

All Wrapped Up

Extended Producer Responsibility for Packaging



August 2024 State-By-State Updates

California

- The California Department of Resources Recycling and Recovery (“CalRecycle”) advised the SB54 Advisory Board on August 16, 2024, that it had completed its review of the 2500+ comments received on the proposed regulation text, and that it will provide another update on the status of the rulemaking at the next SB54 Advisory Board meeting to be held in September. CalRecycle must release any substantial changes for another round of review and public comment pursuant to CAL. GOV’T CODE § 11346.8(c). Final regulations must be adopted by January 1, 2025, which is the statutory deadline set forth in CAL. PUB. RES. CODE § 42060(a).¹
- The SB54 Advisory Board continued its discussion of “barriers and solutions to a circular economy” per the directive in CAL. PUB. RES. CODE § 42070(e)(1), including with respect to “recyclability/recyclable covered materials” and “costs covered by producers.”
 - With respect to “recyclability/recyclable covered materials,” the Board identified the following barriers: poor packaging design and consumer confusion leading to contamination, downcycling, or disposal. Potential solutions to overcome these barriers included streamlined packaging design and labeling, which would facilitate consistent education and outreach; and more clarity in how SB343 (California’s environmental marketing law) will be enforced in connection with noncompliant labeling claims. Each potential “solution” is notable. First, “streamlined” packaging design may signal interest in a regime that requires some level of uniformity in packaging in a manner that may limit a producer’s ability to distinguish its products from its competitors. Second, there has been some discussion regarding CalRecycle’s lack of authority to enforce SB343.
 - With respect to “costs covered by producers,” the Board explored how to best invest in a circular economy in furtherance of EPR. Potential solutions to overcome barriers included upstream investment strategies in packaging design that would reduce downstream impacts. The Board generally discussed the potential investments the PRO could make to achieve the law’s goals, including in packaging design, collection of

¹ 10-Z Cal. Regulatory Notice Reg. 226 (Mar. 8, 2024) (proposed regulation text initially released Dec. 28, 2023, <https://www2.calrecycle.ca.gov/Docs/Web/127317>).

covered materials, consumer outreach and education, material recovery facility upgrades, and subsidies to make post-consumer recycled content more competitive.

This month's discussion of "barriers and solutions to a circular economy" followed last month's discussion of "compostability/compostable covered materials" and "leakage of plastic into the environment." The final topic in this series that remains to be addressed is "reuse, refill, and other source reduction efforts," which is on the agenda for the SB54 Advisory Board's next meeting in September.

Colorado

- The Colorado Producer Responsibility Program for Statewide Recycling Advisory Board held a meeting on August 14, 2024. The Board's discussion focused primarily on a proposed approach for service provider reimbursement, including draft collection scenarios, data and reporting requirements and service agreement considerations; and an introduction to the service provider collaboration approach, including leveraging existing education and outreach programs, measurement of contamination, and the proposed funding approaches. With respect to the former, Circular Action Alliance ("CAA") (the selected PRO in Colorado, California, and Oregon), proposed two methodologies to reimburse service providers, including a "market clearing" model based on a regional rate, and an "actual costs" model based on actual data submissions.
- The Board also held a technical work session on August 29, 2024. The Board's discussion during this session likewise focused primarily on reimbursements and producer dues. CAA provided more detail regarding its reimbursement methodologies. CAA indicated that it anticipates issuing a request for information to service providers to seek information relating to the existing recycling infrastructure, and that it will issue a request for proposals after the PRO plan is approved. One challenge that CAA identified is how to manage recycling collection services in "open markets," *i.e.*, those areas of the state in which residents and businesses have multiple options for collection services.
- Circular Action Alliance Colorado held five "Colorado Consultation Sessions" in August to solicit input from stakeholders in connection with the PRO plan being developed. The sessions were entitled "Education & Outreach Program," "Producer Dues (Fees)," "Compostables," "Reimbursement Session 1 – Collectors," and "Reimbursement 2 – Processors." These five sessions are part of a series of ten that started in July and will end in September.

Illinois (needs assessment only)

- No updates. The Illinois Statewide Recycling Needs Assessment Advisory Council did not meet in August. The next meeting is scheduled for September. The needs assessment consultant selection process is at the top of the agenda.

Maine

- The public comment period for the revised draft rulemaking by the Maine Department of Environmental Protection ("MDEP") closed August 26, 2024. The public comment period for the packaging material exemption requests received by MDEP closed August 1, 2024.

Maryland (needs assessment only)

- No updates. The Maryland Producer Responsibility Advisory Council did not meet in August other than to tour the Montgomery County Materials Recovery Facility, and there otherwise were no updates regarding the ongoing needs assessment, which will be submitted by year end.

Minnesota

- No updates. The Minnesota Pollution Control Agency had not yet established a website for its new EPR law by the end of August.

Oregon

- The Oregon Department of Environmental Quality (“DEQ”) continues to review the public comments received on its second proposed rulemaking, which addresses commingled recycling processing facilities, covered products and exemptions, PRO and producer obligations, standards for life cycle evaluations, local government obligations, and enforcement.² Oregon DEQ will be submitting a written response to these comments in a report to be issued to the Oregon Environmental Quality Commission (“EQC”). Oregon DEQ anticipates presenting the rulemaking for approval at the November 21-22, 2024 Oregon EQC meeting.
- The Oregon Recycling System Advisory Council held a meeting on August 13, 2024, during which Oregon DEQ prepared the Council for its review of the second draft of CAA’s PRO plan. OR. REV. STAT. § 459A.878(2) requires Oregon DEQ to solicit feedback from the Oregon Recycling Advisory Council prior to approving a PRO plan. Oregon DEQ rejected the first draft on July 29, 2024, following earlier consultation with the Council.³ Oregon DEQ outlined the proposed review process and timeline and provided guidance specific to eco-modulation and responsible end markets. The second PRO plan submittal is due in September, and, notably, will include a list of producers that have registered with CAA for Oregon.
- The Product Stewardship Institute on behalf of Oregon DEQ, and in partnership with CAA, hosted a webinar on August 6, 2024, entitled “Preparing Producers for Oregon Packaging EPR: Consumer Goods and B2B Packaging.” This is the third out of a four part webinar series focused on Oregon’s EPR law.

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Circular Action Alliance

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

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

³ Letter from N. Portley, Oregon DEQ, to Charles Schwarze, CAA (July 29, 2024),

<https://www.oregon.gov/deq/recycling/Documents/rmaCAAresp0724.pdf>.

- Jeff Fielkow was named as CAA’s first CEO, effective August 20, 2024. Fielkow previously served as president and CEO of ID Images LLC, a manufacturer of converted label products. Prior to that role, he held multiple executive positions within Tetra Pak, Inc., which is one of the world’s largest food-processing and packaging companies.⁴
- CAA continued to encourage producers to sign up with CAA to comply with EPR registration requirements in California, Colorado, and Oregon, noting that Colorado’s registration requirement is October 1, 2024.
- CAA hosted a producer working group session on August 22, 2024. Agenda items included the Participant Producer Agreement (“PPA”) that they will be requiring producers to execute; a preview of CAA’s data reporting portal; updated CAA timelines for California, Colorado, and Oregon (including data reporting deadlines); and a discussion on how producer fees will be determined, including eco-modulation requirements by each state.
- CAA released a consultation draft of the PPA on August 30, 2024, and invited registered producers to provide feedback via a survey due in September.

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Issue In Focus: Enforcement

Experience with EPR laws in other jurisdictions has clearly established that free-riding is “[o]ne of the key issues that has plagued EPR programs of all types and in all sectors.”⁵ The problem is particularly pronounced in “programs that have thousands of producers/multiple players (i.e., general packaging) compared to those in more concentrated markets (single product packaging such as deposit return for beverage bottles).”⁶ Free-riders create an “uneven playing field for producers[,]” which receive the “benefits of the system without paying.”⁷ EPR systems accordingly must include “enforcement mechanisms to bring [free-riders] into compliance” as well as “the resources and political will to use them.”⁸

All five U.S. states with packaging EPR have powerful sales and distribution prohibitions, or “hammers,” that come down if producers fail to meet certain criteria:

- California has two hammers: (1) a producer shall not “sell, offer for sale, import, or distribute covered materials in the state unless the producer is approved to participate in the plan of a PRO” that is approved by CalRecycle by January 1, 2027 (or earlier if PRO

⁴ CAA, *Jeff Fielkow Named CEO of Circular Action Alliance* (Aug. 13, 2024), <https://circularactionalliance.org/news-feed/fielkow-new-ceo>.

⁵ Marbek Resource Consultants Ltd, *Analysis of the Free-Rider Issue in Extended Producer Responsibility Programs* (2007), p. i (“Marbek Report”); see also Allison Boutillier, Environmental Law Centre, *Extended Producer Responsibility: Designing the Regulatory Framework* (May 2020), p. 17 (concluding that “[o]ne of the big problems facing EPR systems is the existence of free-riders, meaning producers who avoid meeting their obligations under an EPR scheme”) (“Boutillier Report”).

⁶ Marbek Report, p. 14 (citing Organisation for Economic Co-operation and Development, *EPR: A Guidance Manual for Governments* (2001)).

⁷ Boutillier Report, p. 18.

⁸ *Id.* at 20.

plan is approved earlier), CAL. PUB. RES. CODE § 42051(b)(1); and (2) a producer shall not “offer for sale, sell, distribute, or import into the state any product or packaging for which a deceptive or misleading claim about the recyclability of the product or packaging is made” as of January 1, 2027, CAL. PUB. RES. CODE § 42355.51(a).⁹

- In Colorado, a producer shall not “sell or distribute any products that use covered materials in the state unless the producer is participating in the program” approved by the Colorado Department of Public Health and the Environment (“CDPHE”), by July 1, 2025. COLO. REV. STAT. § 25-17-708(1).
- In Maine, a producer may not “sell, offer for sale or distribute for sale in or into the State a product contained, protected, delivered, presented or distributed in or using packaging material for which the producer has not complied with all applicable requirements” of Maine’s EPR law. ME. REV. STAT. ANN. tit. 38, § 2146(4)(A).
- Minnesota has two “hammers”: (1) a producer may not “introduce covered materials” into the state after January 1, 2029, “unless the producer enters into a written agreement with a [PRO] to operate under an approved stewardship plan,” MINN. STAT. § 115A.1448(1)(b); and (2) a producer may not “introduce covered materials” into the state after January 1, 2032, “unless covered services are provided for the covered materials” and they are reusable, included on the recyclables or compostables list, or included in an alternative collection system approved as part of a stewardship plan, MINN. STAT. § 115A.1448(1)(c).
- In Oregon, a producer may not sell, offer to sell, or distribute a covered product in or into the state, if the producer fails to join a PRO by July 1, 2025, fails to pay the membership fee, or fails to provide records and information necessary for the PRO to meet the PRO’s obligations under the law. OR. REV. STAT. § 459A.869 & 962.

All five U.S. states with EPR also have significant civil penalty provisions that range from up to \$10,000 per violation, per day; to up to \$50,000 per violation, per day; with one state (Minnesota) imposing penalties of up to \$100,000 per violation, per day, for repeated violations.

None of the five, however, have laws or regulations that prescribe the methodology the PRO, stewardship organization (“SO”) (in the case of Maine), or state environmental agency should employ to identify those producers that fail to register in the first instance, *i.e.*, free-riders. Colorado’s EPR law, for example, requires the PRO’s annual report to list “producers that are not participating in the program,” but there are no rules or guidance that would inform how the PRO should make this determination. COLO. REV. STAT. § 25-17-709(2)(a)(III). Similarly, there are no express provisions for disciplinary actions to be taken against free-riders, including with respect to how sales and distribution prohibitions or civil penalties should apply to producers caught free-riding years after the programs have been in effect. Nor are funds earmarked for enforcement for the PRO, SO, or agencies to identify and pursue these entities. Compounding the situation is that the initial reports from CAA indicate that only a fraction of the universe of producers have registered to date.

Key Takeaway

⁹ With respect to (2), products or packaging that display the iconic chasing arrows symbol (among other indicia of recyclability) will be deemed to be deceptive or misleading unless the product or packaging is deemed recyclable in California. CAL. PUB. RES. CODE § 42355.51(b)(1).

There is a real specter in U.S. packaging EPR that the rule-followers will be held accountable for the free-riders (and on a very large scale) unless and until CAA and the state environmental agencies meaningfully engage on this important issue. These laws hold the PRO and SO accountable for the costs of reimbursing municipalities and service providers for the collection, transportation, and/or recycling of covered materials, without regard to the fact that free riders are not paying their share. The point here is not more aggressive hammer provisions or higher civil penalties – it is how EPR laws will be implemented to achieve fair and equitable enforcement via timely identification of free-riders. To further the discourse, the Sustainable Packaging Coalition will be hosting a panel on “EPR free riders and enforcement in the US” on October 1, 2024, in Chicago, Illinois. The panel will be moderated by Lorax EPI, with panelists from Éco Entreprises Québec (Québec’s PRO), CDPHE, and Oregon DEQ.¹⁰

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¹⁰ For further information, see https://spcadvance.com/series/spc-advance-2024-Agendaf4ae4204fc7ff365122006b2/landing_page.

King & Spalding + Extended Producer Responsibility

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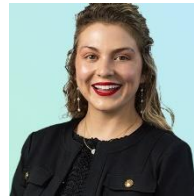
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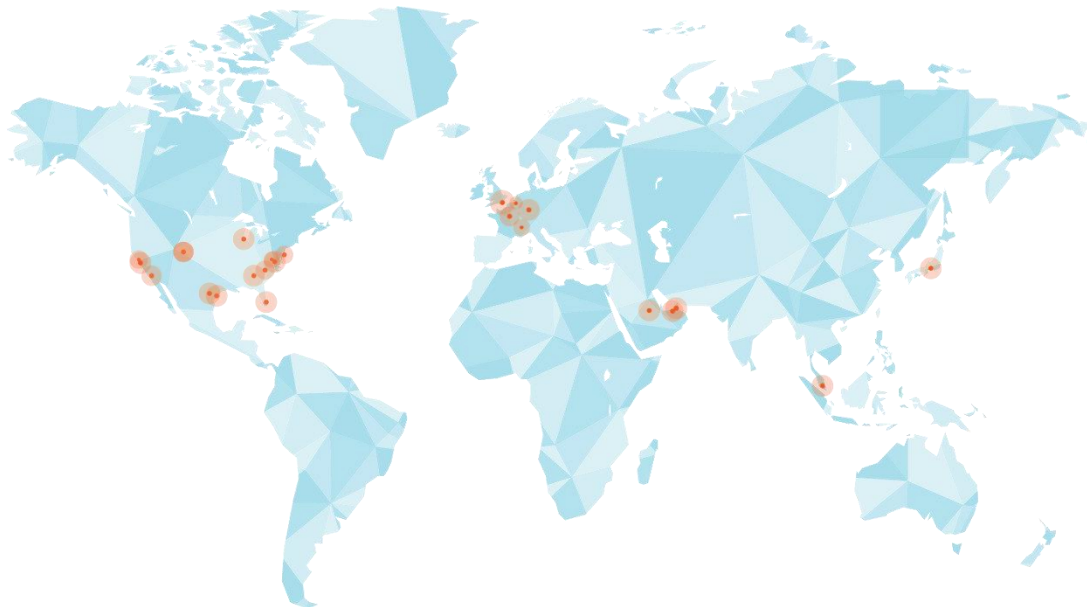
Karl Heisler
Partner
Chicago
+1 312 764 6927
kheisler@kslaw.com



Cynthia Stroman
Partner
Washington D.C./Houston
+1 202 626 2381
cstroman@kslaw.com



Sydney Weiss
Associate
Chicago
+1 312 764 6907
sweiss@kslaw.com



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