

Testimony in OPPOSITION
to
New York State Executive Budget – TED Part RR “Extended Producer Responsibility Act” and
TED Part SS “Toxics in Packaging Act”
in
New York Senate Committee on Finance
on
February 1, 2022

The Flexible Packaging Association (FPA) is submitting testimony in opposition to the New York State Executive Budget – TED Part RR “Extended Producer Responsibility Act,” which would establish an extended producer responsibility (EPR) act for packaging and paper, and TED Part SS “Toxics in Packaging Act,” which would place restrictions on packaging with heavy metals, PFAS, and Phthalates at levels above 100 parts per million (ppm).

I am Sam Schlaich, Counsel, Government Affairs of FPA, which represents flexible packaging manufacturers and suppliers to the industry in the U.S. Flexible packaging represents over \$34 billion in annual sales; is the second-largest and fastest-growing segment of the packaging industry; and employs approximately 79,000 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 have become increasingly important during the pandemic, are also heavily supported by the flexible packaging industry.

Thus, FPA and its members are particularly interested in solving the plastic pollution issue, increasing the recycling of solid waste from packaging, and creating a working, circular economy. Unfortunately, we do not believe that Part RR and Part SS, as written, will accomplish these goals and feel compelled to highlight several concerns.

Part RR “Extended Producer Responsibility Act”

The flexible packaging industry 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. 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 drivers 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 raises the following concerns to improve Part RR, ensuring 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 of a broader array of today's packaging materials, including flexible packaging, and quality sorting and markets for currently difficult-to-recycle materials.

First and foremost, as currently drafted, Part RR's definition of producer is extremely problematic. Overwhelmingly, EPR legislation defines "Producer" to mean consumer packaged goods companies (CPGs), who are the brand owners who use the packaging, whereas here, the language points to packaging manufacturers (converters). This would effectively render the entire stewardship program unworkable, as I shall explain.

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.”

This is because the primary responsibility for fee collection, remittance, and reporting must be on the CPGs, which encompasses food and goods manufacturers and retailers in their role as brand owners. They, and not the producers of the packaging (converters), control how products are packaged and can track consumer sales in a given jurisdiction. 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 then use it for multiple brands within their portfolios 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. Packaging can be more than one element as well, coming from multiple converters. Take, for example, Chobani yogurt, manufactured in the state of New York. The different components of a yogurt container, which include the ridged cup, the flexible peel off top, and in many cases the cardboard portion used to sell multi-packs, are coming from different packaging producers. Chobani as the CPG is the only producer, however, that knows where the item that uses the packaging, the yogurt itself, is distributed and sold in or out of the State. Thus, just as all EPR for packaging programs in Europe, Canada and the two bills that have passed in the US, the responsible party must be the brand owner or entity who uses the packaging and not the packaging producer or converter.

FPA is also concerned with several other elements of the bill. The current definition of “Readily Recyclable” is severely limiting and does not allow for or take into consideration innovation. The definition needs to be expanded to allow greater flexibility so that it may foster innovation and better accommodate the evolving needs of the system. Similarly, the definition of “Recycling collection” is overly restrictive and does not allow for any new collection methods in the future.

Part RR also grants broad authority and far too much power to the department and Advisory Board to demand requirements for reimbursement for costs without providing 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.

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 Part RR 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.

PART SS “Toxics in Packaging Act”

FPA is very aware of the increasing concerns related to Per- and Polyfluoroalkyl Substances (PFAS) as environmental contaminants, some of which also have human health implications. We are also aware of intentions at both Federal and State levels to regulate certain PFAS to reduce adverse effects to human health and the environment. This is a complex subject largely because there is no globally consistent convention listing all substances of concern that are part of the PFAS group, and those that are listed do not share all the same concerns. This situation has created confusion among many stakeholders along the supply chain, which in turn has driven unfounded generalization of these concerns.

The group of PFAS that is the main focus of public and regulatory concern include perfluoro-octanoic acid (PFOA), perfluoro-octane sulfonate (PFOS), perfluoro-alkyl phosphate esters (PAPs), perfluoroalkyl carboxylic acids (PFCAs) or perfluoroalkyl sulfonates (PFSAAs). We are not aware that these environmentally more prevalent and persistent perfluoroalkyl substances are intentionally added to flexible packaging or that they are associated with manufacturing any of our raw materials.

The PFAS in use in flexible packaging are typically referred to as fluoroelastomers. These compounds have been used for years as polymer processing aids for the production of recyclable Poly Ethylene (PE) films and to improve the runnability of post-consumer recycled (PCR) content PE resins. While these compounds have not been a focus of environmental and human health concerns, they are increasingly grouped into the broad PFAS definition.

FPA is concerned that in applying a restriction of 100 parts per million (ppm) to the entire PFAS family, this proposal will be banning an entire class of chemicals which provide many benefits in

packaging. Furthermore, treating all uses of PFAS the same will create significant disruptions to the recycling supply chain and result in less use of PCR materials as feedstock. We believe the state of New York would be better served to adopt an “intentionally added” standard, as other states have done. This allows for separate, sensible regulatory standards for PFAS as a “processing aid” and PFAS used in food contact.

FPA would suggest using following language as a starting point in establishing standards:

"Intentionally introduced" means deliberately utilized regulated PFAS in the formulation of a package or packaging component where the continued presence of such metal or PFAS is desired in the final package or packaging component to provide a specific characteristic, appearance or quality.

The use of post-consumer recycled materials as feedstock for the manufacture of new packaging materials where some portion of the recycled materials may contain amounts of the regulated metals or PFAS shall not be considered intentional introduction for the purposes of this section provided the new package or packaging component is in compliance.

As soon as feasible, but not later than [insert effective date], no food package to which PFAS has been intentionally introduced during manufacturing or distribution in any amount shall be offered for sale or for promotional purposes in this state by its manufacturer or distributor.

In the light of the above, we ask that you revisit your stance on the limit of 100ppm for all PFAS and adopt a more efficient alternative. The ability of the flexible packaging industry to use fluoroelastomer-polymer processing aids is a critical component to driving a more circular economy for this packaging format and should therefore not be an obstacle to achieving the stated intent of this proposal in reducing “toxicity without impeding or discouraging the expanded use of post-consumer materials in the production of packaging and its components.”

For these reasons, FPA opposes the current draft and respectfully **urge you to reject the proposal in the Executive Budget TED Part RR and Part SS** but stands ready to assist in amending the provisions 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, and addressing the PFAS issue through a scientifically based policy approach.

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 SSchlaich@Flexpack.org.

Respectfully,

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