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Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW.
Suite CC-5610 (Annex O)
Washington, DC 20580

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

We represent several jewelry retailers who oppose certain of the proposed revisions to the FTC Jewelry Guides (“Guides”), 16 CFR Part 23, 81 Fed. Reg. 1349 (Jan. 12, 2016).

Overview

In sum, our clients have three major areas of concern:

1. They object to the proposed new language of § 23.3 which prohibits the use of the term “gold plated” unless the gold or gold alloy is of not less than 22 karat fineness with a thickness of at least 0.381 microns. (81 Fed. Reg. at 1352).
2. They object to the new language of § 23.7 which states that it is unfair or deceptive to fail to disclose a surface layer of rhodium on products marked or described as precious metal. (81 Fed. Reg. at 1355). Specifically they object to the mandate in those applications where rhodium plating is an inherent benefit to the consumer; in these situations in particular, the proposed requirement to disclose provides no additional benefit.
3. They object to the new language of § 23.27 which states that using coined names that include references to gem names (such as “Yellow Emerald” or “Green Amethyst”) can be misleading. (81 Fed. Reg. at 1358). First, the FTC provided no supporting evidence to demonstrate that usage of these terms is deceptive. Second, it does not appear that consideration was given to the fact that the “perceived misrepresentation” could be overcome by disclosures.

Discussion

As stated at pages 1 and 3 on the *Statement of Basis and Purpose: Proposed Revisions to the Jewelry Guides (Statement of Basis and Purpose)*, the basis of the Jewelry Guides is to provide marketing advice on how to avoid deceptive practices involving material statements or omissions that would mislead a consumer acting reasonably under the circumstances and that changes to the Guides will only be implemented “when supported by solid evidence of deception.” Our clients – and many others in the industry -- believe that many of the suggested changes are not supported by solid evidence of deception. In addition, they believe that, based on this framework, the Guides are intended to assist consumers to understand what they are purchasing and not to establish a product’s intrinsic or perceived value, as some of the proposed changes appear to attempt.

Certain members of the industry have inherent incentives to reduce competition, whether through the provision of flawed evidence, or recommendations that advantage their current business model or membership; the FTC should weigh those members’ incentives when considering their proposed revisions consistent with a primary mission of the Commission -- to promote fair competition.

I. Objection to the new language of § 23.3 Restricting the use of the term “gold plated”

Section 23.4(c)(2) of the current Guides establishes the following “safe harbor” for “reasonable durability.” The term “gold plated” is permissible if the plating is not less than 10 karat fineness with a minimum thickness that is equivalent to 0.5 microns of fine gold.¹ The proposed new language of § 23.3 would prohibit the use of the term “gold plated” unless the gold or gold alloy is of not less than 22 karat fineness with a thickness of at least 0.381 microns.

The opinions and research provided at the public roundtable do not provide evidence that supports the proposed change to the “safe harbor” for “reasonable durability;” in fact, as explained below, the data corroborates the current standards as being able to meet fully the consumer’s expectations.

Both the Jewelry Vigilance Committee and Sterling/Richline comments claimed these proposed changes were needed because coated products “sell at high prices not ‘justified’ by the insubstantial amounts of precious metals they contain” or that “any thickness of 10 karat electrolytic plating has only a fraction of the “intrinsic value” of a 22 karat plating of the same thickness.” These opinions are irrelevant as the Guides are intended to help marketers avoid deception and as noted above are not intended to establish intrinsic or perceived value. They overlook that there are a multitude of factors that contribute to jewelry value.

¹ Footnote 4 to that section provides the following example to clarify the equivalency allowance for different gold karat alloys: “A product containing 1 micron of 12 karat gold is equivalent to ½ micron of 24 karat gold.”

Three reasons that some products are perceived as having prices not “justified by” lesser amounts of precious metals are: a) brand; b) the designs of the products; and c) the fact that the products are associated with other brands such as movie studios, sports teams or named designers. Such associated products carry a hefty license fee which must inherently be incorporated in the price. Although purchasers of these types of products may consider the fact that the items are gold plated for their color, they are not primarily buying them because of their precious metal content but because of their design or licensed property association. As long as the consumer is getting a product that has plating of a sufficient thickness and karat fineness as to be durable, and that is accurately represented (that is, properly described as *e.g.*, 12K gold plate), it is not up to the Commission to take away buying choices from the consumer.

One commenter also argued that the change is needed as “the equivalent language is confusing for consumers and manufacturers because of the calculation required” and that “prices have spurred a proliferation of products coated with precious metal.” Again, both arguments are irrelevant. It is not the purpose of the Guides to teach industry members or consumers math, determine what products marketers are allowed to bring to market or to limit consumer choices – the purpose of the Guides is to help marketers avoid deceptive practices. To have the FTC influence the development of a market economy (provided all of the elements are clearly disclosed) is inappropriately meddling with a vibrant market.

Thus, a change to the current “safe harbor” and equivalent language would only be justified if solid evidence were provided to show that the current standard misleads reasonable consumers. No such evidence has been provided.

The fine gold plating thickness of 0.175 micron that was recommended as being able to meet consumer expectations “because they provided acceptable wear characteristics when subjected to normal wear conditions” is the same as the current standard assigned to the terms “Electroplate” and “Electroplated.” There was no evidence provided to support the assumption that the equivalent plating allowance is deceptive and does not meet the requirement for “reasonable durability.” As stated on page 38 of the *Statement of Basis and Purpose*: “there is no evidence that the Commission’s guidance has been ineffective at preventing consumer deception, *i.e.* that consumers are not getting what they expect when they purchase products with a surface application of precious metal.”

In reality, the durability of a product plated with a lower karat gold plating would maintain its color and finish longer than a higher karat coating due to the fact that the lower karat gold plating is an alloy containing other metals such as copper or zinc which create a harder coating than pure gold. This fact is commonly understood in the industry.

Perhaps, with the equivalency allowance in the current Guides, there is a possibility that consumers currently are not provided with enough information to allow a fully informed decision. Assuming that is the case, our clients recommend the following changes:

- i) consolidate the usage of the terms “Gold-Plate, Gold-Plated, Gold-Electroplate and Gold-Electroplated;”

- ii) retain the current standards in § 23.3(4) allowing a 10 karat minimum gold fineness and equivalency allowance for the plating thickness of 0.175 microns of fine gold; and
- iii) add the additional requirement that marketers follow the same guidelines for coated products that are established for solid gold – that is to require a statement of the karat fineness – (for example, “24k Gold Plated” or “10k Gold Plated”).

This revision would provide the greatest benefit to both members of the jewelry trade and consumers. Manufacturers would continue to have the full range of plating options that are available today and consumers would be better able to understand what they are purchasing.

As an alternative, if the Commission believes that an absolute mandate of karat fineness statement is too restrictive on businesses, those who would prefer not to include a statement of karat fineness could instead be bound to the proposed revised guide. In this way, consumers would have the most choice and would not be misled.

Thus, our clients propose two alternatives to proposed Section 23.3 (c)(3) (with changes to the existing Guides shown in bold and underlined, below):

(3) Use of the term “Gold Plate,” “Gold Plated,” “Gold Electroplate” or “Gold Electroplated,” or any abbreviation to describe all or part of an industry product provided that such product or part contains a surface-plating of gold alloy, applied by any process, which is of such thickness and extent of surface coverage that reasonable durability is assured and provided that the karat fineness of the gold used is accurately and conspicuously disclosed. An industry product or part thereof on which there has been affixed on all significant surfaces by an electrolytic process an electroplating of gold or gold alloy of not less than 10 karats with the minimum thickness which is equivalent 0.175 microns fine gold may be marked or described as “Gold Plate”, “Gold Plated,” “Gold Electroplate” or “Gold Electroplated,” or abbreviated, as, for example, “G.E.P”, provided that the promotion accurately and conspicuously states the applicable karat fineness, for example, “14k Gold Plated” or “10k Gold Plated.” Industry products containing gold with a lower karat than fine gold may have a concomitant increase in thickness for consistent durability. For example that “A product containing 0.35 microns of 12 karat gold is equivalent to 0.175 micron of 24 karat gold.” When the electroplating meets the minimum fineness but not the minimum thickness specified above, the marking or description may be “Gold Flashed” or “Gold Washed.” An industry product or part thereof on which there has been affixed on all significant surfaces by an electrolytic process an electroplating of gold or gold alloy of not less than 22karats that is 100 millionths of an inch (approximately 2.54 microns) may be marked or described as “Heavy Gold Plate”, “Heavy Gold Plated”, “Heavy Gold Electroplate” or “Heavy Gold Electroplated.” When electroplating qualify for the term “Gold Electroplate”(or

“Gold Electroplated”), or the term “Heavy Gold Electroplate” (or “Heavy Gold Electroplated”), and have been applied by use of a particular kind of electrolytic process, the marking may be accompanied by identification of the process used, as for example, “Gold Electroplated (X Process)” or “Heavy Gold Electroplated (Y Process).” The exact thickness of the plate may be marked on the item, if it is immediately followed by a designation of the karat fineness of the plating, which is of equal conspicuousness as the term used (as, for example, “0.381 microns 22 K gold electroplate” for an item plated with 0.381 microns of 22 karat gold or “2.54 u 22 K. heavy gold electroplated” for an item plated with 2.54 microns of 22 karat gold).

Or, in the alternative:

(3) Use of the term “Gold Plate,” “Gold Plated,” “Gold Electroplate” or “Gold Electroplated,” or any abbreviation to describe all or part of an industry product provided that such product or part contains a surface-plating of gold alloy, applied by any process, which is of such thickness and extent of surface coverage that reasonable durability is assured and provided that the karat fineness of the gold used is accurately and conspicuously disclosed. An industry product or part thereof on which there has been affixed on all significant surfaces by an electrolytic process an electroplating of gold or gold alloy of not less than 10 karats with the minimum thickness that is equivalent to at least 0.175 microns fine gold may be marked or described as “Gold Plate”, “Gold Plated,” “Gold Electroplate” or “Gold Electroplated,” or abbreviated, as, for example, “G.E.P”, provided that the promotion accurately and conspicuously states the applicable karat fineness, for example, “14k Gold Plated” or “10k Gold Plated.” Industry products containing gold plating of less than 22 karat fineness may have concomitant increase in thickness for consistent durability. For example a product containing 0.35 microns of 12 karat gold is equivalent to 0.175 microns of fine gold. When the electroplating meets the minimum fineness but not the minimum thickness specified above, the marking or description may be “Gold Flashed” or “Gold Washed.” An industry product or part thereof on which there has been affixed on all significant surfaces by an electrolytic process an electroplating of gold or gold alloy of not less than 22 karats that is 100 millionths of an inch (approximately 2.54 microns) may be marked or described as “Heavy Gold Plate”, “Heavy Gold Plated”, “Heavy Gold Electroplate” or “Heavy Gold Electroplated.” When electroplating qualify for the term “Gold Electroplate”(or “Gold Electroplated”), or the term “Heavy Gold Electroplate” (or “Heavy Gold Electroplated”), and have been applied by use of a particular kind of electrolytic process, the marking may be accompanied by identification of the process used, as for example, “Gold Electroplated (X Process)” or “Heavy Gold Electroplated (Y Process).” The exact thickness of the plate may be marked on the item, if it is immediately followed by a designation of the karat fineness of the plating, which is of equal

conspicuousness as the term used (as, for example, “0.381 microns 22 K gold electroplate” for an item plated with 0.381 microns of 22 karat gold or “2.54 u 22 K. heavy gold electroplated” for an item plated with 2.54 microns of 22 karat gold). **Should the seller of an industry product or part thereof on which there has been affixed on all significant surfaces by an electrolytic process an electroplating of gold or gold alloy of not less than 22 karats that is 15 millionths of an inch (approximately 0.381 microns) not wish to disclose the karat fineness of the gold used, such product may be marked or described by such seller as “Gold Plate,” “Gold Plated,” “Gold Electroplate” or “Gold Electroplated,” or abbreviated, as, for example, “G.E.P.”**

II. Disclosure of surface-layer of application of rhodium

Section 23.7 of the Proposed Guides adds the provision:

Disclosure of surface-layer of application of rhodium.

It is unfair or deceptive to fail to disclose a surface-layer application of rhodium on products marked or described as precious metal.

The *Statement of Basis and Purpose* posits that it is “now common to plate rhodium over another precious metal to enhance a product’s white color, especially for white gold and sterling silver.” This statement is incorrect as rhodium is not plated over sterling silver to enhance its color – if a sterling silver product has rhodium plating, the purpose is to delay tarnishing. Rhodium has essentially the same color as non-tarnished silver. In the case of rhodium plating over other precious metals such as white gold, when the plating wears off, there will be a change in color (e.g., white gold has a yellowish tint). However in the case of an underlayment of sterling silver, when the plating wears off, there will be no immediate change in color, and the color of the then-non-plated silver will be no different than simple sterling silver which will eventually have to be polished to restore the silver color. As contrasted to the white gold example, there is no effort to “hide” the underlying color – just to delay the tarnishing process.

In the sterling silver situation, our clients see no reason why rhodium plating is NOT a benefit to the consumer. It is in no way deceptive. A consumer who purchased a piece of jewelry of sterling silver or with a sterling silver finish will have an item that, when exposed to air, will immediately begin to tarnish. Yet, a consumer who purchased a rhodium plating piece of jewelry of sterling silver or with a sterling silver finish will have an item that, when exposed to air, will not noticeably tarnish until the finish wears off, which could be months or years depending on the type (ring, pendant, bracelet, pin) and use of the jewelry. With rhodium plating, the consumer has a product that has an inherent benefit over the non-plated item -- delayed tarnishing.

Please see the below chart for a comparison of expectations and benefits.

<p>TYPE OF METAL OR FINISH</p>	<p>Solid sterling silver or sterling silver finish.</p>	<p>Rhodium plating over solid sterling silver or sterling silver finish.</p>
<p>CHARACTERISTICS OF THE PRODUCT</p>	<p>When delivered, typically exhibits shiny silver finish (depending on whether it was left to tarnish). After unpacking and exposure to air, product will immediately begin to tarnish. Over time, tarnishing will get worse, requiring polishing to exhibit shiny silver finish.</p>	<p>When delivered, routinely exhibits shiny silver finish (because of rhodium plating). After unpacking and exposure to air, product will not immediately begin to tarnish. Over time, plating will eventually wear away, and tarnishing will begin. Then tarnishing will begin to get worse after the plating wears away; after that time requiring polishing to exhibit shiny silver finish.</p>
<p>MINIMUM EXPECTATION OF THE CONSUMER</p>	<p>Solid sterling silver or sterling silver finishes immediately begin to tarnish.</p>	<p>Solid sterling silver or sterling silver finishes immediately begin to tarnish.</p>
<p>ACTUAL PERFORMANCE OF THE PRODUCT</p>	<p>Product adheres to expectation of the consumer.</p>	<p>Product exceeds expectation of the consumer for two reasons: 1) item routinely exhibits shiny silver finish on delivery, and 2) item retains its shiny silver finish (for months or years) longer than non-plated silver.</p>

However, our clients understand the Commission’s point as it relates to rhodium plating over a metal that is of a different color than rhodium. Thus, we propose that § 23.7 be modified to read as follows (proposed revision in bold and underlined below):

§ 23.7 Disclosure of surface-layer of application of rhodium.

It is unfair or deceptive to fail to disclose a surface-layer application of rhodium on products marked or described as precious metal, **where the rhodium application is applied to a precious metal that has a materially different color than rhodium.**

III. Misrepresentation of Varietal Names

The FTC has proposed to add a new section (§ 23.27) to the Guides to address the use of varietal names with the concern that certain terms are being used to “exploit consumers’ lack of knowledge of a particular stone’s value;” data from a Harris study was provided to support this assumption. Here again, our clients believe that the Commission is over-reacting in an attempt to protect consumers, with the end result that they will be even more confused.

In the gem industry, it is not an uncommon practice that coined names have come to delineate products with more complex and obscure scientific names. For example, according to the International Colored Gemstone Association, in the 1960’s Tiffany & Co coined the name Tanzanite to describe blue zoisite because the scientific name was unappealing and the pronunciation is similar to the word “suicide.” Another example would be use of the name “Morganite.” In 1911 Tiffany & Co renamed the gemstone “pink beryl” in honor of millionaire banker and mineral collector John Pierpont Morgan.

In the instant case the Commission’s proposed changes to the Guides supplies two specific examples of terms that it believes are misleading to consumers: “Green Amethyst” and “Yellow Emerald.” The proposed Guides suggest adding a new section as follows:

§ 23.27 Misrepresentation as to varietal name.

- (a) It is unfair or deceptive to mark or describe an industry product with the incorrect varietal name.
- (b) The following are examples of marking or descriptions that may be misleading:
 - (1) Use of the term “yellow emerald” to describe golden beryl or heliodor.
 - (2) Use of the term “green amethyst” to describe prasiolite.

It seems that in the case of “yellow emerald,” the Commission is concerned that consumers might confuse the stone as being as valuable as something simply called an “emerald.” In the case of “green amethyst,” the Commission is concerned that consumers might confuse the stone as being as valuable as something simply called an “amethyst.” In fact the use of the color designations is a clear indication to consumers that the items are not the same as the gems that have no color designations. Moreover, should consumers want more information, the definitions of “yellow emerald,” “green amethyst,” “emerald” and “amethyst” can easily be found on the internet. Some examples are:

“Emerald:”

- a **bright green** precious stone consisting of a chromium-rich variety of **beryl** (Google) (emphasis added)
- a rare variety of **beryl** that is **colored green** by chromium and valued as a gem. (dictionary.com) (emphasis added)
- A **bright green** precious stone consisting of a chromium-rich variety of **beryl**. (oxforddictionaries.com) (emphasis added)

- a gemstone and a variety of the mineral **beryl** ($\text{Be}_3\text{Al}_2(\text{SiO}_3)_6$) **colored green** by trace amounts of chromium and sometimes vanadium. (wikipedia.com) (emphasis added)

“Yellow emerald:”

- Perhaps the most significant fact is the opinion of the United States Patent and Trademark Office (USPTO). On July 28, 2011, the USPTO Trademark Trial and Appeal Board (*In re American Diamond Importers of St. Clair, Inc.*) denied trademark registration for **YELLOW EMERALD for golden beryl** gemstones stating that the “mark is **merely descriptive** of applicant’s goods.” The opinion noted that the Examining Attorney concluded that “the **purchasing public has come to know golden-colored beryl gemstones as ‘yellow emeralds.’**” To support the descriptiveness refusal, the Examining Attorney submitted an article entitled “Minerals and Gemstones” from geoscience.org. The TTAB opinion continued stating “[t]he article explained that an “[e]merald is the blue-green to grass-green gem variety of beryl. The beryl family also includes aquamarine (blue), morganite (pink) and golden beryl (yellow).” (emphasis added)

The USPTO’s determination that Yellow Emerald is descriptive is a useful benchmark on which to analyze these terms and the FTC’s proposed revisions of the ordinary understanding of them.

“Amethyst:”

- a precious stone consisting of a violet or purple variety of quartz (Google)
- purple or violet quartz, used as a gem (dictionary.com)
- a violet variety of quartz often used in jewelry (wikipedia.com)
- A precious stone consisting of a violet or purple variety of quartz (oxforddictionaries.com)

“Green Amethyst:”

- In the “Gem Identification Lab Manual” written by the Gemological Institute of America, a Praseolite Quartz is noted as “sometimes described as “greened” Amethyst.”
- In addition, the term Green Amethyst is in current use by such well known designers as David Yurman and retailers such as Ross-Simons and Macy’s, therefore the term has become somewhat familiar to consumers. Both gems are in fact the same mineral species, quartz. (Per wikipedia.com prasiolite, is green-quartz or vermarine, a green form of quartz.)

In reality, the term “green amethyst” is most likely helpful to the customer since the terminology provides a frame of reference with which they are familiar.

Given that “emerald” is simply green beryl and that “amethyst” is simply purple or violet quartz, using the Commission’s logic, perhaps the use of the terms “emerald” and “amethyst” should be

prohibited and the designations green beryl and purple quartz should be required. Conversely, if the Guides restrict the usage or varietal names only to their associated color, then the commonly accepted usage of the variety "Sapphire" would only be acceptable for a blue-colored corundum. However such usage of the varietal name would be in direct conflict with the commonly accepted and well documented usage of the term "Sapphire" as described in the GIA's Lab Identification Manual where the reference to corundum is "Sapphire (designated by color)." Thus, using the proposed Guides, so the varietal name for a "yellow sapphire" should be "yellow corundum."

However, we believe that applying proposed §23.27 in this fashion would only be confusing and not serve the public good.

It is obvious, for example, in the case of "yellow emerald," (at least as opined by the TTAB) many understand the term to be descriptive of golden beryl. Perhaps the solution is to permit the use of such terms, provided that the consumer is also informed of the more scientific name of the gem. Thus, an advertisement could state something like:

This ring features a stone of "green amethyst." The beautiful hue of the green amethyst gemstone used in this ring is created by heat treating quartz, whereas amethysts are purple quartzes.

While it's certainly true that purists may object to the usage of gemstone coined names, these are the terms with which today's consumers are familiar, and it would cause a great deal of confusion in the trade and to the end consumer to add the proposed change to the Guides. Thus, our clients propose that § 23.27 be removed or be modified to read as follows:

§ 23.27 Misrepresentation as to varietal name.

(a) It is unfair or deceptive to mark or describe an industry product with the incorrect varietal name, **unless the related promotion conspicuously discloses that the product is different from a product of the varietal name.**

(b) The following are examples of marking or descriptions that may be misleading:

- (1) Use of the term "yellow emerald" to describe golden beryl or heliodor.
- (2) Use of the term "green amethyst" to describe prasiolite.

(c) The following is an example of such a disclosure: "The beautiful hue of the green amethyst gemstone used in this ring is created by heat treating quartz, whereas amethysts are purple quartzes."

We ask that the Commission incorporate our suggested changes to the new Guides.

Sincerely,

Mary Ellen Callahan