

ATTORNEY GENERAL OF THE STATE OF NEW YORK
BUREAU OF CONSUMER FRAUDS & PROTECTION

In the Matter of the

Assurance No. 16-085

Investigation by ERIC T. SCHNEIDERMAN,
Attorney General of the State of New York, of

WALGREEN CO.,

Respondent.

ASSURANCE OF DISCONTINUANCE

The Office of the Attorney General of the State of New York (“NYAG”) has conducted an investigation, pursuant to Executive Law § 63(12) and General Business Law Article 22-A, of the business practices of Walgreen Co. and its subsidiary Duane Reade (collectively, “Walgreen”) concerning its advertising and pricing practices in its New York stores. This Assurance of Discontinuance (“Assurance”) contains the findings of the NYAG and the relief agreed to by the NYAG and Walgreen (collectively, “the parties”).

I. DEFINITIONS

For purposes of this Assurance, the following definitions shall apply:

1. “Advertised Price” shall mean the price or any description of the price of merchandise available for purchase in a New York store that is in written, graphic, or pictorial form, including, but not limited to, any notice, sign, tag, display, solicitation, or label.

2. “Balance Rewards Points” means the Walgreen loyalty incentive program by which those consumers who are enrolled in the program may redeem points toward a money discount on a future purchase.

3. “Clear and Conspicuous” or “Clearly and Conspicuously” shall mean that the statement, representation, or term being disclosed is of such size, color, contrast, and/or

audibility and is so presented as to be readily noticed or heard and understood by the person to whom it is being disclosed. If such statement is necessary as a modification, explanation, or clarification to other information with which it is presented, it must be presented in close proximity to the information it modifies, in a manner so as to be readily noticed or heard and understood.

4. “Consumer” shall mean any consumer who shopped at or purchased one or more products at any Walgreens or Duane Reade retail store located in New York State.

5. “POS Price” shall mean the price of an item when it is scanned at the Point of Sale (“POS”).

6. “Price Advertisement” shall mean any notice, sign, tag, display, or label that is in written, graphic, or pictorial form, or any print, television, or radio advertisement, relating to the price of merchandise offered for sale in a New York store, including, but not limited to, the price of merchandise or amount of Balance Rewards Points received in connection with the purchase of a product.

7. “Price Discrepancy” shall mean any variance, whether intentional or unintentional, between the Advertised Price and the POS Price. A Price Discrepancy shall not include:

- a. a variance between the Advertised Price and POS Price when that variance is consistent with a Clear and Conspicuous price correction notice in close proximity to the merchandise or at each POS terminal that adequately notifies Consumers of an incorrect Advertised Price;
- b. a variance between an Advertised Price and POS Price when the merchandise was correctly stocked and labeled but either the price tag or merchandise was

inadvertently moved, transferred, or transported by a Consumer to the wrong rack, shelf, display, or fixture; or

- c. a variance that results in a Consumer being charged a price lower than the Advertised Price.

II. FINDINGS OF THE NYAG

8. Walgreen Co. is an Illinois corporation with its principal offices located at 200 Wilmot Road, Deerfield, IL 60015.

9. Walgreen Co. operates 251 Walgreens and 214 Duane Reade stores in New York State.

10. Walgreen transacts business within New York State by advertising, marketing, offering for sale, and selling products in retail stores and online to New York residents.

11. In early 2014, the NYAG instigated an undercover investigation into Walgreen's advertising and pricing practices. As part of the investigation, NYAG investigators visited a sampling of Walgreens and Duane Reade New York stores and found that in connection with its advertising, marketing, offering for sale, and sale of products in New York State, Walgreen induces Consumers to purchase products through the following practices:

- a. representing to Consumers that they will receive the price published in print Price Advertisements and on shelf tags, when the POS Price does not match the Advertised Price;
- b. representing to Consumers that a product is a "Smart Buy" or "Great Buy" when the Advertised Price is the same as the original retail price Walgreen regularly charges for that product;
- c. representing to Consumers that a product is a "Last Chance" or "Clearance"

item, thus implying that the product is available at a reduced price only for a limited time when such product may actually be available at the reduced price for a significant period of time;

- d. implying that Consumers will receive an immediate cash discount, when the discount would only be received on a future purchase. For example, representing that Consumers' purchases are "like paying . . ." or "like buying . . ." when the item could not be presently purchased for the stated price.

12. In addition, Walgreen's website provides inconsistent information concerning the number of Balance Rewards Points that Consumers need to redeem toward a discount. One chart shows that point redemption starts at 1,000 points, which is equivalent to a \$1.00 discount. Another chart, however, shows that point redemption starts at 5,000 points, which is equivalent to a \$5.00 discount. As a result, many Consumers may be confused as to whether they have a sufficient number of Balance Rewards Points to redeem. This is exacerbated by the fact that Walgreen employees did not routinely ask Consumers whether they want to redeem their accumulated Balance Rewards Points toward their current purchases during the check-out process.

13. New York Executive Law § 63(12) prohibits persons or business entities from engaging in repeated fraudulent or illegal acts or otherwise demonstrating persistent fraud or illegality in the carrying on, conducting, or transaction of business.

14. New York General Business Law ("GBL") Article 22-A prohibits deceptive acts or practices (GBL § 349), and false advertising in the conduct of any business, trade or commerce in this State (GBL § 350).

15. New York Agriculture and Markets Law § 197-b requires pricing accuracy in retail stores.

16. The NYAG finds that the practices described above constitute repeated violations of Executive Law § 63(12), GBL Article 22-A, §§ 349 and 350, and Agriculture and Markets Law § 197-b.

III. PROSPECTIVE RELIEF

WHEREAS, Walgreen neither admits nor denies the NYAG's Findings (10)-(16) above;

WHEREAS, the NYAG is willing to accept the terms of this Assurance pursuant to Executive Law § 63(15) and to discontinue its investigation; and

WHEREAS, the parties each believe that the obligations imposed by this Assurance are prudent and appropriate;

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the parties that with respect to Walgreen's present and future retail locations in New York State:

General Business Practices

17. Walgreen shall comply with New York Executive Law § 63(12), GBL §§ 349 and 350, and Agriculture and Markets Law § 197-b.

18. Within sixty (60) days of the Effective Date of this Assurance, Walgreen shall regularly review all unique Price Advertisements, including, but not limited to, shelf tags, store circulars, and coupon books, to ensure the Price Advertisements Clearly and Conspicuously reflect the following:

- a. the reduced price being advertised;
- b. the material conditions the Consumer must meet to obtain the advertised sales price, *e.g.*, quantities, varieties, flavors of items that must be purchased

to obtain any savings;

c. the product(s) being offered for sale;

d. the period of time the product is available at a reduced price.

19. All shelf tags shall display the retail price of each item directly above, below, or immediately adjacent to every stock-keeping unit or group of stock-keeping units of the same brand, size and price. However, for line sales, such as “buy one, get one” offers on all Walgreen-brand dietary supplements, a single sign of prominent size and conspicuous display every ten (10) linear feet shall suffice.

20. Walgreen shall remove any shelf tag that displays a reduced price that is available to Consumers for a limited period of time no later than thirty-six (36) hours after the expiration of such offer.

21. Within thirty (30) days of this Assurance, Walgreen shall update its website so that its Balance Rewards Points charts and redemption information are consistent with offers relating to earning such points, including but not limited to, the “Program Details” located at www.walgreens.com/topic/balancerewards/balance-program-details.jsp and the “Terms and Conditions” located at www.walgreens.com/images/balancerewards/BalanceRewards_termsandconditions.pdf.

22. Until at least September 1, 2016, Consumers shall be entitled to redeem Balance Rewards Points as follows:

Points Earned	Reward
1,000 points	\$1
2,000 points	\$2
3,000 points	\$3
5,000 points	\$5
10,000 points	\$10
18,000 points	\$20
30,000 points	\$35
40,000 points	\$50

23. Walgreen shall ensure that its PIN pad machines in all New York stores display Consumers' Balance Rewards Points and, on every fifth purchase per Consumer, that the PIN pad machines automatically prompt Consumers to ask whether they would like to redeem any available Balance Reward Points toward their current purchase.

Prohibited Practices

24. Walgreen shall not misrepresent the price of a product offered for sale, including, but not limited to, statements made in any Price Advertisement. In the event that discrepancies are identified between the Advertised Price and the POS Price, Walgreen shall promptly correct such discrepancies.

25. Walgreen shall not charge at the time of the sale of a product an amount greater than the lowest price that is currently advertised, written, posted, or marked for that product. In the event that a Consumer notifies Walgreen after the transaction is complete that he or she has paid a price other than the lowest currently advertised, written, posted, or marked price for that

product, Walgreen shall refund the Consumer the difference between the charged price and the posted price.

26. Walgreen shall not utilize any Price Advertisement, including shelf tags, that promote a product as either a “Smart Buy” or a “Great Buy” unless:

- a. the product is available at a price lower than the original retail price Walgreen regularly charges for that product; or
- b. the product is available at a price lower than the price of a comparable brand name product that is being offered for purchase.

27. Walgreen shall not utilize any Price Advertisement, including any shelf tags that use the terms “like paying” or “like buying” in referring to a discounted price on a future purchase unless the Price Advertisement:

- a. Clearly and Conspicuously discloses, if applicable, that the Consumer must use a Balance Rewards Card or user identification number to obtain the discounted price;
- b. Clearly and Conspicuously discloses that upon purchase of the advertised products(s) the Consumer will receive Balance Reward Points in an amount equivalent to a certain dollar value discount on a future purchase; and
- c. displays the actual price to be charged for the product(s) at the time of purchase in a type size that is larger than the “like paying” or “like buying” price. In addition, the current price for the item shall appear in bolded type.

28. Walgreen shall not utilize any Price Advertisement, including shelf tags, that displays an expiration date to promote a product as either a “Last Chance” or a “Clearance” item, if such expiration date implies that the product will remain available for sale for an extended

period of time.

Employee Training Requirements

29. Walgreen shall prepare training materials regarding pricing policies, procedures, and the importance of pricing accuracy. Walgreen shall provide a copy of those materials to the NYAG within thirty (30) days of the Effective Date of this Assurance.

30. Within six (6) months of the Effective Date of this Assurance, Walgreen shall train all store managers, assistant managers, shift leads, and any other employees who have responsibility for posting and/or replacing shelf tags in New York stores. In addition, Walgreen shall provide training to all newly-hired employees with responsibility for posting and/or replacing shelf tags in its New York stores within sixty (60) days of their hiring date. To the extent any employees are on leave status, training shall occur within sixty (60) days of their return to active employment.

31. Walgreen shall obtain written or electronic acknowledgement from each employee indicating that he or she has received, read, and understands the requirements of this Assurance and policies concerning retail signage and pricing accuracy. Walgreen shall maintain written records confirming that all covered employees have completed the training required by this Assurance and shall promptly provide such records to the NYAG upon the NYAG's written request. Walgreen shall maintain each such record for at least three (3) years.

32. Walgreen store managers shall be required to monitor staff for compliance with the signage requirements and Price Discrepancy issues. In accordance with Walgreen's Discipline Policy, appropriate disciplinary action shall be taken against store managers who regularly fail to meet signage requirements and properly address Price Discrepancies. Such actions shall include, as appropriate, verbal counseling, a written warning, a final written

warning, and when necessary, termination of employment.

IV. COMPLIANCE

33. Within sixty (60) days of the Effective Date of this Assurance, Walgreen shall monitor its New York retail stores for compliance with the terms of this Assurance by conducting the following audits:

a. Internal Audits. Walgreen shall audit each New York store once per quarter. The audit shall consist of fifty (50) randomly selected items (15 advertised reduced price items and 35 regular price items) for consistency between the Advertised Price and the POS Price. When an item is selected, all shades, flavors, and/or varieties of the item must be verified.

b. External Audits. An independent external company shall audit fifty (50) individual stores throughout New York each quarter, for a total of two hundred (200) stores per year. Such company shall conduct external audits at New York stores not previously audited, unless a store fails the audit as set forth in Paragraph 36. The audit shall consist of fifty (50) randomly selected items (15 advertised reduced price items and 35 regular price items) for consistency between the Advertised Price and the POS Price. When an item is selected, all shades, flavors, and/or varieties of the item must be verified.

34. Individual stores shall not receive advance notice that they have been selected for an internal or external audit in order to ensure accurate and reliable results.

35. Within thirty (30) days of completion, Walgreen's Compliance Department shall be provided with a copy of the results of each internal and external audit.

a. Walgreen's Compliance Department shall review the results of each failed or

incomplete internal and external audit and shall notify store management of any Price Discrepancy issues at the store level within fourteen (14) days. Store management shall take the necessary steps to promptly correct the Price Discrepancy and report back to the Compliance Department that the correction has been made. To the extent such failed or incomplete audit indicates that any Price Discrepancy is the result of an operational error at the corporate level, Walgreen's Compliance Department shall take necessary steps to correct the Price Discrepancy within fourteen (14) days.

36. Any Walgreen store found to have Price Discrepancies on more than five percent (5%) of products audited each quarter shall be deemed to have failed the audit and shall be included in the external audit the following quarter. These stores shall not be counted as part of the fifty (50) stores referenced in Paragraph 33(b).

37. For a period of three (3) years following the Effective Date of this Assurance, Walgreen shall provide the NYAG with a bi-annual compliance affidavit with the external quarterly audit reports attached. Each compliance affidavit shall include the following information concerning Walgreen's quarterly audits, both internal and external:

- a. the name and address of each store audited;
- b. the name and contact information for the individual(s) who performed each audit;
- c. the name and size of each item audited;
- d. the percentage of items purchased that involved a Price Discrepancy; and
- e. the corrective measures taken for items not in compliance.

38. Within three (3) months after receipt of the last compliance affidavit, the NYAG

shall discard all compliance affidavits, including any exhibits, upon written request from Walgreen, provided that the NYAG shall not be required to discard such affidavits and exhibits if he is investigating a potential violation of this Assurance or other wrongful conduct to which the documents are relevant.

39. Within one hundred eighty (180) days of the Effective Date of this Assurance, Walgreen shall file with the NYAG a compliance affidavit, setting forth in detail the manner and form in which it has complied with this Assurance.

40. Walgreen shall, upon request, by the NYAG, provide the NYAG with copies of any records and documents sufficient to demonstrate Walgreen's compliance with the requirements of the Assurance.

41. Walgreen shall promptly and thoroughly investigate Consumer complaints concerning Price Discrepancies and designate a person or entity to act as a direct contact for the NYAG for resolution of Consumer complaints. Within thirty (30) days of the Effective Date of this Assurance, Walgreen shall provide the NYAG with the name and contact information for the designated individual.

V. PAYMENT TO THE STATE

42. In consideration of the making and execution of this Assurance, and within seven (7) business days of the Effective Date of this Assurance, Walgreen shall pay by wire transfer, certified or bank check payable to the State of New York five hundred thousand dollars (\$500,000) in penalties, fees, and costs. If payment is made by check, it shall be payable to the State of New York and delivered to the State of New York Office of the Attorney General, Bureau of Consumer Frauds and Protection, Attention: Melissa O'Neill, Assistant Attorney General, 120 Broadway, 3rd Floor, New York, New York, 10271.

43. In addition to those remedies available for a breach of this Assurance, for a period of three (3) years following the Effective Date of this Assurance, Walgreens shall pay an additional penalty in the amount of \$2,500 for each store that fails two consecutive external audits. Payment shall be made by Walgreen on a quarterly basis, within thirty (30) days of the end of the quarter.

44. Any payments and all correspondence related to this Assurance must reference Assurance #16-085.

VI. MISCELLANEOUS

45. The NYAG has agreed to the terms of this Assurance based on, among other things, the representations made to the NYAG by Walgreen and its counsel and the NYAG's own factual investigation as set forth in the NYAG's Findings (10)-(16) above. To the extent that any material representations are later found to be inaccurate or misleading, this Assurance is voidable by the NYAG in its sole discretion.

46. If the Assurance is voided or breached, Walgreen agrees that any statute of limitations or other time-related defenses applicable to the subject of the Assurance and any claims arising from or relating thereto are tolled from and after the date of this Assurance. In the event the Assurance is voided or breached, Walgreen expressly agrees and acknowledges that this Assurance shall in no way bar or otherwise preclude the NYAG from commencing, conducting or prosecuting any investigation, action or proceeding, however denominated, related to the Assurance, against Walgreen, or from using in any way any statements, documents or other materials produced or provided by Walgreen prior to or after the date of this Assurance.

47. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by Walgreen in agreeing to this

Assurance.

48. Walgreen represents and warrants, through the signatures below, that the terms and conditions of this Assurance are duly approved, and execution of this Assurance is duly authorized. Walgreen shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance, or expressing the view that this Assurance is without factual basis. Nothing in this paragraph affects Walgreen's (i) testimonial obligations or (ii) right to take legal or factual positions in defense of litigation or other legal proceedings to which the NYAG is not a party. This Assurance should not be construed as an admission of liability by Walgreen.

49. This Assurance may not be amended except by an instrument in writing signed on behalf of all the parties to this Assurance.

50. This Assurance shall be binding on and inure to the benefit of the parties to this Assurance and their respective successors and assigns, provided that no party, other than the NYAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of the NYAG.

51. It is understood and agreed that this Assurance shall apply to Walgreen, whether acting through its respective directors, officers, employees, representatives, agents, assigns, successors, affiliates, subsidiaries, or other business persons or business entities whose acts, practices, policies are directed, formulated, or controlled by Walgreen.

52. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the NYAG, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

53. To the extent not already provided under this Assurance, Walgreen shall, upon request by the NYAG, provide all documentation and information necessary for the NYAG to verify compliance with this Assurance.

54. All notices, reports, requests, and other communications to any party pursuant to this Assurance shall be in writing and shall be directed as follows:

If to the NYAG:

Office of the Attorney General of the State of New York
Bureau of Consumer Frauds and Protection
120 Broadway, 3rd Floor
New York, NY 10271
Attn: Melissa O'Neill
Assistant Attorney General

If to Walgreen:

Walgreen Co.
200 Wilmot Road
Deerfield, IL 60015
Attn: Linda Filler
Chief Marketing Officer and President of Retail Products

Such notices, statements, and documents shall be deemed to have been given upon mailing.

55. Acceptance of this Assurance by the NYAG shall not be deemed approval by the NYAG of any of the practices or procedures referenced herein, and Walgreen shall make no representation to the contrary.

56. Pursuant to Executive Law § 63(15), evidence of a violation of this Assurance shall constitute *prima facie* proof of violation of the applicable law in any action or proceeding thereafter commenced by the NYAG against Walgreen.

57. In the event the NYAG believes that Walgreen has violated a provision of this Assurance, prior to taking legal action to enforce this Assurance as a result of the alleged violation, the NYAG shall notify Walgreen identifying the alleged violation and the provision in

question. Walgreen shall have thirty (30) days (“Cure Period”) to cure the violation and provide the NYAG with a detailed written explanation of the corrective actions taken. In the event a violation has not been cured within the Cure Period, Walgreen shall be in breach of this Assurance. Walgreen shall not, however, be entitled to notice and an opportunity to cure an alleged violation on more than two occasions or if the NYAG determines in good faith that a threat to the health, safety, or welfare of the public requires immediate action.

58. If a court of competent jurisdiction determines that Walgreen has breached this Assurance, Walgreen shall pay to the NYAG the cost, if any, of such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

59. The NYAG finds the relief and agreements contained in this Assurance appropriate and in the public interest. The NYAG is willing to accept this Assurance pursuant to Executive Law § 63(15), in lieu of commencing a statutory proceeding. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

60. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

61. This Assurance may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

62. This Assurance constitutes the entire agreement between the NYAG and Walgreen and supersedes any prior communication, understanding or agreement, whether written or oral, concerning the subject matter of this Assurance.

63. Walgreen shall provide written notice to the NYAG of any change in address within ten (10) days of such change.

IN WITNESS WHEREOF, this Assurance is executed by the parties hereto on the 13th day of April, 2016.

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
120 Broadway
New York, NY 10271

By: Jane M. Azia 4/18/16
Jane Azia
Bureau Chief
Bureau of Consumer Frauds and Protection

By: Melissa O'Neill 4-18-16
Melissa O'Neill
Assistant Attorney General

WALGREEN CO.

SLC
4-13-16

By: Linda Filler
Linda Filler
Chief Marketing Officer and
President of Retail Products

By: Dana Rosenfeld
Dana Rosenfeld
Kelley Drye & Warren LLP
Counsel for Walgreen Co.