

August 26, 2024

Submitted via email: MainePackagingEPR@maine.gov

Brian Beneski
Maine Department of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

RE: Chapter 428 Stewardship Program for Packaging Rules; Comments – Reposted Draft

Dear Mr. Beneski,

AMERIPEN – the American Institute for Packaging and the Environment – appreciates the opportunity provided by the Maine Department of Environmental Protection (“DEP” or the “Department”) to submit written comments on the reposted draft of the proposed rules for the **Stewardship Program for Packaging** (“program”) (38 M.R.S. § 2146). AMERIPEN respectfully submits these written comments for consideration and with requested modifications to the draft rules. However, despite these comments we also are formally requesting that this current draft not be submitted to the Board of Environmental Protection, in order to consider fundamental changes to their structure to align with other states, by allowing the stewardship organization more overall authority and flexibility and defer to the results of the needs assessment. These regulations increasingly diverge from the four other states that have implemented extended producer responsibility (EPR) for packaging and adopting these regulations now would lock in a regulatory approach that is likely to be impossible to implement.

As a representative of the entire packaging supply chain, we have commented on these rules and participated in this nearly 3-year process constructively, offering comments at every opportunity. We appreciate DEP’s efforts to attempt to create a workable program, however, we continue to have serious concerns with the fundamental structure of these rules and especially the most recent redraft of the rules on which we are commenting here. Therefore, we are also requesting a pause in the rule-making process and to allow for possible consideration of an Administration bill to amend the significant flaws in the underlying law (38 M.R.S. §2146).

AMERIPEN is a trade association dedicated to improving packaging and the environment. We are the only material-inclusive packaging association in the United States representing the entire packaging supply chain. This includes materials suppliers, packaging producers, consumer packaged goods companies, retailers, and end-of-life materials managers. Our membership also includes a robust array of industry, material, and product-specific trade associations who are essential to the AMERIPEN fabric. We focus on science and data to define and support our public policy positions, and our advocacy and policy engagement is based on rigorous research rooted in our commitment to achieve sustainable packaging policies. We have several member

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companies with a presence in Maine, and many more who distribute packaging materials and products into the state.

AMERIPEN supports policy solutions, including packaging producer responsibility, that are:

- **Results Based:** Designed to achieve the recycling and recovery results needed to create a circular economy.
- **Effective and Efficient:** Focused on best practices and solutions that spur positive behaviors, increase packaging recovery, recapture material values and limit administrative costs.
- **Equitable and Fair:** Focused on all material types and funded by shared cost allocations that are scaled to make the system work and perceived as fair among all contributors and stakeholders.

The below written comments and clarifying questions from AMERIPEN, ordered by section, speak to the contents of the rules in the reposted draft released by the Department on July 9, 2024.

Section 2. Definition

Composting: The definition of “composting” cross-references an existing definition of “composting” in another Maine regulation. That existing definition does not explicitly include home composting, which is a more accessible form of composting than industrial composting but does not meet the standards in the current definition in the reposted draft rules. Home composting enables a wider range of compostable materials to be eligible under the Program. AMERIPEN recommends adding an additional sentence to paragraph (G) stating “Alternatively, composting means the controlled microbial degradation of source-separated compostable materials to yield a humus-like product.” This definition aligns with the one in the EPR law enacted in Minnesota in 2024.¹

Compostable Packaging Material: AMERIPEN recommends the Department also consider amending the definition of “compostable packaging material” to only apply to fully certified products meeting international standards.

Consumer: AMERIPEN remains concerned that definition of “consumer” will inappropriately capture industrial, commercial, and other business-to-business entities rather than being limited

¹ Minnesota Statutes Chapter 115A.1441, subdivision 7.

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to consumer packaging destined for municipal recycling systems that makes up most packaging material that is recycled. The expansion of “consumer” in the draft regulations greatly broadens the scope of the law and will result in capturing many packaging materials that will already have a business entity paying for those materials. Additionally, in contrast to residential recycling systems, commercial and industrial packaging materials already have payers for those materials and would not be any burden to municipal governments. To that end, AMERIPEN objects to the reposted draft’s proposed addition of “or includes its use in a service it provides,” which will significantly expand the scope to include any service provider even if the product it uses never reaches the municipal recycling stream. AMERIPEN recommends limiting the definition 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.

Durable Product: The definition of “durable product” provides that “A durable product is not depleted through use.” This would seemingly exclude products like paint, solvents, and waxes, even though they may be designed to last more than five years and are contained in long-term packaging that would avoid being managed as waste for at least as long. AMERIPEN recommends striking this latter sentence, as it is unnecessarily restrictive.

Intentionally Added: The proposed regulations use the term “intentionally added” several times, but it is not defined. AMERIPEN recommends including a definition, and suggests the following: “‘Intentionally added’ means provided through ‘intentional introduction,’ as defined in Title 32, chapter 26-A.”

Manage: The definition of “manage” has been revised in the reposted draft rules to explicitly include actions “to educate consumers about packaging material” and “to pick-up litter.” While the prior draft provided that “manage” included “educational initiatives to facilitate collection and litter pick-up,” this revision inappropriately and significantly expands the scope of activities that would be eligible for reimbursement. AMERIPEN opposes this change, as it is not supported by the reimbursement language in the law. Moreover, producers should not be charged for littering since it occurs outside of their control and should not be charged “to educate consumers about packaging material” because that is a vague and unnecessary obligation. The stewardship organization (S.O.) instead direct statewide investments in these areas. AMERIPEN therefore requests that the definition of “manage” be returned to how it appeared in the prior draft rules.

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Produce: In addition to the corresponding change recommended to definition of “manage,” above, AMERIPEN recommends revising the definition of “produce” to clarify that a residential consumer is the targeted party. This can be achieved as follows:

“Produce” means to use packaging material to contain, protect, deliver, present, or distribute a product that is sold, offered for sale, or distributed for sale in or into the State to a residential consumer.

Producer: In the definition of “producer,” a paragraph from the earlier draft rules governing situations where two people qualify as the producer for the same packaging material is now proposed for deletion. AMERIPEN seeks the Department’s explanation as to how such situations will be handled without specific language in the final rules.

Producer: Additionally, subparagraph (3) within the definition of “producer” states that a producer includes a person that “[a]dds packaging material to another producer’s product for distribution directly to a consumer. This person is only the producer for the packaging material that is added.” This definition would pose an impractical challenge because a producer generally cannot add its own packaging material to the packaging material of another. Rather, a producer would arrange to add another producer’s packaging material to its own or would add it directly. AMERIPEN recommends revising this subparagraph to instead provide that the producer is the one that adds another producer’s packaging material to its own. This is like the regulatory approach being contemplated in Oregon’s EPR program, where the producer that “directs” the manufacturing is the obligated producer.

Product: The definition of “product” in the reposting draft provides that, “[f]or products that are not durable, material that remains when the product is depleted is not the product; it is packaging material.” This condition is constructed too broadly, such that it will convert items that are clearly products into packaging material after they reach the end of their useful life (e.g., pens, wipes, and personal protective equipment.) If the intent of this sentence was to capture nondurable packaging materials, AMERIPEN recommends replacing it with the following:

(3) For products that are not durable and that are purchased empty or as wraps, wrapping, or tape for use in containing, protecting, delivering, or presenting items at a later time, material that remains when the product reaches the end of its useful life is not the product; it is packaging material.

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Retailer: The reposted draft rules propose striking the “retailer” definition that was included in the earlier draft rules. AMERIPEN recommends retaining this definition since that term is used later in the rules and is not defined in the law.

Reusable Packaging Material: For the revised definition of “reusable packaging material,” AMERIPEN is concerned with requiring the use of a formal alternative collection program, as it will hinder the rollout of reusable systems. AMERIPEN recommends partially restoring language from the prior draft, such that the definition reads as follows: “... by an alternative collection program collecting the reusable packaging material in every county in which it is produced or by adequate logistics and infrastructure as part of a reuse system.”

Further, it is unclear how this definition will be implemented for packaging produced outside of Maine, since it is tied to counties. Finally, AMERIPEN again recommends that in-home reuse and refill be incorporated into the definition to maximize the opportunities to adopt them as an alternative to reuse through an alternative collection program. In-home reuse systems currently have the greatest potential for reuse functionality and packaging source reduction.

Toxics: Regarding the definition of “toxics,” AMERIPEN is deeply concerned with the approach proposed in the reposted rules. The number of chemicals implicated is over one thousand and is subject to regular revisions, making it virtually impossible to implement the toxics-related provisions of the rules. AMERIPEN requests DEP review the application of the chemicals from two of the statutes referenced for their applicability to packaging materials and if they are even relevant. Those laws specifically deal with children’s products and food packaging, and therefore should not be applied indiscriminately to all forms of packaging. AMERIPEN therefore requests that the Department produce and update as necessary a discrete list of all chemicals that would appropriately qualify as “toxics” under this definition. These chemicals are not compiled anywhere, and that will make it challenging for producers to ensure they are checking for the right chemicals to remain compliant. Finally, AMERIPEN notes a misalignment between the definition of “toxicity” in the law and “toxics” in the draft rules: the statute refers to “intentionally introduced metals or chemicals regulated” by Title 32, chapter 26-A (Reduction of Toxics in Packaging), whereas the rules refer to PFAS and phthalates under that law. We recognize that the Department may be limited in its ability to correct this misalignment and that an amendment to the law itself may be required.

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Section 3. Assessment

AMERIPEN continues to have fundamental concerns with the overall structure and approach to these rules, and continues to strongly recommend that the S.O., in collaboration with the Department and after the statewide recycling needs assessment has been completed, be able to propose programmatic goals in a manner that effectively balances costs, feasibility, and effectiveness. The S.O. will be in a suitable position for this role because it will be informed by the needs assessment and its experience working with all composting and recycling system stakeholders. **All other states that are implementing EPR programs are waiting until after the needs assessment to make these types of decisions and Maine should align with those other states.**

Recycling Access: The reposted draft adds a “recycling access” goal that ultimately expects that 100% of Maine residents will have “access to municipal recycling of readily recyclable packaging material.” This is an unrealistic goal, given that municipalities are not required to participate in the program and neither the S.O. nor the state can compel their participation. As with other goals, AMERIPEN recommends deferring to the S.O. to establish recycling access progress in a manner responsive to actual municipality participation and supported by the needs assessment.

AMERIPEN appreciates the effort to reduce duplicative reporting throughout this section, particularly by not compelling certain reporting more than once every three years.

Participation: Pertaining to the Participation goal in paragraph (A)(2), producers, the S.O., and consumers all lack control over whether a municipality participates in the Program. “Participation” is not required as an element for performance goals under 38 M.R.S. §2146(13)(A)(5). While municipal “recycling access” goals are required by law, and one is now found in these rules. “Participation” is not a proxy for “access,” as it does not measure consumers’ ability to use recycling systems. AMERIPEN recommends that this goal be stricken and that DEP instead work with municipalities to encourage participation using existing resources.

Reduction: The Reduction goal in paragraph (A)(4) for packaging weight entails escalating percentages that ultimately reaches 60% by 2050. It applies to the total weight for all packaging material. As previously expressed in comments submitted to the Department, AMERIPEN is deeply concerned that this goal significantly exceeds the ambitious single-use plastic source reduction policy California has adopted within their packaging extended producer responsibility law, in terms of materials covered, amount to be reduced, and pace of reduction. DEP’s proposed Reduction goal is unrealistic and should be readjusted to at least align with California, including

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using the same benchmarking year of 2013 to account for producers' historical progress on source reduction that has taken years and millions of dollars to achieve. The reposted draft moves the benchmarking year from the first reporting year to the fifth. AMERIPEN objects to this change because it will ignore many years of earlier progress made in reductions, including the initial 40% goal through 2049. Further, AMERIPEN requests that: (1) the reduction goal be normalized by the number of packaging units shipped, to avoid creating a barrier to future business growth; (2) producers be able to receive credit for historical reductions, to avoid penalizing companies that have already significantly optimized their packaging; (3) producers who make reductions in plastic materials through replacement with other materials not be subject to reduction requirements for those replacement materials; and (4) the method for calculating these reductions be enumerated. Finally, AMERIPEN requests restoration of the phrase "if its study identifies market demand for expansion of such programs," from the earlier draft rules to avoid unnecessary reporting obligations where no demand exists.

Reuse: Regarding the Reuse goal in paragraph (A)(5), AMERIPEN generally recommends collaboration among the S.O., producers, and other interested parties before specifying discrete reuse targets. The goal proposed in the draft rules measures "the percent by weight of total packaging material reported by producers that is managed for reuse," which creates an unintended incentive to use make reusable materials heavier. AMERIPEN therefore recommends considering revising the goal to measure "the weight of packaging material *engaged in reuse*" instead, to directly compare the amount of reusable packaging each time it is used to the equivalent amount of single-use packaging. Additionally, this goal focuses exclusively on reuse, which leaves out opportunities to encourage refill. AMERIPEN again requests that this provision be revised to ensure that the refilling of packages by the original consumer, whether inside their home or outside, be incorporated into the goal, in alignment with the suggested revision to the "reusable packaging material" definition above. Furthermore, federal law restricts the reuse of packaging designed with child-resistant closures, so AMERIPEN requests that packaging restricted for reuse by law or regulation should be exempt from this goal.² Finally, AMERIPEN requests restoration of the phrase "if its study identifies room for establishment or expansion of such programs" included in the earlier draft rules to avoid unnecessary reporting obligations where no capacity exists.

Readily Recyclable, Reusable, Compostable: Regarding the readily recyclable, reusable, or compostable goal in paragraph (A)(6), it is important that the Department address the

² 16 Code of Federal Regulations 1700.15(c)

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reimbursement issues AMERIPEN has previously identified and commented on in Section 5. If the Department is going to establish such ambitious goals (up to 100% by 2050), it should ensure that any costs tied to reimbursement of readily recyclable materials are reasonable and justified. Otherwise, it will create a compound problem of undue expenses across a high volume of materials. Additionally, AMERIPEN requests that there be some off-ramps for critical packaging materials that serve vital functions that cannot be readily recyclable given the products that they contain or their use by consumers. Finally, while AMERIPEN appreciates the addition in the reposted draft rules of a specific number of the most common packaging material types that are not readily recyclable, AMERIPEN requests that it be modified so that the S.O. will determine this number.

The Base material-specific recycling rate goal in paragraph (A)(7) requires each base material to achieve the same recycling rate. Like the post-consumer recycled material content goal, it is not realistic to expect this would ever be the case, given each material's unique physical properties. Furthermore, the goals are overly ambitious considering the recycling yields presently attained for various materials. Finally, there is no current data that suggests that any material is achieving these recycling rates. AMERIPEN therefore requests again that the rates, as well as the rates in the overall recycling rate goal in paragraph (A)(8), be initially proposed by the S.O. following the needs assessment and adjusted appropriately by base material.

PCR Content: The post-consumer recycled material content goal in paragraph (A)(9) requires packaging in each base material to use the same proportion of post-consumer recycled material. Like the base material-specific recycling rate goal, it is not realistic to expect this would ever be the case, given each material's unique physical properties. AMERIPEN once again requests that the rates be proposed by the S.O. and adjusted by base material and the S.O. submit those goals to the Department for approval. Furthermore, the post-consumer recycled material content market and its use is complicated by U.S. Food and Drug Administration (FDA) requirements and supply constraints for packaging for many types of products (i.e., food). This fact may make it impossible to comply with the goals. As submitted in previous comments, AMERIPEN requests that packaging material that is precluded by law or regulation from using any post-consumer recycled material be excluded upfront from post-consumer recycled material goals and fees, rather than requiring a waiver request. This will save the Department resources from considering (potentially thousands of) cases that are clearly constrained by existing prohibitions. Absent of this approach, AMERIPEN acknowledges and appreciates the opportunity the Department is providing producers in Section 21 of the draft rules to request exemptions if certain criteria are met. But AMERIPEN requests that the final rules clearly state that packaging materials that are restricted from post-consumer recycled material due to other laws and federal safety

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requirements, and that have been granted an exemption from the PCR content requirements, not be considered when calculating the total weight under this goal and be discounted from the overall denominator.

Litter Reduction: As expressed in previous AMERIPEN comments submitted to the Department, meeting the litter goal in paragraph (A)(10) is ultimately contingent upon consumer behavior and must first be fully informed by the pending litter audits. Not all litter has an equal impact on the environment, and it should not be assumed that packaging litter is the most troublesome form of litter. Given that, AMERIPEN cautions the Department in setting such aggressive expectations here. This approach also is flawed in its assumption that discouraging litter across the state will only impact packaging materials. Moreover, this goal does not acknowledge that absolute reductions in litter may be made for all material types, and instead requires reporting on the top five types no matter how little is found. Therefore, the efforts under this law have broad application and such a goal and measurement are not justified and should be removed. Additionally, in this paragraph, the term “item” (“unit” in the earlier draft rules), for the purposes of measurement, is not defined. AMERIPEN requests that it be defined or clarified for each use, or that weight instead be used instead as the measurement for the purpose of this goal (consistent with some of the other goals).

Annual SO Reporting: AMERIPEN appreciates the removal of brand-level reporting from subsection 3(B)(2) regarding producer benchmarking, which was problematic in the earlier draft rules for several reasons.

This section requires the S.O. to produce an annual report by January 30 each year. However, that date is likely to be too soon for producers and municipalities to compile the requisite information from the preceding year and for the S.O. to consolidate it. AMERIPEN recommends using a date later in the year, such as April 1.

Subsection 3(B)(5) references “recycling establishments,” but that term is not defined or used elsewhere in the draft rules. Moreover, it is unclear what would happen if such “recycling establishments” were located outside of Maine. AMERIPEN requests more detail as to the definition of this term and how out-of-state situations will be handled.

Toxics: Subsection 3(B)(6) requires the S.O. to report an “updated list of toxics.” While producers would appreciate a regularly updated list, the responsibility for developing and updating it should be with DEP. The State of Maine has responsibility for managing the laws referenced in the “toxics” definition and is in the best position to accurately identify all applicable chemicals used

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in packaging, and the reliance on the current lists (per above) is not appropriate and too expansive with over one thousand chemicals.

Infrastructure: AMERIPEN recommends adding a requirement in subsection 3(C) for the Statewide Recycling Needs Assessment to include a review of the state of compostable packaging collection, existing capacity of composting infrastructure, and the projected need for more capacity and investment.

Subsection 3(C)(2) requires the needs assessment to identify the infrastructure necessary to collect single-stream recycling, dual-stream recycling, and readily recyclable packaging material separately by base material for areas that do not collect and recycle all readily recyclable packaging. This is an unnecessary level of assessment, because the need in such situations is to collect the remaining portion of readily recyclable packaging that is not collected. AMERIPEN requests the goal be revised to only identify the infrastructure necessary to collect the uncollected readily recyclable packaging.

Litter Audits:

Subsection 3(E)(2) regarding “Litter Audits” allows municipalities to report on litter collection events, from which the S.O. may randomly select two municipalities to audit. As submitted in previous comments, AMERIPEN remains concerned that this approach will not yield “representative audits,” despite its intent. A “litter collection event” is an undefined term and is unlikely to target locations *randomly*, as would be necessary, but instead would target sites where litter is common. Furthermore, municipalities are not required to participate. Altogether, this approach will deliver a biased examination, which is problematic given that the audits will also inform the “reduction of litter” incentive fee. AMERIPEN asks that the S.O. instead be allowed to design the nature of the litter audits in an unbiased, representative fashion. This can be done by replacing subparagraph (2) with the following:

“(2) The S.O. must design and implement a process to randomly select a representative sample of site or sites in the state for a litter audit.”

AMERIPEN also objects to the increase frequency of litter audits to twice annually, the option for providing stipends if they are producer-funded, and the requirement to categorize littered packaging material by brand in subparagraphs (E)(3) and (4).

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Section 4. Defining Packaging Material

Subsection 4(A)(3) states that “[p]ackaging material used to contain products that, regardless of the consumer’s generator status, are hazardous in accordance with Chapter 850, *Identification of Hazardous Wastes*, can be classified as a distinct packaging material type.” As the statute in question is focused on packaging, not products within the packaging, this is an unnecessary distinction and AMERIPEN therefore requests removal of this provision.

In subsection 4(C)(1)(a), AMERIPEN recommends deletion of “and conventions,” since “conventions” is undefined and the intent of the applicable provision is covered by reference to “laws.”

Subsection 4(C)(1)(c) in the reposted draft rules creates a brand-new requirement for a packaging material type to qualify as “readily recyclable.” Specifically, it requires that the “anticipated cost per ton is less than or equal to two times the cost per ton of managing the most expensively readily recyclable material type.” This is an arbitrary and unnecessary criterion that will hinder the recycling of packaging materials by imposing an economic test. Moreover, no other states with a packaging EPR program have such a requirement, so this would reduce harmony across programs. AMERIPEN strongly urges deletion of this subsection.

Subsection 4(C)(2) establishes “throughput” requirements for the definition of “readily recyclable.” AMERIPEN recommends that the S.O., in consultation with the Department, be empowered explicitly to determine when materials satisfy the proposed criteria.

Section 5. Process for Defining the Packaging Material Types List.

Subsection 5(B)(2) requires the S.O.’s annual report to the Department to include an appendix of suggested changes to the lists. The reposting draft requires the appendix to include “information gathered by the SO to support estimates of anticipated cost per ton for packaging material types being considered for readily recyclable designation.” AMERIPEN cautions that this information may be proprietary and difficult or impossible for the S.O. to acquire, as the S.O. does not have the power to compel its provision.

For subsection 5(C)(1)(a), AMERIPEN appreciates elimination of the use of the ready recyclable packaging material type with the highest management cost to determine transition costs. However, AMERIPEN is still concerned that the approach in the reposting draft may lead to excessive costs that do not reflect reality. That, in turn, may disincentivize producers from adopting readily recyclable materials. AMERIPEN therefore recommends shortening the

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transition period by deleting “and the calendar year following that in which the change occurs” and reverting “fourth” back to “third” later in the paragraph. Related, AMERIPEN recommends changing “two” to “one” in subsection 5(C)(1)(b).

Subsection 5(C)(1)(c) provides that newly designated readily recyclable materials must still be treated as not readily recyclable for reimbursement purposes for three subsequent calendar years. This will result in an inequitable overpayment of funds for materials that have met the recyclability requirements. AMERIPEN recommends rewriting this paragraph to tie the reimbursement value to the fee values as reflected in the recommendation for subsection 5(C)(1)(a), above.

To make subsection 5(C)(2)(a) consistent with the recommendation for subsection 5(C)(1)(a), AMERIPEN recommends amending the transition period from “three” to “two” calendar years and based on “the anticipated cost per ton,” and making a corresponding change to revert “fourth” to “third” later in the paragraph. This will create a more appropriate reimbursement framework for a readily recyclable material that might subsequently be designated as not readily recyclable.

AMERIPEN also notes it is fundamentally inequitable that there is a phase-in period with subsection 5(C)(1)(b), but no phase-out period in subsection 5(C)(2)(b).

Like the recommendation for subsection 5(C)(1)(c), above, AMERIPEN recommends rewriting subsection 5(C)(2)(b) to tie the reimbursement value to the fee values as reflected in the recommendation for subsection 5(C)(2)(a), above.

Section 6. Defining Cost by Packaging Stream.

The complexity and data required to define packaging stream costs under this section are significant, and every participating municipality would be required to pursue it to receive reimbursement. AMERIPEN recommends striking all the prescriptive formulas contemplated and instead permitting the S.O. to determine the appropriate ways to define costs. This will avoid locking in formulas that may not prove appropriate and ensure there is appropriate flexibility, while the Department retains oversight.

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AMERIPEN greatly appreciates the clarification in subsection 6(A), as per our previously submitted comment, that “labor costs” do not include “time spent maintaining equipment and structures.” This avoids introducing duplicative and unjustified expenses for producers.

Subsection 6(E) treats profit and overhead as reimbursable costs for managing packaging streams. Profit and overhead are not directly tied to the management of packaging, but rather are shaped by contractors themselves. To suggest within the draft rules that packaging producers may be wholly responsible for contractor profits or losses related to the management of packaging streams is inappropriate and fails to recognize factors that may be fully outside the scope of producers to control (e.g., mismanagement, poor operational practices, and inefficiency). Calculation of the profit and overhead amount will be extremely speculative, since contractors are unlikely to disclose the actual value. AMERIPEN therefore does not believe profit and overhead should be included in packaging stream cost calculations in Sections 6 and 7.

Section 8. Start-Up Registration and Payment.

While AMERIPEN appreciates the allowance to use national sales data to estimate the total tons of packaging materials used in subsection 8(A), this allowance should not be limited to only the start-up registration period. Producers do not all have the same capacity to measure their production by state level, especially as the Program ramps up. AMERIPEN recommends allowing the estimation authority to be permanent, or at least until the S.O. submits a recommendation to the Department that it is no longer necessary. Furthermore, AMERIPEN recommends allowing the producer to calculate the Maine-adjusted estimate rather than requiring the S.O. only to make the determination to avoid having producers’ reported data overwritten by another party.

Subsection 8(B) requires non-low-volume producers to pay a start-up registration fee “within 180 days of the SO entering into a contract with the Department.” The payment deadline should be tied to the registration deadline (as provided in subsection 8(A)) instead, as the contract date and registration deadline may not be synchronized to make this provision feasible as written. AMERIPEN recommends replacing “within 180 days of the SO entering into a contract with the Department” with “at the time of the registration deadline provided in 8(A).”

Section 9. Ongoing Producer Registration and Reporting.

In subsection 9(A), the reposting draft requires the specified information to be reported annually rather than when it begins production and within 60 days of the information changing. This is

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unnecessary and duplicative, given the requirement to report changed data within 60 days. AMERIPEN requests deletion of this new clause.

Subsection 9(A) also requires a producer to register with the S.O. “when it begins producing packaging material,” but the producer may have begun that production years in the past. As previously submitted to the Department, AMERIPEN seeks to clarify this provision to account for existing producers, as follows: *“when it begins producing packaging material, **or when this rule goes into effect if it already produces packaging material**, and must update the SO within 60 days of this information changing.”*

Regarding the reporting obligations listed in subsection 9(B), AMERIPEN appreciates the removal of the general requirement to report by brand. However, these obligations should be simplified to allow calculation of fees against statutory obligations without additional, unnecessary complexity that could introduce inaccuracies, given that producer data may be organized in different ways. To this end, AMERIPEN requests consideration of the following:

- Reporting should only be required within a range broader than the nearest kilogram or pound (as proposed in the reposted draft), such as within the nearest 10 pounds.
- Reporting should be by company rather than by brand, as required in subsection (B)(2), as brand-level reporting would necessitate massive amounts of data.
- Reporting should be by category and then packaging components as defined in the producer specification system, rather than defined by separability for recycling.
- Given that SKU UPCs do not always change when a package changes, this level of reporting is not needed as it might not create a distinction between packaging types and materials. AMERIPEN asserts that, while the statute references UPC code reporting, the Department should only require reporting of packaging materials by weight and could request UPC reporting if compliance with the law for all materials sold is in question for a particular producer and the producer is able to appropriately identify those UPCs. Additionally, AMERIPEN firmly believes that the Legislature should repeal this confusing and poorly drafted language and urges the Department to support statutory change in this area.
- Subsection 9(B)(4) requires reporting of 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.” This may not align with the type of weight reporting done in other EPR states. AMERIPEN recommends deferring the nature of this reporting to the

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S.O. instead, or at minimum giving the S.O. the authority to request a different scope of reporting.

- Subsection 9(B)(5) requires reporting of the total weight of a packaging material type. AMERIPEN recommends adding a mechanism in this section allowing materials recovery facilities to report to the Department, S.O., or both about the weight of any material types that go to markets that use more than the traditionally targeted portion of packaging in their processing. This is because the “weight not recycled” incentive fee in Section 10 (Producer Fees) measures the weight of readily recyclable material types that do not end up recycled, and more specific data about the fate of various materials will help provide for accurate fee levels.
- Subsection 9(B)(6) requires a new, costly third-party auditing process for post-consumer recycled (PCR) content. AMERIPEN instead recommends allowing a producer to self-attest to compliance if it obtained third-party certifications of its material from PCR content suppliers. The S.O. could subsequently require provision of those certifications to check compliance.
- AMERIPEN opposes the new requirement in subsection 9(B)(7) for producers to declare if they can “provide a certificate of compliance from the entity or entities that manufacture the packaging material that attests to the absence of intentionally added toxics.” This will create an entirely infeasible obligation to obtain certification for an extremely large universe of chemicals, per comments above. AMERIPEN preferred the prior version of this language, which was less prescriptive. If the Department does not revert the language to the prior version, AMERIPEN requests that producers be allowed to self-attest to the absence of intentionally-added toxics.
- Subsections 9(B)(8) and 9(B)(9) require reporting as to whether a producer “provides, or is aware of,” refill or reuse options, respectively. It is not useful or productive for producers to report their awareness of options, so AMERIPEN recommends striking “, or is aware of,” from both subsections.
- In subsection 9(B)(10), packaging must be labeled “in a way that suggests it is” recyclable, reusable, or compostable. “Suggests” is an unclear and undefined term and will generate significant challenges for producers in determining compliance. AMERIPEN prefers striking this newly added clause altogether, as the language would be more objective and certain without it.

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AMERIPEN requests the addition of clarifying language in subsection 9(D) that producers be allowed to make weight and unit estimates using prorated/normalized national data prorated for Maine's population.

Subsection 9(D)(1)(c) requires producers to measure any parts of a packaging material type that weigh at least 0.1 gram when estimating weight from units. This weight threshold is extremely low. AMERIPEN requests the Department's rationale for its use and consideration of a higher, more reasonable threshold.

For the auditing provisions in subsection 9(E), AMERIPEN appreciates use of producer-level reporting rather than brand-level reporting, and the inclusion of auditing of information reported under subsection 9(C).

Section 10. Producer Fees.

As previously submitted by AMERIPEN as a general structural comment on the entire rule, and like the program goals referenced above, the type fees and incentive fees proposed in the draft regulations will be financially punitive for producers and introduce steep costs. AMERIPEN recommends instead to defer to the S.O. to set any type fees and incentive fees or credits in a manner that effectively balances costs, feasibility, and effectiveness, as well as the overall budgetary needs for an approved S.O. plan in the state. AMERIPEN also cautions against allowing collected revenues from exceeding actual management costs and a limited reserve; doing otherwise will inflate costs statewide.

Section 10 requires the S.O. to invoice producers by July 1 and requires producers to pay the invoice by September 1 every year. Based on experiences in other EPR jurisdictions, this timeline is likely too compressed. AMERIPEN recommends consultation with producer responsibility organizations and producers involved in EPR elsewhere to determine a more appropriate timeframe. The reimbursement deadline in Section 13 would also need to be adjusted accordingly.

Subsection 10(A)(1) sets the aggregate annual registration fee at the full \$300,000 – the maximum amount authorized in the statute for Department administration. As previously submitted, AMERIPEN seeks the Department's analysis or justification as to why that value was determined appropriate, rather than a lesser amount. Additionally, this subsection exempts low-volume producers from sharing in the cost of the S.O.'s annual budget, thereby shifting costs

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disproportionately on all other producers. AMERIPEN recommends that some proportion of the S.O.'s annual budget be allocated to low-volume producers.

Reusable materials must be designed to make them sufficiently reusable multiple times for at least five years. As a result, it may be harder for them to qualify as “readily recyclable,” and this creates a tension with the proposed reuse goal and the increased fee for non-readily recyclable material. To help address this, AMERIPEN recommends adding language stating that, “Reusable packaging materials that are managed through a reuse system must not be charged producer fees more than once, upon initial entry into the marketplace.” This is based on a similar provision in Minnesota’s packaging EPR law.³

As previously submitted, AMERIPEN seeks to know whether the Department performed cost impact analysis regarding the fee provisions, as many appear to be purely speculative for cost factors. Specifically, subsection 10(A)(2)(b) requires producers to pay (at least) twice the costs for materials that are not readily recyclable, reusable, or compostable, based on the cost of the most expensive readily recyclable material rate. These two requirements will lead to unjustified costs. AMERIPEN recommends the S.O. instead determine the factor and propose that for approval by the Department in the stewardship plan.

Also previously submitted, subsection 10(A)(2)(b)(iii) lacks a bifurcated fee approach for varying levels of recyclability/reusability/compostability, unlike subsection 10(A)(2)(b)(ii). Such bifurcation provides an incentive for producers to incrementally increase the recyclability/reusability/compostability of their material. AMERIPEN recommends bifurcating this subsection so that materials achieving a rate between at least 75% and 100% after 2050 would pay four times the cost.

Subsection 10(A)(3)(a) establishes a “post-consumer recycled material fee.” Compostable packaging is not capable of utilizing post-consumer recycled content because the packaging is ultimately intended to break down in an industrial or home composting system rather than be recycled directly into new products or packaging. Applying this fee will unfairly inflate the cost of compostable packaging in a way that cannot be addressed. AMERIPEN recommends exempting compostable packaging material directly from this fee.

Subsection 10(A)(3)(b) establishes a “toxicity fee.” As commented above, AMERIPEN believes the new requirement to provide a certificate of compliance is infeasible and excessive. AMERIPEN

³ Minnesota Statutes Chapter 115A.1454, Subdivision 1, Paragraph (5).

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recommends instead that a producer’s self-certification that there are not intentionally-added toxics in their packaging during reporting is sufficient to not be subject to this fee.

Subsection 10(A)(3)(c) bases a “reduction of litter” incentive fee on whether a brand is one of the top five brands found in litter audits. This fee on five brands is not specifically called for by statute. It is also an arbitrarily designed, unsupportable approach that ignores the possibility that litter goals will have been met and/or that litter is de minimis. In such cases, this would add unnecessary costs without justification. Litter reduction can instead be incentivized through increased waste collection opportunities and education efforts. AMERIPEN recommends letting the S.O. design any potential litter-related fee and assessing any fee by packaging material type rather than by brand.

Subsection 10(A)(3)(d) establishes a “labeling” incentive fee that penalizes labeling for material management pathways that are “not available throughout the State.” This approach is not supported by any reasonable standard and will jeopardize the ability to communicate proper waste management to consumers. This is especially challenging for compostable materials, which have not had as much time or investment yet to develop infrastructure as ubiquitous as for recycling. The law requires the labeling fee “to reduce consumer confusion,” but the proposed fee will make it harder to communicate appropriate materials management. AMERIPEN instead requests that this incentive be tied to national labeling best practices and standards until such time a clearer picture of what materials are uniformly recycled across the State of Maine, and that the fee be set by the S.O. AMERIPEN further notes the inappropriate use of “suggests” and reiterates the same concerns expressed for subsection 9(B)(10).

Subsection 10(A)(3)(e) establishes a “weight not recycled” incentive fee of 30% of the packaging material type fee per ton not recycled and applied to packaging material types designated readily recyclable. This fee is fundamentally unfair, as producers do not have control over consumer behavior and whether consumers appropriately recycle materials. Further, the 30% rate is steep and will result in excessive costs for producers and consumers alike. This fee is not required by law, and AMERIPEN therefore requests it be struck.

Section 11. Alternative Collection Programs.

Subsection 11(A) delineates proposal fees must be paid to the Department for reviewing alternative collection program proposals. It is unclear how the Department arrived at these fee amounts and AMERIPEN is concerned they may prove excessive. AMERIPEN appreciates the allowance in subsection 11(A)(4) for the Department to waive or reduce the proposal fee for a

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proposed modification to an alternative collection program if its review does not require significant staff resources.

Subsection 11(B)(1)(c) limits the credit that a producer can receive for an alternative collection program that operates in one, two, or three to fifteen counties to 10%, 20%, or 30%, respectively. This is an overly simplistic approach. AMERIPEN recommends revising the credit amount to instead reflect the statewide proportion of the population served in the applicable county or counties.

Subsection 11(D) establishes the annual report fees for alternative collection programs. AMERIPEN seeks the Department's justification for these fee levels and asks whether the Department has considered whether lower levels would be more appropriate given the reduced complexity of a single producer/industry collection program.

Section 13. Defining Municipal Reimbursement.

In conjunction with the previous recommendation to allow in-home refill to qualify as reuse, AMERIPEN recommends amending subsection 13(B) to provide that municipal reimbursement is not required for reusable packaging that the consumer refills in the home.

AMERIPEN vehemently objects to the approach in paragraph (D) for providing reimbursement for packaging material types that are not readily recyclable but are sent to a landfill. AMERIPEN firmly believes that reimbursement for disposal and landfill costs for packaging material that is not readily recyclable should **not** be allowed under the program. This is evidenced in the law and legislative intent, through clear amendments taken during the legislative process that struck "disposal" costs in three places. Specifically, this concept was removed from the law and references to disposal were specifically struck from LD 1541, through a floor amendment (H-A to C-A (H-714)) from then Representative Ralph Tucker. The legislative intent is clear, and "disposal" costs were struck in three places from the bill. Disposal costs therefore cannot be paid for under the final rules promulgated for the law. In contrast, AMERIPEN does support funding for alternative management of packaging materials that are diverted from disposal at landfill and moved up the state's solid waste hierarchy, as stipulated in 38 MRSA §2101.

Section 14. Obtaining Information for Municipal Reimbursement.

Subsection 14(A)(2) requires that if "a participating municipality or any affiliated contractor makes a change to the management of a packaging stream that requires notification, it must contact the S.O. within 30 days of making the change." As previously submitted, AMERIPEN urges the Department to give thought to how it can be ensured that municipalities report changes in a

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timely manner – particularly those that will result in lower reimbursement. This may entail robust auditing and enforcement efforts.

Related, the third paragraph of subsection 14(A)(2) details what qualifies as “changes to the management of a packaging stream that might require notification.” AMERIPEN recommends deletion of “might” to ensure the S.O. is fully informed of any actions that could necessitate a follow-up cost study. Additionally, AMERIPEN appreciates the revisions in the reposted draft rules from “additional” to “changes to” in the last example.

Subsection 14(B)(2)(d) requires audit results from two municipalities that “are not significantly different” to be averaged and represent all municipalities managing the same commodity or accepted materials. This methodology relies on very small sample sizes and appears to risk biasing the average in favor of just two results that agree by chance. As previously submitted to the Department, AMERIPEN seeks justification as to why this approach was chosen and how it will produce truly representative values. It may be preferable instead to let the S.O. set the nature of this applicability determination.

Section 16. Determining the Median Per Ton Cost of Recycling, Reusing, and Composting Each Packaging Material Type.

Subsection 16(B)(3) provides that, if “there are not three current complete cost studies measuring the per ton cost of a management pathway for a packaging material type, the S.O. will not determine the median per ton cost for this management pathway for this packaging material type.” AMERIPEN requests clarification as to what would happen next in this scenario to complete the determination of the median per ton cost.

Section 17. Calculating the Tons Managed of Packaging Material Recycled, Reused, or Composted.

Subsection 17(B)(2)(a) requires municipalities to report to the Department “total tons of the set of accepted materials received by the receiving facility,” which presumably is not a figure to which municipalities already have access. As previously submitted to the Department, AMERIPEN suggests including an explicit requirement for receiving facilities to share this information with municipalities, including any appropriate confidentiality measures.

Subsections 17(B)(3)(a) and 17(B)(3)(b) lack the language stating, “unless a specific case is brought to the attention of the Department and determined to be an exception,” which was included in corresponding language in the rule concept. AMERIPEN again seeks the Department’s explanation for the reason for this omission.

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Section 18. Investments.

Subsection 18(A)(2) limits eligibility for infrastructure investments to municipalities, tribes, school administrative units, career, and technical regions, 501(c)(3) organizations, or businesses with less than \$5 million in total gross annual revenue. However, the law does not place any restrictions on who may receive investment funding. As previously submitted to the Department, AMERIPEN believes that full flexibility for eligibility is warranted to ensure that every option that can support packaging recycling in Maine. The S.O. and Department will still be responsible for evaluating the merit of each proposal, so there will be no loss in stringency for funding use. While we appreciate the addition of the conditions not applying to major investment needs, AMERIPEN again recommends striking specific references to eligible entities.

AMERIPEN appreciates the addition in the reposted draft rules the increased flexibility for pilot projects provided in subsection 18(A)(5).

Subsection 18(A)(6)(c) establishes a \$2,000/ton recycled cost effectiveness requirement for infrastructure proposals. AMERIPEN again requests to know how the Department established this figure.

Regarding the Major Investment provisions in subsection 18(D)(4), there is a lack of criteria to determine when a major investment is necessary and justified. AMERIPEN recommends that major investment proposals must demonstrate that they will increase efficiency and/or recycling capacity where there is a regional need. AMERIPEN also requests restoration of the last sentence of the final paragraph, which required funds not reallocated to other major investments needs within three years to be made available for all program needs. This would help defray the need for increased fees.

As previously submitted, an earlier published rule concept included a requirement for the S.O., in its annual report, to “include the amount of investment funding approved during the prior calendar year and a description of the approved investment proposals.” AMERIPEN supports the reporting of this information to give insight into investment performance and requests it be added back into the draft rules.

Section 19. Packaging Stewardship Fund Cap.

AMERIPEN supports this section governing the treatment of “excess funding,” particularly for the reduction of producer costs. Related to previous comments submitted, AMERIPEN appreciates the addition of a tiered reserve level requirement in the reposting draft in paragraph (A).

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Subsection 18(B) requires the S.O. to “reduce the amount owed for each ton of packaging material produced” according to the calculation of expected excess funding. AMERIPEN is concerned that this approach will penalize producers that sell into commercial spaces have a business entity paying for their recycling by spreading out the excess collected from those producers - as their funds then subsidize other producers whose packaging is collected in the municipal recycling stream.

Section 21. Requests for Exemption from the Post-Consumer Recycled Material Incentive Fee.

AMERIPEN appreciates the addition of this section and acknowledgement of the limits of incorporating post-consumer recycled material. AMERIPEN reiterates its support for six of the parties that requested exemptions pursuant to this authority, expressed in the letter AMERIPEN submitted to the Department on July 30, 2024. However, we feel it is critical to note that the underlying statute is overly restrictive in not exempting materials for which it is impractical or impossible to comply. This is especially apparent when comparing Maine’s law with those in the other states with similar programs, which all contain affirmative exemptions that do not require a request and review process. Our letter, and the exemption requests submitted by the aforementioned parties, delve much further into these facts.

As previously submitted to the Department, AMERIPEN seeks to clarify in the rule that, if a request is approved, the amount of the applicable fee would be entirely eliminated and not reapportioned to any other producers. Additionally, and consistent with the law, AMERIPEN recommends that this section explicitly state that a material that receives an exemption should be excluded from all packaging material requirements, including the calculation of a PCR rate.

Additionally, the draft of these rules posted on February 5, 2024, removed an appeals process involving the Maine Board of Environmental Protection (BEP). As we previously submitted to the Department, AMERIPEN seeks to know why this appeal option was eliminated and requests some form of appeal be made available in the final rule.

Finally, AMERIPEN again requests that packaging material that is precluded by law or regulation from using any post-consumer recycled material be excluded upfront from post-consumer recycled material goals and fees, rather than requiring a waiver request. This will save the Department resources from considering cases that are clearly constrained by existing prohibitions.

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AMERIPEN strives to offer a good-faith and proactive approach that integrates elements from other established packaging producer responsibility programs with hopes of developing a plan that will incentivize recycling growth and the beneficial impacts that come along with that in Maine. AMERIPEN continues to focus on strategies that develop and/or strengthen policies to progress the “reduce, reuse, recycle” strategies, while at the same time, enhancing the value of packaging. Our members are driving innovation, designing better environmental performance to evolve the recycling infrastructure and to create a more circular economy for all packaging. In our efforts to reduce environmental impact by increasing the circularity of packaging, our members continue to recognize the value of collaboration and the importance of working across the packaging value chain. Unfortunately, these regulations fall short of what we believe is a workable approach and continue to take major unproductive steps backward. Therefore, we reiterate our request that these rules be paused, and that the Department and the Administration offer an opportunity for a larger dialogue about the structure of the rules and the law itself, and potential changes that need to be made to the law before rules are promulgated further.

AMERIPEN hopes that a pause in the regulations would allow for an open dialogue with the Department, the Administration and interested stakeholders while collectively balancing the myriads of needs for packaging, recycling, and sound solutions to grow a more sustainable future, an effective circular economy, and systems that achieve positive environmental outcomes for everyone, which in the end, ultimately assists in the success of this program. We remain committed to supporting progressive, proactive, and evidence-based strategies for sustainable packaging policies and programs.

As always, AMERIPEN thanks the Department for this opportunity to provide written comments regarding the above proposed draft rules and appreciates the Department staff’s time and assistance during the rulemaking process. Please feel free to contact me or Andy Hackman with Serlin Haley, LLP (AHackman@serlinhaley.com) with any questions on AMERIPEN’s positions.

Sincerely,

Dan Felton
Executive Director