

Date of Hearing: April 20, 2021

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 1371 (Friedman) – As Amended April 7, 2021

As Proposed to be Amended

SUBJECT: RECYCLING: PLASTIC: PACKAGING AND CARRYOUT BAGS

KEY ISSUES:

- 1) IN ORDER TO REDUCE PLASTIC POLLUTION, SHOULD CALIFORNIA ADOPT REGULATIONS AND PROHIBITIONS REGARDING THE USE OF PLASTIC PRODUCTS IN ONLINE RETAILER SHIPPING MATERIALS?
- 2) IN ORDER TO PERMIT THE CONVENIENT RECOVERY OF PLASTIC BAGS, SHOULD THE AT-STORE RECYCLING PROGRAM BE REAUTHORIZED AS ITS PROVISIONS RECENTLY SUNSET?

SYNOPSIS

Approximately 33 billion pounds of plastic waste enter marine environments globally each year. A significant driver of this waste stems from the fact that many plastic products are nearly impossible to recycle, thus the only means of disposing the waste is in a traditional landfill, which may result in some of the plastic seeping into the environment. The growing use of plastic in shipping materials, due to its light weight and affordability, is further driving this crisis as online retail grew significantly during the pandemic. As proposed to be amended, this bill seeks to address two sources of plastic pollution, plastics found in shipping materials and plastic bags. To address the plastic shipping materials this bill proposes a new regulatory scheme to prohibit the use of single-use plastics and Styrofoam by 2025. In the interim, this bill proposes several methods for recovering plastics used in shipping products. To address the issues posed by plastic bags, this bill reauthorizes the recently lapsed At-Store Recycling Program whereby consumers can drop used bags off at local retailers and grocery stores. Both measures are proposed to be enforced by civil penalties that may be brought by the Attorney General, county counsels, and city attorneys.

This bill is sponsored by Oceana and is strongly supported by a broad coalition of environmental and product stewardship organizations. The supporters point out the significant amount of plastic waste generated in California as a result of customer confusion and a difficult recycling market. They contend this bill, particularly provisions aimed at recapturing used plastic, will help well-meaning consumers ensure that plastic is recycled or reused and not redirected to a landfill or elsewhere in the natural environment. This bill, as in print and as proposed to be amended, is stridently opposed by a coalition of retailers, manufacturers, technology companies, shipping companies, and the California Chamber of Commerce. The opposition contends that the bill is unworkable, as it would prohibit the use of products that have no substitute and would impose difficult-to-implement plastic collection mandates. This bill was previously heard by the Assembly Committee on Natural Resources where it was approved by a vote of 8-3.

SUMMARY: Seeks to regulate the use and collection of various plastic products utilized by online retailers to ship products to consumers and restores the authorization for the At-Store Recycling Program. Specifically, **this bill:**

- 1) Defines the following terms for the purposes of 2)-23):
 - a) “Cushioning” means material used to protect fragile goods by absorbing shocks and vibrations during shipping. Plastic cushioning includes, but is not limited to, plastic bubble wrap and inflatable plastic pillows.
 - b) “Expanded polystyrene packaging” means any packing material made of polystyrene that has been expanded or blown using a blowing agent into a solid foam, including, but not limited to, loose fill, often referred to as packing peanuts, and molded foam.
 - c) “Large online retailer” means an online retailer that has annual gross sales equal to or more than one million dollars (\$1,000,000) in or into the state and that has equal to or more than 2,500 shipping units sold and transported in or into the state annually.
 - d) “Online retailer” means a business that sells goods over the internet and transports goods by mail or parcel delivery. An online retailer includes business-to-business and business-to-consumer sales of products.
 - e) “Packaging” includes, but is not limited to, all of the following: primary packaging; secondary packaging used to group products into unit loads during transit and that is the outermost layer of packaging shipped to consumers; and tertiary packaging or dunnage used to facilitate the protection, handling, and transportation of a sales unit or sales units to consumers.
 - f) “Plastic film” means thin flexible sheets of plastic, sold in thicknesses of up to 10 millimeters, of which the majority produced are made of polyethylene resins. Plastic film is used to produce, and includes, shipping envelopes, cushioning, and void fill.
 - g) “Reusable packaging” means packaging that is all of the following: designed for reuse in the same or similar application, or for another purposeful packaging use in a supply chain; highly durable to function properly in its original condition for multiple trips and its lifetime is measured in years; repeatedly recovered, inspected, and repaired, if necessary, and reissued into the supply chain for reuse; and prevented, at the end of its life, from becoming solid waste with a process in place for recovery and recycling at the final destination of the packaging.
 - h) “Shipping envelope” means packaging used for the containment, protection, handling, or delivery of smaller goods by a manufacturer or retailer for the user or consumer. A plastic shipping envelope includes, but is not limited to, plastic mailers, envelope mailers, lightweight plastic mailers, padded plastic mailers, poly mailers, poly bubble mailers, plastic shipping mailers, and paper mailers with plastic lining.
 - i) “Single-use packaging” means packaging that satisfies any of the following: is intended for a single use; is regularly discarded, recycled, or otherwise disposed of after a single use; or is not reusable packaging.

- j) “Small online retailer” means an online retailer that has annual gross sales of less than one million dollars (\$1,000,000) in or into the state or that has less than 2,500 shipping units sold and transported in or into the state annually.
 - k) “Void fill” means a filler material used to close up the free space in a shipping container and prevents excessive movement. Plastic void fill includes, but is not limited to, sealed air and expanded polystyrene packaging.
- 2) Provides that for the purpose of 1), an online retailer does not include an online marketplace that satisfies all of the following:
- a) Is an online or mobile application providing user services and facilitating sales solely from third-party sellers to third-party buyers;
 - b) Does not own any of the inventory for sale on the online marketplace;
 - c) Does not ship or control the distribution, packaging, or transport of any products on the online marketplace;
 - d) Facilitates and permits direct, unhindered communication between the third-party buyer and the third-party seller;
 - e) Conspicuously displays the third-party seller’s location.
 - f) Does not determine the price for the product offered on the online marketplace.
 - g) Is not a large online retailer.
- 3) Provides that for the purpose of 1) an online retailer does not include a public or privately operated motor carrier, as defined in 49 U.S.C. Section 13102, that only transports a parcel that has been placed into packaging prior to the motor carrier’s taking possession of the parcel and is not opened until after the motor carrier has delivered the parcel.
- 4) Prohibits an online retailer that sells or offers for sale and delivers purchased products in or into the state from utilizing single-use plastic packaging that consists of shipping envelopes, cushioning, or void fill to package or transport the products.
- 5) Requires a large online retailer to comply with the provisions of 4) by January 1, 2023 and a small online retailer to comply with the provisions of 4) by January 1, 2025.
- 6) Prohibits a manufacturer, retailer, producer, or other distributor that sells or offers for sale and delivers purchased products in or into the state from using expanded polystyrene packaging to package or transport their products.
- 7) Provides that an online retailer that has at least one physical location in the state with in-person sales must provide at all physical locations in the state with in-person sales a take back container for plastic film and expanded polystyrene packaging that provides an opportunity for a customer to return to the location clean plastic film and expanded polystyrene packaging. The program must provide for all of the following:

- a) The online retailer must place a collection bin for plastic film and expanded polystyrene packaging at each physical location with in-person sales that is visible, easily accessible to the customer, and clearly marked that the collection bin is available for the purpose of collecting and recycling plastic film and expanded polystyrene packaging;
 - b) All clean plastic film and clean expanded polystyrene packaging collected by the online retailer, or its agent, must be transported and recycled in a manner that does not conflict with the local jurisdiction's source reduction and recycling element;
 - c) The online retailer must maintain records describing the collection, transport, and recycling of plastic film and expanded polystyrene packaging collected for a minimum of one year and make the records available to the department and the local jurisdiction, upon request, to demonstrate compliance with this bill.
- 8) Provides that the provisions of 7), with the exception of the record keeping requirements, become inoperative January 1, 2025 and that the entirety of 7) is repealed as of January 1, 2026.
 - 9) Requires an online retailer that provides lockers for the secure pickup of purchased products at a store, other than a physical location with in-person sales described in 7), to provide a collection bin at the store near the lockers that is visible, easily accessible to the customer, and clearly marked as available for the purpose of collecting and recycling plastic film and expanded polystyrene packaging. A collection bin must be maintained by the online retailer and is not required to be maintained by the store.
 - 10) Requires that all plastic film and expanded polystyrene packaging collected by the online retailer, or its agent, pursuant to 9) be collected, transported, and recycled in a manner that does not conflict with the local jurisdiction's source reduction and recycling element.
 - 11) Requires an online retailer to maintain records describing the collection, transport, and recycling of plastic film and expanded polystyrene packaging for one year and make the records available to the department and the local jurisdiction, upon request, to demonstrate compliance with this bill.
 - 12) Provides that the provisions of 9) and 10) become inoperative on January 1, 2025 and that the provisions of 9)-11) are repealed as of January 1, 2026.
 - 13) Requires an online retailer that delivers purchased products to customers in this state to have an at-delivery recycling program that provides for the pickup at the time of delivery of plastic film and expanded polystyrene packaging for products previously purchased from the online retailer, at no cost to the customer.
 - 14) Requires all plastic film and expanded polystyrene packaging collected by the online retailer, or its agent, pursuant to 13) be collected, transported, and recycled or reused in a manner that does not conflict with the local jurisdiction's source reduction and recycling element.
 - 15) Requires an online retailer to maintain records describing the collection, transport, and recycling of plastic film and expanded polystyrene packaging in 13) and 14) for one year and make the records available to the department and the local jurisdiction, upon request, to demonstrate compliance with this bill.

- 16) Provides that the provisions of 13) and 14) become inoperative on January 1, 2025 and that the provisions of 13)-15) are repealed as of January 1, 2026.
- 17) States that nothing in 1)-16) prohibits the adoption, implementation, or enforcement of a local ordinance, resolution, regulation, or rule governing curbside or dropoff recycling programs operated by, or pursuant to a contract with, a city, county, or other public agency, including any action relating to fees for these programs.
- 18) Provides that an action to enforce the above provisions may be brought by the Attorney General upon a complaint from the Department of Resources Recycling and Recovery or by a county counsel, or a city attorney from a city or city and county with a full time city prosecutor, upon a complaint by a local agency or resident located within the jurisdiction.
- 19) Provides that an entity authorized to bring an action pursuant to 18) may impose civil liability on a person or entity that knowingly violated this bill, in the amount of one thousand dollars (\$1,000) per day for the first violation of this chapter, two thousand dollars (\$2,000) per day for the second violation, and five thousand dollars (\$5,000) per day for the third and subsequent violations of this chapter if the entity is deemed a small online retailer.
- 20) Provides that entity authorized to bring an action pursuant to 18) may impose civil liability in the amount not to exceed fifty thousand dollars (\$50,000) per day for a violation of this chapter if the entity is deemed a large online retailer.
- 21) Provides that any civil penalties collected pursuant to 19) and 20) are to be paid to the office of the Attorney General, county counsel, or city attorney, whichever office brought the action. The penalties collected by the Attorney General must be deposited into the Plastic Packaging Reduction Penalty Account, which is created in the State Treasury. Moneys in the account may be expended by the Attorney General, upon appropriation by the Legislature, to enforce this bill.
- 22) Provides that in addition to any civil penalties collected in accordance with 21), the Attorney General, county counsel, or city attorney may seek all costs and attorney's fees incurred by the prosecuting entity as well as the costs incurred by the department or a local agency in investigating the matter.
- 23) Provides that the provisions of 1)-22) are severable and that if any provision or its application is held invalid, that invalidity does not affect other provisions or applications that can be given effect without the invalid provision or application.
- 24) Adopts the following additional definitions for the purposes of 25)-32).
 - a) "Manufacturer" means the producer of a plastic carryout bag sold to a store.
 - b) "Operator" means a person in control of, or having daily responsibility for, the daily operation of a store, which may include, but is not limited to, the owner of the store.
 - c) "Plastic carryout bag" means a plastic carryout bag provided by a store to a customer at the point of sale, including, but not limited to, plastic reusable bags.

- d) "Reusable bag" is a bag that has a handle and is designed for at least 125 uses, has a volume capacity of at least 15 liters, is machine washable or made from a material that can be cleaned and disinfected, has specified information printed on the bag, or on a tag attached to the bag that is not intended to be removed, and in a manner visible to the consumer, and not contain lead, cadmium, or any other toxic material that may pose a threat to public health.
 - e) "Store" means a retail establishment that provides plastic carryout bags to its customers as a result of the sale of a product and is either a supermarket, as defined, or has over 10,000 square feet of retail space that generates sales or use tax pursuant to the Bradley-Burns Uniform Local Sales and Use Tax Law.
- 25) Requires an operator of a store, as defined in 24), to establish an at-store recycling program that provides an opportunity for a person to return to the store clean plastic carryout bags and clean durable plastic bags.
- 26) Provides that a retail establishment that does not meet the definition of a store pursuant to 24) and that provides plastic carryout bags to customers at the point of sale may also adopt an at-store recycling program.
- 27) Requires an at-store recycling program provided by the operator of a store established pursuant to 25) or 26) to consist of the following:
- a) A plastic carryout bag or durable plastic bag provided by the store shall have printed or displayed on the bag, in a manner visible to a consumer, the words "PLEASE RETURN TO A PARTICIPATING STORE FOR RECYCLING;"
 - b) A collection bin for plastic carryout bags and durable plastic bags, to be placed at each store and be visible, easily accessible to the consumer, and clearly marked that the collection bin is available for the purpose of collecting and recycling plastic carryout bags and durable plastic bags;
 - c) All plastic bags collected by the store must be collected, transported, and recycled in a manner that does not conflict with the local jurisdiction's source reduction and recycling element; and
 - d) The store maintains records describing the collection, transport, and recycling of plastic bags collected for a minimum of three years and make the records available to the department and the local jurisdiction, upon request, to demonstrate compliance.
- 28) Provides that nothing in 24)-31) prohibits the adoption, implementation, or enforcement of any local ordinance, resolution, regulation, or rule governing curbside or drop off recycling programs operated by, or pursuant to a contract with, a city, county, or other public agency.
- 29) Provides that nothing in 24)-31) affects any contract, franchise, permit, license, or other arrangement regarding the collection or recycling of solid waste or household hazardous waste.
- 30) Provides that a city, a county, or the Attorney General may impose civil liability in the amount of five hundred dollars (\$500) for the first violation, one thousand dollars (\$1,000)

for the second violation, and two thousand dollars (\$2,000) for the third and any subsequent violation of 24)-29).

- 31) Provides that any civil penalties collected pursuant to 30) shall be paid to the office of the city attorney, city prosecutor, district attorney, or Attorney General, whichever office brought the action. The penalties collected by the Attorney General are to be deposited into the At-Store Recycling Program Penalty Account, which is created in the State Treasury. Moneys in the account may be expended by the Attorney General, upon appropriation by the Legislature, to enforce 24)-29).
- 32) Provides that the provisions in 24)-31) are to become inoperative on January 1, 2030, except for the record keeping requirements described in 27), and all provisions of 24)-31) repealed as of January 1, 2033.

EXISTING LAW:

- 1) Federal law, as a part of the Clean Water Act, establishes the National Pollutant Discharge Elimination System to regulate point source pollution being emitted into the waters of the United States. Provides that point sources include discrete conveyances such as pipes or man-made ditches, and that examples of pollutants include, but are not limited to, rock, sand, dirt, and agricultural, industrial, and municipal waste discharged into waters. (40 C.F.R. Section 122.2 *et seq.*)
- 2) Federal law, authorizes state regulatory bodies to implement the National Pollutant Discharge Elimination System so long as the regulatory body possess sufficient legal authority to oversee 47 different aspects of the federal regulatory program, as specified. (40 C.F.R. Section 123.25.)
- 3) Federal law, establishes the Motor Carrier Act, and provides that a state, political subdivision of a state, or political authority of two or more states may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier, as specified) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property. (49 U.S.C. Section 14501 (c)(1).)
- 4) Federal law, pursuant to the Motor Carrier Act, provides that the prohibitions described in 3) do not apply to the following:
 - a) The safety regulatory authority of a state with respect to motor vehicles, the authority of a state to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a state to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;
 - b) The intrastate transportation of household goods; and
 - c) The authority of a state or a political subdivision of a state to enact or enforce a law, regulation, or other provision relating to the regulation of tow truck operations performed without the prior consent or authorization of the owner or operator of the motor vehicle. (49 U.S.C. Section 14501 (c)(2).)

- 5) Federal law defines “motor carrier” for the purposes of 3) and 4) to mean a person providing motor vehicle transportation for compensation. (49 U.S.C. Section 13102 (14).)
- 6) Federal law defines “household goods” for the purposes of 3) and 4) to mean personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is either of the following:
 - a) Arranged and paid for by the householder, except such term does not include property moving from a factory or store, other than property that the householder has purchased with the intent to use in his or her dwelling and is transported at the request of, and the transportation charges are paid to the carrier by, the householder; or
 - b) Arranged and paid for by another party. (49 U.S.C. Section 13102 (10)(A).)
- 7) Federal law, the Marine Protection, Research, and Sanctuaries Act generally prohibits the following:
 - a) The transportation of material from the United States for the purpose of ocean dumping;
 - b) The transportation of material from anywhere for the purpose of ocean dumping by U.S. agencies or United States-flagged vessels; and
 - c) The dumping of material transported from outside the United States into territorial waters of the United States. (16 U.S.C. Section 1431 *et seq.* and 33 U.S.C. Section 1401 *et seq.*)
- 8) Establishes the Porter Cologne Water Quality Control Act which permits the State Water Resources Control Board, and regional water boards, to implement the National Pollutant Discharge Elimination System and more generally provides for the conservation, control, and utilization of the water resources of the state, and ensures that the quality of all the waters of the state can be protected for use and enjoyment by the people of the California. (Water Code Section 13000 *et seq.*)
- 9) Establishes the Preproduction Plastic Debris Program, which requires the State Water Resources Control Board and regional boards to develop a program that requires plastic manufacturing, handling, and transportation facilities to implement best management practices to control discharges of preproduction plastic pellets. (Water Code Section 13367.)
- 10) Established the Integrated Waste Management Act and requires local agencies to divert 50 percent of all solid waste on and after January 1, 2000, through source reduction, recycling, and composting activities. (Public Resources Code Section 41780.)
- 11) Requires, beginning July 1, 2015, that specified retailers may only sell or distribute a reusable grocery bag to a customer at the point of sale only if the reusable bag meets specified standards. (Public Resources Code Section 42281.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: Seeking to address California’s ongoing issues with plastic waste, this bill would prohibit the use of polystyrene packaging, a common type of plastic used in shipping goods purchased online to consumers, as well as single-use plastics that constitute shipping envelopes,

cushioning, or void fill to package or transport products by 2025. The bill would also reauthorize the At-Store Recycling Program which recently lapsed due to the Legislature's failure to extend its sunset date. The author notes that since the onset of the COVID-19 pandemic, and the corresponding boom in online commerce, the amount of single-use plastic used in California has increased nearly 300 percent. In support of this measure that seeks to reduce plastic waste the author writes:

As an online retail consumer, I have been appalled at the amount of plastic packaging that accompanies my orders. No one wants these materials. We can't put them in our recycling bins, and they are overflowing curbside trash bins and taken to landfills at a huge expense to local governments. We know we can do better here in California because alternatives to single-use plastic packaging already exist and are being implemented elsewhere. AB 1371 will reduce the unnecessary and unacceptable amount of single-use plastic used in the e-commerce marketplace by phasing out shipping envelopes, bubble wrap, air pillows and other shipment packaging that contains plastic — including loose-fill (commonly known as packing peanuts) and molded foam packaging made from expanded polystyrene — for shipments in and into California. In the meantime, companies must provide options for people to bring their packaging and plastic bags back to the retailers that use it and ensure they are recycling or re-using those materials.

Consumer retail generates an enormous quantity of plastic by simply packaging a product for consumers. Despite changing trends in consumer habits, for decades plastic has been utilized as a means of storing and shipping consumer goods. At first, plastic bags and plastic packaging posed the biggest issue to recycling markets. As online commerce has grown, especially as many Californians have been forced to stay home during the pandemic, plastics utilized in shipping have grown significantly. According to Forbes magazine, in July 2020 alone, online commerce giant Amazon shipped 415 million packages to American consumers. (Blake Morgan, *Every Piece of E-Commerce Packaging Should Be Recyclable Curbside*, Forbes Magazine, Sept. 24, 2020.) Forbes also noted that in an effort to reduce shipping costs, by lowering package weight, Amazon has been moving away from cardboard boxes and toward plastic-based bubble mailers, thus increasing the plastic intensity of its packaging. (*Ibid.*)

Even if an online seller uses a traditional cardboard box to ship a product, many retailers use polystyrene or lose fill (more commonly known as Styrofoam and packing peanuts) to insulate the contents of the package from damage. This is especially true for larger, more fragile products like televisions, gaming systems, and other consumer electronics. Although some municipalities can recycle these products, many cannot. Thus, even if a well-meaning consumer seeks to recycle shipping materials, frequently waste management agencies must remove the product from the recycling waste stream and divert the unrecyclable plastics into a traditional landfill.

Plastics and Climate Change. The plastic pollution crisis that overwhelms the world's oceans is also a significant and growing threat to the Earth's climate. At current levels, greenhouse gas emissions from the plastic lifecycle threaten the ability of the global community to keep the global temperature rise below 1.5°C. If plastic production continues to grow at the current rate, by 2030, these emissions could reach levels equivalent to the emissions released by more than 295 coal-fired power plants. Nearly every piece of plastic begins as a fossil fuel, and greenhouse gases are emitted at each stage of the plastic lifecycle. For example, 40% of plastic packaging waste is disposed of at sanitary landfills, 14% goes to incineration facilities and 14% is collected for recycling. Incineration creates the most carbon dioxide emissions among the plastic waste

management methods. Further, it is estimated that by 2050 plastic will be responsible for up to 13% of the total “carbon budget” – equivalent to 615 coal-fired power plants. Oftentimes, the link between climate change and plastics is overlooked, but its clear impacts could be detrimental to California’s goal of combatting climate change. (Center for International Environment Law, *Plastics & Climate: The Hidden Costs of a Plastic Planet* (May 2019), available at <https://www.ciel.org/wp-content/uploads/2019/05/Plastic-and-Climate-FINAL-2019.pdf>.)

California has grappled with plastic waste for decades. As a coastal state with many large watersheds that run into the Pacific Ocean, ensuring that plastic waste does not go into the ocean is critical to protecting California’s natural environment and food supply. Despite California’s efforts, the Pacific Ocean is home to a notorious patch of floating plastic debris. Even more troublesome is that as plastic breaks down it is easily ingested by fish and other oceanic species. A recent report suggested that all seven species of sea turtles, 81 of 123 known species of marine mammals and nearly half of all sea bird species demonstrate evidence of plastic ingestion. (Lauren Roman et. al, *Plastic Pollution is Killing Marine Megafauna, but how do we Prioritize Policies to Reduce Mortality?* Conservation Letters- A Journal of the Society for Conservation Biology, Nov. 12, 2020, at p. 2.) The Center for Biological Diversity estimates that between 15 and 51 trillion pieces of plastic pollute the world’s oceans. (https://www.biologicaldiversity.org/campaigns/ocean_plastics/#:~:text=Plastics%20pollution%20has%20a%20direct,or%20getting%20entangled%20in%20it.) Marine plastic is particularly troublesome for its ability to move through the food chain, even into humans who eat fish and other seafood.

To address this issue, California originally adopted the At-Store Recycling Program for plastic bags in 2006. (AB 2449 (Levine) Chap. 845, Stats. 2006.) That program was designed to require grocers and other large retailers to provide bins within their stores whereby consumers could deposit used plastic bags. Building on this program and recognizing that despite the state’s efforts plastic bag pollution still proliferated in the state, the Legislature passed SB 270 by now-United States Senator Alex Padilla to ban all single use plastic bags in California. (SB 270 (Padilla) Chap. 850, Stats. 2014.) In addition to banning single-use plastic bags, that bill required consumers to purchase a reusable plastic or paper bag (a far more environmentally friendly option in California) in lieu of the single-use bags. Similarly in 2015, the Legislature passed a ban on plastic microbeads in consumer beauty products in an attempt to keep these tiny plastic particles out of state waterways. (AB 888 (Bloom) Chap. 594, Stats. 2015.) Despite these measures, improperly discarded plastic products continue to litter the state, and difficult-to-recycle plastics continue to clog California’s waste management systems.

This bill. This measure adopts two programs to deal with plastic waste. First, this measure reauthorizes the At-Store Recycling Program which recently sunset. As proposed to be amended, this bill, with only a minor change in a cross-reference, reauthorizes the program that has been critical to managing plastic bags from food and retail stores. Secondly, this bill builds on more recent efforts to combat plastic waste by regulating, and in some cases outright prohibiting specified single-use plastics used in shipping products from online retailers by 2025. This bill adopts a myriad of definitions necessary to establish the regulatory framework. The bill also establishes a plastics recovery system to be utilized in the interim to permit consumers to recycle these plastics before they are outright banned. The plastic recovery system envisions three means by which plastics in packaging can be recovered by the retailer. First, if a retailer has physical locations in California (for example Target or Best Buy), those locations must have a receptacle

to collect the plastic, similar to the At-Store Recycling Program. Second, if a retailer operates product pick-up storage lockers (similar to Amazon's locker delivery service), then a plastic collection receptacle must be located in the vicinity of the lockers. Finally, and perhaps most innovatively, this bill envisions a program whereby when a package is delivered to a home or business the online retailer must establish a program whereby the plastic is collected from the location of the delivery.

Of note to this Committee, both the At-Store Recycling Program and the new plastic packaging provisions both are enforced by civil penalties. The At-Store recycling program simply readopts the original civil penalty scheme whereby a city, county or the Attorney General can impose civil penalties. Those penalties range from \$500 for a first-time violation, to \$2,000 for repeat offenders. As proposed to be amended, the penalty structure for the packaging plastics adopts a two-tiered approach. Similar to the At-Store Recycling Program, an action can be brought by a city attorney, county counsel, or the Attorney General in concert with the Department of Resources Recycling and Recovery. However, unlike the At-Store Recycling Program, the plastic packaging statute adopts different penalties depending on the size of the retailer. For "small online retailers" the bill proposes penalties between \$1,000 and \$5,000, depending on the reoccurrence of violations. For "large online retailers" the bill imposes a \$50,000 penalty per violation, regardless of how many offenses a retailer has committed.

The various uses of plastic products in shipping consumer goods and the potential logistical issues stemming from regulating plastics in shipping. This measure is opposed by a coalition of retailers, manufacturers, and technology organizations. Their primary concerns are the ban on Styrofoam and single use plastics in shipping materials. The opposition suggest that beyond Styrofoam, there is no suitable alternative for safely shipping fragile items. They contend that such a ban would make it nearly impossible to deliver consumer goods ranging from televisions to refrigerators and potentially even some food products. It should be noted that this bill was previously heard in the Assembly Committee on Natural Resources, the committee with primary jurisdiction over California's refuse and waste management laws. In their analysis (Assem. Nat. Res. Com., analysis of AB No. 1371 (2021-2021 Reg. Sess.) As Amended Apr. 7, 2021) the Committee did not appear to share this concern and instead focused on the above-mentioned harms of plastic pollution to the environment. Given the Committee on Natural Resources' expertise in waste management and pollution issues, this Committee sees no reason to quibble with their judgment on this issue.

However, the opposition raises several additional logistical issues. First, the opponents question this bill's applicability to online shipments between two businesses. While this bill should certainly apply to transactions between an online retailer and a small business purchasing consumer products, for example purchasing a pallet of printer paper from an online office supply retailer, there is some ambiguity about the bill's applicability to two large retailers. For example, if a large shipment of televisions is wrapped in protective plastics and is ordered using an online system between a manufacturer and a retailer it is unclear if the plastic recovery provisions of this bill would apply. In this instance, if a retailer already were required to collect plastic packaging at a retail location, there may be some debate as to which entity is best suited to recover the plastic. This policy decision is, again, best suited for a committee versed in waste management policy and thus this Committee does not have a recommended amendment on this issue. *Nonetheless, as this bill progresses the author and the sponsor may wish to consider clarifying which business entity is responsible for recovering plastic waste in the above described transaction.*

Additionally, the opposition argues that the at-delivery recycling program is vague and nearly-impossible to implement. The proponents of this bill counter that in the case of a company like Amazon, the company could simply pick up the packaging plastic at the time of the next delivery. The proponents also note that companies like Ridwell, a Seattle-based company that collects an assortment of refuse from old rugs and clothing to light bulbs, could be easily contracted to provide this service. Nonetheless, as the bill progresses the author and proponents may wish to add some clarity regarding the logistics of the at-delivery recycling program to ensure that the program can be easily implemented.

Similarly, issues regarding who is obligated to participate in the at-delivery program have arisen. The California Trucking Association opposes this bill and notes that as currently drafted this bill may obligate companies like UPS, FedEx, and the US Postal Service to participate in the program despite having no role in determining what shipping materials are utilized in a parcel. The Trucking Association argues that requiring these companies to participate in this program may violate the federal Motor Carrier Act as it was amended in 1994. That act, which deregulated interstate trucking and ground shipping, provides in pertinent part that no state may, “enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or *service* of any motor carrier.” (49 U.S.C. Section 14501 (c)(1).) An examination of case law shows that the California Trucking Association raises a legitimate point. In interpreting the applicability of a Maine cigarette shipping statute the United States Supreme Court held that, “state enforcement actions having a connection with, or reference to, carrier rates, routes, or services’ are pre-empted” and “that such pre-emption may occur even if a state law’s effect on rates, routes, or services is only indirect” (*Rowe v. New Hampshire Motor Transport Association*, (2008) 552 U.S. 364, 370, citing *Morales v. Trans World Airlines* (1992) 504 U.S. 374). Using this analysis the court invalidated the Maine law arguing it required shipping companies to “offer a system of services that the market does not now provide.” (*Id.* at 372.) Thus, to the extent that this bill would require shipping companies to create a new “service,” collecting packaging materials, the bill likely would be preempted. Accordingly, the author has agreed to the following amendment to the definition of “online retailer” to clarify it does not apply to companies that only ship other’s products. The amendment reads:

(3) An “online retailer” does not include a public or privately operated motor carrier, as defined in 49 U.S.C. Section 13102, that only transports a parcel that has been placed into packaging prior to the motor carrier’s taking possession of the parcel and is not opened until after the motor carrier has delivered the parcel.

Additionally, given the degree of complexity in this area of the law, the author is also proposing to adopt a severability clause for the packaging plastics sections of the bill.

Proposed amendments revise and recast the plastic packaging civil penalty provisions. As currently in print, this bill adopts a standard set of penalties for both large and small retailers. The author and sponsors note that given the diversity of the online retail sector, this approach may not be appropriate. Accordingly, proposed amendments create a tiered system of penalties, with smaller and gradually escalating penalties for small retailers and a flat \$50,000 penalty for large retailers. Furthermore, as currently in print, this bill does not clearly identify what a penalty is and how it is to be calculated. Thus, proposed amendments clarify that the penalties apply per violation of the packaging requirements of the bill per day. Finally, given the potentially complex nature of investigating allegations of violations of the statute, the proposed amendments adopt cost and fee recovery provisions permitting state and local regulators to recoup their

attorney fees and investigation costs. The proposed amendments to the enforcement section of the packaging section of this bill delete the existing Public Resources Code Section 42046 and recast the provisions as follows:

42046.

(a) An action to enforce this chapter may be brought by the Attorney General upon a complaint from the Department of Resources Recycling and Recovery or by a county counsel, or a city attorney from a city or city and county with a full-time city prosecutor, upon a complaint by a local agency or resident located within the jurisdiction.

(b) An entity authorized to bring an action pursuant to subdivision (a) may impose civil liability on a person or entity that knowingly violated this chapter, in the amount of one thousand dollars (\$1,000) per day for the first violation of this chapter, two thousand dollars (\$2,000) per day for the second violation, and five thousand dollars (\$5,000) per day for the third and subsequent violations of this chapter if the entity is deemed a small online retailer in accordance with subdivision (j) of Section 42040.

(c) An entity authorized to bring an action pursuant to subdivision (a) may impose civil liability in the amount not to exceed fifty thousand dollars (\$50,000) per day for a violation of this chapter if the entity is deemed a large online retailer in accordance with subdivision (c) of Section 42040.

(d) Any civil penalties collected pursuant to subdivision (b) or (c) shall be paid to the office of the Attorney General, county counsel, or city attorney, whichever office brought the action. The penalties collected pursuant to this section by the Attorney General shall be deposited into the Plastic Packaging Reduction Penalty Account, which is hereby created in the State Treasury. Moneys in the account may be expended by the Attorney General, upon appropriation by the Legislature, to enforce this chapter.

(e) In addition to any civil penalties collected in accordance with the section, the Attorney General, county counsel, or city attorney may seek all costs and attorney's fees incurred by the prosecuting entity as well as the costs incurred by the Department of Resources Recycling and Recovery or a local agency in investigating the matter.

Finally, it should be noted that the penalty provisions of the At-Store Recycling Program were in law for nearly 15 years prior to erroneously being sunset. Accordingly, the author is opting to keep the original penalty provisions to avoid needless confusion.

Additional technical author amendments. In addition to the above discussed amendments, the author is making several technical amendments to the bill. First, the author is proposing to revise the definition of void fill as to ensure the definition captures the full scope of products utilized to hold materials in place while in a storage box. Accordingly, subdivision (k) of Public Resources Code Section 42020 is being amended to read:

(k) "Void fill" means a filler material used to close up the free space in a shipping container and ~~lock products in place prevent excessive movement~~. Plastic void fill includes, but is not limited to, sealed air and expanded polystyrene packaging.

Additionally, subdivision (b) of Public Resources Code Section 42044, regarding the disposal of plastics collected by the at-delivery collection program is being amended to permit the reuse of the plastic products. Accordingly that subdivision will now read:

(b) All plastic film and expanded polystyrene packaging collected by the online retailer, or its agent, pursuant to this section shall be collected, transported, and recycled or *reused* in a manner that does not conflict with the local jurisdiction's source reduction and recycling element, pursuant to Chapter 2 (commencing with Section 41000) and Chapter 3 (commencing with Section 41300) of Part 2.

Finally, to ensure consistency with the definitions of "reusable bag" adopted in SB 270, the definition of reusable bag in the At-Store Recycling Program is being amended to cross-reference with that bill to avoid any potential inconsistency in the future. Accordingly, subdivision (b) of Public Resources Code Section 42250 is being amended to read:

(d) "Reusable bag" ~~means either of the following:~~ *is a bag that meets the criteria described in subdivision (a) of Section 42281.*

~~(1) A bag made of cloth or other machine washable fabric that has handles.~~

~~(2) A durable plastic bag with handles that is at least 2.25 mils thick and is specifically designed and manufactured for multiple reuse.~~

ARGUMENTS IN SUPPORT: This bill is sponsored by Oceana and is supported by a coalition of environmental and product stewardship organizations. In support of the bill, Oceana writes:

Plastic packaging used in e-commerce shipping includes plastic bubble wrap, mailers, air pillows, and other forms of plastic film along with expanded polystyrene used as loose fill packaging (commonly referred to as packing peanuts) and molded foam. While the plastic packaging is made from a material designed to last for generations, the vast majority of e-commerce packaging is single-use because it is discarded immediately after a package is opened. Almost all plastic waste is neither reused nor recycled and instead becomes landfilled, burned, or enters the environment where it persists as a pollutant.

Assembly Bill 1371 will phase out shipping envelopes, bubble wrap, air pillows and other shipment packaging that contains plastic — including loose-fill and molded foam packaging made from expanded polystyrene — for shipments within and into California by Jan 1, 2023 for large online retailers and Jan 1, 2025 for small online retailers. During the phase-out period, online retailers with at least one physical storefront in the state, or that provide lockers for the secure pickup of purchased products at a store, will be required to take back plastic film and to recycle or re-use that material.

AB 1371 is a significant step to reduce the unnecessary and unacceptable amount of single-use plastic used as packaging for shipments from on-line purchases in California. Enacting AB 1371 will reduce plastic waste in our state, lessen California's contribution to plastic pollution nationwide and across the world, and serve as a model for how to reduce the environmental and economic footprint of single-use plastic in the e-commerce marketplace.

ARGUMENTS IN OPPOSITION: This bill is opposed by a coalition of manufacturing organizations, shipping companies, retailers, internet organizations, and the California Chamber of Commerce. In opposition to the bill, the coalition's letter states:

As drafted, AB 1371 would ban the use of several types of packaging materials used to ship products between retailers and customers, as well as for business-to-business transactions. Though we appreciate the intent of this legislation, we believe it is important to implement a policy that takes into account the necessary role packaging plays in shipping and protecting products, assesses the multitude of environmental attributes (e.g. recyclability, waste prevention, material efficiency, greenhouse gas emissions, etc.) of various packaging materials and arrives at a solution that makes sense environmentally and provides the regulated community with practical and implementable compliance obligations.

A blanket prohibition on certain packaging materials does not fully consider potential unintended environmental impacts and in fact, may lead to increased waste as a result of product breakage or spoilage. For example, expanded polystyrene plays a critical role in the shipment of large, high value products such as televisions and appliances for which no economically viable alternative exists. A ban on expanded polystyrene could result in increased environmental impacts from damaged products.

We do believe there is an opportunity to strike the right balance, including identifying policies to ensure that transport and e-commerce packaging is managed appropriately. These policies could include establishing minimum recycling and recovery rate requirements such as requiring all e-commerce packaging to be recyclable or compostable by 2030; setting practical post-consumer recycled requirements to help develop domestic markets for these materials; implementing improvements to the state's recycling infrastructure, including expanding the network of consumer drop-off opportunities for these types of packaging materials; and maximizing the use of advanced recycling technologies so that even more material can be recovered and used as feedstock to make new products.

REGISTERED SUPPORT / OPPOSITION:

Support

Oceana (sponsor)
350 Humboldt
California Interfaith Power and Light
California League of Conservation Voters
California Product Stewardship Council
Californians Against Waste
Calpirg, California Public Interest Research Group
Center for Food Safety; the
Friends Committee on Legislation of California
Greentown Los Altos
Heal the Bay
Northern California Recycling Association
Plastic Oceans International
Plastic Pollution Coalition
San Francisco Bay Area Physicians for Social Responsibility
Save Our Shores

Seventh Generation Advisors
Sierra Club California
Surfrider Foundation
The 5 Gyres Institute
The Center for Oceanic Awareness, Research, and Education
The Climate Center
The Last Plastic Straw
Upstream
Wholly H2o
Wishtoyo Chumash Foundation
Zero Waste USA

Opposition

American Chemistry Council
American Institute for Packaging and Environment (AMERIPEN)
California Chamber of Commerce
California League of Food Producers
California Manufacturers & Technology Association
California Retailers Association
California Technology Association
California Trucking Association
Consumer Technology Association
Flexible Packaging Association
Internet Association; the
Plastics Industry Association
Proampac Holdings INC.
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Western Growers Association
Western Plastics Association
Wikoff Color Corp.

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