State of California

Board of Equalization
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Memorandum

To :

Honorable Carole Migden, Chairwoman
Honorable Claude Parrish, Vice Chairman
Honorable Bill Leonard
Honorable John Chiang
Honorable Steve Westly

Date: August 12, 2004

From : Timothy W. Boyer
Chief Counsel

Subject: **Limited Peace Officer Status**

With the passage of AB 71, the Board was given the opportunity to establish a limited peace officer status for its tax fraud investigators. This status would provide benefits to the department by permitting issuance of misdemeanor citations for criminal tax violations and for direct access to relevant criminal history.

Limited peace officer status does not allow for enhanced retirement benefits or for the carrying a firearm. It is a tool that should promote a more effective means of seeking out and eliminating those who have chosen to criminally evade the tax laws, which this department administers.

I invite you to review the attached issue paper. It provides detail and description for the requested status. Also provided is a binder, which explains various aspects of the limited peace officer program if such is approved by the Board.

Please be advised that the "citation" process that is referenced in the material is something that I plan on bringing to the Board as a separate subject. This will be done in the near future. "Citations" are a complicated topic that involves civil fines for various infractions. Board member awareness and input is needed before instituting such a program.

Limited Peace officer status is on the Board agenda for August 24, 2004. I plan on discussing it with you before that date. It will be my recommendation that the Board approve Alternative three. This would provide only 27 staff members in the entire State with the subject status. It would also require a progress report to the Board in six months. I believe this is the most prudent approach to a new circumstance in which we have little experience.

TWB:pl
Binder Attached

Cc: Mr. Ramon Hirsig (Binder Attached)

ITEM M1
8-24-04

☒ For Information
☐ For Discussion
☐ For Decision Making

BOARD OF EQUALIZATION
INFORMAL ISSUE PAPER

Limited Peace Officer Powers for Investigative Staff

Issue

Should the Board of Equalization (Board) investigators be granted limited peace officer status with respect to only the power to issue misdemeanor citations and access CLETS?

Issue Summary

The California Cigarette and Tobacco Products Licensing Act of 2003 amended Section 830.11 of the Penal Code which now authorizes the Board's Executive Director to grant limited peace officer status to Board employees in the Investigations Division. Under the act, limited peace officer means authority to exchange investigative information with law enforcement, issue a misdemeanor citation and access criminal history information, via the Criminal Law Enforcement Telecommunications System (CLETS).

The Issue addressed herein only relates to authorizing the Executive Director to grant limited peace officer status exclusively for purposes of issuing misdemeanor citations and obtaining access to CLETS.

Alternatives Considered

1. Maintain current operations - grant no limited peace officer powers to Investigations Division staff.
2. Grant limited peace officer powers to 76 Investigations Division staff and require report to the Board in 6 months.
3. Grant limited peace officer powers to 27 Investigations Division staff and require report to the Board in 6 months.

Overview

In recent years, investigation of cigarette smuggling has become more complex. U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) officials state that in the past, when smuggling was

performed by mom and pop operations, ATF just seized the cigarettes and vehicles. ATF and other federal agencies[1] report a dramatic rise in cigarette seizures, particularly in California, and state that, increasingly, cigarette smuggling is being carried out by international and criminal organizations. Cigarette smuggling attracts these organizations because the risk of detention is considered relatively low, penalties are less severe than for drug smuggling, and potential profits are high. Without effective investigations and enforcement activity, the problem is expected to grow.[2]

Background and History

Since 1989, the Board has had authority to deal with criminal investigations of tax fraud for programs administered by the Board.

Section 13540 of the Penal Code stipulates any person desiring new peace officer status after January 1, 1990, is required to request the Commission on Peace Officer Standards and Training (POST) to undertake a feasibility study regarding designating that person or persons as peace officers. Any such study must include, but not be limited to, the current and proposed duties and responsibilities of the proposed peace officers employed in the category seeking the designation change, their field law enforcement duties and responsibilities, their supervisory and management structure, and their proposed training methods.

In recognition of an expansion in the underground economy, and tax evasion becoming a larger and more significant threat to California's tax base, the Board was concerned that the agency was not working in the most cost and resource efficient manner. In 1997, the Board contracted with POST to conduct a management review of its four investigative programs: Internal Security and Audit Division, Special Investigations Section, Fuel Taxes Investigations and Enforcement Section, and the Cigarette Tax Enforcement Team. The study assessed the organizational structure and operations of the Board's investigative sections to ensure their ability to perform high-quality and effective investigations in the most efficient manner possible.

The POST report, dated May 22, 1998, found that within the four investigative sections there were confusing structures and lines of authority that governed and hampered the way existing investigations were conducted. POST recommended that there be one Investigations Division to handle all external criminal tax evasion cases. Also, among its recommendations, the POST report suggested that the Board seek limited peace officer status pursuant to Section 830.11 of the Penal Code (PC) for Board investigators involved in tax evasion cases. POST noted that limited peace officer status would allow the Board investigators to conduct complete investigations without the necessity of regularly using outside agency support for basic investigative procedures. POST concluded that this would increase employee safety, lead to increased efficiency and effectiveness in conducting tax fraud investigations, and reduce the potential for Board liability. POST further recommended that the Board adopt an operating policy that mandated a uniformed peace officer's presence in situations requiring a peace officer.

The Board accepted the POST recommendations in July of 1998. The Investigations Division was formed and became fully functional on February 1, 2000. The Board also approved the legislative proposal for limited powers under PC Section 830.11 in November 1998. However, the issue was revisited at the request of the Board Members in January 1999, and to date, the Board has not granted peace officer powers at any level for the investigative staff within the division.

In October 2003, the California Cigarette and Tobacco Products Licensing Act of 2003 (Assembly Bill (AB) 71; Stats. 2003, ch. 890) became law. This legislation imposes on the Board the duty to administer a statewide program to license and inspect retailers, distributors, wholesalers, manufacturers, and importers of cigarettes and tobacco products. The intent of the Act is to stem the tide of untaxed purchases and illegal sales of cigarettes and tobacco products in the state of California. The Board of Equalization estimates that California loses approximately $292 million each year in unpaid cigarette and tobacco taxes.

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[1] U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Patrol (CBP)

[2] Bureau of Alcohol, Tobacco, Firearms and Explosives, *Illicit Cigarette Trafficking and the Funding of Terrorism*, July 22, 2003.

To facilitate fulfillment of the Board's responsibility to properly accomplish the above legislative mandate in October 2003, Section 830.11 of the Penal Code was amended to authorize the Board's Executive Director to grant limited peace officer powers to Board employees in the Investigations Division whose primary duty is the enforcement of the laws administered by the Board.

Since January 1, 2004, the Investigations Division has been performing inspections of businesses selling and distributing cigarette and tobacco products and educating them about their licensing requirements and the enforcement aspects of AB 71. Currently, these establishments are receptive to this educational process. However, without investigators having the power to write a citation, it will only be a matter of time before evaders realize there is virtually no consequence for their evasion.

Discussion

"Peace officer" is a generic term in California that includes all law enforcement officers described in the Penal Code. The range of persons employed as peace officers includes such diverse organizations as: traffic officers of the California Highway Patrol (CHP) PC § 830.2 (a)); Sheriff's Deputies from all counties (PC § 830.1 (a)); investigators from the Board of Dental Examiners (PC § 830.3 (a)): and security personnel of cemetery authorities (PC § 830.7 (a)). In 1997, the investigative staff of the Franchise Tax Board obtained full peace officer status. These examples suggest the diverse and disparate functions of peace officers in California. See Exhibit 1 for an extensive list.

Peace officer status, as conferred by Section 830 of the Penal Code, is the basic standard for participation in the enforcement, custodial, and security community in California. Peace officer status does not always, or typically, mandate the carrying of firearms or the inclusion of a safety retirement. There are approximately 128,700 peace officers in California.

The Board's Investigations Division administers the Board's criminal investigations program. Historically, the division's goals were to identify tax evasion problems, identify new fraud schemes, and actively investigate and assist in the prosecution of crimes committed by individuals who are in violation of the laws administered by the Board. The goals are now being adjusted to include the new responsibilities conferred by AB 71 of conducting inspections of cigarette and tobacco facilities.

As part of AB 71, Section 830.11 of the penal code was amended to read:

> The following persons are not peace officers but may exercise the powers of arrest of a peace officer as specified in Section 836 and the power to serve warrants as specified in Sections 1523 and 1530 during the course and within the scope of their employment, if they received a course in the exercise of those powers pursuant to Section 832. The authority and powers of the persons designated under this section shall extend to any place in the state:
>
> (6) (A) Persons employed by the State Board of Equalization, Investigations Division, who are designated by the board's executive director, provided that the primary duty of these persons shall be the enforcement of laws administered by the State Board of Equalization. (B) Persons designated pursuant to this paragraph are not entitled to peace officer retirement benefits. (b) Notwithstanding any other provision of law, persons designated pursuant to this section may not carry firearms. (c) Persons designated pursuant to this section shall be included as "peace officers of the state" under paragraph (2) of subdivision (c) of Section 11105 for the purpose of receiving state summary criminal history information and shall be furnished that information on the same basis as peace officers of the state designated in paragraph (2) of subdivision (c) of Section 11105. (d) This section shall remain in effect until January 1, 2010, and as of that date shall be repealed.

Specifically, the status granted under PC 830.11 would empower Investigations Division investigators to:

- issue misdemeanor citations;
- obtain criminal history information from the California Law Enforcement Telecommunications System (CLETS) on suspects and obtain other criminal history information from allied law enforcement agencies when conducting joint criminal investigations (most California district attorneys require criminal history information as an attachment to misdemeanor citations);
- seize plain-view evidence encountered in responding to crime or search scenes;
- withhold from release documents requested under the Information Practices Act, which relate to an active criminal tax evasion investigation;
- participate in basic, intermediate, and advanced investigative training courses and retain space in those classes on an as needed basis;
- gain credibility with law enforcement personnel; and
- promote a reciprocal exchange of information with law enforcement.

Section 830.11 of the penal code clearly states that the persons listed in the section are not peace officers, but rather, are granted the authority to exercise the powers of arrest and the power to serve warrants. This authority is necessary to issue misdemeanor citations. However, the Investigations Division has drafted strict policies to ensure that no misuse of this authority would occur.

Misdemeanor Citations and CLETS Access

Procedures have been drafted which provide that no misdemeanor citation shall be issued without approval from a supervisor. Staff are strictly prohibited from exercising arrest powers. See Exhibit 2 for Inspection Procedures

On-line database access procedures have been updated to include CLETS access. CLETS access will require a form be completed and submitted to the direct supervisor for signature before any CLETS information is accessed. The form will be maintained in a log and will be subject to audit by the Department of Justice, ISAD, and the Investigations Division. As per CLETS policy, all persons with access will be required to read and sign a biennial statement that any unauthorized access or disclosure of CLETS information is a misdemeanor and will subject the employee to adverse action.

The legislation does not permit investigators to carry firearms and does not make investigators eligible for enhanced retirement benefits afforded full peace officers. Although the need for outside law enforcement will diminish, the Investigations Division will continue current policy in which a full peace officer is involved in cases involving staff safety and cases involving search warrants.

While AB 71 does grant Investigations Division investigators the powers to arrest an individual, division policy will strictly prohibit any use of such powers. Powers of arrest gives a peace officer the authority to write misdemeanor citations, which require an individual to appear in court, similar to the issuance of a traffic ticket. Failure to appear could cause a judge to issue a bench warrant for the individual. The Board currently issues administrative summons to appear at the local Board office for failure to comply with some part of the Revenue and Taxation Code. However, there are no legal consequences to an individual for failure to appear pursuant to such notice to appear.

Once the Investigations Division investigator issues a misdemeanor citation, the investigator will be required to obtain the violator's criminal history information from CLETS and prepare an investigative report. This package will be submitted to the Investigations Division supervising investigator for review and approval. The approved package will then be forwarded to the District Attorney (DA) in charge of misdemeanor citations in the county in which the violation occurred. This package must be submitted to the DA in a timely manner so that the DA can prepare the case for the violator's court appearance.

The DA in charge has the legal responsibility to determine the merits of the Investigations Division's citation. The DA will review the completed and approved Investigations Division citation package comprised of the citation, CLETS criminal history, the Inspector's report of inspection and a DA coversheet for accuracy. Citations will be evaluated to determine if the documentation will suffice for a jury trial should the violator challenge the misdemeanor citation. It is estimated that a citation issued by the Board will require 3 hours to prepare. The citation will serve as a notice to appear in court rather than an actual arrest.

If Board staff does not have citation authority, a mini prosecution package must be prepared and presented to the local District Attorney's Office. It is estimated that preparation of a mini prosecution package will require a minimum of 16 additional hours to complete and will be comprised of suspect details, investigative summary and investigative chronology of events, witness detail, and list of evidence and/or exhibits. Staff will have to schedule a meeting with the local DA to discuss the merits of the prosecution package, and then wait for the DA to decide on whether to proceed. If the DA decides to go forward, then they must prepare and file a charging document, request an arrest warrant, and have the taxpayer arrested or agree to come in for booking. No one at the Board makes this decision. Issuance of citations by Board employees will result in a more expeditious method of charging a taxpayer with a misdemeanor, without the stress to the taxpayer and cost of an actual arrest procedure. See Exhibit 3 for flow chart.

It is believed that the vast majority of violators will plead guilty or no contest and pay the required fines. For those who plead not guilty, based on the DA's decision, the DA will schedule the case for a jury trial.

Alternatives

Staff has identified three possible courses of action to be taken in light of the recent amendment of PC Section 830.11:

1. Maintain current operations - grant no limited peace officer status to Investigations Division staff.
2. Grant limited peace officer status to 76 Investigations Division staff, and require the Executive Director to make a report to the Board in 6 months on the effectiveness of this authority.
3. Grant limited peace officer status to 27 Investigations Division staff, and require the Executive Director to make a report to the Board in 6 months on the effectiveness of this authority.

Each of these alternatives are briefly discussed below.

1. Maintain current operations – grant no limited peace officer status to Investigations Division staff.

This alternative will require additional cost and staff time for the proper administration of AB 71. Without direct access to CLETS, the Investigations Division will have to pay the California Highway Patrol (CHP), through a negotiated contract, to obtain the criminal history background information. Also, since access to this information is limited to Peace Officers, the Board will be required to have CHP forward the Criminal History information to the DA's Office, if the DA's office will agree to this procedure.

Pros

- No additional law enforcement training costs will be incurred.

Cons

- Will not allow Investigations Division to achieve the projected number of inspections because staff will have to take a considerable amount of time to prepare a mini prosecution package to present to a DA to obtain AB 71 violation convictions.
- Investigations Division will not have the ability to write misdemeanor citations; therefore, Investigations Division will not meet special fund revenue projections. It is estimated that the additional time required to prepare and present mini prosecution packages for the most egregious violations, as opposed to issuing misdemeanor citations will reduce the number of inspections performed by staff by approximately 4,575 inspections per year.
- Lessens the Board's ability to perform investigations with the utmost efficiency and effectiveness as recommended by the POST report for three primary reasons.
    - First, no direct access to CLETS. CLETS information would streamline the investigation process.
    - Second, various agencies are willing to share information on investigations with law enforcement, although they are not willing to share with non-sworn personnel.
    - Third, there are questions about the Investigations Division staff's ability to testify to hearsay evidence in a preliminary hearing to determine whether or not a defendant will be held over for trial. These questions have led to additional cost and time for the DA, other law enforcement agencies, and Investigations Division staff.
- Investigations Division will continue to incur full law enforcement contract costs. Limited Peace Officer status was expected to reduce the Board's law enforcement contract needs by $200,000 per year. These costs are expected to increase as a result of the growing complexity of tax evasion cases, and Board investigators needing more and more law enforcement assistance to accommodate increased casework.
- The Investigations Division will have to continue to function without the benefit of knowing the criminal background of individuals or organized groups being investigated.
- The Investigations Division will continue to be a very low priority with other agencies when requesting assistance.

2. Grant limited peace officer powers to 76 Investigations Division staff and require report to the Board in 6 months.

This alternative most adequately allows for the proper administration of AB 71. This special category would include 40 inspectors, 29 investigators, 2 area administrators, 4 supervising investigators, and the division chief for a total of 76 positions. This alternative may require a new classification series within the Board titled "Investigator." It is possible the Department of Personnel Administration and the employees' union would need to approve the classification and duty specification.

Pros

- Places limited peace officer authority at the most appropriate classification level within the Investigations Division.
- Enables investigators to access CLETS with supervisory approval for the pursuit of misdemeanor citations, felony criminal investigations, and prosecutions. This will provide added safety to investigators who, with knowledge of suspected tax evaders' criminal records, can determine if law enforcement assistance is needed when conducting field investigations.
- Achieves increased efficiency and effectiveness in conducting investigations as outlined by POST.
- Enables the Investigations Division to proceed with planned FY 04-05 expenditure reductions ($200,000) in contract law enforcement services.
- Removes all question over whether Investigations Division staff can testify to hearsay evidence at a preliminary hearing to have a defendant held over for trial.
- Promotes credibility with the law enforcement community.
- Allows the Investigations Division to obtain law enforcement training as needed and receive partial cost reimbursement from POST.

Cons

- Costs will be incurred for additional law enforcement training. It's estimated that 40 hours per year of training per ID staff at $120 per position for class costs will be required. This amounts to an estimated cost per year of $9,120.
- Need for law enforcement assistance will continue for protection purposes, to conduct search warrant threat assessments, and to execute Board search warrants as recommended by POST.

3. Grant limited peace officer powers to 27 Investigations Division staff and require report to the Board in 6 months.

This alternative will minimally allow the Investigations Division to meet the requirements of AB 71. This special category would include 15 investigators, 8 inspectors, and 4 supervising investigators for a total of 27 positions. This alternative may require a new classification series within the Board titled "Investigator." It is possible the Department of Personnel Administration and the employees' union would need to approve the classification and duty specification.

Pros

- Places limited peace officer authority at the highest non-supervisory classification level within the Investigations Division and with first level supervision.
- Enables investigators to access CLETS information for the pursuit of misdemeanor citations, felony criminal investigations and prosecutions. This will provide added safety to investigators who, with knowledge of suspected tax evaders' criminal records, can determine if law enforcement assistance is needed when conducting investigations.
- Places issuing of citations at a high level (BTS I or higher), thereby increasing the quality of inspections. Investigations Division staff has obtained a higher level of training and experience over other staff. This knowledge will carry over to their conduct of inspections.
- Enables the Investigations Division to achieve a portion of the projected inspections.
- Achieves increased efficiency and effectiveness in conducting investigations as outlined by POST.

- Removes all question over whether Investigations Division staff can testify to hearsay evidence at a preliminary hearing to have a defendant held over for trial.
- Allows the Investigations Division to obtain law enforcement training as needed and receive partial cost reimbursement from POST.
- Enables the Investigations Division to proceed with planned FY 04-05 expenditure reductions ($200,000) in contract law enforcement services.

Cons

- Reduces inspection quantity and efficiency by requiring the BTS I to be in the field roving between teams in order to deal with any issues that require personnel with limited peace officer status.
- Only 35% of available investigative staff will have limited peace officer status; therefore, the Investigations Division will not meet special fund revenue projections. It is estimated that the additional time required to have staff float between inspection teams for the purpose of writing misdemeanor citations would reduce the total number of inspections performed by staff by approximately 2,175 inspections per year.
- Increases total travel costs by $114,000 per year.
- Costs will be incurred for additional law enforcement training. An estimated per position cost of approximately $120 per class will result in estimated costs of $3,240 per year.
- Need for law enforcement assistance will continue for protection purposes, to conduct threat assessments, and to execute Board search warrants as suggested by POST.

Conclusion

Currently, the Board staff assigned to conduct investigations is very limited in what they can accomplish. Limited peace officer authority is vital to the effectiveness of the Board's Investigations Division. The Board's primary interest in limited peace officer powers is the access to criminal history information, POST sponsored or endorsed training programs, the ability to seize evidence in plain sight, and the ability to issue misdemeanor citations. Limited peace officer status will lead to increased efficiency and effectiveness as concluded by POST. Limited peace officer powers will allow Board employees to effectively enforce the criminal provisions of AB 71 and reduce cigarette and tobacco tax evasion. These powers do not encompass the civil penalties and fines, also created in AB 71, that will be addressed in a separate issue paper.

The described peace officer powers will not lead to unnecessary or intrusive investigations of ordinary taxpayers. The Investigations Division will continue to adhere to its current high standards for determining if reasonable and probable cause exist to investigate whether or not a crime is being committed or has been committed. Peace officer powers will in no way weaken any taxpayer rights contained in the law.

Staff recognizes the sensitive nature of this issue. However, we have asked the staff of the Investigations Division to do a job that requires them to protect the revenue base for the taxes administered by this agency. With the amount of evasion of taxes that has been discovered in the past several years and the increased sophistication of today's criminal, this job will only grow larger and more difficult. The Board should give staff the tools they need to accomplish the tasks assigned in a professional manner and in as safe an environment as possible.

Prepared by: Investigations Division
Current as of August 9, 2004

EXHIBIT 1

State Agencies Employment of Peace Officers

Following is a list of the state and county agencies that employ peace officers and the Penal Code authorization for peace officer status. This is not an all-inclusive list.

Agency	Penal Code Authorization
Full Peace Officers	
Alcoholic Beverage Control	830.2 (h)
Board of Dental Examiners	830.3 (a)
CA Exposition and State Fair	830.2 (i)
CA Inspector General	830.2 (j)
CA State Lottery	830.3 (p)
CA Science Center	830.3 (r)
Consumer Affairs	830.3 (a)
Contractor's State Licensing Board	830.3 (m)
Controller	830.3 (k)
Corporations	830.3 (l)
County Child Support	830.35 (b)
County Coroner	830.35 (c)
County Welfare Fraud	830.35 (a)
Department of Justice	830.1 (b)
Department of Managed Health Care	830.3 (u)
Department of Parks and Recreation	830.2 (f)
Department of Toxic Substance Control	830.3 (h)
Developmental Services	830.3 (h)
Division of Labor Standards	830.3 (g)
Employment Development Department	830.3 (q)
Franchise Tax Board	830.3 (s)
Health Services	830.3 (f)
Horse Racing Board	830.3 (d)
Housing and Community Development	830.3 (j)
Insurance	830.3 (i)
Medical Board	830.3 (a)
Mental Health	830.3 (h)
Motor Vehicles	830.3 (c)
Office of Emergency Services	830.3 (n)
Office of Statewide Health Planning and Development	830.3 (h)
Public Employees Retirement System	830.3 (h)
Secretary of State	830.3 (o)
Sergeant-at-Arms each house of Legislature	830.36 (a)
Social Services	830.3 (h)
Limited Peace Officers	
Department of Financial Institutions	830.11 (a)
Department of Real Estate	830.11 (a)
Investigations Bureau of the Department of Insurance	830.11 (a)
Public Utilities Commission	830.11 (a)
State Lands Commission	830.11 (a)

CHAPTER XXX

INSPECTION PROCEDURE XXX.XXX

PURPOSE OF THIS SECTION XXX.XXX

This section is a guide for conducting inspections of manufacturers, distributors, wholesalers, importers, and retailers of cigarette or tobacco products whom are engaged in business in California. It incorporates procedures and techniques that have evolved over a period of years, which have proven to be sound and practical. All investigative staff should follow these procedures to ensure that inspections and reports are prepared in a uniform manner utilizing approved inspection methods. However, this section cannot be a substitute for experience, training, good judgement, or active supervision.

AUTHORIZATION XXX.XXX

The California Cigarette and Tobacco Products Licensing Act of 2003 (CCTPLA) was created to provide licensure by the State Board of Equalization of retailers, distributors, wholesalers, manufacturers, and importers of cigarette or tobacco products that are engaged in business in California. The CCTPLA prohibits retailers, manufacturers, distributors, wholesalers, and importers from distributing or selling cigarette and/or tobacco products unless they are licensed. The Board is authorized to suspend or revoke the license of any manufacturer, distributor, wholesaler, importer, or retailer of cigarette or tobacco products that are in violation of the Act's provisions. The CCTPLA prohibits a manufacturer, distributor, wholesaler, importer, retailer, or any other person from selling counterfeit cigarette and/or tobacco products and provides that a violation of that prohibition is a crime. Specified fines or imprisonment are imposed for possessing, selling, or buying false or fraudulent cigarette tax stamps. Also, CCTPLA requires manufacturers and importers of cigarette and/or tobacco products that provide those products to distributors or wholesalers, to pay to the Board a one-time licensing fee for cigarette and/or tobacco products sold in this state.

PRE-INSPECTION PROCESS XXX.XXX

The purpose of the pre-inspection process is to gather investigative and background information. The information gathered should be used to ensure that active investigations are not impeded, related parties and locations are accounted for, and safety concerns are addressed. Staff should develop a list of all licenses and permits issued by the Board utilizing the Integrated Revenue Information System (IRIS), gather pertinent information contained in the Investigations Tracking System (ITS), and analyze registration (TAR AI) and revenue reporting (REV FZ) information for each assigned inspection location.

When gathering investigative and background information for an inspection, there are a number of permits that may be related to a location. Each permit will have a Taxable Activity Type (TAT) that denotes the tax program description. The following is a list of possible Taxable Activity Type's that staff may find when searching for active permits and licenses:

TAT	TAX PROGRAM DESCRIPTION
CM	Cigarette Manufacturer
CP	Tobacco Products Distributor
CR	Cigarette Distributors
CW	Cigarette Wholesaler
SR	Regular Sales Tax
SRX	Consolidated within single taxing jurisdiction
SRY	Consolidated w/ multiple taxing jurisdictions

TAT	TAX PROGRAM DESCRIPTION
TW	Tobacco Products Wholesaler
LR	Retailer of Cigarettes or Tobacco License
LD	Distributor of Cigarettes or Tobacco License
LW	Wholesaler of Cigarettes or Tobacco
LM	Manufacturer/Importer of Cigarettes or Tobacco Products License

The ITS should be checked prior to any inspection for active and closed complaints and cases. Information contained in prior complaints or cases may be valuable when planning, coordinating, and conducting inspections. When the subject of inspection is related directly or indirectly to an active investigation, and the inspection is not a referral from the lead investigator, the lead investigator should be contacted immediately. Also, in cases where the ITS shows that a seizure was conducted during a prior inspection, no inspection shall be performed until after the 60 day notice period to all interested parties, related to the seizure, has passed and no appeal has been filed.

Note: The information contained in this AB 71 Inspection Procedures is in draft form and may not accurately reflect the text of the final plan. Exhibits referred to in this draft are not presented with this copy, but are included within the procedural manual.

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The information gathered should be used by field staff to develop a picture of what the potential inspection should look like upon entering the location. As an example, consider the following scenario:

The background and investigative information gathered regarding a business to be inspected has revealed the following:

- The business is registered with a BOE business classification code of "33" (grocery stores with beer and wine licenses).
- The business maintains a seller's permit and no other BOE licenses or permits.
- The business reports on sales tax returns that 20% of their gross sales are taxable.

Based on this information, field staff might expect to find the following at this business:

- a small retail stock of soda, beer, and wine because reported taxable sales are low.
- The business does not sell cigarettes, tobacco products, or distilled spirits because a business code of "33" denotes beer and wine sales only, and IRIS did not show that the taxpayer maintained a license for retail sales of cigarette or tobacco products.
- a seller's permit displayed.
- a license displayed to sell beer and wine, as issued by the Department of Alcoholic Beverage Control (ABC).

Instead, upon entering the business field staff find that the taxpayer:

- has a large retail stock of soda, beer, and wine.
- does not have a license to sell beer and wine from ABC properly displayed.
- sells tobacco products and counterfeit stamped cigarettes.
- has no invoices for the purchase of the tobacco and counterfeit stamped cigarettes.

Given all of the above, field staff should take the following steps:

- Send a completed BOE-1164, *Audit Memorandum of Possible Tax Liability* (Exhibit 8), to the district office of registration because a large retail stock of taxable products (soda, beer, wine, cigarettes, and tobacco products) should result in a significantly higher percentage of gross sales being taxable.
- Seize the counterfeit stamped cigarettes under R &T §30436(b).
- Seize the untaxed tobacco products under R&T §30436(b). The tobacco products are presumed untaxed under *Business and Professions Code Section 22974.3(b)* because the taxpayer could not establish the contrary by providing purchase invoices from a licensed distributor.
- Write a citation for the following violations:
  - B&P §22974.3(a) for possession of counterfeit stamped cigarettes, punishable under B&P §22974.3(a)(1-5).
  - B&P §22974.3(b) for possession of untaxed tobacco products, punishable under B&P §22891.
  - B&P §22974 for failure to keep purchase records for up to one year at the retail location punishable under B&P §22981.
- Send BOE-220-I, *Account Maintenance/Referral* (Exhibit 9), with information about unlicensed taxpayer to Excise Taxes & Fees Division.
- Send an outside agency referral to the Department of Alcoholic Beverage Control.
- Open a complaint ID-600, *Investigative Complaint* (Exhibit 10), unless a complaint currently exists, to document and track the seizure.

The *Pre-Inspection Process* will ensure that all inspections are conducted utilizing the most current intelligence and background information. The process will enable field staff to better plan an inspection that incorporates all related parties and business, does not impede active investigations, and provides information necessary to ensure a safe environment for field staff and the taxpayer (Exhibit 1).

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INSPECTION PROCESS xxx.xxx

State and local law enforcement and licensees all play an important role in preventing cigarette and tobacco products related problems within our communities. The Board of Equalization is committed to a philosophy of service and accountability to the public, whose interest is best served through sound administration of the tax laws. The Board of Equalization licenses and regulates the California cigarette and tobacco products industry. Because most of the taxes administered by the Board of Equalization are self-assessed by the taxpayer, the goal of the inspection process is to secure voluntary compliance among licensees and permittees.

The California Business and Professions Code § 22980(a)(1) authorizes any peace officer, or Board employee granted limited peace officer status pursuant to paragraph (6) of subdivision (a) of Section 830.11 of the Penal Code, upon presenting appropriate credentials, to enter any place as described in paragraph (3) and to conduct inspections in accordance with the following paragraphs, inclusive. As described in paragraph (3) inspections may be at any place at which cigarettes or tobacco products are sold, produced, or stored or at any site where evidence of activities involving evasion of cigarette or tobacco products tax may be discovered.

Cigarette and tobacco products found to be untaxed should only be seized based on the exercise of good judgement and caution, and with the approval of field staff's immediate supervisor. Although AB 71 authorizes persons designated by the Executive Director of the BOE to exercise the arrest powers of a peace officer in the enforcement of the taxes and fees administered by the BOE, **staff will not exercise arrest powers**. Any situation that would require an arrest to be made will require State and local law enforcement to be contacted and to make the arrest.

For safety purposes, personal vehicles will never be utilized to perform inspections, and inspections will always be performed by a minimum of two people. Additionally, inspections shall be performed in a reasonable manner and at times that are reasonable under the circumstances, taking into consideration the normal business hours of the place to be entered. Additionally, inspections shall be requested or conducted no more than once in a 24-hour period.

Any person that refuses to allow an inspection shall be subject to the penalties imposed pursuant to Section 22981 of the Business and Professions Code.

Upon entering the place of inspection, field staff should request to speak to the owner or person in charge if the owner is not present. Once the owner or person in charge is identified, field staff should display identification and badge, and inform the individual that the business will be subject to a cigarette and tobacco products inspection. If the taxpayer refuses inspection, field staff should try to persuade the owner or person in charge to allow the inspection by explaining the consequences of their decision to not allow an inspection. However, if the owner or person in charge is still not willing to allow an inspection, a supervisor should be contacted immediately. All inspections should be conducted in a manner that causes minimum disruptions to the business' ongoing transactions. The safety of field staff, owner or person in charge, employees, and customers should be the most important consideration when performing an inspection, and every precaution should be utilized to ensure that staff has an environment that is relatively safe to conduct the inspection. Situations could make it prudent to contact the local police department to ensure safety or enforce the law. Local police should be contacted immediately during any situation that would normally require a person to call 9-1-1. All other requests for assistance by local police should be approved by direct supervision.

Field staff should make a visual observation of the business and verify that the business has all necessary permits and licenses displayed. Any abnormalities or violations should be handled accordingly by way of referrals to other departments or agencies and/or citations (see Ch. XX, *Citations,* of the ID Manual). No citation will be written without prior approval of a supervisor.

According to B&P §22974, retailers; B&P §22978.1, distributors and wholesalers; and B&P §22979.4, manufacturers and importers, purchase invoices must be maintained on the premises for the previous twelve months. Additionally, B&P §22978.5(b), distributors and wholesalers, and B&P §22979.5(a), manufacturers and importers, must retain all records on premise for the previous twelve months. When presented with records, field staff should review the purchase and sales invoices and verify the following information:

- Cigarette or tobacco products are purchased from licensed wholesalers, distributors, or manufacturers.
- Information on invoices is adequate and complete per B&P §22978.4 and B&P §22979.5.
- Cigarette inventory and retail stock is supported by purchase invoices.

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- Tobacco products inventory and retail stock is supported by purchase invoices.

If the records are not available upon request by field staff, the owner or agent responsible can be cited. However, prior to citation, the owner or agent should be given an opportunity to state their reasons for noncompliance. If a sufficient reason is provided, the owner or agent should not be cited. Examples are that the business is under audit or the records for the previous quarter are at the taxpayer's accountant's office for quarterly returns.

The following property is subject to seizure by the Board pursuant to Section 30436 of the Revenue and Taxation (R&T) Code:

- Cigarettes or tobacco products transported upon the highways, roads, or streets of this state by a transporter without a transporter's permit from the Board authorizing such transporter to possess or transport more than 400 unstamped cigarettes or tobacco products with a value of $25.00 or more. (A licensed distributor, common carrier, or a person transporting cigarette or tobacco products under federal internal revenue bond or customs control may transport unstamped cigarettes or untaxed tobacco products.)
- Cigarettes not contained in packages to which are affixed California cigarette tax stamps or meter impressions or tobacco products upon which the tobacco products surtax has not been paid, which are offered for sale, possessed, kept, stored, or owned by any person with the intent of the person to sell the cigarettes or tobacco products without payment of the taxes imposed by this part.
- Any cigarette or tobacco product vending machine, together with the cigarettes, tobacco products, money or other contents thereof, that has been loaded, in whole or in part, with packages of cigarettes that do not have California cigarette tax stamps or meter impressions affixed or tobacco products upon which the tobacco products surtax has not been paid.
- Cigarettes contained in packages to which are affixed California cigarette tax stamps or meter impressions in violation of Section 30163.
  - The package does not comply with all requirements of the Federal Cigarette Labeling and Advertising Act (15 U.S.C. Sec. 1331 and following) for the placement of labels, warnings, or any other information upon a package of cigarettes that is to be sold within the United States.
  - The package is labeled "For Export Only," "U.S. Tax Exempt," "For Use Outside U.S.," or similar wording indicating that the manufacturer did not intend that the product be sold in the United States.
  - The package, or a package containing individually stamped packages, has been altered by adding or deleting the wording, labels, or warnings described in the either of the two paragraphs above.
  - The package was imported into the United States after January 1, 2000, in violation of Section 5754 of Title 26 of the United States Code.
  - The package bears a cigarette brand name, which is a registered U.S. trademark of a participating manufacturer and the package was imported by anyone other than the participating manufacturer of that cigarette brand.
- Cigarette or tobacco products to which are affixed California cigarette tax stamps or meter impressions, or for which tax is paid pursuant to Sections 30123 and 30131.2, in violation of Section 30165.1, regardless of whether the violation is subject to the defense described in paragraph (2) of subdivision (i) of Section 30165.1.

Cigarette and tobacco products found to be untaxed should only be seized based on the exercise of good judgement and caution, and with the approval of field staff's immediate supervisor. Although AB 71 authorizes persons designated by the Executive Director of the BOE to exercise the arrest powers of a peace officer in the enforcement of the taxes and fees administered by the BOE, **staff will not exercise those powers.** Any situation that would require an arrest to be made will require State and local law enforcement to be contacted and to make the arrest.

According to B&P §22974.3(b), "... It shall be presumed that tax has not been paid to the board on all tobacco products in the possession of a retailer or of any other person until the contrary is established by a proof of payment to the board or by a purchase invoice that shows that the retailer or other person, as applicable, paid the tax included purchase price to a licensed distributor, wholesaler, manufacturer, or importer as described in Section 22978.4. The burden of proof that tax has been paid on tobacco products shall be upon the retailer or the other person, as applicable, in possession thereof." However, upon inspection, if a person is unable to provide documentary evidence, in the form of purchase invoices, tax reports, etc., to establish that the tobacco products in question are

tax-paid, the investigator should not seize the tobacco products without prior approval of his or her supervisor. Even though the person would be in violation of B&P §22974, §22978.1, or §22979.4 (requirements to retain one year of purchase invoices at the business), does not mean that the person can not, at a later time, provide documentation indicating that the tax has been paid.

Cigarette and tobacco products should be seized administratively if all of the following conditions are met:

- Field staff has permission from the appropriate lead person to inspect the business.
- Field staff conducted a complete background and investigative information check on the business, owners, and other related parties (IRIS, STARS, ITS, etc.).
- Cigarette and/or tobacco products meet the requirements for seizure under R&T §30436.
- The supervisor's approval has been obtained prior to seizure.

When field staff seize cigarette or tobacco products, staff will provide a completed form BOE-1317, *Receipt for Property Seized* (Exhibit 15), to the person from whom the cigarette or tobacco products were seized. If that person indicates that another person has an interest in the cigarette or tobacco products, then the investigator must obtain the name and address of the other person. The BOE-1317 should be completed in entirety, listing the reason for seizure, with an itemized listing by brand of seized cigarette and/or tobacco products. The BOE-1317 must be signed by the person in control of the product at the time of the seizure, and a copy should be left with that person.

An ID-016, *Inspection Sheet* (Exhibit 12), will be completed at every inspection. The information gathered on the ID-016 could be useful in establishing distribution patterns, knowledge, or intent in current active or future related investigations. The information on the ID-016 will be essential when justifying a proper seizure at a hearing for release or recovery of property. The ID-016 should include, but not be limited to the following:

- An itemized listing by brand of the quantity of cigarette and/or tobacco products seized.
- A detailed explanation outlining the reason for seizure.
- Any evidence, or lack of evidence, justifying the reason for seizure.
- If applicable, any citation numbers that are preprinted on the citation.
- Vendor information.
- Any information given to or statements made by the person in control of the cigarette or tobacco products that tend to demonstrate knowledge of the Cigarette and Tobacco Products Tax Law. Some R&T violations require specific intent, therefore it is important to document situations when the taxpayer demonstrates knowledge.

All administrative seizures of cigarette and/or tobacco products are made under the authority of R&T Code §30436. The implementation of the CCTPLA of 2003 has provided many penalties that can be utilized to encourage compliance through enforcement. Many of the penalties can be found in Division 8.6 of the Business and Professions Code (Exhibit 5 & Exhibit 7), as well as the Revenue and Taxation Code (Exhibit 6 & Exhibit 7).

POST INSPECTION PROCESS xxx.xxx

The post inspection process is vital to the inspection procedures. In this phase, the activity reports and all necessary forms relating to seizures are completed. It is critical that all documents and forms be completed accurately and in detail. These documents are the foundation for defending any actions taken during the inspection process such as the appeals process. Also, the information contained within the reports, related to the inspections, can be vital to active or future investigations.

Upon completion of an inspection, field staff will update the form BOE ID-609, *Investigations Activity Report* (Exhibit 11), with all necessary information, such as conversations regarding leads and tips, any indication of the taxpayer's knowledge of various laws affecting their business, or intelligence that can be used in future criminal investigations. Should the inspection result in an administrative seizure, the inspection report should include at a minimum:

a) date and location of the inspection;
b) name of owner or representative who was present at the time of inspection;
c) detail regarding the specific location of stock that was administratively seized;
d) invoices that were provided (if any);

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e) discussion with the taxpayer or representative regarding their purchase of the contraband cigarette and/or tobacco products; and
f) acknowledgement of the explanation of the administrative seizure process to the taxpayer and/or representative.

It is important that the BOE-016, *Inspection Sheet,* be completed in a clear and concise manner, and that it contains all pertinent information related to the business that was inspected. Remember that the information contained in the report might later be used as evidence in an active investigation or in the decision process of future investigations. The BOE-016 must be submitted to office staff responsible for the tracking of inspection data before the end of the month in which the inspection occurred.

Cigarette and/or tobacco products administratively seized will be secured in locked storage in the District Office until the Evidence Custodian (EC) acknowledges receipt of the products in accordance with established procedure (see Ch. 9, *Evidence,* of the ID Manual). In the event that the information provided on the form BOE-1317, *Receipt For Property Seized,* does not accurately reflect the actual products seized, an amended BOE-1317, *Receipt For Property Seized,* will be created. Any cigarettes incorrectly seized should be personally returned to the taxpayer. A new signature on the amended form BOE-1317, *Receipt For Property Seized,* must be acquired from the EC and the taxpayer or taxpayer representative.

Additionally, field staff will complete a legal package consisting of form BOE-1238, *Notice Of Seizure And Forfeiture* (Exhibit 13); form BOE-1238-A (Exhibit 14), *Verified Petition For Release Or Recovery Of Property;* a copy of BOE-016; a copy of BOE-1317 signed by the EC and the taxpayer or taxpayer representative; a copy of all citations; a copy of IRIS screen TAR AI, *Account Activity;* and a copy of newspaper publication (Exhibit 16) if seizure was 61 cartons or more of cigarettes or an equivalent amount of tobacco products (Exhibit 18). Field staff will forward this package to their lead or supervisor for review. Upon approval the package will be forwarded to the Legal Department for review and signature. When completed, the description of property on form BOE-1238, *Notice Of Seizure And Forfeiture,* should **exactly** match the description of items seized on the form BOE-1317, *Notice Of Seizure And Forfeiture.* The following are additional guidelines for completion of form BOE-1238, *Notice Of Seizure And Forfeiture*:

a) In the "To" section – include the name(s) and addresses identified under each of the following business entities:

   1. **Corporation:** must be addressed to the business DBA at the location of the seizure, and to the Corporation's "Agent of Service".

   2. **Partnerships:** must be addressed to each partner at their individual mailing address, if known, and to the DBA at the business address of seizure.

   3. **Sole Proprietorships:** must be addressed to the DBA at address of seizure, and the mailing address of the sole proprietorship identified on IRIS.

   4. **Married:** must be addressed to the husband and wife individually (even if at the same residential and/or business address, and to the DBA at the address of seizure).

b) The address listed on form BOE-1238, form BOE-1317, and STARS screen TAR AI (Exhibit 17) must all be the same. If the STARS screen TAR AI is incorrect, then the cover memo should indicate that compliance staff has been notified to make the correction(s) using form BOE-220-I, *Account Maintenance/Referral.*

c) Describe the property seized (should match BOE ID-1317 description).

d) Verify the value assigned to the seizure to ensure that it's reasonable and consistent with the seizure and complaint paperwork.

Upon receipt of form BOE-1238 from the Legal Department, the field staff will:

- send the original BOE-1238 and BOE-1238-A, *Verified Petition for Release and Recovery of Property*, to the person from whom the cigarettes were seized,
- send a photocopy of the BOE-1238 and 1238-A to any other person who may have an interest in the property,
- retain a photocopy of the BOE-1238 for the complaint file,

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- retain proof of mailing,
- retain copy of a Postal Service form 3811, *Domestic Return Receipt*, signed by taxpayer or taxpayer representative indicating that the documentation sent was received.

The form BOE-1238, *Notice of Seizure and Forfeiture,* shall be personally served or sent by certified mail to all persons known to have any rights, title, or interest in the property. If the amount of cigarettes seized is 61 cartons or more of 200 cigarettes each or an equivalent amount of tobacco products, newspaper publication is required to notify others that may have an interest in the property seized. Notification must be published at least one time in a newspaper of general circulation in the county where the seizure was made. The notice shall include a description of the property, the reason for the seizure, and the time and place of the seizure. It is the responsibility of staff to make sure the billing for the press release is received by the Accounting Section. Field staff will obtain and retain proof of the publication from the newspaper for the complaint file.

Any person claiming an interest in the seized property may, within twenty (20) days of the date of personal service, mailing, or publication of the notice, file a verified petition requesting release or recovery of the property on the grounds that the property was erroneously or illegally seized. Petitioners may send petitions to the Board's P.O. Box, MIC:81. Any petition received by the Investigations Division should be forwarded to the Chief or his or her designee, who will forward it to the Chief of Board Proceedings. In addition, the Chief will provide copies to HQ petition person.

If the inspection of the business resulted in an administrative seizure of products and/or citation is issued to the business, and no open complaint against the business currently exists, then field staff must open a complaint on the business and send a copy of the completed BOE-016, *Inspection Sheet,* and/or a copy of the citation (see Ch. XX, *Citation Procedures*, of the ID Manual) and the result to the Excise Taxes & Fees Division.

Once all the necessary forms have been completed, the field staff must submit the Inspection File, including copies of all completed forms to the lead person. If an inspection was due to an open complaint and resulted in no citation or seizure, the field staff should close the complaint, and submit the complaint close out to the lead person.

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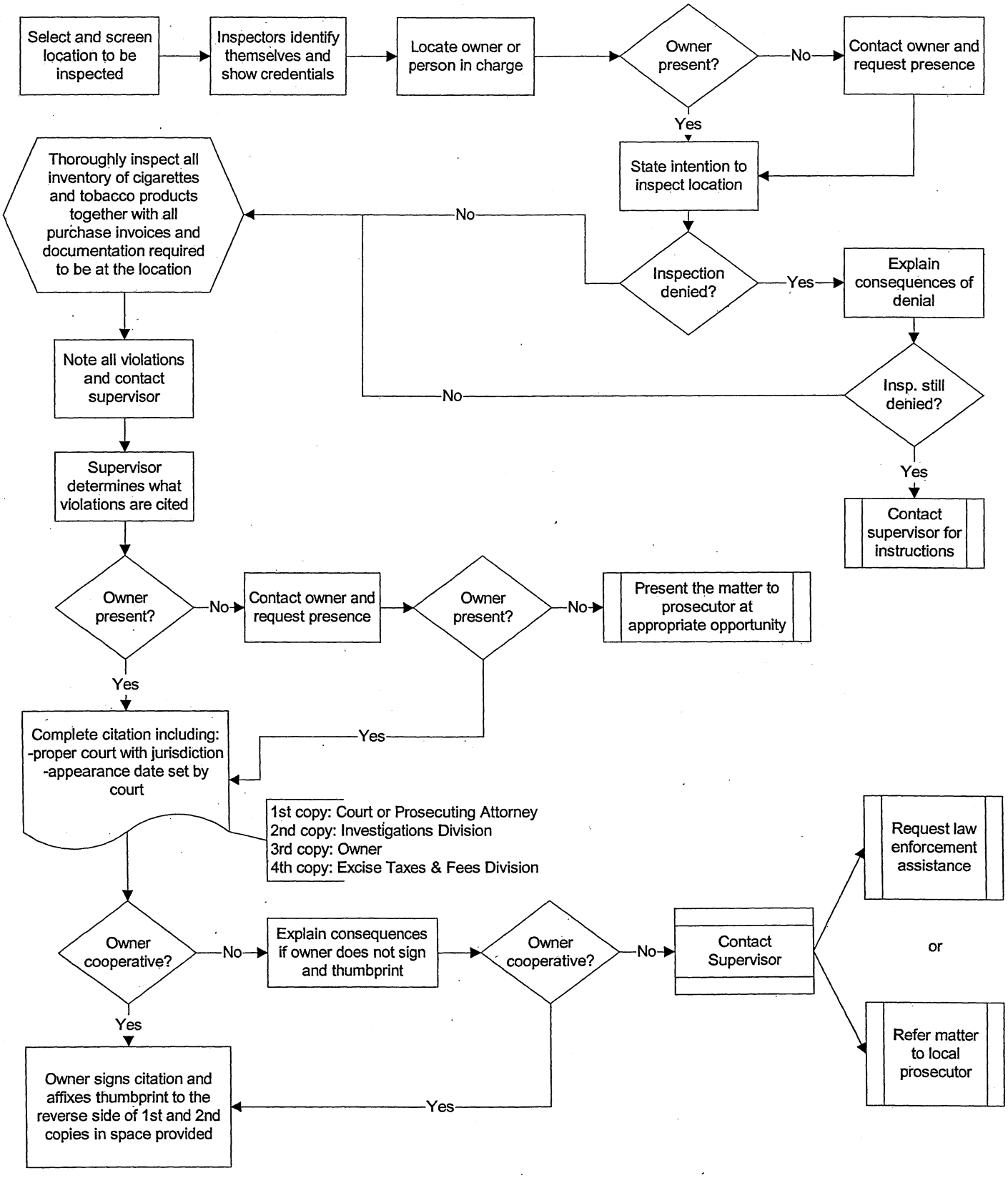
EXHIBIT

Citation Process