

Testimony in OPPOSITION
to
Senate Bill 1185
in
New York Senate Committee on Environmental Conservation
on
February 2, 2021

The Flexible Packaging Association (FPA) is submitting testimony in opposition to SB1185, “An Act to amend the environmental conservation law, in relation to establishing the extended producer responsibility act,” which would establish an extended producer responsibility (EPR) act for packaging and paper.

I am Alison Keane, President and CEO of FPA, which represents flexible packaging manufacturers and suppliers to the industry in the U.S. Flexible packaging represents \$33.6 billion in annual sales; is the second largest, and fastest growing segment of the packaging industry; and employs approximately 80,000 workers in the United States. Flexible packaging is produced from paper, plastic, film, aluminum foil, or any combination of these materials, and includes bags, pouches, labels, liners, wraps, rollstock, and other flexible products.

These are products that you and I use every day – including hermetically sealed food and beverage products such as cereal, bread, frozen meals, infant formula, and juice; as well as sterile health and beauty items and pharmaceuticals, such as aspirin, shampoo, feminine hygiene products, and disinfecting wipes. Even packaging for pet food uses flexible packaging to deliver fresh and healthy meals to a variety of animals. Flexible packaging is also used for medical device packaging to ensure that the products packaged, diagnostic tests, IV solutions and sets, syringes, catheters, intubation tubes, isolation gowns, and other personal protective equipment maintain their sterility and efficacy at the time of use. Trash and medical waste receptacles use can liners to manage business, institutional, medical, and household waste. Carry-out and take-out food containers and e-commerce delivery, which are increasingly important during this national emergency, are also heavily supported by the flexible packaging industry.

Thus, FPA and its members are particularly interested in solving the plastic pollution issue and increasing the recycling of solid waste from packaging. We do not believe that SB1185, as written, will accomplish these goals. Flexible packaging is in a unique situation as it is one of the most environmentally sustainable packaging types from a water and energy consumption, product-to-package ratio, transportation efficiency, food waste, and greenhouse gas emissions reduction standpoint, but circularity options are limited. There is no single solution that can be applied to all communities when it comes to the best way to collect, sort, and process flexible packaging waste. Viability is influenced by existing equipment and infrastructure; material collection methods and rates; volume and mix; and demand for the recovered material. Single material flexible packaging, which is approximately half of the flexible packaging waste generated, can be mechanically recycled through store drop-off programs, however, end-markets are scarce. The other half can be used to generate new feedstock, whether through pyrolysis, gasification, or fuel blending, but again, if there are no end markets for the product, these efforts will be stranded.

Developing end-of-life solutions for flexible packaging is a work in progress and FPA is partnering with other manufacturers, recyclers, retailers, waste management companies, brand owners, and other organizations to continue making strides toward total packaging recovery. Some examples include The Recycling Partnership; the Materials Recovery for the Future (MRFF) project; the Hefty® EnergyBag® Program; and the University of Florida's Advanced Recycling Program. All of these programs seek to increase the collection and recycling of flexible packaging and increasing the recycled content of new products that will not only create markets for the products but will serve as a policy driver for the creation of new collection, sortation, and processing infrastructure for the valuable materials that make up flexible packaging.

FPA believes that a suite of options is needed to address the lack of infrastructure for non-readily recyclable packaging materials, and promotion and support of market development for recycled products is an important lever to build that infrastructure. We also believe that EPR can be used to promote this needed shift in recycling in the U.S. In fact, FPA worked with the Product Stewardship Institute (PSI) and have jointly drafted a set of principles to guide EPR for flexible packaging (<https://www.flexpack.org/end-of-packaging-life>). New York was part of this dialogue, which looked at the problems and opportunities for EPR to address the needs of the

flexible packaging industry to reach full circularity for over a year. It is with this background that FPA provides this testimony to improve SB1185 so that it provides the necessary elements for the improvement of collection and infrastructure investment and development of advanced recycling systems to allow for collection and recycling to a broader array of today's packaging materials, including flexible packaging; and quality sorting and markets for currently difficult-to-recycle materials.

As currently drafted, SB1185's definition of producer is not clear. The PSI/FPA principles suggest the following in order to ensure the responsible party is correctly identified:

“Producer – means a party that has legal ownership of the brand of a product for sale, use, or distribution in the state, including online retailers who sell into the state, that utilizes plastic packaging.

(1) For plastic packaging, producer shall be determined based on the following criteria:

(A) A person who manufactures a product under the manufacturer's own brand that uses plastic packaging

(B) If subparagraph (A) does not apply, a person who is not the manufacturer of a product under the manufacturer's own brand that uses plastic packaging, but is the owner or licensee of a trademark under which plastic packaging is used in a commercial enterprise, sold, offered for sale or distributed in the state, whether or not the trademark is registered; or

(C) If subparagraphs (A) and (B) do not apply, a person who imports the product that uses the plastic packaging into the state for use in a commercial enterprise, sale, offer for sale or distribution in the state.”

The primary responsibility for fee collection, remittance, and reporting must be on the consumer packaged goods companies (CPGs), which encompasses food manufacturers and retailers in their role as brand owners. They, and not the producers of the packaging (converters), have the ability to track consumer sales in a given jurisdiction and control how products are packaged. Packaging producers (converters) would have no way to determine where the packaging is sold and even in some cases to what brand – packaging producers sell packaging to CPGs, which may then use it for multiple brands within their portfolio and sell throughout the country. Even when packaging

is sold directly to a brand in New York State, packaging producers have no way of knowing whether the final product (that uses the packaging) will be sold in or out of the state.

FPA is also concerned that SB1185 gives very broad authority to the Department and far too much power to the Department and current municipal governments to demand requirements for reimbursement for costs without giving the Producer Responsibility Organization (PRO) the appropriate authority to negotiate these costs for its needs in accomplishing the goals that will be outlined in its program plan. It appears that the money collected on the PRO's products will merely go towards the current infrastructure and not to the advanced infrastructure needed to take all packaging products. In addition, the dates for implementation and plan amendments/resubmissions are far too aggressive, particularly for the first ever of its kind EPR program in the Country. FPA is also concerned about the potential for a labeling requirement that may not be compatible with U.S. or global sales. CPG's products and its packaging are sold throughout the country and in some cases across the globe and cannot be expected to be labeled separately for New York State. Finally, the antitrust protections for the supply chain implementing this new system, including fees on packaging are not sufficient. New York cannot be less stringent than the federal antitrust regulations and must comport to the "State Action Doctrine," in order to give the PRO and producers the limited antitrust exemption needed to implement an EPR scheme. The current version of SB1185 does not do this. And finally, the extremely stringent penalties, including joint and several liability for producers, is wholly inappropriate and defeats the purpose of having a constructive and successful PRO representing various CPG competitors.

For these reasons, FPA opposes the current draft of SB1158 but stands ready to assist in amending the bill so that it comports with the PSI/FPA elements and supports a meaningful EPR program for packaging; providing the necessary investment in new infrastructure and markets for all packaging, including flexible packaging. In advance, thank you for your consideration. If we can provide further information or answer any questions, please do not hesitate to contact me at 410-694-0800 or akeane@flexpack.org