FEDERAL TRADE COMMISSION

16 CFR Part 23

Guides for the Jewelry, Precious Metals and Pewter Industries

AGENCY: Federal Trade Commission.

ACTION: Final guides.

SUMMARY: The Federal Trade Commission (Commission) announces that it is revising §§ 23.13 and 23.22 of the Guides for the Jewelry, Precious Metals and Pewter Industries (Jewelry Guides or Guides), 16 CFR Part 23. The Commission has combined § 23.13, which addresses the disclosure of diamond treatments, with § 23.22, which addresses treatments of other gemstones. The Commission also has revised these sections to provide for disclosure of any treatment to gemstones that significantly affects the value of the gemstone, which would include laser-drilling of diamonds.

EFFECTIVE DATE: April 10, 2001.

ADDRESSES: Requests for copies of this document should be sent to Public Reference Branch, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580. Copies also are available on the Commission's website at <www.ftc.gov>.

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SUPPLEMENTARY INFORMATION:

I. Introduction

The Commission announces that it is revising §§ 23.13 and 23.22 of its Guides for the Jewelry, Precious Metals, and Pewter Industries, 16 CFR Part 23 (Jewelry Guides or Guides). The Jewelry Guides address claims made about precious metals, diamonds, gemstones, and pearl products.[1] The Guides explain how to describe these products truthfully and non-deceptively and how to avoid unfair or deceptive practices. Sections 23.13 and 23.22 of the Guides address the disclosure of certain treatments to diamonds and other gemstones that are performed to improve their beauty or durability. Some treatments are not permanent because their effects fade over time. For example, gemstones sometimes are treated with a colorless oil that improves the color of the stone and helps to mask certain imperfections. Other treated gemstones require special care to retain the benefit of the treatment. For example, a stone that is fracture-filled (*i.e.,* injected with plastic or glass to hide cracks and improve its appearance) cannot be cleaned with certain types of jewelry cleaners, because the cleaner could adversely affect the treatment. In addition, re-cutting or re-setting a fracture-filled stone could damage the treatment.[2] Other gemstone treatments are permanent and do not create special care requirements, but the treated gemstone is not as valuable as a similar untreated stone.

On June 8, 1999, the Commission solicited comment on a proposal to revise § 23.13 of the Guides to require disclosure of laser-drilling of diamonds.[3] The Commission also solicited comment on a proposal to revise § 23.22 of the Guides, which addresses other gemstone treatments, to provide for the disclosure of treatments similar to laser-drilling—those that are permanent and do not create special care requirements for the stone, but significantly affect the value of the stone. The Commission received 40 comments.[4] After reviewing these comments, the Commission has decided to revise the Guides to provide for disclosure of permanent gemstone treatments that significantly affect the value of the gemstone, such as laser-drilling.

II. Background

On December 9, 1998, two jewelry trade associations, the Jewelers Vigilance Committee (JVC), a trade association promoting ethical jewelry sales practices, and the Diamond Manufacturers and Importers Association of America (DMIA), jointly petitioned the Commission to revise § 23.13 of the Jewelry Guides to add laser drilling to the list of diamond treatments that should be disclosed.[5] Laser drilling involves directing a laser beam at an inclusion and forcing acid through the resulting tunnel, thereby removing the inclusion or rendering it invisible to the naked eye. Thus, the diamond's appearance is improved.

In a 1996 review of the Guides, the Commission determined, based on the record before it, that the failure to disclose laser-drilling was not unfair or deceptive. The evidence presented in the comments to the Commission indicated that laser-drilling of diamonds was ''a common practice and not an extraordinary process.'' [6] Moreover, the evidence demonstrated that, while laser-drilling produces a small surface opening on a diamond, ''the majority of diamonds sold in the U.S. have similar surface imperfections.'' [7] Surface imperfections are to be expected in diamonds, except in diamonds described as flawless. The record also reflected that disclosing laser-drilling in each advertisement or promotional description could be costly and the additional advertising costs could be passed on to consumers in the form of higher prices.[8] At that time, there was a conflict in the industry regarding the need for and the appropriateness of disclosure. Therefore, the Commission decided not to amend § 23.13 of the Guides to require disclosure.

The JVC petition asks the Commission to reconsider its decision based on the following factors: (1) There is now widespread industry support for disclosure; (2) the amendment would promote industry disclosure and self-regulation; (3) disclosure would impose few costs on retailers, and therefore, no increased costs to consumers; (4) technological advances make it increasingly difficult for consumers to

[1] The Commission issues industry guides to provide guidance for the public to conform with legal requirements. Industry guides are administrative interpretations of the laws the Commission administers. Industry guides explain how to describe products truthfully and non-deceptively and identify practices the Commission considers unfair or deceptive.

[2] The American Gem Trade Association (AGTA) publishes a manual that contains a comprehensive listing of gemstone treatments and information regarding the permanence of the treatment and special care requirements. AGTA–2 (022A).

[3] 64 FR 30448 (June 8, 1999).

[4] In the remainder of this FRN, the comments are cited to by an abbreviation of the comment name and the comment number. Attached to this FRN as Appendix A is a list of the comment name, abbreviation and comment number used to identify each commenter. The comments numbered 1 to 21 were received in response to the Commission's first request for comment dated June 8, 1999. 64 FR 30448. The comments numbered 1A to 22A were received after the Commission extended the deadline to submit comments. 64 FR 37051 (July 9, 1999). Three comments were submitted twice, by US mail and by electronic mail. These comments are listed once and are referred to in this FRN by the number of the comment that was received first.

[5] Fifteen trade associations joined the JVC and DMIA petition: World Federation of Diamond Bourses; International Diamond Manufacturers Association; Diamond Promotion Services; Diamond Dealers Club of New York; Gemological Institute of America; International Society of Appraisers; Jewelers of America; American Gemstone Society; American Gem Society; United States Carat Club; International Confederation of Jewelry, Silverware, Diamonds, Pearls and Stones; American Gemstone Trade Association; Manufacturing Jewelers and Suppliers of America; International Standards Organization; and Diamond High Council. The petition is on the public record and copies are available by contacting the Public Reference Branch, Room 130, Federal Trade Commission, Washington, DC 20580. The petition also has been posted on the Commission's website at <www.ftc.gov>. For the remainder of this **Federal Register** Notice, the petition will be referred to as the JVC petition.

[6] 61 FR 27177, 27197 (May 30, 1996).

[7] Id. at 27196.

[8] Id. at 27197 n.305–06.

detect laser-drilling; (5) consumers would not necessarily learn about laser-drilling through grading reports because most diamonds sold in the US are small stones that typically are not accompanied by such a report; (6) consumers may suffer economic injury by purchasing laser-drilled diamonds without disclosure, because such stones are worth less than untreated diamonds; and, (7) laser drilling is no different than other permanent artificial processes that affect the value of products that already are required to be disclosed (e.g., cultured pearls must be identified as ''cultured'' because they are created by humans inserting an irritant into an oyster's shell and are worth less than natural pearls).

III. Laser-Drilling of Diamonds

A. Request for Comment

The Commission tentatively concluded that the JVC petition demonstrated, contrary to the record before the Commission in 1996, that the failure to disclose laser-drilling is an unfair or deceptive trade practice. Therefore, in June 1999 the Commission solicited comment on a proposal to include laser-drilling as a treatment that should be disclosed.[9] The FRN posed several questions regarding this proposed revision. Question 1 asked whether it was currently a prevalent practice in the industry to disclose laser-drilling at all levels of the transaction up to the sale to the consumer. Question 2 asked: ''Would a provision in the Jewelry Guides to disclose laser-drilling to consumers inhibit advertising or create additional costs for retailers that could be passed on to consumers in the form of significantly higher prices?'' Finally, Question 3 asked: ''Is there a disparity in value between a laser-drilled diamond and an untreated diamond of the same clarity rating?'

B. Summary of the Comments

The comments, except for one, support revising the Guides to provide for disclosure of laser-drilling. The comments responding to Question 1, however, indicate that there is not an industry consensus on whether disclosure currently is the prevalent practice. Two comments state that disclosure is the industry practice.[10] One comment states that disclosure was the industry practice until the FTC revised the Jewelry Guides in 1996.[11] Because the Jewelry Guides, as revised in 1996, did not provide for disclosure of laser-drilling, this comment asserts that some industry members stopped disclosing the treatment. Two comments state simply that it is not an industry practice to disclose.[12] One comment explains that ethical sellers disclose but unethical ones do not.[13] With respect to Question 2 of the FRN, the comments are unanimous that disclosure will not result in additional costs.[14] Finally, the comments, responding to Question 3 of the FRN, are also unanimous that a laser-drilled diamond is worth less than a similar untreated diamond.[15] As one comment explains, a laser-drilled stone is not as rare as an untreated stone and therefore is less costly.[16]

C. Analysis of the Comments

The comments establish that a laser-drilled stone is worth less than an untreated stone of the same clarity rating. Diamonds are graded on clarity on a scale running from Flawless (F) to Included (I), reflecting the number and size of inclusions appearing in the stone.[17] Laser-drilling can elevate a lesser quality diamond to a higher grade on standard clarity rating scales, increasing the stone's value. The JVC petition stated that the price differential between a diamond that has a natural black inclusion and one where laser drilling has removed the inclusion could be as much as twenty-five percent. Even more important, however, is the fact that the laser-drilled stone is worth less than a untreated stone of the equivalent clarity rating.[18]

For example, if a diamond has a clarity rating of SI1 and has a natural black inclusion, the inclusion could be removed by laser-drilling, improving the clarity of the stone to VS2. The stone would now be worth more than it was as a non-laser-drilled stone with a clarity rating of SI1. At the same time, the laser-drilled stone with a clarity rating of VS2 is worth less than a non-laser-drilled stone with a clarity rating of VS2. Laser-drilling produces a small surface opening on a diamond. These surface imperfections are similar to natural surface imperfections that are expected in diamonds unless they are described as flawless. Industry buyers and consumers nevertheless have a preference for diamonds that contain only naturally occurring imperfections.[19] Accordingly, diamond appraisers and consumers place a lower value on laser-drilled stones in comparison to non-laser-drilled stones of the same clarity.[20]

In determining whether a practice is deceptive, the Commission considers whether there is a representation or omission that is likely to mislead consumers acting reasonably under the circumstances.[21] The representation or omission must be material. Previously, the Commission had no basis on which to conclude that there were any significant differences between naturally occurring and man-made inclusions. New evidence, provided in response to the FRN suggests, however, that consumers and appraisers place a lower value on laser-drilled diamonds than on comparable diamonds with naturally occurring inclusions. Because laser-drilled diamonds are worth less than comparable non-drilled diamonds, failure to disclose laser-drilling may lead consumers to believe a laser-drilled stone is as valuable as an untreated stone of the same clarity rating.[22] In addition, not providing for disclosure inadvertently may have created an avenue for unscrupulous marketers to overcharge consumers for laser-drilled stones. Consumers are at a disadvantage due to the imbalance of information that currently exists regarding laser-drilling of diamonds. As a result, unscrupulous marketers can charge consumers the same price for a laser-drilled stone with, *e.g.,* a VS2 clarity rating, that they would charge for a untreated stone with

[9] 64 FR 30448.

[10] JVC (006A); AGTA–1 (015A).

[11] Matlins (001A).

[12] NAJA (016); Zale (007A).

[13] ISA (014).

[14] Matlins (001A); ISA (014); NAJA (016); CJAO (005A); JVC–1 (006A); Zale (007A); AGTA–1 (015A).

[15] Adamas (005); Sherman (007); Indenbaum (009); ISA (014); NAJA (016); Gaenzle (017); Matlins (001A); Rapaport (002A); Green (003A); Kapoor (004A); CJAO (005A); JVC–1 (006A); Zale (007A); Dua (013A); AGTA–1 (015A).

[16] Matlins (001A); see also NAJA (016) (''laser-drilled diamonds are less costly than similar clarity, non-drilled diamonds''); ISA (014) (''laser-drilled diamonds are generally less expensive than similar non-treated stones'').

[17] The ratings in between, from highest to lowest, are: Internally Flawless (IF); Very, Very Small Inclusions 1 (VVS1); Very, Very Small Inclusions 2 (VVS2); Very Small Inclusions 1 (VS1); Very Small Inclusions 2 (VS2); Small Inclusions 1 (SI1); and Small Inclusions 2 (SI2).

[18] JVC Petition, at 6–8.

[19] Matlins (01A); NAJA (011); ISA (014); AGTA–2 (022A).

[20] See ISA (014) (International Society of Appraisers comment stating that ''laser-drilled diamonds are generally less expensive than similar non-treated stones''); accord NAJA (011) (National Association of Jewelry Appraisers); see also Gaenzle (017) (consumer comment attaching a petition signed by 500 consumers requesting revision of the Jewelry Guides to provide for disclosure of laser-drilling of diamonds because consumers are being deceived as to the value of laser-drilled diamonds).

[21] Deception Policy Statement, Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984), Letter dated Oct. 14, 1983, from the Commission to Chairman John D. Dingell.

[22] See Gaenzle (017) (consumer comment attaching a petition signed by 500 consumers requesting revision of the Jewelry Guides to provide for disclosure of laser-drilling of diamonds because consumers are being deceived as to the value of laser-drilled diamonds).

a VS2 clarity rating, even though the laser-drilled stone is worth less than the untreated stone.[23]

Because the record indicates that failure to disclose laser-drilling may mislead consumers as to the value of the diamond, the Commission has concluded that failure to disclose laser-drilling is deceptive and that the benefits to consumers of requiring sellers to disclose laser-drilling outweigh any potential costs.[24] Accordingly, the Commission is revising the Jewelry Guides to require laser-drilling of diamonds to be disclosed. The manner in which the Guides require disclosure of this treatment is discussed in Part V below.

IV. Other Permanent Gemstone Treatments

A. Request for Comment

The Commission's FRN also sought comment regarding proposed changes to § 23.22 of the Guides, which addresses treatments to gemstones generally. This section states that it is unfair or deceptive to fail to disclose that a gemstone has been treated in any manner that is not permanent or that creates special care requirements and to fail to disclose that the treatment is not permanent, if such is the case. As explained above, some gemstone treatments are not permanent and, as a result, the color of the stone may fade or inclusions may become more visible as the treatment fades. In addition, some treated gemstones require special care. The Commission determined, during the 1996 revision of the Guides, that consumers would not expect a gemstone to change over time and should be made aware of any special care requirements necessary to preserve the product. Accordingly, § 23.22 provides for disclosure of non-permanent gemstone treatments and treatments that create special care requirements for the gemstone.

In light of the petition's evidence about laser-drilling, the Commission sought comment on whether consumers may be injured by non-disclosure of other permanent gemstone treatments that do not create special care requirements but do affect the value of the stone. For instance, sapphires are often heat treated to enhance their color. This treatment is permanent and does not create special care requirements. An untreated sapphire, however, could be considered more valuable than a heat-treated stone, and absent disclosure consumers may be deceived as to the value of the stone. Further, new technologies for treating gemstones are continually developing that might affect the value of the gemstone, similar to how laser-drilling affects the value of diamonds. Accordingly, the Commission asked whether § 23.22 of the Jewelry Guides should be revised to require disclosure of permanent treatments that do not require special care, if the treatment has a significant effect on the stone's value and a consumer, acting reasonably under the circumstances, could not ascertain that the stone has been treated.

Specifically, the FRN asked: ''Is there a disparity in value between a gemstone treated in a manner that is permanent and does not require special care and one that is not treated? How many different gemstones and gemstone treatments fall into this category?'' The FRN also asked whether industry policy provides for disclosure of permanent gemstone treatments that do not create special care requirements. Finally, the FRN asked: ''Would guidance in the Jewelry Guides calling for disclosure of permanent gemstone treatments that do not require special care inhibit advertising or create additional costs for retailers that could be passed on to consumers in the form of significantly higher prices? Would this guidance adversely impact competition in any way?''

B. Summary of the Comments

The comments state that currently it is not a widespread industry policy to disclose permanent gemstone treatments that do not create special care requirements.[25] But, the comments also contend that requiring disclosure of these treatments would not inhibit advertising or create additional costs for retailers in most instances.[26] Thus, overall, the comments support amending the Guides to provide for disclosure of permanent gemstone treatments.[27]

Eight comments discussed whether there is a disparity in value between a gemstone treated in a manner that is permanent and does not require special care and one that is not treated. All eight assert that a treated gemstone is less valuable than a untreated gemstone even if the treatment is permanent and does not create special care requirements.[28]

A number of comments also address the two proposed conditions that would trigger a disclosure: (1) The treatment has a significant effect on the stone's value; and, (2) a consumer, acting reasonably under the circumstances, could not ascertain that the stone has been treated. These proposed conditions generated significant comment, as discussed below.

C. Analysis of Comments

Based on the record and for the same reasons that the Commission is now requiring laser drilling to be disclosed, the Commission has determined that the Guides should require disclosure of permanent gemstone treatments that significantly affect a stone's value. As one comment explains ''[t]here is definitely a disparity in price between natural unenhanced gemstones, and those which are enhanced. And it does not matter whether the treatment is permanent or not, or whether special care is required * * * Treated gems are less rare than non-treated gems, and cost less.''[29] For example, blue sapphires are often heat treated to enhance their color. This treatment is permanent and the stone does not require special care. If one compared two sapphires of the same size and clarity but one obtained its rich, blue color naturally and the other from heat treatment, the treated sapphire would be worth less.[30] In fact,

[23] Although laser-drilling adds to the cost of a stone, the amount added is substantially less than the price differential between a non-lasered stone of a certain clarity rating and a stone that achieves that clarity rating as a result of laser-drilling. JVC Petition, at 6–8.

[24] As explained above, the JVC petition asserts that disclosure will not result in additional costs because it is already industry practice to disclose laser-drilling at all levels of the transaction up to the sale to the consumers. Although the comments do not agree that disclosure is currently a widespread industry practice, the industry unanimously asserts that disclosure of laser-drilling to consumers will not result in additional costs that could be passed on to them in the form of higher prices. Thus, to the extent requiring disclosure changes industry practice, the changed practice will benefit consumers. Further, the disclosure requirement does not apply to general ads; the Guides only require that disclosure be made prior to sale.

[25] The following comments state that current industry policy is not to disclose. ISA (014); NAJA (016); Gaenzle (017); Matlins (001A); CJAO (005A). The following comments recommend disclosure. JVC–1 (006A); Zale (00A); AGTA–1 (015A).

[26] ISA (014); NAJA (016); Matlins (001A); Kapoor (004A); JVC–1 (006A); Zale (007A); AGTA–1 (015A).

[27] See DMIA (002); Lange (003); Chuck (004); Adamas (005); DiamondDude (006); Shrake (013); ISA (014); JIC–1 (015); Gaenzle (017); JIC–2 (018); Miranda (020); Matlins (001A); CJAO (005A); JVC–1 (006A); Zale (007A); Bothra (008A); Baum (011A); GE–1 (014A); AGTA–1 (015A); NRF (017A); AIS (018A).

[28] Matlins (001A); Adamas (005); NAJA (016); ISA (014); CJAO (005A); JVC–1 (006A); Zale (007A); AGTA–1 (015A).

[29] Matlins (001A); see also Adamas (005) (''[t]reatments applied to gemstones significantly effect the cost and ultimate value''); NAJA (016) (''[t]here is a disparity in rarity of treated vs. natural gemstones and therefore almost always some price differential exists.'').

[30] Matlins (001A). This commenter explains, however, that untreated sapphires often do not sell

there are some retailers that specialize in untreated stones and charge a premium for these products.[31]

1. Conditions Triggering Disclosure

a. Significant Effect on Value. Although the record establishes that there is a disparity in value between treated and untreated gemstones, failure to disclose the treatment is deceptive only if the omission is material to consumers. Thus, the purpose of the first condition—that the treatment have a significant effect on value—was to trigger disclosure in circumstances where the information would be important to consumers and not where there were small value changes that were not likely to affect consumers' purchasing decisions. In addition, the Commission did not intend for the Guides to require disclosure of routine processing treatments, such as cutting and polishing, that all stones undergo that enhance their value. The comments, however, question whether conditioning disclosure upon whether the treatment has an effect on value is necessary and whether the term ''significant'' should modify this condition.

First, a few comments assert that the phrase ''effect on value'' is unclear. The comments note that the proposed language does not indicate what kind of effect on value triggers disclosure.[32] They note that treatments have two effects on value—first, the stone is more valuable than it was before it was treated; second, the stone may be less valuable than a similar untreated stone. As explained above, the Commission is concerned with the effect on value that is material to a consumer's purchasing decision, i.e., whether the treated stone is less valuable than a comparable untreated stone.

Another commenter, AGTA, opposes tying the treatment disclosure to value, stating:

All treatments, permanent or otherwise, are performed to increase the value of untreated material. To propose otherwise implies that when comparing two gemstones with similar characteristics of quality, one treated and another untreated, they should be considered of equal value. This goes directly against the fundamental property of ''rarity'' with respect to untreated gemstones.[33]

Thus, AGTA instead proposes that all treatments to gemstones be disclosed regardless of permanence, special care, or their effect on value.

The Commission finds, however, that failure to disclose a gemstone treatment is deceptive only if absent disclosure consumers would falsely believe that the treated gemstone is as valuable as a similar untreated stone. Any treatment that in fact affects the value of a gemstone in a way that is material to consumers must be disclosed under the revised Guide.[34]

Second, with respect to the term ''significant,'' several comments state that the term ''significant'' does not provide sufficient guidance as to when disclosure is required.[35] One comment explains that the word ''significant'' could create a loophole for unethical sellers to avoid disclosure by arguing that the treatment's effect on the value of the stone was not significant.[36] The Commission concludes that the term ''significant'' is necessary to limit the disclosure requirement to instances where the failure to disclose treatment information would be deceptive. Disclosure of permanent treatments is necessary only where the treatment's effect on value is likely to affect a consumer's purchasing decision.

The Commission often uses the term ''significant'' to establish materiality, that is claims or omissions that are likely to affect purchasing decisions. For example, the Commission's Deception Policy Statement explains that the Commission considers certain categories of information presumptively material, including claims that ''significantly involve health, safety, or other areas with which the reasonable consumer would be concerned,'' including a claim that ''concerns the purpose, safety, efficacy or cost of the product or service.'' [37] Thus, the inclusion of the word ''significant'' is meant to provide a practical, common sense limitation on when disclosures should be made.

The Commission also acknowledges that the value of the gemstone in a piece of jewelry may not be determinative of the price. Factors such as the workmanship of the piece and overall beauty undoubtedly affect the price charged for the product. Holding these factors constant, however, retailers should evaluate whether the gemstone treatment makes the product less valuable than it would be if it contained an untreated stone. The difference in value as a result of a gemstone treatment, although not large from the seller's point of view, might be significant to consumers who might reasonably expect to pay less for a product containing a treated stone or would choose a piece with an untreated stone if the treatment were disclosed. The consumer's point of view is the relevant viewpoint from which to analyze the necessity for disclosure.[38]

b. Consumer Acting Reasonably under the Circumstances. The comments also expressed concern regarding the second condition that triggered disclosure in the Commission's proposed changes to § 23.22—i.e., a consumer, acting reasonably under the circumstances, could not ascertain that the stone has been treated. This condition was designed to incorporate the concept of ''reasonableness,'' which is an element of deception.[39] The test is whether it is reasonable for consumers to believe that two seemingly identical stones are identical or very comparable in value based either on the ad, the stones themselves or the seller's representation, about other characteristics of the stone (e.g., carat weight, cut and color).[40]

Based on the comments, the Commission concludes that consumers acting reasonably under the circumstances, in the absence of disclosure, could believe (incorrectly) that the treated stone and untreated stone have the same or nearly the same value. Thus, the Commission has determined that failure to disclose a gemstone treatment that has a significant effect on the value of the stone may mislead reasonable consumers as to the value of the stone and has revised the guide to require

for a higher price than treated stones. Some retailers do not charge a premium for the naturally colored stones because in order to explain the price differential the retailer would have to disclose that the other stones were treated.

[31] *Id.*

[32] NRF (017A); Zale (007A); AIS (018A).

[33] AGTA–2 (022A) (emphasis in original).

[34] If, in fact, all treatments have such an effect on the value of gemstones, then all treatments will need to be disclosed. There may, however, be some exceptions, such as the treatments to very small gemstones in jewelry pieces, which is discussed below.

[35] Gaenzle (017); JVC–1 (006A); NRF (017A); GE–2 (020A).

[36] GE–2 (020A).

[37] *Deception Policy Statement,* 103 F.T.C. at 182–83 (emphasis added, footnotes omitted). In addition, prior orders and guides also tie disclosures to situations involving significance. For example, an order against a pharmaceutical company prohibits the company from representing that ''any such [mouthwash] product will have any **significant** beneficial effect on the symptoms of sore throats.'' *Warner-Lambert Co.,* 92 F.T.C. 191, 192 (1978) (emphasis added). Similarly, the Commission's Guides for the Use of Environmental Marketing Claims provide ''[i]f an incidental component **significantly** limits the ability to recycle a product or package, a claim of recyclability would be deceptive.'' 16 CFR 260.7(d) (emphasis added).

[38] In evaluating whether a treatment should be disclosed retailers could ask themselves how a consumer would react if he discovers this treatment after he leaves the store (for example, when he takes the stone to an appraiser or attempts to sell the piece).

[39] In addition, it was designed to determine alternatively whether an element of unfairness had been met.

[40] Deception Policy Statement, 103 F.T.C. at 174.

disclosure of such treatments. Accordingly, it is unnecessary to consider further whether a consumer could avoid injury by taking affirmative action, such as seeking an independent appraisal, before purchasing the product or to limit the disclosure requirement to situations where the consumer could not otherwise learn that the stone had been treated.[41]

2. Additional Issues Raised in the Comments

Although the comments support revising the Guides to provide for disclosure of permanent gemstone treatments that significantly affect the value of the gemstone, the comments raise two additional concerns regarding when disclosure is necessary. These concerns relate to disclosure of undetectable treatments and treatments to very small gemstones.

a. Undetectable Treatments. Several comments note that some gemstone treatments are not detectable, even by experts. These comments express concern that requiring disclosure of any gemstone treatment that has a significant effect on the stone's value would put retailers at a high risk for lawsuits for failing to disclose treatments even when the seller did not know or have reason to know about the treatments.[42] This concern stems largely from the new GE diamond treatment that is performed on diamonds with inferior color (*e.g.,* brown or very yellow diamonds), which permanently and greatly improves their color without any need for special care.[43] Currently, this treatment is not detectable.[44] Since the treatment only recently became available, it is unclear whether it will affect a diamond's value. Some industry groups have opined that the treatment will affect a diamond's value and, therefore, disclosure would be required under the proposed Guides.[45] Because the treatment is undetectable, however, these comments propose adding to § 23.22 a phrase that permanent treatments should be disclosed ''if said treatments are known or reasonably should have been known to the seller at the time of sale.'' [46]

Adding such a phrase, however, might provide unscrupulous marketers with an opportunity to avoid disclosure by arguing that they did not know the gemstone had been treated. AGTA strongly opposes the addition of this language, noting such language would ''leave loopholes in gemstone enhancement disclosure guidelines that would ultimately be damaging to our trade.'' [47] AGTA publishes a manual on gemstone treatments that advises that if a gemstone falls into a group that is routinely enhanced, the seller must assume that it has been enhanced, even if he is unaware of whether the treatment has been performed or not, and disclose the treatment.[48]

The Commission has decided not to add the limiting phrase because all members of the jewelry industry, not just retailers, have an obligation to disclose treatments to others in the line of distribution and a duty to make reasonable inquiries about whether the products they are purchasing have been treated. At the same time, the Commission is mindful that responsible retailers may be misled about whether the gemstones they have purchased have been treated or not. The Commission's ability and willingness to exercise prosecutorial discretion in such situations should alleviate retailers' concerns that they unreasonably would be held accountable for others' illegal conduct. To address the concern raised in the comments, however, the Commission has added a note to § 23.22 reiterating that the disclosures outlined in this section are applicable to sellers at every level of trade, as defined in § 23.0(b) of these Guides.[49]

b. Treatments to Small Gemstones. Several comments relate an additional concern regarding treatments to very small gemstones, such as stones weighing less than .10 carat.[50] These comments explain that very small stones generally are sold mounted in jewelry, not loose. Efforts to inspect the stones individually to detect treatments would be very expensive and would likely result in higher consumer prices.[51] In addition, the detection efforts might destroy the piece.[52] The comments further state that the price of the piece is not based on the value of the individual gemstones but on the jewelry piece as a whole. These comments request that the Commission craft an exemption to the disclosure provisions for very small stones.[53]

The Commission has determined that an exemption is not necessary to address gemstone disclosures for very small stones. If, as the comments state, the price of the piece is not based on the value of each individual gemstone, a permanent gemstone treatment performed on some or all of the stones may not significantly affect the value of a jewelry product containing very small gemstones. Thus, disclosure may not be required under the revised Guide.

The Guides, however, already require, regardless of the stone's size, that non-permanent gemstone treatments or treatments requiring special care still be disclosed. When the Commission revised the Guides to require disclosure of these treatments, it did not exempt very small gemstones. The Commission explained in 1996 that ''if consumers are unaware of the non-permanency of a treatment or the special care requirements associated with a treatment, the gemstone may not meet their expectations, if the color fades or inclusions appear, etc.'' [54] This reasoning applies to all jewelry products regardless of the size of the gemstones contained in the product.

In addition, individual inspection of each stone is not necessary to disclose gemstone treatments. For example, if a jewelry piece contains very small emeralds, the retailer could disclose that the emeralds have likely been oiled and disclose that the treatment is not permanent and the special care requirements necessary to care for oiled emeralds. It is prudent and appropriate to disclose gemstone treatments, rather than remain silent, where there is a possibility that the stones have been treated.

The Commission is aware of several large retailers that currently employ this practice. For instance, some retailers selling jewelry on the Internet include a general disclosure on their websites such as: ''Gemstone products are often treated to enhance their beauty. Some of these treatments are not permanent or the stone requires special care. Click here for more information about gemstone treatments.'' The link then provides information about gemstone treatments, including whether the

[41] Because the omission or any implied misrepresentations may mislead consumers, the Commission has concluded that it is not necessary to determine separately whether the practice is unfair.

[42] JVC–1 (006A); Zale (007A); NRF (017A).

[43] See, *e.g.,* JVC–1 (006A); AIS (018A); Adamas (005); DiamondDude (006); Matlins (001A). In fact, the introduction of this treatment was the impetus for many comments' support for disclosure of permanent gemstone treatments that do not create special care requirements.

[44] GE–1 (014A).

[45] *E.g.,* AIS (018A); JVC–1 (006A). General Electric voluntarily is disclosing the treatment right now. GE–1 (014A).

[46] JVC–1 (006A); accord Zale (007A); NRF (017A).

[47] AGTA–2 (022A).

[48] *Id.*

[49] Several comments indicated that the Guides should specify that the disclosure provisions apply to all levels of trade.

[50] Zale (007A); NRF (017A); Indenbaum (009).

[51] One retailer stated that it could not continue to sell these types of pieces if disclosure were required because the cost would be so prohibitive. Zale (007A).

[52] Zale (007A).

[53] Zale (007A); NRF (017A); Indenbaum (009).

[54] 61 FR 27207.

treatments are permanent or require any special care to maintain. In addition, as required by the Guides, these disclosures are provided prior to consummation of the sale. Other large retailers use counter placards that are clearly and conspicuously placed above display cases showcasing gemstone products. The placards include general disclosures about gemstone treatments and direct consumers to ask a salesperson for more information. Pamphlets providing information about gemstone treatments are available on the counter near the placards. These methods of gemstone treatment disclosure comply with the Jewelry Guides and can be used to disclose gemstone treatments that significantly affect the value of gemstones.

V. Revisions to the Guides

As noted above, the Commission is revising the Jewelry Guides to require disclosure of laser-drilling and other permanent gemstone treatments that significantly affect the value of the gemstone. The Commission has determined to combine §§ 23.13 and 23.22. The first section addresses the disclosure of diamond treatments and the second addresses gemstone treatments. The current sections, and the originally proposed revisions, are not identical. Many comments requested that the Commission make the two sections consistent. The Commission has determined that there is no reason to treat the disclosure of treatments to diamonds and to gemstones differently. Therefore, the Commission is combining the two sections. Section 23.13, in the diamonds section of the Guides, will direct readers to § 23.22, which will address treatments to all gemstones, including diamonds.

Section 23.22 of the Guides is revised to include three sub-paragraphs addressing three categories of gemstone treatments. Section 23.22(a) require disclosure of non-permanent gemstone treatments and the fact that the treatment is not permanent. Section 23.22(b) requires disclosure of treatments that create special care requirements for the gemstone and advises sellers to disclose what those requirements are. Section 23.22(c) requires disclosure of gemstone treatments that significantly affect a stone's value.

Previously, the sections listed the various treatments that should be disclosed. The comments indicate that the jewelry industry is continually developing new treatments.[55] Thus, any examples of treatments included in the Guides could be out-of-date fairly quickly. Therefore, the Commission has determined that the Guides would be more useful to the industry if the treatment disclosure provisions provide general guidance that could be applied to whatever treatments are being used. Information regarding the application of the Guides to specific treatments will be addressed in the Commission's consumer and business education materials.[56] Finally, as noted above, revised § 23.22 contains a note stating that the disclosure provisions apply to all levels of trade.

List of Subjects in 16 CFR Part 23

Advertising, Jewelry, Labeling, and Trade practices.

For the reasons set forth in the preamble, the Federal Trade Commission amends Chapter I of Title 16 of the Code of Federal Regulations as follows:

PART 23—GUIDES FOR THE JEWELRY, PRECIOUS METALS, AND PEWTER INDUSTRIES.

1. The authority citation for part 23 continues to read as follows:

Authority: Sec. 6, 5, 38 Stat. 721, 719; 15 U.S.C. 46, 45.

2. Revise § 23.13 to read as follows:

§ 23.13 Disclosure of treatments to diamonds

A diamond is a gemstone product. Treatments to diamonds should be disclosed in the manner prescribed in § 23.22 of these guides, Disclosure of treatments to gemstones.

3. Revise § 23.22 to read as follows:

§ 23.22 Disclosure of treatments to gemstones.

It is unfair or deceptive to fail to disclose that a gemstone has been treated if:

(a) The treatment is not permanent. The seller should disclose that the gemstone has been treated and that the treatment is or may not be permanent;

(b) The treatment creates special care requirements for the gemstone. The seller should disclose that the gemstone has been treated and has special care requirements. It is also recommended that the seller disclose the special care requirements to the purchaser;

(c) The treatment has a significant effect on the stone's value. The seller should disclose that the gemstone has been treated.

Note to § 23.22: The disclosures outlined in this section are applicable to sellers at every level of trade, as defined in § 23.0(b) of these Guides, and they may be made at the point of sale prior to sale; except that where a jewelry product can be purchased without personally viewing the product, (e.g., direct mail catalogs, online services, televised shopping programs) disclosure should be made in the solicitation for or description of the product.

By direction of the Commission.

Donald S. Clark,

Secretary.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix A

Abbreviation	Number	Commenter
Gross	001	Gross Diamond Corporation.
DMIA	002	Diamond Manufacturers & Importers Association of America.
Lange	003	Erik Lange.
Chuck	004	Chuck <*diamonds@execpc.com*>.
Adamas	005	Adamas Gemological Laboratory.
Diamond Dude	006	Diamond Dude.
Sherman	007	Alan Sherman.

[55] E.g., Matlins (001A); AIS (018A).

[56] For at least 20 years, the Commission has published a consumer education pamphlet describing the Jewelry Guides and advising consumers on jewelry industry terms and practices. This publication has been revised several times over the years to address developments in the industry. In 1998, the Commission published a business guide to assist business in complying with the Guides. These publications, ''All That Glitters: How to Buy Jewelry,'' and the business guide, ''In the Loupe: Advertising Diamonds, Gemstones and Pearls,'' are available by contacting the FTC Consumer Response Center, 600 Pennsylvania Avenue, NW, Washington, DC 20580, (877) FTC–HELP or from the FTC website at <www.ftc.gov>.

The Commission also notes that for at least the past 10 years, AGTA has published a Gemstone Information Manual, which details gemstone enhancements and provides information regarding the permanency of treatments and special care requirements. This manual is updated frequently and can respond to industry trends more rapidly and with greater precision than the FTC Jewelry Guides. The industry is encouraged to use this and other industry resources in conjunction with the Commission's Jewelry Guides to avoid unfair or deceptive trade practices.

Abbreviation	Number	Commenter
Rist	008	John Rist.
Indenbaum	009	Arthur Indenbaum.
Brown	010	Grahame Brown.
Sagan	011	Van Sagan.
Park City	012	Park City Jewelers.
Shrake	013	Jim Shrake.
ISA	014	International Society of Appraisers.
JIC–1	015	Jewelry Information Center comment 1.
NAJA	016	The National Association of Jewelry Appraisers.
Gaenzle	017	Bonnie Burton Gaenzle.
JIC–2	018	Jewelry Information Center comment 2.
Jensen	019	Karen Jensen.
Miranda	020	Jose Miranda.
Themelis	021	Ted Themelis.
Matlins	001A	Antoinette Leonard Matlins.
Rapaport	002A (& 010A)	Martin Rapaport.
Green	003A	Green Brothers LLC.
Kapoor	004A (& 009A)	Amit Kapoor.
CJAO	005A (& 0012A)	CJAO.
JVC–1	006A	Jewelers Vigilance Committee comment 1.
Zale	007A	Zale Corporation.
Bothra	008A	Dharmesh Bothra.
Baum	011A	Baum Diamonds.
Dua	013A	Deep Singh Dua.
GE–1	014A	General Electric comment 1.
AGTA–1	015A	American Gem Trade Association comment 1.
Mason-Kay	016A	Mason-Kay, Inc.
NRF	017A	National Retail Federation.
AIS	018A	Appraisal Information Services.
JVC–2	019A	Jewelers Vigilance Committee comment 2.
GE–2	020A	General Electric comment 2.
Real Gems	021A	Real Gems, Inc.
AGTA–2	022A	American Gem Trade Association comment 2.

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