

phentermine, a schedule IV controlled substance, from the stock of his former employer, which he ingested. The DOPL further found that Mr. McFadden did not have a prescription for the phentermine. These findings are entitled to preclusive effect in this proceeding. *See Robert L. Dougherty*, 76 FR 16823, 16830 (2011) (collecting cases).

Under the CSA, a controlled substance may only be dispensed "pursuant to the lawful order [such as a prescription] of, a practitioner." 21 U.S.C. 802(21).³ Mr. McFadden did not, however, have a prescription for phentermine. Thus, he unlawfully distributed phentermine to himself, which he then ingested. *See id.* § 829(b) ("Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act * * * may be dispensed without a written or oral prescription * * *"); *id.* § 841(a)(1) (prohibiting the knowing distribution or dispensing of a controlled substance "[e]xcept as authorized by" the CSA). *See also* Utah Code § 58-17b-501(12) (prohibiting pharmacist from "using a prescription drug or controlled substance for himself that was not lawfully prescribed for him by a practitioner"); *id.* § 58-37-6(7)(c)(i) ("A controlled substance may not be dispensed without the written prescription of a practitioner, if the written prescription is required by the federal Controlled Substances Act.").

Mr. McFadden also violated 21 U.S.C. 844(a), which makes it "unlawful for

(1982) ("Pharmacies must operate through the agency of natural persons, owners or stockholders, pharmacists or other key employees. When such persons misuse the pharmacy's registration by diverting controlled substances obtained thereunder, and when those individuals are convicted as a result of that diversion, the pharmacy's registration becomes subject to revocation under section 824, just as if the pharmacy itself had been convicted."); *S & S Pharmacy, Inc.*, 46 FR 13051, 13052 (1981) ("In a retail pharmacy, * * * the registered pharmacist in charge of the pharmacy is responsible for ordering controlled substances; for keeping and maintaining the required records and inventories; for taking all necessary measures to prevent the loss and diversion of controlled substances; and for dispensing such substances only in accordance with applicable State and Federal laws. The corporate pharmacy acts through the agency of its * * * pharmacist in charge.").

³ Cf. 21 CFR 1306.03 (prescription may only be issued "by an individual practitioner * * * authorized to prescribe controlled substances by the jurisdiction in which he is licensed to practice his profession"); *id.* 1306.04(a) ("A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of * * * professional practice.").

any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice," except as otherwise authorized by the CSA. *See also* Utah Code § 58-37-8(2)(a)(i) (same).

In addition, the DOPL found that Mr. McFadden violated the Utah Pharmacy Practice Act Rule, when he left the Lin's Pharmacy unattended on various occasions. *See* Utah Admin Code R156-17b-614(7). GX M, at 3. While this rule is applicable to pharmacy practice in general, given the evidence that controlled substances were dispensed (and obviously stored) at the pharmacy, the violations have a sufficient connection to the CSA's core purpose of preventing the diversion of controlled substances to be considered as "such other conduct which may threaten public health and safety," 21 U.S.C. 823(f)(5), and are thus within the Agency's authority to consider under factor five.

Finally, the evidence also shows that Mr. McFadden pled no contest to seven misdemeanor counts of making a false or forged prescription or written order for a controlled substance or uttering the same, in violation of state law. Notwithstanding that his pleas are being held in abeyance, and thus the charges may eventually be dismissed, DEA has repeatedly held that a plea of no contest which is subject to deferred adjudication, nonetheless constitutes a conviction for purposes of the CSA. *See Kimberly Maloney, N.P.*, 76 FR 60922, 60922 (2011) (collecting cases). Nor does the fact that the charges were reduced to misdemeanors preclude consideration of his convictions under factor three, which, in contrast to 21 U.S.C. 824(a)(2), is not limited to felony offenses. *See* 21 U.S.C. 823(f)(3).

I thus conclude that the evidence with respect to factors two, three, four, and five⁴ establishes that granting

⁴ The Government seeks several additional findings that Mr. McFadden engaged in "such other conduct which may threaten public health and safety." 21 U.S.C. 823(f)(5). More specifically, the Government alleges that "[w]hile working as a pharmacist for Lin's Pharmacy, * * * Mr. McFadden took and consumed legend drugs and food items from the pharmacy without compensating the store for the use of such items," GX B, at 2, and that "[i]n August 2010, Lin's Pharmacy terminated Mr. McFadden from working as a pharmacist there because he unlawfully took and consumed drugs and food items and left the pharmacy unattended by a pharmacist." Gov. Req. for Final Agency Action, at 10.

As for his former employer's termination of his employment, that decision is not conduct on his part but rather a response to his conduct. Moreover, his former employer's findings that he engaged in

Applicant's application would be "inconsistent with the public interest." 21 U.S.C. 823(f). And because Applicant waived its right to a hearing, there is no evidence to the contrary. Accordingly, I will deny Applicant's application.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b), I order that the application of Pharmboy Ventures Unlimited, Inc., for a DEA Certificate of Registration as a retail pharmacy, be, and it hereby is, denied. This order is effective immediately.

Dated: May 4, 2012.

Michele M. Leonhart,
Administrator.

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DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Voluntary Fiduciary Correction Program

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Employee Benefits Security Administration (EBSA) sponsored information collection request (ICR) titled, "Voluntary Fiduciary Correction Program," to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*).

DATES: Submit comments on or before July 9, 2012.

misconduct are not entitled to preclusive effect in this matter. Accordingly, an employer's termination decision clearly does not fall within the scope of factor five.

As for his expropriation of store property, there is no evidence refuting Mr. McFadden's claim that he paid for the phentermine or that he "reimbursed" the pharmacy by taking the Maxzide out of his subsequent refill, and the evidence regarding his plea to misdemeanor retail theft does not identify what items were involved. To be sure, Mr. McFadden admitted in a statement to having taken bagels and fountain drinks from his employer without paying for them. However, his acts have no apparent relationship to controlled substances, and the Government offers no explanation as to why being a bagel bandit constitutes a threat to public health and safety, let alone one that is of such a degree as to "create reason to conclude that a person will not faithfully adhere to [his] responsibilities under the CSA." *Terese, Inc., d/b/a/ Peach Orchard Drugs*, 76 FR 46843, 46848 n.11 (2011).

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, <http://www.reginfo.gov/public/do/PRAMain>, on the day following publication of this notice or by contacting Michel Smyth by telephone at 202-693-4129 (this is not a toll-free number) or sending an email to DOL_PRA_PUBLIC@dol.gov.

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-EBSA, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503, Telephone: 202-395-6929/Fax: 202-395-6881 (these are not toll-free numbers), email: OIRA_submission@omb.eop.gov.

FOR FURTHER INFORMATION CONTACT: Contact Michel Smyth by telephone at 202-693-4129 (this is not a toll-free number) or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: The Voluntary Fiduciary Correction Program provides a method for voluntary correction of specified types of transactions that violate (or are suspected of violating) the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 and for securing the Department's assurance that the agency will take no further action with respect to the corrected transaction. The exemption relieves applicants who make corrections under the Program of penalties under section 4975 of under the Internal Revenue Code under specified conditions.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1210-0118. The current OMB approval is scheduled to expire on June 30, 2012; however, it should be noted that existing information collection requirements submitted to the OMB

receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on December 7, 2011 (76 FR 76439).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should reference OMB Control Number 1210-0118. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL-EBSA.

Title of Collection: Voluntary Fiduciary Correction Program.

OMB Control Number: 1210-0118.

Affected Public: Private Sector—Businesses or other for profits.

Total Estimated Number of Respondents: 5,760.

Total Estimated Number of Responses: 119,761.

Total Estimated Annual Burden Hours: 25,920.

Total Estimated Annual Other Costs Burden: \$1,174,000.

Dated: May 31, 2012.

Michel Smyth,

Departmental Clearance Officer.

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DEPARTMENT OF LABOR

Employment and Training Administration

Announcement Regarding States Triggering "On" or "Off" in the Emergency Unemployment Compensation 2008 (EUC08) Program and the Federal-State Extended Benefits (EB) Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: Announcement regarding states triggering "on" or "off" in the Emergency Unemployment Compensation 2008 (EUC08) program and the Federal-State Extended Benefits (EB) Program.

The U.S. Department of Labor (Department) produces trigger notices indicating which states qualify for both EB and EUC08 benefits, and provides the beginning and ending dates of payable periods for each qualifying state. The trigger notices covering state eligibility for these programs can be found at: http://ows.doleta.gov/unemploy/claims_arch.asp.

The following changes have occurred since the publication of the last notice regarding states' EB and EUC08 trigger status:

- Based on data released by the Bureau of Labor Statistics on May 18, 2012, the District of Columbia, New York, and West Virginia no longer meet one of the criteria to remain "on" in EB, i.e., having their current three month average, seasonally adjusted total unemployment rate be at least 110% of one of the rates from a comparable prior period in one of the three prior years. This triggers these states "off" EB and the end of the payable period for these states in the EB program will be the week ending June 9, 2012.

- Based on data released by the Bureau of Labor Statistics on May 18, 2012, the three month average, seasonally adjusted total unemployment rate in Idaho fell below the 8.0% trigger threshold required to remain "on" in a high unemployment period (HUP) within the EB program. Claimants in this state will remain eligible for up to 20 weeks of benefits through June 9, 2012, but starting June 10, 2012, the maximum potential entitlement in the EB program for this state will decrease from 20 weeks to 13 weeks.

- Based on data released by the Bureau of Labor Statistics on May 18, 2012, the estimated three month average, seasonally adjusted total unemployment rate for New York rose