

Testimony in OPPOSITION  
to  
H878, S517, and S610  
in  
Massachusetts Joint Committee on Environment, Natural Resources, and Agriculture  
on  
June 22, 2021

The Flexible Packaging Association (FPA) is submitting testimony in opposition to H878, S517, and S610 (herein referred to as MA EPR Bills), which all purport to establish extended producer responsibility (EPR) programs 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 \$34.8 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 packaging. We do not believe that the MA EPR Bills 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 would not be under the MA EPR Bills and 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® 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 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>). Massachusetts 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. It is with this background that FPA provides this testimony to improve the MA EPR Bills 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 producer is not clear in the MA EPR Bills. It appears to point to the producer (converter) of the packaging itself and not the brand owner who uses the packaging for specific products. The PSI/FPA principles suggest the following 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 itself 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 Massachusetts, packaging producers have no way of knowing whether the final product (that uses the packaging) will be sold in or out of the state.

FPA is also concerned that the MA EPR Bills give far too broad and prescriptive authority to the Department to dictate much of what should be the Producer Responsibility Organization (PRO)'s responsibility. This includes producer fees to the PRO, including modulation of those fees and not only what costs are to be covered through service providers, but how much those service providers will be paid. Further, the Department will dictate what is and isn't recyclable, presumably based on current infrastructure and the Department has to approve any investment in new infrastructure. FPA questions why a PRO is needed if the Department is going to make all the decisions. If the PRO is to be responsible for the program, it must have the authority to determine what the costs of the program will be based on goals established in the plan and then set its own fees to members and negotiate freely for service providers to accomplish the goals. It appears that the money collected on the PRO's products under the MA EPR Bills will merely go towards the current infrastructure and not to the advanced infrastructure needed to take all packaging products, and with the Department dictating all the terms, there is very little ability for the wholesale change needed to the current system, let alone building the system of the future.

In addition, the dates for implementation and plan amendments/resubmissions are far too aggressive, particularly for potentially one of the first-ever of its kind EPR program in the U.S. FPA is also concerned about an overly broad toxicity provision in the MA EPR Bills, that does not appear to use any risk assessment when determining whether or not a package would be deemed a health concern and/or non-recyclable, when there may be zero correlation between the listed chemicals in packaging and actual potential harm. Finally, the antitrust protections for the supply chain implementing this new system, including fees on packaging, are not sufficient. Massachusetts cannot be less stringent than the federal antitrust regulations and must comport to the "State Action Doctrine" in order to give the PRO and producers the limited antitrust exemption needed to implement an EPR scheme.

For these reasons, FPA opposes the current MA EPR Bills but stands ready to assist in amending the bills so that any Massachusetts 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).