

The Disrupted Path to Becoming Easy, Breezy, Beautiful*: How Companies Are Deceiving Consumers with Their Animal Testing Policies

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Introduction

IN 1938, THE U.S. FOOD AND DRUG ADMINISTRATION (“FDA”) passed the Food, Drug, and Cosmetic Act (“FDCA”), the nation’s first regulation on cosmetic ingredients.¹ At the time of the enactment, more people were using makeup than ever before.² This caused users to discover numerous side effects to the chemicals found in cosmetics.³ Congress’s passage of the FDCA was motivated in large part by a handful of gruesome cases involving Lash Lure, an eyelash and eyebrow tint that was popular in the 1930s.⁴ Multiple women reported heinous adverse reactions to this product because it allegedly contained paraphenylenediamine, a powder made from coal tar.⁵ The side effects included ulcers on the eyelids and severe dermatitis around the eyes; one woman died from a bacterial infection after using the product.⁶ As a result of this and deadly incidents with other

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1. Kirk R. Wilhelmus, *The Draize Eye Test*, 45 SURV. OPHTHALMOLOGY 493, 496 (2001).

2. Alice T. Gasch, *Lash Lure and Paraphenylenediamine: Toxic Beauty Past and Present*, AM. ACAD. OF OPHTHALMOLOGY (Nov. 2, 2017), <https://www.aao.org/senior-ophthalmologists/scope/article/lash-lure-paraphenylenediamine-toxic-beauty> [https://perma.cc/Z5VG-WKW8].

3. *See id.*

4. *Id.*

5. *See id.*

6. *See id.*

companies, the FDCA aimed to make all cosmetic products safe for consumption by requiring manufacturers to submit proof of safety.⁷

Although fifty-two percent of Americans in the 2010s disapproved of drug-related animal testing,⁸ the Lash Lure reactions created—what the public believed to be—a need for such testing in the 1900s.⁹ Following this, Dr. John H. Draize, an FDA pharmacologist, developed the Draize eye test,¹⁰ which became the first widely used, government-endorsed method of assessing eye irritancy from ingredients found in cosmetics.¹¹ Draize’s eye test included methods such as consistently exposing rabbits’ eyes to chemical compounds from cosmetics.¹² Rabbits were specifically used because of “their large eyes, with well-described anatomy and physiology, ease of handling, economy, and availability.”¹³ However, “[t]he eyes of rabbits are generally more susceptible to irritating substances than the eyes of humans.”¹⁴

The amount of animals used for a single chemical test of a cosmetic ingredient varied based on the goal of the test and the program’s consideration of animal cruelty, but three to six rabbits were generally used per test.¹⁵ Liquids, ointments, pastes, and solids were applied to the rabbits’ eyes.¹⁶ Anesthetics were only sometimes used for the rabbits’ discomfort.¹⁷ Draize measured the resulting swelling, discharge, and redness, and, therefore, the likeliness of human skin irritancy, on the rabbits’ eyes.¹⁸ For a substance to be classified as a human eye irritant, at least four animals in a testing group of six had to display reactions of discomfort.¹⁹

7. *Part II: 1938, Food, Drug, Cosmetic Act*, U.S. FOOD & DRUG ADMIN. (Nov. 27, 2018), <https://www.fda.gov/about-fda/changes-science-law-and-regulatory-authorities/part-ii-1938-food-drug-cosmetic-act#:~:text=FDR%20signed%20the%20Food%2C%20Drug,adequate%20directions%20for%20safe%20use> [https://perma.cc/BAL4-NRLN].

8. *See Facts and Statistics About Animal Testing*, PETA, <https://www.peta.org/issues/animals-used-for-experimentation/animals-used-experimentation-factsheets/animal-experiments-overview/> [https://perma.cc/Q7JY-DF3F].

9. Wilhelmus, *supra* note 1, at 497.

10. *Id.*

11. *Id.* at 497–98, 505.

12. *Id.* at 497.

13. *Id.* at 498.

14. *Id.*

15. *Id.*

16. *Id.* at 498–99.

17. *Id.* at 499.

18. *Id.* at 500.

19. *Id.* at 500–01.

In 1944, the American Society of Cosmetic Chemists presented Draize a product safety award for developing the eye test.²⁰ As a result of Draize's recognition, laboratory animal testing boomed in the 1960s and 1970s.²¹ A survey of animal use in the United States revealed that approximately seventeen million laboratory animals were used in 1957.²² Less than a decade later, in the 1960s, another survey reported that forty to fifty million animals were being used annually.²³ While the survey did not specify how many of the millions were dedicated to cosmetic purposes, it can be inferred that Draize's test played a large part in this huge jump. In 1977, multinational cosmetics conglomerate Revlon was reported to have used 2,000 rabbits for cosmetic testing.²⁴ While this pales in comparison to the forty to fifty million number above,²⁵ Revlon's rabbit use was plenty to spark an uprising in animal rights advocacy.²⁶

Within the next two years, protestors questioned Revlon for their actions at their stockholders' meetings and marched, some dressed as rabbits, outside of Revlon's New York office.²⁷ Additionally, protestors around the world began handing out informational leaflets regarding the animal testing at department stores selling Revlon products.²⁸ Due to the protestors' actions, news outlets began reporting on Revlon's use of rabbits.²⁹ By the end of 1980, in response to the bad publicity and public outcry, Revlon pledged \$750,000 for non-animal cosmetic testing research purposes.³⁰ Other companies, including Avon and Bristol-Meyers, also pled a collective \$1 million to find alternatives to animal testing due to the Revlon controversy.³¹ Consequently, use of rabbits for the Draize eye test fell by at least eighty-seven percent during the 1980s.³²

However, the public outcry in the 1970s was not the first occurrence of the cruelty-free movement. Nearly eighty years before the

20. *Id.* at 497.

21. *Id.* at 504.

22. ANDREW N. ROWAN & FRANKLIN M. LOEW, ANIMAL RESEARCH: A REVIEW OF DEVELOPMENTS, 1950–2000, *reprinted in* WBI STUDIES REPOSITORY 111, 113 (2001).

23. *Id.*

24. Wilhelmus, *supra* note 1, at 504.

25. ROWAN & LOEW, *supra* note 22.

26. Wilhelmus, *supra* note 1, at 504.

27. *Id.* at 504–05.

28. *Id.* at 505.

29. *Id.* at 504.

30. *Id.*

31. *Id.*

32. *Id.* at 505.

Revlon protests in the 1970s, anti-vivisection activist Frances Power Cobbe founded Cruelty Free International, a nonprofit organization dedicated to eradicating animal experimentation; its cause remains relevant as of 2023.³³ Cruelty Free International campaigned in the streets, raised awareness of the dog vivisection controversy occurring in Britain in the early 1900s, and protested with other animal rights groups from its 1898 founding through the present.³⁴

Despite public outcry and organized groups dedicated to the cruelty-free movement, the FDA has never in history regulated the term “cruelty-free,”³⁵ which allows companies to falsely advertise themselves as cruelty-free. Cosmetic animal testing still exists today, mostly due to China mandating testing for certain cosmetics, such as sunscreens and hair dyes.³⁶

Amidst a culture of consumers demanding cruelty-free labels on their products,³⁷ companies have either committed to being cruelty-free or falsely advertise their products by shielding their involvement in animal testing from consumers. Estée Lauder, an international beauty manufacturer, heavily promoted anti-animal testing legislation in 2019 and pledged to “#BeCrueltyFree”³⁸ despite not being a cruelty-free corporation as of 2023.³⁹

In response to this unethical behavior, this Comment argues that beauty companies that deceptively portray themselves as cruelty-free should be held to higher legal accountability by both state and federal entities due to lack of active regulation. Currently, every state in the country has consumer protection laws, but there is no aggressive regu-

33. *Our History*, CRUELTY FREE INT’L, <https://crueltyfreeinternational.org/what-we-do/our-history> [<https://perma.cc/KWN3-HK7L>].

34. *Id.*

35. “Cruelty Free”/“Not Tested on Animals,” U.S. FOOD & DRUG ADMIN. (Feb. 25, 2022), <https://www.fda.gov/cosmetics/cosmetics-labeling-claims/cruelty-freenot-tested-animals> [<https://perma.cc/U39W-C5RE>].

36. Annachiara Biondi, *Why Clean Beauty Brands Are Heading for China*, VOGUE BUS. (May 12, 2021), <https://www.voguebusiness.com/consumers/china-animal-testing-provisions-clean-beauty-brands> [<https://perma.cc/7UPB-K3QT>].

37. See Daniela Isabel Bolivar Leon, *An Examination of the Growth of Cruelty Free Products Available for the 18-24 Age Range*, (May 10, 2020) (Undergraduate Research Project, CCT College Dublin), <https://arc.cct.ie/cgi/viewcontent.cgi?article=1009&context=Business> [<https://perma.cc/MJ7G-59XB>].

38. Allison Levy, *Estée Lauder Companies Just Made Major Strides in the Fight Against Animal Testing*, NEWBEAUTY (June 25, 2019), <https://www.newbeauty.com/estee-lauder-cruelty-free-humane-society-partners/> [<https://perma.cc/85RK-74KK>].

39. *Animal Testing*, ESTÉE LAUDER COS., <https://www.elcompanies.com/en/our-commitments/viewpoints/animal-testing#20us> [<https://perma.cc/2GF9-F3DP>].

lation of companies who falsely advertise.⁴⁰ In California, specifically, defrauded consumers must retain counsel on their own to obtain restitution from such companies.⁴¹ On the federal level, the U.S. Federal Trade Commission (“FTC”) is a government entity charged with penalizing organizations that falsely advertise and defraud consumers.⁴²

However, the FTC’s methods of identifying such perpetrators are as passive as California’s, and the U.S. Supreme Court recently held in 2021 that the agency lacks authority to obtain monetary relief for defrauded consumers.⁴³ In the same year, the FTC penned a letter asking Congress to expressly reinstate its ability to collect monetary damages for consumers.⁴⁴ This Comment argues Congress should restore the FTC’s authority. Additionally, both California and the FTC should enact active programs to seek out and admonish companies that attempt to veil their involvement in animal testing.

Until the world commits to completely ending animal testing, companies that attempt to conceal their participation should—at minimum—be held accountable and penalized. For example, significant monetary penalties would at least hinder companies from attempting to present themselves as cruelty-free entities. Not only is the practice of animal testing unethical, but the act of hiding it from consumers ruins the integrity of the marketplace. “Even those not particularly concerned about animal testing themselves can recognize the importance of a consumer’s right to choose and to not be deceived.”⁴⁵

Part I of this Comment details the history and current status of cosmetic animal testing. Part II proposes that both California and the federal government adopt methods that are not reliant on consumer action to identify companies that falsely advertise their cruelty-free status. Part III argues that Congress should grant the FTC’s request to regain its ability to obtain monetary damages on behalf of consumers. Part IV suggests task forces, which can be implemented on both state

40. See CAROLYN L. CARTER, NAT’L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 5 (2009).

41. See discussion *infra* Section I.F.

42. *About the FTC*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc> [<https://perma.cc/LR2X-C7VZ>].

43. *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1352 (2021).

44. Letter from Rebecca Kelly Slaughter, Comm’r, Fed. Trade Comm’n, to U.S. Senate (May 18, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590235/acting_chair_letter_to_senate_committee_re_13b_-_final_signed.pdf [<https://perma.cc/H8QG-HB93>].

45. Delcianna J. Winders, *Combining Reflexive Law and False Advertising Law to Standardize “Cruelty-Free” Labeling of Cosmetics*, 81 N.Y.U. L. REV. 454, 456 (2006).

and federal levels, to monitor false advertising. Part V addresses potential criticisms to arguments presented in the preceding sections.

I. History and Current Status of Cosmetic Animal Testing

Cosmetic animal testing involves procedures on live animals for the purpose of ensuring product safety for human consumption.⁴⁶ The earliest practice of using animals to evaluate the harmful effects of products dates back to the eighteenth century.⁴⁷ Since then, the following types of animal testing have developed: eye and skin irritation tests in which chemical substances are applied to rabbits' eyes⁴⁸ and carcinogenicity tests, which expose rats and mice to possible carcinogens.⁴⁹ Other types of cosmetic testing include physical restraints for observation,⁵⁰ surgical procedures, electric shock, and genetic manipulation.⁵¹ In this Comment, the Draize eye test and carcinogenicity tests will specifically be discussed below to shed light on the realities of cosmetic testing.

A large part of the outrage behind the cruelty-free movement is that experimentation on animals has been scientifically proven to raise their stress levels⁵² and is detrimental to their psychological health.⁵³ In 2021, People for the Ethical Treatment of Animals ("PETA") estimated that China used over 300,000 animals for cosmetic testing.⁵⁴ While the U.S. Department of Agriculture reports the numbers of animals utilized for laboratory research, there is little

46. *Animal Testing & Cosmetics*, U.S. FOOD & DRUG ADMIN. (Mar. 4, 2022), <https://www.fda.gov/cosmetics/product-testing-cosmetics/animal-testing-cosmetics> [https://perma.cc/LZ5N-Z76R].

47. See Wilhelmus, *supra* note 1, at 494.

48. NAT'L RSCH. COUNCIL ET AL., *USE OF LABORATORY ANIMALS IN BIOMEDICAL AND BEHAVIORAL RESEARCH* (1988), <https://www.ncbi.nlm.nih.gov/books/NBK218261/> [https://perma.cc/4F6E-PRLC].

49. *Id.*

50. UC DAVIS INSTITUTIONAL ANIMAL CARE & USE COMM. (IACUC), IACUC-43, *THE USE OF PROLONGED PHYSICAL RESTRAINT IN NON-SEDATED RESEARCH AND TEACHING ANIMALS* (2022), <https://research.ucdavis.edu/wp-content/uploads/IACUC-43.pdf> [https://perma.cc/5EEH-3Q5Z].

51. *About Animal Testing*, HUMANE SOC'Y INT'L, <https://www.hsi.org/news-media/about/> [https://perma.cc/X8KV-MTJA].

52. See Jarrod Bailey, Comment, *Does the Stress of Laboratory Life and Experimentation on Animals Adversely Affect Research Data? A Critical Review*, 46 *ALTS. TO LAB'Y ANIMALS* 291, 295 (2018).

53. Morgan Damm, *The Psychological Effects of Medical Research on Animal Subjects and the Ramifications for the Applicability of the Research Results* (2015) (B.S. thesis, Portland State University) (PDXScholar).

54. *PETA Answers Your Questions on Animal Testing for Cosmetics*, PETA UK, <https://www.peta.org.uk/features/animal-testing-cosmetics/#:~:text=2.,likely%20to%20be%20>

transparency as to how many are used for cosmetics purposes.⁵⁵ Global numbers are unknown presumably due to lack of reporting.⁵⁶

A. Draize Eye Test

The Draize eye test gained traction in the 1960s when the FDA and other laboratories began using rabbits for cosmetic testing.⁵⁷ Although non-animal alternatives have been introduced to test eye irritancy in products, use of the Draize test has not been fully eradicated.⁵⁸ Since the public outcry against the test in the 1970s, the modern science community has criticized the test for its lack of ethical consideration and flawed methodology due to biological differences between rabbits and humans.⁵⁹

For example, a fixed amount of potentially toxic liquids spilled onto rabbits' eyes does not equate to all the accidental exposures to toxicity that humans can encounter.⁶⁰ The factors that Draize used to quantify eye irritancy, such as visible conjunctivitis and changes to the iris, are factors that are merely easily observable and do not account for possible microscopic and molecular damage.⁶¹ Additionally, rabbit eyes may not accurately foretell human eye irritation because rabbits have relatively low tear production, do not need to blink as much, and have less sensitive eyes than humans.⁶² Because this test is not considered the best method to determine consumer safety, as human and rabbit anatomies differ, and because the test factors are only surface level and cause painful effects on animals, use of the Draize eye test should be eliminated.

B. Carcinogenicity Testing

There have been several controversies regarding whether cosmetic products, such as hair dyes, deodorants, and face powders, can

much%20higher [https://perma.cc/RWR2-TL92] [hereinafter *PETA Answers Your Questions*].

55. See generally U.S. DEP'T OF AGRIC. ANIMAL & PLANT HEALTH INSPECTION SERV., ANNUAL REPORT ANIMAL USAGE BY FISCAL YEAR (2019), <https://speakingofresearch.files.wordpress.com/2021/08/united-states-2019.pdf> [https://perma.cc/L3CH-3LAB].

56. *PETA Answers Your Questions*, *supra* note 54.

57. Wilhelmus, *supra* note 1, at 496–97.

58. C. Lotz et al., *Replacing the Draize Eye Test: Impedance Spectroscopy as a 3R Method to Discriminate Between All GHS Categories for Eye Irritation*, *SCI. REPS.*, Oct. 2018, at 6.

59. Wilhelmus, *supra* note 1, at 501–02, 504.

60. *Id.* at 502.

61. *Id.*

62. *Id.*

cause cancer in humans.⁶³ In response to consumer fear, stoked by media reports associating cosmetic ingredients with potentially dangerous effects,⁶⁴ scientists performed carcinogenicity testing on animals by exposing rats to suspicious chemicals and observing whether tumors develop in the test subjects.⁶⁵

In a 2009 study, mice were purposefully exposed to ultraviolet radiation for twenty weeks at a time, to mimic humans' natural exposure to sunlight, in order to test commonly used drugstore moisturizers that were suspected of increasing the occurrence of sunlight-induced skin cancer in humans.⁶⁶ Such carcinogenicity testing has also been performed on mice and rats for cosmetic dye used in lipsticks.⁶⁷

Toxicologists have questioned the accuracy of this particular method in predicting human cancer risk as there have been instances of false positives where certain chemicals have caused cancer in rats but not in humans.⁶⁸ There have also been occurrences of false negatives where certain chemicals did not cause cancer in rodents but did in humans.⁶⁹ Due to the proven unreliability of carcinogenicity testing, as well as the harm done to mice and rats, this method of cosmetic testing should also be eradicated.

C. Animal Testing Is Not Required in the United States

The FDA does not require animal testing to prove that cosmetics are safe for human consumption, but the FDA does suggest that manufacturers employ any testing they deem appropriate to determine cosmetic safety.⁷⁰ Moreover, non-animal alternatives to cosmetic testing exist.⁷¹ Scientists have proposed computer models and laboratory-grown cells to create miniature organs, which would replace the use of

63. Saya L. Jacob et al., Commentary, *Cosmetics and Cancer: Adverse Event Reports Submitted to the Food and Drug Administration*, J. NAT'L CANCER INST., 2018, at 1.

64. *Id.*

65. Fanny K. Ennever & Lester B. Lave, *Implications of the Lack of Accuracy of the Lifetime Rodent Bioassay for Predicting Human Carcinogenicity*, 38 REGUL. TOXICOLOGY & PHARMACOLOGY 52, 52 (2003).

66. Yao-Ping Lu et al., *Tumorigenic Effect of Some Commonly Used Moisturizing Creams when Applied Topically to UVB-Pretreated High-Risk Mice*, 129 J. INVESTIGATIVE DERMATOLOGY 468, 469 (2009).

67. See Piengchai Kupradinun et al., *Carcinogenicity Testing of the Cosmetic Dye: D&C Red No. 36*, 3 ASIAN PAC. J. CANCER PREVENTION 55, 55 (2002).

68. See Ennever & Lave, *supra* note 65, at 53.

69. See *id.*

70. "Cruelty Free"/"Not Tested on Animals," *supra* note 35.

71. Sonali K. Doke & Shashikant C. Dhawale, *Alternatives to Animal Testing: A Review*, 23 SAUDI PHARM. J. 223, 224 (2015).

rabbits for checking chemical toxicity and irritancy.⁷² Humans can also volunteer to patch test potential new drugs for the purposes of skin irritation testing.⁷³ Additionally, bacteria testing, including a procedure called the Ames test, allows for testing of possible carcinogens.⁷⁴ Regulation to approve non-animal alternatives also exists.

Some states, including California, have banned cosmetics testing where a validated non-animal alternative exists.⁷⁵ A validated alternative would be vetted by the Interagency Coordinating Committee on the Validation of Alternative Methods (“ICCVAM”),⁷⁶ an organization dedicated to developing toxicity testing methods that both protect humans and reduce or refine animal use.⁷⁷

ICCVAM provides guidelines on what makes for a valid non-animal alternative test, including impact on animal health, ability to predict adverse effects, and convenience over existing tests.⁷⁸ Such approved tests include the OptiSafe test method, an in vitro test method that can replace the Draize test in identifying eye irritating chemicals.⁷⁹ Additionally, in vitro cytotoxicity test methods can replace some carcinogenicity testing methods on rats and mice as it measures toxicity from certain drugs to human cells.⁸⁰ As such, multiple alternatives to animal testing are readily available and arguably eradicate the need for animal testing at all.

72. See *id.* at 225–26.

73. Hajime Kojima et al., *A Step-by-Step Approach for Assessing Human Skin Irritation Without Animal Testing for Quasi-Drugs and Cosmetic Products*, 7 APPLIED IN VITRO TOXICOLOGY 144, 145 (2021).

74. W. Föllmann et al., *Ames Test*, in *BRENNER’S ENCYCLOPEDIA OF GENETICS* 104 (Stanley Maloy & Kelly Hughes eds., 2d ed. 2013).

75. CAL. CIV. CODE § 1834.9(a) (2002).

76. *Id.* §§ 1834.9(a), 1834.9(f) (7).

77. Interagency Coordinating Committee on the Validation of Alternative Methods Communities of Practice Webinar on Emerging Approaches for Anchoring Biological Relevance of New Approach Methodologies, 88 Fed. Reg. 1240 (Jan. 3, 2023).

78. INTERAGENCY COORDINATING COMM. ON THE VALIDATION OF ALT. METHODS (ICCVAM), No. 03-4508, ICCVAM GUIDELINES FOR THE NOMINATION AND SUBMISSION OF NEW, REVISED, AND ALTERNATIVE TEST METHODS, at i, iii (2003).

79. *OptiSafe Test Method*, NAT’L TOXICOLOGY PROGRAM (Aug. 2, 2022), https://ntp.niehs.nih.gov/whatwestudy/niceatm/test-method-evaluations/ocular/optisafe/index.html?utm_source=Direct&utm_medium=Prod&utm_campaign=Ntpgolinks&utm_term=Optisafe [<https://perma.cc/J246-AUZZ>].

80. See generally *Cytotoxicity Assay Development and Testing Services Lab CRO*, NORTHEAST BIOLAB, <https://www.nebiolab.com/cytotoxicity-testing-assay> [<https://perma.cc/8QBC-4E2E>].

D. China's Animal Testing Mandate

1. 2012 to 2021: Pre-Market Testing

Mainland China is one of the few countries in the world that mandates cosmetic animal testing.⁸¹ Since its announcement in 2012 that animal testing was required for imported beauty products,⁸² China's mandate prevents most cosmetic companies from becoming cruelty-free because it houses the second-largest beauty market in the world, after the United States.⁸³ To maximize profits, many beauty corporations in the United States sell in China due to the country's large beauty market.⁸⁴ In 2021, marketing research showed that China's beauty market was worth an estimated \$56 billion, compared to the United States at \$80 billion.⁸⁵

Before May 2021, China required pre-market animal testing in all imported cosmetics.⁸⁶ This meant *all* cosmetics registered⁸⁷ in China from other countries had to be tested on animals before being sold to customers.⁸⁸ Then in May 2021, China made a significant change in its cosmetic testing policy by only mandating post-market testing.⁸⁹

81. Amanda Lim, *China Animal Testing: Limitations Remain for Companies Seeking Exemption from Animal Tests*, COSMS. DESIGN ASIA (Jan. 19, 2021, 2:33 PM), <https://www.cosmeticsdesign-asia.com/Article/2020/09/09/China-animal-testing-Limitations-remain-for-companies-seeking-exemption-from-animal-tests> [https://perma.cc/FMV9-QXN6].

82. *What's Going on with China's Animal Testing Laws in 2021*, ETHICAL ELEPHANT (May 22, 2021), <https://ethicalelephant.com/china-animal-testing-laws-2021/#h-special-use-cosmetics> [https://perma.cc/2SEV-PYFU].

83. See *Cosmetics and Toiletries Industry*, U.S. INT'L TRADE ADMIN. (Jan. 4, 2022), <https://www.trade.gov/country-commercial-guides/china-cosmetics-and-toiletries-industry> [https://perma.cc/N7HX-SER6].

84. See generally Jasmine Wu, *How China Is Fueling the Growth of Beauty Brands and Boosting Luxury Players*, CNBC (Oct. 8, 2019, 8:31 AM), <https://www.cnbc.com/2019/10/08/how-china-is-fueling-the-growth-of-beauty-brands-luxury-players.html> [https://perma.cc/Q7DJ-WRTL].

85. Daniel Allen, *Face Value: Opportunities in China's Booming Beauty Market*, E. W. BANK (Jan. 18, 2022), <https://www.eastwestbank.com/ReachFurther/en/News/Article/Opportunities-in-China-Beauty-Market> [https://perma.cc/BGG7-4U2S].

86. Lim, *supra* note 81.

87. Erik Shao, *China Compliance: Cosmetic Products*, UL SOLS. (Jan. 18, 2019), <https://www.ul.com/news/china-compliance-cosmetic-products> [https://perma.cc/ZKU8-DRXX] (stating all imported cosmetic products were to be sent to a designated testing institution in China with labels in accordance with the Regulations on Cosmetic Label Management).

88. *China*, CE.WAY: INT'L SERVS., <https://ceway.eu/international-services/china/> [https://perma.cc/PYK8-KEP7].

89. Sonalie Figueiras, *China Announces End to Post-Market Animal Testing for Cosmetic Products*, S. CHINA MORNING POST (Apr. 2, 2019, 10:38 AM), <https://www.scmp.com/magazines/style/news-trends/article/3004229/china-announces-end-post-market-animal-testing-cosmetic> [https://perma.cc/7WRD-CC4L].

This updated regulation requires “special-use” cosmetics, instead of all cosmetics, to be tested on animals after the products have already been imported into and sold in the Chinese beauty market.⁹⁰

This change in law was considered a win for animal rights activists because it reduced the number of animals, possibly by thousands, used for cosmetic testing in China.⁹¹ However, despite this step forward, cosmetic animal testing is still possible in China due to post-market testing and special-use cosmetics. These two factors still prevent many brands from being cruelty-free.

2. 2021 to Now: Post-Market Testing and Special-Use Cosmetics

Even though pre-market testing has now been eradicated by China, cosmetic testing can still occur if (1) post-market testing and (2) special-use cosmetics are in play.

The first possible occurrence of cosmetic animal testing, in China’s current state, is post-market testing. Post-market testing occurs when an imported product is already on store shelves in China and happens in two ways: Either China pulls the product for random testing to see if it adheres to China’s safety standards or a customer complains about the product’s safety.⁹²

While it has been reported that post-market testing rarely involves animals anymore, since it is five to ten times more expensive than other safety assessments⁹³ and post-market testing is no longer normal practice,⁹⁴ animal rights activists are hesitant to consider products sold in China to be cruelty-free as China has never outright denied animal use in post-market testing.⁹⁵

The second possible occurrence of cosmetic animal testing is when special-use cosmetics are imported into China. Unlike post-mar-

90. Suzana Rose, *Breaking News: China Will End Mandatory Pre-Market Animal Testing in 2021*, CRUELTY-FREE KITTY (July 7, 2020), <https://www.crueltyfreekitty.com/news/china-ends-mandatory-pre-market-animal-testing-2021/> [<https://perma.cc/FZ2H-JZTB>].

91. *Id.*

92. *What’s Going on with China’s Animal Testing Laws in 2021*, *supra* note 82.

93. *Is It the End of Cosmetics Testing on Animals for China?*, RETAIL IN ASIA (Oct. 4, 2018), <https://retailinasia.com/in-sectors/health-and-beauty/the-end-of-cosmetic-testing-on-animals-for-china/> [<https://perma.cc/E86K-6F22>].

94. Georgina Caldwell, *One Step Closer to Cruelty-Free? China’s National Medical Association Ends Post-Market Animal Testing for Cosmetics*, GLOB. COSMS. NEWS (Mar. 4, 2019), <https://www.globalcosmeticsnews.com/one-step-closer-to-cruelty-free-chinas-national-medical-association-ends-post-market-animal-testing-for-cosmetics/> [<https://perma.cc/BEW5-XUEG>].

95. *See generally* Rose, *supra* note 90.

ket testing, animal testing for special-use cosmetics is required.⁹⁶ Special-use cosmetics are categorized as functional products claiming efficacy⁹⁷ in the following: hair growth, hair dye, hair perming products, deodorants, sunscreens, and whitening products.⁹⁸ Non-special-use cosmetics are defined as “ordinary or general”⁹⁹ makeup products: perfume, skincare, haircare, and nail care products.¹⁰⁰ Therefore, if a beauty product is considered special-use, it must be animal tested if sold in China.

Even with this improvement from pre-market to post-market testing, it does not signify that some beauty products are now completely cruelty-free. The problem is that there is much overlap between both categories of non-special-use and special-use products and no black-and-white distinction between the two classifications.¹⁰¹ For example, sunscreen is widely considered to be a skincare product,¹⁰² which creates confusing overlap between the two categories as sunscreen is considered special-use and skincare falls under the non-special-use category. Thus, animal testing still exists in China due to the special-use cosmetic regulation and the lack of clarity in which beauty products are considered special-use.

While it is alleged that China’s public record shows post-market animal testing has not been conducted in years, the original source is no longer available, and there are no clear sources on how post-market animal testing occurs.¹⁰³ However, there is information regarding the procedure for special-use cosmetic animal testing.

During the special-use testing process, products are assigned to an agent at China’s National Medical Products Administration (“NMPA”),¹⁰⁴ China’s equivalent to the FDA.¹⁰⁵ After product registration, agents check product formulas to see whether they comply

96. *Id.*

97. *See generally China Releases Standards for Cosmetic Efficacy Claim Evaluation*, SOCIÉTÉ GÉNÉRALE DE SURVEILLANCE (May 18, 2021), <https://www.sgs.com/en/news/2021/05/safe-guards-06221-china-releases-standards-for-cosmetic-efficacy-claim-evaluation> [https://perma.cc/YG7E-V56W] (explaining what the Chinese government means by “efficacy” claims in beauty products but no mention of cosmetic animal testing requirements).

98. *China*, *supra* note 88.

99. *What’s Going on with China’s Animal Testing Laws in 2021*, *supra* note 82.

100. *China*, *supra* note 88.

101. *Id.*

102. *See Why Sunscreen Is the Most Important Part of Your Skin Care Routine*, VICTORIAN DERMAL GRP. (Dec. 1, 2020), <https://www.victoriandermalgroup.com.au/information-centre/why-sunscreen-is-the-most-important-part-of-your-skin-care-routine> [https://perma.cc/7YN8-X3J9].

103. *What’s Going on with China’s Animal Testing Laws in 2021*, *supra* note 82.

104. *China*, *supra* note 88.

with China's cosmetic standards.¹⁰⁶ After this compliance check, product testing is mandatory—even if the cosmetic has already been tested abroad—in an NMPA-authorized laboratory in China.¹⁰⁷ In these laboratories, testing is performed on both animals and humans.¹⁰⁸ Animal skin and mucus tests are required for special-use cosmetics.¹⁰⁹ The NMPA then reviews the information submitted for product registration, including the product's formulation and results of testing.¹¹⁰ If the product is approved during this registration process, it will be formally imported into China.¹¹¹

3. Companies Can Sell Beauty Products in China and Circumvent Testing, but It Is a Cumbersome Process

If beauty corporations still want to sell their products in China, but do not want to conduct animal testing, they must meet two requirements: (1) obtain certification issued by the local government and (2) provide a safety assessment regarding their products.¹¹² However, companies have reported this process to be difficult as they would have to obtain certification by third-party organizations, and it is unclear whether the Chinese government will recognize such certifications granted by third parties.¹¹³ There is no known cosmetic brand to have successfully completed this process,¹¹⁴ so it can be hypothesized that this process is discouraging for companies to both sell in China and remain cruelty-free.

While China has made a considerable step, by ending pre-market testing, the possibility of animal harm is still present due to the lack of distinction between special-use and non-special-use cosmetics and a difficult process to circumvent post-market testing. Due to these hurdles, animal rights activists do not consider many companies who sell

105. See *China NMPA Regulatory Approval Process for Medical Devices*, EMERGO BY UL (July 2019), <https://www.emergobyul.com/resources/china-nmpa-regulatory-approval-process-medical-devices> [<https://perma.cc/ZE7S-8VE5>] (stating NMPA was formerly China Food and Drug Administration).

106. *China*, *supra* note 88.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Lim, *supra* note 81.

112. *What's Going on with China's Animal Testing Laws in 2021*, *supra* note 82 (providing an unclear explanation of whether the requirement of local government certification means the United States government or Chinese government).

113. *Id.*

114. *Id.*

their products in China to be cruelty-free, and the problem of animal testing remains.

E. Cosmetic Companies Falsely Advertise to Conceal Their Animal Testing Status

After China's State Council announced in 2020 its plans to end pre-market animal testing, by stating that special-use cosmetics will still require testing,¹¹⁵ several beauty brands began to sell products in China.¹¹⁶ Animal rights activists do not consider these companies to be cruelty-free, as these companies' presences in China could mean cosmetic animal testing on certain products. First Aid Beauty, for example, began selling in China in 2020; they partnered with PETA to claim that they maintain a "no animal test" status by ensuring pre-market animal testing does not occur.¹¹⁷ However, due to China's unpredictable post-market testing process described above, it is possible that First Aid Beauty products may still be categorized as a special-use cosmetics, and, therefore, the products do not avoid all animal testing.¹¹⁸ First Aid Beauty's sunscreen,¹¹⁹ for example, could fall under China's special-use cosmetics category as previously described.¹²⁰

Physicians Formula claimed they could avoid post-market animal testing in China by requesting that the Chinese authorities notify the company before any animal testing occurred.¹²¹ However, this is not a complete guarantee of no animal testing because there is no evidence of the Chinese government cooperating with beauty corporations to avoid cosmetic testing.¹²²

115. *China Appears on Track to End Animal Testing for Imported 'Ordinary' Cosmetics*, HUMANESOC'Y INT'L (July 3, 2020), <https://www.hsi.org/news-media/china-appears-on-track-end-animal-testing-imported-ordinary-cosmetics/> [https://perma.cc/3ZG2-AAJJ].

116. *See, e.g., Suzana Rose, 10 Beauty Brands That Are No Longer Cruelty-Free in 2021*, CRUELTY-FREE KITT (Feb. 6, 2021), <https://www.crueltyfreekitty.com/cruelty-free-101/brands-no-longer-cruelty-free/> [https://perma.cc/6R45-7CKV].

117. *Suzana Rose, We Removed First Aid Beauty from Our Cruelty-Free List After This Announcement*, CRUELTY-FREE KITT (July 16, 2020), <https://www.crueltyfreekitty.com/news/first-aid-beauty-sells-china/> [https://perma.cc/T8L2-P6QD].

118. *See id.*

119. *Mineral Sunscreen Zinc Oxide Broad Spectrum SPF 30*, FIRST AID BEAUTY, <https://www.firstaidbeauty.com/skin-care-products/sun-protection/mineral-sunscreen-zinc-oxide-broad-spectrum-spf-30> [https://perma.cc/W7AW-QLL8].

120. *China, supra* note 88.

121. *Is Physicians Formula Cruelty-Free and Vegan?*, ETHICAL ELEPHANT (Feb. 3, 2023), <https://ethicalelephant.com/physicians-formula-cruelty-free-vegan> [https://perma.cc/X4M3-GWJ7].

122. *Id.*

Additionally, Almay currently advertises themselves as “cruelty-free” in their Instagram biography,¹²³ but they also sell products in China.¹²⁴ Almay is still potentially required to pay for cosmetic testing by the NMPA¹²⁵ as it advertises sunscreen in their products.¹²⁶ Given the amount of cosmetic companies taking advantage of cruelty-free advocates and the fact that they are benefitting from selling their products in China, regulation needs to be enacted to hold these companies accountable.

F. How California and the Federal Government Currently Regulate False Advertising

With the rise of internet advertisements, state attorney generals have implemented more aggressive false advertising legislation when compared to the past.¹²⁷ California, specifically, has been touted as providing the strongest and widest-reaching consumer protection laws in the United States.¹²⁸ Per California state law, it is illegal for “any person, firm, corporation, or association” to falsely or deceptively advertise.¹²⁹ Such deception is defined as an “untrue or misleading” statement about a product, knowingly made by a corporation.¹³⁰ Any violations of this statute result in a misdemeanor punishable by jail time not exceeding six months or by a fine not exceeding \$2,500 or both.¹³¹

However, lawsuits against companies who allegedly violate false advertising legislation require private individuals to retain their own

123. ALMAY (@almay), INSTAGRAM, <https://www.instagram.com/almay/?hl=EN> [<https://perma.cc/Y7ZR-W2GG>].

124. *Is Almay (Revlon) Cruelty-Free and Vegan?*, ETHICAL ELEPHANT (Jan. 15, 2023), <https://ethicalelephant.com/is-almay-cruelty-free> [<https://perma.cc/8VPJ-XUTF>].

125. Thom Waite, *China Ends Mandatory Animal Testing for a Majority of Cosmetics*, DAZED DIGIT. (May 1, 2021), <https://www.dazeddigital.com/beauty/head/article/52658/1/china-ends-mandatory-animal-testing-for-a-majority-of-cosmetics> [<https://perma.cc/7BKN-TH5K>].

126. *Almay Skin Perfecting Healthy Biome Makeup*, ALMAY, <https://www.almay.com/face/foundation/almay-skin-perfecting-healthy-biome-makeup?shade=fair> [<https://perma.cc/R8AL-3VYS>].

127. Ryan J. Strasser et al., *State AGs Lead the Way in False Advertising Enforcement*, TROUTMAN PEPPER (Feb. 2, 2022), <https://www.troutman.com/insights/state-ags-lead-the-way-in-false-advertising-enforcement.html> [<https://perma.cc/K5TB-XVPW>].

128. *What Do I Need to Sue Someone for False Advertising?*, SUPER LAWS. (Mar. 6, 2023), <https://www.superlawyers.com/california/article/what-do-i-need-to-sue-someone-for-false-advertising/3cd307bf-b968-4145-a193-e1d7db2be42b.html> [<https://perma.cc/3QFJ-82WT>].

129. CAL. BUS. & PROF. CODE § 17500 (2022).

130. *Id.*

131. *Id.*

counsel or act as their own counsel; the California Department of Justice can investigate a claim of misconduct, but it does not offer legal assistance to private citizens.¹³² In California, an attorney who specializes in commercial goods law-suits charges an average hourly rate of \$385.¹³³ Private parties may act as their own counsel, but they will likely lose as pro se plaintiffs have been shown to only win about four percent of the time versus about forty-two percent if both parties to the action are represented.¹³⁴ This process probably would not provide much incentive for individuals to bring an action against a company who falsely advertises. Armed with the knowledge that defrauded consumers do not wish to endure taxing legal procedures for restitution, businesses have purposefully defrauded private individuals with security that they will not be penalized.¹³⁵ Due to these issues, California needs a consumer-friendly process to report and obtain damages for false advertising.

At the federal level, the FTC is the only government agency dedicated to protecting consumers from deceptive business practices.¹³⁶ The FTC has undertaken cases against fashion companies suppressing negative reviews regarding their clothes,¹³⁷ companies falsely marketing tea as a cure for COVID-19,¹³⁸ and burger franchises attempting to mislead military veterans.¹³⁹ The FTC's methods could be more punitive once they undertake a case of consumer fraud. As illustrated by

132. *Protecting Consumers*, STATE OF CAL. DEP'T OF JUST. OFF. OF THE ATT'Y GEN., <https://oag.ca.gov/consumers> [<https://perma.cc/8GQW-YH6W>].

133. *See How Much Do Lawyers Charge in California?*, CLIO, <https://www.clio.com/resources/legal-trends/compare-lawyer-rates/ca> [<https://perma.cc/NS9F-GMJF>].

134. Mitchell Levy, Comment, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 UNIV. CHI. L. REV. 1819, 1837 (2018) (discussing statistics based in federal courts because there is not as much information readily available on pro se plaintiff success rates in state courts).

135. *See* Jennifer Shulkin, *When Suing Is Too Expensive, Some Get Away with Breaking the Law*, NEWSWEEK (Aug. 25, 2021, 7:30 AM), <https://www.newsweek.com/when-suing-too-expensive-some-get-away-breaking-law-opinion-1622612> [<https://perma.cc/X2XV-RXZZ>].

136. *Mission*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/mission> [<https://perma.cc/HZX8-YAXW>].

137. Press Release, *FTC Finalizes Order with Fashion Nova over Allegations It Blocked Negative Reviews*, FED. TRADE COMM'N (Mar. 21, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-finalizes-order-fashion-nova-over-allegations-it-blocked-negative-reviews> [<https://perma.cc/8UKL-SK6X>].

138. Press Release, *FTC, DOJ, and FDA Take Action to Stop Marketer of Herbal Tea from Making False COVID-19 Treatment Claims*, FED. TRADE COMM'N (Mar. 3, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-doj-fda-take-action-stop-marketer-herbal-tea-making-false-covid-19-treatment-claims> [<https://perma.cc/EXF2-QF2G>].

139. Press Release, *FTC Sues Burger Franchise Company That Targets Veterans and Others with False Promises and Misleading Documents*, FED. TRADE COMM'N (Feb. 8, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-sues-burger-franchise-company>

AMG Capital Management, LLC v. FTC, the FTC can now only dole out cease-and-desist orders and then file federal claims on behalf of consumers seeking permanent injunctions if the cease-and-desist orders are violated.¹⁴⁰ “Even where the [FTC] determines through adjudication that a practice violates consumer protection or competition law,” it must still “seek the aid of a court to obtain civil penalties” if an entity violates the FTC’s orders to cease and desist.¹⁴¹

Before the *AMG* decision in April 2021, the FTC collected monetary restitution for defrauded consumers under the power of section 13(b) of the FTC Act (“FTCA”).¹⁴² Between 2016 and 2021, the FTC reclaimed \$11.2 billion for consumers.¹⁴³ In 2021, the Supreme Court ruled that the FTC does not have the authority under section 13(b) to obtain monetary relief.¹⁴⁴ The Court explained that the text of section 13(b) specifically allows for injunctive relief but is silent on monetary damages.¹⁴⁵ Because of this ruling, as of 2023 the FTC can only use its section 13(b) power to obtain injunctive relief for consumers.¹⁴⁶ However, it can still technically seek a “refund of money” for defrauded consumers under section 19 of the FTCA, but only after it initiates an administrative hearing about the claim, obtains a cease-and-desist order from the hearing, and petitions for that order to be enforced.¹⁴⁷ It

-targets-veterans-others-false-promises-misleading-documents [https://perma.cc/ZM8G-ERJA].

140. *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1347 (2021).

141. *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM’N (May 2021), <https://www.ftc.gov/about-ftc/mis-sion/enforcement-authority> [https://perma.cc/UZ6K-F7PK].

142. John Sanders et al., *Supreme Court Unanimously Concludes FTC Cannot Obtain Equitable Monetary Relief Through Section 13(b) of the Federal Trade Commission Act*, WINSTON & STRAWN LLP (Apr. 26, 2021), <https://www.winston.com/en/direct-sellers-update-regulation-law-and-policy/supreme-court-unanimously-concludes-ftc-cannot-obtain-equitable-monetary-relief-through-section-13b-of-the-federal-trade-commission-act.html> [https://perma.cc/JS5G-E58F].

143. Press Release, *FTC Asks Congress to Pass Legislation Reviving the Agency’s Authority to Return Money to Consumers Harmed by Law Violations and Keep Illegal Conduct from Reoccurring*, FED. TRADE COMM’N (Apr. 27, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/04/ftc-asks-congress-pass-legislation-reviving-agencys-authority-return-money-consumers-harmed-law> [https://perma.cc/4E99-TSFL].

144. *AMG Cap. Mgmt., LLC*, 141 S. Ct. at 1352.

145. *Id.*

146. *Id.* at 1343.

147. Kristin Lockhart, *Does Section 13(b) of the Federal Trade Commission Act Allow the Federal Trade Commission to Seek Equitable Monetary Relief in Federal Court? Supreme Court Rules ‘No,’* NAT’L L. REV. (July 1, 2021), <https://www.natlawreview.com/article/does-section-13b-federal-trade-commission-act-allow-federal-trade-commission-to-seek> [https://perma.cc/G2U9-X4JG].

is a cumbersome process at best because the FTC will have numerous amounts of procedure to run through.¹⁴⁸

II. Government Entities Need to Be More Aggressive in Identifying Companies Who Lie About Their Cruelty-Free Status

California's current penalization of fraudulent marketing is heavily consumer dependent¹⁴⁹ with no guarantee that consumers will receive a return on investment for their time and energy in pursuing a case. Apart from California, other states have not standardized the "cruelty-free" term¹⁵⁰ and also leave consumers to file suit if they feel action is needed against fraudulent marketing. Some have speculated that attempts to standardize the "cruelty-free" term would just confuse consumers, as states could adopt their own variations of labeling requirements and lead manufacturers to have differing labels across the United States.¹⁵¹ Many or "overly detailed labels" make it more likely that consumers will be confused in their shopping experience.¹⁵²

Nationally, the Leaping Bunny program from the Coalition for Consumer Information on Cosmetics ("CCIC"), a program dedicated to making animal-friendly shopping easier,¹⁵³ certifies cosmetic manufacturers as "cruelty-free," but it has no external legal enforcement of the standard.¹⁵⁴ The CCIC consists of eight national animal protection groups, but because it is not a government entity,¹⁵⁵ companies can inaccurately make cruelty-free claims with no government oversight.¹⁵⁶

The lack of federal regulation of cruelty-free claims, despite multiple organizations attempting to do so, and the loss of the FTC's ability to obtain money damages for consumers all result in consumers being relied upon to report fraudulent marketing. Overall, it is inefficient for consumers because of the money and time required to litigate.¹⁵⁷ A consumer's current options are to hire an attorney or

148. *See generally id.*

149. *Protecting Consumers, supra* note 132.

150. Winders, *supra* note 45, at 464–65.

151. *Id.*

152. *Id.* at 465.

153. *About Leaping Bunny*, LEAPING BUNNY PROGRAM, <https://www.leapingbunny.org/about/about-leaping-bunny> [<https://perma.cc/LL3P-7L4H>].

154. Winders, *supra* note 45, at 460.

155. *See About Leaping Bunny, supra* note 153.

156. Winders, *supra* note 45, at 460.

157. *Id.* at 473.

represent themselves to file a lawsuit, submit a complaint to the California Department of Justice for a potential investigation, or to pester local district attorney or city attorney's offices.¹⁵⁸ These options are available but with the assumption that defrauded consumers, such as animal rights advocates seeking cruelty-free products, will commit time, money, and effort to researching fraudulent marketing regulation.

Similarly, the FTC relies on a Consumer Sentinel Network, a database that collects reports from defrauded consumers about organizations that deceptively advertise.¹⁵⁹ Under the FTC's guidance, consumers are urged to report any instances of fraudulent advertising so that the FTC can "investigate fraud and eliminate unfair business practices."¹⁶⁰ There is no mention of the FTC taking action on its own by actively searching for fraudulent advertising activity.¹⁶¹ This current process means that the FTC is passive in that it responds to claims about fraudulent advertising activity based on what consumers are willing to report. Private individuals are forced to act themselves in order for the FTC to possibly file a false advertising claim for them.

Since both state and federal solutions to deceptive marketing rely on consumer action, there is a gaping hole of unregulated consumer fraud in the world. The chances of consumers being aware of how to address such an issue or knowing what the FTC is or who to contact, would require an advocate to expend considerable time, money, and a willingness to see their complaint through with no guarantee that the company will stop their fraudulent activity. For governments to claim that they protect consumers,¹⁶² this current state of fraudulent marketing litigation seems to work against consumers instead of protecting them.

Both California and the FTC should be more aggressive in their respective handling of truth-in-advertising claims because the responsibility of punishing companies who deceptively advertise should not fall on consumers. Studies support the notion that private individuals consider reporting unlawful activity to be futile because they do not

158. *Protecting Consumers*, *supra* note 132.

159. Press Release, *New Data Shows FTC Received 2.8 Million Fraud Reports from Consumers in 2021*, FED. TRADE COMM'N (Feb. 22, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/02/new-data-shows-ftc-received-28-million-fraud-reports-consumers-2021-0> [<https://perma.cc/A3HM-N67K>].

160. *Bureau of Consumer Protection*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection> [<https://perma.cc/C4YJ-FVYK>].

161. *Id.*

162. *See e.g.*, *Protecting Consumers*, *supra* note 132.

consider the crime “important enough” to involve law enforcement.¹⁶³ This trend, combined with the FTC, California Department of Justice, and district attorney’s and city attorney’s offices not being obvious solutions, will most likely lead to perpetual false marketing by cosmetic companies.

Even when consumers do try to call attention to such activity, they are unsuccessful in enacting change. For example, investigative animal rights activists in 2019 revealed that beauty brand Wet n wild began distributing products in China.¹⁶⁴ Multiple animal rights advocates reported that the company was no longer cruelty-free to inform consumers who wanted to purchase cruelty-free products.¹⁶⁵ Despite the brand advertising that they are cruelty-free and displaying a “cruelty-free” bunny logo on their website as of 2023,¹⁶⁶ Wet n wild is no longer Leaping Bunny-certified and animal rights advocates called for community members to share news of the brand selling in China.¹⁶⁷

Given that news of Wet n wild selling in China broke in 2019 and that they are still falsely claiming they are “100% cruelty-free”¹⁶⁸ as of 2023, it is clear that such companies are not being monitored for their illegal practices despite advocate efforts to call attention to it and to demand clear answers from such a brand.

The grunt work placed onto consumers by California and the FTC can ultimately dissuade consumers from making ethical purchasing decisions if they believe reporting illegal behavior is too much of a burden and that the government does not consider it an issue worth addressing. Currently, if a consumer wanted to be strictly moral and only purchase cruelty-free products, they would have to research a company and confirm it is cruelty-free. If it is not cruelty-free, the consumer would have to invest time investigating how to report the deceptive activity and then more time in filing a report. If the consumer

163. *Why Do So Many Crimes Go Unreported in the States?*, NYU DISPATCH (Aug. 31, 2018), <https://wp.nyu.edu/dispatch/2018/08/31/why-do-so-many-crimes-go-by-unreported-in-the-states/> [https://perma.cc/Z6RX-TDL8].

164. Stephanie Kilbourn, *It’s Confirmed That Wet n Wild Has Been Selling in China Since 2017*, FREE THE BUNNIES (May 21, 2019), <https://www.freethebunnies.com/its-confirmed-that-wet-n-wild-has-been-selling-in-china-since-2017/> [https://perma.cc/F754-Z9VS].

165. Suzana Rose, *Wet n Wild Caught Lying About Being Cruelty-Free and Secretly Selling in China*, CRUELTY-FREE KITTY (May 22, 2019), <https://www.crueltyfreekitty.com/news/wet-n-wild-china-controversy/> [https://perma.cc/9HR2-U9U5]; see Kilbourn, *supra* note 164.

166. *We Are 100% Cruelty Free*, WET N WILD, <https://www.wetwildbeauty.com/cruelty-free/> [https://perma.cc/QA4U-HRE2].

167. See Kilbourn, *supra* note 164.

168. *Id.*

had already been defrauded, they would have to determine how to hire an attorney or how to represent themselves and how to file a claim with the FTC. Consumers typically do not have time, or do not wish to allocate time, to consider these measures when they are in the middle of a shopping aisle trying to choose what product to purchase.

III. Congress Needs to Restore the FTC's Ability to Obtain Monetary Relief for Defrauded Consumers

Under section 5(a) of the FTCA, “unfair or deceptive acts or practices in or affecting commerce” are illegal.¹⁶⁹ A practice is considered deceptive if it: (1) misleads or is likely to mislead consumers, (2) a consumer’s interpretation of the practice is reasonable under the circumstances, and (3) the misleading practice is material.¹⁷⁰

The FTC further defines a claim as misleading “if relevant information is left out or if the claim implies something that’s not true.”¹⁷¹ A misleading practice is considered material if “it is likely to affect a consumer’s decision regarding a product or service,” such as affecting a decision regarding the benefits of the product.¹⁷² Moreover, “[c]laims made with the knowledge that they are false will also be presumed to be material.”¹⁷³ Cosmetic companies who falsely advertise arguably meet these statutory elements.

Almay is a prime example of meeting section 5(a) elements. In an identical fashion to Wet n wild, Almay currently advertises themselves as “cruelty-free” in their Instagram biography,¹⁷⁴ but they also sell products in China.¹⁷⁵

Almay’s claim of being cruelty-free is deceptive because: (1) it misleads consumers into believing Almay products have not been tested on animals as Almay blatantly uses the term “cruelty-free” on their official Instagram biography; (2) a consumer’s interpretation that Almay’s claim is true is reasonable because the company is marketing this false information on their official website; and (3) the mis-

169. Federal Trade Commission Act (FTCA) of 1914, 15 U.S.C. § 45(a)(1).

170. FED. RSRV. BD. OF GOVERNORS, *Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices*, in CONSUMER COMPLIANCE HANDBOOK 1 (2016).

171. *Advertising and Marketing on the Internet: Rules of the Road*, FED. TRADE COMM’N, <https://www.ftc.gov/business-guidance/resources/advertising-marketing-internet-rules-road> [<https://perma.cc/54KT-QUST>].

172. FED. RSRV. BD. OF GOVERNORS, *supra* note 170, at 7.

173. *Id.* at 9.

174. ALMAY (@almay), *supra* note 123.

175. Tully Zander, *Is Almay Cruelty-Free or It Tests on Animals?*, VEGANSFIRST (Feb. 2, 2023), <https://vegansfirst.com/is-almay-cruelty-free/> [<https://perma.cc/NE9E-M5CK>].

leading practice is material because it will likely affect a consumer's decision to purchase from the brand, believing that they are cruelty-free, and because Almay likely knows this claim is false due to beauty brands' familiarity with animal testing laws.¹⁷⁶

Per the FTC standard previously mentioned,¹⁷⁷ this claim is misleading because relevant information is excluded. For example, Almay's products are sold in China, where testing may still be implemented.¹⁷⁸ Additionally, the claim implies something that is not true: Almay's products are never tested on animals.¹⁷⁹ This effect on consumers violates section 5(a) of the FTCA, and the FTC can accordingly take legal action.

In May 2021, the FTC petitioned Congress to pass new legislation authorizing the FTC to collect money damages against false advertisers again.¹⁸⁰ In a separate prepared statement, the FTC also explained to Congress that when the Supreme Court stripped this ability it limited the FTC's "primary and most effective tool for providing refunds to harmed consumers" and that the FTC would "be far less effective in its ability to protect consumers"¹⁸¹ without it.

Since this request, Congress has not passed legislation authorizing the FTC to seek monetary relief again.¹⁸² However, as of April 2022, the FTC had taken steps to reestablish its ability to obtain monetary relief by specifically defining what practices qualify as deceptive acts within marketing.¹⁸³ By assigning specific definitions to deceptive acts, the FTC can then fine specific company conduct, as it still has the power to dole out fines for violations of FTC guidelines.¹⁸⁴ Penalties for violating FTC guidelines can reach up to \$46,000 per violation.¹⁸⁵

While the FTC is taking concrete steps, \$46,000 fines pale in comparison to the caliber of what the FTC has been able to recover for

176. See *id.*; see FED. RESRV. BD. OF GOVERNORS, *supra* note 170, at 8.

177. FED. RESRV. BD. OF GOVERNORS, *supra* note 170, at 8.

178. Zander, *supra* note 175.

179. *Id.*

180. Letter from Rebecca Kelly Slaughter, *supra* note 44.

181. *Prepared Statement of the Fed. Trade Comm'n: The Urgent Need to Fix Section 13(b) of the FTC Act Before the Comm. on Energy and Com. Subcomm. on Consumer Prot. and Com.*, 117th Cong. 1 (2021) (statement of Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n).

182. See Katrina Eash et al., *FTC Proposes Rulemaking to Enhance Its Ability to Seek Civil Penalties for Deceptive Earnings Claims*, WINSTON & STRAWN LLP (Apr. 21, 2022), https://www.winston.com/en/direct-sellers-update-regulation-law-and-policy/ftc-proposes-rulemaking-to-enhance-its-ability-to-seek-civil-penalties-for-deceptive-earnings-claims.html#_ftn [<https://perma.cc/6UQQ-MUVZ>].

183. See *id.*

184. *Id.*

185. *Id.*

consumers in the past. In 2020, for example, the FTC collected \$147 million from Western Union after it discovered that Western Union allowed scammers to use their platform to con their customers.¹⁸⁶ That same year, the agency collected \$34 million dollars from Office Depot for tricking consumers into buying computer repair services.¹⁸⁷ In 2018, the FTC won over \$19 million from Uber for their dishonesty about how much income their drivers could make.¹⁸⁸

In partnership with the FTC, the Better Business Bureau (“BBB”), a nonprofit organization dedicated to advancing marketplace integrity and consumer trust,¹⁸⁹ provides review and voluntary correction of advertising.¹⁹⁰ Because the BBB is not a government agency,¹⁹¹ it has no enforcement power, but it reports noncomplying advertisers to the FTC.¹⁹² The BBB’s compliance rate exceeds ninety-five percent with this method because the FTC has done its part in doling out fines and compulsory compliance reports.¹⁹³ Fines, such as those collected from Uber or Office Depot or in the FTC’s partnership with the BBB would certainly be more impactful incentives for cosmetic companies to stop false advertising practices.

Due to the amount of recovery power the FTC’s authority once yielded for defrauded consumers, as well as the compliance changes it has been able to make in partnership with the BBB, the Senate and House of Representatives should enact the FTC’s suggested legislation to keep companies from lying to consumers. Monetary relief seems like the bare minimum owed to defrauded consumers as injunctions and low-level fines will not incentivize a company to end its unethical behavior. Large conglomerates such as Revlon, the parent company of

186. *\$147 Million in Second Group of Western Union Refunds*, FED. TRADE COMM’N (Sept. 23, 2020), <https://consumer.ftc.gov/consumer-alerts/2020/09/147-million-second-group-western-union-refunds> [<https://perma.cc/4MCM-R2EP>].

187. *Office Depot Refunds: FTC Sends Second Round of Checks to Office Depot Customers*, FED. TRADE COMM’N (Aug. 2022), <https://www.ftc.gov/enforcement/refunds/office-depot-refunds> [<https://perma.cc/67QE-2RT9>].

188. Press Release, *FTC to Send Refund Checks to Uber Drivers as Part of FTC Settlement*, FED. TRADE COMM’N (July 16, 2018), <https://www.ftc.gov/news-events/news/press-releases/2018/07/ftc-send-refund-checks-uber-drivers-part-ftc-settlement> [<https://perma.cc/2YEE-ETJB>].

189. *Mission and Vision*, BETTER BUS. BUREAU, <https://www.bbb.org/mission-and-vision> [<https://perma.cc/WJ35-E5KX>].

190. *National Advertising Division*, BETTER BUS. BUREAU: NAT’L PROGRAMS, <https://bbbprograms.org/programs/all-programs/national-advertising-division> [<https://perma.cc/96TY-VYRF>].

191. *Id.*

192. Winders, *supra* note 45, at 475.

193. *Id.*

Almay,¹⁹⁴ would likely not consider a \$46,000 fine impactful. This is because Revlon's total liquid assets in 2021 amounted to \$171.5 million.¹⁹⁵

IV. State and Federal Agencies Should Model Existing FTC Task Forces to Monitor False Advertising

The California Department of Justice and the FTC should each create a team or bureau that is specifically tasked with investigating and punishing companies who falsely advertise. If the FTC's purpose is to monitor and prevent consumer fraud, it is logical for them to actively seek out perpetrators. It would be considered odd for police officers not to patrol neighborhoods and idly sit waiting for reports of crime to come in. Similar to police officers who patrol highways in order to incentivize cars to slow their speed,¹⁹⁶ businesses will be more incentivized to be honest in their advertising if they are aware the government is patrolling their activity.

Such bureaus are possible to create as variations already exist. In September 2017, the FTC created a Military Task Force to support military consumers in response to receiving more than 100,000 consumer-related complaints from servicemembers, veterans, and their family members in 2016.¹⁹⁷ This team's campaign is described as an "aggressive enforcement" and "ongoing educational campaign" in order to end specific marketing scams targeted at military consumers.¹⁹⁸ The team members are composed of a "cross-section of agency representatives" of the FTC.¹⁹⁹

Comparably, in February 2019, the FTC's Bureau of Competition launched a Technology Task Force to investigate misconduct regarding fair competition in the technology market in order to take any

194. *Our Brands*, REVLON, <https://www.revloninc.com/our-brands.php> [<https://perma.cc/XE9M-8GBQ>].

195. *Revlon Reports Fourth Quarter and Full Year 2021 Results*, NASDAQ (Mar. 3, 2022, 7:30 AM), <https://www.nasdaq.com/press-release/revlon-reports-fourth-quarter-and-full-year-2021-results-2022-03-03> (last accessed Feb. 28, 2023).

196. See Sergeant James Williams, *Effect of High-Visibility Enforcement on Motor Vehicle Crashes*, NAT'L INST. OF JUST. (June 22, 2020), <https://nij.ojp.gov/topics/articles/effect-high-visibility-enforcement-motor-vehicle-crashes> [<https://perma.cc/BA66-CXYR>].

197. Press Release, *FTC Launches Website Dedicated to New Military Task Force*, FED. TRADE COMM'N (Sept. 25, 2017), <https://www.ftc.gov/news-events/news/press-releases/2017/09/ftc-launches-website-dedicated-new-military-task-force> [<https://perma.cc/Y2NU-7C23>].

198. *Military Consumer Protection*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/topics/military-consumer-protection> [<https://perma.cc/J8DK-VCWN>].

199. Press Release, *FTC Launches Website Dedicated to New Military Task Force*, *supra* note 197.

necessary enforcement action.²⁰⁰ This task force is comprised of existing FTC employees, including seventeen attorneys who specialize in technology, and a technology expert.²⁰¹ Additionally, the Bureau of Competition collaborates with the FTC's Bureau of Economics and Bureau of Consumer Protection in order to utilize all employees who have relevant expertise in technology markets.²⁰²

A plethora of fraudulent marketing activity exists in the beauty industry beyond veiled animal testing, including third parties pretending to be reputable businesses in order to sell counterfeit products,²⁰³ companies writing counterfeit reviews for themselves,²⁰⁴ and corporations running pyramid schemes.²⁰⁵ Consumer mistrust in company advertising runs so deep that multiple websites have been created and are frequently updated to educate consumers about beauty companies' use of animal products and animal testing.²⁰⁶

In October 2021, the FTC reported giving notices of possible penalties to "hundreds of businesses" for false advertising in general.²⁰⁷ With countless businesses operating with such fraudulent activity, forty-seven percent of American consumers reported in 2020 that they wasted money on beauty products due to a company's deceptive mar-

200. Press Release, *FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets*, FED. TRADE COMM'N (Feb. 26, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology-markets> [https://perma.cc/5NQB-NEKB].

201. *Id.*

202. *Id.*

203. Jacqueline Kilikita, *Fakes & Bad Batches: Don't Be a Victim of Online Beauty Scammers*, REFINERY29 (Oct. 2, 2021, 11:00 PM), <https://www.refinery29.com/en-gb/third-party-beauty-sellers-scam> [https://perma.cc/YNC3-SFJ4].

204. Press Release, *Devumi, Owner and CEO Settle FTC Charges They Sold Fake Indicators of Social Media Influence; Cosmetics Firm Sunday Riley, CEO Settle FTC Charges That Employees Posted Fake Online Reviews at CEO's Direction*, FED. TRADE COMM'N (Oct. 21, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/10/devumi-owner-ceo-settle-ftc-charges-they-sold-fake-indicators-social-media-influence-cosmetics-firm> [https://perma.cc/V4LY-HFXA] [hereinafter Press Release, *Devumi, Owner and CEO Settle FTC Charges*].

205. See Press Release, *FTC Sues Multi-Level Marketer Neora, Formerly Known as Nerium, Alleging It Operates as an Illegal Pyramid Scheme*, FED. TRADE COMM'N (Nov. 1, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/11/ftc-sues-multi-level-marketer-neora-formerly-known-nerium-alleging-it-operates-illegal-pyramid> [https://perma.cc/G28W-NXSW].

206. For example, CRUELTY-FREE KITTY, <https://www.crueltyfreekitty.com/> [https://perma.cc/4FW5-66UC]; ETHICAL ELEPHANT, <https://ethicalelephant.com/> [https://perma.cc/XN6L-L6LF]; and LOGICAL HARMONY, <https://logicalharmony.net/> [https://perma.cc/2HHT-YNG4].

207. Press Release, *FTC Puts Hundreds of Businesses on Notice About Fake Reviews and Other Misleading Endorsements*, FED. TRADE COMM'N (Oct. 13, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other-misleading-endorsements> [https://perma.cc/STW8-7946].

keting.²⁰⁸ Additionally, a fifty-six percent increase in counterfeit beauty products, sold online, was seen in the first six months of 2020 after COVID-19 quarantines prompted a rise in e-commerce sales.²⁰⁹

Given all these deceptive issues in the beauty market, a dedicated task force on both state and federal levels is warranted. Criticisms will likely arise around why state or federal government resources should be dedicated to task forces monitoring marketing activity. The FTC states that “posting deceptive or inaccurate information pollutes the e-commerce marketplace and prevents consumers from making informed purchasing decisions” and “undermines the marketplace.”²¹⁰ It considers deceptive advertising to be a large enough problem to combat because the economy in the United States is heavily reliant on consumerism.²¹¹

Monitoring fraudulent marketing is also crucial to ensure that private individuals and their money are protected. Given that humans generally cannot live without consuming products, it is crucial that government entities keep marketplaces honest. Otherwise, unregulated fraudulent behavior by companies can lead to unchecked power that corporations hold over consumers by selling product however they wish, and consumers being forced to accept navigating marketing scams.

V. Potential Criticisms and Responses

A. The FTC and FDA’s Existing Authorities

Those opposed to California and the FTC enacting stricter regulation of deceptive marketing would likely assert that the FDA possesses the governing authority over beauty marketing and that the FTC should not be involved in the cruelty-free movement. The FDA, after all, passed the FDCA and approved the Draize eye test in re-

208. *2020 Consumer Report: Combating Misinformation in the Health + Beauty Sector*, TRUSTPILOT (June 30, 2020), <https://business.trustpilot.com/guides-reports/build-trusted-brand/2020-consumer-report-combating-misinformation-in-the-health-beauty-sector> [<https://perma.cc/QF33-GDWX>].

209. Jessica Schiffer, *Why Counterfeit Beauty Products Are Booming Amid COVID-19*, VOGUE BUS. (Aug. 18, 2020), <https://www.voguebusiness.com/beauty/why-counterfeit-beauty-products-are-booming-amid-covid-19> [<https://perma.cc/E8FX-J4S2>].

210. Press Release, *Devumi, Owner and CEO Settle FTC Charges*, *supra* note 204.

211. See Halina Szejnwald Brown, *The US Economy Is Reliant on Consumer Spending – Can It Survive a Pandemic?*, THE CONVERSATION (Aug. 13, 2020, 3:26 PM), <https://theconversation.com/the-us-economy-is-reliant-on-consumer-spending-can-it-survive-a-pandemic-141244> [<https://perma.cc/4DBN-MVJR>].

sponse to cosmetic safety issues.²¹² However, the FDA cannot resolve the issues of cosmetic companies' false advertising because the FDA does not provide a legal definition for the term "cruelty-free."²¹³

Additionally, the government entity acknowledges that cosmetic companies subsequently have an "unrestricted use" of this phrase in their marketing.²¹⁴ Animal rights advocacy has been present for over a century,²¹⁵ and the FDA has only released statements about advocating alternatives to cosmetic animal testing²¹⁶ instead of releasing regulations to outlaw it. The FDA currently has a statement on its website affirming that it condones cosmetic animal testing unless necessary.²¹⁷

If there is no legal definition of "cruelty-free" to infringe upon or any regulation to break, the FDA cannot penalize companies who deceptively market because the companies technically are not breaking FDA compliance standards.²¹⁸ Since California has criminalized false advertising and because the FTC has the power to regulate it, the California state government and the FTC are the only relevant agencies for eliminating deceptive marketing.

B. Standardizing "Cruelty-Free" Is Too Difficult

Opponents would likely also claim that defining a "cruelty-free" label would be too difficult, otherwise it would have already been done. However, the FTC does have the authority to standardize a "cruelty-free" label as it has proven its ability to label terms in the past.²¹⁹ For example, the FTC has issued guidelines regulating the use of multiple terms such as biodegradable, compostable, recyclable, and ozone-friendly.²²⁰ The BBB once referred a case to the FTC regarding "humane care certified" eggs despite those eggs being produced by hens that were being debeaked and generally poorly treated by manufacturers.²²¹ The FTC encouraged the certifiers of that label to change

212. Wilhelmus, *supra* note 1, at 496–97.

213. "Cruelty Free"/"Not Tested on Animals," *supra* note 35.

214. *Id.*

215. *Our History*, *supra* note 33.

216. *Cosmetics Safety Q&A: Animal Testing*, U.S. FOOD & DRUG ADMIN. (Feb. 25, 2022), <https://www.fda.gov/cosmetics/resources-consumers-cosmetics/cosmetics-safety-qa-animal-testing> [<https://perma.cc/UP2A-G2D5>].

217. *Animal Testing & Cosmetics*, *supra* note 46.

218. *See Types of FDA Enforcement Actions*, U.S. FOOD & DRUG ADMIN. (July 14, 2022), <https://www.fda.gov/animal-veterinary/resources-you/types-fda-enforcement-actions> [<https://perma.cc/5JYG-CWXB>].

219. Winders, *supra* note 45, at 463.

220. *Id.*

221. *Id.* at 474.

the “humane care certified” requirements so that such treatment would not qualify under the label in the future.²²²

Since the FTC has proven in the past that they have the ability to influence label certification requirements, the agency can do the same here with cosmetic labeling.²²³ However, such federal standardization and enforcement of a “cruelty-free” label is “relatively unlikely” to occur in the near future due to lack of government intervention.²²⁴ Because there is lack of incentive to standardize cruelty-free labeling, there should logically be deterrence of false advertising of such labeling. California, at least, has proven itself to be incentivized in ending cosmetic testing²²⁵ and the FTC in fraudulent marketing. Thus, more aggressive action within California and the FTC’s litigation power is necessary.

C. Incentivizing Cosmetic Organizations to Become Cruelty-Free Is Failing

Critics may also ask what could possibly incentivize beauty manufacturers to alter their current practices. Delcianna J. Winders, an associate professor and Director of the Animal Law and Policy Institute at Vermont Law School,²²⁶ has suggested a “reflexive law” program in response to a lack of legal definition for “cruelty-free.”²²⁷ Reflexive law would involve enforcing manufacturer compliance under a “cruelty-free” standard and periodic monitoring by third parties to ensure continued compliance.²²⁸ Warning labels and third-party certified labeling claims are some current examples of reflexive law.²²⁹

Currently, the CCIC has released a Standard of Compassion for Animals program,²³⁰ which requires voluntary pledges to remain cruelty-free and performs random audits to ensure compliance.²³¹ Compliance means cosmetic manufacturers pledge not to conduct or commission animal testing and obtain “Statements of Assurance” from

222. *Id.*

223. *See generally id.* at 475.

224. *See id.* at 468–69.

225. *See generally* S. 1249, 2017–18 Leg., Reg. Sess. (Cal. 2018); *see, e.g.*, CAL. CIV. CODE § 1834.9 (2019).

226. *Delcianna Winders*, VT. L. & GRADUATE SCH., <https://www.vermontlaw.edu/directory/person/winders-delcianna> [<https://perma.cc/QTD7-VMP8>].

227. *Winders*, *supra* note 45, at 457.

228. *Id.* at 476, 480.

229. *Id.* at 477.

230. *Id.* at 479.

231. *Id.* at 480.

all their suppliers to ensure full compliance with this pledge.²³² Completion of this process grants manufacturers a Leaping Bunny label.²³³ It has been a successful endeavor since it launched in 1996,²³⁴ however, the success has been hindered by manufacturer participation—not enough cosmetic brands are participating in order to fully eradicate cosmetic animal testing.²³⁵

Winders' suggests targeting large companies who have already been influenced to participate in the program²³⁶ or large retailers who sell beauty products to target a large portion of the cosmetic market at once.²³⁷ Winders argues that reflexive laws should give cosmetic companies incentives to "internalize social norms"²³⁸ because compliant manufacturers will have a "competitive advantage" with consumers who are passionate about the treatment of non-human animals.²³⁹

In line with Winders' suggestions, animal rights activists can help contribute to advertising of the CCIC's certification program in order to incentivize other manufacturers to participate. Given the significant rise of social media's impact on purchasing habits,²⁴⁰ animal rights advocates can offer advertising services on their social media platforms to show that a company is certified cruelty-free through the CCIC; this can potentially create an incentive for more companies to complete certification if competitors see that consumers are reacting positively to cruelty-free brands.

The cost of advertising would likely be much more affordable to animal rights activists than filing false advertising lawsuits. Popular beauty brands that have already been persuaded to become cruelty-free can advertise through commercials and social media influencers in order to highlight their cruelty-free compliance to persuade the overall beauty market into following suit, per Winders' suggested strategy,²⁴¹ as well as appeal to consumers who advocate for animal rights.

232. *Id.*

233. *Id.*

234. *See id.* at 479.

235. *Id.* at 481.

236. *Id.* at 482.

237. *Id.* at 483.

238. *Id.* at 476.

239. *Id.* at 477.

240. Sam Gutierrez, *Momentive Study: Gen Z Social Media and Shopping Habits*, SURVEYMONKEY, <https://www.surveymonkey.com/curiosity/gen-z-social-media-and-shopping-habits/> [https://perma.cc/RRY6-Q3QH].

241. Winders, *supra* note 45, at 482.

CoverGirl garnered headlines for being the first major beauty brand to become cruelty-free,²⁴² which shows that consumers do care about and celebrate a brand's cruelty-free status. About two years later, Garnier, "ranked as one of the world's ten most valuable cosmetic brands," also became certified cruelty-free and made headlines for it.²⁴³ Using CoverGirl and Garnier to advertise for the CCIC certification program, for example, can influence similar brands in the drugstore, such as Maybelline and Almay, to go cruelty-free because CoverGirl and Garnier have the "competitive advantage" of internalizing social norms of protecting non-human animals.²⁴⁴

D. Possible Infringement of Free Speech

Corporations' right to free speech, and subsequently their right to advertise their products as they prefer, is a possible constitutional-based criticism. The First Amendment protects speech made by companies under the concept of "commercial speech."²⁴⁵ A company's speech qualifies as "commercial speech" if it can be defined as "expression related solely to the economic interests of the speaker and its audience."²⁴⁶ Since cosmetic companies' advertising is related solely to its economic interest and to its audiences' economic interest of purchasing product, their advertising speech will most likely be protected by the First Amendment.

However, the U.S. Supreme Court has ruled that misleading commercial speech is unprotected by the First Amendment.²⁴⁷ Since cosmetic companies are purposefully misleading consumers when they claim to be cruelty-free, yet they knowingly participate in animal testing, their advertising speech does not qualify as protected commercial speech. This type of advertising plainly attempts to trick consumers

242. Marci Robin, *CoverGirl Is Now the Biggest Makeup Brand Granted the Leaping Bunny Seal by Cruelty Free International*, ALLURE (Nov. 5, 2018), <https://www.allure.com/story/covergirl-goes-cruelty-free> [<https://perma.cc/67XF-764L>].

243. *Garnier Granted Leaping Bunny Cruelty-Free Certification by Cruelty Free International*, VEGAN FOOD & LIVING (Mar. 9, 2021), <https://www.veganfoodandliving.com/news/garnier-leaping-bunny-cruelty-free-certification/> [<https://perma.cc/ZCT4-KRXQ>]; see Mohsina Dodhiya, *Garnier Is Now Officially 'Cruelty-Free' Certified*, TOTALLY VEGAN BUZZ (Mar. 10, 2021), <https://www.totallyveganbuzz.com/news/garnier-officially-cruelty-free-certified/> [<https://perma.cc/YQN4-TACU>].

244. See generally Winders, *supra* note 45, at 477.

245. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980).

246. *Id.* at 561 (citing *Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976)).

247. *Id.* at 566.

into believing they are making ethical purchases when they are not. Such disqualification of First Amendment protection signifies that false advertising can be regulated by the government.

For example, in 2016, an egg producer certification organization called Humane Farm Animal Care (“HFAC”) sent an email to grocery retailers falsely reporting that a certain egg producer lacked certification to prove its eggs were organic and its hens were humanely treated.²⁴⁸ The egg producer, Handsome Brook Farm, filed a false advertising claim as it did indeed have up-to-date organic and pasture-raised certifications but lost customers due to HFAC’s false advertising to grocery retailers.²⁴⁹ As a result, the Court of Appeals for the Fourth Circuit, under the First Amendment, issued a preliminary injunction against HFAC, prohibiting them from spreading this false information and forcing them to send a correction email to its consumers in order to combat false advertising and irreparable harm to the egg producer.²⁵⁰ Since such deceptive marketing is unprotected by both state and federal authorities, regulation by government agencies is warranted.

Conclusion

Cosmetic animal testing, which continues to be an intensely debated issue after decades of protest, is hidden by certain beauty corporations through false advertising. Deceptive marketing adds a second layer of questionable ethics, on top of the animal testing itself, in that it defrauds consumers into believing the products they are purchasing were not tested on animals.

While false advertising is illegal at both state and federal levels, the current regulations in California and on the federal level heavily rely on consumers’ actions. As a result, cosmetic companies have continued with their unethical and illegal marketing practices without repercussions. Additionally, the Supreme Court has recently stripped the FTC of its ability to demand monetary relief on behalf of defrauded consumers. California and the FTC’s current, passive regulation allows cosmetic corporations to claim that their products have not been tested on animals—when in fact products have been tested on animals.

248. Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc., 700 Fed. Appx. 251, 252–53 (4th Cir. 2017).

249. *Id.* at 253.

250. *Id.*

To resolve this corruption, this Comment proposes three solutions. First, both California and the FTC need to adopt methods of punishing false advertising without solely relying on consumer action. Second, Congress should reinstate the FTC's authority to demand monetary relief from such organizations on behalf of defrauded consumers. Third, both the California Department of Justice and the FTC should create and dedicate task forces to identify and penalize companies that falsely advertise. These three solutions would ultimately help deter beauty enterprises, and other industries, from defrauding customers about their business practices. If California and the FTC were to dedicate resources to combat this behavior, consumers would not have to carry such a judicial burden. It is equally important for the FTC to regain its authority to collect monetary relief from entities that violate truth-in-advertising laws. Leaving the FTC with its current authority does not inflict any urgency upon companies to stop illegal advertising activity.

With the proposed transition from consumer reliance to task forces and reinstated government authority, the goal is to set a standard for beauty corporations to be transparent about their business practices. Without this level of integrity, consumers are left with feelings of mistrust and no motivation to participate in the marketplace. Not only is this ethically problematic, but it could lead to damaging the U.S. economy. For these reasons, and to be able to claim that *all* beauty products are "easy, breezy, beautiful," regulation of false advertising concerning cosmetic animal testing needs to improve.