

THE FASHION INDUSTRY IS NOT AS “GREEN” AS IT WOULD LIKE YOU TO BELIEVE

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INTRODUCTION

According to its website, major retailer H&M is making strides toward environmental stewardship. As shoppers are navigating the site, they will notice hyperlinks titled “sustainability” both at the top and bottom of the main page.¹ The sustainability page touts buzzwords such as “recycling,” “climate,” “circularity,” and “materials.”² H&M even has a *Conscious* line of clothing, which purports to include only garments made of “at least 50% of more sustainable materials.”³ These claims would be very likely to assuage the average shoppers into believing their purchases are doing good for the environment and that they are buying responsibly. However, a sustainability watchdog group⁴ recently exposed H&M’s environmental marketing tactics as largely falsified.⁵ Its report clarifies that H&M does very little to define or inform consumers on what constitutes a “sustainably sourced material,” and its claims are not backed by third-party certifications.⁶ Further, the group compared H&M’s sustainability claims to the UK’s Competition Markets Authority guidelines on environmental

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1. H&M, https://www.hm.com/en_us/index.html [https://perma.cc/AEA6-ANKS] (last visited Sept. 24, 2022).

2. H&M, *Circular and Climate Positive*, <https://hmgroup.com/sustainability/circularity-and-climate/> [https://perma.cc/7JXY-YWU6] (last visited Sept. 24, 2022).

3. H&M, *Conscious Products*, https://www.hm.com/en_us/sustainability-at-hm/our-products/explained.htmlhttps://www2.hm.com/en_us/sustainability-at-hm/our-products/explained.html [https://perma.cc/7VCT-5FTG] (last visited Sept. 24, 2022).

4. Changing Markets Foundation, *About Us*, <https://changingmarkets.org/about/> (last visited Sept. 24, 2022).

5. See Changing Markets Foundation, *Synthetics Anonymous: Fashion Brands’ Addiction to Fossil Fuels*, 51 (2021), http://changingmarkets.org/wp-content/uploads/2021/07/SyntheticsAnonymous_FinalWeb.pdf (finding that the majority of H&M’s Conscious collection was made of synthetics fibers, despite being marketed as sustainable).

6. *Id.* at 41.

marketing,⁷ and found that 96% of them were in breach, meaning that the claims were deceptive or misleading to consumers.⁸

Brands like H&M are known as “fast fashion,” a subset of the fashion industry that is best known for providing cheap, trendy clothing at a quick pace.⁹ Unfortunately, fast fashion companies are also well known for engaging in harmful labor practices¹⁰ and contributing to the global environmental crisis.¹¹ Fast fashion negatively impacts the environment at nearly every stage of production.¹² The creation of the garments requires massive amounts of natural and synthetic resources, the processing and dyeing of fabric wastes and pollutes water, and the transportation across the global supply chain releases carbon emissions.¹³ Then, the use and laundering of the garment by consumers is responsible for releasing microplastics into the ocean.¹⁴ Finally, the

7. *Id.* at 17 (CMA guidelines are not binding law, but are suggestions to retailers regarding best practices for advertisements under UK consumer protections law).

8. *Id.* at 50.

9. *Fast Fashion*, THE FASHION LAW, <https://www.thefashionlaw.com/resource-center/fast-fashion/>.

10. *See id.* (showing the brand Zara was exposed for using child and slave labor in sweatshop conditions in their factories).

11. *See, e.g.*, Maxine Bédat, *Fast Fashion’s Dirty Secret – and a Solution Made in America*, CNBC (July 3, 2015),

<https://www.cnbc.com/2015/07/03/fast-fashions-dirty-secret-and-a-solution-made-in-america-commentary.html> (“[T]extile companies just keep those engines roaring, running largely on coal, while they systematically dump their chemicals untreated back into their local water.”); Tatiana Schlossberg, *How Fast Fashion is Destroying the Planet*, N.Y. TIMES (Sept. 3, 2019), <https://www.nytimes.com/2019/09/03/books/review/how-fast-fashion-is-destroying-the-planet.html> (“More than 60 percent of fabric fibers are now synthetics, derived from fossil fuels, so if and when our clothing ends up in a landfill (about 85 percent of textile waste in the United States goes to landfills or is incinerated), it will not decay.”); Helle Abelvik-Lawson, *The UK’s Fast Fashion Habit is Getting Worse – and it’s Destroying the Planet*, GREENPEACE (Nov. 23, 2020), <https://www.greenpeace.org.uk/news/the-uks-fast-fashion-habit-is-getting-worse-and-its-destroying-the-planet/> (statement of Stella McCartney) (“Did you know that the equivalent of one garbage truck of textiles is burned or landfilled every second? And right now, less than 1% of material used to produce clothing is recycled into new clothing, meaning 99% of all textiles and fashion are waste... that’s about 100 billion dollars worth of materials wasted each year. It’s crazy!”); Our Changing Climate, *Is Fast Fashion Destroying Our Environment?*, YOUTUBE (Nov. 23, 2018), <https://www.youtube.com/watch?v=YOAO0D0i5-fA&t=21s>.

12. *See* Mark K. Brewer, *Slow Fashion in a Fast Fashion World: Promoting Sustainability and Responsibility*, 8 LAWS 1, 2 (2019) (“Fashion . . . requires enormous quantities of raw materials, creates considerable levels of pollution, leaves a significant carbon footprint, and generates alarming levels of waste.”).

13. “*Toxic Textiles*” *Report Finds Many Top US Apparel Retailers Coming Up Short*, GREEN AMERICA (July 23, 2019), <https://www.greenamerica.org/press-release/new-report-finds-many-us-apparel-retailers-coming-short> (showing the fashion industry is responsible for about 20% of all industrial water pollution and 10% of global carbon emissions).

14. Sienna Somers, *Our Clothes Shed Microfibres – Here’s What We Can Do...*, FASHION REVOLUTION (2019) <https://www.fashionrevolution.org/our-clothes-shed-microfibres-heres->

garments end up clogging landfills or being incinerated.¹⁵ Despite a multitude of strategies, efforts to mitigate environmental harm from the fashion industry have largely fallen short.¹⁶ World leaders cannot seem to agree on a path forward for global environmental change.¹⁷

The environmental crisis is too complicated to be solved in one fell swoop. Instead, this Note recommends tackling one harmful practice that can be regulated, and will likely decrease the environmental impact of fast fashion. That harmful practice is greenwashing, which occurs “when a corporation increases its sales or boosts its brand

image through environmental rhetoric or advertising, but in reality does not make

good on these environmental claims.”¹⁸ H&M’s use of deceptive claims regarding the eco-friendliness of its products is a prime example of greenwashing. Although fashion is one of the most polluting industries in the world,¹⁹ retailers continue to mollify consumers into

what-we-can-do/ (noting that about 50% of clothing is made from synthetic materials that release microplastics, fibers of plastic too small to be filtered out, which make their way into waterways through wastewater and that clothing is the largest source of microplastic pollution).

15. Beth Porter, *What Really Happens to Unwanted Clothes?*, GREEN AMERICA, <https://www.greenamerica.org/unraveling-fashion-industry/what-really-happens-unwanted-clothes> (last visited Sept. 25, 2022) (showing that the majority of Americans’ textile waste is sent to landfill and the next largest portion is sent to incinerators). According to data from 2019, Americans generate 16 million tons of textile waste per year. *Id.* The majority of this clothing is sent to landfills (62.5%), and the next largest portion is sent to the incinerators (18.7%). *Id.*

16. See generally Elizabeth Jane Poland, *Fashioning Compliance: The Fashion Charter for Climate Action and Strategies for Forming a More Effective Fashion Industry Agreement*, 49 GA. J. INT’L & COMP. L. 407 (2021).

17. For example, many world leaders gathered recently for the 26th UN Climate Change conference in Glasgow, but the conference is generally considered to have accomplished very little. See generally Solitaire Townsend, *COP26 Reflections: The Specifics & The Signals*, FORBES (Dec. 14, 2021), <https://www.forbes.com/sites/solitairetownsend/2021/12/14/cop26-reflections-the-specifics—the-signals/?sh=4bf12c05f855> (outlining the results of the 2021 COP in Glasgow); Thomas Colson, *COP26 is Looking like a Historic Failure After the World’s Biggest Polluters Snubbed the Summit and Even Rich Nations Failed to Deliver*, BUSINESS INSIDER (Nov. 3, 2021), <https://www.businessinsider.com/analysis-cop26-climate-summit-is-looking-like-a-historic-failure-2021-11> (describing COP26 as a historic failure); Emma Newburger, *What the COP26 Climate Conference Really Accomplished*, CNBC (Nov. 16, 2021), <https://www.cnbc.com/2021/11/16/un-cop26-climate-summit-what-was-accomplished.html> (focusing on outcomes of COP26).

18. Sophia Von Bergen, *Holding Oregon Benefit Companies Accountable for Greenwashing and Faux CSR*, 24 LEWIS & CLARK L. REV. 1097, 1099 (2020) (quoting Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 UNIV. CAL. DAVIS BUS. L.J. 281, 300 (2014)).

19. See Alden Wicker, *Fashion Is Not the 2nd Most Polluting Industry After Oil. But What Is It?*, ECOCULT (Apr. 1, 2021), <https://ecocult.com/now-know-fashion-5th-polluting-industry-equal-livestock/> (noting that current estimates place the fashion industry as the third most polluting industry in terms of carbon emissions, second in terms of dumping plastics into the

believing that their purchases are environmentally sound. Companies are generally not held responsible for these falsified claims since green advertising in the fashion industry is largely unregulated in the US.²⁰ As consumers become more eco-conscious, corporations that advertise sustainable practices will continue to profit. However, without a reliable way to ensure those practices are actually being implemented, consumers may be unwittingly supporting the destruction of the environment at the hands of the fashion industry.

The US should implement a Green Fashion Certification system to combat greenwashing in the fashion industry. This system would be run by the Environmental Protection Agency (EPA), a regulatory body which has the expertise to review company audits and inspections for true environmental impact.²¹ Fashion companies that choose to participate would benefit from the legitimacy of a government-backed seal of approval, which would serve the dual purpose of decreasing consumer deception and awarding compliant companies with higher sales from eco-conscious customers. The regulation would also punish companies that attempt to label their products as eco-friendly without complying with the program, thus decreasing greenwashing in American fashion marketing. If companies want to benefit from eco-friendly rhetoric, they will have to follow through on their word.

Part I of this note will discuss greenwashing in more depth. Specifically, it will provide an overview of greenwashing, common greenwashing tactics in fast fashion, an explanation of the harm that results, and the current, insufficient barriers to greenwashing. Part II will review the proposed solution, including an analogous regulatory program, suggested standards, an application, and rationales. Part III will briefly conclude.

I. THE PROBLEM: GREENWASHING

Although efforts to mitigate the environmental impacts of the fast fashion industry have been largely unsuccessful, many companies would like to hide that fact from consumers.²² Many fast fashion companies engage in greenwashing in an attempt to make their

ocean, and significant impacts on solid waste production and water pollution).

20. See generally Robin M. Rotman, Chloe J. Gossett & Hope D. Goldman, *Greenwashing No More: The Case*

for Stronger Regulation of Environmental Marketing, 72 ADMIN. L. REV. 417 (2020).

21. See EPA, *How We Monitor Compliance*, <https://www.epa.gov/compliance/how-we-monitor-compliance> (last visited Sept. 25, 2022).

22. See generally Changing Markets Foundation, *supra* note 5.

products seem more appealing to customers. This Part will first briefly define greenwashing. It will then expand on greenwashing in the fast fashion industry and why using this tactic is so harmful. Finally, it will explain why the current solutions to combat greenwashing are insufficient.

A. *What is Greenwashing?*

Companies practice greenwashing when their advertisements include misleading environmental claims.²³ Usually, a company will claim a positive environmental impact without actually implementing any action or state an eco-friendly claim without substantiation.²⁴ There have been popular attempts to define greenwashing, including the “Seven Sins” method,²⁵ which identifies common greenwashing strategies: the hidden trade-off, no proof, vagueness, worshipping false labels, irrelevance, lesser of two evils, and fibbing.²⁶ There have also been more academic attempts, such as defining greenwashing as “[a] wrongdoing, distraction in the form of a ‘wash,’ and at its heart, an underlying structural problem [which] never receives proper redress.”²⁷ Greenwashing first became prevalent in the 1980s, and instances of its use in advertisements grew rapidly in the 1990s.²⁸ These deceptive advertisements are difficult for consumers to identify²⁹ because environmental issues are very complex.³⁰ Greenwashing stems from the knowledge that consumers, especially millennials and Generation Z, want to buy products that are eco-friendly and are willing to pay more for such items.³¹ This means that companies that market their goods as eco-friendly can raise prices and still have consistent sales – and, if they forgo the costly process of implementing

23. Rotman et al., *supra* note 20, at 419.

24. *Greenwashing*, THE FASHION LAW, <https://www.thefashionlaw.com/resource-center/greenwashing/>.

25. Yan Rong, *Greenwashing: Are Your Purchases Really Eco-Friendly?*, THE SUSTAINABILITY PROJECT (May 4, 2021), <https://thesustainabilityproject.life/blog/2021/05/04/greenwashing-are-your-purchases-eco-friendly/> (explaining what the seven sins of greenwashing are).

26. *Id.*

27. Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 UNIV. CAL. DAVIS BUS. L.J. 281, 286 (2013).

28. Nick Feinstein, *Learning from Past Mistakes: Future Regulation to Prevent Greenwashing*, 40 BOS. COLL. ENV'T AFF. L. REV. 229, 232 (2013).

29. For a visual breakdown of a greenwashed ad, see Our Changing Climate, *Greenwashing: A Fiji Water Story*, YOUTUBE (July 28, 2017), <https://www.youtube.com/watch?v=mOpa8kd6fBI>.

30. Rotman et al., *supra* note 20, at 419.

31. *Id.* at 418.

eco-friendly changes, may benefit from even higher profits.

B. *Greenwashing in the Fast Fashion Industry*

Fast fashion companies use many of the traditional greenwashing tactics, but their employment may be difficult to detect. Because fashion has such a complicated supply chain, it is easier for the industry to hide behind green messages. There are a few common strategies to look out for in fashion advertising. First, fast fashion companies will often claim vague environmental benefits but offer no proof.³² Second, companies may rely on one example of eco-friendly behavior but ignore the impacts of the majority of its operation.³³ Third, they may advertise environmental targets that are not actually effective, or advertise green behavior that is already required by law.³⁴ Finally, companies may compare their practices to other fast fashion actors, or utilize internal markers of eco-friendliness that are not verifiable.³⁵

32. For example, a fashion brand may label itself “conscious” or “eco-friendly” but provide no details on how it defines those terms or how the brand itself fulfills that standard. Elizabeth Joy, *How to Tell if a Fashion Brand is Green – or Just Greenwashing*, CONSCIOUS LIFE & STYLE (May 19, 2021), <https://www.consciouslifeandstyle.com/how-to-identify-greenwashing/>.

33. An example of this is Forever 21, which installed solar panels at its headquarters, but ignores the huge carbon footprint left by its production and distribution of clothing. See Madeleine Hill, *How Can You Tell When a Fashion Brand is Greenwashing?*, GOOD ON YOU (Mar. 22, 2021), <https://goodonyou.eco/how-can-you-tell-when-a-fashion-brand-is-greenwashing/>; THE FASHION LAW, *supra* note 24. Another example is a company that has a “sustainable” range of clothing which is marketed as environmentally positive but is actually a very small subset of its overall business and does not actually offset any of the company’s detrimental behavior. Hill, *supra* note 33; Joy, *supra* note 32.

34. Companies may use environmental targets as part of a PR campaign but generally are not held responsible for meeting those targets. Additionally, the targets may employ misleading statistics which lead consumers to believe a bigger change was made than actually occurred. Hill, *supra* note 33. For example, in 2016, H&M admitted that its recycling program only utilizes 0.1% of the garments customers bring in. Eleanor Greene, *Are These Trends Green or Greenwashed?*, GREEN AMERICA, <https://www.greenamerica.org/unraveling-fashion-industry/are-these-trends-green-or-greenwashed> (last visited Sept. 22, 2022). Further, companies may try to garner kudos for following environmental mandates, capitalizing on their consumers’ ignorance of the law. Joy, *supra* note 32.

35. A “lesser of two evils” approach occurs when a fast fashion company claims to be more environmentally friendly than another fast fashion company. If the company does not disclose the details of how it is eco-friendly, this tactic is misleading to the consumer. A company could use this approach if its carbon footprint is only 1% less than another fast fashion company, for example. Another strategy that operates through non-disclosure is false certification labels. A fast fashion company may label a product as “green” or “ethical” and mislead the consumer into believing that this label was granted by a third-party or is backed by certified proof. Joy, *supra* note 32. Even labels by real certification companies may be misleading. In 2015, the Textile Exchange recognized H&M as the number one user of organic cotton, which may lead consumers to believe that the majority of H&M’s clothing uses organic materials. However, it was revealed that only 13.7% of H&M’s cotton is organic. Marc Bain, *H&M’s “Sustainability” Report Hides*

Each of these strategies are effective primarily due to consumers' ignorance of how the industry operates.

These tactics are insidious and difficult for consumers to identify. For example, H&M's *Conscious* line utilizes many of the tactics already discussed. It is difficult to tell how many products the line contains,³⁶ but it is heavily marketed, to make the company appear very eco-friendly. The line is also guilty of bragging about vague environmental benefits without supplying evidence or third-party verification (stating that the *Conscious* items are made of "at least 50% sustainably sourced materials," but not defining what a sustainable material is or providing any verification to support the claim).³⁷ These tactics are difficult for consumers to identify without investigating the claims through personal research or other methods that may be too arduous for the common shopper.

Another method that may be even more difficult for consumers to spot is trendy advertising. A recently published Instagram ad for the company Sheertex features a close up of a model wearing designer tights, with the phrases "snag-resistant," "ultra-durable," and "sustainably made" laid over top of the graphic.³⁸ Consumers may take this advertisement at its face value and may assume a myriad of beliefs about these tights: that they are made with eco-friendly materials, that the process to make them is not harmful to the environment, or that purchasing the tights will benefit the environment. Although these beliefs are most likely false, most consumers would not know that without doing their own investigation of Sheertex. The truth about Sheertex's environmental impact is buried at the bottom of its webpage, within its FAQ section. Under the question, "are they good for the environment?" Sheertex has this to say:

Our goal environmentally (and financially!) is to reduce the number of purchases of pantyhose overall - making sure fewer pairs of pantyhose end up in the landfill and thus you needing to buy fewer replacements over time. Although our fibre is not biodegradable, we're aware of our impact on the environment and are proud to

the Unsustainable Reality of Fast Fashion, QUARTZ (Apr. 12, 2015), <https://qz.com/380055/hms-sustainability-report-hides-the-unsustainable-reality-of-fast-fashion/>.

36. H&M's website, though touting a prominent "Sustainability" page, does not actually allow consumers to sort by sustainable products. A consumer is forced to scroll through and open individual products to determine whether any given product is part of the *Conscious* line. See generally [H&M website]. H&M produces more than 600 million garments each year. Bain, *supra* note 35.

37. H&M, *supra* note 3.

38. Sheertex (@sheertex), INSTAGRAM (Dec. 2, 2021), https://www.instagram.com/p/CW_qx6LAorn/.

make our products and packaging as sustainable as possible. While individual actions do not equate to the majority of the climate crisis, each small step is a good one, and we are working towards making our product fully circular, one day! We are always trying to improve, and thus have a few other projects to reduce out [sic] footprint in the works. Currently, we have stored sheers that didn't make it past Quality Assurance for a recycling program in the future. Our Second Chances collection is entirely made from upcycled products and extra material leftover during our production process. We are looking to expand this collection even further! We encourage everyone to shop for their lifestyle, and if our products are a part of that, great.³⁹

The answer does not support or offer proof of its tights being “sustainably made.” In fact, the answer says very little about the environmental impact at all. Although Sheertex should get credit for making a product that will last longer and thus reduce overall production, there is no evidence that it is implementing any other beneficial tactics. The company claims to want to be circular “one day,” and has a recycling program in the planning stages.⁴⁰ The rest of its statements are vague at best and not specific enough to warrant belief. Claims that it makes its products “as sustainable as possible,” are not backed up by facts or evidence⁴¹ and should be considered greenwashing. Additionally, its Second Chances collection, while admirable on the surface, is not supported by facts either. The author could not find any details on Sheertex’s website regarding the Second Chances line’s actual production process.⁴² Sheertex is guilty of nearly all of the greenwashing tactics – its claims are vague and not supported by facts or verifications, it attempts to benefit from programs that are not actually effective, it uses a small portion of its production to claim overall eco-friendliness, and it compares itself to other products (disposable tights) to appear more green. Yet, most consumers will

39. *Product Facts*, SHEERTEX, <https://www.sheertex.com/pages/faq-product-facts> (last visited Sept. 22, 2022).

40. *Id.*

41. *Id.*

42. For example, consumers should be able to discern how many products are part of the Second Chances line, and what percentage of the materials used to make those products are upcycled. Sheertex’s website includes a short blurb on the Second Chances line which says, “We use the extra material from our production process to make new products like masks, headbands, scrunchies, and underwear. This collection is still growing—so stay tuned for more upcycled products to come.” *Our Story*, SHEERTEX, <https://perma.cc/R7JL-LDTA> (last accessed Sept. 24, 2022). When the author clicked to shop the collection, the page showed only one product, an “Everywear Mask for Kids.” *Accessories*, SHEERTEX, <https://perma.cc/3QPL-2P32> (last accessed Sept. 24, 2022). Although any movement toward upcycling materials is a good one, Sheertex’s exaggeration of their efforts is clearly greenwashing.

only see its trendy Instagram ad, and may be deceived.

The fast fashion industry's use of greenwashing tactics is harmful in three major ways. First, and most importantly, greenwashing companies harm consumers by misleading them regarding the purchases they make. Second, these companies harm the free market and the business of fashion brands engaging in legitimate Corporate Social Responsibility (CSR). Finally, these companies harm the environment by continuing to engage in irresponsible production methods.

Consumer Harm

Greenwashing is effective because many consumers are drawn to companies that claim to be doing environmental good. Especially in the fashion industry, the data shows that customers want to make purchases that are good for the environment. According to statistics compiled by the non-profit Fashion Revolution, 62% of customers are more likely to buy clothing from a brand that values sustainability and 66% are willing to pay more for sustainable garments.⁴³ Perhaps more importantly, customers care about accountability and honesty from brands. 55% of customers say they care about knowing where the clothes they buy come from and how they are made, and 80% believe fashion companies should disclose their manufacturers.⁴⁴ Greenwashing deceives consumers, and especially for those that value transparency, that deception can be very harmful.

Consumer harm occurs in two main ways: first, greenwashing increases a product's perceived value, and second, the consumer links the purchase with her own values. Effective marketing for a product should always aim to increase its perceived value, which is the price the customer is willing to pay and is based on the product's desirability in comparison to other products.⁴⁵ There are many strategies for increasing a product's perceived value. Greenwashing utilizes two of them by focusing on a target audience and incorporating social value.⁴⁶ Companies engaging in greenwashing know that there is an important subset of customers who will spend more money to buy eco-friendly

43. *Why We Still Need a Fashion Revolution*, FASHION REVOLUTION 1, 20 (Apr. 21, 2020), https://issuu.com/fashionrevolution/docs/fr_whitepaper_2020_digital_singlepages.

44. *Id.*

45. Carol M. Kopp, *Perceived Value*, INVESTOPEDIA (Nov. 30, 2020), <https://www.investopedia.com/terms/p/perceived-value.asp>.

46. John E. Lincoln, *Perceived Value: Why Charge More for Your Products?*, IGNITE VISIBILITY (Oct. 29, 2020), <https://ignitevisibility.com/perceived-value-pricing-why-charge-more-for-your-products/>.

products. By marketing toward those customers and emphasizing the social and environmental good its product is doing, a company can vastly increase the perceived value of its product and raise prices considerably. Essentially, greenwashing dupes consumers into paying more for a product that is not what it appears. Secondly, greenwashing can harm consumers emotionally. By making purchases from companies that claim to be environmentally beneficial, consumers feel as though they are contributing to that benefit. Much of the environmentally-conscious consumerism that occurs is reflective of the consumer's own beliefs.⁴⁷ Consumers who want to "vote with their dollar," generally link their purchases with their personal values.⁴⁸ When consumers discover that the purchases they made were not truly beneficial for the environment, they may feel deceived, and it may impact their sense of self. The harm done by greenwashing has been labeled "identity harm," defined as "the anguish experienced by a consumer who learns that her efforts to consume in line with her personal values have been undermined by a company's exaggerated or false promises."⁴⁹ When a consumer is duped by greenwashing and makes a purchase that is not truly eco-friendly, the consumer may feel as though she directly caused injury to the planet and its people.⁵⁰ Additionally, instances of greenwashing in marketing can lead to mass consumer confusion and distrust, and ultimately skepticism in all green marketing claims.⁵¹ Greenwashing primarily harms consumers who care about the environment, but may also impact the general population by creating disdain for environmental issues.

Economic Harm

There are many companies that legitimately cater to environmentally conscious customers and reap the benefits of a business model that does good for the planet. Generally, these companies operate under a Corporate Social Responsibility (CSR) model. CSR is "the concept of businesses considering and attending to interests beyond maximizing profits."⁵² Companies that engage in CSR

47. See Rotman et al., *supra* note 23, at 419 (reporting that the decision to purchase green products is driven by emotion, can be influenced by a belief that such purchases will elevate a consumer's social status, and make a positive statement about the consumer).

48. Eleanor Greene, *What Does it Mean to Vote with Your Dollar?*, GREEN AMERICA (June 20, 2017), <https://www.greenamerica.org/blog/what-does-it-mean-vote-your-dollar>.

49. Sarah Dadush, *The Law of Identity Harm*, 96 WASH. UNIV. L. REV. 803, 804 (2019).

50. *Id.* at 807.

51. Rotman et al., *supra* note 20, at 439.

52. Bergen, *supra* note 18, at 1102.

by committing to environmentally and socially beneficial practices (such as reducing their carbon footprint or paying a living wage) also benefit from increased buy-in from their stakeholders, including customers and investors alike.⁵³ As CSR initiatives are becoming more popular, companies are seeing obvious benefits, including improved loyalty from customers and employees, more confidence from long-term investors, and brand differentiation.⁵⁴ Greenwashing allows companies to take advantage of CSR without actually putting in the required effort. Companies know that giving consumers the impression of green practices will raise their revenue,⁵⁵ and giving that impression without actually making costly environmentally-friendly changes can be even more profitable.⁵⁶ Greenwashing can be considered the largest threat to genuine CSR.⁵⁷ Greenwashing confuses customers who want to purchase responsibly and makes it difficult for them to discern between companies that are only talking the talk and those that are actually walking the walk. Even worse, it may impact the financial health of companies engaging in genuine CSR, possibly dissuading them of the cost-effectiveness of social good.

Environmental Harm

The creation, use, and disposal of a fashion item negatively impacts the environment at every stage of its lifecycle.⁵⁸ For example, the use of chemicals, which is only a small part of the entire process, has a large negative effect on the planet and its people. Cotton, a natural fiber found in many garments, requires a huge amount of water,

53. Bergen, *supra* note 18, at 1103.

54. See generally James Epstein-Reeves, *Six Reasons Companies Should Embrace CSR*, FORBES (Feb. 12, 2012, 12:15 PM), <https://www.forbes.com/sites/csr/2012/02/21/six-reasons-companies-should-embrace-csr/?sh=2520d7273495>; Autumn Strier, *Want Loyal Customers and Employees? Build the Right CSR Program*, FORBES (Sept. 02, 2021, 7:30 AM), <https://www.forbes.com/sites/forbesnonprofitcouncil/2021/09/02/want-loyal-customers-and-employees-build-the-right-csr-program/?sh=6212003d620e>; Carl Hung, *Three Reasons Why CSR and ESG Matter to Businesses*, FORBES (Sept. 23, 2021, 8:15 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/09/23/three-reasons-why-csr-and-esg-matter-to-businesses/?sh=4b81ed1839b9>.

55. See Jacob Vos, *Actions Speak Louder than Words: Greenwashing in Corporate America*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 673, 681 (2009) (quoting GE's executive director of advertising and branding as stating: "Green is green as in the color of money. It is about a business opportunity, and we believe we can increase our revenue behind these Ecomagination products and services.").

56. *Id.*

57. Cherry, *supra* note 27, at 301.

58. Elisha Teibel, *Waste Size: The Skinny on the Environmental Costs of the Fashion Industry*, 43 WM. & MARY ENV'T L. & POL'Y REV. 595, 601–02 (2019).

fertilizers, and pesticides.⁵⁹ Over 900 million pounds of nitrogen and other chemicals were used to grow cotton in just the U.S. in 2015.⁶⁰ Many areas of the world are affected by this practice. According to the documentary “The True Cost,” most of India’s cotton is grown in the Punjab region.⁶¹ This region is also India’s largest consumer of pesticides.⁶² These chemicals do not just negatively impact the environment – they also affect human health. The Punjab region has experienced a large increase in birth defects, cancers, and mental illnesses.⁶³ The people living in areas where fast fashion sources materials, builds factories, and incinerates garments will continue to face long-term health hazards for themselves and their children.

Unfortunately, many companies that engage in greenwashing tend to be those that engage in massive environmental harm.⁶⁴ A successful greenwashing campaign relieves a company of much of the social and economic pressure to operate in a more eco-friendly way. A greenwashing brand does not experience any pressure from its customers, because the customers have been deceived into believing that the company is acting in accordance with its advertisements. The company receives all the economic benefit of claiming to be environmentally friendly without experiencing any of the implementation costs. If a fashion company can run a successful greenwashing campaign, there are no financial incentives left to actually becoming green. With no reason to improve, the environment continues to bear the brunt of the harm.

59. *Id.* at 602.

60. *Id.* at 603.

61. THE TRUE COST (Untold Creative 2015). To view the documentary, see Plot11, *The True Cost | Clothing Industry | Fashion Market | Capitalism | Modern Slavery*, YOUTUBE (July 11, 2020), <https://www.youtube.com/watch?v=NHp1ucQvQ9I> (clip: 30:15-32:59).

62. *Id.*

63. *Id.*

64. One of the most popular greenwashing reveals is, of course, the BP oil spill. Although not a fashion company, BP engaged in a large greenwashing campaign, called “Beyond Profit,” and spent a lot of money to convince consumers that it was a more socially responsible oil company. This went down in flames when the Deepwater Horizon oil spill occurred in 2011, killing multiple workers and releasing a million gallons of oil into the ocean. BP is a prime example of a company that used greenwashing to distract consumers from its role in intense environmental harm. Cherry, *supra* note 27, at 295–96. See also @safely_endangered, INSTAGRAM (Nov. 4, 2021), https://www.instagram.com/p/CV3GoN0I95U/?utm_source=ig_web_copy_link (depicting a comic strip which implies that companies do not take responsibility for their harmful actions). Companies that greenwash can continue to rely on their token eco-friendly action while disregarding the environment completely with the majority of its operation. See Vos, *supra* note 5555, at 685 (giving the example of Toyota, which can “continue to disregard its fleet’s overall fuel efficiency while resting on the laurels garnered by its flagship Prius.”).

C. *Current Solutions are Insufficient*

As it stands, consumers have very few protections against greenwashing. Although there is a patchwork regime of various shields against greenwashing, none of them are sufficiently comprehensive or enforceable. Further, it is difficult under the current system for consumers to become properly educated about the validity of environmental claims. Agencies like the FTC and independent environmental watchdog organizations provide some of the best existing consumer protection against greenwashing, but currently, neither do enough.

The Federal Trade Commission's "Green Guides"

Currently, the FTC's Guides for the Use of Environmental Marketing Claims (the "Green Guides")⁶⁵ seem to be the most robust barrier to greenwashing. The Green Guides are the "centerpiece of the [FTC's] environmental marketing program,"⁶⁶ and yet they remain unenforceable administrative guidelines.⁶⁷ The purpose of the Green Guides is only to explain how consumers may interpret certain environmental claims, in an effort to assist marketers in qualifying claims such that they are not deceptive.⁶⁸ The FTC has the choice to pursue environmental claims which are deceptive under Section 5 of the FTC Act,⁶⁹ but such enforcement has historically been inconsistent at best. Unfortunately, enforcement by the FTC is largely influenced by the presidential administration, as clearly shown by the egregious disparity between the 37 claims brought between 1990-1999 and the 0 claims brought between 2000-2009.⁷⁰ Additionally, the Green Guides are not tailored to any specific industry and do not address all possible claims.⁷¹ For example, the term "sustainable" does not appear in the

65. 16 C.F.R. pt. 260 (2012).

66. *It's Too Easy Being Green: Defining Fair Green Marketing Principles: Hearing Before the Subcomm. on Com., Trade, and Consumer Prot. of the H. Comm. on Energy and Com.*, 111th Cong. (2009) (prepared statement of James Kohm, Associate Director, Federal Trade Commission), <https://www.ftc.gov/public-statements/2009/06/prepared-statement-federal-trade-commission-its-too-easy-being-green>.

67. *Id.* at n.3. Further, the Green Guides do not provide consumers with a right of action, and so individuals must rely on the agency to act. See Feinstein, *supra* note 28, at 252 (clarifying that the FTC Act provides standing only to the FTC).

68. FEDERAL TRADE COMMISSION, *Green Guides*, <https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides> (last visited Sept. 23, 2022).

69. Feinstein, *supra* note 28, at 252.

70. *Id.* at 245.

71. While the Green Guides do address claims of "General Environmental Benefit," most sections cover specific language that may be implemented in marketing such as "Carbon Offsets,"

current iteration of the Green Guides.⁷² With the FTC slow to update the guidelines, industry actors have ample opportunity to develop new ways to subtly deceive consumers.

Watchdog Groups

Environmental watchdog groups are a good source of education for consumers, but their impact is limited. These groups can provide consumers with a multitude of resources, including easy-to-access education about the benefits of more eco-friendly fashion⁷³ and how to implement responsible buying on an individual level,⁷⁴ how to identify greenwashing,⁷⁵ and current environmental impacts of fashion companies.⁷⁶ Watchdog groups may act as a deterrent to greenwashing if they are successfully able to alert consumers and create negative publicity for fast fashion companies.⁷⁷ However, watchdog organizations are lacking in a few respects. First, they vary in both size and effectiveness. While a few have the resources to take action,⁷⁸ many are grassroots groups that have only an online presence. And none have the enforceability of government regulation.⁷⁹ Watchdog groups also tend to be unstable and may provide consumers with

“Recycled Content Claims,” and “Renewable Energy Claims,” which may have different consumer interpretations based on the context of the industry.

72. In his 2009 statement to the Committee on Energy and Commerce, James A. Kohm reported that the FTC would be analyzing new environmental terms such as “sustainable” and “carbon neutral” in order to keep the Guides up to date with current claims. *Supra* note 66, at n.12. These terms have not yet been added to the Green Guides.

73. See generally Delilah Smith, *Fast Fashion’s Environmental Impact: The True Price of Trendiness*, GOOD ON YOU (Feb. 15, 2021), <https://goodonyou.eco/fast-fashions-environmental-impact/>.

74. See generally Solene Rauturier, *A Beginner’s Guide to Sustainable Fashion*, GOOD ON YOU (May 7, 2021), <https://goodonyou.eco/guide-sustainable-fashion/>; Isabella Wolfe, *Is Ethical Clothing Really Expensive?*, GOOD ON YOU (Sept. 2, 2019), <https://goodonyou.eco/ethical-clothing-expensive/>.

75. See generally Hill *supra* note 33; *Greenwashing*, *supra* note 24; THE GREEN LIFE ONLINE, *Greenwashing 101*, <https://thegreenlifeblog.wordpress.com/greenwash101/#2> (last visited Sept. 23, 2022).

76. See generally Changing Markets Foundation, *FOSSIL FASHION: THE HIDDEN RELIANCE OF FAST FASHION ON FOSSIL FUELS*, http://changingmarkets.org/wp-content/uploads/2021/01/FOSSIL-FASHION_Web-compressed.pdf (Feb., 2021); Changing Markets Foundation, *SYNTHETICS ANONYMOUS: FASHION BRANDS’ ADDICTION TO FOSSIL FUELS*, http://changingmarkets.org/wp-content/uploads/2021/07/SyntheticsAnonymous_FinalWeb.pdf (Jun., 2021); GOOD ON YOU, *Thousands of Rated Brands*, <https://perma.cc/9QBY-25J8> (last visited Sept. 23, 2022).

77. Feinstein, *supra* note 28, at 235.

78. See, e.g., ENV’T INTEGRITY PROJECT, *Who We Are*, <https://environmentalintegrity.org/who-we-are/> (last visited Sept. 23, 2022).

79. Feinstein, *supra* note 28, at 250.

information only for a short time before being taken offline or otherwise ceasing to publish material.⁸⁰ Finally, some organizations have been accused of accepting funds from corporate sources and thus being hesitant to “out” their benefactors.⁸¹ These groups are an important part of the current fight against greenwashing, but their overall effectiveness is largely limited to influencing individual consumers.

II. THE SOLUTION: GREEN FASHION CERTIFICATIONS

This Part will explain and justify the proposed regulation to combat greenwashing. First, it will review the USDA’s regulation of the term “organic” in marketing, which will act as an analogous program. Second, it will explain the details of the proposal and the terms it will cover. Third, it will apply the suggested regulation to a real fashion company. Finally, it will lay out the rationales for why this proposal type is ideal.

A. *USDA Organic Certification*

The proposed certification program takes inspiration from the USDA’s regulation of organic products. Congress authorized the USDA to establish a national standard for organic agricultural products in 1990 through the Organic Foods Production Act.⁸² The Act laid out three goals:

- (1) to establish national standards governing the marketing of certain agricultural products as organically produced products;
- (2) to assure consumers that organically produced products meet a consistent standard; and
- (3) to facilitate interstate commerce in fresh and processed food that is organically produced.⁸³

80. For example, the author noted mention of a large watchdog website called “The Greenwashing Index” both online (Lee van der Voo, *Greenwashing Index Takes Aim at False Claims*, PORTLAND BUS. J. (Jun. 20, 2014), <https://www.bizjournals.com/portland/blog/sbo/2010/11/greenwashing-index-takes-aim-at-false.html>) and in scholarly articles (Sarah E. Merkle, *Tips for Navigating the Greenwashing Landscape*, 22 BUS. TORTS & UNFAIR COMPETITION 7, 10 (2015)) which allowed consumers to rate an advertisement based on how misleading its environmental claim is. Unfortunately, the site is no longer accessible online and the group does not appear to have published its information elsewhere. Other groups, such as The Green Life Online, have retained their websites but no longer update them with current information.

81. Cherry, *supra* note 27, at 298.

82. NAT’L ORGANIC PROGRAM, USDA OVERSIGHT OF ORGANIC PRODUCTS (2012), <https://www.ams.usda.gov/sites/default/files/media/USDA%20Oversight.pdf>.

83. 7 C.F.R. pt. 205 (2000).

The Act then authorized the creation of The National Organic Program (NOP) to set the national standards for what can be considered organic and to oversee the certification process.⁸⁴ The Act also authorized the creation of the National Organic Standards Board (NOSB),⁸⁵ a body which provides recommendations to the USDA regarding organic products.⁸⁶ The program also utilizes non-governmental actors to assist in certification. The NOP accredits certifying agents, independent organizations tasked with implementing the necessary auditing and inspection processes.⁸⁷ These actors work together to implement the certification process.

If a producer wishes to be certified it must complete the application process, which includes a written submission, on-site inspection, and fee payment. The cost of certification can range from several hundred to several thousand dollars, depending on the complexity of the producer's operation, and includes the application fee, annual renewal fee, and inspection fee.⁸⁸ The written application must include a detailed description of its operation, a three-year history of the land used, which products it wishes to certify, and a complete Organic System Plan that outlines the exact processes and substances used to grow the products.⁸⁹ The application standards aim to cover the product's entire lifecycle.⁹⁰ A certifying agent will then conduct an on-site inspection.⁹¹ This process is repeated each year to ensure that the producer is maintaining the required standards.⁹² If the certifying agent

84. Mary V. Gold, *Organic Production/Organic Food: Information Access Tools*, NAT'L AGRIC. LIBR. (Oct. 2021), <https://www.nal.usda.gov/legacy/afsic/organic-productionorganic-food-information-access-tools>.

85. *Id.*

86. AGRIC. MKTG. SERV., *National Organic Standards Board (NOSB)*, <https://www.ams.usda.gov/rules-regulations/organic/nosb>.

87. DAVID P. CARTER, *REGULATION BY PROXY: HOW THE USDA RELIES ON PUBLIC, NONPROFIT, AND FOR-PROFIT INTERMEDIARIES TO OVERSEE ORGANIC FOOD IN THE U.S.*, 7 (2019).

88. NAT'L ORGANIC PROGRAM, *ORGANIC CERTIFICATION OF FARMS AND BUSINESSES PRODUCING AGRICULTURAL PRODUCTS* (2012), <https://www.ams.usda.gov/sites/default/files/media/Guide%20to%20Organic%20Certification.pdf>.

89. NAT'L ORGANIC PROGRAM, *supra* note 82.

90. *See* NAT'L ORGANIC PROGRAM, *supra* note 82 ([The] standards require the integration of cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity. This means that organic operations must maintain or enhance soil and water quality while also conserving wetlands, woodlands, and wildlife").

91. NAT'L ORGANIC PROGRAM, *supra* note 82.

92. *Id.*

discovers any violations, it reports them to the NOP.⁹³ Alleged violations are investigated by the NOP⁹⁴ and it may punish violators with fines of up to \$11,000.⁹⁵

Consumers are becoming increasingly concerned about how their food is grown and processed,⁹⁶ and the USDA organic certification can be a source of reassurance. Rather than relying on personal research, which can be difficult for the average shopper, the consumer trusts that the USDA has put in the required work. The USDA organic seal acts as a signal to consumers, communicating that the product has been appropriately vetted and meets the standard.⁹⁷ Organic foods have vastly increased in popularity since this program was authorized. The Organic Trade Association reports that around 82% of U.S. households bought organic foods in 2016⁹⁸ and, since 2000, retail sales for organic foods experienced double digit growth most years, reaching \$43 billion in 2015.⁹⁹ Once found only at farmers' markets or specialty stores, organic products are now staple items at most chain stores.¹⁰⁰ Farmers have also found the organic certification worthwhile. Between 2011 and 2016, the number of certified organic farms increased by 56%, for a total of more than 14,000 farms.¹⁰¹ The price of complying with the certification requirements remains worthwhile, since organic product sales are also increasing. The USDA program continues to offer benefits to both producers and consumers, as it legitimizes the claims of certified producers and allows consumers to make informed buying choices.¹⁰²

B. Proposed Green Fashion Certifications Program

To solve similar issues posed by greenwashing in fast fashion,

93. CARTER, *supra* note 87, at 8.

94. AGRIC. MKTG. SERV., THE NAT'L ORGANIC PROGRAM (2016), <https://www.ams.usda.gov/sites/default/files/media/TheNationalOrganicProgramNov2016.pdf>.

95. NAT'L ORGANIC PROGRAM, *supra* note 82.

96. *Id.*

97. *Id.* at 4.

98. CARTER, *supra* note 87, at 3.

99. Catherine Greene, et al., *Growing Organic Demand Provides High-Value Opportunities for Many Types of Producers*, ECON. RSCH. SERV. (Feb. 06, 2017), <https://www.ers.usda.gov/amber-waves/2017/januaryfebruary/growing-organic-demand-provides-high-value-opportunities-for-many-types-of-producers/>.

100. CARTER, *supra* note 87, at 3.

101. Kristen Bialik & Kristi Walker, *Organic Farming is on the Rise in the U.S.*, PEW RSCH. CTR. (Jan. 10, 2019), <https://www.pewresearch.org/fact-tank/2019/01/10/organic-farming-is-on-the-rise-in-the-u-s/>.

102. Feinstein, *supra* note 28, at 238–39.

Congress should adopt a Green Fashion Certifications program, inspired by the USDA's regulation of the term "organic." The regulation would operate under the same basic principles but would be expanded and customized to the fashion industry. First, it would require Congressional action in order to authorize the program, which would be run by the EPA. The EPA would work with fashion brands that apply to receive certifications by reviewing their supply chains and internal reports and conducting inspections to ensure compliance. If the brand meets the standards required, it would then be allowed to market itself using the Green Fashion Certifications. If a company violated the standards or marketed itself as certified without applying to the EPA, it would be penalized.

The first step in realizing the Green Fashion Certifications program is an authorizing statute. Congress should pass a bill that empowers the EPA to create environmental impact standards for fashion companies and authorizes the EPA to regulate and measure those impacts. The EPA would then research the current environmental impact of the fashion industry and decide what regulations would be appropriate to monitor. Congress and the EPA have successfully implemented this strategy many times before.¹⁰³ For example, in 1970 Congress passed the Clean Air Act, which authorized the EPA to establish air quality standards and regulate emissions.¹⁰⁴ The EPA then decided what regulations were needed to fulfill the law.¹⁰⁵ This process means that Congress does not need to become an expert on the fashion industry or its environmental impact in order to create change – the important decisions would be left to the environmental professionals at the EPA.

The EPA is the right choice to oversee the Green Fashion Certifications program because it has the infrastructure to do so already in place. This includes a robust compliance monitoring program. As authorized under statute, the EPA conducts inspections, oversees imports, and provides training to ensure compliance with environmental programs.¹⁰⁶ It also has an audit policy which

103. See generally EPA, *Laws and Executive Orders*, <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

104. EPA, *Summary of the Clean Air Act*, <https://www.epa.gov/laws-regulations/summary-clean-air-act>.

105. EPA, *The Basics of the Regulatory Process*, <https://www.epa.gov/laws-regulations/basics-regulatory-process>.

106. EPA, *Compliance Monitoring Programs*, <https://www.epa.gov/compliance/compliance-monitoring-programs>.

incentivizes self-policing and correction by relevant entities.¹⁰⁷ These programs could be utilized to ensure a fashion company's compliance, and to verify that its practices qualify for the certification it has requested. Importantly, the EPA has experience in creating and monitoring environmental regulations.

The EPA's expertise is especially important because addressing the fashion industry's environmental impact is a complex task that will require input from many sources. Although individual brands and coalitions have attempted to mitigate their impact, there is not one method or system that is lauded as a universal solution. Primarily this is because the fashion industry's impact is different at each stage of production.¹⁰⁸ In order to address these concerns, various tools should be utilized to shape and strengthen the standards of the regulation. Although these tools may not be enough to eradicate the environmental problems on their own, they offer insight and guidance from experts and, when fashioned into a multi-faceted scheme, can capture more of the harmful effects of the industry. For example, one tool that can assist in forming the regulatory scheme is the FTC's Green Guides. Scholars are already calling for the FTC to formalize the Green Guides as enforceable law in order to strengthen the protection they provide.¹⁰⁹ Rather than relying on the Green Guides alone, integrating select definitions from them could bring increased credibility to the new regulatory scheme. The EPA should also look to private companies and non-profits for inspiration on forming the regulation, since many non-governmental organizations are already trying to tackle this issue.

The regulatory program itself should target at least three areas of environmental impact: material processing, carbon emissions, and disposal. Each of the three areas should have its own standards, approval process, and certification. Focusing on these three areas of impact will cover most of a garment's lifecycle – from sourcing to shipping to scrapping – and will ensure that brands that wish to acquire all three certifications are adequately eco-friendly throughout the entire process. If a company can prove it has net zero carbon emissions, for example, it can apply for and receive the Carbon Offsetting

107. EPA, *EPA's Audit Policy*, <https://www.epa.gov/compliance/epas-audit-policy>.

108. For example, some brands might focus on sourcing renewable materials, others might try to reduce their water consumption, and still others will develop recycling programs. It would be difficult to create a program that addresses all stages of the garment production process equally.

109. See, e.g., Rotman et al., *supra* note 2323, at 442 (calling for Congress to authorize the FTC to transform the Green Guides into binding regulations).

Certification, but it would still need to apply separately for the other two certifications. This will help consumers know exactly what behaviors a company is engaging in, and will prevent companies from making (misleadingly or meaninglessly) broad statements such as “sustainable fashion.” If a company qualifies for a certification, it will be permitted to add an EPA seal of approval for that certification (similar to the USDA Organic seal) to its garments’ tags. This will aid consumers in making purchases that align with their values.

The EPA should monitor a company’s entire production, much like the USDA Organic program. A fashion company that opts-in to the Certifications program would be analyzed at the level of the whole company’s operation, rather than on a piecemeal basis. This would prevent companies like H&M from receiving praise for its *Conscious* collection despite continuing to produce environmentally-detrimental garments. It would also prevent companies from funneling all of their efforts into becoming certified for one line of clothing, while allowing a different line to sink further into environmentally-detrimental processes (thus nullifying any positive effect). Finally, companies that attempt to use the EPA’s certification without complying with the regulatory process should be punished with a fine. The agency should determine an amount that will be an adequate deterrent to protect the legitimacy of the certification.

Ultimately the EPA will be responsible for developing standards that are protective of the public good and the health of the environment. The following subsections are suggestions from the author regarding the shape of the program. The suggestions are sourced from examples of environmentally responsible programs in the fashion industry and are categorized into the proposed three areas of certification.

Eco-Friendly Production

Providing a certification for material processing will combat an area of both high environmental harm and prevalent greenwashing. Fabric dyeing and finishing has been called the fashion industry’s “hottest spot” for environmental impact.¹¹⁰ This stage of clothing

110. Domenica Leibowitz, *Guide to Sustainable Strategies*, COUNCIL OF FASHION DESIGNERS OF AMERICA (2019), https://s3.amazonaws.com/cfda.f.mrhenry.be/2019/01/CFDA-Guide-to-Sustainable-Strategies_16.pdf; see also *The Life Cycle of a Jean*, LEVI STRAUSS & CO. (2015), <http://levistrauss.com/wp-content/uploads/2015/03/Full-LCA-Results-Deck-FINAL.pdf> (Levi’s lifecycle analysis reports that fabric production has the second highest impact on climate change at 27%, with consumer care the highest at 37%).

production, in addition to having a huge potential for environmental harm, is an area that is particularly vulnerable to greenwashing due to its complexity. For example, some fashion companies believe they are being eco-friendly by applying for the Fair Trade USA Factory Certified label, a third-party certification¹¹¹ and consumers are unaware of the full impact of the clothing. The proposed EPA certification must monitor all factories that a company uses in order to gather a full picture of the garments' impact. By providing a trustworthy certification for eco-friendly production, this program could vastly reduce greenwashing.

The Eco-Friendly Production Certification could be modeled after the Natural Resource Defense Council's "Clean by Design" program, which assists textile mills in saving money and reducing environmental impact.¹¹² As reported in 2018, mills following this program saved 7 million tons of water annually, 90 thousand tons of coal annually and \$12.8 million annually in operational costs.¹¹³ The program works by implementing the Ten Best Practices¹¹⁴ in the participating mills, which act to save water, fuel, and electricity.¹¹⁵ In 2019 the program was picked up by the Apparel Impact Institute and began tracking CO₂ and GHG emissions as well.¹¹⁶ A processing certification modeled after this program would place the onus on fashion brands to utilize factories that follow the best practices for reducing environmental harm. Brands that source their fabrics from these factories would be responsible for ensuring the standards were met. By receiving this certification, consumers would be able to recognize that the brand was doing its part in reducing water waste, fuel consumption, and emissions during the material processing stage.

111. Greene, *supra* note 34.

112. *Clean by Design*, NAT. RES. DEF. COUNCIL (2015), https://assets.nrdc.org/sites/default/files/cbd-initiative-fs.pdf?_ga=2.160967805.1160446822.1525012523-737422993.1511915891.

113. *Clean by Design: 2018 Mill Overview*, NAT. RES. DEF. COUNCIL (2018), https://www.nrdc.org/sites/default/files/brochure-for-cbd_2018-02-27.pdf.

114. The Ten Best Practices are: metering and leak detection, cooling water reuse, heat recovery from hot water, steam traps and system maintenance, heat recovery from exhaust gas and heating oil, condensate collection and recovery, process and waste water reuse, boiler efficiency improvement, insulation improvement, and compressed air optimization. NAT. RES. DEF. COUNCIL *supra* note 113.

115. *Id.*

116. Kurt Kipka, *What You Need to Know About the Evolution of Clean by Design*, APPAREL IMPACT INST. (Nov. 04, 2019), <https://apparelimpact.org/what-you-need-to-know-about-the-evolution-of-clean-by-design/#>.

Carbon Offsetting

Although controversial,¹¹⁷ carbon offsetting is one important way for brands to reduce their carbon footprint.¹¹⁸ In essence, carbon offsetting works through companies estimating the amount of greenhouse gases their operations have produced, and then paying a third-party offsetting company, which in turn funds projects that sequester or reduce an equivalent amount of CO₂.¹¹⁹ In this way, the company's actions are essentially net-zero in carbon emissions.

The proposed certification should require fashion brands to ensure that they contract with reputable and reliable carbon offsetting projects. It should also require the brand to track its emissions and pay for the equivalent amount in reductions. The FTC Green Guides include suggestions for marketing carbon offsetting. Primarily, they suggest that companies employ reliable accounting methods to ensure offsets are accurately tracked, and that companies should only advertise offsets that have already occurred or will occur in the near future.¹²⁰ Additionally, the proposal could take inspiration from the California Air Resources Board's Compliance Offset Program.¹²¹ This program regulates the third-party offsetting companies to ensure that they are properly sequestering or reducing emissions.¹²² By requiring

117. There are legitimate pros and cons to carbon offsetting. Supporters of the process acknowledge that it is an effective way for companies to become carbon neutral (reducing the same amount of carbon as they produce). Critics point out that not all offsetting programs are reputable, and companies have the option to get credit for programs that do not actually reduce carbon. Compare Rob Jordan, *Allowing Polluters to Offset Carbon Emissions by Paying Forest Owners Effectively Reduces Greenhouse Gases, Stanford Study Finds*, STANFORD NEWS (Aug. 14, 2017), <https://news.stanford.edu/2017/08/14/carbon-offsets-wide-ranging-environmental-benefits/>, and *Carbon Offsetting*, CIRCULAR ECOLOGY, <https://circularecology.com/carbon-offsets.html>, with Jess Shanklemand & John Ainger, *Greta Thunberg Attacks CO₂ Offset Projects as "Greenwash" at COP26*, BLOOMBERG (Nov. 03, 2021), <https://www.bloomberg.com/news/articles/2021-11-03/thunberg-attacks-offsets-as-greenwash-as-anger-builds-at-cop26>.

118. One company which has successfully implemented carbon offsetting is Etsy, which purchases carbon offsets for 100% of its shipping emissions. Etsy also reports the specific projects it funds in order to do this. Josh Silverman, *Etsy Becomes the First Global eCommerce Company to Completely Offset Carbon Emissions from Shipping*, MEDIUM (Feb. 27, 2019), <https://medium.com/etsy-impact/etsy-becomes-the-first-global-e-commerce-company-to-completely-offset-carbon-emissions-from-shipping-b8ede4322e44>.

119. Peter Miller, *Carbon Offsets 101*, NAT. RES. DEF. COUNCIL (Sept. 30, 2019), <https://www.nrdc.org/experts/peter-miller/carbon-offsets-101>.

120. See generally 16 C.F.R. pt. 260 (2012).

121. *Compliance Offset Program*, CA. AIR RES. BD., <https://ww2.arb.ca.gov/our-work/programs/compliance-offset-program> (last visited Sep. 24, 2022).

122. *About*, CA. AIR RES. BD., <https://ww2.arb.ca.gov/our-work/programs/compliance-offset-program/about> (last visited Sep. 24, 2022).

fashion brands to disclose their emissions, the amount of offsetting they paid for, and the companies they bought offsets from, the certification will ensure that only carbon neutral brands can advertise as being so.

Circular Fashion

A brand's commitment to circularity should be present throughout the entire lifecycle of the garment, from design to disposal. This certification goes beyond using recycled materials and should require an implemented program for managing clothes after they have been worn. Material sourcing is a large contributor to environmental harm in the fashion industry,¹²³ and only 3% of the fibers used to make clothing are recycled.¹²⁴ Brands report that incorporating recycled materials is difficult due to inconsistent supply.¹²⁵ Further, many brands destroy or burn their unsold clothing,¹²⁶ and beyond that, many consumers discard their used clothing, leading to massive landfill contributions.¹²⁷ Circular fashion will not only prevent improper disposal of garments, it will also help increase the amount of recycled fibers available. A Circular Fashion Certification should inform consumers that the brand has an alternative procedure for disposal and implore consumers to take advantage of that procedure. Although the experts at the EPA should define standards for the Circular Fashion Certification, it is likely that each fashion company will design a program that is unique to its products and materials, so this certification will require oversight to ensure that each program is fulfilling the goals of the certification.

A good example of circular fashion methods is Levi's. Levi's implements four distinct programs that either help extend the life of its

123. COUNCIL OF FASHION DESIGNERS OF AMERICA, *supra* note 110110, at 91 (according to a 2017 report, "The industry relies on 98 million tonnes of non-renewable resources per year. Producing plastic-based fibres for textiles uses an estimated 342 million barrels of oil every year, and the production of cotton is estimated to require 200,000 tonnes of pesticides and 8 million tonnes of fertilisers annually").

124. *Id.* at 95.

125. See the final report of the 2017's Copenhagen Fashion Summit's 2020 Circular Fashion System Commitment, which reports that only 67% of the recycling targets were reached after the three-year test period. *What is the 2020 Commitment?*, GLOB. FASHION AGENDA, <https://www2.globalfashionagenda.com/commitment/#>.

126. Other jurisdictions are looking into ways to solve this issue, including a French bill titled "For a Circular Economy and Better Waste Management" which would require by law brands to "reemploy, reuse or recycle" garments they do not sell, and is expected to help with clothing the homeless. Arielle Elia, *Fashion's Destruction of Unsold Goods: Responsible Solutions for an Environmentally Conscious Future*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 539, 572-73 (2020).

127. *Id.* at note 15.

garments or assist consumers in keeping them out of landfills. Levi's offers in-store tailoring to mend garments, thus increasing the times they can be worn.¹²⁸ Consumers can also purchase "Authorized Vintage" garments, which are pre-owned and thus do not increase the number of garments manufactured.¹²⁹ The company is also partnered with Blue Jeans Go Green, which recycles jeans that cannot be mended or resold into other products such as building insulation.¹³⁰ Finally, Levi's produces a garment made in part from recycled denim, a good alternative for consumers who want a new product.¹³¹ Brands that apply for this certification should be able to present a realistic plan for keeping garments out of landfills, and should implement a process that is easy for consumers to participate in.

C. *Application of the Green Fashion Certifications Proposal*

Although the parameters of the Certifications program should be set by the EPA, it is possible to predict the process that a company would undergo in order to be granted the certifications as they are currently laid out. The company that this section will analyze is Rothy's, a direct-to-consumer fashion brand that produces shoes and bags.¹³² Rothy's appears to value transparency with its customers, and the information used in the following analysis was sourced directly from its website. However, the Green Fashion Certifications would require Rothy's to disclose more information than it currently appears to share with the average customer. Based on the information readily accessible to the public, Rothy's would be likely to receive approval for all three Green Fashion Certifications.

First, Rothy's would apply for the Eco-Friendly Production Certification. This certification hinges on the production activity at Rothy's factories, including material processing, water use and pollution, emissions, and energy usage. Since Rothy's uses only one factory that it owns and operates,¹³³ it will likely be very easy for Rothy's to submit the required information to the EPA. Rothy's would draft a report to the EPA outlining its exact production process,

128. LEVI STRAUSS & CO., *Use and Reuse*, <https://www.levistrauss.com/how-we-do-business/use-and-reuse/> (last visited Sept. 23, 2022).

129. *Id.*

130. *Id.*

131. Phil Zabriskie, *The Story Behind the Most Sustainable Levi's Ever*, LEVI STRAUSS & CO. (July 23, 2020), <https://www.levistrauss.com/2020/07/23/wellthread-renewcell/>.

132. ROTHY'S, *About*, <https://rothys.com/pages/about> (last visited Sept. 23, 2022).

133. ROTHY'S, *The Art of Shoemaking* (June 17, 2019), <https://rothys.com/blogs/the-loop/the-art-of-shoemaking>.

including the operating efficiencies of its factory. The EPA would then send a representative to audit the factory and ensure that the information it received matches what the factory is actually doing. Although this specific information is not available, it is likely that Rothy's, as the sole owner of its factory, would be able to adjust its procedures to match the certification requirements and easily track its compliance.

Second, Rothy's would apply for the Carbon Offsetting Certification. It is likely that Rothy's carbon footprint is already relatively small compared to other fashion brands. This is due in large part to the fact that its products are made from recycled materials rather than new materials.¹³⁴ Rothy's repurposed 74 million plastic bottles¹³⁵ and 200,000 pounds of marine plastic¹³⁶ into fashion items in 2020. In order to achieve carbon neutral status, Rothy's would first need to accurately calculate its current carbon footprint, including high-emissions activities like shipping its products to consumers. Then, Rothy's would need to contract with reputable carbon offsetting companies to pay for an equal amount of carbon reduction. Finally, Rothy's would submit complete documentation to the EPA regarding this process. Currently, Rothy's claims it is working toward being carbon neutral by 2023,¹³⁷ but unfortunately its procedure for achieving that has not yet been disclosed. However, it is likely that Rothy's would be able to offset its smaller carbon footprint and accurately report to the EPA for certification.

Third, Rothy's would apply for the Circular Fashion Certification. Rothy's has a fairly detailed circularity plan already in place, according to its website. Its garments are made primarily from recycled plastic, as well as algae and other natural materials.¹³⁸ Rothy's manufacturing techniques include knitting, which reduces production material waste by 30% compared to traditional methods.¹³⁹ The company hosted an

134. See, e.g., PREVENTED OCEAN PLASTIC, *Recycled Plastic: An Undervalued Carbon Reduction Strategy* (June 25, 2020), <https://www.preventedoceanplastic.com/recycled-plastic-an-undervalued-carbon-reduction-strategy/>.

135. ROTHY'S, *That's a Wrap, 2020* (Dec. 28, 2020), <https://rothys.com/blogs/the-loop/that-s-a-wrap-2020>.

136. ROTHY'S, *Closing the Loop at Rothy's* (Aug. 9, 2021), <https://rothys.com/blogs/the-loop/closing-the-loop-at-rothy-s>.

137. ROTHY'S, *Going in Circles*, <https://rothys.com/pages/sustainability> (last visited Sept. 23, 2022).

138. ROTHY'S, *Meet Our Materials*, <https://rothys.com/pages/materials> (last visited Sept. 23, 2022).

139. ROTHY'S, *supra* note 137.

“Archive Event” in the summer of 2021 in order to sell its leftover stock (rather than destroying or otherwise disposing of excess products) and may hold future discounted sale events if unsold products accumulate again in the future.¹⁴⁰ Finally, Rothy’s has plans in place for shoes that are no longer being worn. Rothy’s launched a recycling program in April 2021 for damaged returns,¹⁴¹ and held an in-store drop-off event for local customers to bring in worn shoes.¹⁴² By November 2021, Rothy’s had recycled 1,000 pairs of shoes.¹⁴³ Rothy’s plans on expanding the recycling program to customers who do not have access to one of its six physical stores.¹⁴⁴ This recycling program will help Rothy’s achieve its 2022 goal of creating shoes using “twice-recycled materials,”¹⁴⁵ meaning shoes made from recycled shoes made from recycled plastic. In order to apply for the certification, Rothy’s would need to detail its entire circularity plan to the EPA, including the exact percentage of its products that are made from recycled materials, and how many items it has saved from being disposed of through landfills or incineration. The report should also include a full marketing plan, to assess how accessible the plan will be to consumers – a circularity plan is useless if customers do not bring in products to recycle. Although Rothy’s goals are still somewhat far off, if it follows its current projections, it is likely that it would be approved for certification.

While Rothy’s may be able to receive all three certifications, it is completely possible for a brand to apply only to one of the certifications if that is more feasible. Rothy’s is a somewhat simple example, since it controls its own production and appears to already disclose much of its environmental impact. These proposed standards may be more difficult to fulfill for companies well-known to greenwash. However, it is completely within a company’s capacity to monitor its factories, measure its carbon footprint, and plan for the future of the planet. If a company wants to benefit from the EPA certifications, it will have to audit and disclose its activities in the ways described above.

140. ROTHY’S, *Why the Summer Archive Event?* (June 30, 2021), <https://rothys.com/blogs/the-loop/why-the-summer-archive-event>.

141. ROTHY’S, *National Recycling Day: Rothy’s Past, Present, and Future* (Nov. 15, 2021), <https://rothys.com/blogs/the-loop/national-recycling-day-at-rothys>.

142. ROTHY’S, *Our recycling pilot program: October 18-24, 2021* (Oct. 29, 2021), <https://rothys.com/blogs/the-loop/recycling-pilot-program>.

143. ROTHY’S, *supra* note 141.

144. *Id.*

145. ROTHY’S, *supra* note 136.

D. *Rationales for this Proposal*

A proposal such as this one is drastically needed in order to combat greenwashing in the US market. Many scholars support the implementation of legislation to combat greenwashing.¹⁴⁶

A collaborative regulatory system makes sense for the fashion industry specifically due to its complex supply lines. Additionally, the program will create benefits for the companies, the consumers, and the environment.

Fast Fashion Actors are Optimally Situated

This proposal relies on active participation from brands and fashion companies because they are in the best position to monitor their own impact. Due to the nature of the fashion industry, a garment may travel through a supply chain that encompasses multiple countries.¹⁴⁷ It would require far too many resources for the EPA to track all of a brand's garments from the beginning of their lifecycle until they ended up in the US – it is far easier for the company to do so, since it already possesses that information. Instead, it is only up to the EPA to ensure that the certificate standards are met. A mix of internal reporting and government auditing will be effective in monitoring compliance. This cooperation mirrors the process already used in the USDA's Organic regulatory program.

Companies that Opt-In will Benefit Economically

There are many economic rationales for companies to make the switch to an eco-friendly approach. Multiple studies make the case for environmentalism as a way to increase profits.¹⁴⁸ A Harvard Business Review article breaks down the economic advantages in this way: “companies that proactively make sustainability core to business strategy will drive innovation and engender enthusiasm and loyalty

146. See, e.g., Vos, *supra* note 55, at 689–90 (asserting that legislation which would turn over relevant information such as a company's environmental and social footprint to the market could assist consumers in making informed choices); Feinstein, *supra* note 28, at 255–57 (asserting that Congress should authorize the promulgation of binding standards for environmental marketing generally).

147. See Poland, *supra* note 16, at 430 (“A single piece of clothing may be sourced from various textiles that were all grown in different countries, processed and treated in different factories with different chemical processes, stitched and sewn in multiple pieces before being combined into a final garment, and then finally packaged and shipped to its final destination.”).

148. See generally NATURAL CAPITALISM SOLUTIONS, SUSTAINABILITY PAYS: STUDIES THAT PROVE THE BUSINESS CASE FOR SUSTAINABILITY (2012), <https://natcapsolutions.org/wp-content/uploads/2017/02/businesscasereports.pdf>.

from employees, customers, suppliers, communities and investors.”¹⁴⁹ In fact, it may cost brands business if they do not engage in at least some form of sustainable practice. Fifty percent of consumers say they would move away from their preferred brand if a more environmentally friendly alternative were available.¹⁵⁰ Companies that opt-in to this program would likely see net profits as a result of the certification.

Both Consumers and the Environment will be Better Protected

Two of the major harms of greenwashing are to the consumer and to the environment. By battling greenwashing, this program will better protect both. First, the consumer will be protected because she will no longer be deceived by false environmental marketing. She will be able to confidently make responsible purchases that align with her values and will not have to engage in arduous fact-checking to ensure that she is making an environmentally sound choice. Second, the environment will be better protected. By requiring companies to actually act on the environmental claims they make, the program will encourage more fashion brands to engage in eco-friendly practices. Without the option to greenwash, brands will have to implement real environmental change in order to continue benefiting from eco-conscious consumer support.

III. CONCLUSION

The current environmental crisis is not going to be easy to solve, and there is debate about how governments, corporations, and even individuals should approach change. However, by combating greenwashing, the US has a good chance at decreasing environmental harm, and at the very least, better protecting its consumers from deception. The proposed solution, while still voluntary, goes beyond current environmental pacts¹⁵¹ by penalizing companies that fail to

149. Tensie Whelan & Carly Fink, *The Comprehensive Business Case for Sustainability*, HARVARD BUSINESS REVIEW (Oct. 21, 2016), <https://hbr.org/2016/10/the-comprehensive-business-case-for-sustainability>.

150. HIGG, <https://higg.com/> (last visited Sept. 23, 2022).

151. Some fashion companies have voluntarily entered agreements to minimize their environmental impact. However, these pacts generally do not include repercussions for not meeting the agreed upon goals. Two such pacts are the Fashion Industry Charter for Climate Action and the 2020 Circular Fashion System Commitment. Although signatories to these agreements may make positive change, and deserve praise for their efforts, the agreements generally are not binding. *See generally* UNITED NATIONS CLIMATE CHANGE, *About the Fashion Industry Charter for Climate Action*, <https://unfccc.int/climate-action/sectoral-engagement/global-climate-action-in-fashion/about-the-fashion-industry-charter-for-climate-action> (last visited

follow through on their claims. Fashion brands that want to market as having Eco-Friendly Production, Carbon Offsetting, and Circular Fashion will have to prove their claims to consumers, which could drastically impact the way garments are made.