

FINDING A COMMON THREAD: ENACTING FEDERAL LEGISLATION TO CURB GREENWASHING IN THE FASHION INDUSTRY AND PROTECT AMERICAN CONSUMERS

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The fashion industry is at an environmental crossroads. United States consumers are demanding increased transparency from fashion companies regarding their impact on the environment. While consumer interest in sustainable fashion is on the rise, there is a simultaneous increase in demand for more clothing at lower price points. Despite industry and consumer focus on sustainability, there is no uniform, standardized rating system or certification scheme that provides consumers with clarity or certainty regarding environmental claims. This leaves consumers swimming in a sea of competing claims based on differing methodologies, left to sort out for themselves which claims are true and which are misleading.

To solve this growing problem, the United States government should legislatively mandate fashion companies doing business in the United States to meet specific minimum standards in order to be able to make claims about the environmental impact of their operations.

This Act should draw from the Higg Index to create a standardized framework for gathering and processing environmental impact data. It should also draw from the OEKO-TEX labeling system to allow consumers to view sustainability data at the point of purchase. The FTC should be empowered to enforce the provisions of this Act.

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INTRODUCTION

The fashion industry is currently facing an environmental labeling crisis. As of this writing, over 463 different ecolabels and certification schemes claim to identify sustainable purchasing options.¹ Despite international efforts to increase transparency in sustainability marketing, there is no uniform, standardized rating system or certification scheme that provides consumers with clarity or certainty regarding environmental claims.² The fashion industry is uniquely susceptible to the dangers of misleading sustainability marketing because of its increasingly complex supply chains that often span multiple continents.³

As consumer trust in fashion companies has waned in recent years, there has been a push by consumers for “radical transparency” in the industry.⁴ Surveys suggest that trust in businesses in general fell in forty percent of countries in 2017, with over forty percent of consumers saying that they do not know which brands to trust.⁵ A 2021 study found that eighty-six percent of consumers believe that sustainability is a good goal, but nearly half do not know how or where to find sustainable clothing or what makes clothing sustainable.⁶ Almost ninety percent of consumers do not trust brands that say they are sustainable, but half of consumers believe that a sustainability label would help them to better identify and understand sustainable clothing while shopping.⁷

In light of this consumer confusion and increasing demand for

¹ George Arnett, *What the Rise of ‘Ecolabelling’ Means for Retailers*, VOGUE BUS. (Dec. 13, 2019), <https://www.voguebusiness.com/sustainability/ethical-labelling-selfridges-net-a-porter-kering-allbirds-kering> [https://perma.cc/C7TD-CB76].

² *Id.*

³ CHANGING MKTS. FOUND., *THE FALSE PROMISE OF CERTIFICATION* 64 (2018), https://changingmarkets.org/wp-content/uploads/2018/05/False-promise_full-report-ENG.pdf [https://perma.cc/B7Z4-NKHK].

⁴ IMRAN AMED, JOHANNA ANDERSSON, ANITA BALCHANDANI, MARCO BELTRAMI, ACHIM BERG, SASKIA HEDRICH & FELIX RÖLKENS, *THE STATE OF FASHION*, MCKINSEY & CO. (2019), <https://www.mckinsey.com/~media/mckinsey/industries/retail/our%20insights/what%20radical%20transparency%20could%20mean%20for%20the%20fashion%20industry/the-state-of-fashion-2019-vf.pdf> [https://perma.cc/UF6R-TG2L].

⁵ *Id.* at 64.

⁶ *Survey: 1 in 3 U.S. Consumers Would Do All Their Shopping at a Sustainable Clothing Store, If Only One Existed*, GLOBENEWSWIRE (May 26, 2021, 9:00 AM), <https://www.globenewswire.com/news-release/2021/05/26/2236466/17500/en/Survey-1-in-3-U-S-Consumers-Would-Do-All-Their-Shopping-At-A-Sustainable-Clothing-Store-If-Only-One-Existed.html> [https://perma.cc/LRL5-QG4F].

⁷ *Id.*

transparency, the United States must act to ensure that consumers have access to standardized, accurate information on the environmental impact of their purchasing decisions. Fashion companies in the United States should be legislatively required to meet specific minimum standards before making claims about the environmental impact of their operations. The federal legislation contemplated herein would not require all fashion companies doing business in the United States to disclose their environmental impact. Instead, the legislation would simply ensure that companies who choose to market their products as sustainable are held to a uniform set of standards. This serves the ultimate goal of protecting consumers from confusing and misleading advertising without placing an undue burden on consumers who are either uninterested in shopping sustainably or who cannot shoulder the increased economic burden often attached to sustainable consumption.

The standards set out in the proposed federal legislation should be uniform, based on the best available scientific and data collection techniques, easily understood by the public, and regulated by the Federal Trade Commission (FTC). Congress should follow the example set by New York's Fashion Sustainability and Social Accountability Act ("the New York Fashion Act"), with a few essential alterations and additions. The New York Fashion Act was proposed in January 2022 and, if enacted, would require all fashion companies who do business in the state and generate more than \$100 million in revenues to map at least fifty percent of their supply chains and disclose impacts such as greenhouse gas emissions, water footprint, and chemical use.

Section I of this Note discusses the meaning of sustainability. Section II explains the rise in demand for clearly labeled sustainable fashion choices and describes the environmental impact of the fashion industry. Section III analyzes two prominent independent certification and measurement schemes that claim to provide uniform environmental impact measurements. Section IV outlines the existing intersecting regulatory frameworks that determine what environmental impact factors must currently be disclosed and how those factors are communicated to the public. Section V looks at the New York Fashion Act, the aforementioned state bill that, if enacted, would require fashion companies doing business in New York with more than \$100 million in gross worldwide receipts to disclose certain critical environmental impact factors. Finally, Section VI argues that Congress should require fashion companies to adhere to a standardized framework for environmental impact reporting enforced by the FTC.

I

WHAT DOES “SUSTAINABILITY” REALLY MEAN?

Terms like “ethical,” “fair trade,” and “natural” are often used to signal to consumers that certain products are “environmentally friendly and ethically sound.”⁸ However, these “sustainability” signals are not used consistently. There is no single definition of “sustainable fashion” that is accepted or used across the fashion industry, particularly in the United States.⁹ Sustainable development, in general, is defined by the United Nations as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”¹⁰ Given this broad definition, it is unsurprising that fashion companies have adopted a variety of more targeted terms to indicate the alleged virtues of their products.¹¹ This includes terms like “ethical,” “organic,” “natural,” “recycled,” “second-hand,” or “vintage.”¹² At first blush, this litany of targeted terminology may appear to indicate specific environmental claims that communicate a more explicit message to consumers. However, it is still difficult to monitor the actual usage and meaning of these terms in an industry where supply chains are decentralized, span multiple continents, and are inconsistently regulated across the globe.¹³ Therefore, it remains “up to individual consumers to navigate their way through the offerings of fashion brands, deciding for themselves which brands and products have genuine ‘green credentials,’” and which do not.¹⁴

Even among companies that claim to prioritize sustainability, a lack of consensus regarding the true meaning of the term persists.¹⁵ Furthermore,

⁸ Nathaniel Dafydd Beard, *The Branding of Ethical Fashion and the Consumer: A Luxury Niche or Mass-Market Reality*, 12 FASHION THEORY: J. DRESS, BODY & CULTURE 447, 450 (2015).

⁹ Elisha Teibel, *Waste Size: The Skinny on the Environmental Costs of the Fashion Industry*, 43 WM. & MARY ENV'T L. POL'Y REV. 595, 598 (2019) (citing Sue Thomas, *From Green Blur to Eco-fashion: Fashioning an Eco-Lexicon*, 12 FASHION THEORY: J. DRESS, BODY & CULTURE 525, 528 (2008); Anika Kozlowski, Michal Bardecki & Cory Searcy, *Environmental Impacts in the Fashion Industry: A Life-Cycle and Stakeholder Framework*, J. CORP. CITIZENSHIP 16–17 (2012); Vanessa Friedman, *Sustainable Fashion: What Does Green Mean?*, FIN. TIMES (Feb. 5, 2010), <https://www.ft.com/content/2b27447e-11e4-11df-b6e3-00144feab49a> [<https://perma.cc/GW84-32HA>]).

¹⁰ *Id.* (quoting World Comm. on Env't and Dev., Rep. of the World Comm. on Env't and Dev.: “Our Common Future,” U.N. Doc. A/42/427, at 54 (1987)).

¹¹ See Beard, *supra* note 8, at 450.

¹² *Id.*

¹³ See Teibel, *supra* note 9, at 600 (citing GLOB. FASHION AGENDA & THE BOSTON CONSULTING GRP., PULSE OF THE FASHION INDUSTRY 8 (2017), https://www.greylockglass.com/wp-content/uploads/2021/08/Pulse-of-the-Fashion-Industry_2017.pdf [<https://perma.cc/FGA7-F54Y>]).

¹⁴ Beard, *supra* note 8, at 450.

¹⁵ See Olivia Suraci, *The Best-Dressed Polluter—Regulation and Sustainability in the Fashion*

there is a lack of agreement among brands regarding how to prevent what is known as “greenwashing.”¹⁶ Greenwashing refers to “the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service.”¹⁷ Greenwashing is particularly prevalent in the fashion industry, with some commentators labeling fashion companies as “among the worst offenders of greenwashing.”¹⁸ According to a recent global survey by the International Consumer Protection and Enforcement Network,¹⁹ as many as forty percent of the environmental claims made on the fashion websites surveyed could mislead consumers.²⁰ This Note attempts to show how legislation can curb greenwashing in the fashion industry by promoting transparency and mandating uniform standards that must be met before marketing products as sustainable.²¹

II

THE FASHION INDUSTRY’S IMPACT: ON THE RUNWAY TO ENVIRONMENTAL DISASTER

The last three decades have seen a meteoric rise in what has come to be known as “fast fashion.”²² Fast fashion is defined as “an approach on design,

Industry, 27 HASTINGS ENV’T L. J. 225, 230 (2021) (citing Emily Chan, *What Are Fast Fashion Brands Doing to Tackle Fashion’s Sustainability Problem?*, VOGUE AUS. (July 30, 2019), <https://www.vogue.com.au/fashion/news/what-are-fast-fashion-brands-doing-to-tackle-fashion-sustainability-problem/image-gallery/00db9acbbb9cb5da053486ae2f3dc59b> [<https://perma.cc/L4XH-MT43>]) (explaining that even among brands that make an effort to be more environmentally friendly, there is confusion and lack of consensus over how to define sustainability and prevent greenwashing).

¹⁶ *Id.*

¹⁷ Michelle Diffenderfer & Keri-Ann C. Baker, *Greenwashing: What Your Client Should Know to Avoid Costly Litigation and Consumer Backlash*, 25 NAT. RES. & ENV’T 21, 21 (2011).

¹⁸ Bella Webb, *The Big Global Greenwashing Crackdown*, VOGUE BUS. (May 27, 2021), <https://www.voguebusiness.com/sustainability/the-big-global-greenwashing-crackdown> [<https://perma.cc/T72U-49QX>].

¹⁹ The International Consumer Protection and Enforcement Network is an organization composed of consumer protection authorities from seventy countries, including the United States, that provides a forum for “developing and maintaining regular contact between consumer protection agencies and focusing on consumer protection concerns.” *Who We Are*, ICPEN, <https://icpen.org/who-we-are> [<https://perma.cc/58XE-VTV2>].

²⁰ *Global Sweep Finds 40% of Firms’ Green Claims Could Be Misleading*, HM GOV’T (Jan. 28, 2021), <https://www.gov.uk/government/news/global-sweep-finds-40-of-firms-green-claims-could-be-misleading> [<https://perma.cc/FHP7-AC88>].

²¹ This Note will use the term “sustainable” to refer to fashion company practices and supply chains that meet the needs of the present generation without compromising the ability of future generations to meet their needs, modeled on the definition promulgated by the U.N. Teibel, *supra* note 9, at 598. This Note will use the phrase “sustainability claims” to encompass any claims made by fashion companies regarding positive and/or improved environmental practices at any stage in the supply chain.

²² Jennifer Xiaopei Wu & Li Li, *Sustainability Initiatives in the Fashion Industry*, in FASHION

creation, and marketing of clothing fashions that emphasizes making fashion trends quickly and cheaply available to consumers.”²³

The traditional model for fashion production was built around two “cycles” per year, one from January to June and another from July to December.²⁴ Historically, designers previewed their creations at fashion shows attended by industry insiders who would draw inspiration from the designs and predict what styles would be fashionable in the coming cycle.²⁵

In the 1990s, this traditional process began to speed up dramatically.²⁶ As fashion shows began to open to the public and photographs from the runways proliferated, demand grew from consumers who wanted access to these designs sooner than the traditional model allowed.²⁷ Fast-fashion giant Zara led the break from the traditional model by introducing “microseasons” every week, so that it is now common for fashion companies to have fifty to one hundred micro seasons per year.²⁸ It is now regular practice for interpretations of runway designs to be in store and ready to purchase within weeks or even days, so as to cater to consumer demands and get ahead of the competition.²⁹

One factor in the rise of fast fashion, perhaps surprising to older or “offline” consumers, is the role that social media “influencers” have played in the growth of fast fashion and greenwashing. An influencer is “someone who has the power to influence the perception of others or get them to do something different.”³⁰ According to recent surveys, nearly half of all

INDUS.: ITINERARY BETWEEN FEELINGS & TECH. 3, 4 (Riccardo Beltramo, Annalisa Romani & Paolo Cantore eds., 2019).

²³ Hala Abdel-Jaber, *The Devil Wears Zara: Why the Lantham Act Must Be Amended in the Era of Fast Fashion*, 15 OHIO STATE BUS. L.J. 234, 235 (2021) (citing *Fast Fashion*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/fast%20fashion> [https://perma.cc/EKN8-LJ6B]).

²⁴ See Deborah Drew & Genevieve Yehounme, *The Apparel Industry’s Environmental Impact in 6 Graphics*, WORLD RES. INST. (July 5, 2017), <https://www.wri.org/insights/apparel-industrys-environmental-impact-6-graphics> [https://perma.cc/U2RJ-JEGS] (explaining that a “cycle” refers to the time it takes for a piece of clothing to go through all of the stages to get from the designer’s mind into the hands of the consumer).

²⁵ Vertica Bhardwaj & Ann Fairhurst, *Fast Fashion: Response to Changes in the Fashion Industry*, INT’L REV. RETAIL DISTRIB. CONSUMER RSCH. 165, 168 (2010).

²⁶ See Abdel-Jaber, *supra* note 23, at 236 (noting the advent of weekly seasons and the increased turnover of products and designs by fast fashion behemoths).

²⁷ See Francesca M. Witzburg, *Fashion Forward: Fashion Innovation in the Era of Disruption*, 39 CARDOZO ARTS & ENT. L.J. 705, 706 (2021) (noting the “accelerat[ion]” of the process following increased accessibility of fashion shows to the public).

²⁸ Drew & Yehounme, *supra* note 24.

²⁹ Bhardwaj & Fairhurst, *supra* note 25, at 169 (citing Liz Barnes & Gaynor Lea-Greenwood, *Fast Fashioning the Supply Chain: Shaping the Research Agenda*, 10 J. FASHION MKTG. & MGMT. 259 (2006)).

³⁰ Gerardo A. Dada, *What Is Influencer Marketing and How Can Marketers Use It Effectively?*, FORBES (Nov. 14, 2017, 8:00 AM),

companies ran social media influencer campaigns in 2020 and seventy-one percent planned to increase their influencer marketing budget over the next year.³¹ It is difficult to overstate the effect that influencers have on young consumers. For example, seventy percent of teenage YouTube subscribers assert that they relate to YouTube influencers more than traditional celebrities, and forty percent of millennial subscribers report that their favorite YouTube creator understands them better than their friends.³²

Increases in the popularity of online shopping, the introduction of social media influencers who promote new trends daily, and the rise of the fashion micro-season have created a world in which clothes are no longer made to last.³³ From 2000 to 2014, the average consumer bought sixty percent more clothing but kept each garment just half as long.³⁴ Younger millennials and Gen Z are accustomed to the ease and rapidity of online shopping.³⁵ They have grown up in a social-media-dominated world that encourages consumption through advertisement and promotion of the latest trends via constantly updated social media feeds.³⁶ These generations of consumers desire “newness.”³⁷ A recent study conducted in Britain revealed that one in three young women considers a clothing item “old” after wearing it once or twice.³⁸ One in seven young women considers it a “fashion faux-pas” to be photographed wearing the same item of clothing twice.³⁹

These significant changes in production and consumption patterns have produced demand for more apparel at a lower price point,⁴⁰ leaving behind a

<https://www.forbes.com/sites/forbescommunicationscouncil/2017/11/14/what-is-influencer-marketing-and-how-can-marketers-use-it-effectively/?sh=3df8139423d1> [<https://perma.cc/T4L6-QQV2>] (explaining that in the social media marketing context specifically, an influencer is someone who promotes products and convinces people to buy from whatever brand has paid them for their promotion).

³¹ LINQIA, THE STATE OF INFLUENCER MARKETING 2021: HOW ENTERPRISE MARKETERS VIEW INFLUENCER MARKETING—THE NEED FOR INFLUENCER ROI 3 (2021).

³² Celie O’Neil-Hart & Howard Blumenstein, *Why YouTube Stars Are More Influential than Traditional Celebrities*, THINK WITH GOOGLE (July 2016) <https://www.thinkwithgoogle.com/marketing-strategies/video/youtube-stars-influence> [<https://perma.cc/4DQ7-NL26>].

³³ See Abdel-Jaber, *supra* note 23, at 237–39 (describing various factors which have affected the growth of fast fashion).

³⁴ AMED ET AL., *supra* note 4 (citing Nathalie Remy, Eveline Speelmann & Steven Swartz, *Style That’s Sustainable: A New Fast Fashion Formula*, MCKINSEY & CO. (Oct. 20, 2016), <https://www.mckinsey.com/capabilities/sustainability/our-insights/style-thats-sustainable-a-new-fast-fashion-formula> [<https://perma.cc/92VH-PDPN>]).

³⁵ See Abdel-Jaber, *supra* note 23, at 235–36.

³⁶ See *id.*

³⁷ AMED ET AL., *supra* note 4, at 39.

³⁸ *Id.* (citing *Once Worn, Thrice Shy – British Women’s Wardrobe Habits Exposed!*, SKEMNEWS (June 11, 2015), <https://skemnews.com/worn-thrice-shy-british-womens-wardrobe-habits-exposed> [<https://perma.cc/9EJW-G8ZD>]).

³⁹ *Id.*

⁴⁰ Abdel-Jaber, *supra* note 23, at 237–42.

tremendous amount of textile waste and a staggering carbon footprint.⁴¹ While the clothing resale market is on the rise, many resellers will not accept clothing from fast fashion brands like Forever 21, H&M, or Zara because the quality of the clothing is poor, the resale value is low, and there is simply too much of it.⁴² Furthermore, the chemicals added to clothing through bleaching, dyeing, printing, and scouring processes can leach into groundwater or be released as air-borne toxins, thereby compounding the negative environmental effects of fast fashion.⁴³

Consequently, the amount of clothing thrown away by Americans each year has doubled in the last twenty years from seven million tons to fourteen million tons, which equates to roughly eighty pounds per person.⁴⁴ According to the U.S. Environmental Protection Agency (“EPA”), seventeen million tons of textile waste ended up in landfills in 2018.⁴⁵ Once clothing reaches a landfill, it could take hundreds or even thousands of years to biodegrade depending on the material.⁴⁶

Retailers themselves are often responsible for clothing and accessories ending up in landfills or incinerators because many luxury brands have a policy of destroying merchandise that is returned or unsold.⁴⁷ Until very recently, Burberry, Louis Vuitton, and other luxury brands operating under the umbrella of parent company Richemont boxed up their unsold goods at the end of each year and sent them off to be burned to maintain scarcity of goods and avoid selling at a markdown. In 2018 alone, Burberry burned almost \$40 million of unsold goods before suddenly announcing plans to halt the practice in the face of mounting pressure from environmental groups.⁴⁸ However, other luxury brands continue the practice of merchandise destruction,⁴⁹ including the fashion houses operating under parent company Kering SA.⁵⁰ In defense of the practice, Niccolò Ricci, CEO of luxury label

⁴¹ Suraci, *supra* note 15, at 226–27 (citing several studies and reports emphasizing the extensive environmental detriment caused by the fashion industry) (internal citations omitted).

⁴² Alden Wicker, *Fast Fashion Is Creating an Environmental Crisis*, NEWSWEEK MAGA. (Sept. 1, 2016, 6:40 AM), <https://www.newsweek.com/2016/09/09/old-clothes-fashion-waste-crisis-494824.html> [<https://perma.cc/JZ2L-73DF>].

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ ENV’T PROT. AGENCY, TEXTILES: MATERIAL-SPECIFIC DATA, <https://www.epa.gov/facts-and-figures-about-materials-waste-and-recycling/textiles-material-specific-data> [<https://perma.cc/2PSS-S6TT>].

⁴⁶ *Id.*

⁴⁷ See Matthew Dalton, *Why Luxury Brands Burn Their Own Goods*, WALL ST. J. (Sept. 6, 2018), <https://www.wsj.com/articles/burning-luxury-goods-goes-out-of-style-at-burberry-1536238351> [<https://perma.cc/3SSX-DDJ3>].

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See *Couture and Leather Goods*, KERING, <https://www.kering.com/en/houses/couture-and-leather-goods/gucci> [<https://perma.cc/L5EM-QQ5N>]. Kering is a multi-national corporation that

Stefano Ricci, said “[w]e do not like to sell our goods in discounted stores” to give “respect to the clients and the workers” who do not want to spend thousands of dollars on a suit, only to see the same item at an outlet store a few months later for half the price.⁵¹

The fashion industry produces more than just the textile waste described above. The industry is responsible for consuming one-tenth of all the water used industrially to run factories and clean products,⁵² using around ninety-three trillion liters of water per year.⁵³ Cotton, a staple of clothing production, requires a tremendous amount of water to produce.⁵⁴ Roughly 10,000 liters of water is needed to produce one kilogram of cotton, which equates to about 3,000 liters of water to produce one cotton shirt.⁵⁵ Other materials, such as denim, require large amounts of water as well—a pair of jeans takes about 7,500 liters of water to make.⁵⁶

Textile dyeing is the second largest polluter of water globally,⁵⁷ accounting for around twenty percent of the wastewater produced worldwide.⁵⁸ The United Nations (“U.N.”) estimates that eighty to ninety percent of wastewater is returned to the environment untreated, causing “pollution at all stages of the value chain, from the agricultural runoff from cottonfields causing algal blooms that choke rivers, to the dyeing process releasing a cocktail of toxic chemicals and the washing of clothes releasing microplastics.”⁵⁹

While demand for apparel continues to rise, calls for sustainable fashion are on the rise too.⁶⁰ A 2021 survey of U.S. teenagers and adults found that eighty-six percent of consumers believe that sustainability in fashion is a good goal, and more than half of the survey respondents were interested in

owns several popular luxury goods producers such as Gucci, Yves Saint Laurent, Bottega Veneta, and Balenciaga. *Id.*; Kering S.A., WALL ST. J. MKTS., <https://www.wsj.com/market-data/quotes/FR/XPAR/KER/company-people> [<https://perma.cc/PF4S-AGXG>].

⁵¹ Dalton, *supra* note 47.

⁵² Ngan Le, *The Impact of Fast Fashion on the Environment*, PSCI (July 20, 2020), <https://psci.princeton.edu/tips/2020/7/20/the-impact-of-fast-fashion-on-the-environment> [<https://perma.cc/4R9B-RF3F>].

⁵³ *The Issues: Water*, COMMON OBJECTIVE (Nov. 2021), <https://www.commonobjective.co/article/the-issues-water> [<https://perma.cc/44CK-FAPQ>].

⁵⁴ See THE STATE OF THE APPAREL SECTOR 2015 SPECIAL REPORT: WATER, THE SUSTAINABLE BUS. GRP. 14 (Sept. 2015).

⁵⁵ *Id.*

⁵⁶ *Putting the Brakes on Fast Fashion*, UNEP (Nov. 12, 2018), <https://www.unep.org/news-and-stories/story/putting-brakes-fast-fashion> [<https://perma.cc/NNQ3-SBH2>].

⁵⁷ *Id.*

⁵⁸ Le, *supra* note 52.

⁵⁹ Mike Scott, *Out of Fashion—The Hidden Cost of Clothing Is a Water Pollution Crisis*, FORBES (Sept. 19, 2020), <https://www.forbes.com/sites/mikescott/2020/09/19/out-of-fashion-the-hidden-cost-of-clothing-is-a-water-pollution-crisis/?sh=637cb2b3589c> [<https://perma.cc/SVG6-3JM6>].

⁶⁰ See AMED ET AL., *supra* note 4.

purchasing sustainable clothing.⁶¹ However, forty-eight percent of respondents did not know where or how to find sustainable clothing and forty-two percent were confused about what makes clothing sustainable.⁶² Part of this confusion stems from a distrust of fashion companies' branding and certifications. Almost ninety percent of consumers surveyed did not immediately trust brands that said they were sustainable and just over half believed that greenwashing is common in the fashion industry.⁶³

Consumer confusion poses a significant setback to the development of sustainable fashion practices. With consumers confused and cynical about sustainability claims, the incentive that fashion companies have to make meaningful changes to their practices is diminished. Creating a comprehensive framework for measuring environmental impact and communicating that impact to the public is essential to drive sustainable fashion practices. Furthermore, imposing standardized metrics and guidelines that fashion companies must comply with in order to advertise as sustainable would meet the needs of environmentally-conscious consumers and allow them to have confidence in their purchases.

III

MEASURING ENVIRONMENTAL IMPACT

This Section discusses two of the most widely used environmental impact rating systems: the Higg Index and OEKO-TEX's Made in Green and Standard 100.⁶⁴ Each has key attributes that should factor into environmental impact legislation. The Higg Index utilizes an optimal methodology for measuring environmental impact throughout the various stages of production, from raw material extraction and production through final fabric assembly.⁶⁵ OEKO-TEX has its own methodology for calculating environmental impact, but the true benefit to be derived from OEKO-TEX's practices is its use of traceable product labels.⁶⁶ Ultimately, a combination of the Higg Index's methodologies and OEKO-TEX's traceable product labels should be utilized in the federal environmental impact legislation considered in Section VI of this Note.⁶⁷

⁶¹ GLOBENEWSWIRE, *supra* note 6.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See CHANGING MKTS. FOUND., *supra* note 3, at 65–71.

⁶⁵ See *Higg Product Tools*, SUSTAINABLE APPAREL COAL., <https://apparelcoalition.org/higg-product-tools> [<https://perma.cc/FYE7-UMKL>].

⁶⁶ See STANDARD: MADE IN GREEN BY OEKO-TEX, OEKO-TEX (Feb. 2021), https://www.oeko-tex.com/importedmedia/downloadfiles/MADE_IN_GREEN_by_OEKO-TEX_R_-_Standard_en.pdf [<https://perma.cc/6PWM-7XEN>].

⁶⁷ See *infra* Section VI (discussing how the Higg Index and OEKO-TEX label should be incorporated into federal environmental impact legislation).

A. *The Higg Index*

The Higg Index was developed by the Sustainable Apparel Coalition (“SAC”). The SAC was created in 2010 after “a dynamic and unconventional meeting of the minds”: a partnership between Walmart and Patagonia.⁶⁸ It is a collaboration with two other organizations, Higg Co. and Apparel Impact Institute (Aii).⁶⁹ The SAC was formed to synthesize the environmental sustainability research and metrics developed by Higg Co. and Aii to make them more available to fashion companies and to encourage a greater number of companies to join together and commit to sustainability.⁷⁰ In 2010, the SAC released its first version of the Higg Index, which built “on the best of existing work” by adapting an “Eco-Index” that had been developed by the Outdoor Industry Association, whose members include Patagonia, REI, and Timberland.⁷¹ The Higg Index began as an internal tool for member companies to assess the environmental impact of their products.⁷² For the first nine years of its existence, the SAC did not allow member organizations to publish their Higg ratings while the rating system went through revisions and fine-tuning.⁷³

The first Higg Index rating that was allowed to be published was the Higg Material Sustainability Index (“Higg MSI”). The product-focused Higg MSI, just one measurement tool in the Higg Index Suite, measures the sustainability of certain products by comparing their impact to “conventional versions of the same materials,”⁷⁴ across the four broad categories of global warming potential, fossil fuel use, water use, and water pollution.⁷⁵

The Higg MSI generates a percentage score for each impact area and a total score from zero to three based on overall reduction on environmental impact.⁷⁶ To make these calculations, the Higg MSI takes into account the following inputs: energy, water, materials and chemicals, and agricultural

⁶⁸ *Our Origins*, SUSTAINABLE APPAREL COAL., <https://apparelcoalition.org/origins> [<https://perma.cc/C3FJ-5LHL>].

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Sustainability Profiles*, HIGG, <https://profiles.production.higg.com/profile/PR0M6VFK> [<https://perma.cc/97Q7-PJNC>].

⁷⁵ CHANGING MKTS. FOUND., *supra* note 3. “Global warming potential” is defined as “[t]he amount of the greenhouse gas emissions that contribute to global warming, from sources such as energy, soil emissions, and refrigerants”; “fossil fuel use” is defined as “[t]he amount of non-renewable fossil fuel resources used in manufacturing, from sources like coal, oil, and natural gas”; “water use” is defined as “[t]he amount of water removed from local environments because of manufacturing, also factoring in differences of water availability between regions”; “water pollution” is defined as “[t]he amount of excess nutrient emissions, which can lead to harmful algal bloom and dead zones in bodies of water.” *Sustainability Profiles*, *supra* note 74.

⁷⁶ *Sustainability Profiles*, *supra* note 74.

land use; and the following outputs: product (intermediate output) and amount, solid waste, emissions, and wastewater.⁷⁷ A score of zero represents an environmental impact in the same range as conventional versions of the same material; a score of one represents at least a 12.5% reduction in environmental impact compared to conventional materials; a score of two represents at least 25% impact reduction; and a score of three represents at least 50% impact reduction.⁷⁸

In May 2021, Amazon, H&M, and Calvin Klein were among the first companies to publish their Higg MSI scores.⁷⁹ There is no way for consumers to directly browse all products with published Higg MSI scores. In order to see the scores online, a consumer must go to the SAC website, view the list of member companies, go to the individual brands' websites, and then click through products to find pieces that are scored. The H&M website, for example, does not have a filter or search tool that allows customers to locate Higg MSI rated products specifically. Customers can browse H&M's "Conscious Collection," but many of the apparel items on this page are not Higg rated.⁸⁰ Customers must click on individual products and scroll down to see if there is an available score.⁸¹ One floral dress, for example, has a Higg MSI score of two, and shows the following ratings across the four impact categories: 34% less global warming potential, 28% less fossil fuel use, 49% less water use, and 35% less water pollution.⁸²

The SAC says that the publication of Higg MSI data is the "first phase of a transparency program for publicly sharing data" on environmental impact.⁸³ The Higg MSI is valuable because it provides a consistent rating process across the fashion industry for brands who join the SAC, with more than 150 brands and retailers currently enrolled as SAC members.⁸⁴ They cover vast swaths of the market and range from brands commonly perceived

⁷⁷ *Higg Materials Sustainability Index (MSI) Methodology*, SUSTAINABLE APPAREL COAL. (July 31, 2020), <https://higg.com/wp-content/uploads/2021/05/Sustainable-Apparel-Coalition-and-Higg-launch-new-program-for-publicly-sharing-data-on-a-products-environmental-impact.pdf> [<https://perma.cc/6ARP-AH54>].

⁷⁸ *Id.*

⁷⁹ Press Release, Sustainable Apparel Coalition, Sustainable Apparel Coalition and Higg Launch New Program for Publicly Sharing Data on a Product's Environmental Impact: Amazon, H&M, and Norrona Among First to Participate (May 27, 2021), <https://apparelcoalition.org/press-releases/transparency-program-launch> [<https://perma.cc/GN3Y-HBGF>].

⁸⁰ *What's the Buzz About Higg Index? Creating Consumer-Facing Transparency*, H&M, <https://hmggroup.com/news/the-higg-index-sustainability-profiles-a-common-language-for-collective-action/?s=higg> [<https://perma.cc/DH95-RWGM>].

⁸¹ *Id.*

⁸² V-Neck Dress, H&M, https://www2.hm.com/en_us/productpage.1025692001.html [<https://perma.cc/882Y-R2TC>].

⁸³ Press Release, Sustainable Apparel Coalition, *supra* note 79.

⁸⁴ *Our Members*, SUSTAINABLE APPAREL COAL., <https://apparelcoalition.org/members> [<https://perma.cc/SK9T-KBRF>].

to be sustainable (Patagonia, Allbirds, Columbia, and REI) to brands that are traditionally perceived to be some of the worst environmental offenders (Amazon, Boohoo, Walmart, and ASOS).⁸⁵

One shortcoming of the Higg Index is that membership is completely voluntary, as is the decision to publish product ratings.⁸⁶ Companies are completely free to publish the ratings for their highest-achieving products, while simply omitting ratings from lower scoring items.⁸⁷

Another potential shortcoming is the cost of membership. For companies with annual revenue under one hundred million dollars, the cheapest option is to pay two thousand dollars per year to access the Higg MSI and product training module directly through Higg rather than through the SAC.⁸⁸ To access all of the tools and functionalities of the Higg Index, including training and impact calculation tools for brands and retailers, and access to the Higg Index's other rating methods, the cost rises to five thousand dollars per year.⁸⁹ Neither of these plans involve membership or access to the SAC, which provides important support and marketing for brands and retailers that utilize the Higg Index.⁹⁰ The cost of SAC membership ranges from six thousand five hundred dollars for companies with annual revenue under twenty million dollars, to ninety thousand dollars for companies with more than twenty-five billion dollars in annual revenue.⁹¹

While the cost of membership to either Higg or the SAC may be negligible for most companies, smaller businesses could be priced out of membership. These small businesses would therefore be unable to access the Higg and SAC tools that would allow them to accurately measure and advertise their environmental impact in a reliable or uniform way. Section VI of this Note discusses how the federal legislation proposed herein would address similar cost problems.⁹²

B. OEKO-TEX

OEKO-TEX is a union of eighteen independent textile-testing and

⁸⁵ *Our Members: Brands and Retailers*, SUSTAINABLE APPAREL COAL., <https://apparelcoalition.org/brands-retailers> [<https://perma.cc/3QRU-J7MJ>].

⁸⁶ *See Higg Index Communication Guidelines: Beta Release*, SUSTAINABLE APPAREL COAL., at 6 (Mar. 2021), <http://apparelcoalition.org/wp-content/uploads/2021/05/SAC-Higg-Index-Comm-Guidelines-v11.pdf> [<https://perma.cc/989V-GNXQ>].

⁸⁷ *See id.*

⁸⁸ *Higg Product Module FAQ*, HIGG, <https://howtohigg.org/higg-product-module/faq> [<https://perma.cc/Q455-ZT5Y>].

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *SAC Membership*, SUSTAINABLE APPAREL COAL. 10 (May 2023), <https://sacoalition.wpenginepowered.com/wp-content/uploads/2022/04/SAC-Membership-Brochure-March-2023.pdf> [<https://perma.cc/ZZ6R-LUUU>].

⁹² *See infra* Section VI.

research institutes that offers seven different environmental certification schemes and services to companies.⁹³ Five of these certification schemes do not relate to product labeling and are only used internally.⁹⁴ The relevant product label standard is the “Made in Green” standard.⁹⁵ The Made in Green standard does not specifically measure environmental impact but provides a traceable product label for different textile goods including yarn, fabric, and garments.⁹⁶ To qualify for Made in Green certification, a product must first comply with OEKO-TEX’s “Standard 100,” which means that the product is free from the harmful chemicals banned by the Made in Green standard.⁹⁷

Every “Made in Green” certified product has a unique QR code that purchasers can scan to see information about the production facilities, the textile or leather article, the stage of production to which the facility belongs, and the countries in which production took place.⁹⁸ Products go through several more certification steps along the supply chain and must earn OEKO-TEX certification for all components equal to or exceeding 5% of the total weight of the product and must account for at least 85% of the total weight of the product.⁹⁹ Metal, plastic, and rubber fixtures are excluded from the analysis.¹⁰⁰

The strength of the OEKO-TEX rating system is that it accounts for various steps along the supply chain. It also promotes transparency by allowing customers to easily scan a QR code to view product information. This allows consumers to view environmental impact data at the point of purchase. The main drawback of OEKO-TEX Made in Green—for the purposes of the legislation proposed herein—is that its scope exceeds environmental impact.¹⁰¹ The Made in Green standard also encompasses chemicals hazardous to human health,¹⁰² fair labor standards,¹⁰³ and ethical production factors.¹⁰⁴ While these factors may also be useful to consumers

⁹³ See CHANGING MKTS. FOUND., *supra* note 3, at 68.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 68–69.

⁹⁷ To comply with OEKO-TEX Standard 100, a product must not contain chemicals such as “banned azo dyes, carcinogenic and allergy-inducing colourants, pesticides for textiles made of natural fibres, polycyclic aromatic hydrocarbons (PAHs), tin organic compounds, chlorinated phenols, phthalates (softeners), PFOS, PFOA, surfactant wetting agent residues (APEOs) and many more.” QUESTIONS & ANSWERS, OEKO-TEX 11 (Jan. 2019), https://www.oeko-tex.com/fileadmin/user_upload/Marketing_Materialien/STANDARD_100/FAQs/FAQ_STANDAR_100_EN_ES_01.2019.pdf [<https://perma.cc/NVA2-THEV>].

⁹⁸ STANDARD: MADE IN GREEN BY OKEO-TEX, *supra* note 66.

⁹⁹ *Id.* at 5.

¹⁰⁰ *Id.*

¹⁰¹ See generally STANDARD: MADE IN GREEN BY OKEO-TEX, *supra* note 66.

¹⁰² *Id.* at 4, 6.

¹⁰³ *Id.* at 7.

¹⁰⁴ *Id.*

and beneficial to the planet, they exceed the scope of the legislation proposed in this article.

IV REGULATION BY THE FTC

The Federal Trade Commission (“FTC”), created in 1914,¹⁰⁵ is a bipartisan federal agency designed to “[p]rotect[] the public from deceptive or unfair business practices and from unfair methods of competition through law enforcement, advocacy, research, and education.”¹⁰⁶ Section 5 of the FTC Act (“Section 5”) gives the FTC the authority to regulate unfair trade practices.¹⁰⁷ In 1992, the FTC adopted the first version of its “Guides for the Use of Environmental Marketing Claims” (“Green Guides”), created to help marketers avoid deceptive use of environmental claims under Section 5.¹⁰⁸ The Green Guides were revised in 1996, 1998, and 2012,¹⁰⁹ with new revisions currently underway.¹¹⁰

The Green Guides cover claims made through “labeling, advertising, promotional materials and all other forms of marketing in any medium.”¹¹¹ The Green Guides regulate marketing claims about “general environmental benefit,” “carbon offsets,” “certifications and seals of approval,” and claims that a product is “compostable,” “free of” certain ingredients, “non-toxic,” “ozone-safe,” “ozone-friendly,” “recyclable,” “recycled,” made from “renewable materials,” or made using “renewable energy.”¹¹² Importantly, the Green Guides explicitly state that the FTC does not regulate claims that a product is “sustainable.”¹¹³ The Green Guides state that “for sustainable . . . [claims] . . . the Commission [FTC] lacks a basis for providing [] guidance.”¹¹⁴

The Green Guides represented significant progress in the regulation of

¹⁰⁵ 38 Stat. 719, ch. 311 § 5 (codified as amended at 15 U.S.C. § 45).

¹⁰⁶ *About the FTC*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc> [<https://perma.cc/9G2B-NL52>].

¹⁰⁷ See 15 U.S.C. § 45.

¹⁰⁸ FED. TRADE COMM’N, FTC GREEN GUIDES: STATEMENT OF BASIS AND PURPOSE 1 (2012), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf> [<https://perma.cc/AW6K-77FF>].

¹⁰⁹ *Environmentally Friendly Products: FTC’s Green Guides*, FED. TRADE COMM’N: GREEN GUIDES, <https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides> [<https://perma.cc/3JGN-LA8S>].

¹¹⁰ *The Federal Trade Commission Says it Will Review its “Green Guides” in 2022*, FASHION L. (July 7, 2021), <https://www.thefashionlaw.com/the-federal-trade-commission-says-it-will-review-its-green-guides-in-2022> [<https://perma.cc/SP8Y-VDNP>].

¹¹¹ 16 C.F.R. § 260.1(a) (2012).

¹¹² FED. TRADE COMM’N, FTC GREEN GUIDES: STATEMENT OF BASIS AND PURPOSE 35 (2012).

¹¹³ *Id.* at 257–58.

¹¹⁴ *Id.*

environmental claims when they were first promulgated, but they presently suffer from several key limitations. First, the Green Guides are administrative interpretations that do not have the force of law.¹¹⁵ Courts and prosecutors often defer to them in the litigation of environmental claims but are not required to do so.¹¹⁶ Furthermore, the FTC is limited in its enforcement powers. The FTC can enforce compliance with the Green Guides through administrative proceedings, rulemaking, and the federal courts.¹¹⁷ In an administrative proceeding, the FTC can seek a cease-and-desist order from an administrative law judge.¹¹⁸ If the defendant in such a case failed to comply with a cease-and-desist order, the FTC could then file a contempt proceeding in federal court seeking to enforce the administrative order, seek civil penalties, or seek other equitable relief.¹¹⁹

In a recent case, however, the Supreme Court sharply limited the FTC's ability to enforce its judgments through the federal courts. In 2021, the Supreme Court unanimously held in *AMG Capital Management, LLC v. Federal Trade Commission* that the FTC did not have the power to seek equitable monetary relief such as disgorgement or restitution.¹²⁰ The Court in *AMG* stated that the FTC is "free to ask Congress to grant it further remedial authority . . . and Congress has considered at least one bill that would do so."¹²¹ This potential enhanced enforcement mechanism will be discussed further in Part VI of this Note.¹²²

Although the *AMG* decision means that the FTC is no longer able to seek equitable monetary relief under Section 14(b) of the FTC Act, a recent enforcement action (and resulting consent decree) demonstrates the

¹¹⁵ 16 C.F.R. pt. 260, 62122 (2012); Nick Feinstein, *Learning from Past Mistakes: Future Regulation to Prevent Greenwashing*, 40 B.C. ENV'TL AFF. L. REV. 229, 243 (2013).

¹¹⁶ See Feinstein, *supra* note 115. See also *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding that judicial deference should be given to agency decisions and administrative actions when such decisions or actions are not unreasonable). The FTC refers complaints to the United States Department of Justice (DOJ) "when it has 'reason to believe' that the named defendants are violating or are about to violate the law and it appears to the [FTC] that a proceeding is in the public interest. Consent orders have the force of law when approved and signed by the District Court judge." The DOJ files complaints and proposed orders on the FTC's behalf. Press Release, Office of Public Affairs, FTC Uses Penalty Offense Authority to Seek Largest-Ever Civil Penalty for Bogus Bamboo Marketing from Kohl's and Walmart (Apr. 8, 2022) [hereinafter "FTC Settlement Press Release"], <https://www.ftc.gov/news-events/news/press-releases/2022/04/ftc-uses-penalty-offense-authority-seek-largest-ever-civil-penalty-bogus-bamboo-marketing-kohls> [https://perma.cc/JQY3-RKYP].

¹¹⁷ *The Supreme Court Limits FTC's §13(b) Powers*, CROWELL (Apr. 27, 2021), <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/The-Supreme-Court-Limits-FTCs-13b-Powers> [https://perma.cc/KEE4-JJN5].

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1347–51 (2021).

¹²¹ *Id.* at 1352.

¹²² See *infra* Section VI (discussing how the Act proposed in this Note would address the impact of *AMG* on FTC enforcement).

successful use of an alternative monetary penalty-based enforcement mechanism. In April 2022, the FTC reached a settlement with Walmart requiring the retail giant to pay \$3 million for making misleading environmental claims about certain products.¹²³ To achieve this outcome (the largest civil penalty ever granted in this domain) the FTC used its Penalty Offense Authority.¹²⁴ Under the Penalty Offense Authority granted by Section 45(m)(1)(B) of the FTC Act, the FTC can seek civil penalties if it proves that (1) the company knew the conduct was unfair or deceptive in violation of the Act, and (2) the FTC had already issued a written decision that such conduct is unfair or deceptive.¹²⁵ The FTC also derives authority to regulate product labeling from the Fair Packaging and Labeling Act (FPLA), enacted in 1967.¹²⁶ The FPLA was enacted in response to decades of growing pressure to protect the rights and interests of consumers from increasingly deceptive labeling and marketing practices.¹²⁷ Prior to the FPLA's enactment, the patchwork of federal legislation had left "critical gaps in consumer protections laws."¹²⁸ Congress hoped to fill these gaps with the FPLA and ensure that consumers had access to accurate and complete information about the goods they purchased, stating that "informed consumers are essential to the fair and efficient functioning of a free market economy."¹²⁹

The FPLA directs the FTC and the Food and Drug Administration (FDA) to "issue regulations requiring that all 'consumer commodities' be labeled to disclose net contents, identity of commodity, and name and place of business of the product's manufacturer, packer, or distributor."¹³⁰ It also

¹²³ See Stipulated Order and Judgment for Civil Penalties, Permanent Injunction, and Other Relief, U.S. v. Walmart, Inc., No. 1:22-cv-00965, at 8 (D.D.C. Apr. 8, 2022) https://www.ftc.gov/system/files/ftc_gov/pdf/Walmart%20Order.pdf [<https://perma.cc/4SMA-Z4KB>]. This case arose because Walmart claimed that dozens of its products were made from bamboo, when in fact they were made from rayon that was derived from bamboo. *Id.*; FTC Settlement Press Release, *supra* note 116. Walmart advertised that the "bamboo" products were made using an ecofriendly process, when in fact the process used to convert bamboo into rayon "requires the use of toxic chemicals and results in hazardous pollutants." FTC Settlement Press Release, *supra* note 116. In addition to the \$3 million civil fine, the stipulation also required Walmart to stop making false or unsubstantiated claims about the environmental impact or chemical/textile composition of its products. *Id.*

¹²⁴ FTC Settlement Press Release, *supra* note 116.

¹²⁵ 15 U.S.C. § 45(m)(1)(B).

¹²⁶ Fair Packaging and Labeling Act, 15 U.S.C. § 1451–61 (1966).

¹²⁷ Stephanie M. Neitzel, *One Size Fits All: A Federal Approach to Accurate Labeling of Consumer Products*, 23 J. HEALTH CARE L. & POL'Y 87, 89–92 (2020).

¹²⁸ *Id.* at 93.

¹²⁹ Fair Packaging and Labeling Act, 15 U.S.C. § 1451–61 (1966).

¹³⁰ *Fair Packaging and Labeling Act: Regulations Under Section 4 of the Fair Packaging and Labeling Act*, FED. TRADE COMM'N, <https://www.ftc.gov/legal-library/browse/rules/fair-packaging-labeling-act-regulations-under-section-4-fair-packaging-labeling-act> [<https://perma.cc/SFP4-DJKF>].

authorizes each agency to issue new regulations where necessary to prevent unfair or deceptive packaging and labeling of consumer commodities and to facilitate value comparisons.¹³¹ Under the FPLA, the FDA has the authority to regulate concerns relating to food, drugs, cosmetics, and medical devices, while the FTC regulates all other “consumer commodities.”¹³² The FPLA defines the type of consumer commodity to be regulated by the FTC as

any other article, product, or commodity of any kind or class which is customarily produced or distributed for sale through retail sales agencies or instrumentalities for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which is usually consumed or expended in the course of such consumption or use.¹³³

Two years after enacting the FPLA, Congress expressly listed certain categories that were outside the scope of the definition of consumer commodity, including “[t]extiles or items of apparel.”¹³⁴

The legislative history of the FPLA indicates that textiles and apparel were excluded because the FPLA was meant to fill the gaps of the then-existing regulatory regime, and regulations dealing with textile and apparel labeling already existed.¹³⁵ Laws like the Wool Products Labeling Act, enacted in 1939,¹³⁶ and the Fur Products Labeling Act, enacted in 1951,¹³⁷ prohibited false or deceptive labeling of apparel specifically related to the material composition of the apparel item. However, none of these acts addressed the regulation of environmental impact labeling. This is not a flaw in the acts, as each was designed to serve a specific purpose, and environmental impact labeling was outside the scope of those purposes. Rather than highlighting a flaw, this highlights a gap in the regulatory scheme that must be addressed. The Green Guides, as they stand now in the aftermath of the decision in *AMG Capital Management, LLC v. Federal Trade Commission*,¹³⁸ are not sufficient to fill that gap.

While the FPLA’s exemption of apparel from its definition of consumer commodity means that the statute does not currently apply to the fashion industry, it provides an example of the FTC specifically regulating product labeling. As recently as 2020, there have been attempts to amend and expand the FPLA to increase the regulatory authority of the FTC.¹³⁹ This

¹³¹ *See id.*

¹³² Neitzel, *supra* note 127, at 94.

¹³³ Fair Packaging and Labeling Act, 15 U.S.C. § 1459(a) (1966).

¹³⁴ 16 C.F.R. § 503.5(d)(2) (1969).

¹³⁵ *Id.*

¹³⁶ The Wool Products Labeling Act of 1939, 15 U.S.C. § 68.

¹³⁷ Fur Products Labeling Act, 15 U.S.C. § 68–69j (1951).

¹³⁸ 141 S. Ct. 1341, 1347–51 (2021).

¹³⁹ H.R. 6044, 116th Cong. (2020).

demonstrates that current members of Congress take seriously the power and authority of the FTC to regulate product labels.

V

STATE LEGISLATION: NEW YORK SETS THE TREND

In early January 2022, the Fashion Sustainability and Social Accountability Act (“Fashion Act”) was introduced in the New York State Senate.¹⁴⁰ The Fashion Act would “amend the general business law” by “requiring fashion retail sellers and manufacturers to disclose environmental and social due diligence policies.”¹⁴¹ The Fashion Act would apply to fashion retailers and fashion manufacturers doing business in New York and having worldwide gross receipts of over \$100 million.¹⁴² In a news release, Alessandra Biaggi—who cosponsored the bill alongside Assemblywoman Anna R. Kelles¹⁴³—said that as “a global fashion and business capital of the world, New York State has a moral responsibility to serve as a leader in mitigating the environmental and social impact of the fashion industry.”¹⁴⁴

The Fashion Act would require companies to make disclosures in several specified areas. Companies would be required to map out and disclose at least 50% of their supply chain through every stage of production from raw materials to final production.¹⁴⁵ Companies must also disclose impact and due diligence reports, including a social and environmental sustainability report.¹⁴⁶ The report must include (1) a link on the company’s website to relevant policies on responsible business conduct; (2) information on measures taken to incorporate responsible business conduct into policies and management systems; (3) the company’s identified “areas of significant risk” prioritized to the company’s activities; (4) the significant adverse impacts of the identified risks; (5) the criteria used to prioritize the identified risks; (6) the specific actions taken to mitigate those risks; (7) measures to track corrective measures; and (8) the company’s provision of or cooperation in the corrective measures.¹⁴⁷

Companies must also make impact disclosures on their prioritized environmental impacts within eighteen months after enactment.¹⁴⁸ This

¹⁴⁰ Fashion Sustainability and Social Accountability Act, S. 7428, 2021 Leg., Reg. Sess. (N.Y. 2021).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ 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> [https://perma.cc/4MHH-3GM9].

¹⁴⁵ *Id.*

¹⁴⁶ S. 7428.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

disclosure would include, among other things, quantitative baseline and reduction targets on energy and greenhouse gas emissions, water, and chemical management.¹⁴⁹ Notably, the Act requires that claims about greenhouse gas emissions must include absolute figures and be independently verified to conform with the World Resource Institute's greenhouse gas protocol corporate accounting and reporting standard, and the greenhouse gas protocol corporate value chain scope three standard.¹⁵⁰

The Fashion Act tasks the state's attorney general with enforcement of the Act's provisions.¹⁵¹ For companies who are noncompliant, two things will happen. The first is a monetary penalty. The company will have three months after notification of noncompliance to remedy the breach.¹⁵² If they fail to remedy the breach, they may be fined up to two percent of annual revenues of four hundred fifty million dollars or more.¹⁵³ The fines will go into a community benefit fund, established by amending the state finance law.¹⁵⁴ The community benefit fund will be used to implement "one or more environmental benefit projects that directly and verifiably benefit environmental justice communities."¹⁵⁵ The second consequence of noncompliance will be a reputational penalty. The attorney general's office will publish a publicly available list of all sellers and manufacturers who are out of compliance, as well as a report on the attorney general's monitoring of these compliance failures.¹⁵⁶

The Fashion Act's weak enforcement provisions are one of its major shortcomings. The reputational penalty for noncompliance does not create a strong incentive for companies to care about enforcement. In their study of corporate fraud, Jonathon M. Karpoff and John R. Lott, Jr. found that a reputational penalty alone is insufficient to "generate the optimal total sanction" when the damage is done to unrelated third parties, as is the case with claims of environmental damage or widescale consumer fraud.¹⁵⁷

Another major shortcoming of the Fashion Act is its ambiguity. The Fashion Act would require companies to disclose fifty percent of their supply chains, but the Act does not specify what parts of the supply chain should be disclosed.¹⁵⁸ Critics have pointed out that this ambiguity allows companies

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J. L. & ECON. 489, 489–50 (1999); Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J. L. & ECON. 757 (1993).

¹⁵⁸ S. 7428.

to be selective about “which 50 per cent of their supply chain [they] will choose to map—most likely the easiest and that which makes them look best.”¹⁵⁹ If companies choose to report in this way, then very little will actually be accomplished. Worse, the Fashion Act could raise prices for all consumers in New York without actually delivering a tangible benefit to either consumers or the environment. This risk is exacerbated by the Fashion Act’s weak enforcement mechanisms, which make the cost of noncompliance negligible for most large firms.

The Fashion Act, while an ambitious step in the right direction, is not designed to benefit consumers. In addition to the shortcomings of its individual provisions, the overall effect of the Fashion Act could actually harm, rather than help, New York consumers. The mandatory disclosures required by the Fashion Act would apply to all qualifying companies, not just those who market themselves as sustainable. Therefore, every qualifying company would be forced to comply and to bear the financial burden of compliance. This cost would very likely be shifted to consumers. While some consumers are happy to pay a premium for sustainable clothing, others do not share the same sentiment.¹⁶⁰ It follows that the goal of protecting consumers is not served by mandatory disclosure requirements for all companies, since consumers who have no interest in sustainability or are unable or unwilling to pay more for sustainable goods would nonetheless be forced to pay higher prices for their clothing.

Ultimately, state legislation like the Fashion Act is not the best vehicle for consumer protection. Even if the major shortcomings addressed above were resolved or a new bill were drafted specifically addressing consumer interests in greenwashing, a state bill is unlikely to have the teeth to make real change. The minimal consequences for noncompliance with the Fashion Act are illustrative. Legislation aimed at curbing greenwashing and protecting U.S. consumers from false and misleading advertisement should come at the federal level, so that the full powers of the FTC and the federal government can be called on to oversee the administration and enforcement of the law.

¹⁵⁹ Rachel Cernansky, *Deconstructing New York’s Fashion Act*, VOGUE BUS. (Jan. 13, 2022), <https://www.voguebusiness.com/sustainability/deconstructing-new-yorks-fashion-act> [https://perma.cc/2YP4-N353].

¹⁶⁰ Olivia Montgomery, *Attention Retailers: Here’s What You Should Be Doing About Sustainability Now*, CAPTERRA (Dec. 1, 2021), <https://www.captterra.com/resources/what-retailers-should-do-about-sustainability-for-consumers> [https://perma.cc/2C53-WZLR].

VI

STITCHING IT ALL TOGETHER: PROPOSED FEDERAL LEGISLATION

A. *Structure and Content of the Act*

Creating a uniform, workable framework for sustainability labeling does not require starting from scratch. The systems that are currently in place can be brought together to create a cohesive whole from these disparate parts. Congress should enact legislation (the Act) mandating that fashion companies doing business in the United States may not make claims about their products' sustainability without adhering to a standardized framework for environmental impact reporting. The Act would not mandate environmental impact disclosure for all companies, as the New York Fashion Act would. Such a regime on the federal level would likely be prohibitively costly to the government, companies, and consumers alike. Rather, the Act will apply only to fashion companies who choose to market their products, or their companies as a whole, as sustainable. The Act will enhance the ability of the FTC to regulate environmental impact claims and will provide the necessary scientific, methodological, and practical framework to facilitate this goal.

The effectiveness of the Act will depend, first and foremost, on the use of a uniform system for measuring environmental impact to ensure accurate and comparable data across the industry. This standardized system should incorporate elements from two of the most successful and comprehensive labeling and rating schemes, the Higg Index and the OEKO-TEX system.¹⁶¹ The Higg Index is already used by many of the biggest brands doing business in the United States.¹⁶² The Higg Index is ideal because it addresses issues that occur across the entire supply chain, including raw material processing, transportation, and final production.¹⁶³

The Higg Index has proven to be effective in gathering data from across transnational supply chains and translating that data into metrics that are relatively straightforward and easy to understand. Most importantly, the resulting data allows for simple comparison between different companies. This factor is essential to the success of the Act because consumers should be able to evaluate and make judgments on the environmental impact of companies without advanced technical knowledge, or hours spent sifting

¹⁶¹ The National Technology Transfer and Advancement Act of 1995 states that federal agencies should use privately developed technical standards and consult with private standards bodies when doing so would not be "inconsistent with applicable law or otherwise impractical." National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775, 783 (1996); *see also* JOANNE YATES & CRAIG MURPHY, *ENGINEERING RULES: GLOBAL STANDARD SETTING SINCE 1880* (2019).

¹⁶² *See Our Members*, *supra* note 84 (member brands include Aldo, Amazon, and AEO).

¹⁶³ *Higg Product Tools*, *supra* note 65.

through complex data collected using differing methodologies.¹⁶⁴

Using the metrics measured by the Higg Index, the Act should require companies who make sustainability claims to adopt the user-friendly traceable tagging system developed by OEKO-TEX. OEKO-TEX's scannable QR codes allow customers to view sustainability and production data at the point of purchase.¹⁶⁵ Rather than hang tags that are removed immediately after purchase, the OEKO-TEX tags are stitched into the clothing itself, like a care label. Although it is possible for purchasers to cut out the tags after purchase, the sewn-in tag makes it more likely that consumers will be able to gain insight into their clothing even when it is purchased on the resale market, allowing consumers access to information at various stages in apparel's lifecycle.

The combination of the Higg Index and OEKO-TEX label could look something like nutrition labels, which have been federally mandated since 1990.¹⁶⁶ Instead of calories and fat content, the labels would display the product's overall Higg MSI rating and its performance across the four measured categories. Just like nutrition labels provide quick and simple guidance to consumers about their food choices, the Federal Act's labels would empower shoppers to make informed decisions about their fashion choices.¹⁶⁷

The idea of fashion labels that read like nutrition labels is not without precedent. In December 2021, Nashville-based shoe brand, Nisolo, introduced a "Sustainability Facts" label inspired by nutrition labels.¹⁶⁸ Nisolo spent three years and half a million dollars developing the label, which appears in all its shoeboxes.¹⁶⁹ The information is divided into twelve categories and includes labor facts as well as environmental facts.¹⁷⁰ In

¹⁶⁴ One important question that is outside the scope of this Note is the exact Higg Index "score" that a fashion company should be required to achieve in order to meet the Act's criteria for sustainability marketing. This is, of course, a vital question to answer in the formulation of the Federal Act. This question should be left to Congressional committees to sort out, ideally in consultation with experts such as the developers and professionals behind the Higg Index's creation and use.

¹⁶⁵ STANDARD: MADE IN GREEN BY OKEO-TEX, *supra* note 66.

¹⁶⁶ See Nutrition Labeling and Education Act of 1990, 21 U.S.C. § 343-1 (1990) (requiring nutrition labels contain the serving size, the amount of certain nutrients, and other nutritional information that the Secretary determines will assist in maintaining healthy dietary practices).

¹⁶⁷ Amy Nguyen, *Carbon Labels, Digital Passports and Traceability Tags—Clothing Labels' New Normal*, FORBES (Jan. 7, 2021), <https://www.forbes.com/sites/amynguyen/2021/06/07/carbon-labels-digital-passports-and-traceability-tags—clothing-labels-new-normal/?sh=6313dbf614aa> [https://perma.cc/D29X-9GPF].

¹⁶⁸ Dana Thomas, *What if You Could Read a Fashion Label Like a Food Label?*, N.Y. TIMES (Jan. 10, 2022), <https://www.nytimes.com/2022/01/10/style/clothes-label-sustainability.html> [https://perma.cc/3AXF-ENBW].

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

addition to the labels, Nisolo also includes a QR code on its shoe bags and hang tags that customers can scan to view more detailed information on each particular shoe in its line.¹⁷¹

The idea of a scannable tag is likewise not without precedent. In 2019, London-based knitwear label Sheep, Inc. introduced a near field communication (“NFC”) tag attached to its sweaters.¹⁷² Customers can scan the NFC tags and use an app to track the supply chain of Sheep, Inc.’s Merino wool sweaters.¹⁷³ The available details include the full journey of the product’s manufacturing and carbon footprint.¹⁷⁴

In October 2021, Prince Charles’s Sustainable Markets Initiative Fashion Taskforce (Fashion Taskforce) introduced a “Digital ID” that allows customers to trace a fashion item from production through sale and even resale.¹⁷⁵ Currently, the Digital ID is only used by, and available to, the Fashion Taskforce’s fifteen member brands and retailers.¹⁷⁶ These brands include big names such as Armani, Stella McCartney, and Chloé.¹⁷⁷ The Fashion Taskforce has said that it plans to make the tag more widely available in the coming years.¹⁷⁸

While New York’s Fashion Act provides for enforcement by the state’s attorney general, the Federal Act should draw on the enforcement powers of the FTC to oversee compliance with the Federal Act’s provisions. In its 2012 Green Guides, the FTC specifically stated that it declined to regulate claims about “sustainable” products because it “lack[ed] sufficient evidence on which to base general guidance.”¹⁷⁹ The Act’s adoption of the Higg Index would fill this knowledge gap, providing the FTC with uniform standards on which to base its enforcement of sustainability claims. Fashion companies who make sustainability claims must have the Higg Index data to back up these claims so that the FTC is able, without overwhelming administrative burden, to ensure that consumers are protected from false or misleading claims.

The Federal Act must also specifically address the implications of the

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Chloe Street, *Sheep Inc.: The World’s First Carbon-Negative Fashion Brand*, EVENING STANDARD (Dec. 6, 2019), <https://www.standard.co.uk/insider/fashion/sheep-inc-jumpers-carbon-negative-nfc-tag-a4303601.html> [<https://perma.cc/NF8P-KEFN>].

¹⁷⁵ Thomas, *supra* note 168.

¹⁷⁶ *Id.*

¹⁷⁷ SUSTAINABLE MARKETS INITIATIVE, HRH THE PRINCE OF WALES’ SMI FASHION TASKFORCE LAUNCHES GROUNDBREAKING DIGITAL ID WITH SUSTAINABILITY PROTOCOLS AT G20 IN ROME (2021), https://a.storyblok.com/f/109506/x/6b1a1c3d9c/website_smi-fashion-taskforce-launches-digital-id.pdf [<https://perma.cc/L4MV-PB52>].

¹⁷⁸ See Thomas, *supra* note 168.

¹⁷⁹ 16 C.F.R. § 260.1(a) (2012).

Supreme Court’s recent decision in *AMG Capital Management, LLC v. Federal Trade Commission*, which proscribed the FTC’s use of the federal courts to seek equitable monetary relief.¹⁸⁰ As Justice Breyer stated in his opinion for the Court, the FTC remains “free to ask Congress to grant it further remedial authority.”¹⁸¹ The Act should explicitly delegate authority to the FTC to enforce monetary penalties for violations of the Act, including fines and disgorgement of profits.

B. Associated Costs

Compliance with the proposed Act will inevitably come at a financial cost for companies, consumers, or both. For companies that do not use the Higg Index or belong to the SAC, there will likely be a cost associated with implementing this new framework. Even for companies who are already members of both organizations, there will likely be a cost associated with compiling and disclosing the data to the FTC. Regulatory compliance can be costly for organizations, particularly those who do not have a robust compliance system already in place.

One way of dealing with this cost is to pass at least a portion of the increase onto consumers. A 2021 study of U.S. consumers found that seventy-six percent were willing to pay more for sustainable clothing and textiles.¹⁸² For companies whose consumer base prioritizes sustainability and is willing to pay a premium for sustainable clothing, this investment may be well worth it.

Even for companies with diverse consumer bases, the cost of compliance can be offset by creating a sustainable line within their larger brand and charging a premium on those products. H&M’s Conscious Collection, for example, offers a more sustainable option for H&M shoppers who are willing to pay the higher prices associated with sustainable products.¹⁸³ Although H&M has repeatedly been accused of greenwashing with their Conscious Collection,¹⁸⁴ it still serves as an example of how a

¹⁸⁰ 593 U.S. at 1.

¹⁸¹ *Id.* at 14.

¹⁸² Montgomery, *supra* note 160.

¹⁸³ Isabelle Gerretsen & Ivana Kottasová, *The World is Paying a High Price for Cheap Clothes*, CNN BUS. (May 6, 2020), <https://www.cnn.com/2020/05/03/business/cheap-clothing-fast-fashion-climate-change-intl/index.html> [<https://perma.cc/V9DL-JZC6>].

¹⁸⁴ H&M has received a steady stream of criticism accusing the Conscious Collection of misleading consumers. Alden Wicker, *H&M Is Being Sued for Greenwashing. What Does That Mean for Fashion?*, NEW YORK MAGAZINE: THE CUT (Aug. 19, 2022), <https://www.thecut.com/2022/08/h-and-m-greenwashing-fashion.html> [<https://perma.cc/KGM3-KSF4>]. Most notably, a 2022 class action lawsuit accused the company of greenwashing, but the lawsuit was dismissed in May 2023 for lack of personal jurisdiction (for the first named plaintiff) and failure to state a claim (for the second named plaintiff). *Lizama v. H&M Hennes & Mauritz*

major retailer known for producing extremely cheap clothing can likewise charge a premium to cater to an environmentally-conscious consumer base, while maintaining low prices for the rest of their purchasers.¹⁸⁵ This solution benefits consumers because those who are willing to pay more for sustainable options are able to do so without raising prices for consumers who aren't interested in sustainability or cannot afford to pay the premium associated with it.

Another way of dealing with the cost of compliance with the Act would be through government subsidies. The Act would benefit a majority of U.S. consumers, according to consumer studies and surveys that indicate that a majority of U.S. consumers want sustainable purchasing options.¹⁸⁶ The Act, particularly if subsidized, would also have the potential to save U.S. taxpayer money in the long run by encouraging sustainability and thus reducing the cost of negative externalities like environmental destruction. The EPA alone has requested more than half a billion dollars in its fiscal year 2023 budget to be used specifically to “[t]ackle the [c]limate [c]risis,” in addition to the funding needed for the remainder of their budget priorities.¹⁸⁷ This is a tremendously high price to pay for the continued destruction of the environment. The EPA's budget for fiscal year 2023 also allocates more than \$2.6 billion for grants and assistance towards their environmental protection goals. The Act could include provisions for EPA-managed subsidies for companies who have revenues under a certain threshold, to assist these companies with the initial costs of compliance with the Act.

Finally, it is essential to note that the choice to market clothing as sustainable is completely voluntary. Companies are free to decide that they would rather not advertise their products as sustainable. Companies who are unwilling or unable to comply with the Act will face no legal consequences, so long as they do not advertise their products as sustainable. The goal of the Act is not to force every company doing business in the U.S. to operate sustainably. The goal of the Act is to protect consumers from deceptive sustainability marketing and the greenwashing that is so prevalent in the fashion industry.

LP, No. 4:22 CV 1170 RWS, 2023 WL 3433957, at *23 (E.D. Mo. May 12, 2023). *See also Fast Fashion Giant H&M Wins Lawsuit Accusing It of Greenwashing*, THE FASHION L. (May 16, 2023), <https://www.thefashionlaw.com/hm-escapes-lawsuit-accusing-it-of-greenwashing-its-fast-fashion-wares> [<https://perma.cc/H636-7EXU>]; Tiffany Ferris, Joseph Lawlor & Emily Ketterer, *Guidance for 'Sustainable' Claims After Dismissal of 'Greenwashing' Class Action*, REUTERS (June 2, 2023), <https://www.reuters.com/legal/legalindustry/guidance-sustainable-claims-after-dismissal-hm-greenwashing-class-action-2023-06-02> [<https://perma.cc/UQU5-S9NE>].

¹⁸⁵ Gerretsen & Kottasová, *supra* note 183.

¹⁸⁶ GLOBENEWSWIRE, *supra* note 6; AMED ET. AL., *supra* note 4; Montgomery, *supra* note 160.

¹⁸⁷ U.S. ENV'T PROT. AGENCY, FY 2023: EPA BUDGET IN BRIEF (Mar. 2022), <https://www.epa.gov/system/files/documents/2022-03/fy-2023-epa-bib.pdf> [<https://perma.cc/E5NZ-YHKT>].

CONCLUSION

The fashion industry is at an environmental crossroads. Consumers want more and more clothing, and they want that clothing to be cheap, trendy, at their doorstep as soon as possible, and—somehow—sustainable. These conflicting demands place tremendous pressure on fashion companies and create contradicting incentives. It is no surprise, then, that a rapidly growing number of fashion companies have started to label apparel items, clothing lines, or entire brands, as sustainable. It is similarly unsurprising that some of these sustainability claims have proven to be less than accurate and difficult to back up or compare with the claims of other fashion companies.¹⁸⁸

In order to protect consumers and provide them with accurate, reliable, and easily comparable sustainability data, the federal government must take action. Many pieces of the puzzle already exist, but federal law is needed to put the pieces in place. Companies that want to capitalize on increased consumer demand for sustainable clothing should be incentivized to do so. The Federal Act proposed above would do just that. By providing a federally mandated and managed framework for evaluating sustainability claims, consumers can have more faith in the claims made by companies and can direct their money towards reliably sustainable purchases.

The Federal Act will draw from the Higg Index and the OEKO-TEX labeling system to empower the FTC to regulate and monitor sustainability claims. As the threat of climate change increases with each day and younger consumers increasingly want to decrease their own carbon footprint, sustainability marketing will only continue to become more prevalent. It is vital that the federal government acts to close the regulatory gap and protect consumers now and in future generations.

¹⁸⁸ *See id.*