

All Wrapped Up

Extended Producer Responsibility for Packaging



July 2024 State-By-State Updates

California

- The California Department of Resources Recycling and Recovery (“CalRecycle”) is currently reviewing the comments received on its proposed regulation text during the public comment period that has since closed. Final regulations must be adopted by January 1, 2025, which is the statutory deadline set forth in CAL. PUB. RES. CODE § 42060(a).¹
- CalRecycle published an update to the Covered Material Categories (“CMC”) list on July 1, 2024, pursuant to CAL. PUB. RES. CODE § 42061(a)(1).² Each CMC identifies a combination of material type and form that apply to each detachable component of covered material individually. Although there were several changes made to the CMC list released in December 2023, there were no updates to the determinations of recyclability or compostability by CMC that had accompanied the initial CMC list. Tin cans are still deemed nonrecyclable.
- The Producer Responsibility Advisory Board met on July 21, 2024. Agenda items included:
 - (1) a presentation by the Chair of the Colorado Producer Responsibility for Statewide Recycling Advisory Board regarding lessons learned in connection with the development of Colorado’s needs assessment and PRO plan;
 - (2) a discussion of “barriers and solutions to a circular economy” per the directive in CAL. PUB. RES. CODE § 42070(a), including with respect to (a) compostability/compostable covered materials, and (b) plastic leakage into the environment; and
 - (3) a summary of the statutory mandates associated with the SB 54 Plastic Pollution Mitigation Fund (*i.e.*, the \$500,000,000 annual environmental mitigation surcharge) provided for in CAL. PUB. RES. CODE § 42064, and how the proceeds will be allocated to California agencies.

¹ 10-Z CAL. REGULATORY NOTICE REG. 226 (Mar. 8, 2024) (proposed regulation text initially released Dec. 28, 2023, <https://www2.calrecycle.ca.gov/Docs/Web/127317>).

² CalRecycle, *Update to Covered Materials Categories (CMC)* (July 1, 2024), <https://www2.calrecycle.ca.gov/Docs/Web/128187>.

With respect to (2)(a) (compostability/compostable covered materials), the Board identified the following barriers: lack of standardization for labeling; inconsistent and inadequate composting infrastructure; contamination; and the U.S. Department of Agriculture National Organic Program restriction set forth in CAL. PUB. RES. CODE § 42357(g)(1)(B), which takes effect January 1, 2026.

Potential solutions to overcome these barriers included: improving labeling; incentivizing reuse and prioritizing compostable material; creating a “one bin” collection system for all compostable materials; standardizing future composting infrastructure; mobilizing education campaigns; and ramping up enforcement of CAL. PUB. RES. CODE § 42357(a)(1), which prohibits the sale of products labeled “compostable” unless they meet certain criteria.

With respect to 2(b) (plastic leakage into the environment), the Board identified the following barriers: increased plastic production by the fossil fuel industry; global mismanagement of plastic waste; the negative impact of U.S. foreign policy on efforts to address plastic pollution; and the rise of plastic pollution in ocean sediments.

Potential solutions to overcome these barriers included: increasing awareness of proper disposal; reducing the number and types of conventional polymers in the market; eliminating single-use plastics that are not recyclable or compostable; eco-modulating PRO fees; and restricting the use of plastics in certain applications.

- California SB 1231 – the subject of last month’s *Issue In Focus* – would amend California’s packaging EPR law to address a perceived oversight that would prevent producers from qualifying for the “trending on-ramp” exemption during the first few years of the program. The bill, which had already passed the Senate, was amended by the Assembly Committee on Natural Resources on July 2, 2024, then passed the full Assembly, and now resides in the Assembly Committee on Appropriations.³ Of note, the recent amendment would add an additional 6 months to the existing 18-month grace period set forth in CAL. PUB. RES. CODE § 42355.51(b)(2), such that products and packaging manufactured up to 24 months after the first update to the material characterization study would not be subject to the sales/distribution prohibition, but only if the producer had previously submitted a petition to CalRecycle seeking qualification for the trending on-ramp.

Colorado

- The Colorado Department of Public Health and the Environment (“CDPHE”) adopted the primary regulations necessary to implement and enforce Colorado’s packaging EPR law on June 14, 2024. The new rules were published in the Colorado Register on July 10, 2024, and became effective July 31, 2024.⁴
- Colorado’s producer registration deadline, which is the earliest among all states with packaging EPR, is October 1, 2024. COLO. CODE REGS. § 18.2.4(A)(1). Many producers, however, have already registered pursuant to an earlier request from Circular Action

³ California SB 1231 (last amended July 2, 2024), https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=202320240SB1231.

⁴ 47 COLO. REG. 13 (July 10, 2024) (regulations also available at <https://www.sos.state.co.us/CCR/Upload/AGORequest/AdoptedRules02024-00190.docx>).

Alliance (“CAA”) to register in July 2024, which was the registration deadline originally proposed in a prior iteration of the rulemaking.

- The Colorado Producer Responsibility Program for Statewide Recycling Advisory Board held a hearing on July 10, 2024. The Board’s discussion focused primarily on eco-modulation. The CDPHE presented the eco-modulation requirements specified under Colorado law. CAA followed with a presentation providing background information on eco-modulation and compared other states’ eco-modulation factors.
- The Advisory Board also held a third technical work session on July 25, 2024. Discussion topics included eco-modulation and post-consumer recycled content (“PCR”). Guest speakers presenting on eco-modulation emphasized the importance of (1) ensuring that eco-modulation changes are feasible, and (2) starting eco-modulation fees on the low end and gradually ramp up as the program progresses. PCR discussions centered around stakeholders’ opposition to the use of advanced chemical recycling to meet PCR goals and to the use of accounting for PCR via a “free allocation” method.⁵
- CAA hosted a virtual consultation session on July 30, 2024, entitled “Minimum Recyclable List, Minimum Collection Targets, and Recycling Rates.”⁶ This session is the first of ten sessions focused on key elements of the PRO plan, which is due on or before February 1, 2025. COLO. REV. STAT. § 25-17-705(4). There are five sessions scheduled in August: Education and Outreach Program (Aug. 1); Producer Dues (Fees) (Aug. 6); Compostables (Aug. 13); Reimbursement Session 1 – Collectors (Aug. 20); and Reimbursement Session 2 – Processors (Aug. 27). One of the areas covered during the July 30, 2024 session included how CAA will track compliance among producers and how CAA will collaborate with CDPHE to bring producers into compliance. CAA proposed to “monitor compliance by conducting periodic operational and record audits as well as undertaking an ongoing assessment of the market.” CAA would report non-compliant producers to CDPHE “after certain internal compliance processes and timelines have passed.”

Illinois (needs assessment only)

- The Illinois Statewide Recycling Needs Assessment Act was amended on July 1, 2024, to require the Illinois Environmental Protection Agency to select a consultant to perform the needs assessment on or before January 1, 2025, as opposed to the original deadline of July 1, 2024. Ill. Pub. Act 103-0636 (amending 415 ILL. COMP. STAT. § 180/20(a)). The needs assessment must be finalized by November 1, 2026, as opposed to the original date of May 1, 2026. *Id.*

Maine

- The Maine Department of Environmental Protection (“MDEP”) anticipates adoption of the routine/technical rules necessary to implement and enforce Maine’s packaging EPR law by

⁵ Free allocation is a method of mass balance accounting that allows credit for PCR to be assigned to the products of choice from recycling processes, allowing PCR content to be assigned to products used to produce plastics as opposed to products used to produce fuels.

⁶ CAA Colorado, *CAA Consultation Session 1: Minimum Recyclable List, Minimum Collection Targets, and Recycling Rates* (July 30, 2024), at <https://circularactionalliance.org/s/CAA-Consultation-Session-1-Compliance-MRL-Targets.pdf>.

end of this summer. The draft rules were originally posted on January 18, 2024, then revised and reposted for public comment on July 9, 2024.⁷ The comment period is open through August 26, 2024. The “Reposting Draft” contains at least two notable revisions:

- (1) MDEP is proposing to remove the 20% packaging reduction goal for 2030-2039, while leaving in place the 40% reduction goal for 2040-2049 and the 60% reduction goal from 2050 onward. The reduction goals are also now based on the total weight of packaging material as opposed to total units and total weight of packaging material.
 - (2) Of particular concern for many producers is the revised definition of “product.” The new definition expands the scope of “packaging material” to include: “[f]or products that are not durable, material that remains when the product is depleted is not the product; it is packaging material.” This broad definition could be interpreted to encompass a wide variety of products that are not typically associated with packaging material, ranging from dental floss to diapers. While this sentence might be more narrowly construed if interpreted in context with other provisions in the rule, a traditional canon of statutory construction is that each sentence within a statute should generally be interpreted separately and given its own meaning. As drafted, the revision could lead to higher PRO fees, increased regulatory and litigation scrutiny on consumer products, and unhelpful precedent for other states to follow.
- MDEP anticipates provisional adoption of major substantive rules by the end of next summer. The law requires MDEP to consider whether the packaging material for certain federally regulated products should be excluded from the definition of “packaging material” via substantive rulemaking subject to legislative approval, as opposed to routine/technical rulemaking. MDEP must consider, at a minimum, whether the packaging material is “required by federal law or regulation to meet specific content or construction standards that may preclude or significantly diminish the producer’s ability to increase the recyclability or reduce the volume of the packaging material.” ME. REV. STAT. ANN. tit. 38, § 2146(13)(D).

MDEP is taking the position that there are no “incompatibilities” based on its review of federal laws and regulations, but nevertheless invited producers to seek exemptions.⁸ MDEP received 11 exemption requests prior to the May 20, 2024 deadline. Exemption requests included, but were not limited to, pesticides, specialty pest control, and fertilizers; tobacco products; and over-the-counter healthcare products.⁹ Notably, however, MDEP has been clear that the “law will not limit a producer’s packaging options; it does not prohibit the use of any type of packaging material or format.”¹⁰ Any successful exemption request must therefore likely be based on the imposition of fees, as opposed to federal limitations on packaging changes. On July 1, 2024, MDEP released the 11 exemption requests for public comment, with a deadline of August 1, 2024.

⁷ MDEP, *Reposting Draft, Chapter 428: Stewardship Program for Packaging*, <https://www.maine.gov/tools/whatsnew/attach.php?id=12351122&an=2>.

⁸ MDEP, *Maine DEP is accepting comments on packaging material exemption requests*, <https://content.govdelivery.com/accounts/MEDEP/bulletins/3a607e9>.

⁹ MDEP, *Exemption Requests*, <https://www.maine.gov/dep/ftp/temp/epr/exemption%20requests/>.

¹⁰ MDEP, *Frequently-Asked Questions, What does this law not do?*, <https://www.maine.gov/dep/waste/recycle/epr.html>.

Maryland (needs assessment only)

- The Maryland Department of the Environment (“MDE”) hosted its second Producer Responsibility Advisory Council meeting on July 25, 2024. MDE announced during the meeting that HDR, Inc. (“HDR”) was selected to conduct the needs assessment. A representative from HDR addressed the scope of services and projected schedule, which was informed by HDR’s experiences conducting the needs assessment for Colorado. HDR advised that it intends to issue recommendations on how to implement EPR in Maryland by December 1, 2024, consistent with the statutory deadline for the Advisory Council to report its findings and recommendations to the Governor on how to effectively establish and implement a producer responsibility program. MD. CODE ANN. § 9-2503(i). HDR also advised that it intends to issue the needs assessment report by the end of December 2024. The statutory deadline for MDE to report the results of the needs assessment to the Governor, however, passed on July 30, 2024. Act of May 8, 2023, ch. 465, 2023 Md. Laws (concerning statewide recycling needs assessment and producer responsibility for packaging materials). There were extensive discussions during the meeting regarding the constrained and accelerated timetable.

Minnesota

- Dan Felton, Executive Director for AMERIPEN, authored a guest column in *Packaging Strategies* entitled, “New Minnesota EPR law could reshape future packaging waste management policy.”¹¹ While recognizing it “may not be perfect,” Felton discussed the rationale for AMERIPEN’s support for the new Minnesota law, citing “shared responsibility for recycling costs” as the “most important factor.” Other factors Felton cited included “fair competition, with reimbursement to service providers for infrastructure investments based on competitive bids”; a PRO to be “formed by packaging producers” as opposed to the state; the PRO’s ability to petition the state for certain concerns; and the lack of “arbitrary recycling targets and unrelated mandates on packaging composition.”

New York

- Capstone, a financial consulting firm that advises on the impact of policy changes, published an analysis on July 3, 2024, that forecasted a likely (65%) passage of a New York EPR bill during the next legislative session.¹² Capstone cited Gov. Kathy Hochul’s support for EPR legislation and the “consensus-building and stakeholder engagement” that occurred during the last legislative session.

Oregon

¹¹ Dan Felton, *New Minnesota EPR law could reshape future packaging waste management policy*, PACKAGING STRATEGIES (July 16, 2024), <https://www.packagingstrategies.com/articles/104844-new-minnesota-epr-law-could-reshape-future-packaging-waste-management-policy#:~:text=After%20having%20worked%20with%20stakeholders, costs%E2%80%94somethi ng%20AMERIPEN%20staunchly%20advocates.>

¹² Gianna Kinsman, *Likely NY Passage of Extended Producer Responsibility Program Poses Challenges, Opportunities*, Capstone (July 3, 2024), <https://capstonedc.com/insights/likely-ny-passage-of-extended-producer-responsibility-program-poses-challenges/>.

- The Oregon Department of Environmental Quality (“DEQ”) adopted the first of two rulemakings necessary to implement and enforce Oregon’s packaging EPR law on November 17, 2023.¹³ The first rulemaking addresses PRO fees and plan requirements, local government compensation, and material lists. DEQ issued a notice of proposed rulemaking for the second rulemaking on June 10, 2024, after having released an earlier draft on May 29, 2024.¹⁴ The comment period ended July 26, 2024.¹⁵ The second rulemaking addresses commingled recycling processing facilities, covered products and exemptions, PRO and producer obligations, standards for life cycle evaluations, local government obligations, and enforcement.
- Oregon DEQ rejected the initial PRO plan submitted by CAA, which was not unexpected. Oregon DEQ provided a detailed rationale and recommendations for the resubmission in a decision letter issued on July 29, 2024, and requested CAA submit an amended PRO plan on or before September 27, 2024.¹⁶

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Circular Action Alliance

- CAA hosted a producer working group session on July 16, 2024, and invited legal counsel to participate. CAA announced they will require all producers to enter into a Participant Producer Agreement (“PPA”) that will be released in September 2024. CAA indicated they would not entertain any changes to this “agreement” and provided little information regarding its terms and conditions, other than to note that it will outline producer compliance obligations and that there will be state-specific addenda. CAA will host additional Q&A sessions for producers and legal counsel once the PPA is finalized. CAA advised that additional guidance on the definition of “producer” is forthcoming in advance of the PPA release, but reiterated that they cannot advise producers as to whether they qualify as producers. CAA also intends to release a guidebook for producer reporting in September 2024.
- CAA reported on July 30, 2024, that over 1300 producers have registered, 250 of which are considered to be large producers.

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Issue In Focus: Eco-Modulation of Toxic Substances

¹³ OR. ADMIN. R. 340-090-0005/0810,

<https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=1487>.

¹⁴ Oregon DEQ, Notice of Proposed Rulemaking, Plastic Pollution and Recycling Modernization Act, Rulemaking 2 (June 10, 2024),

<https://ormswd2.synergydcs.com/HPRMWebDrawer/Record/6734994/File/document>.

¹⁵ Oregon DEQ posted the comments at

<https://www.oregon.gov/deq/rulemaking/Pages/recycling2024.aspx>.

¹⁶ Letter from N. Portley, Oregon DEQ, to Charles Schwarze, CAA (July 29, 2024),

<https://www.oregon.gov/deq/recycling/Documents/rmaCAAresp0724.pdf>.

Eco-modulation is an EPR policy approach that incentivizes producers to reduce the environmental impact of their packaging. Packaging that is more difficult to recycle will result in higher fees imposed on the producer.

All five EPR packaging laws include some form of eco-modulation. Producers of covered materials are required to report the weight of packaging material broken out by the type of covered material, which informs the assessment of eco-modulated fees. Eco-modulation provisions generally emphasize PCR, source reduction, and enhanced recyclability. For example, Colorado's EPR law requires the PRO plan to include a funding mechanism with eco-modulation factors that decrease producer fees to incentivize source reduction; enhanced recyclability; PCR; designs for the reuse and refill of covered materials; and high recycling and refill rates. COLO. REV. STAT. § 25-17-705(4)(i)(IV). Colorado's EPR law also requires eco-modulation factors that increase producer fees to discourage the use of covered materials that are not on the minimum recyclable list as well as designs and practices that increase the costs of recycling, reusing, or composting or that disrupt the recycling of other materials. The lower fees are often called "credits" or "bonuses" and the higher fees are often called "malus" fees, *i.e.*, fees that are levied on producers due to the adverse environmental or public health impacts of the covered material.

Three states – California, Maine, and Minnesota – expressly require eco-modulation based on the presence or absence of toxic substances. These laws can require producers to conduct supply chain diligence, test packaging for the presence of toxic substances, and to report the results to the PRO. The other two states – Colorado and Oregon – are currently contemplating eco-modulation for the presence or absence of toxic substances.

California's EPR law requires an upward adjustment for the "[p]resence of hazardous material" as identified by the Office of Environmental Health Hazard Assessment ("OEHHA"), the Department of Toxic Substances Control, or CalRecycle and "covered material that contains toxic heavy metals, pathogens, or additives." CAL. PUB. RES. CODE § 42053(e)(4)&(9). The OEHAA lists certain PFAS (PFOA, PFOS, and PFNA) among the "chemicals known to the state to cause cancer or reproductive toxicity." CAL. CODE REGS. tit. 27, § 27001. California also requires all covered material sold and distributed in the state to be recyclable or compostable by January 1, 2032. *Id.* § 42050(b). Packaging with intentionally added PFAS or the PFAS at or above 100 parts per million ("ppm") as measured in total organic fluorine are deemed not recyclable or compostable. *Id.* § 42355.51(d)(3)(D). The use of a 100 ppm threshold "as measured" in total organic fluorine implies testing is required if there is no other reliable information measuring the presence of PFAS in the packaging.¹⁷

Maine's EPR law requires MDEP to develop a payment schedule for producers that incentivizes "lower toxicity in packaging material." ME. REV. STAT. ANN. tit. 38, § 2146(13)(A)(1)(c). "Toxicity" is defined to include "intentionally introduced metals or chemicals regulated pursuant to Title 32, chapter 26-A; food contact chemicals of high concern or priority food contact chemicals regulated pursuant to Title 32, chapter 26-B; or chemicals of concern, chemicals of high concern or priority chemicals identified pursuant to chapter 16-D." *Id.* § 2146(1)(U). Title 32, chapter 26-A, for example, regulates certain heavy metals in products and packaging as well as food packaging containing PFAS and phthalates. *Id.* § 1733. Maine's Reposting Draft would

¹⁷ Note that California's Proposition 65 ("Prop 65") requires methods of detection and analysis for Prop 65 listed chemicals, including PFOA, PFOS, and PFNA. Prop 65 often requires testing for these constituents to demonstrate compliance with labeling requirements. CAL. HEALTH & SAFETY CODE §§ 25249.5/14; CAL. CODE REGS. tit. 27, §§ 25102/27001.

implement this directive through a per ton “toxicity fee” equal to 10% of the packaging material type fee on producers who are “unable to provide a certificate of compliance from the entity or entities that manufacture the packaging material that attests to certify no intentional addition of toxics.”¹⁸

Minnesota’s EPR law requires producer fees that “incentivize using materials and design attributes that reduce the environmental impacts and human health impacts of covered materials” by “eliminating intentionally added toxic substances in covered materials” and “enhancing the recyclability or compostability of a covered material.” MINN. STAT. § 115A.1454(3). “Toxic substance” is broadly defined as a “hazardous waste, a problem material, a chemical or chemical class regulated under section 115A.965, 116.943, 325F.075, or 325F.172 to 325F.179, or a chemical of high concern identified under section 116.9402.” *Id.* § 115A.1441(39). The law further directs the Minnesota Pollution Control Agency to consider “the presence and amount of . . . toxic substances” in developing its recyclable and compostable lists. *Id.* § 115A.1453(4).

As noted above, the Colorado Producer Responsibility Program for Statewide Recycling Advisory Board held a hearing on July 10, 2024. The Board’s discussion, which focused primarily on eco-modulation, included discussion of adding toxics as an eco-modulation factor even though it is not expressly called out in the statute.

Oregon is likewise contemplating eco-modulation based on toxics. Oregon DEQ’s most recent rulemaking allows producers to seek fee reductions (a) if they perform a voluntary evaluation and disclosure of the life cycle impacts of covered products; and (b) if they perform this evaluation and disclosure and include proof of substantial impact reduction.¹⁹ Life cycle impact indicators that must be disclosed include toxicity, which must be reported separately.²⁰ At this time, however, the life cycle impact indicators for toxicity are excluded from the calculation of substantial impact reduction.²¹

Key Takeaways

EPR packaging laws and bills are increasingly targeting toxic substances, which can be broadly defined. Minnesota, for example, defines “toxic substance” as including any “problem material.” These efforts may be propelled in part by recent federal and state regulatory activity and litigation scrutiny associated with PFAS. Any EPR law requiring eco-modulated fees to account for the presence of toxic substances (like PFAS) will necessitate producers to report relevant information to the PRO or the state as a basis to support the fee adjustment or lack thereof. In addition to higher PRO fees and practical limitations on packaging options, this reporting function and the associated due diligence requirements may lead to increased regulatory scrutiny and litigation risk.

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¹⁸ See *supra* n. 7.

¹⁹ See *supra* n. 14 (proposed OR. ADMIN. R. 340-090-0910(3)(a-b)).

²⁰ *Id.* (proposed OR. ADMIN. R. 340-090-0930(3)(b-c)).

²¹ *Id.* (proposed OR. ADMIN. R. 340-090-0930(3)(c)(A)).

King & Spalding + Extended Producer Responsibility

King & Spalding has a cutting edge extended producer responsibility practice. We have been at the forefront of these laws long before Maine became the first state to pass a comprehensive EPR packaging law in 2021. Our EPR practice extends beyond paper and plastics to batteries, electronics recycling, and other product stewardship, and our clients include producers as well as service providers. The firm also has one of the deepest environmental teams among the AmLaw top tier firms, providing full-service capability and a global reach. This year, Chambers USA, one of the most preeminent legal ranking organizations, named King & Spalding as the Environmental Law Firm of the Year.

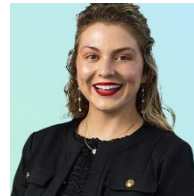
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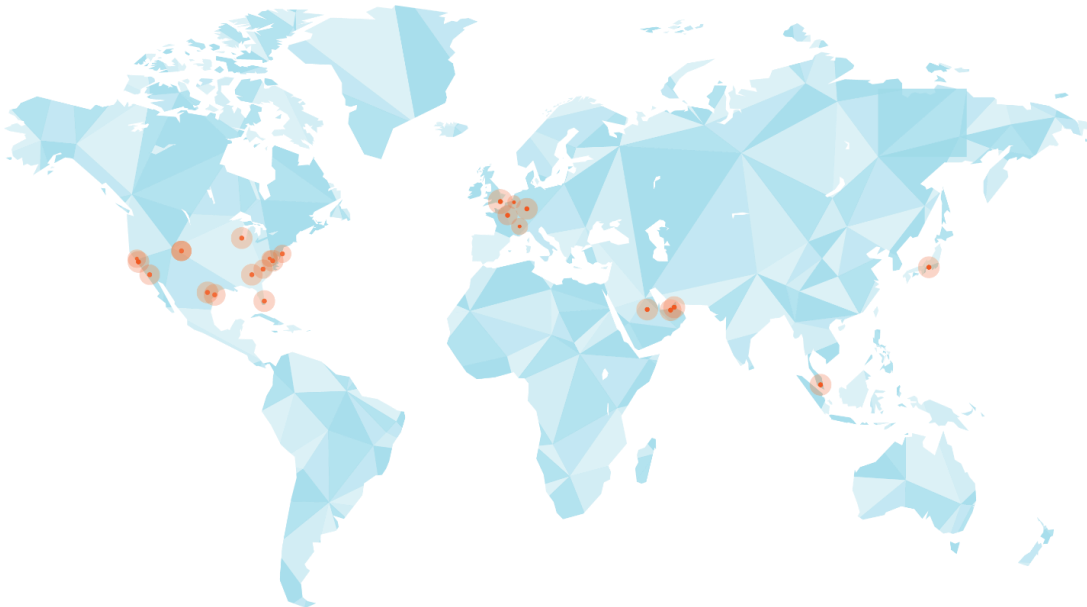
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