

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Center for Tobacco Products,

Complainant,

v.

Prater Holdings I, LLC d/b/a Gypsum Liquors,

Respondent.

Docket No. C-12-789  
FDA Docket No. FDA-2012-H-0556

Decision No. CR2583

Date: August 8, 2012

**INITIAL DECISION AND DEFAULT JUDGMENT**

The Center for Tobacco Products (CTP) initiated the above-captioned matter when it filed an Administrative Complaint for Civil Money Penalties (Complaint) with the Civil Remedies Division and the Food and Drug Administration's (FDA) Division of Dockets Management. CTP seeks to impose civil money penalties under the Federal Food, Drug, and Cosmetic Act (Act) and the Act's implementing regulations.

The Complaint alleges the following facts. Respondent owns an establishment in Gypsum, Colorado, that sells tobacco products. Complaint ¶ 2. CTP conducted two inspections of the establishment. Complaint ¶ 8. During the first inspection, on August 8, 2011, the FDA-commissioned inspector observed that Respondent:

[Sold] cigarettes or smokeless tobacco products to a person younger than 18 years of age, in violation of 21 C.F.R. § 1140.14(a); [and] fail[ed] to verify by means of photographic identification, containing the bearer's

date of birth, that no person purchasing cigarettes or smokeless tobacco is younger than 18 years of age, as required by 21 C.F.R. § 1140.14(b)(1).

#### Complaint ¶ 10.

After the first inspection, on October 27, 2011, CTP issued a warning letter to Respondent, specifying the violations the inspector observed. Complaint ¶ 10. The letter warned Respondent that a failure to correct the violations could result in the imposition of civil money penalties, and that it was Respondent's responsibility to ensure compliance with the law. Complaint ¶ 10. Subsequently, on November 8, 2011, Stevie Brantley contacted CTP by letter and responded to the warning letter on Respondent's behalf. Complaint ¶ 11. Mr. Brantley stated that "the establishment's policy is to check the identification of anyone whom they do not know personally who appears to be 30 years of age or younger. Complaint ¶ 11.

Most recently, during a two-part follow-up inspection on February 10 and 11, 2012, the inspector again found that Respondent was "[s]elling tobacco products to a minor, in violation of 21 C.F.R. § 1140.14(a). Complaint ¶ 9. "Specifically, a person younger than 18 years of age was able to purchase a package of Marlboro cigarettes on February 10, 2012, at approximately 11:15 AM MST . . . ." Complaint ¶ 9. In addition, the inspector observed that Respondent failed to "verify the age of a person purchasing tobacco products by means of photographic identification containing the bearer's date of birth, as required by 21 C.F.R. § 1140.14(b)(1)." Complaint ¶ 9. "Specifically, the minor's identification was not verified before the sale, as detailed above, on February 10, 2012, at approximately 11:15 AM MST." Complaint ¶ 9.

In compliance with 21 C.F.R. §§ 17.5 and 17.7, CTP served Respondent with the Complaint on June 15, 2012, via United Parcel Service. CTP charged Respondent with violating 21 C.F.R. § 1140.14(a) (sale of tobacco products to a minor); and 21 C.F.R. § 1140.14(b)(1) (failure to verify the age of a person purchasing tobacco products by means of photographic identification containing the bearer's date of birth. Complaint ¶¶ 1, 9, 10. CTP asked the Civil Remedies Division to impose a \$500.00 civil money penalty based on three alleged violations of the regulations within a 24-month period. Complaint ¶ 13.

Both the cover letter to the Complaint and the Complaint provided detailed instructions regarding filing an answer and requesting an extension of time to file an answer. See, e.g., Complaint ¶¶ 14, 16, 17, 18. The letter and Complaint stated that failure to file an answer could result in the imposition of a civil money penalty against Respondent. See, e.g., Complaint ¶ 19. Respondent neither filed an answer nor requested an extension of time within the 30-day time period prescribed in 21 C.F.R. § 17.9.

If a respondent does not file an answer within 30 days of a properly served complaint, the regulations provide that the:

presiding officer shall assume the facts alleged in the complaint to be true, and if such facts establish liability under the relevant statute, the presiding officer shall issue an initial decision within 30 days of the time the answer was due, imposing: (1) The maximum amount of penalties provided for by law for the violations alleged; or (2) The amount asked for in the complaint, whichever amount is smaller.

21 C.F.R. § 17.11(a). Further, a failure to file a timely answer means that “respondent waives any right to a hearing and to contest the amount of penalties and assessments” imposed in the initial decision. 21 C.F.R. § 17.11(b).

Accepting the facts alleged in the Complaint as true, I find that those facts establish Respondent’s liability under the Act. *See* 21 U.S.C. §§ 333(f)(9), 387c(a)(7)(B), and 387f(d); 21 C.F.R. §§ 1140.1(b), 1140.14. I also find that CTP’s request to impose a \$500.00 civil money penalty is permissible. *See* 21 C.F.R. § 17.2.

Therefore, Respondent is directed to pay a civil money penalty in the amount of \$500.00. This initial decision becomes final and binding upon both parties within 30 days of the date of its issuance. 21 C.F.R. § 17.11(b).

It is so ordered.

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/s/  
Scott Anderson  
Administrative Law Judge