

MEMORANDUM

From: Adam L. Brookman
To: The Federal Trade Commission
Date: September 28, 2012
Re: Comments on the Jewelry Guides

The Federal Trade Commission (“FTC” or the “Commission”) has requested public comments (the “Notice”) on the cost and benefits of the Jewelry Guides (formally known as the “Guides for the Jewelry, Precious Metals, and Pewter Industries”), and on whether the Guides should be repealed, amended, or retained in their current form. The Notice also requested comments on specific issues concerning composite gemstones, pearls, diamonds, and precious metal alloys, as well as comments regarding any other issues or concerns relating to the Guides.

Understandably, the Guides provide rules that must be followed in the sale of jewelry to avoid unfair or deceptive trade practices. This is in keeping with the FTC Acts’ unfair, deceptive, and fraudulent practices laws.

With the above in mind, the comments herein are directed to the following considerations and made within the context of Section 5 of the Act:

1. The healthy competitive landscape as between sellers of natural stones and sellers of laboratory created synthetic and simulated stones;
2. Use of the word “flawless” - Sections 23.12 and 23.26;
3. Use of the word “gem” - Section 23.25; and
4. Use of the words "ruby," "sapphire," "emerald," "topaz," "stone," "birthstone," "gemstone," etc. - Section 23.23.

The Competitive Landscape

Currently, there is a tension between the traditional jewelry industry (the “Industry”), on the one hand, and the purveyors of high quality simulated and synthetic gemstones (the “Alternative Gem Sellers”), on the other hand.

As the FTC is well aware, the subjective interests of the traditional jewelry industry are represented by the Jewelers Vigilance Committee (the “JVC”). The JVC admits this on its web site noting, “The JVC is a non-profit trade association supported by the jewelry industry.”

<http://www.jvclegal.org/Consumers/index.php?categoryid=1>.

Among others, the JVC’s board of directors includes: Mr. Terry W. Chandler of the Diamond Council of America, Ms. Rebecca Foerster of diamond mining company Rio Tinto, Mr. Sheldon Kwiat of diamond trading company Kwiat International, and Mr. Eric Christopher, representatives of mall jeweler Zale’s. ***There are no representatives of the lab created or synthetic gemstone industry on the Board of Directors of the JVC.***

JVC’s subjective bias is also borne out by, for example, the list of the 16 JVC members in Wisconsin set forth below;¹ all but two of whom are traditional diamond jewelers.²

Organization	Address	City	ST	Zip
Affordable Gold Direct	544 E Ogden Avenue, Suite 700/151	Milwaukee	WI	53219
Bay Area Diamond	225 South Military	Green Bay	WI	54303
Candace Gerbers Brey	3285 Nelson Lane	DePere	WI	54115
Diamond Designs	18900 W. Bluemound Rd. #109	Brookfield	WI	53045
Dorothy Gallun & Associates	N70 W5336 Bridge Road	Cedarburg	WI	53012
Greaton's, Inc. Jewelers	224 South Knowles Avenue	New Richmond	WI	54017
Kessler's Diamonds	N96 W16920 Country Line Road	Germantown	WI	53022
Kloiber Jewelers	411 East Wisconsin Ave - Lobby,	Milwaukee	WI	53202
Krueger Jewelers, Inc.	106 North Main Street,	Fort Atkinson	WI	53538
Lake Hill House	611 E Lake Hill Court	Whitefish Bay	WI	53217
Lasker Jewelers	3705 S. Oakwood Mall Drive,	Eau Claire	WI	54701
Rohr Jewelers, Inc.	813 N. Jefferson Street,	Milwaukee	WI	53202
Sharbuno Jewelers	216 N Franklin Street,	Port Washington	WI	53074
Stein's Jewelers LLC	715 W. Wisconsin Avenue,	Milwaukee	WI	53233
The Diamond Center	2500 Milton Avenue, Unit 110	Janesville	WI	53545
Treiber & Straub Jewelers	14740 W. Capitol Drive,	Brookfield	WI	53005

While the Jewelers Vigilance Committee has arrogantly proclaimed itself to be “The Industry's Guardian of Ethics and Integrity,” curiously absent is any discernible “vigilance” with respect to any issue that might negatively impact the public perception of traditional diamond jewelry industry such as the issue of “blood” or “conflict” diamonds flowing into the world’s markets and the lack of any correlation between the price of diamonds and their scarcity (or abundance).

While the overall traditional jewelry industry has been stagnant over the last five years, purveyors of high quality simulated and synthetic gemstones have been growing.³ This is no doubt due, at least in part, to the challenging economy faced by jewelry consumers who find the price of synthetic and simulated gemstones to be more attractive.

This growth and price structure clearly have the traditional jewelry industry extremely concerned and defensive in a competitive marketplace. Over the last five years the Industry has watched multiple

¹ This list was compiled by filtering JVC’s membership list by state, on its web site at http://www.jvclegal.org/JVCmembers/Retailers_view.php.

² Candace Gerbers Brey appears to be a jewelry/metalsmithing teacher. No information of any kind could be found for Affordable Gold Direct

³ Documentation to support this and other statements herein may be provided upon request.

Alternative Gem Sellers establish a significant online presence and launch highly successful retail stores, often located in shopping malls in close proximity to traditional jewelry stores. Such competition is the cornerstone of a free marketplace.

When buying from Alternative Gem Sellers, consumers often save as much as 80% over traditional mined diamonds. Stated another way, the traditional diamond jewelry industry's average price for an engagement ring is \$7000. Alternative Gem Sellers' average price for an engagement ring is in the neighborhood of \$1500. While this savings is a tremendous benefit for consumers, it also makes it important that truthful comparative information is available without the hindrance of unnecessary adjectives and limitations that serve only to further the interests of the Industry and confuse consumers.

As a result, the Industry, in reliance on its largest membership organization the JVC, is waging a self-serving war on Alternative Gem Sellers by, among other things, filing baseless claims and lobbying the FTC to issue rules and guidelines that will place Alternative Gem Sellers at an unjustified and unlawful competitive disadvantage. For example, as the Commission is well aware, the JVC sought to preclude the use of the term "cultured" in the sale of laboratory-created gemstones. The FTC previously declined the JVC's request.⁴

It is anticipated that, by virtue of the current public comment invitation, the JVC will once again seek to create self-serving barriers to the sale of goods by Alternative Gem Sellers.⁵ Such barriers would have no legitimate benefit to consumers and would, in fact, harm the growing number of consumers who are already struggling with fewer jobs and lower incomes.

As the growth of the Alternative Gem Sellers indicates, consumers have welcomed the opportunity to purchase lower price simulated and synthetic gems that offer the same or similar visual appearance without the political and ecological issues associated with many mined stones. Unwarranted limitations on Alternative Gem Sellers' ability to sell its products serves only to harm consumers and healthy competition, generally, while propping up an industry that has been unequivocally known to engage in questionable tactics to market its products and maintain its prices, while taking advantage of uninformed and powerless consumers.⁶

⁴ <http://www.ftc.gov/os/2008/07/G711001jewelryguides.pdf>.

⁵ Should the JVC submit what it purports to be "evidence" claiming that Alternative Gem Sellers are misleading consumers despite adhering to the Guidelines, the opportunity to respond is respectfully requested.

⁶ See, e.g., Sullivan v. DB Investments, Inc. (\$295 million settlement of class action accusing De Beers group of companies conspiring to fix, raise and control the price of gem diamonds, monopolizing the rough gem diamond market, and issuing false and misleading advertising.); The Rise and Fall of Diamonds by Edward Jay Epstein (revealing the mechanisms used for controlling the price and availability of diamonds); The New Diamond Age by Joshua Davis in Wired Magazine, November 2009 (describing tactics used by DeBeers and others from the Industry to try to keep laboratory-created diamonds stigmatized or out of the market).

Use of the Word “Flawless” (Sections 23.12 and 23.26)

Section 23.12 of the Guides sets forth guidelines for the use of the word “flawless” (and the word “perfect”) as follows:

- (a) It is unfair or deceptive to use the word "flawless" to describe any diamond that discloses flaws, cracks, inclusions, carbon spots, clouds, internal lasering, or other blemishes or imperfections of any sort when examined under a corrected magnifier at 10-power, with adequate illumination, by a person skilled in diamond grading.
- (b) It is unfair or deceptive to use the word "perfect," or any representation of similar meaning, to describe any diamond unless the diamond meets the definition of "flawless" and is not of inferior color or make.
- (c) It is unfair or deceptive to use the words "flawless" or "perfect" to describe a ring or other article of jewelry having a "flawless" or "perfect" principal diamond or diamonds, and supplementary stones that are not of such quality, unless there is a disclosure that the description applies only to the principal diamond or diamonds.

These guidelines (“Guidelines”) are augmented by Section 23.26 of the Guides which states:

- (a) It is unfair or deceptive to use the word "flawless" as a quality description of any gemstone that discloses blemishes, inclusions, or clarity faults of any sort when examined under a corrected magnifier at 10-power, with adequate illumination, by a person skilled in gemstone grading.
- (b) It is unfair or deceptive to use the word "perfect" or any representation of similar meaning to describe any gemstone unless the gemstone meets the definition of "flawless" and is not of inferior color or make.
- (c) It is unfair or deceptive to use the word "flawless," "perfect," or any representation of similar meaning to describe any imitation gemstone.

When taken as a whole, the guidelines stand for two propositions:

1. It is unfair or deceptive to use “flawless” or “perfect” to describe any diamond or gemstone ***unless*** the diamond or gemstone has no blemishes, inclusions, or clarity faults of any sort when properly examined under 10-power magnification.
2. It is unfair or deceptive to use “flawless” or “perfect” to describe ***any*** imitation gemstone.

As the FTC’s Bureau of Consumer Protection states in a number of publications, when buying diamonds, a consumer should consider four criteria: cut, color, clarity and weight, with each factor affecting the price.⁷

⁷ See, e.g., Puttin’ on the Glitz? What to Know When Shopping for Jewelry <<http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt011.pdf>>; All That Glitters... How to Buy Jewelry <<http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro02.pdf>>; Buying Gold and Gemstone Jewelry: The Heart of the Matter <<http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt087.pdf>>.

Clarity is the criterion used to address blemishes and inclusions visible under 10-power magnification. Where no blemishes are visible, a natural diamond or gemstone can be described as “flawless.” Yet, a consumer seeking to acquire a simulated stone is apparently not entitled to receive information that the simulated stone is “flawless” or “perfect” even if it is! This is because according to the Guidelines, such a statement is unfair or deceptive even if 100% true when judged on the exact same criteria as a natural stone.

It is respectfully submitted that this prohibition in the Guidelines actually serves to create a situation that is unfair or deceptive to a consumer seeking to comparison shop and a purveyor seeking to compete.

As Section 23.23 of the Guides makes clear, a purveyor of simulated or imitation stones must clearly and conspicuously disclose that such products are simulated or imitation. Thus, a consumer is already fully-informed that such stones are not natural diamonds or gemstones. Once in possession of that knowledge, consumers should be permitted to compare such stones using the exact same criteria as are used to evaluate natural stones. If beauty and value are, in part, determined by the presence or absence of flaws, consumers should be entitled to the truth about the clarity of both natural and simulated stones on the same scale. Anything less is itself unfair and misleading.

Use of the Word “Gem” - Section 23.25

The Guides place limitations on the use of the word “gem” as follows:

- (a) It is unfair or deceptive to use the word "gem" to describe, identify, or refer to a ruby, sapphire, emerald, topaz, or other industry product that does not possess the beauty, symmetry, rarity, and value necessary for qualification as a gem.
- (b) It is unfair or deceptive to use the word "gem" to describe any laboratory-created industry product unless the product meets the requirements of paragraph (a) of this section and unless such word is immediately accompanied, with equal conspicuousness, by the word "laboratory-grown," "laboratory-created," or "[manufacturer-name]-created," "synthetic," or by some other word or phrase of like meaning, so as to clearly disclose that it is not a natural gem.

As can be seen by close reading of the Guideline, there is a circularity that makes it difficult to understand and comply with. More specifically, section (a) states that it is unfair or deceptive to use the word “gem” for a product that does not possess the beauty, symmetry, rarity and value to qualify as a “gem.” Yet, the guide provides no definition or rubric for ascertaining what a “gem” is other than the subjective circular reference to the very same word. It is respectfully submitted that clarification is warranted to permit purveyors to make the proper claims and use “gem” in a manner that is not unfair or deceptive.

Still further, the prohibition on the use of “gem,” with the terms “laboratory-created” etc., unless the product has a particular value, is unnecessary as such use is not misleading to a consumer. By way of example, under Section 23.23 of the Guides, it is permissible to describe a “ruby” or “gemstone” as laboratory-created, imitation or simulated without any requirement of value.

Dictionary.com defines “gem” as “a cut and polished precious stone or pearl fine enough for use in jewelry.” Merriam-Webster.com defines “gem” as “a precious or sometimes semiprecious stone cut and polished for ornament.” Merriam-Webster.com defines “ruby” as “a precious stone that is a red

corundum.” Merriam-Webster.com defines “gemstone” as “a mineral or petrified material that when cut and polished can be used in jewelry.” The word “gem” is identified as a synonym for “gemstone.”

These foregoing definitions demonstrate that “gem,” from the perspective of a consumer, does not require or deserve treatment distinct from that of the terms “ruby,” “gemstone,” etc. as set forth in Section 23.23 of the Guides. They are essentially interchangeable terms that are, without reason, treated differently by the Guidelines. Thus, it is respectfully submitted that sub-section (b) of Section 23.23 of the Guides should be eliminated.

Use of the Words "Ruby," "Sapphire," "Gemstone," etc. - Section 23.23.

Section 23.23(b) of the Guides states:

It is unfair or deceptive to use the word "ruby," "sapphire," ["diamond,"] . . . or the name of any other precious or semi-precious stone. . . to describe a laboratory-grown, laboratory-created, [manufacturer name]-created, synthetic, imitation, or simulated stone, *unless* such word or name is immediately preceded with equal conspicuousness by the word "**laboratory-grown,**" "**laboratory-created,**" "[manufacturer name]-created," "synthetic," or by the word "imitation" or "simulated," *so as to disclose clearly the nature of the product and the fact it is not a natural gemstone.*

Section 23.23(c) of the Guides states:

It is unfair or deceptive to use the word "**laboratory-grown,**" "**laboratory-created,**" "[manufacturer name]-created," or "synthetic" with the name of any natural stone to describe any industry product *unless* such industry product has essentially the same optical, physical, and chemical properties as the stone named.

On the one hand, it is improper to use “laboratory-created” with the name of a natural stone unless the stone has “essentially the same . . . properties as the stone named.” On the other hand, it is a requirement to use “laboratory created” (“simulated,” “imitation,” etc.) with the name of a natural stone to make clear that the product is not a natural stone.

This can seemingly be reconciled by deriving a guideline that says, “a laboratory-created stone that has essentially the same properties as a natural stone must be clearly and conspicuously identified as ‘laboratory-created.’”

However, this derivation has two problems. First, there should be no need to try to reconcile the two clauses of the Section 23.23 to derive a guideline. Instead, the Guideline can and should be more plainly stated. Second, and perhaps more importantly, the Guidelines, as set forth (and as derived) do not address laboratory-created simulated or imitation versions of natural stones.

As the FTC is no doubt aware, numerous such stones exist. It is respectfully submitted that a new guideline that explicitly permits or encourages the truthful, non-misleading use of “laboratory-created” in close proximity to other limiting language such as “simulated” or “imitation” followed by the name of the stone name (e.g., “laboratory-created simulated [stone name]” or “laboratory-grown imitation

[stone name]”) would provide the average consumer with sufficient information regarding the nature and quality of potential purchases, while giving purveyors the clear ability to accurately identify their wares.

Conclusion

As set forth herein, the Guides, as currently promulgated, do not comport with the evolving business reality reflected in the growth of the Alternative Gem Sellers and the stagnation of the Industry. It is respectfully submitted that disclosing all material terms clearly and conspicuously effectively vitiates any regulatory concerns with respect to misleading the reasonable consumer. In fact, a policy that encourages compliant marketing practices, rather than stifling them entirely, is in the best interest of the economy, consumers, regulators and Alternative Gem Sellers.

As such, the Commission is requested to critically examine the issues highlighted above both in terms of the competitive landscape and the language of the Guidelines to maximize the benefit of the Guides to the consuming public and purveyors of natural and man-made stones and jewelry. The Commission’s consideration of this submission is appreciated.