

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2021-2022 Regular Session**

AB 478 (Ting)  
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Fiscal: Yes  
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AWM

**SUBJECT**

Solid waste: thermoform plastic containers: postconsumer thermoform recycled  
plastic: commingled rates

**DIGEST**

This establishes minimum recycled content requirements for thermoform plastic containers, as specified; redefines “commingled rate” for purposes of California’s Bottle Bill program; and requires the Department of Resources Recycling and Recovery (CalRecycle) to exclude thermoform plastic for purposes of calculating the commingled rate for each type of plastic container.

**EXECUTIVE SUMMARY**

The United States, including California, has not developed the infrastructure necessary to recycle meaningful volumes of plastic or satisfy the market demand for recycled plastic. Last year, the Legislature passed, and the Governor signed, AB 793 (Ting, Ch. 115, Stats. 2020), which requires certain beverage manufacturers to include specified levels of recycled plastic in their bottles, with the goal of encouraging beverage manufacturers to develop the necessary infrastructure to meet the required recycled content levels. This bill follows up on AB 793 by requiring producers of thermoform plastic containers (such as the “clamshell” containers used to hold berries, and other similar molded plastic containers) to, starting in 2024, include specified levels of plastic recycled from other thermoform containers, with the goal of encouraging users of thermoform containers to develop a separate recycling stream for that type of plastic. The bill also changes how the “commingled rate” for plastics collected for recycling is calculated, requiring thermoform containers to be excluded from the comingled bales, to ensure that thermoform containers are separately sorted out for separate recycling. This bill also imposes certain reporting requirements on thermoform container producers, and provides that thermoform producers are exempt from certain antitrust and anti-competitive behavior laws so that they can work together to build the needed recycling infrastructure and streams.

This bill is sponsored by rPlanet Earth and supported by a number of environmental organizations. It is opposed by a number of plastic industry, beverage industry, and producer organizations. This bill passed out of the Senate Environmental Quality Committee with a vote of 5-1.

### **PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Establishes the California Beverage Container Recycling and Litter Reduction Act (Bottle Bill), which requires beverage containers sold in this state to have a California redemption value (CRV) of 5 cents for containers that hold fewer than 24 ounces and 10 cents for containers that hold 24 ounces or more and requires a distributor to pay a redemption payment to CalRecycle. (Pub. Res. Code, div. 12.1, §§ 14500 et seq.)
- 2) Establishes the Integrated Waste Management Act of 1989, which establishes a state recycling goal of 75 percent of solid waste to be diverted from landfill disposal through source reduction, recycling, and composting. (Pub. Res. Code, div. 30, pt. 1, §§ 40000 et seq.)
- 3) Establishes the California Beverage Container Recycling and Litter Reduction Act, which sets recycled-content requirements for glass food and beverage containers manufactured in the state and, starting on January 1, 2022, escalating recycled-content requirements for plastic beverage containers subject to the CRV for sale in the state. (Pub. Res. Code, §§ 14547, 14549.)
- 4) Authorizes CalRecycle to calculate and set the rate paid to curbside recycling programs for the collection of plastic beverage containers and postfilled containers, calculated by determining the ratio of empty beverage containers to all other materials of the same material type, known as the “comingled rate.” Recycling centers and processors are prohibited from paying more than the applicable statewide comingled rate unless CalRecycle specifically provides a different rate. (Pub. Res. Code, §§ 14506.7, 14512, 14549.5, 14559.51.)
- 5) Establishes the Rigid Plastic Packaging Container Law, which applies certain recycling-content requirements on specified rigid plastic containers. (Pub. Res. Code, § 42310.)
- 6) Recognizes that “[t]he people have the right of access to information concerning the conduct of the people’s business, and therefore . . . the writings of public officials and agencies shall be open to public scrutiny,” and provides in the California Public Records Act (CPRA) that all public agency records are open to public inspection

unless otherwise exempt from public disclosure. (Cal. Const., art. I, § 3(b)(1); Gov. Code, tit. 1, div. 7, ch. 3.5, §§ 6250.)

- 7) Creates an exemption to disclosure under the CPRA for trade secrets. (Gov. Code, § 6254(k); Evid. Code, § 1060.)
- 8) Defines trade secrets exempt from disclosure as information, including a formula, pattern, compilation, program, device, method, technique, or process that (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. (Gov. Code, § 6254(k); Evid. Code, § 1060; Civ. Code, § 3426.1; Pen. Code, § 499c.)
- 9) Establishes the Cartwright Act, which declares that every trust is unlawful, against public policy, and void. (Bus. & Prof. Code, div. 7, pt. 2, ch. 2, §§ 16700 et seq.)
  - a) A “trust” is any combination of capital, skill, or acts by two or more persons for the purposes of:
    - i. Creating or carrying out restrictions in trade or commerce.
    - ii. Limiting or reducing the production, or increasing the price of, merchandise or any commodity.
    - iii. Preventing competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or any commodity.
    - iv. Fixing any standard or figure in a way that creates a set or controlled price to the public for any article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in the state.
    - v. Making, entering into, executing, or carrying out contracts or other agreements by which the parties agree not to sell products below a certain price, keep the price of articles at a fixed or graduated figure, establish or settle the price of any article so as to preclude competition, or to pool any interests in a way that affects the price of an article. (Bus. & Prof. Code, § 16720.)
- 10) Establishes the Unfair Practices Act, which is intended to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented, and prohibits the following practices when committed with the purpose of destroying competition or injuring competitors:
  - a) Creating locality discriminations.
  - b) Selling any article at less than the cost, or giving away an article.

- c) Secretly paying or allowing rebates, refunds, commissions, or unearned discounts, or secretly extending to certain purchasers special services or privileges not extended to all purchasers on like terms and conditions.
- d) Soliciting any of the above practices.
- e) Jointly colluding with other manufacturers, wholesalers, distributors, or other vendors or agents to effectuate the above practices. (Bus. & Prof. Code, div. 4, pt. 2, ch. 4, §§ 17000 et seq.)

This bill:

1) Defines the following relevant terms:

- a) "Postconsumer thermoform recycled plastic" is plastic produced from the recovery, separation, collection, and reprocessing of a thermoform plastic container that would otherwise be disposed of or processed as waste after consumer use.
- b) "Producer" is:
  - i. A person who manufactures thermoform plastic containers (thermoform container or container) in the state under that person's own name or brand and who sells or offers for sale the containers in the state; or
  - ii. If there is no person who meets requirement (i), a person who imports the thermoform container as the owner or licensee of a trademark or brand under which the container is sold or distributed in the state; or
  - iii. If there is no person who meets requirement (i) or (ii), a person or company who offers for sale, sells, or distributes the thermoform container in the state.
  - iv. The term excludes a person or company that produces, harvests, and packages an agricultural commodity on the site where the commodity was grown or raised.
- c) "Thermoform plastic container" is a plastic container such as a clamshell or other rigid, nonbottle packaging, formed from sheets of extruded resin and used to package items such as fresh produce, baked goods, nuts, and deli items. The term does not include:
  - i. A lid or seal made of a different type of plastic.
  - ii. Thermoform containers that are medical devices or products.
  - iii. A refillable container that would ordinarily be returned to the manufacturer to be refilled and resold.
  - iv. A plastic beverage container subject to the California Beverage Container Recycling and Litter Reduction Act.
  - v. A thermoform container of a resin type for which the total amount of the type sold in California is either (1) less than 1,000,000 pounds for a resin type other than expanded polystyrene, or less than 50,000 pounds of expanded polystyrene.
  - vi. A thermoform container that is designed to be, and eligible to be labeled as, compostable.

- 2) For purposes of the commingled rate under the California Beverage Container Recycling and Litter Reduction Act, redefines the “commingled rate” to mean the ratio of empty beverage containers to all other containers of the same material type and form, as defined by CalRecycle, and requires CalRecycle, for purposes of calculating the comingled rate for each type of plastic container, to exclude thermoform plastic.
- 3) Requires that the total of the thermoform containers, as defined, offered for sale, sold, distributed, or imported by a producer in this state meet the following average content requirements, averaged across the total number of containers:
  - a) Beginning January 1, 2024, no less than 10 percent postconsumer recycled plastic per year.
  - b) Beginning June 1, 2027, either:
    - i. No less than 20 percent postconsumer thermoform recycled plastic per year, if the recycling rate for each resin type of thermoform container is equal to or exceeds 50 percent for the year 2026; or
    - ii. No less than 25 percent postconsumer thermoform recycled plastic per year, if the recycling rate for each resin type of thermoform container is less than 50 percent for the year 2026.
  - c) Beginning June 1, 2030, either:
    - i. No less than 20 percent postconsumer thermoform recycled plastic per year, if the recycling rate for each resin type of thermoform container is equal to or greater than 75 percent for the year 2029; or
    - ii. No less than 30 percent postconsumer thermoform recycled plastic per year, if the recycling rate for each resin type of thermoform container is less than 75 percent for calendar year 2029.
- 4) Requires CalRecycle to determine the recycling rate for each resin type of thermoform container for purposes of the requirements, and to consider reports submitted by recycling operations, information from producers, and any other relevant information received.
- 5) Provides that, beginning January 1, 2024, a producer that does not meet the minimum postconsumer thermoform plastic content shall be subject to a penalty, which will begin to be collected annually on March 1, 2025, unless a reduction has been approved. A producer assessed penalties may receive a payment plan, subject to approval, and CalRecycle may grant a one-time extension for payment if certain emergencies occur.
- 6) Requires CalRecycle to assess the administrative penalty by calculating the amount in pounds in the aggregate of virgin and postconsumer thermoform recycled plastic used by the producer to produce thermoform plastic containers sold or offered for sale in the state; the penalty shall be assessed by calculating the difference between

the content of postconsumer recycled plastic the producer should have used and the amount actually used, and charging either \$.20 or \$4.00 per pound of the difference, depending on the type of plastic.

- 7) Authorizes CalRecycle to conduct audits and investigations and take enforcement actions as necessary for compliance. CalRecycle must keep confidential all business trade secrets and proprietary information about manufacturing processes and equipment gathered during the course of an audit or investigation, and business trade secrets and proprietary information that meet the definition in Section 3426.1 of the Civil Code are exempt from disclosure under the CPRA.
- 8) Permits CalRecycle to consider granting a reduction of the administrative penalties provided above based on the presence of anomalous market conditions, disruption in or lack of supply of recycled plastic due to unforeseen circumstances or event, or if the recycling rate is 60 percent or higher and there is a lack of supply due to purchases from other industries.
  - a) In order to receive a reduction, a producer must submit to CalRecycle a corrective action plan explaining its failure to satisfy the postconsumer recycled plastic requirements and the steps the producer will take to meet the requirements next year.
  - b) A corrective action plan approved by CalRecycle will include a compliance deadline and any additional penalties that may be imposed if the producer fails to comply.
- 9) Creates the Thermoform Recycling Enhancement Penalty Account in the State Treasury and provides that the penalties described above shall be deposited therein.
- 10) Requires producers to annually report to CalRecycle the amount in pounds and by resin type of virgin plastic and postconsumer thermoform recycled plastic used to manufacture the thermoform plastic containers sold or offered for sale in the state in the previous calendar; and requires CalRecycle to post the collected information on its website.
- 11) Requires an importer or manufacturer of a thermoform plastic container that first sells the container in or into the state, and that exceeds specified annual sales volumes, to register with, and pay a registration fee to, CalRecycle, and file annual reports relating to the volume of containers it sells into the state and the amount of PCR contained in those containers.
- 12) Requires an entity that purchases at least a specified volume of thermoform plastic containers in the state, to satisfy the above-described PCR content requirements or provide documentation establishing that the portion of the containers not exported out of the state satisfied the above-described PCR content requirements; and maintain records of purchases as required by CalRecycle. If an entity exports a

specified volume or more from the state on an annual basis, it must report to CalRecycle the total pounds of exported plastic by resin type.

- 13) Provides that the following acts done pursuant to the thermoform PCR requirements do not violate the Cartwright Act or the Unfair Practices Act:
- a) Acts taken solely to increase the collection, processing, and recycling of scrap plastic materials by a producer that affects scrap values, the quantities of materials being recycled, or the method of invoicing the sale of thermoform plastic containers.
  - b) The formation of a nonprofit organization that may include two or more producers and that establishes specifications for different grades or classifications of thermoform plastics, which may affect the scrap value of those grades or classifications, the quantity or quality of materials being recycled, or the method of invoicing the sale of thermoform plastic containers.
- 14) Provides that the exemption to the Cartwright and Unfair Practices Acts set forth in item 11) above does not apply to any agreement between two or more producers establishing or affecting the price of plastic materials, including, but not limited to, virgin plastic, postconsumer recycled plastic, and thermoform plastic products, or the output or production of thermoform plastic products, or any agreement restricting the geographic area or customers to which thermoform plastic products will be sold.

## COMMENTS

### 1. Author's comment

According to the author:

Thermoform plastic packaging such as clamshells revolutionized the ability of California farmers to transport their fresh produce to consumers nationwide. There are approximately 200 million pounds of thermoform waste discarded every year in California and growing. The state currently has a low collection rate for the material. In order to encourage efficient use of recyclable plastics, this bill sets a minimum recycled content standard. AB 478 helps create a circular economy to produce, collect, recycle and reprocess post-consumer plastic thermoformed containers.

### 2. The status of plastics recycling

The Senate Environmental Quality Committee's analysis of this bill provides useful background on the state of recycling in the state, the market for recyclable materials, and the nature of the thermoform containers at the heart of this bill:

*Solid waste in California.* For over three decades, CalRecycle has been tasked with reducing disposal of municipal solid waste and promoting recycling in California through the IWMA. Under IWMA, the state has established a statewide 75 percent source reduction, recycling, and composting goal by 2020 and over the years the Legislature has enacted various laws relating to increasing the amount of waste that is diverted from landfills. According to CalRecycle's State of Disposal and Recycling for Calendar Year 2019, published February 12, 2021, 42.2 million tons of material were disposed into landfills in 2019.

According to CalRecycle's report, an estimated 28.9 million tons of waste were recycled or diverted in California in 2019, resulting in a statewide recycling rate of 37%, down from 40% in 2018, and a peak of 50% in 2014. Based on these trends, it is unlikely that the state will meet its diversion goals.

*Market challenges for recyclable materials.* The U.S. has not developed significant [market infrastructure] for recyclable content materials. In California, approximately one third of recyclable material is exported. China used to be where the world sent their recyclable material, but beginning in 2017, the country began significantly restricting the types of materials and levels of contamination that would be accepted. Commencing earlier this year, China announced that it would no longer be accepting all waste imports. Before this year's blanket waste ban, China accepted 32 types of scraps for recycling and reuse and limited contamination levels of those materials to 0.5 percent. The initial ban left waste-exporting countries such as the U.S. scrambling to find alternative destinations, including Southeast Asian nations like Thailand, Vietnam, and Indonesia, which quickly became overwhelmed by the volume of refuse received. Soon after, those countries began to impose their own bans and restrictions on waste imports. Without a global market to send these "recyclable" materials, the contents of many blue recycling bins are being diverted to landfills.

*Thermoforms.* Thermoforms include a wide range of plastic packaging created by heating sheets of plastic and then formed into a specific shape in a mold. Common thermoforms include plastic "clamshell" trays used for take-out food, plastic egg cartons, and bakery trays. Most thermoforms are PET, but can be made from a wide range of plastic resins, including polypropylene (PP), and PS, including expanded polystyrene (EPS). In California, thermoforms have included relatively high quantities of recycled content; however, the source of its PET has been PET bottles, not thermoforms. While providing an important market for recycled bottle plastic, recycling PET bottles into thermoforms means that the bottle is recycled once and then discarded (thermoforms usually end up in landfills). Under AB 793 (Ting, Ch. 115, Stats. 2020), bottle manufacturers are required to include recycled content to ensure that bottles are recycled back into bottles.



In jurisdictions that accept thermoforms in curbside recycling, only thermoforms made out of PET are usually accepted. The majority of PET thermoforms collected are baled with other PET, primarily bottles, even though bottles and thermoforms generally cannot be recycled together. As a result, recyclers separate the thermoforms from the bottles and the thermoforms are discarded.

The Senate Environmental Quality Committee's analysis also discusses the myriad negative effects of plastic pollution on our state, including pollution in rivers and oceans, harm to wildlife, damage from extracting the fossil fuels necessary to make plastic, and air pollution from both producing and burning plastic. The analysis is incorporated herein by reference.

As that analysis notes, last year's AB 793<sup>1</sup> created a recycled plastic requirement for certain beverage containers subject to California's CRV. The bill's first minimum recycled plastic requirement will begin in 2022, at which point a beverage manufacturer's plastic bottles sold in California must contain, on average, no less than 15 percent recycled plastic per year; the requirement will increase to 25 percent in 2025 and 50 percent in 2030.<sup>2</sup>

3. This bill creates a recycled content requirement for thermoform producers<sup>3</sup> and modifies the calculation of the comingled plastic rate to encourage the development of a thermoform recycling stream

This bill requires thermoform containers to contain at least 10 percent recycled thermoform content by 2024; either 20 percent or 25 percent depending on the corresponding recycling rate by June 1, 2027; and either 20 percent or 30 percent depending on the corresponding recycling rate by June 1, 2030. The bill exempts from the recycled content requirements a person or company that produces, harvests, and packages an agricultural commodity on the site where the agricultural commodity was grown or raised; this exemption is intended to avoid unduly burdening the segment of California's agricultural industry that packages its product on-site. The bill authorizes CalRecycle to begin assessing administrative penalties against noncompliant producers in 2025; a producer may receive a reduction if it provides a corrective action plan to CalRecycle that explains the reason for its noncompliance and how it will improve going forward.

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<sup>1</sup> Ting, Ch. 115, Stats. 2020.

<sup>2</sup> Pub. Res. Code, § 14547.

<sup>3</sup> The author intends to amend the bill to clarify that the burden of ensuring the minimum recycled content in thermoform containers is on the *purchaser* of the thermoform container, not the manufacturer. Due to the timing of the bill's committee hearings, these amendments will have to be made after this bill is passed by this Committee, if it passes. Imposing the burden of ensuring minimum recycled on the purchaser of the thermoform container, rather than the manufacturer, brings the bill more in line with the Bottle Bill's requirements for beverage manufacturers.

In order to encourage the development of the more precise recycling streams that will be necessary to ensure an adequate supply of recycled thermoform, this bill also creates incentives for the material recovery facilities (MRFs) that receive and sort plastic to keep thermoform containers separate from other recyclable plastics. Currently, MRFs create bales of plastic that include CRV material (i.e., plastic for which the state returns the CRV deposit) and non-CRV material (such as thermoforms) which are picked up by haulers; the haulers are paid the “comingled rate,” which accounts for the ratio of CRV to non-CRV material in the average bale. This means that bales sold to recycling centers contain material – such as thermoform containers – that cannot be used to recycle into bottle plastic; that plastic is often treated as waste. This bill requires CalRecycle, when calculating the comingled rate, to exclude thermoform containers, which effectively prohibits thermoform containers from being included in bales. Thus, any hauler who wants to receive the comingled rate will need to insist that the MRFs exclude thermoform containers from their bales; the assumption is that the MRFs and the thermoform producers subject to this bill’s recycling requirements will develop a new market procedure and infrastructure to separate, store, and reclaim the thermoform containers for recycling into new thermoform containers.

In recognition of the fact that the bill’s targets might not be possible to meet, the bill contains certain safeguards against unfairly penalizing thermoform producers. First, CalRecycle has the authority to reduce the administrative penalties against a producer who fails to meet the recycled content requirements if the market conditions make compliance overly onerous, including in cases where the recycling rate leads to a lack of available supply. Second, the bill’s recycled content minimum requirements for 2027 and 2030 will be determined by the recycling rate of thermoform plastic in the prior years, as a means of ensuring that the target is tethered to the actual state of the market.

All of the stakeholders – supporters and opponents – agree that the existing infrastructure for collecting and processing plastic into PCR for use in plastic products is not adequate to meet the bill’s PCR content requirements. The bill’s supporters argue that imposing PCR requirements and requiring thermoform containers to be separated out from recyclable bales will spur manufacturers and purchasers of thermoform plastic containers to develop the necessary infrastructure, with the help of haulers who want to keep thermoform containers out of CRV bales.<sup>4</sup> They also point to the safeguards relating to the recycled rate to show that this bill will not penalize producers who cannot obtain the necessary recycled content.

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<sup>4</sup> The bill’s sponsor, rPlanet Earth, is a recycler and manufacturer of recycled PET that, among other things, has a partnership with another company to manage the collection and purchase of postconsumer thermoform in California and other southern states, where it is recycled at a thermoform recycling plant in Mexico. (Toto, *Companies partner to recycle PET thermoform packaging*, Recycling Today (Nov. 13, 2019), <https://www.recyclingtoday.com/article/rplanet-earth-green-impact-plastics-seeking-pet-thermoform-bales/> [last visited Jul. 9, 2021].)

The bill's opponents argue that the targets are overly ambitious in light of the existing state of PCR recycling infrastructure and the high demand for PCR, so that the bill sets them up for failure. One opponent, the California Strawberry Commission, argues that even if the bill results in the creation of thermoform recycling infrastructure, the market forces this bill seeks to harness will still prevent thermoform container producers from easily acquiring the recycled material because so many other industries will be competing for that recycled plastic. In particular, they note that the textile industry – one of the largest consumers of plastic – is likely to buy up the recycled thermoform in large quantities.

4. This bill imposes certain requirements on in-state and out-of-state thermoform container manufacturers, importers, and purchasers who sell or buy specified quantities of thermoform containers

Section 8 of Article I of the United States Constitution grants the United States Congress the power to regulate interstate commerce.<sup>5</sup> The obverse proposition – that states may not usurp Congress's express power to regulate interstate commerce – is known as the "Dormant Commerce Clause."<sup>6</sup> The Dormant Commerce Clause serves as an absolute bar to regulations that discriminate against interstate commerce, i.e., by favoring in-state businesses or excluding out-of-state businesses.<sup>7</sup> But "[s]tate laws that 'regulat[e] even-handedly [across all in-state and out-of-state businesses] to effectuate a legitimate local public interest...will be upheld unless the burden imposed upon such commerce is clearly excessive in relation to the putative local benefits.' "<sup>8</sup>

The minimum recycled thermoform plastic content requirements set forth in this bill are not intended to be imposed on containers that will be used by out-of-state companies.<sup>9</sup> As such, an out-of-state manufacturer is not obligated under the bill to comply with the minimum recycled content requirement; in-state producers retain the choice to purchase only plastic that meets the recycled content requirement, or purchasing products with a range of recycled content plastic rates that average out, across the producer's total sales for a year, to the minimum plastic requirement for that year.

The bill does pose a registration and reporting requirement on manufacturers, importers, and entities that buy or sell in excess of 100,000 pounds of thermoform plastic containers for all resin types except expanded polystyrene, or 5,000 pounds of expanded polystyrene equivalent, *in or into* the state in any calendar year. The

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<sup>5</sup> U.S. Const., art. I, § 8, cl. 3.

<sup>6</sup> See *Gibbons v. Ogden* (1824) 22 U.S. 1.

<sup>7</sup> E.g., *Dean Milk Co. v. Madison* (1951) 340 U.S. 349, 354.

<sup>8</sup> *South Dakota v. Wayfair, Inc.* (2018) 138 S.Ct. 2080, 2091.

<sup>9</sup> As noted above in footnote 3, the bill currently imposes its requirements on in-state thermoform manufacturers, but the author intends to amend the bill to clarify that the obligation to ensure the minimum recycled content levels falls on in-state producers; in-state manufacturers will have no obligation to manufacture thermoform containers with any particular recycled content.

registration and reporting requirement is thus applies equally across in-state and out-of-state businesses and does not favor domestic manufacturers. With respect to the requirement itself, manufacturers selling in or into California must register with CalRecycle and pay a fee to cover reasonable regulatory costs, and on an annual basis report:

- Its thermoform container sales for the prior year.
- The amount in pounds of containers sold into the state.
- The resin type of the containers.
- The amount of postconsumer resin, if any.
- The container volume and resin type/composition for each purchaser.

Manufacturers must also retain records of all sales and information regarding the source of any postconsumer resin so that CalRecycle can verify its source. According to the author, these reports are necessary so that CalRecycle can calculate each producer's overall annual average recycled thermoform content to determine whether the minimum content requirement was met. Given that the requirements are minimal and applies equally to effectuate the bill's intent, it is unlikely that the reporting requirement implicates the Dormant Commerce Clause.

5. This bill exempts trade secrets, as defined in statute, from disclosure under the CPRA

The California Constitution and the California Public Records Act (CPRA) recognize that Californians have a right to access information concerning the conduct of the people's business, and therefore grant the public access to a wide range of public records.<sup>10</sup> That right is not absolute, however, and the CPRA provides a number of exemptions to public disclosure for documents and information the Legislature has determined that, for policy reasons, the risks of disclosure outweigh the public benefit.

One such policy-based exemption is for trade secrets. The CPRA does not directly exempt trade secrets, but creates the exemption by incorporating the Evidence Code's conditional privilege for trade secrets.<sup>11</sup> The Evidence Code's privilege, in turn, incorporates identical definitions of "trade secrets" from the Civil Code and the Penal Code,<sup>12</sup> which identify a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique, or process" that derives "independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use," and for which the owner of the trade secret makes efforts that are reasonable under the circumstances to maintain its secrecy.<sup>13</sup>

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<sup>10</sup> See Cal. Const., art. I, § 3(b)(1); Gov. Code, §§ 6250 et seq.

<sup>11</sup> Civ. Code, § 6254(k); Evid. Code, § 1060.

<sup>12</sup> Evid. Code, § 1061; Civ. Code, § 3426.1; Pen. Code, § 499c.

<sup>13</sup> Civ. Code, § 3426.1(d).

This bill exempts from disclosure under the CPRA information CalRecycle collects from manufacturers that falls under the statutory definition of trade secrets. This exemption – which was narrowed at the recommendation of the Assembly Judiciary Committee – appears consistent with existing protections for trade secrets without being overbroad.

6. This bill exempts producers from certain prohibitions on antitrust and anti-competitive behavior to encourage producers to collectively develop a thermoform recycling market

The Cartwright Act<sup>14</sup> is California’s antitrust statute, modeled after the federal antitrust laws, the Sherman Act and the Clayton Act.<sup>15</sup> Rather than interpreting the Cartwright Act’s antitrust provisions to conflict with the federal laws, courts treat them as complimentary and treat case law on the federal laws as applicable to the state act.<sup>16</sup> Both the Cartwright Act and the Sherman Act facially ban all restraints on trade, but have been interpreted to permit such restraints as long as they are “reasonable.”<sup>17</sup>

The Unfair Practices Act<sup>18</sup> is intended “to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.”<sup>19</sup> To that end it “prohibits specific ‘practices which the Legislature has determined constitute unfair trade practices,’ ”<sup>20</sup> such as selling products below cost and “loss leader” practices.<sup>21</sup>

As discussed above in Part 2, the existing recycling procedures and infrastructure are insufficient to produce the volume of recycled thermoform necessary to satisfy the bill’s recycled-thermoform content requirements; the goal of the bill is, in part, to drive the companies that introduce thermoform plastic containers to invest in the necessary infrastructure. At the same time, the author recognizes that it would be difficult for individual producers to create a market, particularly if they have to compete with other thermoform producers for the same recycled material. Accordingly, in order to encourage companies to develop the necessary infrastructure, exempts specified conduct from the state’s antitrust and unfair competition laws:

- An action, taken pursuant to the bill’s requirements, taken solely to increase the collection, processing, and recycling of scrap plastic materials by a producer that

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<sup>14</sup> Bus. & Prof. Code, div. 7, pt. 2, ch. 2, §§ 16700 et seq.

<sup>15</sup> *Corwin v. Los Angeles newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 852-853.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Id.* at p. 853.

<sup>18</sup> Bus. & Prof. Code, div. 4, pt. 2, ch. 4, §§ 17000 et seq.

<sup>19</sup> *Id.*, § 17001.

<sup>20</sup> *Cal-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 179.

<sup>21</sup> See Bus. & Prof. Code, §§ 17040-17050.

affects scrap values, the quantities of materials being recycled, or the method of invoicing the sale of thermoform plastic containers.

- The formation of a nonprofit organization that may include two or more producers and that establishes specifications for different grades or classifications of thermoform plastics, which may affect the scrap value of those grades or classifications, the quantity or quality of materials being recycled, or the method of invoicing the sale of thermoform plastic containers, but does not establish the value of such materials.

The bill limits the scope of the exemption, however, by expressly providing that the exemption does not apply to any agreement between two or more producers establishing or affecting the price of plastic materials or any agreement restricting the geographic area or customers to which thermoform plastic products will be sold. In plain terms, the bill authorizes producers subject to the bill's recycled thermoform requirements to engage in otherwise-impermissible anticompetitive or collusive behavior between producers, but not price-fixing or territorial restrictions, on the theory relaxing these restrictions will allow producers to more efficiently and cost-efficiently develop the necessary infrastructure and upstream materials supply.

## 7. Arguments in support

According to a coalition of the bill's supporters:

PET thermoform containers have contained the most California recycled content of any food package in the United States. The recycled content, however, consisted primarily of recycled plastic beverage containers. As the beverage industry moves to increase their own recycled content to comply with AB 793 (Ting, Ch. 115, Stats. 2020), we are pleased to see the thermoform industry taking leadership to close the loop on their own thermoform containers.

As amended June 17th, AB 478 would:

- Establish recycled content requirements on a wide variety of food and beverage thermoform packaging including clamshells, cups, trays, yogurt containers, [and] foam take-out packaging.
- Establish compliance and reporting requirements for thermoform importers and container manufacturers and thermoform purchasers/buyers.
- Set meaningful levels of penalties.
- Encourage the collection of California-processed plastic feedstock needed to make new food and beverage thermoform containers for a closed loop system.
- Reduce greenhouse gas emissions and landfill disposal.
- Provide a level playing field.

AB 478 will help the state move toward its waste reduction and climate change goals. Beyond the climate-friendly reduction in resource use and greenhouse gases, plastic recycling generates jobs and economic benefits for local communities, creating a circular economy to produce, collect, recycle, and reprocess post-consumer plastic thermoformed containers.

#### 8. Arguments in opposition

According to a coalition of the bill's opponents:

Our member companies strongly support the use of PCR content in their packaging products and welcome discussions about effective public policies that strive to encourage its use. We are firmly committed to manufacturing products that meet the environmental, social and product needs of consumers. Unfortunately, we do not believe that there will be enough PCR content to meet the mandates of this legislation. While this bill would develop end markets for plastic materials, there needs to be an equal emphasis on improving the collection and sortation of these materials to get more materials to these markets...

[A]s various food and beverage companies make commitments to use PCR at higher rates for an increasing number of products, the supply of available material dwindles. There is currently not enough PCR resin in the marketplace to meet the voluntary demand driven by manufacturers. In fact, a recent study by AMERIPEN that analyzed U.S. company recycled content goals states that, "domestic supply and reprocessing capacity for plastic resin concludes that based upon demand stated through public commitments for plastic PCR, the U.S. currently lacks the available supply and, in some cases, domestic reclamation capacity to meet these goals."

We encourage the development of policies that support the expansion of recycling infrastructure to improve the recovery of all packaging. To that end, we look forward to discussing amendments to this bill.

#### SUPPORT

rPlanet Earth (sponsor)  
CA League of Conservation Voters  
California Alliance of Nurses for Healthy Environments  
Californians Against Waste  
County of San Diego  
Global Plastics Recycling  
Heal the Bay  
Natural Resources Defense Council

Northern California Recycling Association  
Plastic Oceans International  
Plastic Pollution Coalition  
Save Our Shores  
Seventh Generation Advisors  
Sierra Club California  
The 5 Gyres Institute  
The Center for Oceanic Awareness, Research, and Education  
UPSTREAM  
Wishtoyo Chumach Foundation  
Zero Waste USA

### **OPPOSITION**

American Beverage Association  
American Chemistry Council  
AMERIPEN  
California Strawberry Commission  
Flexible Packaging Association  
Foodservice Packaging Institute  
TekniPlex  
Plastics Industry Association  
Western Growers Association

### **RELATED LEGISLATION**

#### **Pending Legislation:**

SB 54 (Allen, 2021) prohibits producers of single-use, disposable packaging or single-use, disposable food service ware products from offering for sale, selling, distributing, or importing in or into the state such packaging or products that are manufactured on or after January 1, 2032, unless they are recyclable or compostable. SB 54 was placed on the Senate inactive file.

SB 38 (Wieckowski, 2021) requires distributors of beverage containers in the state to form a beverage container stewardship organization, which would be required to develop and submit to the department a plan, annual report, and budget for the recovery and recycling of empty beverage containers in the state similar to that described in the Used Mattress Recovery and Recycling Act. SB 38 is pending before the Assembly Committee on Natural Resources.

AB 842 (Cristina Garcia, 2021) enacts the California Circular Economy and Plastic Pollution Reduction Act, which establishes a comprehensive regulatory scheme for producers, retailers, and wholesalers of single-use packaging, as defined, and single-use



products, as defined, made partially or entirely of plastic, to be administered by CalRecycle. AB 842 is pending before the Assembly Natural Resources Committee.

AB 881 (Lorena Gonzalez, 2021) provides that, for purposes of regional requirements to divert a certain percentage of recyclable material from disposal, exporting the material out of the country, as specified, constitutes disposal. AB 881 is pending before the Senate Appropriations Committee.

Prior Legislation:

AB 793 (Ting, Ch. 115, Stats. 2020) establishes a timeframe for minimum recycled content for plastic bottle beverage manufacturers, provides an off-ramp for CalRecycle to determine whether or not the minimum content requirements are appropriate given the market conditions of recycled plastics, and sets flexible penalties for manufactures that do not meet the requirements.

AB 792 (Ting, 2019) established similar recycling-related requirements as AB 793 (Ting, Ch. 115, Stats. 2020) but on a more aggressive timeline. AB 792 was vetoed by Governor Gavin Newsom, who stated in his veto message that late-added amendments to the bill would result in a costly, burdensome process that undermines the worthy intent of the legislation.

**PRIOR VOTES:**

Senate Environmental Quality Committee (Ayes 5, Noes 1)  
Assembly Floor (Ayes 54, Noes 3)  
Assembly Appropriations Committee (Ayes 12, Noes 3)  
Assembly Judiciary Committee (Ayes 8, Noes 1)  
Assembly Natural Resources Committee (Ayes 8, Noes 0)

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