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CLEAN BEAUTY'S TOXIC DECEPTION: THE IMPACT OF CHANGING REGULATORY SCHEMES ON THE COSMETICS INDUSTRY

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I. INTRODUCTION

Over the past two years, the cosmetics industry has seen an explosion in "clean beauty" brands and marketing. As an industry projected to earn $22 billion by 2024,[1] it is hard to ignore the potential effects "clean beauty" has had on consumers and the cosmetics industry. Walk into any cosmetics retailer, be it high-end or low-end, and you'll quickly spot the relentless marketing of 'clean' products, including claims that they are either "all natural" or "non-toxic."[2] One consulting firm even estimated that roughly one-third of the entire United States cosmetics market is labeled as "clean."[3] The market includes several indie brands, popping up at retailers like Sephora,[4] but it also includes established brands like Dior,[5] Olaplex,[6] and others, who have hopped on the bandwagon of clean beauty marketing.

Perhaps due to the collective trauma that the pandemic has left on American consumers, it is more important than ever to be conscious of the products that are ingested, applied on, or absorbed into the human body.[7] While collective consciousness is usually a good thing, brands have used this curiosity to manipulate consumers through empty promises and deceptive claims.[8] This deception is primarily due to the fact that there is no accepted standard for what "clean" actually means in the context of cosmetics.[9] Further, the guidelines around the use of these terms are essentially non-existent since the government has severely underregulated clean beauty and the cosmetics industry.[10] For reference, the European Union bans more than 1,300 ingredients from use in cosmetics,[11] while the Food and Drug Administration (FDA) bans only eleven ingredients.[12] Furthermore, current U.S. legislation does not require cosmetic products to obtain FDA approval, unlike approval

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[1] Lindy Segal, *How beauty brands are redefining "clean" in 2023*, FAST COMPANY (Dec. 12, 2022).

[2] Elizabeth Paton, *The Dirt on Clean Beauty*, NEW YORK TIMES (Jan. 9, 2023).

[3] *Id.*

[4] *Clean at Sephora*, SEPHORA (last visited Jan. 20, 2024).

[5] *Dior Forever the Next Generation Foundation*, DIOR (last visited Jan. 20, 2024).

[6] *OLAPLEX is Clean and Non-Toxic…but What Does That Mean?*, OLAPLEX (Nov. 23, 2020).

[7] *See generally* Naveed Jan et al., *Pre-and post-COVID-19: The impact of the pandemic and stock market psychology on the growth and sustainability of consumer goods industries*, 13 FRONT. PSYCHOL. 1, 4 (2022).

[8] Clara Hudson, *Retailers' Clean Beauty Claims Fuel Consumer Doubts and Lawsuits*, BLOOMBERG LAW (Dec. 5, 2023, 5:00 AM).

[9] Paton, *supra* note 2.

[10] *Id.*

[11] *Id.*

[12] *Id.*

requirements for new drugs.[13] Moreover, the FDA does not define the terms "natural," or "clean."[14]

Brands have made sure to take advantage of this extreme leniency, particularly within the clean beauty industry.[15] For example, the brand Beyond Coastal[16] offered a sunscreen that was advertised as "100% natural," however, it contained the synthetic silicone, dimethicone.[17] This is not to say that dimethicone is conclusively unsafe or harmful.[18] But, it does show the degree to which the terminology of the cosmetics industry is confused.

This article will analyze the lacking regulatory scheme for clean cosmetics (and cosmetics as a whole) as well as propose several potential solutions and their possible ramifications. The purpose of this article is not to draw conclusions about the safety or efficacy of any particular products or ingredients, but instead to advocate for further research, transparency, and regulation of the products used by so many.

II. CURRENT REGULATORY FRAMEWORK

The primary methodology by which the United States government currently regulates cosmetics formulation and packaging are through the Federal Food, Drug, and Cosmetic Act (FDCA)[19] and the Fair Packaging and Labeling Act.[20] Unfortunately, for several reasons discussed below, the existing legislation is not enough to guarantee safe products and honest practices from the cosmetics industry.

First, as mentioned above, the FDCA does not require cosmetic products to obtain FDA approval before entering the market.[21] The FDCA defines cosmetics as "articles 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."[22] This means that products falling under this definition are not required to seek government

[13] Alecsandra Dragus, *Detoxing from Clean Claims: Bridging the Gap Between "Clean" and "Dirty" Beauty*, 13 WM. & Mary Bus. L. Rev. 895, 906 (2022).

[14] *Id.*

[15] Hudson, *supra* note 8.

[16] Lesley Fair, *Are your "all natural" claims all accurate?*, FED. TRADE COMM'N (Apr. 12, 2016).

[17] *Id.*

[18] Joanne Lewsley, *What is Dimethicone and What are its Benefits?*, MED. NEWS TODAY (Mar. 17, 2022).

[19] 21 U.S.C. § 362.

[20] 15 U.S.C. § 1456.

[21] Dragus, *supra* note 13.

[22] 21 U.S.C. § 31(i).

approval, despite their proximity and interaction with the human body.[23] Moreover, because there is no pre-market approval, words like "natural" and "clean" are unregulated;[24] the FDA admits that these terms can "mean anything or nothing at all."[25]

The FDCA's primary functions, then, are to give the FDA statutory authority to conduct inspections of cosmetics companies without prior announcement and to provide remedies for when companies violate the FDCA.[26] Unfortunately, inspections rarely occur because of the FDA's limited resources.[27] Even if violations are discovered, the agency cannot mandate a recall, but must file suit in court "to institute 'a civil seizure, an [. . .] injunction, or criminal prosecution.'"[28] With regard to labeling, the FDCA makes two requirements: "(1) that product labeling be consistent with labeling requirements, and (2) that claims must not mislead consumers."[29] The FDCA also defines adulterated and misbranded cosmetics but goes no further with regard to regulating the industry.[30]

At the end of 2022, Congress passed the Modernization of Cosmetics Regulation Act (MoCRA) which was considered a major overhaul of the FDA's current regulatory framework for cosmetics.[31] MoCRA amends Chapter VI of the FDCA and consequently provides the FDA more regulatory authority over the cosmetics industry.[32] A few key provisions of MoCRA include facility registration, product listing, mandatory adverse event reporting, good manufacturing practice, safety substantiation, and mandatory recall authority.[33] While MoCRA certainly provides the FDA with more protective authority, there is still no pre-market approval requirement.[34] Further, while these measures will hopefully increase the safety of cosmetics in the coming years, the FDA is still no closer to establishing an industry-wide

[23] *Cosmetics and Cancer Risk*, AMERICAN CANCER SOCIETY (May 28, 2014).

[24] *Myths on Cosmetics Safety,* EWG'S SKIN DEEP (last visited Jan. 21, 2024).

[25] *Id.*

[26] Lauren Jacobs, *Beauty Shouldn't Cause Pain: A Makeover Proposal for the FDA's Cosmetic Regulation*, 39 J. NAT'L ASS'N ADMIN. L. 83, 103. (2019).

[27] *Id.*

[28] *Id.* at 104.

[29] Dragus, *supra* note 13, at 910.

[30] 21 U.S.C. § 361-362.

[31] *FDA Regulatory Framework for Cosmetics Gets Major Overhaul*, COOLEY (last visited Mar. 2, 2023).

[32] *Id.*

[33] H.R. 2617, 117th Cong. § 3502 (2023).

[34] Li X. Massie and Felicia Leborgne Nowels, *New FDA Regulatory Framework for Cosmetics: The Modernization of Cosmetics Regulation Act 2022 (MoCRA)*, AKERMAN LLP (Jan. 31, 2023).

standard for clean cosmetics.[35] For the most part, the FDA's authority over cosmetics under the FDCA is curative, rather than preventative.[36]

Since there is no established authority on the use of clean beauty standards and labeling, it is critical that the Federal Trade Commission (FTC or the Commission) enjoins and regulates mislabeling. Currently, the FTC's primary avenue for enforcement of false labeling is through the Fair Packaging and Labeling Act (FPLA).[37] The FPLA requires that cosmetic labeling is truthful and not misleading, and that it discloses all ingredients contained within.[38]

Under the FPLA, the FTC has authority to prevent customer deception with respect to descriptions of ingredients, slack fill of packages, use of "cents-off"[39] lower price labeling, and characterization of package sizes.[40] However, the FPLA's focus is to prevent misinformation about the product's contents, rather than the language used to describe the product.[41] Alternatively, the FDA has similar authority to enforce fair packaging and labeling.[42] 15 U.S.C. Section 1456 states:

> any consumer commodity which is a food, drug, device, or cosmetic . . . which is introduced or delivered for introduction into commerce in violation of any of the provisions of this chapter . . . shall be deemed to be misbranded within the meaning of chapter III of the Federal Food, Drug, and Cosmetic Act.[43]

Outside of agency enforcement, individuals also have a cause of action for mislabeled cosmetics under the Lanham Act.[44] Section 1125 states:

> (1) any person who . . . uses in commerce any word, term . . . or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact which
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> (A) is likely to cause confusion, or to cause mistake . . . or

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[35] *See Modernization of Cosmetics Regulation Act of 2022 (MoCRA)*, U.S. FOOD & DRUG ADMIN. (Dec. 18, 2023); *See also* H.R. Rep. No. 2617-1396, at 1 (2023).

[36] *Id.* at 2617-1392.

[37] 16 C.F.R. § 500.4, 502.1.

[38] *Id.*

[39] 21 C.F.R. § 1.35(a); *A Guide to The Fair Packaging and Labeling Act – FAQs*, CTM LABELING SYSTEMS (Sep. 4, 2023).

[40] *Fair Packaging and Labeling Act: Regulations Under Section 4 of the Fair Packaging and Labeling Act*, FED. TRADE COMM'N (last visited Jan. 21, 2024).

[41] 15 U.S.C. § 1451.

[42] 15 U.S.C. § 1456.

[43] *Id.*

[44] 15 U.S.C. § 1125.

> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin . . .[45]

shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.[46]

Thus, individuals are granted an avenue for relief if they feel they have been deceived by unfair labeling.[47] While this cause of action may nudge brands in the right direction, consumer led enforcement is not nearly as effective as agency led enforcement which requires compliance on a sweeping scale.[48] Moreover, the problem with exercising this right of action as an individual is that proving clear deception by brands in a court of law can be difficult. This difficulty arises because cosmetics brands are not held to any standard in the use of clean labeling.[49] The FDA's Cosmetics Labeling Guide (the Guide) provides a clear and easy-to-follow summary of all the relevant regulations regarding labeling, including definitions and exceptions to those definitions.[50] According to the Guide,

> labeling may be considered misleading not only because a label statement is deceptive but also because a material fact is not revealed on a label. A fact may be material in light of a statement made on a label or because certain consequences may result from the recommended use of a product.[51]

The FTC also has the power to regulate packaging through Section 5 of the Federal Trade Commission Act (FTC Act). The act states that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practice in or affecting commerce, are . . . unlawful."[52] The FTC Act also empowers the Commission to prevent corporations and persons from these unlawful acts.[53] While not directly related to cosmetics, this broad power given to the FTC allows them to act if deceptive practices arise in the clean beauty industry.[54]

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[45] *Id.*
[46] *Id.*
[47] *See* 15 U.S.C. § 1456; 15 U.S.C. § 1125.
[48] Dragus, *supra* note 13, at 915-16.
[49] *Id*. at 922.
[50] *Cosmetic Labeling Guide*, FOOD AND DRUG ADMINISTRATION (last visited Jan. 21, 2024).
[51] *Id*. at 3.
[52] *See* 21 C.F.R. §1.21 (2023).
[53] *Id.*
[54] *Id.*

III. SEPHORA CLASS ACTION LAWSUIT

Perhaps the best example of misleading labeling in the context of clean beauty is the current class action lawsuit filed against cosmetics retailer, Sephora.[55] In their complaint, Plaintiffs establish the consumers' understanding of "clean" and allege that Sephora has falsely labeled their products as clean, even when they do not conform to the generally accepted understanding of the term.[56] Plaintiffs write, "consumers understand 'clean' as consistent with its dictionary definitions, which define it as describing something free from impurities, or unnecessary and harmful components, and pure."[57] Moreover, the Plaintiffs claim that "in the context of cosmetics, this means products made without synthetic chemicals and ingredients that could harm the body, skin, or environment."[58]

Sephora advertises their "Clean at Sephora"[59] line as "the beauty you want, minus the ingredients you might not."[60] The signature green seal given to select products indicates that the product is formulated "without parabens,[61] sulfates, SLS,[62] and SLES,[63] phthalates,[64] mineral

[55] Corrado Rizzi, *Class Action Claims Certain Sephora Cosmetics Not as 'Clean' as Advertised,* CLASS ACTION (Nov. 15, 2022).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Clean Beauty*, *'Formulated Without' List*, SEPHORA, (last visited Mar. 31, 2022).

[60] *Id.*

[61] *Parabens in Cosmetics*, U.S. FOOD & DRUG ADMIN. (Feb. 25, 2022) ("Parabens are a family of related chemicals that are commonly used as preservatives in cosmetic products.")

[62] *The 6 Most Harmful Ingredients In Your Beauty Products,* KATE'S HEALTHY CUPBOARD (Feb. 26, 2018) ("SLS is a penetration enhancer, meaning that its molecules are so small they're able to cross the membranes of your body's cells. Once cells are compromised, they become more vulnerable to other toxic chemicals that may be with the SLS.")

[63] *Why You Should Avoid SLS and SLES in Skincare,* IREN SHIZEN (Oct. 25, 2022) ("SLES is derived from SLS through ethoxylation and is used as a cleaning agent, emulsifier, stabilizer, and solubilizer. It is also often used as an alternative to SLS due to its additional properties and cheap production cost, which is always favored by corporations.")

[64] *The 6 Most Harmful Ingredients In Your Beauty Products, supra* note 62 (Phthalates are "potential endocrine disruptors" "linked to serious health problems such as cancer, reproductive, and developmental toxicity, allergies and sensitivities.")

oils,[65] formaldehyde,[66] and more."[67] The primary allegation in Plaintiffs' complaint is that many of the products given the green seal[68] actually contain ingredients inconsistent with consumers' understanding of "clean." [69] The complaint latches onto products that have been labeled clean, yet contain synthetic ingredients, such as the Saie Mascara 101.[70] This mascara allegedly contains polyglyceryl-6 distearate as its primary ingredient.[71] Polyglycerol-6 distearate is a compound of glycerol, which is a byproduct of biodiesel production.[72] This is not to say that polyglycerol-6 distearate is a dangerous or toxic ingredient,[73] but it is an example of how consumer understanding is not aligning with brand marketing.

Other products labeled as clean contain cetyl alcohol, "a synthetic substance manufactured by reducing ethyl palmitate with metallic sodium or other acidic conditions with lithium aluminum hydride as a catalyst."[74] Although this product has been labeled safe by the FDA, the complaint alleges that many dermatologists caution against cetyl alcohol for those who have sensitive skin since it can cause allergic dermal reactions.[75] The eleven-page complaint covers several other ingredients found in "Clean at Sephora" products that do not align with consumer understandings, primarily because of their synthetic nature.[76] Plaintiff states that she read and relied on the "Clean at Sephora" seal with the understanding that products would not contain synthetic ingredients, nor those linked to physical harm or skin irritation.[77]

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[65] *Id.* ("Mineral oils are derived from crude oil and are a known human carcinogen.")

[66] *Id.* ("These chemicals which help prevent microbes from growing in water-based products, can be absorbed through the skin and have been linked to cancer and allergic skin reactions.")

[67] *Clean Beauty*, *'Formulated Without' List*, *supra* note 59.

[68] *Behind the Seal: What it Means to be Clean at Sephora*, MBGLIFESTYE (Aug. 12, 2019) ("The green Clean at Sephora seal is a quick heads-up to shoppers that a product is formulated without certain ingredients.")

[69] Finster v. Sephora USA Inc., No. 6:22-cv-1187 at 3 (N.D.N.Y. Nov. 11, 2022).

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] Monice M. Flume et al., *Safety Assessment of Polyglyceryl Fatty Acid Esters as Used in Cosmetics,* 42 INTL. J. OF TOXICOLOGY 5s, 36s (Aug. 2023) (The Expert Panel for Cosmetic Ingredient Safety determined that Polyglyceryl-6 Distearate is safe in cosmetics in the present practices of use and concentration).

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

Plaintiffs accuse Sephora of breach of express warranty, implied warranty of merchantability, the Magnuson Moss Warranty Act,[78] fraud, and unjust enrichment, among other claims.[79] In response, Sephora filed a motion to dismiss in early 2023, stating that the plaintiff was "twisting purposes to mean something other than what they say or are said to mean."[80] Further, Sephora states that Plaintiff "implausibly claims to think . . . in a way wholly different from how Sephora clearly states it is using it."[81]

The suit was filed in the United States District Court for the Northern District of New York but could have potential ramifications for the cosmetics industry, not just for Sephora.[82] If the district judge rules in favor of Sephora, it could mean that brands will take this as a green light to be even more murky with their language. This indirect stamp of approval could contribute to the fearmongering and deceptive marketing already employed by the clean beauty industry. One cosmetic chemist said, "I see clean beauty as a cynical marketing ploy to get consumers to be afraid of conventional products and to spend more money on products that cost more, don't actually work better, and aren't actually safer for people."[83] Thus, if steps are not taken to rein in the marketing ploys of the clean beauty industry, it could result in a more misguided consumer base.

If, however, the district court denies Sephora's motion to dismiss, it would mean, at the very least, that the Plaintiffs have a viable claim for relief.

IV. OTHER DANGERS

The proliferation of clean beauty marketing has other ramifications for consumers.[84] For example, there seems to be a widely held misunderstanding of what ingredients are safe and efficacious because

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[78] *Businessperson's Guide to Federal Warranty Law,* FED. TRADE COMM'N (Mar. 2018) (The Magnuson-Moss Warranty Act "requires warrantors of products to provide consumers with detailed information regarding warranty coverage." The Act was passed by Congress to ensure that consumers obtained complete information about warranty terms and conditions for products in the marketplace to increase customer satisfaction).

[79] Finster v. Sephora USA Inc., No. 6:22-cv-1187 at 8 (N.D.N.Y. Nov. 11, 2022).

[80] Priya Rao, *Sephora Responds to Claim Its Clean Beauty Program is Anything But*, BUSINESS OF FASHION (Feb. 2, 2023).

[81] *Id.*

[82] Rizzi, *supra* note 55.

[83] Savannah Sicurella, *'Clean' Beauty Products are a Marketing Triumph*, NAT'L PUBLIC RADIO (Jul. 12, 2021).

[84] Amy K. Fuhrmeister, Product Labeling & Consumer Perception in Personal Care & Cosmetic Industries (May 2012) (Thesis, Hawaii Pacific University) at 6.

the market has conflated the words "clean" and "natural" with safe, when many chemists call this a major misconception.[85] One chemist even said that some natural ingredients, like raw shea butter or unrefined oils, are more damaging to the skin than synthetic chemicals when applied to the skin.[86] Similarly, consumers have experienced negative reactions to entirely natural extracts such as witch hazel.[87]

Aside from misconceptions surrounding clean beauty, there have also been instances of outright deceitful practices. In *Onaka*, Plaintiffs alleged that a Shiseido makeup line advertised as clean and free of chemicals contained per-and polyfluoroalkyl substances (PFAS).[88] Comparable suits have been brought against Proctor & Gamble, Colgate, and Clorox.[89] PFAS, a group of chemicals that have received widespread attention by many state legislatures recently,[90] are widely used in consumer products and can be found in drinking water, soil, fire extinguishing foam, food packaging, and more.[91] In the context of cosmetics, PFAS are used to improve product consistency and texture, or to improve condition and smooth the skin.[92] Further research needs to be completed, but there have been studies to show that PFAS are toxic to humans.[93] PFAS can cause developmental effects in children, increased risk of cancer, interference with the body's natural hormones, and more.[94] Plaintiffs have claimed that brands' failure to disclose PFAS in products labeled as clean have resulted in economic injury because they paid a price premium for natural products.[95]

The danger to consumers as a result of clean marketing is clear, but brands should also be wary of using this unregulated language,

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[85] *Id.* at 8.

[86] Sicurella, *supra* note 83.

[87] *Id.*

[88] Onaka v. Shiseido Ams. Corp., Case No. 1:21-cv-10665 (S.D.N.Y. 2023).

[89] McGinty v. Procter & Gamble Co., No. 4:20-cv-08164 (N.D. Cal. 2021); Anne de Lacour et al. v. Colgate-Palmolive Co. et al., No. 1:16-cv-08364 (S.D.N.Y. 2016); Gruen v. The Clorox Company et al., No. 3:22-cv-00935 (N.D. Cal. 2022) (alleging that makeup line characterized as natural and formulated "without chemicals of concern" contained PFAS).

[90] *PFAS in Food Packaging Law*, N.Y. STATE DEP'T OF ENV'T CONSERVATION (last visited Jan. 21, 2024).

[91] *Our Current Understanding of the Human Health and Environment Risks of PFAS*, U.S. ENVTL. PROTECTION AGENCY (Jun. 7, 2023).

[92] *Per and Polyfluoroalkyl Substances (PFAS) in Cosmetics*, U.S. FOOD & DRUG ADMIN. (Feb. 25, 2022).

[93] *PFAS in Food Packaging Law*, *supra* note 90.

[94] *Our Current Understanding of the Human Health and Environment Risks of PFAS*, *supra* note 91.

[95] Kelly Bonner, *Cosmetics Companies Invite Legal Risks With 'Clean' Marketing*, DUANEMORRIS (Sept. 1, 2022).

especially in light of recent litigation surrounding unclear labeling.[96] In the absence of clear standards, it is suggested that brands "ensure consistency of claims and language with marketers and influencers to ensure any product claims are truthful, not misleading, and adequately substantiated."[97] Perhaps more importantly, it is critical that brands carefully consider the terminology they are using and the message they are conveying to consumers.

V. POTENTIAL SOLUTIONS AND THE FTC'S ROLE

Some legislators have recognized the dangers associated with a virtually unregulated cosmetics industry, which is why Senator Feinstein of California proposed the Personal Care Products Safety Act in 2021.[98] Under this legislation, cosmetics brands and manufacturers would need to register with the FDA; they would also need to register all ingredients used in their products, as well as their manufacturing facilities.[99] Further, the bill requires the FDA to annually conduct a safety review "of at least five cosmetics ingredients or nonfunctional constituents and, if appropriate, issue a final finding on the safety of that ingredient or constituent."[100] Additionally, brands would be required to report "serious adverse events" to the FDA within fifteen days and allow the FDA to inspect all factories and records.[101] Currently, this legislation is with the Senate Committee on Health, Education, Labor, and Pensions.[102]

More robust legislation, while necessary, is just a starting point. The FDA needs to work to develop a concrete list of ingredients that are prohibited from cosmetic products if the brand chooses to employ clean terminology. Brands should then be required to meet this threshold to qualify for the use of clean marketing. Take beauty retailer Credo, for instance, with its "dirty list" of 2,700 ingredients, comprising substances associated with health and/or environmental risks.[103] Brands that chose to partner with Credo must agree to skip these products when formulating their products.[104] While lists like this have been accused of fearmongering and misinformation,[105] the alternative, which is a

[96] Lisa Friedman & Vivian Giang, *3M Reaches $10.3 Billion Settlement in 'Forever Chemicals' Suits*, N.Y. TIMES (Jun. 22, 2023).

[97] Bonner, *supra* note 95.

[98] Personal Care Products Safety Act, S. 2100, 117th Cong. (2021).

[99] *Id.* § 605(a)-(f).

[100] *Id.* § 607(a)(3)(A) & (d)(3).

[101] *Id.* § 609(c).

[102] Personal Care Products Safety Act S. 2100.

[103] *The Credo Clean Standard*, CREDO BEAUTY (last visited Mar. 3, 2023).

[104] *Id.*

[105] *See generally* Wing Sze Tang, *Has Clean Beauty Become a Misinformation Movement?*, ELLE CANADA (Jan. 8, 2020).

complete lack of standard, is more dangerous.[106] The extent of clinical research behind Credo's "dirty list" creation remains unclear.[107] However, there is a prevailing sentiment that for the continuation of the clean beauty in the American market, brands should adhere to specific criteria to warrant the use of "clean" and similar terms on their labels.[108]

In the European Union (EU), more than 1,300 chemicals are banned from personal care products.[109] The FDA, however, has banned only eleven ingredients.[110] Several of the ingredients banned by the EU are still allowed for use in the US.[111] Because the FDA has no pre-market approval, there is no way of knowing exactly how these ingredients have affected our health or environment.[112] For instance, the ingredient cyclotetrasiloxane has been banned in the EU for being linked to developmental and reproductive toxicity, as well as endocrine disruption.[113] In the US, however, cyclotetrasiloxane is still commonly found in lipsticks, foundations, moisturizers, and more, because it helps increase product penetration.[114] While more research needs to be done to establish the conclusive effects of cyclotetrasiloxane,[115] the existing research should be enough to disqualify any products containing this ingredient from being labeled "clean."[116] Therefore, the proposed FDA's "clean list" does not have to entail an outright prohibition of certain ingredients which could be a lengthy process. Rather, it could aim to identify potentially higher-risk ingredients not allowed in products labeled as "clean."

In the meantime, the FTC should work to enjoin use of clean labeling and advertising where brands do not meet the threshold requirements of the FDA's clean list. Even if the FDA is slow to set a standard, there are still steps the FTC can take. For example, the FTC brought charges against L'Oréal USA, Inc.[117] in 2014 when they falsely advertised that their Génifique[118] and Youth Code[119] products provided

[106] Dragus, *supra* note 13, at 895.
[107] *See id.* at 910.
[108] *Id.* at 923.
[109] Paton, *supra* note 2.
[110] Paton, *supra* note 2.
[111] Zhou & Martiner, *supra* note 109.
[112] *Id.*
[113] *Cyclotetrasiloxane*, EWG'S SKIN DEEP (last visited Jan. 21, 2024).
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *FDA Warning Letter Chides L'Oreal Over Drug-Like Health Claims on a Website for Cosmetic Products*, FDA ADVERT. AND PROMOTION MANUAL NEWSL. (Apr. 2015).
[118] Complaint at 1, 9, In re L'OREAL USA, No. C-4489 (F.T.C. 2014).
[119] *Id.*

certain unsubstantiated anti-aging benefits.[120] Likewise, Sunday Riley,[121] a skincare brand, faces criticism after being discovered for posting fabricated reviews of its own products online.[122] So far, the FTC has taken some action to stymie the abuse of clean labeling,[123] but not nearly enough.

In one settlement, the FTC found that Trans-India Products (d.b.a. ShiKai), a beauty brand sold in national drugstores like Walgreens, marketed their products as "all natural."[124] However, these products contained the synthetic ingredients such as Ethylhexyl Glycerin, Phenoxyethanol, and Dimethicone.[125] These claims were found to violate Section 5(a) of the FTC Act for being false and misleading.[126] Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce."[127] The FTC Act also gives the Board authority to take action when the act has been violated.[128] Despite this authority, however, the FTC has been excessively lax on developing regulations to curb the misuse of clean labeling.[129]

While the US has no federal regulation for clean beauty labeling, California has come the closest to creating a workable scheme that could be applied to clean beauty.[130] In 2005, California passed the California Safe Cosmetics Act[131] into law, making it the "first state in the nation to pass legislation governing the safety and reporting of cosmetic ingredients."[132] The California Safe Cosmetics Act lists nearly 800 known carcinogens and reproductive and developmental toxicants.[133] Further, "unlike the FDCA, manufacturers must include trade secret or fragrance ingredients in the lists they submit to the state."[134] Perhaps the most significant work that the legislation is responsible for is

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[120] *Id.*

[121] Complaint at 2, In re Sunday Riley Modern Skincare, LLC, and Sunday Riley, individually and as an officer of Sunday Riley Modern Skincare, LLC., No. C-4729 (F.T.C. 2020).

[122] *Id.*

[123] Fair, *supra* note 16.

[124] Complaint at 1-2, In re Trans-India Products, Inc., No. C-4582 (F.T.C. 2016).

[125] *Id.*

[126] 15 U.S.C. § 45.

[127] *Id.*

[128] *Id.*

[129] Jonathan Burbaum, *Protecting Consumers by Reforming Food Labeling Regulations*, FED'N OF AMERICAN SCIENTISTS (June 29, 2023).

[130] *California Safe Cosmetics Program*, CAL. DEPT. OF PUB. HEALTH (last visited Jan. 21, 2024).

[131] CAL. HEALTH & SAFETY CODE § 111791 (Deering, Lexis Advance through the 2023 Extra Session Ch 1, 2023 Regular Session Ch. 890).

[132] Jacobs, *supra* note 26, at 112.

[133] *Id.* at 112-113.

[134] *Id.* at 113.

> [m]aintaining a list of chemicals known or suspected to cause cancer or developmental or other reproductive harm, maintaining a user-friendly reporting system, maintaining a publicly-available database of company-submitted product ingredient information, providing a downloadable database of product ingredient information, create reports of submitted data, and participate in meeting with health advocates, industry regulators, and others to promote collaborative research efforts and to ensure product safety.[135]

A list of this nature allows California's Department of Public Health to regulate its cosmetics industry and gives companies clear guidelines to adhere to during manufacturing and production.[136] While the list is not directly targeted at clean beauty, it is certainly informative regarding clean beauty vernacular and packaging.

Currently, the California Safe Cosmetics Program (CSCP) is reported to include 800 cosmetics companies detailing over 100,000 products and their respective ingredients.[137] These entries are accessible through a publicly searchable database.[138] Most of the ingredients reported through the CSCP have been linked to reproductive and developmental defects as well as toxicity to the human body.[139] Many of these ingredients have not been banned on a federal level by the FDA.[140]

If a system similar to California's were implemented for clean beauty, it would likely necessitate differentiation.[141] Products labeled as clean and/or natural would likely need to meet thresholds separate from a product not marketed with the same vernacular. Additionally, the FDA and FTC could reference the Environmental Working Group (EWG) and Credo's research on potentially problematic ingredients as a starting point. Then, the FDA's list could categorize ingredients by risk, such as those with a high risk of irritation or allergens. Product marketing would then by monitored by the FTC based on the FDA's ingredient database.

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[135] *Id.*

[136] *See generally* Calif. Dep't of Pub. Health, *California Safe Cosmetics Program (CSCP) Product Database*, Calif., SAFE COSMETICS PROGRAM (2020).

[137] *Id.*

[138] *Id.*

[139] *See* Calif. Dep't of Pub. Health, *Reportable Ingredients List,* CALIF. SAFE COSMETICS PROGRAM (Aug. 2020).

[140] *See* 21 C.F.R. § 700.11 (2023).

[141] *See generally* Dragus, *supra* note 13.

VI. DEFINING CLEAN & POTENTIAL ROADBLOCKS

The first hurdle that the regulatory system will need to grapple with is developing an accepted standard for the meaning of the word "clean" as applied to cosmetics.[142] While the FTC has the power to review deceptive and misleading labeling, they will struggle to enforce or even review claims of deception.[143] This challenge arises if there is no clear indication from the FDA as to what is the definition of "clean."[144] Further,

> the lack of standard as to what 'clean' beauty is, combined with ongoing consumer perception that clean beauty is actually better than traditional products . . . cannot be said to directly constitute misleading claims under the FTC because these conclusions are based on a general misunderstanding of science and ambiguity in the marketplace.[145]

Essentially, consumers often confuse the words "clean" and "natural"; something is not "good" just because it comes from nature, nor is something "bad" simply because it is man-made.[146] This concept is best exemplified by the fact that synthetic ingredients often make natural ingredients functionally safer by providing stabilization and consistency to the product.[147]

One ingredient that has found popularity as of late,[148] bakuchiol, is marketed as a natural alternative to retinol that is allegedly more suitable for sensitive skin.[149] However, the research is extremely limited.[150] Some chemists point out that with natural ingredients like bakuchiol,[151] it is much more difficult to ensure that each batch is as efficacious or potent as the previous batch.[152] Furthermore, natural ingredients are

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[142] *Id.*

[143] *See* Anthony J. Dreyer, *FTC Enforcement Trends in Consumer Protection Under the Biden Administration*, SKADDEN (Dec. 13, 2023).

[144] *See* Lisa Lefferts*, Clean Labels Public Relations or Public Health?*, THE CTR. FOR SCI. IN THE PUB. INT. (2017).

[145] Dragus, *supra* note 13, at 916.

[146] Perry Romanowski, *Why Natural Cosmetics aren't better*, CHEMISTS CORNER (Jan. 19, 2021).

[147] *Id.*

[148] *See generally* Parizaad Khan Sethi, Chinea Rodriguez & Lauren Adhav, *This Natural Alternative to Retinol is Actually Better Than the Real Thing*, THE CUT (Oct. 21, 2022).

[149] Stephanie Watson, *Bakuchiol: Does it make skin look younger?*, HARVARD HEALTH PUBLISHING (May 4, 2022).

[150] *Id.*

[151] *Id.*

[152] Romanowski, *supra* note 146.

actually more likely to cause adverse allergic reactions than synthetic ingredients.[153]

Thus, defining "clean" is not as simple as synonymizing the word with "natural." Unfortunately, there is no other generally accepted standard to be applied to cosmetics, and it may be a long way until one is developed.[154] One potential approach to define clean beauty, instead of relying on terms like natural or non-toxic, could involve contextualizing ingredients based on their likelihood of causing skin irritation or adverse reactions. Skin irritation could include redness, rashes, breakouts, or burning.[155]

One ingredient commonly found in skincare, for example, is fragrance, whether it be a synthetic fragrance like linalool[156] or more natural fragrances like citrus extract.[157] Consumers often like fragrance because it adds to the sensorial experience of applying skincare, however, fragrance can be irritating to many people's skin.[158] Since some consumers react to it while others do not, fragrance should be categorized as an irritant, and therefore not "clean." Thus, individuals who have highly reactive or sensitive skin can shop for clean skincare with the understanding that it is irritant free. Other consumers who enjoy the aromatic smell of skincare, however, can opt for products that do contain fragrance.

The proposed "irritant free" standard would also change the conception of "natural" as "clean," since many natural products have the potential to be irritating to the skin.[159] Essential oils are commonly used in skincare products despite having a high rate of irritation.[160] Tea tree oil in particular is used to treat acne but has been linked to rashes, redness, or even making acne worse.[161] Some side effects of essential oils as a whole include "redness, chemical burns, headaches, swelling and blisters."[162] Further, "although many brands maintain that the antibacterial properties of essential oils aid in fighting acne, they can actually worsen breakouts."[163] An outright ban of essential oils is

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[153] *Id.*

[154] Paton, *supra* note 2.

[155] *Allergens in Cosmetics,* FDA (Feb. 25, 2022).

[156] *Natural vs Synthetic: Clarifying the Terms*, LABORATOIRE PHYTOCHEMIA, (Mar. 17, 2016).

[157] Dylan Marino, *All Your Questions About Fragrance in Skincare, Answered*, BYRDIE (Jan. 10, 2022).

[158] *Id.*

[159] *See* Jessica Schiffer, *Essential Oils May Be Wreaking Havoc on Your Skin*, THE NEW YORK TIMES (Mar.11, 2021).

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

unnecessary, but based on the data and the high risk of adverse side effects, products containing essential oil should not be labeled clean.[164] Despite their natural origin, the risk of irritation disqualifies products containing essential oils from meeting clean beauty standards.[165]

Of course, "non-irritating" is just one component of a much more complex definition that would need to be developed by the proper authorities within the FDA.[166] Further, consumers would need to be informed that the lack of a "clean" label on products does not mean that it is "dirty" or "non-clean" or even dangerous—it simply means that it has not met the parameters set by the FDA as a clean product.[167]

Even assuming that "clean" is properly defined by the FDA, the work would not stop there. A "non-clean" ingredients list would need to be developed, and it would need to be consistently updated as more research comes forward. Thus, the list would be a living document. The prospect of creating a list of ingredients is problematic in and of itself, considering the nature of science and its ability to consistently reverse its own conclusions.[168] As a result of slow developments and evolving opinions, much of cosmetic chemistry is highly controversial.[169] The process of getting researchers within the FDA to draw concurring opinions as to the safety level of ingredients is certainly a lengthy and costly ordeal.[170]

Within the cosmetics industry, chemists have highly varied opinions on the role of Sodium Laureth Sulfate (SLS).[171] SLS is the ingredient in cleansers or shampoos that allows a product to lather into a soapy foam; but, some research has shown that it can be irritating to those with sensitive skin.[172] Other sources have claimed, however, that any irritation experienced with SLS is because the user left the product on their skin for prolonged periods of time.[173] Reconciling differences such as this would require extensive time and resources.

Lastly, the shift towards more honest clean beauty marketing is only as effective as the consumer chooses to make it. Consumers have the

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[164] *See id.*

[165] *See id.*

[166] *See* Jacobs, *supra* note 26, at 102.

[167] Jasmine Clark, Clean Beauty: Beyond Skin Deep (2020) (B.A. thesis, Pennsylvania State University).

[168] *See generally* John P. Loannidis, *Why Most Published Research Findings Are False*, 2 PLOS MED. 696 (2005).

[169] *See generally* Oliver Jones & Ben Selinger, *The chemistry of cosmetics*, AUSTRALIAN ACAD. OF SCI. (last visited Jan. 21, 2024).

[170] *See generally*, *Dev. & Approval Process | Drugs,* U.S. FOOD & DRUG ADMIN. (Aug. 8, 2022).

[171] *What is SLS?*, WEBMD (Nov. 27, 2021).

[172] *Id.*

[173] *Id.*

ultimate responsibility for ensuring they are informed about the products they are purchasing.[174] Ensuring that brands adhere to the FDA and FTC's standards do not necessarily carry any weight to the consumer if the consumer has no awareness of the changes that have taken place. Most consumers who currently equate words like natural or non-toxic with clean will likely continue to do so without researching the difference.

VII. CHANGES TO THE COSMETICS INDUSTRY

Even without an established standard for clean beauty, the clean beauty industry will still feel the effects of MoCRA passed at the end of 2022.[175] Specifically, brands now need to disclose common allergens and maintain records that prove the safety of their products.[176] Most experts, however, find that MoCRA, while a step forward, is still not enough to change this largely unregulated industry for the better.[177]

Individual states, however, have taken some action to put pressure on the cosmetics industry.[178] As mentioned, California has banned many ingredients from being sold in the state.[179] Additionally, Washington state has banned phthalates, an ingredient found in fragranced products.[180] These steps certainly increase the safety of cosmetics for consumers but they do not address clean beauty's unique issue, the lack of any discernible standard.

The current state of clean beauty has often been described as the "wild west" where anything goes.[181] But surprisingly, major cosmetics manufacturers and retailers like Ulta, Sephora, and Target have launched clean-beauty programs with their own standards outlining what shoppers can expect when something has been labeled clean.[182] Unfortunately, consumers still need to be aware that a product labeled "clean" at Target could have an entirely different meaning from a product labeled "clean" at Sephora. If federal regulations were implemented, however, brands and retailers would need to align to one uniform standard.

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[174] Rashmi Karan, *Consumer Responsibilities You Must be Aware Of*, SHIKSHA (Jul 21, 2023).

[175] *FDA Regulatory Framework for Cosmetics Gets Major Overhaul, supra* note 31.

[176] Rachel Cernansky, *The US beauty industry is largely unregulated. Is that starting to change?*, VOGUE BUS. (Jan. 26, 2023).

[177] *Id.*

[178] *Id.*

[179] CAL. HEALTH & SAFETY CODE § 108980 (West 2021).

[180] Cernansky, *supra* note 176.

[181] Ambreen Ali, *Federal regulations are finally taking aim at the 'Wild West' of clean beauty*, FORTUNE (July 4, 2023, 12:00 PM).

[182] *Id.*

It is impossible to know for certain what type of shift this would cause in the cosmetics industry, but an adjustment period would likely be needed. Brands that do not use clean beauty marketing would not be greatly affected. However, brands whose entire philosophy is centered around creating clean products would have a difficult time pivoting their brand at the beginning of this major shift.

Kosas Cosmetics, for example, calls themselves a "next-level clean" brand that adheres to the EU, Sephora, and Credo clean standards.[183] They claim to have banned over 2,700 ingredients such as talc, petrolatum, dimethicone, and sulfates.[184] Their brand also places a huge emphasis on natural products and each product's individual landing page states the percentage of naturally derived ingredients.[185] Kosas' highly popular Revealer Concealer, for example, calls itself the "#1 Clean Concealer" that is "vegan, cruelty-free and gluten-free. Formulated without: mineral oil, talc, silicones, fragrance, parabens, sulfates, and phthalates."[186] A closer look at the ingredients list, however, shows that it contains arnica flower extract and rosemary leaf oil.[187] Both are fragranced plant extracts that can cause irritation to the skin.[188]

Hence, if the FDA were to implement a type of "non-irritating" standard for clean cosmetics like the one proposed above, Kosas would either need to entirely change their branding, or entirely change their formulation.[189] Kosas is not the only brand that would need to carry out a major overhaul in the face of FDA regulation.[190] This transitionary process would be extremely costly to brands and could result in lost business.

If a clean beauty brand chooses the reformulation route, they run the risk of sacrificing product efficacy or stability.[191] If, on the other hand, they choose to rebrand so that they no longer align with the clean beauty philosophy, they run the risk of losing customers who purchased from the brand specifically for that purpose.[192]

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[183] *Kosas Clean*, KOSAS (last visited Dec. 27, 2023).

[184] *Id.*

[185] See, e.g., *Glow I.V.*, KOSAS (last visited Dec. 27, 2023).

[186] *Revealer Concealer*, KOSAS (last visited Dec. 27, 2023).

[187] *Id.*

[188] *See* Ute Hofmann et al., *A sensitive sensor cell line for the detection of oxidative stress responses in cultured human keratinocytes*, 14 NAT'L CENTER FOR BIOTECH. INFO. 11293 (2014).

[189] *See generally* Kristin Larson, *Shopper Demand For Clean Beauty And Increased Transparency Continues*, FORBES (Jun. 30, 2021).

[190] *Id.*

[191] *See* Maria Monteros, *To accommodate the clean and vegan beauty movements, major brands are reformulating ingredients*, MODERN RETAIL (Jul. 17, 2023).

[192] *Id.*

Perhaps what is more likely, however, is that brands could find a way to skirt the requirements by subtly altering the specific terminologies they've used to establish their branding. This would essentially be equal to a subtle rebranding, like changing a product's language from being "all natural" to "naturally derived" or switching to "no added fragrance" instead of claiming to be "fragrance free."[193] In other words, brands may try to use all of the language currently claimed by clean beauty, just shy of actually using the word "clean" on their product.[194] That way, brands may not need to adhere to the FDA's clean standards.[195]

Regardless of whether the rebrand is big or small, consumers will notice.[196] Brands will need to grapple with the chaos that will undoubtedly result from increased regulation. Like any industry shift, however, the chaos eventually dies down and what is left will be a much more workable standard and a much less confused customer.[197] Further, costs incurred at the beginning of the shift will hopefully result in costs saved later on as a result of diminished litigation.

VIII. CONCLUSION

Currently, the cosmetics industry acts with almost no governmental oversight.[198] The clean beauty industry has taken advantage of this leeway and created a market of highly misinformed, fearful consumers.[199]

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[193] *See* William A. Hanssen & Katie M. Jackson, *Natural Cosmetics: Products Without a Clear Definition*, THE NAT'L L. REV. (Apr. 10, 2020) (defining "natural" and "naturally derived"); Joe Schwarcz, *What is the Difference between "Unscented" and "Fragrance-free" Products?*, MCGILL UNIV. (Mar. 20, 2017) (discussing the importance of terminology in the fragrance industry).

[194] *See e.g.*, Hudson, *supra* note 8 (discussing how Stella McCartney chose to never label her products as "clean" and instead relies on her slogan "skin care with a clear conscience").

[195] *See* Bonner, *supra* note 95 (stating that while the FDA has not provided a clear definition of "clean," under Fair Packaging and Labeling Act the FDA can take enforcement action against labeling that is determined to be untruthful and misleading).

[196] Hudson, *supra* note 8 (highlighting the value that consumers place on the word "clean" in product marketing).

[197] *See, e.g.*, Stephanie T. Nguyen, *A Century of Technological Evolution at the Federal Trade Commission*, FTC (Feb. 17, 2023) (explaining how the evolution of technological legislation and enforcement has protected consumers).

[198] *See* Priyanka Narayan, *The Cosmetic Industry Has Avoided Strict Regulation for Over a Century. Now Rising Health Concerns has FDA Inquiring*, CNBC (Aug. 2, 2018).

[199] *See* Jessa Glassman, *Navigating Greenwashing in the Beauty Industry*, GRC INSIGHTS (Dec. 7, 2020).

The suggested solution necessitates coordinated action from both the FDA and the FTC. It involves defining "clean" within the realm of personal care products and subsequently enforcing this definition to ensure compliance within the clean beauty industry.

Part of the work towards defining "clean" would ideally divorce the meaning of "clean" from "natural" as is understood in the mind of the American consumer. A starting point to be referenced by the FDA could be to work off of California's existing ingredients database, or that of the EWG, Credo, and/or the European Union.[200] Furthermore, this Note has proposed that the meaning of "clean" be understood in the context of risk; clean products should be less likely to pose a risk of irritation or adverse side effects when used.

If clean beauty is successfully defined by the FDA, the work must be carried on by maintaining a database of ingredients framed around the definition. Research would need to be continuous, as new ingredients and their uses are discovered frequently, and the FDA would need to maintain a "non-clean" list as a living document. This process would no doubt be lengthy and costly, especially as cosmetic chemistry remains a contentious field with experts frequently in disagreement regarding the safety, effectiveness, and applications of various ingredients.

Once more, this Note does not advocate for the prohibition of specific ingredients. Rather, it underscores the need for heightened testing to achieve a deeper comprehension of each ingredient's function in personal care products applied to the human body. This understanding is essential in formulating an effective regulatory framework for the clean beauty industry. Without clear standards, brands like Sephora risk litigation and consumers risk confusion; further, clear standards prevent misinformation from running rampant among consumers.

The Modernization of Cosmetics Regulation Act,[201] passed at the end of 2022, will place stricter requirements on the cosmetics industry, including more reporting and accountability in the face of dangerous products. However, these changes do not address issues unique to clean beauty and will not necessarily help the FDA in developing the clean standard. In the absence of FDA regulation, the FTC has no workable

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[200] *California Safe Cosmetics Program (CSCP) Product Database*, CALIFORNIA DEP'T OF PUB. HEALTH (last visited Jan. 14, 2023); *Your Guide to Safer Personal Care Products*, EWG (last visited Jan. 14, 2023); *The Dirty List*, CREDO BEAUTY (last visited Jan. 14, 2023); *Cosmetic Ingredient List*, EUROPEAN COMMISSION (last visited Jan. 14, 2023).

[201] *See, e.g.*, Nora Wells, *FDA Regulation of Cosmetics and Personal Care Products Under the Modernization of Cosmetics Regulation Act of 2022 (MoCRA)*, CONG. RSCH. SERV. (Oct. 30, 2023).

standard to enforce against brands who are using clean beauty labeling deceptively. The process proposed here works only if both agencies, the FDA and FTC, work in tandem to curb the high frequency of deceptive practices.

Presuming that the FDA and FTC can successfully create a regulatory scheme that the clean beauty industry is forced to comply with, major changes would certainly take place. Brands rushing to come into compliance with new standards would need to balance priorities as they develop either new formulations, new language, or both.

An industry shift such as this one would take years to fully roll out, and it's impossible to tell how changes within the industry would affect consumer behavior. Regardless, it is critical that agency action take place to stymie the abuse of the industry's extreme flexibility. Whether these changes will ever take shape and whether it will be enough to keep the industry honest, only time will tell.