to the character, name, nature, or origin of any product of the industry or is false or misleading in any other material respect." The conduct proscribed by Section 248.5—"passing off"—has been held to violate Section 5 of the FTC Act,8 and Commission policy regarding such conduct is a matter of public record. Accordingly, there is no need for Section 248.5, which merely restates that policy and does not provide instruction specifically relevant to the beauty and barber equipment and supply industry. Moreover, the conduct prohibited by Section 248.5 is addressed by Section 43(a) of the Lanham Act, applicable state unfair trade statutes, and common law theories of trademark infringement.9

Section 248.7

Section 248.7 of the Guides proscribes the defamation of competitors and the disparagement of their products. This section prohibits conduct which may be addressed under Section 43(a) of the Lanham Act and common law theories of commercial tort. ¹⁰ There is no need for this section of the Guides, because it does not supplement this general authority with instruction specifically relevant to the beauty and barber equipment and supply industry.

Section 248.8

Section 248.8 of the Beauty/Barber Guides proscribes the payment by industry members of so-called "push money." This section prohibits industry members from providing anything of value to a salesperson employed by a customer of the industry member as inducement to obtain greater effort in promoting the resale of the industry member's products when: (i) the agreement or payment is made "without the knowledge and consent of the salesperson's employer"; (ii) the benefit to the salesperson or customer is dependent on lottery; (iii) "any provision of the agreement or understanding requires or contemplates practices or a course of conduct unduly and intentionally hampering the sales of products of competitors * * *"; (iv) "the effect may be to substantially lessen competition or tend to create a monopoly"; or (v) "similar payments are not accorded to salespersons of competing customers on proportionally equal terms in compliance with Sections 2 (d) and (e) of the Clayton Act."

To the extent that Section 248.8 prohibits industry members from surreptitiously compensating employees of their customers in exchange for greater effort on the part of those employees, it addresses commercial bribery, which may be prohibited under Section 2(c) of the Clayton Act 11 and is proscribed by many state criminal statutes.12 To the extent that § 248.8 prohibits bonus plans dependent on lottery, it addresses business conduct which may be proscribed by Section 5 of the FTC Act and by state statutes relating to lotteries and similar promotions. 13 To the extent that it requires payments to salespersons of competing customers to be on proportionally equal terms, it restates general principles of competition law which are set forth in Section 2 of the Clayton Act and the Fred Meyer Guides. See Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 CFR Part 240.

Section 248.9

Section 248.9 of the Guides prohibits industry members from "willfully" enticing away the employees of competitors "with the intent and effect of thereby hampering or injuring competitors in their business or destroying or substantially lessening competition." ¹⁴ Such conduct may constitute a commercial tort. ¹⁵ The Guides do not add substantial industry-specific analysis to this general authority.

Section 248.10

Section 248.10 of the Guides prohibits industry members from "knowingly inducing or attempting to induce the breach of existing lawful contracts

between competitors and their customers. * * *'' The conduct described in this section may be a commercial tort. 16 There is no need for this section of the Guides, because it does not supplement this general authority with instruction specifically relevant to the beauty and barber equipment and supply industry.

Section 248.11

Section 248.11 proscribes exclusive dealing arrangements where the effect on such arrangements "may be substantially to lessen competition or tend to create a monopoly in any line of commerce." This section recapitulates language contained in Section 3 of the Clayton Act and sets out a general principle of Sherman Act Section 2 jurisprudence—namely, that exclusive dealing may constitute an antitrust violation where it constitutes an attempt to monopolize or results in an actual monopolization of a relevant market.

Section 248.12

Section 248.12 prohibits commercial bribery. This conduct may be prohibited by Section 2(c) of the Clayton Act, and by many state criminal statutes. ¹⁷ There is no need for this section of the Guides, because it does not supplement this general authority with instruction specifically relevant to the beauty and barber equipment and supply industry.

Section 248.13-248.15

Sections 248.13, 248.14 and 248.15 of the Beauty/Barber Guides respectively proscribe discriminatory pricing, the provision of discriminatory promotional allowances, and inducing price discrimination. Section 248.13 and 248.15 recite almost verbatim language contained in Sections 2 (a), (b) and (f) of the Clayton Act. Section 248.14 is duplicative of the Fred Meyer Guides. which interpret Sections 2 (d) and (e) of the Clayton Act and Section 5 of the Federal Trade Commission Act. See Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 CFR part 240.

IV. Conclusion

The Commission thus believes that the Beauty/Barber Guides do not provide guidance substantially specific to the beauty and barber equipment and supply industry. The Guides merely restate principles of consumer protection and commercial tort law found in statutes, case law, and other

⁸ See, e.g., Waltham Watch Co. v. FTC, 318 F.2d 28 (7th Cir.), cert. denied, 375 U.S. 944 (1963) ("passing off" products as those of a competitor violates Section 5); Parke, Austin & Lipscomb, Inc. v. FTC, 142 F.2d 437 (2d Cir.), cert. denied, 323 U.S. 753 (1944) (false claims of association with a better known company violate Section 5); J. Merrell Redding, 14 F.T.C. 32 (1930) (simulation of a competitor's advertising violates Section 5); Lighthouse Rug Co. v. FTC, 35 F.2d 163 (7th Cir. 1929) (imitation of a competitor's corporate name and trademark violates Section 5).

 $^{^9}$ See generally, Restatement, supra note 7, Chapter 3.

¹⁰ See generally, Restatement, supra note 7, § 2, Comment C. See also, J.D. Lee, Modern Tort Law, § 36.09 (4th ed. 1990) (hereinafter "Lee").

^{11 15} U.S.C. 13(c).

 $^{^{12}\,}See~e.g.,$ Cal. Penal Code § 641.3 et~seq. (Deering 1995); Ill. Rev. Stat., Ch. 38, para. 29A–1 (1995); N.Y. Penal Law § 180.00 (McKinney 1976).

 ¹³ See e.g., Tex. Penal Code § 32.42 (West 1995);
Cal. Bus. & Prof. Code § 17539.1 (Deering 1995);
Cal. Penal Code § 319 et seq. (Deering 1995).

¹⁴ As a caveat, section 248.9 provides: nothing in this section shall be construed as precluding such persons from seeking more favorable employment, or as precluding employers from hiring or offering employment to employees of a competitor in good faith and not for the purpose of inflicting competitive injury.

¹⁵ See generally, Lee, supra note 10, Ch. 45; William L. Prosser, *Prosser on Torts* § 129 (4th ed. 1971) (hereinafter "*Prosser*").

 $^{^{16}}$ Lee, supra note 10, at 45; Prosser, supra note 15, at $\S\,129.$

¹⁷ See supra note 12.