

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

In the Matter of Kmart Corporation, Kmart Services Corporation, and Kmart Promotions, LLC., File No. 062 3088

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 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 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 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 FTC, 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.