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ESG and Fashion: New York Takes Aim At the Industry

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ESG and fashion are certainly en vogue in 2022, at least with regulators and legislators. Yesterday, we wrote about the United Kingdom's intent to target the fashion industry in 2022 over alleged greenwashing of consumers for apparel and footwear. Marketing buzzwords such as "sustainable", "environmentally friendly", and "responsibly sourced" find themselves under the microscope. In the United States this month, New York sent to committee a bill that aims to have all fashion retailers and manufacturers doing business in New York formally disclose environmental and social effects of the companies' practices. Now more than ever, globally situated companies of all types that are advertising, marketing, drafting ESG statements, or disclosing information as required by regulatory agencies must pay extremely close attention to the language used in all of these types of documents, or else run the risk of enforcement action or lawsuits.

ESG and Fashion: New York Legislation

In October 2021, legislators in New York introduced the Fashion Sustainability and Social Accountability Act (S7428/A8352), which in January 2022 was sent to the Consumer Protection committee. The legislation would require fashion retailers and manufacturers that do business in New York and have global revenues exceeding $100 million to disclose detailed information about their environmental and social due diligence policies. The bill would require the fashion industry to track and provide detailed information regarding the raw materials and other supplies for their finished good, with the added requirement for the industry to disclose information about supply sourcing from area in the world that have reported forced labor, child labor, or "sweatshop" working conditions. Further, under the bill, it would no longer be enough for fashion companies to disclose their due diligence efforts to mitigate environmental and social impacts of their practices. Instead, companies would have to disclose how they conducted their due diligence on these two points, as well as the considerations and risk areas that they took into account as part of their due diligence practices. Due diligence information would be submitted in a Social and Environmental Sustainability Report.

Finally, companies would be required to disclose how much of their raw materials are sourced from recyclable sources, targets for reduction of greenhouse gases, water use reduction goals, and chemical management programs. Median wages of workers for suppliers identified as a risk to environmental or social principles would need to be identified and compared to local minimum wages. All targets for all of these factors would be required to be disclosed on an annual basis.

Enforcement of the bill would fall on the New York Attorney General's Office and the office would have the power to levy penalties, seek injunctions, or other relief that it deems necessary. The bill would require the Attorney General to publish a list of companies that are in non-compliance, which would then give non-compliant companies three months to come into compliance or face fines of up to 2% of annual revenue. Consumer action under the law would also be permissible under the bill.

Corporate Preparation Is Key

2022 is only three weeks old, and already the SEC, CMA (in the UK) and the State of New York have shown a significant interest in pursuing companies that they feel are engaging in practices that amount to greenwashing of consumers. We predict that 2022 will see a great degree of regulatory enforcement action and legislation seeking to curb over zealous marketing language or statements that could be seen as greenwashing. ESG and fashion concerns have thus far been an industry of interest, but so has the cosmetics industry.

While there are numerous avenues to examine to ensure that ESG principles are being upheld and accurately conveyed to the public, the underlying compliance program for minimizing greenwashing allegation risks is absolutely critical for all players putting forth ESG-related statements. These compliance checks should not merely be one-time pre-issuance programs; rather, they should be ongoing and constant to ensure that with ever-evolving corporate practices, a focused interest by the regulatory agencies on ESG, and increasing attention by the legal world on greenwashing claims, all statement put forth are truly “ESG friendly” and not misleading in any way.

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