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 against Kmart, but dissent in part from the proposed consent agreement because we believe the remedy should include disgorgement of ill-gotten profits. Otherwise, Kmart will remain 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.[2]

Gift cards have become enormously popular with consumers and generated nearly $28 billion in sales during the 2006 holiday season.[3] 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 proposed order settles the Commission's allegations that Kmart deceptively advertised its gift cards by, among other things, misrepresenting the existence of any expiration dates or fees asso6nated

[2] 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.

[3] Press Release, Nat'l Retail Fed'n, (Jan. 23, 2007).

[4] Commission consent orders have required advertisers to pay redress, offer refunds, or disgorge profits, and it is appropriate to do so here. ., FTC Dkt. No. C–4136 (May 12, 2005) (requiring $450,000 in redress); ., FTC Dkt. No. C–4022 (Aug. 24, 2001) (requiring company to offer refunds to all purchasers of the challenged products); ., FTC Dkt. No. C–3983 (Nov. 17, 2000) (requiring $400,000 in redress); ., FTC Dkt. No. D–9292 (May 5, 2000) (requiring $2 million in redress); ., 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); ., 121 F.T.C. 507 (1996) (requiring toymaker to offer refunds); & ., 118 F.T.C. 896 (1994) (requiring $1.45 million in disgorgement).

[5] 119 Cong. Rec. 29480 (1973).

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. Commission Rule 4.9(c), 16 CFR 4.9(c).

public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at . // . As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at . // / / .

FOR FURTHER INFORMATION CONTACT: Mark D.S. Peterson (202–326–3731), Joel Christie (202–326–3297), or Grace Kwon (202–326–2560), Bureau of Competition, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 of the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for March 9, 2007), on the World Wide Web, at . // / . / / / . . A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

A a i f Ag ee e C ai i g C e O de T Aid P b ic C e

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order with the Missouri Board of Embalmers and Funeral Directors (''the Board'' or ''Respondent''). The agreement settles charges that the Board violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, through particular acts and practices described below. The Agreement has been placed on the public record for thirty (30) days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed Order final.

The purpose of this analysis is to facilitate comment on the proposed consent Order. This analysis does not constitute an official interpretation of the agreement and proposed Order, and does not modify the terms in any way. Further, the proposed consent Order has been entered into for settlement purposes only, and does not constitute an admission by the proposed Respondent that it violated the law or that the facts alleged in the Complaint against the Respondent (other than jurisdictional facts) are true.

I. The Re de

Respondent is the sole licensing authority for the practices of funeral directing and embalming in the State of Missouri. It is authorized to promulgate, adopt and enforce rules and regulations governing and defining those practices. Respondent is able to seek a court order to enjoin any person from engaging or offering to engage in any act that requires a license from the Board. The unlicensed practice of funeral directing or embalming in Missouri may be prosecuted as a class A misdemeanor.

At the time it adopted the regulation at issue in the proposed complaint, the Board was composed of five (5) licensed funeral directors, all of whom competed in the sale of at-need funeral caskets to consumers in Missouri.

II. The C d c Add e ed b he P ed C e O de

The proposed Complaint alleges that Respondent violated Section 5 of the Federal Trade Commission Act by unlawfully restraining competition in the retail funeral casket market in the State of Missouri by promulgating a regulation that defined the practice of funeral directing to include selling at-need funeral merchandise.

The at-issue regulation stated: ''No person other than a duly licensed and registered funeral director may make the following at-need arrangements with the person having the right to control the incidents of burial: * * * (C) sale or rental to the public of funeral merchandise, services or paraphernalia.'' [2] Under the laws of the State of Missouri, however, licensing qualifications and conditions for persons practicing or offering to practice funeral directing and embalming do not apply to anyone engaged simply in the furnishing of at-need burial receptacles to the public.[3]

The proposed Complaint alleges that the Board's regulation had anticompetitive effects by discouraging non-licensed persons from selling funeral caskets to the public in Missouri, depriving consumers of the benefits of price competition, and reducing consumer choices concerning the purchase of funeral caskets.

The Commission has previously found that funeral director conduct that limits entry by non-licensed casket sellers harms competition. In its 1994 review of the Funeral Rule,[4] the Commission found that funeral-director-imposed ''casket handling fees'' excluded competition from third-party casket sellers, and the record evidence indicated that the fees ''prevent[ed] potential price competition and reduce[d] consumer choice.'' [5] The Commission further found that ''the long-term effect of [banning these fees] will be increased competition in the casket market such that prices will eventually go down and all consumers will pay less.'' [6]

The courts have likewise found that state laws prohibiting the sale of caskets by non-licensed persons harm competition. The Sixth Circuit concluded that a Tennessee state law forbidding anyone but state licensed funeral directors from selling caskets imposed ''a significant barrier to competition in the casket market'' and ''harm[ed] consumers in their pocketbooks.'' [7] A district court in Oklahoma found that ''[a]s long as independent sellers stay in the market, casket sales from independent sources * * * place downward pressure on

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[2] 4 CSR 120–2.060(18).

[3] See Mo. Rev. Stat. § 333.251 (2005). The at-issue regulation was revised during the course of the investigation and published in 20 CSR 2120–2.060(18)(C) effective September 2006.

[4] The FTC's Funeral Rule, which was promulgated by the Commission in 1982 and revised in 1994, requires providers of funeral goods and services to give consumers itemized lists of funeral goods and services that not only provide price and descriptions, but also contain specific disclosures. The Funeral Rule removed the primary industry restraint on consumer choice (package-only funeral goods and service pricing) and makes clear that consumers may select and purchase only the goods and services they want. See 59 FR 1592 (1994).

[5] 59 FR at 1603–04.

[6] P v. , 41 F.3d 81, 91 (3d Cir. 1994). See also Memorandum of Law of Amicus Curiae The Federal Trade Commission, P v. , Case No. CIV–01–445–F (W.D. Okla. Aug. 29, 2002).

[7] v. , 312 F.3d 220, 222, 228 (6th Cir. 2002).

casket prices as a result of increased competition.'' [8] A district court reviewing a similar statute in Mississippi also concluded that such requirements result in less price competition and consumer choice in selecting a casket.[9]

The Missouri statute that created the Board and grants it the authority to act was not intended to displace competition in the sale of funeral merchandise with regulation. Indeed, it appears that Missouri intended to preserve price competition with respect to the retail sale of funeral caskets by excepting from application of the at-need funeral statute ''any person engaged simply in the furnishing of burial receptacles for the dead.'' [10]

III. Te f he P ed C e O de

The Board has signed a consent agreement containing the proposed consent Order. The proposed Order would prevent the Board from

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[8] P , . v. . , 2002 WL 32026155 at *6 (W.D. Okla. Dec. 12, 2002).

[9] . , , , . v. .. .. , 124 F.Supp. 2d 434, 440 (S.D. Miss. 2000).

[10] Mo. Rev. Stat. § 333.251 (2005).