

Complaint

IN THE MATTER OF

**KMART CORPORATION,
KMART SERVICES CORPORATION,
AND
KMART PROMOTIONS, LLC**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4197; File No. 062 3088
Complaint, August 14, 2007 – Decision, August 14, 2007*

This consent order addresses the failure of respondents Kmart Corporation et al. to disclose, or to disclose adequately, material terms and conditions of the Kmart Gift Card, as well as a deceptive claim regarding the gift card. The order prohibits respondents from advertising or selling Kmart Gift Cards without disclosing, clearly and prominently, both in advertising and at the point of sale, the existence of any expiration date or automatic fees. Kmart must also place this information on the front of the gift card. Respondents are prohibited from making any misrepresentation about any material term or condition associated with the Kmart Gift Card. The order prohibits respondents from collecting or attempting to collect any dormancy fee on any Kmart Gift Card activated prior to the date of issuance of the order, and requires them to create, maintain, and distribute a written policy to reimburse consumers whose gift cards were diminished by fees. Other provisions of the order include a document retention requirement to ensure compliance with the proposed order, a requirement to distribute copies of the order to applicable parties, and requirements relating to reports to the Commission.

Participants

For the Commission: *Julie G. Bush, Jonathan M. Kraden, Karen Leonard, Alice Saker Hrdy, Dianna Thaxton, and Peggy L. Twohig.*

For the Respondent: *Linda Goldstein, Manatt, Phelps & Phillips, LLP.*

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COMPLAINT

The Federal Trade Commission, having reason to believe that Kmart Corporation, Kmart Services Corporation, and Kmart Promotions, LLC (collectively, “respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Kmart Corporation is a Michigan corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, IL 60179.

2. Respondent Kmart Services Corporation is an Ohio corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, IL 60179.

3. Respondent Kmart Promotions LLC is a Virginia corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, IL 60179.

4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

5. Since at least 2003, respondents have advertised, sold, and distributed the Kmart Gift Card and Kmart Cash Card (hereinafter, collectively referred to as the “Kmart Gift Card”) through their retail stores, the *Kmart.com* Web site, and through third parties.

6. The Kmart Gift Card is a plastic, stored-value card, similar in size and shape to a credit or debit card, that can be used to purchase goods or services from Kmart retail locations.

7. Respondents represent that a consumer can redeem the Kmart Gift Card for goods or services of an equal value to the monetary amount placed on the card. For example, respondents sell the Kmart Gift Card in stores and on the *Kmart.com* Web site in

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specific denominations for exact amounts (*e.g.*, a \$25 Kmart Gift Card costs \$25, etc.). Kmart Gift Cards are often branded with monetary amounts on the front of the cards. Additionally, respondents claim that the Kmart Gift Card is equivalent to cash, branding several as “Kmart Cash Cards.” In some instances, respondents sell the Kmart Gift Card affixed to cardstock that states that consumers can “use [the card] like cash at all Kmart locations.”

8. When a Kmart Gift Card was not used for 24 consecutive months, respondents deducted a fee of \$2.10 for *each* of the past 24 months, resulting in an immediate reduction of \$50.40 from the value of the Kmart Gift Card. Respondents describe the fee (hereinafter, “dormancy fee” or “fee”), on the back of the cards, using the following language: “after 24 months of non-use, a \$2.10 per month service fee will be deducted from your balance in arrears until the card is used or depleted.” In those instances where the balance of any Kmart Gift Card was less than \$50.40, the application of the dormancy fee reduced the card’s balance to zero.

9. In numerous instances, respondents failed to disclose or failed to disclose adequately the dormancy fee by, among other practices:

a. Disclosing the dormancy fee in small print (approximately five point font) on the back of the Kmart Gift Card, imbedded in a paragraph of “Terms and Conditions” (*See Attachment A*);

b. Affixing the Kmart Gift Card to cardstock that completely obscures the disclosure on the back of the card;

c. Failing to use understandable language and syntax to describe the dormancy fee; and/or

d. Selling Kmart Gift Cards on the *Kmart.com* Web site, without disclosing to consumers at the time of purchase that a dormancy fee may apply to the card.

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10. In numerous instances, consumers did not learn of the fee until they attempted to use their Kmart Gift Cards and found out that their cards had expired or held little or no remaining value. Some consumers have contacted respondents to request reimbursement for these fees, and respondents have provided some amount of reimbursement to consumers.

11. Since at least December 2005, respondents have stated on their Web site that Kmart Gift Cards “never expire.”

12. In the advertising and sale of Kmart Gift Cards, respondents have represented, expressly or by implication, that a consumer can redeem a Kmart Gift Card for goods or services of an equal value to the monetary amount placed on the card. Respondents have failed to disclose or failed to disclose adequately that, after 24 consecutive months of non-use, a \$2.10 fee is deducted, retroactively for each of the past 24 months, and again for each successive month of continued inactivity, from the value of the Kmart Gift Card. This fact would be material to consumers in their purchase or use of Kmart Gift Cards. The failure to disclose adequately this fact, in light of the representation made, was, and is, a deceptive practice.

13. In the advertising and sale of Kmart Gift Cards on the *Kmart.com* Web site, respondents have represented, expressly or by implication, that the Kmart Gift Card never expires. In truth and in fact, in numerous instances, after 24 consecutive months of non-use, a \$2.10 fee is deducted, retroactively for each of the past 24 months, from the value of the Kmart Gift Card, thereby causing any Kmart Gift Card valued at less than \$50.40 to expire. Therefore, the representation set forth in Paragraph 11 was, and is, false or misleading.

14. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

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THEREFORE, the Federal Trade Commission, on this fourteenth day of August, 2007, has issued this complaint against respondents.

By the Commission, with the five Commissioners voting in the affirmative, but with Commissioner Harbour and Commissioner Leibowitz concurring in part and dissenting in part from the Decision and Order.

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Attachment A



Example of Kmart Gift Card. (Actual Size)

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DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission act; and

The respondents, their attorney, and counsel for the Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

- 1.a. Respondent KMART CORPORATION is a Michigan corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, IL 60179.

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- 1.b. Respondent KMART SERVICES CORPORATION is an Ohio corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, IL 60179.
- 1.c. Respondent KMART PROMOTIONS, LLC is a Virginia corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, IL 60179.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

DEFINITIONS

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

1. “Clearly and prominently” shall mean as follows:
 - (A) In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. *Provided, however,* that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the advertisement is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

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- (B) In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on each page where a gift card is advertised, promoted, mentioned, or depicted.
- (C) On a product label or gift card, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.
- (D) The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.
2. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
 3. “Covered Fee” shall mean any fee or surcharge that is assessed automatically by respondents or their successors and assigns, following activation of any Kmart Gift Card, and that decreases the value of the gift card, including but not limited to any dormancy, maintenance, inactivity, monthly, balance inquiry, or other fees assessed automatically by respondents, their successors and assigns. *Provided, however,* this definition shall not apply to any replacement fee for any lost or stolen Kmart Gift Card.
 4. “Document” is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a), and includes writings, drawings, graphs, charts,

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photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, into reasonably usable form through detection devices. A draft or non-identical copy is a separate document within the meaning of the term.

5. “Eligible Consumer” shall mean any consumer who purchased or received a Kmart Gift Card prior to the date of issuance of this order, that was diminished in value by a Covered Fee for which no reimbursement previously has been issued.
6. “Kmart Gift Card” shall mean any payment device: (a) that is issued by, or on behalf of, respondents or their successors and assigns; and (b) that can be used to purchase goods or services at a Kmart retail location, or any other store or Web site operated by respondents or their successors and assigns; and (c) that is issued in a specified monetary amount; and (d) that may, or may not, be increased in value or reloaded; and (e) for which cash or other value or consideration was given.
7. Unless otherwise specified, “respondents” shall mean Kmart Corporation, Kmart Services Corporation, and Kmart Promotions LLC, corporations, their successors and assigns, and their officers, agents, representatives, and employees.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution, in or affecting commerce, of any Kmart Gift Card, shall not fail to disclose clearly and prominently:

- A. the existence of any expiration date or Covered Fee associated with the Kmart Gift Card; *Provided, however,* that, at the point of sale, prior to purchase, respondents shall

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not fail to disclose clearly and prominently all of the material terms and conditions of any expiration date or Covered Fee associated with the Kmart Gift Card; and

- B. on the front of each Kmart Gift Card, the existence of any expiration date or Covered Fee associated with the Kmart Gift Card.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution, in or affecting commerce, of any Kmart Gift Card, shall not misrepresent, in any manner, expressly or by implication, any material term or condition of the Kmart Gift Card.

III.

IT IS FURTHER ORDERED that, upon issuance of this order, respondents, directly or through any corporation, subsidiary, division, or other device, shall:

- A. Not collect or attempt to collect any Covered Fee on any Kmart Gift Card activated prior to the date of issuance of this order; and
- B. Create, maintain, and distribute to all respondents' retail stores and customer care network centers, a written reimbursement policy that describes the methods by which Eligible Consumers may contact respondents to request reimbursement of the value of any Covered Fees that were deducted from their Kmart Gift Cards and the means by which respondents will reimburse the value of such Covered Fees. At a minimum, the reimbursement policy:

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1. Shall specify a toll free number, a valid email address, and a postal address consumers may use to request and obtain reimbursement of the value of such Covered Fees assessed against a Kmart Gift Card;
2. Shall specify that a consumer may complete a request for reimbursement of the value of any Covered Fees assessed against his or her Kmart Gift Card through the toll free number, email address, or postal address required by Part III.B.1. of this Order;
3. For two (2) years after the issuance of the order, shall be clearly and prominently disclosed, including, but not limited to, the toll free number, email address, and postal address required by Part III.B.1. of this Order, on respondents' primary web sites, including, but not limited to, *www.kmart.com* and *www.kmartcorp.com* web sites;
4. Shall be disclosed to any consumer who complains or inquires about the balance on a Kmart Gift Card; and
5. Shall require reimbursement of the value of any Covered Fee assessed on a Kmart Gift Card activated prior to the date of entry of this Order, in the form of a check or a Kmart Gift Card, to any Eligible Consumer who meets the following qualifications:
 - (a) contacts respondents using any of the methods specified in Part III.B.2 of this Order; and
 - (b) provides the Kmart Gift Card number and the consumer's mailing address and telephone number. The consumer may provide, but is not required to provide, the store where the card was purchased, the date the card was issued, and the physical Kmart Gift Card. Once a consumer provides the required

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information, respondents shall issue a reimbursement within ten (10) business days. *Provided however*, that for thirty (30) days after issuance of the order, respondents shall issue a reimbursement within fifteen (15) business days.

IV.

IT IS FURTHER ORDERED that respondents Kmart Corporation, Kmart Services Corporation, and Kmart Promotions LLC, and their successors and assigns, shall, for five (5) years after the date of issuance of this order, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution, in or affecting commerce, of any Kmart Gift Card, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. Accounting records that reflect the cost of Kmart Gift Cards sold, revenues generated, and the disbursement of such revenues;
- B. Records documenting the sales figures and unit sales figures for the Kmart Gift Card; the total amount of any and all Covered Fees that have been deducted from Kmart Gift Cards; and the total number of Kmart Gift Cards from which a covered fee was deducted;
- C. Records maintained in the ordinary course of business reflecting during their employment: the name, physical address, and telephone number of each person employed by respondents, and their successors and assigns, including as an independent contractor, with responsibilities relating to compliance with this Order; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;

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- D. Complaints and refund requests relating to the Kmart Gift Card (whether received directly, indirectly or through any third party) and any responses to those complaints or requests;
- E. Copies of all advertisements or other marketing materials promoting, advertising, or referring to the Kmart Gift Card;
- F. Representative copies of all versions of the Kmart Gift Card; and
- G. All other records and documents reasonably necessary to demonstrate full compliance with each provision of this Order, including but not limited to, all documents obtained, created, generated or which in any way relate to the requirements, provisions or terms of this Order, and all reports submitted to the FTC pursuant to this Order.

V.

IT IS FURTHER ORDERED that respondents Kmart Corporation, Kmart Services Corporation, and Kmart Promotions LLC, and their successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers who engage in conduct related to the subject matter of the Order, and to the officers, directors, and managers of any third-party vendor who engages in conduct related to the subject matter of the Order, and shall secure from each such person, within thirty (30) days of delivery, a signed and dated statement acknowledging receipt of the Order. Respondents shall deliver this Order to current personnel within five (5) days after the date of service of this Order, and to future personnel within ten (10) days after their assuming their responsibilities.

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IT IS FURTHER ORDERED that respondents Kmart Corporation, Kmart Services Corporation, and Kmart Promotions LLC, and their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in any of the corporations that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondents Kmart Corporation, Kmart Services Corporation, and Kmart Promotions LLC, and their successors and assigns, shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied and are complying with this order.

VIII.

This order will terminate on August 14, 2027, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any

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violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this Order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, with the five Commissioners voting in the affirmative, but with Commissioner Harbour and Commissioner Leibowitz concurring in part and dissenting in part from the Decision and Order.

Concurring and Dissenting Statement

**Statement of Commissioners Pamela Jones Harbour
and Jon Leibowitz
(Concurring in Part and Dissenting in Part)**

Today, the Commission approves a consent agreement with Kmart Corporation and two of its subsidiaries (collectively, “Kmart”) to settle charges that Kmart misrepresented material aspects of its gift cards and failed to disclose that, after two years of non-use, Kmart would deduct a \$50 fee from the gift card and a \$2.10 monthly fee thereafter. We concur in the Commission’s decision to bring an action and impose certain injunctive provisions upon Kmart, but dissent in part from the consent agreement because we believe the remedy should include disgorgement of ill-gotten profits. Otherwise, Kmart remains unjustly enriched by a substantial amount of buried “dormancy fees” while many consumers will have lost the chance for reimbursement because they long ago threw out their seemingly worthless gift cards in frustration.¹

Gift cards have become enormously popular with consumers and generated nearly \$28 billion in sales during the 2006 holiday season.² Gift card dormancy fees and expiration dates are material restrictions that affect the value of the cards. These restrictions must be clearly disclosed so that consumers can make informed decisions, whether they are purchasing the cards or receiving them as a gift.

The final order settles the Commission’s allegations that Kmart deceptively advertised its gift cards by, among other things,

¹ Kmart applied a dormancy fee of \$2.10 per month to the balance of every Kmart gift card that went unused for 24 months – both retroactively (\$50.40) and prospectively. Consequently, cards worth \$50 or less were rendered worthless if unused for two years. Imagine stashing a \$10, \$25, or \$50 gift card in a drawer and then pulling it out two years later for a trek to shop at Kmart, only to learn at the check-out counter that the card had no value. Kmart recently discontinued charging this dormancy fee after learning about the FTC’s investigation, but only on a prospective basis.

² Press Release, Nat’l Retail Fed’n Gift Card Spending Surpassed Expectations as Last-Minute Shoppers Looked for Quick, Easy Gifts; Most Consumers Have Spent Less Than Half of Card Values (Jan. 23 2007).

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misrepresenting the existence of any expiration dates or fees associated with the cards. Not only did Kmart claim that the gift cards could be used “like cash at all Kmart locations,” but its website also affirmatively misled consumers by stating that the Kmart gift cards “never expire.” We agree that Kmart’s alleged conduct justifies the order injunctive provisions.

But we believe the order should go further. It should require Kmart to disgorge the profits of its unlawful behavior, provide more complete consumer redress, or a combination of both.³ More than three decades ago, in sponsoring the Magnuson-Moss Act extending the Commission’s authority under Section 19 to obtain monetary remedies, Senator Magnuson explained that the Commission cannot “rely merely upon a slap of the violator’s wrist to maintain fair play in the marketplace” and that “[a] mere cease-and-desist order has frequently let a wrongdoer keep his ill-gotten gains.”⁴ The same rationale holds true today.

In this case, Kmart deducted dormancy fees from consumers’ gift cards. It failed to give adequate notice. In many instances, Kmart’s actions rendered unused or partially used cards valueless, at significant monetary benefit to Kmart but considerable monetary detriment to consumers. Today’s final order, in our opinion, stops the deceptive practices but does not completely cure the consumer injury or fully excise Kmart’s ill-gotten gains. Pursuant to the order,

³ Commission consent orders have required advertisers to pay redress, offer refunds, or disgorge profits, and it is appropriate to do so here. See, e.g., *Hi-Health Supermart Corp.*, FTC Dkt. No. C-4136 (May 12, 2005) (requiring \$450,000 in redress); *ValueVision Int’l, Inc.*, FTC Dkt. No. C-4022 (Aug. 24, 2001) (requiring company to offer refunds to all purchasers of the challenged products); *Weider Nutrition Int’l, Inc.*, FTC Dkt. No. C-3983 (Nov. 17, 2000) (requiring \$400,000 in redress); *Dura Lube, Inc.*, FTC Dkt. No. D-9292 (May 5, 2000) (requiring \$2 million in redress); *Apple Computer, Inc.*, FTC Dkt. No. C-3890 (Aug. 6, 1999) (requiring company to honor representation that customers would receive free support for as long as they own the product); *Azrak-Hamway Int’l, Inc.*, 121 F.T.C. 507 (1996) (requiring toymaker to offer refunds); *L& S Research Corp.*, 118 F.T.C. 896 (1994) (requiring \$1.45 million in disgorgement).

⁴ 119 CONG. REC. 29480 (1973).

Analysis to Aid Public Comment

Kmart may not assess additional dormancy fees on previously activated gift cards and must reimburse previously assessed dormancy fees if consumers complain and can provide the gift card number. Many consumers no doubt already have thrown out their gift cards and will have no remedy under this settlement. Moreover, the order does not require Kmart automatically to restore previously deducted dormancy fees (absent consumer inquiries) or disgorge the windfall profits it made from these fees. Although Kmart's reimbursement practices have been improved by the Commission's efforts, in our opinion the refund policy, without additional monetary relief, is still too little, too late.

We commend staff for pursuing Kmart's failure to disclose its gift card dormancy fees and for challenging Kmart's affirmative misrepresentations that its gift cards do not expire. For the foregoing reasons, however, we respectfully dissent in part from the final order.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Kmart Corporation, Kmart Services Corporation, and Kmart Promotions, LLC (collectively, "respondents").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it

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should withdraw from the agreement or make final the agreement's proposed order.

Respondents advertise, sell, and distribute the Kmart Gift Card through their retail stores and Internet Website *www.Kmart.com*. The Kmart Gift Card is a plastic, stored-value card similar in size and shape to a credit or debit card, that can be used to purchase goods or services from Kmart retail locations. This matter concerns the respondents' alleged failure to disclose, or failure to disclose adequately, material terms and conditions of the Kmart Gift Card as well as a deceptive claim regarding the Kmart Gift Card.

The Commission's complaint alleges that, in the advertising and sale of Kmart Gift Cards, respondents have represented, expressly or by implication, that a consumer can redeem a Kmart Gift Card for goods or services of an equal value to the monetary amount placed on the card. Respondents have failed to disclose, or failed to disclose adequately, that, after 24 consecutive months of non-use, a \$2.10 fee is deducted, for each of the past 24 months, and again for each successive month of continued inactivity, from the value of the Kmart Gift Card. The proposed complaint alleges that the failure to disclose adequately this material fact is a deceptive practice.

The complaint also alleges that respondents have represented on the *Kmart.com* Web site that the Kmart Gift Card never expires. In truth and in fact, after 24 months of non-use, the application of the Kmart Gift Card dormancy fee causes any Kmart Gift Card valued at less than \$50.40 to expire. The complaint alleges that the representation that the Kmart Gift Card never expires is false and misleading.

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future.

Part I.A. of the proposed order prohibits respondents from advertising or selling Kmart Gift Cards without disclosing, clearly

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and prominently: (a) the *existence* of any expiration date or automatic fees *in all advertising*, and (b) *all material terms and conditions* of any expiration date or automatic fee *at the point of sale and prior to purchase*. The effect of this provision is to require respondents to alert consumers to potential fees and expiration dates during advertising, and to fully disclose all relevant details at the point of sale, before consumers purchase the gift cards.

Part I.B. of the proposed order prohibits respondents from advertising or selling Kmart Gift Cards without disclosing, clearly and prominently the *existence* of any automatic fee or expiration date *on the front* of the gift card.

Part II of the proposed order prohibits respondents from making any misrepresentation about any material term or condition associated with the Kmart Gift Card.

Part III.A. of the proposed order prohibits respondents from collecting or attempting to collect any dormancy fee on any Kmart Gift Card activated prior to the date of issuance of the proposed order.

Part III.B. of the proposed order requires respondents to create, maintain, and distribute a written policy to reimburse consumers whose gift cards were diminished by fees. The policy: (1) must specify a toll free number, a valid email address and a postal address that consumers can use to complete a request for reimbursement of dormancy fees from Kmart; (2) must be clearly and prominently disclosed on Kmart's web site for two years from the issuance of the order; (3) must be disclosed to anyone who complains or inquires to Kmart about a gift card balance; and (4) requires reimbursement to any eligible consumer who (a) contacts Kmart by phone, email, or postal mail, and (b) provides a Kmart gift card number, a mailing address, and a phone number. Once a consumer provides the required information, Kmart must issue a reimbursement within 10 business days, provided however, that for thirty (30) days after

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issuance of the order respondents shall issue a reimbursement within fifteen (15) business days.

Part IV of the proposed order contains a document retention requirement, the purpose of which is to ensure compliance with the proposed order. It requires that respondents maintain accounting and sales records for the Kmart Gift Card, copies of ads and promotional material that contain representations covered by the proposed order, complaints and refund requests relating to the Kmart Gift Card, and other materials that were relied upon by respondents in complying with the proposed order.

Part V of the proposed order requires respondents to distribute copies of the order to various principals, officers, directors, and managers of respondents as well as to the officers directors, and managers of any third-party vendor who engages in conduct related to the proposed order.

Part VI of the proposed order requires respondents to notify the Commission of any changes in corporate structure that might affect compliance with the order.

Part VII of the proposed order requires respondents to file with the Commission one or more reports detailing compliance with the order.

Part VIII of the proposed order is a “sunset” provision, dictating the conditions under which the order will terminate twenty years from the date it is issued or twenty years after a complaint is filed in federal court, by either the United States or the, alleging any violation of the order.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify in any way its terms.

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IN THE MATTER OF

AMERICAN PETROLEUM COMPANY, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4198; File No. 061 0229**Complaint, August 21, 2007 – Decision, August 21, 2007*

This consent order addresses actions by respondent American Petroleum, which agreed with several competing importers and sellers of lubricants to restrict the importation and sale of lubricants in Puerto Rico, in order to pressure the Puerto Rican Government to repeal a law requiring a refundable environmental deposit for lubricants purchased. The order enjoins American Petroleum from agreeing or attempting to agree with any other seller of lubricants (1) to restrain, restrict, limit, or reduce the import or sale of lubricants or (2) to deal with, refuse to deal with, threaten to refuse to deal with, boycott, or threaten to boycott any buyer or potential buyer of lubricants. The order does not interfere with the company's constitutional right to exercise rights under the First Amendment to petition any government body concerning legislation, rules, or procedures.

Participants

For the Commission: *Mark Frankena, Kenneth L. Glazer, Geoffrey M. Green, Peter D. Gulyn, Armando Irizarry, Geoffrey Oliver, and Louis Silvia.*

For the Respondents: *Rosalie Irizarry Silvestrini and Luis Oliver, Fiddler, Gonzalez & Rodriguez, P.S.C.*

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Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that American Petroleum Company, Inc., a corporation, hereinafter sometimes referred to as "respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding in