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■ EXPERT BRIEFING October 2021

Extended producer responsibility for packaging: and so it begins in the US

BY LYNN L. BERGESON

On 13 July 2021, Maine became the first state in the US to enact extended producer responsibility (EPR) legislation for packaging. Quickly thereafter, on 6 August, Oregon became the second state to enact a similar EPR law applicable to packaging. Other states are poised to enact similar legislation, following trends more mature in the European Union (EU) and elsewhere around the world.

What are these new packaging EPR laws, which entities in the commercial value chain do they impact and what are the commercial supply chain implications of their enactment are questions now being asked by product manufacturers and brand owners, importers, retailers and members of the investment and financial communities that support these entities. This article defines these packaging EPR initiatives and identifies key issues of which affected supply chain entities, and their financial supporters, should be aware.

EPR in the US

EPR is defined by the Product Stewardship Institute (PSI), one of the concept's most

devoted proponents, as a “mandatory type of product stewardship that includes, at a minimum, the requirement that the manufacturer’s responsibility for its product extends to post-consumer management of that product and its packaging”.

There are two related features of EPR policy: (i) shifting financial and management responsibility, with government oversight, upstream to the manufacturer and away from the public sector; and (ii) providing incentives to manufacturers to incorporate environmental considerations into the design of their products and packaging.

In the US, EPR is viewed chiefly as a funding mechanism to support recycling programmes by shifting the responsibility to pay for these programmes from municipal, public sources to private, product producer sources. Embedded in EPR is a version of ‘polluter pays’, which has a more than faintly punitive ring to it and has been generally interpreted as such by the business community. EPR has been actively espoused by organisations like PSI for more than 15 years, but industry pushback has slowed the

adoption of mandated EPR programmes like those recently enacted in Maine and Oregon.

EPR programmes for certain product categories, including paint, carpet, batteries and pharmaceuticals, already exist in the US. Other product categories, like plastics and packaging, however, have not been the subject of mandated programmes, until now. Several factors have converged to jump-start these packaging EPR initiatives. Unsurprisingly, the costs to maintain recycling programmes in general have increased dramatically in the recent past.

Moreover, the pandemic has generated vastly more single-use packaging waste, and the imperative to recycle such waste has focused more public attention on the issue, which predated the pandemic, but COVID-19 greatly exacerbated. Finally, the complexity of the packaging waste stream has increased substantially, and some materials are not as amenable to recycling as others. This has incentivised lawmakers to craft mandated solutions to these problems and shifting the cost burden to the producer is widely seen by some as an elegant and efficient fix.

The concept of EPR is, of course, more deeply rooted in European culture. According to the Organization for Economic Cooperation and Development (OECD), EPR has steadily been incorporated in waste policy for more than three decades. Now there are more than 400 EPR programmes of one form or another operative worldwide, most recently in several Asian countries and South America. EPR is framed in Europe more as a component of circularity and heavily incentivised to increase recycling rates. There is decidedly less emphasis on EPR as a version of the ‘polluter pays’ principle, although there remains a whiff of this flavour in other jurisdictions as well as in the US.

The European Union’s new Circular Economy Action Plan (CEAP), adopted by the European Commission in March 2020, is a core component of the European Green Deal. The CEAP focuses heavily on business sectors that consume significant resources and possess a high potential for circularity, including electronics, batteries and vehicles, packaging, textiles, construction and building materials, and food.

US state EPR packaging laws

The Maine and Oregon laws are noteworthy less for their particular provisions, which are similar, than the fact that they have been signed into law at all. Whether this reflects the start of a trend that other states may follow, a prospect the business community can be expected to disfavour, or are one-off laws unlikely to be enacted more broadly, is unclear.

The Maine law focuses on plastics and packaging materials. The law requires product producers to fund stewardship organisations that are intended to collect, recycle and otherwise manage end-of-life products manufactured by the producers. The legislation extends to most packaging materials, but includes exemptions for paint and beverage containers, small businesses, and low-volume packaging producers, all terms defined in the law. While the law is intended to incentivise the use of materials that are easily recycled, the primary purpose of the law is to transfer the cost of managing and recycling packaging waste to the product producer.

The Oregon law creates an EPR programme that includes several ‘covered products’, including packaging, printing and writing paper, and food serviceware. Covered products specifically exclude several categories of products, including bound books, beverage containers, napkins, paper towels and specialty packaging used exclusively for industrial or manufacturing processes, among other categories. Under the new law, producers of these materials are required to join stewardship organisations, called producer responsibility organisations, that are required to assess annual membership fees based on the environmental impacts of the producers’ products.

Both laws contain much more granularity well beyond the scope of this brief summary and are worth a read. The point is despite the passage of many years, two states now have laws on the books mandating EPR for packaging and plastics, both categories possessing promising recyclability potential. Another five states (California, Hawaii, Maryland, Massachusetts and New York) have pending proposed legislative initiatives involving mandated EPR for plastics and packaging, each shifting the cost of the programmes to the producer along the lines of the Maine and Oregon measures.

Trend or anomaly and a few takeaway messages

EPR writ large may well be a concept whose time has come in the US. Versions of the concept are already embedded in Europe’s DNA. With state and local resources severely stressed by pandemic demands, eroding tax bases and competing priorities, state legislatures with a more progressive leaning can be expected to welcome opportunities to shift the cost burden of recycling programmes to others. And who better than the producers of the material generating the waste? Despite the intuitive appeal of this approach, state legislatures with a more conservative bent may be less receptive, despite the obvious advantages to a state’s fiscal health.

Whether the American public’s growing demand for environmental accountability, fuelled by seemingly daily reminders of climate change that may move the needle across the board, is unclear, but definitely not

out of the question. Product categories likely to be targeted more broadly and routinely include plastics and packaging materials, long considered ripe for recycling, and especially plastics, given the intensity of global concern with the ubiquity of plastic pollution.

That said, the engrained resistance to mandated EPR remains strong in some industry sectors. Product manufacturers bristle at the ‘polluter pays’ stigma associated with EPR, and some believe, not without merit, that consumers should participate in some way in the cost of managing the end-of-life aspects of the products they purchase and use. Some believe such participation would most equitably be expressed in an increase in the purchase price of the product.

Businesses also often possess a reflexive opposition to mandated programmes, believing voluntary programmes that are calibrated to the specific contours of the product at issue are likely to be more successful than state-legislated programmes. More robust data on the truth of these widely held beliefs would benefit the discussion.

Regardless of whether this is the start of a national packaging EPR trend or something else, it seems clear that product manufacturers would be wise to recognise that consumers increasingly expect businesses to be accountable for the environmental consequences of their products and to account for the recycle or reuse of these products in demonstrably more defined ways. State initiatives similar to the Maine and Oregon laws are likely to proliferate, and the types of materials covered by such initiatives could well expand.

Businesses will need to monitor these initiatives carefully and understand the supply chain, cost and business reputation implications of state legislative consideration and potential enactment. So will the financial entities investing in these businesses and the products they market. ■

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