STATE OF NEW YORK

1185--A

2021-2022 Regular Sessions

IN SENATE

January 8, 2021

Introduced by Sens. KAMINSKY, HINCHEY, COMRIE, HOYLMAN, JACKSON, KAPLAN, KRUEGER, LIU, MAY, RAMOS, REICHLIN-MELNICK, SERRANO, THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Environmental Conservation -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the environmental conservation law, in relation to establishing the extended producer responsibility act

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative intent. The legislature finds the weight of waste generated in New York is a threat to the environment. The legislature further finds and declares that it is in the public interest of the state of New York for covered material and product producers to undertake the responsibility for the development and implementation of strategies to promote recycling, reuse and recovery of covered material and products through investments in the end-of-product-life management of products, printed paper, and product packaging.

§ 2. Article 27 of the environmental conservation law is amended by adding a new title 33 to read as follows:

TITLE 33

EXTENDED PRODUCER RESPONSIBILITY ACT

Section 27-3301. Definitions.
27-3303. Producer responsibilities.
27-3305. Funding mechanism.
27-3307. Producer responsibility plan.
27-3309. Producer responsibility plan approval.
27-3311. Collection and convenience.
27-3313. Outreach and education.
27-3315. Reporting requirements and audits.
27-3317. Antitrust protections.

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

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27-3319. Penalties.
27-3321. State preemption.
27-3323. Authority to promulgate rules and regulations.
27-3325. Severability.

§ 27-3301. Definitions.

1. "Covered materials and products" shall mean any part of a package or container, regardless of recyclability or compostability, that includes material that is used for the containment, protection, handling, delivery, and presentation of goods that are sold, offered for sale, or distributed to consumers in the state, including through an internet transaction. Covered materials and products include, but are not limited to, the following classes of materials:

(a) Containers and packaging: this class includes all flexible foam or rigid material, including but not limited to paper, carton, plastic, glass, or metal, and any combination of such materials that:

(i) is used to contain, protect, wrap or present products at any stage in the movement of the product from the responsible party to the ultimate user or consumer, including tertiary packaging used for transportation or distribution directly to a consumer;

(ii) is intended for a single or short-term use and designed to contain, protect or wrap products, including secondary packaging intended for the consumer market; or

(iii) does not include packaging used for the long-term protection or storage of a product or with a life of not less than five years.

(b) Paper products: this class includes:

(i) paper and other cellulosic fibers, whether or not they are used as a medium for text or images, except books, and materials in the newspapers class of materials;

(ii) containers or packaging used to deliver printed matter directly to the ultimate consumer or recipient;

(iii) paper of any description, including but not limited to:

(1) flyers;
(2) brochures;
(3) booklets;
(4) catalogs;
(5) telephone directories;
(6) newspapers;
(7) magazines;
(8) paper fiber; and
(9) paper used for writing or any other purpose.

(c) Plastics: this class includes any plastic as determined by the department including, but not limited to:

(i) rigid plastics:
(1) polyethylene terephthalate (PET);
(2) polyethylene (PE);
(3) polyvinyl chloride (PVC);
(4) polypropylene (PP);
(5) polystyrene (PS);
(6) poly coated fiber;
(7) multi-layered plastics;
(8) other (BPA, Compostable Plastics, Polycarbonate and LEXAN);
(ii) flexible plastics:
(1) polyethylene (PE);
(2) polyvinyl chloride (PVC);
(3) polypropylene (PP);
(4) poly coated fiber;

(5) multi-layered plastics;
(6) other (BPA, Compostable Plastics, Polycarbonate and LEXAN).
(d) For the purpose of this title, the products covered designation does not include the following:
(i) paper products that could become unsafe or unsanitary to recycle by virtue of their anticipated use;
(ii) literary, text, and reference bound books; and
(iii) beverage containers as defined in section 27-1003 of this article.
2. "Curbside recycling" means a recycling program that serves single and multi-family residential units, schools, state or local agencies, or institutions that is operated by a municipality or pursuant to a contract with the municipality, private entity, or other public agency or through approved local solid waste management plans.
3. "Post-consumer recycled content" means the content of a product made of recycled materials derived from post-consumer recycled materials or feedstock.
4. "Producer" means: (a) the person who manufactures the covered material or product under such person's own name or brand and who sells or offers for sale the covered material or product in the state; or
(b) the person who imports the covered material or product as the owner or licensee of a trademark or brand under which the covered material or product is sold or distributed in the state; or
(c) the person or company that offers for sale, sells, or distributes the covered material or product in the state.
A producer shall not include a municipality or a local government planning unit, or a registered 501(c)(3) charitable organization or 501(c)(4) social welfare organization.
5. "Producer responsibility organization" means a not-for-profit organization designated by a group of producers to act as an agent on behalf of each producer to develop and implement a producer responsibility plan, or a registered 501(c)(3) charitable organization or 501(c)(4) social welfare organization
6. "Readily-recyclable" means packaging that can be sorted by entities processing recyclables from New York and for which, during the previous two calendar years, there was a consistent market, meaning recyclers were willing to accept sorted material at the door of their facilities. Readily-recyclable does not include material types that recyclers accept in low quantities or sort out of material during additional processing steps; if material recyclers do not desire a full bale of a specific material type, that material type is not readily recyclable. Readily-recyclable also does not include materials that contain harmful chemical, physical, biological, or radiological substances that pose a threat to human health or the environment for its intended or like manner of use.
7. "Recycling" means to separate, dismantle or process the materials, components or commodities contained in covered products for the purpose of preparing the materials, components or commodities for use or reuse in new products or components. "Recycling" does not include energy recovery or energy generation by means of combustion, or landfill disposal of discarded covered products or discarded product component materials.
8. "Recycling rate" means the percentage of discarded covered products that is managed through recycling or reuse, as defined by this title, and is computed by dividing the amount of discarded covered products collected and recycled or reused by the total amount of discarded covered products collected over a program year.

9. "Reuse" means donating or selling a discarded covered product back into the market for its original intended use, when the discarded covered product retains its original performance characteristics and can be used for its original purpose.

10. "Retailer" means a person who sells or offers for sale a product to a consumer, including sales made through an internet transaction to be delivered to a consumer in the state.

§ 27-3303. Producer responsibilities.

1. Within three years after the effective date of this title, no producer shall sell, offer for sale, or distribute covered materials or products for use in New York unless the producer, or a producer responsibility organization acting as their designated agent, has a producer responsibility plan approved by the department. Producers may satisfy participation obligations individually or jointly with other producers or through a producer responsibility organization.

2. Within one year after the department approves a producer responsibility plan, producers shall be required to meet the minimum post-consumer recycled material content rate and minimum recycling rate for a covered material or product as approved by the department in the producer responsibility plan.

3. A producer shall be exempt from the requirements of this title if the producer:

(a) Generates less than one million dollars in annual revenues;

(b) Generates less than one ton of covered materials or products supplied to New York state residents per year; or

(c) Operates as a single point of retail sale and is not supplied or operated as part of a franchise.

4. Retailers that are not producers are exempt from the requirements of this title.

5. Producers may comply individually or may form a producer responsibility organization and discharge their responsibilities to such organization.

§ 27-3305. Funding mechanism.

1. A producer or producer responsibility organization acting as their agent shall establish program participation charges, such as through the use of eco-modulated fees, for producers through the producer responsibility plan pursuant to section 27-3307 of this title which shall be sufficient to cover all program costs.

2. A producer responsibility organization shall structure program charges to provide producers with financial incentives, to reward waste reduction and recycling compatibility innovations and practices, and to discourage designs or practices that increase costs of managing the products. The producer responsibility organization may adjust charges to be paid by participating producers based on factors that affect system costs. At a minimum, charges shall be variable based on:

(a) Costs to provide curbside collection or other level of consumer service that is, at minimum, as convenient as curbside collection or as convenient as the previous recycling collection schema in the particular jurisdiction or as convenient as the previous refuse collection schema in the particular jurisdiction should recycling collection not be provided;

(b) Costs to process a producer's covered materials or products for acceptance by secondary material markets;

(c) Whether the covered material or product would typically be readily-recyclable except that as a consequence of the product's design, the product has the effect of disrupting recycling processes or the product

includes labels, inks, and adhesives containing heavy metals or other hazardous waste as defined by the department in regulations that would contaminate the recycling process;

(d) Whether the covered materials or product are nonfood contact containers and other nonfood contact packaging that is specifically designed to be reusable or refillable and has high reuse or refill rate.

3. The charges shall be adjusted based upon the percentage of post-consumer recycled material content and such percentage of post-consumer recycled content shall be verified either by the producer responsibility organization through an independent third party approved or designated by the department to perform verification services to ensure that such percentage exceeds the minimum requirements in the covered material, as long as the recycled content does not disrupt the potential for future recycling.

4. A producer responsibility organization shall be responsible for calculating and dispersing funding for municipal services utilized by a producer responsibility organization if the municipality elects to be compensated by the producer responsibility organization in the recovery, recycling, and processing of covered materials, whether such services are provided directly by the municipality or through a contracted service provider. The program funding mechanism shall be based on the cost of residential curbside collection, including the cost of curbside containers where relevant, as well as processing cost for each readily-recyclable material, cost of handling non-readily recyclable material types collected as part of a recycling operation, transportation cost of recycling for each material type, and any other cost factors as determined by the department. To facilitate the producer responsibility organization's determination of the cost of recycling, participating municipalities shall report data related to their costs and the value of materials to the producer responsibility organization. Cost calculations shall take into consideration revenue generated from recyclable materials.

5. No producer may charge a point-of-sale or other fee to consumers to recoup the costs of meeting producer obligations under this title.

6. Nothing in this title shall require a municipality to participate in a producer responsibility program.

7. The department shall make such rules and regulations which may be necessary for a producer responsibility organization to develop and manage a funding mechanism and activity-based costs.

§ 27-3307. Producer responsibility plan.

1. Producers, or a producer responsibility organization acting as their designated agent, shall develop and submit a producer responsibility plan to the department no later than one year after the effective date of this title. Such plan shall be for five years and shall be reviewed and updated every five years following the approval of the original plan. The department shall have the discretion to require the plan to be reviewed or revised prior to the five year period if the department has cause to believe the minimum post-consumer recycled material content rates, minimum recycling rates, or other factors of the plan are not being met or followed by the producer, or producer responsibility organization, or if there has been a change in circumstances that warrants revision of the plan. The submitted plan shall include, but not be limited to:

(a) contact information of the producer responsibility organization and the producer or producers covered under the plan;

(b) a description of how comments of stakeholders were considered and, if applicable, addressed in the development of the plan;

(c) a comprehensive list of the covered materials or products for which the producer or producer responsibility organization is responsible for;

(d) a funding mechanism that allocates the costs to the producers to meet the requirements of this title and is sufficient to cover the cost of registering, operating and updating the plan, and maintaining a financial reserve sufficient to operate the program in a fiscally prudent and responsible manner;

(e) a description of the process for municipalities to recoup all reasonable costs, both operational and capital, from the producer or producer responsibility organization for the activity-based costs, including, as applicable, any administrative, sorting, collection, transportation, public education, or processing costs, if the producer responsibility organization uses existing services through a municipality;

(f) a detailed description of how the producer or the producer responsibility organization, consulted with stakeholders, including municipalities, private sector haulers, and material recovery facilities, and processors to seek their input in the development of the plan prior to its submission to the department, and to what extent the producers or the producer responsibility organization specifically incorporated the stakeholders' input into the plan. Producers or the producer responsibility organization shall provide such stakeholders with an opportunity to review and comment upon the draft plan prior to its submission to the department. Producers or the producer responsibility organization shall make an assessment of comments received and shall provide a summary and an analysis of the issues raised by stakeholders and significant changes suggested by any such comments, a statement of the reasons why any significant changes were not incorporated into the plan, and a description of any changes made to the plan as a result of such comments.

(g) a proposed minimum post-consumer recycled material content rate requirement and minimum recycling rate for covered materials. The minimum recycling rate shall be varied for each covered recycled material and shall include paper products, glass, metal, and plastic;

(h) a description of a public education program pursuant to section 27-3313 of this title;

(i) how the producers, or the producer responsibility organization, will work with existing waste haulers, material recovery facilities, recyclers, and municipalities to operate or expand current collection programs to address material collection methods;

(j) a description of how producers or the producer responsibility organization will use open, competitive, and fair procurement practices should they directly enter into contractual agreements with service providers, including municipalities and private entities;

(k) a description of how a municipality will participate, on a voluntary basis, with collection and how existing municipal waste collection infrastructure will be used;

(l) a description of how the producer, or producer responsibility organization, plans to meet the convenience requirements set forth in this title;

(m) a description of how the producer, or producer responsibility organization, will meet or exceed the minimum recycling rate for a product;

(n) a description of the process for end-of-life management, including recycling and disposal, using environmentally sound management practices;

(o) a description of how a producer responsibility organization will work with producers to reduce packaging through product design and program innovations;

(p) a description of how a producer responsibility organization will invest in reuse and recycling infrastructure and market development in the state, including, but not limited to, installing or upgrading equipment to improve sorting of covered products or mitigating the impacts of covered products to other commodities at existing sorting and processing facilities, and capital expenditures for new technology, equipment, and facilities.

(q) a process to address concerns and questions from customers and consumers; and

(r) any other information as specified by the department through regulations.

2. The department shall promulgate a registration fee schedule to cover administrative costs, including a schedule for re-evaluating the fee structure on an annual basis.

§ 27-3309. Producer responsibility plan approval.

1. No later than ninety days after the submission of the producer responsibility plan, the department shall make a determination to approve the plan as submitted; approve the plan with conditions; or deny the plan. The department shall consider the following in whether to approve a plan:

(a) the plan adequately addresses all elements described in section 27-3307 of this title with sufficient detail to demonstrate that the objective of the plan will be met;

(b) the producer has undertaken satisfactory consultation with stakeholders, has provided an opportunity for stakeholder input in the implementation and operation of the plan prior to submission of the plan, and has thoroughly described how the stakeholders' input will be addressed by and incorporated into the plan pursuant to paragraph (f) of subdivision one of section 27-3307 of this title;

(c) the plan adequately provides for: (i) the producer collecting and funding the costs of collecting and processing products covered by the plan or reimbursing a municipality; (ii) the funding mechanism to cover the entire cost of the program; (iii) convenient and free consumer access to collection facilities or collection services; (iv) a formulaic system for equitable distribution of funds; and (v) an evaluation system for the fee structure, which shall be evaluated on an annual basis by the producer responsibility organization and re-submitted to the department annually;

(d) the plan takes into consideration a post-consumer content rate and recycling rate that will create or enhance markets for recycled materials and there is a plan to adjust the minimum rates on an annual basis. Such rates shall take into consideration current state and federal rates;

(e) the plan creates a convenient system for consumers to recycle that is, at minimum, as convenient as curbside collection or as convenient as the previous waste collection schema in the particular jurisdiction.

(f) The department may establish additional plan requirements in addition to those identified herein to fulfill the intent of this title.

2. No later than six months after the date the plan is approved, the producer, or producer responsibility organization, shall implement the

approved plan. The department may rescind the approval of an approved plan at any time.

§ 27-3311. Collection and convenience.

A producer or producer responsibility organization shall provide for widespread, convenient, and equitable access to collection opportunities for the covered products identified under the producer or producer responsibility organization's plan. A producer responsibility organization shall ensure services continue for all single and multi-family residential units that a municipality serves as of the effective date of this article, either directly or through a contract to provide services, and that such services are continued through the plan. A producer responsibility organization may rely on a range of means to collect various categories of covered materials or products including, but not limited to, curbside collection, depot drop-off, and retailer take-back so long as covered materials and products collection options include curbside or multi-family recycling collection services provided by municipal programs, municipal contracted programs, solid waste collection companies, or other approved entities as identified by the department if:

1. The category of covered materials and products is suitable for residential curbside recycling collection and can be effectively sorted by the facilities receiving the curbside collected material;

2. The category of paper is suitable for residential curbside recycling collection and can be effectively sorted by the facilities receiving the curbside collected material;

3. The recycling facility providing processing and sorting service agrees to include the category of covered materials and products as an accepted material;

4. The covered materials and products category is not handled through a deposit and return scheme or buy back system that relies on a collection system other than curbside or multi-family collection; and

5. The provider of the residential curbside recycling service agrees to the producer responsibility organization service provider costs arrangement.

§ 27-3313. Outreach and education.

1. The producer, or producer responsibility organization, shall provide effective outreach, education, and communications to consumers throughout New York state regarding:

(a) proper end-of-life management of covered products and materials;

(b) the location and availability of curbside and drop-off collection opportunities;

(c) how to prevent litter of covered products materials; and

(d) recycling and composting instructions that are: consistent statewide, except as necessary to take into account differences among local laws and processing capabilities; easy to understand; and easily accessible.

2. The outreach and education required pursuant to subdivision one of this section shall:

(a) be designed to achieve the management goals of covered products under this title, including the prevention of contamination of covered products;

(b) incorporate, at a minimum, electronic, print, web-based, and social media elements that municipalities could utilize at their discretion;

(c) be coordinated across programs to avoid confusion for consumers;

(d) include, at a minimum: consulting on education, outreach, and communications with local governments and other stakeholders; coordinating with and assisting local municipal programs, municipal contracted programs, solid waste collection companies, and other entities providing services; and developing and providing outreach and education to the diverse ethnic populations in the state; and

(e) a plan to work with participating producers to label covered products with information to assist consumers in responsibly managing and recycling covered products.

3. The producer or producer responsibility organization shall consult with municipalities on the development of educational materials and may coordinate with municipalities on outreach and communication.

4. The department shall determine the effectiveness of outreach and education efforts under this section to determine whether changes are necessary to improve those outreach and education efforts and develop information that may be used to improve outreach and education efforts under this section.

5. The producer responsibility organization shall undertake outreach, education, and communications that assist in attaining or exceeding the minimum post-consumer content and recovery rates.

§ 27-3315. Reporting requirements and audits.

1. On or before one year after a producer or producer responsibility organization's first plan is approved, and annually thereafter, each producer, or producer responsibility organization acting as their designated agent, shall submit a report to the commissioner that details the program for the prior year's program. The report shall be posted on the department's website and on the website of the producer, or producer responsibility organization acting as their designated agent. Such annual report shall include:

(a) a detailed description of the methods used to collect, transport and process covered materials and products including detailing collection methods made available to consumers and an evaluation of the program's collection convenience;

(b) a description on the status of achieving the post-consumer recycled content requirements as set forth in the plan pursuant to this title, and what efforts are proposed in the event of failing to achieve such goals;

(c) the overall weight of covered materials and products collected in the state by material type;

(d) the weight and type of covered materials and products collected in the state by the method of disposition by material type;

(e) the total cost of implementing the program, as determined by an independent financial audit, as performed by an independent auditor;

(f) information regarding the independently audited financial statements detailing all payments received and issued by the producers covered by the approved plan;

(g) a copy of the independent audit;

(h) a detailed description of whether the program compensates municipalities, solid waste collection, sorting and processing facilities, and other approved entities for their recycling efforts and other related services provided by the above entities;

(i) samples of all educational materials provided to consumers or other entities;

(j) a detailed list of efforts undertaken and an evaluation of the methods used to disseminate such materials including recommendations, if

any, for how the educational component of the program can be improved; and

(k) A detailed description of investments made in reuse and recycling infrastructure and market development.

2. The department shall not require public reporting of any confidential information that the department finds to be protected proprietary information. For purposes of this title, protected proprietary information shall mean information that, if made public, would divulge competitive business information, methods or processes entitled to protection as trade secrets of such producer or producer responsibility organization or information that would reasonably hinder the producer or producer responsibility organization's competitive advantage in the marketplace.

§ 27-3317. Antitrust protections.

A producer responsibility organization, including officers, members, employees and agents thereof, shall be immune from liability for conduct under state laws relating to antitrust, restraint of trade, unfair trade practices, and other regulation of trade or commerce only to the extent necessary to plan and implement compliance with this section.

§ 27-3319. Penalties.

1. Except as otherwise provided in this section, any person or entity that violates any provision of or fails to perform any duty imposed pursuant to this title or any rule or regulation promulgated pursuant thereto, or any term or condition of any registration or permit issued pursuant thereto, or any final determination or order of the commissioner made pursuant to this article or article seventy-one of this chapter shall be liable for a civil penalty not to exceed five hundred dollars for each violation and an additional penalty of not more than five hundred dollars for each day during which such violation continues.

2. (a) Any producer or producer responsibility organization who violates any provision of or fails to perform any duty imposed pursuant to this title or any rule or regulation promulgated pursuant thereto, or any term or condition of any registration or permit issued pursuant thereto, or any final determination or order of the commissioner made pursuant to this article or article seventy-one of this chapter shall be liable for a civil penalty not to exceed five thousand dollars for each violation and an additional penalty of not more than one thousand five hundred dollars for each day during which such violation continues. For a second violation committed within twelve months of a prior violation, the producer or producer responsibility organization shall be liable for a civil penalty not to exceed ten thousand dollars and an additional penalty of not more than three thousand dollars for each day during which such violation continues. For a third or subsequent violation committed within twelve months of any prior violation, the producer or producer responsibility organization shall be liable for a civil penalty not to exceed twenty thousand dollars and an additional penalty of six thousand dollars for each day during which such violation continues.

(b) All producers participating in a producer responsibility organization shall be jointly and severally liable for any penalties assessed against the producer responsibility organization pursuant to this title and article seventy-one of this chapter.

3. Civil penalties under this section shall be assessed by the department after an opportunity to be heard pursuant to the provisions of section 71-1709 of this chapter, or by the court in any action or proceeding pursuant to section 71-2727 of this chapter, and in addition thereto, such person or entity may by similar process be enjoined from

continuing such violation and any permit, registration or other approval issued by the department may be revoked or suspended or a pending renewal denied.

4. The department and the attorney general are hereby authorized to enforce the provisions of this title and all monies collected shall be deposited to the credit of the environmental protection fund established pursuant to section ninety-two-s of the state finance law.

§ 27-3321. State preemption.

Jurisdiction in all matters pertaining to costs and funding mechanisms of producer responsibility organizations relating to the recovery of covered materials by this title, vested exclusively in the state; provided, however, that (i) nothing in this section shall preclude any city, town, village or other local planning units, which already has in place on the effective date of this title any local law, ordinance or regulation governing a municipally-operated recycling program or collection program operated on behalf of such municipality, from determining what materials shall be included for recycling in such municipal recycling collection program, or shall preclude any such local law, ordinance or regulation which provides environmental protection equal to or greater than the provisions of this title or rules promulgated hereunder, and (ii) that nothing in this section shall preclude a person from coordinating, for recycling or reuse, the collection of covered materials and products.

§ 27-3323. Authority to promulgate rules and regulations.

The commissioner shall have the power to promulgate rules and regulations necessary and appropriate for the administration of this title.

§ 27-3325. Severability.

The provisions of this title shall be severable and if any phrase, clause, sentence or provision of this title or the applicability thereof to any person or circumstance shall be held invalid, the remainder of this title and the application thereof shall not be affected thereby.

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law.