

STATE OF TENNESSEE

Office of the Attorney General



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July 12, 2022

Via Email() and First Class Mail*

Walgreens Boots Alliance, Inc., and Walgreen Co.
200 Wilmot Rd
Deerfield, IL 60016

Les Houtz*
Bartlit Beck, LLC
1801 Wewatta St, Suite 1200
Denver, CO 80202
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Re: *Notice of Intent to Sue Walgreens Boot Alliance, Inc., and Walgreen Co.*

Dear Counsel:

Pursuant to Tenn. Code Ann. § 47-18-108(a)(2), you are hereby given ten days' notice of the Tennessee Attorney General's intention to initiate legal proceedings against Walgreens Boots Alliance, Inc. and Walgreen Co. ("Walgreens"). The Attorney General has reason to believe Walgreens has violated Tenn. Code Ann. § 47-18-104(a) and (b)(43)(C) of the Tennessee Consumer Protection Act of 1977 ("TCPA") and created a public nuisance through its distribution and sale of opioids. You have an opportunity to present reasons why such proceedings should not be instituted and to respond, if you choose, with a proposal to resolve the matters raised below within this ten-day period.

The TCPA prohibits "unfair or deceptive acts or practices affecting the conduct of any trade or commerce." Tenn. Code Ann. § 47-18-104(a). These acts include "directly or indirectly . . . selling or offering for sale any good . . . that is illegal or unlawful to sell in the state."¹ The TCPA also prohibits unfair practices; the concept of "unfairness" is "even broader than the concept of deceptiveness and applies to various abusive business practices that are not necessarily

¹ Tenn. Code Ann. § 47-18-1049(b)(43)(C).

deceptive.”²

Unless an entity is excepted, Schedule II and III controlled substances are unlawful to distribute, sell, or possess. *See* Tenn. Code Ann. § 39-17-417(a). To fit within an exception, the entity must “lawfully possess” these controlled substances as authorized under Tenn. Code Ann. §§ 39-17-402 to -455, Tenn. Code Ann. §§ 53-11-301 to -311, or Tenn. Code Ann. §§ 53-11-401 to -413. *See* Tenn. Code Ann. § 39-17-427. The entity may only lawfully possess these controlled substances if it maintains “effective control against diversion of particular controlled substances.” Tenn. Code Ann. § 53-11-303; 21 U.S.C. § 823(b)(1). No provision in the Tennessee Code allows a licensed pharmacy to sell or possess a narcotic, including a Schedule II substance, that it should reasonably know will be diverted or abused based on actionable information it possesses.

Walgreens’ failure to maintain effective controls against abuse and diversion rendered its sale of opioids unlawful between 2006 and 2020. Over fourteen years, Walgreens sold massive quantities of opioids, regularly failed to maintain effective monitoring and reporting, and even took affirmative steps to undermine the monitoring it did choose to implement. At multiple levels of the opioid supply chain, Walgreens sold opioids at such an alarming rate and volume that there could be no legitimate purpose associated with their use.

First, Walgreens unlawfully sold opioids from 2006 to 2020 from its retail pharmacies. Walgreens failed to maintain controls, in part, by:

- using inter-storing, or transferring controlled substances between nearby Walgreens pharmacies, to subvert Walgreens’ already-generous limits;
- inadequately staffing its Rx Integrity division—a division meant to address diversion and suspicious ordering;
- failing to identify problematic prescribers or patients and implementing inadequate “good faith dispensing” policies that merely required pharmacists to contact the prescriber to ensure a prescription was “valid;”
- approving controlled substance override forms for stores like #3798, #5373, and #6853 and transferring prescriptions to these stores from others that had already surpassed their ordering limits; and
- helping individual pharmacies skirt ceilings set by third-party distributors by requesting higher ceilings based solely on that pharmacy’s “sales.”³

But Walgreens also unlawfully *distributed* opioids between 2006 and 2014. Over this eight-year period, Walgreens self-distributed approximately 652 million opioid dosage units (ODUs),

² *Tucker v. Sierra Builders*, 180 S.W.3d 109, 116 (Tenn. Ct. App. 2005).

³ *See, e.g.*, WAGMDL00048739.

roughly equal to 9,237,532,288 morphine milligram equivalents (MMEs).⁴ As both a distributor and a retail pharmacy chain, Walgreens had a dual obligation to ensure effective controls against abuse and diversion. However, Walgreens failed to fulfill these obligations. These failures include:

- choosing to set unreasonably high suspicious ordering thresholds;
- choosing, before 2010, to merely flag orders that exceeded these thresholds rather than reporting, halting, or reducing them;
- choosing, post-2010, to reduce suspicious orders but not halt or report them;
- choosing to calibrate its suspicious order monitoring system to ensure supply rather than prevent diversion;⁵
- choosing not to track opioid orders placed through other distributors or orders deemed “pretty darn quick” (“PDQ”) through its suspicious order monitoring system; and
- choosing not to perform any meaningful due diligence on its monthly suspicious order monitoring reports from 2007 to 2012 even after admonishment by the DEA.

Based on the facts summarized above, the State believes that Walgreens has violated the TCPA.

NOTICE

Please be advised this is the only notice you will receive and is your only opportunity prior to litigation to 1) present reasons why proceedings should not be instituted against Walgreens Boots Alliance, Inc., and Walgreen Co., and 2) to present a proposed resolution, should you choose. Please contact the undersigned if you wish to do so **by July 22, 2022**.

Sincerely,



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⁴ ARCOS.

⁵ See, e.g., WAGMDL00659802; WAGMDL00709395

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cc: Herbert H. Slatery III, Attorney General
Michael Leftwich, Senior Deputy Attorney General
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