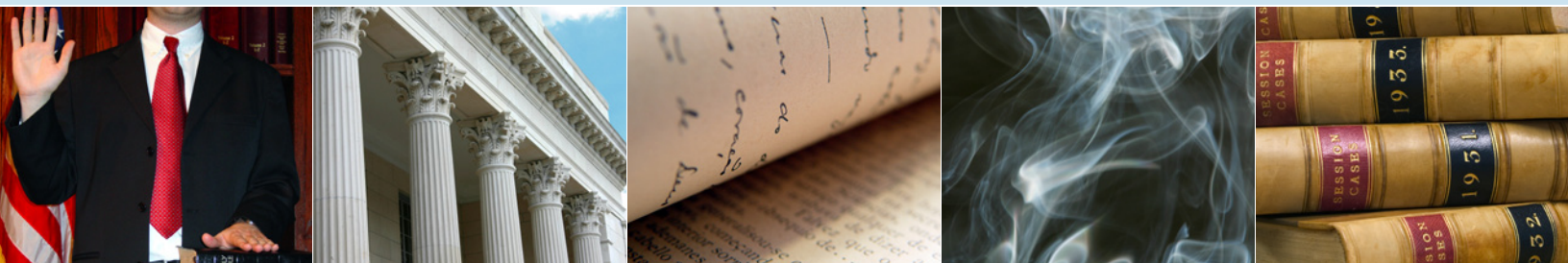


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Strategies to Combat Illicit Tobacco Trade

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Law. Health. Justice.

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Strategies to Combat Illicit Tobacco Trade

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Introduction

Illicit tobacco trade is a significant global problem. Experts estimate that more than 10 percent of cigarettes bought around the world are sold illegally,¹ and in the United States alone smuggling costs about \$5 billion per year in lost state tax revenues.² The contraband tobacco trade is one of the most complex tobacco control issues because it is intertwined with so many other political, legal, and policy concerns. High tobacco taxes have a significant positive impact on public health³ and the evasion of tobacco taxes directly undermines the documented ability of these taxes to reduce smoking rates. Other, more indirect effects include shielding tobacco purchases from state requirements relating to customer age verification, licensing, advertising, manufacturing standards, and record keeping.

This law synopsis focuses on illicit tobacco trade within and across the borders of the United States. It explains how illegal tobacco trade works and why it is appealing, its impact on state revenues, and the past complicity of the tobacco industry in illicit trade. It explores the complex role played by Native American lands, tribes, and businesses in tax-free sales and outlines various law enforcement approaches to combat smuggling. It also recognizes the growing connection between smug-

Key Points

- Illicit tobacco trade in the U.S. includes direct smuggling of tobacco products into the country; introducing products designated for export only into the American domestic market; manufacturing tobacco products without a license; buying products in one state for illegal resale in another; buying cigarettes on Native American territory for illegal resale to non-tribal members and buying from websites that do not charge taxes.
- Smuggling tobacco products is highly profitable and the penalties for smuggling tobacco are lenient, which makes illicit tobacco trade a low-risk crime.
- Tax-free tobacco sales in Native American smoke shops are a major problem in the United States. It is illegal for Native American tribes to sell untaxed tobacco products on their territory to non-tribal members, but states find it extremely difficult to address the widespread lack of compliance given their lack of legal authority over Native American tribes.
- Tobacco smuggling operations have been linked to numerous terrorist organizations globally, and evidence shows that cigarette smuggling profits have financed terrorism around the world.
- Key federal laws that address the illegal tobacco trade are the Jenkins Act, Contraband Cigarette Trafficking Act, PACT Act, and the Family Smoking Prevention and Tobacco Control Act. Multiple federal agencies are responsible for enforcing these laws.
- To combat illicit tobacco trade, state, local and tribal governments and health advocacy organizations need to coordinate and cooperate at many different levels to support federal legislation and also to increase anti-smuggling efforts in their own jurisdictions.



Smuggling tobacco products is highly profitable and the penalties are lenient.

gling and national security issues and describes the federal agencies and laws that address it. Finally, this law synopsis suggests ways in which state and local governments as well as health advocacy organizations can contribute to the fight against illicit tobacco trade.

Q: How does the illicit tobacco trade work, and how is smuggling related to tobacco tax avoidance and evasion?

A: The term “smuggling” means illegal trade across borders,⁴ while “illicit trade” is a broader term that encompasses “any practice or conduct prohibited by law and which relates to production, shipment, receipt, possession, distribution, sale or purchase.”⁵ There are numerous methods of contraband tobacco trade in the United States: direct smuggling of product into the country; introducing products designated for export only into the American domestic

market; manufacturing tobacco products without a license; buying products in one state for illegal resale in another; buying cigarettes on Native American territory for illegal resale to non-Natives; and buying from web sites that do not charge taxes. Another strategy involves underreporting production or sales to the state to avoid taxes.⁶

Tobacco tax rates in the United States have been rising for more than a decade. For example, the average state tax increase between 1998 and 2002 was 90 percent.⁷ Higher tax rates lead to both tax avoidance (taking advantage of legal loopholes or exemptions from tax) and tax evasion (illegally avoiding paying a required tax).⁸ Differences in tobacco tax rates among states can create an incentive to transport tobacco products from low-tax jurisdictions to higher ones. To purchase cheaper cigarettes for personal use, individuals might cross state lines

to patronize stores in lower-tax states, or they might go to commissaries on military bases or to smoke shops on Native American reservations where they can avoid paying state taxes. “Bootlegging” occurs when individuals or small groups purchase a threshold amount of tobacco products in a low-tax state for illegal resale in a high-tax state.⁹ For example, there is a high bootlegging rate between Virginia, which has very low tobacco taxes, and New York, which has among the highest.¹⁰

Internet sales of tobacco products also play a role in tax evasion. The sites traditionally have not charged applicable taxes, offering products at much lower prices and undermining states’ public health efforts.¹¹ It is also difficult to verify a customer’s age on the Internet, increasing minors’ access to tobacco.¹² The number of websites selling tax-free cigarettes to Americans mushroomed from 88 in 2000 to 772 in 2006.¹³ Frustrated by states’ lack of ability to directly stop the flow of untaxed merchandise, in 2005 the National Association of Attorneys General (NAAG) reached agreements with credit card companies to refuse to process illegal Internet sales,¹⁴ and later that year several mail delivery services agreed to stop cigarette deliveries to individual Americans under pressure from NAAG.¹⁵ In 2008 California made a similar agreement with a bank that had been processing a large volume of illegal Internet sales.¹⁶

Variations in tax rates are only one of the factors that drive smuggling. Illicit trade and tax evasion occur even when tax rates in the involved areas are similar, and in fact countries with the lowest cigarette prices tend to have higher smuggling rates.¹⁷ Large-scale smuggling tends to involve organized crime and sophisticated local distribution systems.¹⁸ While bootleggers rely on tax differences to produce profit, large-scale smugglers typically avoid taxes by diverting products tax-free (e.g., when they are in transit between countries).¹⁹ Their highly organized operations are heavily influenced by the ease of operating in

a specific area: the presence of organized crime networks; the level of political corruption in the area; the severity of the penalties they face; the extent to which the local tobacco industry facilitates smuggling; etc.²⁰

In the United States, tax-free individual purchases for personal use and bootlegging are small problems compared to larger-scale organized smuggling.²¹ Small-scale evasion of tobacco taxes tends to spike after a tax increase and then gradually fade, likely because smokers prefer the convenience of local purchases to cheaper but less convenient purchases that require pre-planning and/or buying in bulk.²²

Q: Why smuggle a product that can be purchased legally around the world?

A: There are two primary reasons:

Smuggling tobacco products is highly profitable.

Unlike those who run smuggling operations involving illegal or highly regulated products like drugs and weapons, tobacco smugglers’ primary motivation is to avoid paying taxes. Smuggling has a very high profit margin if taxes can be avoided anywhere along the supply chain.²³ For example, a wholesaler can profit from selling tax-free tobacco products to retailers and distributors. A retailer can boost revenue by buying tax-free cigarettes from smugglers and then selling them to customers at regular rates.²⁴ In 2011, Maryland’s Field Enforcement Director noted that “the amount of money is phenomenal. It’s tens of thousands of dollars in any particular run.”²⁵ Even small-time smugglers can make as much as \$7,000 per day.²⁶ Smuggling a truckload (48,000 cartons) of cigarettes purchased in Virginia for illegal resale in New York City can net a profit of \$2 million.²⁷ Similarly, it costs about \$100,000 to manufacture a shipping container of cigarettes (10 million cigarettes) in China that can bring in \$2 million when sold in the United States.²⁸ In some cases, it is more profitable to smuggle tobacco than to deal

drugs.²⁹ For example, in one government sting, two suspects willingly traded undercover agents a kilogram of cocaine (worth about \$30,000) for 3,000 cartons of cigarettes,³⁰ and in others offered marijuana and weapons in exchange for untaxed cigarettes.³¹

The penalties for smuggling tobacco are lenient, which makes illicit tobacco trade a low-risk crime.³² In many cases, contraband cigarettes are simply confiscated, resulting in a loss of profit but no real legal deterrent.³³ Jail time is typically only a few years unless the crime involves guns or drugs.³⁴ The typical worst-case scenario for smugglers is a relatively short jail sentence that will enable them to resume lucrative smuggling operations soon after release.³⁵ Recent laws have begun to increase penalties for tobacco smuggling (see discussion *infra*).

The high profit potential and low risk of smuggling tobacco are especially appealing to criminal organizations with already established smuggling operations for other substances (e.g., illegal drugs or arms), which can easily use exist-

ing contacts and resources to establish tobacco smuggling routes.³⁶

Q: How do tobacco taxes and illicit trade affect state revenues?

A: Tobacco taxes have proven to be a valuable source of revenue for state and local governments. Even though many states do not use all or even some of this revenue for tobacco control programs, raising tobacco taxes benefits both health and financial goals. While a tobacco tax imposed for any reason has a positive effect on public health by reducing smoking rates, states may consider tobacco taxes separately from their health objectives. The claim that lowering or eliminating tobacco taxes will significantly reduce any type of smuggling is mostly false (as discussed below), and, in any case, states typically profit more from taxes than they lose from smuggling. Nonetheless, illicit trade has a negative impact on states' bottom line; states lose billions of dollars each year as a result of unpaid tobacco taxes.³⁷ Although tobacco tax collection enforcement costs can be high, especially when

The tobacco industry tends to view illegal markets as just another kind of business and has little incentive to discourage contraband sales.



dealing with Internet transactions, lost revenue from tobacco taxes combined with other costs like health care expenditures make enforcement efforts beneficial.³⁸

Q: Why hasn't the tobacco industry tried to stop illicit trade?

A: Illicit tobacco trade benefits the industry in many ways.³⁹ It makes tobacco products more affordable for consumers, which increases demand and can foster brand loyalty. In addition, it is much easier for minors to purchase illegal cigarettes because vendors who operate in the shadows of state regulations seldom verify customer age, ensnaring a new generation of smokers. The tobacco industry tends to view illegal markets as just another kind of business⁴⁰ and has little incentive to discourage contraband sales.⁴¹

Historically, the tobacco industry has been complicit in tobacco smuggling, in many cases knowingly providing its products to smugglers.⁴² For example, the industry willingly supplied cigarettes for a black market between Canada and the United States.⁴³ Numerous examples of active industry involvement in illicit trade, sometimes documented in internal company documents, have occurred around the world.⁴⁴ Legal crackdowns have improved the situation in Europe and North America, although experts suspect the industry continues to work with smugglers in other parts of the world.⁴⁵

The industry publicly claims that states should lower tobacco taxes because lower tax rates will decrease smuggling,⁴⁶ but tobacco companies are aware that this assertion is primarily false.⁴⁷ Higher tobacco taxes have been demonstrated to decrease smoking rates while increasing government revenues.⁴⁸ While smuggling certainly reduces tobacco tax revenues,⁴⁹ it does not do so to an extent that lowering or eliminating tobacco taxes would be a desirable option. Further, research in European countries did not find a correlation between high taxes and high

smuggling rates because large-scale illicit trade involves complete tax evasion rather than merely exploiting differences in tax rates.⁵⁰ At the same time the industry claims that higher taxes will increase smuggling rates, it has itself raised base prices without expressing such concerns.⁵¹ The tobacco industry has also claimed that high cigarette taxes have detrimental economic consequences, such as hurting local businesses, but research suggests that such concerns are often false or exaggerated.⁵²

Q: What do tobacco taxes and smuggling have to do with Native Americans?

A: Native American tribes located within the United States are protected by sovereign immunity. The United States Congress alone can limit tribes' legal independence; states do not have legal authority over Indian tribes located within their borders⁵³ and cannot bring enforcement lawsuits against tribes.⁵⁴ The unique status of Native American lands creates many legal difficulties for states that want to address problems related to tobacco smuggling because they must rely on Congress to regulate business activities on reservations. It is legal to sell tobacco products on a Native American reservation tax-free only to tribal members. However, states find it extremely difficult to collect taxes on sales to non-Natives given their lack of authority over Native American territory and the widespread lack of compliance among Native American shop owners hoping to profit from non-Native customers.

It is clear that some tribes are selling large amounts of cigarettes to non-Natives because of the excessive volume of their imports. The number of cigarettes imported by some tribes would be enough for every reservation resident, including children and infants, to smoke hundreds of packs a day.⁵⁵ For example, a tiny Long Island reservation with 283 residents imported 90 million cigarettes in 2000 and more than 2 billion in 2007.⁵⁶ The problem is especially

prevalent in New York, where tax-free purchases on reservations are estimated to comprise about a third of all brand-name sales.⁵⁷ In 2008, seven wholesalers, six of which were located in New York, supplied more than 90 percent of cigarettes sold on Native American territory.⁵⁸ The Seneca Nation tribe in western New York has been a major source of tax-free cigarette sales around the country.⁵⁹ In the mid-2000s, two Seneca reservations housed more than 75 percent of Native American tobacco websites and 95 percent of the tribe's tobacco sales took place online or over the phone.⁶⁰

The ongoing battle between the state of New York and its Native American retailers over tobacco tax collection illustrates the complexity of this issue. The United States Supreme Court ruled in 1976⁶¹ and reaffirmed in 1994⁶² that states can impose taxes on reservation sales to non-tribal members. Despite these decisions, New York has long declined to enforce tax-avoidance laws against Native American tribes,⁶³ who have fiercely resisted state attempts to collect tax on their sales. Facing budget shortfalls in 2010, the state passed a law specifying mechanisms for collecting tobacco taxes on Native sales to non-Natives. Much litigation and a stormy political battle followed, but ultimately a federal court ruled in 2011 that New York could proceed with tax collection.⁶⁴

Q: Which law enforcement approaches are most effective against smuggling?

A: The U.S. Government Accountability Office notes that smugglers rapidly alter their methods of operation in response to external factors like higher taxes, new laws, and varying levels of law enforcement efforts in the region.⁶⁵ The difficulty of combating smuggling is commonly referred to as a “whack-a-mole” problem because of the need to constantly change tactics.⁶⁶

Another challenge is that law enforcement cannot always rely on affected communities for sup-

port. Low-income smokers may be supportive of smugglers in their neighborhoods. High taxes have been shown to dissuade many smokers from purchasing tobacco, but some highly addicted people on limited budgets who would likely react to a tax increase by skimping on other necessities might view smuggling as a reasonable response to skyrocketing tobacco prices.⁶⁷

Tobacco smuggling is driven by supply,⁶⁸ so the key to controlling it is to cut off the source.⁶⁹ Because tobacco is a legal product, tracking contraband sales should be much easier than tracking smuggling of illegal products.⁷⁰ Producers and distributors have a large amount of power to address smuggling, and if they are held responsible for controlling the process, great progress could be made in halting the underground tobacco trade.⁷¹

Some states have been making progress with approaches tailored to their specific needs. For example, California's successful attempts to decrease smuggling included a 2003 law that required a license to sell tobacco products and a digital tax stamp law implemented in 2005 that may have led to the recovery of as much as \$24 million.⁷² Despite a reluctance to take on the tobacco industry in court,⁷³ in 2008 New York passed a law that required manufacturers to verify that wholesalers were not providing tax-free cigarettes to Native American shops for sales to non-Natives.⁷⁴ New York also was a pioneer in banning direct-to-consumer deliveries of cigarettes to stop illegal Internet purchases.⁷⁵ A federal court upheld the ban against challenges by the tobacco industry⁷⁶ and other states have since passed similar laws.

Combating tobacco smuggling requires complex coordination at many levels, including internationally.⁷⁷ Through the World Health Organization's Framework Convention on Tobacco Control (“FCTC”), about 135 countries have negotiated an international treaty to address smuggling⁷⁸ that is expected to be ratified around



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2014.⁷⁹ Provisions include requiring licensing of manufacturers and traceable marking on packages, tracking of Internet and duty-free sales, and establishing formal cooperation among countries conducting investigations of contraband tobacco trade.⁸⁰ The United States was not a party to the negotiations⁸¹ but the Prevent All Cigarette Trafficking (PACT) Act (see below) will address many of its national concerns.

Q: What does illicit tobacco trade have to do with national security?

A: The illicit tobacco trade has ramifications that extend beyond the harmful effects of smoking. Tobacco smuggling operations have been linked to numerous terrorist organizations globally, and there is ample evidence that cigarette smuggling profits often finance terrorism around the world. Authorities have traced cigarette smuggling funds to terrorist organizations and militant groups,⁸² making smuggling a much higher priority for the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”).⁸³ Other terrorist organizations financed by contraband

tobacco trade include the Irish Republican Army, the Taliban, the Kurdistan Workers’ Party, FARC (Revolutionary Armed Forces of Colombia), and the CNDP, a Congolese rebel group.⁸⁴ Unfortunately, terrorism is relatively inexpensive compared to profits from smuggling. The estimated cost of the 2005 London subway bombing was \$15,000, while all of the attacks on the United States on September 11, 2001 are estimated to have cost between \$400,000 and \$500,000.⁸⁵ If governments at any level reduce funding for tobacco control programs when faced with limited financial resources, national security concerns should ensure that addressing contraband tobacco remains a high priority.

Q: Which federal agencies are involved in policing illegal tobacco trade?

A: Many tobacco control issues can be addressed at the local level: for example, a state, city or town can prohibit smoking in restaurants. In contrast, most of the laws directly pertaining to smuggling are federal laws enforced by federal agencies. When state and local authorities are involved,

efforts must be coordinated to monitor and control large multistate and multinational smuggling operations effectively. A further complication is that multiple federal agencies are responsible for enforcement of laws that affect smuggling.

The Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”), which traditionally performed most of the federal government’s tobacco-related functions, was reorganized in January 2003 in accordance with the Homeland Security Act.⁸⁶ The ATF, the primary agency charged with combating “illegal diversion” of tobacco, now operates under the auspices of the Department of Justice. The Alcohol and Tobacco Tax and Trade Bureau (TTB), a branch of the Department of the Treasury, is responsible for collecting tobacco taxes. Other federal agencies are more tangentially involved, as explained below.

Q: What are the primary federal laws that address illegal tobacco trade?

A: *Jenkins Act.* The Jenkins Act, passed in 1949, requires sellers who ship cigarettes across state lines to report to the state where they are shipped the names and addresses of recipients as well as the quantities and brands shipped.⁸⁷ However, prior to the passage of the PACT Act, this law was rarely enforced by the federal government. State governments found it difficult to ensure compliance with related state laws, facing legal challenges to their jurisdiction over out-of-state or international Internet sellers, lack of authority to hold sovereign tribes accountable, and problems with identifying and prosecuting Internet suppliers.⁸⁸ Many Internet sellers simply ignored Jenkins Act requirements.⁸⁹

Contraband Cigarette Trafficking Act. This law penalizes illicit trade, establishes threshold amounts for contraband, and sets forth record keeping requirements for transactions that exceed the threshold.⁹⁰ The USA PATRIOT Improvement and Reauthorization Act of 2005 lowered threshold amounts to more than 10,000

cigarettes and/or 500 single-unit packages of smokeless tobacco.⁹¹ Enforcement authority was expanded by the PACT Act.

PACT Act. The Prevent All Cigarette Trafficking (PACT) Act, passed in 2009 to update and close gaps in the Jenkins Act, directly addressed public health advocates’ concerns and codified many of their recommendations. It applies reporting requirements for tobacco taxes to sales, advertising of sales, and the shipping and transporting of cigarettes and smokeless tobacco, including shipment into a state, city, town, or Native American reservation that taxes the product being shipped.⁹²

Sellers who mail tobacco products to customers must pay the relevant taxes, comply with the laws in force at their customers’ location, register with and make periodic reports to the state, and verify customer age at both purchase and delivery. They cannot ship goods weighing more than 10 pounds and must keep records of all deliveries for four years. The Act also provides state attorneys general, local governments, Native American tribes, manufacturers, importers, and export warehouses with the ability to sue violators of the Act. Penalties for violations of the Act include fines and up to three years in prison. Civil penalties are 2 percent of annual gross sales of tobacco products or \$5000 for a first violation and \$10,000 for further offenses, whichever is greater.⁹³

Addressing the United States Postal Service’s inability to comply with tracking and age verification requirements,⁹⁴ the Act designated cigarettes and smokeless tobacco to be “non-mailable” materials.⁹⁵ It also bans delivery of packages from noncompliant sellers by common carriers such as UPS and FedEx.

The original version of the law allowed states to sue any noncompliant Internet sellers, including those on Native American lands. As discussed above, Native American businesses are not subject to enforcement lawsuits by the states, so the

original law would have significantly expanded state powers. Protests by tribal governments led to a narrowing of the law to preserve tribal sovereignty as subject only to Congress.⁹⁶ The final version of the Act does not “affect, amend or modify” any existing agreements with Indian tribes,⁹⁷ preventing states from prosecuting Native American tribes for not complying with tax-collecting requirements, although it explicitly allows agreements between tribes and state or local governments regarding tobacco tax collection. The Act allows tribes as well as states to bring enforcement lawsuits. Tobacco tax reporting laws already require Native American Internet sellers to report sales to their customers’ states, and the Act expands this requirement to mandate Internet sellers to report sales delivered to tribal lands to Native American tax authorities to facilitate collection of tribal taxes.⁹⁸

The Act is enforced mostly by ATF, although other agencies, such as the U.S. Postal Service, are also involved. It authorizes the ATF to inspect the records and products of delivery sellers.⁹⁹

Family Smoking Prevention and Tobacco Control Act. The Tobacco Control Act of 2009 authorized the Food and Drug Administration to regulate tobacco products. Title III of this law deals with tobacco smuggling.¹⁰⁰ It sets forth new requirements for labeling (e.g., “sale only allowed in the United States”), inspection, and records to track merchandise and directs the Comptroller General to conduct a study of cross-border tobacco trade. It also requires manufacturers and distributors to report known or reasonably suspected tobacco smuggling or tax evasion.

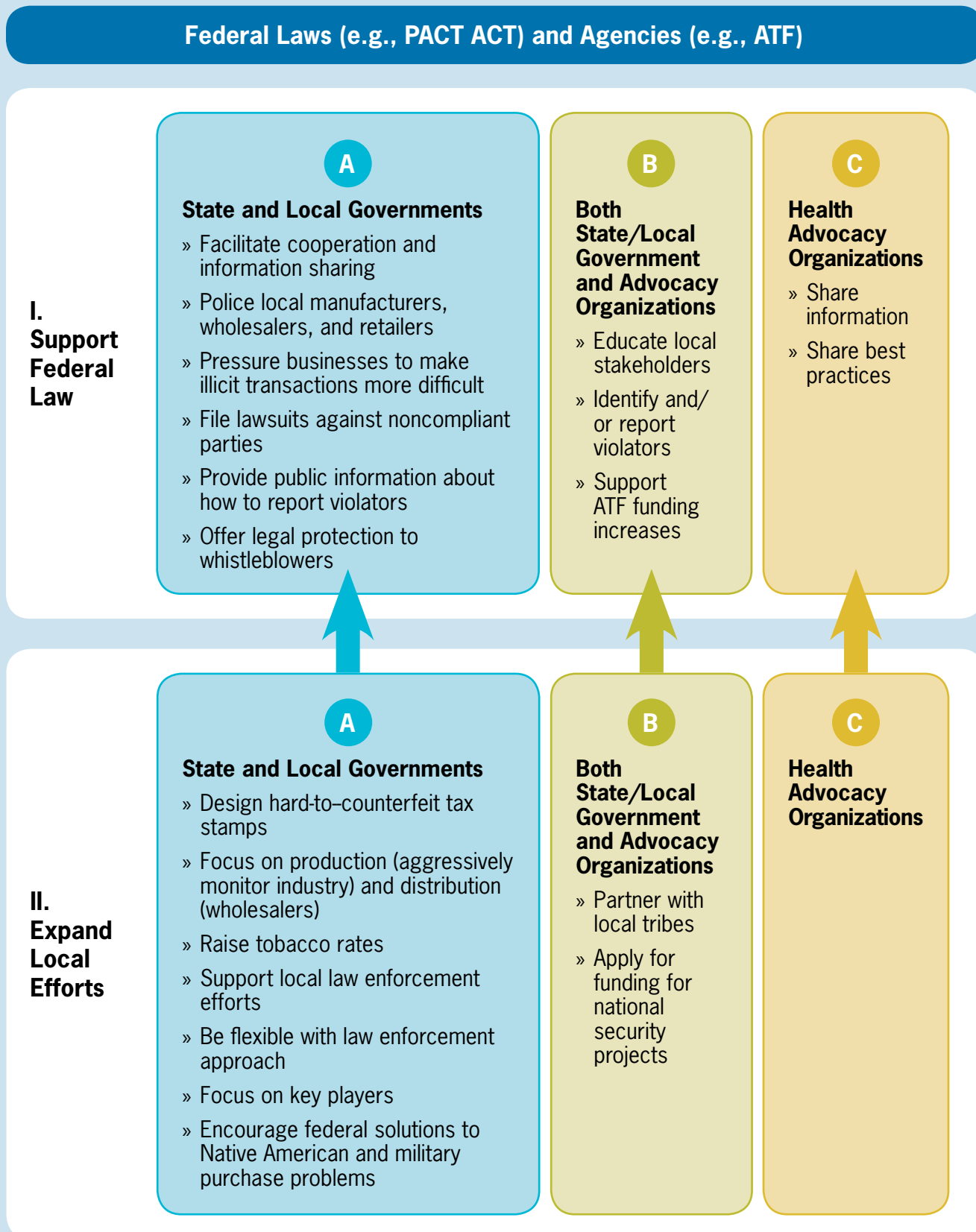
Other applicable federal laws. The Federal Trade Commission enforces the Fair Packaging and

Labeling Act, which requires information on packages and labels to be accurate and also regulates package warnings and tobacco advertising.¹⁰¹ U.S. Customs and Border Protection collects taxes and fees, imposes record keeping requirements,¹⁰² and enforces other anti-smuggling laws such as a requirement that imports be marked with the name of the country of origin.¹⁰³ American-made cigarettes designated for export cannot be brought back into the United States by anyone except the original manufacturer or a warehouse proprietor it has authorized to do so. There is no federal license to sell tobacco products, but TTB must approve manufacturers and importers.

Q: What can state and local governments or health advocacy organizations do to combat the illicit tobacco trade?

A: State and local governments and health advocacy organizations can combat illegal tobacco trade in several ways. The PACT Act expands the powers of state, local, and tribal governments, giving any of these entities that charge a tobacco tax broad enforcement powers and making pre-emption issues less likely. A primary goal of state and local governments should be to support this federal legislation through coordination and cooperation at many different levels. Another primary goal should be to increase anti-smuggling efforts in their own jurisdictions. If many local areas step up their own efforts, the cumulative effect could be quite powerful. Health advocacy organizations can also play a key role by tailoring current programs and/or developing new projects that help all levels of government implement solutions. Figure 1 provides an overview of these options.

Figure 1. Overview of State and Local Options to Combat Illicit Tobacco Trade



I. Support the new federal legislation

Public health advocates have long called for increased penalties, better recordkeeping requirements, reporting requirements for delivery sellers, verification of Internet buyers' age, and registration with the state. The PACT Act addresses all of these issues and has the potential to make a real impact on smuggling.

A. State and Local Governments

- ***Facilitate cooperation and information sharing.*** Coordination is a key element in combating illicit trade, which is very rarely limited to a local area and frequently involves international rings. Local, state, and federal governments need a very high level of communication and cooperation if their efforts are to be effective, and they should also work closely with health advocacy groups when possible.
- ***Police manufacturers, wholesalers, and retailers within the jurisdiction.*** While smuggling involves an interstate or international supply chain, states and localities have jurisdiction over involved local parties.
- ***Pressure economic entities that might be involved, even unwittingly, in facilitating smuggling to adopt business practices that make illicit trade more difficult.*** As mentioned above, in the past state attorneys general have worked with businesses such as credit card companies, common carriers, and banks to block illegal tobacco transactions. Even in circumstances in which state and local governments cannot directly address smuggling issues because they lack jurisdiction, this type of indirect action can help.
- ***Bring lawsuits against noncompliant parties.*** Taking advantage of this newly granted right under the PACT Act will help send a powerful message that the state will not tolerate violators, and that it will expose noncompliant parties to bad publicity and create a financial disincentive to smuggle.

- ***Publicize information about how to anonymously report suspected illicit trade.*** Maintain a hotline, email address or other simple way for people to communicate with law enforcement if they have information about suspected smuggling or other illegal activity.¹⁰⁴
- ***Legally protect whistleblowers who report illicit activity*** to remove any disincentive to report suspicious behavior to law enforcement.¹⁰⁵ There are numerous state and federal laws protecting whistleblowers, although most pertain to employees and it is not clear whether the typical whistleblower in a tobacco smuggling case would be an employee of an involved party. If so, more specific state and federal laws would be helpful. Non-employee whistleblowers would also benefit from protection against lawsuits, etc. Smuggling's connection to terrorism may make it easier politically to pass laws protecting those who report suspected illegal activity.

B. Both State/Local Governments and Advocacy Organizations

- ***Educate local stakeholders about the PACT Act.*** While large businesses should already be familiar with the Act, small businesses, local leaders, aldermen, and others would likely welcome a convenient source of information about PACT. In addition, it may be useful for local organizations and citizens to be aware of key provisions and requirements.
- ***Assist the federal government in identifying violators.*** Local law enforcement is more likely to be familiar with local criminal operations and suspects and to be aware when something has changed or activity seems out of the ordinary. This type of intelligence is critical in identifying smugglers and collecting evidence.
- ***Support increased funding for ATF's tobacco-related enforcement activities.*** Close ties

between large-scale smuggling and terrorist activity should now make tobacco smuggling investigations a top priority.

C. Health Advocacy Organizations

- ***Share information and best practices.*** Health advocacy groups, particularly those that are

nationwide organizations organized into local chapters, are well-placed to collect data from their own organizations both to improve their own efforts and to assist all levels of government.

II. Expand local efforts to combat smuggling

While supporting federal law is key, local solutions that target specific issues in the region are also necessary. Preemption is unlikely to be much of a barrier because the PACT Act was designed to expand the power of state, local, and tribal governments and explicitly does not affect any existing rights that state or local governments already had to enforce anti-smuggling laws. Although they do not have enforcement powers, health advocacy organizations can also be active participants by supporting and enhancing local efforts as well as facilitating cooperation and coordination.

A. State and Local Governments

- ***Design hard-to-counterfeit tax stamps*** and implement strict requirements about their use. This approach can simplify inspections, aid in detecting violations, and facilitate state tobacco tax collection.
- ***Focus on production and distribution.*** Parties at these initial stages of the tobacco trade can have a tremendous influence on what happens later and should be held accountable for any downstream activity within their sphere of influence. In particular, local governments should aggressively monitor the tobacco industry. There has already been much improvement in addressing North America and European smuggling issues based on industry accountability. It is simply not true that the industry cannot exert a great deal of control over illicit tobacco traffic.

- ***Raise tobacco taxes.*** States (and localities to the extent that they are able) with low tobacco tax rates should raise them. There is little downside to this approach: it has proven public health benefits, generates revenue, and can reduce smuggling motivated by tax differentials in the local region.

- » Emphasizing that tobacco taxes are a major source of state revenue should increase political support.
- » Lowering taxes harms public health, decreases revenue more than reducing smuggling increases it, and provides additional incentive for the tobacco industry to spread misinformation. Tax rate differences are not the primary problem in large-scale smuggling. To the extent that they are an important factor, it makes much more sense for low-tax jurisdictions to raise their rates rather than vice versa.

- ***Recognize the importance of strong law enforcement.*** General law enforcement and anti-corruption efforts play an important role in addressing illicit tobacco sales.
- » ***Support and prioritize combating organized crime and political corruption.*** The more political corruption and organized crime in an area, the more appealing it will be to tobacco smugglers. These types of factors may be less obvious influences than local tobacco tax rates, but they are at least as important and in some cases more important.

- » ***Work with customs near the border.*** Border states and localities need to increase awareness of tobacco smuggling issues and work closely with U.S. Customs to generate effective local strategies.
- ***Be flexible with law enforcement approaches.*** As laws and policies change, so will the methods of smuggling. Be aware of different tactics smugglers might use and ready to adjust enforcement accordingly.
- ***Stay focused on key players.*** States should prioritize the largest, most organized operations. While individual tax evasion tends to increase after a tax hike, it usually wanes rather quickly as consumers seek convenience over savings. Pursuing small-time smugglers or individuals usually is not a good use of law enforcement resources because it does not address the underlying causes or effects of the problem, seems particularly draconian for a legal product and is thus politically unpopular, and is exceedingly difficult and impractical to monitor. Local governments should ensure that their law enforcement efforts target the large-scale organized operations and key players that pose the real threat to public health.
- ***Encourage federal solutions to problems with sales on Native American lands and military commissaries.*** When a problem is beyond the legal reach of a state or locality, it can still play a role in raising public awareness of the problem, explaining the challenges it faces, and increasing support for a federal response.

B. Both State/Local Governments and Advocacy Organizations

- ***Partner with local tribal governments.*** State and local governments and organizations must partner with sovereign Native American tribes to combat smuggling.

» ***Allow tribes to keep any state taxes they collect.*** This approach has been tried in some states in order to equalize the prices on reservations

and surrounding areas.¹⁰⁶ In return for tribes collecting state taxes on reservation sales, the state agrees that the tribe can keep the tax revenues. The state still loses tax revenues but benefits from a reduction in non-Natives traveling to reservations to purchase tax-free tobacco products.

- » ***Offer other benefits to tribes.*** Similarly, the state might offer other state-sponsored benefits to tribe members in exchange for tobacco tax collection. The offerings could be tailored to local needs and resources.
- » ***Support Native American public health programs.*** Many parties in disputes about tobacco taxes conceptualize the issue as solely financial. However, Native Americans themselves have the highest smoking rates in the United States.¹⁰⁷ A proactive focus on Native American health issues has long been lacking in debates about smuggling and would benefit everyone. States might offer to fund Native health programs in exchange for tax collection compliance. Health advocacy organizations can also offer health programs tailored to the needs of local tribes. Such programs could work with the Indian Health Service to address unmet needs due to lack of funding and might offer assistance with smoking cessation and provide education about the harmful effects of smoking and the role of taxes in reducing smoking rates and associated health problems.

- ***Apply for funding opportunities for state and local projects related to national security.*** As concerns about national security increase, so has funding. Use the connection between illicit tobacco and national security issues to obtain local grants that are available for national security projects. Combating tobacco smuggling can often benefit both public health and national security.

Conclusion

Illicit tobacco trade, which includes smuggling, bootlegging, and related tax evasion schemes, is a major global problem. Given the high profit potential and lenient penalties for tobacco smuggling, this activity is often regarded as a low-risk crime by criminal organizations. While it is clear that some Native American tribes are selling large amounts of cigarettes to non-tribal members, the unique status of Native American tribes creates many barriers to state enforcement. States must develop partnerships with local tribal governments, involving them as active participants in state efforts to combat smuggling. Not only does illicit tobacco trade have a financial impact on states, which lose billions of dollars annually due to unpaid tobacco taxes, but contraband tobacco operations have been linked to terrorist organizations, which jeopardizes national security. Although several federal laws address

illegal tobacco trade, enforcement is challenging and requires complex coordination with many federal agencies. Local, state and tribal governments can help combat illicit tobacco trade by expanding local efforts to address this problem in their jurisdictions and by coordinating with and sharing information with federal enforcement agencies. Health advocacy organizations can also play a role in supporting law enforcement efforts by sharing information and best practices.

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About the Tobacco Control Legal Consortium

The [Tobacco Control Legal Consortium](#) is a network of legal programs supporting tobacco control policy change throughout the United States. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Our legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support.