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Government Tan Lines: Examining the Reach and Effectiveness of Federal and State Efforts to Protect Consumers from the Dangers of Indoor Tanning

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Government Tan Lines: Examining the Reach and Effectiveness of Federal and State Efforts to Protect Consumers from the Dangers of Indoor Tanning

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I. INTRODUCTION

Gone are the days when fair skin was considered a sign of beauty and wealth.¹ Instead, these days many seek the “healthy glow” of tan skin.² In order to obtain this bronzed look, color seekers go lie outside in the sun or commit to the increasingly popular alternative of lying in a tanning bed.³ Indoor tanning beds allow consumers to tan at their convenience in a matter of minutes rather than lying out for hours in the sun.⁴ In the United States alone, the indoor tanning industry generates over five billion dollars annually,⁵ and some thirty million people tan indoors each year.⁶ In recent years, tanning has become increasingly popular with teenagers, especially teen girls.⁷ Tanning’s rising popularity is largely attributable to the media message that tan skin is beautiful. With bronzed beauties gracing the covers of magazines and filling major roles in television shows and movies, that message is hard to miss.⁸

1. Prior to the twentieth century, fair skin was considered a symbol of status and something to be desired. See Tanning Skin Care, History of Sun Tanning, http://web.archive.org/web/20070810041205/www.tanningskincare.com/index.php?option=com_content&task=view&id=20&Itemid=87 (last visited Apr. 27, 2009) [hereinafter History of Sun Tanning]. The primary reason was that dark skin was often linked to the role of servants and laborers, while the wealthy often had paler skin tones. *Id.* Women sometimes took drastic measures to retain their fair skin and to make their skin look even paler. *Id.* Women generally used clothing and hats to avoid sunburns, and in the latter part of the nineteenth century parasols became popular “both as a means of sun protection and as a fashion accessory.” Michael R. Albert & Kristen G. Ostheimer, *The Evolution of Current Medical and Popular Attitudes Toward Ultraviolet Light Exposure: Part 1*, 47 J. AM. ACAD. DERMATOL. 930, 930 (2002) [hereinafter Albert & Ostheimer I]. Magazines informed women about preserving their complexions using specific products and homemade recipes, and even recommended these remedies for men. See *id.* at 930–31. However, toward the end of the nineteenth century, attitudes about skin color began to change. See *id.* at 931. Part of the reason was that women became “engaged in many activities that resulted in significant sun exposure.” *Id.* According to an article in 1900:

The summer girl of 1900 is ready to take a spin in an automobile; or to speed forth on her bicycle; or to hold her own with a racquet in her hand at the tennis nets . . . or to take her ocean bath, and with sturdy strokes to swim and disport herself like a mermaid in her abbreviated bathing costume; or to row and sail and yacht from early morn until late at night, letting the sun leave what impress upon her it can or may.

Id. (quoting G.P. Murray, *The Summer Girl's Complexion*, 33 HARPER'S BAZAR 444–45 (1900)). Additionally, many people began to view tanned skin as a sign of health. See *id.* Several sources credit Coco Chanel for starting the trend of tanning in the 1920s. See, e.g., History of Sun Tanning, *supra*. A leader in the fashion world, Chanel unintentionally developed a tan while on vacation and the trend of tanning was born. *Id.*

2. Skin tans as a result of exposure to ultraviolet (“UV”) radiation, which generally comes from the sun. See Mayo Clinic, *Sun Damage: The True Price of Tanning*, May 12, 2006, http://www.mafoundation.org/media/pdf/2006-05-12_True-Price-Tanning.pdf [hereinafter *Sun Damage*]. Contrary to the idea that a suntan is healthy, both sunburns and suntans are a sign of injury to the skin. See *id.* Sunburns are more than just painful redness, which eventually fades:

Depending on the severity of the burn, the dead, damaged skin may peel away to make

room for new skin cells. Though the symptoms of sunburn may fade after several days, the damage to your skin remains. Sun exposure that is intense enough to cause a burn can also damage the DNA of skin cells. This damage sometimes leads to skin cancer.

Id. Suntans are not any better:

A suntan is the result of injury to the epidermis, the top layer of your skin. A tan develops when UV light accelerates the production of melanin. Melanin is the dark pigment in the epidermis that gives your skin its normal color. The extra melanin—produced to protect the deeper layers of your skin—creates the darker color of a “tan.” A suntan is your body’s way of blocking out the ultraviolet rays to prevent further injury to the skin

Id. Even those who have naturally darker skin and are less likely to burn are still subject to the risks of overexposure to the sun:

[E]ven those with darker skin types can burn with repeated exposures to UV light. This intense exposure can produce negative effects in the skin, including dry, rough patches, wrinkling and other skin disorders. So even though people with darker skin can tan and tolerate longer periods of sun exposure without “burning,” the sun can still cause skin damage.

Id.

3. See History of Sun Tanning, *supra* note 1; see also *Indoor Tanning—Magnitude of the Health Issue*, 5 J. DRUGS DERMATOL. 193 (2006) [hereinafter *Magnitude of the Health Issue*] (“Reports indicate that between 1986 and 1996 there was a three-fold increase in the percentage of Americans using tanning beds.”). Indoor tanning beds use special lamps to “mimic two types of UV radiation, UVA and UVB, emitted by the sun.” Jennifer Saranow, *States Crack Down on Indoor Tanning—Amid Skin-Cancer Concerns, New Laws Restrict Access; Weighing the Health Risks*, WALL ST. J., Jan. 26, 2005, at D1. The most common type of indoor tanning consists of lying in “tanning beds,” which contain light bulbs that emit UV radiation. *Id.* Depending on the region of the country, the cost of each tanning session ranges from five to ten dollars. *Id.*

4. See History of Sun Tanning, *supra* note 1.

5. See Paul Vitello, *Skin Cancer Up Among Young; Tanning Salons Become Target*, N.Y. TIMES, Aug. 14, 2006, at B1. According to the Indoor Tanning Association (ITA), the indoor tanning industry “is adding about 1,000 new customers monthly and will grow to \$7.5 billion in annual revenue” during the next few years. Saranow, *supra* note 3.

6. *Id.* There are around twenty thousand indoor tanning salons and about the same number of additional locations—such as health clubs and spas—which have one or two tanning beds. Judie Bizzozero, *State of the Industry Report '07*, LOOKING FIT, Sept. 1, 2007, available at www.lookingfit.com/articles/operations/79h514453055074.html. Most indoor tanning salons in the United States are considered small businesses, and most of them offer “four to five levels of tanning and a sunless unit.” *Id.* The indoor tanning industry “provides jobs for approximately 160,000 employees annually.” *Id.* The Midwest and Southeast portions of the United States have the most indoor tanning salons per capita “with Ohio, North Carolina, Michigan, South Carolina, Illinois, Indiana and Florida leading the charge.” *Id.*

7. Of the projected thirty million people who tan indoors every year in the United States, an estimated 2.3 million are teenagers. *American Academy of Dermatology Association Commends President Bush for Signing Tanning Accountability and Notification (TAN) Act; New Law Designed to Warn Americans About Risks of Indoor Tanning Devices*, PR NEWSWIRE, Sept. 28, 2007 [hereinafter *AADA Commends President*]. Further, a study in the Archives of Pediatrics and Adolescent Medicine found that nearly one in three Caucasian teenage girls tan indoors. Saranow, *supra* note 3.

8. See, e.g., Hays Burchfield, *Skin Deep*, THE STAR, Mar. 31, 2007, available at http://www.shelbystar.com/news/tanning_19915_article.html/cancer_skin.html (“Try telling [young people that the risks of indoor tanning outweigh the benefits] . . . when they’re exposed to glowing,

On the reality show *Sunset Tan*, which “glamorized the tanning salon experience,” the popularity of tanning among celebrities was often the focus.⁹ One episode of the show featured a mother purchasing a tanning package for her elementary-school-aged daughter in order to prepare for school photos.¹⁰ The sales person convinced the girl to tan by assuring her “that she, too, could look like teen actress Lindsay Lohan.”¹¹

These images send the message that being tan is fabulous but fail to mention its consequences.¹² Many people know someone who tans “too much” and looks a little orange or someone who tanned through their teens and now has wrinkly, leathery skin. Those who tan often do not consider these side effects to be “consequences,” at least not serious enough to stop them from tanning.¹³ In fact, a few wrinkles may be considered a small price to pay for a tan, fabulous look. However, there are some much more serious consequences to tanning that the media rarely discusses.¹⁴

beautiful bronzed men and women on television, movie screens and magazine pages.”); David Scharfenberg, *Coming Between Teenagers and Their Tans*, N.Y. TIMES, Sept. 18, 2005, at WE4 (“The fashion statements are tan, tan, tan . . . [T]he cultural icons are tan, tan, tan.”). One recent trend has been the promotion of indoor tanning on reality television shows. See Solmaz P. Poorsattar & Robin L. Hornung, *Television Turning More Teens Toward Tanning?*, 58 J. AM. ACAD. DERMATOL. 171, 171 (2008).

9. Poorsattar & Hornung, *supra* note 8, at 171 (“Popular Hollywood celebrities were constantly mentioned and making appearances in the show’s Los Angeles tanning salon. In one episode, Britney Spears praises the practice of tanning while Paris Hilton is featured in another. These famous personalities and their bronzed appearance are revered by the tanning salon employees.”). The reality show *Sunset Tan* is “a deep, dark peek into L.A.’s most chichi tanning salon” which airs on the E! Network. See E! Online, *Sunset Tan*, <http://www.eonline.com/on/shows/sunsetting/index.jsp> (Mar. 6, 2009). The salon offers both tanning beds and sunless tanning options. The salon’s television debut was so successful that, according to the company’s co-founder, “the six-unit chain is expected to balloon to 50 units within a year and 400 to 500 in the next three to four years.” Rachel Brown, *Reality Show Success Spurs Sunset Tan Growth*, WOMEN’S WEAR DAILY, Jan. 4, 2008, at 8.

10. See Poorsattar & Hornung, *supra* note 8, at 171. The tanning package was “a \$1300 combination tanning bed plus spray-on tan package.” *Id.*

11. *Id.* The reality television show *The Real Housewives of Orange County* is just one more of many shows currently on television that send the message that tan equals beauty. See *The Real Housewives of Orange County* (Bravo television broadcast). The show follows the lives of several wealthy housewives in an exclusive gated community in Orange County, California who sport highlights, breast implants, and “healthy” tans. *Id.*; see also Bravotv.com, *The Real Housewives of Orange County Season 4*, <http://www.bravotv.com/the-real-housewives-of-orange-county> (last visited Apr. 27, 2009) (official website for the show).

12. For example, shows like *Sunset Tan* emphasize that tan skin is beautiful and glamorous but offer no disclaimer regarding potential risks of tanning. *Sunset Tan* (E! Network television broadcast); see also Poorsattar & Hornung, *supra* note 8, at 171. Even beyond shows centered on tanning like *Sunset Tan*, the prevalence of tan celebrities throughout media sends the message that tan skin is desirable. However, these celebrities do not wear a disclaimer about the possible risks. Indeed, a recent study “confirmed that the desire to look like girls and women in popular media is significantly associated with tanning bed use.” Poorsattar & Hornung, *supra* note 8, at 171.

13. See, e.g., Burchfield, *supra* note 8 (quoting a teen tanner who said, “I know it causes skin cancer and wrinkles. I’m young right now, though, and I don’t think anything of that.”).

14. Such consequences include possible “eye injury, premature wrinkling of the skin, . . . light-

On a recent episode of *The Real Housewives of Orange County*, self-proclaimed trophy wife Kimberly Bryant talked about the serious dark side of tanning.¹⁵ Kimberly—who admitted spending her teen years and early twenties in tanning beds—did not talk about the color of her skin or her wrinkles, but rather her battle with skin cancer.¹⁶ She was initially diagnosed with skin cancer nine years prior, and since then she has visited her dermatologist every eight weeks, has had over one hundred biopsies,¹⁷ and has had five melanomas¹⁸ removed.¹⁹ She now takes precautions when she goes out in the sun and no longer tans, but she acknowledges that the damage has already been done.²⁰

induced skin rashes, and [an increased chance] of developing skin cancer. See FED. TRADE COMM'N, FTC FACTS FOR CONSUMERS, INDOOR TANNING I (1997), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/health/health1.pdf> [hereinafter FTC FACTS]. In addition, indoor tanning can also cause “severe skin or corneal burns, cataract formation, . . . [and] exacerbation of photosensitive disorders.” *Magnitude of the Health Issue*, supra note 3, at 193. UV exposure can also lead to DNA and immune system damage. See Henry W. Lim et al., *Sunlight, Tanning Booths, and Vitamin D*, 52 J. AM. ACAD. DERMATOL. 868, 868 (2005).

15. See *The Real Housewives of Orange County: Episode 106* (Bravo television broadcast Apr. 25, 2006) [hereinafter *Real Housewives*].

16. *Id.*

17. A biopsy is a medical procedure where doctors remove a small piece of tissue to examine for disease. See MedlinePlus: Biopsy, <http://www.nlm.nih.gov/medlineplus/ency/article/003416.htm> (last visited Apr. 27, 2009). For potential skin cancer patients, doctors often use what is referred to as a “skin lesion biopsy,” which involves removing a piece of the patient’s skin in order to determine whether it is cancerous or not. See MedlinePlus: Skin Lesion Biopsy, <http://www.nlm.nih.gov/medlineplus/ency/article/003840.htm> (last visited Apr. 29, 2009). The specific method for removing the portion of skin to be tested varies depending on the location, size, and type of skin lesion, but most biopsies are outpatient procedures. See *id.* The examination “may reveal skin cancer, or a benign (noncancerous) condition.” *Id.*

18. Melanoma is the most serious form of skin cancer, and “melanomas” refer to spots on the skin that are cancerous. See MedlinePlus: Melanoma, <http://www.nlm.nih.gov/medlineplus/melanoma.html> (last visited Apr. 27, 2009). Melanomas often appear after a “change in the size, shape, color or feel of a mole,” or as a new mole. *Id.* In watching for the appearance of melanomas, the United States National Library of Medicine and the National Institutes of Health recommend looking for “‘ABCD’ . . . Asymmetry—the shape of one half does not match the other[.] Border—the edges are ragged, blurred or irregular[.] Color—the color [is] uneven and may include shades of black, brown and tan[.] Diameter—there is a change in size, usually an increase.” *Id.* If any of these symptoms are noticed, one should consult a physician. *Id.*

19. *Real Housewives*, supra note 15. When Kimberly was initially diagnosed with skin cancer, her doctor gave her five years to live. *Id.* So far she has outlived that prediction, but she fears she does not have many years left. *Id.* On this particular episode, Kimberly was in tears as she waited for news from her doctor about whether her most recent biopsy was cancerous or not. *Id.* She talked about her fears that she will not get to grow old with her husband or be there for her two children as they grow up. *Id.* Kimberly later found out that this time the biopsy revealed the spot was not cancerous. *Id.*

20. *Id.*

Kimberly Bryant is just one of many former-tanners who have begun to speak out about the serious dangers of indoor tanning.²¹ One possible reason for this is that while tan skin maintains prevalence in the media, incidents of skin cancer are on the rise.²² According to recent findings by the 110th Congress, over one million new cases of skin cancer are diagnosed each year, about ten thousand Americans die due to skin cancer each year, and Melanoma—the deadliest form of skin cancer—has tripled among Caucasians since 1980.²³ Additionally, it is believed that one in five Americans and one in three Caucasians will get skin cancer at some point in their lifetime.²⁴ While skin cancer is generally treatable if discovered in time,²⁵ it is the most common form of cancer in the United States,²⁶ and it is the most common cause of cancer-related death for women ages twenty-five to thirty.²⁷

Studies in recent years have come out not only linking indoor tanning to skin cancer, but indicating that indoor tanners have a significantly greater risk of developing the most serious forms of skin cancer.²⁸ Whether someone tans on a regular basis because she believes tan skin looks better, tans just for a special occasion like a wedding, or tans to get a “pre-vacation

21. Danielle Dahm, another skin cancer survivor, was diagnosed with the deadliest form of skin cancer—melanoma—shortly before she hit thirty. Heather Woodward, *Cancer Survivor Warns Against Tanning: Past Sun-Worshipper Says Having a Bronze Tone Isn't Worth Risking Your Health*, THE OLYMPIAN, July 26, 2007, at B8. Dahm blamed her frequent trips to tanning beds during her late teens and early twenties for the cancer. *Id.* She was addicted to the “healthy glow” and thought indoor tanning was safer than tanning outside in the sun. *Id.* Although she admitted she thought about the possibility of getting skin cancer, she assumed if she got it the doctors would “just cut it off.” *Id.* However, just cutting it off was not so easy: Dahm had surgery to remove the skin “from her leg down to the muscle and to have all of the lymph nodes removed from her groin.” *Id.* Additionally, she was on crutches for six weeks, used a cane for two months, and had to give herself injections three times per week for ten months which caused her to lose most of her hair and drop to eighty-six pounds. *Id.* Dahm is now cancer-free, and hopes to use her story to warn other tanners so they do not end up like her. *Id.* She was only given a sixty-one percent chance of living five years after the melanoma, and wants tanners to know that the bronze tone is not worth the risk. *See id.*

22. *See* Skin Cancer Prevention, Education, and Consumer Right-to-Know Act, H.R. 3084, 110th Cong. § 2(1)–(4) (2007) [hereinafter H.R. 3084]. The United States Congress has acknowledged “[s]kin cancer is a growing epidemic in the United States” and in 2007 alone considered several bills to try to address the issue. *See id.* (dealing with the need to amend sunscreen standards); Tanning Accountability and Notification Act of 2007, H.R. 945, 110th Cong. (2007) (dealing with the need for the FDA to review current warning label requirements on tanning devices).

23. H.R. 3084 § 2(1)–(3).

24. *Id.* § 2(4).

25. *See* MayoClinic.com, Skin Cancer, <http://mayoclinic.com/health/skin-cancer/DS00190> (last visited Apr. 27, 2009) (“And with early detection, you can receive successful treatment for most skin cancers, even the most aggressive forms.”).

26. Skin Cancer Foundation, Skin Cancer Facts, <http://www.skincancer.org/skin-cancer-facts.html> (last visited Apr. 27, 2009).

27. Christine Dell’Amore, *Tanning’s Burning Questions*, UPI, Apr. 17, 2006.

28. *See infra* notes 110–11 and accompanying text.

tan,”²⁹ there are serious health implications.³⁰ Although exposure to the sun has also been proven to cause skin cancer,³¹ regulators cannot stop the sun from shining.³² Instead, because indoor tanning is the most preventable known cause of skin cancer,³³ regulatory eyes have shifted to the indoor tanning industry to address the skin cancer problem.³⁴

This Comment will explore current federal and state regulation of the indoor tanning industry and its effectiveness in protecting consumers.³⁵ It will also explore the reasoning behind the most recent surge of indoor

29. The pre-vacation tan is a dangerous practice involving the use of tanning beds to gain a base tan prior to a sunny vacation. Jody A. Levine et al., *The Indoor UV Tanning Industry: A Review of Skin Cancer Risk, Health Benefit Claims, and Regulation*, 53 J. AM. ACAD. DERMATOL. 1038, 1039 (2005). Some believe that a pre-vacation tan will actually limit sun damage to their skin during a vacation. *See id.* However, this practice not only leads to more UV radiation prior to the vacation than the consumer would otherwise be exposed to but “also leads to decreased use of sun-protective precautions during vacation” because “people falsely believe that their tan will protect against the harmful rays of the sun.” *Id.*

30. According to dermatologists, “just one time in a tanning bed has the potential to cause harm.” Dell’Amore, *supra* note 27.

31. *See, e.g., Sun Damage, supra* note 2.

32. It would be nice if regulators could limit the emissions of UV radiation from the sun, but absent the ability to do that, the federal government also regulates sunscreen standards to address the health hazard of UV radiation from the sun. *See, e.g., Sunscreen Drug Products for Over-the-Counter Human Use*, 21 C.F.R. § 352 (2008). The regulation covers standards for formulating, testing, and labeling sunscreens. *See id.* In response to concerns that consumers believe sunscreen alone will protect them from the dangers, the FDA has proposed a new standard for sunscreens including requiring a warning statement which states “UV exposure from the sun increases the risk of skin cancer, premature skin aging, and other skin damage. It is important to decrease UV exposure by limiting time in the sun, wearing protective clothing, and using a sunscreen.” *See* FDA News, *FDA Proposes New Rule for Sunscreen Products*, Aug. 23, 2007, available at <http://www.fda.gov/bbs/topics/news/2007/new01687.html>. Sunscreen regulation is beyond the scope of this Comment, but it is another way regulators are addressing the need for UV radiation protection for consumers.

33. *See, e.g., Anthony Coley & Brendan Gilfillan, Governor Signs Legislation Limiting Teen Tanning Salon Use*, July 19, 2006, <http://www.state.nj.us/governor/news/news/2006/approved/20060719.html> (“[I]ndoor commercial tanning . . . is one of the most avoidable risk factors for skin cancer.”). UV exposure is “[t]he most modifiable risk factor for skin cancer.” Malody J. Eide & Martin A. Weinstock, *Public Health Challenges in Sun Protection*, 24 DERMATOL. CLIN. 119, 119 (2006). Limiting UV exposure from both the sun and other sources such as indoor tanning are key in reducing the risk of skin cancer. *See id.* However, while regulation to limit the amount of time people spend in the sun would be extremely difficult and likely unconstitutional, regulating the use of tanning beds is much easier. *See, e.g., Vitello, supra* note 5 (“Even the most conscientious health officials cannot keep the sun from rising; so in response to an unexplained increase in skin cancer among young people, some have fixed their sights on a more governable suspect: the \$5 billion-a-year indoor tanning industry.”).

34. Vitello, *supra* note 5.

35. *See infra* Part III.

tanning regulation—restricting use by minors.³⁶ Through this discussion it will become clear that more is needed in order to protect consumers, especially if regulators are aiming to reduce incidents of skin cancer. This Comment will pose the question of whether the “more” that is needed is additional regulation, or something beyond regulatory reach.

Part II will begin with an examination of the history of the indoor tanning industry and the beginnings of federal and state attempts to regulate the industry in the United States.³⁷ Part III will discuss the current regulation of the indoor tanning industry and the practical effects of this regulation, focusing on state level tanning restrictions for minors.³⁸ Part IV of this Comment will discuss predictions and recommendations for future regulation.³⁹ Part V will examine some non-regulatory alternatives which could ensure greater consumer protection,⁴⁰ and Part VI will conclude the Comment.⁴¹

II. HISTORY AND BACKGROUND OF INDOOR TANNING REGULATION

A. *History of Indoor Tanning*

The booming indoor tanning industry that exists today has its roots in two developments that began over one hundred years ago.⁴² The first, which emerged in the late 1800s, was the growing popularity of sun-tanning and the “perception that a suntan was a sign of good health.”⁴³ Women who had once taken extraordinary measures to avoid the sun began “go[ing] hatless, . . . wash[ing] [their] hands and face in salt water, and hold[ing] them in the sun, and [were] not content unless [they were] freckled . . . and burned an Indian red or a coffee brown.”⁴⁴ By the 1920s, “[t]he popularity of recreational sunbathing exploded,”⁴⁵ and suntanned skin became a fashion statement.⁴⁶

36. See *infra* Part III.B.2.

37. See *infra* notes 42–136.

38. See *infra* notes 137–256.

39. See *infra* notes 257–97.

40. See *infra* notes 298–350.

41. See *infra* notes 351–54.

42. See Albert & Ostheimer I, *supra* note 1, at 931–33 (discussing the developments in the late 1800s of the emergence of sun tanning and the introduction of phototherapy).

43. *Id.* at 932; see also *supra* note 1 (discussing the change in perception).

44. *Id.*

45. Michael R. Albert & Kristen G. Ostheimer, *The Evolution of Current Medical and Popular Attitudes Toward Ultraviolet Light Exposure: Part 2*, 48 J. AM. ACAD. DERMATOL. 909, 913 (2003) [hereinafter Albert & Ostheimer II].

46. See *supra* note 1 (discussing when tan skin became a fashion statement).

The second development was the introduction of “phototherapy” into modern medical practice.⁴⁷ In the late 1890s, a Danish physician successfully used ultraviolet (UV) radiation to treat a disease.⁴⁸ The practice quickly became “one of the major physical therapies of the early twentieth century.”⁴⁹ In the early 1920s, doctors and public health officials began recognizing exposure to UV radiation “as an important form of preventive medicine.”⁵⁰ As a result, there was strong public health advocacy for sunbathing and phototherapy.⁵¹ People who already suntanned because they believed it made them look healthier now had reason to believe sun tanning made them physically healthier as well.⁵²

Many companies took advantage of these new developments and began creating and marketing UV ray-emitting “sunlamps” for both personal and medical use.⁵³ The companies placed advertisements in many popular magazines, capitalizing on the notion that exposure to UV rays was a form of “preventive medicine.”⁵⁴ Such advertisements often emphasized the

47. See Albert & Ostheimer I, *supra* note 1, at 932 (“The view of sunlight as beneficial to health was further advanced in the late 1800s with the introduction of phototherapy into modern medicine.”).

48. *Id.* The physician, Niels Finsen, was credited as being “the father of modern phototherapy” after successfully treating a form of tuberculosis using phototherapy. *Id.* (citation omitted).

49. *Id.* Phototherapy was also successfully used in treating lupus vulgaris, “lupus erythematosus, alopecia areata, epithelioma, acne vulgaris, acne rosacea, tinea capitis, . . . vascular nevi” and “other common dermatologic conditions such as eczematous dermatitis and psoriasis.” *Id.*

50. Albert & Ostheimer II, *supra* note 45, at 911. One major reason was the discovery that UV light could treat Rickets—a disease that resulted from vitamin D deficiencies. *Id.* at 909. Many health benefits began being attributed to exposure to UV light including “[o]ne prevalent fallacy . . . that exposure to ultraviolet light increased resistance to infections including the ‘common cold.’” *Id.* at 910. Some other common claims included that exposure “‘improved metabolism’ . . . ‘tissue tone’ and ‘skin tone,’ acted as a general tonic, increased mental activity, improved the circulation, and cured anemia.” *Id.* (citation omitted).

51. See *id.* at 911–13.

52. See *id.*

53. *Id.* at 915. According to several accounts, the first of these sunlamps was invented by a Germany company by accident in the early 1900s. See Solar Retreat, Commercial Tanning Beds, <http://solar-retreat.com/commercial-tanning-beds.htm> (last visited Apr. 27, 2009); see also TanningBedsNow.com, History of the Tanning Bed, <http://www.tanningbedsnow.com/HistoryIndoorTanning.asp> (last visited Apr. 27, 2009). A German company called Heraeus was working on developing lamps for home and industrial use when they noticed the lamps produced a tanning effect like the sun. Solar Retreat, *supra*. The company was attempting to create lamps with visible light but detected “invisible, tanning, ultraviolet emissions” coming from the lamps as well. *Id.* “By the 1920s, Heraeus had invented the forerunner of today’s commercial tanning beds” which consisted of a “single lamp attached to a freestanding structure.” *Id.* The company marketed the product as a “tanning and wellness device.” *Id.*

54. See Albert & Ostheimer II, *supra* note 45, at 916. For example, one such advertisement stated:

tanning aspect of the sunlamps.⁵⁵ According to one advertisement, “[t]he lamp was . . . ‘50 times as effective in producing tanning of the skin . . . as midday midsummer sunlight of equal intensity.’”⁵⁶ Ultimately, sunlamps became popular in homes as a way to create artificial sunlight indoors.⁵⁷ Thus, those who were unable to sunbathe could still reap the supposed benefits of sun exposure.⁵⁸

While the benefits of the sun were widely celebrated, it was not long before some of the adverse effects of UV light exposure started to be revealed.⁵⁹ Toward the end of the 1920s, medical groups “began to respond with criticism to the extravagant claims being made for phototherapy and the aggressive marketing of UV lamps to the public.”⁶⁰ By the 1930s the United States Public Health Service was cautioning consumers that sunlamps should not be used without medical supervision,⁶¹ and UV radiation was widely believed to be a carcinogen.⁶² Nevertheless, exposure to UV light remained popular.⁶³

Around the 1970s, manufacturers in Europe began making devices that held multiple sunlamps and in many ways resembled the commercial

[L]ie back in comfort while the rays of health steal through your skin, enriching your blood, touching frayed nerves with a healing, soothing gentleness, reaching in to stir vital glands into normal, healthful activity, increasing your power of assimilation, killing harmful bacteria that may be on your skin or in your blood, increasing your resistance to disease, flooding your whole body with energy and well-being.

Id. (quoting *Hanovia Chemical and Manufacturing Advertisement*, 97 LITERARY DIGEST 51 (1928)).

55. *See id.*

56. *Id.* The same company also marketed a “milder” sunlamp “which at a distance of 24 inches, elicited a ‘mild sunburn’ in approximately 20 minutes.” *Id.*

57. *See id.* at 915–17. In the 1930s General Electric developed a “dual purpose” light bulb that could be used in homes for illumination and the “benefits” of UV rays. *See id.* at 916–17.

58. *See id.*

59. Albert & Ostheimer I, *supra* note 1, at 933 (“During the same time that ultraviolet light exposure was achieving greater popularity in both medical and nonmedical circles, the first reports appeared associating sunlight exposure with skin cancer.”). By 1858 it was “demonstrated that the ultraviolet wavelengths caused erythema of the skin,” and by 1900, several “uncommon dermatologic conditions related to sun exposure” were discovered. *Id.* Additionally, as early as 1894, a dermatologist suspected that long-term exposure to UV light was a cause of skin cancer. *See id.* In 1906, prominent American dermatologist James Nevins Hyde wrote an article about the effects of light in the production of skin cancer. *Id.* at 934. The next year, a French dermatologist “reported epidemiologic data suggesting that precancerous keratoses and skin cancer occurred more commonly in outdoor workers and on the sun-exposed parts of the body.” *Id.* For more information regarding the early studies of the causes of skin cancer and the connection to UV light, see *id.* at 933–36. Early studies such as these “received very little attention from the medical profession, especially outside of the field of dermatology. As a result, these reports did not translate into articles in the popular press or public health efforts.” *Id.* at 935.

60. Michael R. Albert & Kristen G. Ostheimer, *The Evolution of Current Medical and Popular Attitudes Toward UV Light Exposure: Part 3*, 49 J. AM. ACAD. DERMATOL. 1096, 1096 (2003).

61. *Id.* at 1096–97.

62. *Id.* at 1098.

63. *See id.*

tanning beds used today.⁶⁴ Then, in the late 1970s, a man named Fredrich Wolff was credited with introducing tanning beds to the United States.⁶⁵ While sunlamps were marketed for home use,⁶⁶ tanning beds were typically located in salons and day spas.⁶⁷ Instead of tanning out in the sun, or using a sunlamp at home, consumers could pay a fee to lie in a tanning bed and maintain their tans all year long—even in the winter months.⁶⁸ Tanning beds quickly gained popularity and the multi-billion dollar indoor tanning industry was born.⁶⁹

Indoor tanning was welcomed with open arms and virtually unregulated in the early years of its popularity.⁷⁰ Some medical associations had suggested safety precautions, but for many years there was not any official government regulation on the topic.⁷¹ Finally, in the late 1970s the United States Government began to take serious notice of the industry due to numerous reported sunlamp-related injuries.⁷² The Consumer Product Safety Commission reported thousands of sunlamp-related skin and eye injuries in 1974 and 1975.⁷³ Additionally, the Commission noted several

64. See Solar Retreat, *supra* note 53.

65. Wolff's commercial tanning beds—Wolff Systems—were considered state of the art. *Id.* Wolff's brother Jorg eventually bought Wolff's company, and is also considered a pioneer in the commercial tanning bed industry. *Id.* Today, the Wolff patent has expired so the technology is available to anyone who wants to use it. *Id.* However, salons continue to rely on Wolff name recognition when using Wolff commercial tanning beds because the Wolff reputation is "so highly respected." *Id.*

66. See *supra* notes 53–58 and accompanying text (discussing the home use of sunlamps).

67. See, e.g., History of Sun Tanning, *supra* note 1.

68. See *id.* Tanning beds generally take the form of a human-sized, clam-shaped bed full of sunlamps which provide for a much more even tan than tanning with a single lamp. See generally All Tanning Beds, Information on Indoor Tanning Beds, <http://www.all-tanning-beds.com/tanning-tips/information-on-indoor-tanning-beds.html> (last visited Apr. 27, 2009).

69. See *supra* notes 3–6 and accompanying text (discussing the growing popularity of indoor tanning from 1986 to the present).

70. Despite evidence of serious health risks related to exposure to UV light for nearly a century, see *supra* note 59, the United States Government did not begin to regulate sunlamps until the 1970s. See Sunlamp Products Performance Standard, 42 Fed. Reg. 65,189, 65,189 (proposed Dec. 30, 1977) (to be codified at 21 C.F.R. pt. 1040) [hereinafter Proposed Rule]; see also *infra* Part II.B.

71. See, e.g., Albert & Osteheimer II, *supra* note 45, at 916 ("The American Medical Association in the 1930s established recommendations for ultraviolet lamps . . . but such guidelines were not necessarily followed by manufacturers.")

72. See generally Proposed Rule, *supra* note 70.

73. According to the Consumer Product Safety Commission, there were 10,000 reported sunlamp-related injuries treated in the contiguous forty-eight states in 1974, and 12,000 in 1975. *Id.* at 65,189. These numbers underrepresented the injuries that sunlamps caused because the Commission did not include injuries that were not treated in hospitals, nor did they include long-term effects, which were not yet known. See, e.g., Sunlamp Products; Performance Standard, 44 Fed. Reg. 65,352, 65,352 (Nov. 9, 1979) (to be codified at 21 C.F.R. pt. 1040.20) [hereinafter Final

studies that revealed an even more serious concern: a possible link between sunlamps and skin cancer.⁷⁴ In at least one study noted by the Commission, “skin cancer was produced in laboratory animals by single or repeated exposure to UV wavelengths.”⁷⁵ Other studies implicated “solar UV radiation as a factor in causing human skin cancer.”⁷⁶ The numerous injuries and growing concern regarding the likely connection to skin cancer begged for some sort of governmental response in order to protect consumers.⁷⁷

B. Initial Government Response

In response to concerns about sunlamp-related injuries, the Food and Drug Administration (FDA)⁷⁸ began working on a proposal to regulate sunlamps as early as 1974.⁷⁹

Rule]. At the time, the FDA found that sunlamps were widely used in the United States. Proposed Rule, *supra* note 70, at 65,189. Eight hundred thousand to one million sunlamps were sold in the United States each year. *Id.* Possible injuries related to indoor tanning at the time included burns, eye injuries, premature aging of the skin, and skin cancer. *Id.*

74. See Proposed Rule, *supra* note 70, at 65,189 (“[The belief] that certain UV wavelengths in sunlamp radiation have the potential for producing skin cancer . . . is supported by studies . . .”).

75. *Id.*

76. *Id.*

77. See *id.* (“The Commissioner [of the FDA] has considered alternative means to address the hazards of sunlamp radiation . . . [but] the Commissioner believes that a mandatory product performance standard is needed.”).

78. The FDA is a federal government agency that is “responsible for ensuring that foods are safe, wholesome and sanitary; human and veterinary drugs, biological products, and medical devices are safe and effective; cosmetics are safe; and electronic products that emit radiation are safe.” U.S. Food and Drug Administration, What FDA Regulates, <http://www.fda.gov/comments/reg.html> (last visited Apr. 27, 2009). To ensure that “electronic products that emit radiation are safe,” the FDA has the authority to enact “radiation safety performance standards” for sunlamps and the products used in tanning beds. See *id.* While the FDA has primary regulatory authority for sunlamps and tanning beds, the FDA does not regulate the advertising claims of the indoor tanning industry. U.S. Food and Drug Administration, What FDA Does Not Regulate, <http://www.fda.gov/comments/noregs.html> (last visited Apr. 27, 2009). The Consumer Product Safety Commission typically regulates household goods including household appliances. *Id.* However, sunlamps are considered products that “emit radiation” and therefore are covered solely by the FDA. See *id.* The FDA’s authority to regulate dates back to the passage of the Federal Food and Drugs Act of 1906. John P. Swann, *History of the FDA*, available at <http://www.fda.gov/oc/history/historyoffda/default.htm> (adapted from A HISTORICAL GUIDE TO THE U.S. GOVERNMENT (George Kurian ed., 1998)).

79. In response to reports of injuries and risks related to sunlamps, the FDA Commissioner considered several means to address the dangers including “(1) us[ing] . . . the defect provisions of section 359 of the Public Health Service Act . . . [,] (2) develop[ing] . . . voluntary recommendations, and (3) . . . promulgat[ing] . . . a product performance standard.” Proposed Rule, *supra* note 70, at 65,189. However, the Commissioner acknowledged that the defect provisions did not address future production, and that voluntary recommendations lacked an enforcement mechanism to ensure consumer safety. *Id.* With that in mind, the Commissioner began working on a proposed standard to regulate sunlamps by allowing those who were interested to participate in developing the regulatory standard. *Id.* The FDA’s Bureau of Radiological Health presented basic ideas at a Technical Electronic Product Radiation Safety Standards meeting on September 18, 1974. *Id.* Drafts of the proposed standard were also reviewed by this group on two other occasions. *Id.* Then on June 19,

In 1977 the FDA released a proposed rule “to establish a radiation safety performance standard for sunlamp products due to a recognized need for a regulatory standard for such products to protect the public health and safety.”⁸⁰ The proposed regulation was based on the assumption that overexposure and unnecessary exposure were what led to sunlamp injuries.⁸¹ The proposed rule outlined the basics of the proposed regulatory standard,⁸² and included labels for the devices that warned about possible injuries such as skin cancer.⁸³ After releasing the rule, the FDA gave until February 28, 1978, for public comment.⁸⁴

As expected, manufacturers of sunlamps and owners of tanning parlors opposed the proposed regulation.⁸⁵ Their primary criticism focused on the costs of complying with the proposed standards.⁸⁶ The FDA acknowledged the increased costs that could be imposed on manufacturers and consumers as a result of the proposed regulation, but found that the benefit of increased safety outweighed the burden of any increased costs.⁸⁷ Another main area of criticism concerned the proposed warning label requirements.⁸⁸ Some critics expressed the belief that most sunlamps already contained adequate

1975, the FDA published a notice of intent to develop a performance standard in the Federal Register inviting public comments. *Id.*; see also Radiation Safety Performance Standards; Advance Notice of Proposed Rule Making, 40 Fed. Reg. 25,830 (June 19, 1975) (to be codified at 21 C.F.R. pt. 1040). The FDA also sent drafts of the proposed standard to various interested groups including manufacturers for review and comment. Proposed Rule, *supra* note 70, at 65,189.

80. Final Rule, *supra* note 73, at 65,352. The FDA hoped to reduce the possibility of injuries by “(1) [l]imiting shorter wavelength emissions that . . . pose unreasonable risk, (2) providing for more adequate label warnings and user instructions containing safety information, and (3) requiring special lamp bases, protective goggles, timers, and controls” to enable tanners to limit the risk of overexposure which was believed to be the main cause of sunlamp related injuries. *Id.*

81. See Proposed Rule, *supra* note 70, at 65,190.

82. *Id.* at 65,189–93.

83. *Id.* at 65,191 (“[T]he warning labels for sunlamp products must caution users about possible deleterious effects of UV radiation, including premature aging of the skin and skin cancer.”).

84. See *id.* at 65,193. Following the publishing of the proposed rule, comments came from “at least 214 different sources: 169 individuals, 26 physicians and medical facilities, 11 medical associations and their chapters, 9 manufacturers, 4 governmental agencies, [and] a manufacturer’s association.” Final Rule, *supra* note 73, at 65,352.

85. See Final Rule, *supra* note 73, at 65,352. Several comments complained that the proposed performance standard was “needless, ineffective, costly, and an unwarranted government intrusion.” *Id.* Also, some doctors were concerned about the regulation as well due to its possible application to sunlamps used for medical purposes. See *id.* at 65,355.

86. See *id.* at 65,352.

87. See *id.* Further, in response to concerns about costs, the FDA also introduced some changes in the final rule aimed at minimizing the costs of compliance. *Id.*

88. See *id.*

labeling,⁸⁹ and others maintained that the cancer studies were inconclusive.⁹⁰ They worried that mentioning the possibility of skin cancer on the warning labels would unduly scare consumers.⁹¹ The FDA, in spite of the aforementioned concerns, ultimately decided that the labeling requirements were fair and justified.⁹²

However, manufacturers and tanning salon owners were not the only members of the public concerned about the proposed rule.⁹³ In light of the proposed rule, the question arose whether the new standard would also apply to sunlamps which were used by doctors for various medical treatments.⁹⁴

89. *See id.* Some comments stated that “(1) [m]ost sunlamp products already come with adequate warnings, (2) the public is already aware of ultraviolet radiation hazards, and (3) only those who are careless are injured by sunlamp products.” *Id.* In response to these comments, the FDA pointed to “the large number of sunlamps-related skin and eye injuries treated annually” combined with the unknown number of injuries that have not been treated as evidence of a problem with sunlamps that must be addressed. *Id.* The FDA maintained that the agency was establishing the standard to protect consumers from harm and “when informed of the possible adverse effects to the body of exposure to ultraviolet radiation, and . . . when the product is provided with necessary safety performance features,” consumers could “take appropriate action” to avoid injury. *Id.*

90. *See id.* at 65,355–56.

91. *See id.* The comments also expressed concern that requiring warning labels to mention skin cancer would “place the responsibility for any skin cancer on a sunlamp product and not on the other causes that cannot be identified.” *Id.* The FDA responded that the wavelengths used by fluorescent sunlamps were within “the wavelength ranges that are known to be associated with the induction of skin cancer,” and rejected the comments. *Id.* Other comments claimed the proposed warnings were too harsh because no study proved sunlamps caused skin cancer in humans but agreed exposure to natural sunlight could cause skin cancer. *Id.* The FDA noted that sunlamps produce the same type of radiation as the sun—which is known to cause skin cancer—so the FDA again found that the reference to skin cancer was justified. *Id.* at 65,355–56. Some comments also alleged that it did not make sense for the FDA to insist on referencing cancer on sunlamps, “when it ha[d] not seen fit to impose any reference to cancer in labeling of cigarettes.” *Id.* at 65,356. The FDA quickly dismissed those concerns by stating “the health aspects of cigarettes and the appropriate warning labeling are not the subject of this particular agency action . . . [and therefore] do not justify a change in the regulation and are rejected.” *Id.*

92. *See id.* at 65,355–56.

93. *See id.* at 65,352.

94. One common treatment was the treatment of psoriasis. *See id.* at 65,353. Psoriasis “is a noncontagious, lifelong skin disease” which afflicts “as many as 7.5 million Americans.” National Psoriasis Foundation, About Psoriasis, <http://www.psoriasis.org/about/psoriasis/> (last visited Apr. 27, 2009). “The most common form . . . appears as raised, red patches or lesions covered with a silvery white buildup of dead skin cells, called scale.” *Id.* One common form of treatment to help control this condition is called “phototherapy” which involves exposing the affected skin to UV light. *See* National Psoriasis Foundation, Treatment: Psoriasis, <http://www.psoriasis.org/treatment/psoriasis/> (last visited Apr. 27, 2009). The skin is exposed “to an artificial UVB light source for a set length of time on a regular schedule, either under a doctor’s direction . . . or with a home unit purchased with a doctor’s prescription.” National Psoriasis Foundation, Psoriasis Treatment: Light Therapy, <http://www.psoriasis.org/treatment/psoriasis/phototherapy/> (last visited Apr. 27, 2009). When developing the proposed rule, the FDA noted this was a common use of sunlamps, and that the Agency did not intend for its new regulation of sunlamps to affect this medical use. *See* Proposed Rule, *supra* note 70, at 65,190.

Another common medical treatment involving sunlamps is the treatment of Seasonal Affective Disorder (SAD)—a form of depression. Mayoclinic.com, Depression: Seasonal Affective Disorder

As such, there was considerable debate over whether the new regulation should apply to prescription UV devices used for medical purposes and UV devices not intended for the human body.⁹⁵ The FDA noted that the standard was being “developed specifically for sunlamps used in skin tanning,” and although the standard “may not be appropriate for ultraviolet devices intended for [medical purposes]” the “various therapeutic uses for sunlamp products . . . [could not] be readily separated from the tanning function insofar as assurance of intended use and danger from overexposure [were] concerned.”⁹⁶ However, when addressing specific concerns that the proposed regulation may prohibit sunlamps used for medical treatment, the FDA noted that it was not the Agency’s intent for the standard to apply to “sunlamps used for medical treatment.”⁹⁷ Ultimately, the FDA adopted a definition of sunlamp that included “any [UV device] . . . intended for

(SAD): Treatment and Drugs, <http://www.mayoclinic.com/health/seasonal-affective-disorder/DS00195/DSECTION=treatments-and-drugs> (last visited Apr. 27, 2009) [hereinafter SAD Treatment]. SAD is believed to be a severe reaction to the shorter days and longer nights during the fall and winter months. Mayoclinic.com, Depression: Seasonal Affective Disorder (SAD), <http://www.mayoclinic.com/health/seasonal-affective-disorder/DS00195> (last visited Apr. 27, 2009). The disorder can “trigger feelings of depression, lethargy, fatigue, and other problems.” *Id.* Increased exposure to sunlight is believed to improve the symptoms of SAD, so a common treatment of the disorder is the use of light therapy. SAD Treatment, *supra*. This treatment involves sitting “a few feet from a specialized light therapy box,” which “mimics outdoor light and causes a biochemical change in your brain that lifts your mood, relieving symptoms of [SAD].” *Id.* Light therapy has not been approved by the FDA due to “a lack of definitive evidence about its effectiveness in clinical trials” but the treatment remains widely used in the treatment of SAD. *Id.* Light therapy offers an alternative to the side effects and costs of antidepressant medications or psychotherapy. Mayoclinic.com, Light Therapy, <http://www.mayoclinic.com/health/light-therapy/MY00195> (last visited Apr. 27, 2009). Today, although some light boxes used for light therapy still give off UV radiation, the Mayo Clinic recommended patients seek out light box devices “that [produce] as little UV light as possible at high intensity or that carefully [shield] the UV rays [they produce].” Mayoclinic.com, Seasonal Affective Disorder Treatment: Choosing a Light Therapy Box, <http://www.mayoclinic.com/health/seasonal-affective-disorder-treatment/DN00013> (last visited Apr. 27, 2009).

95. *See, e.g.*, Proposed Rule, *supra* note 70, at 65,190. In the proposed rule, the FDA originally planned to exclude “prescription ultraviolet devices” that were “not intended for use in skin tanning” from the definition of “sunlamp product.” *Id.* The Commissioner welcomed comments to help “determine whether the standard should continue to exclude prescription ultraviolet devices.” *Id.* The Commissioner further noted that UV lamps that were not intended for the human body may be addressed in future regulations, but were not the subject of this current regulation. *Id.* At least one forthcoming comment objected to the exclusion of prescription UV devices. *See* Final Rule, *supra* note 73, at 65,353. The same comment noted that the phrase “or otherwise affect the function of the body” in the definition of sunlamp product “change[d] the standard substantially from one only for sunlamps used for skin tanning.” *Id.*

96. *Id.*

97. *Id.* at 65,355.

irradiation of the human body . . . to induce skin tanning.”⁹⁸ Given that those who use sunlamps for medical purposes do not intend to “induce skin tanning,” it seems clear the FDA chose to avoid application to sunlamps used for medical purposes.⁹⁹

After making minor changes to the proposal,¹⁰⁰ the FDA published the first official regulation of the indoor tanning industry.¹⁰¹ The regulation controlled irradiance ratio limits,¹⁰² required sunlamps to have a timer with specific settings¹⁰³ and a manual off switch,¹⁰⁴ required protective eyewear to accompany sunlamps;¹⁰⁵ and mandated specific label requirements and instructions to be provided to users.¹⁰⁶ The FDA believed that sunlamps performed a desired function for consumers and therefore chose to impose safety regulations rather than remove sunlamps completely from the marketplace.¹⁰⁷ Still, the FDA acknowledged such regulations would “not prevent misuse or remove all the dangers.”¹⁰⁸ The FDA maintained it would

98. *Id.* at 65,357 (emphasis added). The statutory wording today remains virtually the same. See 21 C.F.R. § 1040.20(b)(9) (2008).

99. After all, the Proposed Rule noted that the new standard was not intended to apply to devices that met the requirements of 21 Code of Federal Regulations section 801.109, which regulates labeling of prescription medical devices. See Proposed Rule, *supra* note 70, at 65,190.

100. See Final Rule, *supra* note 73 (discussing responses to comments and minor changes made from the proposed rule).

101. See *id.*

102. See *id.* at 65,357. Irradiance ratios are limits placed on the radiation emissions of sunlamps in order to “allow for design variations in the level of useful ultraviolet radiation while restricting the unnecessary and potentially damaging radiation.” Proposed Rule, *supra* note 70, at 65,190.

103. Final Rule, *supra* note 73, at 65,357 (“Each sunlamp product shall incorporate a timer with multiple timer settings adequate for the recommended exposure time intervals for different exposure distances and expected results . . .”).

104. *Id.* (“Each sunlamp product shall incorporate a control on the product to enable the user manually to terminate radiation emission from the product at any time without disconnecting the electrical plug or removing the ultraviolet lamp.”).

105. *Id.* (“Each sunlamp product shall be accompanied by the number of sets of protective eyewear that is equal to the maximum [sic] number of persons . . . recommend[ed] to be exposed simultaneously . . .”). The regulation required each sunlamp to be equipped with sets of protective eyewear due to the risk of eye damage that could result from overexposure or multiple exposures over time. See Proposed Rule, *supra* note 70, at 65,191.

106. Final Rule, *supra* note 73, at 65,357–58. The Final rule mandated a warning label which included the specific words:

DANGER—Ultraviolet radiation. Follow instructions. As with natural sunlight, overexposure can cause eye injury and sunburn; repeated exposure may cause premature aging of the skin and skin cancer. Medications or cosmetics applied to the skin may increase your sensitivity to ultraviolet light. Consult physician before using lamp if taking any medication or if you believe yourself especially sensitive to sunlight.

Id. at 65,357. The Final Rule also required the label to contain the recommended “minimum use distance,” a warning to use protective eyewear, and “recommended maximum exposure time in minutes.” *Id.* The Final Rule also required manufacturers of sunlamps to provide specific safety instructions to purchasers of sunlamp products. See *id.* at 65,358.

107. *Id.* at 65,352.

108. Proposed Rule, *supra* note 70, at 65,189.

continue to consider further means of protection, including user education programs, use restrictions, and banning the use of sunlamps except for medical purposes.¹⁰⁹

C. *Developments After the Initial Regulation*

Since this regulation was formally codified, increasing studies have continued to find a causal link between indoor tanning and skin cancer.¹¹⁰ Of special concern are some recent studies which have revealed that young

109. *Id.*

110. The possibility that indoor tanning may cause skin cancer has been known for decades. *See supra* note 59 and accompanying text. However, more recent studies linking indoor tanning to skin cancer have been gaining attention in light of the increasing prevalence of skin cancer. *See, e.g.,* Scharfenberg, *supra* note 8 (“The shift toward more regulation is being driven by increasing evidence that tanning salon customers are at significantly greater risk for the three major types of skin cancer.”). Among these studies is a 2002 study published in the *Journal of the National Cancer Institute*, which indicated that tanning bed users are more likely to develop squamous cell carcinoma and basal cell carcinoma—two forms of skin cancer—than those who do not use tanning beds. Margaret R. Karagas et al., *Use of Tanning Devices and Risk of Basal Cell and Squamous Cell Skin Cancers*, 94 J. NAT’L CANCER INST. 224 (2002). The researchers in the study adjusted the results for the “history of sunburns, sunbathing, and sun exposure.” *Id.* However, this did not affect their findings, which suggested tanning bed users were 1.5 times more likely to develop basal cell carcinoma and 2.5 times more likely to develop squamous cell carcinoma. *Id.* Another study published in the same journal in 2003 suggested indoor tanners were 55% more likely to develop the most dangerous form of skin cancer—malignant melanoma. Scharfenberg, *supra* note 8 (referring to Marit Bragelien Veierød et al., *A Prospective Study of Pigmentation, Sun Exposure, and Risk of Cutaneous Malignant Melanoma in Women*, 95 J. NAT’L CANCER INST. 1530, 1537 (2006)). Additionally, both the 2002 and 2003 studies found that individuals who began using tanning beds at a young age were more at risk to develop skin cancer than those who started tanning later. *Id.* In 2006, the Working Group on Artificial UV Light and Skin Cancer of the International Agency for Research “reviewed all studies done up until March 2006, to investigate the relationship between tanning bed use and skin cancer” and published their conclusions in an issue of the *International Journal of Cancer*. Burchfield, *supra* note 8. The review concluded that those who had used tanning beds were 15% more likely to develop melanoma, and those who were exposed to tanning beds before age thirty-five had a 75% higher risk of developing melanoma. *Id.* Studies have revealed a link between both UVA and UVB and skin damage including wrinkling and cancer. *See* Saranow, *supra* note 3. Additionally, the Department of Health and Human Services has placed UV radiation on its list of known carcinogens. *Id.*

Recent studies have also revealed that indoor tanning may be addictive. Dell’Amore, *supra* note 27. In a recent blind trial, a professor of dermatology discovered that when given the choice women preferred tanning beds that emitted UV radiation over beds without it. *Id.* The professor believes that the release of endorphins—“the body’s natural narcotic”—could be one explanation. *Id.*; *see also* Jennifer Hunter-Yates et al., *Case Letter: Tanning in Body Dysmorphic Disorder*, 56 J. AM. ACAD. DERMATOL. S107 (2007) (discussing the possibility that some tanners may have a psychiatric disorder characterized by distorted body image which leads them to tan); Sarah Zeller et al., *Do Adolescent Indoor Tanners Exhibit Dependency?*, 54 J. AM. ACAD. DERMATOL. 589 (2006) (discussing the possibility that tanning is addictive for minors).

people are the most at risk of developing skin cancer from indoor tanning.¹¹¹ As a result of mounting evidence, several health organizations, including the American Academy of Dermatology,¹¹² the World Health Organization,¹¹³ and the American Medical Association,¹¹⁴ have come out with anti-tanning

111. See *supra* note 110.

112. The American Academy of Dermatology (AAD) “is the largest, most influential and most representative of all dermatologic associations. With a membership of over 16,000, it represents virtually all practicing dermatologists in the United States.” American Academy of Dermatology, Welcome, <http://www.aad.org/> (last visited Apr. 27, 2009). The American Academy of Dermatology Association (AADA) supports banning the sale or production of indoor tanning equipment except for medical use due to the “hazards of indoor tanning” and the “rising incidence of melanoma and non-melanoma skin cancer.” See American Academy of Dermatology, Position Statement on Indoor Tanning, <http://www.aad.org/forms/policies/Uploads/PS/PS-Indoor%20Tanning%206-15-07.pdf> (last visited Apr. 27, 2009). The AADA encourages the FDA to take action to ban tanning equipment, as well as encouraging state and local regulation, “appropriate funding” for enforcement purposes, and “education of the public . . . by schools, government, industry, and medical professionals.” *Id.* The AADA position statement was approved by the board of directors in October 1998, and amended on February 7, 2004. *Id.* AAD and AADA are often used interchangeably, but the AADA is a division of AAD which works on advocacy and legislative issues. See American Academy of Dermatology Association, Government & Advocacy, <http://www.aad.org/gov/index.html> (last visited Apr. 27, 2009).

113. The World Health Organization (WHO) “is the directing and coordinating authority for health within the United Nations system.” World Health Organization, About WHO, <http://www.who.int/about/en/> (last visited Apr. 27, 2009). WHO “is responsible for providing leadership on global health matters.” *Id.* Due to the recognized health risks of exposure to UV radiation from tanning beds, WHO recognizes a need for regulation in order to reduce the risks of indoor tanning. See WORLD HEALTH ORGANIZATION, ARTIFICIAL TANNING SUNBEDS: RISKS AND GUIDANCE 4–7 (2003), available at <http://www.who.int/uv/publications/en/sunbeds.pdf>. In response to this need, WHO published a guide intended to assist government health officials around the world in developing public health policies related to indoor tanning devices. *Id.* In March 2005, WHO released a recommendation that children under the age of eighteen should not be allowed to use tanning beds. Gregory Hartl, World Health Organization, *The World Health Organization Recommends that No Person Under 18 Should Use a Sunbed*, Mar. 17, 2005, <http://www.who.int/mediacentre/news/notes/2005/np07/en/index.html>. Some of the reasons that WHO lists for this special level of protection for children include:

A child’s skin is thinner and more sensitive and even a short time outdoors in the midday sun can result in serious burns. Epidemiological studies demonstrate that frequent sun exposure and sunburn in childhood set the stage for high rates of melanoma later in life. Children have more time to develop diseases with long latency, more years of life to be lost and more suffering to be endured as a result of impaired health. Increased life expectancy further adds to people’s risk of developing skin cancers and cataracts.

World Health Organization, *Protecting Children from Ultraviolet Radiation*, July 2001, <http://www.who.int/mediacentre/factsheets/fs261/en/>.

114. The American Medical Association (AMA) is the nation’s largest physician’s group, which advocates on the issues vital to the nation’s health. American Medical Association, About AMA, <http://www.ama-assn.org/ama/pub/about-ama/our-mission.shtml> (last visited Apr. 27, 2009). The AMA policy regarding tanning parlors is to:

- (1) continue to support an educational campaign on the hazards of tanning parlors, as well as the development of local tanning parlor ordinances to protect our patients and the general public from improper and dangerous exposure to ultraviolet radiation; and
- (2) support legislation to strengthen state laws to make the consumer as informed and safe as possible.

H-440.959 Tanning Parlors, AMERICAN MEDICAL ASSOCIATION, HEALTH AND ETHICS POLICIES OF

policies.¹¹⁵ These groups strongly advocate for government regulation to protect consumers¹¹⁶ and have taken the position that tanning should be banned for those under eighteen years of age.¹¹⁷

Despite this, efforts to get tougher regulations of the indoor tanning industry at the federal level have so far been unsuccessful.¹¹⁸ Consequently,

THE AMA HOUSE OF DELEGATES, <http://www.ama-assn.org/ad-com/polfind/Hlth-Ethics.pdf> (last visited Apr. 27, 2009) [hereinafter AMA HEALTH AND ETHICS POLICIES]. Further, the AMA:

(1) supports the dissemination of information to physicians and the public about the dangers of UV light from sun exposure and the possible harmful effects of the UV light used in commercial tanning centers; and (2) urges medical societies to work with all schools to include information in their health curricula on the hazards of exposure to tanning rays.

H-440.980 Education on the Harmful Effects of UVA and UVB Light, AMA HEALTH AND ETHICS POLICIES, *supra*. At the AMA's annual meeting in June 2005, the AMA passed a new policy that supports federal legislation to ban indoor tanning for anyone under the age of eighteen. *American Medical Association; Doctors Voice Support for Legislation on Indoor Tanning Equipment*, LAW & HEALTH WEEKLY, Aug. 13, 2005, at 33 [hereinafter *Doctors Voice Support*]. According to the policy, the AMA will:

(1) support the enactment of federal legislation to: (a) prohibit access to the use of indoor tanning equipment (as defined in 21 [C.F.R.] § 1040.20 [a][9]) by anyone under the age of 18; and (b) require a United States Surgeon General warning be prominently posted, detailing the positive correlation between ultraviolet radiation, the use of indoor tanning equipment, and the incidence of skin cancer; and (2) urge the Food and Drug Administration's Center For Devices and Radiological Health to hold a fair hearing as soon as possible on the safety and efficacy of UVA bulbs, as used in indoor tanning facilities.

D-440.969 Protect Children from Skin Cancer, AMERICAN MEDICAL ASSOCIATION, DIRECTIVES OF THE AMA HOUSE OF DELEGATES, <http://www.ama-assn.org/ad-com/polfind/Directives.pdf>. According to AMA Trustee Ronald M. Davis, M.D., "UV radiation is an acknowledged source of skin cancer . . . and can have a damaging effect on one's eyes and . . . immune system. . . . Children and teens are still . . . undergoing rapid development, so it's particularly critical that we take the necessary steps to ensure their long-term health and well-being." *Doctors Voice Support, supra*.

115. Vitello, *supra* note 5. The position taken by health organizations is particularly interesting given that fear of sunlamps being banned completely caused some doctors to oppose the FDA's initial regulation of sunlamps. See *supra* note 97 and accompanying text. However, since that time more of the long-term effects of indoor tanning have begun appearing, and many health professionals are convinced that repeated exposure to indoor tanning, much like the sun, causes skin cancer and is especially risky for minors. See *supra* notes 112–14.

116. See *supra* notes 112–14.

117. See *supra* notes 112–14.

118. The last time the FDA amended 21 C.F.R. 1040.20 was in 1986. See Sunlamp Products; Performance Standard, 50 Fed. Reg. 36,548 (Sept. 6, 1985) (to be codified at 21 C.F.R. pt. 1040). These amendments were intended to "accommodate new products employing design concepts significantly different from those for which the current standard was developed. . . . [And] to establish a standard that is appropriate for the present technology of sun tanning and new sunlamp product designs." *Id.* This is not to say that changes have not been considered. In 1999, the FDA sought public comments "on possible changes to the Sunlamp Performance Standard," and in 2003 several amendments were proposed. See Lim et al., *supra* note 14, at 871. However, these

health groups have shifted their focus to the state and local levels.¹¹⁹ As a result, many states have begun passing regulations of the indoor tanning industry.¹²⁰ The reasons why states choose to regulate vary,¹²¹ yet regulation has become a “common trend across the country.”¹²²

In response to this increase in state and local regulation, the Indoor Tanning Association (ITA)¹²³ has retained the services of a Washington lobbying firm since 2001 to aggressively lobby and attempt to defeat any further regulation.¹²⁴ The indoor tanning industry resists regulation based on

proposals did not aim to make any significant changes. *See id.* In the early 1990s there was an effort to get the federal government to ban indoor tanning except for medical uses. *See* Saranow, *supra* note 3. For example, the AMA proposed a ban of cosmetic indoor tanning in 1994 due to “compelling evidence of long-term risks from indoor tanning.” Levine et al., *supra* note 29, at 1042. However, due to intense lobbying by the indoor tanning industry, this effort failed. *See* Saranow, *supra* note 3.

119. *See* Saranow, *supra* note 3.

120. *See infra* Part III.B.

121. For instance, as the basis for its regulation, the California legislature stated “the risks associated with sun-tanning are greater when tanning with artificial ultraviolet light” and “[t]he creation of state law to protect and promote the public health, safety, and welfare is needed concerning tanning with artificial ultraviolet light.” CAL. BUS. & PROF. CODE § 22701 (a), (e) (Deering 2007); *cf.* COLO. REV. STAT. ANN. § 25-5-1002 (1)–(3) (West 2008) (“The general assembly . . . declares . . . injuries may result from improperly supervised use of artificial tanning devices [. . .] . . . users may be unaware of and lack access to information . . . [and] establishments which provide users with access to artificial tanning devices may fail to establish basic sanitary precautions . . .”); N.J. STAT. ANN. § 26:2D-81 (West 2007) (“[V]arious physical complications can arise from frequent and unsupervised use of these tanning facilities . . . [and] it is imperative that effective minimum safety standards in this health area be established.”).

122. *See* Bizzozero, *supra* note 6. While most of the new regulation and newly introduced “anti-tanning legislation” has been taking place at the state level, recently many local municipalities have begun introducing “anti-tanning legislation” as well. *Id.* The State of the Industry Report for the indoor tanning industry called this development “extremely troublesome since what was once a state issue also has become a local and county issue.” *Id.* Indeed, this development should be “troubling” to the industry. The addition of local regulations to the mix of surging state regulations stretches the resources of the indoor tanning lobby and will make it more difficult for it to continue to fight these regulations. The effect of the surge of indoor tanning regulations may already be seen: salons reported that in 2007 “antitanning campaigns affected their season by 16 percent.” *Id.* Although regulating is a common trend, many states have specifically exempted medical use from their indoor tanning regulation. *See, e.g.,* CAL. BUS. & PROF. CODE § 22703 (“This chapter does not apply to a phototherapy device used by or under the direct supervision of a licensed physician who is trained in the use of phototherapy devices.”); TENN. CODE ANN. § 68-117-103 (2006) (“[T]his chapter do[es] not apply to a licensed health care professional who uses a tanning device for the treatment of patients, if the use is within the lawful scope of practice of the health care professional.”).

123. The ITA is a national organization which represents thousands of tanning salon owners and equipment distributors. *See* Indoor Tanning Association, <http://www.theita.com/> (last visited Apr. 27, 2009).

124. *See* Vitello, *supra* note 5. The D.C. lobbying firm Akin, Gump, Strauss, Hauer & Feld has represented the ITA since 2001. *Id.* Industry representatives “[claim] that 30 million people safely use tanning facilities each year in the United States” and “have argued their case . . . in state capitols across the country.” *Id.* For purposes of this Comment, the indoor tanning industry and the ITA will be referred to interchangeably based on the assumption that the ITA is representative of the indoor tanning industry as a whole. However, while there is generally a movement against regulation, not all indoor tanning salon owners necessarily oppose all regulation. *See, e.g.,* Scharfenberg, *supra*

claims that there are many positive benefits of indoor tanning,¹²⁵ moderation can limit injuries,¹²⁶ and there is no conclusive proof linking indoor tanning

note 8 (noting that one salon owner “opposed an outright ban on teenagers using tanning salons” but thinks moderate regulation may “be good for an industry that suffers from the bad-apple syndrome.”); *see also* Yolanda Henderson, *Tanning Salons Welcome Regulations*, THE LEAF-CHRONICLE, Feb. 8, 2002, at 7B (“Local tanning operators surveyed . . . shared the opinion that proposed state legislation to require them to shoulder more responsibility for consumers’ health makes good business sense.”).

125. *See, e.g.*, TanningTruth.com, Our Position Statement, http://www.tanningtruth.com/index.php/our_position_statement/ (last visited Apr. 27, 2009) [hereinafter Tanning Truth Position Statement] (“Public debate on this issue has completely lost the perspective that there are known physiological and psychological benefits associated with sunlight . . .”). One of the main alleged benefits of indoor tanning is the production of vitamin D. *See, e.g.*, TanningTruth.com, *Vitamin D: One Big Reason We Need Sun Exposure*, Jan. 18, 2008, http://www.tanningtruth.com/index.php/vitamin_d_sunshine_vitamin/. UV exposure—through the sun or tanning beds—is believed to be a major source of vitamin D. *See* Vitamin D Council, *Understanding Vitamin D Cholecalciferol*, <http://www.vitamindecouncil.com/> (last visited Apr. 27, 2009). Doctors believe vitamin D has many benefits for the body including improved bone health, muscle strength, and fracture prevention. Lim et al., *supra* note 14, at 870. Further, according to the Vitamin D Council, vitamin D deficiency plays a role in causing “17 varieties of cancer as well as heart disease, stroke, hypertension, autoimmune diseases, diabetes, depression, chronic pain, osteoarthritis, osteoporosis, muscle weakness, muscle wasting, birth defects, [and] periodontal disease.” Vitamin D Council, *supra*. However, dermatologists argue there is no need to lie in a tanning bed in order to get a sufficient intake of vitamin D. *See* Lim et al., *supra* note 14, at 870. Instead, the necessary amount can generally be obtained through regular sun exposure during one’s daily activities, or by taking a supplement. *See id.* The indoor tanning industry often alleges there are many other “benefits” to indoor tanning in addition to vitamin D but often do not specify those benefits. *See, e.g.*, Tanning Truth Position Statement, *supra*. Generally, these “other benefits” consist of the argument that people “feel better” and “look better” when they tan. *See, e.g.*, Tanning Info Center, *The Benefits of Tanning Beds*, <http://www.tanninginfocenter.com/benefits-of-tanning-beds.html> (last visited Apr. 27, 2009) [hereinafter *Benefits of Tanning*] (“Most people will tell you that when they have tan skin, they feel better, look healthier, and have a thinner, fit appearance.”). However, the “look” can be achieved with much safer sunless tanning methods. *See, e.g.*, Saranow, *supra* note 3 (discussing the pros and cons of various sunless tanning methods).

126. The indoor tanning industry continues to allege that avoidance of sunburns and “control” of their environment through timed sessions in a tanning bed will allow patrons to avoid the harmful risks while still acquiring a “beautiful, golden tan.” *Benefits of Tanning, supra* note 125; *see also* Tanning Truth Position Statement, *supra* note 125 (“Moderate tanning . . . is the smartest way to maximize the potential benefits of sun exposure while minimizing the potential risks associated with either too much or too little sunlight. Sunburn prevention—not sun avoidance—is the best and most natural approach for everyone.”).

From the beginning of the FDA’s regulation, opponents have tried to claim that moderation could limit the risk of injury and skin cancer. *See* Final Rule, *supra* note 73, at 65,356 (“One manufacturer suggested that . . . the concept of repeated overexposure should be added [to the warning label] because there [was] no link to the harmful effects from just ‘exposure’ to sunlamp radiation.”). However, from the beginning, the FDA has also rejected that argument because “[t]he overexposure to ultraviolet radiation in a single incident leads to acute effects such as skin burn and eye irritation. . . . Repeated exposure . . . may lead to premature skin aging and cancer.” *Id.* Thus, from at least the 1970s it has been believed that repeated exposure over time—even without burning due to overexposure—could lead to serious harmful effects. *See id.* Additionally, the FTC has

to skin cancer.¹²⁷ In response, supporters of regulations argue there are safer alternatives to any benefits,¹²⁸ even with moderation injuries can still occur,¹²⁹ and there is no doubt that indoor tanning increases the risk of skin cancer.¹³⁰

Competing viewpoints have led to heated debates both in the public square and legislative halls across the country regarding the necessity of regulating the indoor tanning industry.¹³¹ On the one hand, the indoor tanning industry provides a service that is desired by consumers.¹³² That said, the incidence of injury resulting from indoor tanning triggers the need of the government to protect the public from the inherent risks of indoor tanning.¹³³ These competing concerns have been acknowledged since the FDA first initiated regulation in the 1970s¹³⁴ and continue to exist today as states grapple with the issue of whether to regulate the industry at the state

rejected the moderation argument. *See infra* note 180.

127. *See, e.g., Vitello, supra* note 5. The industry has argued this since the beginning of regulation. *See supra* notes 90–91 and accompanying text. There is at least some contradictory evidence to suggest that indoor tanning causes skin cancer. *See Vitello, supra* note 5. For example, one study by the FDA found “the evidence that ultraviolet light causes skin cancer was inconclusive.” *Id.*; *see also Media Advisory: Government Findings of Ultraviolet Light and Tanning Beds Disputed by Experts*, INTERNET WIRE, Dec. 19, 2002. However, this study took place prior to 2003. *Id.* Several studies since then—including one by the FDA—have revealed just the opposite. *See supra* note 110. Additionally, “some cancer researchers have suggested that greater vigilance in cancer screening may be part of the reason” for the rising number of reported incidents of skin cancer. Vitello, *supra* note 5. ITA executive director John Overstreet argues, “[t]here may be an increase in skin cancer . . . but there are many complex factors that could be involved, including climate change and the ozone. The fact is, medical science has no idea why there is an increase in skin cancer. No idea.” *Id.* However, many health professionals remain adamant that indoor tanning causes skin cancer. *See, e.g., id.* (“[W]e know [indoor tanning] will cause cancer. Not maybe. Not might. It’s going to cause cancer.”). Additionally, the federal government has listed UV radiation as a known cause of skin cancer since 2002. *See Sid Kirchheimer, UV Radiation Listed as Known Carcinogen: Tanning Industry Disputes Government Decree That Sun, Artificial Lights, Cause Skin Cancer*, WEBMD HEALTH NEWS, Dec. 30, 2002, <http://www.webmd.com/cancer/news/20021230/uv-radiation-listed-as-known-carcinogen>. There have also been many studies since 2002 that repeatedly link indoor tanning to skin cancer. *See supra* note 110.

128. *See supra* note 125 (discussing some alternatives to the alleged benefits of indoor tanning).

129. *See supra* note 126 (discussing why the moderation argument does not work).

130. *See supra* note 127 (discussing proof that indoor tanning leads to skin cancer).

131. *See generally* Dell’Amore, *supra* note 27; Sarah Netter, *Opposing Voices Raised at Hearing on Tanning Beds*, THE JOURNAL NEWS, Apr. 26, 2006, at 3A; Saranow, *supra* note 3; Scharfenberg, *supra* note 8; Vitello, *supra* note 5.

132. *See* Final Rule, *supra* note 73, at 65,352 (“[S]unlamps perform a function desired by the consumer . . .”).

133. *See* Proposed Rule, *supra* note 70, at 65,189 (“These studies, which indicate the potential for serious [injury] . . . together with the actual reports of acute skin and eye injuries, justify measures to improve the safety of sunlamp products.”); *see also* Final Rule, *supra* note 73, at 65,352 (“The standard for sunlamp products is being established to protect the consumer However, the agency believes sunlamps perform a function desired by the consumer and, consequently, has not penalized the prudent individual by removing this potentially hazardous product from the marketplace.”).

134. *Id.*

level.¹³⁵ While the indoor tanning industry's aggressive lobbying has been successful thus far in limiting any further regulation at the federal level, it has failed to stop the wave of new regulation at the state and local levels.¹³⁶

III. CURRENT STATE OF INDOOR TANNING REGULATION

A. Federal Regulation: The Shared Responsibilities of the FDA and the FTC

Regulation of the indoor tanning industry has expanded well beyond the initial regulations promulgated by the FDA nearly three decades ago.¹³⁷ While most of the current regulation is at the state level,¹³⁸ the federal government still plays an important role in regulating the industry. Today, the FDA and the FTC share responsibilities for regulation.¹³⁹ The FDA continues to regulate the devices,¹⁴⁰ while the FTC regulates the content of advertising claims made by the indoor tanning industry.¹⁴¹

1. The FDA: Regulating Tanning Devices

The FDA regulates “[s]unlamp products and ultraviolet lamps intended for use in sunlamp products.”¹⁴² Such regulations include requirements for irradiance ratio limits, timer systems, controls for termination, protective eyewear, and labeling.¹⁴³ The primary regulation regards placement and content of warning labels.¹⁴⁴ Current labels must contain specified warnings and be “permanently affixed” on the product in a way that is “legible and readily accessible” by a consumer about to use the product.¹⁴⁵ The warning

135. See, e.g., Saranow, *supra* note 3.

136. See *infra* Part III.B (discussing current state level regulations). States may have more success regulating the indoor tanning industry because it is traditionally the role of the states to protect the health, safety, and welfare of each state's citizens. See, e.g., *Police Power*, THE COLUMBIA ENCYCLOPEDIA (6th ed. 2000) (discussing the history of police powers reserved for the states).

137. See *supra* Part II.B.

138. See *infra* Part III.B.

139. FTC FACTS, *supra* note 14, at 3.

140. See *infra* Part III.A.1.

141. See *infra* Part III.A.2.

142. See 21 C.F.R. § 1040.20 (2008).

143. See *id.* These regulations are substantially similar to those released in the Final Rule. See *supra* notes 102–06 and accompanying text (discussing each of these specific regulations).

144. See FTC FACTS, *supra* note 14, at 3.

145. § 1040.20(d)(3). Each sunlamp product is required to have a label containing a warning

label serves to inform consumers of the dangers of indoor tanning before they subject themselves to the risks.¹⁴⁶ If a label does not comply with the FDA's requirements, the FDA may take corrective action.¹⁴⁷ In extreme circumstances, the FDA may even remove the product from the marketplace.¹⁴⁸

One problem with the current FDA standard is that it only regulates the devices.¹⁴⁹ Although FDA regulations help ensure that tanning devices are as safe as possible and contain warning labels, the warnings do not mandate any behavior.¹⁵⁰ Not only are salon operators and consumers not required to follow the recommendations on the warning label, they are not even required to read it.¹⁵¹ Therefore, many injuries can result when operators or consumers ignore the label recommendations.¹⁵² The FDA acknowledged that its regulations would not prevent misuse of the tanning equipment,¹⁵³

statement, directions, and recommendations for exposure positions, the time it could take for expected results to appear, and the type of lamp that should be used in the product. § 1040.20(d)(1)(i)–(vi).

146. The current version of the regulation requires that the warning statement contain the words:

DANGER—Ultraviolet radiation. Follow instructions. Avoid overexposure. As with natural sunlight, overexposure can cause eye and skin injury and allergic reactions. Repeated exposure may cause premature aging of the skin and skin cancer. WEAR PROTECTIVE EYEWEAR; FAILURE TO MAY RESULT IN SEVERE BURNS OR LONG-TERM INJURY TO THE EYES. Medications or cosmetics may increase your sensitivity to the ultraviolet radiation. Consult physician before using sunlamp if you are using medications or have a history of skin problems or believe yourself especially sensitive to sunlight. If you do not tan in the sun, you are unlikely to tan from the use of this product.

§ 1040.20(d)(1)(i). This current label contains a few additional warnings compared to the original warning label required by the Final Rule. Compare Final Rule, *supra* note 73, at 65,357, with § 1040.20(d)(1)(i). The additional warnings include avoiding overexposure, wearing protective eyewear, and that if the customer does not tan in the sun, she is unlikely to tan from use of the tanning device. See § 1040.20(d)(1)(i).

147. See FTC FACTS, *supra* note 14, at 3.

148. *Id.*

149. See Saranow, *supra* note 3.

150. See § 1040.20(d)(1)(i)–(iv).

151. See § 1040.20. Although the label must contain the words “follow instructions,” there is no provision in the statute requiring operators or consumers to comply with the warning label recommendations. *Id.*

152. For example, although the FDA requires protective goggles be made available, and the warning label directs consumers to wear them, the FDA does not require tanners to wear the goggles, and therefore a tanning patron may forego using the goggles and suffer eye injuries. See § 1040.20(c)(4), (d)(1)(i). Additionally, the warning label must contain recommended exposure times and positions. See § 1040.20(d)(1)(ii)–(v). However, despite posting these recommendations, many tanning salon operators and customers choose to ignore them. See Lim et al., *supra* note 14, at 871. For example, a recent survey of tanning salons in North Carolina revealed that “the recommended dose limits were exceeded by 95% of patrons, and 33% of them started tanning at the maximum doses recommended for maintenance tanning.” *Id.* By not mandating maximum exposure times, the FDA “guidelines” do not do much to protect consumers from injuries due to overexposure.

153. See Proposed Rule, *supra* note 70, at 65,189 (“The Commissioner further notes that the requirements of this proposal do not prevent misuse or remove all the dangers of sunlamp

but the agency did not provide any safeguards beyond the warning label.¹⁵⁴ The FDA suggested it had authority to expand the scope of its regulation including “user education programs, . . . use restrictions, . . . and . . . banning . . . sunlamp products except for prescription use,”¹⁵⁵ but the FDA currently has not taken any of these actions.¹⁵⁶ Arguably, each of these regulations would lead to greater consumer protection.¹⁵⁷

Another concern is that the current warning labels may be inadequate. Despite increasing evidence regarding the serious risks of indoor tanning, its popularity continues to increase.¹⁵⁸ One possible reason for this could be that current warning labels fail to adequately inform consumers about the dangers of indoor tanning.¹⁵⁹ As a result, some consumers may not be fully aware of the risks they are assuming by choosing to use a tanning device. If they were more adequately informed of the risks, some consumers may choose not to tan.

In response to this concern, Congress recently passed the Tanning Accountability and Notification Act of 2007 (TAN Act),¹⁶⁰ which President

products.”).

154. *See id.*; *see also* § 1040.20.

155. *See* Proposed Rule, *supra* note 70, at 65,189.

156. Acknowledging the proposed standard would not prevent misuse, the Commissioner stated that the FDA would “continue to consider additional means to address sunlamp protection.” Proposed Rule, *supra* note 70, at 65,189. However, none of these “additional means” have as yet been incorporated into the FDA’s current regulation of the industry. *See* § 1040.20.

157. In fact, health groups have advocated for each of these options. *See supra* notes 112–14. They have encouraged more education for the public regarding the risks of indoor tanning. *See supra* notes 112–14. They have also strongly advocated for banning tanning except for medical purposes, or in the alternative at least enacting use restrictions to ban those under eighteen from tanning. *See supra* notes 112–14.

158. *See* American Academy of Dermatology, *Innovative Public Service Advertisement Campaign Sends Strong Message to Teens About Dangers of Indoor Tanning*, Oct. 18, 2006, http://www.aad.org/media/background/news/Releases/Innovative_Public_Service_Advertisement_Campaign_S/ (“[The numbers of indoor tanners] continue to rise each year, despite research which demonstrates the risks of indoor tanning, including premature aging such as age spots and wrinkles, and even worse, the danger of skin cancer.”); *see also supra* notes 3–6 and accompanying text (discussing the rising popularity of indoor tanning).

159. The way the warning labels are designed and worded may make the warnings seem like a general disclaimer rather than a cause for concern. *See, e.g.,* Adam Voiland, *Take Care During Indoor Tanning Season; Overexposure in Beds, Booths No Safer Than Basking in Sun*, GRAND RAPIDS PRESS, Jan. 8, 2008, at E8 [hereinafter *Take Care*]. One indoor tanner stated “[h]ad I not just spent the day interviewing indignant dermatologists about the wisdom of [indoor tanning], it’s unlikely I would have noticed the inconspicuous warning label on the [tanning bed]’s lid. ‘Repeat exposure may cause premature aging of the skin and cancer,’ it said.” *Id.*

160. Originally, the TAN Act was a separate bill before the House in the 110th Congress. *See* Tanning Accountability and Notification Act of 2007, H.R. 945, 110th Cong. (2007). However, the TAN Act as passed was “part of the more comprehensive ‘Food and Drug Administration

George W. Bush signed into law in September 2007.¹⁶¹ While the TAN Act does not guarantee any changes, it directs the FDA to examine the effectiveness of the current warning label requirements¹⁶² and to reconsider the wording of those labels it finds to be ineffective.¹⁶³ If the FDA discovers the labels are ineffective and adjusts the requirements, this would be a substantial step toward the FDA providing more effective protection for potential users of indoor tanning devices.¹⁶⁴

Despite these issues, the current FDA regulation is not completely useless. While there is undoubtedly more the FDA could do to protect consumers, this regulation has provided some long overdue safeguards.¹⁶⁵ The lamps used in tanning beds are now somewhat safer,¹⁶⁶ and users have a way to manually control exposure.¹⁶⁷ There are also warnings to use protective eyewear and that repeated exposure can cause serious injuries including skin cancer.¹⁶⁸ Additionally, the FTC now shares some of the responsibility with the FDA to help ensure consumer safety.¹⁶⁹

Amendments Act of 2007 (HR 3580).” See *AADA Commends President*, *supra* note 7.

161. See *AADA Commends President*, *supra* note 7.

162. *Id.*

163. *Id.*

164. See *id.* While the FDA has added some additional warnings to the label since the original version, see *supra* note 146, many still think the labels are insufficient to adequately warn consumers. See *AADA Commends President*, *supra* note 7.

165. See *supra* Part II.B (discussing the FDA’s response to reports of sunlamp related injuries).
166. The FDA designed the irradiance ratio limits to reduce “potentially harmful radiation unnecessary for [the] product’s intended purpose.” See Proposed Rule, *supra* note 70, at 65,190; see also 21 C.F.R. § 1040.20(c)(1) (2008) (irradiance ratio limits in current statute). The FTC has noted that “[m]any older tanning devices” emitted UVB rays which caused burning, and as a result salons began using devices that emitted UVA rays, which were presumed to be safer. FTC FACTS, *supra* note 14, at 2. However, UVA rays are still “suspected to have links to malignant melanoma and immune system damage.” *Id.* Therefore, the FDA has applied irradiance ratio limits of all UV radiation to reduce harmful radiation from sunlamps. See Proposed Rule, *supra* note 70, at 65,190.

167. See § 1040.20(c)(2), (3). With more control over the tanning device, presumably the consumer is more able to avoid overexposure. The devices are also now required to contain a warning label listing recommended exposure times. See § 1040.20(d)(1)(iv). Of course, customers can choose to ignore these recommendations, but a prudent consumer who would like to avoid injury is now provided with beneficial recommendations to avoid burning.

168. See § 1040.20(d)(1)(i).

169. FTC FACTS, *supra* note 14, at 3.

2. The FTC: Regulating Advertising Claims by the Indoor Tanning Industry

Unlike the FDA, the FTC¹⁷⁰ does not regulate the indoor tanning industry directly.¹⁷¹ Instead, it regulates the industry indirectly through its general regulation of advertising claims.¹⁷² The FTC prohibits the dissemination of false advertising, and “investigates false, misleading, and deceptive advertising claims.”¹⁷³ Under the Federal Trade Commission Act (FTCA),¹⁷⁴ “advertising must be truthful and non-deceptive,”¹⁷⁵ “advertisers must have evidence to back up their claims,”¹⁷⁶ and “advertisements cannot be unfair.”¹⁷⁷ As applied to the indoor tanning industry, this Act prohibits the industry from enticing consumers with false claims regarding the safety or benefits of indoor tanning.¹⁷⁸ Additionally, in August 1997 the FTC released a consumer alert to inform consumers of the facts regarding indoor tanning and warn about false advertising claims made by the indoor tanning industry.¹⁷⁹ The FTC continues to monitor the industry’s advertising claims, and the FTC has the power to take corrective action if deceptive claims are made.¹⁸⁰

170. The FTC is a federal government agency which was created in 1914 “to prevent unfair methods of competition in commerce.” Federal Trade Commission, A Guide to the Federal Trade Commission, <http://www.ftc.gov/bcp/edu/pubs/consumer/general/gen03.shtm> (last visited Apr. 27, 2009) [hereinafter FTC Guide]. Congress has expanded the FTC’s authority over the years, including “the authority to adopt trade regulation rules” in 1975. *Id.* Through its Bureau of Consumer Protection, the FTC aims “to protect consumers against unfair, deceptive or fraudulent practices.” *Id.*

171. Compare § 1040.20 (regulating sunlamps specifically), with Dissemination of False Advertisements, 15 U.S.C. § 52 (2000) (regulating advertisements made by “any person, partnership, or corporation.”).

172. The FTC’s Division of Advertising Practices—which enforces truth-in-advertising laws—is a division of the Bureau of Consumer Protection. FTC Guide, *supra* note 170; see also FTC FACTS, *supra* note 14, at 3.

173. See FTC FACTS, *supra* note 14, at 3.

174. Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2007) (regulating advertising in general).

175. Federal Trade Commission, Frequently Asked Advertising Questions: A Guide for Small Business, <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus35.shtm> (last visited Apr. 27, 2009) [hereinafter Advertising Questions]. According to the FTC’s Deception Policy Statement, an advertisement is considered deceptive if it contains information or omits information which “[i]s likely to mislead consumers” and is “important to a consumer’s decision to buy or use the product.” *Id.*

176. *Id.* Before running an advertisement, a company must:

have a “reasonable basis” for the claims. A “reasonable basis” means objective evidence that supports the claim. The kind of evidence depends on the claim. At a minimum, an advertiser must have the level of evidence that it says it has. . . . [A]ds that make health or safety claims must be supported by “competent and reliable scientific evidence”—tests,

studies, or other scientific evidence that has been evaluated by people qualified to review it.

Id.

177. *Id.* Under the FTCA and the FTC's Unfairness Policy Statement, "an ad or business practice is unfair if . . . it causes or is likely to cause substantial consumer injury which a consumer could not reasonably avoid; and it is not outweighed by the benefit to consumers." *Id.*

178. The two types of advertisements the FTC pays closest attention to are "[a]ds that make claims about health or safety" and "[a]ds that make claims that consumers would have trouble evaluating for themselves . . ." *Id.*

179. *See generally* FTC FACTS, *supra* note 14. The alert warned consumers to beware of claims such as "[t]an indoors with absolutely no harmful side effects[;] [n]o burning, no drying, and no sun damage[;] [and] [u]nlike the sun, indoor tanning will not cause skin cancer or skin aging" because these claims could be false. *Id.* at 1. The alert asserted that tanning beds emit the same UV rays as the sun, which can damage the skin and "contribute[] to the risk of developing skin cancer." *Id.* at 2. The alert also suggested ways for consumers to protect themselves while using tanning beds, including limiting exposure to avoid burning, using protective eyewear, and considering medical history. *Id.* at 3.

180. *Id.*; *see also* Advertising Questions, *supra* note 175 (discussing possible penalties). Penalties the FTC may impose against a company that runs a deceptive ad "depend on the nature of the violation." Advertising Questions, *supra* note 175. Penalties may include: cease and desist orders, civil penalties, consumer redress, monetary remedies, corrective advertising, disclosures and other informational remedies. *Id.* For example, the FTC took corrective action in response to false and misleading advertising claims made by a leading manufacturer of indoor tanning products in the 1990s. *See* Federal Trade Commission, *FTC Settlement Stresses Health Risks of Tanning: California Company's Claims for Its Tanning Products Are False and Unsubstantiated, Says FTC*, Nov. 19, 1996, <http://www.ftc.gov/opa/1996/11/caltan.shtm> [hereinafter *FTC Settlement*]. First, the FTC filed a complaint against the company due to the agency's belief that the company "violated the provisions of the Federal Trade Commission Act." Complaint at 1, *In re* Cal. Suncare, Inc., FTC Docket No. C-3715 (Feb. 11, 2007). The complaint reviewed advertising claims made by the company and concluded that the company had:

represented, directly or by implication, that: A. The negative effects of exposure to sunlight or indoor UV radiation, including skin cancer and premature skin aging, are caused only by overexposure or burning and not by moderate exposure, over a period of years, including exposure sufficient to cause tanning. B. Tanning as a result of exposure to sunlight or indoor UV radiation is not harmful to the skin. C. Use of California Tan Heliotherapy products prevents or minimizes the negative effects of exposure to sunlight or indoor UV radiation, including skin cancer and premature skin aging. D. Exposure to sunlight or indoor UV radiation reduces the risk of skin cancer.

Id. ¶ 5. The FTC found these statements were false and misleading. *Id.* ¶ 6. The agency held "[t]he negative effects of exposure to sunlight or indoor UV radiation" are not simply due to "overexposure or burning, but also can be caused by cumulative moderate exposure, over a period of years, including exposure sufficient to cause tanning." *Id.* Additionally, the agency held tanning itself was harmful to the skin, use of the company's products did not "reduce the risk of skin cancer or premature skin aging," and "[e]xposure to sunlight or indoor UV radiation does not reduce the risk of skin cancer." *Id.* The complaint also listed many representations of other benefits of tanning, which the company made. *Id.* ¶ 7. The FTC asserted the company "did not possess and rely upon a reasonable basis that substantiated such representations." *Id.* ¶ 9. After the complaint was filed, a decision and order was issued, which required the company to refrain from making false and unsubstantiated claims about the benefits of sun or UV exposure, and to add warnings to their products which state that "[t]anning in sunlight or under tanning lamps can cause skin cancer and premature skin aging—even if you don't burn." Order ¶ 5, *In re* Cal. Suncare, Inc., FTC Docket No. C-3715 (Feb. 11, 2007) [hereinafter *Order*]. Additionally, the company was required to send a notice to each purchaser of their products in the past four years informing them about the complaint and the settlement agreement. *Id.* ¶ 6. The decision was issued on February 11, 1997. *Id.* at 11.

One problem with this limited regulation is the indoor tanning industry can find ways to get around it. For example, while the indoor tanning industry cannot make claims about benefits of indoor tanning that are unsupported,¹⁸¹ there are some truthful benefits of indoor tanning that may be promoted without FTC scrutiny.¹⁸² The problem with this is that these possible benefits often have healthier alternatives.¹⁸³ By leaving out any mention of healthier alternatives, a consumer may think indoor tanning is the best or only way to achieve that particular result. While this may not be considered deceptive such that the FTC can take action, it still has the potential to endanger consumers. One solution to this would be to not allow the indoor tanning industry to make health claims,¹⁸⁴ but so far there is no indication the FTC plans to take any such action.¹⁸⁵

A more serious problem with this regulation is that it does not—and cannot—regulate the images frequently portrayed in the media that tan skin is beautiful. It is unlikely that any federal agency could prohibit these visual representations even if one wanted to. Yet it is notable here because the success of the FTC's efforts to limit false advertising claims will undoubtedly be hampered by the visual images frequently portrayed in the media.¹⁸⁶ Even without the ability to make unsubstantiated claims about the benefits of tanning, as long as people in society continue to view tan skin as a good thing, tanning salons will have no problem getting customers.¹⁸⁷

The complaint and order both contain the same date, both of which are later than the FTC press release. See *FTC Settlement, supra*. The reason for the discrepancy is not clear. However, 1997 was also the same year the FTC released the consumer alert warnings about false and misleading claims being made about indoor tanning. See *FTC FACTS, supra* note 14.

181. See generally Advertising Questions, *supra* note 175; see also Order, *supra* note 180 (ordering California Suncare to stop making claims about the benefits of indoor tanning that were not supported by sufficient medical and scientific evidence).

182. A prime example of this is the fact that UV rays emitted by tanning devices are known to produce vitamin D. See *supra* note 125 (discussing the production of vitamin D). Many tanning websites stress the benefits of vitamin D and make it seem like UV exposure is the only way to get a sufficient amount of vitamin D. See, e.g., Indoor Tanning Association, Positive Effects of UV Light, http://www.theita.com/indoor/PositiveEffects_ofUV.cfm (last visited Apr. 27, 2009).

183. For example, there are healthier alternatives for people who need more vitamin D than lying in a tanning bed. See *supra* note 125. Additionally, there are healthier alternatives to the "tan, healthy look." See *id.*

184. Some states have enacted regulations that prohibit the industry from making health claims. See *infra* note 202.

185. See Advertising Questions, *supra* note 175 (stating advertisers only need a reasonable basis for health claims).

186. See *supra* notes 8–11 (discussing the effects of tan images in the media).

187. Some have theorized that changing tanning behavior "will require a fundamental change in the societal belief that tans are attractive and healthy." See J. Matthew Knight et al., *Awareness of*

Nonetheless, the FTC regulation has provided some protection for consumers by stopping the indoor tanning industry from making purely unsubstantiated claims.¹⁸⁸ While the industry is no longer able to make such claims, at least some consumers will no longer be enticed to tan. Coupled with the FDA regulation, these federal level regulations have provided a base level of protection for consumers. However, despite these regulations tanning popularity has continued to go up rather than down.¹⁸⁹ This suggests that either more regulation is needed, or that something beyond regulation will be necessary to affect consumer behavior. The notion that more regulation is needed is what has led to separate indoor tanning regulation in a majority of states.¹⁹⁰

B. State Regulations

Concerned by the limited regulation at the federal level, and the growing sense of alarm due to rising skin cancer rates, many state legislatures have begun enacting regulations of indoor tanning.¹⁹¹ These regulations reach far and wide,¹⁹² vary from state to state,¹⁹³ and ultimately offer many of the protections that the FDA said it would consider but has not enacted.¹⁹⁴ Additionally, rising concerns about the added dangers of indoor tanning for minors has led to the most recent surge of state-level regulation: Restrictions on the use of indoor tanning by minors.¹⁹⁵

1. General State Regulations

A majority of states now regulate the indoor tanning industry beyond the minimal federal regulations.¹⁹⁶ Many of the common state regulations

the Risks of Tanning Lamps Does Not Influence Behavior Among College Students, 138 ARCH. DERMATOL. 1311, 1311 (2002).

188. See, e.g., FTC FACTS, *supra* note 14; *FTC Settlement*, *supra* note 180.

189. See *supra* note 158 and accompanying text.

190. See *infra* Part III.B.

191. See, e.g., Saranow, *supra* note 3 (“Amid mounting evidence of a link between indoor tanning and skin cancer, there is a sharp increase in legislative efforts to strengthen regulation of the tanning industry. . . . What’s driving much of the concern about tanning is that melanoma is a growing problem. . . .”); Scharfenberg, *supra* note 8 (“The shift toward more regulation is being driven by increasing evidence that tanning salons customers are at significantly greater risk for the three major types of skin cancer. . . .”).

192. See *infra* Part III.B.1.

193. See *infra* Part III.B.1.

194. See *supra* note 155 and accompanying text. State regulations often include user education requirements, see *infra* note 210, implement use restrictions, see *infra* notes 244–49, and in some cases ban minors under a certain age from using the devices, see *infra* note 239.

195. See *infra* Part III.B.2.

196. At least thirty-one states have enacted some form of regulation of the indoor tanning industry. See ARIZ. ADMIN. CODE § R12-1-1412 (2008); CAL. BUS. & PROF. CODE § 22700

overlap areas already covered by the FDA and FTC.¹⁹⁷ Such regulations include warning statements,¹⁹⁸ lamp standards,¹⁹⁹ timer accuracy,²⁰⁰

(Deering 2007); COLO. REV. STAT. ANN. § 25-5-1001 (West 2008); CONN. GEN. STAT. ANN. § 19a-232 (West Supp. 2008); FLA. STAT. ANN. § 381.89 (West 2007); GA. CODE ANN. § 31-38-1 (2006); 210 ILL. COMP. STAT. ANN. 145 (West 2007); IND. CODE ANN. § 25-8-15.4-1 (West 2008); IOWA CODE ANN. § 136D.1 (West 2007); KAN. STAT. ANN. § 65-1920 (2006); KY. REV. STAT. ANN. § 217.920 (LexisNexis 2007); LA. REV. STAT. ANN. § 40:2701 (2007); 10-144-223 ME. CODE R. § 12 (Weil 2007); MASS. GEN. LAWS ANN. ch. 111, § 207 (West 2003 & Supp. 2008); MICH. COMP. LAWS ANN. § 333.13401 (West 2008); MINN. STAT. ANN. § 325H (West 2007); 15-78-2 MISS. CODE R. § 100.01 (Weil 2007); N.H. REV. STAT. ANN. § 313-A:28 (LexisNexis 2005); N.J. STAT. ANN. § 26:2D-81 (West 2007); N.Y. PUB. HEALTH LAW § 3550 (McKinney 2007); N.C. GEN. STAT. ANN. § 104E-9.1 (West 2007); N.D. CENT. CODE § 23-39-01 (2007); OHIO ADMIN. CODE § 4713:19-01 (2007); OR. REV. STAT. ANN. § 431.925 (West 2007); R.I. GEN. LAWS § 23-68-1 (2007); S.C. CODE ANN. REGS. 61-106 (2000); TENN. CODE ANN. § 68-117-101 (2006); TEX. HEALTH & SAFETY CODE ANN. § 145.001 (Vernon 2001 & Supp. 2007); UTAH CODE ANN. § 26-15-13 (West 2007); VA. CODE ANN. § 59.1-310.2 (West 2008); WIS. STAT. ANN. § 255.08 (West 2007). Some states regulate the indoor tanning industry under multiple codes, so it is best to search multiple sources in order to find all the regulations affecting the indoor tanning industry in a particular state. *See, e.g.*, 210 ILL. COMP. STAT. ANN. 145 (West 2007), *and* ILL. ADMIN. CODE tit. 77, § 795 (2007). Some states have no separate regulation and leave the regulation issue entirely up to the FDA and FTC. *See generally* National Tanning Training Institute, A Guide to State Radiation Control Offices, <http://www.tanningtraining.com/reginfo/state.html> (last visited Apr. 27, 2009). For example, according to a compilation of state regulations by the National Tanning Training Institute, it appears that twenty-four states—Alabama, Alaska, Arkansas, Connecticut, Delaware, Hawaii, Idaho, Kentucky, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Vermont, Washington, West Virginia, and Wyoming—currently do not have separate state regulations of the indoor tanning industry. *Id.* However, state regulations are always changing. Several of the states that the National Training Institute lists as not having any separate regulation of the indoor tanning industry do in fact have separate regulation. *See supra* (listing of state regulations).

197. One possible critique of these overlapping regulations is that the FDA and FTC have already addressed these particular issues and adopted the standard the agency thought was best, so the states should leave those areas alone. There currently are no cases on point regarding the preemptive power of the current federal regulations over state regulations in these areas. However, presumably the FDA and FTC have merely set minimum standards, and the states—as long as within valid exercise of state powers—are able to enact regulations in these areas. *See* U.S. GEN. ACCOUNTING OFFICE, REGULATORY PROGRAMS: BALANCING FEDERAL AND STATE RESPONSIBILITIES FOR STANDARD SETTING AND IMPLEMENTATION 11 (2002), *available at* <http://www.gao.gov/new.items/d02495.pdf>. Additionally, state standards cannot be less stringent than the federal standards or conflict with the federal regulation, otherwise federal preemption will come into play. *See id.* Preemptive issues are beyond the scope of this Comment, but for more information regarding minimum federal standards and shared regulation, *see id.*

198. The FDA only requires a warning label be placed on each tanning device. *See supra* note 145 and accompanying text. However, many states require separate warning signs to be placed in additional locations, including near each tanning device and in the lobby area. *See, e.g.*, ARIZ. ADMIN. CODE § R12-1-1415(A)-(B) (2008) (requiring warning signs be placed “within 1 meter . . . of each tanning device” and “at or near the reception area”); GA. CODE ANN. § 31-38-4(a) (2006) (requiring posted warning sign within three feet of each tanning device); WIS. STAT. ANN. § 255.08(5) (West 2007) (requiring warning sign to be placed “prominently . . . in each area where a tanning device is used”); TEX. HEALTH & SAFETY CODE ANN. § 145.006(a) (Vernon Supp. 2007)

protective eyewear,²⁰¹ and advertising.²⁰² In addition, some states have specific regulations requiring compliance with the FDA regulations.²⁰³

(requiring a warning sign to be “readily visible by persons entering the establishment” and at each tanning device). Some states have very specific requirements for the look of the warning statements to ensure that they are conspicuous. *See, e.g.*, GA. CODE ANN. § 31-38-4(b) (2006) (“The warning sign . . . shall use upper and lower case letters which are at least two inches and one inch in height . . .”); MASS. GEN. LAWS ANN. ch. 111, § 209 (West 2003 & Supp. 2008) (“[The warning notice] shall be at least eight and one-half inches wide by eleven inches long and printed in white on a red background.”); TEX. HEALTH & SAFETY CODE ANN. § 145.006(b) (Vernon Supp. 2007) (requiring warning signs to be at least eleven inches by seventeen inches).

199. The FDA regulates standards for the lamps to be used in tanning devices. *See supra* note 102 and accompanying text (discussing the irradiance ratio requirement in detail). However, some states have enacted standards for replacement of the lamps. *See, e.g.*, ARIZ. ADMIN. CODE § R12-1-1413(A)–(B) (2008) (“[T]anning facilit[ies] shall use sunlamp products that are certified by the manufacturer to comply with 21 C.F.R. 1040.20 [They] shall replace burned-out or defective lamps or filters, before any use of a tanning device.”); GA. CODE ANN. § 31-38-8(c)–(d) (2006) (“The tanning facility owner . . . shall replace defective or burned out lamps . . . with a type intended for use in the affected tanning equipment . . . [and] shall replace ultraviolet lamps . . . which are not otherwise defective or damaged . . . at such frequency or after such duration of use as may be recommended by the manufacturer.”). Additionally, some states require the implementation of additional safety features. *See, e.g.*, OHIO ADMIN. CODE 4713:19-04(F) (2009) (“Each ultraviolet lamp contained within the sunlamp product shall be shielded so as to not come into any contact with the user.”).

200. The FDA requires that the timers not exceed the maximum recommended exposure time. *See supra* note 103 and accompanying text. In addition, state-level regulations often specifically do not allow consumers to exceed recommended exposure times. *See, e.g.*, 820 IND. ADMIN. CODE 5-1-26 (2008) (“Each customer shall be limited to less than or equal to the maximum exposure time recommended by the manufacturer [I]n no event shall exposure . . . be allowed for more than the . . . recommended exposure time for a given skin type in any twenty-four (24) hour period.”); VA. CODE ANN. § 59.1-310.5(E) (West 2008) (“The tanning facility shall use a timer with an accuracy of at least plus or minus ten percent of any selected time interval. The facility shall limit the exposure time of a customer on a tanning device to the maximum exposure time recommended by the manufacturer.”).

201. The FDA merely requires that protective eyewear accompany tanning devices. *See supra* note 105 and accompanying text. However, some states require the tanning salon to provide *each customer* with protective eyewear. *See, e.g.*, IND. CODE ANN. § 25-8-15.4-14 (West 2008) (“The operator of the a tanning facility shall . . . [p]rovide each person using a tanning device with properly sanitized eyewear that protects the eyes from ultraviolet radiation and allows adequate vision.”). Some states prohibit tanning salons from allowing a person to tan if the person does not use protective eyewear. *See, e.g.*, KAN. STAT. ANN. § 65-1924(b) (2006) (“The operator may not allow a person to use a tanning device if that person does not use the protective eyewear.”).

202. The FTC regulations only prohibit false or deceptive advertising. *See supra* note 173. State regulations of indoor tanning advertising vary, but often prohibit the industry from making specific statements, such as advertising tanning packages as “unlimited.” *See, e.g.*, OR. ADMIN. R. 333-119-0120(3) (2008) (“No person or facility shall advertise or promote tanning packages labeled as ‘unlimited.’”). Additionally, some states specifically prohibit the industry from making representations that tanning is safe or free from risk. *See, e.g.*, COLO. REV. STAT. ANN. § 25-5-1007 (West 2008) (“No owner, employee, or operator . . . shall advertise or promote that the use of any artificial tanning device is safe or without risk to the user or that registration with the department constitutes approval or endorsement . . . of artificial tanning.”). Some states even take this a step further and prohibit tanning facilities from claiming that there are any health benefits attributable to tanning. *See, e.g.*, CAL. BUS. & PROF. CODE § 22705(d) (Deering Supp. 2008) (“A tanning facility shall not claim, . . . that using an ultraviolet tanning device is safe or free from risk or that indoor tanning has any known health benefits.”); TEX. HEALTH & SAFETY CODE ANN. § 145.007 (Vernon

Rather than applying solely to the tanning devices, these state-level regulations typically require operators to take specific actions.²⁰⁴ In implementing these regulations, states have addressed one of the main critiques of the FDA regulation—the need for regulation of tanning salons in addition to regulation of the devices themselves.²⁰⁵ Where advocates of more protective tanning laws have been unsuccessful in getting the FDA or FTC to adopt such regulations, it seems they have been successful in getting these regulations enacted in many states.²⁰⁶

Many states also regulate indoor tanning in areas that are not covered by the FDA or the FTC.²⁰⁷ One of the common types of these gap-filling statutes regulates the business aspects of indoor tanning.²⁰⁸ Others include

2001) (“A tanning facility operator may not claim or distribute promotional materials that claim . . . that using a tanning device will result in medical or health benefits.”). Not allowing any health claims directly addresses one of the shortcomings of the FTC regulation. *See supra* Part III.A.2.

203. *See, e.g.*, CAL. BUS. & PROF. CODE § 22704 (Deering 2007) (“Any tanning device used by a tanning facility shall comply with all applicable federal laws and regulations.”); OR. REV. STAT. § 431.935 (2007) (same). While this may seem redundant for states to require tanning salons to comply with federal regulations (the salons have to comply with federal regulations whether the states require them to or not), in doing so, the states essentially incorporate the FDA provisions into state law so the state is able to enforce those provisions as well. *See, e.g.*, CAL. BUS. & PROF. CODE § 22708 (detailing penalties for violating the chapter which include state regulations and requirements to comply with federal regulations).

204. *See supra* notes 198–202 (regulations specify “tanning facility” or “operator”).

205. *See supra* Part III.A.1 (discussing the current FDA regulation and major critiques).

206. *See supra* notes 198–202. For example, many state regulations require that protective eyewear be worn during indoor tanning to protect tanners from tanning-related eye injuries. *See, e.g.*, 210 ILL. COMP. STAT. ANN. 145/25(b) (West 2007) (“The operator shall require each person desiring to use a tanning facility to use protective eyewear.”). The current FDA regulation only requires that tanning beds be accompanied by a number of pairs of protective eyewear equal to the number of people who can use the device at one time. *See* 21 C.F.R. § 1040.20(c)(4) (2008). The regulation does not require tanning bed operators to ensure that customers use the eyewear, or even ensure the customers are aware the protective eyewear is there or for what purpose. *See id.* Additionally, many states regulate claims that can be made both by tanning salon operators and in promotional materials much more stringently than the FTC. *Compare supra* note 202 (discussing state regulations of advertising), *with supra* notes 172–80 (detailing the FTC’s less demanding regulation). For example, some states outright deny the indoor tanning industry the right to make certain claims about tanning even if the industry has sufficient evidence to back up those claims. *See supra* note 202. However, some states have chosen not to impose any standards of their own, or refuse to impose stricter standards than the FDA. For example, in 2006, the Pennsylvania legislature passed a statute forbidding any regulation which would prohibit indoor tanning absent a finding by “the [FDA], or another . . . agency of comparable expertise” that indoor tanning “presents a serious risk to the public.” *See* 63 PA. CONS. STAT. ANN. § 520.1 (West 2008).

207. *Compare supra* Part III.A, *with infra* notes 208–11.

208. This includes regulations such as regulating licensing, initial and annual fees, sanitation guidelines, inspections, and record keeping standards. *See, e.g.*, IND. CODE ANN. § 25-8-15.4-5 (West 2008) (necessity for license); § 25-8-15.4-6 (license requirements); § 25-8-15.4-14 (sanitation

mandating some form of training for tanning bed operators,²⁰⁹ requiring written notice of the warnings to be given to all customers,²¹⁰ and providing

requirements); 820 IND. ADMIN. CODE 5-1-32 (2008) (record keeping); *see also* FLA. ADMIN. CODE ANN. r. 64E-17.004(7)–(8) (2009) (record keeping requirements); 64E-17.005 (sanitation requirements); 64E-17.006 (license and fee requirements); 64E-17.007 (inspections, enforcement, and penalties). These regulations—aside from providing uniformity among tanning salons—provide a much needed enforcement mechanism. License requirements generally require the payment of fees which presumably go toward the costs of regulating the industry. *See, e.g.*, 320 IND. ADMIN. CODE 5-1-20(2) (requiring fee of \$200.00); FLA. ADMIN. CODE ANN. r. 64E-17.006(5) (specifying an annual license fee of \$150.00 for one device and \$55.00 for each additional device); OHIO ADMIN. CODE 4713:19-03 (2009) (specifying \$65.00 for original fee, \$55.00 for renewal); *see also* TEX. HEALTH & SAFETY CODE ANN. § 145.010 (Vernon 2001) (specifying licensing fees are to be used for inspections, administration, and enforcement of indoor tanning regulations). Additionally, some salons may face the threat of losing their license if they fail to comply with state regulations—which would put the salon owners out of business. *See, e.g.*, WIS. STAT. ANN. § 255.08(13) (West 2007) (specifying suspension or revocation of permit as possible penalties for violating indoor tanning regulations). This likely encourages salon owners to be aware of current regulations and remain compliant.

209. While the requirement that operators be “trained” is common among state indoor tanning regulatory schemes, the specificity of this requirement varies by state. For example, some statutes merely require that the operator be “trained” without going into specific detail. *See, e.g.*, TENN. CODE ANN. § 68-117-104(a)(1) (2006) (“A tanning facility shall . . . [h]ave a trained attendant on duty whenever the facility is open for business”); VA. CODE ANN. § 59.1-310.5(A) (West 2008) (“The operator shall be sufficiently knowledgeable in the correct operation of the tanning devices.”). Some states list specific aspects of training in the applicable regulation. *See, e.g.*, ARIZ. ADMIN. CODE § R12-1-1414 (2008) (specifying training to be provided to operators including skin type evaluations, procedures for dealing with minors, protective eyewear requirements, sanitation, and risks); 820 IND. ADMIN. CODE 5-1-34 (specifying the types of training each operator is required to have prior to serving customers); OR. ADMIN. R. 333-119-0080(1) (2008) (specifying specific training for all tanning device operators). Some states go so far as to mandate state in-classroom training for all tanning bed operators. *See, e.g.*, FLA. ADMIN. CODE ANN. r. 64E-17.003 (2009) (requiring operators to attend formal in-classroom training and specifying what the training is to include); OHIO ADMIN. CODE 4713:19-14 (2009) (requiring each tanning facility to have “an operator on duty at all times” who has completed formal training); OR. ADMIN. R. 333-119-0080(3) (2008) (requiring at least one owner of each facility to complete formal training course). Salon operators must be careful to be aware of all places where regulations that affect them may be encoded. For example, the Illinois Compiled Statutes merely require that operators be “adequately trained.” *See* 210 ILL. COMP. STAT. ANN. 145/25 (West 2007) (“Each tanning facility shall have on hand at all times an operator adequately trained in the correct operation of the facility.”). However, the Illinois Administrative Code lists specific training requirements. *See* ILL. ADMIN. CODE tit. 77, § 795.180 (2007). Presumably, if the operator is trained in how to properly use the tanning device, consumers will be less susceptible to injuries which result from improper exposure.

210. This requirement is different from the FDA warning requirement because that warning requirement only applies to labels affixed on the tanning devices. *See* 21 C.F.R. § 1040.20(d) (2008). The warnings discussed here refer to separate written warning statements given to customers who come to use a tanning device. Like the training requirement, the specificity in these warning statutes varies. Several states merely require salons to provide customers with written warnings about the risks of indoor tanning, without specifying the risks to be included. *See, e.g.*, ILL. COMP. STAT. ANN. 145/25(f) (West 2007) (requiring operators to give each customer a written warning statement); IOWA CODE ANN. § 136D.4.2 (West 2007) (“A tanning facility shall provide each customer with a written warning statement that complies with rules adopted by the department.”). Some state statutes specifically list the warnings that are to be made. *See, e.g.*, FLA. STAT. ANN. § 381.89(4)(a) (West 2007) (requiring operator to give each customer written list of specific warnings including risk of damage to the eyes, burning, premature aging, and skin cancer);

specific penalties for non-compliance.²¹¹ These states have evidently deemed more stringent regulations necessary to adequately protect

TEX. HEALTH & SAFETY CODE ANN. § 145.005(a)(1)–(7) (Vernon Supp. 2007) (requiring tanning facilities to give each customer a written warning statement of specific risks associated with indoor tanning). Some states additionally require all customers to sign a form acknowledging they have read and understood those risks. *See, e.g.,* CAL. BUS. & PROF. CODE § 22706 (Deering 2007 & Supp. 2008).

Every person who uses a tanning facility shall sign a written statement acknowledging that he or she has read and understood the warnings before using the device The statement of acknowledgment shall be retained by the tanning facility until the end of the calendar year at which time each person who is a current customer of the facility shall be required to renew that acknowledgment.

§ 22706(b)(1). *See also* ARIZ. ADMIN. CODE § R12-1-1414(D)(2) (2008) (requiring operator to have customer read specific warnings and sign “acknowledgement that the user has heard or read and understands the warnings”). These additional requirements of giving customers written notice of warnings help ensure that the customers are in fact aware of the warnings regarding indoor tanning, rather than assuming customers will actually read the FDA required warning label on the tanning device. *See Take Care, supra* note 159.

When customers are required to sign a form, it is an acknowledgement of the risks rather than a waiver of the tanning salon’s liability for any resulting injuries. Whether a tanning salon can require a patron to sign a waiver of liability before tanning is beyond the scope of this Comment. However, some states already regulate by statute that a tanning salon may still be liable for injury even if patrons have been warned of the possible risks, or even if the tanning salon has complied with all applicable laws. *See, e.g.,* MASS. GEN. LAWS ANN. ch. 111, § 212 (West 2003) (“The liability of a tanning facility operator or the manufacturer of a tanning device shall not be affected by the giving of the warnings required”); N.D. CENT. CODE § 23-39-04 (2008) (“A tanning facility’s compliance with this chapter does not relieve the owner or any employee of the tanning facility from liability for injury sustained by a user of a tanning device.”); TEX. HEALTH & SAFETY CODE § 145.005(b) (Vernon 2007) (“Compliance with the notice requirement does not affect the liability of a tanning facility operator or a manufacturer of a tanning device.”); COLO. REV. STAT. ANN. § 25-5-1011 (West 2008) (“[T]he defense of assumption of risk . . . shall not apply if the owner has failed to provide the injured party with the written handout or [required] safety equipment . . . or if the owner has failed to provide a safe artificial tanning device.”) (emphasis added). Due to the possible risks of indoor tanning, many argue that there is no such thing as a safe tan. *See, e.g.,* Netter, *supra* note 131, at 3A (featuring a quote from a dermatologist who objected to notions of any health benefits of indoor tanning because “[t]here is no such thing as a safe tan”). Because indoor tanning as we know it has only been around since the 1970s, the possible liability of the indoor tanning industry for indoor tanning related injuries including skin cancer, and whether it may be compared to that of the cigarette industry, remains to be seen. *But see More Regulation Sought for Indoor Tanning Industry*, ABC PREMIUM NEWS (Australia), Jan. 16, 2008, available at <http://www.abc.net.au/news/stories/2008/01/16/2139554.htm> (stating a lawyer in Australia is “representing four women who say they have suffered skin damage” from indoor tanning salons and thinks “more needs to be done to protect sun bed users”).

211. The FDA and FTC are both authorized to take “corrective action” when federal statutes are violated. *See* FTC FACTS, *supra* note 14, at 3. However, the respective statutes do not list specific penalties in the event any provisions are violated. *See, e.g.,* 21 C.F.R. § 1040.20. *Cf.* CAL. BUS. & PROF. CODE § 22708 (Deering 2007) (“A first violation . . . is an infraction. . . . Any violation . . . subsequent to a first violation is a misdemeanor. . . . A tanning facility that has violated this chapter shall be liable for a civil penalty not to exceed . . . \$2,500 per day”) (emphasis added); FLA. STAT. ANN. § 381.89(10) (West 2007) (listing specific penalties for violations); IOWA

consumers. Each of these requirements ensures that consumers are informed about the risks of tanning and proper use of the tanning devices, thereby limiting the chance of injury due to misuse or overexposure.²¹²

Keeping up with state regulation in this area can be quite difficult. Not only does each state vary on whether they regulate, what they regulate, and how they regulate, but states are adding new regulations on a regular basis.²¹³ Indeed, it may be difficult for the indoor tanning industry to keep up with both the federal regulations and the varying state regulations, especially for tanning salon chains which span several states.²¹⁴ While this may prove difficult for tanning salons attempting to remain compliant with

CODE ANN. § 136D.8 (stating director may seek injunction to prohibit continuing violations of the chapter); KAN. STAT. ANN. § 65-1925(d) (West 2007) (“[T]he board . . . may suspend the license of a tanning facility until such time that the tanning facility can demonstrate to the board that it has corrected deficiencies and is in compliance with this act and rules and regulations adopted pursuant to this act.”); WIS. STAT. ANN. § 255.08(13)–(15) (“The department may . . . deny issuance of a permit . . . or suspend or revoke any permit . . . if the applicant or permit holder or his or her employee violates [tanning regulations] . . . and [the tanning facility] may be required to forfeit not less than [\$]50 nor more than [\$]250.”). Of course, just providing specific penalties will not mean much if there is little chance of getting caught. Several states have also specifically provided for inspections. *See, e.g.*, FLA. STAT. ANN. § 381.89(9) (West 2007) (“The department shall inspect or investigate a tanning facility as necessary but at least annually.”); IOWA CODE ANN. § 136D.8.1 (“The director or an authorized agent shall have access at all reasonable times to any tanning facility to inspect the facility to determine if this chapter is being violated.”).

Several states have also enacted regulations providing for criminal penalties for unauthorized video recording, live video transmission, or peeping in tanning beds. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/26-4(a-15) (West 2007); N.D. CENT. CODE § 12.1-20-12.2(c)–(d) (2007).

212. It is unknown whether there have been studies that have measured the success of any of these varying types of regulations compared to others. However, it is fairly easy to see how these requirements would increase safety. For example, a tanning operator ensuring that a customer wear the protective eyewear—as opposed to just having the recommendation to do so on the FDA warning label—will ensure that the customer’s eyes are protected. Additionally, an operator who is trained in the proper use of the machine can help ensure that customers avoid overexposure, which can cause burning. Of course, this added safety is dependent on whether salons are actually compliant with the state regulations. The level of compliance with these state level general regulations is currently unknown.

213. *See supra* note 196.

214. For example, Hollywood Tans Tanning Salons has locations in at least twenty-eight states. *See* Hollywood Tans Tanning Salons, Hollywood Tans Locations, <http://www.hollywoodtans.com/salonlocations.html> (last visited Apr. 27, 2009). The level of indoor tanning regulation in these states ranges from states that currently do not have any regulation (i.e., Alabama and West Virginia), to states that have fairly comprehensive indoor tanning regulation schemes (i.e., California and Indiana). *See* CAL. BUS. & PROF. CODE §§ 22700–08; IND. CODE ANN. § 25-8-15.4-1 to -17 (West 2008); 820 IND. ADMIN. CODE 5-1-1 to -51. But not to worry, quite a few services have sprung up offering certified training for salons on current state and federal regulations. *See, e.g.*, The National Tanning Training Institute, Basic Tanning Certification, <http://www.tanningtraining.com/> (last visited Apr. 27, 2009) (“The Basic Certification course is designed for owners and operators and covers a range of topics including: Skin Anatomy and Function; Understanding Ultraviolet Light; The Tanning Process; Determining an Exposure Schedule; Eye Protection; and *State and Federal Regulations.*”) (emphasis added). Some states—including Oregon, Louisiana, North Carolina, South Carolina, and New Hampshire—require specific “in-classroom training.” *See id.*

all applicable laws, it can also present a problem for consumers who may be unable to locate the applicable laws in their state.²¹⁵

A more serious issue with these regulations is that they all seem to be aimed at reducing the risks of injury such as burning, but not aimed at actually reducing incidents of skin cancer.²¹⁶ If the rising incidents of skin cancer are really what are driving the increase in regulation,²¹⁷ it is surprising that these regulations are not doing much to address the skin cancer issue. Granted, burning—which results from overexposure—has been linked to increased chances of skin cancer.²¹⁸ However, since the 1970s the FDA has recognized “repeated exposure over time”—not just overexposure—can lead to skin cancer.²¹⁹ It seems if regulators were really trying to address skin cancer resulting from indoor tanning, they would also address the “repeated exposure” issue. Of course, this would likely require banning indoor tanning altogether. This is an extreme remedy, and many who seek stricter regulations recognize that they often have to compromise with less extreme remedies in order to get any regulations passed.²²⁰

Whether the protections afforded by these state level regulations are aimed at making indoor tanning safer or reducing incidents of skin cancer, they will only be effective to the extent tanning salons comply with the regulations.²²¹ Although these state level regulations could undoubtedly lead to greater consumer protection, tanning salons will have no incentive to

215. Tanning laws for each individual state are often found in many different locations. See *supra* note 196 and accompanying text. As a result, consumers who might want to ensure their local tanning salon is in compliance with all applicable laws, and thereby the most diligent about consumer safety, will not be able to do so unless applicable statutes in each locality are made easily accessible.

216. For example, statutes requiring consumers to wear protective eyewear, see *supra* note 201, or not to exceed the recommended exposure time, see *supra* note 200, reduce the likelihood of consumers suffering burns if the regulations are followed. However, it is widely believed that tanning can cause skin cancer even without burning. See *supra* note 126.

217. See, e.g., Proposed Rule, *supra* note 70 (risk of skin cancer was one of the primary reasons the FDA chose to regulate).

218. See *supra* note 110.

219. See *supra* note 126 (discussing the FDA’s findings regarding repeat exposure).

220. See, e.g., Vitello, *supra* note 5. One dermatologist noted that one reason dermatologists’ stricter proposals are not adopted is because “there are 60,000 tanning salons . . . and only 8,000 . . . practicing dermatologists. So the reality is [the dermatologists’] proposals . . . get watered down.” *Id.* A “mother of a 30-year-old woman who died of melanoma and one of . . . [many] private citizens lobbying for restrictions around the country” was very grateful for the laws they were able to get, but has explained that “in order to get these bills passed, you have to accept certain limits.” *Id.*; see also Melissa Klein, *Teenage Tanning Faces Regulations*, THE JOURNAL NEWS, Nov. 25, 2005, at 3A.

221. See *supra* note 211 (discussing the issue of salon compliance).

implement them without effective enforcement mechanisms in place.²²² To the extent the state regulatory schemes lack enforcement mechanisms and provisions for inspections, the effectiveness of any regulation will be reduced.

2. State Regulation of Use by Minors

Most of the recent regulations of the indoor tanning industry have been restrictions on the use of indoor tanning by minors.²²³ These restrictions are the most common type of indoor tanning regulation among the states, with at least twenty-eight states having passed such regulation.²²⁴ Those who support regulating teen tanning generally point to the increased risks of tanning for minors²²⁵ and the vulnerability of minors in decisions that affect

222. *See id.*

223. *See Bizzozero, supra* note 6 (“More than 20 proposed antitanning legislations were introduced at the state and local level—the majority of which were aimed at restricting teen tanning.”); *see generally* Vitello, *supra* note 5 (discussing how tanning salons become a target to address the “unexplained increase in skin cancer among young people.”). In 2003, only three states limited indoor tanning by minors. *See Skin Cancer: State Regulations Decrease Youth Access to Indoor Tanning*, MEDICAL LETTER ON THE CDC & FDA, Sept. 11, 2005, at 144 [hereinafter MEDICAL LETTER] (“[I]n 2003, only three states had set limits for indoor tanning customers: Texas at age 13 years, Illinois at age 14 years and Wisconsin at age 16 years.”). By 2006, nineteen more states had passed regulations of indoor tanning by minors. Vitello, *supra* note 5. In the 2007 legislative session, sixteen states introduced new bills on the topic, and as of February 2009, at least twenty-nine states and four counties regulate indoor tanning for minors in some way. *See* National Conference of State Legislatures, Tanning Restrictions for Minors: A State-by-State Comparison, <http://www.ncsl.org/programs/health/tanningrestrictions.htm> (last visited Apr. 27, 2009) [hereinafter Tanning Restrictions].

224. *See* ARIZ. ADMIN. CODE § R12-1-1414(A)(2) (2008); CAL. BUS. & PROF. CODE § 22706(b)(3), (4) (Deering 2007 & Supp. 2008); CONN. GEN. STAT. ANN. § 19a-232(b) (West Supp. 2008); FLA. STAT. ANN. § 381.89(7) (West 2007); GA. CODE ANN. § 31-38-8(b) (2006); ILL. ADMIN. CODE tit. 77, § 795.190(c) (2007); IND. CODE ANN. § 25-8-15.4-15 to -16 (West 2008); KY. REV. STAT. ANN. § 217.922 (LexisNexis 2007); LA. REV. STAT. ANN. § 2714.E. (2007); 10-144-223 ME. CODE R. § 12A(3)(f) (Weil 2007); MASS. GEN. LAWS. ANN. ch. 111, § 211 (West 2007); MICH. COMP. LAWS ANN. § 333.13405(2) (West 2008); MINN. STAT. ANN. § 325H.08 (West 2007); 15-78-2 MISS. CODE R. § 100.12.3.e. (Weil 2007); N.H. REV. STAT. ANN. § 313-A:31 (LexisNexis 2005); N.J. STAT. ANN. § 26:2D-82.1 (West 2007); N.Y. PUB. HEALTH LAW § 3555 (McKinney 2007); N.C. GEN. STAT. ANN. § 104E-9.1(a) (West 2007); N.D. CENT. CODE § 23-39-05 (2007); OHIO ADMIN. CODE. 4713:19-09(B) (2009); OR. ADMIN. R. 333-119-0090(2) (2008); S.C. CODE ANN. § 61-106-4.5 (2007); TENN. CODE ANN. § 68-117-14 (2006); TEX. HEALTH & SAFETY CODE ANN. § 145.008(e)–(g) (Vernon Supp. 2007); UTAH CODE ANN. § 26-15-13(4) (West 2007); VA. CODE ANN. § 59.1-310.3(B) (West 2008); WIS. STAT. ANN. § 255.08(9)(a) (West 2007); R.I. DEP’T OF HEALTH, RULES AND REGULATIONS FOR THE REGISTRATION OF TANNING FACILITIES Part III § 9.5 (1998).

225. *See, e.g., supra* note 113 (discussing the reasons why WHO has recommended banning teens from tanning); Saranow, *supra* note 3 (“Many doctors believe [rising incidents of skin cancer] may have to do in part with indoor tanning, and that teens may be especially susceptible to skin cancer because their cells are dividing and changing more rapidly than those of adults.”); Vitello, *supra* note 5 (“[D]ermatologists . . . point to . . . the rising number of melanomas being diagnosed, studies indicating possible links between melanomas and sunburning in early life, and the popularity of

their health.²²⁶ As a result, regulating minors in this area will help protect them from increased risk in their youth, and warn them about the dangers of tanning now so they can make informed decisions about indoor tanning as adults.²²⁷ These arguments not only have strong emotional appeal, but they are also backed by strong evidence.²²⁸

In response, the indoor tanning industry claims that regulating in this area is pointless.²²⁹ First, they argue that minors only represent a very small percentage of their clientele.²³⁰ If so few minors are using salons, it may not

tanning among teenage girls—to support their proposal to bar those under 18 from indoor tanning parlors.”); see also Coley & Gilfillan, *supra* note 33 (quoting a state assemblyman: “Mounting research indicates that there is an ominous dark side when kids overexpose themselves to ultraviolet rays at a tanning salon The attractive look kids are seeking today can lead to malignant melanoma tomorrow.’ . . . ‘[I]ndoor commercial tanning . . . is one of the most avoidable risk factors for skin cancer.”); Scharfenberg, *supra* note 8 (“Concerned about the perils of skin cancer, Mr. Rogowsky is leading the charge for a countywide ban on indoor tanning for anyone under 18. ‘I’m convinced that [tanning is] very dangerous and not necessary,’ he said”); MEDICAL LETTER, *supra* note 223 (“Changing the tanning behavior of minors is a goal for skin cancer prevention given that adolescence is a critical period during which UV radiation increases skin cancer risk.”).

226. See, e.g., Sen. Fuschillo: *Weisenberg Bill to Protect Teenagers from Skin Cancer Passed by State Legislature*, U.S. STATES NEWS, July 10, 2006 [hereinafter *Weisenberg Bill*] (quoting a state senator: “Right now, many teenagers are flocking to tanning salons to look good before hitting the beach, but they often don’t concern themselves with the potential health hazards associated with indoor tanning, such as skin cancer, eye injury, skin rashes, and skin wrinkling.”); Dell’Amore, *supra* note 27 (“If you’re of age, you can go to a bar and drink and smoke. But if you’re not of age, you don’t have the same reasoning. You need guidance from society—either from parents or the law—about whether you should expose yourself to something you know causes cancer.”). Many advocates of tanning regulation for minors have analogized banning teens from tanning to banning teens from smoking. See, e.g., Coley & Gilfillan, *supra* note 33 (“Like smoking in earlier generations, young people often did not realize the long-lasting dangerous effects of overexposure to UV rays until fairly recently.”); Vitello, *supra* note 5, at 1 (“[W]e don’t sell cigarettes to minors, and indoor tanning is similar—we know it will cause cancer. . . . No one under 18 should be allowed to use those things.”). This is generally based on the belief that teens are less likely to make informed decisions about the risks of tanning and their health. See *id.* As an example of teens’ lack of knowledge about the risks of indoor tanning, four teenage tanners were asked what they thought about the possible link between indoor tanning and skin cancer. See Burchfield, *supra* note 8. Cary, age fourteen, said, “It scares me. I watch myself when I do it and be careful not to burn.” *Id.* Sarah, age fifteen, said, “It’s kind of scary. That’s why I don’t stay in it really long. I don’t go enough to cause skin cancer.” *Id.* Patrick, age seventeen, said, “I never really think about skin cancer.” *Id.* Lastly, Ashley, age seventeen, said, “I know it causes skin cancer and wrinkles. I’m young right now, though, and I don’t think anything of that. I won’t go as much when I get older so I won’t get cancer.” *Id.*

227. See *supra* notes 225–26.

228. See *id.* (discussing some of the evidence that supports restricting indoor tanning access by minors); *supra* notes 110–111 and accompanying text (discussing some studies that have indicated minors are more at risk of developing skin cancer from UV exposure than adults).

229. See, e.g., Vitello, *supra* note 5.

230. *Id.* ITA executive director John Overstreet has claimed, “very few youngsters [use] our

be worth the time and money spent to enact minor-specific regulations. Second, critics often argue that if teens are denied the ability to tan at salons, they will just go lie outside to tan.²³¹ They argue such a result would render the regulation pointless, and also argue that tanning outdoors is more dangerous.²³² Third, some argue that restricting teen tanning is equivalent to telling parents how to raise their kids.²³³ They assert that the decision regarding whether a minor should be allowed to tan is better left to the minor's parent.²³⁴ Lastly, the indoor tanning industry continues to emphasize the "benefits" of indoor tanning and claim that the connection to cancer is still "inconclusive."²³⁵

Nevertheless, states are passing new regulations restricting teen tanners.²³⁶ However, while many health organizations have recommended banning indoor tanning for anyone under eighteen,²³⁷ outright bans based on age are currently the least common type of teen tanning restriction.²³⁸ In

facilities anyway, and that making these laws—there's no point to it." *Id.* Additionally, some salons reportedly self-regulate by not allowing minors below a certain age to tan. *See, e.g.,* Rob Johnson, *Political Hot Topic*, THE ROANOKE TIMES, Feb. 16, 2007, at C10. To counter the argument that regulating in this area is pointless due to self-regulation already in place, regulation supporters argue that it is needed to ensure the protection of youth, and if salons really are already self-regulating, there should be no harm in making it official. *See Our Opinion: His and Misses: Another 'Sunshine' Law Worth Supporting*, COURIER NEWS, June 10, 2006, at A-7 [hereinafter *Our Opinion*].

231. *See, e.g.,* Netter, *supra* note 131 ("[One critic] predicted that . . . prohibit[ing] indoor tanning for those under 16 would send many teenagers into their backyards to tan unsupervised."). The indoor tanning industry often claims that tanning indoors is "safer" than tanning outdoors because it is a "controlled environment." *See, e.g.,* Henderson, *supra* note 124. If this were true, causing minors to head outdoors to tan may be a good reason to forego restricting minors' use of indoor tanning facilities. However, research has shown that tanning beds actually emit more UV radiation than the sun. *See, e.g.,* Lim et al., *supra* note 14, at 871. One study of tanning salons in North Carolina revealed that the average UVA output of tanning beds was four-times higher than the output of the sun at noon on a summer day in Washington D.C. *Id.* Of course, the sun still emits UV radiation, so the possibility of minors heading out into the sun if indoor tanning is banned is still of some concern. However, the concern is not validly based on any possibility that indoor tanning is safer than tanning in the sun. *See id.* This merely suggests that more than just regulation may be needed in order to protect minors from the dangers of UV radiation. For a discussion of some of these possible alternatives, see *infra* Part V.

232. *See supra* note 231.

233. *See, e.g.,* Vitello, *supra* note 5. One critic of state regulation claimed that what legislatures were doing by enacting restrictions of teen tanning was equivalent to "telling people how to raise their kids." *Id.* However, those seeking to regulate teen tanning claim to be doing just the opposite: one lawmaker who introduced a teen tanning bill "said its intent was . . . 'to put parents back into the equation.'" *Id.*

234. *Id.*

235. *See supra* notes 125–27 and accompanying text.

236. *See supra* note 224 (listing current state restrictions of indoor tanning by minors and noting the increase of such regulation in recent years).

237. *See supra* notes 112–14 and accompanying text.

238. At least six states have some form of outright ban for minors under a certain age, usually fourteen, without consent from a parent or guardian. *See* CAL. BUS. & PROF. CODE § 22706(b)(3)

fact, no state or county has yet passed a regulation that strict.²³⁹ Instead, many states focus on some form of parental consent requirement.²⁴⁰ Enacting a parental consent requirement addresses the concern that the government should not tell parents how to raise their children.²⁴¹ Rather than telling parents what to do—which would be the effect of an outright ban—the parental consent requirement puts the decision in the hands of parents as to whether to allow their children to tan.²⁴²

The most common form of the parental consent regulation is the risk waiver.²⁴³ The risk waiver requires parents to sign a form acknowledging

(Deering Supp. 2008) (under fourteen prohibited); ILL. ADMIN. CODE tit. 77, § 795.190(c) (2007) (under fourteen prohibited); N.J. STAT. ANN. § 26:2D-82.1.a (West 2007) (under fourteen prohibited); N.C. GEN. STAT. ANN. § 104E-9.1(2) (West 2007) (under thirteen prohibited); N.Y. PUB. HEALTH LAW § 3555.4 (McKinney 2007) (under fourteen prohibited). Currently, Wisconsin has the strictest law in this area, prohibiting indoor tanning by all minors under age sixteen. WIS. STAT. ANN. § 255.08(9)(a) (West 2007). While not an outright prohibition, a few states prohibit use by minors of a certain age unless they have authorization from a licensed physician. *See, e.g.*, N.H. REV. STAT. ANN. § 313-A:31(II) (LexisNexis 2005) (licensed physician must authorize use for minors under age fourteen); TEX. HEALTH & SAFETY CODE § 145.008(f) (Vernon 2007) (need written permission from physician for use of anyone under age thirteen, and parent must remain at the facility while minor uses the device).

239. *But see supra* note 238 (Wisconsin bans tanning for minors under sixteen).

240. *See generally* Tanning Restrictions, *supra* note 223.

241. *See supra* note 233.

242. *See, e.g.*, Vitello, *supra* note 5 (“[T]he . . . lawmaker who introduced the bill[] said its intent was . . . ‘to put parents back into the equation.’”).

243. At least sixteen states have enacted this form of regulation. *See* CAL. BUS. & PROF. CODE § 22706(b)(4) (anyone between ages fourteen and eighteen must get his or her parent or legal guardian to sign a consent form acknowledging the parent or legal guardian has read and understood the risks and consents to the minor’s use); FLA. STAT. ANN. § 381.89(6)(g) (West 2007) (ages fourteen to eighteen); IND. CODE ANN. § 25-8-15.4-16 (West 2008) (ages sixteen to eighteen); KY. REV. STAT. ANN. § 217.922(1) (LexisNexis 2007) (ages fourteen to eighteen); LA. REV. STAT. ANN. § 40:2714(E) (2008) (ages fourteen to eighteen); MASS. GEN. LAWS ANN. ch. 111, § 211 (West 2003 & Supp. 2008) (ages fourteen to seventeen); MICH. COMP. LAWS ANN. § 333.13405 (West 2008) (anyone under eighteen); MINN. STAT. ANN. § 325H.08 (West 2007) (anyone under sixteen); N.D. CENT. CODE § 23-39-05(1)(a) (2008) (ages fourteen to eighteen); N.J. STAT. ANN. § 26:2D-82.1 (West 2007) (ages fourteen to eighteen); N.Y. PUB. HEALTH LAW § 3555.2 (McKinney 2007) (ages fourteen to eighteen); OR. ADMIN. R. 333-119-0900(2) (2008) (anyone under eighteen); R.I. DEP’T OF HEALTH RULES AND REGS. FOR THE REGISTRATION OF TANNING FACILITIES Part III § 9.5 (2007) (anyone under eighteen); TEX. HEALTH & SAFETY CODE ANN. § 145.008(g) (Vernon Supp. 2007) (ages sixteen to seventeen); UTAH CODE ANN. § 26-15-13 (West 2007) (anyone under eighteen); VA. CODE ANN. § 59.1-310.3 (West 2008) (anyone under fifteen). Additionally, nine of these states require the risk waiver to be signed in the presence of an operator. *See* CAL. BUS. & PROF. CODE § 22706(b)(4); IND. CODE ANN. § 25-8-15.4-16; LA. REV. STAT. ANN. § 2714(E); MINN. STAT. ANN. § 325H.08; N.D. CENT. CODE § 23-39-05(1)(a); N.Y. PUB. HEALTH LAW § 3555.2; OR. ADMIN. R. 333-119-0900(2); UTAH CODE ANN. § 26-15-13; R.I. DEP’T OF HEALTH RULES AND REGULATIONS FOR THE REGISTRATION OF TANNING FACILITIES Part III § 9.5. This additional requirement helps ensure the parent’s signature was not forged, and the parent did in fact read and acknowledge the

they have read and understand the risks of indoor tanning before minors of specified ages can use a tanning bed.²⁴⁴ The major benefit of this requirement is that it ensures that a parent has been informed of the risks of indoor tanning and has consented before allowing a minor to tan indoors. This requirement addresses the concern that minors are less likely to make informed decisions about behaviors which affect their health by ensuring that an informed adult is making the decision for them.

The second most common form of parental consent regulation is less stringent and simply requires minors of specified ages to obtain written consent from a parent or guardian before using a tanning bed.²⁴⁵ Unlike the risk waiver requirement, this type of regulation does not ensure that a parent is making an informed decision.²⁴⁶ A parent may sign the form just because

risks of indoor tanning before consenting to the child's use of a tanning bed.

The term "risk waiver" merely refers to a form parents are required to sign acknowledging they have read and understood the risks of indoor tanning before allowing their minor to use the facility. An actual waiver of risk—waiving the liability of the salon for any tanning related injury—is not within the scope of the state regulations in this area. Whether salons may choose to require customers to sign such a waiver, and whether such a waiver is enforceable, is beyond the scope of this Comment. *See supra* note 210 (discussing potential liability of the indoor tanning industry).

244. *See* CAL. BUS. & PROF. CODE § 22706(b)(4) ("The written consent form required by this paragraph shall state that the parent or legal guardian has read and understood the warnings given by the tanning facility, consents to the minor's use of an ultraviolet tanning device, and agrees that the minor will use the protective eyewear that the tanning facility provides.").

245. At least ten states currently have this basic written consent requirement. *See* ARIZ. ADMIN. CODE § R12-1-1414(A)(2) (2008) ("The operator shall . . . [p]revent use of the tanning equipment by anyone under 18 years of age unless the person has written permission from a parent or guardian."); CONN. GEN. STAT. ANN. § 19a-232(b) (West Supp. 2008) (under age sixteen); GA. CODE ANN. § 31-38-8(b) (2006) (minors); ILL. ADMIN. CODE tit. 77, § 795.190(c) (2007) (ages fourteen through seventeen); 10-144-223 ME. CODE R. § 12.A(3)(f) (Weil 2007) (under age eighteen); 15-78-2 MISS. CODE. R. § 100.12.3(e) (Weil 2007) (under age sixteen); N.H. REV. STAT. ANN. § 313-A:31(I) (LexisNexis 2005) (under age eighteen); OHIO ADMIN. CODE 4713:19-09(b) (2009) (under age eighteen); S.C. CODE ANN. § 61-106-4.5 (2007) (under age eighteen); TENN. CODE ANN. § 68-117-104(b)(3) (2006) (persons between ages fourteen and eighteen). Additionally, at least five of these states require the parent or guardian to sign the consent form in the presence of an operator. *See* GA. CODE ANN. § 31-38-8(b) (parent or legal guardian must sign at the tanning facility); ILL. ADMIN. CODE tit. 77, § 795.190(c) (parent must sign in presence of facility operator); N.H. REV. STAT. ANN. § 313-A:31(I) (parent must sign in presence of operator and be present at initial tanning session); S.C. CODE ANN. § 61-106-4.5 (2007) (must be signed in presence of operator); TENN. CODE ANN. § 68-117-104(b)(3) (minor must be accompanied by parent who signs form, or must present a notarized consent form).

Some states require the parent to receive warning materials, but do not require the parent to acknowledge receiving or reading them. *See, e.g.*, 15-78-2 MISS. CODE. R. § 100.12.3(e) (Weil 2007) ("The parent or guardian shall have been provided with [a copy of the warnings]"). Given that the parent is not required to read these warnings, but only to receive them, the states with this type of requirement have been lumped together with the "written consent" states listed here rather than the risk waiver states.

246. While the risk waiver ensures that parents have read and understood the risks of indoor tanning, *see supra* note 244, just requiring written consent does not ensure that parents have any knowledge of the risks, and therefore, they may not be making informed decisions when giving consent. *See, e.g.*, ARIZ. ADMIN. CODE § R12-1-1414(A)(2) (requiring written consent, but not any

a child asks him or her to sign it, and yet have no knowledge of the actual risks. This may seem like a pointless requirement for those who seek to ensure that an informed decision about the risks is made before allowing a teen to tan. However, if the goal is simply to ensure a parent is involved in the process—regardless of actual knowledge of the risks—then this regulation serves its purpose.²⁴⁷ Additionally, though not required to acknowledge the risks, at least some parents will seek more information about tanning on their own before allowing their teen to tan.

The last form of parental consent regulation requires parents to accompany minors under a certain age—typically fourteen—to the tanning salon.²⁴⁸ States which have these requirements generally have them for younger minors in conjunction with written consent or risk waiver requirements for older minors.²⁴⁹ Of the three types of parental consent regulations, this type may be the most effective in ensuring parental involvement in the decision to allow teens to tan. By requiring the parent to accompany the teen, it guarantees the minor has parental consent. Being forced to give up their own time, parents may be more likely to read up on the risks. Additionally, it puts an extra obstacle in the path for the teen, and places a burden on the parent that may lead to fewer teens tanning and, ultimately, fewer teens being exposed to the dangers of tanning at a young age.

While each of these types of restrictions involves parents to some degree, a primary concern is that sometimes parents are the worst offenders.²⁵⁰ Some parents want their children to look good for pictures or

notification or acknowledgement of risks).

247. Despite questions of whether the parent is making an informed decision, the states still ensure a parent is involved to the extent they have to decide to allow the minor to tan before giving written consent. *See supra* note 245.

248. At least eight states have this type of regulation. *See* FLA. STAT. ANN. § 381.89(8) (West 2007) (“A minor under the age of 14 must be accompanied by a parent or legal guardian when using a tanning device.”); 820 IND. ADMIN. CODE 5-1-31(a) (2008) (under age sixteen); KY. REV. STAT. ANN. § 217.922(2) (LexisNexis 2007) (under age fourteen); LA. REV. STAT. ANN. § 40:2714(E) (2007) (under age fourteen); MASS. GEN. LAWS ANN. ch. 111, § 211 (under age fourteen); N.H. REV. STAT. ANN. § 313-A:31(II) (under age fourteen); TENN. CODE ANN. § 68-117-104(b)(4) (2006) (under age fourteen); TEX. HEALTH & SAFETY CODE ANN. § 145.008(g) (Vernon Supp. 2007) (ages thirteen to fifteen).

249. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 111, § 211 (requiring parent or legal guardian to accompany minors under fourteen, and parental consent for ages fourteen to seventeen).

250. *See, e.g.* Johnson, *supra* note 230 (“Tommy Hubbard, owner of Caribbean Tan, [asserted that] [t]he biggest potential offenders to the age limit aren’t teens but their parents [who] ‘try to get [tanning salons] to let their kids tan. Some want them to look prettier for beauty pageants.’”). *See also* Ardis L. Olson & Pamela Starr, *The Challenge of Intentional Tanning in Teens and Young Adults*, 24 DERMATOL. CLIN. 131, 133 (2006) (“Unfortunately, it is common for parents to see

pageants and ignore the risks involved.²⁵¹ Therefore, leaving the choice in parents' hands may not be sufficient to protect minors from the dangers of indoor tanning. The fact that some parents may not care about the risks limits the effectiveness of this type of regulation. Presumably, health officials had this in mind when they recommended outright bans for anyone under eighteen.²⁵² However, at least for now, state legislatures have not chosen to follow this advice.²⁵³ Instead, most have accepted the possibility that some parents will not make informed decisions in favor of leaving the decision of whether to allow teens to tan with parents rather than the government.

The effectiveness of these restrictions will also depend on the level of their enforcement. Several limited studies have found compliance with state-level teen tanning restrictions is low.²⁵⁴ Even states which have enforcement and penalty provisions in place have been found to have low compliance.²⁵⁵ However, the fact that non-compliance is not one hundred percent indicates that at least some minors are being afforded protection; but states will need to consider enforcement issues if they want to guarantee that these protections extend to all minors.²⁵⁶

tanning as benign and to give permission. In addition, mothers who tan indoors themselves are likely to give their teens permission. Our data show that one third of teens who tan indoors have a mother who uses tanning lights.”).

251. See Johnson, *supra* note 230.

252. See *supra* note 117 and accompanying text.

253. See *supra* note 239 (listing only six states which currently have bans for minors under a certain age).

254. See, e.g., MEDICAL LETTER, *supra* note 223 (citing a study that indicated 77% of facilities in Texas would allow a twelve-year-old to use the facility, and 83% would allow a fifteen-year-old to tan without parental accompaniment, both contrary to Texas law); Jean L. Forster et al., *Compliance with Restrictions on Sale of Indoor Tanning Sessions to Youth in Minnesota and Massachusetts*, 55 J. AM. ACAD. DERMATOL. 962, 962 (2006) (“Eighty-one percent of businesses sold a session to an underaged buyer on at least one of two tries.”); Ami L. Hurd et al., *Comparing Two Methods of Measuring Legislation Compliance Among Indoor Tanning Facilities*, 54 J. AM. ACAD. DERMATOL. 433, 433 (2006) (“Facility compliance with the frequency variable . . . was 25.5% and . . . [the] rates for the parental consent variable were 73.3%.”).

255. See, e.g., Forster et al., *supra* note 254, at 966 (finding no difference in compliance rates between two states where one state had enforcement and penalty provisions and the other did not).

256. In at least one study, two states with long-standing youth access laws were found to have high levels of compliance. See MEDICAL LETTER, *supra* note 223. The authors of the study noted that higher compliance rates in Illinois and Wisconsin suggested “the potential for successful tanning industry youth access regulation.” *Id.* This suggests that perhaps the lack of compliance problem lies in a lack of information regarding applicable laws. States may be able to boost compliance by ensuring each salon is aware of applicable minor restrictions as well as enforcement and penalty laws.

IV. FUTURE REGULATION: PREDICTIONS AND RECOMMENDATIONS

The current state of regulation begs the question of whether more—and how much more—regulation lies in the future. As has already been discussed, despite increasing regulation of indoor tanning since the 1970s, the popularity of indoor tanning has also continued to increase.²⁵⁷ This may suggest that regulation is not effective in addressing the risks of indoor tanning. However, some more recent evidence indicates that the increase in state and local regulation is beginning to impact the popularity of tanning.²⁵⁸ In light of this evidence, multiple avenues of future regulation should be considered including tougher FDA regulations,²⁵⁹ more state regulations,²⁶⁰ and the possibility of a national minimum age²⁶¹ or national ban.²⁶²

A. Tougher FDA Regulations

The increasing state-level regulations will likely put pressure on the federal government to address some of the shortcomings of the current FDA regulation. When the FDA first proposed the standard to regulate sunlamps, the agency said it was willing to consider further regulation to ensure consumer protection.²⁶³ Thirty years later, as studies continue to show serious health risks related to indoor tanning and a general lack of compliance with FDA recommendations, the FDA may finally be willing to consider further regulation. The fact that Congress passed the TAN Act²⁶⁴ after twenty years without implementing any new regulations²⁶⁵ suggests that Congress has started to listen to those seeking stricter regulations. As a result, more federal-level regulation may be coming soon.

If the FDA does consider tougher regulations, given the low compliance with the FDA's "recommendations" on the warning labels,²⁶⁶ perhaps the FDA should start by making these recommendations into requirements. In

257. See *supra* note 158 and accompanying text.

258. See *supra* note 122 (noting that the recent surge of "antitanning legislation" affected the indoor tanning industry's season by sixteen percent in 2007).

259. See *infra* Part IV.A.

260. See *infra* Part IV.B.

261. See *infra* Part IV.C.1.

262. See *infra* Part IV.C.2.

263. See Proposed Rule, *supra* note 70, at 65,189.

264. See *supra* notes 160–64 and accompanying text (discussing the TAN Act).

265. See *supra* note 118 (discussing the limited changes to the FDA regulation since its enactment in 1979).

266. See *supra* note 152 (discussing salon compliance with warning label recommendations).

fact, many state regulations—such as requiring customers to wear protective eyewear—have done just that.²⁶⁷ In addition to these requirements, state-level regulations would be a good place to look for any further regulations worth enacting on a national level.²⁶⁸ Of course, the FDA will also have to consider the costs of implementing each potential regulation.²⁶⁹ Such costs would include costs of enforcement, costs of implementation for the salons, and costs that may be passed on to consumers.²⁷⁰ However, much like the initial regulation in the 1970s, the FDA will likely find that greater protection afforded to consumers is worth the cost.²⁷¹

B. State Level Regulation

With the current trend of increasing state-level regulation there is no doubt that more is coming. As state-level regulations continue to gain more attention and publicity, states which already regulate will likely pass additional regulations, and more importantly many of the twenty-plus states which currently do not have any regulation will likely begin regulating as well.²⁷² State regulations such as mandating that consumers wear protective eyewear, mandating training for operators, and requiring written warnings to be given to each customer offer greater protection to consumers and appear to be gaining popularity in the states. In states which currently do not have

267. See, e.g., *supra* note 201 (listing some state regulations that require all customers to wear protective eyewear).

268. The states have adopted a wide range of regulations that go above and beyond the current federal level regulation. See *supra* Part III.B.

269. See, e.g., Final Rule, *supra* note 73, at 65,352. When the FDA first considered a possible safety standard, the agency had to prepare an economic impact statement assessing the costs of implementing the proposed regulation. See *id.* The FDA will likely be required to create such an impact statement for any new regulation it considers.

270. See *id.* (“[The] FDA has considered the increased costs that a performance standard may impose on manufacturers and, therefore, on consumers of sunlamp products . . .”). While the FDA made no mention of consideration of enforcement costs, the FDA should consider this expense in light of the discussion above. See *supra* note 211 (discussing the need for funding for proper enforcement). See also THE SCOTTISH PARLIAMENT, THE REGULATION OF SUNBED PARLOURS BILL: SUMMARY OF RESPONSES, at 13–14, available at <http://www.scottish.parliament.uk/business/bills/pdfs/mb-conclusion/SunbedParloursBillSummary.pdf> (discussing the potential costs to local authorities, salons, and customers that would result from regulation of sunbed use).

271. See Final Rule, *supra* note 73, at 65,352 (determining the benefit to consumers outweighed the costs to manufacturers). Manufacturers bore the bulk of the costs of implementation for the original performance standard. See *id.* Tanning salons would most likely bear the costs of new FDA regulations if modeled after the states because state-level regulations generally apply to tanning salon operators. See *supra* notes 198–202. However, the FDA could justify any burden on tanning salons as the cost of doing business in an inherently dangerous industry. The FDA could even pass on the enforcement costs to the tanning salons via a federal permit requirement. Cf. *supra* note 211 (discussing state permit requirements as a method to raise funds for enforcement costs).

272. In 2007 alone, more than twenty states and localities introduced new indoor tanning legislation. See Bizzozero, *supra* note 6.

any separate regulations, consumers would benefit greatly from those states joining this trend of greater regulation.

However, while additional regulations may be desirable, it is most important that each state ensures there is an effective enforcement mechanism in place for these regulations.²⁷³ Without proper enforcement, the safety precautions adopted by the states may be virtually meaningless because tanning salons have no incentive to remain compliant.²⁷⁴ Some state regulations already include penalties for violations,²⁷⁵ but penalties alone will not be sufficient if there is no inspection program established to check for violations.²⁷⁶ Such enforcement programs will undoubtedly cost money to administer. However, states can acquire the necessary funds for enforcement from the tanning salons themselves through licensing and permitting programs. By establishing enforcement programs with proper funds to back them up, states can ensure that the regulations they enact are implemented as intended.

C. *The Possibility of a Nationwide Minimum Age or Nationwide Ban*

The increase in regulation of the indoor tanning industry raises the question of whether regulators could be headed in the direction health groups have been recommending for years.²⁷⁷ More specifically, the growing number of restrictions on access of minors suggests that we could be headed in the direction of a nationwide minimum age, or even a nationwide ban. The FDA has suggested it has the power to enact both of these restrictions, but it remains questionable whether the FDA will actually take such action.

1. Nationwide Minimum Age

Given the increase in the number of states setting a minimum age for tanning,²⁷⁸ there may be an effort to set a federal minimum tanning age in

273. See *supra* notes 221–22 and accompanying text (discussing the need for enforcement for current state level regulations)

274. See *supra* notes 221–22.

275. See *supra* note 211 (listing some examples of state penalty provisions).

276. See *id.* Some states have already provided for inspections in the regulation. *Id.*

277. See *supra* notes 112–14 (discussing major health group recommendations to ban indoor tanning except for medical purposes, or to at least ban it for those under eighteen).

278. State-level restrictions of minors are the fastest growing type of regulation. Bizzozero, *supra* note 6. In fact, a majority of the indoor tanning legislation introduced in 2007 consisted of teen tanning restrictions. *Id.*

the near future.²⁷⁹ Analogizing indoor tanning to smoking cigarettes or drinking alcohol not only provides support for setting a minimum tanning age, but also provides insight into whether the FDA will attempt to set such a standard. The rationale for setting minimum smoking and drinking ages could easily be extended to cover indoor tanning as well.²⁸⁰ However, the minimum smoking and drinking ages—while they seem like national standards—are actually set by each state individually.²⁸¹ Due to the circumstances surrounding federal efforts to set minimum ages for these activities,²⁸² whether a federal minimum tanning age could be enacted is debatable.²⁸³

279. France has prohibited tanning for people under eighteen since 1997. Levine et al., *supra* note 29, at 1041. In some places, minimum tanning ages may be ineffective due to unenforceability. See, e.g., Oliver Burkeman, *Going for the Burn*, THE GUARDIAN, Feb. 24, 2006, available at <http://lifeandhealth.guardian.co.uk/fashion/story/0,,1716787,00.html>. For example, in the United Kingdom, coin-operated, unstaffed tanning beds are common. See *id.* Such tanning options would make it virtually impossible to enforce a minimum age standard. See *id.* However, the United States does not appear to have any coin-operated salons, and therefore, U.S. regulators would not be faced with that issue in attempting to set a minimum tanning age.

280. For example, one rationale for setting a minimum age for smoking is the belief that “long-term health consequences are greater the earlier one begins smoking.” Joni Hersch, *Teen Smoking Behavior and the Regulatory Environment*, 47 DUKE L.J. 1143, 1143 (1998) (“[B]ecause the long-term health consequences are greater the earlier one begins smoking, one focus of recent anti-smoking campaigns and initiatives has been preventing teens from beginning to smoke.”). The same rationale is used to justify a minimum age for alcohol consumption. See, e.g., Judith G. McMullen, *Underage Drinking: Does Current Policy Make Sense?*, 10 LEWIS & CLARK L. REV. 333, 341 (2006) (“[R]ecent research . . . suggests alcohol can have an especially detrimental effect on the developing brain. . . . [D]rinking by adolescents and young adults could result in long-term brain damage, including diminishment of memory, reasoning, and learning abilities.”). Similarly, the adverse health effects of tanning are believed to be greater the earlier one begins tanning. See *supra* note 225 (discussing evidence that tanning is more risky for minors than adults). Additionally, minors are often limited by laws when it comes to making decisions which affect their health and welfare. See McMullen, *supra* note 280, at 340–61 (discussing policy rationales for minimum ages for drinking, medical decision making, compulsory education, smoking, and drivers licenses). Such “restrictions on activities by minors are expected and normally honored by parents, law, and society.” *Id.* at 333.

281. See Hersch, *supra* note 280, at 1149 (listing the minimum smoking ages for each of the fifty states); McMullen, *supra* note 280, at 333 (“Currently, all 50 states have a minimum drinking age of 21.”).

282. See Lim et al., *supra* note 14, at 872–73. In 2000, the Supreme Court struck down an attempt by the FDA in 1996 to set a federal minimum smoking age at eighteen. See *id.* at 872 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)). Instead, each state government sets minimum smoking ages. See *id.* at 872; Hersch, *supra* note 280, at 1149. Rather than attempt to directly set a federal minimum age for drinking, Congress—via its spending power—chose to attach a minimum drinking age as a condition for states to receive certain federal highway funds. See Lim et al., *supra* note 14, at 872. The Supreme Court later held this exercise of Congress’s spending power was constitutional. *South Dakota v. Dole*, 483 U.S. 203, 212 (1987). In the case, *South Dakota* challenged the constitutionality of Congress’s use of the spending power to indirectly require states to raise their minimum ages. *Id.* at 205. *South Dakota* claimed that Congress did not have the power to set a minimum drinking age. *Id.* The Supreme Court held that “[e]ven if Congress [lacked] the power to impose a national minimum drinking age directly,” its use of the spending power to encourage state action was valid. *Id.* at 212. The Court noted that the states were free to

However, even if a federal minimum age is not possible, it is likely more states will continue to enact minimum ages until there is effectively a minimum age across the country similar to those for tobacco and alcohol consumption.²⁸⁴ What that minimum age will be, however, is somewhat questionable. No state has currently set a minimum age as high as recommended by health groups.²⁸⁵ However, the current trend in regulating indoor tanning by minors could ultimately lead to most states enacting a minimum age closer to the age health groups have suggested. In 2007, two states—Colorado and Vermont—introduced bills that would ban indoor

choose not to enact the minimum age. *Id.* at 211–12. Therefore, although the minimum drinking age is twenty-one in all fifty states, it is not a federal law. *See supra* note 281.

283. The Supreme Court's response to the FDA's attempt to set a minimum smoking age seems to indicate that an FDA attempt to set a minimum tanning age would not withstand Supreme Court scrutiny. *See supra* note 282. However, the FDA's attempt to set a minimum age for smoking was struck down based on a finding that Congress had precluded the FDA from regulating tobacco products. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 142 (“Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA’s jurisdiction.”). Therefore, the minimum smoking age was not struck down because such a standard was invalid in itself, but rather because the Court found the FDA did not have authority to regulate the product at all. *See id.* at 142–43. However, the FDA has authority to regulate indoor tanning. *See supra* Parts II.B and III.A.1 (discussing the FDA’s authority and regulation of indoor tanning). Should the Court hear a case on the issue of a minimum tanning age—given the FDA does have the authority to regulate the underlying product—it seems more likely the Court would find such a requirement to be valid. However, in the event the Court held the FDA could not directly set such a standard, Congress may be able to do so indirectly through its spending power as it did with the minimum drinking age. *See supra* note 282. For example, Congress could grant federal funds for skin cancer prevention education in public schools and make its receipt conditional on states setting a minimum indoor tanning age. While such an outcome would not result in a federal minimum age, it would likely encourage more states to set their own. *Cf. Dole*, 483 U.S. 203. One important consideration is that the spending clause power is not unlimited. *Id.* at 207. Congress’s exercise of the spending power must be “in pursuit of ‘the general welfare,’” the condition must be unambiguous, and must be related “to the federal interest in particular national projects or programs.” *Id.* Also, the “financial inducement” by Congress may be found invalid if it is too coercive. *See id.* at 211. A national minimum age for indoor tanning would clearly be in pursuit of the general welfare by protecting minors from the risks of indoor tanning. *See supra* notes 225–26 and accompanying text (discussing the rationale for restricting indoor tanning use by minors). There is no doubt this would further “the federal interest” in reducing incidents of skin cancer. *See supra* notes 22–24 (discussing Congressional findings regarding the skin cancer epidemic). Further, it is unlikely such a condition could be considered “too coercive.” States could easily turn down the money for a skin cancer education program and continue to address skin cancer concerns in whatever way they currently do so. Therefore, as long as the condition that each state set a certain minimum age to receive specific education funds was unambiguous, such a method for encouraging states to increase their minimum tanning age would likely be successful. This would not create a federal minimum age, but it could ultimately result in every state enacting a minimum age.

284. *See supra* note 281 and accompanying text (all fifty states now have minimum smoking and drinking ages).

285. Health groups have recommended banning indoor tanning for anyone under the age of eighteen. *See supra* note 117–14.

tanning for anyone under eighteen.²⁸⁶ Although these efforts failed, it signals that states are beginning to consider adopting stricter minimum age regulations.

A nationwide minimum tanning age would afford greater protection to minors whether it comes through state-level regulation or through the FDA. However, a minimum age restriction alone will not be enough to protect minors from the dangers of tanning. Minors who are banned from tanning salons can go lie outside to tan, and still be subjected to the dangerous health risks of UV exposure.²⁸⁷ It is debatable whether tanning indoors or outdoors is safer,²⁸⁸ but ultimately both can lead to serious injuries including skin cancer.²⁸⁹ Therefore, to truly address the problem of teen tanning, regulators and health officials need to do more than just set a minimum age at the tanning booth. Teens also need education about the dangers of all UV exposure,²⁹⁰ and suggestions for healthier alternatives to tanning.²⁹¹ A minimum tanning age coupled with these alternatives will ensure the utmost protection for minors from the dangers of tanning—both indoors and out.

2. Nationwide Ban

Health groups continue to advocate for an outright ban of indoor tanning except for medical purposes.²⁹² Given that indoor tanning increases the risk

286. See Tanning Restrictions for Minors, A State-by-State Comparison, Mar. 2007, available at http://www.skincancerprevention.org/portals/0/powerpoint/Tanning_Restrictions.pdf. The Colorado bill—SB 07-023—would have prohibited the use of tanning beds by anyone under eighteen without a prescription from a doctor. *Id.* at 1–2. The Vermont bill—H 215—would have prohibited use by anyone under eighteen. *Id.* at 3.

287. See *supra* note 231. Like the UV exposure emitted from tanning beds, UV exposure from the sun also causes the skin to tan, and is also known to cause skin cancer. See *Sun Damage*, *supra* note 2.

288. Some believe lying outside may actually be more dangerous than lying in a tanning bed because outside teens are unsupervised and more likely to stay outside too long and burn. See, e.g., Henderson, *supra* note 124. This argument generally comes from the indoor tanning industry. See *id.* However, some evidence suggests indoor tanning is actually more dangerous than tanning in the sun. See, e.g., Lim et al., *supra* note 14, at 871 (“Compared to the output of the summer noontime sun in Washington, D.C. the average UVA output of the tanning bed was 4-fold higher . . .”). In fact, several states have regulated indoor tanning based at least in part on studies indicating that indoor tanning may actually be more dangerous than outdoor tanning. See, e.g., CAL. BUS. & PROF. CODE § 22701 (Deering 2007) (“The Legislature finds . . . [m]any physicians and scientists now warn that the risks associated with suntanning are greater when tanning with artificial ultraviolet light.”); COLO. REV. STAT. ANN. § 25-5-1002(1) (West 2008) (“Artificial tanning devices may emit more than ten times the amount of ultraviolet radiation than normal exposure to the sun.”); LA. STAT. ANN. § 40:2702(1) (2007) (“Many physicians and scientists warn that the risks associated with suntanning are greater when tanning with artificial ultraviolet light.”).

289. See *Sun Damage*, *supra* note 2.

290. For a discussion of this non-regulatory alternative, see *infra* Part V.B.

291. For a discussion regarding the promotion of healthier alternatives to tanning, see *infra* Part V.C.

292. See *supra* notes 112–14.

of skin cancer, it makes sense to advocate removing such a dangerous product from the market. With incidents of skin cancer on the rise, banning indoor tanning altogether would eliminate one of the few known causes of skin cancer that is completely preventable.²⁹³ Additionally, an outright ban would be significantly more effective than trying to regulate the business. Even with regulations in place, it costs money to enforce those regulations and it is virtually impossible to ensure all tanning salons are in compliance. Banning tanning completely would result in greater protection for consumers and be easier than trying to administer specific regulations. Rather than trying to enforce a myriad of regulations there would only be one—no tanning beds allowed.

However, despite the known risks of indoor tanning, the chance of an outright ban coming to pass is very unlikely. When it comes to public health risks from products desired by consumers, regulators tend to focus on regulating the product rather than removing it from the marketplace.²⁹⁴ For example, cigarettes have been a known cause of various cancers for a long time and yet cigarettes are still available for purchase.²⁹⁵ Ultimately, the decision whether to use such a dangerous product is often left up to the individual. If an informed adult wants to smoke and get lung cancer, regulators will allow him or her to make that choice,²⁹⁶ just like regulators will probably continue to allow informed adults to choose to tan despite the increased risk of skin cancer and other indoor tanning related injuries.²⁹⁷

293. See *supra* note 33 (discussing the fact that indoor tanning is the most modifiable risk factor for skin cancer).

294. For example, the FDA has chosen to regulate indoor tanning rather than completely remove it from the marketplace. Final Rule, *supra* note 73, at 65,352 (“The standard for sunlamp products is being established to protect the consumer However, the agency believes sunlamps perform a function desired by the consumer and, consequently, has not penalized the prudent individual by removing this potentially hazardous product from the marketplace.”). Similarly, despite known risks related to alcohol consumption and tobacco use, those products—while regulated at state and federal levels—remain on the market for the discretion of the consumer. See McMullen, *supra* note 280, at 341–42, 359.

295. See, e.g., McMullen, *supra* note 280, at 359 (“Smoking . . . is left to the discretion of persons aged 18 and over, despite the fact that . . . [t]he health risks . . . are well-known and no longer debatable. Smoking has been clearly linked to respiratory diseases and to numerous cancers . . . [and] to heart disease and stroke.”) (footnote omitted).

296. See *id.*

297. However, some dicta in *FDA* suggests that an outright ban may actually be required by the FDA. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 142–43 (2000). The Court held that if the FDA did have authority to regulate tobacco, the FDA would be required to remove the product from the marketplace because tobacco was not “safe for its intended use.” *Id.* at 142 (“A fundamental precept of the FDCA is that any product regulated by the FDA—but not banned—must be safe for its intended use.”). Because the Court determined the FDA did not have the authority to

V. ALTERNATIVES TO REGULATION

The regulation already in place combined with the recommendations above will ensure indoor tanning is as safe as possible. However, regulation alone is not enough to protect consumers. Even if indoor tanning was completely banned, those who still wanted a tan could just go lie outside in the sun. Therefore, it is important to consider possible non-regulatory alternatives to supplement indoor tanning regulation. Some possible alternatives include self-regulation by the indoor tanning industry,²⁹⁸ education for consumers regarding the dangers of all types of UV exposure,²⁹⁹ promoting safer alternatives to tanning,³⁰⁰ and taxing indoor tanning.³⁰¹ Beyond these basic alternatives, getting consumers to stop tanning will require a fundamental change in what consumers consider beautiful skin.³⁰²

A. *Promoting Self-Regulation Including Education and Training for Salon Operators*

One non-regulatory way to provide greater protection for consumers is to promote training for tanning bed operators. Such training would help to ensure misuse of the equipment is limited. This type of regulation could be easily promoted among salons because it would help increase consumer confidence in the industry, which has come under recent fire.³⁰³ Consumers who were interested in tanning but worried about the dangers would be more likely to visit a salon that worked to ensure maximum safety for its customers. Some states already mandate training for indoor tanning

regulate, the Court did not reach the issue of whether cigarettes must be removed from the marketplace. *See id.* at 160–61. However, if a case were to reach the Supreme Court regarding the constitutionality of the FDA's current regulations regarding indoor tanning, it is possible the Court could hold that the FDA is required to remove tanning beds from the market. If the FDA determines the risk of harm to consumers from tanning outweighs any "therapeutic benefits," the FDCA would require the FDA to remove the product from the marketplace completely. *Cf. id.* at 143 ("[T]he FDA has concluded that, although tobacco products might be effective in delivering certain pharmacological effects, they are 'unsafe' and 'dangerous' when used for these purposes. Consequently, if tobacco products were within the FDA's jurisdiction, the Act would require the FDA to remove them from the market entirely."). In light of this dictum, and the increasing evidence of risks from indoor tanning, a national ban may not be as unlikely as it may otherwise seem.

298. *See infra* Part V.A.

299. *See infra* Part V.B.

300. *See infra* Part V.C.

301. *See infra* Part V.D.

302. *See infra* Part V.E.

303. Some members of the indoor tanning industry have welcomed regulation, believing it would restore consumer confidence in the industry. *See supra* note 124. Instituting voluntary training programs would only further this restoration of consumer confidence.

operators,³⁰⁴ but promoting self-regulation will lead to operators being properly trained in states that do not mandate training. Training requirements may vary, but some important elements to any training program include evaluating skin types, training on proper use of the equipment, and educating about the risks.³⁰⁵

The first important element is training in skin type evaluations.³⁰⁶ Studies have shown that certain skin types are more at risk to burning and injury from exposure to UV light.³⁰⁷ To address this, operators can be trained to evaluate skin types and recommend exposure times based on the specific evaluation.³⁰⁸ Such recommendations offer a great customer-specific way to help reduce the risks of indoor tanning-related injuries.³⁰⁹

Another important element is training regarding the proper use of the equipment.³¹⁰ This includes training regarding optimal positioning and exposure times to help reduce the risk of burning, and instruction on the use of protective eyewear. If customers are allowed to walk into a tanning booth without any instruction and tan for as long as they want, the chances of injury are great.³¹¹ However, if a trained professional is there to ensure the

304. See *supra* note 209 (discussing state-level mandated training programs).

305. See *id.* (discussing some of these training elements as required in some state statutes).

306. Some states specifically require operators to evaluate each customer's skin type using the Fitzpatrick Scale before allowing the customer to tan. See, e.g., VA. CODE ANN. § 59.1-310.5(B) (West 2008) ("The owner or his designee shall identify the skin type of the customer based on the Fitzpatrick scale, document the skin type of the customer, and advise the customer of . . . maximum time of recommended exposure in the tanning device."); cf. ILL. ADMIN. CODE tit. 77, § 795.180(a)(10) (2007) ("Such training shall include . . . the six different skin types, in accordance with Appendices A and B of this Part."). Also referred to as the "Fitzpatrick Skin Type Classification" system, is a scale developed by dermatologist Thomas Fitzpatrick in 1975 to classify different skin types and their respective tolerance to sunlight. See Rob Trow & Carol S. Trow, *The Fitzpatrick Scale and Anti-Aging Treatment Plans*, SKIN INC., Nov. 2007, available at <http://www.skininc.com/skinscience/physiology/10764816.html>. The scale ranges from Type I, which describes white, very fair skin which always burns and never tans, to Type VI, which describes black skin which never burns and tans easily. *Id.* Some salons, which are not yet required by law to conduct such evaluations, already do so in some form or another. See, e.g., Johnson, *supra* note 230, at C10 ("[T]anning operators . . . said they already analyze patients' skin and make recommendations.").

307. See *Sun Damage*, *supra* note 2.

308. See Trow & Trow, *supra* note 306.

309. See Johnson, *supra* note 230.

310. Some states already mandate this type of training. For example, in Illinois all operators must "be trained on the correct and compliant operation of the facility and its equipment," which includes knowledge of the applicable laws, operational procedures of the tanning facility, operation and maintenance of tanning devices, and use of protective eyewear. ILL. ADMIN. CODE tit. 77, § 795.180(a) (2007); see also *supra* note 209.

311. The need for adequate user instructions to help reduce the risk of sunlamp related injuries was one of the driving forces behind the FDA's initial decision to regulate. See Proposed Rule,

customer knows the proper way to lie in the bed and the proper amount of time to tan, the chances of injury due to misuse or overexposure will be reduced.³¹²

A third important element of training is education about the risks involved in indoor tanning.³¹³ This includes information regarding all of the possible risks of indoor tanning as well as requirements for disclosure to customers. An operator who is adequately informed about the risks will be able to accurately address customer concerns³¹⁴ and ensure compliance with federal and state regulations regarding risk disclosure. Additionally, an operator who is fully aware of the risks would be in the best position to assist a customer in minimizing the risks of indoor tanning, should the customer still choose to tan.³¹⁵

In addition to salon-implemented training programs for operators, other important measures of consumer protection could be promoted and

supra note 70, at 65,189. However, the final regulation did not specify that a tanning bed operator need be present during a consumer's use of the product. See 21 C.F.R. § 1040.20 (2008). In response to this, states have acknowledged the increased risk due to unsupervised use of tanning beds in their decision to regulate. See, e.g., COLO. REV. STAT. ANN. § 25-5-1002(1) (West 2008) ("The general assembly . . . declares that injuries may result from improperly supervised use of artificial tanning devices . . ."). In the United Kingdom, tanning beds are often coin-operated so there is no supervision at all to help ensure tanning beds are not misused. See, e.g., Burkeman, *supra* note 279 ("All the company's . . . Glasgow [Scotland] outlets are self-service and completely unstaffed: put [money] into a slot near the entrance and one of the locked, numbered doors buzzes open."); Victoria Fletcher, *Sunbeds Increase Risk of Skin Cancer*, THE DAILY EXPRESS, Jan. 16, 2008, available at <http://www.express.co.uk/posts/view/31616/sunbeds-increase-risk-of-skin-cancer> ("[C]oin-operated and unstaffed solariums could be targeted as the Government tries to slash the 65,000 cases of skin cancer reported in the UK each year.").

312. Additionally, customers may not know the importance of using the protective eyewear, and the instruction on use of such equipment will help reduce eye injuries. See, e.g., Wendy Craft, *Protective Eyewear: Seeing the Truth*, LOOKING FIT, Mar. 1, 2005, <http://www.lookingfit.com/articles/531feat2.html>. For example, customers may feel they do not need to use the protective eyewear because they are not bothered by the brightness of the tanning bed lights. See *id.* However, the protective eyewear is not intended as a comfort measure to shield customers from the brightness of the lights, but rather to protect their eyes from damage that can result from overexposure or repeated exposure. See *id.*

313. See, e.g., ILL. ADMIN. CODE tit. 77, § 795.180 (2007) (requires training on "effects of ultraviolet radiation, acute and chronic exposure, biological effects, and health risks"). While some states already require such training, salons could take the initiative to educate their employees on the risks of tanning regardless whether the law requires it or not.

314. One potential problem with salon-implemented training regarding the risks—as opposed to specific training mandated by a state—is that the salon could easily be biased in its training regarding the risks and provide operators with inaccurate or incomplete information so as not to risk scaring any consumers away from tanning. See, e.g., Danielle Barbarich, *Sunblocking State's Youth: Central Jersey Salons Ponder: When is Too Young to Tan?*, COURIER NEWS, June 12, 2006, at A-1 (quoting a salon owner who said, "I wouldn't have opened up a tanning salon if it was going to endanger people. . . . [I]t's a lot safer to tan indoors than it is outdoors. . . . As long as people are doing it safe[ly] and going to a place that promotes safe tanning, I don't see a problem.").

315. For example, a tanning bed operator who was informed that eye injuries such as corneal burns can result when a user does not wear protective eyewear would be best prepared to inform a consumer about the importance of wearing such eyewear. See *supra* note 312.

voluntarily implemented as well. Requiring all patrons to wear protective eyewear, giving out written warnings of the risks, and not allowing minors to tan are just a few examples of voluntary measures that salons could take in states that do not already require these measures by statute. Some salons which take these self-regulatory measures may claim that state and federal mandated safety precautions are unnecessary. However, if most salons have already implemented these precautions, there should be no harm in making them official.³¹⁶

B. Education for Consumers

Another non-regulatory alternative to increase consumer protection would be to increase the amount of information and education given to consumers regarding the dangers of tanning—both indoors and outdoors. Even where separate warning statements are given to each indoor tanning customer—through state regulation or voluntary implementation—printed warnings may not be enough to get a customer’s attention regarding the dangers of the activity. Additionally, these warnings may solely focus on the dangers of indoor tanning, and say nothing about sun tanning. There is no operator to hand such warning statements to those who decide to tan out in the sun rather than at an indoor tanning salon.³¹⁷

Greater education measures regarding the dangers of UV exposure in general can address these concerns. Some possible ways to educate consumers include school programs³¹⁸ and public awareness campaigns.³¹⁹

316. Cf. *Our Opinion*, *supra* note 230, at A-7 (“[A] spokesman for a Washington-based tanning association . . . says parental permission for youths is ‘pretty much’ a national standard for the industry. . . . [W]e see no harm in making sure that ‘pretty much’ becomes a certainty . . .”).

317. Another concern is that tanning beds have become increasingly affordable, which is leading a growing percentage of consumers to buy their own tanning beds and tan at home. See *Popularity of Home Tanning Grows as Home Beds Become Increasingly Affordable, Convenient*, PR NEWSWIRE, Nov. 19, 2007; see, e.g., Nova Tan, <http://www.novatan.com/> (last visited Apr. 27, 2009) (listing home units starting at \$999). The popularity of tanning at home has even made it to the big screen. See, e.g., *AMERICAN PSYCHO* (Universal Studios 2000). In the movie *American Psycho*, Patrick—a tan, wealthy executive—compliments another man’s tan and after the man admits tanning at a salon, Patrick says “I’ve got a tanning bed at home. You should look into it.” *Id.* Those who tan at home using their own tanning beds are also outside the reach of any mandated warnings given by tanning salon operators.

318. This approach could be modeled after similar programs to educate children about the dangers of drunk driving or using drugs. See, e.g., Drug Abuse Resistance Education, About D.A.R.E., http://www.dare.com/home/about_dare.asp (last visited Apr. 27, 2009) (“D.A.R.E. is a police officer-led series of classroom lessons that teaches children from kindergarten through 12th grade how to resist peer pressure and live productive drug and violence-free lives.”); Students Against Destructive Decisions, SADD’s Mission, <http://www.sadd.org/mission.htm> (last visited Apr. 27,

Each of these methods provides ways to reach those who do not tan in salons, or have not read warning statements where they have been provided. Additionally, education provides a much-needed counterargument to the frequent media messages about the desirability of tan skin.³²⁰ One potential

2009) [hereinafter SADD's Mission] ("Originally, the mission of the SADD chapter was to help young people say "No" to drinking and driving. Today, the mission has expanded [to include more than drinking and driving]."). At least one state is already prepared to incorporate skin cancer prevention education in all public schools assuming that the United States Environmental Protection Agency provides a comprehensive program. See ARIZ. REV. STAT. ANN. § 15-718 (2007). Additionally, at least one state—Colorado—has provided that money collected from registration fees should go to an "artificial tanning device education fund." COLO. REV. STAT. ANN. § 25-5-1004(3) (West 2008). Students Against Destructive Decisions (SADD), which was formerly known as Students Against Drunk Driving, "has become a peer-to-peer education, prevention, and activism organization dedicated to preventing destructive decisions." See SADD's Mission, *supra*. The organization has indicated "that positive peer pressure, role modeling and environmental strategies can prevent other destructive decisions and set a healthier, safer course for their lives." *Id.* One possibility for health groups may be to petition an organization like SADD to include sun safety education in its program.

319. The American Academy of Dermatology (AAD) has created a database of public awareness campaigns to increase public awareness regarding sun safety and the dangers of tanning. See American Academy of Dermatology, Sun Safety Program Database, <http://www.aad.org/forms/SunSafetyDatabase/default.aspx> (last visited Apr. 27, 2009). The Academy has also created several of its own public awareness campaigns including "Play Sun Smart" which was created to educate the public about the benefits of sun protection for those who play and observe outdoor sports. See Play Sun Smart, <http://www.playsmartsun.org/> (last visited Apr. 27, 2009). Additionally, the Academy released a 2007–08 public service campaign that used television, radio, print, and Internet ads to "highlight the risks of skin cancer and skin damage that indoor tanning can cause." See Medical News Today, *Innovative Public Service Campaign Sends Strong Message to Teens About Dangers of Indoor Tanning*, Oct. 19, 2006, <http://www.medicalnewstoday.com/articles/54504.php> [hereinafter *Innovative Public Service Campaign*]. The 2007–2008 campaign used the concept of instant messaging to "speak to teens in their own language." See *id.* The Academy's 2008–2009 campaign, "Indoor Tanning is Out," focuses on young female tanners. See American Academy of Dermatology, Public Service Advertisements, <http://www.aad.org/media/psa/index.html> (last visited Apr. 27, 2009). The ads feature young women, including two skin cancer survivors, warning their peers about the dangers of indoor tanning. See *id.* The World Health Organization has also taken steps to raise awareness about sun safety. See, e.g., World Health Organization, INTERSUN Programme, <http://www.who.int/uv/intersunprogramme/en/> (last visited Apr. 27, 2009). For example, in 1992, WHO created a program to address UV radiation issues. *Id.* The goals of this program include "provid[ing] information, practical advice and sound scientific predictions on the health impact and environmental effects of UV exposure [,] . . . encourag[ing] countries to take action to reduce UV-induced health risks, and . . . provid[ing] guidance to national authorities and other agencies about effective sun awareness programmes." *Id.*

320. Poorsattar and Hornung have suggested that the media "can also be a source of positive health information for adolescents, and could potentially be a powerful tool for skin cancer prevention education." Poorsattar & Hornung, *supra* note 8, at 172. Indeed, given the negative effect that pro-tan images in the media have had, see *supra* notes 8–11, the media could be a great tool to counter that message by pointing to celebrities who practice sun safety. See, e.g., Jennifer Berman, *Eva Mendes & Heidi Klum, Pose for The Marc Jacobs 'Protect the Skin You're In' Campaign*, Oct. 12, 2007, available at <http://communications.med.nyu.edu/news/2007/eva-mendes-heidi-klum-pose-marc-jacobs-protect-skin-youre-in-campaign>. Famous fashion designer Marc Jacobs recently unveiled a new campaign for sun safety using t-shirts printed with nude pictures of famous celebrities and the slogan "Protect the Skin You're In." See *id.* He persuaded the famous celebrities to "disregard warnings from agents and managers" and bare it all for his new campaign to

problem is that each of these methods requires funding which may be difficult to acquire. However, some health groups and celebrities have already donated time and money to help in this area,³²¹ and hopefully more will be willing to do the same. These non-regulatory methods of education can help ensure that all consumers are aware of the serious risks before they choose to tan.

However, although many advocate increasing education, several studies have indicated that even when consumers have adequate knowledge regarding the risks of UV exposure, many still choose to tan.³²² Even as research has revealed serious health risks related to indoor tanning, the number of indoor tanners has continued to rise.³²³ The fact that some consumers with adequate information still choose to tan suggests that education alone will not be sufficient to get people to stop heading to their local tanning salons. It may very well be true that as long as people view tan skin as “beautiful,” risky tanning behaviors for many are unlikely to change.

warn the public about the dangers of skin cancer. *Id.* All proceeds from the sale of the t-shirts went to support the NYC Cancer Institute. *See id.* Famous soccer player David Beckham was recently photographed wearing one of the t-shirts featuring a nude photo of his wife—Victoria “Posh Spice” Beckham. *See* Sarah McCorquodale, *David Beckham Wears a Naked Victoria Across His Chest in Support of Her New Ad Campaign*, DAILY MAIL, Jan. 30, 2008, available at <http://www.dailymail.co.uk/tvshowbiz/article-510899/David-Beckham-wears-naked-Victoria-chest-support-new-ad-campaign.html> (last visited Apr. 27, 2009). Posh’s presence in the campaign has been the source of some controversy because she is often sporting a tan. *Id.* Posh aside, this campaign is a brilliant way to counteract the mainline message in the media that “tan is beautiful” by using beautiful celebrities to urge the public to protect their skin.

321. *See supra* note 319 (discussing awareness efforts by health organizations); *supra* note 320 (discussing celebrity involvement).

322. *See, e.g.*, Knight et al., *supra* note 187. One study conducted in 1999 found that although those who took part in the study had adequate information regarding the risks of indoor tanning, they still frequently used tanning devices. *Id.* at 1311. According to the study, “[a]lmost half of current users believed that a tan represents a healthy appearance,” and education regarding the dangers of tanning are only “minimally effective, if at all.” *Id.* at 1315. The authors of the study asserted that changing the risky behavior of tanning “will require a fundamental change in the societal belief that tans are attractive and healthy.” *Id.* at 1311. According to the authors, such a fundamental change “will take a concentrated joint effort on behalf of health care organizations, industry, and physicians to bring about an eventual change in the belief that damaging tans are attractive and healthy.” *Id.* at 1315; *see also* Olson & Starr, *supra* note 250, at 133 (“[S]un protection educational programs have focused on health (future cancer risk) and have changed knowledge and attitudes but not actual behaviors.”). Research in Australia revealed “decreasing sun protection in high school students during a period of extensive public media campaigns.” *Id.*

323. *See Innovative Public Service Campaign, supra* note 319 (“[The numbers of indoor tanners] continue to rise each year, despite research which demonstrates the risks of indoor tanning, including premature aging such as age spots and wrinkles, and even worse, the danger of skin cancer.”); Olson & Starr, *supra* note 250, at 132 (“Despite evidence that UV radiation causes skin cancer, the use of indoor tanning devices that emit UV light . . . has never been more popular.”).

While this evidence seems to dilute the importance of education, it may be a matter of needing to emphasize the right risks.³²⁴ Although some studies have shown that education regarding the health risks did not change behavior,³²⁵ other studies have shown that tanners were more likely to change their behavior when “immediate risks to appearance were emphasized rather than cancer risks.”³²⁶ Other scholars agree that it is not a matter of education failing to change behaviors, but a matter of knowing the right things to say to a particular type of consumer, or having the right person say it.³²⁷ Each of these explanations offer hope that increasing consumer education can have a beneficial impact as long as the right methods are used.

C. Promoting Safer Alternatives to Tanning

One way to reduce the use of indoor tanning is to promote healthier alternatives to tanning.³²⁸ The main perceived benefit of tanning is a tan

324. See, e.g., Olson & Starr, *supra* note 250, at 133–34. Several studies have revealed that education regarding health risks does not change tanning behavior. *Id.* at 133; see also Knight et al., *supra* note 187, at 1311. However, some studies have shown that emphasizing the risk to appearance rather than the risk to health has been successful in changing behaviors. See Olson & Starr, *supra* note 250, at 134. This is likely because the possibility of later health problems often do not motivate tanners to change behaviors that are currently pleasurable. See *id.* However, when the purpose of tanning is to enhance one’s appearance, warnings about “immediate risks to appearance” are much more motivating. See *id.*

325. See *supra* note 322.

326. See Olson & Starr, *supra* note 250, at 134. For example, so-called “risk-to-appearance interventions” involve showing a tanner a picture of herself filtered with a UV flash so she can immediately see the effect the UV radiation will have on her skin. *Id.* “[T]he viewing of [these] UV-filtered photographs along with . . . educational information about aging from the sun have resulted consistently in changes in planned and reported sun protection motivation and behaviors.” *Id.* Studies have found these changes included the “intention to use sunscreen,” a “decline in reported sunbathing in college students and young adults,” and other sun protective behavior. *Id.*

327. See, e.g., Alan C. Geller & Allan C. Halpern, *The Benefits of Skin Cancer Prevention Counseling for Parents and Children*, 55 J. AM. ACAD. DERMATOL. 506 (2006) (discussing the benefits of physician counseling on patient sun safety). Numerous studies have revealed “the power of the physician in providing new information or assisting patients to make difficult behavioral changes.” *Id.* at 507. “[E]ven brief skin cancer prevention counseling . . . can lead to marked reduction of risky practices.” *Id.* Geller and Halpern cite this evidence to counter the misconceptions that “[t]he public already has a high degree of knowledge about . . . [the] danger of tanning beds” and that “[t]here is little that physicians can do to educate or motivate their patients.” *Id.* (emphasis omitted). Therefore, perhaps a greater effort by doctors to educate their patients regarding sun safety would help change risky tanning behaviors where other forms of education have proved unsuccessful. See *id.*

328. See, e.g., MEDICAL LETTER, *supra* note 223 (“To effectively reduce tanning behaviors, it is critical to make the attitudes toward healthy alternatives more positive than the behaviors we wish to reduce . . .”). Jergens, a company which sells skin lotions, started a campaign to encourage people to “give up bad tanning habits for good.” Jergens, <http://www.jergens.com/GlowInTheDark/index.asp> (last visited Apr. 27, 2009). The campaign encourages women to forego tanning in favor of alternatives like Jergens’s sunless tanning lotions to get “natural looking color.” *Id.*

appearance.³²⁹ While the most common way to achieve this look is through indoor tanning, in recent years many sunless tanning options have been developed.³³⁰ These options include spray-on tans, sunless lotions, and pills which cause the skin to look tan.³³¹ Such options enable consumers to achieve the tan look without subjecting themselves to the dangers associated with UV exposure.³³² In fact, many indoor tanning salons already offer these sunless tanning options in addition to traditional indoor tanning services.³³³

A major benefit of promoting this alternative is that it gives consumers what they want—a tan appearance—and at the same time does not put tanning salons out of business. Instead of marketing the use of tanning beds, the salons could promote these alternative methods which—unlike tanning beds—have not been proven to cause wrinkles, photoaging, permanent eye injuries, and skin cancer.³³⁴ Due to the difficulty of getting people to stop going tanning despite the known risks, the creation and promotion of these sunless tanning methods provide a great alternative absent a change in desire to look tan.³³⁵

329. See, e.g., Olson & Starr, *supra* note 250, at 132 (“The most common reasons given by tanners are that they feel more attractive and paradoxically healthier with a tan.”); Knight et al., *supra* note 187, at 1313 (revealing ninety-two percent of respondents said they tanned because they enjoy a tanned appearance).

330. See Saranow, *supra* note 3.

331. *Id.* The spray-on tan involves spraying clients “with an FDA-approved ingredient” that makes skin look tan. *Id.* This provides “a UV-free” tan, but may look orange or streaky and can cost twenty to thirty dollars per session. *Id.* A similar option involves using tanning creams or bronzers that essentially stain the skin. *Id.* These range in cost from less than eight to more than twenty dollars, and newer variations are less likely to turn the skin orange. *Id.* However, they sometimes still cause the skin to look orange, may look streaky, and may stain the skin multiple shades. *Id.* There are also tanning pills which consumers can pop for a sunless tan. *Id.* However, these pills range from twenty to sixty dollars per bottle, are not FDA-approved, and can cause “side effects including itching and vision damage.” *Id.* By comparison, indoor tanning sessions range from five to ten dollars depending on the region. See Saranow, *supra* note 3. Additionally, indoor tans also fade. See Johnson, *supra* note 230.

332. See, e.g., Saranow, *supra* note 3. At a high school in the United Kingdom, school officials took a unique approach to try to limit the students’ use of indoor tanning. See Burkeman, *supra* note 279. When indoor tanning salons became popular in the area, many students began “sneaking out [during] their lunchbreaks” and using their lunch money to purchase tanning sessions at a nearby coin-operated salon. *Id.* When school authorities began noticing students coming back from lunch looking like they had spent the break at the beach—in a place where it is almost never sunny—officials called in the help of a local fake tan company. *Id.* Officials then started running lessons on how to apply fake tans. *Id.*

333. Bizzozero, *supra* note 6 (“The majority of freestanding tanning salons have at least 10 rooms on average; of those, most have four to five levels of tanning and a *sunless unit*.”) (emphasis added).

334. See Saranow, *supra* note 3.

335. See, e.g., Katie Brooks et al., *Use of Artificial Tanning Products Among Young Adults*, 54 J.

One concern with the promotion of these alternatives is that some studies have revealed those who use sunless tanning methods are more likely to get sunburns and more likely to visit tanning booths than non-users.³³⁶ If use of sunless tanning methods do not correlate with a reduction in tanning, it would be pointless to promote these methods. However, the primary suspected reason for this is that sunless tanners are often “unaware that [sunless tanning methods] provide negligible sun protection unless combined with separate use of sunscreen.”³³⁷ Therefore, what is needed is education that sunless tanning methods do not provide any protection from UV radiation and that these methods are safer than tanning.³³⁸ With this, sunless tanning methods will remain a hopeful alternative for those who seek the tan skin tone without the associated risks of traditional tanning.³³⁹

AM. ACAD. DERMATOL. 1060, 1062 (2006). One study of the use of sunless tanning methods among young adults found that “[t]wenty-two percent of respondents reported using sunless tanning lotions” in the past year, and a majority of users—fifty-one percent—said they used a sunless tanning method because they believed it was “a safer alternative to the sun.” *Id.* On the other hand, some tanning enthusiasts do not like the option of sunless tanning because it fades faster than UV tans, and some do not provide “the same natural look as do ultraviolet rays.” Johnson, *supra* note 230. Another concern is that sunless tanning options are often more expensive than traditional tanning. *See, e.g.,* Poorsattar & Hornung, *supra* note 8, at 171 (“Young children cannot afford the \$1300 sunless tanning packages that their media role models purchase, but can imitate popular celebrities by exposing themselves to less expensive UV rays.”). Therefore, for the sunless tanning alternative to take hold, it is likely that cheaper options will need to be developed.

336. *See, e.g.,* Brooks, *supra* note 335, at 1062 (“Spray tan users were more likely than spray tan non-users . . . to have sunburned in the past summer, and to have used a tanning booth in the past year.”); Poorsattar & Hornung, *supra* note 8, at 171 (“[S]tudies in the United States and Australia have shown that individuals who do use sunless tanning or artificial tanning are more likely than nonusers to sunburn and use tanning beds. We must be careful about endorsing an unhealthy alternative.”).

337. Brooks, *supra* note 335, at 1064; *see also* Jo Ellen Stryker et al., *Prevalence of Sunless Tanning Product Use and Related Behaviors Among Adults in the United States: Results from a National Survey*, 56 J. AM. ACAD. DERMATOL. 387, 387 (2007) (“The darkened skin color achieved with sunless tanning products, along with sunscreen ingredients when they are included, may create a false sense of protection from [UV radiation].”). Another suspected reason is that “those with stronger tan-promoting attitudes” may commonly use sunless tanning methods. Brooks, *supra* note 335, at 1064–65. “Sunless tanning lotion users and potential users may be more likely than others to seek tans or accentuate the tans they receive from the sun or from tanning beds.” *Id.* at 1065.

338. A more optimistic way to view the studies which have revealed that sunless tanners are more likely to use tanning beds is that it also means “many tanning bed users are also using sunless tanning lotions.” Brooks, *supra* note 335, at 1065. Thus, one way to reduce the tanning behavior and increase the sunless behavior may be to urge such consumers to “go completely sunless.” *Id.*

339. Overall, little research has been done thus far on the prevalence of the use of sunless tanning methods in the United States. *See* Stryker, *supra* note 337, at 387. One limited study found that frequent use of sunless tanning products was uncommon. *Id.* at 389. However, while sunless tanning is currently not that common, it is increasing in popularity. *Id.* at 387. The study also found that exclusive sunless tanners—those who do not otherwise tan—were much more likely to practice sun protective behaviors such as using sunscreen than those who exclusively indoor tan. *Id.* at 389. This study suggests that despite other evidence, *see supra* note 332, sunless tanning options could be a hopeful sun-protective alternative for tan-seekers. *See* Stryker, *supra* note 337, at 389.

While a darkened appearance is the most common benefit tanners seek, there are some additional “benefits” which tanners enjoy that also have healthier alternatives. One commonly cited benefit is that tanning is relaxing.³⁴⁰ However, the risks of indoor tanning are a high price to pay for a little relaxation. Instead, other methods of relaxation should be promoted such as massages or warm baths.³⁴¹ Another common benefit—at least as stressed by the indoor tanning industry—is the production of vitamin D.³⁴² However, vitamin D can also be obtained through certain foods or taking a supplement.³⁴³ Even alleged medical benefits like the treatment of psoriasis or depression have safer alternatives.³⁴⁴ Ultimately, discovering the benefits which indoor tanners seek and promoting healthier alternatives is a key way to help reduce risky tanning behaviors.

340. See, e.g., Knight et al., *supra* note 187, at 1313 (revealing forty-seven percent of respondents tanned because they found it relaxing); *Magnitude of the Health Issue*, *supra* note 3 (“A tanned appearance is a strong motivator, as is the desire for relaxation.”); Lim et al., *supra* note 14, at 869 (“[O]f the 41 possible choices [between UV and non-UV beds], 39 were for UV radiation, with better ‘relaxation’ as the most frequently cited reason.”). Indeed, the tanning salon experience can be very relaxing. Desert Sun Tanning in Malibu, California, offers its customers a tanning bed with a mattress and sheet and no lid, which resembles a real bed more so than typical clam-shaped tanning beds. Compare PC Marketing, P90 Mattress, http://www.pcmarketinguwe.com/equipment/p90m_info.htm (last visited Apr. 27, 2009) (the bed used at Desert Sun Tan), with TanningBeds4Less, <http://www.tanningbeds4less.com/> (last visited Apr. 27, 2009). The mattress tanning beds also feature air conditioning, misting, aroma therapy, and a stereo. See PC Marketing, *supra*. Even without such perks, substantial evidence indicates that UV exposure produces endorphins that increase the relaxation effect of tanning. See, e.g., Lim et al., *supra* note 14, at 869 (“One possible explanation for UV acting as a ‘relaxing’ reinforcing stimulus is the epidermal production and release following UV radiation of beta-endorphin . . . best known . . . to be responsible for the sense of well-being after vigorous exercise”); Dell’Amore, *supra* note 27 (“Endorphins, the body’s natural narcotic, could explain why people lay in the sun in the hottest part of the day. . . . In a recent blinded trial . . . women select[ed] tanning beds with UV radiation when given a choice between a UV bed and a bed blocked from UV.”); Indoor Tanning Association, Positive Effects of UV Light, http://www.theita.com/indoor/PositiveEffects_ofUV.cfm (last visited Apr. 27, 2009) (“Exposure to UV light is also responsible for the production of endorphins and serotonin (which in turn is related to positive psychological effects).”).

341. See *Magnitude of the Health Issue*, *supra* note 3 (suggesting whirlpool baths or massages as healthy alternatives to the relaxation benefit).

342. See *supra* note 125 (discussing the benefit of and alternatives to vitamin D production from exposure to UV radiation).

343. See *supra* note 125.

344. See, e.g., Burchfield, *supra* note 8, at 1 (“Doctors have prescribed indoor tanning to treat depression and some skin conditions such as psoriasis. . . . [But] ‘exercise helps depression, [and] prescription creams can help psoriasis. . . . [T]he risks of indoor tanning outweigh any benefits.’”).

D. *The Possibility of a Tanning Tax*

Another possible alternative to traditional regulation would be to place a tax on indoor tanning.³⁴⁵ While such a tax would not directly lead to greater consumer protection, the added cost due to the tax may serve to deter at least some consumers from tanning. Additionally, for those who still choose to tan, taxes would provide funds that could be used to enforce current indoor tanning regulations or to pay for public education programs.

However, there are two possible responses to an indoor tanning tax which may ultimately make such a tax ineffective. First, those who will not want to pay the increased cost of indoor tanning may choose to go tan outdoors. In such a case, no money would be made from the tax, and the consumer would not be deterred from tanning altogether. The presence of a free, adequate alternative will limit the effectiveness of a tanning tax. Second, some will not be swayed by the added cost and will still choose to tan indoors. While this second group would defeat the deterrence purpose, it would serve the purpose of raising money. Thus, a tax on indoor tanning will work better as a way for governments to raise money for indoor tanning regulation programs rather than as a method to deter consumers from tanning.

E. *Changing the Perception that Tan Skin is Desirable*

Even with additional regulation, education, and availability of healthier alternatives, some people will still choose to tan.³⁴⁶ As long as the media continues to portray tan as beautiful, it will be difficult to stop consumers from using tanning salons.³⁴⁷ Therefore, if health officials want to limit the dangerous practice of tanning, something beyond regulation or education regarding the risks is needed.³⁴⁸ Getting consumers to stop tanning will

345. Some scholars have suggested that a tax on cigarettes is an effective tool to reduce smoking. See, e.g., Joni Hersch, *Teen Smoking Behavior and the Regulatory Environment*, 47 DUKE L.J. 1143, 1165–67 (1998) (discussing the possible effects of cigarette taxes on the purchase of cigarettes by minors). According to Hersch, “raising the price of cigarettes discourages purchase” and “may be especially effective for teens.” *Id.* at 1165. Similarly, a tax on tanning would raise the cost, which may deter some consumers, particularly minors, from indoor tanning.

346. See *supra* note 158 and accompanying text (discussing increasing popularity of tanning despite increasing regulation); *supra* notes 322–23 and accompanying text (discussing evidence that some people tan with adequate education regarding risks); *supra* note 336 and accompanying text (discussing evidence that some who use safer alternatives still tan as well).

347. This is evident from studies that have revealed that consumers still choose to tan even when adequately informed of the risks. See *supra* notes 322–23 and accompanying text. According to dermatology professor Robert P. Dellavalle, “there is something inherently attractive in tan-looking skin, and it’s hard to change what people think is good-looking.” Dell’Amore, *supra* note 27.

348. See *supra* note 322; see also Geller & Halpern, *supra* note 327, at 506 (“Like smoking cessation, skin cancer prevention is an uphill battle that will require a multifaceted approach that includes public education, policy change, and—yes—physician counseling.”); *Magnitude of the*

“require a fundamental change in the societal belief that tans are attractive and healthy.”³⁴⁹

It is unclear what it will take for such a “fundamental change” to occur. One thing, however, is clear: changing the way people think of beauty is not a transition that can occur overnight. After over a century of believing that tan skin is desirable, it is understandable that changing this public perception is going to be difficult. In the meantime, the public needs more of the options discussed above. This means more regulation at all levels to ensure indoor tanning is as safe as possible, more education about the risks of tanning both in tanning beds and in the sun, and emphasis on healthy alternatives to the alleged “benefits.”³⁵⁰

VI. CONCLUSION

For the past 100 years tan skin has been desirable, despite knowledge from early on that there were some dangerous side effects. For the past thirty years, health groups and regulators have been trying to figure out what to do with the indoor tanning industry—a service so desired by consumers and yet so detrimental to their health. The primary options were to ban indoor tanning or try to regulate it in order to make it as safe as possible. Despite recommendations from health groups, regulators have chosen door number two. Through a combination of regulation and some non-regulatory alternatives, regulators and health groups together can ensure that indoor tanning is as safe as possible. However, no matter how stringent these precautions, it must be remembered that “[t]here is no such thing as a safe tan.”³⁵¹

For health groups who wish to convince consumers to stop tanning, it will take more than regulation or warnings about its dangers. It will take a fundamental change in what we consider beautiful—a fundamental change

Health Issue, *supra* note 3, at 195 (“Ultimately a multifaceted strategy is needed. Lobbying to limit access by minors, better FDA regulation of the industry, and fines for non-compliance with regulations will all be critical. Direct parental education and availability of alternatives to indoor tanning, such as self-tanners will also be important.”); Poorsattar & Hornung, *supra* note 8, at 171–72 (“Parents, physicians, and teachers need to engage in conversations about the negative effects of media, and need to provide positive health information to children.”).

349. Knight et al., *supra* note 187, at 1311. “To effectively decrease the rate of artificial tanning . . . it seems that public opinion will have to change regarding what is aesthetically admirable.” *Id.* at 1315. Indeed, many celebrities are beginning to get involved in changing the public perception about tanning. See *supra* note 320.

350. See *supra* Part V.C.

351. Netter, *supra* note 131, at 3A.

in the messages our media conveys. While that is a tall order, this change may already have begun. Celebrities like *Real Housewife* Kimberly³⁵² and those who have taken part in Marc Jacobs's sun safety campaign³⁵³ are putting cracks in the foundation of the belief that tan equals beauty. If more cracks keep coming, the indoor tanning industry's days—at least for selling UV radiation—will be numbered.

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352. *See Real Housewives*, *supra* note 15.

353. *See supra* note 320.

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