

# Virginia State Crime Commission

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## Illegal Cigarette Trafficking

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2013

# Illegal Cigarette Trafficking

## Executive Summary

During the 2012 Regular Session of the Virginia General Assembly, Senate Joint Resolution 21 was enacted, which directed the Crime Commission to study and report on a number of topics involving the subject of illegal cigarette trafficking. The Crime Commission was mandated to determine: why illegal cigarette trafficking occurs, the methods and strategies used by traffickers, the beneficiaries of trafficking, the health implications of non-regulated cigarettes, methods used to counterfeit cigarettes and tax stamps, potential uses of information technology to prevent cigarette trafficking, and statutory options that Virginia could adopt to combat the problem. At the conclusion of the study, the Crime Commission recommended a number of statutory changes, including increasing the penalties for cigarette trafficking. Concurrently, the Crime Commission unanimously agreed to continue the study for an additional year, both to monitor the ongoing trafficking situation in Virginia, and to see what impact the proposed statutory changes would have.

Virginia appears to have continuing problems with cigarette trafficking. This was detailed in a number of newspaper reports throughout the year, typically involving the arrests of various traffickers. Such issues were independently confirmed by confidential briefings provided by various law enforcement agencies involved in active, on-going investigations. However, because the increased penalties went into effect only on July 1, 2013, it is still too early to be able to accurately examine what impact, if any, they are having on cigarette trafficking overall in the state, and on the types and lengths of sentences received by traffickers. Conversations with various prosecutors throughout the state did reveal a number of improvements that could be made to Virginia's existing statutes.

The Crime Commission reviewed findings and data at its November and December meetings and directed staff to draft legislation to address them. As a result of the study effort, the Crime Commission endorsed the following legislative recommendations at its December meeting:

**Recommendation 1:** Create a prima facie presumption that the contents of an unopened pack of cigarettes meet the legal definition of a "cigarette," as provided in Va. Code § 58.1-1000. This would eliminate the possible need to call an expert witness during a criminal trial for testimony that a particular brand of cigarettes contains nicotine.

**Recommendation 2:** Rewrite the trafficking statute, Va. Code § 58.1-1017.1, to make clear that a prosecutor does not have to prove a defendant is not an "authorized holder," as an element of the offense. Attempting to prove a negative in court is difficult and time-consuming, and is not required in comparable criminal statutes, such as drug possession.

**Recommendation 3:** Amend the forfeiture statute that applies to counterfeit and trafficked cigarettes, Va. Code § 19.2-386.21, so that law enforcement officers can make use of forfeited cigarettes for legitimate, undercover operations. Under the current wording of the statute, these cigarettes must be destroyed, and cannot be used for any law enforcement purposes. Law

enforcement should also be given the explicit authority to possess unstamped cigarettes, if they need to do so while conducting an undercover operation.

**Recommendation 4:** Increase the required civil penalties which accompany a conviction for cigarette trafficking under Va. Code § 58.1-1017.1, by making them mandatory minimums. To provide a more effective deterrent against traffickers, the required civil penalties should be no less than \$5,000 for a first offense; no less than \$10,000 for a second offense within 36 months; and no less than \$50,000 for a third or subsequent offense within 36 months.

**Recommendation 5:** Prohibit anyone convicted of trafficking cigarettes from ever again qualifying as an “authorized holder.”

**Recommendation 6:** Because cigarette trafficking almost always involves activity occurring in multiple jurisdictions, it should be added to the list of crimes that can be investigated by multi-jurisdictional grand juries.

All of these recommendations were introduced in the Regular Session of the 2014 General Assembly of Virginia, and were passed into law, going into effect on July 1, 2014.

The Crime Commission also noted that because there are unique difficulties in combatting a form of crime that involves activity that occurs both inside Virginia and in other states, and that often necessitates forensic accounting and examining financial records for effective enforcement efforts, consideration should be given to the creation of a specialized, state-wide unit dedicated to investigating cigarette trafficking. Finally, the Crime Commission endorsed providing continued training on the subject of cigarette trafficking in Virginia to law enforcement, Commonwealth’s Attorneys, and judges.

## Background

During the 2012 Regular Session of the Virginia General Assembly, Senate Joint Resolution (SJR) 21, introduced by Senator Janet Howell, was passed, which directed the Crime Commission to study and report on a number of topics involving illegal cigarette trafficking, including a focus on the prevalence of this crime in Virginia and how it can be combatted.<sup>1</sup> At the conclusion of the study, a final report was published that examined cigarette trafficking both broadly and in the context of Virginia’s role as a source state for black market cigarettes. This published report should be referred to for a comprehensive overview of the topic.<sup>2</sup> Based upon its findings, the Crime Commission recommended a number of statutory changes, including increasing the penalties for cigarette trafficking.<sup>3</sup> At the time, the Crime Commission unanimously voted to extend the study for an additional year, for the purpose of monitoring the ongoing trafficking situation in Virginia, and to see what impact any proposed statutory changes might have.

All of the Crime Commission’s recommended statutory changes from 2012 were enacted into law during the 2013 Regular Session of the Virginia General Assembly, becoming effective on July 1, 2013.

- The penalties for trafficking tax-paid cigarettes were increased. Previously, the penalty for trafficking more than 25 cartons was a Class 2 misdemeanor, and a second or subsequent offense was a Class 1 misdemeanor.<sup>4</sup> The penalties were increased as follows:

- Trafficking more than 25 cartons, but less than 500 cartons, was made a Class 1 misdemeanor, and a second or subsequent offense was made a Class 6 felony; and,
- Trafficking 500 cartons or more was made a Class 6 felony for a first offense, and a Class 5 felony for a second or subsequent offense.<sup>5</sup>
- The penalties for trafficking unstamped cigarettes, i.e., cigarettes for which the state excise tax has not been paid, were similarly increased. Previously, the penalty for trafficking unstamped cigarettes was a Class 2 misdemeanor, for quantities up to 3,000 packs, and a Class 6 felony if the quantity was 3,000 packs or greater.<sup>6</sup> The penalties were increased as follows:
  - The qualifying threshold for this offense was lowered to 500 packs; trafficking less than 500 packs was made a Class 1 misdemeanor, and a second or subsequent offense was made a Class 6 felony; and,
  - Trafficking 500 or more packs was made a Class 6 felony, with a second or subsequent offense at that quantity level being made a Class 5 felony.<sup>7</sup>
- Trafficking stamped cigarettes was added to the qualifying offenses for Virginia’s RICO statute.<sup>8</sup>
- Virginia Code § 19.2-386.21, which permitted law enforcement officers to seize and forfeit all “fixtures, equipment, materials, and personal property” used in connection with the sale or possession of counterfeit cigarettes, was expanded to also include non-counterfeit, trafficked cigarettes.<sup>9</sup>
- The knowing distribution or possession with the intent to distribute counterfeit cigarettes was made a criminal offense; prior to this change, the distribution of counterfeit cigarettes only carried a civil penalty.<sup>10</sup> The penalties were established as follows:
  - If the quantities involved are less than 10 cartons, the offense is a Class 1 misdemeanor;
  - If 10 or more cartons are involved, the offense is a Class 6 felony;<sup>11</sup> and,
  - Any subsequent offense, regardless of the number of cartons involved, is a Class 6 felony.<sup>12</sup>
- The Virginia Department of Taxation, and the Office of the Attorney General of Virginia were authorized, though not mandated, to accept the electronic receipt of reporting forms from tobacco manufacturers and wholesalers.<sup>13</sup>
- The Virginia Department of Taxation was authorized to accept electronic payments for tax stamps.<sup>14</sup>

To comply with the directive to continue the cigarette trafficking study for an additional year, numerous meetings and interviews were held with representatives from cigarette manufacturers, cigarette wholesalers and retailers, local and state law enforcement, the Northern Virginia Cigarette

Tax Board (NVCTB), the Tobacco Enforcement Unit of the Office of the Attorney General of Virginia, the Virginia Department of Taxation, the Virginia Department of Alcoholic Beverage Control (ABC), and the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The Crime Commission also participated on the Virginia Department of Criminal Justice Service’s (DCJS) tobacco trafficking task force during the year. Previous data sources, such as the Virginia Department of Taxation, the Virginia State Police, and the Virginia Criminal Sentencing Commission (VCSC), were contacted for updated figures. Additionally, assistance was provided to DCJS in creating a training curriculum for law enforcement officers on the topic of cigarette trafficking. Staff also provided a number of trainings to law enforcement, Commonwealth’s Attorneys, the Virginia Wholesalers and Distributors Association, and the Virginia Municipal League.

## Update: Trends in Cigarette Trafficking

Virginia still has the second lowest cigarette excise tax rate in the country, while the mid-Atlantic and New England states directly north of Virginia continue to have some of the highest tax rates in the country as seen in Figure 1 below. In fact, during 2013, Massachusetts raised their cigarette excise tax rate an additional one dollar, to \$3.51 per pack.

**Figure 1: Enacted Cigarette Excise Tax Rates per 20 Pack (in \$) by State or Territory**

|                      |             |                     |             |
|----------------------|-------------|---------------------|-------------|
| Alabama              | 0.425       | Montana             | 1.70        |
| Alaska               | 2.00        | Nebraska            | 0.64        |
| Arizona              | 2.00        | Nevada              | 0.80        |
| Arkansas             | 1.15        | New Hampshire       | 1.78        |
| California           | 0.87        | New Jersey          | 2.70        |
| Colorado             | 0.84        | New Mexico          | 1.66        |
| <b>Connecticut</b>   | <b>3.40</b> | <b>New York</b>     | <b>4.35</b> |
| Delaware             | 1.60        | North Carolina      | 0.45        |
| District of Columbia | 2.50        | North Dakota        | 0.44        |
| Florida              | 1.339       | N. Marianas Islands | 1.75        |
| Georgia              | 0.37        | Ohio                | 1.25        |
| Guam                 | 3.00        | Oklahoma            | 1.03        |
| Hawaii               | 3.20        | Oregon              | 1.31        |
| Idaho                | 0.57        | Pennsylvania        | 1.60        |
| Illinois             | 1.98        | Puerto Rico         | 2.23        |
| Indiana              | 0.995       | <b>Rhode Island</b> | <b>3.50</b> |
| Iowa                 | 1.36        | South Carolina      | 0.57        |
| Kansas               | 0.79        | South Dakota        | 1.53        |
| Kentucky             | 0.60        | Tennessee           | 0.62        |
| Louisiana            | 0.36        | Texas               | 1.41        |
| Maine                | 2.00        | Utah                | 1.70        |
| Maryland             | 2.00        | Vermont             | 2.62        |
| <b>Massachusetts</b> | <b>3.51</b> | <b>Virginia</b>     | <b>0.30</b> |
| Michigan             | 2.00        | Washington          | 3.025       |
| Minnesota            | 2.83        | West Virginia       | 0.55        |
| Mississippi          | 0.68        | Wisconsin           | 2.52        |
| <b>Missouri</b>      | <b>0.17</b> | Wyoming             | 0.60        |

Source: Federation of Tax Administrators, updated and rates current as of January 1, 2014, <http://www.taxadmin.org/fta/rate/cigarette.pdf> (last visited April 22, 2014). In addition, it should be noted that New York City has an additional tax of \$1.50 per pack. Information on the tax rates for the District of Columbia, Guam, Puerto Rico, and the Northern Marianas Islands comes from the National Conference of State Legislatures, updated and rates current as of August 1, 2013, <http://www.ncsl.org/research/health/2011-state-cigarette-excise-taxes.aspx#Table2> (last visited April 22, 2014); and from Campaign for Tobacco-Free Kids, updated and rates current as of December 3, 2013, <https://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf> (last visited on April 22, 2014).

As a result of these tax disparities, the actual tax costs of cartons (10 packs) or cases (60 cartons) of cigarettes vary greatly between states, creating the opportunity for traffickers to make huge profits by illegally avoiding required taxes, smuggling cigarettes from Virginia to higher tax states.

- The state excise tax rate for a carton of cigarettes (10 packs):
  - **Virginia:** **\$3.00**
  - Pennsylvania: \$16.00
  - New Jersey: \$27.00
  - Rhode Island: \$34.60
  - Massachusetts: \$35.10
  - New York: \$43.50
  - **New York City:** **\$58.50**
  
- The state excise tax rate for a case of cigarettes (60 cartons):
  - **Virginia:** **\$180.00**
  - Pennsylvania: \$960.00
  - New Jersey: \$1,620.00
  - Rhode Island: \$2,076.00
  - Massachusetts: \$2,106.00
  - New York: \$2,610.00
  - **New York City:** **\$3,510.00**

Simple multiplication reveals that the tax differential between Virginia and New York City for ten cases of cigarettes, an amount that could be tightly packed into a large automobile, is \$33,300. If a van is used, 50 cases of cigarettes can be transported in one trip, with a total tax differential of \$166,500. And, if a U-Haul or moving truck is used, 200 cases of cigarettes can be transported at a time, resulting in a tax differential of \$666,000. While the amount of profit a trafficker will make from a trip is less than the total tax differential, due to costs and to having to offer his cigarettes to retailers at a reduced price from the legal wholesale price in the area, the amounts of money that can be made in a short period of time by trafficking cigarettes is frighteningly large.

Police intelligence reports indicate that the allure of illegal profits from this area of crime has indeed been irresistible to various organized crime groups. They are continuing to establish operations in the Commonwealth, with a noted increase in the number of fictitious retail businesses opened up in the past year that are purchasing large quantities of cigarettes from wholesalers. As these “businesses” are not selling cigarettes to the public, but are instead moving them out-of-state, no sales tax is being collected or paid on these cartons—money which should be going to the Commonwealth and the localities. Even more worrisome than this loss of revenue is the increase in attendant crimes which is being noticed by law enforcement, as cigarette traffickers begin to establish more of a presence in the state. Credit card fraud, burglaries of retail establishments where primarily cartons of cigarettes are stolen, money laundering schemes, and armed robberies between competing gangs, have all been observed in connection with cigarette traffickers, and appear to be on the increase. These ancillary crimes, which directly harm Virginians, are the indirect result of cigarette trafficking and its rise in the Commonwealth.

***Update: Virginia Cigarette Data***

The Virginia State Police were contacted to see if there had been any increase in the number of cigarettes seized by their Criminal Interdiction and Counter-Terrorism Unit. From January 2012 to October 2012, approximately 1,941 cartons of cigarettes were seized, along with \$226,360 in cash, during the course of normal drug interdiction efforts.<sup>15</sup> During the same time frame of one year later, from January 2013 to October 2013, the Virginia State Police seized approximately 6,775 cartons of cigarettes, along with \$45,749 in cash.<sup>16</sup>

The NVCTB was contacted regarding their continuing enforcement efforts against cigarette trafficking. They reported completing approximately 3,000 inspections of retail establishments per year across their 18 jurisdictions in northern Virginia. They estimate that they have seized approximately 140,000 packs of illicit cigarettes since 2007; and approximately 55,000 packs of cigarettes in the last two years.

The Tobacco Enforcement Unit (Unit) in the Office of the Attorney General of Virginia reported that they conducted 145 retail inspections in Virginia in 2012, and seized 114,569 packs of cigarettes. From January 2013 through November 6, 2013, they conducted an additional 159 inspections, and seized 2,923 packs of cigarettes. During the course of their investigations, they continue to identify a number of fictitious businesses that are clearly involved with cigarette trafficking.<sup>17</sup> In 2011, this Unit only identified 5 fictitious businesses; in 2012 they identified 6 such businesses; and as of November of 2013, they identified 25 fictitious businesses.<sup>18</sup>

The Virginia Department of Taxation reported that, with regard to cigarettes, they conducted 565 on-site inspections of retailers over the last two years, as well as 9 on-site inspections of wholesalers. No instances of non-compliance were found with any of the wholesaler stamping agents. As for the retailers who were inspected, 177 assessments for non-compliance were issued, and the Department collected \$142,374.

The Virginia Department of Alcoholic Beverage Control (Virginia ABC) does have some involvement with cigarettes. A large majority of the establishments that have a license to sell alcohol also sell cigarettes, and technically, Virginia ABC enforcement agents may enforce all of the laws of the Commonwealth, not just those that involve alcohol. In addition, Virginia ABC agents conduct periodic underage buyer tobacco checks. Virginia ABC reported that they conducted 7,309 inspections of establishments last year, in the course of their regular duties of enforcing Virginia's alcohol laws. In addition, they conducted 933 underage buyer checks for tobacco. Individual Virginia ABC agents have also been involved with local law enforcement in a number of cigarette trafficking investigations.

Conversations with local law enforcement in different parts of the state, as well as with the NVCTB, indicate that cigarette trafficking is continuing to be a common occurrence in the Commonwealth. Having previously ascertained that Virginia appears to be the largest single source for black market cigarettes in New York City,<sup>19</sup> the Office of the Sheriff of New York City was contacted for updated figures on their cigarette seizures. From August 1, 2011, to August 2, 2012, the Tobacco Task Force of the New York City Sheriff's Office seized 4,982 cartons of contraband cigarettes, of which 2,053 (41%) were identified as coming from Virginia.<sup>20</sup> From August 3, 2012 to October 7, 2013, the Sheriff's Office seized approximately 4,222 cartons of contraband cigarettes, of which 2,142 cartons (51%) were identified as coming from Virginia.<sup>21</sup>

### ***Recent Press Articles***

A number of large criminal conspiracies to traffic cigarettes from Virginia have been reported in the press, further indication that the state-wide scope of the problem has continued unabated.

In April 2012, Onesimo Marcelino and three defendants were arrested in New York for trafficking cigarettes. Between May of 2010 and when they were arrested, they purchased over 111,000 cartons of cigarettes in Virginia and transported them to New York; payment was made with “millions in cash, thousands of grams of cocaine, an expensive SUV, and two firearms.”<sup>22</sup> Marcelino had two previous convictions for cigarette trafficking in New York, and a previous conviction for possession of counterfeit cigarette tax stamps. On September 28, 2012, he was sentenced to 11 years in federal prison.<sup>23</sup>

In May 2013, a multi-agency police investigation of a cigarette smuggling ring led to 16 arrests in New York and Virginia.<sup>24</sup> This criminal conspiracy, involving Palestinians who were believed to be associated with both Hamas and Hezbollah operatives, was smuggling up to 20,000 cartons of cigarettes a week into New York City.<sup>25</sup> The cigarettes were bought in bulk from a wholesaler in Virginia, transported to and stored in Delaware, and then trafficked into New York City. It is estimated that a \$22 million dollar profit was generated by this criminal ring.<sup>26</sup> Five months later, two of the leaders of the ring, Basel Ramadan and Yousseff Odeh, were additionally charged with attempting to orchestrate a murder-for-hire plot, while they were incarcerated in Rikers Island jail in New York City, to eliminate possible witnesses against them.<sup>27</sup>

On May 8, 2013, seven individuals were arrested in Rhode Island in connection with a cigarette smuggling ring. Between July 2011 and the time of their arrest, Wissam Khalil and his co-conspirators purchased more than 30,000 cartons of cigarettes in Virginia and transported them to Rhode Island, where it is estimated they generated more than \$1.2 million in illegal sales.<sup>28</sup>

On November 9, 2013, three residents of New Jersey were arrested in Stafford, Virginia, after the clerk of a convenience store became suspicious; one of the defendants presented a Florida identification, but was in a vehicle with New Jersey license plates. All three defendants had been purchasing multiple cartons of cigarettes, using phony gift cards, from convenience stores located along the Jefferson Davis Highway.<sup>29</sup>

And, on March 28, 2014, it was reported that Thaer Khashman and John Taveras, of New York City, and Harvey Luna, of Elizabeth, New Jersey, were facing multiple charges in Shenandoah County Circuit Court for selling more than 3,000 packs of cigarettes that were purchased in Virginia, and then sold in New York City.<sup>30</sup> Khashman and Taveras are also charged with money laundering.<sup>31</sup>

These five examples illustrate how the large amounts of money that can be gained from cigarette trafficking are attracting criminals to Virginia.

### ***Virginia Criminal Sentencing Commission Data***

The VCSC was contacted for updated figures on the number of charges and convictions in Virginia courts for various cigarette offenses related to tax avoidance, improper record keeping, cigarette trafficking, and possession of counterfeit or illegal cigarettes.<sup>32</sup> Figure 2 illustrates the number of charges filed in general district courts for misdemeanor cigarette-related offenses. It appears that charges filed for violations of local ordinances have decreased in the past three fiscal years. Also noteworthy is that in the first fiscal year (FY14) after it became a crime in Virginia to possess



stamped cigarettes for purposes of trafficking, 104 charges were filed in general district courts.<sup>33</sup> Conviction data for these offenses in the general district courts thru FY13 is provided in Figure 3. No conviction data was yet available for FY14. Figures 4 and 5 illustrate circuit court charges and convictions for cigarette-related offenses. The data from the circuit courts indicates that few charges are filed, and few convictions are obtained, for these types of cigarette offenses.

**Figure 2: General District Court Charges for Cigarette-related Offenses, FY10- FY14\***

| Code                              | Description   | FY10 | FY11 | FY12 | FY13** | FY14† |
|-----------------------------------|---|------|------|------|--------|-------|
| § 3.2-4212(D,i)                   | Sell or distribute cigarettes not in directory, < 3000 pkgs.            | 0    | 0    | 0    | 2      | 0     |
| § 3.1-336.10(D,i)/§ 3.2-4212(D,i) | Sell or distribute cigarettes not in directory                          | n/a  | n/a  | n/a  | n/a    | 0     |
| § 3.2-4212(D,ii)                  | Possess, import, etc., cigarettes not in directory, < 3000 pkgs.        | 0    | 2    | 0    | 0      | 0     |
| § 4.1-103.01(B)                   | Dealers fail to allow inspection of records                             | 0    | 1    | 0    | 0      | 0     |
| § 58.1-1007                       | Fail to keep records on purchase, sale of cigarettes (Excise Tax)       | 0    | 1    | 0    | 0      | 0     |
| § 58.1-1009                       | Cigarettes, unlawful sale of revenue stamps                             | 0    | 0    | 1    | 1      | 0     |
| § 58.1-1009                       | Revenue stamps not purchased from Tax Dept.                             | 1    | 8    | 2    | 0      | 0     |
| § 58.1-1017(B)                    | Cigarettes without stamp, sale, purchase, possess, < 3000 pkgs.         | 21   | 7    | 15   | 8      | 0     |
| § 58.1-1017(C)                    | Cigarettes without stamp, sale, purchase, possess, > 3000 pkgs.         | 2    | 10   | 53   | 12     | 3     |
| § 58.1-1021                       | Fail to keep records on purchase, sale of cigarettes (Use Tax)          | 0    | 0    | 0    | 1      | 0     |
| § 58.1-1033                       | Violation of restrictions   | 0    | 3    | 0    | 0      | 0     |
| Local Cigarette Tax Ordinance     | Local Cigarette Tax Ordinance Violation                                 | 158  | 107  | 64   | 7      | 1     |
| § 58.1-1017.1                     | Possession with intent to distribute tax-paid, contraband cig.          | n/a  | n/a  | n/a  | 102    | 10    |
| § 58.1-1017.1                     | Possession with intent to distribute tax-paid, contraband cig., subseq. | n/a  | n/a  | n/a  | 2      | 0     |

Source: Supreme Court of Virginia - General District Court Case Management System. \*Fiscal year in which the charge was concluded (nolle prossed, dismissed, sentenced, etc.); \*\*Data do not include charges that were still pending at the end of FY13; † Charges filed since July 1, 2013 thru November 9, 2013.

**Figure 3: General District Court Convictions for Cigarette-related Offenses, FY10- FY13\***

| Code                            | Description  | FY10      | FY11      | FY12      | FY13**    |
|---------------------------------|--|-----------|-----------|-----------|-----------|
| § 3.2-4212(D,ii)                | Possess, import, etc., cigarettes not in directory, < 3000 pkgs. (M1)        | 0         | 2         | 0         | 0         |
| § 58.1-1007                     | Fail to keep records on purchase, sale of cigarettes (Excise Tax) (M2)       | 0         | 1         | 0         | 0         |
| § 58.1-1010                     | Illegal sale of unstamped cigarettes by wholesale dealers (M2)               | 0         | 0         | 0         | 1         |
| § 58.1-1017(B)                  | Cigarettes without stamp, sale, purchase, possess, < 3000 pkgs. (M2)         | 10        | 7         | 22        | 7         |
| § 58.1-1021                     | Fail to keep records on purchase, sale of cigarettes (Use Tax) (M2)          | 0         | 0         | 0         | 1         |
| Local Cigarette Tax Ordinance   | Local Cigarette Tax Ordinance Violation (M2)                                 | 33        | 36        | 19        | 3         |
| § 58.1-1017.1                   | Possession with intent to distribute tax-paid, contraband cig. (M1)          | n/a       | n/a       | n/a       | 68        |
| § 58.1-1017.1                   | Possession with intent to distribute tax-paid, contraband cig., subseq. (M2) | n/a       | n/a       | n/a       | 2         |
| <b>Total Convictions/Counts</b> |  | <b>43</b> | <b>46</b> | <b>41</b> | <b>82</b> |

Source: Supreme Court of Virginia - General District Court Case Management System. \*Fiscal year in which the charge was concluded (nolle prossed, dismissed, sentenced, etc.); \*\*Data do not include charges that were still pending at the end of FY13.

**Figure 4: Circuit Court Charges for Cigarette-related Offenses, FY10-FY14\***

| Code                        | Description  | FY10           | FY11      | FY12      | FY13**         | FY14 <sup>†</sup> |
|-----------------------------|--|----------------|-----------|-----------|----------------|-------------------|
| § 58.1-1009                 | Cigarettes, unlawful sale of revenue stamps (F6)                     | 0              | 1         | 0         | 0              | 0                 |
| § 58.1-1009                 | Revenue stamps not purchased from Tax Dept. (F6)                     | 0              | 8         | 0         | 2              | 0                 |
| § 58.1-1017(B)              | Cigarettes without stamp, sale, purchase, possess, < 3000 pkgs. (M2) | 8 <sup>†</sup> | 11        | 0         | 0              | 0                 |
| § 58.1-1017(C)              | Cigarettes without stamp, sale, purchase, possess, > 3000 pkgs. (F6) | 0              | 32        | 12        | 9              | 0                 |
| § 58.1-1033                 | Violation of restrictions (F5)                                       | 0              | 1         | 0         | 0              | 0                 |
| § 58.1-1017.1               | Possession with intent to distribute tax-paid, contraband cig. (M1)  | 0              | n/a       | n/a       | 4 <sup>†</sup> | 2 <sup>†</sup>    |
| § 58.1-1017.1               | Intent/distribute >= 100,000 tax paid cigarettes                     | 0              | n/a       | n/a       | n/a            | 2                 |
| <b>Total Charges/Counts</b> |  | <b>8</b>       | <b>53</b> | <b>12</b> | <b>15</b>      | <b>4</b>          |

Source: Supreme Court of Virginia – Circuit Court Case Management System. \*Fiscal year in which the charge was concluded; \*\*Data do not include charges that were still pending at the end of FY13. † These charges were the result of appeals from General District Court. The Circuit Court Case Management System does not include cases from Fairfax or Alexandria. Prince William joined the system in FY09 and Virginia Beach left the system in FY09. † Charges filed since July 1, 2013 thru November 9, 2013.

**Figure 5: Circuit Court Convictions for Cigarette-related Offenses, FY10-FY13\***

| Code                            | Description  | FY10           | FY11      | FY12     | FY13**         |
|---------------------------------|--|----------------|-----------|----------|----------------|
| § 58.1-1009                     | Cigarettes, unlawful sale of revenue stamps (F6)                             | 0              | 1         | 0        | 0              |
| § 58.1-1009                     | Revenue stamps not purchased from Tax Dept. (F6)                             | 0              | 4         | 0        | 1              |
| § 58.1-1017(B)                  | Cigarettes without stamp, sale, purchase, possess, < 3000 pkgs. (M2)         | 7 <sup>†</sup> | 6         | 4        | 5              |
| § 58.1-1017(C)                  | Cigarettes without stamp, sale, purchase, possess, > 3000 pkgs.(F6)          | 0              | 8         | 1        | 4              |
| § 58.1-1017.1                   | Possession with intent to distribute tax-paid, contraband cig. (M1)          | N/A            | N/A       | N/A      | 2 <sup>†</sup> |
| § 58.1-1017.1                   | Possession with intent to distribute tax-paid, contraband cig., subseq. (M2) | N/A            | N/A       | N/A      | 0              |
| <b>Total Convictions/Counts</b> |  | <b>7</b>       | <b>19</b> | <b>5</b> | <b>12</b>      |

Source: Supreme Court of Virginia – Circuit Court Case Management System. \*Fiscal year in which the charge was concluded; \*\*Data do not include charges that were still pending at the end of FY2013. † These charges were the result of appeals from General District Court. The Circuit Court Case Management System does not include cases from Fairfax or Alexandria. Prince William joined the system in FY2009 and Virginia Beach left the system in FY2009.

## Continuing Vulnerabilities In Virginia

Numerous meetings with law enforcement and prosecutors revealed that while the changes to the law effective in 2013 have greatly assisted in enforcement efforts against cigarette trafficking in Virginia, there remain a number of areas where improvements could be made. Some of these reflect systemic weaknesses in Virginia due to multiple, uncoordinated investigations. A related vulnerability is that diverse sources of important information relevant to uncovering trafficking rings are not brought together in an organized manner. Finally, a number of difficulties in effectively prosecuting these cases were identified that could be remedied through statutory change.

The systemic weaknesses are created, in part, by Virginia’s current system of multiple law enforcement agencies, each of which are autonomous, and which could theoretically become involved in investigating the same gang or group of conspirators, without knowing other investigations were simultaneously taking place. This inherent difficulty is aggravated by the nature of cigarette trafficking, which almost always involves the transportation of black market cigarettes through multiple jurisdictions before they are taken out of the state. Without a coordinated response between agencies, there is a risk that one law enforcement agency could inadvertently interfere with another agency’s investigation or surveillance operation. Additionally, to effectively combat multi-state trafficking rings, coordination with other state agencies and federal authorities is necessary.

In terms of the valuable sources of information which are not collated, the Virginia Department of Taxation, the State Corporation Commission, the Virginia State Police, local law enforcement, the Attorney General's Office, NVCTB, and tobacco manufacturers and wholesalers each may possess valuable data, which, when evaluated in a comprehensive manner, could provide valuable leads for the investigation of cigarette trafficking gangs and their ongoing crimes. For example, the Virginia Department of Taxation may have information that a retail business has cancelled its "sales and use tax" certificate; if the business is still operating, not only is that a crime in and of itself, but it may be a sign that cigarette trafficking is occurring. They may also possess tax records which demonstrate the business is greatly under-reporting their expected income, based upon their cigarette sales volume. These records may assist local law enforcement agencies that begin an investigation of a suspected cigarette trafficking operation, based upon observations of suspicious behavior, but later encounter difficulties handling the forensic accounting and tax record analyses that are needed to prepare the case for prosecution. At the same time, the State Corporation Commission may have information that the retail business has recently cancelled or failed to maintain its corporate status, another possible indication that trafficking is occurring. In other words, the ability to synthesize records can provide important leads that may uncover a trafficking ring and assist law enforcement with deconfliction concerns.<sup>34</sup>

Frequently, manufacturers and wholesalers will have information on suspicious levels of sales activity—amounts far too large for a given store, or even a geographic area. However, they have reported uncertainty as to which agency is the best one for them to report their findings: the State Police, the Office of the Attorney General, or local law enforcement? Because there is no central registry for wholesalers to easily verify the continued good standing of "sales and use tax" certificates of retailers, wholesalers may inadvertently sell large quantities of cigarettes to traffickers who are operating a fictional storefront as a cover for their illegal operations. And, because there is no registry of all retailers who sell tobacco products, the Virginia Department of Taxation and the Tobacco Enforcement Unit of the Attorney General's Office are not currently able to identify all retail locations which might be the focus of an audit.

Similarly, law enforcement does not have ready access to information on large purchases of cigarettes made to individuals at "cash and carry" wholesalers. And, while local law enforcement may gain valuable information during the course of an investigation on ancillary crimes committed by a trafficking gang, such as credit card fraud or money laundering, they may not have the critical criminal intelligence that the State Police may have that connects the conspirators in Virginia with known criminal groups in other states.

As for current difficulties which exist with Virginia's laws, prosecutors identified a number of issues they have had while prosecuting cigarette trafficking cases. One is simply that if a defendant argues that the contents of the pack of cigarettes that are entered into evidence have not been proven, beyond a reasonable doubt, to meet the definition of a "cigarette," as defined by Va. Code § 58.1-1000, there is no easy response by the Commonwealth. As the definition specifies that cigarettes must contain nicotine, the only remedy to this argument is to call in an expert witness who can testify that the cigarettes in that specific brand do, in fact, contain nicotine.

A similar defense argument that can be difficult to respond to is that the Commonwealth is required to prove that a defendant is not, in fact, an "authorized holder."<sup>35</sup> Requiring the Commonwealth to prove a "negative" can be difficult; in some cases, obtaining testimony from a representative of the Virginia Department of Taxation may be necessary to prove that the defendant is not operating a legitimate retail business. Normally, when a criminal statute contains language making it inapplicable to certain persons, or under certain circumstances, it becomes an affirmative defense

on the part of the defendant to demonstrate that the inapplicability applies in his own case. By way of illustration, Virginia’s marijuana possession statute specifically states that the “provisions of this section shall not apply to members of...law enforcement agencies...for the performance of their duties.”<sup>36</sup> This clause does not require prosecutors to prove that the defendant in a marijuana possession case is not, in fact, a law enforcement officer.

Another difficulty reported by some prosecutors and law enforcement is that while cigarette trafficking was made a RICO offense in 2013, it is not a crime that can be investigated by a multi-jurisdictional grand jury.<sup>37</sup> As cigarette trafficking almost always involves multiple jurisdictions, the inability to present these cases to a multi-jurisdictional grand jury has been frustrating for some prosecutors.

While Va. Code § 19.2-386.21 allows prosecutors to forfeit trafficked cigarettes that have been seized by law enforcement, the wording of the statute then requires that the cigarettes be destroyed. Prosecutors mentioned that the work of filing information and having a court hearing, for a forfeiture action that will only result in the cigarettes being destroyed, simply is not worth their time. Law enforcement has complained that they could make use of these cigarettes for undercover operations, and it is a waste of a valuable resource to simply burn trafficked cigarettes that they seize. Law enforcement also mentioned that they would like the cigarette taxation statutes to be amended so as to make clear that they may possess unstamped cigarettes, if necessary, in the normal course of their duties.

Lastly, it was suggested that Virginia statutorily prohibit anyone who has been convicted of a cigarette trafficking offense from ever again qualifying as an “authorized holder.” This could prove an effective deterrent to traffickers who, even after being convicted, continue to establish false businesses as a means of hiding their trafficking operations.

## Conclusion

The Crime Commission reviewed the information on Virginia’s continuing problems with cigarette trafficking, as well as the vulnerabilities that were identified. Policy options based upon the vulnerabilities identified in some of Virginia’s current statutes were presented for consideration by the Crime Commission. As a result of the study effort, the Crime Commission endorsed the following legislative recommendations at its December meeting:

**Recommendation 1:** Create a prima facie presumption that the contents of an unopened pack of cigarettes meet the legal definition of a “cigarette,” as provided in Va. Code § 58.1-1000. This would eliminate the possible need to call an expert witness during a criminal trial for testimony that a particular brand of cigarettes contains nicotine.

Recommendation 1 was introduced by Senators Bryce Reeves and Janet Howell as Senate Bill 352 during the Regular Session of the 2014 Virginia General Assembly. It was passed by the General Assembly and signed by the Governor on March 24, 2014.

**Recommendation 2:** Rewrite the trafficking statute, Va. Code § 58.1-1017.1, to make clear that a prosecutor does not have to prove a defendant is not an “authorized holder,” as an element of the offense. Attempting to prove a negative in court is difficult and time-consuming, and is not required in comparable criminal statutes, such as drug possession.

Recommendation 2 was introduced by Senators Thomas Norment and Janet Howell as Senate Bill 489 during the Regular Session of the 2014 Virginia General Assembly. It was passed by the General Assembly and signed by the Governor on April 7, 2014.

**Recommendation 3:** Amend the forfeiture statute that applies to counterfeit and trafficked cigarettes, Va. Code § 19.2-386.21, so that law enforcement officers can make use of forfeited cigarettes for legitimate, undercover operations. Under the current wording of the statute, these cigarettes must be destroyed, and cannot be used for any law enforcement purposes. Law enforcement should also be given the explicit authority to possess unstamped cigarettes, if they need to do so while conducting an undercover operation.

Recommendation 3 was introduced by Senators Bryce Reeves and Janet Howell as Senate Bill 365 during the Regular Session of the 2014 Virginia General Assembly. It was passed by the General Assembly and signed by the Governor on March 31, 2014.

**Recommendation 4:** Increase the required civil penalties which accompany a conviction for cigarette trafficking under Va. Code § 58.1-1017.1, by making them mandatory minimums. To provide a more effective deterrent against traffickers, the required civil penalties should be no less than \$5,000 for a first offense; no less than \$10,000 for a second offense within 36 months; and no less than \$50,000 for a third or subsequent offense within 36 months.

Recommendation 4 was introduced by Senators Thomas Norment and Janet Howell as Senate Bill 478 during the Regular Session of the 2014 Virginia General Assembly. It was passed by the General Assembly and signed by the Governor on March 31, 2014.

**Recommendation 5:** Prohibit anyone convicted of trafficking cigarettes from ever again qualifying as an “authorized holder.”

Recommendation 5 was introduced by Senators Bryce Reeves and Janet Howell as Senate Bill 364 during the Regular Session of the 2014 Virginia General Assembly. It was passed by the General Assembly and signed by the Governor on March 31, 2014.

**Recommendation 6:** Because cigarette trafficking almost always involves activity occurring in multiple jurisdictions, it should be added to the list of crimes that can be investigated by multi-jurisdictional grand juries.

Recommendation 6 was introduced by Senators Bryce Reeves and Janet Howell as Senate Bill 366 during the Regular Session of the 2014 Virginia General Assembly. It was passed by the General Assembly and signed by the Governor on April 3, 2014.

All six of these recommendations were also introduced in a single bill, House Bill 853, introduced by Delegate Todd Gilbert during the Regular Session of the 2014 Virginia General Assembly. It was passed by the General Assembly and was signed by the Governor on March 31, 2014.

The Crime Commission considered the general idea of having a state-wide, centralized unit dedicated to cigarette trafficking. Such a unit could assist local law enforcement with specialized investigations, could coordinate between departments, could facilitate interactions with federal and other state agencies, and could serve as a clearing house for important criminal intelligence. Having full time investigators who are experienced in forensic accounting and financial audits would greatly assist in uncovering and prosecuting cigarette trafficking rings and those who engage in large-scale tax fraud connected with cigarettes. The Crime Commission recommended that,

subject to other work-load responsibilities, the specific details of creating such a unit be examined. The creation of model protocols for conducting undercover operations involving cigarette traffickers was also recommended. Finally, the Crime Commission endorsed providing continued training on the subject of cigarette trafficking in Virginia to law enforcement, Commonwealth's Attorneys, and judges.

## Acknowledgements

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Chesterfield Commonwealth's Attorney's Office

Chesterfield Police Department

Lorillard

National White Collar Crime Center

Northern Virginia Cigarette Tax Board

Office of the Attorney General of Virginia - Tobacco Enforcement Unit

R. J. Reynolds

S&M Brands

Shenandoah County Sheriff's Office

The Smith Group

Virginia Criminal Sentencing Commission

Virginia Department of Taxation

Virginia State Police

Virginia Wholesalers and Distributors Association

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<sup>1</sup> S.J.R. 21, 2012 Gen. Assemb., Reg. Sess. (Va. 2012).

<sup>2</sup> See Va. State Crime Comm'n, *Illegal Cigarette Trafficking*, S. Doc. 5, 2013 Gen. Assemb., Reg. Sess. (2013).

<sup>3</sup> Id.

<sup>4</sup> VA. CODE ANN. § 58.1-1017.1 (2012).

<sup>5</sup> 2013 Va. Acts chs. 567, 623.

<sup>6</sup> VA. CODE ANN. § 58.1-1017 (2012).

<sup>7</sup> 2013 Va. Acts chs. 570, 624.

<sup>8</sup> 2013 Va. Acts ch. 626. Trafficking unstamped cigarettes was already a RICO offense. VA. CODE § 18.2-513 (2012).

<sup>9</sup> 2013 Va. Acts ch. 627.

<sup>10</sup> VA. CODE ANN. § 18.2-246.14 (2012).

<sup>11</sup> 2013 Va. Acts ch. 625.

<sup>12</sup> Id.

<sup>13</sup> 2013 Va. Acts ch. 381.

<sup>14</sup> Id.

<sup>15</sup> Va. State Crime Comm'n, *Illegal Cigarette Trafficking*, S. Doc. 5, 2013 Gen. Assemb., Reg. Sess. at 18 (2013).

<sup>16</sup> The large increase in the number of cartons seized, with the concurrent drop in the amount of cash seized, during drug interdiction efforts, may indicate that drug trafficking gangs are increasingly turning to cigarettes as a means of “currency,” especially for purposes of transporting their profits.

<sup>17</sup> These are “retail” businesses that purchase large quantities of cigarettes from wholesalers, or other retailers, and whose “premises” are in clearly non-commercial areas, such as a private apartment, an abandoned building, or a commercial storage facility. Due to the sensitivity of on-going investigations, specific locales and details of investigations are not mentioned in this report, unless they have previously been reported by the press.

<sup>18</sup> Although based on anecdotal evidence, law enforcement reported their general impression that “smurfing,” or traveling from retail location to retail location, and purchasing small quantities of cigarettes, seemed to have decreased in 2013, compared to the previous two years. In lieu of that, they reported seeing more evidence of fraudulent businesses being created for the purposes of purchasing large quantities of cigarettes at one time from wholesalers. This observation is consistent with the increase in fictitious businesses identified by the Tobacco Enforcement Unit.

<sup>19</sup> Va. State Crime Comm'n, *Illegal Cigarette Trafficking*, S. Doc. 5, 2013 Gen. Assemb., Reg. Sess. at 8-9 (2013).

<sup>20</sup> Id. at 9.

<sup>21</sup> Information provided by the New York City Sheriff's Office, e-mail correspondence, Oct. 16, 2013.

<sup>22</sup> Frank Green, *Contraband cigarette trafficker sentenced to 11 years in prison*, RICHMOND TIMES DISPATCH, January 17, 2013, [http://www.timesdispatch.com/news/contraband-cigarette-trafficker-sentenced-to-years-in-prison/article\\_2f32199c-eca0-5c44-b941-353ec70a8dbc.html?mode=jqm](http://www.timesdispatch.com/news/contraband-cigarette-trafficker-sentenced-to-years-in-prison/article_2f32199c-eca0-5c44-b941-353ec70a8dbc.html?mode=jqm).

<sup>23</sup> Id.

<sup>24</sup> Brittany Brady, *NY cigarette-smuggling ring may have terror link*, CNN, May 17, 2013, <http://www.cnn.com/2013/05/17/us/new-york-cigarette-ring/>.

<sup>25</sup> Greg B. Smith & Oren Yaniv, *Terrorists may get money from regional, cheap cigarette smuggling ring: Ray Kelly*, NY DAILY NEWS, May 17, 2013, <http://www.nydailynews.com/new-york/terrorists-money-regional-cigarette-smugglers-ray-kelly-article-1.1346120>.

<sup>26</sup> Id.

<sup>27</sup> Brian Shane, *Cigarette smuggling suspects charged in murder plot*, USA TODAY, October 17, 2013, <http://www.usatoday.com/story/news/nation/2013/10/17/cigarette-smuggling-murder-for-hire-plot/3004063/>. This is consistent with general law enforcement observations that the cigarette trafficking gangs are slowly becoming more violent in their approach to conducting and safeguarding their operations.

<sup>28</sup> Press Release, FBI-Boston, *Federal Indictment Unsealed as Rhode Island State Police and Federal Agents Arrest Seven* (May 8, 2013), available at <http://www.freerepublic.com/focus/news/3017308/posts> (last visited on April 24, 2014).

<sup>29</sup> Keith Epps, *Jersey men charged in gift-card fraud*, FREE LANCE-STAR, Nov. 12, 2013, <http://news.fredericksburg.com/newsdesk/2013/11/12/jersey-men-charged-in-gift-card-fraud/>.

<sup>30</sup> Joe Beck, *Three cigarette smuggling cases emerge in court*, NORTHERN VIRGINIA DAILY, Mar. 28, 2014, [http://www.nvdaily.com/news/2014/03/three\\_cigarette\\_smuggling\\_cases\\_emerge\\_in\\_court-print.html](http://www.nvdaily.com/news/2014/03/three_cigarette_smuggling_cases_emerge_in_court-print.html).

<sup>31</sup> Id.

<sup>32</sup> As with the original study in 2012, data figures were not requested for offenses that involve the sale of cigarettes to minors, as these crimes were outside the scope of the study and its focus on illegal trafficking.

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<sup>33</sup> This criminal offense was first created in 2012, and went into effect on July 1 of that year. 2012 Va. Acts chs. 362, 472.

<sup>34</sup> Deconfliction refers to the process whereby one law enforcement agency contacts another, to ensure that the investigations or arrests made will not conflict with, or jeopardize, an ongoing investigation by the other agency.

<sup>35</sup> The statute that makes it illegal to distribute, or possess with the intent to distribute, tax paid cigarettes, i.e., the cigarette trafficking statute, specifically mentions that this crime does not apply to “authorized holders.” VA. CODE § 58.1-1017.1 (2013).

<sup>36</sup> VA. CODE § 18.2-250.1(B) (2013).

<sup>37</sup> VA. CODE § 19.2-215.1 (2013).