Date of Hearing: April 20, 2021

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 478 (Ting) – As Amended March 18, 2021

As Proposed to be Amended

**SUBJECT**: SOLID WASTE: THERMOFORM PLASTIC CONTAINERS: POSTCONSUMER RECYCLED PLASTIC

**KEY ISSUE**: IF CALIFORNIA CREATES A MUCH-NEEDED CIRCULAR ECONOMY FOR PLASTIC THERMOFORM CONTAINERS BY SETTING MINIMUM CONTENT STANDARDS REGARDING THEIR USE OF POSTCONSUMER PLASTIC, SHOULD IT GIVE A LIMITED EXEMPTION FROM THE STATE'S PUBLIC RECORDS ACT AND ITS MOST IMPORTANT ANTITRUST LAWS TO PRODUCERS OF SUCH PLASTIC CONTAINERS?

## SYNOPSIS

*This bill sets content standards for thermoform plastic containers to include a minimum amount of postconsumer recycled plastic in order to create a circular economy that will produce, collect, recycle and reprocess post-consumer plastic thermoformed containers. Most of this bill deals with topics and policies that are in the jurisdiction of the Assembly Natural Resources Committee and are thoroughly discussed in that Committee's analysis of the bill. The two provisions that bring the bill into this Committee's jurisdiction are its exemption from the California Public Records Act (CPRA) and its exemption from the state's Unfair Practices Act (UPA) main antitrust law, the Cartwright Act.*

*The analysis discusses why the bill's current language dealing with these two provisions needs to be revised. In the case of the CPRA exemption, the language just needs to be slightly modified to include a cross-reference. In the case of the Cartwright Act exemption, the analysis goes into detail about why the bill's current language (like at least two statutes currently in the Public Resources Code upon which it is modeled) is problematic in that it seems to allow anti-competitive behavior by businesses. The analysis explains why the bill's current provision needs to be deleted in its entirety and replaced with one that is modeled on a different statute in the PRC that has been analyzed by a federal court and found to prohibit anti-competitive behavior in a manner consistent with the intent of the Cartwright Act. The author proposes to amend the bill as recommended in the analysis and also to take amendments that were made to the bill when it was recently heard and approved by the Assembly Natural Resources Committee.*

*The bill is sponsored by rPlanet Earth, which claims to be the world's first completely vertically integrated recycler and manufacturer of recycled PET ("rPET") packaging and other products derived from post-consumer baled PET containers, and supported by a number of environmental and public health organizations. The bill is opposed (unless amended to have lower standards for the percentage of recycled plastics in thermoform containers) by the Foodservice Packaging Institute and the Plastics Industry Association.*

**SUMMARY**: Sets content standards for thermoform plastic containers to include a minimum amount of postconsumer recycled plastic in order to create a circular economy that will produce,

collect, recycle and reprocess post-consumer plastic thermoformed containers; and provides limited exemptions from the state's public records act and antitrust laws to producers of such plastic containers. Specifically, **this bill**:

1) Requires that the total thermoforms sold by a producer in the state shall, on average, contain a minimum amount of recycled content:

   a) From January 1, 2024 through December 31, 2026, no less than 10% postconsumer recycled plastic per year;

   b) From January 1, 2027 through December 31, 2029, no less than 20% postconsumer recycled plastic per year; and,

   c) On and after January 1, 2030, no less than 30% postconsumer recycled plastic per year.

2) Beginning January 1, 2024, a producer that does not meet the minimum amount of postconsumer recycled plastic requirements is subject to an annual administrative penalty. Beginning March 1, 2025, the penalty shall be collected annually, as specified.

3) Allows a producer to pay the penalties in quarterly installments or to arrange an alternative payment schedule subject to the approval of the Department of Resources Recycling and Recovery (CalRecycle), not to exceed a 12-month payment plan. Authorizes an extension due to unforeseen circumstances, such as a public health emergency, state of emergency, or natural disaster.

4) Authorizes CalRecycle to conduct audits and investigations and take an enforcement action against a producer to enforce the bill's provisions, including against a producer that fails to pay or underpays the administrative penalty after notice and hearing, as specified.

5) Requires CalRecycle to keep confidential all business trade secrets and proprietary information about manufacturing processes and equipment and specifies that this information is not subject to the California Public Records Act if it meets the definition of a trade secret in subdivision (d) of Section 3426.1 of the Civil Code.

6) Requires CalRecycle to consider granting a reduction of the administrative penalties assessed after considering anomalous market conditions, disruption or lack of supply of recycled plastic, and other factors that have prevented a producer from meeting the requirements.

7) In order to receive a reduction of the administrative penalty, requires a producer to submit a corrective action plan to CalRecycle that details the reasons the producer will fail to meet, or has failed to meet, the minimum content requirements and the steps the producer will take to comply with the requirement within the next reporting year. Authorizes CalRecycle to approve the corrective action plan and, if approved, to reduce the administrative penalties. Specifies that administrative penalties accrue from the point of noncompliance if the corrective action plan is not approved.

8) Requires a corrective action plan to include a compliance deadline not to exceed 24 months from the date of the original notice of violation; a description of each action the producer shall take to remedy the violation and the applicable compliance deadline for each action; and, the penalties that may be imposed if a producer fails to comply.

9) Establishes the Recycling Enhancement Penalty Account (Account) in the State Treasury and requires that penalties be deposited into the Account. Specifies that the Account may be expended, upon appropriation, for the sole purpose of supporting the recycling, infrastructure, collection, and processing of thermoforms in the state.

10) Requires producers to report the amount in pounds by resin type of virgin plastic and postconsumer recycled plastic used to manufacture thermoforms sold or offered for sale in California for the previous calendar year. Requires CalRecycle to post this information on its website.

11) Specifies that under certain circumstances, actions to increase the collection, processing, and recycling taken by CalRecycle or any person or entity that affects scrap values, the quantities of materials being recycled, or the method of invoicing the sale of thermoforms pursuant to the bill do not constitute a violation of the Cartwright Act, that state's main antitrust law.

12) Defines relevant terms and makes related legislative findings.

**EXISTING LAW**:

1) Establishes the California Beverage Container Recycling and Litter Reduction Act (Bottle Bill) that 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. (Public Resources Code Sections 14500 – 14599.)

2) Requires rigid plastic containers and bottles, as defined, to be labeled with a code consisting of a number placed inside a triangle that corresponds with the type of plastic used to manufacture the container or bottle. (Public Resources Code Sections 18000 – 18017.)

3) Provides, in the California Constitution, that "The 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." (Cal. Const., art. 1, sec. 3, subd. (b), par. (1).)

4) Requires, pursuant to the California Constitution, that "A state, court rule, or other authority . . . that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest." (Cal. Const., art. 1, sec. 3, subd. (b), par. (2).)

5) Provides, under the CPRA, that all public agency records are open to public inspection upon request, unless the records are otherwise exempt from public disclosure. (Government Code Section 6250 *et seq*. All further references are to this code unless otherwise noted.)

6) Requires, except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. (Section 6253 (b).)

7) Requires each agency, upon a request for a copy of records, to, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor. (Section 6253 (c).)

8) Exempts a "trade secret" from the mandatory disclosure requriements of the CPRA. (Section 6254 (k).)

9) Defines "trade secret" in a number of ways, including the following:

   a) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

      i) 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

      ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. (Civil Code Section 3426.1 (d), Penal Code Section 499c (9).)

   b) "Trade secret" means "trade secret," as defined in subdivision (d) of Section 3426.1 of the Civil Code, or paragraph (9) of subdivision (a) of Section 499c of the Penal Code. (Evidence Code Section 1060.1 (a)(1).)

10) Prohibits restraints on competition by, among other things, defining "a trust" as a combination of capital, skill or acts by two or more persons for any of the following purposes:

   a) To create or carry out restrictions in trade or commerce.

   b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

   c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

   d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

   e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any combination of any of the following:

      i) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

      ii) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

      iii) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and

unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

iv) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. (Business & Professions Code Section 16720.)

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

**COMMENTS**: California has a monumental waste problem. An estimated 35 million tons of waste are disposed of in California's landfills annually. California's recycling system is not up to the challenge of addressing this problem. California enacted its landmark California Beverage Container Recycling and Litter Reduction Act, also known as the Bottle Bill, in 1986. (Margolin, Chapter 1290, Statutes of 1986.) The program was designed to be a self-funded operation that would reduce litter, and achieve a recycling rate of 80 percent for eligible containers. Since the program was first implemented in 1987, according to Cal Recycle, the recycling rate of eligible containers has increased from 52 percent to a program high of 85 percent in 2013. (*California's Bottle Bill Turns 30*, Cal Recycle (Sept. 11, 2017), https://www.calrecycle.ca.gov/blogs/in-the-loop/in-the-loop/2017/09/11/california-s-bottle-bill-turns-30.)

However, recycling rates have dropped dramatically in recent years, mostly because of a severe downturn in the market value of recycled materials. This has led to the closure of nearly one thousand beverage container buyback centers, roughly 38% of the statewide total, leaving many Californians without redemption opportunities. According to Californians Against Waste, this drop in recycling is equivalent to an additional 1.7 million beverage containers littered or landfilled every day. (*How California's Bottle Bill Works*, Californians Against Waste (undated), https://www.cawrecycles.org/how-the-california-bottle-bill-works.)

***This bill.*** One way to reduce plastic waste is to build a "circular economy" to produce, collect, recycle and reprocess post-consumer plastic, including thermoformed containers, which are the subject of this bill. A thermoform container is, according to the bill, "a plastic container, such as a clamshell, cup, tub, lid, box, tray, egg carton, or similar rigid, nonbottle packaging, formed from sheets of extruded resin and used to package items such as fresh produce, baked goods, nuts, and deli items." According to information provided to the Committee by the author, thermoformed containers have contained the most California recycled content of any food package in the United States. The recycled content consists primarily of recycled plastic beverage containers. However, there is a lack of collection infrastructure in California to allow for thermoformed containers to be recycled and reused. As a result, approximately 200 million pounds of thermoform waste is discarded in California every year.

According to the author, this bill will help close the loop for recycling these plastic containers:

> 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.

Most of this bill deals with topics and policies that are in the jurisdiction of the Assembly Natural Resources Committee and are thoroughly discussed in that Committee's analysis of the bill. The two provisions that bring the bill into this Committee's jurisdiction are its exemption from the California Public Records Act (CPRA) and its exemption from the state's Unfair Practices Act (UPA) main antitrust law, the Cartwright Act.

***Exemption from the CPRA.*** The California Public Records Act (CPRA) was enacted in 1968 (Chapter 1473, Statutes of 1968) and codified as Sections 6250 through 6276.48. Similar to the federal Freedom of Information Act, the CPRA requires that the documents and "writings" of a public agency be open and available for public inspection, unless they are exempt from disclosure. (Sections 6250-6270.) The CPRA is premised on the principle that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." It defines a "public record" to mean "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Section 6252 (e).) In enacting the CPRA, the Legislature was "mindful of the right of individuals to privacy," but also found and declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Courts interpreting the CPRA have held that given the fact that principle of open records are enshrined in the state constitution, any exemptions from compelled disclosure must be narrowly construed. (See Cal. Const., art. I, § 3, subd. (b)(2); *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1262; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1425.)

The CPRA does not contain an express exemption for alleged trade secrets. Rather, it incorporates a trade-secret exemption indirectly through Section 6254 (k), which exempts records that are privileged under the California Evidence Code. California Evidence Code 1060 establishes a conditional privilege for trade secrets. It states that the "owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or *otherwise work injustice*." Evidence Code Section 1060 incorporates the definition of a "trade secret" contained in Civil Code Section 3426.1: "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."

The bill in print contains two confidentiality provisions. First, it requires the department to maintain the confidentiality of "all business trade secrets and proprietary information about manufacturing processes and equipment that the department gathers" which seems appropriate, given the confidential and proprietary nature of the information. Second, it exempts "business trade secrets and proprietary information obtained pursuant to this subdivision" from the CPRA. As explained above, business records that contain trade secrets and proprietary information are only exempt from the CPRA if and when they meet other criteria: specifically that they defined as a "trade secret" under the definition provided in Civil Code Section 3426.1.

In order to clarify that the bill's trade secret exemption from the CPRA is consistent with existing law, the author proposes the following clarifying amendment:

(2) The department shall keep confidential all business trade secrets and proprietary information about manufacturing processes and equipment that the department gathers or becomes aware of through the course of conducting audits or investigations pursuant to paragraph (1). Business trade secrets and proprietary information obtained pursuant to this subdivision ***that meet the definition of Section 3426.1 of the Civil Code*** ~~are not subject to~~ ***are exempt from disclosure as otherwise required pursuant to*** the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) ***consistent with subdivision (k) of Section 6254 of the Government Code***.

***Exemptions from the Cartwright Act and Unfair Practices Act.*** The Cartwright Act (Business & Professions Code Section 16700 *et seq*.), California's main antitrust law, makes unlawful a "trust," defined as a combination of capital, skill, or acts by two or more persons, firms, partnerships, corporations, or associations of persons to restrict trade, limit production, increase or fix prices, or prevent competition. The Act is broad in scope, and its plain language embraces every type of business. (*Cianci v. Superior Court* (1985) 40 C.3d 903, 917-18.) There was no express congressional intent in the Sherman Act to preempt and supplant state legislation; and the nature of the subject matter does not call for such preemption. The Cartwright Act is a state act which operates in furtherance of the purpose and intent of the federal antitrust legislation, not in contravention of it. (*R. E. Spriggs Co. v. Adolph Coors Co.* (1974) 37 Cal.App.3d 653, 666.)

The purpose of the UPA (Business and Professions Code Section 17000 *et seq*.) likewise is 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." (Business & Professions Code Section 17001.) It provides, among other things:

> It is unlawful for any person engaged in the production, manufacture, distribution or sale of any article or product of general use or consumption, with intent to destroy the competition of any regular established dealer in such article or product, or to prevent the competition of any person who in good faith, intends and attempts to become such dealer, to create locality discriminations. (Business & Professions Code Section 17040.)

The UPA chiefly prohibits selling articles below cost, or giving them away, for the purpose of injuring competitors and destroying competition, and also prohibits rebates or special privileges to purchasers that have these purposes or tendencies. (1 *Witkin* Sum. Cal. Law Contracts Section 623.)

Like the Cartwright Act, the UPA does not apply to governmental entities to the extent that inclusion would result in an infringement on their sovereign governmental powers. Thus, a county's operation of a hospital in competition with private hospitals for nonindigent patients was not subject to the Act; preventing the hospital from accepting paying patients as a means of meeting its obligation to indigents would infringe on its sovereign governmental powers. (*Community Memorial Hosp. of San Buena Ventura v. Ventura* (1996) 50 C.A.4th 199, 209.)

The bill in print provides the following exemption from these competition and consumer protective measures:

> 42378. An action to increase the collection, processing, and recycling taken by the department, or by any person or entity, affecting scrap values, the quantities of materials

> being recycled, or the method of invoicing the sale of thermoform plastic containers pursuant to this chapter is not a violation of the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code) and the Unfair Practices Act (Chapter 4 (commencing with Section 17000) of Part 2 of Division 7 of the Business and Professions Code).

This language seems unnecessarily broad, unreasonably vague, and generally problematic. It deals with actions of the department to "increase the collection, processing, and recycling" and declares that "an action [for this purpose] . . . taken by *the department* [emphasis added]" is not a violation of the Cartwright Act. This seems unnecessary because the Cartwright Act applies to every type of business (See *Cianci v. Superior Court, supra*) but not any type of government entity. Thus, it is not a violation of the Cartwright Act for an individual to conspire with a government official in an attempt to influence government action, although such conspiracies certainly may violate other laws. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 320.)

But the language also applies to "an action [for this purpose] . . . taken . . .by *any person or entity*, affecting scrap values [etc.]" and declares that such an action-- is not a violation of the Cartwright Act. What is meant by "an action to increase the collection, processing, and recycling"? And what actions "by any person or entity affecting scrap values" --including presumably anticompetitive behavior that is outside the scope of the goals of the bill--would be exempt from the state's main antitrust law because of this broad language? As currently drafted, this provision would seem to allow manufacturers of thermoform containers to agree among themselves on a certain price for their products, as long as they determined that setting a standard price was "an action to increase the collection, processing, and recycling." Presumably that type of anti-competitive behavior is something that the Legislature would not want to allow. The language also could prove ineffective in actually shielding businesses from liability for their anti-competitive behavior under the federal equivalent of the Cartwright Act, the Sherman Act, which does not have a similar exemption.

The author and sponsors point to the fact that several Cartwright Act exemptions in the Public Resources Code (PRC) about recycling programs have language that is just as broad as the language of the bill in print. And that's true. At least two sections of the PRC have Cartwright Act exemptions that are virtually identical to the one in the bill in print: PRC Section 14529.5 (the Bottle bill) and PRC Section 15016 (Battery stewardship).

However, other sections of the PRC (Sections 48706 (Paint Stewardship) 42994 (Mattress stewardship), and 42981 (Carpet stewardship, for example) have Cartwright Act exemptions that are far more limited. They do not include unnecessary exemptions for government action and make clear that agreements between businesses that affect the price of products violate the Cartwright Act. In general, these provisions were enacted after the statutes that have Cartwright Act exemptions which are similar to the bill in print (i.e. the Bottle bill, enacted in 1986). For example, Section 48706 (Paint stewardship) was enacted in 2010 by AB 1343 ((Huffman) Chap.420, Stats. 2010) and has a Cartwright Act exemption that reads as follows:

> (a) Except as provided in subdivision (c), an action solely to increase the recycling of architectural paint by a producer, stewardship organization, or retailer that affects the types or quantities being recycled, or the cost and structure of any return program, is not a violation of the statutes specified in subdivision (b).
>
> (b) The following statutes are not violated by an action specified in subdivision (a):

(1) The Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code).

(2) The Unfair Practices Act (Chapter 4 (commencing with Section 17000) of Part 2 of Division 7 of the Business and Professions Code).

(c) Subdivision (a) shall not apply to any agreement establishing or affecting the price of paint, except for the architectural paint stewardship assessment, or the output or production of paint, or any agreement restricting the geographic area or customers to which paint will be sold.

One federal district court case, *GreenCycle Paint, Inc. v. PaintCare, Inc.* (N.D.Cal. 2017) 250 F. Supp. 3d 438, 456-457, a court interpreted this section and found that a paint company could be held responsible under California's Cartwright Act and Unfair Competition Law for its anti-competitive behavior, despite PRC Section 48706's "safe harbor" that allows producers to cooperate under limited circumstances. The court found that it is crucially important that the statute provided an *exception* to the Cartwright Act exemption/safe harbor. Without such an exception, anti-competitive conduct would seem to be allowed by PRC Section 48706, which would frustrate the purpose of the Cartwright Act and potentially harm consumers:

> Indeed, PaintCare's interpretation ignores the Safe Harbor's requirement that the action must be one "solely to increase the recycling of architectural paint." This limitation suggests only certain actions are protected, namely, those that increase the amount of recycled paint. If PaintCare engaged in acts that increased the amount of recycled paint, such conduct would be consistent with the purpose of the Program; in that case, protection from antitrust lawsuits is appropriate. But that is not what Plaintiff alleges occurred. . . . PaintCare took steps to *decrease* the availability of recycled paint, which Plaintiff alleges is contrary to the Program's purpose. . . PaintCare's sole purpose in diverting paint away from Plaintiff was to "prevent[] a recycling facility from operating in the Bay Area and [to] limit[] the amount of paint being recycled for sale in California." FAC ¶ 31. The Safe Harbor Provision is silent as to a stewardship organization's actions taken to decrease the recycling of architectural paint.
>
> . . . In short, the Court cannot find the Safe Harbor Provision's plain language is meant to immunize any action taken pursuant to the Program from claims under the Cartwright Act or the UCL. Rather, the plain language indicates only "actions solely to increase the recycling of architectural paint" are protected from antitrust suits. The Safe Harbor Provision therefore does not apply where, as here, the defendant allegedly took steps to decrease paint recycling. (*GreenCycle Paint, Inc., supra,* 456-457.)

Committee staff was unable to find any cases where Cartwright Act violations were brought against companies notwithstanding the very broad exemptions in the PRC which are similar to the one in the bill in print. This makes sense given that the wording of those exemptions would seem to make actions alleging violations of the Cartwright Act (and UPA) virtually impossible.

*In order to address these issues, the author proposes the following amendment to the bill in order to limit the bill's Cartwright Act and UPA exemption. It is modeled on PRC Section 48706, the statute at issue in the* GreenCycle Paint, Inc. *case discussed above.*

On Page 7 line 36 – Page 8, line 4, delete all of the current language of Section 42378 and replace it with the following:

42378. (a) Except as provided in subdivision (c), neither of the following is a violation of the statutes specified in subdivision (b):
(1) An action pursuant to this chapter 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.
(2) 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.
(b) The following statutes are not violated by an action specified in subdivision (a):
(1) The Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code).
(2) The Unfair Practices Act (Chapter 4 (commencing with Section 17000) of Part 2 of Division 7 of the Business and Professions Code).
(c) Other than as provided by subdivision (a), the exemption from the statutes specified in subdivision (a) shall 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.

***ARGUMENTS IN SUPPORT:*** rPlanet Earth, the sponsor of the bill which claims to be the world's first completely vertically integrated recycler and manufacturer of recycled PET ("rPET") packaging and other products derived from post-consumer baled PET containers, writes the following about why the bill is an important environmental measure:

> PET thermoform containers have incorporated the most California recycled content of any food package in the United States. The recycled content, however, consisted primarily of recycled plastic beverage bottles. As the beverage industry moves to increase their own recycled content
>
> to comply with AB 793 (Ting), the thermoform industry recognizes the need to transition to closing the loop on their own thermoform containers.

California, Alliance of Nurses for Healthy Environments writes that, "AB 478 will help California and our local counties meet our waste reduction and climate change goals. It will also create jobs and economic benefits for local communities." They also point out the beneficial public health effect of less plastic going into our state's landfills as a result of the bill.

> As nurses concerned about the public's health we believe that creating a circular economy to produce, collect, recycle and reprocess post-consumer plastic thermoformed containers will improve the health of California's communities by reducing landfill and in doing so help keep our air safe and slow climate change.

***ARGUMENTS IN OPPOSITION:*** The Foodservice Packaging Institute (FPI) writes that "In principle, FPI fully supports policies and programs that result in more recycling and/or composting of foodservice packaging." FPI writes, however, that the bill "sets unachievable targets, is too narrow and does not reflect requirements and market realities for foodservice packaging." In terms of amendments, FPI suggests that the bill's requirement that "*postconsumer recycled plastic*" must come from a thermoform plastic container "exacerbates the already limited supply and the tight timelines will also be challenging to meet given the current realities of collection, sortation and reprocessing of thermoform plastic containers." Rather, FPI suggested that the bill should allow more types of plastics, or relax the targets for use of postconsumer recycled plastic.

Similarly, the Plastics Industry Association writes that although it "strongly supports the use of recycled content. We are firmly committed to manufacturing products that meet the environmental, social, and business needs of consumers. Unfortunately, we do not believe that there will be enough recycled content to meet the mandates of this legislation."

**REGISTERED SUPPORT / OPPOSITION**:

**Support**

rPlanet Earth (sponsor)
350 Silicon Valley
California Alliance of Nurses for Healthy Environments
Elders Climate Action, Norcal and Socal Chapters
National Stewardship Action Council

**Oppose Unless Amended**

Foodservice Packaging Institute
Plastics Industry Association

**Analysis Prepared by**: Alison Merrilees / JUD. / (916) 319-2334