S T A T E O F N E W Y O R K

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2009-2010 Regular Sessions

I N S E N A T E

February 5, 2009

Introduced by Sen. MARCELLINO -- read twice and ordered printed, and when printed to be committed to the Committee on Environmental Conservation

AN ACT to amend the environmental conservation law, in relation to mercury in products and toxicity in packaging

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subdivisions 7 and 8 of section 27-2101 of the environmental conservation law, as amended by chapter 676 of the laws of 2005, are amended to read as follows:

7. "Mercury-added consumer product" means any device or material into which elemental mercury or mercury compounds are intentionally added during such device's or material's formulation or manufacture, and in which the continued presence of mercury is required to provide a specific characteristic, appearance or quality, or to perform a specific function. Such term shall include, but not be limited to mercury-containing:

(a) thermostats;

(b) thermometers;

(c) switches, whether individually or as part of another product;

(d) medical or scientific instruments;

(e) electrical relays and other electrical devices;

(f) lamps; and

(g) batteries sold to consumers[, not including button batteries].

8. "Mercury-added novelty consumer product" means a mercury-added consumer product intended mainly for personal or household enjoyment or adornment. Mercury-added novelty consumer products include, but are not limited to, items intended for use as practical jokes, figurines, adornments, toys, games, cards, ornaments, yard statues and figures, candles, jewelry, holiday decorations, items of apparel (including footwear), or similar products. [A product is not a mercury-added novelty consumer product solely on the basis that it is a game with a light screen

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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display containing mercury, or includes a removable battery containing mercury.]

S 2. Section 37-0201 of the environmental conservation law, as added by chapter 286 of the laws of 1990, is amended to read as follows:

S 37-0201. Legislative findings and intent.

The legislature finds and declares that:

1. The management of solid waste can pose a wide range of hazards to public health and safety and to the environment; [and]

2. Packaging comprises a significant percentage of the overall solid waste stream; [and]

3. The presence of heavy metals in packaging is a part of the total concern in light of their likely presence in emissions or ash when packaging is incinerated, or in leachate when packaging is landfilled; [and]

4. Lead, mercury, cadmium and hexavalent chromium, on the basis of available scientific and medical evidence, are of particular concern; [and]

5. It is desirable as a first step in reducing the toxicity of packaging waste to eliminate the addition of these heavy metals to packaging; and

6. The intent of this title is to achieve this reduction in toxicity without impeding or discouraging the expanded use of [post-consumer] RECYCLED materials in the production of packaging and its components.

S 3. Section 37-0203 of the environmental conservation law, as added by chapter 286 of the laws of 1990, is amended to read as follows:

S 37-0203. Definitions.

For the purposes of this title, the term:

1. "Distributor" shall mean any person, firm, association, partnership or corporation, who [or which imports or causes to be imported into the state, any container, whether filled or unfilled, used to package products] TAKES TITLE TO OR POSSESSION OF GOODS OR PURCHASES FOR RESALE OR PROMOTIONAL PURPOSES. "DISTRIBUTION" SHALL MEAN THE PRACTICE OF TAKING TITLE TO OR POSSESSION OF PACKAGES OR PACKAGING COMPONENTS FOR PROMOTIONAL PURPOSES OR RESALE. PERSONS INVOLVED SOLELY IN DELIVERING PACKAGES OR PACKAGING COMPONENTS ON BEHALF OF THIRD PARTIES ARE NOT CONSIDERED DISTRIBUTORS.

2. "INCIDENTAL PRESENCE" SHALL MEAN THE PRESENCE OF LEAD, MERCURY, CADMIUM OR HEXAVALENT CHROMIUM AS AN UNINTENDED OR UNDESIRED INGREDIENT OF A PACKAGE OR PACKAGING COMPONENT.

3. "INTENTIONAL INTRODUCTION" OR "INTENTIONALLY INTRODUCED" SHALL MEAN THE ACT OF DELIBERATELY UTILIZING LEAD, MERCURY, CADMIUM OR HEXAVALENT CHROMIUM IN THE FORMATION OF A PACKAGE OR PACKAGING COMPONENT WHERE ITS CONTINUED PRESENCE IS DESIRED IN THE FINAL PACKAGE OR PACKAGING COMPONENT TO PROVIDE A SPECIFIC CHARACTERISTIC, APPEARANCE, OR QUALITY. THE USE OF LEAD, MERCURY, CADMIUM OR HEXAVALENT CHROMIUM AS A PROCESSING AGENT OR INTERMEDIATE TO IMPART CERTAIN CHEMICAL OR PHYSICAL CHANGES DURING MANUFACTURING, WHEREUPON THE INCIDENTAL RETENTION OF A RESIDUE OF ANY SUCH METAL IN THE FINAL PACKAGE OR PACKAGING COMPONENT IS NEITHER DESIRED NOR DELIBERATE, IS NOT CONSIDERED INTENTIONAL INTRODUCTION FOR THE PURPOSES OF THIS TITLE WHERE THE FINAL PACKAGE OR PACKAGING COMPONENT IS IN COMPLIANCE WITH SUBDIVISION THREE OF SECTION 37-0205 OF THIS TITLE. THE USE OF RECYCLED MATERIALS AS FEED STOCK FOR THE MANUFACTURE OF A NEW PACKAGE OR PACKAGING COMPONENT, WHERE SOME PORTION OF THE RECYCLED MATERIALS MAY CONTAIN AMOUNTS OF LEAD, MERCURY, CADMIUM OR HEXAVALENT CHROMIUM, IS NOT CONSIDERED INTENTIONAL INTRODUCTION FOR THE PURPOSES OF THIS TITLE WHERE THE NEW PACKAGE OR PACKAGING COMPONENT IS IN COMPLIANCE WITH SUBDIVISION THREE OF SECTION 37-0205 OF THIS TITLE.

4. "Manufacturer" shall mean [a] ANY person, firm, association, partnership or corporation, who [or which makes containers to be used to package products] PRODUCES PACKAGES OR PACKAGING COMPONENTS AS DEFINED IN THIS TITLE.

5. "MANUFACTURING" SHALL MEAN PHYSICAL OR CHEMICAL MODIFICATION OF MATERIALS TO PRODUCE PACKAGES OR PACKAGING COMPONENTS.

[3.] 6. "Package" [means a] SHALL MEAN ANY container providing a means of marketing, protecting or handling a product and shall include a unit package, an intermediate package [and] OR a shipping container. "Package" shall also mean and include, but not be limited to, such unsealed receptacles as carrying cases, crates, cups, pails, rigid foil and other trays, wrappers and wrapping films, bags and tubs.

[4.] 7. "Packaging component" [means] SHALL MEAN any individual assembled part of a package such as, but not limited to, any interior or exterior blocking, bracing, cushioning, weatherproofing, exterior strapping, coatings, closures, inks and labels. TIN-PLATED STEEL THAT MEETS THE AMERICAN SOCIETY FOR TESTING AND MATERIALS (ASTM) SPECIFICATION A623 SHALL BE CONSIDERED AS A SINGLE PACKAGE COMPONENT. ELECTRO-GALVANIZED COATED STEEL AND HOT-DIPPED GALVANIZED STEEL THAT MEETS THE ASTM SPECIFICATIONS A653, A924, A879 AND A591 SHALL BE TREATED IN THE SAME MANNER AS TIN-PLATED STEEL.

8. "PURCHASER" SHALL MEAN ANY PERSON, FIRM, ASSOCIATION, PARTNERSHIP OR CORPORATION, WHO PURCHASES ANY PACKAGES OR PACKAGING COMPONENTS TO PACK PRODUCTS. THIS TERM SHALL NOT MEAN ANY RETAIL STORE OR INDIVIDUAL MAKING RETAIL PURCHASES.

9. "SUPPLIER" SHALL MEAN ANY PERSON, FIRM, ASSOCIATION, PARTNERSHIP OR CORPORATION, WHO SELLS, OFFERS FOR SALE, OR OFFERS FOR PROMOTIONAL PURPOSES PACKAGES OR PACKAGING COMPONENTS FOR USE BY ANY OTHER PERSON, FIRM, ASSOCIATION, PARTNERSHIP, OR CORPORATION TO PACK PRODUCTS.

S 4. Section 37-0205 of the environmental conservation law, as added by chapter 286 of the laws of 1990, is amended to read as follows:

S 37-0205. Prohibitions.

1. No package or packaging component shall be SOLD, OR offered for sale or for promotional purposes by a manufacturer [or], distributor OR SUPPLIER which includes (in the package itself, or in any packaging component, inks, dyes, pigments, adhesives, stabilizers or any other additives [to which]) ANY lead, cadmium, mercury or hexavalent chromium WHICH has been [included] INTENTIONALLY INTRODUCED as an element during [manufacture] MANUFACTURING or distribution [in excess of the concentration levels set forth in subdivision three of this section].

2. No product shall be SOLD, OR offered for sale or for promotional purposes by a manufacturer [or], distributor OR SUPPLIER in a package which includes, in the package itself or in any of its packaging components, inks, dyes, pigments, adhesives, stabilizers or any other additives [to which], ANY lead, cadmium, mercury or hexavalent chromium WHICH has been [included] INTENTIONALLY INTRODUCED as an element during [manufacture] MANUFACTURING or distribution in excess of the concentration levels set forth in subdivision three of this section.

3. The sum of the concentration levels of lead, cadmium, mercury or hexavalent chromium present in any package or packaging component shall not exceed [the following prior to incineration:

600 parts per million by weight (0.06%), effective January 1, 1992

250 parts per million by weight (0.025%), effective January 1, 1993]

100 parts per million by weight (0.01%)[, effective January 1, 1994].

S 5. Section 37-0207 of the environmental conservation law, as added by chapter 286 of the laws of 1990, is amended to read as follows:

S 37-0207. Exemptions.

All [packaging] PACKAGES and packaging components shall be subject to this title except the following:

1. Those packages or packaging components which have been delivered to a distributor, SUPPLIER or manufacturer prior to January 1, [1992] 1994; or those packages or packaging components with a code indicating date of manufacture [that were manufactured] prior to [January 1, 1992] 1994; or

2. Those packages or packaging components to which lead, cadmium, mercury or hexavalent chromium have been added in the manufacturing, forming, printing or distribution process in order to comply with health or safety requirements of federal law or for which there is no practicable alternative, as determined by the commissioner, provided that the manufacturer of a package or packaging component must petition the department for any exemption from the provisions of this title for a particular package or packaging component based on [either criterion] THE CRITERIA OF THIS SUBDIVISION; AND provided further that the department may grant [a two year] AN exemption FOR UP TO TWO YEARS if warranted by the circumstances; and provided further that such an exemption may, upon REAPPLICATION FOR EXEMPTION AND meeting [either criterion] THE CRITERIA of this subdivision, be renewed [for two years] AT TWO-YEAR INTERVALS; or

3. Packages and packaging components that WOULD NOT exceed the maximum [levels] CONCENTRATION LEVELS set forth in subdivision three of section 37-0205 of this title [only because of] BUT FOR the addition of [post-consumer] RECYCLED materials, provided that the exemption for this subdivision shall expire on January 1, [1996.] 2010 AND SHALL NOT APPLY TO ANY CADMIUM, LEAD, MERCURY OR HEXAVALENT CHROMIUM THAT HAS BEEN RECOVERED AND/OR SEPARATED FROM OTHER MATERIALS FOR USE AS A METAL OR METALLIC COMPOUND; OR

4. [Until January first, nineteen hundred ninety-four, any glass container that is intended for reuse or refilling that uses pigments in or on the container that exceed the maximum levels set forth in subdivision three of section 37-0205 of this title.] A GLASS OR CERAMIC PACKAGE OR PACKAGING COMPONENT WHICH HAS A VITRIFIED LABEL AND WHEN A SAMPLE IS PREPARED ACCORDING TO ASTM C1606-04 AND TESTED IN ACCORDANCE WITH THE TOXICITY CHARACTERISTICS LEACHING PROCEDURES OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S TEST METHOD AND PUBLICATION SW-846 "TEST METHODS FOR EVALUATING SOLID WASTE, PHYSICAL/CHEMICAL METHODS," DOES NOT EXCEED 1.0 PARTS PER MILLION FOR CADMIUM, 5.0 PARTS PER MILLION FOR HEXAVALENT CHROMIUM AND 5.0 PARTS PER MILLION FOR LEAD. MERCURY SHALL NOT BE EXEMPTED BY THIS PROVISION.

S 6. The environmental conservation law is amended by adding a new section 37-0208 to read as follows:

S 37-0208. CERTIFICATE OF COMPLIANCE.

ANY MANUFACTURER, DISTRIBUTOR OR SUPPLIER MUST FURNISH TO ANY PURCHASER OF A PACKAGE OR PACKAGING COMPONENT A CERTIFICATE OF COMPLIANCE STATING THAT A PACKAGE OR PACKAGING COMPONENT IS IN COMPLIANCE WITH THE REQUIREMENTS OF THIS TITLE, EXCEPT WHERE AN EXEMPTION IS PROVIDED IN SECTION 37-0207 OF THIS TITLE THE CERTIFICATE SHALL STATE THE SPECIFIC BASIS UPON WHICH THE EXEMPTION IS CLAIMED. THE CERTIFICATE OF COMPLIANCE SHALL BE SIGNED BY AN AUTHORIZED OFFICIAL OF THE MANUFACTURER, DISTRIBUTOR OR SUPPLIER. THE PURCHASER SHALL RETAIN THE CERTIFICATE OF COMPLIANCE FOR AS LONG AS SUCH PURCHASER IS USING THE PACKAGE OR PACKAGING COMPONENT. A COPY OF THE CERTIFICATE OF COMPLIANCE SHALL BE KEPT ON FILE BY THE MANUFACTURER, DISTRIBUTOR OR SUPPLIER FOR EACH PACKAGE OR PACKAGING COMPONENT. IF A MANUFACTURER, DISTRIBUTOR OR SUPPLIER REFORMULATES

OR CREATES A NEW PACKAGE OR PACKAGING COMPONENT, IT SHALL FURNISH TO THE PURCHASER AN AMENDED OR NEW CERTIFICATE OF COMPLIANCE FOR THE REFORMULATED OR NEW PACKAGE OR PACKAGING COMPONENT. CERTIFICATES OF COMPLIANCE, OR COPIES THEREOF, SHALL BE FURNISHED TO THE DEPARTMENT UPON ITS REQUEST AND TO MEMBERS OF THE PUBLIC IN ACCORDANCE WITH SECTION 37-0210 OF THIS TITLE.

S 7. Subdivision 2 of section 37-0209 of the environmental conservation law, as added by chapter 286 of the laws of 1990, is amended to read as follows:

2. No manufacturer [or], distributor OR SUPPLIER of a product shall be held in violation of this title who can show that, in the purchase of a package or packaging component, [he or she] IT relied in good faith on [the written assurance of the manufacturer of such packaging or packaging component that such packaging or packaging component met the requirements of this title. Such written assurance shall take the form of a certificate of compliance stating that a package or packaging component is in compliance with the requirements of this title, provided however, where compliance is achieved under an exemption provided in subdivision two or three of section 37-0207 of this title, the certificate shall state the specific basis upon which the exemption is claimed. The certificate of compliance shall be signed by an authorized official of the manufacturing or distributing company] A CERTIFICATE OF COMPLIANCE MEETING THE REQUIREMENTS OF SECTION 37-0208 OF THIS TITLE.

S 8. The environmental conservation law is amended by adding a new section 37-0210 to read as follows:

S 37-0210. PUBLIC ACCESS.

1. ANY MEMBER OF THE PUBLIC MAY REQUEST ANY CERTIFICATE OF COMPLIANCE FROM THE MANUFACTURER, DISTRIBUTOR OR SUPPLIER OF A PACKAGE OR PACKAGING COMPONENT. SUCH REQUEST SHALL BE:

A. IN WRITING; AND

B. SPECIFIC AS TO THE PACKAGE OR PACKAGING COMPONENT FOR WHICH INFORMATION IS REQUESTED.

2. THE MANUFACTURER, DISTRIBUTOR OR SUPPLIER MUST RESPOND TO SUCH REQUEST WITHIN SIXTY DAYS OF RECEIPT OF THE REQUEST.

S 9. Section 37-0211 of the environmental conservation law, as added by chapter 286 of the laws of 1990, is amended to read as follows:

S 37-0211. [Reports] REVIEW OF EFFECTIVENESS OF TITLE.

The department shall [include a report on] PERIODICALLY REVIEW the effectiveness of this title [as part of its annual solid waste management plan as required by section 27-0103 of this chapter]. [The report shall] SUCH REVIEW MAY contain [a review] AN ANALYSIS of other toxic substances contained in PACKAGES AND packaging and recommend [additions to the list of hazardous ingredients set forth in this title] ADDITIONAL SUBSTANCES WHICH SHOULD BE PROHIBITED FROM USE IN PACKAGING in order to further reduce the toxicity of packaging waste, [and shall contain a recommendation whether to continue the recycling exemption as it is provided for in subdivision three of section 37-0207 of this title,] and a description of the nature of the substitutes used in lieu of [the] lead, mercury, cadmium, or hexavalent chromium. The department [may include recommendations of the source reduction council of the conference of North-Eastern governors in the report. Recommendations made by the department to eliminate toxic substances contained in packaging shall include a determination of whether the ingredient presents or will present an unreasonable risk to health or the environment, based upon a recognized risk assessment protocol and taking into account the magnitude and severity of the harm against the benefits of the substance or

mixture to society as well as the availability of substitutes for the substance or mixture and other adverse effects which such proposed action to eliminate such ingredient may have on society] SHALL REVIEW THE ADVISABILITY OF EXTENDING THE EXEMPTIONS PROVIDED FOR IN SUBDIVISION THREE OF SECTION 37-0207 OF THIS TITLE. THIS REVIEW SHALL COMMENCE NO LATER THAN JANUARY FIRST, TWO YEARS PRIOR TO THE EXPIRATION OF SUCH EXEMPTIONS. IN REVIEWING THE EFFECTIVENESS OF THIS TITLE AND THE ADVISABILITY OF EXTENDING THE EXEMPTIONS PROVIDED FOR IN SUBDIVISION THREE OF SECTION 37-0207 OF THIS TITLE, THE DEPARTMENT MAY CONSULT WITH THE TOXICS IN PACKAGING CLEARINGHOUSE.

S 10. The environmental conservation law is amended by adding a new section 37-0215 to read as follows:

S 37-0215. SEVERABILITY.

THE PROVISIONS OF THIS TITLE SHALL BE SEVERABLE, AND IF ANY COURT DECLARES ANY PHRASE, CLAUSE, SENTENCE, OR PROVISION OF THIS TITLE TO BE INVALID, OR ITS APPLICABILITY TO ANY GOVERNMENT, AGENCY, PERSON, OR CIRCUMSTANCE IS DECLARED INVALID, THE REMAINDER OF THIS TITLE AND ITS RELEVANT APPLICABILITY SHALL NOT BE AFFECTED. THE PROVISIONS OF THIS TITLE SHALL BE LIBERALLY CONSTRUED TO GIVE EFFECT TO THE PURPOSES THEREOF.

S 11. This act shall take effect on the ninetieth day after it shall have become a law.