

specific policy of seeking public comment as part of its regulatory review process, the Commission has chosen not to seek public comment before repealing or revising these guides and interpretive rules. Why not? Has the Commission changed its view about the potential value of public comment? Perhaps the Commission knows all the answers, but then again, perhaps not. Although reasonable arguments can be made for repeal or revision of these guides and interpretive rules, public comment still might prove to be beneficial.

In addition, the relatively short period of time that would be required for public comment should not be problematic. The Commission has not addressed any of these guides or interpretive rules in the last ten years. Indeed, it has not addressed some of them for thirty years or more. For example, the Commission apparently has not addressed the interpretive rule concerning the use of the word "tile" in designation of non-ceramic products since it was issued in 1950.³ The continued existence of these guides and interpretive rules during a brief public comment period surely would cause no harm because they are not binding and because, arguably, they are obsolete. I seriously question the need to act so precipitously as to preclude the opportunity for public comment.⁴

In 1992, the Commission announced a careful, measured approach for reviewing its guides and interpretive rules, and public comment has been an important part of that process. Incorporating public comment into the review is appropriate and sensible. Although I have voted in favor of repealing or revising these guides and interpretive rules, I strongly would have preferred that the Commission seek public comment before doing so.

[FR Doc. 95-19541 Filed 8-7-95; 8:45 am]

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16 CFR Part 237

Guides Against Debt Collection Deception

AGENCY: Federal Trade Commission.

ACTION: Elimination of guides.

SUMMARY: Because the Commission's Guides Against Debt Collection Deception have been superseded by, and submitted in, the Fair Debt Collection Practices Act (FDCPA), the Commission has determined that it is in the public interest to eliminate them.

The Guides were adopted in 1967 to codify the results of many debt collection cases brought by the

Commission against debt collectors and creditors under Section 5(a)(1) of the Federal Trade Commission Act (FTCA). Although the Guides covered creditors and the FDCPA generally does not, proceedings still may be brought against creditors under Section 5 of the FTCA for engaging in unfair or deceptive debt collection practices, many of which are addressed in the FDCPA. Thus, the Commission would expect creditors and other parties whose collection activities are not covered by the FDCPA to look to the FDCPA for guidance in this regard.

EFFECTIVE DATE: August 8, 1995.

ADDRESSES: Requests for copies of this notice should be sent to the Public Reference Branch, Room 130, Federal Trade Commission, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: John F. LeFevre, Division of Credit Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580, (202) 326-3209.

SUPPLEMENTARY INFORMATION:

I. Background

The Commission issued its Guides Against Debt Collection Deception in 1967.¹ The Guides reflect principles enunciated in a number of prior debt collection cases brought by the Commission against debt collectors and creditors under Section 5 of the Federal Trade Commission Act.² Among other things, the Commission found that various misrepresentations made in connection with debt collection were Section 5 violations, including false claims that (1) Accounts had been referred to independent debt collection agencies and/or consumer reporting agencies; (2) debtors' credit ratings would be adversely affected if their debts remained unpaid; (3) legal action would be taken; (4) collection agencies had legal divisions; and (5) dunning letters were genuine legal documents, telegrams, or other "official" forms. The Guides served to inform the collection industry and the general public of the Commission's position on a number of "deception" issues in debt collection that were regarded as particularly pertinent at the time. However, they were never used as a basis for instituting formal action against a debt collector for

violation of Section 5. On September 20, 1977, Congress enacted the FDCPA, which became effective on March 20, 1978. Since that time, all Commission debt collection cases against debt collectors have been based upon violations of the FDCPA.³ Under the FDCPA, the Commission can obtain, not only an injunction and affirmative relief, but also a civil penalty, which is not obtainable under Section 5. The Guides have not been useful to the Commission's debt collection enforcement program since the enactment of the FDCPA.

II. Comparison of the Guides to the FDCPA

With few exceptions, the provisions of the FDCPA duplicate or expand upon the Guides, as demonstrated by the following comparisons.

A. Definitions [Section 237.0]

1. Industry Member [Section 237.0(a)]

The standards of conduct in the Guides are directed at "industry members," which include all entities that collect debts or help others in collecting debts, including creditors and skip-tracers.⁴

The comparable provision in the FDCPA is the definition of the "debt collector" [Section 803(6)], which focuses mainly on the third-party debt collection industry. Generally, creditors are not included in the definition unless they (1) use a false name in their collection activities to convey the impression that third parties are involved in collecting debts or (2) sell deceptive forms. Congress also determined that a number of other entities should not be included within the scope of the definition, including government employees, non-profit organizations, mortgage servicers and other designated groups.

Although the coverage of the Guides is greater than coverage under the FDCPA, particularly with respect to creditors, it has been the Commission's experience in enforcing the FDCPA that creditors look not to the Guides but to

³ The Commission has also initiated a few debt collection cases against creditors as Section 5 matters, since the FDCPA generally does not cover creditors. *Aldens, Inc.*, 98 F.T.C. 790 (1981); *J.C. Penney Co., Inc.*, 109 F.T.C. 54 (1987); *American Family Publishers*, Docket No. 9240 (1991). If a creditor uses a deceptive third-party name or furnishes deceptive forms in collecting debts, however, it is covered by the FDCPA.

⁴ "Industry Member shall mean any person, firm, partnership, corporation, organization, association and any other legal entity engaged in the practice of collecting or attempting to collect any and all kinds of money debts for itself or others, or any person, firm, partnership, corporation, organization, association, or any other legal entity."

³ 16 C.F.R. 14.2.

⁴ Unfortunately, seeking public comment would not permit the Commission to count the repeal and revision of these guides and interpretive rules in its tally of completed actions in the Regulatory Reinvention Initiative Report that will be sent to the President on August 1, 1995, but perhaps that harm could be mitigated by reporting to the President that the Commission is seeking public comment concerning repeal or revision.

¹ 32 FR 15539 (Nov. 8, 1967), as amended at 33 FR 5661 (Apr. 12, 1968).

² Testimony before the Subcommittee on Consumer Affairs of the Senate Committee on Banking, Housing and Urban Affairs, on S. 918, a proposed Fair Debt Collection Practices Act, May 13, 1977. See also *Parents Magazine Enterprises, Inc.*, 68 F.T.C. 980 (1965); *State Credit Control Board*, 70 F.T.C. 1318 (1966).

the FDCPA for appropriate criteria to use in collecting their own debts. In addition, the Commission's jurisdiction under Section 5 has been sufficient to regulate the collection activities of creditors when necessary. Also, to the extent that the Commission has proceeded against creditors for violations of Section 5 in their debt collection activities, it has used the FDCPA as a model for appropriate standards of conduct—not the Guides. Thus, the Guides have not been useful to the Commission's debt collection enforcement program against either creditors or debt collectors.

2. Debt [Section 237.0(b)]

The Guides' definition of "debt" is similar to that in the FDCPA [Section 803(5)] except that it includes "commercial" as well as "consumer" debts.⁵ Congress determined in enacting the FDCPA that there was no need to cover "commercial" debts. The Commission's experience in enforcing the FDCPA supports this decision. The Commission has received few complaints from commercial enterprises about debt collection abuse. If the Commission finds that there is a problem with the collection of "commercial" debts, the problem can be addressed adequately under Section 5.

3. Debtor [Section 237.0(c)]

The Guides define a "debtor" as one who owes or allegedly owes a money debt. The FDCPA's definition of "consumer" as "any natural person obligated or allegedly obligated to pay any debt" is analogous. From the Commission's standpoint, they are substantively identical. The absence of the Guides will have no effect upon who is considered a "debtor."

4. Creditor [Section 237.0(d)]

The Guides' definition of "creditor" includes all parties to whom money is owned or allegedly owed. Since creditors can also be "industry members" under the Guides, the definition does not affect the scope of the Guides' coverage. The FDCPA's definition of "creditor" is similar except that it excludes those who receive or are assigned debts in default for purposes of collection.

5. Credit Bureau [Section 237.0(e)]

There is no provision in the FDCPA that is analogous to the Guides' definition of "credit bureau."⁶ Sections

⁵ "Debt shall mean money which is due or alleged to be due from one to another."

⁶ "Credit Bureau is any * * * legal entity engaged in gathering, recording, and disseminating favorable as well as unfavorable information relative to the

806(3) and 807(16) of the FDCPA, however, make two references to the definition of a "consumer reporting agency" (credit bureau) contained in Section 603(f) of the Fair Credit Reporting Act (FCRA).⁷ The FCRA definition of "consumer reporting agency" has rendered the Guides' definition of "credit bureau" obsolete; the FCRA definition is keyed to the concept of a "consumer report" in the FCRA and was obviously drafted in a credit reporting context. The FCRA definition governs insofar as the Commission's law enforcement activities are concerned.

6. Collection Agency [Section 237.0(f)]

The Guides define a "collection agency" as any entity that collects money debts for others. This is essentially the focus of the FDCPA's definition of "debt collector" in Section 803(6) as one "who regularly collects or attempts to collect, directly or indirectly, debts owed * * * another." Thus, the Guides' definition has been subsumed by the FDCPA.

B. Deception (general), Guide 1 [Section 237.1]

Section 807(10) of the FDCPA is virtually identical to Guide 1.⁸ Thus, elimination of Guide 1 will have no effect on the Commission's debt collection enforcement policy.

C. Disclosure of Purpose, Guide 2 [Section 237.2]

Section 807(11) of the FDCPA⁹ paraphrases Guide 2(a) of the Guides,¹⁰

credit worthiness, financial responsibility, paying habits and character of * * * any other legal entity being considered for credit extension, so that (the) prospective creditor may be able to make a sound decision in the extension of credit."

⁷ Consumer reporting agency is "any person which, for monetary fees, dues or on a cooperative nonprofit basis, regularly engages * * * in the practice of assembling or evaluating consumer credit information on consumers for the purpose of furnishing consumer reports to third parties. * * *"

⁸ Guide 1 states that an industry member "shall not use any deceptive representation or deceptive means to collect or attempt to collect debts or to obtain information concerning debtors." Section 807(10) states that a debt collector shall not "use any false representation or deceptive means to collect or attempt to collect any debt or to obtain information about a consumer."

⁹ Section 807(11) requires that a debt collector "disclose clearly in all communications made to collect a debt or to obtain information about a consumer that the debt collector is attempting to collect a debt and that any information will be used for that purpose."

¹⁰ "An industry member shall not use or cause to be used in connection with the collection of or the attempt to collect a debt or * * * obtaining or attempting to obtain information concerning a debtor any * * * material printed or written which does not * * * disclose * * * the purpose of collecting or attempting to collect a debt or to obtain or attempt to obtain information concerning a debtor."

requiring that all communications made to collect a debt contain a disclosure that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose. Guide 2(b) prohibits placing communications in the hands of others that do not contain the required disclosure. Similarly, knowingly placing communications in the hands of others that violate the FDCPA is a violation of Section 807(10) as well as the preamble to Section 807 of the FDCPA with respect to "debt collectors" covered by the Act. Thus, Guide 2(b) is also subsumed by Section 807 of the FDCPA.

D. Government Affiliation, Guide 3 [Section 237.3]

Guide 3 prohibits false representations of government affiliation.¹¹ Section 807(1) of the FDCPA is virtually identical.¹² Thus, elimination of Guide 3 will have no effect on the Commission's debt collection enforcement policy.

E. Organizational Titles, Guide 4 [Section 237.4]

Guide 4 prohibits conveying a false impression that an "industry member" is a "credit bureau."¹³ The analogous provision in the FDCPA is Section 807(16), which prohibits the same practice.¹⁴ As a result, elimination of Guide 4 will have no effect on the Commission's debt collection enforcement policy.

F. Trade Status, Guide 5 [Section 237.5]

Guide 5 prohibits an "industry member" from creating the false impression that it is a collection agency.¹⁵ Since the FDCPA principally regulates the activities of genuine collection agencies, it has no analogous provision. To the extent that it regulates the activities of "creditors," Section

¹¹ "An industry member shall not use any trade name, address, insignia, picture, emblem or any other means which creates a false impression that such industry member is connected with or is an agency of government."

¹² A debt collector may not falsely represent or imply that it is "vouched for, bonded by or affiliated with the United States or any State, including the use of any badge, uniform or facsimile thereof."

¹³ "An industry member which is not in fact a "Credit Bureau * * * shall not use the term * * * in its corporate or trade name; nor shall it use any other term of similar import or meaning * * * as to create the false impression that such industry member is a credit bureau."

¹⁴ A debt collector may not falsely represent or imply that it "operates or is employed by a consumer reporting agency. * * *"

¹⁵ "In collecting debts * * * an industry member shall not, through the use of any designation or by other means, create the impression that he is a collection agency, unless he is such as defined in this part."

803(6) prohibits creditors from using names other than their own that would create the false impression that a third party (presumably a collection agency) is involved. This addresses the problem highlighted by Guide 5. Section 812 of the FDCPA also prohibits furnishing forms creating a false impression of third-party collection agency involvement. In the main, the practices addressed by Guide 5 are addressed by the FDCPA.

G. Services, Guide 6 [Section 237.6]

Guide 6 prohibits an "industry member" from misrepresenting the services it renders in soliciting accounts.¹⁶ Similarly, Section 807(2) of the FDCPA prohibits the false representation of "any services rendered or compensation received by any debt collector for the collection of a debt." Thus, elimination of Guide 6 will have no effect on the Commission's debt collection enforcement policies.

III. Conclusion

The Commission's Guides Against Debt Collection Deception have been superseded by the FDCPA and are no longer needed. Few in the debt collection industry are even aware that the Guides exist. The Commission has never taken any enforcement action alleging violation of Section 5 because the conduct at issue violated the Guides. Since they are superfluous, the Commission has determined that it is in the public interest to eliminate the Guides.

List of Subjects in 16 CFR Part 237

Credit, Trade practices.

PART 237—[REMOVED]

The Commission, under authority of Sections 5(a)(1) and 6(g) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1) and 46(g), amends chapter I of Title 16 of the Code of Federal Regulations by removing Part 237.

By direction of the Commission.

Donald S. Clark,
Secretary.

Statement of Commissioner Mary L. Azcuenaga Concurring in 16 CFR Part 14, Matter No. P954215; Repeal of Mail Order Insurance Guides, Matter No. P954903; Repeal of Guides Re: Debt Collection, Matter No. P954809; and Free Film Guide Review, Matter No. P959101

In a flurry of deregulation, the Commission today repeals or substantially revises several Commission guides and other interpretive

rules.¹ The Commission does so without seeking public comment. I have long supported the general goal of repealing or revising unnecessary, outdated, or unduly burdensome legislative and interpretive rules, and I agree that the repeal or revision of these particular guides and interpretive rules appears reasonable. Nevertheless, I cannot agree with the Commission's decision not to seek public comment before making these changes.

Although it is not required to do so under the Administrative Procedure Act, 5 U.S.C. 553(b)(A), the Commission traditionally has sought public comment before issuing, revising, or repealing its guides and other interpretive rules. More specifically, the Commission adopted a policy in 1992 of reviewing each of its guides at least once every ten years and issuing a request for public comment as part of this review. See FTC Operating Manual ch. 8.3.8. The Commission decided to seek public comment on issues such as:

(1) The economic impact of and continuing need for the guide; (2) changes that should be made in the guide to minimize any adverse economic effect; (3) any possible conflict between the guide and any federal, state, or local laws; and (4) the effect on the guide of technological, economic, or other industry changes, if any, since the guide was promulgated.

Id. The Commission has sought public comment and has posed these questions concerning a number of guides since adopting its procedures for regulatory review in 1992.²

Notwithstanding its long-standing, general practice of seeking public comment and its specific policy of seeking public comment as part of its regulatory review process, the Commission has chosen not to seek public comment before repealing or revising these guides and interpretive rules. Why not? Has the Commission changed its view about the potential value of public comment? Perhaps the Commission knows all the answers, but then again, perhaps not. Although reasonable arguments can be made for repeal or revision of these guides and interpretive rules, public comment still might prove to be beneficial.

In addition, the relatively short period of time that would be required for public comment should not be problematic. The Commission has not addressed any of these guides or interpretive rules in the last ten years. Indeed, it has not addressed some of them for thirty years or more. For example, the Commission apparently has not addressed the interpretive rule concerning the use of the word "title" in designation of non-ceramic products since it was issued in

¹ Administrative Interpretations, General Policy Statements, and Enforcement Policy Statements, 16 C.F.R. Part 14; Guides for the Mail Order Insurance Industry, 16 C.F.R. Part 234; Guides Against Debt Collection Deception, 16 C.F.R. Part 237; and Guide Against Deceptive Use of the Word "Free" In Connection With the Sale of Photographic Film and Film Processing Services, 16 C.F.R. Part 242.

² See, e.g., Request for Comments Concerning Guides for the Hosiery Industry, 59 FR 18004 (Apr. 15, 1994); Request for Comment Concerning Guides for the Feather and Down Products Industry, 59 Fed. Reg. 18006 (Apr. 15, 1994).

1950.³ The continued existence of these guides and interpretive rules during a brief public comment period surely would cause no harm because they are not binding and because, arguably, they are obsolete. I seriously question the need to act so precipitously as to preclude the opportunity for public comment.⁴

In 1992, the Commission announced a careful, measured approach for reviewing its guides and interpretive rules, and public comment has been an important part of that process. Incorporating public comment into the review is appropriate and sensible. Although I have voted in favor of repealing or revising these guides and interpretive rules, I strongly would have preferred that the Commission seek public comment before doing so.

[FR Doc. 95-19542 Filed 8-7-95; 8:45 am]

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16 CFR Part 242

Guide Against Deceptive Use of the Word "Free" in Connection With the Sale of Photographic Film and Film Processing Service

AGENCY: Federal Trade Commission.

ACTION: Elimination of guide.

SUMMARY: The Guide Against Deceptive Use of the Word "Free" in Connection With the Sale of Photographic Film and Film Processing Service ("Free Film Guide") sets forth industry guidance concerning offers of "free" film in connection with the sale of photographic processing services. The Commission's Guide Concerning Use of the Word "Free" and Similar Representations, which was adopted after the Free Film Guide and which applies to all industries, sets forth essentially the same guidance concerning offers of "free" merchandise or service in connection with the sale of some other merchandise or service. The Free Film Guide has thus been supplanted by the Guide Concerning Use of the Word "Free" and Similar Representations and is no longer needed. Accordingly, the Commission has determined that it is in the public interest to eliminate the Guide Against Deceptive Use of the Word "Free" in Connection With the Sale of Photographic Film and Film Processing Service.

³ 16 C.F.R. 14.2.

⁴ Unfortunately, seeking public comment would not permit the Commission to count the repeal and revision of these guides and interpretive rules in its tally of completed actions in the Regulatory Reinvention Initiative Report that will be sent to the President on August 1, 1995, but perhaps that harm could be mitigated by reporting to the President that the Commission is seeking public comment concerning repeal or revision.

¹⁶ "In the solicitation of accounts for collection or for ascertainment of credit status, an industry member shall not directly, or by implication, misrepresent the services he renders."