



Is Your Cosmetic Product Really Natural? Congress Pushes for Legislation to Define the Term “Natural” for Cosmetics

Carolina M. Wirth

The use of the term “natural” on the labeling of FDA-regulated products has been the source of many lawsuits in recent years, and even the subject of enforcement actions by the Federal Trade Commission (FTC). However, neither the FTC nor the FDA have established a definition for the term “natural.”

While FDA does not have a definition of the term, the agency has a long-standing policy for what it means for a food to be “natural.” Specifically, FDA has considered the term “natural” to mean that nothing artificial or synthetic (including all color additives, regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in that food.

FDA’s policy may provide some general guidelines to companies in the food space; however, when it comes to cosmetics and personal care products, there has been little to no guidance on the issue. This has left marketers to make the determination as to whether their products can be described as “natural” without any real guidelines, and consumers on their own when purchasing these types of products. Moreover, because of the saturation in the market of “natural” cosmetics and personal care products, the word “natural” on a product label can sometimes become almost meaningless and, at times, false and misleading to consumers.

In 2016, the FTC challenged four companies that were making “natural” claims when marketing their skincare products, shampoos and sunscreens, even though they contained synthetic ingredients.¹ In announcing the proposed settlements, the FTC noted that “all-natural” or “100% natural” “means just that;” however, the agency did not provide any guidance as to what is needed to support a “natural claim.”

In an effort to protect consumers, Representatives Sean Maloney (D-NY) and Grace Meng (D-NY) introduced what has been described a “landmark” legislation in the House of Representatives entitled the “Natural Cosmetics Act.”² The Natural Cosmetics Act would define the terms “natural” and “naturally-derived ingredient” as they relate to cosmetics and personal care products. The legislation, introduced on November 5, 2019, would amend the Federal Food, Drug and Cosmetic Act (FD&C Act) and be the first major update to the cosmetics laws in more than 80 years.

Highlights

Below are some of the key provisions:

Definition of the Term “Natural”

The term natural would be defined as “any chemical substance that is naturally occurring and which is (i) unprocessed; (ii) processed only by manual, mechanical, naturally derived solvent or

¹ See FTC’s Press Release, Four Companies Agree to Stop Falsely Promoting Their Personal-Care Products as “All Natural” or “100% Natural;” Fifth is Charged in Commission Complaint, available at <https://www.ftc.gov/news-events/press-releases/2016/04/four-companies-agree-stop-falsely-promoting-their-personal-care>.

² See copy of the Natural Cosmetics Act, H.R. 5017, available at <https://www.congress.gov/bill/116th-congress/house-bill/5017/text>.

gravitational means, by dissolution in water or steam, by flotation, or by heating solely to remove water; or (iii) is extracted by air by any means.”

Packaging or Labeling

Any package or labeling that includes the term “natural” would need to contain at least 70 percent natural substances (other than water and salt) and made without the use of certain manufacturing processes (e.g., ionizing radiation, alkoxylation, deterpenation).

A cosmetic or other personal care product that fails to meet these standards and is labeled as “natural” would be “misbranded” under the FD&C Act.

Recordkeeping and Recalls

The Natural Cosmetics Act would require that manufacturers or distributors of a cosmetic making natural claims maintain records verifying the claim and demonstrating that each ingredient in the cosmetic has been dated by the supplier of the ingredient using carbon 14-testing. It also grants FDA the authority to request a voluntary recall of any cosmetic that is believed to be misbranded.

AGG Observations

- The Natural Cosmetics Act is currently awaiting further consideration in the House Committee on Energy and Commerce. If enacted, the legislation could have a significant impact on the cosmetics and personal care industry, as it will provide clear guidance as to what it is necessary in order to make a “natural” claim. This may, in turn, reduce the number of false advertising lawsuits.
- As currently drafted, the legislation does not provide FDA with additional funding to be able to enforce any of the new requirements. Without additional funding, FDA may end up exercising enforcement discretion and focus on only bringing actions against really bad actors.
- This bill is one of many involving cosmetics over the last few years. For example, in March 2019, the Personal Care Products Safety Act was introduced by Senators Dianne Feinstein (D-Calif.) and Susan Collins (R-Maine), which would require FDA to oversee and regulate the safety of ingredients used in cosmetics and personal care products.³
- While the cosmetic industry is primed for legislative reform, with some other major FDA-related issues (e.g., drug pricing, opioid crisis) currently being addressed by Congress, we do not expect that this bill will take center stage anytime soon.
- While companies wait for additional regulations or guidance, they should continue to make sure that all claims on their cosmetic products are substantiated. Any claims should also be truthful and not misleading. Moreover, companies should make sure that any claims that they make are not drug claims, if they want to remain a cosmetic. A product can be both a cosmetic and a drug. If a company makes both drug and cosmetic claims for a product, the claims and labeling must comply with both the regulations for drugs and for cosmetics.

³ See copy of the Personal Care Products Safety Act, available at https://www.feinstein.senate.gov/public/_cache/files/1/f/1f8c3544-1634-4af5-951f-a7fbb8940f0a/68A8E8C042CDDD66BD5E2CCB44294C03.2019.03.07-personal-care-products-safety-act.pdf.

Authors and Contributors

Carolina M. Wirth

Of Counsel, DC Office
202.677.4916
carolina.wirth@agg.com

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Atlanta Office

171 17th Street, NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office

1775 Pennsylvania Avenue, NW
Suite 1000
Washington, DC 20006

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