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House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet: Virtual hearing on The SHOP SAFE Act: Stemming the Rising Tide of Unsafe Counterfeit Products Online

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Chairman Johnson, Ranking Member Issa, and distinguished members of the Subcommittee, thank you for the opportunity to testify today on behalf of the Personal Care Products Council (PCPC) on our support for the SHOP SAFE Act and the Subcommittee's efforts to address the critical and growing risk posed by online sales of counterfeit products, including cosmetics and personal care products.

My name is Meredith Simpson, and I am Vice President, Federal Government Affairs and External Relations for the Personal Care Products Council (PCPC). PCPC is the leading national trade association representing global cosmetics and personal care products companies. Founded in 1894, PCPC's approximately 600 member companies manufacture, distribute, and supply the vast majority of finished personal care products marketed in the U.S. – a \$488 billion global industry. PCPC appreciates the Subcommittee holding this hearing and is pleased to offer our views on the importance of ensuring consumers always enjoy the same health and safety protections for products purchased online as those purchased in brick-and-mortar stores.

E-commerce platforms create valuable opportunities for legitimate companies to grow, reach new consumers, and provide buyers with numerous choices and convenience. However, the current structure is vulnerable to exploitation and contributes significantly to a rise in illicit trade. Our member companies invest substantial resources to ensure the safety and quality of their products and to meet federal and state safety and quality requirements. Counterfeit personal care products are fraud – they damage businesses, drain the economy, and – most importantly – threaten consumer health and safety. We strongly support provisions in the SHOP SAFE Act that advance best practices for online platforms to help ensure products sold on these platforms are safe and authentic.

Our Role in Strengthening Communities and the Economy

Cosmetics and personal care products companies are proud of their essential role in creating jobs, generating income, and making our communities stronger. In 2018, the personal care products industry was responsible for 3.9 million direct and indirect jobs representing 1.9% of total U.S. employment and \$64.8 billion in tax payments at the federal, state, and local levels. Personal care products exports were more than 35% higher than imports, representing the second largest trade surplus in the manufacturing sector.¹

Small businesses are the heart of the personal care products industry. Companies with fewer than 10 employees account for 34% of the industry's employment, and those with fewer than 50 employees account for nearly 70%. Women make up nearly 77% of the industry's workforce and people of color, 33%.

Like other industries, the beauty and personal care sector has felt the tremendous impact of the COVID-19 pandemic, from supply chain and manufacturing disruptions to declining sales. Throughout, our primary focus has been on the health and safety of our employees, our customers, and our communities. Many member companies quickly shifted their manufacturing lines to produce alcohol-based hand sanitizers for distribution to medical professionals; donated soap, personal hygiene, and household cleaning products to organizations operating on the front lines; and provided more than \$150 million dollars in cash support to a range of relief and charitable organizations.

¹ Personal Care Products Council - *Driving the Economy, Shaping the Future: Economic & Social Contributions Report 2020*. (2020) https://www.personalcarecouncil.org/wp-content/uploads/2020/09/PCPC_EcoReport_2020.pdf

Our Commitment to Safety, Quality, and Innovation

As the makers of a diverse range of products millions of consumers rely on every day — from sunscreens, toothpaste, and shampoo to moisturizer, hand soap, and fragrance — personal care products companies are global leaders committed to product safety, quality and innovation. The average consumer uses 12 personal care products each day and trusts the makers of those products to supply them and their families with safe, high-quality products that meet all applicable regulatory requirements.

Cosmetics and personal care products are regulated by the U.S. Food & Drug Administration (FDA). Among other requirements, the Federal Food, Drug & Cosmetic Act requires that every product and its individual ingredients are safe before they are put on the market. Companies that manufacture or market cosmetics have a legal responsibility to ensure their products are safe and properly labeled, and current federal law provides penalties for failure to meet these requirements. Our member companies take their responsibility to make safe products very seriously. Consumer and product safety are top priorities for our industry, with careful and thorough scientific research and development serving as the foundation for everything we do.

The U.S. cosmetics industry invests nearly \$3 billion every year in scientific research and development. As a result, approximately 2,000 innovative new products are launched annually. The industry employs nearly 6,000 scientific and technical professionals dedicated to ensuring product and ingredient safety. Companies also work with a number of scientific and medical experts – chemists, toxicologists, microbiologists, dermatologists, epidemiologists, environmental scientists, and other technical experts – to evaluate and ensure the safety of products before they reach the consumer.

Counterfeiting and Online Platforms

The volume of counterfeit goods reaching consumers, including via online platforms, is increasing.¹ While global trade in counterfeit and pirated goods represented \$200 billion in 2005 (equating to 1.9% of global trade), this figure reached \$509 billion in 2016 and is predicted to increase to \$991 billion by 2022.¹ In 2019, U.S. Customs and Border Protection (CBP) seized 27,599 shipments containing goods violating intellectual property rights, which, if genuine, would have had an estimated MSRP of nearly \$1.5 billion – up from \$1.4 billion in 2018.³ Counterfeit goods are also estimated to result in a fiscal loss of \$270 billion worldwide by 2022, with global employment losses ranging between 4.2 and 5.4 million, a non-negligible consideration in the context of the current global pandemic and its economic repercussions.⁴

Notably, according to a report from the Organization for Economic Cooperation and Development (OECD), the cosmetics industry loses more money to counterfeit products than any other industry, with

¹ OECD, EUIPO, *Illicit Trade – Trends in Trade and in Counterfeit and Pirated Goods* (2019); OECD, *The Economic Impact of Counterfeit and Piracy* (2008); EUROPOL and EUIPO, *2019 Intellectual Property Crime Threat Assessment Report* (2019).

³ U.S. Customs and Border Protection, *Operation Mega Flex Stops Hundreds of Illicit “Made in China” Shipments at LAX* (October 30, 2020), <https://www.cbp.gov/newsroom/local-media-release/operation-mega-flex-stops-hundreds-illicit-made-china-shipments-lax>.

⁴ INTA and ICC-BASCAP, *The Economic Impacts of Counterfeiting and Piracy* (2017).

losses of approximately \$5.4 billion each year to fraudulent sellers.¹ This means \$5.4 billion of products that very likely do not meet FDA’s safety, efficacy, and labeling requirements are sold to consumers each year. Contrary to the popular perception of counterfeited products, luxury personal care products are not the only category at risk as there is a low barrier to entry online for all personal care products given that counterfeiters do not strive to meet the same safety and quality requirements as legitimate manufacturers. Oftentimes, consumers cannot tell the difference between an authentic and counterfeit product when shopping online, as sellers will even utilize brand owners’ product images and trademarks in online offers. One of our members reports that every one of the more than thirty brands the company owns has been counterfeited – everything from nail polish and fragrance to shampoo and eye shadow palettes. The problem of online counterfeits is not exclusive to the platforms, as the personal care industry is increasingly seeing counterfeits offered on social media sites as well.

As highlighted in a 2020 Department of Homeland Security (DHS) Report, consumers in the United States, in particular, face an increasing risk of exposure from the sale of online counterfeits.⁵ In the second quarter of 2019, total year-over-year retail sales grew by only 3.2%, while e-commerce grew 13.3%.¹ Amidst this growth in e-commerce, there has been a corresponding growth in the number of dangerous counterfeits being imported year after year.¹ COVID-19 has only exacerbated and highlighted the severity of counterfeit availability on platforms due to the increase in online shopping. Counterfeit sales have proliferated during the pandemic; between March and April of 2020 alone, counterfeit sales increased by 38%.⁶ According to a study led by McKinsey & Company, more people have been making, and are expected to continue making, a portion of their purchases online post-COVID-19 than before.⁷

Beyond the health risks to the individual consumer using a counterfeit product, counterfeiting has repeatedly been tied to organized crime, encompassing terrorism, human trafficking, illegal weapons, and drug trafficking.⁸

Consumer Health Risks from Counterfeit Cosmetics

Since they are produced illegally and without adherence to federal or state safety and quality requirements, counterfeit products inherently pose health risks to consumers. Counterfeit cosmetics may be adulterated, tampered with, expired, and contain impurities or materials not of cosmetic grade, meaning consumers may be applying dangerous ingredients not approved for topical use directly to the skin, lips, eyes, and other sensitive areas, including products indicated for children’s use. In a January 2020 report to the President, the DHS noted that counterfeit cosmetics often contain elements such as arsenic, mercury, and aluminum and counterfeit personal care items have been found to be contaminated with substances from harmful bacteria to human waste.⁵

¹ OECD, EUIPO, *Illicit Trade – Trends in Trade and in Counterfeit and Pirated Goods* (2019); OECD, *The Economic Impact of Counterfeit and Piracy* (2008); EUROPOL and EUIPO, *2019 Intellectual Property Crime Threat Assessment Report* (2019).

⁵ U.S. Department of Homeland Security, *Combating Trafficking in Counterfeit and Pirated Goods, Report to the President of the United States* (January 24, 2020) https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf

⁶ International Chamber of Commerce, *Guide to Managing Counterfeiting and Piracy Risks in the COVID-19 Era*, July 2020. [Link.](https://www.iccned.org/~/media/Files/2020/07/20200720-Guide-to-Managing-Counterfeiting-and-Piracy-Risks-in-the-COVID-19-Era.pdf)

⁷ *Survey: US Consumer Sentiment During the Coronavirus Crisis*, McKinsey & Company (December 8, 2020), <https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/survey-us-consumer-sentiment-during-the-coronavirus-crisis>.

⁸ Union des Fabricants (UNIFAB), *Counterfeiting & Terrorism – Edition 2016* (2016), https://www.unifab.com/wp-content/uploads/2016/06/Rapport-A-Terrorisme-2015_GB_22.pdf.

The dangers to consumers from counterfeit products are not limited to the type of non-authentic goods that typically come to mind – illicit products created entirely by a counterfeiter in a clandestine factory. Personal care products sold without their original packaging can also pose risks to consumers. Counterfeit packaging may contain dangerous metals, paints, chemicals, plastics, or other substances and lack FDA-required ingredient disclosure information.

Industry Efforts to Mitigate Counterfeit Products on E-Commerce Platforms

At present, the burden of monitoring and enforcing against counterfeit goods on online platforms falls on the makers of the authentic products, rather than on the platforms themselves. Brand owners engage directly and regularly with the online platforms to address counterfeits. A single personal care product company may spend as much as \$15 million annually to combat counterfeits, including monitoring the platforms and social media sites; enforcing against counterfeits through resource- and time-consuming notice and takedown processes; test buys and lab testing of purchases; and working and sharing information with competitors and federal, state, and local law enforcement. Smaller companies, however, often lack the resources needed to combat online counterfeits in the same way.

Many companies employ robust brand protection teams to combat counterfeits, utilizing artificial intelligence and third-party monitoring services. Companies work closely with law enforcement – including CBP agents, Federal Bureau of Investigation (FBI), Department of Justice (DOJ), DHS, and local police officers – and some even put resources toward training the platforms and law enforcement to better detect counterfeits. Companies utilize multiple avenues to disrupt counterfeiters in the supply chain and anti-diversion efforts through multi-layered solutions built into product design – constantly innovating to try to stay ahead of counterfeiters.

The notice and takedown process is expensive and burdensome. One of our member companies, for example, employs 10 external firms to manage online platform notice and takedown processes; another brand owner has seen online platform notice and takedowns more than double over the last year – exemplifying the growing problem. Even if the platforms comply with the notice and takedown process, it is impossible to keep up with the number of counterfeit listings. Oftentimes, even when a listing or seller is removed, both could pop back up under new identities. When brand owners want to take action, the process is incredibly difficult – as many times these sellers are unknown entities.

The level of engagement of various online platforms related to counterfeits is increasing and we applaud several of these platforms for implementing programs to address illegal products and counterfeits. Platforms have the technology to identify and take down counterfeit listings. However, many platforms still do not have proactive measures in place, and those that purport to are often not transparent about their counterfeit prevention policies and processes, and there is a lack of standardization of counterfeit prevention policies and processes that all companies should follow. Brand owners, for example, have significant difficulty accessing verified information on sellers from the platforms. There is a need for a level playing field and not a long, burdensome process to hold these counterfeiters accountable.

In addition, our members also incur costs addressing reputational harm. Brand owners are inundated with complaints from consumers regarding counterfeit products purchased through online platforms, all of which brands must try to investigate and respond to in order to maintain and protect their reputation for quality goods and services and to help ensure the safety of their customers.

To date, despite aggressive efforts on the part of the personal care products industry to mitigate the harms of counterfeit goods, too often our members are stymied by a lack of cooperation from the platforms and difficulty in identifying sellers who can too easily hide and change their information – leading to a costly game of “whack-a-mole.” In the meantime, consumers continue to be put at risk from these potentially dangerous counterfeits.

Advancing Responsible Solutions: SHOP SAFE Act

PCPC supports the establishment of a framework to advance best practices for online platforms and sales to help ensure products sold on online platforms comply with U.S. laws and regulations. We applaud the introduction of the SHOP SAFE Act to establish provisions incentivizing e-commerce platforms to address the sale of counterfeits online and protect unsuspecting consumers from unsafe products being sold through these channels.

The SHOP SAFE Act includes many elements that PCPC members have stated would be helpful for combating online sales of counterfeit products, including:

- Broad scope of platform definition to capture counterfeits where they are offered online, including social media
- Practices to prevent occurrence of counterfeit goods before they are made available online, including:
 - Verification of seller information;
 - Displaying seller identity, location, and contact information (with exceptions for personal information); and
 - Screening for counterfeits before listing;
- Repeat infringer policies;
- Screening sellers to prevent terminated sellers from rejoining;
- Provide verified information on infringing sellers to brand owners, when requested;
- Prohibition of certain selling practices, such as the use of generic images rather than photographs of the actual item being sold; and
- Potential for liability for platforms that do not adopt the best practices.

We wanted to highlight a few considerations for the Committee:

- Consumer notification after a platform removes an illegal product that has been reported – consumers have a right to know they have purchased what could be a dangerous product;
- Clarity in the legislation to ensure the processes and steps outlined in the bill work in practice for the platforms and brand owners - to achieve what is intended – preventing and mitigating counterfeits getting in hands of consumers, and;
- Recognition that all counterfeits cause harm or have potential to be dangerous – efforts to distinguish between those that could cause health and safety risks and those that may not could be confusing for consumers and cause impediments to effective implementation.

In closing, we strongly support provisions in the SHOP SAFE Act that advance best practices for online platforms to help ensure that products sold on these platforms are authentic and safe. We look forward to continuing our engagement with this Committee and with other stakeholders, including online platforms, government regulators and law enforcement to advance solutions to combat counterfeit products online and establish strong consumer protections.

Thank you again for the opportunity to testify.