

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Deborah Platt Majoras, Chairman
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch**

)	
In the Matter of)	DOCKET NO. C-4197
)	
KMART CORPORATION,)	
KMART SERVICES CORPORATION,)	DECISION AND ORDER
and)	
KMART PROMOTIONS, LLC,)	
corporations.)	
)	

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.

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.
 - (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, 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 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:
 - 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 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;
- 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.

VI.

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 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.

Donald S. Clark
Secretary

ISSUED: August 14, 2007
SEAL