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ADVISORY OPINIONS

Marking of jewelry produced from a 14 karat gold sheet laminated upon sterling (File No. 773 7004).

Opinion Letter

February 18, 1977

Dear Mr. Goldberg:

This is in response to your request for an advisory opinion concerning the marking of articles of jewelry produced from a 14 karat gold sheet laminated upon sterling, the gold sheet constituting at least 1/20th of the weight of each jewelry item's metal content. The items of jewelry contemplated for manufacture include bracelets, necklaces and earrings. You propose marking such articles "Sterling and 14K" or "Sterling + 14K," on the premise that such markings are permitted by Section 4 of Commercial Standard CS51-35, "Marking Articles Made of Silver in Combination with Gold."[1] In the Commission's opinion, the use of either marking would have the tendency and capacity to mislead consumers and thus be in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

The sample of the laminated metals submitted to the Commission might be described as having an obverse side of yellow gold and a reverse side of silver. The different metals in the sample provided are clearly distinguishable, but casual inspection cannot determine the relative thicknesses of the gold layer and the silver. The 1:20 ratio you have specified, however, does no more than meet the minimum requirements for "gold fill," "gold plate," or "gold overlay." See 16 C.F.R. 23.22(c)(2).

The markings "Sterling and 14K" or "Sterling + 14K," in the Commission's view, could suggest to consumers that the amounts of gold and silver in the articles of jewelry so marked are approximately equal or, at least, would suggest more than five percent 14K gold. Such markings, accordingly, would have the capacity to mislead consumers.

The Commission does not construe Commercial Standard CS 51-35 to justify a different conclusion. In the circumstances presented, a marking must be used which makes clear to consumers the relative

[1] The Standard, a voluntary guide developed by industry members with the cooperation of the National Bureau of Standards, was recently redesignated as PS68-76.

proportion of yellow gold to silver, either by use of a "gold plate" designation (or related designations set forth in the Trade Practice Rules for the Jewelry Industry, 16 C.F.R. 23.22(c)(2)) or by preceding the gold fineness designation with a fraction consisting of the ratio of the weight of the 14K gold to the weight of the metal in the entire article, a marking clearly not inconsistent with the Commercial Standard.

This opinion is limited to the circumstances presented by your sample, *i.e.*, where silver is combined with yellow gold and both the gold and silver surfaces are equally visible in jewelry made from the laminates.

Assuming that the sterling and 14K yellow gold meet the designated quality standards and that the 14K gold is at least 1/20th the weight of the metal in any finished article of jewelry, the following markings, in the Commission's opinion, would comply with Section 5 of the Federal Trade Commission Act:

Sterling and [or +] 14K Gold Plate*

14K Gold Plate on Sterling

Sterling and [or +] 1/20th [or other fraction] 14K Gold

* "Gold Filled," "Gold Overlay," or "Rolled Gold," or their abbreviations set out in 16 C.F.R. § 23.22(c)(2), may be used if they are appropriate for the laminating process.

By direction of the Commission.

Letter of Request

15 April, 1976

Dear Mr. Tobin:

My company has been in business three years and we manufacture jewelry for the finest retail stores in the United States.

We have developed a new process whereby we laminate, by mechanical means, a sheet of 14 karat gold directly upon sterling silver. We enclose a small sample of our product. Please note, the gold is easily distinguishable from the sterling.

The purpose of this letter is to request a formal advisory opinion under the Federal Trade Commission Act to determine whether or not this item of jewelry made from 14 karat gold and sterling can be stamped 14 karat gold plus sterling in accordance with Commercial Standard CS

51-35, Marking Items Made of Silver in combination with Gold, as recognized in the Federal Trade Commission Trade Practice Rules for the Jewelry Industry, Rule 23 (see footnote No. 4).

The weight of the 14 karat gold to the weight of the entire article will be at least 1/20th of the weight of the entire metal or better.

Commercial Standard CS 51-35, we believed, would apply, since the silver of the 14 karat gold is easily distinguishable, one part from the other part. Paragraph four of this Standard would permit, we believe, this item to be stamped "Sterling and 14K" or "Sterling + 14K".

We are currently not manufacturing this product nor selling the same and request this opinion so that we may correctly designate our jewelry to our retailers for the protection of the consumer.

Since jewelry is a fashion item, and since we would like to produce this product for our Fall market season, we would greatly appreciate your efforts in forwarding this opinion to us no later than June 30, 1976. Your cooperation within this period of time would be, as stated, greatly appreciated.

Sincerely,

/s/ VICTOR GOLDBERG
President

Association's proposed plan to provide gasoline dealer with instant identification intended to assure motorists of the credibility and reliability of such dealer's performance for fill-up customers at full service gasoline pump islands (File No. 773 7003).

Opinion Letter

March 5, 1977

Dear Mr. Houston:

This is in response to your request for an advisory opinion on a certification plan developed by your association for members of the Georgia retail petroleum industry.

Under this plan, as we understand it, participating petroleum retail dealers would provide to "fill-up" customers at designated full service islands, the services of (1) cleaning their windshields and (2) offering to check or checking under their hood. Dealers who certify their provision of the services to customers ordering a fill up of gasoline at one or more designated service islands may participate in the program and receive a seal to post indicating their participation in the program. As we understand the program, retail dealers with multi-island stations could participate on a single island basis.

For the reasons set forth below, the Commission is unable to approve the program.

With respect to the antitrust implications of your proposal, your letter states that "* * * all members of the industry may participate in the proposed plan who perform at least the minimum service for fill-up customers." Your proposed seal, however, bears the words, "Dealer Operated—An Independent Small Businessman." It is therefore unclear whether service stations not owned and operated by dealers may participate in the program. If the program is in fact open to any industry member who supplies the requisite services, regardless of ownership or operation, the Commission finds the plan unobjectionable on antitrust grounds. If a class of stations is excluded on grounds other than their failure to offer and provide those services, however, a question would be raised whether the program could have an illegal anticompetitive effect, and the Commission would be unable without a further factual inquiry, not undertaken in the context of advisory opinions, to approve it. Federal Trade Commission Procedures and Rules of Practice, 16 CFR 1.1(c).

This is not to say that such a program could not result in or facilitate

violation of the antitrust laws. The program could present occasion to fix prices or otherwise to limit competition. For example, if participants agreed explicitly or implicitly to withhold the services provided under the program from "partial fill" customers, or agreed that self-service or other kinds of sales would not be offered to the public, violations of the antitrust laws would result. That retail dealers with multi-island stations may participate on a single-island basis is an extremely important consideration in the Commission's evaluation of the plan.

Fees for participation in the program might best be structured in such a way that association members and nonmembers pay equal shares of program costs. Nonmembers of the association might be charged a higher fee than members if the differential simply insures that nonmembers, who do not pay association dues or assessments, are bearing an equal share of the costs of the program.

Section 5 of the Federal Trade Commission Act prohibits not only antitrust violations in the form of unfair methods of competition, but also unfair or deceptive acts or practices in or affecting commerce. Your proposed program is deficient in certain respects that could lead to illegal unfairness or deception.

You state in your promotional material that the Golden Triangle is "your assurance for receiving the above services when you drive up to a full service gasoline pump island and say—Fill er up." The services specifically designated are cleaning the windshield, checking tires for dangerous conditions, and offering to look under the hood, to check the oil, battery, fan belts, look for faulty or loose wiring and leaking brake or fuel systems. Yet participating dealers only agree to clean windshields and either check or offer to check under the hood. The affidavit should provide that all of the services specified in advertising material will in fact be provided. Of course, both the Association and the individual participants in the program bear the responsibility to ensure not only that the services are promised but also that they are actually provided. The Association should adopt a program of verifying compliance with the program, which should consist at least of spot-checking at appropriate intervals as well as investigating complaints.

In addition, the seal represents that the participant offers "full service at the pump island." In our view this implies that the servicing is available at the designated island to those willing to purchase gasoline. In fact, under the program, dealers commit themselves to provide "full service" only to those who order a fill up. We believe the limitation

regarding a fill up must either be prominently displayed on the seal or otherwise disclosed with prominence equal to that of the seal.

Finally, the Commission sees no problem in principle in franchising the program so that it would be available through trade associations in other states, if the objections raised in this opinion to the present form of the program are removed.

By direction of the Commission.

*Letter of Request**

October 22, 1975

Dear Sirs:

This is to request an advisory opinion on a proposed plan developed by this Association for all members of the industry.

The objective of the proposed plan is to provide the gasoline dealer with instant identification intended to assure motorists of the credibility and reliability of such dealer's performance for fill-up customers at full service gasoline pump islands.

The proposed plan is intended to insure availability of minimum performance which the consumer may expect at a full service pump when the consumer has ordered a fill-up of his tank. Only a general certification (See Exhibit A) that such minimum performance is regularly provided is proposed. Competition and public demand will continue to dictate the quality and extent of performance above the minimum described in this proposal.

This Association, recognizing that professionalism and credibility are valuable to its members, has developed the proposed plan to identify to consumers gasoline dealer locations where minimum performance is certain for fill-up customers. It is proposed that all members of the industry may participate in the proposed plan who perform at least the minimum service for fill-up customers. All participants will voluntarily and without implied or expressed coercion certify in writing to the Association of their willingness to assure such minimum performance is maintained. In return for the certification of such practices by any member of the industry the Association will make available the symbol illustrated in the copy attached (Exhibit B) for posting on his premises.

* The exhibits mentioned in the requesting letter are not reproduced herein but are available for inspection at Public Reference Branch, Room 130, Federal Trade Commission, Washington, D.C.

With reference to the illustration depicting the symbol for performance, it is proposed that the non-member of the Association will be supplied the identical signing with the exception that the word "member" shall be removed and the words "sponsored by the" shall be substituted. To fulfill the credibility intended under the proposed plan for public confidence in performance at locations where such symbol is displayed, it is deemed necessary to use the Association name in said signing. In the alternative, said symbol could be provided without other wordage to avoid any objection to the use of the Association name should the Commission feel this is necessary.

To insure consistency and quality in the use of the symbol and/or signing, it is intended that the Association will retain all rights for reproduction of authorized signing under this plan. Only approved designs as may from time to time be developed by the Association will be permitted in the use of said symbol.

By certification to performance as provided in this proposed plan, it is the intention of the Association to provide the symbol as a distinguishable basis for consumer decisions which might not otherwise be apparent.

In addition to providing the member of the industry who chooses to participate in the proposed plan with adequate signing as described above, it is the intention of the Association to provide from time to time promotional pieces it designs for use of said participating members of the industry. Such proposed promotional pieces as are illustrated by the attached sample (Exhibit C) are intended to develop public confidence in the proposed plan. In addition, such promotional pieces will serve as educational tools to inform consumers of the valuable and essential services performed at the pump island by the full service dealer when the customer says to fill his tank. Participating members of the industry would be encouraged to provide non fill-up customers with the best service performance they can provide to the extent it is economically feasible under their individual circumstances.

The use of the proposed promotional piece is intended for participating member dealers to hand to their fill-up customers. Upon receipt by the Association of complaints against any participating dealer, notice is to be given to the participating dealer complained of as a matter of information. In the event substantial numbers of complaints by consumers are received advising non-compliance with minimum performance certified to for participation in the purposed plan, said participating dealer shall be given an opportunity to appear before the Board

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of Directors of the Association. The Board of Directors, acting as a committee which shall have the duty to examine the circumstances, shall hear the participating dealers' views and will make judgment whether the facts merit withdrawal of the right to participate in said program. Among the committee's other duties shall be the responsibility for insuring non-discriminatory access to the program by non members of the Georgia Association of Petroleum Retailers.

To effectively focus public attention upon the symbol and the participating industry members, it is intended that the Association may require all participating industry members to contribute to a co-operative advertising campaign to be conducted through public media. At the option of the Association, it is proposed that either a voluntary contributory plan will be implemented or that an assessment for each participating member of the industry will be implemented to support said intended advertising campaign. A Sample copy of the initial ad (Exhibit D) proposed for use in this connection is attached.

It is intended that non members of the Association will receive all promotional materials and the use of the symbol at a cost no greater than those imposed upon comparable Association members for whom comparable services have been rendered.

The Commission is requested to provide an advisory opinion on the general conditions of the proposed plan as outlined above in addition to the specific questions which follow:

1. Can the proposed plan be implemented as above described without danger of the Association being charged with anticompetitive activity?
2. Could the Association establish an annual charge for the use of the symbol and waive payment by members of the Association?
3. Would the Commission view as anticompetitive activity of this Association if as owner of the symbol and above plan this Association attempted to franchise said plan through other gasoline dealer Associations across the Nation with agreements with other Associations requiring uniformity in operation as described above?
4. If the Commission finds one phase of the above described plan to be improper or anticompetitive the Commission is respectfully asked to comment as to the effect of such finding on the remaining parts of said plan.

Thank you for your attention and for your best effort to expedite this request for an advisory opinion.

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Sincerely,

/s/ Jack W. Houston
Executive Director

Magnuson-Moss Warranty Act—Compliance of Ultrafiche System with 16 C.F.R. 702, (File No. 773 7005).

*Opinion Letter**

March 18, 1977

Dear Mr. Raymond:

This is in response to your request for an advisory opinion concerning a proposed method of complying with the Commission's Rule on Pre-Sale Availability of Written Warranty Terms, 16 C.F.R. 702. Your request was made following the Commission's advisory opinion of November 10, 1976, to the National Retail Hardware Association (NRHA) approving use of a microfiche reader system to satisfy Part 702.3(a)(1)(ii) of the Rule. 41 F.R. 53472. The Rule requires a retailer to maintain a binder "or [other] similar system* * *" giving consumers "convenient access to * * * warranties." 16 C.F.R. 702.1(g).

Specifically, you ask whether an ultrafiche viewing system would also satisfy Part 702.3(a)(1)(ii) of the Rule. In addition, you ask whether a retailer wishing to use an ultrafiche system under the Rule must comply with the condition set forth in the advisory opinion to the NRHA that:

> The warranties appear on separate microfiche cards which contain all warranties for a given product class, and only that product class (*e.g.* vacuum cleaners), and which do not contain any other product information* * *.

The system you propose is substantially similar to the NRHA microfiche system. Information is stored on cards in greatly reduced photographic form. The cards can then be inserted into a viewing machine which magnifies the information and displays it in readable form on a screen.

The basic difference between the two systems is that an ultrafiche card contains 2,800 pages of information while a microfiche card typically contains less than 100. You argue that requiring a separate ultrafiche card for the warranties relating to each class of products would defeat the purpose of an ultrafiche system.

The Commission has carefully considered the matters set forth in your letter. It is the Commission's conclusion that the ultrafiche system you propose will satisfy the Commission's Rule if:

* Published in the *Federal Register*, 42 F.R. 15679.

(1) Simple, complete instructions for use of the system are posted on each ultrafiche viewer; and

(2) Personnel in each selling establishment familiar with the operation of the system are available to assist consumers should the need arise; and

(3) Ultrafiche cards used to display warranties contain only warranty information.

The Commission further concludes that the warranties relating to more than one product class may be stored on a single ultrafiche card provided the conditions listed below are met. Moreover, the Commission has reconsidered the requirement set forth in its opinion to the NRHA that the warranties for each product class be displayed on separate microfiche cards. Therefore, the Commission concludes that the warranties relating to more than one product class may be displayed on either a single ultrafiche or a single microfiche card if:

(1) All warranties relating to a product class are grouped together on the same ultrafiche or microfiche card; and

(2) All warranties relating to a particular product class appear on the same row or column of the ultrafiche or microfiche card; and

(3) Each ultrafiche or microfiche card contains a clear product index.

These conditions are required to ensure that consumers have the "convenient access" to warranties required by the Rule.

By direction of the Commission.

*Letter Revising Conditions on Use of Microfiche System**

March 18, 1977

Dear Mr. London:

This is to advise you of a revision of the Commission's conditions on the use of microfiche viewing systems to satisfy the Commission Rule on the Pre-Sale Availability of Warranty Terms, 16 C.F.R. 702.

In its advisory opinion to the National Retail Hardware Association of November 10, 1976, the Commission required separate microfiche cards. Upon reconsideration, the Commission concludes that warranties from

* Opinion letter published in 88 F.T.C. 1027, and 41 F.R. 53472.

more than one product class may be displayed on the same microfiche card so long as the warranties relating to any particular product class all appear on the same row or column of the card and the card contains a clear index of the warranties it contains. A letter setting out the new conditions is enclosed.

By direction of the Commission.

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"Hiatus" requirement of the Trade Regulation Rule of Games of Chance in the Food Retailing and Gasoline Industries (16 C.F.R. 419.1(f)) (File No. 773 7010).

Letter of Response

March 25, 1977

Dear Mr. Rogal:

This is in response to your March 16, 1977, request for an advisory opinion respecting the so called "hiatus" requirement of the trade regulation rule for Games of Chance in the Food Retailing and Gasoline Industries (16 C.F.R. 419.1(f).

The Commission has recently directed its staff to initiate a rulemaking proceeding for amendment of said rule, specifically to include consideration of repeal of Paragraph (f), the "hiatus" requirement. As your request seeks, in effect, individual exemptions from the "hiatus" requirement of the rule, it is not deemed appropriate for advisory opinion.

By direction of the Commission.

Letter of Request

March 16, 1977

Honorable Commissioners:

The undersigned was orally informed today by attorney Edwin F. Dosek of the Commission's Bureau of Consumer Protection that the Bureau's staff has determined to advise the undersigned that the proposed courses of action described in the two attached Requests for Staff Advisory Opinion would violate the Commission's trade regulation rule governing games of chance in the food and gasoline retailing industry. He stated that it was the staff's opinion that extensions of the games for additional thirteen week periods would violate section 419.1(f) of the rule which reads as follows:

> Promote or use any new game without a break in time between the new game and any game previously employed in the same establishment equivalent to the duration of the game previously employed.

Mr. Dosek further advised me that it is the staff's view that under the circumstances presented, *i.e.*, when some of the independent stores which participated in the first run of the game do not wish to participate in the extension or when stores which did not participate in

the first run will participate in the second run, the second run constitutes a "new game" and falls within the quoted rule provision. According to Mr. Dosek the second run is a "new game" because the geographic area will change and the total number of prizes and game chances distributed will change. The staff was not persuaded by the fact that all other aspects of the game will remain exactly the same including the odds or chances of winning a prize in each separate prize category.

The undersigned is at a loss to understand the staff's negative views on these simple proposals. There is absolutely no chance of consumer confusion or deception. The independent stores are scattered widely over a three state area in one instance and an eleven state area in the other. Newspaper advertising is the only medium employed since the rule bans the use of radio or television advertising. The stores prepare and disseminate their own advertising on a town-by-town or area by area basis.

This request points up the anti-competitive nature of the rule provision quoted above. Here we have independent grocery stores blocked in a competitive fight with large retail food chains. I do not have any current information as to the competition which faces the Malone and Hyde Stores but as the attached Request on behalf of Associated Grocers of Colorado points out, that group is faced with competition from two large chains which together control in excess of 80 percent of the food retail market in that three state area. What possible public interest is served by denying to these independent grocers the right to employ this completely lawful method of competition?

In closing I wish to point out that this request differs from the request submitted by Fox Grocery Company in that we are not requesting the opportunity to engage in an entirely new and different game but merely requesting the opportunity to extend the same promotion with slightly different participants.

Finally, it is urgently requested that the Commission handle this request with all possible speed. A refusal to respond within the next ten days will, in effect, constitute a denial for orders for printing the game materials must be in the hands of the printer by March 25, 1977.

Respectfully submitted,

/s/ Willaim W. Rogal

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First Attachment

March 8, 1977

Dear Mr. Dosek:

This request for a staff advisory letter is submitted on behalf of Glendinning Companies, Inc. Glendinning is a marketer of game of chance promotions utilized by food retailers and others in connection with advertising their goods and services.

On January 12, 1977, approximately 293 retail stores affiliated with Malone and Hyde commenced a thirteen weeks game promotion marketed by Glendinning. The 293 stores are located in the states of Alabama, Arkansas, Indiana, Illinois, Kentucky, Louisiana, Mississippi, Tennessee, Texas, Virginia and West Virginia. The Malone and Hyde stores are grouped into divisions for purposes of organization. The 293 stores now engaged in the game promotions comprise five distinct Malone and Hyde divisions.

Glendinning has recently been notified that some, but not all, of the five divisions wish to renew the game promotion for an additional thirteen weeks when the original promotion terminates in April. Of course, this means that the promotion will be somewhat smaller during the contemplated second run. The odds of winning each separate prize will remain exactly the same but the total number of tickets and the total number of prizes will diminish in proportion to the diminished retail store participants.

It is important to realize that each of the divisions of Malone and Hyde are geographically distinct and separate. The stores in each division prepare and disseminate their own advertising, thus consumers in one division do not see advertising disseminated in another division or divisions. Thus, there is absolutely no chance of consumer confusion by reason of the fact that one or more of the five divisions may decide not to renew the game for an additional thirteen weeks.

In compliance with the Trade Regulation rule, Glendinning and Malone and Hyde have been mixing game chances and making the requisite disclosures over the entire eleven state area encompassed by the Malone and Hyde divisions. They will follow the same procedure during the second run. The new advertising will properly disclose the new diminished area in which the game will be played.

Glendinning requests advice as to whether the procedure outlined above is acceptable. Of course all provisions of the Trade Regulation

rule will be scrupulously followed. Time is of the essence in this request, since advance orders and commitments for the new tickets and game material must be placed within the next few weeks.

Sincerely,

/s/ William W. Rogal

Second Attachment

March 3, 1977

Gentlemen:

This request for a staff advisory letter is submitted on behalf of Glendinning Companies, Inc. and Associated Grocers of Colorado. Glendinning is a marketer of game of chance promotions utilized by food retailers and others in connection with advertising their goods and services. Associated Grocers of Colorado is a cooperative group of independent food retailers operating in Colorado, part of Wyoming and part of New Mexico.

The market area in which Associated Grocers operates is dominated by two large chain retailers, Safeway Stores and King Soopers. Together these two large retailers account for in excess of 80 percent of the food retail market in the relevant area. The combined market shares enjoyed by these two large chains has steadily increased in recent years at the expense of independnet grocers such as Associated Grocers of Colorado.

For approximately the last seven weeks 28 Associated stores have employed a Glendinning game of chance promotion known as "Shoppers Spree Bingo". The game has been successful in the sense that the participating stores have enjoyed increased sales and have regained a small part of the business lost to the larger competitors. Because of this favorable experience most of 28 stores wish to extend or renew the game for an additional 13 weeks. In addition, a substantial number of Associated stores which elected not to participate during the initial run of the game now wish to participate during the 13 week extension. Thus the mix of stores would change during the second run with a few of the original stores dropping out and an undetermined number of new stores entering.

During the extension period the prize structure will remain the same, i.e., the odds or chances of winning in each separate prize category will remain the same. Only the market area, the number of participating

stores and the number of prizes in each category will increase depending upon the number of stores which elect to participate.

It is important to realize that this is a scattered market area and not a homogeneous, easily defined metropolitan market. The stores are scattered in various small towns and cities. Apparently each separate area or store places its own advertising but the consuming public is free to play the game at any outlet. Glendinning provides all of the stores with assistance in preparing advertising to make certain that all disclosures mandated by the Commission's trade regulation rule are made.

It is not economically possible to provide a unique and separate game for individual stores. The game materials must be mass produced and mixing must be done on a market-wide basis. Moreover, separate games with different prizes and different termination dates would hopelessly confuse consumers.

It seems apparent that an extension of this game in the manner outlined above would not deceive or confuse consumers. It is also apparent that the extension would be in the public interest in that it would enable this group of relatively small food retailers to better compete with their large, chain competitors. And, conversly, a refusal to permit the Associated stores to engage in this method of competition would adversely affect competition in this market area.

Thus, Glendinning and Associated request a staff opinion advising them that an extension of the game in the manner outlined in this letter would not be considered by the Commission as a violation of its trade regulation rule. Unfortunately, time is of the essence in this matter. Plans must be made immediately for the printing and distribution of game materials. Commitments and orders for materials must be placed within two weeks from today in order to permit the extension to commence when the original game terminates.

Sincerely,

/s/ William W. Rogal