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Cover Page Footnote

* Candidate for Juris Doctor, Notre Dame Law School, 2021; Master's in Business Management, Durham University England, 2018; Bachelor of Arts in Public Policy and Leadership, University of Virginia, 2017. I would like to thank my parents for the opportunity to advance my academics as well as Patrick Foss for his encouragement and support in my endeavors.

THE LACK OF REGULATION IN PREVENTING GREENWASHING OF COSMETICS IN THE U.S.

*Alexa Riccolo**

INTRODUCTION

If you walked through your local grocery or beauty store today, there is no doubt that you would be bombarded with thousands of different products. You may also observe that many labels accompanying these products utilize terms such as “organic,” “natural,” or “green” in their marketing efforts. Most consumers look to these labels and trust that the products are better for their health and the environment.

In a recent study, over 80% of millennials believe that purchasing eco-friendly products not only improves their quality of life, but 75% of millennials are actively looking to make greener changes in their homes and lifestyles.¹

Further, according to a Nielsen’s Global Corporate Sustainability Report, 66% of consumers, including 73% of millennials, would spend more money on a product if it comes from a sustainable brand.² This priority has led young Americans to pay premium prices for products that they believe are healthy and environmentally conscious.³ As corporations recognize the shift in their consumers’ desires, they are desperate to meet the demand for clean, green, and organic products. With this shift in the strategies of corporations, consumers need to be more aware of predatory marketing practices that have not been as prevalent in the cosmetic space in the past.

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¹ See GLASS PACKAGING INSTITUTE, THE MILLENNIALS: A GENERATION INVESTED IN HEALTH AND THE ENVIRONMENT 3 (2014), https://assets.noviams.com/novi-file-uploads/gpi/pdfs-and-documents/Advocacy/GPI-TheMillennials-11_6_14-FINAL.pdf.

² See Adryan Corcione, *What is Greenwashing?*, BUS. NEWS DAILY (Jan. 17, 2020), <https://www.businessnewsdaily.com/10946-greenwashing.html>; see also *Consumer-Goods’ Brands that Demonstrate Commitment to Sustainability Outperform Those That Don’t*, NIELSEN (Oct. 12, 2015), <https://www.nielsen.com/eu/en/press-releases/2015/consumer-goods-brands-that-demonstrate-commitment-to-sustainability-outperform/>.

³ SHARMEEN SOMANI & SCOTT R. STROUD, GREEN IS THE NEW COLOR OF MONEY: GREENWASHING AND ADVERTISING ETHICS I (2019), <https://mediaengagement.org/wp-content/uploads/2019/04/48-greenwashing-case-study.pdf>.

Corporations are striving to appeal to consumer desires and, in doing so, are not necessarily representing the true health information about their products. In many cases, brands are misleading consumers to think that their products are truly healthy or environmentally friendly.

This method of misleading consumers and inaccurately claiming green, natural, organic, or healthy attributes has been termed “greenwashing.”⁴ A study by TerraChoice, an environmental marketing group, found that 99% of products reviewed were found to be guilty of committing one of the six sins of greenwashing: the sin of hidden trade-off, the sin of no proof, the sin of vagueness, the sin of irrelevance, the sin of lesser of two evils, or the sin of fibbing.⁵ The corporate response of wrapping products in green labels has led to court battles such as *Hill v. Roll International Corp.*⁶ In that case, a water bottle company claimed that its bottled water was environmentally friendly to spur consumer purchasing, when in actuality, the manufacturing, production, packing, and distribution were similar to that of other water bottle companies.⁷ Greenwashing is a pervasive problem for consumers, as terms like “‘organic,’ ‘natural,’ and ‘green’ are just some examples of the widely used labels that can be confusing and misleading to consumers.”⁸

“Greenwashing,” as a term, has been expanded in recent times, and the term is now used to describe the false labeling of other products, such as cosmetics within the beauty and personal care industry.⁹ The U.S. is considered the most valuable beauty and personal care product market in the world.¹⁰ In 2018, the U.S. cosmetics market yielded a revenue of nearly \$90 billion and employed approximately 63,000 people.¹¹ As concern grows among advocacy groups, lawmakers, celebrities, scientists, and the general public, the U.S. needs to reconsider how it regulates the use of chemicals and the labeling of cosmetic products.

This Note will argue that the existing laws applied by the Food and Drug Administration (“FDA”), the Environmental Protection Agency (“EPA”), the U.S. Department of Agriculture (“USDA”), and the Federal Trade Commission (“FTC”) are not sufficient to protect consumers and have inefficient enforcement procedures. The purpose of this Note is to evaluate the competence of current agencies in order to make recommendations on how to better protect consumers from harmful chemicals that are hidden beneath a greenwashed veil. While greenwashing and chemical use in products has become a major national issue, it should be noted that

⁴ TERRACHOICE, THE “SIX SINS OF GREENWASHING”: A STUDY OF ENVIRONMENTAL CLAIMS IN NORTH AMERICAN CONSUMER MARKETS 1 (2007) [hereinafter SIX SINS OF GREENWASHING], https://sustainability.usask.ca/documents/Six_Sins_of_Greenwashing_nov2007.pdf.

⁵ *Id.*

⁶ *Hill v. Roll Int’l Corp.*, 128 Cal. Rptr. 3d 109 (Cal. Ct. App. 2011); see also SOMANI & STROUD, *supra* note 3.

⁷ *Hill*, 128 Cal. Rptr. 3d 109.

⁸ Corcione, *supra* note 2.

⁹ *Greenwashing in Cosmetics - Who Are You Trusting?*, 100% PURE (Feb. 16, 2018), <https://www.100percentpure.com/blogs/feed/greenwashing-in-cosmetics-who-are-you-trusting>.

¹⁰ M. Ridder, *Cosmetics Industry in the U.S. - Statistics & Facts*, STATISTA (Dec. 1, 2020), <https://www.statista.com/topics/1008/cosmetics-industry/>.

¹¹ *Id.*

there are companies that are actively transparent with their labeling and ingredients and act ethically by allowing consumers to make fully educated decisions regarding the products that they purchase and use.

First, this Note will begin with an overview of the history of greenwashing, as well as chemical use, in the U.S. Second, this Note will explain the overlap of regulations and the responsibility of the involved agencies to regulate the chemicals that are printed on labels. This Note recognizes that there are a variety of agencies and regulations connected with chemical use and greenwashing within the cosmetic industry and it does not offer a comprehensive regulatory analysis. Third, this Note will examine possible solutions that the U.S. could adopt in order to make the regulations more effective at protecting consumers by providing restrictions of certain chemicals and transparency throughout labeling. Fourth, this Note will propose several recommendations on how the U.S. can solve cosmetic and personal care product greenwashing issues through more stringent regulations. Finally, this Note will conclude that, although the FDA should take a leading role in the movement towards safer products and more transparent labeling, the most effective solution is for consumers to actively educate themselves.

I. WHAT IS GREENWASHING?

Greenwashing is the false conveyance that a product, service, company, or institution involves environmental or health conscious practices in its manufacturing, production, packaging, or other offerings and operations.¹² Greenwashing can be defined as “the phenomena of socially and environmentally destructive corporations, attempting to preserve and expand their markets or power by posing as friends of the environment.”¹³ The term “greenwashing” was coined in the mid-1980s when consumers were receiving information and advertising about their products from television, radio, and print news.¹⁴ During this time, consumers did not have the luxury of fact-checking products and their advertising on the internet and were essentially stuck making choices based on the little information the company released about their products.¹⁵

Greenwashing has been traditionally used for products that claim environmentally beneficial impacts, such as sustainable packaging that reduces the amount of deforestation involved in the packaging of the product.¹⁶ Greenwashing is

¹² Ruth Markell, *How Can Consumers Find Out If a Corporation Is “Greenwashing” Environmentally Unsavory Practices?*, SCI. AM. (June 29, 2013), <https://www.scientificamerican.com/article/greenwashing/>.

¹³ *Id.* CorpWatch is a non-profit dedicated to discouraging greenwashing and maintaining truthfulness of U.S.-based companies’ social responsibility. *Id.*

¹⁴ See Corcione, *supra* note 2.

¹⁵ One of the first cases to thrust greenwashing to the forefront of the public’s knowledge was surrounding the activity of Chevron. Chevron employed a series of advertising schemes, including television and print advertisements, about their environmental friendliness. *Id.* However, it was later discovered that Chevron spilled oil and violated the Clean Air and Clean Water Acts. *Id.* Further, many of Chevron’s environmental claims were already mandated by law. Greenwashing has changed in the last thirty years as consumers have the means to check facts and investigate companies’ claims about their products. *See id.*

¹⁶ *Id.*

also used when describing claims about environmental friendliness in the manufacturing, production, packaging, or operations of a business. In addition to environmental effects, greenwashing has also bled over into the health industry and affects the way consumers buy cosmetic and personal products. The term is now used in the cosmetic industry for products that have organic, natural, or non-toxic labeling or packaging, but actually contain chemicals that have been found to be harmful or toxic to humans.¹⁷

Greenwashing is a particularly grey area in the beauty and cosmetic industry, and the government has seen some pushback from the public on how it chooses to regulate greenwashing. In addition to the national beauty industry exploding, the natural and organic beauty market has seen exponential growth in the last decade and is expected to reach \$25.11 billion by 2025.¹⁸ With this growth, consumers, legislators, and non-profit organizations are lobbying for stricter regulations on chemical usage in cosmetics and how companies are allowed to label and market their products as safe to combat greenwashing. Some examples of pushback against greenwashing include additional legislation and third-party organizations.¹⁹ Senators from California and Maine have introduced bills such as the Personal Care Safety Act to push for stricter regulations.²⁰ Similarly, non-profits and independent groups, such as the Environmental Working Group, are creating databases that contain information on cosmetics ingredients to provide consumers with knowledge on what is really in their products.²¹

A. THE TERRACHOICE SIX SINS

TerraChoice Environmental Marketing, Inc., conducted a study of environmental claims in North American consumer markets.²² TerraChoice sent research teams to six “big box” stores “to record every product-based environmental claim they observed.”²³ The study showed that companies partake in many specific actions, or inactions, that inevitably push their products under the umbrella of greenwashing.²⁴ The TerraChoice team identified 1,018 products that made a total of 1,753 claims related to environmental friendliness.²⁵ The products included everything from air fresheners, to appliances, to toothpaste.²⁶ Of the 1,018 products

¹⁷ See *The industry set to reach US\$25.11 billion in 2025 – and it's not technology*, CEO MAGAZINE (Aug. 7, 2019), <https://www.theceomagazine.com/business/health-wellbeing/eco-industry-growth/>.

¹⁸ *Id.*

¹⁹ Kate Samuelson, *Senators Propose Bill to 'Ensure the Safety of Cosmetics'*, TIME (May 12, 2017, 11:30 AM), <http://time.com/4777231/fda-bill-cosmetics-feinstein-collins/>

²⁰ *Id.*, see also Personal Care Safety Act, S. 726, 116th Cong. §1 (2019-2020).

²¹ ENV'T WORKING GRP., WHY THIS MATTERS—COSMETICS AND YOUR HEALTH (n.d.) [hereinafter WHY THIS MATTERS], <https://isthmuswellness.com/wp-content/uploads/2012/10/Cosmetic-and-Your-Health-Why-This-Matters.pdf> (last visited Oct. 12, 2018).

²² SIX SINS OF GREENWASHING, *supra* note 4.

²³ *Id.* at 2.

²⁴ *Id.*

²⁵ *Id.* at 1.

²⁶ *Id.* at 9.

that were tested, only one product did not make claims that were either false or at risk of misleading the intended audience.²⁷

Through this study, TerraChoice developed the aforementioned “Six Sins of Greenwashing.”²⁸ These six sins better explain the specific actions that companies take which inevitably lead to greenwashing. Further, it is important to clarify that not all companies are greenwashing purposefully, or in a malicious manner. Philip Beere, Vice President of Marketing at Sightline Payments, states that oftentimes greenwashing is not done purposefully, but that “the [number one] violation is embellishing the benefit of the product or service.”²⁹

1. *The Sin of the Hidden Trade-Off*

The first of the Six Sins, and also the most prevalent throughout the TerraChoice study, is the “Sin of the Hidden Trade-Off.”³⁰ When companies suggest that a product is “organic,” “natural,” or “green” based on a single attribute or, a narrow set of attributes of the product, this is considered a hidden trade-off.³¹ When companies ignore other ingredients or attributes of the product that may not be as healthy or consumer friendly, they are categorizing a very small part of the product to the whole.³² These claims are typically not false, but are misleading in the sense that they trick consumers into thinking that the product is more organic, natural, or green than it really is.³³ Products that are greenwashed through the Sin of the Hidden Trade-Off include cleaning supplies such as laundry detergents, multi-purpose cleaners, and dish detergent.³⁴

2. *The Sin of No Proof*

The second sin of greenwashing is the “Sin of No Proof.”³⁵ This is the second most common sin of greenwashing. Like the Sin of Hidden Trade-Off, the information being provided is not necessarily false. However, with the Sin of No Proof, the company claims a green or natural aspect that cannot be easily fact-checked or substantiated with accessible information for consumers or third-party certifications.³⁶ This leads to greenwashing because consumers rely on the companies’ statements without having the means to educate themselves on the

²⁷ *Id.* at 1.

²⁸ *Id.* at 2.

²⁹ Corcione, *supra* note 2.

³⁰ SIX SINS OF GREENWASHING, *supra* note 4, at 1. The Sin of the Hidden Trade-Off was the most frequently committed sin in the study. It was committed by 57% of all environmental claims. *Id.* at 3.

³¹ *Id.* at 2.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 3.

³⁵ *Id.* at 1. The study found a total of 454 products—approximately 26% of the environmental claims made about these products—committed the Sin of No Proof, making it the second most frequently committed sin. *Id.* at 3.

³⁶ *Id.*

truthfulness of what goes into the manufacturing, packaging, and operations of the product as well as what ingredients actually go into making the product itself.

3. *The Sin of Vagueness*

The third sin of greenwashing is the “Sin of Vagueness.”³⁷ According to the study, “the Sin of Vagueness is committed by every claim that is so poorly defined or broad that its real meaning is likely to be misunderstood by the intended consumer.”³⁸ The study also gave several common examples of this sin in action. The examples include using the term “chemical-free” when in fact most ingredients are a type of chemical.³⁹ Another example is using the term “non-toxic,” when in fact any ingredient can be toxic in a sufficient amount.⁴⁰ Lastly, the study uses the examples of companies who used the terms “natural” and “green,” which mean nothing without elaboration.⁴¹

4. *The Sin of Irrelevance*

The fourth sin of greenwashing is the “Sin of Irrelevance.”⁴² “The Sin of Irrelevance is committed by making an environmental claim that may be truthful but is unimportant and unhelpful for consumers seeking environmentally preferable products.”⁴³ This sin misleads consumers by distracting them from important aspects of the products by hiding them behind insignificant claims and tricky advertisements.⁴⁴ An example of this sin in action is when a company claims that a product is free of a certain chemical, but that chemical is legally banned and no other products in the market contain it due to its illegality.⁴⁵

5. *The Sin of Lesser of Two Evils*

The fifth sin of greenwashing is the “Sin of Lesser of Two Evils.”⁴⁶ This sin is committed when a company makes certain product claims that distract the consumer from the truth about the product and industry.⁴⁷ A common practice of the Sin of Lesser of Two Evils is when environmental qualifiers are used on products that

³⁷ One hundred and ninety-six individual products, which were the subjects of 11% of the environmental claims, committed the Sin of Vagueness. *See id.* at 3.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² The Sin of Irrelevance was committed by seventy-eight products and 4% of the environmental claims. *Id.* at 4.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ In this study, seventeen products and approximately 1% of environmental claims committed the Sin of Lesser of Two Evils. *Id.*

⁴⁷ *Id.*

have entirely questionable health and environmental value.⁴⁸ An example of this would be a cigarette company labeling its cigarettes as “organic cigarettes.”⁴⁹

6. *The Sin of Fibbing*

The last sin of greenwashing is the “Sin of Fibbing.”⁵⁰ Companies commit the Sin of Fibbing when they make environmental claims that are false.⁵¹ This is the least common sin of greenwashing, perhaps because it would violate any public trust that a company has with the public and government agencies. According to the study, only a few products were found to commit the sin of fibbing, and most of the sins were misrepresentations of certification by an independent authority.⁵² For example, some products were labeled “certified organic” or that they had been “Energy Star” registered when no research of fact-finding could verify that those statements were true for those products.⁵³

The TerraChoice study and the Six Sins together describe the different methods by which a company can greenwash its product. By highlighting these different avenues organizations take to commit a greenwashing offense, regulatory bodies should be able to better recognize the regulations that can effectively curb greenwashing habits.

II. THE LACK OF SAFETY REGULATIONS IN THE U.S. COSMETICS INDUSTRY AND THE HARMFUL INGREDIENTS FOUND IN COSMETICS

Now that the issue of greenwashing has been explained, it is necessary to highlight the safety regulations (or lack thereof) that the U.S. has put in place, as well as the harmful ingredients that are typically the subject of greenwashing in cosmetics. There are 80,000 chemicals currently manufactured in products, materials, and other items within the U.S., with only a few hundred having been tested for safety.⁵⁴ Many of these untested, or unstudied, chemicals can be found in personal care products such as sunscreen and other cosmetics.⁵⁵ Some studies have shown that chemicals found in these products, such as lead, formaldehyde, and asbestos, can lead to reproductive

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ SUZANNE H. REUBEN, DEP’T OF HEALTH & HUM. SERVS., REDUCING ENVIRONMENTAL CANCER RISK 5 (2010), https://deainfo.nci.nih.gov/advisory/pep/annualreports/pep08-09rpt/pep_report_08-09_508.pdf; see also U.N. DEP’T OF ECON. & SOC. AFFS., PRACTICES IN THE SOUND MANAGEMENT OF CHEMICALS 27 (2010), <https://sustainabledevelopment.un.org/content/documents/41Practices%20in%20the%20Sound%20Management%20of%20Chemicals.pdf>.

⁵⁵ Reuben, *supra* note 54, at 40.

abnormalities, including infertility,⁵⁶ disruption of the human endocrine system,⁵⁷ formation of cancerous tumors and lesions,⁵⁸ and developmental abnormalities in children.⁵⁹

This lack of regulation can cause two problems that are largely borne by the American public.⁶⁰ The first problem, and the focus of this Note, is that a lack of appropriate regulations for cosmetics leads to a lack of consumer protection by federal agencies.⁶¹ A recent survey conducted by the Federal Trade Commission (“FTC”) and the U.S. Department of Agriculture (“USDA”) found that when consumers see “organic” labeling, they believe that it confirms that the product is held to a higher standard than it really is.⁶² The second problem, which is related, but not explored in this Note, is that the cosmetic industry affects people of various races and genders differently, and may disproportionately harm women and people of color.⁶³

According to the USDA, “clean beauty” does not have an exact definition.⁶⁴ This has led to confusion and fear among consumers as they try to educate themselves on what is harmful within their home products with no help from regulators.

⁵⁶ Kristen W. Smith et al., *Urinary Paraben Concentrations and Ovarian Aging Among Women from a Fertility Center*, 121 ENV’T HEALTH PERSPS. 1299 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3855500/>.

⁵⁷ Isabel Corpas et al., *Lead Intoxication in Gestational and Lactation Periods Alters the Development of Male Reproductive Organs*, 53 ECOTOXICOLOGY & ENV’T SAFETY 259 (2002), <https://www.sciencedirect.com/science/article/pii/S014765130292230X?via%3Dihub>.

⁵⁸ Anton C. De Groot & Margo Veenstra, *Formaldehyde-Releasers in Cosmetics in the USA and in Europe*, 62 CONTACT DERMATITIS 221 (2010), https://www.researchgate.net/publication/42254221_Formaldehyde-releasers_in_cosmetics_in_the_USA_and_in_Europe.

⁵⁹ David C. Bellinger & Andrew M. Bellinger, *Childhood Lead Poisoning: The Torturous Path from Science to Policy*, 116 J. CLINICAL INVESTIGATION 853 (2006), <https://www.jci.org/articles/view/28232> [<https://doi.org/10.1172/JCI28232>].

⁶⁰ Grace Wallack, Note, *Rethinking FDA’s Regulation of Cosmetics*, 56 HARV. J. ON LEGIS. 311, 317 (2019) (Grace Wallack’s Note gives a thorough deep dive into the FDA regulations of cosmetics and includes recommendations on how the FDA could expand their risk assessment authority to ensure compliance with regulations. This Note varies in the way that it focuses on the lack of regulation pertaining to greenwashing and false labeling of cosmetics and personal care products. The focus on greenwashing brings additional players into the regulatory issues including looking at the EPA, USDA, and FTC and how those agencies influence cosmetic regulations. In this Note, multiple agencies were called upon to do their part by strengthening regulations surrounding the greenwashing of cosmetics.)

⁶¹ *Id.*

⁶² BUREAU OF ECON. & BUREAU OF CONSUMER PROT., FED. TRADE COMM’N, CONSUMER PERCEPTION OF “RECYCLED” CONTENT AND “ORGANIC” CLAIMS 3 (2016), https://www.ftc.gov/system/files/documents/reports/consumer-perception-recycled-content-organic-claims-joint-staff-report-federal-trade-commission/consumer_perception_of_recycled_content_and_organic_2016-08-10.pdf.

⁶³ See Wallack, *supra* note 60, at 317; see also Amy Westervelt, *Not So Pretty: Women Apply an Average of 168 Chemicals Every Day*, THE GUARDIAN (Apr. 30, 2015), <https://www.theguardian.com/lifeandstyle/2015/apr/30/fda-cosmetics-health-nih-epa-environmental-working-group>; see also *Exposure Adds Up—Survey Results*, ENV’T WORKING GRP., <https://www.ewg.org/skindeep/2004/06/15/exposures-add-up-survey-results/#.W7EVhxNKjq0> (last visited Sept. 26, 2018).

⁶⁴ DEP’T OF AGRIC., FACT SHEET: COSMETICS, BODY CARE PRODUCTS, AND PERSONAL CARE PRODUCTS (2008), <https://www.ams.usda.gov/sites/default/files/media/OrganicCosmeticsFactSheet.pdf>; see also “Organic” Cosmetics, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/Cosmetics/Labeling/Claims/ucm203078.htm#If> (last updated Aug. 24, 2020).

Examples can be found in many recent class action lawsuits, against brands like Jason and Avalon Organics, brands sold at Whole Foods, and a brand called Organix, all for deceptive labeling.⁶⁵ Further, Jessica Alba’s skin and beauty line has recently come under fire for similar reasons after it claimed it uses natural and organic ingredients, when in fact the company uses some harmful chemicals in their products.⁶⁶ Some well-known harmful chemicals that are allowed within the U.S. include: parabens, phthalates, phenoxyethanol, fragrance, butylated hydroxyanisole (“BHA”), and butylated hydroxytoluene (“BHT”), coal tar dye, dioxane, ethanolamine, formaldehyde-releasing preservatives, triclosan, and talc.⁶⁷ These chemicals are just a small sample of ingredients that are hidden in cosmetics and personal care items under a greenwashed label.

In the U.S., there are several different agencies that ensure safe products for American consumers by prohibiting certain chemicals and enforcing labeling standards.⁶⁸ These agencies include the Food and Drug Administration (“FDA”), the Environmental Protection Agency (“EPA”), the USDA, and the FTC. So, what are these agencies and their respective regulations doing about greenwashing?

A. THE FDA’S REGULATION OF COSMETICS

The FDA began regulating cosmetics in 1906 when Congress passed the Pure Food and Drug Act which prohibited the sale of foods or drugs that were misbranded, mislabeled, or contaminated.⁶⁹ Today, cosmetics are “articles intended to be rubbed,

⁶⁵ See generally Complaint at 1–2, *Brown v. Hain Celestial Grp.*, 913 F. Supp. 2d 881 (N.D. Cal. 2012) (No. C 11-03082 LB), 2012 WL 4449873; Complaint at 1–3, *Golloher v. Todd Christopher Int’l Inc.*, No. C 12-06002 RS, 2014 U.S. Dist. LEXIS 91942 (N.D. Cal. 2014); see also, Wallack, *supra* note 60 at 322.

⁶⁶ Adele Chapin, *All the Lawsuits Filed Against Jessica Alba’s The Honest Company*, RACKED (Apr. 24, 2016), <https://www.racked.com/2016/4/27/11518654/jessica-alba-honest-company-lawsuits>; see also John Kell, *Jessica Alba’s Honest Co. Accused of ‘Deceptive’ Labeling*, FORTUNE (Feb. 17, 2016), <http://fortune.com/2016/02/17/jessica-alba-honest-lawsuit>; Wallack, *supra* note 60 at 322.

⁶⁷ Oliver Milman, *US Cosmetics are Full of Chemicals Banned in Europe—Why?*, THE GUARDIAN (May 22, 2019), <https://www.theguardian.com/us-news/2019/may/22/chemicals-in-cosmetics-us-restricted-eu>; see also, Wallack, *supra* note 60, at 324-328.

⁶⁸ Different individuals, agencies, and even countries might have a different definition of what they believe to be safe. This paper not to safety as:

“Safe” or “safety” means no evidence in the available information that demonstrates or suggests reasonable grounds to suspect a hazard to the public under the conditions of use that are now current or that might reasonably be expected in the future, e.g., a low incidence of minor adverse reactions (as shown in animal or human testing or product experience). Such information includes, but is not limited to, the chemical structure of the ingredient, published and unpublished tests on the ingredient and products containing the ingredient, significant human experience on products containing the ingredient during marketing, and information on similar or related substances. A lack of information about an ingredient shall not be sufficient to justify a determination of safety. COSMETIC INGREDIENT REVIEW, COSMETIC INGREDIENT REVIEW PROCEDURES & SUPPORT TO THE EXPERT PANEL FOR COSMETIC INGREDIENT SAFETY 2 (2019), <https://www.cir-safety.org/sites/default/files/CIR%20Procedures%20-%20September%202019.pdf>.

⁶⁹ *Part I: The 1906 Food and Drugs Act and Its Enforcement*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/AboutFDA/WhatWeDo/History/Origin/ucm054819.htm> [<https://perma.cc/C4VS-H7BV>] (last updated Feb. 1, 2018).

poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body . . . for cleansing, beautifying, promoting attractiveness, or altering the appearance.”⁷⁰ When the Pure Food and Drug Act was initially enacted, many corporations escaped liability, as the act was loosely enforced and required proof that the corporation purposefully intended to defraud consumers.⁷¹ Since that was a hard showing to make, corporations continued to use harmful ingredients in the manufacturing of their products without any consequences.⁷²

Today, within the cosmetics industry, the FDA does not define or regulate the term “organic” as it applies to cosmetics, body care, or personal care products.⁷³ This lack of regulation allows cosmetic companies to advertise using terms like “bio-organic” for marketing to health-conscious consumers without any actual certification.⁷⁴

It is important to note that there are some key similarities and differences of how the FDA regulates food, drugs, and cosmetics. The FDA considers some drugs to be cosmetics and therefore those areas often overlap.⁷⁵ Despite any overlaps, the FDA has supplied definitions for both cosmetics and drugs. A drug is defined by its therapeutic use, or its use “in the diagnosis, cure, mitigation, treatment, or prevention of disease,” and they include “articles (other than food) intended to affect the structure or any function of the body of man or other animals.”⁷⁶ Whereas the FDA considers a cosmetic to be an “article intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and articles intended for use as a component of any such articles”⁷⁷ Examples

⁷⁰ 21 U.S.C. § 321(g)(1)(2012). This definition includes body moisturizers, perfumes, makeup, nail polish, and many hair products. Wallack, *supra* note 60, at 314. This definition does not include soap:

Soap is instead regulated by the Consumer Products Safety Commission. In order to be a “true” soap, the product must be made from certain ingredients including fatty acids and an alkali (typically lye). Much of the soap on the market, such as liquid hand soap or body wash, would not be considered a soap and would instead be regulated as a drug or a cosmetic. For example, if the “soap” is intended to moisturize or provide fragrance, it would be treated as a cosmetic. And if the “soap” were intended to treat acne or kill germs, it would be regulated as a drug. However, any of the above products can use the word “soap” on the label, regardless of whether the product is a “soap” according to the regulatory definition.

Id. at 314 n.17; *see also* 21 U.S.C. § 321(i)(2012); *Frequently Asked Questions on Soap*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/cosmetics/cosmetic-products/frequently-asked-questions-soap> (last updated Aug. 24, 2020).

⁷¹ Wallack, *supra* note 60, at 314.

⁷² About Us, Part I: The 1906 Food and Drugs Act and Its Enforcement, U.S. Food & Drug Admin., <https://www.fda.gov/AboutFDA/WhatWeDo/History/Origin/ucm054819.htm> (last updated Oct. 5, 2017); *see also*, Wallack, *supra* note 60, at 314.

⁷³ DEP’T OF AGRIC., *supra* note 64.

⁷⁴ *Id.*

⁷⁵ *Is It a Cosmetic, a Drug, or Both? (Or Is It Soap?)*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/Cosmetics/GuidanceRegulation/LawsRegulations/ucm074201.htm> [<https://perma.cc/3CVG-UGFJ>] (last updated Aug. 2, 2018).

⁷⁶ 21 U.S.C. § 321(g)(1).

⁷⁷ 21 U.S.C. § 321(i).

include products such as skin moisturizers, perfumes, lipsticks, eye makeup, face makeup, and other substances that are intended for use on the human body.⁷⁸

Further, under the FDA, drugs need pre-market approval.⁷⁹ In contrast, cosmetic products, with the exception of color additives, do not require any approval and are allowed to directly enter the market.⁸⁰ “Neither the law nor FDA regulations require specific tests to demonstrate the safety of individual products or ingredients.”⁸¹ When placing these cosmetic products on the market, the cosmetic manufacturers do not have to register or file their products with the FDA and do not have to partake in any identification system that may track registration for importing cosmetics into the U.S.⁸²

Further, the FDA requires both food and cosmetics to “bear a declaration of the name of each ingredient label in descending order of predominance, except that fragrance of flavor may be listed as fragrance of flavor.”⁸³ The FDA emphasizes that the ingredients that are required to be listed must go by an FDA specified name to keep consistency within labeling products.⁸⁴ If the name is not specified, the labeling is required to follow the name adopted by the Cosmetic, Toiletry, and Fragrance Association, Inc. (“CTFA”).⁸⁵ The FDA does not require any specialty labeling for products designed solely for professional use.⁸⁶ It does not have the authority to recall products, only the authority to advise companies to recall any products that are found to be faulty.⁸⁷

The FDA has several routes to punish violators of the law. The FDA can take action against companies or individuals who have marketed adulterated, misbranded, or misleading cosmetics.⁸⁸ When the FDA finds a chemical to be unsafe within a product, it typically begins by writing a warning letter to the manufacturer.⁸⁹ Further, the FDA can also send “untitled letters” to the manufacturer.⁹⁰ These letters are issued to companies when their violation is not great enough to warrant a warning

⁷⁸ *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, but Are FDA-Regulated*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/cosmetics/cosmetics-laws-regulations/fda-authority-over-cosmetics-how-cosmetics-are-not-fda-approved-are-fda-regulated> (last updated Aug. 3, 2013).

⁷⁹ 21 U.S.C. § 321.

⁸⁰ *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, but Are FDA-Regulated*, *supra* note 78.

⁸¹ *Id.*

⁸² *Id.*

⁸³ 21 C.F.R. § 701.3(a) (2016). Fragrances are considered trade secrets and therefore are permitted to be excluded from the label, and companies can just list an ingredient as “fragrance.”

⁸⁴ *Id.* § 701.3(c)(1).

⁸⁵ *Id.* § 701.3(c)(2).

⁸⁶ See Sarah M. Nir, *Perfect Nails, Poisoned Workers*, N.Y. TIMES (May 11, 2015), <https://www.nytimes.com/2015/05/11/nyregion/nail-salon-workers-in-nyc-face-hazardous-chemicals.html>; Wallack, *supra* note 60 at 316.

⁸⁷ Regardless of whether chemicals are used in a professional setting or not, their use can still be worrisome. See *id.*; see also *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, but Are FDA-Regulated*, *supra* note 78.

⁸⁸ *Id.*

⁸⁹ Wallack, *supra* note 60, at 317-18. These letters typically include what the violation was and how failure to fix the violation would lead to action against the company. See Wallack, *supra* note 60, at 317.

⁹⁰ *Id.*

letter, and are often sent to companies who are falsely advertising cosmetics as drugs.⁹¹ The FDA can also pursue action through the Department of Justice to remove products from the market if letters are disregarded or ignored.⁹² If the FDA is trying to shipments of faulty product, the FDA can seek action from a federal district court to grant a restraining order.⁹³ The FDA also has authority to seize cosmetics that are not in compliance with the law.⁹⁴ Additionally, the FDA can seek criminal action against individuals or companies who have violated any of their laws.⁹⁵ The FDA has also been known to work closely with the U.S. Customs and Border Patrol because, under the Food, Drug and Cosmetic Act of 1938 (“FDCA”), any imported cosmetics are subject to review by the FDA at the time of entry through customs.⁹⁶ Although there are no mandatory or binding practices, regulations, or standards for the cosmetic industry, the FDA does have a “Good Manufacturing Practice Guidelines” checklist. This checklist is intended to notify consumers as to where a manufacturer or producer is prone to release adulterated⁹⁷ or misbranded products to the market.⁹⁸

B. FDA LEGISLATION AND POLICIES: FOOD, DRUG, AND COSMETIC ACT OF 1938, FAIR PACKAGING AND LABELING ACT, AND REPORTING PROGRAMMING

In order to enforce the FDA’s procedures and policies, Congress has passed two important pieces of legislation. In 1938, Congress passed the FDCA to help enforce the FDA’s mission of protecting consumers from exposure to dangerous chemicals or ingredients that would negatively impact public health and safety.⁹⁹ The FDCA act gave the FDA a basis for protecting consumers by ensuring proper labeling

⁹¹ *Id.*

⁹² *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, but Are FDA-Regulated*, *supra* note 78.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Adulteration is referred to as “violations involving product composition,” including the ingredients in the product, chemicals or contaminants in the product, or packaging of the product. *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, but Are FDA-Regulated*, *supra* note 78. Under the FDCA, a cosmetic is adulterated if “it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling thereof, or under conditions of use as are customary and usual”; “it consists in whole or in part of any filthy, putrid, or decomposed substance”; “it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health”; “its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health”; or “it is, or it bears or contains, a color additive which is unsafe within the meaning of section 721(a) of the FD&C Act.” *Id.*; *see also* 21 U.S.C. § 361.

⁹⁸ *Good Manufacturing Practice (GMP) Guidelines/Inspection Checklist for Cosmetics*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/cosmetics/cosmetics-guidance-documents/good-manufacturing-practice-gmp-guidelinesinspection-checklist-cosmetics> (last updated Aug. 24, 2018).

⁹⁹ *How did the Federal Food, Drug, and Cosmetic Act Come About?*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/about-fda/fda-basics/how-did-federal-food-drug-and-cosmetic-act-come-about> (last updated May 28, 2018).

of food, drugs, and other consumer products. Further, the FDA has the power to regulate cosmetics not only under the FDCA, but also under another piece of legislation, the Fair Packaging and Labeling Act (“FPLA”).¹⁰⁰ These two pieces of legislation were designed to give the FDA more authority for monitoring chemicals and labeling.

The FDA has not used these two pieces of legislation to regulate cosmetics as stringently as it has regulated food and drugs.¹⁰¹ Today, the FDCA is supposed to prohibit the marketing of adulterated or misbranded cosmetics in interstate commerce.¹⁰² However, the FDCA has been largely unchanged since its passage in 1938. With the explosion of a billion-dollar “natural” cosmetic market, consumers and academics alike have become more interested in analyzing the lack of cosmetic regulations.¹⁰³

Of the 80,000 chemicals that are used in manufacturing products today, the FDA has created only a single category which deems products automatically adulterated.¹⁰⁴ This means that thousands of chemicals that could be classified as harmful, depending on the situation, are allowed to be included in products and released to the public. Some substances that automatically deem products adulterated include chloroform,¹⁰⁵ chemicals commonly used in paint thinners such as methylene chloride,¹⁰⁶ and chemicals that have been commonly used in refrigerators and air conditioners such as chlorofluorocarbon propellants.¹⁰⁷ Healthcare advocates and scientists have argued that the FDA’s list is very short and underinclusive.¹⁰⁸ This undersized list is evidence that the FDA has only explicitly banned a few ingredients and has left thousands in the market to be greenwashed by false advertising and marketing.¹⁰⁹

¹⁰⁰ 15 U.S.C. §§ 1451–61 (2018); *see also* 21 U.S.C. §§ 301–399h (2018).

¹⁰¹ §§ 1451–1461; *see also* Wallack, *supra* note 60, at 316–17.

¹⁰² “Misbranding” refers to violations involving improperly labeled or deceptively packaged products. Under the FDCA, a cosmetic is considered misbranded if “its labeling is false or misleading in any particular” or “its label does not include all required information.” *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, but Are FDA-Regulated*, *supra* note 78; *see also* 21 C.F.R. § 701.9. Exceptions do apply. For example, exemptions can apply to cosmetics that are to be processed, labeled, or repacked at an establishment other than where they were originally processed or packed. *See* 21 C.F.R. § 701.9. “[T]he required information is not adequately prominent and conspicuous”; “its container is so made, formed, or filled as to be misleading”; “it is a color additive, other than a hair dye, that does not conform to applicable regulations issued under section 721 of the FD&C Act”; and “its packaging or labeling is in violation of an applicable regulation issued pursuant to section 3 or 4 of the Poison Prevention Packaging Act of 1970. *See also* *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, but Are FDA-Regulated*, *supra* note 78.

¹⁰³ *See* Wallack, *supra* note 60, at 311; *see also* Rajiv Shah & Kelly E. Taylor, *Concealing Danger: How the Regulation of Cosmetics in the U.S. Puts Consumers at Risk*, 23 FORDHAM ENV’T L. REV. 203 (2012).

¹⁰⁴ Reuben, *supra* note 54.

¹⁰⁵ 21 C.F.R. § 700.18 (Lexis Advance through Dec. 21, 2020 issue of the Federal Register).

¹⁰⁶ 21 C.F.R. § 700.19 (Lexis Advance through Dec. 21, 2020 issue of the Federal Register).

¹⁰⁷ 21 C.F.R. § 700.23 (Lexis Advance through Dec. 21, 2020 issue of the Federal Register).

¹⁰⁸ Wallack, *supra* note 60, at 317.

¹⁰⁹ *Id.*

In terms of the regulations created by the FDA pursuant to the FPLA, the FPLA requires labels on cosmetics to not be misleading.¹¹⁰ However, there are many exceptions to what is considered misleading. For example, the ingredient “fragrance” has gained national media attention with debuts in health documentaries such as *Stink!*¹¹¹ Fragrance can be listed as a fragrance or flavor and may contain up to 3,000 secret ingredients that are categorized as a trade secret.¹¹² Under the guise of fragrance, manufacturers can include ingredients that are not subject to the review or approval of any government agencies, including the FDA.¹¹³

The FDA also has a voluntary reporting system called the Voluntary Cosmetics Registration Program (“VCRP”).¹¹⁴ The program requests that manufacturers or operators of facilities that make cosmetics register with the FDA and report on the items they place in the market.¹¹⁵ If companies were to choose to participate in this voluntary programming, it would help the FDA track producers and ingredients for more efficient inspections or recalls. However, many manufacturers are aware of how harmful chemicals in their products can be and choose not to report, as their voluntary actions may lead to a decrease in profit.¹¹⁶ The FDA states that manufacturers of cosmetics or other personal use items may rely on pre-existing safety data for “individual ingredients and on products with similar formulations.”¹¹⁷

To help companies patrol their own chemicals for ingredient safety, the FDA recommends that companies consult the Cosmetic Ingredient Review (“CIR”). This review is the FDA’s scientifically based evaluation of the safety of cosmetic ingredients.¹¹⁸ The purpose of this review is “to determine those cosmetic ingredients for which there is a reasonable certainty in the judgment of competent scientists that the ingredient is safe under its conditions of use.”¹¹⁹ However, the CIR has only evaluated between 11% and 24% of the 80,000 chemicals used in products today and has only deemed eleven total ingredients “unsafe.”¹²⁰ These voluntary programs are further evidence of the FDA’s failure to regulate the “safety” of cosmetics, as few

¹¹⁰ *Cosmetics Labeling*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/cosmetics/cosmetics-labeling> (last updated Aug. 24, 2020).

¹¹¹ *STINK!* (Jon J. Whelan Production 2015).

¹¹² 21 C.F.R. § 701.3 (Lexis Advance through the Jan. 22, 2020 issue of the Federal Register).

¹¹³ *Fragrances in Cosmetics*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/cosmetics/cosmetic-ingredients/fragrances-cosmetics> (last updated Aug. 24, 2020); see also *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, but Are FDA-Regulated*, *supra* note 78.

¹¹⁴ *Using Adverse Event Reports to Monitor Cosmetic Safety*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/cosmetics/how-report-cosmetic-related-complaint/using-adverse-event-reports-monitor-cosmetic-safety> (last updated Nov. 3, 2017).

¹¹⁵ 21 C.F.R. § 710.1 (Lexis Advance through Dec. 21, 2020 issue of the Federal Register).

¹¹⁶ See Richard A. Clarke et al., *The Challenge of Going Green*, HARV. BUS. REV. 37 (July–Aug. 1994).

¹¹⁷ *Product Testing of Cosmetics*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/cosmetics/cosmetics-science-research/product-testing-cosmetics> (last updated Aug. 24, 2020).

¹¹⁸ *About the Cosmetic Ingredient Review*, COSMETIC INGREDIENT REV., <https://www.cir-safety.org/about> (last visited Oct. 20, 2020).

¹¹⁹ *Cosmetic Ingredient Review Procedures*, COSMETIC INGREDIENT REV., Part A Section 2 (Sept. 2019), <https://www.cir-safety.org/sites/default/files/CIR%20Procedures%20-%20September%202019.pdf>.

¹²⁰ *Unsafe Ingredients*, COSMETIC INGREDIENT REV., <https://www.cir-safety.org/sites/default/files/U-122017revised072018.pdf> (last visited Jan. 23, 2021).

companies actually utilize the reporting system, and the reviewing initiative has hardly made a dent on the testing chemicals commonly used.

III. OTHER REGULATIONS OF COSMETICS

The FDA has been at the forefront of the greenwashing and non-toxic chemical movement and the main focus of many policy recommendations. However, there are other U.S. agencies that have the authority and responsibility to help protect consumers from greenwashing harmful chemicals. This section will give brief information about three other agencies, the EPA, the USDA, and the FTC, along with their accompanying regulations. Although the EPA, USDA, and FTC are supporting agencies and important to note, it has been recognized that much of the authority within the cosmetic industry is still under the authority of the FDA. Further, consumers rely on the FDA, and therefore it can be seen as the primary agency that should be working to intensify regulations for consumer protection.

A. THE EPA AND TOXIC SUBSTANCE CONTROL ACT (“TSCA”)

According to title 40 of the Code of Federal Regulations, the function of the EPA is “to assure the protection of the environment by abating and controlling pollution on a systematic basis.”¹²¹ The Toxic Substance Control Act (“TSCA”) was enacted in 1976 and grants the EPA authority to mandate reporting, record-keeping, testing, and other requirements regarding chemicals.¹²² Under section 4 of the TSCA, the EPA has the authority to test chemicals by manufacturers, importers, and processors where risks or exposures of concern are found.¹²³

In essence, the TSCA is designed to keep a list of all the chemicals that are currently being manufactured or processed in consumer goods in the U.S.¹²⁴ All of these chemicals are then entered into an inventory, which currently contains around 84,000 chemicals.¹²⁵ When a chemical is placed on the inventory, it is considered a chemical that is involved in U.S. commerce.¹²⁶ A chemical that is not on the inventory is a “new chemical substance.”¹²⁷ According to the Environmental Working Group, the way the TSCA operates is by grandfathering thousands of chemicals already being used in consumer products as they slowly review those

¹²¹ 40 C.F.R. § 1.3 (2020).

¹²² 15 U.S.C. § 2601 (2018).

¹²³ *Assessing and Managing Chemical Under TSCA: Learn About the Toxic Substances Control Act (TSCA)*, ENV’T PROT. AGENCY, <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/learn-about-toxic-substances-control-act-tsca> (last updated Sept. 1, 2016).

¹²⁴ *TSCA Chemical Substance Inventory*, ENV’T PROT. AGENCY, <https://www.epa.gov/tsca-inventory>.

¹²⁵ 40 C.F.R. § 720.25 (2019); see also *Debunking the Myths: Are There Really 84,000 Chemicals?*, CHEMICAL SAFETY FACTS, <https://www.chemicalsafetyfacts.org/chemistry-context/debunking-myth-chemicals-testing-safety/> (last visited Jan. 13, 2021).

¹²⁶ *TSCA Chemical Substance Inventory: About the TSCA Chemical Substance Inventory*, ENV’T PROT. AGENCY, <https://www.epa.gov/tsca-inventory/about-tsca-chemical-substance-inventory#howare> (last visited Jan. 25, 2020).

¹²⁷ *Id.*

chemicals for safety.¹²⁸ Of 85,000 chemicals that the federal government has approved for use, the TSCA has only reviewed about 100.¹²⁹

B. USDA AND ORGANIC LABELING

The USDA “provides leadership on food, agriculture, natural resources, rural development, nutrition, and related issues based on public policy, the best available science, and effective management.”¹³⁰ One of the main pieces of legislation to be administered by the USDA is the Organic Foods Production Act (“OFPA”).¹³¹ The OFPA prohibits the marketing of domestic agricultural products as organically produced, except in conformity with the USDA’s national standards.¹³² The OFPA has three main purposes. The first is to “establish national standards governing the marketing of certain agricultural products as organically produced products.” The second is to “assure consumers that organically produced products meet a consistent standard.” The third is “to facilitate interstate commerce in fresh and processed food that is organically produced.”¹³³

The USDA regulates the term “organic” through its National Organic Program (“NOP”) regulation as applied to cosmetics only if the “cosmetic, body care product, or personal care product contains or is made up of agricultural ingredients.”¹³⁴ On its face, it appears that the USDA has some regulatory authority over cosmetic items containing agricultural aspects.¹³⁵ However, the USDA does not have an actual division for cosmetics listed on its website.¹³⁶ The USDA has extremely limited authority pertaining to cosmetics and personal care products. In addition to having no authority over products that are not “made up of agricultural ingredients, or do not make any claims to meeting the USDA organic standards,” it has no authority over the production and labeling of cosmetics that may be certified by other private standards such as foreign organic standards, eco-labels, and the term “earth friendly.”¹³⁷

The USDA is the agency that provides a “USDA Organic” seal and enables products to use the label “organic” through its Organic Certification Program.¹³⁸

¹²⁸ *Chemical Policy (TSCA)*, ENV’T WORKING GRP., <https://www.ewg.org/key-issues/toxics/chemical-policy> (last visited Jan. 25, 2020).

¹²⁹ *Id.*

¹³⁰ *About the U.S. Department of Agriculture*, DEP’T OF AGRIC., <https://www.usda.gov/our-agency/about-usda> (last visited Jan. 24, 2020).

¹³¹ Organic Foods Production Act of 1990, 7 U.S.C. § 6501et seq.

¹³² *See* 7 U.S.C. §§ 6501–23 (2018).

¹³³ 7 U.S.C. § 6501.

¹³⁴ DEP’T OF AGRIC., NATIONAL ORGANIC PROGRAM, FACT SHEET: COSMETICS, BODY CARE PRODUCTS, AND PERSONAL CARE PRODUCTS (2008), <https://www.ams.usda.gov/sites/default/files/media/OrganicCosmeticsFactSheet.pdf>; *see also* 7 C.F.R. § 205 (2019).

¹³⁵ Phillip Picardi, *Greenwashing: The Beauty Industry’s Dirty Little Secret*, REFINERY29 (Apr. 22, 2015), <https://www.refinery29.com/en-us/greenwashing-fake-eco-friendly-beauty-products>.

¹³⁶ *Id.*

¹³⁷ *Id.*; *see also* DEP’T OF AGRIC., *supra* note 134.

¹³⁸ Picardi, *supra* note 135.

These labels have become very popular in most grocery and beauty stores.¹³⁹ This seal gives the impression that the item is safe for use as it has met the high standard of being deemed “organic.” However, this one label can mean three different things: (1) 100% organic, which means the item contains only organically produced ingredients excluding water and salt; (2) “organic,” which means that the product is 95% made with organic ingredients other than water and salt; (3) “made with organic ingredients,” which means the product contains at least 70% organically approved ingredients.¹⁴⁰ If less than 70% of the ingredients within a product are not derived from organic ingredients, then the product may not use the term “organic” anywhere on the main label, but may identify individual ingredients that the USDA has approved as organic in their ingredient list.¹⁴¹ The label’s variety of meaning and inconsistent definition is evidence that although the agency has developed seals and labels to facilitate consumer knowledge, they are not effectively protecting consumers as the seals are misleading and contributing to the greenwashing problem.

The USDA labels contribute to greenwashing because when consumers see the seal, they believe that the product is safe. The USDA has admitted that the label represents different levels of organic and the levels are not revealed on the packaging.¹⁴² Therefore, consumers may believe they are buying an organic product, but the reality is that it has been greenwashed and may only contain 70% of clean ingredients.¹⁴³ This misleading labeling and certification from the USDA is another way that agencies are not properly protecting American consumers.

C. FTC AND GREEN GUIDES

Another agency that has an effect on cosmetic greenwashing regulation is the FTC. The mission of the FTC is “protecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity.”¹⁴⁴ The FTC was designed to curb the original type of greenwashing surrounding false information of companies’ environmental friendliness. However, the FTC has also played a role in the expansion of cosmetic greenwashing because many consumers are looking for cosmetic and personal care products that contain recyclable and sustainable packaging.¹⁴⁵

¹³⁹ The seal is a small black and white circle on the front of the product that states “USDA” with a white background over the word “organic” with a black or green background. DEP’T OF AGRIC., *supra* note 134.

¹⁴⁰ *Id.*

¹⁴¹ Miles McEvoy, *Organic 101: What the USDA Organic Label Means*, DEP’T OF AGRIC. (Mar. 13, 2019), <https://www.usda.gov/media/blog/2012/03/22/organic-101-what-usda-organic-label-means>.

¹⁴² DEP’T OF AGRIC., *supra* note 134.

¹⁴³ *Id.*

¹⁴⁴ *About the Federal Trade Commission*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc> (last visited Jan. 25, 2020).

¹⁴⁵ *FTC Issues Revised “Green Guides,”* FED. TRADE COMM’N (Oct. 1, 2012), <https://www.ftc.gov/news-events/press-releases/2012/10/ftc-issues-revised-green-guides>.

Under the section 5 of the FTC Act, the FTC is allowed to prevent “persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce.”¹⁴⁶ In order to bring a challenge under section 5 there is no need to show actual misrepresentation.¹⁴⁷ To succeed, it needs to be shown that there was a likelihood of deception.¹⁴⁸ This type of challenge can apply to labeling within any industry where a consumer is misled while acting reasonably and, therefore, could be brought against the cosmetics industry.¹⁴⁹ Section 5 claims are typically brought as the basis for the FTC Green Guides.¹⁵⁰

The Green Guides have consisted mainly of environmental claims but, with today’s expansion of greenwashing, their scope has been extended to the cosmetic industry.¹⁵¹ In order to assist companies in releasing transparent labeling information and avoiding misleading statements about their company’s corporate or social responsibility, the FTC first introduced its “Green Guides” in 1992.¹⁵² “The Federal Trade Commission’s Green Guides are designed to help marketers avoid making environmental claims that mislead consumers,” and have since been revised several times.¹⁵³ The Green Guides include “general principles that apply to all environmental marketing claims; . . . how consumers are likely to interpret particular claims and how marketers can substantiate these claims; and . . . how marketers can qualify their claims to avoid deceiving consumers.”¹⁵⁴ Similar to the FDA and USDA labeling regulations, the FTC is supposed to help prevent companies from misleading consumers. The Green Guides state that, “[m]arketers should not make broad, unqualified general environmental benefit claims like ‘green’ or ‘eco-friendly.’”¹⁵⁵ Due to the lack of regulations by the FDA, EPA, and USDA, the FTC has not been able to properly carry out its function of deterring misleading labeling and greenwashing because other agencies have not correctly identified and banned harmful chemicals or defined commonly used terms such as “organic,” “natural,” or “green.”

¹⁴⁶ 15 U.S.C. § 45(a)(2) (2006).

¹⁴⁷ J. THOMAS ROSCH, FED. TRADE COMM’N, DECEPTIVE AND UNFAIR ACTS AND PRACTICES PRINCIPLES: EVOLUTION AND CONVERGENCE (2007), https://www.ftc.gov/sites/default/files/documents/public_statements/deceptive-and-unfair-acts-and-practices-principles-evolution-and-convergence/070518evolutionandconvergence_0.pdf.

¹⁴⁸ *Id.* at 7.

¹⁴⁹ *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164–65 (1984).

¹⁵⁰ *Environmental Claims: Summary of the Green Guides*, FED. TRADE COMM’N (Nov. 25, 2019), <http://www.ftc.gov/bcp/gmrule/guides980427.htm>.

¹⁵¹ *Id.*

¹⁵² *Environmentally Friendly Products: FTC’s Green Guides*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides> (last visited Jan. 25, 2020).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Environmental Claims: Summary of the Green*, *supra* note 150.

IV. POSSIBLE SOLUTIONS TO THE PROBLEM

This Note briefly recommends three potential solutions for how the U.S. could renovate the current system to better regulate greenwashing and prevent toxins in cosmetics that are greenwashed to appear safe. One option is that the U.S. could completely overhaul its regulatory system by adopting a model similar to that used within the European Union. If the U.S. is not comfortable with the harsh shift in regulatory strictness presented by the European Union, it could consider adopting separate regulations that would enhance the system already in place, such as those found in the Personal Care Safety Act or the COSMOS Standard. Lastly, the most plausible solution to this lack of regulation is simply that consumers need to take the time to research the products they purchase and educate themselves on the characteristics of the chemicals contained inside.

A. CHANGING FEDERAL REGULATIONS TO BE MORE SIMILAR TO THE EUROPEAN MODEL

The first consideration, and also one of the more popular recommendations among scientists and activists, is to change what the FDA is doing to more closely reflect the European Union model. Cosmetics not only make up a large portion of the U.S. market, they also hold a large place in the global market. When comparing the U.S. to other nations, the U.S.'s regulation of chemicals in cosmetics is less restrictive than that of over forty nations.¹⁵⁶ A study done by the Environmental Working Group shows that the U.S. has issued fewer categorical bans for cosmetic ingredients than most of the developed world, including countries such as Cambodia and Vietnam.¹⁵⁷

In contrast, the European Union has one of the strictest government regulatory systems for cosmetics products.¹⁵⁸ At the center of the European Union's cosmetic regulations is its increased safety requirement for cosmetic products. Any cosmetic manufactured, produced, or distributed within the European Union must be proven safe before the product is allowed to be sold.¹⁵⁹ The testing is required to be done by an expert, and a full safety report must be issued before its distribution.¹⁶⁰ Further, the European Union has passed Regulation 1223/2009, which reformed a 1976 regulation that had failed to provide proper safety methods for consumer products.¹⁶¹ Regulation 1223/2009 recognizes a long list of ingredients that are

¹⁵⁶ Scott Farber, *On Cosmetics Safety, U.S. Trails More Than 40 Nations*, ENV'T. WORKING GRP. (March 20, 2019), <https://www.ewg.org/news-and-analysis/2019/03/cosmetics-safety-us-trails-more-40-nations>.

¹⁵⁷ *Id.*

¹⁵⁸ *Internal Marketing, Industry, Entrepreneurship and SMEs: Legislation*, EUROPEAN COMM'N, https://ec.europa.eu/growth/sectors/cosmetics/legislation_en (last visited Dec. 8, 2020).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

explicitly banned.¹⁶² This shift from old regulations to new and improved regulations is evidence that a switch is not only necessary but also possible for the FDA.

Further, the European Union introduced the concept of a “responsible person” in terms of assigning responsibility for regulations.¹⁶³ This person is charged with maintaining records of formulation and maintaining reporting standards for the company. Further, in the event of a breach, the “responsible person” must notify all European Union member states about what the breach was, where the product had been sold or distributed, and a list of measures that the company is undertaking to minimize the harm.¹⁶⁴ The U.S. has no parallels to a “responsible person,” and therefore shifts the burden onto the consumers to educate themselves about the safety of the product instead of placing the burden on larger companies who have the funds and scientific resources to test their products for meeting set standards.

Another key aspect of the European Union’s cosmetic regulation is reporting systems. The European Union has two key reporting systems that help regulate the use of cosmetics in the European Union. The first reporting system is a mandatory reporting process in which any use of nanomaterials must be expressly authorized.¹⁶⁵ This reporting system, called the Cosmetics Product Notification Portal (“CPNP”), is a large database of all cosmetics distributed within the European Union.¹⁶⁶ A nanomaterial is “an insoluble or biopersistent and intentionally manufactured material.¹⁶⁷ A nanomaterial has one or more external dimensions, or an internal structure, on the scale from 1 to 100 nm.”¹⁶⁸ This category includes many chemicals the U.S. has not regulated, such as colorants, preservatives, and UV-filters.¹⁶⁹

The second reporting system is the reporting of Serious Undesirable Events (“SUE”). SUE defines a serious or undesirable event as one “which results in temporary or permanent functional incapacity, disability, hospitalization, congenital anomalies or an immediate vital risk or death.”¹⁷⁰ This type of reporting became mandatory under the notion that consumers in European Union countries should have a level of transparency presented to them about the products they choose to buy and what effects those products may have.¹⁷¹ These SUE reports are then shared with governments, authorities, healthcare providers, as well as the responsible person and the manufacturer in order to keep everyone involved in the circle of cosmetic

¹⁶² “The specific chemicals that are banned have been listed in Annex II of the EC regulation on cosmetics.” See Commission Regulation 1223/2009 O.J. (L 342/59) 59, 83–127 (EC), <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:342:0059:0209:EN:PDF>.

¹⁶³ *Id.* at 60.

¹⁶⁴ *Id.* at 63.

¹⁶⁵ *Internal Market, Industry, Entrepreneurship and SMEs: Market Surveillance*, EUR. COMM’N (Feb. 7, 2020), https://ec.europa.eu/growth/sectors/cosmetics/market-surveillance_en.

¹⁶⁶ Commission Regulation 1223/2009, art. 13, 2009 O.J. (L 342) (EC), <http://data.europa.eu/eli/reg/2009/1223/2019-08-13>.

¹⁶⁷ *Nanomaterials*, EUR. COMM’N, https://ec.europa.eu/growth/sectors/cosmetics/products/nanomaterials_en (last visited Jan. 25, 2020).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Commission Regulation (EC) No. 1223/2009, O.J. *supra* note 162, at ch. I, art. 2(p).

¹⁷¹ *Internal Market, Industry, Entrepreneurship and SMEs: Market Surveillance*, *supra* note 158.

purchasing informed.¹⁷² There are many similarities between the American system and the European system, however, the European Union standards place more accountability on the manufacturers for conducting safety assessments.¹⁷³ Those safety assessments are done by professionals with suitable backgrounds, as opposed to regular consumers who have less knowledge and access to information in order to learn the truth beneath the greenwashing.¹⁷⁴

B. MODERNIZE THE FDA PROCEDURES WITH UPDATED LEGISLATION AND STANDARDS

Another consideration for reforming the regulations surrounding chemicals used in cosmetics is to encourage states to pass their own legislation similar to the Personal Care Products Safety Act, which was introduced in 2015 by Senator Dianne Feinstein, a Democrat from California, and Senator Susan Collins, a Republican from Maine.¹⁷⁵ These two senators worked together to show that the issues of greenwashing and misleading health labels are non-partisan and deserve attention. This legislation proposed that the FDA should be required to review chemicals used in cosmetic and personal care products and provide clearer support for companies and consumers on the safety of their products.¹⁷⁶ Senator Collins stated that, “by improving FDA oversight of the ingredients in cosmetics and personal care products, this legislation aims to protect consumers while also providing regulatory certainty for manufacturers, enabling them to plan for the future.”¹⁷⁷ The Personal Care Products Safety Act would require that the FDA evaluate at least five ingredients per year to determine their safety.¹⁷⁸

An act similar to Senators Feinstein and Collins’s Personal Care Products Safety Act would also reform the current FDA system by requiring the FDA to order mandatory recalls for products that have ingredients linked to consumer harm; requiring the FDA to label products differently and specifically, for example “use by children” or “use by professionals”; requiring companies to provide contact information and provide a more stringent reporting system for any harm that is caused by a product; and requiring manufacturers to register as opposed to the voluntary reporting system.¹⁷⁹

¹⁷² *Id.*

¹⁷³ See *Confidence in Cosmetics*, COSMETIC, TOILETRY & PERFUMERY ASS’N, <http://www.thefactsabout.co.uk/confidence-in-cosmetics/content/128#safety> [https://perma.cc/8E96-MY2B] (last visited Jan. 24, 2020); see also Regul. (EC) No 1223/2009 O.J. (L 342/46), ch. III, art. 10(1).

¹⁷⁴ Commission Regulation (EC) No 1223/2009 O.J. (L 342/46), ch. III, art. 10(2).

¹⁷⁵ Press Release, Off. of Sen. Dianne Feinstein, Senators Introduce Bill to Strengthen Personal Care Product Oversight (Apr. 20, 2015), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=89FF88B8-5FB1-4617-B96A-C46547CA14EF>.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ The first two chemicals proposed to be reviewed were formaldehyde which has been linked to increased risk of cancer and propyl paraben which is used as a preservative in many products and acts as estrogen which therefore has been linked to endocrine and reproductive disorders. *Id.*

¹⁷⁹ *Id.*

Another consideration would be to enact stricter standards for receiving certifications and seals. One way the U.S. could achieve this is by mimicking COSMOS, an international non-profit organization that specializes in certifying companies for organic or natural products.¹⁸⁰ Their goal is to “harmonize organic standards globally.”¹⁸¹ In order to meet the certification requirements under the COSMOS standard, “the producer must have its manufacturing facility inspected (including an ingredients audit) once a year, the product formulas and labels have been approved according to its standards, anything non-organic is only being used because there’s currently no organic alternative, and all ingredients are free of genetic modification.”¹⁸² In addition to these requirements of using organic ingredients, the ingredients must undergo rigorous testing to show that they were grown or produced in organic soil.¹⁸³

This rigorous standard of testing would hold businesses accountable for tracking and maintaining the quality of their product while also redeveloping trust from the public and would ensure that when products received a label, seal, or certification, it was well deserved.

D. ENCOURAGE MORE CONSUMER SELF-EDUCATION

The last recommendation this Note will offer is to have consumers take an active role in the process of preventing misleading labeling. In particular, it is critical that consumers become informed enough to recognize and avoid greenwashed products.¹⁸⁴ The first way would be to look for eco-labels which are the most useful tool for avoiding greenwashing.¹⁸⁵ These eco-labels, such as EcoLogo or GreenSeal, have both been certified by a third-party by organizations that work towards creating transparency about the life-cycle and health aspects of products.¹⁸⁶

Unfortunately, with the lack of regulation within the U.S. of toxic substances in cosmetics and personal use products, and no progress in advancing these regulations, a lot of the burden is shifted to the average consumer.¹⁸⁷ One of the best ways for consumers to educate themselves is to simply use the internet to research the material and read about which chemicals could be toxic.¹⁸⁸ Consumers can educate themselves by visiting agency websites to learn more about how they operate and reading official statutes to get a better understanding of how the agencies operate. Additionally, there are also many lifestyle brands and advocacy groups, such as Goop

¹⁸⁰ Picardi, *supra* note 135.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ SIX SINS OF GREENWASHING, *supra* note 4, at 5.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Shah & Taylor, *supra* note 103, at 271–72.

¹⁸⁸ *For Consumers*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/consumers> (last visited Jan. 25, 2020).

or Environmental Working Group, which aim to educate the consumer on the current lack of regulation and offer safe, healthy, and truthfully labeled alternatives.¹⁸⁹

CONCLUSION

Today, “greenwashing” is no longer a term synonymous with the environmental movement. Greenwashing now pertains largely to cosmetic companies who are hiding the harmfulness of their ingredients under terms such as “organic,” “natural,” or “green.” As a major government agency involved in the regulation of these products, the FDA needs to expand its assessment strategy of the chemicals used in cosmetic and personal care items. Further, other government agencies, such as the EPA, USDA, and FTC, need to provide stricter guidelines in order to facilitate the FDA’s advancement in this area. It is clear that there are many chemicals in current products that pose a serious risk to consumer health. If the U.S. were to continue with the current state of a lack of regulation, consumers would not only continue to be harmed by chemicals in greenwashed packaging, but would also see their risk increased from foreign manufacturers who are looking to enter the American market and make a profit off the low chemical use standards in America.¹⁹⁰

Lastly, although there are a number of possible solutions to these problems, the popular recommendation would be to imitate the European Union system and how it regulates cosmetics. By instituting a mandatory reporting system and responsible parties, American manufacturers would be discouraged from using harmful chemicals and no longer allowed to hide their secret knowledge of the toxicity of their products. Another option would be to develop a new program, bill, or standard, such as COSMOS or the Personal Care Products Safety Act, to restrict chemical use in products. Unfortunately, it seems that America is on the path of the last suggested recommendation: the recommendation that consumers must educate themselves about toxic substances in their cosmetics and personal care items on their own. Fortunately, there are many trade associations, advocacy groups, and social media accounts that are focused on fighting this battle which has been ongoing since the 1970s. The greenwashing of the cosmetics industry will continue to be a hot topic until more rigorous government action is taken to truly protect American consumers.

¹⁸⁹ STINK!, *supra* note 111.

¹⁹⁰ *Id.*