



FASHION’S GREENWASHING PROBLEM AND HOW TO BETTER PROTECT CONSUMERS

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“Fashion is not something that exists in dresses only. Fashion is in the sky, in the street, fashion has to do with ideas, the way we live, what is happening.” – Coco Chanel

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I. INTRODUCTION

Nowhere is it truer that consumers are shifting to buy sustainably made products than in the fashion industry.1 Luxury brands illuminate runways with supposed ethically sourced garments and mainstream

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1. See, e.g., Alison Bringé, The State of Sustainability in the Fashion Industry (And What it Means for Brands), FORBES (Jan. 2, 2023, 7:00 AM), https://www.forbes.com/sites/forbescommunicationscouncil/2023/01/02/the-state-of-sustainability-in-the-fashion-industry-and-what-it-means-for-brands/?sh=52af4f6a1c82.

lines disseminate styles tagged with an ode to reduced carbon emissions. But fashion's commitment to sustainability runs into friction with industry practices for shorter, more frequent launch cycles that produce garments for fewer wears and more purchases. This is the model for "fast fashion" which has propelled the fashion industry deeper as one of the most polluting markets in the global economy.²

To satisfy consumers with rapidly changing preferences but also aspire to make environmentally conscious purchases, fashion companies frequently find themselves marketing their garments as sustainable when they are not as environmentally friendly as the consumer believes. This conniving marketing ruse is known as "greenwashing."³ By doing this, companies can convey empty promises to better the environment while consumers purchase their products under the false impression that they are contributing to an eco-friendly objective.⁴

This Comment will study the fashion industry's practice of greenwashing. Part II explores the dynamics of the fashion industry to understand its vulnerability to greenwashing. Part III investigates forms and cases of greenwashing in fashion. And Part IV explains how the Federal Trade Commission ("FTC") can revise its Guidance for Environmental Marketing Claims (the "Green Guides") to curb deceptive advertising. This Comment emphasizes that the FTC should allocate heavy consideration to the fashion industry when revising the Green Guides given its size and complexity, environmental impact, and consumer demand for sustainable products.

II. CURRENT DYNAMICS OF THE FASHION INDUSTRY

Fashion is one of the most sophisticated and thriving global industries.⁵ U.S. consumers spent over \$520 billion on clothing and footwear in the third quarter for 2023.⁶ And the industry is optimistic for

2. See, e.g., Meghann M. Principe, *Dressed to Kill: How the Lack of Environmental Regulations Tailored to the Fashion Industry is Destroying Our Planet*, 10 *JOULE: DUQ. ENERGY & ENV'T L.J.* 79, 81–83 (2022); see *infra* Part II.B.

3. See *infra* Part III.

4. See *infra* Part III.

5. E.g., STAFF OF J. ECON. COMM.: DEMOCRATS, 116TH CONG., *THE ECONOMIC IMPACT OF THE FASHION INDUSTRY 1* (Comm. Print 2019), https://www.jec.senate.gov/public/_cache/files/39201d61-aec8-4458-80e8-2fe26ee8a31e/economic-impact-of-the-fashion-industry.pdf (written primarily by Congresswoman Carolyn B. Maloney, Vice Chair Designate, U.S. Congress Joint Economic Committee).

6. *Table 2.4.5U. Personal Consumption Expenditures by Type of Product*, BUREAU OF ECON. ANALYSIS, https://apps.bea.gov/iTable/?reqid=19&step=3&isuri=1&nipa_table_list=2017&categories=underlying (last visited May 10, 2024).

continued growth.⁷ However, it carries a dark passenger as a profound contributor to anthropogenic climate change.

A. *Environmental Impact of the Fashion Industry's Supply Chain*

An industry of fashion's magnitude comes with complexities, particularly in its supply chain. The fashion supply chain is a transnational web of manufacturers, laborers, distributors, retailers, and consumers who exhaust an alarmingly vast quantity of natural resources to perpetuate their operations.

This Comment simplifies the supply chain to textile production, transportation, retail, and disposal. Textile production usually starts the fashion supply chain and consumes a staggering amount of water to, for example, dye textiles and cultivate cotton.⁸ As a result, the fashion industry has become responsible for twenty percent of the world's wastewater.⁹ Then, carbon emissions are elevated from transporting finished clothes and textiles around the world.¹⁰ Fashion is estimated to be responsible for as high as eight percent of the world's greenhouse gas emissions.¹¹ At the end of the fashion supply chain, when the consumer purchases the garment, current trends suggest styles change more frequently causing less wears and more disposal.¹² Landfills are the popular resting place for used garments.¹³ And new and unsold clothing are frequently burned by its brand to make room for new styles.¹⁴

The fashion supply chain displays patterns of unsustainable practices, but the conduct of individual fashion companies, particularly in fast fashion, leave a path of environmental destruction.

7. IMRAN AMED ET AL., MCKINSEY & CO., *THE STATE OF FASHION 10–13* (2023), https://www.mckinsey.com/industries/retail/our-insights/state-of-fashion-archive#.

8. Elisha Teibel, *Waste Size: The Skinny on the Environmental Costs of the Fashion Industry*, 43 WM. & MARY ENVTL. L. & POL'Y REV. 595, 597, 622–63 (2019) (“[M]ore than a half-trillion gallons of freshwater are used annually to dye textiles.”).

9. Julia Adamkiewicz et al., *Greenwashing and Sustainable Fashion Industry*, 38 CURRENT OPINION IN GREEN & SUSTAINABLE CHEMISTRY 1, 1 (2022).

10. STAFF OF J. ECON. COMM.: DEMOCRATS, *supra* note 5, at 3.

11. Adamkiewicz et al., *supra* note 9, at 1.

12. 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> (stating that consumers keep garments for half as long in 2014 as they did in 2000).

13. Rachael Dottle & Jackie Gu, *The Global Glut of Clothing is an Environmental Crisis*, BLOOMBERG (Feb. 23, 2022), <https://www.bloomberg.com/graphics/2022-fashion-industry-environmental-impact/>.

14. See Chavie Lieber, *Why Fashion Brands Destroy Billions' Worth of Their Own Merchandise Each Year*, VOX (Sept. 17, 2018, 8:00 AM), <https://www.vox.com/the-goods/2018/9/17/17852294/fashion-brands-burning-merchandise-burberry-nike-h-and-m>.

B. Sustainability Concerns of Fast Fashion

The “fast fashion” prong of the industry currently dominates the market and facilitates unsustainable operations.¹⁵ Fast fashion is “an approach to the design, creation, and marketing of clothing fashions that emphasizes making fashion trends quickly and cheaply available to consumers.”¹⁶ Fast fashion companies include H&M, Shein, and Zara.¹⁷

Social media and influencer culture contribute to the fast fashion frenzy. Fashion’s traditional production and distribution model historically embraced two cycles annually.¹⁸ But media platforms like TikTok entice viewers to revamp their wardrobes multiple times each year.¹⁹ This permits fast fashion to undergo roughly fifty cycles per year to keep pace.²⁰ Fast fashion companies are then invited to design products to last only a few wears. The accelerated turnover for what is in style then feeds landfills and incendiaries with the previous style.²¹

A look into one of the more distinguished fast fashion companies, Shein, shows its hold on the industry. The private Chinese based online retailer is valued in excess of H&M and Zara at \$100 billion.²² Shein uses a test-and-scale model for production that produces a supply of garments to launch and then more based on how demand accelerates.²³ This production model, however, may be unsustainable even if it prevents overproduction.²⁴ Shein added over 300,000 new items between January

15. See, e.g., Adamkiewicz et al., *supra* note 9.

16. *Fast Fashion*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/fast%20fashion> (last visited May 10, 2024).

17. Adam Hayes, *Fast Fashion: How It Impacts Retail Manufacturing*, INVESTOPEDIA, <https://www.investopedia.com/terms/ff-fast-fashion.asp#toc-fast-fashion-leaders> (Feb. 13, 2024).

18. Drew & Yehounme, *supra* note 12.

19. Anna Braz, *How TikTok Drives Fast Fashion*, AXIOS: ECON. (July 12, 2022), <https://www.axios.com/2022/07/12/tiktok-trends-fast-fashion-coastal-grandmother-gen-z-influencers>.

20. Drew & Yehounme, *supra* note 13.

21. See Allegra Catelli, *How Fast, Cheap Fashion is Polluting the Planet*, BLOOMBERG (Nov. 29, 2023, 12:32 PM), <https://www.bloomberg.com/news/articles/2023-11-29/is-fast-fashion-bad-the-climate-impact-of-brands-like-shein>.

22. Bruce Einhorn et al., *ESG Is So Hot Right Now*, BLOOMBERG BUSINESSWEEK, July 18, 2022, at 13. The SEC has not made Shein’s registration statement effective as of this writing. See, e.g., James Fontanella-Khan et al., *Chinese Fast-Fashion Retailer Shein Makes Confidential Filing for US IPO*, FIN. TIMES (Nov. 27, 2023), <https://www.ft.com/content/ab3067cf-c885-4c7c-81bb-30ead3bb94d6>.

23. Jinjoo Lee, *Fast Fashion’s Curious Comeback*, WALL ST. J. (May 30, 2023, 7:00 AM), <https://www.wsj.com/articles/fast-fashions-curious-comeback-8a5516c5>.

24. E.g. Astha Rajvanshi, *Shein Is the World’s Most Popular Fashion Brand—at a Huge Cost to Us All*, TIME (Jan. 17, 2023, 1:09 PM), <https://time.com/6247732/shein-climate-change-labor-fashion/>.

and April 2022 with fifteen percent of its products containing “concentrations of hazardous chemicals that breach EU regulatory limits.”²⁵ Shein’s production operations contribute “about 6.3 million tons of carbon dioxide a year.”²⁶ And that is just for one participant in an expedited apparel market.

C. *Push Toward Green Marketing*

Consumers consider sustainability in purchasing apparel more than many other products.²⁷ This trend compels fashion companies to adopt and showcase their commitment to environmental, social, and governance (“ESG”) goals to attract sustainability conscious consumers.²⁸ Some examples of sustainability campaigns in fashion include mainstream brands like Levi’s “Buy Better. Wear Longer.” campaign that sells sustainably made jeans.²⁹ And Sephora’s “Clean at Sephora” line of cosmetics made without supposed environmentally harmful ingredients.³⁰ Luxury brands like Gucci launched its circular line “Off the Grid,”³¹ and Coach highlighted its “Made Circular” line as a main focus on its website.³² These kinds of marketing campaigns are meant to target environmentally conscious consumers, but popular ESG-based terms like “sustainability” are ambiguous.

Sustainability in the fashion industry “refers to creating and consuming clothes in a ‘sustained’ way that protects the environment and those producing the clothes.”³³ Genuine sustainability in fashion should ensure that the entire supply chain is environmentally and socially

25. URSKA TRUNK ET AL., *SYNTHETICS ANONYMOUS 2.0: FASHION'S PERSISTENT PLASTIC PROBLEM*, CHANGING MKTS. FOUND. 45 (Dec. 2022), <http://changingmarkets.org/wp-content/uploads/2022/12/Synthetics-Anonymous-2.0-Report-final-web.pdf> (finding that in comparison BooHoo, a competitor to Shein, launched about 18,000 new styles in that time).

26. Rajvanshi, *supra* note 24.

27. Robert Haigh, *Sustainability – The Driving Force Behind Brand Value*, BRAND FIN. (Jan. 17, 2024), <https://brandfinance.com/insights/sustainability-the-driving-force-behind-brand-value> (finding that sustainability is a stronger choice driver in luxury apparel, luxury cosmetics, and apparel than in oil & gas, technology, and food among others).

28. See, e.g., Vanessa Friedman, *Redefining ‘Sustainable Fashion’*, N.Y. TIMES, <https://www.nytimes.com/2022/05/07/style/redefining-sustainable-fashion.html?searchResultPosition=3> (May 10, 2022).

29. LEVI'S: BUY BETTER. WEAR LONGER., https://www.levi.com/US/en_US/sustainability/c/levi_clothing_sustainability_us (last visited May 10, 2024).

30. SEPHORA: CLEAN AT SEPHORA, <https://www.sephora.com/shop/clean-at-sephora> (last visited May 10, 2024).

31. GUCCI: OFF THE GRID, <https://www.gucci.com/us/en/st/capsule/circular-line-off-the-grid> (last visited May 10, 2024).

32. COACH: COACHTOPIA, <https://www.coach.com/shop/coachtopia/about/circular-craft> (last visited May 10, 2024).

33. Bringé, *supra* note 1.

ethical.³⁴ The fashion industry's push toward adopting and marketing its ESG initiatives, even in fast fashion,³⁵ can be seen as its way of redeeming itself of long-lasting malevolent conduct towards the environment. But sustainability-related terms are often ambiguous which leaves consumers vulnerable to deception. When brands market sustainability-related terms in a way that is false or misleading, that is known as "greenwashing."

III. GREENWASHING IN THE FASHION INDUSTRY

Greenwashing is "the act or practice of making a product, policy, activity, etc. appear to be more environmentally friendly or less environmentally damaging than it really is."³⁶ This is a case of consumer deception of buyers thinking they are making a sustainable purchase when they are not.

A. *Forms of Greenwashing in Fashion*

Sustainability claims are commonly either vague, misleading, or false in the fashion industry. A vague or misleading claim may market a product using "carbon," "sustainable," or "recyclable."³⁷ Those terms and others often lack clear uniform definitions or standards.³⁸ For example, marketing a leather garment as "vegan" is appealing to consumers who would rather not purchase animal leather, but the same product may be made out of materials that are similar to pleather.³⁹ The lifespan of a vegan leather garment can be significantly less compared to its animal-based counterpart and made of environmentally harmful plastics while conferring the impression it is a green alternative.⁴⁰ As a result, consumers of vegan leather products may find themselves replacing them more often than natural leather and consuming a product made of

34. *Id.*

35. See Friedman, *supra* note 28.

36. *Greenwashing*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/greenwashing> (last visited May 10, 2024).

37. *Greenwashing: Deception and Vague Promises that Do Not Help the Environment*, REUTERS (Oct. 26, 2021, 1:25 PM), <https://www.reuters.com/business/cop/greenwashing-deception-vague-promises-that-do-not-help-environment-2021-10-26/>.

38. *Id.*

39. See Amanda Mull, *How Shoppers Got Tricked By Vegan Leather*, ATLANTIC (Apr. 11, 2023), <https://www.theatlantic.com/technology/archive/2023/04/pleather-vegan-faux-leather-fashion-sustainability/673693/>. Pleather is "a plastic fabric made to look like leather." *Pleather*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/pleather> (last visited May 10, 2024).

40. Mull, *supra* note 39.

plastics that more quickly breaks down chemically.⁴¹ The product is still free of animal products, so it is “vegan.” But marketing with this term becomes vague or misleading when consumers believe the “vegan” version comes with positive externalities even though the product threatens the environment just as much as the animal-based version.

Supply chain disclosures can also be misleading. Research suggests that companies “strategically disclose environmentally friendly suppliers while [] not disclosing suppliers with poor environmental performance.”⁴² Companies that report their suppliers’ performance selectively may effectively greenwash their supply chain.⁴³ Regulatory bodies and ESG rating agencies do not have a unified reporting standard, so companies may choose to disclose enough to boost their ESG appeal.⁴⁴ A shoe brand company, for example, could praise itself for reducing its carbon emissions while the emissions of their suppliers (Scope 3 emissions) are much greater.⁴⁵ That company may conceal details of their relationship with those suppliers if they are not compelled to disclose. This can be misleading to consumers who believe their consumption is socially ethical or eco-friendly.

A false sustainability claim is an inaccurate or unsubstantiated assertion.⁴⁶ For example, H&M used to describe its Conscious Collection products as those with “at least 50% sustainable materials, such as organic cotton and recycled polyester.”⁴⁷ Little information, however, could be found on what makes a material sustainable.⁴⁸ And while recycled polyester sounds appealing, there are doubts that it nets the

41. *See id.*

42. Yilin Shi et al., *Green Image Management in Supply Chains: Strategic Disclosure of Corporate Suppliers*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3700310 (Aug. 16, 2023).

43. Christopher Tang & Tinglong Dai, *The Blind Spot that Dampens Sustainability Claims: Supply Chains*, FASHION L. (Jan. 16, 2024), <https://www.thefashionlaw.com/the-blind-spot-that-puts-companies-sustainability-promises-in-doubt-supply-chains-2/>.

44. *Id.*, but see Jenny Gesley, *Germany: New Law Obligates Companies to Establish Due Diligence Procedures in Global Supply Chains to Safeguard Human Rights and the Environment*, L. LIB. OF CONG. (Aug. 17, 2021), <https://www.loc.gov/item/global-legal-monitor/2021-08-17/germany-new-law-obligates-companies-to-establish-due-diligence-procedures-in-global-supply-chains-to-safeguard-human-rights-and-the-environment/> (documenting how qualifying companies that do business in Germany must take responsibility for human rights and environmental matters arising from their supply chain).

45. Tang & Dai, *supra* note 43.

46. *How to Spot and Avoid Nine Types of Greenwashing*, CONNECTICUT SUSTAINABLE BUSINESS COUNCIL (Oct. 8, 2022), <https://www.ctsbccouncil.org/types-of-greenwashing/>.

47. CHANGING MARKETS FOUND., SYNTHETICS ANONYMOUS: FASHION BRANDS’ ADDICTION TO FOSSILS FUELS 50 (2021) (internal citations omitted).

48. *Id.*

social or environmental benefits consumers hope to believe.⁴⁹ According to The Changing Markets Foundation, ninety-six percent of H&M's sustainability claims for all analyzed products—including its “Conscious Collection”—were in breach of United Kingdom's guidelines in 2021.⁵⁰ After these findings were released, the Netherlands investigated H&M's marketing scheme and concluded it made false sustainability claims because they were unclear and unsubstantiated.⁵¹ H&M later removed its “Conscious Choice” indicator.⁵² These cases are not isolated, instead they offer a glimpse into how riddled the fashion industry is with greenwashed claims.

B. Retail Companies Embroiled in Greenwashing Litigation

Companies in the fashion industry that have been or are entangled in greenwashing litigation include Canada Goose,⁵³ Allbirds,⁵⁴ H&M,⁵⁵ Sephora,⁵⁶ and Nike.⁵⁷ Such widespread litigation reveals that without clear standards for sustainability marketing claims courts may yield competing outcomes, plaintiffs could be left with inconsistent litigation strategies, and companies may be confused on how to market its sustainability efforts.

Two recent cases, for example, yielded different outcomes at the motion to dismiss stage: *Lee v. Canada Goose* and *Lizma v. H&M*. *Lee* concerned a challenge to Canada Goose's tag attached to its coyote fur parkas asserting a commitment to the “ethical, responsible, and

49. See Lucianne Tonti, *How Green are Your Leggings? Recycled Polyester is Not a Silver Bullet (Yet)*, GUARDIAN (Mar. 21, 2021), <https://www.theguardian.com/fashion/2021/mar/22/how-green-are-your-leggings-recycled-polyester-is-not-a-silver-bullet-yet> (offering that recycled polyester cannot be re-recycled and how it sheds plastic microfibers into the waters and soil).

50. CHANGING MARKETS FOUND., *supra* note 47.

51. *Dutch Regulator Says H&M Ads Include Unsubstantiated Sustainability Claims*, FASHION L. (Sept. 13, 2022), <https://www.thefashionlaw.com/dutch-regulator-says-hm-ads-include-unsubstantiated-sustainability-claims/>.

52. *Id.*

53. See, e.g., *Lee v. Canada Goose US, Inc.*, No. 20 CIV. 9809, 2021 WL 2665955, at *1 (S.D.N.Y. June 29, 2021).

54. See, e.g., *Dwyer v. Allbirds, Inc.*, 598 F. Supp. 3d 137, 144 (S.D.N.Y. 2022).

55. See, e.g., *Lizama v. H&M Hennes & Mauritz LP*, No. 4:22 CV 1170 RWS, 2023 WL 3433957, at *1 (E.D. Mo. May 12, 2023).

56. *Sephora Faces “Clean” Beauty Lawsuit Amid Cosmetics “Regulatory Vacuum”*, FASHION L. (Jan. 4, 2023), <https://www.thefashionlaw.com/sephora-faces-lawsuit-over-clean-beauty-amid-cosmetics-regulatory-vacuum/>.

57. Class Action Complaint at 1, *Ellis v. Nike*, No. 4-00632, 2024 WL 1344805, (E.D. Mo. Mar. 28, 2024); Mike Curley, *Nike Hit With False Ad Suit Over ‘Sustainable’ Clothing*, LAW360 (May 12, 2023, 2:32 PM), <https://www.law360.com/articles/1606892/nike-hit-with-false-ad-suit-over-sustainable-clothing>.

sustainable” sourcing of real fur, to act in accordance with third-party Canadian and American humane trapping standards, and to only purchase fur from licensed trappers subject to North American regulations.⁵⁸ The court denied Canada Goose’s motion to dismiss only to the claim that its “ethical, responsible, and sustainable sourcing and use of fur” assertion was misleading because the plaintiff plausibly alleged that Canada Goose used inhumane trapping methods that could raise factual disputes on whether consumers relied on its representation of humane trapping and sourcing to purchase its parkas.⁵⁹

In *Lizama*, the plaintiff purchased a sweater from an H&M store marked as part of its “Conscious Choice Collection.”⁶⁰ H&M would place hangtags for shoppers to “identify [its] most environmentally sustainable products.”⁶¹ Such garments were:

created with a little extra consideration for the planet. Each Conscious choice product contains at least 50% of more sustainable materials – like organic cotton or recycled polyester – but many contain a lot more than that. The only exception is recycled cotton, where we accept a level of at least 20%.⁶²

The court dismissed the plaintiff’s claim that H&M deceived and misled consumers into believing they were purchasing environmentally friendly garments.⁶³ In reaching its decision, the court appealed to a literal interpretation of what H&M stated in its advertisement to find that H&M did not represent its products as inherently sustainable or environmentally friendly and no reasonable consumer would believe it did.⁶⁴

The *Lee* and *Lizama* cases thus reveal a tension on what the companies meant by terms like “sustainable.” But it cannot be solved without uniform legal or regulatory definitions for sustainability-related and other ESG-based terms.

58. *Lee*, 2021 WL 2665955 at *1.

59. *Id.* at *4, *7.

60. *Lizama v. H&M Hennes & Mauritz LP*, No. 4:22 CV 1170 RWS, 2023 WL 3433957 at *14 (E.D. Mo. May 12, 2023).

61. *Id.* at *4.

62. *Id.*

63. *Id.* at *5–*7.

64. *Id.* at *5 (noting that H&M never uses the phrase “environmentally friendly” in its Conscious Choice advertising).

IV. UPDATING THE GREEN GUIDES TO ADDRESS FASHION'S GREENWASHING PROBLEM

The FTC offers one approach to addressing the greenwashing problem detailed above. The agency handles matters relating to consumer protection at the federal level. Section 5 of the FTC Act (“Section 5” or “the FTC Act”) generally forbids “unfair or deceptive acts or practices in or affecting commerce.”⁶⁵ This language and the scope of the FTC’s powers, however, are broad. To address this, the FTC issued its Guides for the Use of Environmental Marketing Claims (the “Green Guides”) for marketers to use when making environmental claims⁶⁶ and for courts to use when an unfair or deceptive act concerns a sustainability marketing claim.⁶⁷ But this interpretative guidance is imperfect and overdue for an update.

A. Calls for the FTC to Revise the Green Guides

The Green Guides were first issued in 1992 to address concerns for a national standard over environmental claims in marketing, and they were revised in 1996, 1998, and 2012.⁶⁸ With the wave of appeals to ESG-based demands, the Green Guides are behind the trends. Revisions are necessary because as greenwashing persists, consumers will start to lose trust in brands’ sustainability claims which can hurt honest companies and lead to continued harm to the environment.⁶⁹

The FTC acknowledged these concerns in December of 2022 when FTC Chair Lina Khan remarked that consumers bestow their trust on companies to label their products truthfully when looking to make a sustainably conscious purchase.⁷⁰ Chair Khan emphasized that deceitful claims place honest companies at a competitive disadvantage and harms

65. 15 U.S.C.A. § 45(a) (West 2006).

66. 16 C.F.R. § 260.1 (2012).

67. See *Lizama*, 2023 WL 3433957 at *8; *Swartz v. Coca-Cola Co.*, No. 21-CV-04643-JD, 2023 WL 4828680 at *3 (N.D. Cal. July 27, 2023); *Duchimaza v. Niagara Bottling, LLC*, 619 F. Supp. 3d 395, 411–17 (S.D.N.Y. 2022).

68. See *Guides for the Use of Environmental Marketing Claims*, 61 Fed. Reg. 53311 (Oct. 11, 1996); *Guides for the Use of Environmental Marketing Claims*, 63 Fed. Reg. 24240 (May 1, 1998); *Guides for the Use of Environmental Marketing Claims*, 77 Fed. Reg. 62122 (Oct. 11, 2012).

69. Rebecca Ballard, *Green Guides Review, Matter No. 954501*, FASHION CONNECTION (Apr. 16, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0631>.

70. Statement of Chair Lina M. Khan Regarding the Regulatory Review of the Guides For the Use of Environmental Marketing Claims, Commission File No. P954501, FED. TRADE COMM’N 1 (Dec. 14, 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-regarding-regulatory-review-guides-use-environmental-marketing-claims>.

consumers.⁷¹ She recognized that the Green Guides serve a critical purpose in assuring companies do not run afoul with the FTC Act.⁷² Khan reasonably observes that the Green Guides have “to keep up with developments in both science and consumer perception” to be effective.⁷³

Since then, the FTC accepted public comments on updates to the Green Guides.⁷⁴ Over seven thousand comments were submitted with scores of them addressing the fashion industry.⁷⁵ A revised version of the Green Guides should reimagine how marketing departments and general counsels for fashion companies approach their ESG-based marketing campaigns, so consumers are less confused.⁷⁶

The FTC's questions for comment cover general matters like the benefits of the Green Guides and specific matters like definitions of certain terms.⁷⁷ The most frequent call from commentators was for the FTC to amend or add definitions.⁷⁸ The Fashion Advocates Group suggests the FTC refer to “new and existing research” to revise existing definitions, recognize new and emerging terms, and expand its principles.⁷⁹ Three terms that the fashion industry is concerned with relate to “recyclable,” “sustainable,” and “carbon.” L'Oréal urges the FTC to define “recyclable” more precisely to absolve confusion among marketers over whether they can make unqualified claims or must confirm certain outcomes of their products disposal.⁸⁰

The Green Guides do not have a current definition for “sustainable,” yet it is widely used among companies in their labeling.⁸¹ Circ

71. *Id.*

72. *Id.*

73. *Id.*

74. Press Release, Fed. Trade Comm'n, FTC Seeks Public Comment on Potential Updates to its 'Green Guides' for the Use of Environmental Marketing Claims (Dec. 14, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-public-comment-potential-updates-its-green-guides-use-environmental-marketing-claims>.

75. *See Guides for the Use of Environmental Marketing Claims*, REGULATIONS.GOV, <https://www.regulations.gov/document/FTC-2022-0077-0001/comment> (last visited May 10, 2024).

76. This discussion is limited to what changes within the Green Guides could benefit the fashion industry, but other industries will be considered.

77. *See* Press Release, Fed. Trade Comm'n, *supra* note 74.

78. *Companies Call on FTC to Revise Green Guides, Adopt Sustainability Definitions*, FASHION L. (May 3, 2023), <https://www.thefashionlaw.com/companies-call-on-ftc-to-revise-green-guides-adopt-sustainability-definitions/>.

79. *Green Guides Review, Matter No. 954501*, FASHION ADVOC. GRP. (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0969>.

80. *See Green Guides Review, Matter No. P954501*, L'ORÉAL USA (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0977>.

81. *Green Guides Review, Matter No. P954501*, CIRC 7 (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-1298>. In the 2012 update, the FTC “stated that it lacked a sufficient basis to provide specific advice on using ‘sustainable’ as

emphasizes that “without clear and consistent definitions of what ‘sustainable’ means, this term can be misleading and contribute to consumer confusion.”⁸² One element of that confusion is whether the product or the whole company is sustainable. The American Apparel & Footwear Association recommends that the FTC promulgate certain conditions for companies to satisfy before making “sustainable” claims to narrow the scope of how the term is used and understood.⁸³

One point of contention is whether the FTC should initiate a rulemaking proceeding to give the Green Guides the force of binding law. The FTC gets its rulemaking powers from the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (“FTC Improvement Act”).⁸⁴ This grants the FTC the ability to prescribe non-enforceable interpretative rules and guidance and enforceable legislative rules that “define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce.”⁸⁵

The Green Guides are interpretative rules and do not have the force of law.⁸⁶ But Collective Fashion Justice is one advocate for the FTC to undergo a legislative rulemaking procedure since it is the best way to “protect consumers against green-washing.”⁸⁷ This would bring the United States more into line with international efforts backing their guides for green claims with legal action like in Europe.⁸⁸ In contrast, the National Retail Federation contends that the FTC should not undergo a rulemaking proceeding since sustainability-based marketing is an

an environmental marketing claim” and declined commentors’ requests to offer a definition. FTC, THE GREEN GUIDES: STATEMENT OF BASIS AND PURPOSE 250, 258.

82. *Id.* CIRC is a company that seeks to propel the fashion industry into a circular-economic model. CIRC, <https://circ.earth/about-us/> (last visited May 10, 2024).

83. See Stephan Lamar, *Green Guides Review, Matter No. P954501*, AM. APPAREL & FOOTWEAR ASSOC. at 3 (Apr. 23, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0904>, (offering two conditions for companies to satisfy: “(1) The claim does not imply the product or product component are *wholly* environmentally sustainable; [and] (2) A statement *immediately* precedes or follows the environmentally ‘sustainable’ claim that includes specific information about the environmental impact(s) that underly the ‘sustainable’ claim.”).

84. See 15 U.S.C.A. § 57a(a)(1) (West 2011). The rulemaking process requires (1) taking preventative action to stop or slow unfair or deceptive acts or come to information indicating widespread deception, (2) publishing notice and inviting comments, and (3) notifying Congress. Robin M. Rotman et al., *Greenwashing No More: The Case for Stronger Regulation of Environmental Marketing*, 72 ADMIN. L. REV. 417, 427 n.55 (2020).

85. § 57a(a)(1) (West 2011).

86. Rotman et al., *supra* note 84 at 427; § 15 U.S.C.A. § 57a(b) (West 2011); 16 C.F.R. § 260.1 (2012).

87. Collective Fashion Just. Commentary on the FTC’s Green Guides 9 (Apr. 18, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0719>.

88. See *id.*

emerging practice that continues to evolve.⁸⁹ This position advocates that the Green Guides remain flexible while market dynamics transform.⁹⁰

The comments from the above entities are going to be key for the FTC to determine where changes to the Green Guides are most necessary.⁹¹

B. Recommendations for Revised Green Guides

Terms used in sustainability-based labeling should be true for the brand and the product's supply chain so that claims are not misleading or deceptive. The Green Guides could be updated such that popular terms used in fashion marketing relating to "sustainable," "carbon," and "recyclable" have clear, unequivocal definitions and substantiation requirements. The FTC could achieve these objectives by revising the Green Guides to incorporate ideas consistent with (as discussed immediately below) the United Kingdom, the European Union, and California law.

U.K. guidelines could serve as a model for crafting guidance on "sustainability." Their Competition & Markets Authority ("CMA") issued its guidance, *Making Environmental Claims on Goods and Services* ("U.K. Guidelines"), in 2021.⁹² The CMA defines "sustainability claims" as "claims which suggest that a product is made, a service delivered or a business run in accordance with principles of sustainability, sustainable consumption or sustainable development."⁹³ This could include claims relating to the environment and climate change, biodiversity, animal welfare, workers' welfare, [and] corporate social responsibility."⁹⁴ This definition touches on all three ESG prongs. Climate change links to the "E" for "Environmental," workers' welfare matches with "S" for "Social," and corporate responsibility pairs with "G" for "Governance." The FTC should find this approach advantageous to cover most ESG-related marketing claims.

Principle (f) of the U.K. Guidelines stands for that environmental claims must be substantiated.⁹⁵ The CMA states that those businesses

89. Stephanie A. Martz, *Green Guides Review, Matter No. P954501*, NAT'L RETAIL FED'N 12 (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0900>.

90. *Id.*

91. "An agency must consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015).

92. See COMPETITION & MARKETS AUTH., *CMA GUIDANCE ON ENVIRONMENTAL CLAIMS ON GOODS AND SERVICES* (2021), https://assets.publishing.service.gov.uk/media/61482fd4e90e070433f6c3ea/Guidance_for_businesses_on_making_environmental_claims_.pdf (last visited May 10, 2024).

93. *Id.* at 5.

94. *Id.*

95. *Id.* at 36.

making environmental claims “should have evidence to support them” but without a bright line threshold for what makes a complete substantiation.⁹⁶ Instead, the U.K. Guidelines offers several factors for advertisers to consider like whether the claim is subjective or objective, there is appropriate evidence to support it, if the evidence is based on accepted scientific standards, if the evidence is available to others in the supply chain, and if consumers can verify the claims.⁹⁷ The amount of evidence and the form it takes to substantiate an environmental claim is understandably industry specific and may vary depending on customer sophistication. But evidence relating to carbon effects and recyclability are embedded in science which should not significantly change by the industry. The FTC should frame substantiation requirements as considerations, like the U.K. Guidelines, but with some key points as requirements like verification by the public to cut greenwashing in research.

The Council of the European Union (“CEU”) offers another blueprint for the FTC to define “sustainability.” The CEU issued a provisional agreement (“CEU Directive”) in 2023 defining “sustainability label” as “any voluntary trust mark, quality mark or equivalent, either public or private, that aims to set apart and promote a product, a process or a business with reference to its environmental or social aspects or both.”⁹⁸ The CEU also bans sustainability labels that are “not based on a certification scheme or not established by public authorities” and generic environmental claims that lack substantiation or are “about the entire product when it actually concerns only a certain aspect of the product.”⁹⁹

Where the United Kingdom sets what is a sustainability claim, the European Union establishes contours to its appearance as a mark designed to promote a product. The FTC should consider adopting similar

96. *Id.*

97. *Id.* at 36–39.

98. *Commission Proposal for a Directive of the European Parliament and of the Council Amending Directives 2005/29/EC and 2011/83/EU as Regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information*, at 26, COM (2022) 143 final (Apr. 1, 2022), <https://data.consilium.europa.eu/doc/document/ST-7808-2022-INIT/en/pdf>.

99. *Id.* at 16. The Commission defines “environmental claim” as:

[A]ny message or representation, which is not mandatory under Union law or national law, including text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names, in the context of a commercial communication, which states or implies that a product or trader has a positive or no impact on the environment or is less damaging to the environment than other products or traders, respectively, or has improved their impact over time.

Id. at 26.

language because this gives companies guidance to what a sustainability claim looks like. The threat of greenwashing litigation may deter companies from promoting its ESG-related goals since the definition of sustainability is broad and can take many forms. They should give companies reassurance that something like a chief marketing officer's interview comment on their product's recyclability may not count as a sustainability claim to the FTC. Also, the FTC should replicate the European Union's prohibition of claims that are about the entire product when only a part of it relates to the claim. This aims to cut supply chain greenwashing. Companies may not have to disclose the environmental impacts of each part of the chain, but if there is a net environmental benefit from some parts, then a sustainability claim can only address those parts of the product.

For recycling claims, California's SB 343 enforces a sophisticated regulatory regime for how companies can use the recycling symbol and advertise the recyclability of their products.¹⁰⁰ SB 343 mandates anyone who uses the term "recyclable" or a "chasing arrows symbol" to demonstrate: (1) the product or packaging the claim is directed towards is made of a material that recycling facilities that collectively service at least sixty percent of California residents accept; and (2) the material can be "sorted into defined streams for recycling processes by large volume transfer or processing facilities" that service at least sixty percent of California's recycling programs.¹⁰¹

The Green Guides do not mention the chasing arrows motif aside from an example.¹⁰² And the current guides permit unqualified recyclable claims when certain conditions are met.¹⁰³ But SB 343 requires substantiation for all sustainability-related claims.¹⁰⁴ The statute is more specific than the Green Guides to request the reasons why a sustainability-based claim is true, adverse environmental effects that are associated with the product, measures the company is taking to reduce negative environmental consequences of the product, and others.¹⁰⁵ SB 343 also removes compliance with the Green Guides as a defense for challenges to a recyclability claim as deceptive or misleading.¹⁰⁶ The Green Guides do not require substantiation for as many "recyclable" claims as California and is not clear with what the substantiation

100. *See generally* S.B. 343, 2021 Leg., Reg. Sess. (Cal. 2021).

101. *Id.* The Green Guides currently have similar requirements for certain recyclable claims. *See* 16 C.F.R. § 260.12(b)(1) (2012).

102. *See* 16 C.F.R. § 260.13 (2012).

103. *See id.*; § 260.12(c).

104. *See* Cal. S.B. 343.

105. *Id.*

106. *Id.*

requirements are. The FTC should revisit its guidance on “recyclable” claims and require more specific substantiation requirements for all “recyclable” claims, so other states do not eschew FTC compliance as a defense.¹⁰⁷

Also, California’s Voluntary Carbon Market Disclosures Act (AB 1305) (“VCMDA”) offers a blueprint to regulate carbon claims.¹⁰⁸ The VCMDA compels any qualified entity that claims its product is “carbon neutral” or makes a related claim that its product does not add greenhouse gases to disclose all information to how that “claim was determined to be accurate or actually accomplished, and how interim progress toward that goal is being measured.”¹⁰⁹ The California Assembly kept the FTC’s guidance on carbon offsets in the background but builds on it to extract specified information from entities who make related claims.¹¹⁰ The statute suggests entities to include information from third-party verifiers, science-based targets, and sector methodology to meet this substantiation element.¹¹¹ The current Green Guides do not have a clear substantiation pathway for carbon claims.¹¹² But the FTC should advance California’s mission and impose similar substantiation requirements across the United States.

The sources discussed (public comments, U.K. Guidelines, the CEU Directive, and California law) are relevant to the FTC for their own reasons. The FTC should consult the public comments to determine the sections of the Green Guides that are in the most need of revising and what the guides are missing. European law is most helpful for arriving at clearer definitions of sustainability-based terms. Streamlined definitions between the United States and continental Europe should offer clarity to global firms and alleviate some concern of whether certain claims comply or not. Lastly, California is formulating innovative substantiation requirements that should keep many U.S. entities subject to FTC regulations more in sync.

107. This may result in fewer fashion companies being able to make “recyclable” claims. See *What a California Recycling Study Means for Clothing Brands*, FASHION L. (Jan. 17, 2024), <https://www.thefashionlaw.com/what-a-california-recycling-study-means-for-clothing-brands/>. The California Environmental Protection Agency determined textiles are clothing are primarily non-recyclable materials for SB 343 compliance purposes. CALRECYCLE, SB 343 MATERIAL CHARACTERIZATION STUDY PRELIMINARY FINDINGS, 97–98 (2023), <https://www2.calrecycle.ca.gov/Publications/Details/1729>.

108. CAL. HEALTH & SAFETY CODE § 44475.2 (West 2024).

109. *Id.*

110. 2023 California Assembly Bill No. 1305, California 2023–2024 Regular Session at 1, 5.

111. HEALTH & SAFETY CODE § 44475.2.

112. See 16 C.F.R. § 260.5 (2012).

The Green Guides should continue to serve as interpretative guidance. And, if the political climate permits, the FTC can then proceed with its rulemaking procedure. The FTC should not enact a rule while industries and legislators are adapting to changing consumer preferences in the wake of the ESG movement and while companies develop innovative methodologies to sustainable operations.

The FTC should be mindful that against the push for greater disclosure and exercising rulemaking powers is “greenhushing” – a term “to describe the phenomenon of companies deliberately not communicating about their environmental initiatives, for fear of being called out.”¹¹³ Smaller fashion companies especially are justified in their concerns that overregulation coupled with the specter of greenwashing litigation and unrelenting public scrutiny could deter them from marketing the sustainability characteristics of their garments.¹¹⁴ Greenhushing does not necessarily mean companies are not trying to incorporate more sustainable practices in their business models, as they may not be advertising such methods to consumers.¹¹⁵ While this brings some reassurance, “[i]f fewer brands are sharing what they’re doing publicly, there may be less incentive for others to adopt more eco-friendly practices.”¹¹⁶

In short, there are several sources for the FTC to consider for revising the Green Guides to curb greenwashing in industries like fashion. The FTC should try to harmonize the Green Guides with those other regulatory entities, so companies are assured of some consistency. And terms like “recyclable”, “carbon”, and “sustainability” along with variations should be clarified with the dynamics of the fashion industry in mind since it is among the most polluting and “greenwashed” industries in the global economy that uses these terms in its advertising. All of this should be considered with the recognition that fashion companies need to remain incentivized to undergo sustainability-based marketing campaigns and not be “greenhushed.” Regardless, interests in protecting consumers and promoting sustainably-based marketing campaigns are not necessarily conflicting. Such campaigns cannot be effective to reverse the fashion industry’s infamous history of nearly

113. Emily Chan, *Is Greenhushing the New Greenwashing?*, BRIT. VOGUE (Mar. 27, 2023), <https://www.vogue.co.uk/fashion/article/what-is-greenhushing>.

114. See Christopher Cole, *Greenwashing And ‘Greenhushing’: Lessons For Fashion Cos.*, LAW360 (Sept. 29, 2023, 5:34 PM), <https://www.law360.com/articles/1727273/greenwashing-and-greenhushing-lessons-for-fashion-cos->.

115. *Id.*; Chan, *supra* note 113.

116. Chan, *supra* note 113.

irreparable environmental damage if consumers do not trust the brands forwarding such claims to start.

V. CONCLUSION

The fashion industry is a behemoth in the global economy with a menacing carbon footprint. With demands for sustainable garments gaining more traction, marketing teams are scurrying to keep pace, but they often fail to truthfully represent their products. This could leave environmentally conscious consumers confused and frustrated and companies facing the specter of greenwashing litigation.

Greenwashing solutions are essential to alleviating consumer distrust and further environmental damage. The FTC plays a vital role in this effort in updating the Green Guides to reflect current understandings of key green terms. And the agency should do by identifying trending issues among the public comments and look to Europe, the SEC, and California to determine how the Green Guides can better level with other regulatory entities as interpretative guidance. Revised Green Guides promise to move the United States closer to a clearer and more effective standard for environmental marketing claims when the call could not be more urgent.