



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Enforcement
Bureau of Consumer Protection

August 7, 2012

VIA FEDERAL EXPRESS

C.J. Erickson
Cowan, Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, NY 10036

Re: Advisory Opinion Request of MJJ Brilliant Jewelers, Inc.

Dear Mr. Erickson:

This letter responds to MJJ Brilliant Jewelers, Inc. ("MJJ" or "Company")'s request for a staff opinion concerning MJJ's proposed marking and advertising of jewelry constructed of an alloy comprising gold, silver, palladium, and non-precious metals.¹

You state that MJJ has developed a proprietary alloy formulation composed of % gold (periodic element Au), 21% silver (periodic element Ag), % palladium (periodic element Pa), and % base metals, which MJJ will use in jewelry merchandise ("Jewelry Alloy").² Acknowledging the provisions in the Jewelry Guides³ that address misrepresentations regarding the content of gold or gold alloy in an industry product, you ask whether your client's anticipated use of the term "gold" in its advertising and marketing materials to identify the specific composition of the Jewelry Alloy would be "proper" under Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §45(a). Specifically, you request guidance on the acceptability of each of the following: (1) using the phrase: "consisting of a proprietary alloy of gold, silver, and platinum;" (2) providing a link to a third-party assay report that identifies the precious metal content of the finished article; (3) identifying the specific percentage content of all precious metals in the finished article; (4) stamping merchandise with the Company's " " trademark. You did not provide any specific advertising or marketing materials for

¹ Your letter requests "that the Commission of [sic] FTC Staff issue an advisory opinion," which could be interpreted as a request for a Commission advisory opinion. You also indicate, however, that your request is in accordance with Section 1.3(c) of the Commission Rules of Practice, by which FTC staff may render an opinion without prejudice to the right of the Commission to rescind the advice at a later date and, as appropriate, to commence an enforcement action. 16 C.F.R. §1.3(c).

² Your letter also states that the MJJ alloy is "identified as

³ The Federal Trade Commission's Guides for the Jewelry, Precious Metals, and Pewter Industries ("Jewelry Guides" or "Guides"), 16 C.F.R. Part 23.

our consideration, nor did you make clear whether MJJ intends to use any of the proposed marketing claims in combination.

As you are aware, the Jewelry Guides are administrative interpretations of Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices. The Guides state, in pertinent part, that “[i]t is unfair or deceptive to misrepresent the presence of gold or gold alloy in an industry product, or the quantity or karat fineness of gold or gold alloy contained in the product. . . .” 16 C.F.R. §23.4(a). The Guides also provide that it may be misleading to use the word “gold” or any abbreviation, or a quality mark implying gold content (*e.g.*, 9 karat), “to describe all or part of an industry product that is composed throughout of an alloy of gold of less than 10 karat fineness.” 16 C.F.R. §23.4(b)(9). In addition, the Jewelry Guides provide that “[i]t is unfair or deceptive to mark, describe, or otherwise represent all or part of an industry product as silver, . . . unless it is at least 925/1000ths pure silver.” 16 C.F.R. §23.6(b). Additionally, the Jewelry Guides provide that “[i]t is unfair or deceptive to use the words ‘platinum, . . . ‘palladium,’ . . . or any abbreviation to mark or describe all or part of an industry product if such marking or description misrepresents the product’s true composition,” and further provide that it may be misleading to use the word “platinum” or any abbreviation “to mark or describe any product that is not composed throughout of at least 500 parts per thousand pure Platinum.” 16 C.F.R. §§23.7(a), 23.7(b)(3).

You concede that MJJ “cannot stamp or market its gold alloy jewelry with the traditional karat marking[. . .] as the alloy is admittedly less than 10 karat fineness.” Indeed, given your representation that the Jewelry Alloy is comprised of % gold by weight, the gold content of the product more closely approximates 6 karats, which falls short of the 10 karat minimum fineness set forth in the Guides. Likewise, your description of the Jewelry Alloy indicates that it contains % silver, which is below the 92.5% level stated in the Guides. The Jewelry Alloy also includes % palladium, but does not contain any pure platinum.

As part of the 1996 review, the Commission considered whether to amend the Guides to permit gold alloys containing less than 10 karats of gold (*i.e.*, less than 41.6% gold) to be marketed as containing gold. 61 Fed. Register 27185-86 (May 30, 1996). In addressing this issue, the Commission noted that it had previously sought comments in 1977 regarding a proposal to lower the 10 karat minimum threshold to permit sellers to market gold of less than 10 karats if the quality was accurately disclosed, and also to lower the 92.5% level for silver. Based on the record and comments it received in response to the 1977 proposal, the Commission retained the 10 karat minimum fineness which appears in Section 23.4 of the Jewelry Guides, and the Commission also retained the 92.5% level for silver which appears in Section 23.6. *Id.* at 27185 n.99.

The Commission included the minimum of 500 parts per thousand pure platinum for platinum markings pursuant to its 1997 revisions to the Guides. 62 Fed. Register 16673 (Apr. 8, 1997). In developing the 1997 guidance, the Commission indicated that referring to an article containing less than 500 parts per thousand pure platinum as “platinum,” without qualification, may be deceptive. 61 Fed. Register 27225 (May 30, 1996). When revising the platinum section again in 2010, the Commission noted that it had previously found that deception would likely

result if marketers were to describe platinum/base metal alloys as "platinum" without disclosing information regarding their composition and attributes. 75 Fed. Register 81449 (Dec. 28, 2010).

In light of the foregoing, it is our opinion that MJJ's proposed use of the phrase "consisting of a proprietary alloy of gold, silver, and platinum" would contravene the plain language of the current Jewelry Guides. As discussed above, the Guides advise against using the word "gold" or any quality mark implying gold content on any product of less than 10 karat fineness. 16 C.F.R. §23.4(b)(9). The Guides also advise against using the word "silver" to describe all or part of an industry product unless it meets the 92.5% threshold, 16 C.F.R. §23.6(b), and advise against using the word "platinum" to describe all or part of any product that is not composed throughout of at least 500 parts per thousand pure platinum. 16 C.F.R. §23.7(b)(3). Furthermore, using the phrase "consisting of a proprietary alloy of gold, silver, and platinum" may misleadingly imply that the Jewelry Alloy is comprised solely of those three precious metals (gold, silver, platinum). Therefore, this claim would likely run afoul of Section 5 of the FTC Act, which prohibits deceptive acts or practices.

The Jewelry Guides do not explicitly address the use of marketing claims that identify the total precious metal content of a jewelry product. Thus, in our opinion, the Guides would not prohibit MJJ from stamping the Jewelry Alloy merchandise with its " " trademark.

Your letter does not indicate whether MJJ's proposed "identification of the specific percentage content of all precious metals" would specifically describe the Jewelry Alloy as containing gold, silver, or platinum, nor did you attach a copy of the "representative" assay report that MJJ anticipates using to market the product.⁴ On that basis, we cannot provide an opinion regarding those proposed practices.

Marketing of the Jewelry Alloy would nevertheless be guided by the provisions cited above that prohibit misrepresentations regarding gold, silver, and platinum content, as well as the general prohibition against deception contained in Section 23.1 of the Jewelry Guides. MJJ's marketing would also be subject to Section 5 of the FTC Act. Your letter does not make clear whether the Company's marketing and advertising materials would adequately disclose the Jewelry Alloy's full composition and attributes, such as by giving consumers complete information regarding all components of the product (including disclosure of the fact that % of the alloy consists of non-precious base metals). Moreover, to the extent MJJ anticipates providing qualifications or disclosures regarding the content of its Jewelry Alloy, any such disclosures or qualifications must be sufficiently clear and prominent, and proximate to the claim, to prevent deception. In evaluating whether a representation is misleading, the Commission examines not only the claim itself, but the net impression of the entire advertisement. Finally, to the extent MJJ provides disclosures through a hyperlink reference to a third-party assay report, the information in such report must be truthful and non-misleading.

⁴ We understand that an assay usually reflects a test made to determine the quantity of precious metal in a product compared to the weight of the whole product.

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In our opinion, a literal reading of the provisions in the Guides that discuss misuse of the words "gold," "silver," and "platinum" does not address how to describe the content of an alloy that contains those precious metals in amounts below the minimum thresholds. Pursuant to the Commission's systematic review process for all of its rules and industry guides, the Commission recently published a Federal Register notice soliciting comment on all aspects of the Jewelry Guides, including disclosures that relate to the content of precious metal alloys. 77 Fed. Register 39201 (July 2, 2012). We encourage MJJ to submit comments and supporting consumer perception evidence on this and any other issue relating to the Guides before the deadline of August 27, 2012.

This letter sets out the views of the staff of the Bureau of Consumer Protection, as authorized by the Commission's Rules of Practice. Those views are based on information you provided to Commission staff. Staff has not engaged in independent factual investigation regarding the proposed marketing and product stamping. In accordance with Section 1.3(c) of the Commission Rules of Practice, 16 C.F.R. § 1.3(c), this is a staff opinion only and has not been reviewed or approved by the Commission or by any individual Commissioner, and is given without prejudice to the right of the Commission to rescind the advice at a later date and, as appropriate, to commence an enforcement action. In accordance with Section 1.4 of the Commission's Rules of Practice, 16 C.F.R. § 1.4, your request for advice and this response will be placed on the public record.

Thank you for contacting the Federal Trade Commission. If you have any questions, please do not hesitate to contact me at 202-326-2272.

Sincerely,



Reenah L. Kim
Staff Attorney