CFR Part 248, on April 4, 1995.1 The notice contained, with minor modification, the standard regulatory review questions relating to the economic impact and continuing relevance of the Guides; burdens or costs related to adherence to the Guides: benefits conferred on industry members by the Guides; changes needed to minimize the economic impact of the Guides; their relation to other federal, state, or local laws or regulations; changes in relevant technology or economic conditions since the Guides were issued; and the effects of those changes on the Guides. The comment period ended on June 4, 1995, and only one comment was received before that date.2 One additional comment was received on June 16, 1995, after the comment period expired.3

II. Background

The Beauty/Barber Guides were first published on August 23, 1968 under the authority of Sections 5(a)(1) and 6(g) of the FTC Act, 5 U.S.C. 45(a)(1) and 46(g). They were intended by the Commission to supersede trade practice rules for the Beauty and Barber Equipment and Supplies Industry, which had been promulgated on August 9, 1941. They designate as unacceptable certain advertising and trade practices relating to the sale of products used by, and/or marketed through, "industry members" (as defined in Section 248.0 of the Guides) such as barber shops, barber schools, beauty parlors, beauty salons, and beauty clinics. Such products embrace a wide range of beauty and barber preparations, as well as articles or items of equipment, furnishings, and supplies for such establishments.

Like other Commission guides, the Beauty/Barber Guides were "intended to encourage voluntary compliance with the law by those whose practices are subject to the jurisdiction of the Commission, and were published in the belief that a businessman who is fully informed of the legal pitfalls he may encounter can conduct his affairs so as to avoid such difficulties." 4 The Guides provide instruction regarding the use of trade names, symbols, and depictions; the defamation of competitors or the false disparagement of their products; false invoicing; push money; discriminatory advertising or promotional allowances, or services or facilities; commercial bribery; enticing away employees of competitors as a means of restraining competition; inducing breach of contract; exclusive dealing arrangements; and price discrimination.

III. Discussion

The Commission has concluded that the Beauty/Barber Guides do not provide guidance substantially specific to the beauty and barber equipment and supply industry. In general, the Guides merely restate basic principles of consumer protection and commercial tort law. In addition, certain sections describe conduct that may be proscribed by Section 2 or 3 of the Clayton Act, as amended by the Robinson-Patman Act, and certain conduct that may, in limited circumstances, violate Section 5 of the FTC Act or Section 2 of the Sherman Act. However, in some instances, the Guides no longer accurately reflect Commission policy and enforcement standards. Consequently, the Commission believes that there is no continuing need for the Guides, and that they should be repealed.

Sections 248.1-248.4 and 248.6

Sections 248.1 of the Guides prohibits industry members from using, or causing or promoting the use of statements, representations, guarantees, testimonials, or endorsements "which ha[ve] a capacity and tendency or effect of misleading or deceiving purchasers. * * *" Likewise, § 248.2 prohibits industry members from misrepresenting, directly or indirectly, the character of their businesses or the types of services they offer; § 248.3

prohibits the use of deceptive plaques and certificates in connection with the "distribution, promotion or sale (including utilization in connection with services) of industry products" § 248.4 proscribes deceptive pricing; an § 248.6 prohibits industry members from "withhold[ing] from, or insert[ing] in, invoices or sales slips, any statements, or information by reason of which omission or insertion a false record is made * * * of the transactions represented on the face of such invoices or sales slips, with the capacity and tendency or effect of thereby misleading or deceiving purchasers, prospective purchasers, or the consuming public in any material respect." Each of these Guide sections addresses trade practices which are actionable under Section 5 of the FTC Act pursuant to the Commission's general Policy Statement on Deception ("Deception Statement"), set forth in the appendix to *Cliffdale* Associates, Inc., 103 F.T.C. 110, 174 (1984) (Letter from FTC Chairman James C. Miller III to the Honorable John D. Dingell (October 14, 1993)), or the Commission's Unfairness Statement set forth in the appendix to International Harvester, Inc., 104 F.T.C. 949, 1061, 1073-74 (1984) (Letter from Commission Chairman Michael Pertschuk and Commissioners Paul Rand Dixon, David A. Clanton, Robert Pitofsky, and Patricia P. Bailey to the Honorable Wendell H. Ford and the Honorable John C. Danforth (December 17, 1980)). Moreover, the conduct proscribed by the aforementioned Guide sections may be actionable under Section 43(a) of the Lanham Act, 6 applicable state unfair competition statutes, and the commonlaw of commercial torts.7

In addition, Sections 248.1, 248.6, and other sections of the Guides specifically refer to the Commission's former "capacity and tendency or effect of misleading or deceiving" standard for deception, which was superseded by the Commission's Deception Statement. Accordingly, these sections fall to reflect the Commission's current policy regarding deception.

Section 248.5

Section 248.5 of the Guides prohibits industry members from using or imitating a competitor's trade or corporate name, trademarks, or other trade designations, where such use "has the tendency or effect of misleading purchasers or prospective purchasers as

¹Request for Comments Concerning Guides for the Beauty and Barber Equipment and Supplies Industry, 60 FR 17032, (April 4, 1995). The record in this proceeding has been designated P 958803 in the Commission's Public Reference Branch.

² The National Cosmetology Association (''NCA''), a national association of cosmetologists, barbers, estheticians, nail technicians, and owners of independent salons, stated that (1) the Guides have been effective in protecting industry members from problematic conduct, and (2) ''[m]ost industry members do not have resources available to hire attorneys to counsel them with respect to [trade regulation] laws. Thus the Guides are *the* principal means by which the industry is continuously reminded of how those laws apply to the industry.'' Comment of Messrs. William W. Scott, J. Keith Ausbrook and Brian R. Henry, Counsel for the National Cosmetology Association (June 2, 1995).

³ The Beauty and Barber Supply Institute, Inc. ("BBSI") stated that: "we have no objection to the recommendation that Part 248—Guides For The Beauty And Barber Equipment And Supplies Industry, be deleted in its entirety from the Code of Federal Regulations." Letter from Douglas A. Kash, Esq. to Douglas Goglia, Esq., June 22, 1995 (regarding Amendments to the Code of Federal Regulations).

 $^{^4}$ Statement by the Commission, 33 FR 11987 (August 23, 1968).

⁵The Commission has adopted Guides for the Advertising of Warranties and Guarantees which provide detailed guidance with respect to guarantee and warranty representations. *See* 16 CFR Part 239. Accordingly, to the extent Section 248.1 of the Beauty/Barber Guides relates to Guaratees, it is no longer necessary.

^{6 15} U.S.C. 1125(a).

⁷ See generally, Restatement (Third) of Unfair Competition, Chapter 2 (1995) (hereinafter "Restatement").