Updates
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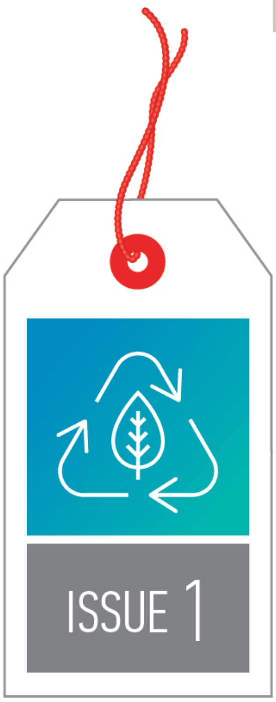
ESG and the Apparel Industry: Always in Fashion



In recent years, the apparel, fashion, and luxury goods industries have seen an increased focus on environmental, social, and governance (ESG) initiatives. As industry leaders continue to make ESG commitments, regulators, investors, and consumers have focused on how these public commitments align with company operations. Given increasing scrutiny of ESG-related disclosures, it is important to take steps to mitigate the risks of both regulatory enforcement and private litigation when reporting on ESG challenges and achievements. This Update provides guidance on mitigating emerging ESG risks.

Measuring Up: What Is ESG?

ESG commitments have three components:

- Environmental concerns, which often focus on how companies are promoting sustainability and stewardship of natural resources.
- Social concerns, which generally address how companies manage their employees, supply chains, and other labor practices.
- Governance concerns, which usually center on whether the actions of company leadership align with stated goals, compliance with diversity and inclusion principles, and anti-corruption activities.

Taking Stock: Regulators and ESG

Regulators have focused on how ESG representations are reported and substantiated. For example, the U.S. Securities and Exchange Commission (SEC) has created a Climate and ESG Task Force to identify potential misconduct regarding ESG disclosures. The SEC has also proposed new rules to standardize climate-related disclosures. The American Apparel & Footwear Association (AAFA) submitted comments to the SEC regarding these proposed rules, asking for additional time and practical considerations for the agency to incorporate in its final rulemaking.

In addition, the Federal Trade Commission (FTC) announced that it was considering revisions to the *Green Guides*—guidelines as to how marketers portray environmental claims. The agency also recently held a public forum on the term "recyclable" on product labels and marketing.

The FTC has paid particular attention to deceptive environmental claims, including claims advertising that rayon textile products marketed as "bamboo" were made using "ecofriendly processes," when in reality converting bamboo into rayon requires the use of toxic chemicals and results in hazardous pollutants. Back in 2010, the FTC issued warning letters to 78 retailers about this practice. More recently, the agency has issued $5.5 million in civil penalties regarding these deceptive environmental claims.

Sizing the Fit: Litigation and ESG

Litigation risks regarding ESG are on the rise. As we recently reported, there have been nearly 100 putative ESG class actions in state and federal courts across the country since 2019. These cases have challenged representations such as "sustainably sourced" and "recyclable."

In May 2023, H&M prevailed in a suit challenging its "Conscious Choice" line of products. The U.S. District Court for the Eastern District of Missouri dismissed allegations on reasonable consumer grounds, holding that the court would not imply "sustainable" or "environmentally friendly" claims when these representations were not actually made by the company. Specifically, the court reasoned that "H&M states that its conscious choice garments contain 'more sustainable materials' and that the line includes 'its most sustainable products,'" and "[n]o reasonable consumer would understand this representation to mean that the conscious choice clothing line is inherently 'sustainable' or that H&M's clothing is 'environmentally friendly' when neither of those representations were ever made."

Canada Goose US, Inc. faced a putative class action challenging the company's representations regarding the sourcing of its products. In June 2022, the U.S. District Court for the Southern District of New York held that the plaintiff plausibly alleged that the statement "ethical, responsible, and sustainable sourcing" could be misleading to a reasonable consumer and denied the company's motion to dismiss.

Allbirds successfully defended against a putative class action lawsuit challenging various environmental impact and animal welfare representations made in advertisements for wool shoes. Challenged claims included "Sustainability meets Style," "Low Carbon Footprint," "Environmentally Friendly," "Made with Sustainable Wool," and "Our Sustainable Practices." The Southern District of New York dismissed the lawsuit, finding that the plaintiff's allegations, which largely consisted of criticisms of the wool industry in general, did not plausibly allege that Allbirds' descriptions of its own practices were materially misleading.

Relatedly, as noted in a recent ruling by the Superior Court of the District of Columbia, purely aspirational statements cannot form the basis of a consumer protection claim unless they can be found to be inaccurate or actually misleading. In that case, which is currently on appeal, the court held that statements such as working toward "a more sustainable future for our communities and our planet" and "help develop more effective recycling systems" were "general goals," not a "measurable standard." Even so, diligence in reviewing these statements for accuracy and substantiation remains crucial in risk mitigation.

Tailoring Takeaways

To mitigate the risks associated with ESG claims, companies might consider the following:

- The ways in which their policies and procedures comply with the developing disclosure standards applicable to ESG topics.
- The substantiation of ESG claims with appropriate documentation.
- The bounds of aspirational and similar ESG statements.

While these mitigation strategies cannot completely eliminate ESG-associated disclosure risks, the best litigation strategy often begins with intentional investment in assessments and ongoing compliance. Formalizing, assessing, measuring, and documenting a company's efforts to translate its ESG values into corporate policies, communications, and actions can help companies further mitigate risks associated with ESG and defend against claims that any such representations are false or misleading.

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