco sales in Massachusetts and neighboring states and will discuss approaches to combatting illegal tobacco sales based on best practices from other jurisdictions.

A. Orientation/Opening remarks
B. Altria Client Services presentation
C. Discussion of potential legislative changes
D. Wrap up/Closing Comments

Due to security at the Saltonstall Building, those interested in attending the meeting should allow for additional time to check-in.

If any member of the public wishing to attend this meeting seeks special accommodations in accordance with the American with Disabilities Act, please contact DOR Human Capital Development at 617-626-2355.

Date of Posting: December 4, 2015 @ 5:00pm

Illegal Tobacco Enforcement: Multi-Agency Illegal Tobacco Task Force

SECTION 71. Chapter 64C of the General Laws is hereby amended by adding the following section:-

Section 40. (a) There shall be a multi-agency illegal tobacco task force. 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 be co-chaired by the colonel of state police or a designee and the commissioner of revenue or a designee and shall also consist of: the secretary of public safety and security or a designee; the state treasurer or a designee; the attorney general or a designee; and the commissioner of public health or a designee.

(b) 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 this chapter 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 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.

(c) The multi-agency illegal tobacco task force shall meet at times and places to be determined by the co-chairs and may establish working groups, meetings, forums or any other activity deemed necessary to carry out its mandate.

(d) The task force shall submit a report not later than March 1 of each year on the results of its findings, activities and recommendations from the preceding year 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 report shall include, but not be limited to: (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.

Illegal Tobacco Enforcement: Multi-Agency Illegal Tobacco Task Force Report

SECTION 184. Not later than July 1, 2016 the multi-agency illegal tobacco task force established in section 40 of chapter 64C of the General Laws shall submit a report and proposed legislation to the clerks of the house of representatives and the senate, the house and senate chairs of the joint committee on revenue, the chairs of the house and senate committees on ways and means and the house and senate chairs of the joint committee on public safety and homeland security with recommendations on: (i) enhancing and amending cigarette excise forfeiture provisions; (ii) increasing civil and criminal penalties; (iii) updating and clarifying cigarette excise regulatory and administrative provisions; and (iv) potential regulatory or statutory changes to strengthen enforcement efforts, including any changes necessary to resolve existing legal ambiguities or inconsistencies and potential legal procedures for facilitating enforcement efforts.

Illegal Tobacco Task Force

Agency	Designees
AGO	Thomas Bocian, Amber Villa
MSP	Capt. Steve Fennessy (Co-Chair)
DPH	Lea Susan Ojamaa
EOPSS	David Solet
TRE	Shawn Collins, Michael Sweeney
DOR	Kajal Chattopadhyay (Co-Chair)

Proposed Upcoming Meeting Dates

Wednesday, January 13, 2016 @ 10:30am - 12:30pm (Room C)

Tuesday, February 9, 2016 @ 10:30am – 12:30pm (Room B)

*All meetings will be held at 100 Cambridge St., 2nd Floor, Boston, MA

Commonwealth of Massachusetts

Report of Commission on Illegal Tobacco

03/01/2014

Findings and recommendations made by the Commission on Illegal Tobacco on the illegal tobacco market and resulting loss of revenue in the Commonwealth of Massachusetts

Members of the Commission on Illegal Tobacco

Commissioner Amy Pitter, *Chair*
Department of Revenue

Al Gordon, Deputy Treasurer
State Treasurer Designee

Brian Mannal
Massachusetts House of Representatives

Michael Rodrigues
Massachusetts Senate

David Sullivan, General Counsel
Office of the Secretary of Administration and Finance

Matthew Schrumpf, Assistant Attorney General
Office of the Attorney General

Captain Robert Irwin, Massachusetts State Police
Governor Appointee

Paul Caron, Executive Director
Northeast Association of Wholesale Distributors

Stephen Ryan, Executive Director
New England Convenience Store Association

Table of Contents

I. Authority to Study

The Commission on Illegal Tobacco was established pursuant to section 182 of the Fiscal Year 2014 General Appropriations Act 2013[1]. The Commission was charged with the following tasks:

> To study and report on the illegal tobacco distribution industry in the commonwealth and the resulting loss of tax revenue. The commission shall investigate, report and make recommendations relative to: (1) the regulation, oversight, distribution and sale of all tobacco products sold in the commonwealth; (2) the illegal tobacco market in the commonwealth; (3) the loss of tobacco excise and sales tax revenues in the commonwealth as a result of the illegal tobacco market; (4) methods to maximize the collection of tobacco excise and sales tax revenues being lost to the illegal market; and (5) enforcement and penalties for violations of laws relative to the collection and reporting of all tobacco taxes under chapter 64C of the General Laws.

The Commission was required to convene not later than November 1, 2013 and prepare a report detailing its findings and recommendations. In addition, the commission was charged with drafting the legislation necessary to carry recommendations into effect. All actions were to be concluded and recommendations filed with the clerks of the Senate and House of Representatives, the Chairs of the House and Senate Committees on Ways and Means, and the Senate and House Chairs of the Joint Committee on Revenue no later than March 1, 2014.

II. Executive Summary

During the 2013 legislative session, the Massachusetts Legislature created the Commission on Illegal Tobacco to study the economic impact of the illegal tobacco market on the Commonwealth of Massachusetts and make recommendations based on those findings. The Commission was charged with studying the regulation, oversight, distribution, and sale of all tobacco products in Massachusetts, investigating the illegal market, and determining the loss of tobacco excise and sales tax revenues in Massachusetts resulting from illegal market activities. The Commission was also tasked with making recommendations on how to maximize the collection of tobacco excise and sales tax revenues and on enforcement and penalties for violating laws related to the distribution and sale of tobacco products.

Tobacco is illegally distributed and sold with the purpose of deriving illegal profits through tax avoidance. Tobacco taxes are imposed at both the federal and state levels. Violators avoid paying the tobacco excise and sales taxes in Massachusetts in multiple ways, including individual bootlegging, organized wholesale domestic smuggling, international smuggling, and counterfeits. In Massachusetts, the predominant method of tax avoidance is by smuggling tobacco products across the state border.

The cigarette excise tax rate in Massachusetts is $3.51, comparable to rates in Connecticut and Rhode Island, but well above the rates in New Hampshire, Vermont, and Maine. In addition, the excise tax rate for cigars is 40% of the wholesale price while the excise tax rate for smokeless

[1] Established by St. 2013, c. 38, sec. 182

tobacco is 210% of the wholesale price. The difference between Massachusetts tax rates and other states' tax rates provides an economic opportunity to avoid Massachusetts taxes by smuggling. However, data[2] shows that reducing Massachusetts tax rates is not a viable solution for combatting the avoidance of Massachusetts taxes, as that approach would not only reduce tax revenues but would also undermine public health objectives.

Department of Revenue economists estimate that in 2012, between 7% and 20% of cigarettes consumed in the Commonwealth were untaxed. They predict the percentage of untaxed cigarettes will rise to between 8.3% and 27.5% due to the $1.00 rate increase. With the rate at $3.51, economists project Massachusetts will bring in an additional $157.5 million a year and that the annual revenue loss from tax avoidance will be in the range of $62 million to $246 million in excise taxes and an additional $12 and $49 million in sales tax revenues. Economists are unable to assess the impact of the illegal tobacco market on cigars, smoking tobacco, and smokeless tobacco (hereinafter referred to as "Other Tobacco Products") because there is a lack of hard data and literature on which to base estimates.

Current state laws make it illegal to transport or sell any cigarettes in Massachusetts without the Massachusetts cigarette stamp. The Commonwealth has an encrypted stamping system which allows officials to scan cigarettes and track them. Auditors for the Department of Revenue conduct compliance drives three to four times a year; they visit licensed retailers and make sure those retailers are selling Massachusetts-taxed tobacco products.

With more compliance drives over the past three years, voluntary compliance among licensed retailers has increased, leaving the Commission to deduce that a greater problem stems from unlicensed retailers and distributors selling illegal cigarettes. Such products are being transported from places with lower excise taxes including New Hampshire where the excise tax rate is only $1.78 per pack or even Virginia where the excise tax rate is just $0.30 per pack. To bring even one pack of cigarettes into Massachusetts without the state's excise tax stamp is illegal.

When Department of Revenue auditors find a retailer selling illegal products, auditors have the authority to seize the goods, impose fines to collect taxes, and revoke tobacco licenses. However, the audit division does not conduct criminal investigations. Audit division staff must refer cases to a separate investigations unit within the Department of Revenue and work with outside agencies to pursue criminal charges. Also, auditors rely largely on tips from the public and have limited resources for ongoing investigations.

Other Tobacco Products are not stamped in Massachusetts. When auditors conduct compliance checks, they have difficulty making sure Other Tobacco Products are legitimate and taxed. There is no way to verify that an invoice detailing the taxes paid on Other Tobacco Products are for the specific products found at the retailer at the time of a compliance check, as opposed to identical product acquired on which taxes have not been paid.

Currently, there is no formal multi-agency taskforce combatting the illegal tobacco market in the Commonwealth. The Massachusetts State Police (MSP), along with the Federal Bureau of

[2] Massachusetts Department of Public Health

Alcohol, Tobacco, Firearms, and Explosives, and other agencies work alongside the Department of Revenue to handle criminal investigations as they arise. Their findings are then turned over to the Attorney General's Office for prosecution. The MSP has limited resources while conducting tobacco investigations including a lack of physical resources necessary to conduct an investigation, overtime costs, operational costs, and time constraints. The Department of Revenue also does not have the resources to conduct fulltime surveillance or stake out every case. In addition, ongoing cases drain limited resources over the long term.

The Commission on Illegal Tobacco reviewed information on the overall tobacco market, the illegal tobacco market, revenue losses, enforcement powers and practices, and penalties for violating tobacco-related statutes. As a result of its findings, the Commission recommends that the following actions, as subjected to the state budgeting process, be taken to prevent illegal tobacco sales and to collect additional revenue otherwise lost to the illegal market:

Recommendation 1: The Commission encourages The Legislature to dedicate additional funding to tobacco enforcement. The Commission acknowledges that sources of such funding are subject to the state budget process. Lost revenue from illegal tobacco distribution is estimated at between $62 million and $246 million after the most recent tobacco excise tax increases. A reduction of even 10% would mean revenue protection and enhancement of between $6.2 million and $24.6 million. By contrast, the cost to fund a 20-person team, for example, in Massachusetts would be roughly $2 million. In other states, increased tobacco enforcement has proved effective. In New Jersey, seized currency and vehicles totaled more than $1 million, while the state estimates that enforcement prevented more than $10 million in illegal cigarettes being sold to consumers[3]. In New York City, enforcement officials averted the loss of more than $1.5 million in state and city cigarette excise tax revenues[4].

Recommendation 2: The Commission recommends that the forfeiture provisions of Chapter 64C be amended so that they are similar - both as to procedures and as to the authorized use for enforcement purposes of forfeited items and of the proceeds of their sale - to the provisions of G.L. c. 94C, §47, relative to forfeitures of items connected to violations of the controlled substance laws. Specifically, the Commission recommends that the forfeiture provisions of Chapter 64C be amended to provide that, when court proceedings result in a final order of forfeiture, the final order shall provide for disposition of forfeited items in any manner not prohibited by law, including official use by an authorized law enforcement or other public agency, including members of the tobacco task force, or sale at public auction or by competitive bidding; and deposit of the monies and proceeds of any such sale (less associated expenses) to special tobacco enforcement trust funds, from which the funds may be expended by members of the tobacco task force for tobacco enforcement-related purposes, including defraying the costs of investigations and providing additional technical equipment or expertise.

Recommendation 3: The Commission acknowledges that the efforts of tobacco enforcement are currently divided among various agencies. Furthermore, the Commission

[3] New Jersey Treasury
[4] New York City Sheriff's Office

understands that the creation of joint task forces have proven to be an effective mechanism for combating the illegal tobacco market and enhancing interagency relationships, information sharing, and the prosecution of violators. The Commission encourages the Legislature to dedicate additional funding to tobacco enforcement either through the establishment of a tobacco taskforce or, if not through such task force, through direct funding for full-time dedicated personnel to state entities responsible for tobacco law enforcement. Should the Legislature accept this Commission's recommendation to establish a task force, the Commission recommends that a Joint Illegal Tobacco Task Force be established to combat contraband tobacco and that the task force consist of the following members and/or their designee(s): the Attorney General, the Commissioner of Revenue, the State Treasurer, an appointee from the Massachusetts State Police, and the Commissioner of Public Health. The Commission recommends that the Legislature designate the lead agency for the task force, as the Commission agreed that it was beyond its scope to propose a particular agency of the Commonwealth to have this responsibility. The Commission envisions that the task force would have at its disposal dedicated personnel from member agencies to carry out enforcement activities and that the task force will work toward fostering relationships with the appropriate federal law enforcement agencies.

Recommendation 4: The Commission recommends that the Department of Revenue draft legislation to increase civil and criminal fines and penalties to strict levels that are comparable to states with similar tobacco tax rates, such as New York and New Jersey. The Commission agrees that civil and criminal fines and penalties for illegal activities relative to tobacco be sufficient so that such fines and penalties serve as meaningful deterrents to tax avoidance and crime. The Commission recommends the Department of Revenue also review and revise the current thresholds within the fine and penalty structures.

Recommendation 5: The Commission recommends that the Department of Revenue draft proposed legislation that would clarify the provisions of Chapter 64C by eliminating the practice of using the same terms – notably "cigarettes" and "tobacco products" – to mean different products in different sections of the law. Specifically, the Commission contemplates that, in the chapter as amended, each product would have a clear definition that would remain consistent throughout the chapter, and that the products to which each section applies would be specifically identified in the text of the section. The Commission further proposes that such legislation would update the administrative provisions of the chapter and would update or remove any antiquated or obsolete references in the chapter.

Recommendation 6: The Commission recommends that the Department of Revenue require more detailed information be submitted with current returns and schedules from participants throughout the tobacco supply chain.

Recommendation 7: The Commission recommends that the Massachusetts State Lottery Commission, upon notice from the Department of Revenue, be directed by statute to suspend for 60 days the lottery license of any vendor whose tobacco retailer license under

Chapter 64C, §3, and Chapter 62C, §67, is revoked by the Department of Revenue for the willful possession or sale of illegal tobacco products as provided in Chapter 62C, §68, and subject to the existing appeal process for such license suspension under Chapter 62C, §68.

Recommendation 8: The Commission recommends that the Department of Revenue expand the distributor license application to gather more detailed information about an applicant business and its distribution plans.

Recommendation 9: The Commission recommends that the Department of Revenue engage in the regulatory process to require retailers to renew their tobacco license every year, rather than every two years as is currently required. With the high turnover within the retailer community, it is impossible for the Department of Revenue to maintain an accurate list of licensees. A one-year cycle would make it easier for municipalities and wholesalers to accurately determine the population of licensed retailers. An annual retailer license requirement would also be consistent with other municipal and Department of Revenue license cycles. The Commission recommends that this change in the renewal process not result in an application fee increase for this specific purpose. The Commission acknowledges and agrees that it is not the intent of this recommendation to prevent any future fee increases.

Recommendation 10: The Commission recommends requiring that the Massachusetts Department of Revenue publish a regularly-updated searchable list of all licensed tobacco wholesalers, distributors, and retailers on the Department's public website. This will help promote legal tobacco transactions among legitimate tobacco businesses and consumers through self-auditing.

Recommendation 11: The Commission recommends requiring all retailer/supplier transactions for all tobacco products to be paid for by check, credit or debit card, or electronic fund transfers; cash transactions would be prohibited. Retailer/consumer transactions would be excluded from this method of payment requirement.

Recommendation 12: The Commission recommends that Massachusetts licensed retailers be required to purchase from Massachusetts licensees as defined under Chapter 64C, §1 and §7B, except as authorized by the Commissioner of Revenue.

The Commission concluded there were specific matters discussed with great consideration; however, the Commission agreed any recommendations on these matters would be beyond the purview of the Commission.

Matter 1: While instituting simplified minimum tobacco pricing requirements was discussed at great length by Commission members, it was determined that any recommendation to implement minimum pricing laws was beyond the purview of the Commission.

Matter 2: Although the Commission makes no recommendation at this time to expand the stamping program, the Commission recommends that further analysis should be conducted to evaluate the benefits and shortcoming of expanding the tobacco stamping program. While cigarettes are currently stamped in Massachusetts, estimates of increased revenue collection would need to be made to determine whether the expansion of stamping to cover other tobacco products would benefit the Commonwealth and reduce the illegal tobacco trade. Additionally, it remains questionable whether the technology to stamp other tobacco products is readily available at this time, and if that technology was available, it must be determined who would assume the costs of the expansion.

III. Commission Background Information

To comply with St. 2013, Chapter 38, Section 182, members of the Commission on Illegal Tobacco gathered information from various tobacco market experts. Facts and figures were presented to Commission members by tobacco manufacturers, wholesalers, and retailers; state and federal law enforcement officials, including the Massachusetts State Police, Office of the Attorney General, and Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); representatives from the Public Health Advocacy Institute and American Cancer Society; economists and auditors from the Massachusetts Department of Revenue; and the contracted company SICPA on stamping, tracking and tracing tobacco products. In addition, further information was compiled by the Department of Revenue and submitted to the Commission on tobacco taxes and law enforcement efforts in surrounding states, tobacco manufacturing and distribution measures, and technologies that may be implemented to help enforce current policies.

Commission members met publicly seven times over the course of five months, on the following dates:

October 21, 2013
November 7, 2013
November 21, 2013
December 9, 2013
January 9, 2014
January 30, 2014
February 12, 2014

Detailed minutes reporting the Commission's discussions, presentations, and votes were taken at each meeting and published for the public pursuant to M.G.L Chapter 30A §§18-25 Open Meeting Law.

IV. Massachusetts Tobacco Tax History

In 2013, lawmakers approved an increased excise tax rate on all tobacco products[5]. As shown in Figure 1, these changes effective July 31, 2013, gave Massachusetts the second highest cigarette excise tax in the United States. As a result, the cigarette excise tax rate increased from $2.51 per pack to $3.51 per pack. The excise rates for cigarettes across the country range from

[5] Established by An Act Relative to Transportation Finance (Acts 2013, Chapter 46, §46)

$4.35 a pack in New York to $0.17 a pack in Missouri. While some neighboring states have tobacco excise taxes rivaling Massachusetts's rates, other neighboring states have significantly lower rates. For example, New Hampshire's cigarette excise tax rate also increased in 2013 by 10 cents, making New Hampshire's current excise rate $1.78 a pack.

Figure 1: State rankings by cigarette excise tax

State	Excise Tax	Rank
New York	$4.35	1
Massachusetts	**$3.51**	**2**
Rhode Island	$3.50	3
Connecticut	$3.40	4
Hawaii	$3.20	5
Washington	$3.025	6
Minnesota	$2.83	7
New Jersey	$2.70	8
Vermont	$2.62	9
Wisconsin	$2.52	10
Dist. Of Columbia	$2.50	11
Alaska	$2.00	12
Arizona	$2.00	12
Maine	$2.00	12
Maryland	$2.00	12
Michigan	$2.00	12
Illinois	$1.98	17
New Hampshire	$1.78	18
Montana	$1.70	19
Utah	$1.70	19
New Mexico	$1.66	21
Delaware	$1.60	22
Pennsylvania	$1.60	22
South Dakota	$1.53	24
Texas	$1.41	25
Iowa	$1.36	26
Florida	$1.339	27
Ohio	$1.25	28
Oregon	$1.18	29
Arkansas	$1.15	30
Oklahoma	$1.03	31
Indiana	$0.995	32
California	$0.87	33
Colorado	$0.84	34
Nevada	$0.80	35
Kansas	$0.79	36
Mississippi	$0.68	37
Nebraska	$0.64	38
Tennessee	$0.62	39
Kentucky	$0.60	40
Wyoming	$0.60	40
Idaho	$0.57	42
South Carolina	$0.57	42
West Virginia	$0.55	44
North Carolina	$0.45	45
North Dakota	$0.44	46
Alabama	$0.425	47

Georgia	$0.37	48
Louisiana	$0.36	49
Virginia	$0.30	50
Missouri	$0.17	51

Source: Compiled by FTA from other state sources, MA Department of Revenue updates

The 2013 tobacco excise increase also impacted the excise rates for other tobacco products. Cigar excise rates and smoking tobacco excise rates increased from 30% to 40% of the wholesale price. Smokeless tobacco excise tax rates rose from 90% to 210% of the wholesale price.

Massachusetts Department of Revenue economists predict the latest cigarette excise tax increase will raise an additional $150 million dollars per year; the cigar tax could raise about $3.1 million more per year; the smoking tobacco tax would raise an estimated additional $0.4 million per year; and the smokeless tobacco tax would raise a predicted $3.9 million per year. As shown in Figure 2, the additional amount collected for the Commonwealth would total about $157.5 million per year. The total for the 2014 fiscal year is marginally less at $134.7 million because the increases went into effect mid-year.

Figure 2: Rate Change Expected Revenues

	Prior Rate	Current Rate	Annualized (Millions)	FY2014 (Millions)
Cigarette	$2.51	$3.51	$150.00	$128.43
Cigar (% of price paid by licensee)	30%	40%	$3.1	$2.60
Smoking tobacco (% of price paid by licensee)	30%	40%	$0.4	$0.4
Smokeless tobacco (% of price paid by licensee)	90%	210%	$3.9	$3.27
Total Revenue Impact			**$157.5**	**$134.7**

Source: Massachusetts Department of Revenue

The additional revenue estimates will have an impact on the state budget. As shown in Figure 3, $124.3 million of those collections are designated for the state's budget or General Fund, while $33.3 million of those collections are non-budgetary and would go to the Commonwealth Cares Trust Fund. To put those numbers into context, the total tobacco budgetary fund for the 2014 fiscal year is $542 million, while the tobacco non-budgetary fund is $146 million, for a total of $688 million in revenue generated by tobacco excise taxes.

Figure 3: MA Historical Collections

Collections by Fund ($Millions)	FY8	FY09	FY10	FY11	FY12	FY13	FY14
Budgetary	437	457	456	454	451	440	542
Non-Budgetary	NA	130	124	124	123	118	146
Total	**437**	**587**	**580**	**577**	**574**	**558**	**688**

Collections by Fund (% of Total)	FY8	FY09	FY10	FY11	FY12	FY13	FY14
Budgetary (General Fund)	100%	77.8%	78.7%	78.6%	78.6%	78.8%	78.7%
Non-Budgetary (CCTF)	NA	22.2%	21.3%	21.4%	21.4%	21.2%	21.3%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Source: Massachusetts Department of Revenue

V. Economic Impact of Illegal Tobacco Market

The illegal tobacco market impacts revenue collections at the state and federal level. Before the increase to $3.51, Massachusetts Department of Revenue economists estimated that between 7% and 20% of cigarettes consumed in Massachusetts were untaxed. With the 2013 cigarette excise tax rate increase, Massachusetts Department of Revenue economists predict that between 8.3% and 27.5% of cigarettes consumed in Massachusetts will go untaxed. As shown in Figure 4, those percentages constitute between $62 million and $246 million in uncollected excise taxes due to tax avoidance on between 18 million and 70 million packs of cigarettes. It is also estimated that the Commonwealth would lose an additional $12 million to $49 million in sales tax revenue.

Figure 4: Untaxed cigarette consumption

Before the recent rate increase ($2.51 per pack)

	Untaxed sales as % of total consumption	
	7%	20%
Untaxed sales (Millions of Packs)	16	53
Loss of excise tax revenue ($ Mil.)	$40	$133
Loss of sales tax revenue ($ Mil.)	$10	$33

After the recent rate increase ($3.51 per pack)

	Untaxed sales as % of total consumption	
	8.3%	27.5%
Untaxed sales (Millions of Packs)	18	70
Loss of excise tax revenue ($ Mil.)	$62	$246
Loss of sales tax revenue ($ Mil.)	$12	$49

Source: Massachusetts Department of Revenue

The Department of Revenue estimated the levels of tax avoidance rate by looking at the national consumption estimates in comparison to the state's taxed sales data and literature. The Department made three assumptions in determining its estimates. It assumed (i) that before the recent rate increase to $3.51, tax avoidance was between 7% and 20% of total consumption (ii) that the price elasticity of consumption is between -0.3 and -0.5 and (iii) that the price elasticity of taxed sales is between –0.6 and -1.

The Department's economists were unable to estimate revenue losses on Other Tobacco Products due to the illegal market as there is insufficient hard data on the sales of Other Tobacco

Products in Massachusetts on which to base estimates. There is also a lack of literature on national Other Tobacco Product sales on which to base comparisons.

VI. Tobacco Smuggling

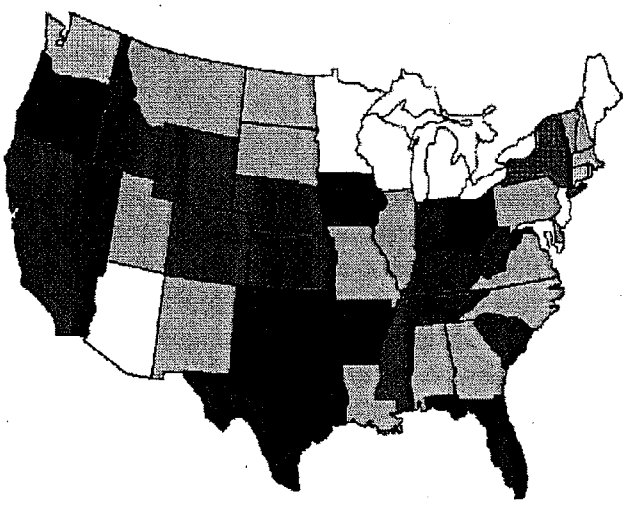
Tobacco excise taxes have been used to raise revenue and decrease the number of smokers, but numerous studies show that the rising prices of tobacco products have led to increases in illegal tobacco sales. All illegal tobacco sales can be attributed to tax avoidance schemes. While the illegal trade is oftentimes carried out by individuals trying to save money by buying illegal tobacco for personal use, it is carried out on a large scale commercial level and has been linked to organized crime. Criminals are willing to work in the illegal tobacco market because the potential economic benefits have, under current laws, far exceeded the associated risks of getting caught. Tobacco is a legal commodity that can be transported easily and sold in the open market. Also, the penalties under the current laws are far less severe than working in other illicit markets such as the illegal drug trade. The large profits in the illegal tobacco market have been generated through federal, state, and local tax evasion. The following actions have been used to avoid paying taxes on tobacco products.

- Domestic Smuggling
- International Smuggling
- Counterfeiting

Domestic Smuggling

Domestic smuggling is a widespread practice that Massachusetts officials have been diligently attempting to prevent. In this domestic smuggling, smugglers primarily focus on the tax disparity between states, but they also consider the degree of law enforcement presence and the penalties for getting caught. With dramatic tax rate differences between certain states, as shown in Figure 5, smugglers seek to acquire significant quantities of tobacco products where tobacco taxes are lower and bring them to states with higher taxes to sell them illegally without paying the higher taxes imposed by such states.

Figure 5: Cigarette Excise Rate Map



Key:

Red: greater than $4
Orange: less than $4, greater than $3
Yellow: less than $3, greater or equal to $2
Green: less than $2, greater than $1.50
Blue: less than $1.50, greater than $1
Purple: less than $1, greater than $0.50
Pink: less than $0.50

As indicated in Figure 6, the taxes imposed on the purchase of a case of cigarettes in New York City in 2010 totaled $4,115, while in Richmond, Virginia, the tax cost was only $786 for a case. Therefore, a smuggler could potentially make $3,330 through tax evasion by buying a case of cigarettes in Virginia and selling it in New York City[6].

Figure 6: Tax Differential for a Pack, Carton, and Domestic Case between New York, NY and Richmond, VA, 2010

	Pack	Carton	Case
New York	$6.86	$68.60	$4,116.00
Richmond	$1.31	$13.10	$786.00
Differential	**$5.55**	**$55.50**	**$3,330.00**

Source: RAI Services Company, 10/21/2013

Geographically, New Hampshire is the closest state to Massachusetts with a significantly lower cigarette excise tax rate. Additionally, New Hampshire does not have a sales tax, further widening the price gap. As shown in Figure 7, smuggling one case of cigarettes (approximately 60 cartons) from New Hampshire into Massachusetts could potentially yield a nearly $1,100 profit.

Figure 7: Tax Differential between Massachusetts and New Hampshire

State	Pack	Carton	Case
Massachusetts	$4.52	$45.20	$2,712.00
New Hampshire	$2.69	$26.90	$1,641.00

[6] GAO-11-313 Illicit Tobacco

Differential	**$1.83**	**$18.30**	**$1,098.00**

Source: RAI Services Company, 10/21/2013

An Empty Discarded Pack Program[7] was conducted in Boston in October 2012 by Altria, the parent company of several tobacco manufacturers including Philip Morris USA, US Smokeless Tobacco, and John Middleton. The purpose of the study was to see what cigarettes were being consumed in the city during the collection period. Five-thousand empty discarded packs of cigarettes were picked up on the streets and from public trash receptacles. Of the discarded packs collected, 84% had the required Massachusetts tax stamps. However, 11.9% had different state stamps, and 3.4% of packs were non-domestic. Of the packs of cigarettes bearing out-of-state stamps, 7.2% were from New Hampshire, .6% of packs were each from Rhode Island and Connecticut, and .5% of packs were each from New York and Virginia. If .5% of all cigarettes consumed in Massachusetts annually are smuggled from Virginia, the potential gross profit from smuggling those cigarettes could be $4,515,600 in unpaid excise and sales taxes. As shown in Figure 8, smuggling a small truck full of illegal cigarettes across the border into Massachusetts from Virginia, smugglers could earn a potential profit of $385,000.

Figure 8: Cross Border Smuggling Potential Profit

State	Car (10 cs.)	Van (20 cs.)	Small truck (200 cs.)
NY	24.3K	$48.6K	$486K
MA	**19.3K**	**$38.5K**	**$385K**
RI	$19.2K	$38.4K	$384K
CT	$18.6K	$37.2K	$372K
VT	$13.9K	$27.8K	$278K
PA	$7.8K	$15.6K	$156K

Source: RAI Services Company, 10/23/2013

Operation "Smoke'em if you Got'em" was a cigarette smuggling case focused on untaxed cigarettes in downtown Boston. One stage of the investigation discovered ten boxes of cigarettes being shipped from Virginia to Chinatown through UPS by China Trade Inc. The boxes were delivered to the back of a Chinatown store and then hidden away behind the counter. The store was also selling taxed tobacco products, but it was selling the illegal cigarettes to trusted regular customers from under the counter. Investigators conducted surveillance on the store and other locations and gathered witness testimony and other evidence. Authorized by a warrant, officials opened the ten box shipment and found Marlboro Light Cigarettes ordered from Costco. The cigarettes had Virginia tax stamps but were illegal in Massachusetts.

As a result of the investigation, in March 2006, three defendants and two corporations pled guilty to failure to file corporate excise tax returns, filing false and fraudulent sales tax returns, evasion of cigarette excise tax, and possession of unstamped cigarettes with intent to sell. Tax revenues of approximately $27,000 per month or $320,000 per year had been lost because of this one scheme, which took place while the cigarette excise tax rate was still only $1.51 per pack.

[7] Altria Client Services survey

The investigation lasted four and a half months, covered six locations, and 45 people from multiple agencies were actively involved[8].

Other Tobacco Products fraud has also risen in recent years[9]. A majority of all Other Tobacco Product illegal activity originates in Pennsylvania because the state does not tax any Other Tobacco Products. Meanwhile, Massachusetts's 2013 raised excise tax rate on smokeless tobacco to 210% of the wholesale cost and on cigars to 40%, caused a wide gap in prices between these two states. For example, the wholesale cost for a five-can roll of Skoal smokeless tobacco is approximately $14 in Massachusetts. After including the $37.45 state excise tax and $3.85 retailer mark-up, that roll sells for approximately $55.30. In Pennsylvania, the wholesale price is also $14, but because there is no state excise tax, when that product is smuggled into Massachusetts and sold without paying the Massachusetts tax owed, the product can be sold for considerably less than the $55.30 thus providing significant illegal profit. Even if the cans were sold at retail price for double the wholesale price for $28, a pallet of Skoal, which is 810 five can roles, purchased in Pennsylvania and sold in Massachusetts provides an illicit profit of $11,340[10]. While Pennsylvania has proven to be the largest source of illegal Other Tobacco Products, Figure 9 shows dramatic price differences between the New England states.

Figure 9: Consumer Costs by State

State	Premium Smokeless (Retail Pricing)
Massachusetts	$14.25/can
New Hampshire	$7.59/can
Rhode Island	$6.19/can
Vermont	$7.65/can
Connecticut	$6.19/can
New York	$7.75/can

Source: Northeast Association of Wholesale Distributors

International Smuggling

Tobacco products manufactured overseas or manufactured in the United States for consumption outside of the United States can also be smuggled into the United States without paying taxes[11]. According to officials with U.S. Customs and Boarder Protection and U.S. Immigration and Customs Enforcement, criminals are able to bring the illegally imported tobacco products into the United States by not declaring them at customs or by disguising or hiding the products behind other imported items[12]. Such illegal import schemes can involve both genuine products and counterfeit goods. In addition to avoiding state tax payments, such

[8] Information presented by the Massachusetts State Police
[9] ATF presentation
[10] Northeast Association of Wholesale Distributors presentation
[11] RAI Services Company presentation
[12] GAO-11-313 Illicit Tobacco

schemes can have an impact on how much revenue Massachusetts receives as part of the Master Settlement Agreement. In Altria's empty discarded pack study conducted in Boston, 3.4% of the packs of cigarettes gathered were non-domestic packs[13]. Investigators from Altria could not determine whether the cigarettes were brought into the United States by individuals traveling from overseas or by an organized smuggling operation.

Counterfeits

Other schemes to avoid paying cigarette taxes include the sale of counterfeit cigarettes and packs of cigarettes containing counterfeit tax stamps. During Altria's Empty Discarded Pack Program, less than .1% of the packs of cigarettes collected were counterfeit Marlboros. Additionally, less than .1% held a counterfeit stamp. Altria representatives noted that while the numbers are low, it shows that these types of schemes still have a presence in the state. They have uncovered schemes where legitimate cigarette tax stamps have been individually removed from packs of cigarettes and reapplied to counterfeit packs of cigarettes, thus making them look more legitimate. However, Altria representatives noted that such activity has not been discovered in Massachusetts to date[14].

VII. Massachusetts State Laws Regulating Tobacco

Tobacco regulations in Massachusetts are outlined in the Massachusetts General Laws Chapter 64C. Over the years, the law has been amended but some components remain outdated. Under the Massachusetts tax law, a cigarette is defined to include (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco, (2) little cigars, which shall mean rolls of tobacco wrapped in leaf tobacco or any substance containing tobacco and as to which 1,000 units weigh not more than 3 pounds, and (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (1)[15]. The term cigarette also explicitly includes smokeless tobacco, which is not the case in most other states. A cigar is any roll of tobacco wrapped in leaf tobacco or in any substance containing tobacco, but does not include a cigarette[16]. Smoking tobacco is roll-your-own (RYO) tobacco and pipe tobacco and other kinds of tobacco suitable for smoking[17].

As of October 31, 2013, the Massachusetts Department of Revenue licensed fourteen manufacturers[18], twenty-four stampers[19]/wholesalers[20], one subjob wholesaler, nine unclassified acquirers[21], eleven vending machine operators[22], and no transportation companies[23]. There are

[13] Altria Client Services study
[14] Altria Client Services
[15] MGL c 64C §1
[16] MGL c 64C §7B
[17] MGL c 64C §7B
[18] MGL c 64C §1
[19] MGL c 64C §1
[20] MGL c 64C §1
[21] MGL c 64C §1
[22] MGL c 64C §1
[23] MGL c 64C §1

approximately 7,500 active retailers[24] in the state, including convenience stores where an estimated 41% of sales involve tobacco products[25].

Wholesaler stampers, wholesaler branches, unclassified acquirers, manufacturers, vending machine operators, vending machine branches, retailers and cigar distributors all need to be licensed to work in the Commonwealth. A majority of the interested parties can apply for the specific license by filling out an application on the Department of Revenue's website. However, retailers must have a MASSTAX registration in order to apply for a retailer license, since the application is found on the Web File for Business (WFB) page. As shown in Figure 10, the duration of a license, the application fee, and the filing requirements depend on the type of license. Additional information may also be required based on the type of license.

Figure 10: License Requirements

Type	Form	Fee	Validity	Filing Requirement	Sales tax registration
Wholesaler Stamper (resident)	CTL	$250	1 year: 07/01	Monthly	Yes
Wholesaler Stamper (non-resident)	CTL	$250	1 year: 07/01	Monthly	Yes
Wholesaler Branch	CTL-2	$125	1 year: 07/01		
Unclassified Acquirers	CTL	$250	1 year: 07/02		Yes
Manufacturers	CTL & CTL-1	$250	1 year: 07/01	No return due	
Vending Machine Operators	CTL	$150 + $50 per machine	1 year: 07/01		Yes
Vending Machine Branch	CTL	$75	1 year: 07/01		
Retailer	CT-RL	$50	2 years: 10/01		Yes
Cigar Distributors	CT-CDL	None	1 year: 10/01	Quarterly returns	Yes

Source: Massachusetts Department of Revenue, additional material may be required for a specific license

There are a number of penalties for working in the tobacco market without the required licenses. These penalties are outlined in the Massachusetts General Laws. A person who sells, offers to sell, or possesses with the intent to sell cigarettes without a license can be fined not more than $50. A person may be fined between $500 and $1,000, imprisoned not more than 1 year, or both for acting as an unclassified acquirer without a license. Purchasing or possessing cigarettes not manufactured, purchased, or imported by a licensed manufacturer, wholesaler, vending machine operator, or unclassified acquirer is penalized with a $50 to $100 fine. Similarly, possessing a case or container of cigarettes not bearing the name and address of the person receiving the cigarettes from the manufacturer, or possessing a case or container of cigarettes from which the name and address has been erased or defaced can result in a $25 to $1,000 fine. Additionally, filing a false return, affidavit, or statement can result in a fine of not more than $1,000, imprisonment for not more than 1 year, or both[26].

[24] MGL c 64C §1
[25] Northeast Association of Wholesale Distributors presentation
[26] MGL c 64C §10

Massachusetts law allows the Department of Revenue to collect excises on any resident who purchases cigarettes or Other Tobacco Products through interstate commerce. This ability is outlined in the General Laws Chapter 64C, Section 5A. While the law does not specify the types of sales, the law is applied to purchases made over the phone, through the mail, and on the internet. The Department seeks invoices from the companies that sell the products and then must match the invoices with Massachusetts residents. The Department of Revenue will directly bill residents who made the purchases. The Department of Revenue is required under Section 5A to report to the House and Senate committees on Ways and Means and Joint Committee on Health Care any steps taken to enforce Section 5A and the amounts collected.

Within Chapter 64C, there are a number of penalties a person can face for violating laws related to the tobacco market. These penalties can be fines, imprisonment, or both. All packs of cigarettes in Massachusetts are required to have Massachusetts excise tax stamps. Selling, offering to sell, possessing with intent to sell, or disposing of 12,000 or more unstamped cigarettes in Massachusetts without being authorized to do so is a felony and can result in a fine of not more than $5,000, jail time for not more than five years, or both[27]. Selling, offering to sell, possessing with intent to sell, or disposing of less than 12,000 unstamped cigarettes in the state is a misdemeanor and can result in a fine of not more than $1,000, jail time for not more than one year, or both[28].

Under Section 35, possessing, delivering, or transporting 12,000 or more unstamped cigarettes in the Commonwealth without authorization is a felony. If convicted, a person could be fined not more than $5,000, imprisoned not more than 5 years, or both. Possessing, delivering, or transporting less than 12,000 unstamped cigarettes without authorization is a misdemeanor punishable by a fine of not more than $1,000, imprisonment for not more than one year, or both. Additionally, the commissioner may assess a civil penalty of not more than $5,000 for each violation of Chapter 64C, Sections 34 and 35.

Penalties surrounding cigarette stamping laws are outlined in Section 37. Forging, altering, or counterfeiting a cigarette excise stamp or passing one as true could result in fine of not more than $2,000, imprisonment for not more than five years, or both. Removing or permitting the removal of any stamp could also result in a fine of not more than $2,000, imprisonment for not more than five years or both. If a person possesses stamps, or stamping machine without authorization, those stamps and machines can be seized. Similarly, Section 38 states that selling or offering to sell stamps without authorization is subject to a penalty of a fine of not more than $2,000, imprisonment for up to five years, or both. Unless authorized by the Commissioner of Revenue, Section 38A states that the police or commissioner can seize any unstamped cigarettes or smokeless tobacco on which taxes have not been paid. Those products must then be destroyed. The police or the Commissioner can also seize the receptacle or vehicle the seized products were transported in. The receptacles and vehicles, including a motor vehicle, boat, or airplane, can be destroyed or sold. Profits made during such sales are allocated to the General Fund[29].

[27] MGL c 64C §34
[28] MGL c 64C §34
[29] MGL c 64C §38A

While the fines and penalties surrounding cigarettes in Chapter 64C also apply to smokeless tobacco, Section 7B relates to cigars and smoking tobacco. The section makes it illegal to sell, offer to sell, possess with intent to sell or otherwise dispose of cigars or smoking tobacco within the Commonwealth without authorization and required licenses. It is also illegal to purchase or possess tobacco not manufactured, purchased, or imported by a licensed manufacturer, wholesaler, vending machine operator, or unclassified acquirer. It is illegal to possess a case or container of tobacco not bearing the name and address of a person receiving the case; additionally, the name and address cannot be removed or defaced. It is illegal to sell or solicit orders for tobacco to be shipped, sent or brought to Massachusetts to anyone not a licensee. Section 7B also applies to filing a false return, affidavit, or statement. There is a civil penalty of between $5,000 and $25,000 for violating any of these provisions[30]. Illegal cigars and smoking tobacco may also be seized, similarly to the cigarette and smokeless tobacco seizures under Section 38A.

VIII. Department of Revenue Tax Enforcement

The Massachusetts Department of Revenue's audit division is involved in civil enforcement but not criminal enforcement. The audit division has two units participating in tobacco tax enforcement. A small tobacco excise unit oversees the selling of stamps, posting of bonds, and renewal of the licenses. The second unit is a special enforcement group which conducts compliance drives. The compliance drives are held to help prevent tobacco excise tax avoidance.

Since Massachusetts started stamping cigarettes, the technology has changed dramatically. The state first used ink stamps before switching to heat-applied cigarette tax stamps. The heat-applied stamps were used for more than thirty years. Since then, the stamps have changed multiple times to accommodate technological upgrades and excise tax rate increases. In 2011, Massachusetts switched to an encrypted stamp and reporting platform known as the SICPATRACE platform. At the time, the stamps were red. With the 2013 excise tax rate increase, the stamp colors have changed to orange for a pack of 20 cigarettes and pink for a pack of 25 cigarettes. According to SICPA, the company contracted to provide stamps and required auditing tools, about 250 million cigarette stamps are applied a year in Massachusetts. SICPA representatives noted that in August and September 2013, after the excise rate increase, stamp sales dropped by 15%. They do not believe the drop will be a continuing trend and said they had not seen any trends from year to year or month to month with regard to cigarette stamp sales. However, they believe sales need to be closely monitored.

In Massachusetts, licensed distributors place orders for the stamps through a streamlined system set up by SICPA. The Department of Revenue then approves all of the orders. The stamps are manufactured with unique encryption codes at the secure SICPA-Meyercord facility. Stamps are then shipped directly to the authorized distributors and stampers. The stamps are not stored by the Department of Revenue. According to SICPA, there are about eight or nine shipments a day, and all shipments are tracked. When the shipments arrive, distributors apply the stamps to cigarette packages using pressure-sensitive machines also designed by SICPA. If the brand information is not listed by the Department of Revenue, the stamping equipment does not allow for the product to be stamped. The stamps are activated by the same application machines,

[30] MGL c 64C §7B

and data is collected on the distributor, date, product, etc. The stamped cigarettes are then shipped to retailers to be sold to the public. Data can also be gathered at any point in the supply chain. While SICPA can gather data through the stamping program, the company does not have jurisdiction over that information or act as auditors. All collected information is turned over to the Department of Revenue to be analyzed.

Currently, the Department of Revenue has fifteen to twenty examiners who try to conduct three to four compliance drives a year visiting approximately 7,500 licensed retailers. The examiners are equipped with auditing tools manufactured by SICPA. Over the past three years, staff has visited more than 7,000 retailers, creating a solid visibility which has resulted in more voluntary compliance among licensed retailers. As shown in Figure 11, the number of overall seizures for the past three years has dropped significantly because of the enforcement presence and use of encrypted stamps. There were 49 seizures between 2011 and 2013, resulting in the confiscation of 1,389 packs of cigarettes.. Between 2008 and 2010, there were 224 seizures with 15,032 packs of cigarettes forfeited. In 2010, there was a major seizure based on an ATF tip. The largest single seizure ever by auditors in the Commonwealth was more than 37,000 packs of cigarettes in 2001.

Figure 11: Past Massachusetts Cigarette Drives

Fiscal Year	Stops/Reviews	Registrations	Retail Licenses	Seizures	Packs	Drives
FY 2014	0	0	0	0	0	Nov.
FY 2013	2442	0	105	16	327	4
FY 2012	2122	0	32	9	229	3
FY 2011	2616	2	48	24	833	3
FY 2010	1326	1	23	31	7764	2
FY 2009	2349	3	67	161	6499	3
FY 2008	2151	2	93	32	769	2

Source: Massachusetts Department of Revenue

While the majority of enforcement efforts are civil, the Department of Revenue currently has two criminal investigators who work in the legal division. One of those two investigators works exclusively in tobacco enforcement. Once a case is built by the investigator who works with other state and federal agencies when necessary, the evidence is submitted to the District Attorney or Attorney General for prosecution. A handful of cases have been prosecuted since 2005.

Another component of the SICPATRACE platform used in Massachusetts is community outreach. SICPA worked with the Department of Revenue to prepare educational material for retail locations when the program was rolled-out. There were stamp information sheets for distributors, validation fact sheets for retailers, and some posters were available for retailers to purchase and display for customers. A validation tool was also made available for distributors and retailers to buy.

Online tobacco transactions are another mechanism for tax avoidance. The Department of Revenue directly bills individuals who purchase tobacco products online. DOR is usually

notified about such purchases through federal and other state agencies. A notable case of tax avoidance the Department of Revenue was involved in related to cigarettes that were planned to be sold in Kentucky, but the cigarettes never made it to the intended destination. The cigarettes ended up being sold on the internet. The estimated tax loss to the Commonwealth was over $7 million with interest and penalties. The state has since collected about $3.7 million of the lost revenue by billing participating parties directly. The investigation took multiple years with records dating between 2003 and 2009.

IX. Protecting MSA Payments

Illegal tobacco sales can impact how much money Massachusetts receives under the Master Settlement Agreement (MSA). The MSA was a 1998 settlement the Attorney General entered into with participating tobacco manufacturers. In 1995, Massachusetts was one of the first states to file suit alleging manufacturers and industry wholesalers were selling products that caused the Commonwealth to bear large healthcare costs due to tobacco related illnesses. Other states followed, and the states and tobacco companies negotiated a global settlement. Fifty-two states and federal jurisdictions and about fifty cigarette or roll-your-own manufactures known as "participating manufacturers" are involved in the MSA. The Master Settlement Agreement requires annual payments made in perpetuity.

The MSA amount paid is not based on the number of cigarettes sold in Massachusetts but on the quantity of participating manufacturer product that federal excise tax was paid on. Cigarettes and roll-your-own tobacco are manufactured or imported and then stored in federally licensed facilities. Federal excise taxes are due when the products are removed from the facilities and shipped to distribution warehouses. Massachusetts receives about 4% of the MSA payment made to all states annually, currently about $250 million. MSA payments can be reduced because of federal tax avoidance schemes. Reports[31] show it is very hard to calculate the amount of cigarettes being illegally distributed in cases involving federal tax avoidance, but the Massachusetts Attorney General's Office estimates the state loses about $1,000 of its MSA payment for every one million federally untaxed cigarettes.

Additionally, the participating manufacturers have disputed whether a reduction of their payment obligations has been triggered. Pending resolution of that dispute, the manufacturers have withheld a portion of their settlement payments, thus depriving Massachusetts of $20 – $35 million for each year. To avoid the potential reduction, and to receive these withheld amounts, Massachusetts enacted and enforced a statute requiring tobacco manufacturers that are not included in the MSA to deposit funds into an escrow account based on the quantities of their cigarettes sold in Massachusetts each year. By statute, the amount of escrow is based on the quantity of product the state collects excise tax on. Whether Massachusetts adequately enforced the statute each year is being disputed. Both the Department of Revenue and the Attorney General's Office work to make sure the manufacturers are annually depositing the correct amount into the escrow account.

However, as a part of the recent arbitration, the participating manufacturers said the state needed to enforce Massachusetts General Laws Chapter 94E for non-taxed cigarette sales. Under

[31] GAO-11-313 Illicit Tobacco

the participating manufacturers' theory, smuggled product for which escrow is not deposited could entitle the manufacturers to payment reduction they seek. Massachusetts officials disagree with the participating manufacturers' interpretation. However, state officials understand that this belief could lead to future litigation, which could affect the amount collected in the Master Settlement Agreement. If litigation regarding the conflicting interpretations is resolved in the manufacturers' favor, smuggled product could reduce or eliminate the settlement payments Massachusetts receives. The creation of an Illegal Tobacco Task Force could further prove the state is taking the necessary steps to enforce Massachusetts General Laws Chapter 94E and prevent MSA payment reductions.

X. State Tobacco Law Enforcement

Massachusetts has several statutes under which the Massachusetts State Police enforce tobacco law. Massachusetts General Laws, Chapter 64C Section 34 involves the possession and sale of unstamped cigarettes. If a person is not licensed to transport or authorized to sell cigarettes, unless those cigarettes hold a Massachusetts stamp, such person could be fined not more than $5,000, imprisoned for not more than five years, or both. However, this offense is treated as a felony only if the illegal act involves at least 12,000 cigarettes, and this does not apply to smokeless tobacco.

Massachusetts General Laws, Chapter 62C, Section 73(a), (b), and (c) all deal with tax evasion records and failure to notify. Section 73(a) states that attempts to evade or defeat any tax imposed is a felony, and that the offending party, upon conviction could face a fine of up to $100,000. Corporations could be fined up to $500,000. They could also face up to five years in prison or both and are required to pay prosecution costs. Section 73(b) states that anyone who fails to collect, account for, or pay taxes is guilty of a felony and can be fined up to $10,000, imprisoned up to five years, or both. Finally, Section 73 (c) imposes a fine of $25,000 or $100,000 for a corporation, imprisonment for up to a year, or both if that person is convicted of the misdemeanor for failing to pay taxes, make returns, keep records, or supply information.

Lastly, Massachusetts General Laws, Chapter 267A, Section 2 addresses money laundering. If convicted of money laundering, a person could be imprisoned up to six years in a state prison, be fined $250,000 or twice the value of the property transacted, or both. If convicted a second time, a person could be imprisoned between two and eight years in a state prison, fined $500,000 or three times the value of the property transacted, or both. The money laundering statute has never been used in an illegal tobacco investigation.

The Massachusetts State Police have numerous tools for carrying out an illegal tobacco investigation. Global positioning technology can be used to track anyone anywhere and can even pinpoint the exact amount of time a person remained in a specific location. A court order is required for tracking technology to be utilized. The MSP also use video surveillance and body wires for investigations. Investigators must obtain a warrant to use a body wire to record a conversation; Massachusetts is a two party consent state, and in these situations, only one party is aware that they are being recorded. The state police also have call detail records and toll analysis to help break down relationships and collect data during investigations.

The Massachusetts State Police are faced with multiple challenges in their tobacco investigations. They must have access to "buy money" to obtain the illegal product. Investigations require officers to work overtime, something not always factored into their budget. Operational costs also add up, and investigators are constantly working against the clock.

XI. Federal Tobacco Laws & Enforcement

Federal tobacco laws are enforced by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which falls under the Department of Justice. Those criminal laws include the Contraband Cigarette Trafficking Act (CCTA), Jenkins Act, and PACT Act, as well as other federal statutes.

The Contraband Cigarette Trafficking Act, which is the ATF's primary tool, applies to 0.8 of a case plus one cigarette or 500 untaxed units of Other Tobacco Products. The CCTA also makes it a felony to possess more than 10,000 unstamped cigarettes in a state which requires cigarette stamps or more than 500 units of snuff. It's also a felony to manufacture counterfeit stamps. Additionally, the law includes record keeping requirements. According to the ATF, criminals never keep legitimate records, so there usually is a record keeping violation in a case.

No interstate commerce is necessary under the CCTA, so the statute is relatively easy to prove. A person also does not have to know the activity is illegal; he or she just has to possess the product. Prosecutors can also try any case in a state that requires a tax stamp. For example, if ATF agents pull over a person in Maryland who is in possession of cigarettes coming from South Carolina, where cigarettes do not have to be stamped, the person can be prosecuted and agents can seize the cigarettes. There are exceptions to the CCTA for those licensed to transport cigarettes.

The Jenkins Act is a federal law dating back to 1949 which regulates the sale of cigarettes across state lines. Under the Jenkins Act, any person who sells or transfers cigarettes for profit is required to report to a state tobacco tax administrator. Anyone who violates the law is guilty of a misdemeanor and could face a fine of no more than $1,000, up to six months in prison, or both. Enforcement of the law falls under U.S. District Court jurisdiction.

In July 2010, the PACT Act was signed into law in response to the explosion in internet-trafficked cigarettes[32]. It amended the Jenkins Act and also added new regulations. The PACT Act defines cigarettes to include roll-your-own tobacco and applies to smokeless tobacco. It also requires a person to comply with state tax laws. The PACT Act increases both the Jenkins Act's criminal felony to three years and its civil penalties. It also allows the ATF to inspect records or any cigarettes or smokeless tobacco kept by a seller. The PACT Act creates an Anti-Trafficking Fund which directs half of the money collected during enforcement back to the ATF and Attorney Generals for continued enforcement efforts.

Under the PACT Act, the U.S. Postal Service is prohibited from mailing cigarettes or smokeless tobacco. Cigarette delivery providers are also required to verify the age of the

[32] ATF presentation

recipient. The ATF produces a list of non-compliance sellers. Delivery providers must check that list; if a person is on it, then the cigarettes cannot be delivered.

A statute regularly used by the ATF, including in Other Tobacco Products cases not covered by the CCTA, is the wire and mail fraud statute. The statute makes it a federal felony to use mail or wires in a scheme to defraud someone of something. According to the ATF, a criminal wires funds or mails something in every case the ATF investigates. Sometimes the wire and mail fraud statute is used in conjunction with the Jenkins and PACT Acts.

Additionally, the ATF catches criminals by using statutes that involve illegal currency transaction reporting, money laundering, and aiding and abetting. Criminals often structure transactions to avoid the $10,000 level of funds which must be reported. However, such structuring is illegal. Also, it is against the law to use the proceeds of one crime to commit another crime or hide money. In ATF investigations, criminals use proceeds to buy more illegal product, so there is almost always a money laundering violation in an ATF case. This usually gets more attention from the U.S. Attorneys because of the substantial penalties and forfeitures associated with the law. In aiding and abetting, many legitimate businesses believe they are untouchable because all they are doing is selling product to smugglers or providing materials. However, if the material is provided for criminal purpose, the legitimate businesses can be accused of aiding and abetting and be held liable. Alternatively, conspiracy can be used because all that the ATF needs in order to convict is intent to commit a crime; the crime does not have to succeed.

Finally, some tobacco trafficking cases involve Racketeering Influenced & Corrupt Organizations (RICO). If the criminal is participating in illegal activity, for example other illegal drugs or extortion, on top of cigarette trafficking, than it could become a RICO case. If it is just tobacco trafficking, the ATF typically stops at money laundering because RICO cases need additional Department of Justice approval, and this slows down the investigation.

While the threshold to prosecute tobacco trafficking cases is low, the ATF and United States Attorney's Office have limited resources, and have determined it is not a wise use of those limited resources to pursue an investigation on one case of cigarettes. Generally, the cases worked by ATF involve millions of dollars in tax fraud because then the U.S. Attorney will have a stronger case to prosecute. Agents reference the federal sentencing guidelines, which are keyed to the amount of lost taxes. Typically, agents will pursue a case with is a major amount of lost taxes ($1 million) because that means the person is going to go to jail, usually for at least two years. The agency believes jail time sends the appropriate message to other would-be-criminals. Additionally, the ATF tries to cripple criminals financially. In almost all ATF cases, agents will seize the property, bank accounts, and the money of criminals. The agency believes that lost money without the jail time potentially pushes criminals to continue their illegal activity to regain lost money. However, in the event agents catch someone smuggling an amount which would not lead to full prosecution, they will nevertheless seize the product and assets.

The ATF is currently working on a major internet trafficking case in which agents believe the suspect is defrauding $500 million a year through websites from Europe and Israel. The agency is also discovering Other Tobacco Products trafficking and has several ongoing cases. If

Massachusetts does have a multi-million dollar case, the ATF is interested in working it; the Bureau is particularly interested in cases the Commonwealth cannot work alone because the cases extend across state lines or are too substantial.

Other federal agencies that might get involved in a tobacco trafficking case include Customs and Border Protection, the United States Postal Service for cases involving illegal shipments, the Food and Drug Administration which regulates tobacco under federal health laws, and the Federal Bureau of Investigation, which would become involved if a case is linked to terrorist activity.

XII. Public Health Tobacco Enforcement

While tobacco excise taxes have a history of generating revenue, the taxes also serve as a practical tool for reducing tobacco consumption. Health advocates acknowledge that the recent tax increases will prompt consumers to look for cheap alternatives like the illegal market to buy tobacco, but they believe that tax avoidance does not render tax increases ineffective for both health and revenue purposes. Cigarette sales data collected over multiple years show despite the drop in sales over time, revenue continues to increase[33]. It is estimated that 27 million fewer packs of cigarettes will be sold in Massachusetts in the 2014 fiscal year, compared to the 2013 fiscal year, but sales will still generate more revenue. Public health officials were unable to determine whether sales dropped because people quit smoking.

Public health officials are also out in the field regulating tobacco. However, that regulation and oversight is largely carried out in a regional manner by municipal boards of health, in coordination with other municipal agents when appropriate. The Department of Public Health (DPH) funds 14 programs to cover 184 municipalities. DPH visits over 5,000 retailers a minimum of three times a year. It does one full round of inspections, including additional inspections when new regulations are passed. During inspections, officials check to make sure retailers have the required signs posted and are not selling to minors. They also do one round of compliance checks and a round of Synar checks which are required by federal law. According to the Public Health Institute, compliance rates are better than they have been historically. Officials attribute these rates partly to programs being successful and to tobacco product placement; meaning tobacco products are not being placed in the open but held behind the counter.

The Department of Public Health also conducts pricing surveys where officials go into retailers and document the tobacco price differences in specific areas. DPH does not have the authority to enforce pricing; it simply gathers information to get a better understanding of the market. There are also retail trainings and some checks by the municipal Boards of Health outside the network which provides technical assistance to the Department of Public Health.

XIII. Conclusion

Based in its study of the tobacco market and illegal tobacco trade in Massachusetts, the Commission on Illegal Tobacco recommends multiple steps be taken to help prevent illegal

[33] MA Department of Public Health

tobacco sales and the resulting loss of revenue in the Commonwealth. The following recommendations were voted on at the final Commission meeting on February 12, 2014:

Recommendation 1: The Commission encourages The Legislature to dedicate additional funding to tobacco enforcement. The Commission acknowledges that sources of such funding are subject to the state budget process. Lost revenue from illegal tobacco distribution is estimated at between $62 million and $246 million after the most recent tobacco excise tax increases. A reduction of even 10% would mean revenue protection and enhancement of between $6.2 million and $24.6 million. By contrast, the cost to fund a 20-person team, for example, in Massachusetts would be roughly $2 million. In other states, increased tobacco enforcement has proved effective. In New Jersey, seized currency and vehicles totaled more than $1 million, while the state estimates that enforcement prevented more than $10 million in illegal cigarettes being sold to consumers[34]. In New York City, enforcement officials averted the loss of more than $1.5 million in state and city cigarette excise tax revenues[35].

Recommendation 2: The Commission recommends that the forfeiture provisions of Chapter 64C be amended so that they are similar - both as to procedures and as to the authorized use for enforcement purposes of forfeited items and of the proceeds of their sale - to the provisions of G.L. c. 94C, §47, relative to forfeitures of items connected to violations of the controlled substance laws. Specifically, the Commission recommends that the forfeiture provisions of Chapter 64C be amended to provide that, when court proceedings result in a final order of forfeiture, the final order shall provide for disposition of forfeited items in any manner not prohibited by law, including official use by an authorized law enforcement or other public agency, including members of the tobacco task force, or sale at public auction or by competitive bidding; and deposit of the monies and proceeds of any such sale (less associated expenses) to special tobacco enforcement trust funds, from which the funds may be expended by members of the tobacco task force for tobacco enforcement-related purposes, including defraying the costs of investigations and providing additional technical equipment or expertise.

Recommendation 3: The Commission acknowledges that the efforts of tobacco enforcement are currently divided among various agencies. Furthermore, the Commission understands that the creation of joint task forces have proven to be an effective mechanism for combating the illegal tobacco market and enhancing interagency relationships, information sharing, and the prosecution of violators. The Commission encourages the Legislature to dedicate additional funding to tobacco enforcement either through the establishment of a tobacco taskforce or, if not through such task force, through direct funding for full-time dedicated personnel to state entities responsible for tobacco law enforcement. Should the Legislature accept this Commission's recommendation to establish a task force, the Commission recommends that a Joint Illegal Tobacco Task Force be established to combat contraband tobacco and that the task force consist of the following members and/or their designee(s): the Attorney General, the Commissioner of Revenue, the State Treasurer, an appointee from the Massachusetts

[34] New Jersey Treasury
[35] New York City Sheriff's Office

State Police, and the Commissioner of Public Health. The Commission recommends that the Legislature designate the lead agency for the task force, as the Commission agreed that it was beyond its scope to propose a particular agency of the Commonwealth to have this responsibility. The Commission envisions that the task force would have at its disposal dedicated personnel from member agencies to carry out enforcement activities and that the task force will work toward fostering relationships with the appropriate federal law enforcement agencies.

Recommendation 4: The Commission recommends that the Department of Revenue draft legislation to increase civil and criminal fines and penalties to strict levels that are comparable to states with similar tobacco tax rates, such as New York and New Jersey. The Commission agrees that civil and criminal fines and penalties for illegal activities relative to tobacco be sufficient so that such fines and penalties serve as meaningful deterrents to tax avoidance and crime. The Commission recommends the Department of Revenue also review and revise the current thresholds within the fine and penalty structures.

Recommendation 5: The Commission recommends that the Department of Revenue draft proposed legislation that would clarify the provisions of Chapter 64C by eliminating the practice of using the same terms – notably "cigarettes" and "tobacco products" – to mean different products in different sections of the law. Specifically, the Commission contemplates that, in the chapter as amended, each product would have a clear definition that would remain consistent throughout the chapter, and that the products to which each section applies would be specifically identified in the text of the section. The Commission further proposes that such legislation would update the administrative provisions of the chapter and would update or remove any antiquated or obsolete references in the chapter.

Recommendation 6: The Commission recommends that the Department of Revenue require more detailed information be submitted with current returns and schedules from participants throughout the tobacco supply chain.

Recommendation 7: The Commission recommends that the Massachusetts State Lottery Commission, upon notice from the Department of Revenue, be directed by statute to suspend for 60 days the lottery license of any vendor whose tobacco retailer license under Chapter 64C, §3, and Chapter 62C, §67, is revoked by the Department of Revenue for the willful possession or sale of illegal tobacco products as provided in Chapter 62C, §68, and subject to the existing appeal process for such license suspension under Chapter 62C, §68.

Recommendation 8: The Commission recommends that the Department of Revenue expand the distributor license application to gather more detailed information about an applicant business and its distribution plans.

Recommendation 9: The Commission recommends that the Department of Revenue engage in the regulatory process to require retailers to renew their tobacco license every

year, rather than every two years as is currently required. With the high turnover within the retailer community, it is impossible for the Department of Revenue to maintain an accurate list of licensees. A one-year cycle would make it easier for municipalities and wholesalers to accurately determine the population of licensed retailers. An annual retailer license requirement would also be consistent with other municipal and Department of Revenue license cycles. The Commission recommends that this change in the renewal process not result in an application fee increase for this specific purpose. The Commission acknowledges and agrees that it is not the intent of this recommendation to prevent any future fee increases.

Recommendation 10: The Commission recommends requiring that the Massachusetts Department of Revenue publish a regularly-updated searchable list of all licensed tobacco wholesalers, distributors, and retailers on the Department's public website. This will help promote legal tobacco transactions among legitimate tobacco businesses and consumers through self-auditing.

Recommendation 11: The Commission recommends requiring all retailer/supplier transactions for all tobacco products to be paid for by check, credit or debit card, or electronic fund transfers; cash transactions would be prohibited. Retailer/consumer transactions would be excluded from this method of payment requirement.

Recommendation 12: The Commission recommends that Massachusetts licensed retailers be required to purchase from Massachusetts licensees as defined under Chapter 64C, §1 and §7B, except as authorized by the Commissioner of Revenue.

The Commission concluded there were specific matters discussed with great consideration; however, the Commission agreed any recommendations on these matters would be beyond the purview of the Commission.

Matter 1: While instituting simplified minimum tobacco pricing requirements was discussed at great length by Commission members, it was determined that any recommendation to implement minimum pricing laws was beyond the purview of the Commission.

Matter 2: Although the Commission makes no recommendation at this time to expand the stamping program, the Commission recommends that further analysis should be conducted to evaluate the benefits and shortcoming of expanding the tobacco stamping program. While cigarettes are currently stamped in Massachusetts, estimates of increased revenue collection would need to be made to determine whether the expansion of stamping to cover other tobacco products would benefit the Commonwealth and reduce the illegal tobacco trade. Additionally, it remains questionable whether the technology to stamp other tobacco products is readily available at this time, and if that technology was available, it must be determined who would assume the costs of the expansion.

XIV. Acknowledgements

Altria Client Services

American Cancer Society Cancer Action Network

Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)

Massachusetts Department of Revenue

Massachusetts State Police

New England Convenience Store Association

Northeast Association of Wholesale Distributors

Office of the Massachusetts Attorney General

RAI Services Company

SICPA

The Public Health Advocacy Institute

Illicit Tobacco Trade Overview

Briefing to Illicit Tobacco Taskforce

December 10, 2015

Altria

Altria Client Services

brand and trade channel integrity

Agenda

- Altria's Tobacco Operating Companies
- Cigarette Landscape
- Other Tobacco Products (OTP) Landscape
- Illegal Tobacco Task Force

Altria Tobacco Operating Companies Structure

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Service Companies

- Altria — Altria Group Distribution Company
- Altria — Altria Client Services

Tobacco Operating Companies

- PhilipMorrisUSA — an Altria Company

- U.S. Smokeless Tobacco Co. — an Altria Company

- John Middleton — an Altria Company

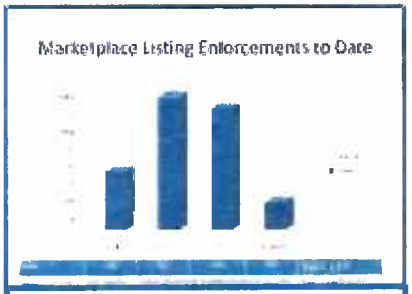
- NuMark — an Altria Company

For illustrative purposes only.
Not actual corporate structure; does not reflect all Altria subsidiaries in its entirety.

Brand and Trade Channel Integrity

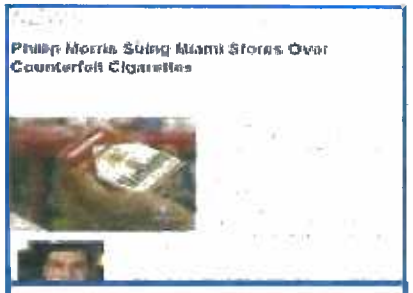
- **Mission:** To protect the integrity of Altria's tobacco operating companies' brands and the legitimate trade channels through which they are distributed and sold.

- **Strategies:**



Market Monitoring

Investigative Intelligence

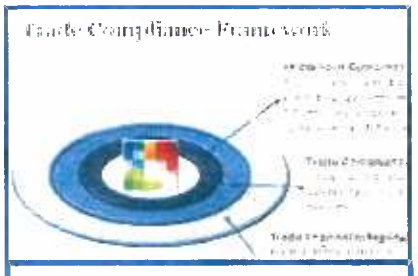


Litigation

Communications

Product Security

Government Affairs

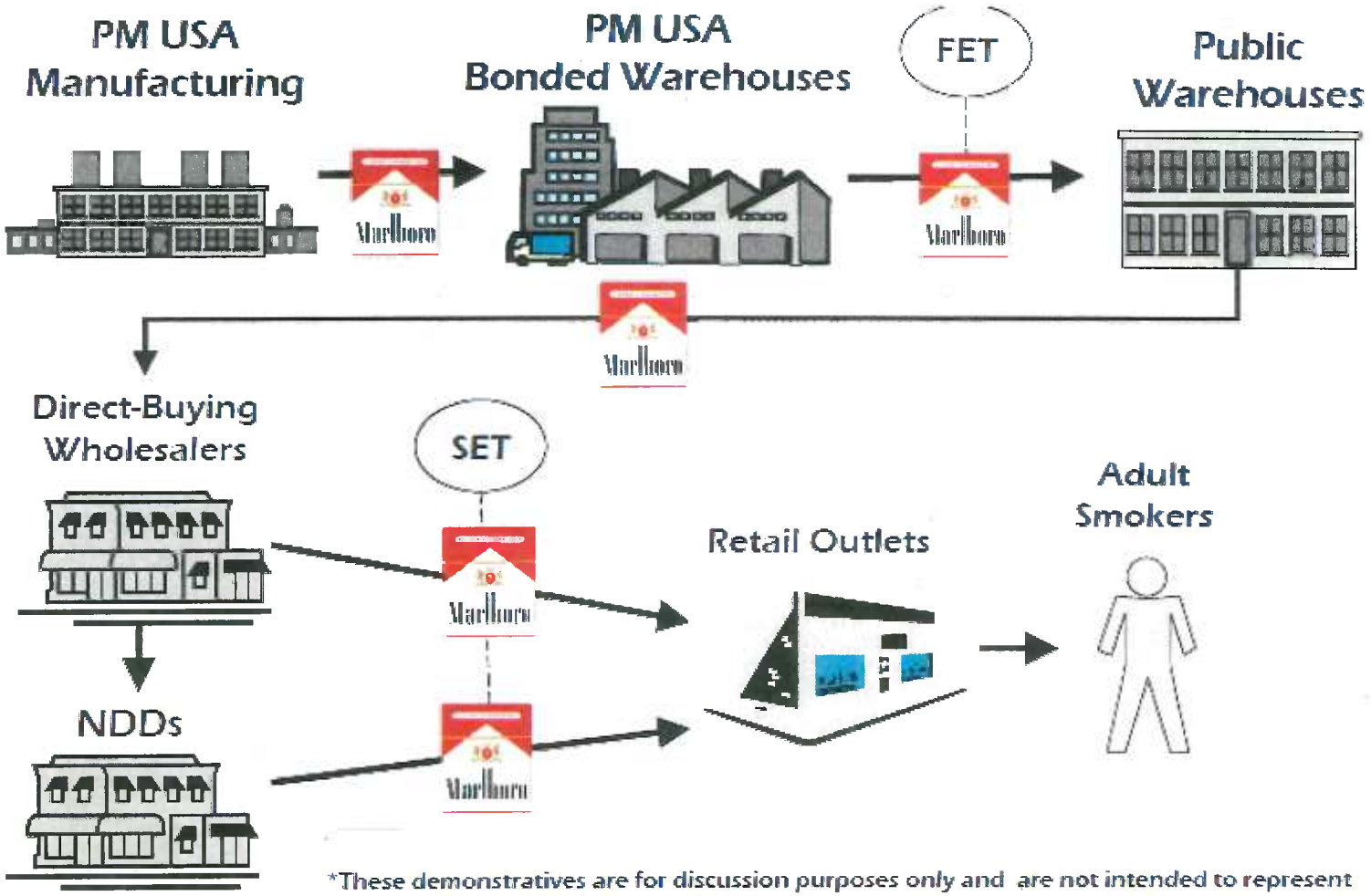


Trade Channel Integrity

Law Enforcement Engagement & Support

Cigarettes

PM USA Cigarette Distribution



*These demonstratives are for discussion purposes only and are not intended to represent every possible manner in which PM USA product is distributed and sold..

How PM USA Cigarettes are Packaged/Sold

Pack contains 20 cigarettes

Pack with Tax Stamp

Case contains 60 cartons

Carton contains 10 packs

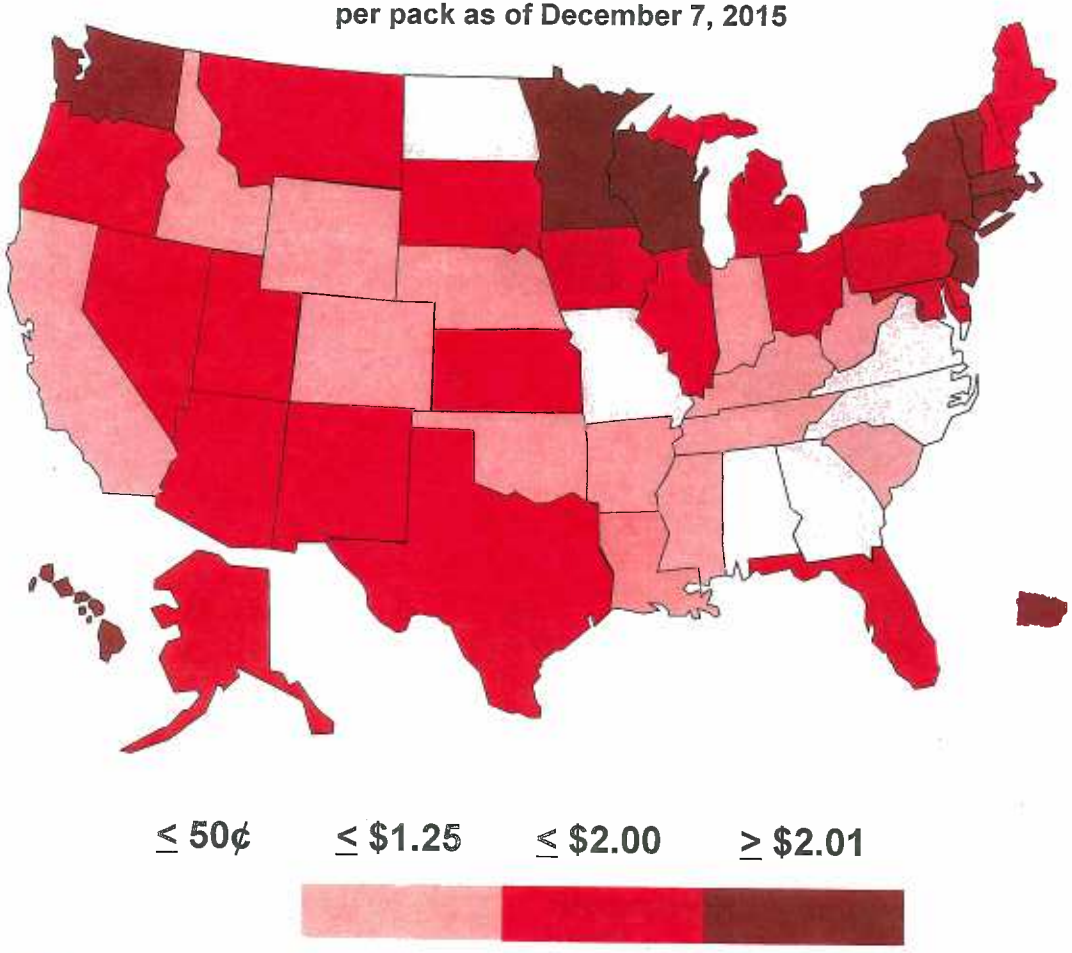
Types of Illicit Trade

Illicit when made	Counterfeit
	Illicit/Unlicensed Manufacturing
Illicit when a border is crossed	Grey Market/Illegal Imports
	Smuggling/Diversion
Fraud Schemes	Counterfeit Stamps
	Non-Registered Brands

The terms "smuggling," "tax evasion," "diversion," "illicit trade" and "trafficking" and "contraband" are often used interchangeably in literature

Drivers of Illicit Trade

State Excise Tax (SET) rates
per pack as of December 7, 2015

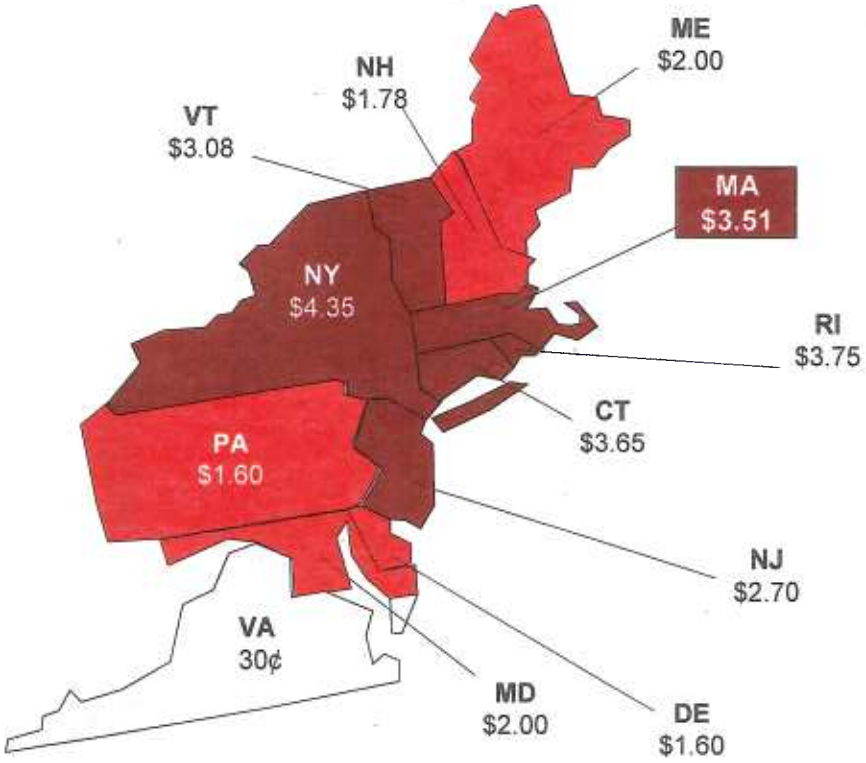


National Average for Taxes and Fees of Retail Price

Source: GAO – March 2011

Considerations for Massachusetts

Select State Excise Tax (SET) rates for cigarettes as of December 7, 2015



Key: Cigarette excise tax rate per pack

≤ 50¢ ≤ $1.25 ≤ $2.00 ≥ $2.01

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Empty Discarded Pack (EDP) Program

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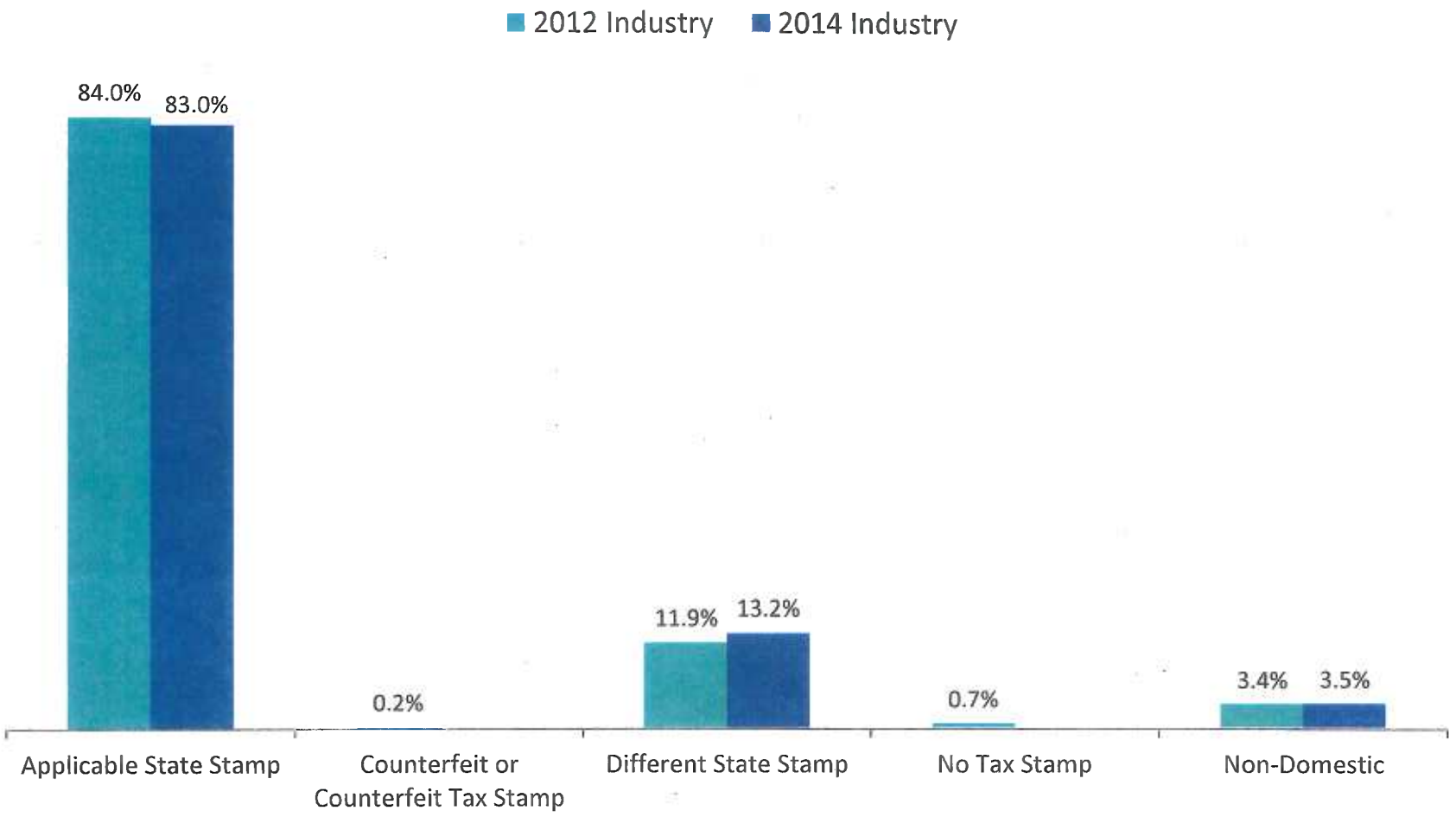
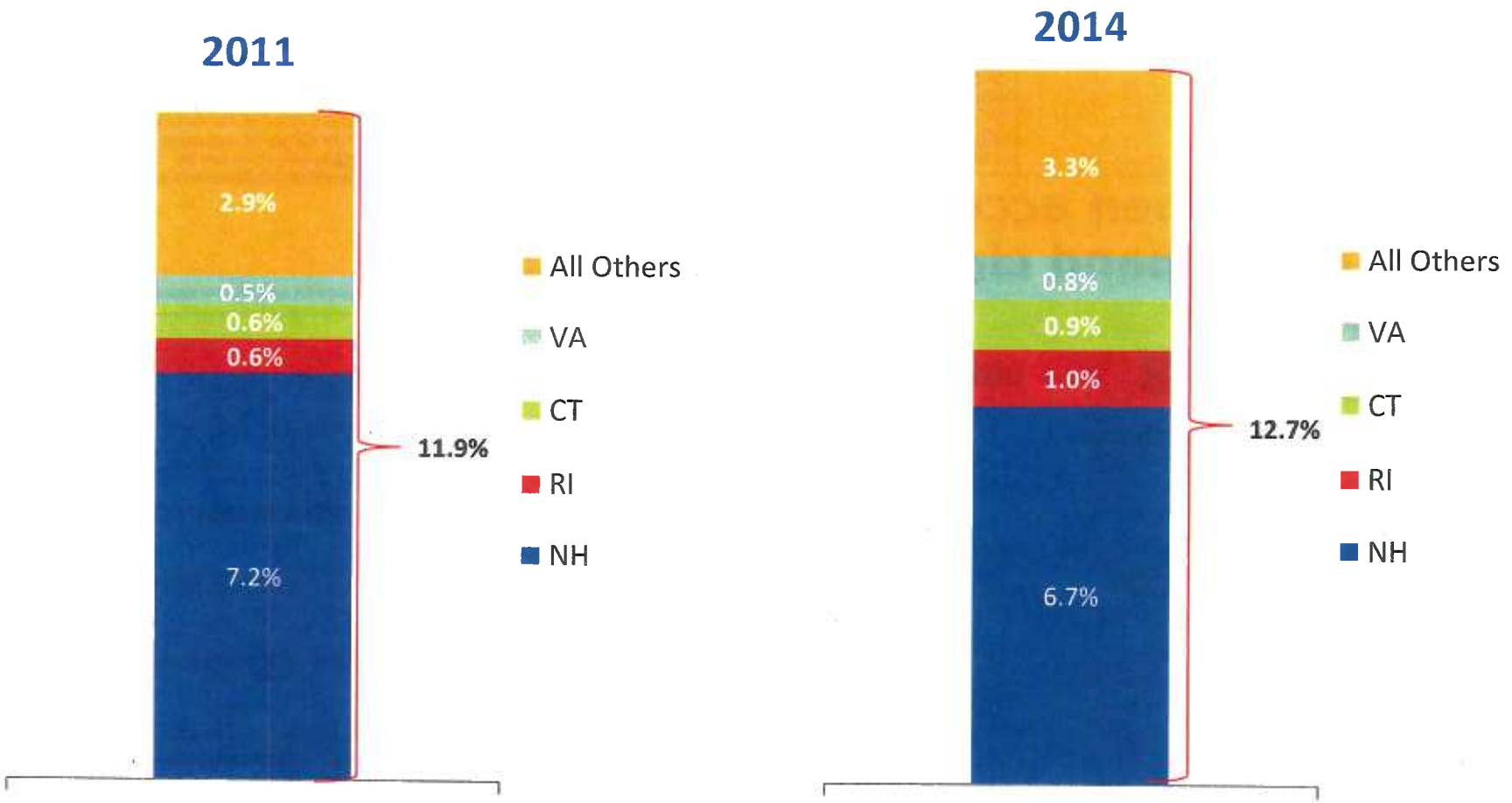
Boston – Industry EDP Results



* Determination of Local Tax Not Paid based on packs not bearing jurisdictional stamps as required based on the zip code where packs were collected.

Boston - Industry EDP Results

State Stamps found in Boston EDP Collections



Tax Avoidance vs. Evasion

3 Haverhill stores caught selling illegal smokes

Posted: Saturday, June 6, 2015 12:05 am
By Bill Cantwell
bcantwell@eagletribune.com
HAVERHILL — Three convenience stores face the possibility of fines or losing their tobacco licenses because they were caught illegally selling cigarettes that came from New Hampshire, police said. The cigarettes were bought in New Hampshire and then placed on shelves in the Haverhill stores, which means they were not subjected to the Massachusetts tobacco tax, police said. The stores were selling the cigarettes at regular Massachusetts prices — nearly $2 a pack more than buyers pay in New Hampshire, said police Lt. Robert Pistone. He said that allowed the Haverhill stores to pocket the difference in prices. Pistone said the stores face the ...g their state license to sell tobacco products. State officials will determine the

...e seized 139 packs of untaxed cigarettes.
...axed cigarettes were seized.
...of untaxed cigarettes were seized.
...Pistone said. The cigarettes were noticeable because the packs did not display a Massachusetts tax stamp.

3 Worcester men accused of selling contraband cigarettes from Vietnam

COMMENT Recommend 1 Tweet 0

By Scott J. Croteau, TELEGRAM & GAZETTE STAFF

Posted Nov. 11, 2013 at 6:56 PM

WORCESTER — Three Worcester men are facing charges in federa... contraband cigarettes they received from Vietnam.

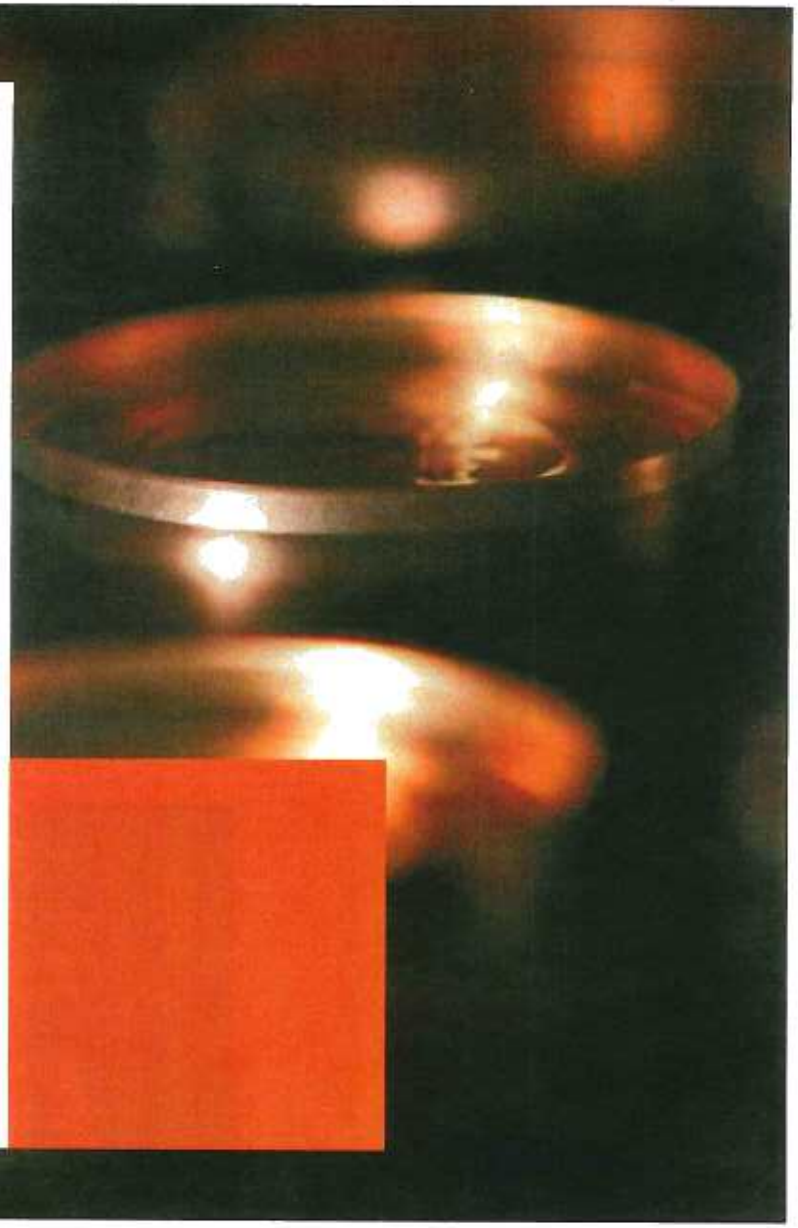
LUDLOW MAN PLEADS GUILTY TO CIGARETTE TRAFFICKING

MONDAY, NOVEMBER 22, 2010

SPRINGFIELD, Mass. - A Ludlow man was convicted today in federal court of possessing contraband cigarettes.

WILLIAM BRANTLEY, 39, pleaded guilty before U.S. District Judge Michael A. Ponsor to possession of contraband cigarettes. At today's plea hearing, the prosecutor told the Court that had the case proceeded to trial the government's evidence would have proven that BRANTLEY purchased over 100 cartons of cigarettes without the required Massachusetts excise tax stamps and that he planned to re-sell them before he was caught with the cigarettes in a routine traffic stop.

Other Tobacco Products

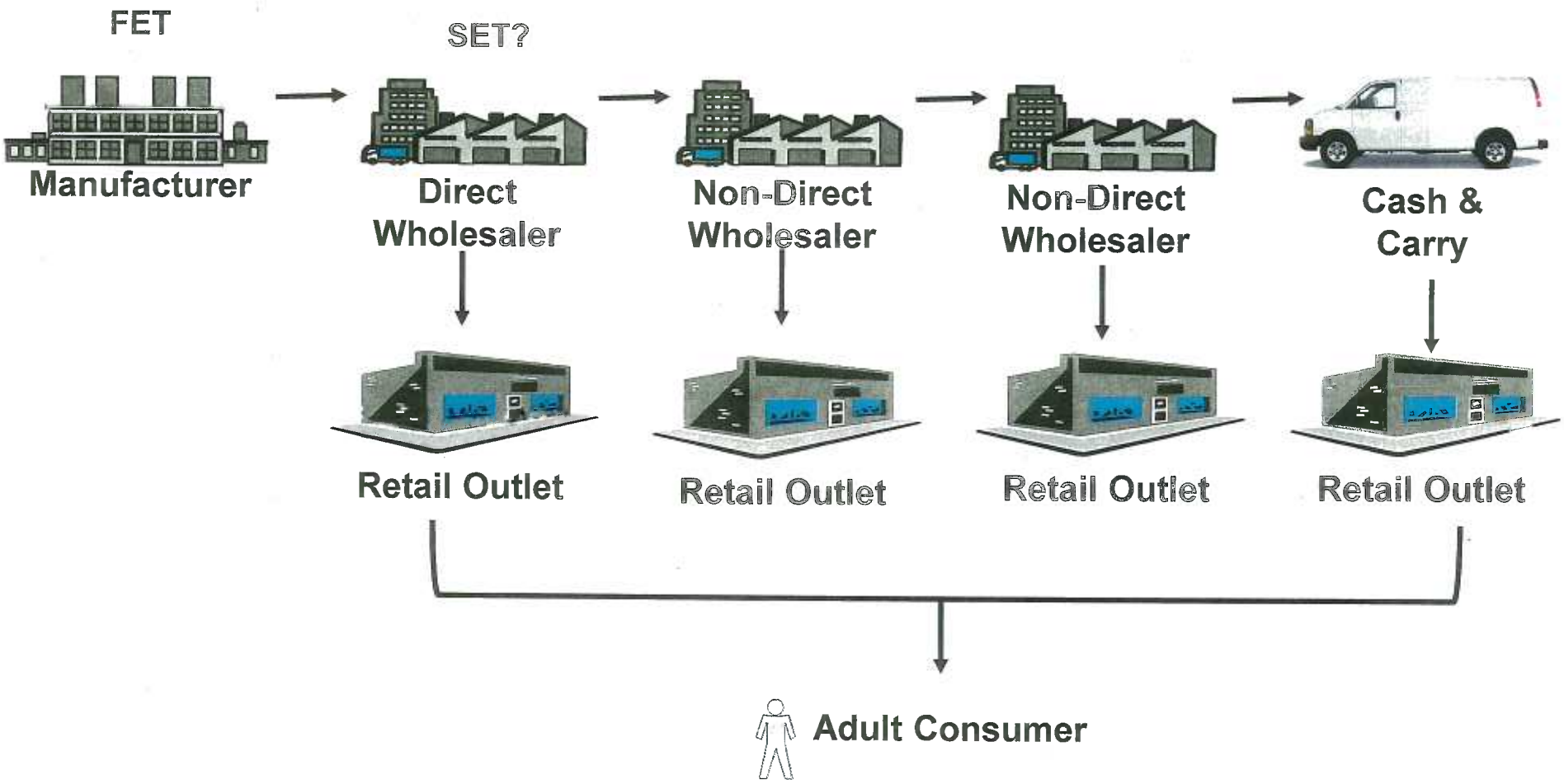


Other Tobacco Products – "OTP"

Large Cigars

Moist Smokeless Tobacco (MST)

OTP Distribution



How USSTC Products are Packaged/Sold

Cans

Logs contain 5 cans

Case contains 90 cans / 18 logs*

*Case image for illustration purposes only. Not actual depiction of USSTC shipping case

How JMC Cigars are Packaged/Sold

5 count packs

25 single cigar dispensers*

Pre-priced 2 Pack Deals*

5 Packs distributed in 50 pack configurations

Cases contain various count configurations

*JMC Single Cigars and Pre-Price Cigars not distributed in jurisdictions where prohibited by law

OTP Excise Tax Rates

State	MST Rate	Large Cigar Rate
Connecticut	$1.00/oz	50%
Maine	$2.02/oz	20%
Massachusetts	210%	40%
New Hampshire	65%	65%
New Jersey	$.75/oz	30%
New York	$2/oz	75%
Pennsylvania	N/A	N/A
Rhode Island	$1.00/oz	80%*
Vermont	$2.57/oz	92%

- As of December 7, 2015
- Federal excise tax rate is $0.09438 per ounce. All ad valorem states base the tax on the manufacturer's price.
- Effective 7/1/10, Philadelphia increased its MST tax rate from 0% to $0.36/oz. and large cigar rate from 0% to .036/unit

* Cigar tax cap of $.50/unit

Massachusetts OTP Case

Feds: Defendant pleads guilty to role in tobacco wholesale tax fraud ring in Massachusetts, Connecticut

By Conor Berry | cberry@repub.com
Email the author | Follow on Twitter
on March 23, 2015 at 11:25 PM, updated March 23, 2015 at 11:35 PM

Massachusetts Illegal Tobacco Task Force

For Immediate Release - February 28, 2014

Commission Issues Recommendations to Combat Tobacco Smuggling

Members call for unified enforcement, stiffer penalties

(Boston, MA) - In a comprehensive report released today, the Commission on Illegal Tobacco, chaired by Massachusetts Revenue Commissioner Amy Pitter, proposed the state create a multi-agency task force to enforce tougher laws and penalties. This was among 12 recommendations to reduce tobacco smuggling and the loss of an estimated $62 to $246 million in excise tax revenues.

Illegal Tobacco Task Force

STATEMENT OF MICHAEL THORNE-BEGLAND

DIRECTOR OF BRAND INTEGRITY AND ASSITANT GENERAL COUNSEL

ALTRIA CLIENT SERVICES INC.

SUBMITTED ON BEHALF OF PHILIP MORRIS USA INC.,

U.S. SMOKELESS TOBACCO COMPANY LLC AND JOHN MIDDLETON CO.

TO ILLICIT TOBACCO COMMISSION[1]

ON OPTIONS FOR MASSACHUSSETS TO ENHANCE ITS EFFORTS

TO COMBAT THE ILLICIT TRADE IN TOBACCO

Commonwealth of Massachusetts

Report of Commission on Illegal Tobacco

03/01/2014

Other Examples

Cook County Department of Revenue Cigarette Enforcement Unit

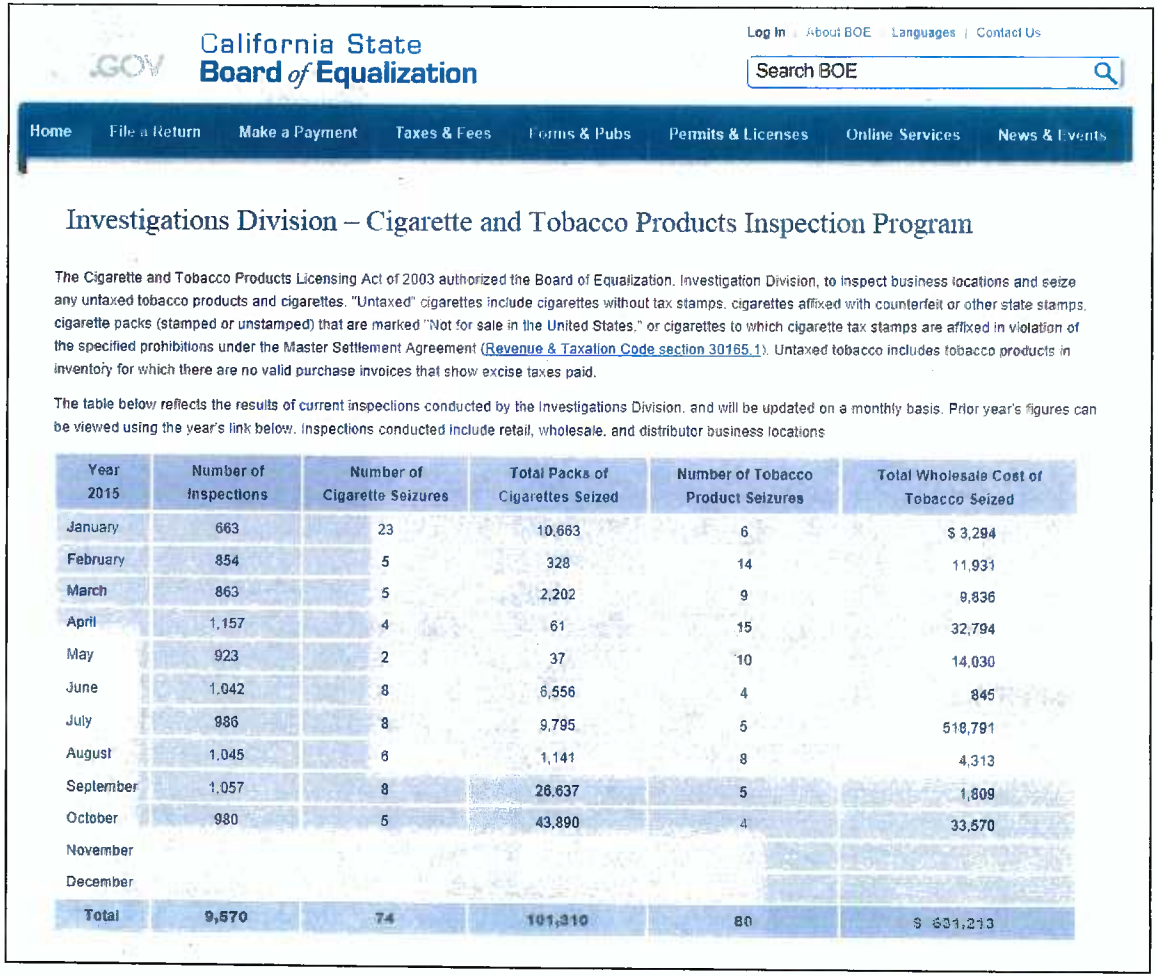
- Task force is funded from the general fund of Cook County and is allocated to the Cook County DOR
- It is funded for 10 investigators, two supervisors and a manager of investigations
- Investigators are civil investigators and write civil citations that result in fines for violations
- Each investigator is partnered with Cook County Sherriff's Police officer

NYS Office of Tax Enforcement Cigarette Strike Force

- Strike force is funded by NYS through the general fund allocation for the NYS Dept of Taxation and Finance (DTF)
- It is within the larger NYS DTF Criminal Investigations Division and conducts criminal investigations and civil inspections
- It has approximately 30 members and is comprised of both criminal and civil investigators
- It has access to tax attorneys and auditors
- It pursues civil remedies and criminal cases that are prosecuted by local DAs or the state AG's office

Other Examples

- Provide measures and annual reporting on tobacco enforcement
- California BOE monthly reporting



California State Board of Equalization

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Investigations Division – Cigarette and Tobacco Products Inspection Program

The Cigarette and Tobacco Products Licensing Act of 2003 authorized the Board of Equalization, Investigation Division, to inspect business locations and seize any untaxed tobacco products and cigarettes. "Untaxed" cigarettes include cigarettes without tax stamps, cigarettes affixed with counterfeit or other state stamps, cigarette packs (stamped or unstamped) that are marked "Not for sale in the United States," or cigarettes to which cigarette tax stamps are affixed in violation of the specified prohibitions under the Master Settlement Agreement (Revenue & Taxation Code section 30165.1). Untaxed tobacco includes tobacco products in inventory for which there are no valid purchase invoices that show excise taxes paid.

The table below reflects the results of current inspections conducted by the Investigations Division, and will be updated on a monthly basis. Prior year's figures can be viewed using the year's link below. Inspections conducted include retail, wholesale, and distributor business locations

Year 2015	Number of Inspections	Number of Cigarette Seizures	Total Packs of Cigarettes Seized	Number of Tobacco Product Seizures	Total Wholesale Cost of Tobacco Seized
January	663	23	10,663	6	$ 3,294
February	854	5	328	14	11,931
March	863	5	2,202	9	9,836
April	1,157	4	61	15	32,794
May	923	2	37	10	14,030
June	1,042	8	6,556	4	845
July	986	8	9,795	5	518,791
August	1,045	6	1,141	8	4,313
September	1,057	8	26,637	5	1,809
October	980	5	43,890	4	33,570
November					
December					
Total	9,570	74	101,310	80	$ 631,213

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Illicit Tobacco Trade Overview

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December 10, 2015

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Open Meeting Law Guide

COMMONWEALTH OF MASSACHUSETTS

OFFICE OF ATTORNEY GENERAL MAURA HEALEY

MARCH 18, 2015

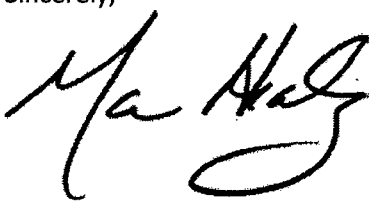
Dear Massachusetts Residents:

One of the most important functions of the Attorney General's Office is to promote openness and transparency in government. Every resident of Massachusetts should be able to access and understand the reasoning behind the government policy decisions that affect our lives. My office is working to achieve that goal through fair and consistent enforcement of the Open Meeting Law, along with robust educational outreach about the law's requirements.

The Open Meeting Law requires that most meetings of public bodies be held in public, and it establishes rules that public bodies must follow in the creation and maintenance of records relating to those meetings. Our office is dedicated to providing educational materials, outreach and training sessions to ensure that members of public bodies and citizens understand their rights and responsibilities under the law.

Whether you are a town clerk or town manager, a member of a public body, or a concerned citizen, I want to thank you for taking the time to understand the Open Meeting Law. If you would like additional guidance on the law, I encourage you to contact my Division of Open Government at (617) 963-2540 or visit our website at www.mass.gov/ago/openmeeting for more information.

Sincerely,



Maura Healey
Massachusetts Attorney General

Attorney General's Open Meeting Law Guide

Overview

Purpose of the Law

The purpose of the Open Meeting Law is to ensure transparency in the deliberations on which public policy is based. Because the democratic process depends on the public having knowledge about the considerations underlying governmental action, the Open Meeting Law requires, with some exceptions, that meetings of public bodies be open to the public. It also seeks to balance the public's interest in witnessing the deliberations of public officials with the government's need to manage its operations efficiently.

Attorney General's Authority

The Open Meeting Law was revised as part of the 2009 Ethics Reform Bill, and now centralizes responsibility for statewide enforcement of the law in the Attorney General's Office. G.L. c. 30A, § 19(a). To help public bodies understand and comply with the law, the Attorney General has created the Division of Open Government. The Division of Open Government provides training, responds to inquiries, investigates complaints, and when necessary, makes findings and orders remedial action to address violations of the law. The purpose of this Guide is to inform elected and appointed members of public bodies, as well as the interested public, of the basic requirements of the law.

Certification

Within two weeks of a member's election or appointment or the taking of the oath of office, whichever occurs later, all members of public bodies must complete the attached Certificate of Receipt of Open Meeting Law Materials certifying that they have received these materials, and that they understand the requirements of the Open Meeting Law and the consequences of violating it. The certification must be retained where the public body maintains its official records. All public body members should familiarize themselves with the Open Meeting Law, the Attorney General's regulations, and this Guide.

In the event a Certificate has not yet been completed by a presently serving member of a public body, the member should complete and submit the Certificate at the earliest opportunity to be considered in compliance with the law.

Open Meeting Law Website

This Guide is intended to be a clear and concise explanation of the Open Meeting Law's requirements. The complete law, as well as the Attorney General's regulations, training materials, and determinations and declinations as to complaints can be found on the Attorney General's Open Meeting website, www.mass.gov/ago/openmeeting. Members of public bodies, other local and state government officials, and the public are

encouraged to visit the website regularly for updates on the law and the Attorney General's interpretations of it.

What meetings are covered by the Open Meeting Law?

With certain exceptions, all meetings of a public body must be open to the public. A meeting is generally defined as "a deliberation by a public body with respect to any matter within the body's jurisdiction." As explained more fully below, a deliberation is a communication between or among members of a public body.

These four questions will help determine whether a communication constitutes a meeting subject to the law:

1) is the communication between or among members of a **public body**;
2) if so, does the communication constitute a **deliberation**;
3) does the communication involve a matter within the body's **jurisdiction**; and
4) if so, does the communication fall within an **exception** listed in the law?

What constitutes a public body?

While there is no comprehensive list of public bodies, any multi-member board, commission, committee or subcommittee within the executive or legislative branches[1] of state government, or within any county, district, city, region or town, if established to serve a public purpose, is subject to the law. The law includes any multi-member body created to advise or make recommendations to a public body, and also includes the governing board of any local housing or redevelopment authority, and the governing board or body of any authority established by the Legislature to serve a public purpose. The law excludes the Legislature and its committees, bodies of the judicial branch, and bodies appointed by a constitutional officer solely for the purpose of advising a constitutional officer.

Boards of selectmen and school committees (including those of charter schools) are certainly subject to the Open Meeting Law, as are subcommittees of public bodies, regardless of whether their role is decision-making or advisory. Individual government officials, such as a town manager or police chief, and members of their staff are not subject to the law, and so they may meet with one another to discuss public business without needing to comply with Open Meeting Law requirements. This exception for individual officials to the general Open Meeting Law does not apply where such officials are serving as members of a multiple-member public body that is subject to the law.

Bodies appointed by a public official solely for the purpose of advising the official on a decision that individual could make alone are not public bodies subject to the Open Meeting Law. For example, a school superintendent appoints a five-member advisory body to assist her in nominating candidates for school principal, a task the

[1] Although the Legislature itself is not a public body subject to the Open Meeting Law, certain legislative commissions must follow the Law's requirements.

superintendent could perform herself. That advisory body would not be subject to the Open Meeting Law.[2]

What constitutes a deliberation?

The Open Meeting Law defines deliberation as "an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction." Distribution of a meeting agenda, scheduling or procedural information, or reports or documents that may be discussed at a meeting is often helpful to public body members when preparing for upcoming meetings. These types of communications generally will not constitute deliberation, provided that, when these materials are distributed, no member of the public body expresses an opinion on matters within the body's jurisdiction. Additionally, certain communications that may otherwise be considered deliberation are specifically exempt by statute from the definition of deliberation (for example, discussion of the recess and continuance of a Town Meeting pursuant to G.L. c. 39, § 10A(a) is not deliberation).

To be a deliberation, the communication must involve a quorum of the public body. A quorum is usually a simple majority of the members of a public body. Thus, a communication among less than a quorum of the members of a public body will not be a deliberation, unless there are multiple communications among the members of the public body that together constitute communication among a quorum of members. Courts have held that the Open Meeting Law applies when members of a public body communicate in a serial manner in order to evade the application of the law.

Note that the expression of an opinion on matters within the body's jurisdiction to a quorum of a public body is a deliberation, even if no other public body member responds. For example, if a member of a public body sends an email to a quorum of a public body expressing her opinion on a matter that could come before that body, this communication violates the law even if none of the recipients responds.

What matters are within the jurisdiction of the public body?

The Open Meeting Law applies only to the discussion of any "matter within the body's jurisdiction." The law does not specifically define "jurisdiction." As a general rule, any matter of public business on which a quorum of the public body may make a decision or recommendation is considered a matter within the jurisdiction of the public body. Certain discussions regarding procedural or administrative matters may also relate to public business within a body's jurisdiction, such as where the discussion involves the organization and leadership of the public body, committee assignments, or rules or bylaws for the body. Statements made for political purposes, such as where a public body's members characterize their own past achievements, generally are not considered communications on public business within the jurisdiction of the public body.

[2] See Connelly v. School Committee of Hanover, 409 Mass. 232 (1991).

What are the exceptions to the definition of a meeting?

There are five exceptions to the definition of a meeting under the Open Meeting Law.

1. Members of a public body may conduct an on-site inspection of a project or program; however, they may not deliberate at such gatherings;
2. Members of a public body may attend a conference, training program or event; however, they may not deliberate at such gatherings;
3. Members of a public body may attend a meeting of another public body provided that they communicate only by open participation; however, they may not deliberate at such gatherings;
4. Meetings of quasi-judicial boards or commissions held solely to make decisions in an adjudicatory proceeding are not subject to the Open Meeting Law; and
5. Town Meetings, which are subject to other legal requirements, are not governed by the Open Meeting Law. See, e.g. G.L. c. 39, §§ 9, 10 (establishing procedures for Town Meeting).

The Attorney General interprets the exemption for "quasi-judicial boards or commissions" to apply only to certain state "quasi-judicial" bodies and a very limited number of public bodies at other levels of government whose proceedings are specifically defined as "agencies" for purposes of G.L. c. 30A.

We have received several inquiries about the exception for Town Meeting and whether it applies to meetings outside of a Town Meeting session by Town Meeting members or Town Meeting committees or to deliberation by members of a public body – such as a board of selectmen – during a session of Town Meeting. The Attorney General interprets this exemption to mean that the Open Meeting Law does not reach any aspect of Town Meeting. Therefore, the Attorney General will not investigate complaints alleging violations in these situations. Note, however, that this is a matter of interpretation and future Attorneys General may choose to apply the law in such situations.

What are the requirements for posting notice of meetings?

Except in cases of emergency, a public body must provide the public with notice of its meeting 48 hours in advance, excluding Saturdays, Sundays, and legal holidays. Notice of emergency meetings must be posted as soon as reasonably possible prior to the meeting. Also note that other laws, such as those governing procedures for public hearings, may require additional notice.

What are the requirements for filing and posting meeting notices for local public bodies?

For local public bodies, meeting notices must be filed with the municipal clerk with enough time to permit posting of the notice at least 48 hours in advance of the public meeting. Notices may be posted on a bulletin board, in a loose-leaf binder, or on an electronic display (e.g. television, computer monitor, or an electronic bulletin board),

provided that the notice is conspicuously visible to the public at all hours in or on the municipal building in which the clerk's office is located. In the event that the meeting notices posted in the municipal building are not visible to the public at all hours, then the municipality must either post notices on the outside of the building or follow one of these alternative posting methods approved by the Attorney General in 940 CMR 29.03(2)(b):

- public bodies may post notice of meetings on the municipal website;

- public bodies may post notice of meetings on cable television, **AND**, post notice or provide cable television access in an alternate municipal building (e.g., police or fire station) where the notice is accessible at all hours;

- public bodies may post notice of meetings in a newspaper of general circulation in the municipality, **AND**, post notice or a copy of the newspaper containing the meeting notice at an alternate municipal building (e.g., police or fire station) where the notice is accessible at all hours;

- public bodies may place a computer monitor or electronic or physical bulletin board displaying meeting notices on or in a door, window, or near the entrance of the municipal building in which the clerk's office is located in such a manner as to be visible to the public from outside the building; or

- public bodies may provide an audio recording of meeting notices, available to the public by telephone at all hours.

Prior to utilizing an alternative posting method, the clerk of the municipality must inform the Division of Open Government of its notice posting method and must inform the Division of any future changes to that posting method. Public bodies must consistently use the most current notice posting method on file with the Division. A description of the alternative posting method must also be posted on or adjacent to the main and handicapped accessible entrances to the building where the clerk's office is located. Note that, even if an alternative posting method has been adopted, meeting notices must still be available in or around the clerk's office so that members of the public may view the notices during normal business hours.

What are the requirements for posting notices for regional, district, county and state public bodies?

- For regional or district public bodies and regional school districts, meeting notices must be filed and posted in the same manner required of local public bodies in each of the communities within the region or district. As an alternative method of notice, a regional or district public body may post a meeting notice on the regional or district public body's website. A copy of the notice must be filed and kept by the chair of the public body or the chair's designee.

- County public bodies must file meeting notices in the office of the county commissioners and post notice of the meeting in a manner conspicuously visible to the public at all hours at a place or places designated by the county commissioners for notice postings. As an alternative method of notice, a county public body may post notice of meetings on the county public body's website. A copy of the notice shall be filed and kept by the chair of the county public body or the chair's designee.

- State public bodies must file meeting notices by posting the notice on the website of the public body or its parent agency. The chair of a state public body must notify the Attorney General in writing of the website address where notices will be posted, and of any subsequent changes to that posting location. A copy of each meeting notice must also be sent to the Secretary of State's Regulations Division and should be forwarded to the Executive Office of Administration and Finance, which maintains a listing of state public body meetings.

A note about accessibility

Public bodies are subject to all applicable state and federal laws that govern accessibility for persons with disabilities. These laws include the Americans with Disabilities Act, the federal Rehabilitation Act of 1973, and state constitutional provisions. For instance, public bodies that adopt website posting as an alternative method of notice must ensure that the website utilizes technology that is readily accessible to people with disabilities, including individuals who use screen readers. All open meetings of public bodies must be accessible to persons with disabilities. Meeting locations must be accessible by wheelchair, without the need for special assistance. Also sign language interpreters for deaf or hearing-impaired persons must be provided, subject to reasonable advance notice.[3] The Attorney General's Disability Rights Project is available to answer questions about accessibility and may be reached at (617) 963-2939.

What information must meeting notices contain?

Meeting notices must be posted in a legible, easily understandable format; contain the date, time, and place of the meeting; and list all topics that the chair reasonably anticipates, 48 hours in advance, will be discussed at the meeting. The list of topics must be sufficiently specific to reasonably inform the public of the issues to be discussed at the meeting. Where there are no anticipated topics for discussion in open session other than the procedural requirements for convening an executive session, the public body should list "open session" as a topic, in addition to the executive session, so the public is aware that it has the opportunity to attend and learn the basis for the executive session.

[3] The Massachusetts Commission for the Deaf and Hard of Hearing will assist with arrangements for a sign language interpreter. The Commission may be reached at 617-740-1600 VOICE and 617-740-1700 TTY.

Meeting notices must also indicate the date and time that the notice was posted, either on the notice itself or in a document or website accompanying the notice. If a notice is revised, the revised notice must also conspicuously record both the date and time the original notice was posted as well as the date and time the last revision was posted. Recording the date and time enables the public to observe that public bodies are complying with the Open Meeting Law's notice requirements without requiring constant vigilance. Additionally, in the event of a complaint, it provides the Attorney General with evidence of compliance with those requirements.

If a discussion topic is proposed after a meeting notice is posted, and it was not reasonably anticipated by the chair more than 48 hours before the meeting, the public body should update its posting to provide the public with as much notice as possible of what subjects will be discussed during the meeting. Although a public body may consider a topic that was not listed in the meeting notice if it was not anticipated, the Attorney General strongly encourages public bodies to postpone discussion and action on topics that are controversial or may be of particular interest to the public if the topic was not listed in the meeting notice.

When can a public body meet in executive session?

While all meetings of public bodies must be open to the public, certain topics may be discussed in executive, or closed, session. Before going into an executive session, the chair of the public body must first:

- Convene in open session;
- State the reason for the executive session, stating all subjects that may be revealed without compromising the purpose for which the executive session was called;
- State whether the public body will reconvene in open session at the end of the executive session; and
- Take a roll call vote of the body to enter executive session.

Where a public body member is participating in an executive session remotely, the member must state at the start of the executive session that no other person is present or able to hear the discussion at the remote location. The public body may authorize, by a simple majority vote, the presence and participation of other individuals at the remote participant's location.

While in executive session, the public body must keep accurate records, all votes taken must be recorded by roll call, and the public body may only discuss matters for which the executive session was called.

The Ten Purposes for Executive Session

The law states ten specific purposes for which an executive session may be held, and emphasizes that these are the only reasons for which a public body may enter executive session.

The ten purposes for which a public body may vote to hold an executive session are:

1. **To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. The individual to be discussed in such executive session shall be notified in writing by the public body at least 48 hours prior to the proposed executive session; provided, however, that notification may be waived upon written agreement of the parties.**

This purpose is designed to protect the rights and reputation of individuals. Nevertheless, where a public body is discussing an employee evaluation, considering applicants for a position, or discussing the qualifications of any individual, these discussions should be held in open session to the extent that the discussion deals with issues other than the reputation, character, health, or any complaints or charges against the individual. An executive session called for this purpose triggers certain rights for the individual who is the subject of the discussion. The individual has the right to be present, though he or she may choose not to attend. The individual who is the subject of the discussion may also choose to have the discussion in an open meeting, and that choice takes precedence over the right of the public body to go into executive session.

While the imposition of disciplinary sanctions by a public body on an individual fits within this purpose, this purpose does not apply if, for example, the public body is deciding whether to lay off a large number of employees because of budgetary constraints.

2. **To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;**

Generally, a public body must identify the specific non-union personnel or collective bargaining unit with which it is negotiating before entering into executive session under Purpose 2. A public body may withhold the identity of the non-union personnel or bargaining unit if publicly disclosing that information would compromise the purpose for which the executive session was called. While we generally defer to public bodies' assessment of whether the inclusion of such details would compromise the purpose for an executive session, a public body must be able to demonstrate a reasonable basis for that claim if challenged.

While a public body may agree on terms with individual non-union personnel in executive session, the final vote to execute such agreements must be taken by the public body in open session. In contrast, a public body may approve final terms and execute a collective bargaining agreement in executive session, but should promptly disclose the agreement in open session following its execution.

Collective Bargaining Sessions: These include not only the bargaining sessions, but also include grievance hearings that are required by a collective bargaining agreement.

3. **To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares;**

Generally, a public body must identify the collective bargaining unit with which it is negotiating or the litigation matter it is discussing before entering into executive session under Purpose 3. A public body may withhold the identity of the collective bargaining unit or name of the litigation matter if publicly disclosing that information would compromise the purpose for which the executive session was called. While we generally defer to public bodies' assessment of whether the inclusion of such details would compromise the purpose for an executive session, a public body must be able to demonstrate a reasonable basis for that claim if challenged.

Collective Bargaining Strategy: Discussions with respect to collective bargaining strategy include discussion of proposals for wage and benefit packages or working conditions for union employees. The public body, if challenged, has the burden of proving that an open meeting might have a detrimental effect on its bargaining position. The showing that must be made is that an open discussion may have a detrimental effect on the collective bargaining process; the body is not required to demonstrate a definite harm that would have arisen. At the time the executive session is proposed and voted on, the chair must state on the record that having the discussion in an open session may be detrimental to the public body's bargaining or litigating position.

Litigation Strategy: Discussions concerning strategy with respect to ongoing litigation obviously fit within this purpose but only if an open meeting may have a detrimental effect on the litigating position of the public body. Discussions relating to potential litigation are not covered by this exemption unless that litigation is clearly and imminently threatened or otherwise demonstrably likely. That a person is represented by counsel and supports a position adverse to the public body's does not by itself mean that litigation is imminently threatened or likely. Nor does the fact that a newspaper reports a party has threatened to sue necessarily mean imminent litigation.

Note: For the reasons discussed above, a public body's discussions with its counsel do not automatically fall under this or any other purpose for holding an executive session.

4. **To discuss the deployment of security personnel or devices, or strategies with respect thereto;**

5. **To investigate charges of criminal misconduct or to consider the filing of criminal complaints;**

This purpose permits an executive session to investigate charges of criminal misconduct and to consider the filing of criminal complaints. Thus, it primarily involves discussions that would precede the formal criminal process in court. Purpose 1 is related, in that it permits an executive session to discuss certain complaints or charges,

which may include criminal complaints or charges, but only those that have already been brought. However Purpose 1 confers certain rights of participation on the individual involved, as well as the right for the individual to insist that the discussion occur in open session. Purpose 5 does not require that the same rights be given to the person who is the subject of a criminal complaint. To the limited extent that there is overlap between Purposes 1 and 5, a public body has discretion to choose which purpose to invoke when going into executive session.

6. **To consider the purchase, exchange, lease or value of real property if the chair declares that an open meeting may have a detrimental effect on the negotiating position of the public body;**

Generally, a public body must identify the specific piece of property it plans to discuss before entering into executive session under Purpose 6. A public body may withhold the identity of the property if publicly disclosing that information would compromise the purpose for which the executive session was called. While we generally defer to public bodies' assessment of whether the inclusion of such details would compromise the purpose for an executive session, a public body must be able to demonstrate a reasonable basis for that claim if challenged.

Under this purpose, as with the collective bargaining and litigation purpose, an executive session may be held only where an open meeting may have a detrimental impact on the body's negotiating position with a third party. At the time that the executive session is proposed and voted on, the chair must state on the record that having the discussion in an open session may be detrimental to the public body's negotiating position.

7. **To comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements;**

There may be provisions in state statutes or federal grants that require or specifically allow a public body to consider a particular issue in a closed session. Before entering executive session under this purpose, the public body must cite the specific law or federal grant-in-aid requirement that necessitates confidentiality. A public body may withhold that information only if publicly disclosing it would compromise the purpose for which the executive session was called. While we generally defer to public bodies' assessment of whether the inclusion of such details would compromise the purpose for an executive session, a public body must be able to demonstrate a reasonable basis for that claim if challenged.

8. **To consider or interview applicants for employment or appointment by a preliminary screening committee if the chair declares that an open meeting will have a detrimental effect in obtaining qualified applicants; provided, however, that this clause shall not apply to any meeting, including meetings of a preliminary screening committee, to consider and interview applicants who have passed a prior preliminary screening;**

This purpose permits a hiring subcommittee of a public body or a preliminary screening committee to conduct the initial screening process in executive session. This purpose does not apply to any stage in the hiring process after the screening committee or subcommittee votes to recommend candidates to its parent body. It may, however, include a review of resumés and multiple rounds of interviews by the screening committee aimed at narrowing the group of applicants down to finalists. At the time that the executive session is proposed and voted on, the chair must state on the record that having the discussion in an open session will be detrimental to the public body's ability to attract qualified applicants for the position. If the public body opts to convene a preliminary screening committee, the committee must contain less than a quorum of the members of the parent public body. The committee may also contain members who are not members of the parent public body.

Note that a public body is not required to create a preliminary screening committee to consider or interview applicants. However, if the body chooses to conduct the review of applicants itself, it may not do so in executive session.

9. **To meet or confer with a mediator, as defined in section 23C of chapter 233, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or entity, provided that:**

(i) any decision to participate in mediation shall be made in an open session and the parties, issues involved and purpose of the mediation shall be disclosed; and

(ii) no action shall be taken by any public body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open session.

10. **To discuss trade secrets or confidential, competitively-sensitive or other proprietary information provided:**

- in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to section 1F of chapter 164;
- in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164; or
- in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164;
- when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy.

May a member of a public body participate remotely?

The Attorney General's Regulations, 940 CMR 29.10, permit remote participation in certain circumstances. However, the Attorney General strongly encourages members of public bodies to physically attend meetings whenever possible. Members of public bodies have a responsibility to ensure that remote participation in meetings is not used

in a way that would defeat the purposes of the Open Meeting Law, namely promoting transparency with regard to deliberations and decisions on which public policy is based.

Note that the Attorney General's regulations enable members of public bodies to participate remotely if the practice has been properly adopted, but do not require that a public body permit members of the public to participate remotely. If a public body chooses to allow individuals who are not members of the public body to participate remotely in a meeting, it may do so without following the Open Meeting Law's remote participation procedures.

How can the practice of remote participation be adopted?

Remote participation may be used during a meeting of a public body if it has first been adopted by the chief executive officer of the municipality for local public bodies, the county commissioners for county public bodies, or by a majority vote of the public body for retirement boards, district, regional and state public bodies. The chief executive officer may be the board of selectmen, the city council, or the mayor, depending on the municipality. See G.L. c. 4, § 7.

If the chief executive officer in a municipality authorizes remote participation, that authorization applies to all public bodies in the municipality. 940 CMR 29.10(2)(a). However, the chief executive officer determines the amount and source of payment for any costs associated with remote participation and may decide to fund the practice only for certain public bodies. See 940 CMR 29.10(6)(e). In addition, the chief executive officer can authorize public bodies in that municipality to "opt out" of the practice altogether. See 940 CMR 29.10(8).

Note about Local Commissions on Disability: Beginning on April 7, 2015, local commissions on disability may decide by majority vote of the commissioners at a regular meeting to permit remote participation during a specific meeting or during all commission meetings. G.L. c. 30A, § 20(e). Adoption by the municipal adopting authority is not required.

What are the permissible reasons for remote participation?

Once remote participation is adopted, any member of a public body may participate remotely if the chair (or, in the chair's absence, the person chairing the meeting) determines that one of the following factors makes the member's physical attendance unreasonably difficult:

1. Personal illness;
2. Personal disability;
3. Emergency;
4. Military service; or
5. Geographic distance.

What are the acceptable means of remote participation?

Acceptable means of remote participation include telephone, internet, or satellite enabled audio or video conferencing, or any other technology that enables the remote participant and all persons present at the meeting location to be clearly audible to one another. Text messaging, instant messaging, email and web chat without audio are not acceptable methods of remote participation. Note that accommodations must be made for any public body member who requires TTY service, video relay service, or other form of adaptive telecommunications.

What are the minimum requirements for remote participation?

Any public body using remote participation during a meeting must ensure that the following minimum requirements are met:

1. A quorum of the body, including the chair or, in the chair's absence, the person chairing the meeting, must be physically present at the meeting location;
2. Members of a public body who participate remotely and all persons present at the meeting location must be clearly audible to each other; and
3. All votes taken during a meeting in which a member participates remotely must be by roll call vote.

What procedures must be followed if remote participation is used at a meeting?

At the start of any meeting during which a member of a public body will participate remotely, the chair must announce the name of any member who is participating remotely and which of the five reasons listed above requires that member's remote participation. The chair's statement does not need to contain any detail about the reason for the member's remote participation other than the section of the regulation that justifies it. This information must also be recorded in the meeting minutes.

Members of public bodies who participate remotely may vote and shall not be deemed absent for purposes of G.L. c. 39, § 23D. In addition, members who participate remotely may participate in executive sessions but must state at the start of any such session that no other person is present or able to hear the discussion at the remote location, unless the public body has approved the presence of that individual.

If technical difficulties arise as a result of utilizing remote participation, the chair (or, in the chair's absence, person chairing the meeting) may decide how to address the situation. Public bodies are encouraged, whenever possible, to suspend discussion while reasonable efforts are made to correct any problem that interferes with a remote participant's ability to hear or be heard clearly by all persons present at the meeting location. If a remote participant is disconnected from the meeting, the minutes must note that fact and the time at which the disconnection occurred.

What public participation in meetings must be allowed?

Under the Open Meeting Law, the public is permitted to attend meetings of public bodies but is excluded from an executive session that is called for a valid purpose listed in the law. While the public is permitted to attend an open meeting, an individual may not address the public body without permission of the chair. An individual may not disrupt a meeting of a public body, and at the request of the chair, all members of the public shall be silent. If, after clear warning, a person continues to be disruptive, the chair may order the person to leave the meeting. If the person does not leave, the chair may authorize a constable or other officer to remove the person. Although public participation is entirely within the chair's discretion, the Attorney General encourages public bodies to allow as much public participation as time permits.

Any member of the public may make an audio or video recording of an open session of a public meeting. A member of the public who wishes to record a meeting must first notify the chair and must comply with reasonable requirements regarding audio or video equipment established by the chair so as not to interfere with the meeting. The chair is required to inform other attendees of any such recording at the beginning of the meeting. If someone arrives after the meeting has begun and wishes to record a meeting, that person should attempt to notify the chair prior to beginning recording, ideally in a manner that does not significantly disrupt the meeting in progress (such as passing a note for the chair to the board administrator or secretary). The chair should endeavor to acknowledge such attempts at notification and announce the fact of any recording to those in attendance.

What records of public meetings must be kept?

Public bodies are required to create and maintain accurate minutes of all meetings, including executive sessions. The minutes, which must be created and approved in a timely manner, must include:

- the date, time and place of the meeting;
- the members present or absent;
- the decisions made and actions taken, including a record of all votes;
- a summary of the discussions on each subject;
- a list of all documents and exhibits used at the meeting; and
- the name of any member who participated in the meeting remotely, along with the reason under 940 CMR 29.10(5) for his or her remote participation.

While the minutes must include a summary of the discussions on each subject, a transcript is not required. No vote taken by a public body, either in an open or in an executive session, shall be by secret ballot. All votes taken in executive session must be by roll call and the results recorded in the minutes. While public bodies must identify in the minutes all documents and exhibits used at a meeting and must retain them in accordance with the Secretary of State's records retention schedule, these documents and exhibits needn't be attached to or physically stored with the minutes.

Minutes, and all documents and exhibits used, are public records and a part of the official record of the meeting. Records may be subject to disclosure under either the Open Meeting Law or Public Records Law. The State and Municipal Record Retention Schedules are available through the Secretary of State's website at: http://www.sec.state.ma.us/arc/arcrmu/rmuidx.htm.

Open Session Meeting Records

The Open Meeting Law requires public bodies to create and approve minutes in a timely manner. The Open Meeting Law does not provide a definition of "timely manner," but the Attorney General recommends that minutes be approved at a public body's next meeting whenever possible. The law requires that existing minutes be made available to the public within 10 days of a request, whether they have been approved or remain in draft form. Materials or other exhibits used by the public body in an open meeting must also be made available to the public within 10 days of a request.

There are two exemptions to the open session records disclosure requirement: 1) materials (other than those that were created by members of the public body for the purpose of the evaluation) used in a performance evaluation of an individual bearing on his professional competence, and 2) materials (other than any resumé submitted by an applicant, which is subject to disclosure) used in deliberations about employment or appointment of individuals, including applications and supporting materials. Documents created by members of the public body for the purpose of performing an evaluation are subject to disclosure. This applies to both individual evaluations and evaluation compilations, provided the documents were created by members of the public body for the purpose of the evaluation.

Executive Session Meeting Records

Public bodies are not required to disclose the minutes, notes, or other materials used in an executive session if the disclosure of these records may defeat the lawful purposes of the executive session. Once disclosure would no longer defeat the purposes of the executive session, however, minutes and other records from that executive session must be disclosed unless they fall within an exemption to the Public Records Law, G.L. c. 4, § 7, cl. 26, or the attorney-client privilege applies. Public bodies are also required to periodically review their executive session minutes to determine whether continued non-disclosure is warranted. These determinations must be included in the minutes of the body's next meeting.

A public body must respond to a request to inspect or copy executive session minutes within 10 days of the request. If the public body has determined, prior to the request, that the requested executive session minutes may be released, it must make those minutes available to the requestor at that time. If the body previously determined that executive session minutes should remain confidential because publication would defeat the lawful purposes of the executive session, it should respond by stating the reason the minutes continue to be withheld. And if, at the time of a request, the public body has not conducted a review of the minutes to determine whether continued nondisclosure is warranted, the body must perform such a review

and release the minutes, if appropriate, no later than its next meeting or within 30 days, whichever occurs first. In such circumstances, the body should still respond to the request within 10 days, notifying the requestor that it is conducting this review.

What is the Attorney General's role in enforcing the Open Meeting Law?

The Attorney General's Division of Open Government is responsible for enforcing the Open Meeting Law. The Attorney General has the authority to receive and investigate complaints, bring enforcement actions, issue advisory opinions, and promulgate regulations.

The Division of Open Government regularly seeks feedback from the public on ways in which it can better support public bodies to help them comply with the law's requirements. The Division of Open Government offers periodic online and in-person training on the Open Meeting Law and will respond to requests for guidance and information from public bodies and the public.

The Division of Open Government will take complaints from members of the public and will work with public bodies to resolve problems. While any member of the public may file a complaint with a public body alleging a violation of the Open Meeting Law, a public body need not, and the Division of Open Government will not, investigate anonymous complaints.

What is the Open Meeting Law complaint procedure?

Step 1. Filing a Complaint with the Public Body

Individuals who allege a violation of the Open Meeting Law must first file a complaint ***with the public body*** alleged to have violated the OML. The complaint must be filed within 30 days of the date of the violation, or the date the complainant could reasonably have known of the violation. The complaint must be filed on a Complaint Form available on the Attorney General's website, www.mass.gov/ago/openmeeting. When filing a complaint with a local public body, the complainant must also file a copy of the complaint with the municipal clerk.

Step 2. The Public Body's Response

Upon receipt, the chair of the public body should distribute copies of the complaint to the members of the public body for their review. The public body has 14 business days from the date of receipt to review the complainant's allegations, take remedial action if appropriate, notify the complainant of the remedial action, and forward a copy of the complaint and description of the remedial action taken to the Attorney General. While the public body may delegate responsibility for responding to the complaint to counsel or another individual, it must first meet to do so.

The public body may request additional information from the complainant. The public body may also request an extension of time to respond to the complaint. A request for an extension should be made within 14 business days of receipt of the

complaint by the public body. The request for an extension should be made in writing to the Division of Open Government and should include a copy of the complaint and state the reason for the requested extension.

Step 3. Filing a Complaint with the Attorney General's Office

A complaint is ripe for review by the Attorney General 30 days after the complaint is filed with the public body. This 30-day period is intended to provide a reasonable opportunity for the complainant and the public body to resolve the initial complaint. It is important to note that complaints are ***not*** automatically treated as filed for review by the Attorney General upon filing with the public body. A complainant who has filed a complaint with a public body and seeks further review by the Division of Open Government must file the complaint with the Attorney General after the 30-day local review period has elapsed but before 90 days have passed since the date of the violation or the date that the violation was reasonably discoverable.

When filing the complaint with the Attorney General, the complainant must include a copy of the original complaint and may include any other materials the complainant feels are relevant, including an explanation of why the complainant is not satisfied with the response of the public body. Note, however, that the Attorney General will not review allegations that were not raised in the initial complaint filed with the public body. Under most circumstances, complaints filed with the Attorney General, and any documents submitted with the complaint, will be considered a public record and will be made available to anyone upon request.

The Attorney General will review the complaint and any remedial action taken by the public body. The Attorney General may request additional information from both the complainant and the public body. The Attorney General will seek to resolve complaints in a reasonable period of time, generally within 90 days of the complaint becoming ripe for review by our office. The Attorney General may decline to investigate a complaint that is filed with our office more than 90 days after the date of the alleged violation.

When is a violation of the law considered "intentional"?

Upon finding a violation of the Open Meeting Law, the Attorney General may impose a civil penalty upon a public body of not more than $1,000 for each intentional violation. G.L. c. 30A, § 23(c)(4). An "intentional violation" is an act or omission by a public body or public body member in knowing violation of the Open Meeting Law. G.L. c. 30A, § 18. In determining whether a violation was intentional, the Attorney General will consider, among other things, whether the public body or public body member 1) acted with specific intent to violate the law; 2) acted with deliberate ignorance of the law's requirements; or 3) had been previously informed by a court decision or advised by the Attorney General that the conduct at issue violated the Open Meeting Law. 940 CMR 29.02. If a public body or public body member made a good faith attempt at compliance with the law but was reasonably mistaken about its requirements or, after full disclosure, acted in good faith compliance with the advice of counsel, its conduct

will not be considered an intentional violation of the Law. G.L. c. 30A, § 23(g); 940 CMR 29.02.

Will the Attorney General's Office provide training on the Open Meeting Law?

The Open Meeting Law directs the Attorney General to create educational materials and provide training to public bodies to foster awareness of and compliance with the Open Meeting Law. The Attorney General has established an Open Meeting Law website, www.mass.gov/ago/openmeeting, on which government officials and members of public bodies can find the statute, regulations, FAQs, training materials, the Attorney General's determination letters resolving complaints, and other resources. The Attorney General offers periodic webinars and in-person regional training events for members of the public and public bodies, in addition to offering a free online training video.

Contacting the Attorney General

If you have any questions about the Open Meeting Law or anything contained in this guide, please contact the Attorney General's Division of Open Government. The Attorney General also welcomes any comments, feedback, or suggestions you may have about the Open Meeting Law or this guide.

Division of Open Government
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THE COMMONWEALTH OF MASSACHUSETTS
OPEN MEETING LAW, G.L. c. 30A, §§18-25

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This version of the law is current as of April 7, 2015.

NOTICE: This is NOT the official version of the Massachusetts General Law (MGL). While reasonable efforts have been made to ensure the accuracy and currency of the data provided, do not rely on this information without first checking an official edition of the MGL.

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Section 18: [DEFINITIONS]

As used in this section and sections 19 to 25, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings:

"Deliberation", an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction; provided, however, that "deliberation" shall not include the distribution of a meeting agenda, scheduling information or distribution of other procedural meeting or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed.

"Emergency", a sudden, generally unexpected occurrence or set of circumstances demanding immediate action.

"Executive session", any part of a meeting of a public body closed to the public for deliberation of certain matters.

"Intentional violation", an act or omission by a public body or a member thereof, in knowing violation of the open meeting law.

"Meeting", a deliberation by a public body with respect to any matter within the body's jurisdiction; provided, however, "meeting" shall not include:

(a) an on-site inspection of a project or program, so long as the members do not deliberate;
(b) attendance by a quorum of a public body at a public or private gathering, including a conference or training program or a media, social or other event, so long as the members do not deliberate;
(c) attendance by a quorum of a public body at a meeting of another public body that has complied with the notice requirements of the open meeting law, so long as the visiting members communicate only by open participation in the meeting on those matters under discussion by the host body and do not deliberate;
(d) a meeting of a quasi-judicial board or commission held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it; or
(e) a session of a town meeting convened under section 9 of chapter 39 which would include the attendance by a quorum of a public body at any such session.

"Minutes", the written report of a meeting created by a public body required by subsection (a) of section 22 and section 5A of chapter 66.

"Open meeting law", sections 18 to 25, inclusive.

"Post notice", to display conspicuously the written announcement of a meeting either in hard copy or electronic format.

"Preliminary screening", the initial stage of screening applicants conducted by a committee or subcommittee of a public body solely for the purpose of providing to the public body a list of those applicants qualified for further consideration or interview.

"Public body", a multiple-member board, commission, committee or subcommittee within the executive or legislative branch or within any county, district, city, region or town, however created, elected, appointed or otherwise constituted, established to serve a public purpose; provided, however, that the governing board of a local housing, redevelopment or other similar authority shall be deemed a local public body; provided, further, that the governing board or body of any other authority established by the general court to serve a public purpose in the commonwealth or any part thereof shall be deemed a state public body; provided, further, that "public body" shall not include the general court or the committees or recess commissions thereof, bodies of the judicial branch or bodies appointed by a constitutional officer solely for the purpose of advising a constitutional officer and shall not include the board of bank incorporation or the policyholders protective board; and provided further, that a subcommittee shall include any multiple-member body created to advise or make recommendations to a public body.

"Quorum", a simple majority of the members of the public body, unless otherwise provided in a general or special law, executive order or other authorizing provision.

Section 19. [Division of Open Government; Open Meeting Law Training; Open Meeting Law Advisory Commission; Annual Report]

(a) There shall be in the department of the attorney general a division of open government under the direction of a director of open government. The attorney general shall designate an assistant attorney general as the director of the open government division. The director may appoint and remove, subject to the approval of the attorney general, such expert, clerical and other assistants as the work of the division may require. The division shall perform the duties imposed upon the attorney general by the open meeting law, which may include participating, appearing and intervening in any administrative and judicial proceedings pertaining to the enforcement of the open meeting law. For the purpose of such participation, appearance, intervention and training authorized by this chapter the attorney general may expend such funds as may be appropriated therefor.

(b) The attorney general shall create and distribute educational materials and provide training to public bodies in order to foster awareness and compliance with the open meeting law. Open meeting law training may include, but shall not be limited to, instruction in:

(1) the general background of the legal requirements for the open meeting law;
(2) applicability of sections 18 to 25, inclusive, to governmental bodies;
(3) the role of the attorney general in enforcing the open meeting law; and
(4) penalties and other consequences for failure to comply with this chapter.

(c) There shall be an open meeting law advisory commission. The commission shall consist of 5 members, 2 of whom shall be the chairmen of the joint committee on state administration and regulatory oversight; 1 of whom shall be the president of the Massachusetts Municipal Association or his designee; 1 of whom shall be the president of the Massachusetts Newspaper Publishers Association or his designee; and 1 of whom shall be the attorney general or his designee.

The commission shall review issues relative to the open meeting law and shall submit to the attorney general recommendations for changes to the regulations, trainings, and educational initiatives relative to the open meeting law as it deems necessary and appropriate.

(d) The attorney general shall, not later than January 31, file annually with the commission a report providing information on the enforcement of the open meeting law during the preceding calendar year. The report shall include, but not be limited to:

(1) the number of open meeting law complaints received by the attorney general;
(2) the number of hearings convened as the result of open meeting law complaints by the attorney general;
(3) a summary of the determinations of violations made by the attorney general;
(4) a summary of the orders issued as the result of the determination of an open meeting law violation by the attorney general;
(5) an accounting of the fines obtained by the attorney general as the result of open meeting law enforcement actions;
(6) the number of actions filed in superior court seeking relief from an order of the attorney general; and
(7) any additional information relevant to the administration and enforcement of the open meeting law that the attorney general deems appropriate.

Section 20. [Meetings of a Public Body to be Open to the Public; Notice of Meeting; Remote Participation; Recording and Transmission of Meeting; Removal of Persons for Disruption of Proceedings]

(a) Except as provided in section 21, all meetings of a public body shall be open to the public.

(b) Except in an emergency, in addition to any notice otherwise required by law, a public body shall post notice of every meeting at least 48 hours prior to such meeting, excluding Saturdays, Sundays and legal holidays. In an emergency, a public body shall post notice as soon as reasonably possible prior to such meeting. Notice shall be printed in a legible, easily understandable format and shall contain the date, time and place of such meeting and a listing of topics that the chair reasonably anticipates will be discussed at the meeting.

(c) For meetings of a local public body, notice shall be filed with the municipal clerk and posted in a manner conspicuously visible to the public at all hours in or on the municipal building in which the clerk's office is located.

For meetings of a regional or district public body, notice shall be filed and posted in each city or town within the region or district in the manner prescribed for local public bodies. For meetings of a regional school district, the secretary of the regional school district committee shall be considered to be its clerk and shall file notice with the clerk of each city or town within such district and shall post the notice in the manner prescribed for local public bodies. For meetings of a county public body, notice shall be filed in the office of the county commissioners and a copy of the notice shall be publicly posted in a manner conspicuously visible to the public at all hours in such place or places as the county commissioners shall designate for the purpose.

For meetings of a state public body, notice shall be filed with the attorney general by posting on a website under the procedures established for this purpose and a duplicate copy of the notice shall be filed with the regulations division of the state secretary's office.

The attorney general may prescribe or approve alternative methods of notice where the attorney general determines the alternative methods will afford more effective notice to the public.

(d) The attorney general may by regulation or letter ruling, authorize remote participation by members of a public body not present at the meeting location; provided, however, that the absent members and all persons present at the meeting location are clearly audible to each other; and provided, further, that a quorum of the body, including the chair, are present at the meeting location. The authorized members may vote and shall not be deemed absent for the purposes of section 23D of chapter 39.

(e) A local commission on disability may by majority vote of the commissioners at a regular meeting permit remote participation applicable to a specific meeting or generally to all of the commission's meetings; provided, however, that the commission shall comply with all other requirements of law and regulation.

(f) After notifying the chair of the public body, any person may make a video or audio recording of an open session of a meeting of a public body, or may transmit the meeting through any medium, subject to reasonable requirements of the chair as to the number, placement and operation of equipment used so as not to interfere with the conduct of the meeting. At the beginning of the meeting the chair shall inform other attendees of any recordings.

(g) No person shall address a meeting of a public body without permission of the chair, and all persons shall, at the request of the chair, be silent. No person shall disrupt the proceedings of a meeting of a public body. If, after clear warning from the chair, a person continues to disrupt the proceedings, the chair may order the person to withdraw from the meeting and if the person does not withdraw, the chair may authorize a constable or other officer to remove the person from the meeting.

(h) Within 2 weeks of qualification for office, all persons serving on a public body shall certify, on a form prescribed by the attorney general, the receipt of a copy of the open meeting law, regulations promulgated under section 25 and a copy of the educational materials prepared by the attorney general explaining the

open meeting law and its application pursuant to section 19. Unless otherwise directed or approved by the attorney general, the appointing authority, city or town clerk or the executive director or other appropriate administrator of a state or regional body, or their designees, shall obtain certification from each person upon entering service and shall retain it subject to the applicable records retention schedule where the body maintains its official records. The certification shall be evidence that the member of a public body has read and understands the requirements of the open meeting law and the consequences of violating it.

Section 21. [EXECUTIVE SESSIONS]

(a) A public body may meet in executive session only for the following purposes:

1. To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. The individual to be discussed in such executive session shall be notified in writing by the public body at least 48 hours prior to the proposed executive session; provided, however, that notification may be waived upon written agreement of the parties. A public body shall hold an open session if the individual involved requests that the session be open. If an executive session is held, such individual shall have the following rights:

i. to be present at such executive session during deliberations which involve that individual;
ii. to have counsel or a representative of his own choosing present and attending for the purpose of advising the individual and not for the purpose of active participation in the executive session;
iii. to speak on his own behalf; and
iv. to cause an independent record to be created of said executive session by audio-recording or transcription, at the individual's expense.

The rights of an individual set forth in this paragraph are in addition to the rights that he may have from any other source, including, but not limited to, rights under any laws or collective bargaining agreements and the exercise or non-exercise of the individual rights under this section shall not be construed as a waiver of any rights of the individual.

2. To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;
3. To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares;
4. To discuss the deployment of security personnel or devices, or strategies with respect thereto;
5. To investigate charges of criminal misconduct or to consider the filing of criminal complaints;
6. To consider the purchase, exchange, lease or value of real property if the chair declares that an open meeting may have a detrimental effect on the negotiating position of the public body;
7. To comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements;

8. To consider or interview applicants for employment or appointment by a preliminary screening committee if the chair declares that an open meeting will have a detrimental effect in obtaining qualified applicants;

provided, however, that this clause shall not apply to any meeting, including meetings of a preliminary screening committee, to consider and interview applicants who have passed a prior preliminary screening;
9. To meet or confer with a mediator, as defined in section 23C of chapter 233, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or entity, provided that:

(i) any decision to participate in mediation shall be made in an open session and the parties, issues involved and purpose of the mediation shall be disclosed; and
(ii) no action shall be taken by any public body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open session; or

10. To discuss trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164, when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy.

(b) A public body may meet in closed session for 1 or more of the purposes enumerated in subsection (a) provided that:

1. the body has first convened in an open session pursuant to section 21;
2. a majority of members of the body have voted to go into executive session and the vote of each member is recorded by roll call and entered into the minutes;
3. before the executive session, the chair shall state the purpose for the executive session, stating all subjects that may be revealed without compromising the purpose for which the executive session was called;
4. the chair shall publicly announce whether the open session will reconvene at the conclusion of the executive session; and
5. accurate records of the executive session shall be maintained pursuant to section 23.

Section 22. [Meeting Minutes; Records]

(a) A public body shall create and maintain accurate minutes of all meetings, including executive sessions, setting forth the date, time and place, the members present or absent, a summary of the discussions on each subject, a list of documents and other exhibits used at the meeting, the decisions made and the actions taken at each meeting, including the record of all votes.

(b) No vote taken at an open session shall be by secret ballot. Any vote taken at an executive session shall be recorded by roll call and entered into the minutes.

(c) Minutes of all open sessions shall be created and approved in a timely manner. The minutes of an open session, if they exist and whether approved or in draft form, shall be made available upon request by any person within 10 days.

(d) Documents and other exhibits, such as photographs, recordings or maps, used by the body at an open or executive session shall, along with the minutes, be part of the official record of the session.

(e) The minutes of any open session, the notes, recordings or other materials used in the preparation of such minutes and all documents and exhibits used at the session, shall be public records in their entirety and not exempt from disclosure pursuant to any of the exemptions under clause Twenty-sixth of section 7 of chapter 4. Notwithstanding this paragraph, the following materials shall be exempt from disclosure to the public as personnel information: (1) materials used in a performance evaluation of an individual bearing on his professional competence, provided they were not created by the members of the body for the purposes of the evaluation; and (2) materials used in deliberations about employment or appointment of individuals, including applications and supporting materials; provided, however, that any resume submitted by an applicant shall not be exempt.

(f) The minutes of any executive session, the notes, recordings or other materials used in the preparation of such minutes and all documents and exhibits used at the session, may be withheld from disclosure to the public in their entirety under subclause (a) of clause Twenty-sixth of section 7 of chapter 4, as long as publication may defeat the lawful purposes of the executive session, but no longer; provided, however, that the executive session was held in compliance with section 21.

When the purpose for which a valid executive session was held has been served, the minutes, preparatory materials and documents and exhibits of the session shall be disclosed unless the attorney-client privilege or 1 or more of the exemptions under said clause Twenty-sixth of said section 7 of said chapter 4 apply to withhold these records, or any portion thereof, from disclosure.

For purposes of this subsection, if an executive session is held pursuant to clause (2) or (3) of subsections (a) of section 21, then the minutes, preparatory materials and documents and exhibits used at the session may be withheld from disclosure to the public in their entirety, unless and until such time as a litigating, negotiating or bargaining position is no longer jeopardized by such disclosure, at which time they shall be disclosed unless the attorney-client privilege or 1 or more of the exemptions under said clause Twenty-sixth of said section 7 of said chapter 4 apply to withhold these records, or any portion thereof, from disclosure.

(g)(1) The public body, or its chair or designee, shall, at reasonable intervals, review the minutes of executive sessions to determine if the provisions of this subsection warrant continued non-disclosure. Such determination shall be announced at the body's next meeting and such announcement shall be included in the minutes of that meeting.

(2) Upon request by any person to inspect or copy the minutes of an executive session or any portion thereof, the body shall respond to the request within 10 days following receipt and shall release any such minutes not covered by an exemption under subsection (f); provided, however, that if the body has not

performed a review pursuant to paragraph (1), the public body shall perform the review and release the non-exempt minutes, or any portion thereof, not later than the body's next meeting or 30 days, whichever first occurs. A public body shall not assess a fee for the time spent in its review.

Section 23. [Enforcement of Open Meeting Law; Complaints; Hearings; Civil Actions]

(a) Subject to appropriation, the attorney general shall interpret and enforce the open meeting law.

(b) At least 30 days prior to the filing of a complaint with the attorney general, the complainant shall file a written complaint with the public body, setting forth the circumstances which constitute the alleged violation and giving the body an opportunity to remedy the alleged violation; provided, however, that such complaint shall be filed within 30 days of the date of the alleged violation. The public body shall, within 14 business days of receipt of a complaint, send a copy of the complaint to the attorney general and notify the attorney general of any remedial action taken. Any remedial action taken by the public body in response to a complaint under this subsection shall not be admissible as evidence against the public body that a violation occurred in any later administrative or judicial proceeding relating to such alleged violation. The attorney general may authorize an extension of time to the public body for the purpose of taking remedial action upon the written request of the public body and a showing of good cause to grant the extension.

(c) Upon the receipt of a complaint by any person, the attorney general shall determine, in a timely manner, whether there has been a violation of the open meeting law. The attorney general may, and before imposing any civil penalty on a public body shall, hold a hearing on any such complaint. Following a determination that a violation has occurred, the attorney general shall determine whether the public body, 1 or more of the members, or both, are responsible and whether the violation was intentional or unintentional. Upon the finding of a violation, the attorney general may issue an order to:

(1) compel immediate and future compliance with the open meeting law;
(2) compel attendance at a training session authorized by the attorney general;
(3) nullify in whole or in part any action taken at the meeting;
(4) impose a civil penalty upon the public body of not more than $1,000 for each intentional violation;
(5) reinstate an employee without loss of compensation, seniority, tenure or other benefits;
(6) compel that minutes, records or other materials be made public; or
(7) prescribe other appropriate action.

(d) A public body or any member of a body aggrieved by any order issued pursuant to this section may, notwithstanding any general or special law to the contrary, obtain judicial review of the order only through an action in superior court seeking relief in the nature of certiorari; provided, however, that notwithstanding section 4 of chapter 249, any such action shall be commenced in superior court within 21 days of receipt of the order. Any order issued under this section shall be stayed pending judicial review; provided, however, that if the order nullifies an action of the public body, the body shall not implement such action pending judicial review.

(e) If any public body or member thereof shall fail to comply with the requirements set forth in any order issued by the attorney general, or shall fail to pay any civil penalty imposed within 21 days of the date of

issuance of such order or within 30 days following the decision of the superior court if judicial review of such order has been timely sought, the attorney general may file an action to compel compliance. Such action shall be filed in Suffolk superior court with respect to state public bodies and, with respect to all other public bodies, in the superior court in any county in which the public body acts or meets. If such body or member has not timely sought judicial review of the order, such order shall not be open to review in an action to compel compliance.

(f) As an alternative to the procedure in subsection (b), the attorney general or 3 or more registered voters may initiate a civil action to enforce the open meeting law.

Any action under this subsection shall be filed in Suffolk superior court with respect to state public bodies and, with respect to all other public bodies, in the superior court in any county in which the public body acts or meets.

In any action filed pursuant to this subsection, in addition to all other remedies available to the superior court, in law or in equity, the court shall have all of the remedies set forth in subsection (c).

In any action filed under this subsection, the order of notice on the complaint shall be returnable not later than 10 days after the filing and the complaint shall be heard and determined on the return day or on such day as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties; provided, however, that orders may be issued at any time on or after the filing of the complaint without notice when such order is necessary to fulfill the purposes of the open meeting law. In the hearing of any action under this subsection, the burden shall be on the respondent to show by a preponderance of the evidence that the action complained of in such complaint was in accordance with and authorized by the open meeting law; provided, however, that no civil penalty may be imposed on an individual absent proof that the action complained of violated the open meeting law.

(g) It shall be a defense to the imposition of a penalty that the public body, after full disclosure, acted in good faith compliance with the advice of the public body's legal counsel.

(h) Payment of civil penalties under this section paid to or received by the attorney general shall be paid into the general fund of the commonwealth.

Section 24. [Investigation by Attorney General of Violations of Open Meeting Law]

(a) Whenever the attorney general has reasonable cause to believe that a person, including any public body and any other state, regional, county, municipal or other governmental official or entity, has violated the open meeting law, the attorney general may conduct an investigation to ascertain whether in fact such person has violated the open meeting law. Upon notification of an investigation, any person, public body or any other state, regional, county, municipal or other governmental official or entity who is the subject of an investigation, shall make all information necessary to conduct such investigation available to the attorney general. In the event that the person, public body or any other state, regional, county, municipal or other governmental official or entity being investigated does not voluntarily provide relevant information to the attorney general within 30 days of receiving notice of the investigation, the attorney general may: (1) take testimony under oath concerning such alleged violation of the open meeting law; (2) examine or cause to be

examined any documentary material of whatever nature relevant to such alleged violation of the open meeting law; and (3) require attendance during such examination of documentary material of any person having knowledge of the documentary material and take testimony under oath or acknowledgment in respect of any such documentary material. Such testimony and examination shall take place in the county where such person resides or has a place of business or, if the parties consent or such person is a nonresident or has no place of business within the commonwealth, in Suffolk county.

(b) Notice of the time, place and cause of such taking of testimony, examination or attendance shall be given by the attorney general at least 10 days prior to the date of such taking of testimony or examination.

(c) Service of any such notice may be made by: (1) delivering a duly-executed copy to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of process on behalf of such person; (2) delivering a duly-executed copy to the principal place of business in the commonwealth of the person to be served; or (3) mailing by registered or certified mail a duly-executed copy addressed to the person to be served at the principal place of business in the commonwealth or, if said person has no place of business in the commonwealth, to his principal office or place of business.

(d) Each such notice shall: (1) state the time and place for the taking of testimony or the examination and the name and address of each person to be examined, if known and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs; (2) state the statute and section thereof, the alleged violation of which is under investigation and the general subject matter of the investigation; (3) describe the class or classes of documentary material to be produced thereunder with reasonable specificity, so as fairly to indicate the material demanded; (4) prescribe a return date within which the documentary material is to be produced; and (5) identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying.

(e) No such notice shall contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the commonwealth or require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of the commonwealth.

(f) Any documentary material or other information produced by any person pursuant to this section shall not, unless otherwise ordered by a court of the commonwealth for good cause shown, be disclosed to any person other than the authorized agent or representative of the attorney general, unless with the consent of the person producing the same; provided, however, that such material or information may be disclosed by the attorney general in court pleadings or other papers filed in court.

(g) At any time prior to the date specified in the notice, or within 21 days after the notice has been served, whichever period is shorter, the court may, upon motion for good cause shown, extend such reporting date or modify or set aside such demand or grant a protective order in accordance with the standards set forth in Rule 26(c) of the Massachusetts Rules of Civil Procedure. The motion may be filed in the superior court of the county in which the person served resides or has his usual place of business or in Suffolk county. This section shall not be applicable to any criminal proceeding nor shall information obtained under the authority of this section be admissible in evidence in any criminal prosecution for substantially identical transactions.

Section 25. [REGULATIONS, LETTER RULINGS, ADVISORY OPINIONS]

(a) The attorney general shall have the authority to promulgate rules and regulations to carry out enforcement of the open meeting law.

(b) The attorney general shall have the authority to interpret the open meeting law and to issue written letter rulings or advisory opinions according to rules established under this section.

CERTIFICATE OF RECEIPT OF OPEN MEETING LAW MATERIALS

I, _____, who qualified for the office of
(Name)

_____, on _____, certify pursuant
(Office) (Date)

to G.L. c. 30A, § 20(h), that I have received copies of the following Open Meeting Law materials:

1) the Open Meeting Law, G.L. c. 30A, §§ 18-25;

2) regulations promulgated by the Attorney General under G.L. c. 30A, § 25; and

3) educational materials promulgated by the Attorney General under G.L. c. 30A, § 19(b), explaining the Open Meeting Law and its application.

I have read and understand the requirements of the Open Meeting Law and the consequences of violating it. I further understand that the materials I have received may be revised or updated from time to time, and that I have a continuing obligation to implement any changes in the Open Meeting Law during my term of office.

_____
(Name)

_____
(Name of Public Body)

_____
(Date)

Pursuant to G.L. c. 30A, § 20(h), an executed copy of this certificate shall be retained, according to the relevant records retention schedule, by the appointing authority, city or town clerk, or the executive director or other appropriate administrator of a state or regional body, or their designee.