

## Brand Protection Alert

February 2022

# Fashion Industry Sustainability Claims Are Focus of Regulation Enforcement in the US and Abroad

Much ink has been spilled over sustainability in fashion as the industry makes a concerted effort to reduce its environmental footprint. Recent reports estimate that the fashion industry accounts for 4% of global emissions annually, with over 70% resulting from production processes alone. With this issue top of mind for fashion executives worldwide, the marketing of sustainable or eco-fashion has become widespread, raising regulators' and legislators' concerns about greenwashing and false advertising.

### Key Takeaways

- U.S. regulators, including the Federal Trade Commission (FTC) as well as advertising industry self-regulatory bodies, are focused on sustainability, or "green," claims in the fashion industry.
- The U.K. and the EU member countries are moving to regulate—and eventually require—sustainability claims for consumer products and for the fashion industry in particular.
- Legislatures in states including California and New York are focused on green claims. In New York, a new bill aimed at the fashion industry would require all large fashion companies doing business in the state to disclose their social and environmental impact.

### NAD's Decision in Everlane Provides Guidance to the Fashion Industry on Evidence Required in the US to Substantiate Green Claims

In the U.S., the FTC's Green Guides (first issued in 1992 and most recently revised in 2012) provide a road map for



businesses to make lawful environmental or green claims in marketing and advertising. On the heels of several fashion companies and lobbyists seeking reform of the Green Guides for a modern era, the FTC announced last July that it would undertake a further review in 2022.

In its independent investigation of fashion retailer Everlane's "ReNew" apparel collection, the National Advertising Division of the Council of Better Business Bureaus (NAD) provided guidance on how to track metrics and compile evidence to support sustainability claims that in most instances are difficult to substantiate, particularly those that are aspirational in nature.

### Aspirational Claims

According to the case report, the NAD determined that Everlane provided a reasonable basis for its "no new plastics" claim because the claim "is limited to a specific environmental benefit— removing all virgin plastic from its supply chain." The company's website provided detailed information on how this is done.

Everlane had modified its original, unqualified claim ("No new plastic in our entire supply chain by 2021. Our first step: the ReNew Collection") to specify the basis for the

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aspirational claim, namely, “No New Plastic: There are already over 8 billion tons of plastic on our Planet—and they’re not going away. So in 2018 we set out to remove virgin plastic from our entire supply chain by 2021.”

### **Recycled Materials Claims**

Everlane advertised several items in its ReNew apparel line as having certain numbers of plastic bottles being recycled to produce a fixed amount of polyester yarn to make each garment. Everlane also claimed, “To date, we have recycled over nine million plastic bottles.”

Everlane’s calculation of the total number of recycled bottles is based on the company’s calculation of the number of recycled bottles used for yarn in a garment, and it is derived from the number of garments it has produced since 2018. The NAD determined that Everlane provided a reasonable basis for its claims concerning the number of bottles used for the identified garments as well as the overall number of bottles it has recycled.

### **“Safer For The Environment” Claims**

Everlane claimed its products were “Recycled Materials ... made from recycled plastic bottles, diverting waste from landfills and lessening dependency on fossil fuels,” and “Safer For The Environment ... dyed with bluesign®-approved dyes, which are safer for dyehouse workers and better for the environment.”

While bluesign is a well-recognized and independent third-party certification that assesses the safety of chemicals on human health and the environment, the NAD noted that consumers are not likely to understand that bluesign is a reputable certification and recommended that Everlane explain it. The company agreed.

The NAD also investigated whether Everlane could provide evidence that it complies with bluesign’s standards required to be a partner and recommended that the claim be further qualified to note bluesign’s limited environmental impact on manufacturing practices and Everlane’s nascent incorporation of bluesign certification into its clothing line.

## **UK and Europe Signal a Move Toward International Comity for ESG Accountability**

The United Kingdom’s antitrust and consumer protection watchdog, the Competition and Markets Authority (CMA), announced that it would be investigating environmental claims to ensure that all companies (particularly fashion and textile companies) are complying with consumer protection laws. In September 2021, the CMA published its [Green Claims Code](#), including six principles:

- Claims must be truthful and accurate.
- Claims must be clear and unambiguous.
- Claims must not omit or hide important relevant information.
- Comparisons must be fair and meaningful.
- Claims must consider the full life cycle of the product or service.
- Claims must be substantiated.

It also provided a [checklist](#) to use to determine whether environmental claims are genuinely green.

Businesses were given until the start of this year to fulfill their obligations before the CMA would begin review. In a follow-up to its Green Claims Guide announcement, the CMA revealed this month that it had begun “looking into environmental claims of fashion companies to weed out businesses it believes are ‘greenwashing’ their operations in a way that violates consumer protection law.”

Similar action is also taking place in the European Union, and the European Commission has announced that further legislative instruction is forthcoming with respect to substantiating green claims. In the Netherlands, the Authority for Consumers and Markets (ACM), which ensures fair competition between businesses and protects consumer interests, has commenced an investigation into several clothing companies, both Dutch and foreign. ACM has stated that it would take action against the Dutch companies and seek action from foreign regulators as well.

Like the CMA, the ACM provides [guidelines](#) in the form of five “rules of thumb” for sustainability claims:

- Make clear what sustainability benefit the product offers.
- Substantiate your sustainability claims with facts, and keep them up to date.
- Comparisons with other products, services or companies must be fair.
- Be honest and specific about your company’s efforts with regard to sustainability.
- Make sure that visual claims and labels are useful, not confusing, to consumers.

ACM has also emphasized that fashion companies will be held accountable.

In France, Law No. 2020-105, Regarding a Circular Economy and the Fight Against Waste, passed in 2020, went into effect on Jan. 1. Among its many provisions aimed at reducing the consumption of nonrenewable resources, encouraging the manufacture of products that have a longer useful life, recycling 100% of plastics in the country and generally less wastefulness, the law requires manufacturers of consumer products, including clothing, to make visible (or accessible during purchase) information about the item’s environmental properties and characteristics (e.g., use of recycled materials and renewable resources as well as the expected life span of the article). Clothing manufacturers also have the option to include a label with an environmental, or environmental and social, rating that indicates the impact of the item of clothing. The new French law also prohibits the destruction of unsold nonfood inventory, including clothing, shoes and beauty products. Manufacturers, distributors and stores will be required to donate or recycle unsold inventory instead of incinerating it or dumping it in landfills.

Germany has a similar environmental and social certification for textiles. The “Green Button” is a government-run certification program that applies “46 stringent social and environmental criteria” (20 criteria for the company; 26 for the product), covering issues ranging from wastewater discharge to a prohibition against the use of child and forced labor in manufacturing. Whether a manufacturer applies to have the Green Button for one product or all its products, it must pass a “company audit.”

## States Look To Regulate Green Claims: California and New York Laws

Back in the U.S., a number of state legislators, sustainability nonprofits and designers such as Stella McCartney are focused on bringing more accountability and transparency to eco-centric initiatives.

California recently expanded its existing Truth in Environmental Advertising law, enacting SB 343 (Truth in Labeling for Recyclable Materials), which imposes new advertising and labeling restrictions as well as new documentation responsibilities on product and packaging manufacturers. The new law makes the use of the familiar chasing-arrows symbol or any other suggestion that a product or packaging is recyclable deceptive or misleading unless the material meets statewide recyclability criteria, to be developed by the California Department of Resources Recycling and Recovery. Read our alert on SB 343, which takes effect Jan. 1, 2024, [here](#).

On the other coast, New York legislators this month introduced a bill aimed specifically at the fashion industry. The vanguard Fashion Sustainability and Accountability Act would require all large fashion companies (defined as those with more than \$100 million in revenue) doing business in the state to disclose their social and environmental impact.

More specifically, and according to the New York State Senate’s website, the bill proposes that these companies “be required to set and achieve [Science Based Targets](#); to provide clear, transparent reporting on its energy, greenhouse gas emissions, water, plastic, and chemical management; and to perform mandatory due diligence to avoid labor abuses.” If the bill is passed into law, companies would be required to make disclosures within a year of its enactment, and those that do not comply could receive fines of up to 2% of their revenue, the proceeds of which would be donated to environmental causes.

## Up Next: Sustainability Claims in the Digital Realm

The focus on sustainability claims is not limited to IRL. According to the McKinsey/Business of Fashion report “State of Fashion 2022,” digital and sustainability offer fashion’s biggest opportunities for growth this year. Companies including DressX (the self-proclaimed “first multi-brand store for digital clothes”) claim that the production of digital garments “minimize[s] the carbon footprint and eliminate[s] waste and chemicals during production and usage.” The digital landscape has created a culture of transparency, and consumers increasingly demand it. Whether blockchain and other technologies can deliver on the sustainable promise of NFTs and digital fashion remains untested.

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