

The Last Straw? Recent Actions and Outlook for Single-Use Plastics

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Key Points

- Weakness in the United States recycling model has been exposed by dramatic action in Asia, prompting a flurry of legislative activity at the local, state and federal level.
- Proposals extend beyond food, beverage and bag manufacturers and could reach an expansive class of single-use plastics familiar to consumers.
- Given the early stage of policy-making, companies have an opportunity to help shape solutions.
- On Wednesday, March 4, the House Energy and Commerce Subcommittee on Environment and Climate Change held a hearing entitled, “America’s Plastic Waste Crisis.” This hearing signaled the most recent focus of policy-makers on issues related to the U.S. plastics recycling market.

Policymakers in the United States at both the state and federal level are working to address dramatic changes in the traditional recycling and waste management markets after recent policy changes in China and Southeast Asia that have disrupted those markets on a global scale. With the recent uptick in the volume of environmentally focused plastic mandate legislation across the country, pressure for federal action on single-use plastics is anticipated to be part of the national dialogue among policy-makers in 2020 as they consider viable long-term solutions to the recycling crisis and the future of single-use plastic packaging. For businesses who manufacture plastic packaging or who retail goods or products in plastic packaging, the national debate may present an opportunity to reshape recycling and waste management practices.

Actions in Asia Expose Weaknesses in Recycling Programs in the United States and Prompt Efforts to Address via State and Federal Policy Changes

In January 2018, China announced its “National Sword” policy, which banned the import of most plastics and other recyclable materials, after 25 years of importing 45 percent of the world’s plastic waste. China’s refusal to process any recycled plastic scrap that was not 99.5 percent pure upended a \$200 billion global recycling industry with profound consequences. Following China’s import policy change in 2018, the

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U.S., United Kingdom and Australia turned to countries such as Thailand, Vietnam and Malaysia, which then quickly followed China's lead by enacting their own restrictions on waste imports, realizing they were quickly overwhelmed by the volume of plastic once easily absorbed by China. Market shifts in the wake of China's National Sword policy and other export restrictions on recyclables have led municipal recycling programs, in hundreds of cities across the U.S., to close down or stop accepting certain materials as they struggle to fill sudden gaps.

As a consequence of these significant policy changes in China and other countries, the U.S. is in urgent need of an innovative waste management solution. U.S.'s reliance on China and the lack of local investment has resulted in the rapid decline of recycling programs across the country, leading to materials piling up in landfills, or being incinerated and releasing harmful chemicals into the environment. The environmental and public health impacts of plastic pollution are overwhelming; the environmental externalities, public costs of clean up and mitigating plastic pollution are staggering and continue to grow. As the waste piles up, American policy-makers are scrambling to plot the next steps absent a solution that has been in place over the last 25 years.

Two approaches have emerged at the state level:

States Act to Reduce or Ban Single-Use Plastics

Pushed by environmental groups, some states are considering approaches to reduce or phase out single-use plastics. Eight states restrict or apply fees on single-use plastic bags, and hundreds of cities and counties across the U.S. have done the same. Significantly, state lawmakers have introduced at least 95 bills in 2019 related to plastic bags alone. Additional state-level sustainability strategies include bans or restrictions on plastic utensils and containers, drinking straws, polystyrene or Styrofoam foodware and/or packaging materials and other nonrecyclable foodservice ware and accessories.

Addressing single-use plastics became an issue of significant focus in a number of state legislatures this year. Moreover, the sustainability strategies of lead reforming states may be looked to as a reference for states that have yet to act and are considering implementing solutions to address the over-reliance on single-use plastic products.

Another notable step took place last year in California where lawmakers introduced legislation (Senate Bill (SB) 54 and Assembly Bill (AB) 1080) to eliminate 75 percent of single-use containers by 2030, reduce the surplus of unmarketable plastics statewide and lay the groundwork for a revamped California recycling industry. SB 54 and its companion sought to ensure that all single-use packaging and priority single-use products that are manufactured, offered for sale, distributed or imported into California on or after January 1, 2030, are recyclable or compostable. Both measures stalled after critics pointed out that the cost of finding alternatives to single-use plastics in consumer packaging will be onerous to consumers and infeasible for many biomedical products and pharmaceuticals. Critics also shed light on outdated and ineffective infrastructure that cannot keep up with demand and its disproportionate impact on underserved communities across California. Opponents also highlighted that the bills do not account for a product's entire lifecycle, provide appropriate incentives for both manufacturers and consumers to reduce packaging waste, while noting that the

legislation may negatively impact the affordability, availability and quality of many products Californians rely on every day.

In New York, Governor Andrew Cuomo signed legislation (SB 1508) in to law that would ban the provision of single-use, plastic carryout bags at any point of sale, with certain exemptions.

Florida's Department of Environmental Protection (DEP) encourages Floridians to reduce their plastic use in its Skip the Straw campaign. In May 2019, Governor Ron DeSantis flexed his veto power on legislation (House Bill (HB) 771) that would have prohibited local governments from banning plastic straws for the next five years. In his veto letter, Governor DeSantis noted that a number of Florida municipalities have enacted ordinances prohibiting single-use plastic straws, which have not frustrated any state policy or harmed the state's interest. On the contrary, such bans comply with the spirit of DEP to limit the use of plastic straws.

Maine became the first state to ban single-use Styrofoam food and drink containers. Governor Janet Mills signed legislation (Legislative Document (LD) 289) into law prohibiting the sale or distribution of disposable foodservice containers composed in whole or in part of polystyrene foam. Maryland and Washington, D.C. followed Maine's lead by enacting similar laws to restrict the use of Styrofoam cups and containers. More than 100 local governments across the U.S. restrict the use of Styrofoam.

Nonetheless, critics illustrate that proposed single-use plastic alternatives may cause more environmental harm than good, and are often not as accessible, affordable and lack recognized quality standards. Similar to the reasons California lawmakers rejected SB 54, existing bans on single-use plastics do not provide incentives for both manufacturers and consumers to cut down on waste, conserve materials or convert recycled material into new and efficient products. Lastly, such policies also fail to consider a level playing field and may position some businesses at a disadvantage to their competitors.

States Are Also Adopting an Alternative Solution: Extended Producer Responsibility

In the aftermath of National Sword and its ripple effect across Southeast Asia, a large number of states are pursuing an alternative approach through "Extended Producer Responsibility" (EPR) laws.

EPR laws provide a mechanism for facilitating sustainable funding for recycling by shifting financial and management responsibility from governments and taxpayers to packaging producers and brand owners. The program also provides financial incentives to manufacturers to incorporate environmental considerations into the design of their products and packaging. Successful EPR programs incentivize producers to design their paper and packaging products (PPP) including plastic containers, steel and aluminum cans, glass bottles and jars, newspaper and cardboard to be recyclable to produce significant cost and resource savings in the manufacture or remanufacture of products.

EPR initiatives have proven successful in Canadian and European markets, resulting in increased recovery rates, a decrease in confusion and environmental contamination and the establishment of resilient recycling infrastructure. In Europe, the packaging recycling rate is 80 percent compared to approximately 50 percent in the U.S.

Moreover, Canada, British Columbia, Quebec, Manitoba, Saskatchewan and Ontario each have robust PPP programs that achieve higher recovery rates than the U.S.

Two bills (S7718 and A09790) have been introduced in the New York state legislature to promote the EPR program by requiring producers to develop and implement strategies to promote recycling, reuse and recovery of packaging and paper products. Although similar, the SB and AB are not identical. For example, the AB requires producers to establish a plan to collect packaging in the state and seeks to achieve the collection of at least 80 percent of the producer's packaging. By January 1, 2025, only packaging containing at least 25 percent post-consumer recycled content could be sold or distributed in the state. The Senate version differs as state regulators are charged with approving post-consumer content and recycling rates that will create or enhance markets for recycled materials.

In addition, states such as Oregon and Maine are both considering proposals to promote EPR programs to boost sustainability; however, no state in the U.S. has since adopted an EPR for packaging purposes.

In the U.S., 33 states have enacted 119 EPR laws covering 14 product categories, including electronics, paint, batteries, mattresses, pharmaceuticals and carpet. These systems have significantly increased recycling, created jobs, saved municipalities millions of dollars and reduced greenhouse gas emissions by conserving resources. In 2019 alone, 50 EPR bills were introduced in 16 state legislatures, of which 12 were passed into law. If applied at the federal level, EPR could be the hidden catalyst in the modernization of our nation's recycling system and a much-needed solution that stands to benefit the health and economic well-being of consumers and producers across the country.

Federal Proposals to Sustainability and Recycling

Against the backdrop of action at the state and municipal level, some federal lawmakers in Washington are have begun to advance proposals to decrease the use of common plastic products, hold corporations accountable, protect natural resources that face the toughest challenges and reform waste and recycling programs by mirroring success made at the state level.

On Wednesday, March 4, the House Energy and Commerce Subcommittee on Environment and Climate Change held a hearing entitled, "America's Plastic Waste Crisis." The hearing signaled elevated attention on the need for potential action at the federal level and drew bipartisan agreement that a solution must be put in place to address existing bottlenecks in local recycling programs. However, the path forward to best respond to new challenges necessitated by China's National Sword Policy exposed divisions between lawmakers along partisan lines.

Subcommittee Chairman John Shimkus (R-IL) agreed that everyone should expect a clean environment; however, he disagreed with increased government involvement in dictating the terms of how local governments and municipalities should manage and discard solid waste. Full Committee Ranking Member Greg Walden (R-OR) also expressed concern about a potential "federal takeover" of waste recycling responsibilities. The right side of the partisan divide also argued whether banning single-use plastic products would, in reality, exacerbate problems. Instead, the lawmakers suggested focusing on mitigation strategies that consider what other risks might occur from taking such action.

Moreover, Democratic lawmakers urged the subcommittee to analyze solutions that consider plastic's entire life-cycle, create the proper incentives to reuse recyclable material, and reduce the amount of generated waste. Full Committee Chairman Frank Pallone (D-NJ) underscored that the nation's recycling system is simply not working based on the amount of plastic pollution that is negatively impacting our natural resources and contributing to the climate crisis.

Lastly, several witnesses argued in favor of the EPR model to require all stakeholders to pay their fair share, promote collaboration, and provide resources for infrastructure. Alluding to the innovative model, Subcommittee Chairman Paul Tonko (D-NY) asked witnesses to discuss the balance between seeking to incentivize better markets for some of the lower value materials versus incentivizing manufacturers to consider using different materials from the outset.

Original Recycling (OR) Bottle Act of 2020 (S. 3281)

On February 12, 2020, Oregon Democratic Sens. Jeff Merkley and Ron Wyden introduced the Original Recycling (OR) Bottle Act of 2020 (S. 3281). The legislation emulates the approach made in the state of Oregon since 1971 by incentivizing unconstrained recycling efforts through private sector implementation. Referred to as the "bottle bill," the proposal offers a template for beverage distributors to participate in an organized regional system for the collection, transportation and processing of containers, including an innovative approach to in-store container redemption with the creation of recycling infrastructure centers.

The bottle bill operates similarly to the current and familiar container deposit process at the state level. The cycle begins with retailers paying a 10 cent deposit for each beverage container delivered and customers paying retailers the same amount for each container at the point of purchase. Finally, once consumers return containers to a retailer for 10 cents, distributors retrieve prior used containers from retailers and also pay 10 cents.

The OR Bottle Act of 2020 has just one democratic cosponsor in the Senate and a companion version has yet to be introduced in the House.

Break Free From Plastic Pollution Act of 2020 (S. 3263 and H.R. 5845)

On February 11, 2020, U.S. Sens. Tom Udall (D-NM) and Jeff Merkley, and Reps. Alan Lowenthal (D-CA) and Katherine Clark (D-MA) introduced the Break Free From Plastic Pollution Act of 2020 (S. 3263 and H.R. 5845). This bicameral legislation would phase out single-use plastic products, reduce packaging and reform the nation's waste and recycling collection system. This legislation represents the first-of-its-kind national EPR proposal by driving innovative incentives and shifting the burden of responsibility onto large corporate producers of plastic from municipalities and taxpayers who are traditionally on the hook for recycling.

Under the proposed legislation, brand owners can finance and manage recycling, administrative and clean-up costs through a Producer Responsibility Organization (PRO). Through PROs, producers share the responsibility for managing their products across the entire lifecycle with Environmental Protection Agency (EPA) approval. Moreover, PROs will be considered nonprofit entities that are financed by a fee structure on the participating producers, and assessed depending on company size and how wasteful and difficult it is to clean up their products. Ultimately, the program

creates direct financial incentives for producers to use materials that cost less to recycle and have less adverse environmental consequences to minimize the impacts of extraction, manufacture, and use of products across their entire lifecycle.

The Break Free from Plastic Pollution Act of 2020 seeks to:

- Reduce and ban certain single-use plastic products that are not recyclable effective January 1, 2022.
- Require large corporations to take responsibility for their pollution, thereby compelling producers of plastic products to design, manage and finance waste and recycling programs.
- Provide financial incentives to producers to incorporate environmental considerations into the design of their products and packaging.
- Create a nationwide beverage container refund program, emulating the models at the state level to be carried out by EPA.
- Establish minimum recycled content requirements for beverage containers, packaging and food-service products.
- Urge producer-led investment in U.S. domestic recycling and composting infrastructure, while halting the production of new plastic facilities until critical environment and health protections are put in place.

The Senate legislation has seven democratic and one independent cosponsors. By contrast, the House companion version has garnered support from 50 democratic cosponsors; neither version includes Republican cosponsors. The legislation marks the introduction of the first comprehensive federal strategy seeking to decrease the reliance on single-use plastics. It also makes clear that EPR laws are gaining momentum as a potential solution on the federal level and may be viewed as a reference by state legislatures to solve this issue.

Recycling Enhancements to Collection and Yield through Consumer Learning and Education (RECYCLE) Act of 2019 (S. 2941)

On November 22, 2019, Sens. Rob Portman (R-OH) and Debbie Stabenow (D-MI) introduced the bipartisan Recycling Enhancements to Collection and Yield through Consumer Learning and Education (RECYCLE) Act of 2019 (S. 2941), which creates a new federal grant program through the EPA to help educate households and consumers about their residential and community recycling programs. The legislation ultimately seeks to increase recycling rates and reduce contamination in the recycling stream while eliminating consumer confusion on how to properly recycle.

The bill currently has six Democratic and four Republican cosponsors in the Senate and a companion version has yet to be introduced in the House. While it is unknown if the RECYCLE Act will become law, the broad proliferation of the bipartisan debate to improve recycling rates across the country to the benefit of consumers and households is growing rapidly and viewed as a common-sense solution.

The increase of recent federal action is indicative of bicameral congressional interest to modernize sustainability solutions and also recognizes that existing state-level gaps are becoming difficult to ignore. Significantly, current federal action creates an opportunity for our clients who manufacture or import plastic packaging or who retail goods or products in plastic packaging to play a key role in formulating national

solutions to the current crisis that are not economically onerous or technologically infeasible.

The Akin Gump cross-practice environment and natural resources team actively continues to monitor forthcoming federal, state and local initiatives related to the regulation of plastic materials. Companies should therefore be prepared for continued state and federal initiatives to gain increased momentum, particularly as additional state recycling programs begin to feel the strain of market disruptions and policy-makers seek to harmonize an increasingly fragmented patchwork of recycling programs.

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