A REPORT BY THE NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM

ON BEHALF OF **THE NATIONAL HEALTHY NAIL SALON ALLIANCE**

Removing the Topcoat

UNDERSTANDING FEDERAL OVERSIGHT OF NAIL SALONS

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NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM

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EXECUTIVE SUMMARY

Over the last decade, the nail salon industry grew by more than three hundred percent (300%).[1] The workers who drive this industry tend to be immigrant women seeking employment opportunities within nail salons because of the low barriers to entry, ability to work without mastery of the English language, and an opportunity to earn an income to support their families.

Unfortunately, there is a price paid for this low-barrier job in the form of daily exposure to a range of toxic chemicals in salon products that are linked to respiratory, cognitive, and reproductive illnesses and conditions. Women comprise the majority of the cosmetic industry's consumers and workforce. Nationwide, women are ninety-four percent (94%) of the customer base and of the approximately 380,000 nail technicians, nearly ninety-five percent (95%) are women, and fifty-nine percent (59%) are women of color. Nearly forty-two percent (42%) of all nail technicians in the U.S. are Asian women.

Currently, federal law is too weak and full of gaps to adequately protect these workers. Federal agencies do not have the authority to effectively monitor and regulate the cosmetics industry, which makes the products used in hair and nail salons. Furthermore, the authority to regulate the cosmetics industry and nail salon workplaces is distributed over several federal agencies including the Federal Drug Administration (FDA), Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA), which creates confusion for both workers and advocates. This report provides a guide for understanding the different federal laws and agencies involved with providing oversight of the cosmetics industry so that nail salon workers and advocates can better understand how to advocate for toxic-free cosmetics and safer working conditions.

The report will provide an intersectional analysis of the impact of toxins used by cosmetic producers on women, especially low-income, immigrant women of color; identify and provide analysis of current law and pending legislation to control the ingredients in and packaging of cosmetic products, including nail products; and improve understanding of the relevant federal agencies responsible for oversight of the nail salon workplace and harms caused by toxic ingredients within nail and other cosmetic products.

Federal regulatory agencies already possess much of the authority necessary to remove harmful chemicals from cosmetic products, increase awareness and education of toxins within cosmetic products, and promote the use of green technologies and protective equipment within nail salons. Still, there are many gaps in the regulations that govern cosmetic products and much room for improving the workplace safety of nail salons by removing toxic chemicals and promoting the development of safer alternatives to toxic ingredients in cosmetics.

THE COSMETICS INDUSTRY: INTERSECTIONS OF ECONOMIC, ENVIRONMENTAL, AND REPRODUCTIVE JUSTICE

In 2007, Lam Thi Le, a mother of two living in Oakland, testified that in 1992, two years after she began working as a manicurist, she was diagnosed with thyroid problems. A decade later she was diagnosed with breast cancer. She quit her job as a manicurist, "after 12 years of sacrificing [her] health to make a living." [2]

The plight of nail salon workers sits at the intersection of the environmental justice, economic justice, and reproductive justice movements. There are more than 250,000 beauty salons in the US that offer hair and nail care services[3] and employ more than 845,000 persons.[4] Nail technicians are predominantly low-income and immigrant women of color. In the last decade, the number of nail technicians in the U.S. has jumped 374% to more than 380,000 nationwide.[5] Nationally, forty-two percent (42%) of nail technicians are Asian immigrant women, with Vietnamese women comprising forty percent (40%)[6] and Korean women comprising another two percent (2%) of the entire industry. In California, up to eighty percent (80%) of nail technicians are Vietnamese women.[7]

The average nail technician is 38 years old, has worked in the industry for nine (9) years, and typically works more than 40 hours per week. The average annual salary for a salon worker is approximately $22,150,[8] although most tend to earn less than $19,000 a year.[9] A majority, or fifty-eight percent (58%), of nail technicians are of reproductive age.[10] The majority also lack basic health care coverage.

The predominance of immigrant women entering this industry as small business owners and workers can be explained by the low barriers to entry. For immigrant women, especially those who arrived in the U.S. as refugees with limited education, training, or English language skills, the nail salon industry has a relatively short and inexpensive training program to become a nail technician, does not require high English proficiency for employment, and allows immigrant women to contribute to their family's finances.

However, all of this comes at a steep cost. Chemicals used in cosmetic products have been linked to illnesses, cancers, and reproductive harm. The top ingredients of concern, termed the "toxic trio," are formaldehyde, toluene, and dibutyl phthalate. These chemicals are prevalent in nail products for their ability to harden nails and create a smooth finish. Exposure to toluene can affect the central nervous system and cause headaches, dizziness, and fatigue. Formaldehyde is a known carcinogen that causes irritation to the

The average nail technician is an Asian American woman in her reproductive years who works more than 40 hours per week over 9 years, earns $22,150 annually and does not have health insurance.

eyes, nose, and throat, skin irritation, allergic rashes or dermatitis, and coughing and wheezing. Dibutyl phthalate, which can be absorbed through the skin, is a possible reproductive or developmental toxin.

Nail salon technicians share numerous stories of co-workers who have experienced problems with infertility, miscarriages, spontaneous abortions, birth defects, or poor infant health outcomes. Given the long-term and cumulative exposure to reproductive toxins that are found in nail salon products, there are grave concerns about the reproductive health impacts on salon workers. Workers' concerns for their reproductive health and pregnancies often lead them to leave their jobs in order to limit the exposure to harmful chemicals to their developing fetuses.

Nail technicians also work in conditions that exacerbate exposure to harmful chemicals and may not even be aware of the health risks involved. Although nail product manufacturers are responsible for ensuring the safety of their products, many often deny evidence connecting negative health outcomes to chemicals found within cosmetic products. For example, manufacturers are supposed to provide labels or material safety data sheets (MSDS) that identify dangerous chemicals within their products, yet most chemicals and products have not been tested for safety and the information that is provided may be inaccurate. The industry trade group, the Cosmetic, Toiletry, and Fragrance Association (CTFA) actively lobbies against legislation that would increase efforts to regulate their products, such as efforts to require expanded product labels. Additionally, inadequate use of protective equipment and ventilation systems within salons also increase worker exposure to toxins and risk of harm.

Formaldehyde, toluene, and dibutyl phthalate, commonly found chemicals in nail salon products are known as the **"toxic trio."**

Formaldehyde can cause cancer.

Phthalates may cause reproductive harm.

Increasing the vulnerability of nail salon workers to these unsafe working conditions, many nail technicians are not protected by U.S. worker safety laws. Many nail technicians are not considered full-time employees of the salon; instead, they are considered private contract workers that rent a station from the salon. This work status does not provide them the full protections of U.S. labor laws, such as access to worker's compensation, overtime pay, or minimum wage protections, which increases their job insecurity.

Thus, it is clear that the connection between economic justice, environmental justice, and reproductive justice is particularly relevant for the low-income, immigrant, and female nail technician. It is also clear that improvements must be made to reduce these risks and advance the health and safety of these women.

OVERVIEW OF KEY LEGISLATION

Clearly, toxic chemicals in nail salon products can negatively affect nail salon worker health and safety. In order to identify strategies for addressing this problem through federal legislation, we must first understand how existing policies affect this issue. There are a number of statutes and regulations that affect the health and safety of nail salon workers and involve multiple government agencies and sub-agencies. This overview will discuss the different federal statutes and regulations that impact health and safety issues in nail salons and will consider the role each of the relevant agencies and sub-agencies plays in implementing these statutes and regulations. This mapping of the federal regulatory oversight of cosmetic producers and the nail salon workplace also allows us to reveal the gaps in the system.

STATUTES PERTAINING TO COSMETICS MARKETED IN THE UNITED STATES

The two most important laws pertaining to cosmetics are the Federal Food, Drug, and Cosmetics Act (FDCA) and the Fair Packaging and Labeling Act (FPLA).[11] For the purposes of this report, nail salon products are considered cosmetics because it falls under the FPLA's definition of "cosmetics," which is:

> "…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, and (2) articles intended for use as a component of any such articles; except that such term shall not include soap."[12]

Prior to market introduction, the cosmetics industry is expected to self-monitor the safety of its products.

Federal Food, Drug, and Cosmetic Act's (FDCA) Regulation of Cosmetics

The FDCA gives authority to the Federal Drug Administration (FDA) to regulate the cosmetic industry. However, this authority is limited to monitoring the adulteration and misbranding of cosmetics *after* the product has been introduced on the market for consumers or sold to professional salons. Prior to market introduction, the cosmetics industry is expected to self-monitor the safety of its products.

The FDCA prohibits the adulteration and misbranding of cosmetics in interstate commerce[13] and the manufacture, delivery or receipt of adulterated or misbranded cosmetics.[14] A cosmetic is adulterated if:

A. It contains any poisonous or deleterious substance which may cause injury to the user under the conditions of use prescribed on the label or of customary use;

B. If it consists in whole or in part of any filthy, putrid, or decomposed substance;
C. If it has been prepared, packed or held under insanitary conditions causing it to become contaminated with filth and thereby injurious to a person's health;
D. If the container is made of any poisonous or deleterious substance that causes its contents to become injurious to health;
E. Or if it is not a hair dye, and contains a color additive which is unsafe.[15]

A cosmetic is misbranded if:

A. If its labeling is false or misleading in any way;
B. If the packaging does not contain the manufacturer's contact information and an accurate statement of the quantity of the contents unless there is an exemption for the product;
C. If required information is not conspicuously placed on the packaging and worded in terms that would be read and understood by the general consumer;
D. If its container is so made, formed, or filled as to be misleading;
E. If it contains color additives and fails to conform to color additives regulations (unless it is for use in or on hair dyes);
F. If its packaging or labeling is in violation of an applicable regulation issued pursuant to section 3 or 4 of the Poison Prevention Packaging Act of 1970.[16]

The FDA's authority is limited to monitoring the adulteration and misbranding of cosmetics *after* the product has been introduced on the market.

Fair Packaging and Labeling Act's (FPLA) Regulation of Cosmetics

The FPLA applies to consumer products labeling, requiring that each retail package include the name and place of business of the manufacturer, packer, or distributor; the net quantity of contents; and net quantity of servings, uses, or applications represented to be present.[17] In particular, the FPLA requires cosmetic manufacturers to include ingredient statement labels on all products that are intended to be sold to consumers, although the same requirement is not applied to products used professionally, including in nail salons.[18] If the company proves that a "trade secret" ingredient is not widely known or used by competitors, the company need only list it as "and other ingredients" rather than revealing trade secret components. Manufacturers are also required to include warning labels for products that have not undergone safety testing.[19] It is unlawful for manufacturers to distribute products that do not conform to FPLA's provisions,[20] but many consumers do not inspect these mandatory labels for unsafe ingredients.

Thus, under current law, only the FDA has authority to penalize companies that sell an adulterated or misbranded product and to ensure proper labeling of cosmetic products once the product is put on the market. If the FDA wishes to pursue regulatory action against a product that violates FDA regulations, it must work with the Department of Justice to pursue court action against the offending product. Furthermore, manufacturers are not required to report adverse health effects or share studies on chronic health impacts with the FDA. This greatly limits the ability of the FDA to monitor the safety and quality of products sold by manufacturers. Instead, the cosmetics industry is expected to self-regulate the safety of products that go to market.

PENDING FEDERAL BILLS

Safe Cosmetics Act

On August 4, 2010, Representatives Jan Schakowsky (D-IL), Ed Markey (D-MA) and Tammy Baldwin (D-WI), introduced the Safe Cosmetics Act of 2010 (H.R. 5786). The bill would significantly change the regulatory structure of cosmetics in the U.S. by more closely aligning it with other FDA-regulated products, such as drugs, biologics, and medical devices. The bill includes a focus on vulnerable populations' exposed to toxic chemicals in the cosmetics industry, such as beauty salon workers and manufacturing plant workers. The bill explicitly defines a safety standard as one which achieves "reasonable certainty" that a product is safe. It also requires cosmetics manufacturers to submit their contact and supplier information for their products to the FDA. It prohibits companies from manufacturing, importing, distributing, or marketing a cosmetic or cosmetic ingredient if they fail to provide information to the FDA as required under the bill or if their products contain non-permitted ingredients. Most importantly, the bill would require companies to report "trade secret" ingredients in cosmetics – companies could continue to withhold ingredient concentration information. Professional salon products are also required to include ingredient labeling under the Act. Finally, the bill establishes an interagency council on cosmetic safety to share existing data and new information.

Toxic Substances Control Act (TSCA) Reform

Chairmen Bobby L. Rush and Henry A. Waxman of the Energy and Commerce Committee introduced the Toxic Chemicals Safety Act (H.R. 5820) to reform existing legislation intended to limit people's exposure to toxins from everyday products. While this bill excludes cosmetics, TSCA reform would improve regulation of chemicals that are allowed in market products, which would indirectly affect ingredients used in nail salon products. The bill requires pre-market approval of chemical safety and gives the Environmental Protection Agency (EPA) greater authority to more effectively regulate the use of unsafe chemicals. It also establishes a safety standard that protects disproportionately vulnerable populations, including children, pregnant women, and workers. The bill includes provisions to reduce the disproportionate burden of toxic chemical exposure placed on people of color, low-income people, and indigenous communities.

Summary

The current legislative landscape includes barriers to federal oversight of the cosmetics industry as well as opportunities for improvement. However, legislative fixes are only one possible solution to this complex problem. Efforts to improve and streamline regulatory reforms within the federal agencies are equally important.

Federal Agency	Scope of Authority
FDA	**CAN** • Regulate cosmetics labeling and branding only after product introduced onto market. • Require that retail cosmetic products include a readable ingredient declaration label. **CURRENTLY CANNOT OR DOES NOT** • Subject cosmetics to FDA pre-market approval, mandatory establishment registration, or ingredient reporting except for color additives. • Establish whether the chemicals used in cosmetics are safe. Manufacturers only need to certify that the ingredients and finished cosmetic products are safe. • Require ingredient declarations for professional use only products. • Cover all products used in salons since not all nail salon products are characterized as cosmetics.
EPA	**CAN** • Regulate toxic chemicals under the Toxic Substances Control Act. Cosmetics and ingredients of cosmetics are specifically excluded. • Sponsor the Designs for the Environment program which includes the Nail Salons Project. **CURRENTLY CANNOT OR DOES NOT** • Restrict companies from using chemicals of concern in cosmetics.
NIOSH	**CAN** • Research, develop and establish recommended occupational safety and health standards. **CURRENTLY CANNOT OR DOES NOT** • Issue or enforce the standards themselves.
OSHA	**CAN** • Ensure safe and health working conditions by setting and enforcing workplace standards and by providing training, outreach, education and assistance. • Use chemical regulations to restrict air contaminants, including the toxic trio, and set permissible exposure limits (PELs). • Require employers to communicate to employees about potential hazards from chemicals in their workplace. • Require hair and nail salons to keep Material Safety Data Sheets, even though they are only available in English. **CURRENTLY CANNOT OR DOES NOT** • Provide full worker rights protections for people who are self-employed or independent contractors.

FEDERAL AGENCIES WITH AUTHORITY OVER COSMETICS

FOOD AND DRUG ADMINISTRATION

The Food and Drug Administration (FDA) is an agency of the U.S. Department of Health and Human Services (HHS). Pursuant to the Federal Food, Drug, and Cosmetics Act (FDCA), the FDA is authorized to regulate cosmetics.[21] In order to enforce the FDCA's provisions, the Secretary of the FDA is authorized to promulgate regulations.[22] While the FDA has authority to pursue enforcement action against violative products, or against firms or individuals who violate the law, its scope does not include the same capacity for regulation that other federal agencies typically have.[23]

Scope of Regulation

The FDA has authority to regulate cosmetics and drugs. Other personal care products may fall under the jurisdiction of other agencies. The agency regulates cosmetics based on their intended use, as "articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body... for cleansing, beautifying, promoting attractiveness, or altering the appearance."[24] Among the products included in this definition are skin moisturizers, perfumes, lipsticks, fingernail polishes, eye and facial makeup preparations, shampoos, permanent waves, hair colors, toothpastes, and deodorants, as well as any material intended for use as a component of a cosmetic product.[25]

Cosmetics are not subject to FDA pre-market approval, mandatory establishment registration, or ingredient reporting with the exception of color additives.[26] To comply with FDA regulations, manufacturers only need to certify that the ingredients and the finished cosmetics products are safe and that the products are not otherwise misbranded or adulterated, but the FDA does not verify ingredient or product safety prior to market introduction.[27] Manufacturers that fail to certify product safety must contain a warning label.[28] Retail cosmetics must also include an ingredient declaration label on the products that is legible to an ordinary consumer.[29] This requirement does not apply to products used solely at professional establishments.[30] Professional products sold at retail follow retail product regulations, such as the labeling requirements, even if products are labeled "for professional use only."[31]

While cosmetic manufacturers are responsible for substantiating the safety of their products and ingredients before they go to market, the FDA does have the regulatory authority to prohibit or restrict the use of some ingredients in cosmetic products. The FDA considers the failure to adequately substantiate the safety of a cosmetic product or its ingredients prior to introduction on the market as misbranding. Products that have not been tested for safety are required to include a warning statement that appears conspicuously on the principal display panel of the product's label.

In general, except for color additives and those ingredients which are prohibited or restricted from use in cosmetics by regulation, a manufacturer may use any ingredient in the formulation of a cosmetic provided that the ingredient and the finished cosmetic are safe, the

product is properly labeled, and the use of the ingredient does not otherwise cause the cosmetic to be adulterated or misbranded under the laws that FDA enforces.

The FDA has a variety of enforcement mechanisms at its disposal when it finds a cosmetic is adulterated or misbranded. Within the FDA, the Center for Food Safety and Applied Nutrition is responsible for regulating the safety of cosmetic ingredients and product labeling.[32] The FDA can also pursue action through the Department of Justice in the federal court system to remove adulterated and misbranded cosmetics from the market. It may request a federal district court to issue a restraining or seizure order against any cosmetic product that violates its regulations. The FDA can also inspect cosmetics manufacturing facilities to ensure regulation compliance.[33]

In 2004, the Environmental Working Group found that 89% of ingredients used in cosmetic products had not been reviewed by the CIR.

Little case law exists to illustrate the types of nail salon products that are considered cosmetics beyond artificial nails and polishes. Nevertheless, the FDA has on rare occasions taken actions against consumer products such as "hair brushes, stockings, and toothpicks" under the cosmetic provisions of the FDCA.[34] In 2003, the FDA took regulatory action against non-corrective decorative contact lenses.[35] The agency said they qualify as cosmetics because "decorative contact lenses are articles intended to be introduced into the eye, which is a part of the body, to beautify the wearer, promote the attractiveness of the wearer, or alter the wearer's appearances."[36] In asserting that these lenses are cosmetics, the agency stated "the fact that contact lenses are 'devises' in the colloquial sense does not preclude cosmetic status under the Act," which has previously been applied to wigs, hair brushes, stockings and toothpicks.[37] In another instance, the FDA re-categorized a consumer product as a drug. Here, the FDA ruled that products advertising nail-biting or thumb-sucking preventions qualify as drugs because "…while nail-biting and thumb-sucking may be habits, they are also conditions which, if left untreated, can result in diseases…."[38] As such, it is possible that the FDA could decide to re-categorize consumer products, such as nail glue and acrylic, as cosmetics given their purposes in beautification.

There is a need for the FDA to clarify their product definitions to shed more light on its scope of authority. For example, while a nail polish is clearly a cosmetic and subject to FDA's authority, it is unclear whether glues and acrylics used by manicurists would likewise be considered cosmetics.[39] Currently, it does not appear that manicure glues fall into the category of "cosmetic," because glues do not themselves cleanse, beautify, promote attractiveness, or alter appearance, as is required by the statute. Rather, such glues might be considered a "consumer product." The FDA's website suggests this distinction, stating that "some 'personal care products' may belong to other regulatory categories, including… other consumer products (such as manicure sets)."[40] More importantly, consumer products are not regulated by the FDA; they are regulated by the U.S. Consumer Product Safety Commission (CPSC).[41] However, the CPSC has not taken a position on cosmetics consumer product safety due to the conflicting authority with the FDA.

Without clarification between drugs, cosmetics, and consumer products, it is easy for nail salon products to slip through both the

FDA's and CPSC's regulations and thus pose a danger to nail salon workers and customers.

Applicability to Nail Salon Worker Health and Safety

FDA regulations over cosmetics extend primarily only to labeling and branding.[42] As mentioned previously, cosmetics are not subject to pre-market approval with the exception of color additives, unlike drugs which require pre-market approval. Still, as the only federal agency responsible for monitoring the ingredients used in cosmetic products, it would be best if all nail salon products are categorized as cosmetics, subjecting them to a certain amount of FDA oversight in terms of ingredient declaration.

Additional problems to achieving better cosmetics regulations by the FDA include the applicable burden of proof and a limited budget to deal with product testing. [43] The FDA does not conduct independent ingredient safety assessments. Instead, it relies on the Cosmetic Ingredient Review (CIR) Expert Panel, an independent industry-funded panel of medical and toxicology experts, for ingredient safety assessments.[44] In 2004, a study conducted by the Environmental Working Group issued a report questioning the safety of most skin care product ingredients. They found that eighty-nine percent of ingredients used in cosmetic products had not been reviewed by CIR.[45] Without proof that certain products are harmful to users, it is difficult for the FDA to bring cases against cosmetic manufacturers for violations.

While the FDA does rely on the CIR for product safety compliance and information, the review panel has several inherent problems. First and foremost of concern is that the CIR is funded by the cosmetics industries directly, and the FDA has a non-voting position on the review panel. For instance, based on CIR reports, which are either outdated or not directly applicable,[46] the FDA determined that chemicals such as the "toxic trio"—formaldehyde, dibutyl phthalate, and toluene—are not dangerous. The study which the FDA based its statement concerning formaldehyde on is from a CIR report in 1984 that studied the effects of formaldehyde in products applied directly to the skin, not nails.[47]

The FDA has begun to acknowledge its weak statutory authority for regulating cosmetics. In 2000, the agency's official magazine included a statement that, "[t]he regulatory requirements governing the sale of cosmetics are not as stringent as those that apply to other FDA-regulated products.... [M]anufacturers may use any ingredient or raw material, except for color additives and a few prohibited substances, to market a product without a government review or approval."[48] As a result, cosmetics manufacturers have relied heavily on self-regulation rather than agency pre-approvals.

Although numerous barriers exist, there are also opportunities for the FDA to remove harmful chemicals from nail salon products and increase its oversight of cosmetic products. For example, it is within the FDA's scope of powers to issue a rule or regulation that prohibits or restricts the use of the "toxic trio" from nail salon products.[49]

It is unclear whether acrylics and glues used by manicurists are considered cosmetics.

The Environmental Protection Agency (EPA), whose mission is "to protect human health and to safeguard the natural environment,"[50] is authorized to develop and enforce regulations and study environmental issues, along with other activities. The EPA was created under the Reorganization Plan No. 3 of 1970[51] and has authority to hold violators of environmental laws or regulations civilly or criminally liable.

Scope of Regulation

Generally, the EPA is not charged with administering any laws that directly implicate nail salon worker health and safety. However, the EPA does have a Nail Salons Project which is a part of the EPA's Designs for the Environment (DfE), a program that allows safer products to carry DfE label.[52] The DfE program began as a way for the EPA to collaborate with industries, environmental groups, and academia to prevent pollution and reduce health risks.[53] The program has supported businesses in selecting safer chemicals and technologies for workplaces and consumers by publishing guides to safer working environments.[54] For instance, the EPA's Nail Salons Project collected data on engineering controls, personal protective equipment, and management practices to develop a Best Practices Manual in 2001, updated in 2007, that is available in English and Vietnamese.[55]

The EPA also regulates toxic chemicals under the Toxic Substances Control Act (TSCA). Most importantly, TSCA's regulatory reach specifically excludes cosmetics and ingredients of cosmetics. Still, although TSCA does not apply directly to cosmetic products, it could limit or prohibit the use of certain chemicals, with an indirect affect on cosmetic product ingredients.

Though EPA has already detailed toluene's and formaldehyde's detrimental effects on human health and the environment, it can't restrict companies from using these chemicals in their products.

Applicability to Nail Salon Worker Health and Safety

Generally, EPA does not have direct influence over cosmetics regulations. Although EPA does regulate chemicals under TSCA, the Act is inadequate. In particular, while the Act provides the EPA with authority to impose testing requirements on chemicals, EPA must first demonstrate by substantial evidence that existing data is "insufficient" to assess the chemical and the EPA has a "more than theoretical" basis to suspect that the chemical "may present" a risk or hazard.[56] Thus, the burden is on the EPA to prove that a chemical is *unsafe*, rather than on the manufacturer to prove that a chemical *is* safe. Furthermore, finalizing test rules can take two to ten years and require the expenditure of substantial agency resources.[57]

Though EPA has already detailed toluene's and formaldehyde's detrimental effects on human health and the environment,[58] it does not have jurisdiction to affect cosmetics regulations to restrict companies from using these chemicals in their products. Furthermore, while the Nail Salons Project manual has been very helpful for nail salon owners and workers, it is by no means mandatory that nail salons follow the

guide. The project is merely a way to better inform the industry on safer professional practices.

To strengthen the EPA's authority over nail salon products, first Congress must amend TSCA to give the agency less constraints in mandating the testing of chemicals. In particular, the burden of proof for EPA to verify whether a chemical is safe or not before subjecting the manufacturer to regulatory sanctions is too high.[59] The Safe Chemicals Act includes language to reform TSCA to give the EPA stronger authority to test and regulate the 80,000 chemicals used in nail salon products on the market today.[60]

The burden is on the EPA to prove that a chemical is *unsafe*, rather than on the manufacturer to prove that a chemical *is* safe.

NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH

The National Institute for Occupational Safety and Health (NIOSH) is the federal agency responsible for conducting research and making recommendations for the prevention of work-related injury and illness.[61] NIOSH is authorized by the Occupational Safety and Health Act of 1970 to develop and establish recommended occupational safety and health standards.[62] It is part of the Centers for Disease Control and Prevention (CDC) within the U.S. Department of Health and Human Services. Unlike its counterpart, the Occupational Safety and Health Administration, NIOSH is not a regulatory agency.[63] It does not issue safety and health standards that are enforceable under U.S. law. Rather, NIOSH's authority under the Occupational Safety and Health Act focuses primarily on research and the development of safer work standards.

While NIOSH cannot directly influence cosmetics regulations, it can help industries develop better products and safer workplace habits.

Scope of Regulation

Although NIOSH has no direct regulatory enforcement power, its research does assist other federal agencies in putting together safer workplace standards.[64]

Applicability to Nail Salon Worker Health and Safety

Under NIOSH-funded research grants, the University of Massachusetts has conducted projects to examine nail salon hazards and health effects.[65] The study spanned a three-year period from 2003 to 2006 to develop "methods for a community-based, comprehensive investigation of both the technical and social issues related to the nail salon work environment and health hazard prevalence in salon workers."[66] Additionally, NIOSH began a research project in 2009 to determine the effectiveness of downdraft vented nail tables (VNTs) in venting potential dust or chemical exposures away from the workers and customers, but does not appear to have completed it.[67]

While NIOSH cannot directly influence cosmetics regulations, it can help industries develop better products and safer workplace habits. For instance, NIOSH aided solvent ink factories in pinpointing harmful chemicals and recommended the necessary steps to prevent health risks.[68] NIOSH also shared their findings with the industry to help them prepare future Material Safety Data Sheets (MSDS).[69] NIOSH also conducts research studies that may help in the development of guidelines and best practices for nail salons, such as investigating "green" technologies and practices that can improve worker and customer health and safety.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

The Occupational Safety and Health Administration (OSHA) is a federal agency within the United States Department of Labor that was created by Congress pursuant to the Occupational Safety and Health Act of 1970. Its goal is to ensure safe and healthy working conditions by setting and enforcing work place standards and by providing training, outreach, education and assistance.

Scope of Regulation

Most employees in the nation come under OSHA's jurisdiction. OSHA covers public and private sector employers and employees in all 50 states, the District of Columbia, and other U.S. jurisdictions either directly through federal OSHA or OSHA-approved state programs.[70] OSHA does not cover people who are self-employed, some state employees, immediate family members of farm employers that do not employ outside employees, and workers who are protected by other federal agencies, such as the Federal Aviation Administration and Coast Guard.[71]

OSHA's chemical regulations restrict air contaminants, including the toxic trio, from workplaces.

Employees who suspect workplace violations may file a complaint with OSHA and request a confidential workplace inspection if they believe there is a serious hazard or their employer is not following OSHA standards.[72] The employer is legally prohibited from taking retaliatory action against whistle-blowing employees.[73] OSHA enforces its regulations through surprise compliance visits or investigations.[74] Violating employers are fined. OSHA provides special services to small and medium businesses, including on-site consultation, fine deduction (for business of a certain size), and English as a second language (ESL) services for training and outreach.[75]

OSHA's chemical regulations restrict air contaminants, including the toxic trio, from workplaces.[76] OSHA sets permissible exposure limits (PELs) that regulate the amount of chemical exposures in working environments.[77] These PELs are based on an eight-hour time weighted average exposure.[78]

Additionally, OSHA has published fact sheets on formaldehyde and other hazardous substances.[79] The OSHA Hazard Communication Standard requires employers to communicate to their employees about potential hazards from chemicals in their working environment.[80] It also requires hair and nail salons to keep Material Safety Data Sheets (MSDS), which are documents provided by the product manufacturer that list the hazardous chemical ingredients and provide

information on safety precautions to prevent or limit exposure.[81] The regulation excludes any cosmetics which are packaged for sale to consumers in a retail establishment, and cosmetics intended for personal consumption by employees while in the workplace.[82]

Applicability to Nail Salon Worker Health and Safety

OSHA or a federally-approved state occupational safety and health program has authority over certain aspects of workplace safety and health. Although nail salon workers do not have the same worker rights protections as most private sector employees, they still have the right to a safe working environment. However, OSHA generally only investigates workplace violations based on alerts from employees, which is problematic since many nail salon workers are unaware of their right to a safe workplace, are afraid to report violations for fear of retaliation and losing their jobs or have concerns around immigration status. Moreover, many nail salons are family-run, and employees are naturally reluctant to report their own relatives' violations. Still, nail salon workers should be aware of OSHA safety standards, in order to advocate for healthier workplaces.

Another relevant bureau within the Department of Labor is the Women's Bureau. It played an instrumental role in the passage of the Equal Pay Act of 1963, Work and Family Clearinghouse in 1989, and the Family and Medical Leave Act of 1993. Currently the Bureau works to better workplace flexibility for all women and workplace concerns for women in science and engineering. The Bureau has voiced support for efforts to improve work conditions within nail salons and conducted outreach to female API workers.[83]

According to **Women's Voices for the Earth's report *Glossed Over***, "OSHA PELs were created in the 1960's for industrial settings with an intent to protect against severe acute exposures. Most OSHA PELs do not take into consideration the effects of a combination of multiple chemicals, or the long term chronic effects of exposure on endpoints such as asthma, cancer or reproductive harm. In addition, these limits are restricted to inhalation exposure and do not account for absorption through the skin, which is a potential route of exposure for nail salon workers."

CONCLUSION

This report documents where the federal government has the power to improve the safety of cosmetic products and the working conditions within the hair and nail salon industry, and where the regulatory powers falls short. Federal agencies can pursue initiatives to clarify regulations, conduct additional research and increase access to their resources and information for limited-English speakers. Asking agencies to implement existing regulatory authority would tighten loopholes for monitoring the safety of products put on the market by cosmetic manufacturers. These actions would push the goal of creating safer cosmetic products and safer workplaces for salon workers, one step closer to the finish line. Although no federal agency is singularly responsible for monitoring the nail salon industry and the chemical products it uses, incremental administrative or regulatory changes can lead to cumulative improvements that can have profound impact on the cosmetic industry and working conditions within nail salons.

Regulatory successes can also build momentum for legislative reforms via the Safe Cosmetics Act or TSCA Reform Bill. As such, efforts to improve and streamline regulatory authority and oversight within the federal agencies become increasingly important. Focusing on feasible, impactful regulatory recommendations allows us to support the relevant agencies to move closer to providing safe and healthy environments for hair and nail salon workers.

For detailed policy recommendations,
please visit the National Health Nail Salon Alliance's
website at www.nailsalonalliance.org
for our latest Federal regulatory recommendations.

ENDNOTES

1 *Glossed Over*, a report by Women's Voices for the Earth, February 2007
2 Elizabeth Fernandez, "Nail salon workers exposed to toxic chemicals, experts say in S.F.", San Francisco Chronicle, November 16, 2007 http://www.aerovexsystems.com/nail-salon-workers-exposed-to-toxic-chemicals-experts-say-in-s-f/
3 Industry Fact Sheet—Beauty Salons (NAICS 812112). The University of Georgia BOS/SBDC, Applied Research Division. http://www.georgiasbdc.org/pdfs/beauty.pdf, October 2001
4 Industry Fact Sheet—Beauty Salons (NAICS 812112). The University of Georgia BOS/SBDC, Applied Research Division. http://www.georgiasbdc.org/pdfs/beauty.pdf, October 2001
5 Environmental Protection Agency, (2006) "About the Nail Salon Project" Available at: www.epa.gov/dfe/pubs/projects/salon/about.htm
6 NAILS Magazine, 2010. Industry Statistics. NAILS Magazine 2010-11 Big Book. Available: http://files.nailsmag.com/Market-Research/bb2010-11stats-reprints.pdf
7 Quach T, Nguyen K-D, Doan-Billings P-A, Okahara L, Fan C, Reynolds P. "A Preliminary Survey of Vietnamese Nail Salon Workers in Alameda County, California." Community Health 33 (2008) 336
8 US Department of Labor, Bureau of Labor Statistics, "May 2009 National Occupational Employment and Wage Estimates" http://www.bls.gov/oes/current/oes_nat.htm#39-0000
9 Nails Magazine. Nationwide Survey 2008-2009. http://www.nailsmag.com/resources/industryStats.aspx?Interstitial=1 (accessed March 5,2009)
10 NAILS Magazine. 2009. Industry Statistics. NAILS Magazine 2000-2010 Big Book. Available: http://www.nailsmag.com/pdfView.aspx?pdfName=NAILSBB2009-10stats.pdf
11 21 U.S.C. § 701(a).
12 21 U.S.C. 301(i).
13 21 U.S.C. 331(b).
14 *Id.* at 331(c) and (g)
15 21 U.S.C. 361.
16 21 U.S.C. 362.
17 15 U.S.C. 1459(a)
18 Leah Tressler. American Beauty : An Analytical View of the Past and Current Effectiveness of Cosmetic Safety Regulation and Future Direction, pg. 263 The Food and Drug Law Institute; Roseann B. Termini, 2008
19 21 C.F.R. § 740.10 (2007).
20 US Metric Association, "Regulations implementing the FPLA" http://lamar.colostate.edu/~hillger/laws/fpla-cfr.html
21 21 U.S.C. § 701(a).
22 *Id.*
23 Food and Drug Administration, *Authority over Cosmetics Fact Sheet*, Mar. 3, 2005, http://www.fda.gov/Cosmetics/GuidanceComplianceRegulatoryInformation/ucm074162.htm [hereinafter *Authority*].
24 21 U.S.C. § 321(i).
25 Food and Drug Administration, *Is it a Cosmetic, a Drug, or Both? (Or is it Soap?)*, July 8, 2002, http://www.fda.gov/Cosmetics/GuidanceComplianceRegulatoryInformation/ucm074201.htm [hereinafter *Cosmetic*].
26 *Authority, supra* note 3.
27 *Authority, supra* note 3.
28 *Id.*; 21 C.F.R. § 740.10.
29 21 C.F.R. § 701.3.
30 *See* Food and Drug Administration, *Nail Care Products*, March 9, 2010 http://www.fda.gov/Cosmetics/ProductandIngredientSafety/ProductInformation/ucm127068.htm (last visited Dec. 22, 2009) ("The requirement for an ingredient declaration does not apply, for example, to products used at professional establishments.") [hereinafter *Nail Care*]
31 *Id.*
32 Jacqueline A. Greff, Regulation of Cosmetics that are Also Drugs, 51 Food & Drug L.J. 243, 261(1996).
33 *Authority, supra* note 3.
34 James T. O'Reilly, Food and Drug Administration § 12:38 (3rd ed. 2010); See FDA, Nail Care Products. [hereinafter *O'Reilly]*
35 *Id.* at 39.
36 68 Fed. Reg. 16520, 16521 (Apr. 4, 2003).
37 Id.
38 Greff, *supra* note 16, at 261.
39 See *Nail Care, supra* note 7 ("Nail products for both home and salon use are regulated by the Food and Drug Administration.").
40 FDA, Cosmetics Q&A: "Personal Care Products," http://www.fda.gov/Cosmetics/ResourcesForYou/Consumers/CosmeticsQA/ucm136560.htm (last visited Nov. 11, 2009).
41 FDA, Cosmetics Q&A: "Personal Care Products," http://www.fda.gov/Cosmetics/ResourcesForYou/Consumers/CosmeticsQA/ucm136560.htm
42 *Authority, supra* note 3; Mira Vu, *How Does the FDA Regulate Cosmetics?* BUKISA.COM, Dec. 6th, 2009, http://www.bukisa.com/articles/209443_how-does-the-fda-regulate-cosmetics

43 *O'Reilly, supra* note 12, § 17:1.
44 *O'Reilly, supra* note 12, § 17:4
45 *Report Criticizes Lack of Regulation for Cosmetics: 89 Percent of Ingredients Not Evaluated, Impurities High*, Warning Letter Bulletin Vol. 12 Issue 12, June 14, 2004, available at 2004 WLNR 6598802.
46 *Nail Care, supra* note 7.
47 *Id.*
48 Carol Lewis, *Clearing Up Cosmetic Confusion*, FDA Consumer, Aug. 2000 http://www.cfsan.fda.gov/~dms/fdconfus.html. Id.
49 *Id.*
50 EPA, "Our Mission and What We Do," http://www.epa.gov/epahome/whatwedo.htm
51 35 F.R. 15623, 84 Stat. 2086, as amended Pub. L. 98-80 §§ 2(A)(2), (B)(2), (C)(2)(C) (1983), 97 Stat. 485, 486.
52 EPA, "What Does the DfE Label Mean?," http://www.epa.gov/dfe/pubs/projects/formulat/label.htm
53 EPA, "About Us," http://www.epa.gov/dfe/pubs/about/index.htm
54 *Id.*
55 EPA, "Protecting the Health of Nail Salon Workers," March 2007 http://www.epa.gov/dfe/pubs/projects/salon/nailsalonguide.pdf
56 *Id.*
57 *Id.*
58 EPA Integrated Risk Information System, "Toluene" http://www.epa.gov/iris/subst/0118.htm and "Formaldehyde" http://www.epa.gov/ncea/iris/subst/0419.htm;
59 *Rawlins, supra* note 29, at 32.
60 Reproductive Health Technologies Project, "Safe Cosmetics Act of 2011: Press Kit" http://www.rhtp.org/fertility/SafeChemicalsAct.asp
61 CDC, "About NIOSH" http://www.cdc.gov/niosh/about.html
62 29 U.S.C. § 671(a).
63 29 CFR § 671
64 See EPA, Nail salons guide, http://www.epa.gov/dfe/pubs/projects/salon/nailsalonguide.pdf (quoting NIOSH approved masks as the one to use).
65 CDC, "NIOSH Program Portfolio" http://www.cdc.gov/niosh/programs/ohd/grants.html#g14
66 *Id.*
67 CDC, "Nail Salon Table Evaluation" http://www.cdc.gov/niosh/blog/nsb031009_nails.html
68 CDC, "Vision Concerns at Plant Lead NIOSH to Identify Link With 2 Chemicals, Suggest Safeguards" January 6, 2003 http://www.cdc.gov/niosh/updates/teramines.html;
69 *Id.*
70 OSHA, "We Can Help," http://www.osha.gov/workers.html
71 *Id.*
72 OSHA Fact Sheet, "Your Rights as a Whistleblower," November 2007 http://www.osha.gov/OshDoc/data_General_Facts/whistleblower_rights.pdf
73 OSHA Fact Sheet, "Your Rights as a Whistleblower," November 2007 http://www.osha.gov/OshDoc/data_General_Facts/whistleblower_rights.pdf
74 Justia.com, "OSHA Compliance" http://www.justia.com/employment/osha-compliance/
75 OSHA, "Benefits and Resources," http://www.osha.gov/dcsp/smallbusiness/benefits.html
76 OSHA, "Regulations (Standards - 29 CFR) - Table of Contents" http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=9992
77 *Id.*
78 *Id.*
79 OSHA, "Hazard Communication 29 CFR Parts 1910, 1915, 1917, 1918, 1926, and 1928 RIN 1218-AB02" http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=13349
80 29 CFR 1910.1200(b)(1)
81 OSHACI s 2.10 OSHA Guide for Construction Industry
82 29 CFR 1910.1200(b)(6)(viii)
83 Two Alliance members attended meetings in June 2010 where Director Sara Manzano-Díaz explicitly stated her support for the Alliance's work.

NOTES

NOTES

Members of the National Healthy Nail Salon Alliance, as of May 2011

California Healthy Nail Salons Collaborative (co-convener)

National Asian Pacific American Women's Forum (co-convener)

Women's Voices for the Earth, Missoula, MT (co-convener)

The American Association on Intellectual and Developmental Disabilities Environmental Health Initiative

American Fertility Association

Ann Blake, Environmental & Public Health Consulting

Asian and Pacific Islander American Health Forum

Campaign for Safe Cosmetics

Commonweal—Health and Environmental Research

Connie Nguyen, nail salon worker and consultant

Department of Work Environment—University of Massachusetts

Environmental Coalition of South Seattle

Hair Color Concerns

Johns Hopkins University School of Nursing

National Council for Occupational Safety and Health

National Economic and Social Rights Initiative

National Institute for Reproductive Health

Physicians for Social Responsibility—Los Angeles

Teens Turning Green

The Oregon Collaborative for Healthy Nail Salons

West Harlem Environmental Action, Inc.

Worksafe

Ally organizations

Boston Public Health Commission's Safe Nail Salon Project

Environmental Health Strategy Center

The Local Hazardous Waste Management Program, King County

If you are interested in joining us, please visit www.nailsalonalliance.org

This report identifies the federal agencies responsible for ensuring the safety of cosmetic products, protecting the environment, and ensuring the health and safety of nail salon workers and consumers. By identifying the role and authority of each agency as well as where there are gaps in oversight, this report provides a roadmap for advocates wishing to seek administrative solutions to improve the health and safety of salons and their workers.

The National Healthy Nail Salon Alliance was formed in 2007 and is co-led by the National Asian Pacific American Women's Forum, the California Healthy Nail Salon Collaborative, and Women's Voices for the Earth, to connect activists and organizations dedicated to improving nail salon worker health and safety, and to develop policy recommendations that will advance worker rights in this industry. It currently has a national membership of over 20 individuals and organizations whose main issue areas range from workers' rights to environmental and reproductive health.

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Women, especially low-income and immigrant women, bear the brunt of harm from toxic products in this luxury service industry.

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