

Testimony in OPPOSITION
to
Senate Bills 14, 581, and 582
in
Oregon Senate Committee on Energy and Environmental
on
February 16, 2021

The Flexible Packaging Association (FPA) is submitting testimony in opposition to SB14, SB581 and SB582, having to do with extended producer responsibility programs for plastic packing, for all packaging and paper and labeling for recyclability.

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 all packaging. We do not believe that any of these bills will fully accomplish these goals as written. We do believe, however, that SB14 may provide a good starting point, so I will detail our concerns on the other two bills first. 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>). Oregon 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 on this suite of bills in the hopes that whatever vehicle moves to provide for packaging circularity, 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.

SB581

Senate Bill 581 would institute new Oregon labeling requirements for recyclability of packaging and ban the use of ASTM labeling for resin codes. This would result in Oregon specific requirements, which is unworkable given the fact that products are not manufactured and sold into Oregon only, and in most cases are sold nationally and internationally. This bill would then ban sales of any products that did not comport to these new labeling requirements by 2023, when those requirements will not even be known until the rulemaking process is finished. There is no sell through provision, nor is there a provision to addressing if the regulations are not promulgated in a timely fashion. The bill would also ban the use of the nationally recognized How-to-Recycle label, which is the label used for in-store drop off programs, currently one of the only programs to collect some types of flexible packaging, as noted above. Lastly, it sets up a "bounty hunter" provision that would increase lawsuits by allowing any citizen to sue any company for non-compliance. This bill is completely counterproductive to increasing the collection and recycling of plastic packaging and will only lead to increased consumer confusion; meaningless lawsuits; and ultimately, less products available to consumers in Oregon as the cost of creating Oregon only products and packaging is far too prohibitive for even the largest product manufacturers.

SB582

This bill, which would set up an EPR program, not only for consumer products, but for commercial and industrial products as well, is far too broad and complex and because of this, difficult to even determine implementation requirements, responsibilities and timelines. To begin with, however, it should be amended to focus on consumer products. As the first ever packaging EPR program in the United States, including commercial and industrial packaging, which generally uses a completely different system to collect, process and recycle packaging is

problematic at best. While the current system and financing for commercial and industrial packaging may be leveraged through an EPR program for consumer products, it should not be included at the onset.

Secondly, as currently drafted, SB582'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 Oregon, packaging producers have no way of knowing whether the final product (that uses the packaging) will be sold in or out of the state. The definition above is the definition used in current EPR packaging programs throughout Canada and Europe.

FPA is also concerned that SB582 gives far too broad authority to the Department and the Environmental Quality Commission (EQC) 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. FPA is also concerned about the potential for a labeling requirements in this bill as with SB14, that may not be compatible with U.S. or global sales. Again, the majority of consumer 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 Oregon. The bill sets up an advisory Council that has no packaging industry representation (Governor MAY appoint someone from PRO); and this advisory council gets paid by the PRO, which is a conflict of interest. Lastly, composting is left up to individual providers, unlike recycling, which if in the program, must conform to standardized state list and preemption. Composting should be treated the same way as recycling, so the PRO and Oregon residents are not left with a patchwork of inequitable access and options.

SB14

As stated earlier, FPA believes that if any bill is to move this session and become the basis for a successful EPR program in Oregon, it is SB14. However, there are issues with this bill as well. FPA represents packaging manufactures that use paper, film, foil and in some cases combinations of these materials. SB14 only covers plastic packaging. FPA would prefer an EPR bill address the full recycling system in the U.S., which does not discriminate based on substrate. Collection systems and infrastructure in the U.S. are built for all packaging types and so should any EPR program addressing the system deficiencies. There are no EPR programs for packaging in Canada or Europe, where they only cover one packaging type. In addition, SB14 bill has the same issue with the definition of brand, manufacturer, and retailer as SB582. Please refer to the PSI/FPA definition above for the same reasons: a package is not a package unless and until a product is placed into it – it is the product manufacturer that uses the packaging that is the responsible party, along with the hierarchy outlined above, so that tracking and reporting

requirements can actually be achieved in and EPR program. FPA is also concerned with the broad authority given to the EQC to determine after the legislation is passed instead of beforehand, what constitutes recyclable plastics. It also appears that if deemed recyclable through rule, they would not be part of the EPR program. The criteria outlined in the bill for determining recyclability is not static and there is no provision to review and update the list once promulgated through rulemaking. FPA believes that all packaging should be included in the EPR program and review of recyclability dependent on design and market conditions that fluctuate should be the purview of the PRO and its plan approval and update process. EPR should provide for the requisite investment in recycling infrastructure and end-market development so that all packaging is eventually recyclable and has achieved circularity.

For these reasons, FPA opposes the current draft of SB14, 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 all packaging; providing the necessary investment in new infrastructure and markets for all packaging, including flexible packaging. FPA oppose SB581 and SB581 and believes them completely unworkable. 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