

To: The Federal Trade Commission

Office of the Secretary
600 Pennsylvania Avenue, NW
Room CC-5610 (Annex O)
Washington, DC 20580

Via email: <https://ftcpublic.commentworks.com/ftc/jewelryguidesreview>

Dated: June 2, 2016

Re: Jewelry Guides, 16 CFR Part 23, Project No. G711001

We are providing this comment on behalf of Yellow Emerald Mining Company (the “Company”) with respect to proposed rule Section 23.27, and in particular proposed rule 23.27(b)(1), which states that “use of the term ‘yellow emerald’ to describe golden beryl or heliodor . . . may be misleading.” The Company is the only firm that has offered gemstones under the name yellow emerald, which the Company has more recently referred to as Emeryl Gemstones to avoid the concerns which have been raised as a result of the FTC’s proposed rule. As described below, the Company believes that there is no basis on which to conclude that the Company’s use of either term is in any way misleading. In fact, it is fairly descriptive, and provides useful information to the consumer.

The only “consumer perception evidence” of deception of which we are aware is a survey (the “Harris Study”) which is on its face completely flawed and provides no useful information on consumer perceptions.

Under the circumstances, we believe that there is no basis on which to conclude that the Company’s use of the term yellow emerald to describe its stones “may be misleading”. Moreover, the effect of the proposed rule would be to undercut efforts to sell the Company’s products, and therefore to suppress competition for green emeralds, which are highly overpriced (10 times the price of the Company’s gemstones, which are of equal clarity to traditional green emeralds). It should be no surprise that the only entity which to our knowledge is advocating this restriction is an association (the “Jewelry Vigilance Committee”) most of whose members either have sold green emeralds or provide support for firms that sell green emeralds.

This anticompetitive restriction should be rejected. Proposed rule 23.27(b)(1) should not be adopted. As this example illustrates, any broad prohibition relating to varietal names would be inappropriate. Any issues raised by the use of particular varietal names should be addressed on a case by case basis.

Applicable Standard

As the Commission explained in the preamble to its Statement of Basis and Purpose to the proposed revisions to the Jewelry Guides, deception is found only when an act or practice “involves a material statement or omission that would mislead a consumer acting reasonably under the circumstances.” The Commission explained that it “has tried to use available consumer perception evidence whenever possible to develop its guidance.” The Commission

added that it “proposes new guides *only when supported by solid evidence of deception* to avoid chilling the use of truthful terms that may be useful to consumers.”

As described below, the use of the term “yellow emerald” does in fact provide useful information to consumers. Moreover, absolutely no evidence has been submitted which would suggest that prospective jewelry purchasers are actually misled by the term. Finally, this proposed provision is being advocated by sellers of green emeralds who seek to eliminate competition and thereby prop up the extremely (and artificially) high prices of emeralds. This kind of harm should not be permitted, and the proposed rule should not be adopted.

Underlying Facts

The term “yellow emerald” fairly describes the Company’s products and provides useful information to consumers. Yellow emeralds are extremely similar to green emeralds in many characteristics:

1. They have the same chemical composition $(\text{Be}_3\text{Al}_2\text{SiO}_3)_6$.
2. They are the same gemstone class (beryl).
3. They are of the same gemstone species (beryllium aluminum silicate), except that green emeralds have chromium added creating a green color, and yellow emeralds have iron added (creating the yellow color).
4. Both have the same kind of crystal system (cyclosilicate).
5. Both have the same measure of “hardness” (Moh’s Scale) – 7.5-8.
6. Both have a specific gravity averaging 2.76.
7. They have the same refractive index, (2.65-2.80).

For all these reasons, the use of the phrase “yellow emerald” to describe the Company’s products provides significant information to the consumer. He or she is purchasing a jewel that resembles emeralds in most respects.

Significantly, the Company’s gemstones are also clearly different from typical yellow beryls or golden heliodor stones. They have significantly greater clarity, comparable to green emeralds. The Company’s gemstones are mined from a particular source in Brazil, which has yielded yellow-colored beryl gemstones of unusual clarity. The Company therefore describes its gemstones as “premium golden beryl gemstones.”

There are differences between the Company’s yellow emeralds or Emeryl Gemstones and green emeralds:

1. The color (yellow versus green).

2. Green emeralds are dull and frequently oiled. As a result, they need often to be re-oiled. The Company's Emeryl Gemstones do not require regular oiling to retain their hue.
3. The Company's products are sold at a price of about a tenth that of a typical green emerald.

But these differences all provide reasons to purchase a yellow emerald, perhaps instead of a green emerald. They do not provide any reason to believe that the term "yellow emerald" will materially mislead consumers to their detriment.

The Alleged Consumer Perception Evidence

The only actual evidence cited related to the proposed rule is the Harris Study . But that study cannot possibly provide any support for proposed Rule 23-27(b)(1). The study is completely deficient in multiple respects:

1. The study purports to show that purchasers of fine jewelry would be misled by the term "yellow emerald". But the vast majority of the people participating in the study are not likely to be purchasers of jewelry. Only 21% of the respondents said that they purchased fine jewelry in the past year. The study included all respondents unless they "will not consider at all" buying fine jewelry in the next year. *See* Slide 2. Of course, people who are unlikely to buy fine jewelry are likely to be far less knowledgeable about jewelry. But if they don't buy jewelry, they won't be misled.
2. The Statement of Basis and Purpose cited the survey response as indicating that approximately half of the sample respondents thought that yellow emeralds were of greater value than golden beryl or heliodor.¹ However, the language of the survey question to which these individuals responded makes clear that the response was meaningless. The question actually states that "if you are not sure, please give your best guess." (Slide 22.) One cannot conclude anything about jewelry buyers' actual *beliefs* based on a survey asking for *guesses*.²
3. The survey found (Slide 21) that 69% of the respondents had never heard of yellow emeralds, 71% had never heard of golden beryl and 87% had never heard of heliodor. Obviously, these respondents know far less than would anyone considering a purchase of such a product. Such an individual would minimally have to learn something about what these products are (at the retail establishment where the purchase was being considered) before making the purchase. This is yet another reason why the views of the respondents really mean nothing about the views and level of knowledge of the actual jewelry-buying population, and say nothing about whether that population is likely to be misled by the case of the

¹ Actually, as described above, the gemstones offered by the Company are much more rare, and offer much greater clarity, than typical golden beryl or heliodor stones. Therefore, they are in fact more valuable.

² The willingness to ask people to guess raises serious questions about the objectives of the persons conducting the survey.

term “yellow emerald.”

Even so, the survey notes at Slide 20 that 80% of the respondents said that green is associated with emeralds. Only 13% said that the color yellow is. This indicates a notable lack of confusion.

4. More generally, this was an online survey, with all the problems that online surveys involve.³ There is no way to tell whether the respondents represent anything like a representative sample of the overall population. Therefore, under well-established statistical principles, **no conclusions** can be drawn from any of this data. Indeed, the authors of the survey explained that “because the sample is based on those who agreed to be invited to participate, no estimates of theoretical sampling error can be calculated.” *See* p.1.

This means that no conclusions can be drawn about the relationship, if any, between the responses to the survey by the sample of people who responded and what would actually happen in the general population. We don’t know if the response concerning the value of yellow emeralds involved a sampling error of 10% or 20% or 50%, and therefore the results are not at all meaningful. Thus, the survey is unreliable, according to its own authors.

The survey was sponsored by the “Jewelers Vigilance Committee,” a group consisting primarily of sellers of traditional emeralds or firms which support them. It was undertaken to prove a point, not to provide unbiased evidence. When such a group sponsors an online survey, and where the reader has no idea who responded and with what motives, the results are suspect, to say the very least.

The Anticompetitive Effects from the Proposed Rule

There is no question but that competition for green emeralds is sorely needed. As the Wall Street Journal reported earlier this year, the primary miner of green emeralds “has helped drive up world-wide emerald prices nearly 14-fold since 2009 . . .” According to the Journal, this was accomplished by “savvy marketing techniques that evoked to De Beers’s strategy for stoking diamond demand.” “Miner Bets Emeralds Can Out Shine Diamonds,” Wall Street Journal (January 21, 2016 at B1). Any steps that would result in a chilling of the marketing of the Company’s products would impede the opportunity for consumers to have an alternative choice to overpriced green emeralds.

If adopted, the proposed rule would have this effect. The Statement of Basis and Purpose at p. 4 notes that the Jewelers Vigilance Committee “listed various ways industry members rely on the guides . . .” That reliance on the proposed rule has already significantly interfered with the Company’s marketing of its products. Several major retailers have decided not to market the Company’s products while the proposed rule was pending. The large buying group, The

³ *See e.g.* Knowledge@Wharton, “Polling the Polling Experts: How Accurate and Useful are Polls These Days” (November 14, 2007) <http://knowledge.wharton.upenn.edu/article/polling-the-polling-experts-how-accurate-and-useful-are-polls-these-days/>.

Independent Jewelers Organization, has indicated that it would not even consider offering the Company's gemstones unless the term "yellow emerald" was eliminated from the Jewelry Guides.

The FTC has recognized that government interference with the naming of products can improperly discourage the use of certain products and thereby impede competition. *See*, for example, the Comment of the Staff of the Federal Trade Commission to the FDA's Request for Comments on the "Non-Proprietary Naming of Biological Products," 80 Fed. Reg. 52296 (Aug. 28, 2015) (submitted on October 27, 2015). The FTC there expressed concerns about a proposal to "assign different suffixes to the drug substance names of bio-similars," because the FTC was concerned that this "could result in physicians incorrectly believing bio-similars' drug substances differ in clinically meaningful ways from their referenced biologics' drug substances . . ." The FTC was concerned that this could "imped[e] the development of bio-similar markets in competition." Comment at 2.

The same concern arises here. The proposed rule would suggest to the public that "yellow emeralds" are somehow phony products that ought to be avoided, and would cause retailers to refuse to offer the products. That would be anticompetitive, and would not provide any useful information to consumers.

Conclusion

For the foregoing reasons, we request that proposed rule 23.27(b)(1) not be adopted.

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