

The Newest Ingredients in Cosmetics: CBD and Probiotics

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Cannabidiol (CBD) appears to be everywhere lately — available as an additive in certain food and drink products, as an oil meant to be used as a dietary supplement and even in cosmetics. But despite the widespread popularity and excitement over CBD's purported ability to provide therapeutic benefits, there is still some uncertainty as to its legality, especially when it comes to its presence in cosmetics. And although CBD is derived from a cannabis plant, its molecular structure — and, as a result, how the body processes it — is separate and distinct from tetrahydrocannabinol (THC), the cannabis derivative that is commonly known for its psychoactive effects.

Under the Agriculture Improvement Act of 2018 (more commonly known as the “2018 Farm Bill”), all cosmetic products made from industrial hemp (including CBD) will be legal under the Controlled Substances Act (CSA). The ability to manufacture, market and sell CBD products is still slightly complicated given the patchwork of state laws that are still in effect. To further confuse the issue, following the passage of the 2018 Farm Bill, the FDA issued a press release acknowledging public interest in CBD, and promised commitments to clarify public health responsibilities and evaluate new products that may pose risks to consumers.

Much of the FDA's focus, however, has been on the inclusion of CBD in food and dietary supplements (which they've deemed illegal, pending further research and review of its safety) — they've been silent on cosmetics incorporating CBD. As of right now, as long as a cosmetic product doesn't make any false or misleading claims (i.e. no health benefit claims, including anxiety-related) and clearly states that any CBD in a product is hemp-derived, there seems to be a low risk of violating hemp regulations or attracting FDA scrutiny. That being said, it is clear that with growing public interest, CBD products will likely face growing scrutiny — and potential regulation — by the FDA.

Another increasingly popular trend in the cosmetics industry is adding probiotics to certain products. Probiotics — live microorganisms that are believed to provide health benefits when consumed — have been migrating from the food and dietary supplement industries into skincare, cosmetics and other products in the beauty business. When marketed in food, probiotics are promised to improve gut health and prevent digestive tract irritation, encourage the growth of “good” bacteria, and promote a healthy immune system. In skincare and cosmetics, manufacturers are promising that probiotic products will soothe inflammation, strengthen the skin's natural barrier and maintain a healthy bacterial balance.

Despite the range of positive outcomes promised by marketers of probiotics, there is little to no consensus within the scientific community on the veracity of those claims. The FDA does not currently regulate the use of probiotics in skincare and only recently issued draft guidance for the use of probiotics in dietary supplements. Issues that may arise through the use of probiotics in cosmetics are manifold. There is, however, some concern that if the probiotics alter the existing microbiome of the skin, the cosmetics that include probiotics could actually be considered a drug. If that were the case, these probiotic cosmetics would be subject to FDA scrutiny and regulation. Given the use of preservatives in cosmetics, the microorganisms used would be considered postbiotics, or the metabolic byproducts from probiotics (and thus dead, not live, microorganisms).

Key Takeaways

- The increasing popularity of using CBD and probiotics in cosmetics portends a likely increasing interest in the two additives and scrutiny by the FDA in the near future.
 - The mislabeling of products (promising probiotics, delivering postbiotics) could leave marketers open to claims of false or misleading advertising. Companies should continue to vet all cosmetic packaging, marketing and websites to ensure compliance with current FDA regulations and review claims with a conservative lens.
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Possessing, using, distributing, and/or selling marijuana or marijuana-based products is illegal under federal law, regardless of any state law that may legalize or decriminalize such activity under certain circumstances. Although federal enforcement policy may at times defer to states' laws and not enforce conflicting federal laws, interested businesses and individuals should be aware that compliance with state law in no way assures compliance with federal law, and there is a risk that conflicting federal laws may be enforced in the future. No legal advice we give is intended to provide any guidance or assistance in violating federal law.

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