

Testimony in OPPOSITION
to
Senate Bill 426 “Packaging Product Stewardship Act,”
in
New Jersey Senate Energy and Environment Committee
on
June 13, 2022

The Flexible Packaging Association (FPA) is submitting testimony in opposition to Senate Bill 426 “Packaging Product Stewardship Act,” which requires producers of packaging products sold in New Jersey to adopt and implement packaging product stewardship plans.

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 S 426, as written, will accomplish these goals and feel compelled to highlight several concerns.

Extended Producer Responsibility (EPR)

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>). Several stakeholders were 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.

Definition of “Producer”

First and foremost, as currently drafted, S. 426'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 the 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 three 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.

Definition of “Packaging Material”

FPA is also concerned with several other elements of the bill. The current definition of “Packaging Material” needs to be heavily amended and at the very least, exclude tertiary packaging from consideration. In becoming the first and only state to include tertiary and business to business packaging in their EPR program, which includes materials such as films and pallet wrap, New Jersey would be creating a logistical nightmare and heavily damaging the current recycling stream. Tertiary packaging is often collected in the “back of house” areas of a business and never comes in contact with consumers. For these reasons, it is much easier to collect large amounts of these materials and avoid contamination. These materials, often Polyethylene (PE) already have strong recycling streams and established markets.

In 2019 the global polyethylene market size was \$107.43 billion and is projected to reach \$130.26 billion by 2027. Furthermore, states and nations are increasingly requiring higher levels of post-consumer recycled (PCR) content in products and the demand for recycled/recyclable materials like PE has already outpaced the supply. Materials used as tertiary packaging, such as PE, are lightweight, highly valuable, easily recyclable, and a crucial piece of the puzzle moving towards a circular economy.

Post-Consumer Recycled (PCR) Content

S. 426 stands to establish, by far, the most severe and restrictive recycling rate in the nation. Attempting to adopt and enforce the proposed rate of 75 percent post-consumer content by January 1, 2027 would be devastating to New Jersey's recycling efforts and economy. The ambitious goal is quite simply impracticable and in part unattainable given today's present recycling infrastructure and technology. In addition, this target completely fails to account for differing requirements and standards for differing packaging types such food or medical device packaging. If New Jersey would like to see increased PCR content in products then the state should expand the definition of "Recycling" to include forms of advanced recycling, such as pyrolysis and gasification.

Advanced recycling technologies can process plastics that do not have strong end markets, thus enabling a more circular economy for plastics. In addition to benefiting the environment, advanced recycling provides important economic benefits. As the American Chemistry Council reports, more than \$7.5 billion in advanced recycling projects have been announced or are already operating in the United States, with the potential to divert 11.7 billion pounds of waste from landfills. And, while this technology may be novel in New Jersey, across the country, private companies are already manufacturing post-use plastics at a commercial scale into a versatile mix of valuable new products.

Administrative Issues

There are several issues with the suggested timelines for implementation that are simply unworkable. For example, S. 426 presently requires that 90 days after approval of a proposed plan, that it is fully implemented. Some of these plans will include major corporations operating across several state and international boundaries with varied product lines. EPR programs are complicated and need to be suited to address the unique needs and criteria of the state and

constituency they are developed for. This requires greater flexibility in the proposed timelines to properly accommodate of unforeseen circumstances, particularly in the initial phases creating and implementing an effective and meaningful EPR program.

Finally, the antitrust protections for the supply chain implementing this new system are not sufficient. New Jersey 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 S. 426 does not do this.

For these reasons, **FPA opposes Senate Bill 426**, 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 addresses the evolving needs and concerns of New Jersey.

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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