

ASSURANCE OF DISCONTINUANCE

IN THE MATTER OF WALMART, INC.

This Assurance of Discontinuance (“Assurance”) is entered into between the State of Colorado, *ex rel.* Philip J. Weiser, Attorney General for the State of Colorado (“the State” or “Colorado”), and Walmart, Inc. (“Walmart”) pursuant to the Attorney General’s powers under Colo. Rev. Stat. § 6-1-110(2) and constitutes a complete settlement between the State and Walmart (the “Parties”) regarding allegations by the State of Colorado that Walmart has violated the Colorado Consumer Protection Act (“CCPA”) due to pricing inaccuracies between the in-store shelf price and the point of sale register price.

I. PARTIES

1. Philip J. Weiser is the duly elected Attorney General for the State of Colorado and has express jurisdiction to investigate and prosecute violations of the Colorado Consumer Protection Act, C.R.S. §§ 6-1-101 through 6-1-1121.

2. Walmart has its principal place of business in Bentonville, Arkansas. Walmart has over 90 retail locations throughout Colorado.

II. DEFINITIONS

3. Unless otherwise specified, all definitions found in C.R.S. § 6-1-105(1) are incorporated herein, and any term defined in those Sections shall have the same meaning when used in this Assurance.

III. STATE ALLEGATIONS

4. Walmart is a multinational retail chain that sells goods and services—in the United States and worldwide—through brick-and-mortar stores and a variety of eCommerce platforms.

5. Walmart's physical stores come in a variety of sizes, including large supercenters, discount stores, and small-format stores like neighborhood markets. In Colorado alone, Walmart operates 70 Supercenters, 4 discount stores, and 18 neighborhood market and other small-format stores. In Nevada, Walmart operates 30 Supercenters, 2 discount stores, and 11 neighborhood market and other small-format stores.

6. Walmart's stores are designed to sell the goods and services that consumers need, including a full line of grocery items, health and wellness products, and general merchandise—including entertainment, sporting goods, apparel, and home furnishing products.

7. Walmart's offerings are designed to appeal to consumers regardless of their financial means.

8. Many Coloradans and Nevadans buy the things they need from Walmart stores. Some of these consumers are highly price-sensitive—some by disposition, others because of financial necessity. For some consumers, even small differences in price may be decisive when deciding whether to purchase a necessity or do without.

Walmart's Price Change System

9. Price accuracy is important to consumers. When consumers see a price

on a store shelf, some consumers rely on the posted price when making purchasing decisions. Some consumers may not check their receipt after purchase to confirm that the posted price matches the price they were charged at the point of sale.

10. Walmart adjusts its prices both upwards and downwards for a variety of reasons. Many price changes are initiated by the Home Office. These changes are then electronically “pushed” to stores to be accepted and finalized.

11. Electronic price change notifications appear in the hand-held devices used by store employees—Walmart refers to their employees as “associates.” These associates’ hand-held devices serve a number of functions, one of which is accepting price changes and printing new labels so that the shelf price matches the register price.

12. Walmart requires the price changes that appear in store associates’ handheld devices to be processed—that is, accepted—within a maximum of three days.

13. An associate who is tasked with processing a price change must first connect the hand-held device to a small printer that can print an updated label. Acceptance of a price change updates the point-of-sale price and also triggers the printing of a new shelf label. The shelf label can then be updated manually by the store associate with the printed shelf label. However, historically, the price change system did not require associates to print shelf labels close to the shelf location in the store.

14. The mismatch between methods by which prices are updated—

electronically at point-of-sale; manually on shelves—can create price inaccuracies. Because the shelf updates are manual, associates may not update the shelf prices with new labels directly after accepting a price change for a variety of reasons. If so, the shelf and point-of-sale prices will not match.

15. High employee turnover and labor shortages create additional vulnerabilities. New employees may be less familiar with Walmart’s systems, and labor shortages mean that there are fewer employees to accept price changes and manually affix new labels.

16. Inflation may also increase the rate of pricing inaccuracies—particularly those inaccuracies where the shelf price is lower than the price at the point-of-sale. When prices are inflating rapidly and unpredictably, a large retailer like Walmart may have a higher volume of price changes. The number of potential price changes places additional burdens on associates to accept the changes and update shelf labels quickly.

Walmart’s Failure to Achieve Price Accuracy

17. In the past (and, in particular, in 2022) Colorado and Nevada retailers saw historic supply chain disruption, unpredictable labor availability, and record inflation—each of which contributed to price volatility.

18. State Departments of Weights and Measures inspect retailers for pricing accuracy. Colorado’s Department of Agriculture, of which its Measurement Standards program is part, as well as Nevada’s Department of Agriculture, of which its Measurement Standards program is part, both use the National Institute of

Standards and Technology guidance for measuring pricing accuracy. Per this guidance, stores only fail inspections if more than 2% of the shelf prices inspected are lower than the point-of-sale price in a test of 100 randomly selected items.

19. Between March 16, 2022 and July 1, 2022, the Colorado Department of Agriculture conducted 17 separate inspections at Walmart stores. Walmart failed 9 of these inspections.

20. Between approximately January 14, 2022 through August 3, 2022, the Nevada Attorney General's Office received 7 separate consumer pricing complaints about Walmart stores in Northern Nevada. In addition, the Nevada Department of Agriculture conducted approximately 9 separate inspections at Walmart stores in Northern Nevada. Walmart failed 4 of these inspections in the greater Reno area, with one store failing multiple times.

21. The Colorado and Nevada Attorneys General became aware of the disparity between Walmart's shelf and point-of-sale prices and jointly engaged Walmart regarding their concerns.

Legal Allegations

22. The CCPA, C.R.S. § 6-1-105(1)(l), prohibits a person in the course of that person's business, vocation, or occupation from making "false or misleading statements of fact concerning the price of goods [or] services[.]"

23. The State alleges that Walmart's conduct violated at least this subsection of the CCPA.

Walmart's new controls to encourage pricing accuracy.

24. Walmart employs a variety of policies, procedures, and technological solutions in an effort to minimize pricing accuracy concerns. In 2022 and 2023, Walmart modified its price change system to increase pricing accuracy. These improvements created additional controls on how and when associates can update prices, including:

- a. Providing additional enhanced training relating to the price change process.
- b. Requiring the store associate to physically be in the aisle or location where an item is located, and to scan the barcode of the section of the item to accept a price change and print the new shelf label. This change is designed to ensure that associates are close to the shelf where a price must be updated at the time the point-of-sale price changes.
- c. Limiting the number of labels associates are able to print at a time with the intention of limiting the time between acceptance of a price change and the manual changing of the shelf label.

25. Additionally, in 2023, Walmart announced a partnership with Vusion to deploy electronic shelf pricing technology to stores throughout the country over a period of time. Electronic Shelf Labels (ESLs)¹ allow for a price change to be pushed to the point of sale and the shelf tag, and remove the need for the manual printing and changing of a shelf tag.

¹ ESLs are also referred to as Digital Shelf Labels or DSLs.

IV. WALMART'S DENIALS

26. Walmart denies the allegations above that it has engaged in violations of the CCPA as alleged by the State.

V. LEGAL AUTHORITY

27. C.R.S. § 6-1-110(2) authorizes the Attorney General to accept an assurance of discontinuance for any deceptive trade practice listed in the CCPA. Section 6-1-110(2) also allows the Attorney General to accept a voluntary payment from Walmart of any amount necessary to restore to any person money acquired by such alleged violator by means of a deceptive trade practice.

VI. RELIEF

28. This Assurance applies only to Walmart stores located in Colorado and Nevada and does not include Sam's Club locations, wherever they are located. The obligations of this Section VI will be in effect beginning ninety days after the Effective Date of this Assurance.

29. For the purposes of this Assurance, the following definitions apply:

- a. The "point-of-sale" shall mean the physical assisted or self-checkout register in the store where the customer pays for the items they are purchasing.
- b. A "price overcharge" occurs when the shelf price is lower than the point-of-sale price.
- c. "Clear(ly) and Conspicuous(ly)" shall mean that a required disclosure is difficult to miss (i.e., easily noticeable) and easily

understandable by ordinary consumers, including in the following ways:

(i) A visual disclosure, by its size, contrast, location, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

(ii) The disclosure must use diction and syntax understandable to ordinary consumers.

(iii) The disclosure must not be contradicted or mitigated by, or inconsistent with, any other representation(s).

(iv) The text of the disclosure must not be combined with other marketing or promotional text or information that is unrelated or immaterial to the subject matter of the disclosure or not legally required.

30. Walmart agrees to continue its implementation of price change policies and processes that promote timely replacement of shelf labels in stores designed to ensure that the price on the shelf label and the in-store point-of-sale are the same, including but not limited to its current practice:

a. the use of a handheld device (“device”) which contains the price change application in order to accept the price change and print the shelf price labels in the aisle or location where the shelf requiring the price change is located;

b. methods designed to require associates be present at a particular

location in a particular aisle or other location where the shelf price changes are being made in order to accept a price change in the device; and

c. methods designed to ensure that a portable printer is connected to the device, the label is printed directly after acceptance of the price change in the system, and the associate prints and affixes the new shelf price label to the shelf for that particular product which price was changed as close in time as possible to any change in the point-of-sale price.

31. For purposes of this section, the parties agree that any method designed to ensure comparable or greater levels of pricing accuracy complies with paragraph 30, including the use of ESLs if those ESLs are intended to match between point-of-sale and shelf prices.

32. Walmart agrees to provide a clear and conspicuous notice at or near the point of sale of customers' ability to request a price override to have the shelf label price honored.

33. Walmart agrees to provide enhanced training to associates whose duties include completing price changes in stores as well as update the trainings and provide retraining to associates as necessary. The training must include the following topics:

- a. The importance of maintaining accurate pricing;
- b. A general overview and discussion of the importance of consumer protection laws that require accurate pricing in the state, and the

remedies available for violations;

c. The methods described above that are intended to promote timely and accurate price changes; and

d. The Walmart policy to honor the shelf price, the sign referencing the policy, and the requirements for store associates in this Agreement.

34. The training in paragraph 33 must occur:

a. For all new associates who will be authorized to conduct price changes within 14 days of starting employment; and

b. Annually thereafter as long as the associate's responsibilities include conducting price changes.

VII. COMPLIANCE AND REPORTING

35. Beginning 90 days after the Effective Date, Walmart shall conduct quarterly pricing accuracy inspections of at least 10 stores in Colorado and 10 stores in Nevada. Each state's quarterly inspection will include 10 stores that were not included in the previous three inspections. Provided, however, if there are less than 40 stores in the state, Walmart will inspect every store in the state that year. Each inspection shall include at a minimum a reasonably varied non-predetermined sampling of 100 food and beverage items in each store to examine if the shelf label matches the point-of-sale price. The items shall not include reduced for sale, discounted, or discontinued items.

36. For stores that are found in an inspection to have more than 2% of the scanned items resulting in a price overcharge, Walmart shall implement a corrective

action plan. The corrective action plan shall be tailored to the specific findings of such inspection, but shall include, without limitation:

- a. retraining of associates determined to have failed to accurately or responsibly make price changes;
- b. a discussion with the store manager regarding the requirement of pricing accuracy;
- c. an inspection of that store in a month consistent with the requirements in paragraph 35. If the store fails at re-inspection, it will be re-inspected every other week until it passes a subsequent inspection; and
- d. a reasonable investigation of any technological cause for the failure.

37. If inspections described in this Section VII find a price overcharge rate of more than 2% in more than one quarter of the inspected stores in Colorado or Nevada in a quarterly inspection period, the Parties agree for that State to meet and confer on reasonable and appropriate remedial measures.

38. Walmart will share the results of the quarterly inspections described in this Section VII with Colorado and Nevada along with an overview of any corrective action plan within thirty days of completion of the set of inspections. To the full extent permitted by law, Colorado shall treat all documents produced under this paragraph confidentially and as exempt from disclosure under the Colorado Open Records Act.

39. On a semiannual basis, for the next two years the Parties agree to meet

and confer to discuss the results of the inspections and remedial measures described above. Such meeting shall include:

- a. A discussion of the results of the inspections described above;
 - b. The details of any corrective action plans implemented;
 - c. Any other significant measures implemented by Walmart designed to promote shelf to point of sale pricing accuracy in Colorado and Nevada, including substantive changes to the price change policies, application, or device described in paragraph 30 above, additional training to associates, and the adoption of ESLs in Colorado and Nevada stores;
 - d. The Colorado Attorney General's Office providing a copy of any pricing accuracy consumer complaints that it receives against Walmart;
 - e. The Nevada Attorney General's Office providing a copy of any pricing accuracy consumer complaints that it receives against Walmart;
- and
- f. A discussion of any concerns the Attorneys General offices of Colorado and Nevada have regarding Walmart's compliance with this agreement, pricing accuracy, and remedial measures.

VIII. PAYMENT TO THE STATE

40. Walmart shall pay to the State of Colorado three million dollars (\$3,000,000) within thirty (30) days of the effective date of this Assurance. Payment shall be in the form of a wire transfer with wire payment instructions to be provided

by the State of Colorado to Walmart. All payments under this paragraph are to be held, along with any interest thereon, in trust by the Attorney General to be used in the Attorney General's sole discretion for reimbursement of the State's actual costs and attorneys' fees, the payment of restitution, if any, and for future consumer fraud or antitrust enforcement, consumer education, or public welfare purposes.

IX. ENFORCEMENT

41. Walmart expressly agrees and acknowledges that the State may initiate a subsequent investigation, civil action, or proceeding to enforce this Assurance, for violations of the Assurance, or if the Assurance is voided pursuant to paragraph 45, and agrees and acknowledges that in such event:

- a. any statute of limitations or other time-related defenses are tolled from and after the effective date of this Assurance; and
- b. the State may use statements, documents or other materials produced or provided by Walmart prior to or after the effective date of this Assurance.

42. A violation of any of the terms of this Assurance shall constitute a prima facie violation of the CCPA under C.R.S. § 6-1-110(2). If the State believes that Walmart has violated any term of this Assurance, the State shall be entitled to file a civil action under the CCPA and to seek an injunction or other appropriate order from such court to enforce the provisions of this Assurance. In any such action, Walmart agrees to waive any counterclaims that it may have had with respect to the subject matter of this Assurance, and agrees to waive any challenge to the enforceability of

this agreement. Provided, however, the State shall notify Walmart at least 30 days in advance of any such filing and the Parties agree to meet and confer and engage in good faith negotiations to attempt to address the State's concerns. The Parties consent to venue and jurisdiction for any proceeding necessary to enforce the terms of this Assurance within the District Court, Denver County, Colorado.

X. NOTICE

43. All notices regarding this Assurance shall be sent by certified mail, return receipt requested or reputable overnight delivery service (e.g., FedEx, UPS) at the addresses set forth below or by email unless any Party notifies the other Parties in writing of another address to which notices should be provided:

If to Walmart, to:

Paul Singer
Kelley Drye & Warren LLP
3050 K Street NW, Suite 400
Washington, D.C. 20007
psinger@kelleydrye.com

Jeff Rickard
Managing Counsel
Central Intake and Legal Holds
702 SW Eighth Street, MS #0215
Bentonville, AR 72716-0215
Jeff.Rickard@walmartlegal.com

If to the State, to:

Abigail M. Hinchcliff
First Assistant Attorney General
Consumer Fraud Unit
Consumer Protection Section
1300 Broadway, Denver, CO 80203

XI. RELEASE

44. The State acknowledges by its execution hereof that this Assurance constitutes a complete settlement and release of all claims under the CCPA on behalf of the State against Walmart or any of Walmart's subsidiaries, successors, officers, directors, managers, agents, and employees with respect to all claims, causes of action, damages, fines, costs, and penalties which were asserted or could have been asserted under the CCPA for the conduct described in this Assurance, that arose prior to the Effective Date and relating to or based upon the acts or practices which are the subject of this Assurance. The terms of this Assurance apply to any and all successors of Walmart. The State agrees that, except as provided in this Assurance, it shall not proceed with or institute any civil action or proceeding under the CCPA against Walmart for any conduct or practice prior to the Effective Date which relates to the subject matter of this Assurance.

XII. MISCELLANEOUS PROVISIONS

45. The State has agreed to the terms of this Assurance based on, among other things, the representations made to the State by Walmart and its counsel and the State's own factual investigation as set forth in the allegations above. Walmart represents and warrants that neither it nor its counsel have made any material representations to the State that are inaccurate or misleading. If any material representations by Walmart or its counsel are later found to be inaccurate or misleading, this Assurance is voidable by the State in its sole discretion.

46. The requirements of paragraphs 30-31 terminate upon Walmart's

certification to the Attorneys General of Colorado and Nevada of its implementation of technology that eliminates the need for associates to physically change shelf labels as part of the price change process in all Colorado and Nevada stores, or in 4 years after the Effective Date, whichever is sooner.

47. The requirements of paragraphs 32-38 terminate upon Walmart's certification to the Attorneys General of Colorado and Nevada of its implementation of technology that eliminates the need for associates to physically change shelf labels as part of the price change process in all Colorado and Nevada stores or in 3 years after the Effective Date, whichever is sooner.

48. All terms and conditions of this Assurance shall continue in full force and effect on any successor, assignee, or transferee of Walmart. Walmart shall include any such successor, assignment or transfer agreement a provision that binds the successor, assignee or transferee to the terms of the Assurance. No party may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of State.

49. This Assurance shall neither create nor waive any private rights or remedies in any third parties nor waive any rights, remedies, or defenses of the Parties in respect to any third parties. Under no circumstances shall this Assurance or the name of the Attorney General or any of the State's employees or representatives be used by Walmart or any person under its direction or control to suggest the State's endorsement of Walmart's past, present, or future conduct.

50. Any failure by the State to insist upon the strict performance by

Walmart of any of the provisions of this Assurance shall not be deemed a waiver of any of the provisions hereof, and the State, notwithstanding that failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Assurance to be performed by Walmart.

51. This Assurance is the final, complete, and exclusive statement of the Parties' agreement on the matters contained herein, and it supersedes, terminates, and replaces any and all previous negotiations, agreements, and instruments as may exist between the Parties. Other than any representation expressly stated in this Assurance, the Parties have not made any representations or warranties to each other, and no Party's decision to enter into this Assurance is based upon any statements by any other Party outside of those in this Assurance. No change or modification of this Assurance shall be valid unless in writing and signed by all Parties. If any provision(s) of this Assurance is held to be invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

52. Nothing in this Agreement shall relieve Walmart of other obligations imposed by any applicable state or federal law or regulation or other applicable law.

53. The terms and provisions of this Assurance may be enforced by the current Colorado Attorney General, and by any of his duly authorized agents or representatives, as well as by any of his successors in interest, and by any of his successors in interest's agents or representatives.

54. Pursuant to C.R.S. § 6-1-110(2), this Assurance shall be a matter of

public record.

55. The State and Walmart acknowledge that they had a full opportunity to review this Assurance and consult with legal counsel regarding it. The undersigned representatives of the State and Walmart agree and represent that they have read and understood this Assurance, accept the legal consequences involved in signing it, and that there are no other representations, agreements, or understandings between the State and Walmart that are not stated in writing herein.

56. This Assurance may be signed in one or more counterparts, each of which shall be deemed an original, but which together shall constitute the Assurance. Electronic copies of this Assurance and the signatures hereto may be used with the same force and effect as an original.

57. Nothing in this Agreement affects Walmart's right to take legal or factual positions in defense of litigation or other legal proceedings to which the State is not a party.

58. Nothing contained herein shall be construed to limit the remedies available to State in the event that Walmart violates the Assurance after its effective date.

59. This Assurance shall be governed by the laws of Colorado without regard to any conflict of laws principles.

60. The Assurance and all its terms shall be construed as if mutually drafted with no presumption of any type against any party that may be found to have been the drafter.

61. Walmart represents and warrants, through the signature below, that the terms and conditions of this Assurance are duly approved.

62. The effective date of this Assurance shall be July 13, 2023.

STATE OF COLORADO:

WALMART INC.

**PHILIP J. WEISER,
ATTORNEY GENERAL**

By:

Abigail Hinchcliff
Abigail Hinchcliff
First Assistant Attorney General
Attorney Reg. No. 47942

July 12, 2023
Date



Paul Singer
Elizabeth Chun
Kelley Drye & Warren LLP
3050 K Street NW, Suite 400
Washington, D.C.
Tel: (202) 342-8400
Fax: (202) 342-8451
Email: psinger@kelleydrye.com

July 10, 2013
Date