



# Rule Concept: Clarifications to Producer Definitions

Plastic Pollution and Recycling Modernization Act (SB 582, 2021)  
Rulemaking Advisory Committee Meeting 6, Rulemaking 2

Feb. 29, 2024

## Background

This memo provides background information on rule concepts for determining producers of covered products.

Per ORS 459A.869, producers of “covered products” must join a Producer Responsibility Organization, pay membership fees and report data to the PRO on the amount of product they sell into the state. ORS 459A.866 describes how producers of covered products are to be determined. Distinct producer definitions are described for items sold in packaging at physical retail and by remote distribution; for printing and writing paper; and for food serviceware.

The rule concepts in this document provide further clarity to identify the obligated producer for packaging under certain circumstances.

## Rule concepts for discussion at March 14, 2024 RAC meeting

### I. Producer definition tiers

For items sold at physical retail and for packaging used to directly contain and protect an item sold by remote distribution, a three-tiered definition in ORS 459A.866(1)(a)(A)-(C) is used to identify the obligated producer:

- Tier 1. The manufacturer of the item contained in the packaging, if the item is sold in packaging under the manufacturer’s own brand or is sold unbranded, i.e., the brand owner is the obligated producer.
- Tier 2. The licensee of the brand owner or trademark holder, if the licensee manufactures the item.
- Tier 3. The first importer of the packaged item into the country, if no entity in the United States is identifiable under the previous two tiers.

Contract manufacturing leads to several situations where it could be unclear which, if any, tier would apply.

For example, a coffee company sells its beans at physical retail under its own brand, but contracts (rather than licenses) with a separate entity to roast the beans to its specifications. Depending on what is considered to be *manufacturing*, tier one could apply and the brand owner could be the obligated producer. There is no licensee, so the second tier cannot apply. And with no importing of a finished, packaged product involved in this particular supply chain, tier three also would not apply, and therefore the product would potentially be orphaned (i.e., left without an obligated producer).

Another example involves arrangements through which a retailer contracts with associated businesses to produce items sold under a house brand that is uniquely sold by that particular retailer. If such arrangements, known as “private label” or “white label” arrangements, involve licensing agreements and the responsibility for manufacturing clearly lies with the licensee, the second tier of the producer definition would apply. But if such an arrangement uses another mechanism—for example, simple contracts—and/or

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the brand directs manufacturing, then, as with the coffee beans example, obligation could either be assigned to the brand owner or orphaned.

DEQ proposes to clarify in rule that “manufacturing” an item includes directing manufacturing of an item. DEQ proposes to further clarify that setting specifications for an item’s packaging is considered directing manufacturing. Purchasing or ordering an item for retail sale in the normal course of business is not considered directing manufacturing.

DEQ also proposes to clarify that the phrase “the manufacturer’s own brand” in the tier one definition at ORS 459A.866(1)(a)(A) includes any brand or trademark that the manufacturer wholly owns or co-owns according to the US Patent and Trademark Office.

Under these proposed rules, producer obligations would be assigned to the coffee company rather than the roasters in the first example above, and to the retailer in the second example if it sets packaging specifications in its contracts with suppliers.

## **II. Definitions for packaging that may reach a consumer empty**

In the rule concept document “[Clarifications and Exemptions from Covered Product](#),” three sub-categories of packaging are defined that are sold to or may otherwise reach a consumer empty: storage items, service packaging, and consumer wraps. The approach to identifying the obligated producer for these items must be clarified in rule, as the three-tiered producer definition for packaging sold at physical retail in ORS 459A.866(1)(a)(A)-(C) assigns producer obligations partly based on who manufactured the item contained in the packaging.

For storage items and consumer wraps, DEQ proposes to put into rule a tailored version of the three-tiered producer definition for items sold in packaging at physical retail, to uphold the statutory intent with respect to designation of obligated producers:

- Tier 1. The manufacturer of the storage item or consumer wrap, if the item is sold in under the manufacturer’s own brand or is sold unbranded, i.e., the brand owner is the obligated producer.
- Tier 2. The licensee of the brand owner or trademark holder, if the licensee manufactures the storage item or consumer wrap.
- Tier 3. The first importer of the packaged item into the country, if no entity in the United States is identifiable under the previous two tiers.

For service packaging, DEQ proposes to define the obligated producer as the person that first distributes the packaging in or into the state.

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