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Good Intentions, but at a Price

The intentions of the Fashion Sustainability and Social Accountability Act are clearly noble, but it is hard to read the text of the current bill without seeing it as a high-minded legislative scold.

A bill pending in the legislature of New York state stands to have a major impact on fashion companies operating in the state—with hints of what may yet arise elsewhere. The name—the Fashion Sustainability and Social Accountability Act—tells you from where the bill has come and where it is trying to go.

The bill, if signed into law in its current form, would add a new §399-mm to the state's General Business Law to require that any fashion company with more than $100 million in "annual worldwide gross receipts" disclose on its website "its environmental and social due diligence policies, processes and outcomes, including significant real or potential adverse environmental and social impacts and disclosure targets for prevention and improvement."

The effect is something like an accountability value added tax, passing disclosure and remediation along the supply chain as goods mature from "raw material to final production." A compliant company would have to address not merely the environmental impact issues implicit in the name of the bill but information on workforce wages of suppliers and the disclosing company's "approach for incentivizing supplier performance on workers' rights …"

The penalty for noncompliance would be a fine of up to 2% of annual global revenues of $450 million or more—not mere profits but revenues, and not simply revenues in New York but total worldwide revenues, regardless of profitability. The New York state attorney general would be charged with enforcement, but private citizens could also start lawsuits. Fines paid would go to a new "community benefit fund" administered by the New York State Department of Environmental Conservation and would be used for "environmental benefit projects that directly and verifiably benefit environmental justice communities."

The intentions are clearly noble, but it is hard to read the text of the current bill without seeing it as a high-minded legislative scold. Some key points:

(1) The required disclosures appear to be iterative: You disclose and promise to make plans to address the links in your supply chain that are most problematic. If you succeed in making those initial corrections, you amend your disclosure to do the same with your next-worst set of problems, down the line, apparently without end.

(2) It is possible that a company could be heavily fined due to problems that are relatively minor relative to its total production and that, because they arose along a supply chain that can easily stretch halfway across the globe, may not have been caught by the company for some time (if at all) in time to take corrective action.

(3) Meanwhile, any citizen can sue. In the course of my practice, I handled a case under the earlier version of the section of federal

patent law that bars the "false marking" goods as being covered by a patent when in fact they are not (or once had been and no longer are). 35 U.S.C. §292. The old version of the section similarly allowed individuals to sue to enforce compliance. In practice, that provision proved to be more in the nature of a "lawyers' relief act"—benefiting entrepreneurial members of my profession—than enabling legislation for self-help by aggrieved citizens. It was mercifully removed from the law by the America Invents Act of 2011.

Although it is indeed not hard to admire the good intentions behind the bill, the potentially disruptive way it would affect the fashion business is equally obvious. It is not just that, if each state copied the act precisely, a fashion business would stand to lose large sums in fines. If many states adopt laws with different reporting requirements, efforts at compliance could quickly become chaotic. Even those consumers with the curiosity and patience to click through to such complex and varied disclosures on a website they had visited in search of socks or a cocktail dress may come away more confused than enlightened. (To a readership composed largely of lawyers: Come on, the truth now—do you really go line-by-line through retail website terms and conditions, privacy policies and mandatory disclosure data, or is your visit more likely enriched by entering your coupon code correctly?)

It must be remembered that fashion, by definition, moves fast at the macro level and, at the micro level, literally changes as quickly as you can change your shirt. A design house's sources of raw materials and goods may vary greatly from season to season and from year to year, making attempts at compliance potentially quite demanding, with accuracy becoming elusive.

Only a very small percentage of the process, from farm to factory, occurs any longer within New York state, presenting the reasonable question of what compelling state interest is really involved. More curiously, the bill applies to any fashion manufacturer doing business within New York without regard to: (1) the extent to which its revenues result from sales of its goods to consumers in the state or (2) any environmental impact within New York. The impact to the state's own ecosystems of a cotton T-shirt sold in New York but made in a manner friendly to the environment of a foreign source of manufacture should, in any event, be equal to the impact in New York of a cotton T-shirt made in a manner destructive to the environment of the place where it was made.

That takes us to the community benefit fund to be established for projects run by "environmental justice communities." The use of those proceeds is a legislative and political Catch-22: If the money is used for projects overseas (where the vast majority of source farms, pastures and factories are located), New York state will have used the legislation to distribute foreign aid—a politically sensitive use of public funds that is properly left to the federal government. If, however, the state keeps the money for use within New York, it will have brought revenue into a relatively rich and clean territory as a direct result of environmental problems in poorer regions. That would turn the curious phrase *environmental justice* on its head by creating what could as easily be described as *environmental injustice*—the sustainability Robin Hood operating in reverse..

When you consider the number of states that might buy into passing similar legislation, it becomes plain that this is the kind of law that should come from the federal government, not individual states and territories. Indeed, it would be better if the USA partnered with the EU and other major territories to arrive at something of a consistent approach to addressing environmental and labor issues related to the international fashion business.

Finally, channeling the garmentos in my own family from generations past, I hear their voices calling out, "It all sounds worthy—but why are you picking on us?" Indeed, I suspect that there are more potential environmental and labor-related challenges in my coffee maker than in my business shirts. But as my ancestors in fact cautioned me, no one goes into the fashion business expecting an easy time of it.

Alan Behr *is a trademark partner at Phillips Nizer.*