

All Wrapped Up

Extended Producer Responsibility for Packaging



June 2024 State-By-State Updates

California

The California Department of Resources Recycling and Recovery (“CalRecycle”) must adopt regulations necessary to implement and enforce California’s packaging EPR law by January 1, 2025. The notice of proposed rulemaking was published in the California Regulatory Notice Register on March 8, 2024.¹ The comment period was extended, then closed May 8, 2024.

Based on a June 6, 2024 response to a California public records act request, CalRecycle received over 220 comments. Commenters included, but were not limited to, AMERIPEN, Association of Plastic Recyclers, Atlantic Packaging, BASF Corporation, California Chamber of Commerce, Californians Against Waste, California Manufacturers & Technology Association, Can Manufacturers Institute, Circular Action Alliance (“CAA”), Consumer Brands Association, Eastman, Flexible Packaging Association, Household & Commercial Products Association, IKEA, Natural Resources Defense Council, Ocean Conservancy, PakTech, Personal Care Products Council, Republic Services, SB 54 Advisory Board, Surfrider Foundation, The Recycling Partnership, Waste Management, and the World Wildlife Fund. Comments ran the gamut from requesting an objective standard that would more clearly identify the producer in the supply chain to requesting an allowance for residual amounts of plastic that serve a necessary function and do not inhibit recycling.

An SB54 Advisory Board meeting took place June 21, 2024. Among other topics on the agenda, representatives from the Advisory Boards/Councils working on packaging EPR laws in Illinois and Oregon provided an overview of their experience and lessons learned to date, including coordination with California.

California SB 1231, introduced February 15, 2024, and referred to the Committee on Natural Resources on June 3, 2024, would amend California’s packaging EPR law in an effort to address a perceived concern with the availability of the “trending on-ramp” exemption. A committee hearing on the bill is set for July 1, 2024. See the “*Issue In Focus*” section below for further discussion.

¹ 10-Z CAL. REGULATORY NOTICE REG. 226 (Mar. 8, 2024) (proposed regulation text released Dec. 28, 2023, and available at <https://www2.calrecycle.ca.gov/Docs/Web/127317>).

Colorado

The Colorado Solid and Hazardous Waste Commission approved the primary regulations necessary to implement and enforce Colorado's packaging EPR law during a rulemaking hearing on June 14, 2024. The final regulations are not yet available online, but the Colorado Department of Public Health and the Environment confirmed that there were no changes made at the hearing to the May 21, 2024 revision to the notice of proposed rulemaking.² Of note, one of the recent revisions delayed the producer registration date to October 1, 2024 in response to stakeholder comments. The new registration deadline is now three months *after* CAA's deadline of July 2024.

A Colorado Producer Responsibility Program for Statewide Recycling Advisory hearing took place June 13, 2024. Topics included, but were not limited to, producer dues methodology and a CAA discussion on auditing responsible end markets. The Board also held a second technical work session on June 27, 2024. Topics discussed included education and outreach and post-consumer recycled content and materials requirements.

Illinois (needs assessment only)

The Illinois Statewide Recycling Needs Assessment Advisory Council held their fifth meeting on June 10, 2024. One of the key agenda items was to discuss the needs assessment request for proposals, scope of work, and schedule. By statute, the Illinois Environmental Protection Agency must select the consultant to perform the needs assessment by July 1, 2024, and the report of findings and recommendations to be made to the General Assembly and the Governor will be due December 1, 2026.

Maine

The Maine Department of Environmental Protection ("MDEP") is targeting this Summer to adopt the routine/technical rules necessary to implement and enforce Maine's packaging EPR law. The draft rules were posted January 18, 2024.³ A public hearing was held on March 7, 2024, and the comment period ended March 18, 2024. MDEP hosted a deliberative session on these rules on June 20, 2024, and proposed edits that will be released for public comment.⁴ MDEP is also targeting this Summer to provisionally adopt the major substantive rules necessary to implement and enforce Maine's EPR law; January 2025 to submit them for legislative approval; and Spring/Summer 2025 for final adoption.

MDEP provided a second opportunity for producers to seek exemptions based on federal laws and regulations that identify whether any content or construction standards preclude or

² 47 COLO. REG. 8 (Apr. 25, 2024) (proposed regulations revised May 21, 2024, and available at <https://oitco.hylandcloud.com/cdphermipop/docpop/docpop.aspx?clienttype=activex&docid=24792319>).

³ Posting draft available at <https://www.maine.gov/tools/whatsnew/attach.php?id=12351122&an=2>).

⁴ The Board of Environmental Protection discussed a markup that was attached to the June 20 2024 meeting agenda at <https://www.maine.gov/dep/bep/2024/06-20-24/Chapter%20428%20Proposed%20Rule%20mark-up.pdf>.

significantly diminish a producer's ability to increase the recyclability or reduce the volume of packaging material. Exemption requests were due May 20, 2024. MDEP received 11 requests and posted them June 21, 2024.⁵ Exemption requests were made for packaging for several materials, including, but not limited to, pesticides, specialty pest control, and fertilizers; tobacco products; and over-the-counter healthcare products.

Maryland (needs assessment only)

The Maryland Department of the Environment ("MDE") hosted its first Advisory Council meeting on May 30, 2024. MDE announced in the meeting that the department is anticipating EPR legislation being introduced in the 2025 legislative session. The next Advisory Council meeting is scheduled for July 25, 2024.

Minnesota

On May 21, 2024, Minnesota became the fifth state to pass a comprehensive packaging EPR law. The law does not specify when regulations must be adopted, although it removes the statutory 18 month deadline to publish a notice of intent to adopt rules that would have otherwise applied. Producers must appoint a producer responsibility organization ("PRO") by January 1, 2025, and become members by July 1, 2025. The statute, however, contemplates that some producers will become members, enter into written agreements, and submit data prior to January 1, 2025.

New York

On June 8, 2024, New York failed to become the sixth state to pass a comprehensive packaging EPR law when the state Assembly failed to vote on it prior to the end of the legislative session. New York S 4246 would have established aggressive source reduction and recycling rate standards relative to other states that have enacted packaging EPR laws. The bill would also have prohibited the sales or distribution of any packaging containing several listed toxic substances, including PFAS. New York S 4246 was initially introduced in early 2023; was subject to several amendments; and was heavily debated in the weeks leading up to the end of the legislative session. Although the state Senate passed it on June 7, 2024, the bill died in Assembly a few hours later. Given the momentum and support, it is reasonable to assume that the bill will be re-introduced in some form during the next legislative session. If New York passes packaging EPR, then it is also reasonable to assume that other states in New England will follow suit. We have already seen, for example, packaging EPR legislation that passed in Maine, which led to the introduction of legislation in New Hampshire, Massachusetts, and Rhode Island. We are seeing a similar dynamic in the Pacific Northwest with California and Oregon having both passed packaging EPR laws, although proposed legislation in Washington failed during its most recent legislative session.

Oregon

⁵ MDEP, EPR Program for Packaging, *Exemption Requests*, at <https://www.maine.gov/dep/ftp/temp/epr/exemption%20requests/>.

The Oregon Department of Environmental Quality (“DEQ”) adopted the first of two rulemakings necessary to implement and enforce Oregon’s packaging EPR law on November 17, 2023.⁶ DEQ issued the notice of proposed rulemaking for the second rulemaking on June 10, 2024.⁷ The comment period remains open and was recently extended to July 26, 2024. Of note, the proposed rule requires producers to “pre-register with and submit data on covered products sold in or into the state in 2024 to a producer responsibility organization no later than March 31, 2025.” There were two public hearings on this proposed second rulemaking on June 27, 2024. As a frame of reference, the notice of proposed rulemaking for the first rulemaking was issued May 25, 2023, and final rules were adopted on November 17, 2023, *i.e.*, the process took roughly 6 months. Based on this timeline, the second rulemaking may conclude in December 2024, which would line up with other deadlines in the statute and rulemakings.

CAA submitted a PRO plan for public comment on March 31, 2024. DEQ received 18 comments. The comment period closed May 31, 2024. The Oregon Recycling System Advisory Council held meetings on June 11, 2024, and June 26, 2024, during which findings and recommendations were presented and amendments were agreed upon. CAA has advised that they will submit a second plan in September 2024.

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Circular Action Alliance

CAA held a producer working group session on June 11, 2024. It was the first such session open only to producers that have registered with CAA. CAA indicated during the session that they intend to require registrants to enter into written “participant agreements,” and that they will be hosting a producer working group session on July 16, 2024, to provide more detail regarding these agreements. CAA also indicated that they will release a guidebook for producer reporting in the third quarter of 2024.

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Issue In Focus: The California Trending On-Ramp Exemption

California SB 1231, introduced February 15, 2024, would amend California’s packaging EPR law to address a perceived oversight in the law that would prevent producers from qualifying for the “trending on-ramp” exemption during the first few years of the program. The bill was referred to the Committee on Natural Resources on June 3, 2024, where it resides today.

Existing Law

CAL. PUB. RES. CODE § 42061(a)(3) requires CalRecycle to complete a material characterization study to include information used to evaluate if materials meet the 60/60 percent criteria to be

⁶ OR. ADMIN. R. 340-090-0005/0810, *at*

<https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=1487>.

⁷ Oregon DEQ, Notice of Proposed Rulemaking, Plastic Pollution and Recycling Modernization Act, Rulemaking 2 (June 10, 2024), *at*

<https://ormswd2.synergydcs.com/HPRMWebDrawer/Record/6734994/File/document>.

labeled or marketed as recyclable as set forth in § 4355.51(d)(2). CalRecycle released “preliminary findings” of its study on December 28, 2023, for public comment. *Id.* § 42355.51(d)(1)(B) (requiring CalRecycle to publish a material characterization study on or before January 1, 2024); *id.* § 42061(a)(3)(B) (requiring CalRecycle to report on “the status of material types relative to the [recyclability] requirements” by January 1, 2024). CalRecycle will be releasing its first material characterization study by July 1, 2025. *Id.* § 42061(a)(3). CalRecycle is required to update the study every five years, starting in 2027. *Id.* § 42355.51(d)(1)(B)(ii). “When updating” this study, CalRecycle may identify materials that are “trending toward” meeting the 60/60 percent criteria for recyclability such that they will be considered recyclable even though they do not yet meet the applicable criteria. *Id.* § 42061(a)(3)(B). This exemption has been referred to as the “trending on-ramp.”

Proposed Amendment

California SB 1231 was introduced to address the availability of the trending on-ramp in SB 54. As noted above, SB 54 allows CalRecycle to identify materials that are “trending toward” meeting the 60/60 percent criteria “[w]hen updating” the material characterization study. CAL. PUB. RES. CODE § 42601(a)(3)(B). SB 1231 would remove the “[w]hen updating” language such that the process would allow producers to seek exemptions prior to 2027, which is when the next material characterization study update is due. The Senate Floor Analysis suggests that, absent this change, certain producers would need to remove the “chasing arrow” symbol only to replace it if CalRecycle determined during the subsequent material characterization study that the packaging met the trending on-ramp exemption.

There are two additional proposed amendments in California SB 1231 that are worth noting. First, the bill would specify a process for producers to petition CalRecycle to identify those material types and forms that should be considered for trending on-ramp exemption, subject to CalRecycle review and approval. This revision would provide producers with the opportunity (and the burden) of demonstrating the need for the exemption, as opposed to placing the initial burden on CalRecycle. This process is also similar to how Oregon and Maine have approached covered material exemptions by soliciting requests for exemptions from producers. Second, California SB 1231 would add an additional six months to the existing 18-month grace period in CAL. PUB. RES. CODE § 42355.51(b)(2) such that products or packaging manufactured up to 24-months after the materials characterization study or subsequent updates are released would not be subject to the sales/distribution prohibition.

Proposed Regulations

CalRecycle proposed several regulations to implement the trending on-ramp. The proposed regulatory text was released December 29, 2023, *i.e.*, prior to the introduction of California SB 1231 on February 15, 2024. These regulations include, but are not limited to:

(a) Pursuant to section 42061(a)(3)(B) of the Public Resources Code, the Department **may** identify covered material categories exempted from section 42355.51(d)(2) of the Public Resources Code for the purposes of this Act, provided they comply with all other restrictions on being considered recyclable set forth in section 42355.51 of the Public Resources Code.

(b) To be considered recyclable under this section, a covered material category must first be preliminarily identified by the Department **when the Department publishes the**

update mandated by section 42355.51(d)(1)(B)(ii) of the Public Resources Code to the material characterization study initially published pursuant to section 42355.51(d)(1)(B)(i) of the Public Resources Code. The Department may preliminarily identify a covered material category only if it preliminarily concludes, in its sole discretion, that the following conditions are met:

(3) Such an increase [in the collection and sorting of materials] is more likely than not to result in the covered material category satisfying the requirements of section 42355.51(d)(2) of the Public Resources Code **before the next mandatory update to the material characterization study**.⁸

There were a number of comments submitted in response to the trending on-ramp provisions in CalRecycle's proposed regulations. AMERIPEN requested that CalRecycle replace the "may" with "shall" in subsection (a) in an effort to ensure that CalRecycle's use of the trending on-ramp is mandatory, as opposed to discretionary. There may, however, be some tension between this request and the language of the statute, which provides "the department may identify materials that are trending toward meeting the requirements." CAL PUB. RES. CODE § 42061(a)(3)(B) (emphasis added). AMERIPEN also submitted comments requesting that CalRecycle remove the time limit in subsection (b) (*i.e.*, the increase would likely occur "before the next mandatory update") to allow for more lead time for materials to achieve full recyclability. There may also be some tension between this request and the statutory language that indicates CalRecycle may identify such materials "[w]hen updating" information in the material characterization study every five years. *Id.* § 42061(a)(3)(B) → § 42355.51(d)(1)(B)(ii). The Recycling Partnership submitted similar comments on the timing of the trending on-ramp, noting that "the statue [sic] language is confusing" but that the bill "negotiators expected the onramp to be an option at any time, especially with the initial recycling designations being in January of this year, 2024." As noted above, California SB 1231 would address the concerns raised by both AMERIPEN and The Recycling Partnership with respect to when the trending off-ramp would first be available through a legislative amendment to remove the "[w]hen updating" language.

Key Takeaways

The trending on-ramp exemption may be a critical component of producers' ability to comply with California's aggressive packaging EPR law, particularly in view of the preliminary findings of CalRecycle's material characterization study, which were met with a significant amount of criticism over its low scores for recyclability. The iconic Campbell's soup can, for example, was deemed to be not recyclable.⁹ The efforts to amend California SB 54 through California SB 1231 as well as to revise CalRecycle's proposed regulations are seeking to strengthen this exemption.

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⁸ See *supra* note 1 (emphasis added).

⁹ CalRecycle, *SB 343 Material Characterization Study Preliminary Findings*, at <https://www2.calrecycle.ca.gov/Publications/Details/1729>, p. 17; see also CalRecycle, *SB 343 Preliminary Findings Report Informational Session*, at <https://www2.calrecycle.ca.gov/Docs/Web/127287> (Slide 34).

King & Spalding + Extended Producer Responsibility

King & Spalding has a cutting edge extended producer responsibility practice. We have been at the forefront of these laws long before Maine became the first state to pass a comprehensive EPR packaging law in 2021. Our EPR practice extends beyond paper and plastics to batteries, electronics recycling, and other product stewardship, and our clients include producers as well as service providers. The firm also has one of the deepest environmental teams among the AmLaw top tier firms, providing full-service capability and a global reach. This year, Chambers USA, one of the most preeminent legal ranking organizations, named King & Spalding as the Environmental Law Firm of the Year.

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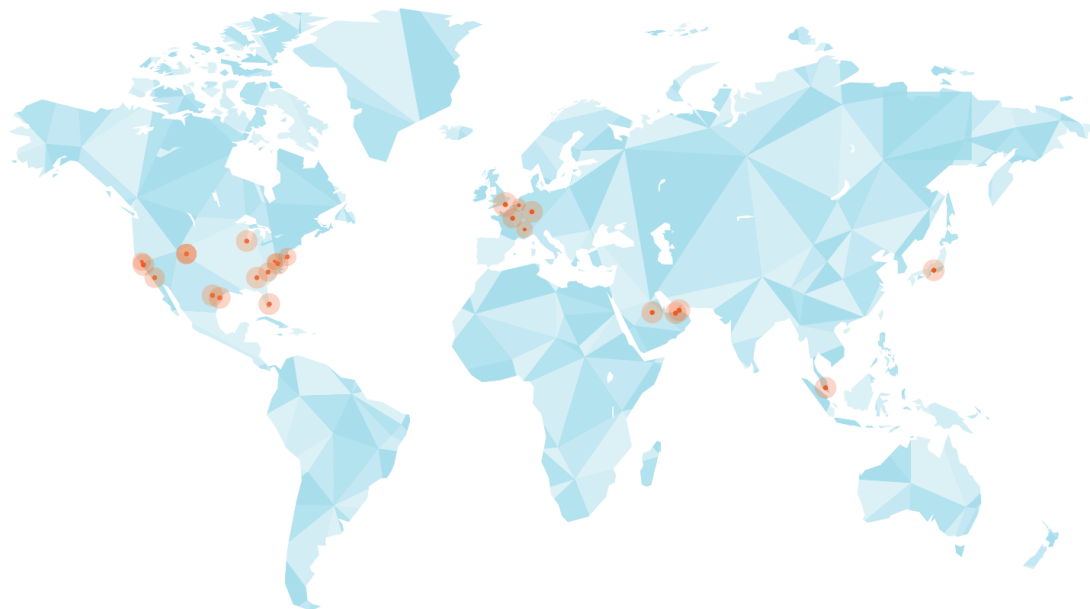
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