

days prior to the issuance of the solicitation for the bundled or substantially bundled requirement. The procuring activity, at that time, should also provide to the small business the name, phone number and address of the applicable SBA PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located).

(iii) When the procuring activity intends to proceed with an acquisition involving bundled or substantially bundled procurement requirements, it must document the acquisition strategy to include a determination that the bundling is necessary and justified, when compared to the benefits that could be derived from meeting the agency's requirements through separate smaller contracts.

(A) The procuring activity may determine a consolidated requirement to be necessary and justified if, as compared to the benefits that it would derive from contracting to meet those requirements if not consolidated, it would derive measurably substantial benefits. The procuring activity must quantify the identified benefits and explain how their impact would be measurably substantial. The benefits may include cost savings and/or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits that individually, in combination, or in the aggregate would lead to:

(1) Benefits equivalent to 10 percent if the contract value (including options) is \$75 million or less; or

(2) Benefits equivalent to 5 percent if the contract value (including options) is over \$75 million.

(B) Notwithstanding paragraph (d)(3)(iii)(A) of this section, the Assistant Secretaries with responsibility for acquisition matters (Service Acquisition Executives) or the Under Secretary of Defense for Acquisition and Technology (for other Defense Agencies) in the Department of Defense and the Deputy Secretary or equivalent in civilian agencies may, on a non-delegable basis determine that a consolidated requirement is necessary and justified when:

(1) There are benefits that do not meet the thresholds set forth in paragraph (d)(3)(iii)(A) of this section but, in the aggregate, are critical to the agency's mission success; and

(2) Procurement strategy provides for maximum practicable participation by small business.

(C) Notwithstanding paragraph (d)(3)(iii)(A) and (B) of this section, a consolidated requirement is necessary and justified when it is subject to the cost comparison conducted in accordance with OMB Circular A-76.

(D) The reduction of administrative or personnel costs alone shall not be a justification for bundling of contract requirements unless the administrative or personnel cost savings are expected to be substantial, in relation to the dollar value of the procurement to be consolidated (including options). To be substantial, such cost savings must be at least 10 percent of the contract value (including options).

(E) In assessing whether cost savings and/or a price reduction would be achieved through bundling, the procuring activity and SBA must compare the price that has been charged by small businesses for the work that they have performed and, where available, the price that could have been or could be charged by small businesses for the work not previously performed by small business.

(4) *Substantial bundling.* Where a proposed procurement strategy involves a substantial bundling of contract requirements, the procuring agency must, in the documentation of that strategy, include a determination that the anticipated benefits of the proposed bundled contract justify its use, and must include, at a minimum:

(i) The analysis for bundled requirements set forth in paragraph (d)(3)(iii) of this section;

(ii) An assessment of the specific impediments to participation by small business concerns as prime contractors that will result from the substantial bundling;

(iii) Actions designed to maximize small business participation as prime contractors, including provisions that encourage small business teaming for the substantially bundled requirement; and

(iv) Actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract or contracts that may be awarded to meet the requirements.

(5) *Significant subcontracting opportunity.* (i) Where a bundled or substantially bundled requirement offers a significant opportunity for subcontracting, the procuring agency must designate the following factors as significant factors in evaluating offers:

(A) A factor that is based on the rate of participation provided under the subcontracting plan for small business in the performance of the contract; and

(B) For the evaluation of past performance of an offeror, a factor that is based on the extent to which the offeror attained applicable goals for small business participation in the performance of contracts.

(ii) Where the offeror for such a bundled contract qualifies as a small business concern, the procuring agency must give to the offeror the highest score possible for the evaluation factors identified in paragraph (d)(5)(i) of this section.

5. In § 125.6, add new paragraph (g) to read as follows:

**§ 125.6 Prime contractor performance requirements (limitations on subcontracting).**

\* \* \* \* \*

(g) Where an offeror is exempt from affiliation under § 121.103(f)(3) of this chapter and qualifies as a small business concern, the performance of work requirements set forth in this section apply to the cooperative effort of the team or joint venture, not its individual members.

Dated: October 19, 1999.

**Aida Alvarez,**

*Administrator.*

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## FEDERAL TRADE COMMISSION

### 16 CFR Part 241

#### Guides for the Dog and Cat Food Industry

**AGENCY:** Federal Trade Commission.

**ACTION:** Recession of the Guides for the Dog and Cat Food Industry; announcement of enforcement policy.

**SUMMARY:** On March 18, 1999, the Commission published a **Federal Register** document initiating the regulatory review of the Federal Trade Commission's ("Commission" or "FTC") Guides for the Dog and Cat Food Industry ("Dog and Cat Food Guides" or "Guides") and seeking public comment. The Commission has now completed its review, and this document announces the Commission's decision to rescind the Guides.

**EFFECTIVE DATE:** October 25, 1999.

**ADDRESSES:** Requests for copies of this document should be sent to the Consumer Response Center, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The document is available on the Internet at the Commission's website. <http://www.ftc.gov>.

**FOR FURTHER INFORMATION CONTACT:** Jock Chung, Attorney, Federal Trade Commission, Division of Enforcement, 600 Pennsylvania Avenue NW, S-4302, Washington, DC 20580, (202) 326-2984, e-mail <jchung@ftc.gov>.

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

The Dog and Cat Food Guides address claims about food for dogs or cats, including dry, semimost, frozen, canned, and other commercial foods manufactured or marketed for consumption by domesticated dogs or cats, as well as claims about special candy for dogs and cats, but not claims about animal medicines or remedies. The Guides apply to "industry members," defined as any person, firm, corporation, or organization engaged in the importation, manufacture, sale or distribution of dog or cat food. In summary, the Dog and Cat Food Guides advise against:

(1) Misrepresenting dog or cat food in any material respect; for example, misrepresenting the composition, form, suitability, quality, color, flavor of any dog or cat food; misrepresenting that any dog or cat food meets the dietary or nutritional needs of dogs and cats; or misrepresenting that any dog or cat food will provide medicinal or therapeutic benefits;

(2) Misrepresenting that any dog or cat food is fit for human consumption or has been made under the same sanitary conditions as food for humans;

(3) Misrepresenting the processing methods used in the manufacture or processing of any dog or cat food;

(4) Making false statements about the conduct of competitors or about the quality of competitors' products;

(5) Misrepresenting the length of time a dog or cat food company has been in business, its rank in the industry, or that it owns a laboratory or other testing facilities;

(6) Using deceptive endorsements or testimonials, or deceptively claiming that any dog or cat food has received an award;

(7) Offering for sale any dog or cat food when the offer is not a bona fide effort to sell the product so offered as advertised and at the advertised price;

(8) Failing to include details, such as the manner in which the guarantor will perform and the identity of the guarantor, for all guarantees, or warranties offered for dog or cat food; and

(9) Misrepresenting the price at which any dog or cat food may be purchased.

As part of the Commission's ongoing review of all current Commission rules and guides, the Commission published a **Federal Register** notice on March 18, 1999, 64 FR 13368, seeking comments about the Guides' overall costs and benefits, and the continuing need for the

Guides. The Commission received six comments in response.<sup>1</sup>

One comment, from the American Pet Products Manufacturers Association, Inc., favors eliminating the Guides. It suggests that the Association of American Feed Control Officials ("AAFCO")<sup>2</sup> Model Pet Food Regulations (AAFCO Model Regulations) now act as "an authoritative guide for regulator to review labels." It further suggests that elimination of the guides will eliminate confusion, and notes that "dog and cat food manufacturers are compelled to conform to general truth in advertising standards set by FTC for all consumer goods."

The remaining five comments support retaining the Guides. In general, these comments suggest that the Guides are useful in providing guidance and setting standards for dog and cat food advertising, while the AAFCO Model Regulations, and the individual state regulations patterned after the AAFCO Model Regulations, are limited to setting standards for pet food labeling. These comments further generally suggest that the Guides impose minimal costs because they "are essentially similar to other regulations."

After carefully reviewing the comments and the Guides, the Commission has concluded that the Guides no longer are needed. The Commission, therefore, has determined to rescind the Dog and Cat Food Guides. In the following part of this notice, the Commission explains its decision to rescind the Guides, and provides guidance to industry members, who must continue to comply with the

<sup>1</sup> The Commission's request for public comment elicited six comments from industry, educational, and regulatory entities, and no comments from consumers or consumer groups: (1) American Feed Industry Association; (2) State of Delaware Department of Agriculture; (3) American Pet Products Manufacturers Association, Inc.; (4) Pet Food Institute; (5) University of Minnesota College of Veterinary Medicine; and (6) Division of Animal Feeds of the Food and Drug Administration's Center for Veterinary Medicine. These comments are on the public record in file number P994242 as document numbers B25346100001 through B25346100006, and are available for viewing in Room 130 at the Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580, from 8:30 AM to 5 PM, Monday-Friday.

<sup>2</sup> AAFCO is an association open to officials or employees of any state, dominion, federal, or other governmental agency responsible for "regulating the production, labeling, distribution, or sale of animal feeds or livestock remedies." Among other things, AAFCO promotes uniform laws, regulations, and enforcement policies by creating model regulations, including Model Pet Food Regulations setting requirements for pet food labels. At present, AAFCO has representatives from agencies in all fifty states and Puerto Rico, as well as from Canada and federal agencies.

Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 41-58, when labeling and advertising dog and cat food.

## II. Reasons for Rescission

The purpose of guides is to assist industry members in complying with the FTC Act, and especially with Section 5 of the FTC Act, 15 U.S.C. 45(a)(1), which prohibits "unfair or deceptive acts or practices in or affecting commerce." Guides are particularly useful when they resolve uncertainty over what claims are likely to be considered deceptive. The current Guides, however, in many sections only advise against making misrepresentations on various subjects and thus do not elaborate on the requirements of section 5 in a meaningful way. Except for topics also addressed by pet food model regulations drafted by AAFCO or animal food regulations issued by the Food and Drug Administration ("FDA"), the Guides do not provide substantial guidance regarding what specific claims the Commission is likely to find deceptive.

The AAFCO Model Regulations provide detailed requirements for labeling pet food, including dog and cat food.<sup>3</sup> For example, the Model Regulations contain detailed feeding protocols for proving growth claims for dog foods and for cat foods, and define various terms used to advertise pet food.<sup>4</sup> The FDA also has issued regulations covering animal food labeling, 21 CFR Part 501. These regulations contain detailed requirements for the labeling of packaged animal foods, including pet foods. Portions of these regulations can also provide guidance to industry members about, for example, the terminology to be used to identify pet

<sup>3</sup> The AAFCO Model Regulations specify labeling requirements for pet food (including food for dogs, cats, and other pets). The Model Regulations require that certain nutritional information appear on labels, and prohibit a variety of misrepresentations, e.g., Regulation PF2(f) prohibits graphics or pictures that misrepresent the contents of the package. The Model Regulations cover claims about nutrition, ingredients, and product characteristics, such as that a pet food controls tartar.

<sup>4</sup> For example, Regulation PF8(b)(1)a. requires that any dog food product labeled as being "lean" must contain no more than 9% crude fat for products containing less than 20% moisture, no more than 7% crude fat for products containing 20% or more but less than 65% moisture, and no more than 4% crude fat for products containing 65% or more moisture. Regulation PF8(b)(1)b. places similar requirements on any cat food product labeled as being "lean."

foods,<sup>5</sup> to describe pet food ingredients,<sup>6</sup> or to describe flavoring.<sup>7</sup>

Several commentators stated that they do not consider the AAFCO Model Regulations to be sufficient to protect consumers, primarily because the AAFCO Model Regulations (and state regulations based on the AAFCO Model Regulations) do not cover advertising. By rescinding the Guides, however, the Commission is not relinquishing jurisdiction over the labeling and advertising of dog and cat food. In fact, pet food labeling and advertising, including labeling and advertising for foods for pets other than dogs and cats, must still comply with Section 5 of the FTC Act. In enforcing Section 5, however, the Commission will be unlikely to challenge advertising claims under the FTC Act that are consistent with labeling claims that satisfy the requirements of the AAFCO Model Regulations or the regulations issued by the FDA. As in any area of policy, the Commission strives to minimize regulatory burdens on industry by avoiding conflicts with other federal and state regulatory agencies.

For those topics not addressed by the AAFCO Model Regulations or by FDA's regulations, the Dog and Cat Food Guides provide only limited guidance, and do not resolve demonstrated uncertainty regarding what claims are likely to be deceptive. For example, §§ 241.3, 241.6, 241.7, and 241.11 of the Guides merely admonish industry members not to misrepresent various characteristics of dog or cat food.<sup>8</sup> The Commission does not believe that it is necessary to retain guides that simply admonish sellers not to misrepresent various items, especially when, as here, there is no evidence that sellers do not understand that such misrepresentations are illegal.

Further, there do not currently appear to be particular areas covered by the Guides where industry members would have difficulty in determining whether specific claims are likely to be deceptive. For example, the Commission believes that industry members should have little difficulty determining that a representation that a dog or cat food contains whole fresh milk is likely to be deceptive if it does

not contain whole fresh milk (see 16 CFR 241.5(f)). In addition, industry members should know, without the Guides, that they should not disseminate advertising for dog or cat food that contradicts the labeling on the product (see 16 CFR 241.6(m)). Thus, the Dog and Cat Food Guides do not appear to clarify specific representations that likely will be considered deceptive.

Other sections of the Guides dealing with claims beyond dog and cat food content and nutrition are also unnecessary, for they do not provide guidance beyond that given in other Commission guides. For example, §§ 241.15, Bait advertising, and 241.16, Guarantees, warranties, etc., of the Guides do not give significant guidance beyond that already contained in the Commission's Guides Against Bait Advertising (16 CFR 238) and Guides for the Advertising of Warranties and Guarantees (16 CFR part 239).

For all of these reasons, the Commission has determined to rescind the Dog and Cat Food Guides.

### III. Other Guidance

In rescinding the Guides, the Commission directs the industry's attention to the principles of law articulated in the FTC's Deception Statement<sup>9</sup> and pertinent Commission and court decisions on deception, both of which are generally applicable to all industries. As articulated in the Policy Statement on Deception, the Commission "will find deception if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, the consumer's detriment." In addition, industry members are required to possess substantiation for objective claims made about products.<sup>10</sup> That is, advertisers must have a reasonable basis for claims before they are disseminated.

Therefore, sellers must have competent and reliable evidence to substantiate objective claims about dog or cat food, such as claims that dog or cat food provides adequate nutrition or promotes health in dogs or cats. In this respect, the AAFCO Model Regulations and FDA's regulations on animal food labeling may provide industry members with useful guidance. Other tests, research, or information, however, also might be used by sellers to substantiate claims. Industry members bear the responsibility of ensuring that such

information constitutes competent and reliable evidence in support of their claims. The Commission will evaluate the adequacy of substantiation on a case-by-case basis.

### List of Subjects in 16 CFR Part 241

Advertising, Animal food, Foods, Labeling, Pets, Trade practices.

### PART 241—[REMOVED]

The Commission, under the authority of Sections 5(a) and 6(g) of the Federal Trade Commission Act, 15 U.S.C. 45(a) and 46(g), amends chapter I of title 16 in the Code of Federal Regulations by removing part 241.

By direction of the Commission.

**Donald S. Clark,**

Secretary.

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Parts 153, 157, 380

[Docket No. RM98-17-000; Order No. 609]

#### Landowner Notification, Expanded Categorical Exclusions, and Other Environmental Filing Requirements

Issued October 13, 1999.

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Final rule.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) is amending its regulations under the Natural Gas Act (NGA) by adding certain early landowner notification requirements that will ensure that landowners who may be affected by a pipeline's proposal to construct natural gas pipeline facilities have sufficient opportunity to participate in the Commission's certificate process. The Commission also is amending certain areas of its regulations to provide pipelines with greater flexibility and to further expedite the certificate process, including expanding the list of activities categorically excluded from the need for an Environmental Assessment in § 380.4 of the Commission's regulations; and expanding the types of events that allow pipelines to rearrange facilities under their blanket construction certificates.

Finally, the Commission also is requiring that pipelines conduct an abbreviated consultation with the National Marine Fisheries Service concerning essential fish habitat as

<sup>5</sup> For example, 21 CFR 501.3(e) requires that the term "imitation" be used to identify certain animal foods.

<sup>6</sup> For example, 21 CFR 501.4(b)(ii)(3) permits concentrated skim milk or reconstituted skim milk to be referred to as "skim milk" on labels.

<sup>7</sup> For example, 21 CFR 501.22(a)(3) sets requirements for using the terms "natural flavor" or "natural flavoring."

<sup>8</sup> Section 241.3, for example, advises industry members not to misrepresent dog or cat food "in any . . . material respect."

<sup>9</sup> Deception Statement, appended to *Cliffdale Associates, Inc., et al.*, 103 F.T.C. 110, 175 (1984).

<sup>10</sup> Policy Statement Regarding Advertising Substantiation, 48 FR 10471 (Mar. 11, 1983), appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984).