

C O M M E N T

WHAT GOES AROUND SHOULD COME AROUND: EXTENDED PRODUCER RESPONSIBILITY FOR TEXTILES

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As marketers across the fashion industry increasingly tout “circularity” initiatives,¹ the reality remains that exponentially more clothes are being produced, purchased, and promptly thrown away than ever before.²

1. Circularity objectives are touted by different players, including fast-fashion companies, luxury fashion groups, and fashion brands traditionally marketing to more “sustainable” consumers. *See, e.g.*, Shein, *Designing Circular Systems*, <https://www.sheingroup.com/our-impact/process/designing-circular-systems/> (last visited Mar. 20, 2024) (pledging that Shein will “have a fully circular textile supply chain by 2050”); *see also, e.g.*, H&M Group, *Circularity*, <https://hmgroup.com/sustainability/circularity-and-climate/circularity/> (last visited Mar. 20, 2024) (proclaiming that “[a]t H&M Group, we’re committed to shifting to a circular system”); *see also, e.g.*, Kering, *Sustainability: Circularity Ambition*, <https://www.kering.com/en/sustainability/innovating-for-tomorrow/circularity-ambition/> (last visited Mar. 20, 2024) (explaining that “Kering and its Houses are developing a circular economy approach”); *see also, e.g.*, LVMH *Highlights Its Circular Economy Initiatives at the ChangeNOW Summit, the World’s Largest Gathering of Innovations for the Planet*, LVMH (May 25, 2022), <https://www.lvmh.com/news-documents/news/lvmh-highlights-its-circular-economy-initiatives-at-the-changenow-summit-the-worlds-largest-gathering-of-innovations-for-the-planet/> (reporting on LVMH’s “creative circularity solutions”); *Our Endless Commitment to Circularity*, OUTERKNOWN (Apr. 16, 2020), <https://www.outerknown.com/blogs/journey/our-endless-commitment-to-circularity> (touting that “Outerknown is fully embracing circularity”); Reformation, *Circularity*, <https://www.thereformation.com/circularity.html> (last visited Mar. 20, 2024) (stating that “we’ve been into circularity since before it was really a thing”).

However, some claims about “circularity” by brands may be an example of greenwashing. *See* Carolyn Kennedy, “Sustainable” Fashion’s True Colors: A Proposal for “Restyling” the FTC Green Guides, 53 ELR 10751, 10755-56, 10766 (Sept. 2023), available at <https://www.elr.info/articles/elr-articles/sustainable-fashion-true-colors-proposal-restyling-ftc-green-guides>; *cf.* Archana Ram, *Our Quest for Circularity*, PATAGONIA (Mar. 10, 2021), <https://www.patagonia.com/stories/our-quest-for-circularity/story-96496.html> (recognizing that “circularity still doesn’t figure into most of the clothing industry—not even here at Patagonia”).

2. *See, e.g.*, *Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions: EU Strategy for Sustainable and Circular Textiles*, COM (2022) 141 final (Mar. 30, 2022), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0141> (noting that “[g]lobal textiles production almost doubled between 2000 and 2015,” that “the consumption of clothing and footwear is expected to increase by 63% by 2030,” and that “every second somewhere in the world a truckload of textiles is landfilled or incinerated”) (internal citations omitted).

The business model of “fast fashion” in which large numbers of garments, typically poor in quality, are sold at low prices to match quickly shifting fashion trends further encourages overproduction and overconsumption. Shein, a global online fashion retailer primarily targeting Generation Z and millennial consumers, is an example of a company that has perfected this model. The company drops thousands of new items on its website daily, allowing shoppers to match the latest microtrends at an unbeatable price.³

The result of these rapid product cycles and practically planned obsolescence is the generation of unprecedented amounts of waste that is often not reusable or easily recycled. The U.S. Environmental Protection Agency (EPA) estimated that textile waste amounted to 17 million tons, or 34 billion pounds, in 2018.⁴ The main source of this textile waste was discarded clothing and footwear, which together contributed an estimated 13 million tons, although textile waste also includes furniture, carpets, sheets, and towels.⁵

Unwanted clothing waste is often shipped in large quantities to other countries such as Ghana, part of a broader reality in waste exportation that has been coined “waste colonialism.”⁶ Due to its low quality, much of this waste is landfilled upon arrival.⁷ Depending on the materials used, decomposition of clothing waste may take centuries

3. *See* Alina Selyukh, *America Can’t Resist Fast Fashion. Shein, With All Its Issues, Is Tailored for It*, NPR (Oct. 13, 2023), <https://www.npr.org/2023/10/13/1204983212/shein-america-fast-fashion-legal-issues> (reporting that “Shein drops up to 10,000 new items on its website daily”).
4. U.S. EPA, *Textiles: Material-Specific Data*, <https://www.epa.gov/facts-and-figures-about-materials-waste-and-recycling/textiles-material-specific-data> (last updated Nov. 22, 2023) (reporting that textile waste represented “5.8 percent of total [municipal solid waste] generation that year”).
5. *See id.*; *see also* U.S. EPA, *Nondurable Goods: Product-Specific Data*, <https://www.epa.gov/facts-and-figures-about-materials-waste-and-recycling/nondurable-goods-product-specific-data> (last updated Nov. 22, 2023).
6. *See* Sarah Kent, *Should Fashion Pay for Its “Waste Colonialism”?*, BUS. FASHION (Feb. 14, 2023), <https://www.businessoffashion.com/articles/sustainability/fashion-pay-waste-colonialism-secondhand-clothes-epr-kantamantol/>.
7. *Id.*; *see also* *Textile Recycling in Germany: A Microcosm of Global Challenges*, COSH (Oct. 4, 2023), <https://cosh.eco/en/articles/textile-recycling-germany>.

and can entail the generation of greenhouse gases and the leaching of chemicals and dyes into groundwater and soil throughout the process.

Most clothing waste is not recycled. The Ellen MacArthur Foundation reported in 2017 that less than 1% of the material used to produce clothing is recycled into new clothing, although some material is “downcycled” into other products such as insulation material and mattress stuffing.⁸ The increased use of blended materials, which offer improved feel and functionality in clothing, presents further barriers for recyclers.⁹ Specifically, the mixing of biodegradable fibers, such as cotton, with nonbiodegradable fibers, such as polyester, results in waste that biological cycles such as composting and anaerobic digestion cannot process.¹⁰

Consumer awareness of the numerous environmental problems and other ethical issues exacerbated by the fashion industry continues to increase.¹¹ However, the general public still has a significant blind spot with respect to the magnitude of the problem of textile waste and the state of textile recycling. A national consumer survey conducted by Wakefield Research in 2023 found that 98% of adult Americans surveyed overestimate the amount of discarded textiles that are recycled, with 30% of respondents mistakenly believing that half or more are recycled.¹²

What is promising is that customers’ expressed preferences are for more environmentally conscious options in the fashion market. More than half of American consumers surveyed in 2021 indicated an interest in purchasing “sustainable” clothing.¹³ However, those looking to shop more sustainably are confronted with rampant greenwashing in the fashion industry, a problem that is currently inadequately addressed by the Federal Trade Commission’s guidance and enforcement related to prohibited deceptive environmental marketing claims.¹⁴

More broadly, the concept of a “circular economy” is increasingly popular in policymaking in many major countries. Responding to these shifts, businesses in the fashion industry are increasingly initiating and implementing circular business models, including resale, rental, repair, and recycling. Such circular business models cur-

rently only make up 3.5% of the global fashion market, but may expand to 23% by 2030.¹⁵ The Ellen MacArthur Foundation estimates that these innovations could collectively represent a \$700 billion business opportunity.¹⁶

Although secondhand clothing markets have existed since at least the late 19th and early 20th centuries, the Internet age has allowed for increasingly organized offerings. Some brands have implemented their own product resale programs, including H&M’s Re:Wear, Patagonia’s Worn Wear, Levi’s SecondHand, Outerknown’s Outworn, Lululemon’s Like New, REI’s Good & Used, Always Athleta, and Carhartt Reworked. Some companies, including Patagonia and Levi’s, also offer repairs for consumers. Third-party platforms, including thredUP, Poshmark, the RealReal, and Depop, allow users to buy and sell used clothing and other fashion goods online. Collection, sorting, and recycling systems also now sometimes exist at the brand level. For example, fast-fashion retailers Zara and H&M collect unwanted clothes.¹⁷

Beyond the private sector, nonprofit organizations, thrift stores, and local charity shops receive and manage billions of pounds of donated clothing each year.¹⁸ However, these voluntary efforts by organizations or companies working alone are insufficient to combat the growing problem. Encouraging collaboration between multiple stakeholders can create a system of improved textile recovery for reuse and recycling.

This Comment focuses on governmental responses to the environmental crisis created by textile waste that promote circularity in the fashion industry through extended producer responsibility (EPR) regulation of textiles. Part I provides a brief overview of EPR as a policy approach more broadly, and examines how EPR laws have been previously implemented in other sectors at the state level as well as outside of the United States. Part II evaluates two recently proposed state senate bills: California’s Responsible Textile Recovery Act of 2023 and New York State Senate Bill (S.B.) 6654/Assembly Bill (A.B.) 8078. The Comment concludes with recommendations for policymakers and other stakeholders, including fashion brands, to promote a more circular economy moving forward.

I. Extended Producer Responsibility

Throwing clothes away is not free. Disposal of the significant amount of textile waste that American society produces today does not come without significant costs. Yet,

8. ELLEN MACARTHUR FOUNDATION, A NEW TEXTILES ECONOMY: REDESIGNING FASHION’S FUTURE 37 (2017), https://emf.thirdlight.com/file/24/uiwtaHvud8YIG_uiTauTlJH74/A%20New%20Textiles%20Economy%3A%20Redesigning%20fashion%E2%80%99s%20future.pdf (noting that “expert interviews and some reporting suggest that the figure could be below 0.1%” for clothing-to-clothing recycling, and explaining that “[o]nly 13% of the total material input is in some way recycled after clothing use”).

9. *Id.* at 92-94.

10. *Id.* at 48, 94.

11. *See, e.g., Survey: Consumers Want Sustainable Clothing*, GENOMATICA (May 26, 2021), <https://www.genomatica.com/news-content/survey-consumers-want-sustainable-clothing/> (reporting that “[n]early 3 in 4 (72%) consumers have heard of environmental sustainability issues in the fashion industry—listing excess consumption, carbon emissions and water pollution from dye processes as issues they’re aware of”).

12. Protein Evolution, *Americans’ Views on Plastics, Recycling, and Sustainability*, <https://www.protein-evolution.com/perspective/americans-views-on-plastics-recycling-and-sustainability> (last visited Mar. 20, 2024).

13. *See Survey: Consumers Want Sustainable Clothing*, *supra* note 11.

14. *See generally* Kennedy, *supra* note 1.

15. Ellen MacArthur Foundation, *Circular Business Models*, <https://www.ellen-macarthurfoundation.org/fashion-business-models/overview> (last visited Mar. 20, 2024).

16. *Id.*

17. H&M, *Let’s Close the Loop*, https://www2.hm.com/en_us/sustainability-at-hm/our-work/close-the-loop.html (last visited Mar. 20, 2024); Zara, *Our Used Clothing Donation Program*, <https://www.zara.com/us/en/help-center/ClothesCollectionProgram> (last visited Mar. 20, 2024).

18. *See, e.g.,* Allyson Chiu, *What Really Happens to Your Clothes After You Donate Them*, WASH. POST (Jan. 4, 2023), <https://www.washingtonpost.com/climate-solutions/2023/01/04/how-to-donate-clothes-waste-environment/> (reporting that Goodwill alone handled more than 5.7 billion pounds of used goods in 2021, “much of which is used clothing”).

the high price of overconsumption is often not borne at all by the fashion companies that generate this waste. EPR describes a policy approach that seeks to hold producers accountable for the entire life cycle of their products. EPR programs attempt to directly address the problems created by the production of short-life or hazardous products by forcing the generators of this waste to internalize the externalities that their disposal creates.

Typically, this is achieved by assigning financial or operational responsibility, or both, to producers in order to create systems to manage covered products beyond their use phase. By doing so, the financial burden of waste management shifts from the public sector back to the polluting industry, consistent with the polluter-pays principle applied in other areas of environmental law. The benefits of EPR programs include reducing waste through improved recycling and reuse where possible, lowering government spending, and encouraging more environmentally conscious product design.

Section A first describes the history of EPR policies in the United States, highlighting California's relatively long-standing Carpet Stewardship Program. Section B addresses regulatory developments in the European Union (EU), with a specific focus on the European Commission's recent EPR Textile Proposal.

A. EPR Implementation in Other Sectors in the United States

EPR schemes currently exist in the United States at the state level for a range of product categories, including, but not limited to, electronics, paint, batteries, mattresses, pharmaceuticals, and, more recently, packaging.¹⁹ According to the Product Stewardship Institute, EPR laws have been enacted in 35 states and the District of Columbia.²⁰ Some of the first waste streams targeted in the early 2000s by these laws were electronics.²¹ Although the U.S. Congress has failed to pass any national legislation in this area, EPR bills were recently introduced in both the U.S. House of Representatives and the U.S. Senate that targeted single-use products and packaging.²²

An example of an existing program involving a targeted product that is somewhat analogous to clothing is California's Carpet Stewardship Program, first enacted in 2010 and later amended in 2017 and 2019.²³ The program seeks to increase the reuse and recyclability of post-consumer carpet by requiring manufacturers to submit stewardship plans with the state for implementation, which is funded by a consumer fee per unit of carpet sold in the state.²⁴ The

results seem promising, with the recycling rate for carpet in the program reportedly increasing from 11% in 2011 to 27.9% in 2021.²⁵ While eventually achieving improved carpet recycling, the program has been criticized for previously repeatedly failing to meet its targets, and for its reliance on consumer fees for support rather than requiring the internalization of costs by manufacturers.²⁶

B. EPR Textile Regulation in Europe

EPR laws targeting specific waste streams are increasingly being enacted across the EU. Legislation that requires separate collection of textile waste will become mandatory in the EU in 2025.²⁷ France, a country with a long-standing worldwide reputation for its influence on fashion, became the first country to regulate textiles through EPR. French EPR policies for textiles have been in place since 2008, and the French government recently issued an order in November 2022 defining new rules and expectations for eco-organizations in the clothing, linen, and footwear sector under this long-standing EPR policy.²⁸

Other individual European countries have been slow to follow France's lead. For example, the Netherlands implemented EPR regulations for textiles only in July 2023.²⁹ Regulations have also been recently introduced and will likely come into force soon in Sweden, Spain, and Italy,³⁰ but implementation may be affected by anticipated manda-

19. NATIONAL CONFERENCE OF STATE LEGISLATURES, REPORT: EXTENDED PRODUCER RESPONSIBILITY 2 (2023), <https://documents.ncsl.org/wwwncsl/Environment/Extended-Producer-Responsibility-f01.pdf>.

20. *Id.*

21. *Id.*

22. *Id.* at 13.

23. CAL. PUB. RES. CODE §§42970-42983 (collectively A.B. Nos. 2398, 1158, 729).

24. *Id.* §42972.

25. CALIFORNIA CARPET STEWARDSHIP PROGRAM, CALIFORNIA CARPET STEWARDSHIP PROGRAM 2021 ANNUAL REPORT (2022), https://carpetrecovery.org/wp-content/uploads/2022/09/2021_CA_AnnualReport_ADACompliant_FINAL.pdf; Cole Rosengren, *UPDATE: Gov. Brown Signs Bill to Update California's Carpet Recycling Program*, WASTE DIVE (Oct. 17, 2017), <https://www.wastedive.com/news/update-gov-brown-signs-bill-to-update-californias-carpet-recycling-progr/505173/>.

26. Rosengren, *supra* note 25.

27. *The EU's Proposal for Extended Producer Responsibility for Textiles*, NORTON ROSE FULBRIGHT (Nov. 2023), <https://www.nortonrosefulbright.com/en/knowledge/publications/d07fc852/the-eus-proposal-for-extended-producer-responsibility-for-textiles>.

28. Code de l'environnement [Environmental Code] art. L5411-10-3 (Fr.), https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000043974919; see also Arrêté du 23 novembre 2022 portant cahiers des charges des éco-organismes et des systèmes individuels de la filière à responsabilité élargie du producteur des textiles, chaussures et linge de maison (TLC) [Order of November 23, 2022, on the Specifications of Eco-organizations and Individual Systems in the Extended Producer Responsibility Sector of Textiles, Footwear, and Household Linen (TLC)], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 25, 2022, <https://www.legifrance.gouv.fr/eli/arrete/2022/11/23/TREP2233003A/loi/texte>.

29. *Decree of 13 April 2023 Containing Rules for Extended Producer Responsibility for Textile Products*, Stb. 2023, 132 (Neth.), <https://www.government.nl/documents/decrees/2023/04/14/decrees-rules-extended-producer-responsibility-for-textile-products>.

30. *Spain: Countdown for the Application of the Extended Responsibility Regime to Textile Products*, BAKER MCKENZIE (Jan. 20, 2024), <https://insightplus.bakermckenzie.com/bm/international-commercial-trade/spain-countdown-for-the-application-of-the-extended-responsibility-regime-to-textile-products>; Statens Offentliga Utredningar [SOU] 2020:72 Producentansvar för textil—en del av den cirkulära ekonomin [government report series] (Swed.), <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2020/12/sou-202072/>; European Recycling Platform, *ERP Italia Tessile: Extended Producer Responsibility for the Textile Sector*, <https://erp-recycling.org/it-it/ep-r-tessile/> (last visited Mar. 20, 2024).

tory and harmonized EPR rules for textiles across the EU proposed by the European Commission in July 2023.³¹

The Commission's recent EPR Textile Proposal, made in line with the broader EU Strategy for Sustainable and Circular Textiles,³² provides that producers of textiles will bear the costs of textile waste management and also the carrying out of a compositional survey of collected mixed municipal waste.³³ In order to encourage better product design, the amount that producers will be responsible for paying is dependent upon the environmental performance of the textiles.³⁴ This cost-adjustment requirement is an example of “eco-modulation,” a principle implemented in other product stewardship and EPR programs.

The EPR Textile Proposal also takes into particular account the impact of regulations and administrative burdens on small- and medium-size enterprises.³⁵ The proposal is for a directive that would entirely exempt “microenterprises,” defined as businesses with nine employees or fewer, from the EPR.³⁶ Standardization across the EU of textile EPR regulation may itself help to alleviate potential problems of inconsistent or different EPR schemes in individual countries. However, this recent action remains in the proposal stage, and implementation will likely not begin for at least another two years.³⁷ The final directive, if approved by the European Council and the European Parliament, may include changes.

II. Evaluating Recently Proposed State Legislation: California and New York

According to EPA, the rate of recycling for all textiles in the United States was only 14.7% in 2018, with the estimated recycling of textiles in clothing and footwear being slightly lower, at 13%.³⁸ Although this represents an improvement over the past few decades, the amount of textile waste being landfilled continues to increase.³⁹ Nonhazardous solid waste is typically managed at the state or local level, with EPA providing guidance, not binding regulations.⁴⁰ National legislation or federal regulations governing textile recycling and reuse are, therefore, unlikely.

Instead, textile waste management is currently the responsibility of state and local governments. Some states have taken action to address the problem of textile waste, such as Massachusetts, which recently banned the disposal of textiles,⁴¹ but California and New York are the first states in which legislation has been introduced specifically seeking to create an EPR scheme for textiles. This part provides an overview of the two recently proposed bills, and finishes with a comparative evaluation of the success of future legislation promoting fashion circularity in these states.

A. California S.B. 707: The Responsible Textile Recovery Act of 2023

In February 2023, California Sen. Josh Newman introduced S.B. 707, the Responsible Textile Recovery Act of 2023, which would create a statewide collection and recycling program for textiles.⁴² This program would be implemented and overseen by the California Department of Resources Recycling and Recovery (CalRecycle).⁴³

The proposed program covers “any postconsumer apparel or postconsumer textile article that is unwanted by a consumer,” with “apparel” defined broadly but specifically excluding “personal protective equipment or clothing items for exclusive use by the United States military.”⁴⁴ The bill creates a tiered definition of “producer” to target enforcement at the first point of entry into the state.⁴⁵ First covering manufacturers, this definition extends also to brand and trademark owners or exclusive licensees if no manufacturer exists in the state.⁴⁶ Then, if no such owner or licensee is in the state, “producer” also applies to importers and retailers.⁴⁷ All producers would be required to implement stewardship programs either independently or through membership in a stewardship organization.⁴⁸

Unlike California's Carpet Stewardship Program, this textile EPR system would be directly funded by producers rather than a standardized consumer fee.⁴⁹ Program operators would be directed to distribute costs among producers based on eco-modulation.⁵⁰ Program operators would have

31. *Commission Proposal for a Directive of the European Parliament and of the Council Amending Directive 2008/98/EC on Waste*, COM (2023) 420 final (July 5, 2023), https://environment.ec.europa.eu/system/files/2023-07/Proposal%20for%20a%20DIRECTIVE%20OF%20THE%20EUROPEAN%20PARLIAMENT%20AND%20OF%20THE%20COUNCIL%20amending%20Directive%202008/98/EC%20on%20waste%20COM_2023_420.pdf.

32. *Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions: EU Strategy for Sustainable and Circular Textiles*, *supra* note 2.

33. *Commission Proposal for a Directive of the European Parliament and of the Council Amending Directive 2008/98/EC on Waste*, *supra* note 31.

34. *Id.*

35. *Id.* at 11.

36. *Id.*

37. *The EU's Proposal for Extended Producer Responsibility for Textiles*, *supra* note 27.

38. U.S. EPA, *supra* note 4.

39. *Id.*

40. See, e.g., U.S. EPA, *Regulatory and Guidance Information by Topic: Waste*, <https://www.epa.gov/regulatory-information-topic/regulatory-and-guidance-information-topic-waste> (last updated June 6, 2023).

41. Massachusetts Department of Environmental Protection, *Clothing and Textile Recovery*, <https://www.mass.gov/guides/clothing-and-textile-recovery> (last visited Mar. 20, 2024).

42. Yuvaraj Sivalingam & Will Wagner, *California Textile Recycling Legislation Delayed to 2024—And in Need of Improvement*, ARNOLD & PORTER (July 28, 2023), <https://www.arnoldporter.com/en/perspectives/advisories/2023/07/ca-textile-recycling-legis-delayed-to-2024>.

43. S.B. 707, 2023-2024 Leg., Reg. Sess. §42984(j) (Cal. 2023).

44. *Id.* §42984(b), (i), defining “apparel” to mean clothing and accessory items intended for regular wear or formal occasions, including, but not limited to, undergarments, shirts, pants, skirts, dresses, overalls, bodysuits, costumes, vests, dancewear, suits, saris, scarves, tops, leggings, school uniforms, leisurewear, athletic wear, sports uniforms, everyday swimwear, formal wear, onesies, bibs, diapers, footwear, handbags, backpacks, and everyday uniforms for workwear.

45. *Id.* §42984(p).

46. *Id.*

47. *Id.*

48. *Id.* §42984.2(a).

49. *Id.* §§42984.4(a)(1), 42984.11.

50. *Id.* §42984.4(a)(1).

to submit detailed implementation plans to CalRecycle for approval at least every five years, prepare annual reports, maintain records, conduct audits, and contribute to regulatory costs.⁵¹ The bill also directs CalRecycle to appoint an advisory committee of stakeholders.⁵² The bill would authorize CalRecycle to impose administrative civil penalties for violations of up to \$10,000 per day, or up to \$50,000 per day for an intentional, knowing, or reckless violation.⁵³

Although the Responsible Textile Recovery Act of 2023 passed 32 to 8 in the Senate and was referred to the Assembly Natural Resources Committee, proponents decided to pull the bill in July 2023 after discussions with opposition groups.⁵⁴ Supporters, including Senator Newman, agreed to negotiate the language and possibly convert the Responsible Textile Recovery Act of 2023 into a two-year bill considered in 2024.⁵⁵

B. New York State S.B. 6654/A.B. 8078

Identical bills were introduced in the New York State Senate and Assembly in May and September 2023, respectively.⁵⁶ The California and New York bills share similarities in their scope, with the New York bill adopting some of the same definitions. “Apparel,” for example, is defined identically.⁵⁷ However, other key terms, including “covered product” and “producer,” are slightly different.⁵⁸ For comparison, the draft of the text of the New York EPR bill is less than half of the length of the Responsible Textile Recovery Act of 2023.

As with California’s bill, producers would be responsible for the costs associated with the implementation of the collection program.⁵⁹ Producers would be similarly required to submit plans for approval every three years, prepare annual reports, maintain records, and contribute to regulatory costs.⁶⁰ The New York law would also create a textile stewardship advisory board to be made up of 12 voting members, with specific numbers representing different stakeholder groups.⁶¹ New York’s Department of Environmental Conservation is authorized, following a hearing or opportunity to be heard, to assess a civil penalty not to

exceed \$500 for each violation and an additional penalty of not more than \$500 for each day during which such violation continues.⁶²

C. Analysis and Areas for Improvement

California’s role as a leader in EPR, an experienced oversight agency, existing infrastructure, and engaged stakeholders make the successful implementation of a future version of the Responsible Textile Recovery Act seem possible despite initial opposition leading to its withdrawal in 2023. The state has implemented numerous EPR and product stewardship programs targeting other waste streams over the past two decades.⁶³ CalRecycle currently oversees statewide EPR programs for paint, carpet, mattresses, pharmaceuticals and sharps, packaging, and batteries.⁶⁴ The bill’s creation of an EPR scheme funded by producers, not consumers, and incentivization of better product design through eco-modulation are improvements from past programs.

The bill carries the support of the California Product Stewardship Council (CPSC), which is a coalition of local governments, nonprofit organizations, businesses, and consumers that currently leads six publicly funded textile recovery pilots.⁶⁵ Several fashion companies, recyclers, and nonprofit organizations also signed a coalition letter in support of the bill in July.⁶⁶ Californians as a consumer community have indicated a particular willingness to participate in apparel recycling programs, with 41% of respondents to a McKinsey 2021 survey saying that they would “always” participate if one of the brands they currently purchased from offered such a program, and 51% indicating that they would do so “sometimes.”⁶⁷

Expanding waste collection, sorting, and recycling in California to meet the goals of the EPR program will undoubtedly present challenges. Textile sorting and recycling remain complex and labor-intensive processes with considerable inefficiencies. However, these infrastructure systems are more developed in parts of California than in other states.⁶⁸ The bill’s EPR program would also integrate

51. *Id.* §§42984.10, 42984.12, 42984.13.

52. *Id.* §42984.1(c) (specifying that membership on the committee may consist of “representatives from local governments, recyclers, retailers, authorized collectors, authorized sorters, authorized repair businesses, nongovernmental organizations, environmental organizations, community-based justice and public health organizations, the second-hand industry, and the solid waste industry”).

53. *Id.* §42984.16(a) (authorizing enforcement against producers, program operators, stewardship organizations, manufacturers, distributors, retailers, and importers).

54. California Legislative Information, *Bill History: SB-707 Responsible Textile Recovery Act of 2023*, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=202320240SB707 (last visited Mar. 20, 2024); Sivalingam & Wagner, *supra* note 42.

55. Sivalingam & Wagner, *supra* note 42.

56. S.B. 6654, 2023-2024 Leg., Reg. Sess. (N.Y. 2023); A.B. 8078, 2023-2024 Leg., Reg. Sess. (N.Y. 2023).

57. S.B. 6654, 2023-2024 Leg., Reg. Sess. §27-3401(1) (N.Y. 2023).

58. *Id.* §27-3401(5), (9).

59. *Id.* §27-3405(5).

60. *Id.* §§27-3403, 27-3405.

61. *Id.* §27-3413.

62. *Id.* §27-3417.

63. See generally NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 19.

64. CalRecycle, *Extended Producer Responsibility (EPR)*, <https://calrecycle.ca.gov/epr/> (last visited Mar. 20, 2024).

65. Doug Kobold, CPSC Executive Director, Public Comment on Proposed S.B. 707—Responsible Textile Recovery Act of 2023 (May 22, 2023), https://www.calpsc.org/_files/ugd/ad724e_5e5af2fa8c944a0784409abaad0a0497.pdf.

66. Doug Kobold, CPSC Executive Director et al., Public Comment on Proposed S.B. 707—Responsible Textile Recovery Act of 2023 (July 3, 2023), https://www.calpsc.org/_files/ugd/ad724e_ea84eafadfe2439385d4d5f14178831e.pdf.

67. DANIELLE BOZARTH ET AL., MCKINSEY & COMPANY, *CLOSING THE LOOP: INCREASING FASHION CIRCULARITY IN CALIFORNIA* 40 (2022), <https://www.mckinsey.com/-/media/mckinsey/industries/retail/our%20insights/closing%20the%20loop%20increasing%20fashion%20circularity%20in%20california/report-closing-the-loop-increasing-fashion-circularity-in-california-v4.pdf>.

68. See, e.g., Tyler Bethke, *Recycling Clothes in America: A Study of 151 Cities*, PROMO LEAF (May 9, 2023), <https://promoleaf.com/blog/clothing-recycling-analysis>.

with existing nonprofit organizations that currently lead collection, resale, and recycling efforts.⁶⁹ Finally, California is one of only a small number of states that already has a textile recycling facility capable of converting used apparel textiles into new apparel.⁷⁰

Criticisms of the Responsible Textile Recovery Act of 2023 focus on its broadly defined covered product categories, the impact of regulation on small businesses, and anticipated enforcement issues with direct-to-consumer e-commerce brands that may disadvantage California-based companies.⁷¹ Revised definitions that more clearly target clothing, rather than fabric sold by bolt at retail, may be more consistent with the goals of the legislation and reduce producer and consumer confusion. To address concerns about the burden on very small companies, a revised bill should consider entirely exempting microenterprises, as done in the EU's EPR Textile Proposal.

The reality may be that CalRecycle cannot secure compliance from international companies that do not have an entity located within the state. Some current language of the bill seemingly contemplates this problem, at least in part, by clarifying that “the sale of a covered textile article shall be deemed to occur in the state if the covered textile article is delivered to the consumer in the state.”⁷² Amending the bill to include recycling goals and a timeline for CalRecycle's implementation of the bill may also help to ensure that progress toward the program's goals is made promptly.

Although the language of New York's proposed legislation is considerably less developed than S.B. 707, and this bill does not appear to have generated significant stakeholder engagement or press, there is reason to remain hopeful that the state can enact a textile EPR scheme in the future. The language of the current bill can be expanded upon using the EU's EPR Textile Proposal and the Responsible Textile Recovery Act of 2023 as sources for improvement. New York City is a global center of fashion, and the state legislature recently has been active in issues related to the industry's environmental impacts. The New York

State Fashion Sustainability and Social Accountability Act (S.B. 7428/A.B. 8352), known as the Fashion Act, was first introduced in 2022 and reintroduced in 2023.⁷³

The state's Department of Environmental Conservation, like CalRecycle, has overseen multiple EPR laws and product stewardship programs for decades.⁷⁴ Because New York plays a significant role in the fashion industry, progress on EPR for textiles would have an important international impact. Continued engagement with stakeholders to clarify the proposed bill's scope and build support for its implementation should be a legislative priority in the next term.

III. Conclusion

Ultimately, even the most well-designed textile EPR regulation cannot fix the most significant contributors to the problem of textile waste: the overproduction and overconsumption of clothing. However, recent proposals in the EU and attempts at legislation in California and New York evaluated here are promising efforts to ensure that the trend of fashion circularity will not just be a fad. While mandatory EPR laws will likely not be enacted in all jurisdictions in the near future, efforts in influential states and countries lay important groundwork for future laws and can singlehandedly force change in product design and business operations for global companies.

This phenomenon, related to the “California effect” that describes the state's long history of enacting stricter regulations that ultimately shift national policy, is why it is essential for program success that such first-of-its-kind regulatory language is clear and met with strong stakeholder engagement. In combination with continued investment in innovative bio-based materials and improving textile-to-textile recycling processes, government implementation and enforcement of laws that require financial and organizational input from companies contributing to the problem can promote better product stewardship.

69. Press Release, Office of California Sen. Josh Newman, Legislation Introduced to Create First-of-Its-Kind EPR Textile Recycling and Repair Program in CA (Feb. 27, 2023), <https://sd29.senate.ca.gov/news/press-release/legislation-introduced-create-first-of-its-kind-epr-textile-recycling-and-repair> (quoting Nicole Suydam, president and chief executive officer of Goodwill of Orange County and chair of the California Council of Goodwills: “My Goodwill colleagues across California and I look forward to working in partnership with Senator Newman and the California Product Stewardship Council to accelerate this important work and ensure a more sustainable future for all.”).

70. BOZARTH ET AL., *supra* note 67, at 30.

71. Sivalingam & Wagner, *supra* note 42; Chelsea Murtha, American Apparel and Footwear Association Director of Sustainability et al., Public Comment on S.B. 707—Responsible Textile Recovery Act of 2023 (July 3, 2023), <https://subscriber.politicopro.com/f/?id=00000189-2c71-d8b7-a9bb-ee7f0b710000>.

72. S.B. 707, 2023-2024 Leg., Reg. Sess. §42984(p)(4) (Cal. 2023).

73. S.B. 4746, 2023-2024 Leg., Reg. Sess. (N.Y. 2023); S.B. 7428, 2021-2022 Leg., Reg. Sess. (N.Y. 2022).

74. New York Department of Environmental Conservation, *Product Stewardship & Extended Producer Responsibility*, <https://dec.ny.gov/environmental-protection/recycling-composting/product-stewardship-extended-producer-responsibility> (last visited Mar. 20, 2024).