

The ‘Clock Is Ticking': Is Fashion Ready for Increased Demand for and Scrutiny of Sustainability?

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Sustainability is trendy. Amid shifting consumer sentiment and mounting criticism in the press, international legislation is forcing change in how companies make and market their products.

On December 14, 2022, the Federal Trade Commission (FTC) voted unanimously to update its Green Guides for the Use of Environmental claims and announced that it was seeking public comment on the subject. First introduced in 1992, the FTC Green Guides provide guidance on avoiding unfair or deceptive environmental marketing claims under Section 5 of the FTC Act, 15 U.S.C. § 45.

“People decide what to buy, or not to buy, for all kinds of reasons. One of those reasons increasingly seems to be environmental impact. Before making a purchase, many American consumers want to know how a product contributes to climate change, or pollution, or the spread of microplastics. Businesses have noticed,” Lina Khan, Chair of the FTC, said in a statement. “Walk down the aisle at any major store — you're likely to see packages trumpeting their low carbon footprint, their energy efficiency, or their quote-unquote 'sustainability.'”

Stressing the need for the Green Guides to “keep up with developments in both science and consumer perception,” Khan said the FTC was especially keen to receive comments on “relatively emerging environmental topics.” Comments remain open until February 21, 2023, though the Consumer Brands Association has requested a 60-day extension on behalf of itself and various other trade groups.

Tougher marketing guidelines are imminent in the European Union, too. Under the Strategy for Sustainable and Circular Textiles, which the European Commission adopted last year, the EU has

been steadily hammering out new legal requirements related to sustainable business practices and increasing transparency in manufacturing and marketing.

“There's not a lot of time. And I'm not sure that people realize how quickly the clock is ticking," said James Fallon, editorial director at Women's Wear Daily, in an interview for *Katten Kattwalk* and *Kattison Avenue*. He said fashion companies appear slow to appreciate the imminence and strictness of upcoming requirements. “I think they're moving, but I'm not sure that they're moving as rapidly as they need to be,” he said. Much of the industry, he added, “tends to focus on what each individual company is doing in its own bubble” rather than on the multi- year process of moving from the raw materials stage to product design to sales. Yet that timeframe, he suggested, adds urgency to any changes in business practices and marketing.

“You're really looking at a pipeline that's probably going to take you well into 2025, and we're in 2023,” Fallon said.

Of course, to stop “greenwashing,” which the EU has defined as “companies giving a false impression of their environmental impact or benefits,” businesses first need to take stock of their ecological footprint.

That's easier said than done. How much of a garment must be made of recycled fibers for a company to tout its greenness? Is accepting the return of old clothes or adding a resale category inherently sustainable? And is farming exotic animals for leather a boon to biodiversity and better for the environment than faux leather — or a step in the wrong direction on both accounts?

The fashion industry can't afford to be passé, but claiming the moral high ground requires a nuanced analysis of the issues. Here, we look closely at several key legal and business debates.

A Global Attack on Misleading Green Claims

The term “greenwashing” is said to have originated in the mid- 1980s, when an environmentalist wrote an essay criticizing hypocritical practices in the hotel industry. These days, greenwashing is everywhere — in advertising and law.

In the US, current FTC guidance addresses general environmental benefit claims (such as “green” and “eco-friendly”); the use of seals and certifications that provide, or appear to provide, an endorsement of a product's environmental bona-fides; claims about waste (such as “recyclable”); claims about a product's impact or toxicity (such as “non-toxic” or “ozone-friendly”); and claims about the impact of manufacturing (such as “made with renewable energy” or “carbon neutral”).

Updates will likely address claims related to carbon offsets and the thresholds guiding marketers on claims that products are “recyclable” or made of “recycled content.”

The EU Commission has introduced several amendments to the Unfair Commercial Practices Directive, which, if adopted, will prohibit companies from making vague, unsubstantiated claims about environmental performance and using eco-labels on products that are not either government-issued or based on third-party verification. Such practices would be part of the commercial practices “blacklist.”

In an attack on planned obsolescence, proposed amendments to the Consumer Rights Directive would require consumers to be “informed about the guaranteed durability of products” and sellers to “provide relevant information on repairs” and, where applicable, software updates. The Commission is also drafting revisions to the EU Waste Framework Directive to improve management of textile waste, in keeping with the EU Strategy for Sustainable and Circular Textiles.

The proposed amendments require the approval of the Council of the European Union and the European Parliament to become law.

Various European countries have also been implementing green laws at the national level. France's Anti-Waste and Circular Economy law went into effect on January 1, 2020, cracking down on single-use plastics and misleading environmental claims in marketing. Effective January 1, 2023, Germany introduced granular supply chain reporting requirements for companies doing business in the country under its Supply Chain Due Diligence Act.

Sergio Tamborini, president of Sistema Moda Italia (SMI), Italy's fashion and textile trade federation, which represents an estimated 50,000 companies and nearly 400,000 employees, said during an interview that the textile industry is facing “increasing market and government pressure to guarantee transparent information about its environmental impact.”

“It's a paradigm shift, from a commercial view of sustainability to a mission that encompasses all facets of a business, from governance and compliance to ethics,” he said. He highlighted the Italian fashion industry's recent efforts to use blockchain technology to trace products back to their original batches, improving supply chain transparency and boosting the profile of “Made in Italy” as shorthand for quality and ethics. Italy's Ministry for Economic Development has worked with SMI on implementing the new technology throughout the textile sector; ICE, the Italian Trade Agency, introduced its TrackIT blockchain program in 2022.

“Traceability across the entire supply chain helps fight greenwashing,” Tamborini said, noting Italian fashion companies that are implementing sustainable practices perceive greenwashing as a form of unfair competition.

Is Secondhand Fashion Green?

The fashion industry is reckoning with the remorse many consumers feel when purchasing disposable apparel and accessories. In a 2022 report by resale platform ThredUp, focused on Gen Z (roughly speaking, the cohort of individuals now aged 16 to 26), 72 percent of those polled admitted to shopping for fast fashion over the past year. Yet most expressed a desire to shop more sustainably, citing an awareness of the environmental impact of manufacturing and an interest in supporting more “ethical” brands.

For some businesses, the uptick in consumer interest in sustainability has prompted an investment in resale, with secondhand shopping marketed as a guilt-free way of scratching the fashion itch. But to avoid claims of “greenwashing,” companies should tread carefully.

“Brands have to find their unique point of view for launching resale, 'sustainability' just doesn't cut it,” said Graham Wetzbarger, founder and chief executive officer of Luxury Appraisals and Authentication LLC, which advises companies and investors on authentication best practices. Instead, he said, companies need to connect resale to their specific mission, focus and clientele, whether by offering archival pieces or a lower price point for aspirational customers.

Fashion businesses making green claims related to resale must also contend with the environmental impact of product packaging and transit. “Currently, the logistics behind shipping and processing resale merchandise nullifies any carbon savings from not having to manufacture a new garment,” Wetzbarger told us.

Further, resale comes with two kinds of authenticity concerns: product and branding. On the one hand, counterfeit merchandise has been a recurring legal headache for secondhand retailers. On the other, consumers are sensitive to any whiff of inauthenticity in marketing, especially when it comes to environmental claims. A study by the UK'sAdvertising Standards Authority found that “the tendency for brands to declare their environmental achievements” elicited cynicism in many participants.

“Authenticity is extremely important for trust building,” said Wetzbarger, suggesting that fashion designers and manufacturers should “start incorporating sustainable second life assets to their products,” including “dissolvable thread, easily removable hardware elements, single fiber fabrics, and removable dyes.”

Repair services are another possibility. Companies that approach resale with an eye on authenticity will have an easier time making accurate claims about the sustainability of their products.

Are Exotic Skins Sustainable? Will California Ban Them?

On January 1, 2023, California's contentious ban on the sale and manufacturing of new animal fur products, Assembly Bill 44, took effect. California is not an outlier: many European countries have banned fur farming, and in June 2021, Israel became the first country to ban the sale of animal fur.

Over the past several years, luxury fashion has scurried away from the use of fur, largely in response to a change in consumer perception — and to the effectiveness of social media campaigns. For many brands, any loss in fur-related revenue pales in comparison to the goodwill generated by going fur-free.

The global fur industry has sought to counter this narrative by emphasizing that fur is a natural, and therefore more sustainable, product than fake fur, an argument also present in the market for exotic leathers, such as alligator, crocodile, python, lizard and ostrich skins. In September, *Business of Fashion* highlighted "a marketing battle that stretches from leather to diamonds as sustainable fashion becomes big business and upstart alternatives challenge established materials."

California enacted an amendment to Penal Code § 653o, a ban on exotic skins, in 2020, but the statute has been ensnared in legal challenges since 1970, with plaintiffs asserting that it is pre-empted by federal regulations. The subject continues to provoke feverish discussions between animal rights and environmental organizations, such as the Center for Biological Diversity and Human Society of the United States, on the one hand, and stakeholder groups such as the Louisiana Department of Wildlife and Fisheries, on the other.

Bruce Weissgold, an independent consultant who spent 25 years working at the US Fish and Wildlife Service (FWS), told us that debates surrounding the ethics and sustainability of farming crocodiles, alligators and pythons, in particular, have "been raging for decades," with one side adopting the precautionary principle — "don't harvest unless you can demonstrate that it's not detrimental to the species in the wild" — and the other side promoting "sustainable utilization."

Weissgold said the acquisition by some major fashion companies of alligator and crocodile farms — partly a reaction to trafficking concerns — has improved transparency in the supply chain for those particular skins. As a whole, however, "I don't think there's a lot of interest right now in developing a traceability system for exotic reptile skins," he said, notwithstanding the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

The treaty requires exotic crocodilian skins to be tagged to move across borders. “In the US, we supply the tags to the state wildlife agencies, who sell them to hunters and alligator farms. The tag is supposed to be applied at the point of harvest,” he explained. But applying tamper-proof tags that will survive the leather-tanning process is no mean feat, and Weissgold suggested that people are adept at manipulating tags.

While FWS officials examine permits and tags before clearing exotic skins for import and export, “at best, all those regulation and enforcement efforts are keeping the trade majority legal,” he said, because “smart traders can take advantage of weak enforcement.” In his estimate, that makes a holistic view of the ethics and sustainability of exotic skins almost impossible.

Fashion brands should heed changes in consumer perception of this product category, as well as supply chain risks associated with sourcing exotic leathers, cautioned PJ Smith, Fashion Policy Director at the Humane Society of the United States. In the last five to ten years, he said, surveys consistently show high consumer engagement with animal welfare, especially for Gen Z, and “the perception of luxury has changed to being what is more sustainable, what is more innovative, what is more ethical.”

Fur and exotics are “just not where consumers are anymore,” he said, adding that various well-known retailers “are looking to get out of exotic skins,” meaning “the markets are closing.”

Still, he expressed frustration that exotic skin bans have yet to get the traction seen with fur. “For five-plus years, there was a fur-free announcement every quarter, and we just haven't seen that with other materials — down or exotic skins — but I always thought exotic skins were next, primarily because these are wild species, similar to fur, and no one's eating the pythons or crocodiles, so it's not considered a by-product of meat production. And it's a huge risk to the brands because of the illegal wildlife trade,” Smith said.

Back in California, legal developments are pending in two cases, *April in Paris v. Becerra*[1] and Louisiana Wildlife and *Fisheries Commn. v. Becerra*[2], centered on the constitutionality of California's exotic skins ban. Lawyers for plaintiffs and defendants presented oral arguments on the merits last spring.

A Changing Storefront

Market economies struggle with externalities such as the negative environmental costs of fashion. As new legislation addressing sustainability claims and practices goes into effect, consumers may soon find “walking down the aisle at any major store” — to quote Khan from the FTC — a starkly different experience.

1 *April in Paris v. Becerra*, 219CV02471KJMCKD, 2020 WL 2404620 [ED Cal May 12, 2020].

2 Louisiana Wildlife and Fisheries Commn. V. Becerra, 219CV02488KJMCKD, 2020 WL 2404830 [ED Cal May 12, 2020].

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