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Via electronic submission: [rulecomments.dep@maine.gov](mailto:rulecomments.dep@maine.gov)

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## **RE: Chapter 428: Stewardship Program for Packaging, Reposting Draft**

Thank you for the opportunity to comment on the Maine Department of Environmental Protection's (the department's) Reposting Draft of Chapter 428: Stewardship Program for Packaging (Chapter 428).

Founded in 1933, the Foodservice Packaging Institute (FPI) is the leading authority on foodservice packaging in North America. FPI supports the responsible use of all foodservice packaging, while advocating an open and fair marketplace for all materials. Our core members include raw material and machinery suppliers as well as packaging manufacturers, which represent approximately 90 percent of the industry. Additionally, several distributors and purchasers of foodservice packaging are part of FPI's affiliate membership.

The foodservice packaging industry is committed to reducing the impact of its products on the environment and is dedicated to increasing their recovery. FPI has several special interest groups that bring together the supply chain to develop and promote economically viable and sustainable recovery solutions for foodservice packaging. These special interest groups include the Paper Recovery Alliance, Plastic Recovery Group, Paper Cup Alliance and Foam Recycling Coalition. More information on these groups and their efforts can be found [here](#).

As part of our commitment to increasing the recovery of foodservice packaging, we are supportive of policy approaches that advance this effort through systems such as recycling and composting. With respect to producer responsibility programs, it is our position that programs should be based on the principles of shared responsibility, fairness and system effectiveness and efficiency. With these principles in mind, please find below our main feedback and recommendations with respect to the Reposting Draft of Chapter 428, much of which is consistent with comments provided regarding earlier drafts.

### Definitions

As amended, the "consumer" definition seems to continue to capture commercial consumers. Our recommendation remains that the definition should be adjusted to reflect consumer packaging that is destined for the residential sector as it is our understanding that industrial, commercial and institutional properties often have (and pay for) private contracts for recycling and waste management services. We further note the addition of the following language to the "consumer" definition: "or includes its use in a service it provides" which appears to further expand the definition beyond the residential consumer. It is our recommendation that the consumer definition be amended as follows:

~~“Consumer” means an entity that uses a product in a residential location, including an entity that uses a product to create a new product or includes its use in a service it provides. A consumer does not include an entity that only distributes, delivers, installs, sells a product at retail, or undertakes any combination thereof.~~

We appreciate the amended definition of “compostable packaging materials” to include third-party certifications to ASTM standards. It may also be helpful to add “or any successor standards” to the end of the definition.

Further, we remain concerned with the definition of “manage”. It is our perspective that this amended definition expands the scope of activities that are eligible for reimbursement in a manner that is not consistent with the law. Also, as we previously commented, the terms “manage”, “managed”, and “management” are used throughout Chapter 428 and may not always reflect the drafted definition. Per our previous recommendation, we propose amending the language as follows:

~~“Manage” means to collect, transport, process, or otherwise prepare a packaging stream for recycling, reuse, composting, or disposal; to educate consumers about packaging material; or to pick-up litter. Manage may include educational initiatives to facilitate collection and litter pick-up.~~

Likewise, we believe the definition of “produce” may be problematic. The term is used in various ways throughout Chapter 428 that are not always aligned with the definition. For instance, under the annual Stewardship Organization (SO) reporting, the SO must “produce” a publicly available annual report. It is our perspective that the term “produce” may not be required or that other adjustments to the definition are needed to ensure consistent use and understanding of the term.

FPI also notes the deletion of the “retailer” definition. However, since the term is referenced in Chapter 428 and not defined in law, it may be necessary to keep this definition.

On the definition of “refill” we continue to suggest the inclusion of language that reflects the ability of the packaging to be refilled at home for the same or similar general purpose for which it was conceived (for example, for food storage purposes), as well as that formal systems are not always needed in these instances. This concept should be applied throughout Chapter 428 as it relates to “refill”.

### Program Goals

Our view remains that establishing program goals is a complex task, particularly in the absence of robust data to guide such goals in Maine. As proposed, the program goals are not grounded in baseline data while imposing significant financial penalties for missing future targets (under producer fees). Further, there is no clear process set forth for adjustments, if needed.

Goal setting should recognize that the SO will complete a needs assessment within 18 months of entering into a contract with the department. We submit that the proposed program goals should be tied to baseline data and that goals should be set after the needs assessment is complete. As such, FPI recommends the removal of the specific targets from Chapter 428 and instead detail a process for the SO to establish and adjust the program goals based on the needs assessment outcomes.

Even as amended, the reduction goals represent the most stringent in the country and do not recognize the value of packaging in reducing waste by protecting and safely delivering products to consumers.

Additionally, the amendments reduction targets change the baseline year to the fifth reporting year and do not include a mechanism for producers to report on recent reductions. We propose that an improved approach may be to create a baseline in the first year of reporting and provide an opportunity for

producers to report on and receive credit for reductions achieved in recent years.

We also note that the “base material-specific recycling rate” and “the post-consumer recycled material” goals both assume that each base material can achieve the same recycling rate and use the same proportion of post-consumer recycled content. This expectation is unrealistic due to each base material’s unique properties and the associated availability of recycled content. As previously suggested, this issue can be addressed by establishing a mechanism for the SO to develop appropriate targets.

Another concern we have with program goals is that many of them are beyond the control of producers.

First, it is important to recognize that the introduction of a “recycling access” program goal is not within producer control since municipalities are not required to participate in the program. While the SO’s responsibility is to measure progress towards this (and other goals), we are concerned that it sets unachievable targets for SO program performance reporting, investments and producer payments. We propose that the recycling access targets be developed by the SO rather than set in the rules, consistent with earlier comments concerning program goals. Additionally, we suggest the removal of “participation” performance goals as they are duplicative of “recycling access” and not required by law.

Similarly, on the matter of “collection” program goals, FPI notes that the amendments measure the goal across the state rather than in participating municipalities at ten-year intervals, making the achievement of this goal outside of the SO’s control. It is our perspective that the goal should be measured more frequently to align with the timing of the targets, and only take into account participating municipalities.

Next, with respect to litter program goals, addressing this issue must draw a clear distinction between the item itself and the human behavior and/or system-wide issues that create it. Producers do not control littering, nor do they have control over how much litter is not packaging. Tying the standard to the proportion of all litter that is packaging means that producers do not control either side of the calculation. A standard that moves toward continuous improvement, meaning an overall reduction in the amount of packaging litter, may be more sensible and connected to the program goals. We further suggest an approach that measures litter by weight rather than unit.

### Litter Audits

The current approach to litter audits, which relies on municipal litter collection events, may not yield a truly representative sample, as these events typically focus on known problem areas rather than being randomly selected. Additionally, the term “litter collection event” is not defined, and since municipal participation is voluntary, the resulting audits may not be representative. This is concerning as these audits are tied to the punitive “reduction of litter” incentive fee. To increase fairness, we recommend permitting the SO to design a more balanced and representative audit process across the state.

### Readily Recyclable

FPI has apprehensions with respect to designating packaging material types as “readily recyclable” and the associated “marketability” criteria (all of which need to be met).

The addition of “cost per ton” as a determination of marketability is problematic, as it may not be a reliable indicator of the viability of recycling a particular material. Like all commodities, markets for recyclables can vary significantly based on nationwide and global trends. It is our view that setting a regulatory standard connecting recyclability to cost per ton could limit market flexibility. We recommend removing this criterion.

On the “ratio of weight targeted for recycling to total weight”, the condition that “at least 60% of the weight of a packaging material type, on average, is composed of materials that are routinely separated and

recycled at recycling facilities that accept the packaging material type” requires clarification. This condition lacks information about how percentages will be determined, particularly in cases where a covered material includes multiple materials. It is our suggestion that the rules clearly state that only the base material is subject to meeting this standard.

### Transitional Period

It continues to be our perspective that the timeline for onboarding new packaging items to the readily recyclable list is too long. To promote increased diversion of covered materials and accurate producer fees, the program needs to be able to adjust and reflect recyclability and actual costs in real time as opposed to waiting between two and three years. This is particularly problematic given the significant financial implications for producers and municipalities.

### Defining Cost by Packaging Stream

Reimbursable costs by packaging stream detailed include labor, equipment, structure, and energy costs. We would ask that consideration be given to developing best practices and associated cost reimbursements in lieu of reimbursements for all costs without parameters.

Additionally, we recommend clarification between the structure costs detailed in this section (containers, warehouses, buildings, trailers, and roll-off containers) and the separate funds for investments in infrastructure.

### Producer Reporting

The Stewardship program for packaging requires that “a producer shall annually report to the stewardship organization the total amount, whether by weight or volume, of each type of packaging material sold, offered for sale or distributed for sale in or into the State by the producer in the prior calendar year”. As drafted, we believe that producer reporting goes beyond these requirements, is overly burdensome and does not align with producer reporting for similar programs in other jurisdictions.

As an example, we have heard that the drafted requirement for producers to report by UPC or brick code will be problematic from both a volume and time perspective. In this regard, we recommend producer reporting that reflects the requirements of the law and is in alignment with other jurisdictions to the extent possible.

Further, while we appreciate the intent of the following amended requirement to provide more specificity, we propose that a percentage rather than weight threshold may be more appropriate. Such an approach would account for size and weight variability between various types of packaging.

The total weight of the base material or, in cases where separation and recycling of more than one material is determined to be routine as designated in Appendix A, the sum of the weights of the materials that are routinely separated and recycled, and a short description of the methodology used to determine this measurement number. Any material present that is neither the base material nor another material that is routinely separated and recycled according to Appendix A, and that weighs at least 0.1 gram, should not be included in this weight, only in Section 9(B)(5);

FPI also notes the addition of a requirement to report on a “statewide packaging recycling rate” which is calculated differently than the base material-specific recycling rate and overall recycling rate (under program goals). Most of the program goals are calculated based on recycling in participating municipalities, yet statewide reporting is focused on the total amount recycled across the state. This approach creates a disconnect between the program goals and the reporting requirements. To address this inconsistency, the program should align the program goal and reporting requirements.

## Producer Fees

We remain generally concerned with the punitive and seemingly arbitrary financial penalties proposed as part of the producer fees, including the incentive fees.

The financial penalties related to labeling continue to be problematic. Uniform labeling standards are crucial for facilitating smooth interstate and international trade, and it is important to note that companies often do not create and distribute packaging solely for one jurisdiction. As proposed, producers may be financially penalized for complying with labeling requirements in other states as well as following existing guidance from the Federal Trade Commission's Green Guides (Green Guides) and other industry standards.

As we understand it, to avoid financial penalties, packaging labeled as recyclable or compostable must meet various requirements centered around collection programs in every county, unless it is readily recyclable (as defined). Currently, other truth in labeling laws as well as the Green Guides center on the percentage of the population with access to programs for the collection and diversion of packaging. This draft language is unworkable and a significant departure from these existing approaches and would result in substantial penalties for producers.

While there is an exemption process in place for the "post-consumer recycled material fee" (see additional recommendations below), we suggest that compostable packaging should be broadly exempted from this fee. Rather than being designed to be recycled and made into new products, compostable packaging is intended to decompose in industrial or home composting systems and not as post-consumer feedstock for compostable packaging.

Similar to earlier comments regarding litter, we have concerns about the "reduction of litter fee" for the "top five brands" collected consecutively during litter audits over the previous three years. There is no substantiation of legislative reason for this fee and approach, and we propose that the SO may be best positioned to determine any necessary fees.

Regarding the "weight not recycled" incentive fee we believe it will be challenging to precisely quantify the amount of these materials. These amounts may vary depending on end markets and possibly even from one batch to another. Further we have seen varying interpretations of this requirement. We suggest that this requirement be removed and materials should all be reported under their packaging material type as in other producer responsibility programs.

## Municipal Reimbursement

As per previous comments, we suggest that consideration be given to developing best practices and associated cost reimbursements in lieu of reimbursements for all costs without parameters. This is a preferred approach rather than reimbursing municipalities at the median per ton cost of managing various packaging materials by similar municipalities.

Further, in principle, there should be no cross-subsidization of programs and reimbursements should reflect the management pathway for the packaging material type. We acknowledge the efforts made to adjust reimbursement practices to address this issue and encourage a requirement to document the costs of recovery for all diversion methods, including recycling and composting, to reduce reliance on alternative reimbursement models.

Regarding municipal reimbursement, FPI opposes the approach in paragraph D that would permit reimbursement of disposal costs for materials that are not readily recyclable. It is important to emphasize that references to disposal costs were deliberately removed during the legislative process. Therefore, we believe their inclusion contradicts the intent of the law and should be eliminated.

## Requests for Exemption from the Post-Consumer Recycled Material Incentive Fee

While we appreciate the inclusion of a process for exemptions from the post-consumer recycled material incentive fee, we continue to recommend a more simplified approach as follows:

A producer may apply for an exemption from the post-consumer recycled material incentive fee. The department may grant an exemption, without penalty, if the producer demonstrates, and the department finds, in writing, that:

- (1) The producer cannot achieve the post-consumer recycled material requirements and remain 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;
- (2) It is not technologically feasible for the producer to achieve the post-consumer recycled material requirements;
- (3) The producer cannot comply with the post-consumer recycled material requirements due to inadequate availability of recycled material or a substantial disruption in the supply of recycled material; or
- (4) The producer cannot comply for another reason as determined by the department pursuant to rule, regulation, or guidance.

Thank you for your consideration of FPI's feedback. We would be pleased to discuss these comments and recommendations with you further.

Sincerely,



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