

as to the number of unaccounted for bottles from the audit. Nevertheless, using the smaller numbers, the Administrative Law Judge characterized OTC's unaccounted for product as being "unacceptably large." However, in its exceptions, Respondent points to the inability of OTC's supplier, OTCB, to provide exact figures as to the amount of product it shipped to OTC during the audit period, thus degrading the reliability of the figures the Diversion Investigator was required to use in making her calculations. The Administrative Law Judge adequately acknowledged the inherent difficulty in arriving at a bottom line using the records that were available. It also should be noted that OTC was required to maintain complete records of all listed chemicals it received. Nevertheless, given the large figures of unaccounted for product, it was reasonable to infer that even given the problems in accuracy noted in the record here, there were still unacceptably large quantities of unaccounted for List I chemical products in OTC's records. Further, the gravamen of the Administrative Law Judge's opinion in this section was OTC's internal failure to maintain adequate records. The Acting Deputy Administrator agrees and concludes that failure is significant and contributes to the risk to the public interest of OTC's chemical products being diverted to the illicit market. *See, e.g., In the Matter of David N. Pruitt*, 57 FR 11,339, 11,340 (1992).

Based on inclusion of the unregulated product Maxinol, in the computation chart prepared by one of the Diversion Investigators based on OTCB records (Govt. Ex. 95) and photographs of that product taken during the May 23, 2000, inspection, Respondent's exceptions further challenge the overall validity of the audits. However, it was jointly stipulated by the parties that Maxinol does not contain a List I chemical and the Administrative Law Judge's findings relating to that audit and her decision were not premised on the apparent 1296 unaccounted for bottles of Maxinol. Indeed, the six other products in the computation chart which did form the basis for the judge's findings regarding the audit, are all products containing List I chemicals and reflect large quantities of unaccounted pseudoephedrine product, including a shortage of 54,403 bottles of OTC's 120-count 60 mg. product. The Acting Deputy Administrator finds Respondent's exception to be without merit.

The Administrative Law Judge concluded Respondent engaged in

suspicious regulated transactions involving uncommon methods of delivery and payment. Such transactions are required to be reported to the DEA pursuant to 21 CFR 1310.05(a)(1) (2000). With regard to delivery, OTC representatives received, processed and distributed orders containing List I chemical products directly from a freight facility, an unregistered location. These transactions would be regarded as suspicious transactions. However, the Acting Deputy Administrator agrees with the Administrative Law Judge that there was insufficient evidence showing Respondent shipped List I chemical products to an unregistered location in connection with sales to Worldwide Wholesale.

The Administrative Law Judge found OTC engaged in a suspicious, unreported transaction when it accepted \$70,000.00 in cash from T.J. Wholesale as part of a transaction for products containing List I chemicals. Noting the finding that Larry Petit did not think the payment suspicious, Respondent has filed an exception asserting the Administrative Law Judge's decision in effect, improperly places the characterization as to what constitutes a "suspicious order in the hands of the Agency after the fact."

While the seizure of pseudoephedrine, sold by OTC to T.J. Wholesale and later discovered in illicit laboratories, had not yet been reported to OTC by a Warning Letter, the suspicious circumstances of the cash transaction were readily apparent to any reasonable person. Larry Petit's explanation, that he did not think it unusual for someone going to Las Vegas to have \$70,000.00 cash, begs the relevant question. While perhaps a "big-time" gambler might carry cash for that purpose, that does not explain why a legitimate business enterprise would purchase a substantial amount of List I chemical products with cash, let alone \$70,000.00 worth of pseudoephedrine.

In addition to the testimony of a Diversion Supervisor that payment in cash is suspicious, payment in cash and by cashier's check were identified as reasons to consider a particular transaction as being suspicious in the very materials OTC sent its own customers. OTC also included cash payments as suspicious in proposed conditions of sale contracts with its customers. (*See* Govt. Ex 11 at 4.) That Larry Petit recognized the unusual nature of the transaction was also indicated by his testimony that he told T.J. Wholesale's representative that he would take the cash "one time only" and "I don't operate my company that

way." (Tr. at 1295.) Given the foregoing, the Acting Deputy Administrator concludes Larry Petit recognized the unusual nature of this transaction and it should have been reported to DEA at the time.

The Administrative Law Judge found OTC engaged in over-the-threshold regulated transactions of pseudoephedrine products with a non-registrant. (Finding of fact 47.) This involves sales to the Red Coleman Stores. Respondent filed exceptions to this finding, arguing Red Coleman is a retail distributor which did not have to be registered with DEA. The Acting Deputy Administrator agrees the evidence is ambiguous on this point and insufficient to show the Red Coleman Stores engaged in over-the-threshold retail transactions requiring that company's registration. Accordingly, the Administrative Law Judge's finding of sales to a non-registrant in violation of DEA regulations will not be adopted.

Regarding factor three, relevant conviction record, the Administrative Law Judge found that neither the Respondent nor its principal officers have any prior conviction record relevant to the handling of List I chemicals.

Regarding factor four, applicant's experience in distributing chemicals, the Administrative Law Judge found that the officers of OTC and Larry Petit in particular, had extensive experience with distributing List I chemicals, much of which stemmed from the operation of L&M Vending Company and Larry Petit's work with DEA.

With respect to factor five, such other factors relevant to and consistent with public health and safety, the Administrative Law Judge noted the serious impact upon the public interest of the diversion of List I chemical products into the illicit production of methamphetamine. Acknowledging the distinction between "Traditional" and "Non-Traditional" markets, the Administrative Law Judge concluded OTC engaged in unusual business practices, raising suspicions as to the exact source of OTC's customer base and intended purpose of its business operations.

Specifically, OTC was not listed in the Dallas area telephone directory, did not have a marketing plan during its formation and early days of operation, has no product catalog or price list, never engaged in promotions or advertising and had no employees. Additionally, Larry Petit did not know OTC's market share of List I chemical products. However, the evidence showed OTC sold over 92 million tablets of pseudoephedrine product