

STATE OF TENNESSEE

Office of the Attorney General



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February 26, 2024

**SUBMITTED ELECTRONICALLY
VIA REGULATIONS.GOV**

Robin Carnahan
Administrator
General Service Administration
1800 F St. NW
Washington D.C., 20405

**Re: Acquisitions Regulations: Reduction of Single-Use Plastic Packaging
Docket ID No. GSA-GSAR-2023-0028-0001**

Dear Administrator Carnahan:

The undersigned State Attorneys General respectfully submit the following comments in response to the General Services Administration ("GSA") proposed rule regarding "Reduction of Single-Use Plastic Packaging" ("SUP").

The proposed rule advocates green policies over the efficient and effective procurement of government property and therefore exceeds the scope of rulemaking authority delegated by Congress to the GSA Administrator. The rule would implement environmental policy in an end run around constitutional bicameral and presentment requirements. *See*, U.S. Const. Art. I, § 1 and § 7, cl. 2 (Bicameral requirement); I, § 7, cls. 2, 3 (Presentment); *see also*, *I.N.S. v. Chadha*, 462 U.S. 919, 951, 103 S. Ct. 2764, 2784, 77 L. Ed. 2d 317 (1983) ("[T]he Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions."). The proposed rule would back-door environmental policy adoption without legislation passed by Congress and signed by the President.

The GSA is meant to provide “[e]ffective and efficient” real estate, acquisition, government technology, and operations services. U.S. General Services Administration, *Mission and Background*, <https://bit.ly/49gzwBS>; 40 U.S.C.A. § 101(1). The Federal Property and Administrative Services Act established the GSA to consolidate administrative operations and “to avoid duplication, reduce cost, streamline the acquisition and distribution of supplies, and centralize the management of Federal buildings.” <https://bit.ly/3uqOmqq>; see also, U.S. General Services Administration, *Office of the Administrator Overview*, <https://bit.ly/48ikoCH>.

The GSA Administrator is authorized by statute to promulgate rules only to forward the GSA’s limited purpose in procuring and using government property. The office of the Administrator of General Services serves as “the head of the General Services Administration.” 40 U.S.C.A. § 302(a). Further, the Administrator retains authority to “prescribe regulations to carry out” the subtitle regarding “Federal Property and Administrative Services.” 40 U.S.C.A. § 121(c)(1). Accordingly, the Administrator’s regulation promulgation authority must be germane to the subtitle’s purpose—“to provide the Federal Government with an economical and efficient system for” (1) procuring and supplying federal government property and services; (2) using available property; (3) disposing of surplus property; and (4) maintaining appropriate records. 40 U.S.C.A. § 101(1)-(4).

By U.S.C.A. § 101(1)’s plain text, any proposed rule with the effect of making the procurement and supplying of government property less “economical and efficient” would violate the GSA Administrator’s limited delegation of rulemaking authority. See 40 U.S.C.A. § 101(1) (requiring the “economical and efficient” procurement of goods and services); 40 U.S.C.A. § 121(c)(1) (restricting the Administrator’s authority to comply with the GSA’s purpose).

The proposed rule would clearly result in increased costs and procurement time for the federal government, states, and businesses who transact with federal or state governmental entities. SUP packaging alternatives, such as paper or cardboard, require significantly more energy to produce, create substantially more solid waste, are more difficult to recycle, and cause other environmental shortfalls, including deforestation. Angela Logomasini, *Science Shows That It’s Not Really Green to Ban Plastic Bags*, NEW YORK POST, <https://bit.ly/42JyDPy> (Jan. 20, 2019); Swiftpak, *Plastic vs Paper Packaging: The Pros and Cons*, <https://bit.ly/4bBsNnF> (Oct. 5, 2023).

While exact costs differ depending upon product type and packaging, almost all other packaging materials are substantially more expensive for producers and consumers than SUP’s. For example, producing soft drinks in glass bottles compared to polyethylene terephthalate costs \$0.01 more to produce per unit, packaging weighs

approximately ten times as much as SUP, requires 40% more energy, and costs five times as much to transport, and produces larger product sizes and less efficient shipping. Richard Gray, *What's the Real Price of Getting Rid of Plastic Packaging?*, BBC, <https://bbc.in/3uzHqXQ> (July 5, 2018). These same cost increases correlate to other packaging materials as well. *See also*, Independent Fiscal Office of the Commonwealth of Pennsylvania, *Economic Impact From Regulation of Single-Use Plastics*; available at http://www.ifo.state.pa.us/download.cfm?file=Resources/Documents/Single-Use%20Plastics%20Report-2020_06.pdf (June 2020) (the State of Pennsylvania estimated a total cost exceeding \$70 million on Pennsylvania state government, industry partners, and consumers alone for “any regulation impacting single-use plastics, reusable plastics, auxiliary containers, wrappings or polystyrene containers.” Pennsylvania estimated a ban alone on light-weight plastic bags would increase consumer costs by \$72 million with a per capita impact of \$5.60 per Pennsylvania resident. Further, a “ban on EPS food service products would require” state and local governments, non-profits, and other institutions “to spend an additional \$40 million on alternatives.”); MB Public Affairs, Inc., *Fiscal Impacts of Prohibiting Expanded Polystyrene Food Service Products in Maryland SB 186 & HB 229*; available at <https://www.plasticfoodservicefacts.com/wp-content/uploads/2017/10/Maryland-2017-fiscal-impact-study-of-SB-186-and-HB-229.pdf> (January 2017) (Estimating the impacts of restricting expanded polystyrene food service product packaging in Maryland to cost up to \$34.9 million annually to affected businesses, organizations, and consumers, with every \$1 dollar spent on expanded polystyrene packaging totaling an average of \$1.85 for packaging alternatives.).

These costs would necessarily shift to retailers, suppliers, wholesalers, and any other parties living in our states who directly contract with the federal government. The proposed rule would force extra costs for production, transportation, and disposal. What is more, this proposed rule would likewise impact parties throughout our states who supply these federal contractors at any point along the chain of production and distribution—forcing compliance for downstream parties who do not directly contract with the federal government. Accordingly, this proposed rule’s sweep is far broader than entities that directly contract with the federal government.

The proposed rule clearly lessens efficiency and effectiveness in federal government procurement by requesting additional inquiry into the existence of SUP-alternative packaging at the outset of the contracting process, as well as creating a preference for SUP-alternatives with higher production, transportation, and disposal costs. As such, the proposed rule violates 40 U.S.C.A. § 101(1).

Finally, the proposed rule is counterproductive to its stated goal. The SUP-free ordering preference would likely increase the overall use of plastics and negate any alleged economic or environmental benefit. Indeed, many other jurisdictions pursued similar SUP policies with disastrous results.

Under the proposed rule's section "Other State and Local Government Policy Efforts," the GSA cites eight states with initiatives "to reduce single-use plastic packaging," including "California[.]. . . Connecticut, Delaware, Hawaii, Maine, New York, Oregon, and Vermont." *See*, 88 Fed. Reg. 88,856 88,857 (Dec. 26, 2023) (*citing* National Conference of State Legislatures, *State Plastic Bag Legislation*, <https://bit.ly/48krsP2> (Feb. 8, 2021)). More specifically, the GSA lists these state-level prohibitions on the use of single-use plastic bags from grocery stores and other retailers as evidence that "the market can react to a reduction in single-use plastic packaging." *Id.* While the proposed rule lists these states as examples to emulate, the proposed rule fails to cite any data from any of these states touting their respective programs' alleged success.

Unfortunately, these statewide bans led to worse economic and environmental outcomes and increased net plastics consumption in some instances. One study found California's ban led to numerous unintended consequences, including the offset of lightweight SUP bags by 120%, 64%, and 6% increase in much heavier and resource-intensive small, medium, and tall trash bags, respectively. *Journal of Environmental Economics and Management*, *Bag leakage: The effect of disposable carryout bag regulations on unregulated bags*, <https://bit.ly/3HZek7c> (January 2019). In addition to converting to more resource-intensive trash bags for first-time use, California consumers also could no longer reuse and recycle SUP bags as small trash can liners for subsequent uses. *Id.*; *see also*, Kenneth Schrupp, *Multiple Analyses Find California Plastic Bag Ban is Failing*, *The Center Square*, <https://bit.ly/42Kk3HU> (Aug. 25, 2023).

Other states' proposals led to similar results—including some states not contemplated by the proposed rule. *See, e.g.*, Forbes, *New Jersey Bag Ban Followed by Increased Use of Plastic*, <https://bit.ly/49mVlzS> (Jan. 22, 2024) ("[P]assage of New Jersey's anti-plastics law has been followed by a near tripling of plastic consumption at Garden State checkouts."); Freedonia Group, *Freedonia Report Finds New Jersey Single-Use Bag Ban Boosts Alternative Bag Production, Increases Plastic Consumption, and Drives Retailer Profits*, <https://bit.ly/3UZPlZx> (Jan. 9, 2024); NY Daily News, *New York's Bad Bag Ban: Unintended Consequences Undermine the Supposed Environmental Benefits*, <https://bit.ly/48yWwLn> (Mar. 6, 2020); Muposhi, Mpinganjira, and Wait, *Considerations, Benefits, and Unintended Consequences of Banning Plastic Shopping Bags for Environmental Sustainability: A Systematic*

Literature Review, 40 WASTE MANAGEMENT & RESEARCH 248, 256 (2022) (“[Single Use] Plastic bag ban led to 21.1% increase in shoplifting in Hawaii, California.”).

These results remain consistent in similar international initiatives. See, Evan Duggan, *Single Use Plastic Bag Ban Creates Unintended Problems in Canada*, RETAIL INSIDER, available at: <https://bit.ly/48krp5O> (April 19, 2023); Eric Stober, *The Federal Court Just Overturned Ottawa’s Single-Use Plastic Ban*, Global News, <https://bit.ly/48hBHUn> (Nov. 16, 2023) (overturning Canada’s ban on SUP’s as “unreasonable and unconstitutional”).

The GSA’s proposed rule exceeds the Administrator’s rule promulgation authority and attempts to enshrine environmental policy not considered by Congress, creates worse outcomes and less efficient procedures for businesses in our states who contract with the federal government, and would likely exacerbate the very environmental harms the rule seeks to prevent.

Sincerely,



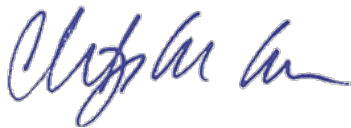
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