

October 31, 2023

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Department of Resources and Recycling
1001 I Street
Sacramento, California 95814

Subject: Regulation Process for Packaging Materials That Have Unique Challenges to Comply with the Plastic Pollution Prevention and Packaging Producer Responsibility Act

Dear Director Wagoner and Members of the Senate Bill 54 Implementation Team:

The undersigned organizations, representing a diverse set of California packaging experts and businesses, are writing to ask CalRecycle to consider and adopt regulations necessary for covered materials that either cannot comply or otherwise present unique challenges in complying with requirements laid out in the Plastic Pollution Prevention and Packaging Producer Responsibility Act (Senate Bill 54, Allen, Chapter 75, 2022 Statutes). In Section 42060(a)(3) and (4) of Article 3 of SB 54, CalRecycle is granted authority to establish a process to identify covered materials that will have difficulty complying with SB 54. Attached to this letter is draft regulatory language that would help identify these products as well as grant exemptions and phase-in regulations for certain materials and packaging.

The companies we represent are committed to and have a shared goal with the State of California and CalRecycle to make packaging both locally and globally recyclable, reusable, or compostable. Furthermore, packaging optimized to protect raw or otherwise perishable or sensitive products is designed and selected first and foremost with the consumer's health and safety in mind, ensuring the safety and freshness of food throughout its entire use cycle from filling, packing, and distribution to the place where the contents in the packaging will be consumed by Californians. While few consumers give thought to the trust they place in the consistent and reliably fresh nature of packaged perishable foods they purchase, food companies and their packaging suppliers spend significant time and resources considering how to affordably protect and preserve those products sold to consumers. These decisions have important consequences, preventing food waste by prolonging the shelf life of perishable items while simultaneously promoting efficiency and resiliency in both energy use and transportation costs.¹

Packaging that reduces durability and performance also tends to limit the shelf life of quality-sensitive and perishable products, increasing spoilage, damage, and food waste. Furthermore, law and regulation that unintentionally compromise packaging designed to preserve and maintain food's freshness and viability are not only likely to amplify food

¹Erik Pauer, Manfred Tacker, Viktoria Gabriel, Victoria Krauter. *Sustainability of flexible multilayer packaging: Environmental impacts and recyclability of packaging for bacon in block*. Cleaner Environmental Systems, Volume 1, 2020, 100001, ISSN 2666-7894.
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waste, but are also likely to simultaneously increase food insecurity, which is experienced by 10.2% of American households, impacting economically disadvantaged urban and rural populations more than suburban communities.²

We believe the attached draft regulations will allow adequate time for industry to develop optimal packaging designs that maintain food preservation qualities at a level currently achieved while fulfilling the policy objectives of SB 54. We hope CalRecycle will find they are fair and even-handed, and we encourage you to consider them in light of the U.S. Food and Drug Administration's latest Food Code, a model for safeguarding public health and ensuring food is unadulterated and honestly presented when offered to consumers. This model, along with other industry and government standards and practices, helps explain how and why food packaging is ultimately designed and selected.

Our organizations look forward to the continued open dialogue with the Department while collectively balancing between the myriad of needs for packaging, recycling, and sound solutions to grow a more sustainable future, an effective circular economy, and systems that achieve positive environmental outcomes for everyone, which in the end, will ultimately assist in the success of SB 54 programs or programs related to SB 54. We remain committed to supporting progressive, proactive, and evidence-based strategies for a sustainable packaging program.

As always, we thank CalRecycle for this opportunity to provide written comments and draft regulatory concepts, as well as appreciate the SB 54 Implementation Team's time and assistance during the rulemaking process.

Sincerely,

American Chemistry Council
AMERIPEN – American Institute for Packaging and the Environment
California Poultry Federation
Consumer Brands Association
Dairy Institute of California
Flexible Packaging Association
International Dairy Foods Association
North American Meat Institute
Southwest Meat Association

² <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-security-and-nutrition-assistance/>.

SB 54 Packaging Exemption Authority

Statutory Authority: SB 54, Article 3, Sect. 42060(a)(3) and (4), stating:

(a) By January 1, 2025, the department shall adopt regulations necessary to implement and enforce this chapter and to ensure that the requirements of this chapter and in particular the requirements established in Section 42050 and the policy goal established in Section 41780.01 as it relates to covered material are met. The regulations shall include, but not be limited to, all of the following: ...

(3) (A) The department shall establish a process to identify covered material that, while determined to be single use for purposes of this chapter, **presents unique challenges in complying with this chapter**. The department may exempt covered material identified pursuant to this subparagraph from this chapter. (B) For any covered material identified as presenting unique challenges and exempted from this chapter under subparagraph (A), the department may at any point develop a plan to phase the covered material into the requirements of this chapter.

(4) The department shall **establish a process to identify covered material that cannot comply with this chapter for health and safety reasons, or because it is unsafe to recycle**. The department may exempt that covered material from this chapter.

[Emphasis added.]

Packaging Exemption Request Procedure

(a) The department may determine certain types, formats, and/or components of covered material are exempt from the requirements of the Act pursuant to Section 42060(a)(4), upon written application by a Producer which establishes, to the Department's satisfaction, that such packaging type, application, and/or packaging component:

(1) presents unique challenges for a Producer in complying with the Act,

(2) cannot comply with the Act

(A) for reasons associated with human health and safety, or

(B) because it is unsafe to recycle.

(b) In determining whether covered material is exempt pursuant to subsection (a), the department may consider, but is not limited in so doing, whether such covered material is:

(1) incapable of being used by a producer or made by a manufacturer consistent with any requirement of this Act while also remaining in compliance with applicable rules and regulations adopted by the United States Food and Drug Administration, or any other State or federal law, rule, or regulation concerning the quality, purity, and/or safety of products used by or contained within the relevant packaging type or application;

(2) designed to and used as a food preservation agent. For purposes of this paragraph, covered material that is a "food preservation agent" includes material which a producer can establish in writing to the department's reasonable satisfaction, prevents or otherwise significantly delays spoilage or damage of a raw or otherwise perishable food or beverage between the time it is manufactured by a manufacturer and when it is sold to a consumer which, if not used, would result in significant (A) food waste, (B) risk of

harm to the health and safety of consumers, or (C) increases in the risk of food insecurity to economically disadvantaged people groups;

(3) designed for and actually used by a food processing plant or food establishment for the purpose of safeguarding public health and safety by ensuring food and beverages intended for human consumption are adequately preserved, safe for consumption, and/or unadulterated when conveyed to a consumer. For purposes of this paragraph, “food processing plant” means a commercial operation that manufactures, packages, labels, or stores for human consumption, and provides food for sale or distribution to other business entities such as other food processing plants or food establishment. For purposes of this paragraph, “food establishment” is an operation that (A) stores, prepares, packages, serves, vends foods directly to a consumer, or otherwise provides food for human consumption, and (B) is conducted in a mobile, stationary, temporary, or permanent facility or location, where consumption is on or off the premises and regardless of whether there is a charge for the food or beverage. Covered materials are not exempt under this paragraph if and to the extent they include wraps or carry-out containers used to protect food during service or delivery to a consumer, by a food establishment, upon consumer request;

(4) technologically incapable of being manufactured safely, consistent with the requirements of the Act;

(5) incapable of being manufactured using postconsumer recycled content during a distinct period as determined by the department due to the unavailability of postconsumer recycled content or a substantial disruption in the supply of recycled material;

(6) designed and used to contain fish and fishery products as those terms are defined and regulated by the “Federal Food, Drug, and Cosmetic Act,” 21 U.S.C. s.201 et seq., including Title 21, Part 123 Fish and Fishery Products;

(7) consistent with the current state of technological advancements associated with identified packaging material and its use for the containment, protection, handling, delivery, or presentation of one or more categories or types of goods identified within the Producer’s written application for exemption, or

(8) is determined by the department for any other reason to:

(A) present unique challenges justifying an exemption from the requirements of the Act,

(B) be unsafe to recycle, or

(C) jeopardize the health and safety of humans, if required to comply with the Act.

(d) In order to qualify for an exemption pursuant to Section (a), a Producer must submit to the department documentation from a federal or State agency or certified third-party expert, as appropriate, demonstrating the basis for the requested exemption, and pay a \$1,000 exemption request fee. The department may modify the amount of the exemption fee as necessary to reflect the department’s costs to administer, monitor, and review exemption requests submitted pursuant to this paragraph.

(e) The department may grant an exemption from pursuant to Section (a) for a period of not less than two years, as determined by the department. The department shall publish any determination to grant an exemption on its Internet website, along with a list of packaging types and applications that it has determined are exempt. The department shall develop a standardized form and procedure for Producers to apply for an exemption pursuant to Section (a).