methamphetamine laboratory operators." ALJ Ex. 1 (¶¶ 6 & 3).

As found above, the Government's figures for the expected sales range and the statistical probability of certain sales level of ephedrine products in legitimate commerce at convenience stores are not supported by substantial evidence. Accordingly, there is no basis for concluding that Respondent's sales of these products "greatly surpass the expected sales range to meet legitimate demand." *Id.* at 2 (¶ 6).

The ALJ also acknowledged that when compared to Respondent's average monthly sales to its other customers ($454), Respondent's sales to the FISCA Oil Company and some other stores seem excessive. ALJ at 21–22. While this evidence is disturbing, I agree with the ALJ's conclusion that this evidence only creates a suspicion that diversion was occurring.[8] *Id.* at 22.

Finally, based on the DI's testimony, the ALJ also found that there is no evidence that Respondent failed to report any suspicious transactions. ALJ at 6 & 18. Notwithstanding the DI's testimony, this finding is erroneous.

On March 9, 2006, the Combat Methamphetamine Epidemic Act of 2005 was signed into law. *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Public Law 109–177, Title VII, 120 Stat.192, 256–77. Section 712(b) of the Act eliminated the 1,000 gram threshold for combination ephedrine products. 102 Stat. 264. While Congress provided an effective date for other provisions of the Act, *see, e.g.,* section 711(b)(2) & (c)(3), 120 Stat. 261, it provided no effective date for section 712(b).

As the Supreme Court has explained, "absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment." *Gozlon-Peretz* v. *United States,* 498 U.S. 395, 404 (1991) (other citations omitted). And "'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Id.* at 404–05 (quoting *Russello* v. *United States,* 464 U.S. 16, 23 (1983) (internal quotations omitted)).

It is therefore clear that the provision eliminating the threshold for combination ephedrine products became effective with the Act's enactment on March 9, 2006. Accordingly, thereafter every transaction in a combination ephedrine product by a distributor became a regulated transaction under the CSA, and thus, all transactions became subject to the recordkeeping and reporting requirements of 21 U.S.C. 830, including the requirement to report "any regulated transaction involving an extraordinary quantity of a listed chemical." 21 U.S.C. 830(b).

Respondent's sales to the FISCA Oil Company, which occurred after the threshold was eliminated and which were more than ten times its average monthly sale (as well as its sales to several other stores which were also multiple times greater than its average sale) involved an "extraordinary quantity" within the meaning of the statute. While the evidence does not establish that the products Respondent sold in these transactions were diverted, it cannot be seriously disputed that the transactions were suspicious and should have been reported to the Agency. *See* ALJ at 25 ("[T]he Respondent should remain more vigilant in determining when a customer is purchasing listed chemical products in suspicious amounts.").

It is acknowledged that the Government did not allege that Respondent violated Federal law by failing to report these transactions. Accordingly, consistent with the Due Process Clause, the Agency cannot impose a sanction on Respondent for these violations. *See, e.g., Darrell Risner, D.M.D.,* 61 FR 728, 730 (1996). However, while the Order to Show Cause must be dismissed, Respondent is now on notice that its failure to report similar transactions in the future may give rise to further proceedings seeking the revocation of its registration.

Order

Pursuant to the authority vested in me by 21 U.S.C. §§ 823(h) and 824(a), as well as by 28 CFR 0.100(b) and 0.104, I hereby order that the application of Hilmes Distributing, Inc., for renewal of its DEA Certificate of Registration be, and it hereby is, granted. I further order that the Order to Show Cause be, and it hereby is, dismissed. This order is effective immediately.

Dated: August 4, 2010

Michele M. Leonhart,

Deputy Administrator.

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[8] The record does not establish the standard deviation for Respondent's sales. Nor did the Government rebut Respondent's evidence regarding the stores which purchased the largest quantities such as their locations and the nature of their businesses.

Moreover, the Government did not file a brief at any stage of this matter. I thus conclude that the Government does not rely on the disparity between Respondent's average sale and its sales to stores such as FISCA to prove that Respondent's products were being diverted.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Hung Thien Ly, M.D.; Revocation of Registration

On August 28, 2009, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Hung Thien Ly, M.D. (Respondent), of McRae, Georgia. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, BL8586147, which authorizes him to dispense controlled substances as a practitioner, and the denial of any pending applications to renew or modify his registration on two grounds. Show Cause Order at 1–2.

First, the Order alleged that, on August 6, 2009, the Georgia Composite Medical Board (Board) revoked his license to practice medicine in Georgia, the State in which he holds his DEA registration, and that therefore, he is not entitled to maintain his registration. *Id.* (citing 21 U.S.C. 824(a)(3)). Second, the Order alleged that on August 14, 2008, Respondent was convicted of 129 counts of violating 21 U.S.C. 841(a)(1), by dispensing controlled substances "outside the usual course of professional practice and for no legitimate medical purpose." *Id.* at 2; *see also id.* at 1 (citing 21 U.S.C. 824(a)(2)).

On September 30, 2009, Respondent was served with a copy of the Order to Show Cause. Thereafter, on November 2, 2009, Respondent filed letter waiving his right to a hearing and responding to the Show Cause Order. Waiver of Hearing and Written Response to Order to Show Cause at 1. Therein, Respondent does not dispute either that he has been convicted by a United States District Court of violations of 21 U.S.C. 841 or that the Board has revoked his medical license. *Id.* Rather, he maintains that the Board's action "was based entirely" on his conviction and that his "trial was fundamentally flawed" because he was "denied appointed counsel by the District Court and represented himself at trial." Moreover, he "is confident that the Eleventh Circuit will grant a new trial with appointed counsel and expert medical testimony that will demonstrate that his practice was consistent with the good faith treatment of chronic pain." *Id.* at 1–2. Accordingly, he "requests that good cause is shown to suspend his registration [rather than revoke it] * * * until such time as the appeal [of his conviction] and any subsequent proceedings are complete." *Id.*

Thereafter, the Government forwarded the record to me for final agency action. Having considered the record, I conclude that it establishes two separate grounds for revoking Respondent's registration. I further reject Respondent's request that his registration should be suspended and not revoked pending the completion of his appeal. I make the following findings.

Findings

Respondent is the holder of DEA Certificate of Registration, BL8586147, which authorizes him to dispense controlled substances in schedules II through V. Respondent's registration was last renewed on March 6, 2006, and was to expire on March 31, 2009. However, on February 13, 2009, Respondent submitted an application to renew the registration. I therefore find that Respondent's registration has remained in effect pending the issuance of this Decision and Final Order. *See* 5 U.S.C. 558(c).

I further find that on May 13, 2009, the United States District Court for the Southern District of Georgia entered a judgment in which it found Respondent guilty on 129 counts of violating 21 U.S.C. 841(a)(1), which prohibits "knowingly or intentionally * * * distribut[ing], or dispens[ing] * * * a controlled substance" except as authorized by the Controlled Substances Act (CSA). *See United States* v. *Ly,* No. CR407–00286–001 (S.D. Ga. May 13, 2009) (judgment). According to the indictment, the counts were for distributing hydrocodone (combined with acetaminophen), a schedule III controlled substance; alprazolam, a schedule IV controlled substance; and amphetamine sulfate, a schedule II controlled substance. For his crimes, the District Court sentenced Respondent to 97 months in prison; the Court also imposed an assessment of $12,900, a fine of $200,000, and a term of supervised release of five years following his release from prison.

I further find that on August 6, 2009, the Georgia Composite Medical Board issued a final decision which revoked Respondent's State medical license based on his convictions.

Discussion

Under Section 304(a) of the CSA, "[a] registration * * * to dispense a controlled substance * * * may be suspended or revoked by the Attorney General upon a finding that the registrant * * * has been convicted of a felony under this subchapter." 21 U.S.C. 824(a)(2). The Attorney General may also revoke a registration "upon a finding that the registrant * * * has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the * * * dispensing of controlled substances." *Id.* § 824(a)(3).

As found above, Respondent has been convicted of 129 counts of violating 21 U.S.C. 841(a)(1), a felony under subchapter I (the CSA). *See id.* § 801 (note). These convictions provide reason alone to revoke his registration.

Moreover, under the CSA, a practitioner must be currently authorized to handle controlled substances in "the jurisdiction in which he practices" in order to maintain a DEA registration. *See* 21 U.S.C. 802(21) ("[t]he term 'practitioner' means a physician * * * licensed, registered, or otherwise permitted, by * * * the jurisdiction in which he practices * * * to distribute, dispense, [or] administer * * * a controlled substance in the course of professional practice"). *See also id.* § 823(f) ("The Attorney General shall register practitioners * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices."). As these provisions make plain, possessing authority under State law to handle controlled substances is an essential condition for holding a DEA registration.

Accordingly, DEA has held repeatedly that the CSA requires the revocation of a registration issued to a practitioner whose State license has been suspended or revoked. *David W. Wang,* 72 FR 54297, 54298 (2007); *Sheran Arden Yeates,* 71 FR 39130, 39131 (2006); *Dominick A. Ricci,* 58 FR 51104, 51105 (1993); *Bobby Watts,* 53 FR 11919, 11920 (1988). Respondent's loss of his State authority thus provides an additional ground for revoking his DEA registration.

I further reject Respondent's request that his registration only be suspended during the pendency of his appeal. As explained above, because Respondent does not have authority under Georgia law to prescribe controlled substances, he no longer meets the statutory requirement for holding a registration. Moreover, in the event that Respondent's confidence in the merits of his appeal is borne out, he can apply for a new registration upon persuading the Board to re-license him. However, given that it is entirely speculative whether both of these events will occur, there is no reason to continue his registration in the interim. Accordingly, Respondent's registration will be revoked and his pending application to renew his registration will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b) & 0.104, I order that DEA Certificate of Registration, BL8586147, issued to Hung Thien Ly, M.D., be, and it hereby is, revoked. I further order that any pending application of Hung Thien Ly, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective September 15, 2010.

Dated: August 3, 2010.

Michele M. Leonhart,

Deputy Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 09–28]

Dewey C. Mackay, M.D.; Revocation of Registration

On February 26, 2009, I, the Deputy Administrator of the Drug Enforcement Administration (DEA), issued an Order to Show Cause and Immediate Suspension of Registration to Dewey C. MacKay, M.D. (Respondent), of Brigham City, Utah. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, AM9742380, which authorizes him to dispense controlled substances as a practitioner, as well as the denial of any pending applications to renew or modify the registration, on the ground that his "continued registration is inconsistent with the public interest, as that term is defined in 21 U.S.C. 823(f) and 824(a)(4)." ALJ Ex. 1, at 1. The Order also immediately suspended Respondent's registration on the ground that his continued registration during the pendency of the proceeding "constitutes an imminent danger to public health and safety." *Id.*

The Show Cause Order alleged that "[f]rom June 2005 to the present," Respondent "issued numerous purported prescriptions for controlled substances without a legitimate medical purpose and outside the usual course of professional practice." *Id.* at 1–2. As evidence of his allegedly "unlawful prescribing practices," the Order alleged that: (1) On four occasions, M.R., a patient of his who cooperated with the DEA, visited Respondent and, while she "did not exhibit any verifiable medical indication warranting the prescribing of controlled substances," Respondent "issued prescriptions for controlled substances to her" and did so even after