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Testimony of the Flexible Packaging Association
Joint Hearing on Packaging Reduction
Before the New York State Senate Standing Committee on Environmental Conversation and the New York State Assembly Standing Committee on Environmental Conservation

Chair Harckham, Chair Glick, and Committee Members:

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 $42.9 billion in annual sales; is the second-largest and fastest-growing segment of the packaging industry; and employs approximately 85,000 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 became 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.

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 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 any EPR program considered by the state, 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 – thoughtful, well-developed definitions are the foundation upon which any successful Extended Producer Responsibility (EPR) program is built. 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.

Definition of "Recycling"

The definition of "Recycling" will be critically important to the success of any New York EPR program and must not shut the door on alternative and advanced recycling technologies. Advanced recycling technologies enable plastics that currently do not have strong end markets (e.g. films, pouches and tubes) to be converted back to their basic chemical building blocks. These chemical building blocks can go back into new food grade plastics, useful chemicals, and other products like waxes, lubricants and ultra-low sulfur transportation fuels. Technologies such as pyrolysis and gasification heat plastics in an oxygen deprived environment and convert the plastics to liquid feedstocks that can be remanufactured into a versatile mix of new products for remanufacturing. Conversely, the purpose of solid waste incineration facilities is to destroy waste materials via combustion or burning.

Unfortunately, there is a significant amount of misinformation that has been put forward, linking these technologies to the destruction of waste material via combustion or incineration. This contradicts legislation that has been adopted in 24 other states, most recently Michigan and Utah. **Advanced recycling is NOT combustion or burning**.

From an environmental standpoint, the emissions for these facilities are low. A recent report found that advanced recycling facilities have emissions that are on par or lower than industrial facilities such as food manufacturing and community institutions such as hospitals and universities. These technologies do not produce pollutants like dioxins and are strictly regulated and monitored by federal, state, and local air emissions authorities.

We recognize that advanced recycling is constantly evolving and that different methodologies offer different benefits and trade-offs. With this in mind, we would advocate that New York take an approach similar to that of Oregon, which allows for the evaluation of each process individually. This approach allows for the state to assess and determine which technologies are best fitted to serve the needs and goals of the state without stifling investment and innovation in the recycling sector.

Chemical Classification and Review

An EPR proposal should not contain a broad, blanket-ban on multiple chemical classes. The state of New York has an obvious and vested interest in regulating the use of particular chemicals for certain applications, ensuring the health and safety of both its citizens and environment. Unfortunately, the proposed ban on, not just the use but the presence of, certain chemicals put forward in S.4264-A (Harckham)/A. 5322-A (Glick) does not achieve that aim.

FPA is very aware of the increasing concerns about the use of certain chemicals or chemical classes in packaging. Specifically, much of the focus has recently been on 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 (PFSAs). 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. And these are only a few of the challenges around PFAS, let alone the other chemicals S.4264-A (Harckham)/A. 5322-A (Glick) would ban. This is a complex subject that certainly deserves science-based, thoughtful consideration by the legislature, but should be addressed as a separate legislative issue.

Conclusion

The Flexible Packaging Association appreciates the opportunity to provide written comments and serve as a resource to the committees. We look forward to continued engagement throughout the process and developing a meaningful EPR program for packaging that comports with the PSI/FPA elements; providing the necessary investment in new infrastructure and markets for all packaging, including flexible packaging, and addressing the toxic substances 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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