

Testimony in OPPOSITION  
to  
WA HB2049  
in  
House Environment and Energy  
on  
January 9, 2024

The Flexible Packaging Association (FPA) is submitting testimony in opposition to HB2049, which purports to establish an extended producer responsibility (EPR) program for packaging and paper.

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 \$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 and increasing the recycling of solid waste from packaging. We do not believe that the bill being heard today, as written, will accomplish these goals. 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 this is not considered recycling, which it may not be under the current bill, and if there are no end markets for the products, these efforts will be stranded, and flexible packaging will never realize circularity.

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 (TRP); the Materials Recovery for the Future (MRFF) project; the Hefty<sup>®</sup> EnergyBag<sup>®</sup> 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 a 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>). The dialogue looked at the

problems and opportunities for EPR to address the needs of the flexible packaging industry to reach full circularity. It is with this background that FPA provides this testimony to improve the WA EPR bill so that any EPR program in the state 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.

As currently drafted, the definition of a producer is not clear in HB2049. Upon first glance, it appears to accurately define the producer as the user of the packaging, the brand owner or licensee of the product that uses the packaging, which is correct. However, in other places in the bill, it appears to call out the producer of the packaging instead. For example, "De minimis producer" is defined as a producer that annually sells, offers for sale, distributes, or imports into Washington state less than one ton of covered products. Consistent with the definition of producer, this should read "annually sells, offers for sale, distributes, or imports into Washington state less than one ton of **items**." Similarly, under Section 103(3)(a)(i) each producer, through a Product Stewardship Organization (PRO), is supposed to register with the Department with a list of all their member producers and their brands of covered products. Here, again, covered products should be items. As this happens in numerous sections, the bill's language needs to be edited for consistency and amended in this regard.

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 itself, can 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/CPG packaging producers sell packaging to, 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 Washington 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.

In addition, FPA believes the dates for implementation do not make sense. Money, a lot of money, including \$5 million each year for 3 years, starts flowing to the state as early as May

2025, but the plan and program would not start till January 1, 2029, at the earliest. The \$5 million a year, in addition to registration and regulatory reimbursement to the Department, is not even for implementation of the program and instead would go to the Department for unspecified “financial assistance” to various entities for reuse programs. And, the source reduction plan dates back to January 1, 2013? The timelines and dates, particularly with a considerable amount of money tied to them going to the Department and not to the funding of any actual EPR program, are problematic at best.

FPA is also concerned with the broad reimbursement plan contemplated by the bill, with the PRO being responsible for recycling wherever “garbage” is currently collected curbside. In addition, the PRO is responsible for all locations, not just residential, but any location where government entities provide and manage recycling collection, including drop-off centers. The PRO is obligated to reimburse these services potentially at any price for all operations? The PRO should be able to freely contract for these services based on a needs assessment and the program plan—and not be obligated to pay for the status quo without regard for need or cost.

Finally, not only are there no antitrust protections for the supply chain implementing this new system, including instituting fees on packaging, but there is actually a poison pill in the bill that says the antitrust protection, even limited, will not be given. Washington state cannot be less stringent than the federal antitrust regulations and must comport with the “State Action Doctrine” in order to give the PRO and producers the limited antitrust exemption needed to implement an EPR scheme, but they certainly can and should afford the PRO and the producers limited immunity for the actions that must be taken to implement the funding of the program, as these type of actions, done collectively among competitors, are normally considered antitrust violations per se. There is precedence for such as Washington state has conveyed this limited exemption in other EPR programs in the state.

For these reasons, FPA opposes the current HB2049 but stands ready to assist in amending the bill so that any Washington state scheme comports with the PSI/FPA elements and supports a meaningful EPR program for packaging, which would provide the necessary investment in new infrastructure and markets for all packaging, including flexible packaging. 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](mailto:akeane@flexpack.org).