



AmericanCoatings

ASSOCIATIONSM

October 31, 2023

Melanie Loyzim
Commissioner
Maine Department of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

RE: ACA Comments and Recommended Exemptions for Maines's Extended Producer Responsibility Program for Architectural Coatings

Dear Commissioner Loyzim,

The American Coatings Association (ACA) submits the following comments to the Maine Department of Environmental Protection for consideration regarding Maine's Extended Producer Responsibility Program for Packaging. ACA is a voluntary, nonprofit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory, and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services. The ACA represents approximately 96% of the paint and coatings products manufactured in the United States, including architectural, industrial and specialty coatings.

The \$29.5 billion paint and coatings industry manufactures a wide variety of coatings products for consumers, businesses, and manufacturing establishments alike. Except for powder coatings, most paint and coatings products are in liquid form and utilize containers in a range of sizes. The sizes range from small containers of less than a liter or pint to large containers that hold several hundred gallons. These containers are typically either metal, plastic, or a hybrid of metal and plastic. With the increased adoption of packaging laws across the country, ACA members will be required to evaluate all of the packaging used by their products, where their products are shipped and sold, and then, determine which laws apply. Consequently, ACA has a significant interest in assisting our industry in compliance with any regulatory requirements.

ACA recognizes that Maine became the first state to adopt an extended producer responsibility (EPR) laws for plastic packaging in 2021. Subsequently in 2022, additional states adopted similar EPR laws for plastic packaging, namely California, Colorado and Oregon. Although these EPR laws are similar, there are notable differences within each of these states' EPR laws that will be extremely problematic and burdensome for the coatings industry. The coatings industry manufactures products for a nationwide customer base and routinely ships and transports these products across state lines. This requires these companies to comply with both federal and all the individual state laws where these products are being transported into or through. To add to that complexity of tracking shipments and products on a state-by-state basis, the variance in state regulatory schemes can become overly burdensome and prohibitive for commerce.

To promote and streamline compliance within the paint and coatings industry, ACA proposes the following recommendations for Maine to adopt for the Extended Producer Responsibility Program for Packaging.

1. Amend the definition of “Durable Product” proposed in the concept rules to only mean “a product that wears out over an average lifespan of at least 5 years.”

Under Maine’s Packaging Stewardship Law, 38 M.R.S. § 2148 (1)(l)(1), the definition of “packaging material” does not include material that is “[i]ntended to be used for the long-term storage or protection of a durable product that can be expected to be usable for that purpose for a period of at least 5 years.” This definition, which was put forth in the Act, to “Support and Improve Municipal Recycling Programs and Save Taxpayer Money,” aligns with both Colorado’s and California’s EPR laws.¹ The concept rules that were recently put forth by Maine further defines a “durable product” as a “product that wears out over an average lifespan of at least 5 years. A durable product is not depleted through use.”

Both Colorado’s and California’s EPR laws do not include packaging materials that are used to store products for at least 5 years. However, neither state places any further limitations on those products nor limits the definition of durable. Products can be expected to be depleted through use. Although many factors can affect the shelf-life and storage of paint, paints can be stored up to 10 years.² This requires that the packaging for paints also be made to last just as long. Additionally, paints are expected to be used and therefore depleted as it is used. As such, ACA recommends that Maine simply define “durable product” as a “product that wears out over an average lifespan of at least 5 years.”

2. Provide exemptions for products regulated by the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136).

Under Maine’s Packaging Stewardship Law, 38 M.R.S. § 2148 (13)(D), it states that the “department shall review packaging material associated with certain federally regulated products to determine whether that packaging material should be excluded” and that at a minimum “consider whether the packaging material for such products is required by federal law or regulation to meet specific content or construction standards...”

Products regulated by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) should be considered for a possible exemption under Maine’s Packaging Stewardship Law. The federal statute FIFRA governs the registration, distribution, sale, and use of pesticides in the United States, and the U.S. Environmental Protection Agency regulates these products. Certain paint products contain ingredients that require regulation under FIFRA which thereby requires these products to abide by FIFRA. The allowance within the Maine statute allows for the department to consider packaging materials to be excluded from the EPR law if there has been consideration given to whether the products are regulated by a federal statute. Furthermore, other states, including California and Colorado have provided exemptions within their EPR laws for products regulated by FIFRA. In order to streamline compliance, state harmonization should also be considered with regards to

¹ Colorado’s Producer Responsibility Program for Statewide Recycling Act §25-17-703(13)(b)(l) defines “covered materials” as not including “packaging materials intended to be used for the long-term storage or protection of a durable product and that are intended to transport, protect, or store the product for at least five years.” California’s Section 5, under § 42041 of the Public Resources Code, subparagraph (e)(2)(F) states that “covered materials” does not include “packaging used for long-term protection or storage of a product that has a lifespan of not less than five years, as determined by the department.”

² Haniya Rae and Tanya A. Christian, *How Long Does Leftover Paint Last?*, Consumer Reports (March 23, 2022), <https://www.consumerreports.org/home-garden/paints/how-long-does-leftover-paint-last-a6297036499/>.

providing an exemption to FIFRA regulated products. Therefore, ACA strongly encourages Maine to include an exemption for products regulated by FIFRA because of the allowance already existing with Maine's statute and to promote state harmonization in EPR laws.

3. Harmonize packaging requirements across the United States by provide the following exemptions.

ACA acknowledges that Maine became the first state to pass an EPR law addressing plastic packaging, and subsequent states have also followed suit with their own variations. Because these other states may have relied on Maine's framework as a foundation to build their own EPR for plastic packaging, these other states have included similar exemptions that exist within Maine's statute. However, these additional states, which are California, Colorado, and Oregon have also included exemptions that were not originally identified in Maine's law. Currently, the exemptions listed below are allowed within at least one of the other states with EPR laws addressing plastic packaging.

- a. Exempt plastic packaging materials classified for transportation of dangerous goods or hazardous materials under Title 49 of the Code of Federal Regulations (CFR) Part 178.
- b. Exempt packaging used to contain hazardous or flammable products regulated under the 2012 Federal Occupational Safety and Health Administration Hazard Communications Standard within 29 CFR Part 1910.1200.
- c. Exempt packaging material that is exclusive to manufacturing or industrial processes.
- d. Exempt packaging material intended solely for use in business-to-business transactions.

California currently provides exemptions for specific packaging under 49 CFR and 29 CFR, as listed in California's Act in § 42021 (e)(2)(C). Additionally, under 49 CFR §199.9, it states that "...this part preempts any State or local law, rule, regulation, or order to the extent that: (1) Compliance with both the State or local requirement..." Based on the preemption clause within 49 CFR, the federal regulation would prevail when compliance to both the state requirement and the federal requirements is not possible. In addition, an exemption for packaging used to contain hazardous or flammable products regulated under 29 CFR Part 1910 aligns with the current exemption for packaging of toxic or hazardous products under ORS 459A.863(6)(b)(Q)(i), since these types of packaging may likely not be able to be recycled because of the contents within those containers.

Both Oregon and Colorado provide an exemption for packaging used exclusively for manufacturing or industrial processes. This can be found under Oregon's ORS 459A.863(6)(b)(E), which excludes specialty packaging used exclusively in industrial or manufacturing process and Colorado's § 25-17-703(13) (b)(VI). Furthermore, Colorado states that "packaging material" does not include packaging materials "used solely in business-to-business transactions where a covered material is not intended to be distributed to the end consumer," as provided under Colorado's § 25-17-703(25)(b)(II).

Since Maine became the first state to adopt an EPR law, it would likely not have been made known to Maine to consider these other types of exemptions that would end up being included in other state EPR bills. ACA requests that Maine consider these additional exemptions to strive for state harmonization in EPR bills. Harmonizing requirements would aid in simpler implementation by reducing the confusion in variance of the laws. Therefore, ACA recommends that Maine harmonize its EPR laws with these other states to facilitate commerce and transportation of goods into commerce.

4. Clarify how manufacturers selling to retailers, distributors, and/or warehouses outside of the state will be responsible for sales from those locations into Maine.

Manufacturers in a variety of industries, including the paints and coatings industry, will likely fall subject to these regulations, and it is important to be aware that distribution and sales of these products often occur through a distributor or in bulk to a retailer or warehouse located outside of the state where the products may ultimately be sold. In these instances, the manufacturers typically do not have visibility into which states their products may be offered for sale to the final consumer.

ACA recommends that the agency consider one of several alternatives for how this information gap of sales data into Maine could be addressed. One option could be to allow reporting and remitting responsibilities to be delegated to a “volunteer,” so that manufacturers can work with their retailers or distributors and decide who should be reporting and remitting this information to Maine. Another option could be to provide a standard formula that manufacturers can use to calculate an estimation on the quantity of products sold into Maine based on national sales if they cannot obtain specific data for Maine. Finally, another option could be for very large retailers (colloquially referred to as “big box retailers”) and distributors to share point-of-sale data with manufacturers so the responsibility of reporting remains with the manufacturer to report and remit this data, provided the most accurate data was supplied by the retailer.

In conclusion, ACA appreciates the opportunity to provide comments on this issue, and we look forward to working cooperatively with the Maine Department of Environmental Protection to assist in implementing the Extended Producer Responsibility Program for Packaging. Please do not hesitate to contact us if you have any questions or require additional clarification.

Sincerely,

/s/

Heidi K. McAuliffe
Vice President, Government Affairs

/s/

Suzanne Chang
Counsel, Government Affairs

Sent via email