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The Proposed New York State Fashion Sustainability and Social Accountability Act – An Update Five Months In

During October 2021, the Fashion Sustainability and Social Accountability Act was introduced in the New York State Senate and Assembly. If adopted, the Act would, among other things, require many fashion companies to map portions of their supply chains, substantially enhance their environmental and supply chain disclosures, obtain third-party assurance of selected reported information and meet set impact targets. In this Alert, we provide both an overview of the Act and a status update.

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The global fashion industry, according to some estimates worth \$2.4 trillion worldwide, has for many years been a focus of the NGO community and other members of civil society due to concerns over environmental and human rights impacts. Many leading brands and retailers –especially in the United States, Canada and Western Europe – are at the forefront of environmental sustainability and promoting respect for human rights in their businesses and supply chains. However, like other industries, maturity in and commitment to addressing these issues varies.

Most corporate social responsibility legislation is industry agnostic, applying across a wide range of industries. As is clear from its name, the Fashion Sustainability and Social Accountability Act takes a different approach. It would specifically apply to and be tailored to the fashion industry. Stating her impetus for the Act during a January 7, 2022 press conference, the Senate sponsor of the bill, Senator Alessandra Biaggi (D), indicated 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.”

An Overview of the Act

Subject Companies

The Act would apply to business enterprises that meet three threshold requirements:

- Fashion retail seller or fashion manufacturer.
- Doing business in New York.
- Annual worldwide gross receipts exceeding \$100 million.

Each of these concepts is unpacked below.

In-scope business activities. A “**fashion retail seller**” would be a business entity that lists retail trade as its principal business activity in the state of New York on its state business tax return, and primarily sells articles of wearing apparel or footwear. A “**fashion manufacturer**” would be a business entity that lists manufacturing as its principal business activity in the state of New York on its state business tax return, and primarily manufactures articles of wearing apparel or footwear. The approach to determining principal business activity is analogous to that taken under the California Transparency in Supply Chains Act, which looks to the principal business activity code reported on an entity’s California tax return for determining whether the entity is a retail seller or manufacturer for purposes of that Act.

Wearing apparel and footwear are in turn defined in the Act. Both are broadly defined. An **“article of wearing apparel”** would be any costume or article of clothing worn or intended to be worn by individuals. **“Footwear”** would include any covering worn or intended to be worn on the foot.

Doing business requirement. For purposes of the Act, **“doing business in New York”** would be broadly defined as actively engaging in any transaction for the purpose of financial or pecuniary gain or profit. Because the jurisdictional nexus would be keyed off of doing business, rather than where a business enterprise is headquartered or incorporated, the Act would reach a significant portion of the fashion industry.

Financial threshold. **“Gross receipts”** would mean the gross amounts realized (*i.e.*, the sum of money and the fair market value of other property or services received) on the sale or exchange of property, the performance of services or the use of property or capital, including rents, royalties, interest and dividends, in a transaction that produces business income, in which the income, gain or loss is recognized, or would be recognized if the transaction were in the United States, under the U.S. Internal Revenue Code. Gross receipts would not be reduced by the cost of goods sold. Specified extraordinary events would be excluded from gross receipts, such as proceeds from sales of stock, litigation proceeds and tax refunds.

Substantive Requirements and Reporting

The Act would require subject fashion retail sellers and manufacturers to disclose their environmental and social due diligence policies, processes and outcomes, including significant real or potential adverse environmental and social impacts, and targets for prevention and improvement.

The Act sets out minimum disclosure requirements, as described below. As noted below, although framed in the lead-in to this portion of the Act as disclosure requirements, there also would be significant accompanying substantive compliance requirements:

- Supply chain mapping and disclosure.

Subject companies would be required to use good faith, risk-based efforts to map suppliers across all tiers of production, from raw material to final production. A minimum of 50% of suppliers by volume across all tiers of production would be required to be mapped. In addition, the subject company would be required to use good faith efforts to map the suppliers and associated supply chains relevant to the prioritized risk and obtain and disclose the names of prioritized suppliers.

- Impact and due diligence efforts.

This element would require preparation of a social and environmental sustainability report. Disclosure would be required to include externally relevant information on due diligence policies, processes and activities conducted to identify, prevent, mitigate and account for potential adverse impacts, including the findings and outcomes of those activities.

“Due diligence” would be defined as the process companies should carry out to identify, prevent, mitigate and account for how they address actual and potential adverse impacts in their own operations, their supply chain and other business relationships, as recommended in the OECD Guidelines for Multinational Enterprises, the OECD Due Diligence Guidance for Responsible Business Conduct and the United Nations Guiding Principles on Business and Human Rights.

The social and environmental sustainability report would be required to include, in line with the UN Guiding Principles, the International Labour Organization Declaration on Fundamental Principles and Rights at Work, the OECD MNE Guidelines and the OECD RBC Guidance, the following:

- A link on the fashion retail seller's or fashion manufacturer's website to relevant policies on responsible business conduct;
 - Information on measures taken to embed responsible business conduct into policies and management systems;
 - The fashion retail seller's or fashion manufacturer's identified areas of significant risks in the contexts of its own activities and business relationships, such as supply chains;
 - The significant adverse impacts on risks identified, prioritized and assessed in the context of its own activities and business relationships, such as supply chains;
 - The prioritization criteria;
 - The actions taken to prevent or mitigate those risks, such as corrective action plans, to be cited where available, including estimated timelines, targets and benchmarks for improvement and their outcomes;
 - Measures to track implementation and results; and
 - The fashion retail seller's or fashion manufacturer's provision of or cooperation in any remediation.
- In addition, the retail seller or fashion manufacturer would be required to provide impact disclosure on prioritized adverse environmental and social impacts within 18 months after enactment of the policies, processes and outcomes, including the following:
 - A quantitative baseline and reduction targets on energy and greenhouse gas emissions, water and chemical management;

Greenhouse gas reporting would be required to include absolute figures and conform to the Greenhouse Gas Protocol Corporate Accounting and Reporting Standard and Greenhouse Gas Protocol Corporate Value Chain (Scope 3) Accounting and Reporting Standard. GHG reporting would be required to be independently verified.
 - The annual volume of material produced, including breakdown by material type, which would be required to be independently verified;
 - The amount of production displaced with recycled materials as compared to growth targets, which also would be required to be independently verified;
 - The median wages of workers of prioritized suppliers and a comparison of the wages against both local minimum wage and living wages; and
 - The approach for incentivizing supplier performance on workers' rights.

The subject company would be required to indicate any key performance indicators or performance incentives used. It also would be required to describe the incentives used to reward suppliers and encourage good performance, such as contract renewals, price premiums and longer-term contracts.

- Targets in place for impact reductions, and for tracking due diligence implementation and results, including where possible estimated timelines and benchmarks for improvement.

Climate change targets would be required to be absolute targets, align with the Apparel and Footwear Sector Science-Based Targets Guidance promulgated by the World Resources Institute and include all scopes of production.

Fashion retail sellers and fashion manufacturers would be required to meet targets and report their compliance on an annual basis.

Publication of required disclosure. A fashion retail seller or manufacturer would be required to post the required disclosure on its website within twelve months after the enactment of its environmental and social due diligence policies, procedures and outcomes, except as noted above in the case of prioritized adverse environmental and social impacts. A clear and easily understood link to the disclosure would be required to be included on the website's homepage. If the fashion retail seller or manufacturer does not have a website, it would be required to provide the required disclosure within 30 days after receiving a request for the information from a consumer.

Enforcement

The New York State Attorney General, or an administrator designated by the Attorney General, would be responsible for enforcing the Act. The Attorney General would be authorized to bring civil proceedings for an injunction, monetary damages or civil performance of a statutory duty.

Each year, the Attorney General would be required to publish a publicly available report regarding compliance with the Act. The report would be required to include a list of fashion retail sellers and manufacturers who are known to be out of compliance.

If a fashion retail seller or manufacturer is not in compliance with the Act three months after receiving a notice of non-compliance from the Attorney General, the fashion retail seller or manufacturer could be fined up to 2% of annual revenues of \$450 million or more. Any fines levied would be required to be deposited into a community benefit fund established by the Act to be used for environmental conservation and justice initiatives.

In addition, private citizens would be able to commence a civil action under the Act (1) against any person who is alleged to have violated the Act or an order by the Attorney General, (2) to compel the Attorney General to investigate a subject company's compliance with the Act, enforce compliance with the Act or apply the prohibitions set forth in the Act or (3) against the Attorney General where there is an alleged failure to perform any mandatory act or duty under the Act.

Status of the Act

The Act currently is in committee in both the New York State Assembly and Senate. Given the potentially onerous nature of some of the proposed elements of the Act, there is significant opposition in some quarters to the Act in its current form.

However, influential names in the fashion industry and advocates for environmental sustainability have shown their support for the Act, including designer Stella McCartney, the New Standard Institute and the Natural Resources Defense Council, all of which are part of the Act on Fashion Coalition.

There also are calls to strengthen the Act. On January 14, another coalition of twenty labor and human rights advocates and organizations – led by Remake and including the Business & Human Rights Resource Centre, Human Rights Watch and the International Corporate Accountability Roundtable – sent an open letter to Senator Biaggi and Assemblywoman Anna Kelles (D), the Assembly sponsor of the bill, advocating for a more robust Act. Among other things, this coalition would like to see the following amendments to the bill:

- An expansion of the labor data required to be disclosed.
- A requirement to perform due diligence. In the coalition’s view, the bill as worded does not ask companies to perform due diligence, instead only asking them to report on due diligence procedures.
- Penalties for harm caused or contributed by or linked to a brand or retailer, as well as for failing to meet the targets that brands and retailers set.
- In line with the recently adopted California Garment Worker Protection Act, a joint liability clause that holds both brands/retailers and manufacturers accountable for wage theft in their supply chain and minimum wage violations. For a discussion of the California Garment Worker Protection Act, see our earlier Alert [here](#).

The due diligence requirement and liability for adverse human rights and environmental impacts proposed by the Remake coalition are intended to move the Act closer to the mandatory human rights due diligence model in place or proposed in a number of European jurisdictions, including that proposed at the EU level. See our Alerts for a discussion of recent mandatory human rights due diligence laws adopted in [Germany](#), [Norway](#) and [Switzerland](#).

In its letter, the Remake coalition also strongly encouraged lawmakers to gather more stakeholder input when amending the bill, from their coalition and beyond, in particular from affected communities and labor rights and environmental organizations, including unions in the United States and globally.

Given the significant calls for changes on both sides – to scale back or strengthen the Act – it is a virtual certainty that if the bill continues to advance it will be amended.

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