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Is Sustainability En Vogue or the Newest Staple? What New York's Proposed Fashion Sustainability and Social Accountability Act Could Mean for the Fashion and Other Industries

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In anticipation of New York Fashion Week, lawmakers remind us that this season's haute couture is not the only thing heating up right now. After years of global warming and environmental, social and governance (ESG) topics making headlines, New York lawmakers are taking sustainability to the runway, intent on greening the fashion industry. If passed, New York's Fashion Sustainability and Social Accountability Act ("Fashion Act"),[1] announced earlier this year, would be the first of its kind in the country in attempting to impose sustainability-related obligations on the biggest brands in fashion.[2]

The Fashion Act would apply to global apparel and footwear companies with more than $100 million in revenue doing business in New York, reaching luxury fashion brands, like Prada, as well as fast-fashion brands, like Shein. The industry has long been a target of environmental activists. The World Economic Forum estimates that the fashion industry contributes up to 10% of worldwide carbon emissions and ranks second in global water consumption.[3] Many facilities once operating as textile dyeing and finishing plants have landed on the Superfund National Priorities List over the years.[4] Yet, the industry remains "stunningly unregulated."[5]

Some companies have forged ahead in addressing climate change despite the absence of regulation, including by providing enhanced sustainability disclosure.[6] Kering, the parent company of luxury houses Gucci, Bottega Veneta, Yves Saint Laurent, Balenciaga, Alexander McQueen, and others, has emphasized sustainable luxury fashion for several years.[7] In 2017, Kering announced the three pillars of its 2025 Sustainability Strategy: care, collaboration, and create.[8] And, in 2020, it shared its first Sustainability Progress Report as part of its 2025 sustainability strategy.[9] Other companies, like Patagonia and Reformation, have made sustainability a core part of their business model. These companies not only have committed to producing sustainable fashion, they also have pushed for more expansive climate change policies and invested in initiatives like renewable energy and water conservation projects.[10]

The Fashion Act seeks to promote sustainability in fashion by, in effect, requiring an increased commitment to sustainability on the part of all industry participants, thereby eliminating perceived competitive disadvantages to adopting climate-friendly methods of production. Maxine Bédat, the founder of the New Standard Institute—a supporter of the New York bill—has stated that the bill is "inherently pro-business," because "[r]ight now, companies are uncompetitive if they do the right thing," and this bill will create a regulatory floor that requires every company doing business to "do the right thing."[11] Nevertheless, the Fashion Act presents a number of challenges for companies seeking to comply with its provisions and, to the extent comparable regulations or laws are adopted in other industries, could be a harbinger for those companies as well.

I. Key Provisions in the Fashion Act

New York State Senator Alessandra Biaggi and Assemblywoman Anna R. Kelles introduced the Fashion Act in both chambers in October 2021. It has since been referred to the Consumer Protection committee of the New York Assembly, where it remains pending. The bill's sponsors boast the support of an alliance of nonprofits, including the New Standard Institute, the Natural Resources Defense Council and the New York City Environmental Justice Alliance, and designer Stella McCartney. As mentioned, the bill seeks to regulate fashion companies with $100 million or more in annual revenue that are doing business in New York. This would cover a majority of multinational fashion brands.

A. What the Bill Proposes

1. **Supply Chain Mapping**: The Act, as introduced, would require fashion companies—including fashion manufacturers and retailers, as defined in the bill—to map (i.e., list and track) a minimum of 50 percent of their supply chain, from farm to storefront. This theoretically encompasses all suppliers of raw material and materials used for finished goods. However, the bill does not specify which 50 percent of the supply chain is subject to disclosure, but urges companies to use "good faith efforts" to focus on "the suppliers and associated supply chains relevant to the prioritized risk." The company must then disclose the names of the prioritized suppliers.

2. **Due Diligence Disclosure**: All subject companies would be obligated to publish an annual "social and environmental sustainability report" that must address environmental and social due diligence policies, processes and activities conducted to identify, prevent, mitigate and account for potential environmental and social risks, as well as the findings and outcomes for each.

3. **Impact Disclosure**: Companies would also be required to disclose actual and potential negative environmental and social impacts, which must include, among other things, greenhouse gas reporting and quantitative baseline and reduction targets on greenhouse gas emissions (in accordance with the Paris Climate Accords), and impacts on water, and chemical management; material production volumes, including itemized lists of material type; and volume of production replaced with recycled materials as compared to growth targets.[12]

4. **Impact Reduction Targets**: Companies must set annual targets to reduce their adverse

environmental impact. Specifically, they must set and meet Science-Based Targets[13] for their greenhouse gas emissions.

5. **Publically Available**: All disclosures must be made publically available online.

B. Implementation

1. **Timeline**: Companies would be given 12 months to comply with the mapping directive and 18 months to make their initial impact disclosures.

2. **Enforcement**: Both the attorney general and citizens—through a citizen suit—would be able to enforce the proposed law against a non-compliant company. If a company is found to be in violation of the law, they would be fined up to 2 percent of their annual revenues over $450 million. Those fines would go to a new Community Fund administered by the Department of Environmental Conservation and used for environmental justice projects.

3. **Public Accountability**: The attorney general would also publish an annual list of companies found to be noncompliant.

II. Takeaways

1. **Sustainability laws and regulations are likely to be proposed in many industries**. The Fashion Act is a reminder that virtually all industries are subject to potential regulation addressing climate change. Whether or not enacted into law, the bill could be a harbinger of what regulation for various industries may look like. For example, the proposed Fashion Act covers often overlooked issues like production volumes (in other words, the amount of clothing produced) and addresses a longstanding environmental justice issue by providing a source of funding for communities that are most heavily impacted by pollution and climate change.

2. **Public disclosure of climate laggards**. The Act seemingly adopts the view that public disclosure is a powerful incentive. Obviously, it seeks to compel compliance by mandating that the New York Attorney General annually publish a list of non-compliant subject companies. Companies appearing on the list could face challenges from various stakeholders, including their customer base for poor sustainability practices or shareholders for not appropriately managing the challenges associated with climate transition and related disclosure. Likewise, by requiring that all mandated disclosure be publicly available online, the Act likely incentivizes companies to adopt robust policies and procedures that adhere to, or at least are drafted cognizant of, best practices and prevailing frameworks and standards for sustainability measurement and disclosure.

3. **Companies confront difficult challenges in accurately providing the required disclosures**. The mandatory impact disclosures require companies to report on, among other things, quantitative baseline and reduction targets for greenhouse gas emissions and to map 50% of their supply chain. But there is no consensus at this time on the appropriate methodology or metrics by which to measure quantitative aspects of sustainability impacts. Absent something approaching accepted consensus, the disclosure will be varied and difficult to compare and assess. Likewise, supply chain mapping requires information from vendors

across a company's supply chain, and it may be difficult to obtain that information and/or assess its accuracy, further complicating the ability of a company to accurately provide the required disclosure.

4. **The Act deputizes private citizens by permitting citizen suits to enforce the law**. While the concept of such suits is not novel, the lack of standards or even guidance regarding the subjects on which disclosure is required creates a risk for companies of having to defend a substantial amount of litigation, some of which may lack merit. That is especially true given the relatively low bar to plead a claim in the absence of a requirement to allege non-compliance with particularity in the form of detailed factual allegations.

5. **Compliance is likely to be expensive for companies.** As we have discussed,[14] there can be a perceived tension between profit and sustainability (*g.*, activities that prevent or mitigate harm to the environment, or promote the protection, conservation, or restoration of ecosystems). For example, clothing companies have manufactured goods with the goal of maximizing profits—electing, for example, to manufacture outside of the United States where low-cost labor is available. The Fashion Act could alter that calculus and require companies to reconsider these choices because they will now have to disclose information about their supply chains—including all suppliers, both domestic and abroad—and their overall impact on the environment. In light of the Fashion Act's disclosure obligations, companies will likely need to engage external advisors on numerous topics, including regarding ESG policies, measuring and reporting environmental impacts, and other compliance issues and business decisions impacted by the Fashion Act.

6. **Sustainability could be expensive for consumers**. The Fashion Act could impact profitability, particularly for brands that rely on low prices to attract sales. Ultimately, companies are likely to attempt to pass on some of these costs to the consumer. We already know that companies with a "sustainable" focus sell products at a higher cost. For example, a T-shirt from Shein costs a mere $9,[15] while a similar T-shirt from Pact—a company that The Good Trade,[16] a media brand committed to sustainable fashion, rated on the *lowest* end of the pricing guide—costs $30.[17] In general, consumers seem to want more "sustainable" choices, but it remains to be seen at what cost.

7. **Beware of Greenwashing**. Along with the challenges specific to the fashion industry, the Fashion Act stirs the same concerns of greenwashing faced by other industries.[18] As discussed in our previous articles, without uniform data standards and ESG ratings systems, each company must adopt a method to calculate and track its environmental impact and associated risks. As a result, there is likely to be inconsistent reporting within a given industry and an inability to make effective comparisons between and among companies. Accordingly, until the SEC or other regulators or states adopt sustainability standards, any regulation requiring environmental risk and impact disclosure may prove ineffective or result in inconsistent or inadvertently misleading disclosure.

To their credit, the bill's sponsors recognize that while it is "the most robust and aggressive bill possible that can get passed," it is only a step; not the silver bullet.[19] Some question whether the Fashion Act has enough teeth—in other words, will the transparency it requires result in demonstrated change, or will it merely require companies to report on problems that continue to go unsolved? Bédat has reassured the public that "[i]t's not just about the reporting. It's about the setting and meeting of these targets[.]" However, she has acknowledged that the "language [is] crystal clear within the Science Based Targets component," but may need "amendments to further clarify that [elsewhere in the bill]."[20] Regardless, the Fashion Act serves as a reminder that companies in virtually every industry should be prepared to address issues surrounding ESG issues.

FOOTNOTES

1 A8352, 2021–2022 Assemb., Reg. Sess. (NY. 2022), https://nyassembly.gov/leg/?bn=A08352&term=2021.

2 Vanessa Friedman, *New York Could Make History With a Fashion Sustainability Act*, N.Y. Times (Jan. 7, 2022), https://www.nytimes.com/2022/01/07/style/new-york-fashion-sustainability-act.html.

3 Morgan McFall-Johnson, These facts show how unsustainable the fashion industry is, World Econ. Forum (Jan. 30, 2020), https://www.weforum.org/agenda/2020/01/fashion-industry-carbon-unsustainable-environment-pollution/.

4 *See*, *e.g.*, *EPA*, *Clearwater Finishing*, https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0403391.

5 Emily Farra, *A New Piece of Legislation Could Make New York a Leader in Sustainable Fashion*, Vogue (Jan. 7, 2022), https://www.vogue.com/article/new-york-fashion-bill-sustainability-social-justice.

6 *See "Sustainable" Companies Face Increased Pressure to Justify the Sustainability Label Amid Investor Challenges and Demands for Greater Risk Assessment and Disclosure*.

7 *Sustainability*, Kering, https://www.kering.com/en/sustainability/crafting-tomorrow-s-luxury/historic-commitment/?page=6 (last visited Feb. 10, 2022).

8 *Id*. The *care* pillar stands for Kering's commitment to reducing its environmental footprint and preserving the planet by adopting and putting into practice sustainable targets and standards; the *collaborate* pillar stands for Kering's collaboration with stakeholders to "ensure[] higher economic, environmental, ethical and social performance," and the *create* pillar stands for the group's commitment to "creating innovative alternatives, driving change to influence the entire industry and sharing its knowledge using an open source approach." *Sustainability 2017-2025 Roadmap*, Kering, https://www.kering.com/en/sustainability/crafting-tomorrow-s-luxury/2017-2025-roadmap/ (last visited Feb. 10, 2022).

9 *Id*.

10 *Sustainable Practices*, Reformation, https://www.thereformation.com/sustainability/sustainable-practices.html (last visited Feb. 10, 2022); *Activism*, Patagonia, https://www.patagonia.com/stories/activism/ (last visited Feb. 10, 2022).

11 Emily Farra, *A New Piece of Legislation Could Make New York a Leader in Sustainable Fashion*, Vogue (Jan. 7, 2022), https://www.vogue.com/article/new-york-fashion-bill-sustainability-social-justice.

12 The bill also proposes measures to monitor and improve labor conditions.

13 The Science Based Targets initiative (SBTi) is a tool for reducing carbon emissions created by the CDP (a nonprofit that sets standards for environmental reporting), the United Nations Global Compact, World Resources Institute and the World Wide Fund for Nature. *How it works*, Science Based Targets, https://sciencebasedtargets.org/how-it-works (last visited Feb. 8, 2022).

14 See Jason Halper et al., Investors and Regulators Turning up the Heat on Climate-Change Disclosures: Attempting to Make Sense of the State of Play in the US, EU, and UK, Cadwalader, Wickersham & Taft LLP (Sept. 14, 2021), https://www.cadwalader.com/resources/clients-friends-memos/investors-and-regulators-turning-up-the-heat-on-climate-change-disclosures--attempting-to-make-sense-of-the-state-of-play-in-the-us-eu-and-uk#; Jason Halper et al., "Sustainable" Companies Face Increased Pressure to Justify the Sustainability Label Amid Investor Challenges and Demands for Greater Risk Assessment and Disclosure, Cadwalader, Wickersham & Taft LLP (DEC. 1, 2021), https://www.cadwalader.com/resources/clients-friends-memos/sustainable-companies-face-increased-pressure-to-justify-the-sustainability-label-amid-investor-challenges-and-demands-for-greater-risk-assessment-and-disclosure.

15 *SHEIN BASICS Solid Slim Tee*, SHEIN, https://us.shein.com/SHEIN-BASICS-Solid-Slim-Tee-p-1995306-cat-1738.html (last visited Feb. 10, 2022).

16 *35 Ethical And Sustainable Clothing Brands Betting Against Fast Fashion*, The Good Trade, https://www.thegoodtrade.com/features/fair-trade-clothing (last visited Feb. 10, 2022).

17 *Softspun Crew Neck Tee*,
PACT,
https://wearpact.com/women/apparel/tops%20&%20shirts/softspun%20crew%20neck%20tee/wa1-wmc-wht (last visited Feb. 8, 2022).

18 *See* Jason Halper *et al.*, *Investors and Regulators Turning up the Heat on Climate-Change Disclosures: Attempting to Make Sense of the State of Play in the US, EU, and UK*, Cadwalader, Wickersham & Taft LLP (Sept. 14, 2021), https://www.cadwalader.com/resources/clients-friends-memos/investors-and-regulators-turning-up-the-heat-on-climate-change-disclosures--attempting-to-make-sense-of-the-state-of-play-in-the-us-eu-and-uk#, Jason Halper *et al.*, *"Sustainable" Companies Face Increased Pressure to Justify the Sustainability Label Amid Investor Challenges and Demands for Greater Risk Assessment and Disclosure*, Cadwalader, Wickersham & Taft LLP (DEC. 1, 2021), https://www.cadwalader.com/resources/clients-friends-memos/sustainable-companies-face-increased-pressure-to-justify-the-sustainability-label-amid-investor-challenges-and-demands-for-greater-risk-assessment-and-disclosure.

19 Rachel Cernansky, *Deconstructing New York's Fashion Act*, Vogue Bus. (Jan. 13, 2022), https://www.voguebusiness.com/sustainability/deconstructing-new-yorks-fashion-act.

20 *Id.*

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