

STATE OF NEW YORK

1185--C

Cal. No. 240

2021-2022 Regular Sessions

IN SENATE

January 8, 2021

Introduced by Sens. KAMINSKY, HINCHEY, ADDABBO, BIAGGI, BRISPORT, BROUK, COMRIE, GAUGHRAN, GOUNARDES, HARCKHAM, HOYLMAN, JACKSON, KAPLAN, KAVANAGH, KRUEGER, LIU, MAY, MAYER, MYRIE, RAMOS, REICHLIN-MELNICK, SEPULVEDA, 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 -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading -- again amended and ordered reprinted, retaining its place in the order of third reading

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:

1 Section 1. Legislative intent. The legislature finds the amount of
2 waste generated in New York is a threat to the environment. The legisla-
3 ture further finds and declares that it is in the public interest of the
4 state of New York for covered material and product producers to under-
5 take the responsibility for the development and implementation of strat-
6 egies to promote reduction, reuse, recovery, and recycling of covered
7 materials and products through investments in the end-of-product-life
8 management of products, printed paper, and product packaging.

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

TITLE 33

EXTENDED PRODUCER RESPONSIBILITY ACT

Section 27-3301. Definitions.

27-3303. Producer Responsibility advisory board.

27-3305. Producer responsibilities.

27-3307. Funding mechanism.

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

LBD01205-11-1

1 27-3309. Producer responsibility plan and needs assessment.

2 27-3311. Producer responsibility plan approval.

3 27-3313. Collection and convenience.

4 27-3315. Outreach and education.

5 27-3317. Reporting requirements and audits.

6 27-3319. Antitrust protections.

7 27-3321. Penalties.

8 27-3323. State preemption.

9 27-3325. Authority to promulgate rules and regulations.

10 27-3327. Other assistance programs.

11 27-3329. Severability.

12 § 27-3301. Definitions.

13 As used in this title:

14 1. "Covered materials and products" shall include, but are not limited
15 to, the following classes of materials:

16 (a) Containers and packaging: any part of a package or container,
17 regardless of recyclability, that includes material used for the
18 containment, protection, handling, delivery, or presentation of goods
19 that are sold, offered for sale, or distributed to consumers, via retail
20 commerce, in the state, including through an internet transaction. This
21 class includes all flexible, foam, or rigid material, including but not
22 limited to paper, carton, plastic, glass, or metal, and any combination
23 of such materials that:

24 (i) is intended at point of sale to contain, protect, wrap, present,
25 or deliver products from the responsible party to the ultimate user or
26 consumer, including tertiary packaging used for transportation or
27 distribution directly to a consumer;

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

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

33 (b) Paper products: this class includes:

34 (i) paper and other cellulosic fibers;

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

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

38 (1) flyers;

39 (2) brochures;

40 (3) booklets;

41 (4) catalogs;

42 (5) telephone directories;

43 (6) paper fiber; and

44 (7) paper used for writing or any other purpose.

45 (c) Single-use plastics: this class includes plastic products as
46 determined by the department through regulations, that frequent the
47 residential waste stream or are plastic products that have the effect of
48 severely disrupting recycling processes, including, but not limited to,
49 single use plastic items such as straws, utensils, cups, plates, and
50 plastic bags. The producer responsibility organization or advisory
51 board may also make recommendations to the department regarding single-
52 use plastics that should be covered under this title.

53 (d) For the purpose of this title, the products covered designation
54 does not include the following:

55 (i) covered materials or products that could become unsafe or unsani-
56 tary to recycle by virtue of their anticipated use;

1 (ii) periodicals, magazines, newspapers or literary, text, and refer-
2 ence bound books;

3 (iii) beverage containers as defined in section 27-1003 of this arti-
4 cle on which a deposit is required to be initiated;

5 (iv) architectural paint containers collected and managed pursuant to
6 title twenty of this article;

7 (v) medical devices and covered materials and products regulated as a
8 drug, medical device or dietary supplement by the U.S. Food and Drug
9 Administration under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C.
10 321 et seq., sec. 3.2(e) of 21 U.S. Code of Federal Regulations or the
11 Dietary Supplement Health and Education Act;

12 (vi) animal biologics, including vaccines, bacterins, antisera, diag-
13 nostic kits, and other products of biological origin, and other covered
14 materials regulated by the United States Department of Agriculture under
15 the Virus, Serum, Toxin Act, 21 U.S.C. 151-159;

16 (vii) covered materials used to contain toxic or hazardous materials,
17 or regulated by the federal insecticide, fungicide, and rodenticide act,
18 7 U.S.C. SEC.136 ET SEQ. or other applicable federal law, rule or regu-
19 lation.

20 2. "Curbside recycling" means a recycling program that serves residen-
21 tial units, or schools, state or local agencies, or institutions where
22 such schools, state or local agencies, or institutions were eligible to
23 be served under a contract with a municipality by a municipality or a
24 private sector hauler as of the effective date of this title, and such
25 recycling program is operated by a municipality or pursuant to a
26 contract with the municipality, private sector hauler, or other public
27 agency or through approved local solid waste management plans.

28 3. "Post-consumer material" means only those covered products or mate-
29 rials generated by a business or consumer which have served their
30 intended end use as consumer items and which have been separated or
31 diverted from the waste stream for the purposes of collection and recy-
32 cling as a secondary material feedstock, but shall not include waste
33 material generated during or after the completion of a manufacturing or
34 converting process.

35 4. "Post-consumer recycled content" means the content of a product
36 made from post-consumer recycled materials or feedstock.

37 5. "Producer" means an entity that shall be determined to be the
38 producer, for the purposes of this title, based on the following hierar-
39 chy:

40 (a) the person or company who uses the covered material or product
41 under such person's own name or brand and who sells or offers for sale
42 the product that uses covered material in the state; or

43 (b) the person or company who imports the product that uses covered
44 material as the owner or licensee of a trademark or brand under which
45 the product is sold or distributed in the state; or

46 (c) the person or company that offers for sale, sells, or distributes
47 the product that uses the covered material or product in the state.

48 A producer shall not include a municipality or a local government
49 planning unit, or a registered 501(c)(3) charitable organization or
50 501(c)(4) social welfare organization.

51 6. "Producer responsibility organization" means a not-for-profit
52 organization designated by a group of producers to act as an agent on
53 behalf of each producer to develop and implement a producer responsibil-
54 ity plan, or a registered 501(c)(3) charitable organization. To the
55 extent applicable, a producer responsibility organization shall have a
56 governing board that represents the diversity of producers and the

1 covered materials and product types and such board shall include non-
2 voting members representing a diversity of material trade associations.

3 7. "Readily-recyclable" means covered materials or products included
4 in the minimum recyclables list pursuant to subdivision 5 of section
5 27-3313 of this title. Readily-recyclable does not include materials
6 that contain toxic substances, as defined in this title.

7 8. "Recovery" means the diversion of covered materials or products
8 that might be disposed of or become waste.

9 9. "Recovery rate" means the amount of covered materials or products
10 recovered over a program year divided by the amount of product produced,
11 expressed as a percentage.

12 10. "Recycling" means reprocessing, by means of a manufacturing proc-
13 ess, of a used material into a product, a component incorporated into a
14 product, or a secondary (recycled) raw material. "Recycling", for
15 purposes of this title, does not include energy recovery or energy
16 generation by means of combustion, use as a fuel, or landfill disposal
17 of discarded covered materials or products or discarded product compo-
18 nent materials or chemical conversion processes, as determined by the
19 department to not qualify in the state as recycling.

20 11. "Recycling rate" means the percentage of discarded covered materi-
21 als or products that is managed through recycling or reuse, as defined
22 by this title, and is computed by dividing the amount of discarded
23 covered products recycled or reused by the total amount of discarded
24 covered products collected over a program year.

25 12. "Reuse" means selling a discarded covered product back into the
26 market for its original intended use, when the discarded covered product
27 retains its original performance characteristics and can be used for its
28 original purpose or covered materials or products that are intended to
29 be refilled for the same or similar purpose by the producer.

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

33 14. "Toxic substance" means any intentionally added chemicals classi-
34 fied by the European Union as carcinogens, mutagens, or reproductive
35 toxics pursuant to Category 1A or 1B in Annex VI to Regulation (EC)
36 1272/2008 or any substance which is identified or listed as a hazardous
37 waste or acute hazardous waste in regulations promulgated pursuant to
38 section 27-0903 of this chapter.

39 § 27-3303. Producer responsibility advisory board.

40 1. There is hereby established within the department a producer
41 responsibility advisory board, hereinafter the advisory board, to
42 receive and review the producer responsibility plans required under this
43 title and to make recommendations to the department regarding the plan's
44 approval.

45 2. (a) The advisory board shall be composed of an odd number of
46 members and the commissioner shall appoint at least one member from each
47 of the following: a municipality association or municipal recycling
48 program, including an additional municipal representative from cities
49 with a population of one million or more residents; a statewide environ-
50 mental organization; a representative of environmental justice communi-
51 ties or organizations; a statewide waste disposal association; a materi-
52 als recovery facility located within the state of New York; a recycling
53 collection provider; a manufacturer of packaging materials utilizing
54 post-consumer recycled content; a manufacturer of paper materials
55 utilizing post-consumer recycled content; a consumer advocate; a retail-

1 er; a public health specialist; and a producer or producer responsibil-
2 ity organization established under this title as non-voting members.

3 (b) Appointments to the advisory board shall be made no later than one
4 year after the effective date of this title.

5 3. The advisory board shall meet at least once a year by the call of
6 the chair or by request of more than half the voting members.

7 4. (a) Each producer responsibility plan prepared by a producer or
8 producer responsibility organization pursuant to this title shall be
9 submitted to the advisory board, which shall consider whether the plan
10 meets the criteria and objectives of this title.

11 (b) The advisory board shall, within ninety days of the submission of
12 the producer responsibility plan, either: (i) forward the plan to the
13 commissioner with its recommendation for approval; or (ii) forward the
14 plan to the commissioner with its disapproval and stated reasons there-
15 for, including any recommended changes to the plan necessary for
16 approval.

17 (c) A producer responsibility organization may resubmit a producer
18 responsibility plan for approval at any time. Upon such resubmission,
19 the advisory board shall, within ninety days, forward the plan to the
20 commissioner with its recommendation for approval or disapproval.

21 5. The advisory board shall review the submitted annual reports and
22 make such recommendations to the department and the producer responsi-
23 bility organization for improving the plan.

24 6. The decisions of the advisory board shall be by vote of the majori-
25 ty of its membership.

26 § 27-3305. Producer responsibilities.

27 1. Within four years after the effective date of this title, no
28 producer shall sell, offer for sale, or distribute covered materials or
29 products for use in New York unless the producer, or a producer respon-
30 sibility organization acting as their designated agent, has a producer
31 responsibility plan approved by the department, upon the recommendation
32 of the advisory board. Producers may satisfy participation obligations
33 individually or jointly with other producers or through a producer
34 responsibility organization.

35 2. Producers or a producer responsibility organization shall meet
36 jointly with the advisory board at least annually.

37 3. The producer, or a producer responsibility organization shall be
38 responsible for producers' compliance with the requirements of this
39 title, including the preparation and implementation of a producer
40 responsibility plan, the preparation and submission of annual audits,
41 and the annual reports to the department.

42 4. Within the first four years after the department approves a produc-
43 er responsibility plan, producers shall be required to report, on an
44 annual basis, progress reports describing in detail progress towards
45 meeting or exceeding the recovery, recycling, and post-consumer recycled
46 content rates by material type. Such progress reports shall also include
47 an evaluation of whether they are on target to meet the approved recov-
48 ery, recycling, and post-consumer recycled content rates by material
49 type. If a producer or producer responsibility organization is not on
50 target to meet the minimum post-consumer recycled material content
51 rates, minimum recovery or recycling rates, or other required components
52 of the plan, the department, in consultation with the advisory board,
53 shall require an approved producer responsibility plan to be revised or
54 require the producer or producer responsibility organization to imple-
55 ment additional measures.

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

6 6. If the department has required a producer or producer responsibil-
7 ity organization to revise their plan or meet additional measures due to
8 failure to meet required rates established under the plan, the depart-
9 ment may, after a reasonable period of time to take corrective action to
10 cure the defaults or deficiencies, impose penalties.

11 7. A producer shall be exempt from the requirements of this title if
12 the producer:

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

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

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

18 8. Retailers that are not producers are exempt from the requirements
19 of this title.

20 9. Producers may comply individually or may form a producer responsi-
21 bility organization and discharge their responsibilities to such organ-
22 ization.

23 10. The department shall establish regulations to allow voluntary
24 agreements to be made between responsible parties to permit a responsi-
25 ble party to convey a different order of responsibility than defined in
26 subdivision 4 of section 27-3301 of this title as long as both parties
27 agree to the change in the hierarchy of responsibility.

28 § 27-3307. Funding mechanism.

29 1. A producer or producer responsibility organization acting as their
30 agent shall establish program participation charges for producers
31 through the producer responsibility plan pursuant to section 27-3309 of
32 this title which shall be sufficient to ensure the obligations of the
33 statewide needs assessment and the producer responsibility plan are met.

34 2. A producer responsibility organization shall structure program
35 charges to provide producers with financial incentives, to reward waste
36 and source reduction and recycling compatibility innovations and prac-
37 tices, and to disincentivize designs or practices that increase costs of
38 managing the products or which contain toxic substances. The producer
39 responsibility organization may adjust charges to be paid by participat-
40 ing producers based on factors that affect system costs. At a minimum,
41 charges shall be variable based on:

42 (a) Costs to provide curbside collection or other form of residential
43 service that is, at minimum, as convenient as curbside collection or as
44 convenient as the previous recycling collection plan in the particular
45 jurisdiction or as convenient as the previous refuse collection plan in
46 the particular jurisdiction should recycling collection not be provided;

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

49 (c) Whether the covered material or product would typically be readi-
50 ly-recyclable except that as a consequence of the product's design, the
51 product has the effect of disrupting recycling processes or the product
52 includes labels, inks, and adhesives containing heavy metals or other
53 toxic substances that would contaminate the recycling process;

54 (d) Whether the covered materials or product is specifically designed
55 to be reusable or refillable and has high reuse or refill rate;

56 (e) the commodity value of a covered material or product.

1 3. The charges shall be adjusted, or the producers may be provided a
2 credit, based upon the percentage of post-consumer recycled material
3 content and such percentage of post-consumer recycled content shall be
4 verified by the producer responsibility organization or through an inde-
5 pendent third party approved to perform verification services to ensure
6 that such percentage exceeds the minimum requirements in the covered
7 material, as long as the recycled content does not disrupt the potential
8 for future recycling.

9 4. In addition to the annual schedule of fees approved in the producer
10 responsibility plan, the producer responsibility organization fee sched-
11 ule may include a special assessment on specific categories of covered
12 materials or products at the request of responsible entities represent-
13 ing and approved by the advisory board if the nature of the covered
14 material or product imposes unusual costs in collection or processing or
15 requires special actions to address effective access to recycling or
16 successful processing in municipal recycling facilities. The revenue
17 from the special assessment shall be used to make system improvements
18 for the specific covered materials or products on which the special
19 assessment was applied.

20 5. A producer responsibility organization shall be responsible for
21 calculating and dispersing funding at a reasonable recycling program
22 funding rate through an objective formula approved by the department,
23 and such reasonable rate may be varied based on population density
24 rates, for municipal services utilized by a producer responsibility
25 organization if the municipality elects to be compensated by the produc-
26 er responsibility organization in the recovery, recycling, and process-
27 ing of covered materials and products, whether such services are
28 provided directly by the municipality or through a contracted service
29 provider. If a municipality does not elect to provide service, and has
30 given notice to the department of its intent, the producer responsibil-
31 ity organization shall be responsible for contracting with a private
32 entity for services and shall be responsible for calculating and
33 disbursing funding at a reasonable recycling program rate for
34 collection, recycling, recovery, and processing services provided by the
35 private sector entity contracted to provide such services. The program
36 funding mechanism shall be based on the cost of residential curbside
37 collection, including the cost of curbside containers where relevant, as
38 well as processing cost for each readily-recyclable material, cost of
39 handling non-readily recyclable material types collected as part of a
40 recycling operation, transportation cost of recycling for each material
41 type, and any other cost factors as determined by the department. To
42 facilitate the producer responsibility organization's determination of
43 the reasonable cost of recycling, participating municipalities and
44 private sector haulers contracting with producer responsibility organ-
45 izations shall report data related to their costs and the value of mate-
46 rials to the producer responsibility organization. Cost calculations
47 shall take into consideration the amount received from the sale of
48 source separated materials.

49 6. Any funds directly collected pursuant to this title shall not be
50 used to carry out lobbying activities on behalf of the producer respon-
51 sibility organization.

52 7. No retailer may charge a point-of-sale or other fee to consumers to
53 facilitate a producer to recoup the costs associated with meeting the
54 obligations under this title.

55 8. Nothing in this title shall require a municipality to participate
56 in a producer responsibility program.

1 9. The department shall make such rules and regulations which may be
2 necessary for a producer responsibility organization to develop and
3 manage a funding mechanism.

4 § 27-3309. Producer responsibility plan and needs assessment.

5 1. A statewide needs assessment shall be conducted prior to the
6 approval of a producer responsibility plan. The statewide needs assess-
7 ment shall be funded by the producers or producer responsibility organ-
8 ization, and shall be conducted by an independent third party approved
9 by the department and shall include an evaluation of the capacity,
10 costs, gaps, and needs for the following factors:

11 (a) Current funding needs, both operational and capital, impacting
12 recycling access and availability;

13 (b) Existing state statutory provisions and funding sources for recy-
14 cling, reuse, reduction, and recovery;

15 (c) The collection and hauling system for recyclable materials in the
16 state;

17 (d) The processing capacity and infrastructure for recyclable materi-
18 als in the state and regionally and identifying necessary capital
19 investments to existing and future reuse and recycling infrastructure;

20 (e) The market conditions and opportunities for recyclable materials
21 in the state and regionally;

22 (f) Consumer education needs for recycling, reuse, and reduction of
23 covered materials and products.

24 2. Producers, or a producer responsibility organization acting as
25 their designated agent, shall develop and submit a producer responsibil-
26 ity plan to the advisory board. Such plan shall cover five years and
27 shall be reviewed by the advisory board and updated every five years
28 following the approval of the original plan. The department shall have
29 the discretion to require the plan to be reviewed or revised prior to
30 the five year period pursuant to section 27-3305 of this title. The
31 advisory board shall also have the discretion to recommend revision of
32 the plan to the department. The submitted plan shall include, but not be
33 limited to:

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

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

38 (c) a comprehensive list of the covered materials or products for
39 which the producer or producer responsibility organization is responsi-
40 ble for, which shall be included in the minimum recyclable lists pursu-
41 ant to section 27-3313 of this title;

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

47 (e) an objective formula establishing a reimbursement rate, which
48 covers obligations identified in the needs assessment and takes into
49 account variable regional costs, for participating municipalities or
50 private sector haulers;

51 (f) a description of the process for participating municipalities or
52 private sector haulers to recoup reasonable costs as established by the
53 objective formula, from the producer or producer responsibility organ-
54 ization, including, as applicable, any administrative, sorting,
55 collection, transportation, public education, or processing costs, if

1 the producer responsibility organization uses existing services through
2 a municipality or obtains such services from a private sector hauler;

3 (g) a detailed description of how the producer or the producer respon-
4 sibility organization, consulted with the advisory board in the develop-
5 ment of the plan prior to its submission to the department, and to what
6 extent the producers or the producer responsibility organization specif-
7 ically incorporated the advisory board's input into the plan. Producers
8 or the producer responsibility organization shall also provide the advi-
9 sory board a reasonable period of time to review and comment upon the
10 draft plan prior to its submission to the department. Producers or the
11 producer responsibility organization shall make an assessment of
12 comments received and shall provide a summary and an analysis of the
13 issues raised by the advisory board and significant changes suggested by
14 any such comments, a statement of the reasons why any significant chang-
15 es were not incorporated into the plan, and a description of any changes
16 made to the plan as a result of such comments;

17 (h) a proposed minimum post-consumer recycled material content rate
18 requirement, minimum recovery, and minimum recycling rate for covered
19 materials and products. The minimum rates shall be varied for each
20 covered material and shall include paper products, glass, metal, and
21 plastic;

22 (i) a description of a public education program pursuant to section
23 27-3313 of this title;

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

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

32 (l) a description of how a municipality will participate, on a volun-
33 tary basis, with collection and how existing municipal recycling proc-
34 essing and collection infrastructure will be used;

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

38 (n) a description of how the producer, or producer responsibility
39 organization, will meet or exceed the minimum rates required under this
40 title for covered materials or product;

41 (o) a description of the process for end-of-life management, including
42 recycling and disposal of residuals collected for recycling, using envi-
43 ronmentally sound management practices;

44 (p) a description of how the producer responsibility organization
45 shall provide the option to purchase recycled materials from processors
46 on behalf of producer members interested in obtaining recycled feedstock
47 in order to achieve post-consumer recycled content objectives;

48 (q) a description of how a producer responsibility organization will
49 work with producers to reduce packaging through product design, systems
50 for reusable packaging, and program innovations;

51 (r) a description of how a producer responsibility organization will
52 strategically invest in existing and future reuse and recycling infras-
53 tructure and market development in the state, including, but not limited
54 to, installing or upgrading equipment to improve sorting of covered
55 materials and products or mitigating the impacts of covered materials
56 and products to other commodities at existing sorting and processing

1 facilities, and capital expenditures for new technology, equipment, and
2 facilities;

3 (s) a process to address concerns and questions from customers and
4 residents; and

5 (t) any other information as specified by the department through regu-
6 lations.

7 3. The department shall promulgate a registration fee schedule to
8 cover administrative costs, including a schedule for re-evaluating the
9 fee structure on an annual basis and shall consider if fees should be
10 adjusted. Such fees collected by the department shall only be used for
11 the implementation, operation, and enforcement of this title, including
12 approved costs associated with the advisory board.

13 § 27-3311. Producer responsibility plan approval.

14 1. Before rejection or approval of a producer responsibility plan can
15 be made in accordance with this title, the producer or producer respon-
16 sibility organization shall submit the plan to the producer responsibil-
17 ity advisory board.

18 2. Within sixty days of the advisory board making a recommendation to
19 the department, the department shall make a determination to approve the
20 plan as submitted; approve the plan with conditions; or deny the plan,
21 with reasons for the denial. The advisory board in recommending, and the
22 department in approving a plan, shall consider the following in whether
23 to approve a plan:

24 (a) the plan adequately addresses all elements described in section
25 27-3309 of this title with sufficient detail to demonstrate that the
26 objective of the plan will be met;

27 (b) the producer has undertaken satisfactory consultation with the
28 advisory board, has provided an opportunity for the advisory board's
29 input in the implementation and operation of the plan prior to
30 submission of the plan, and has thoroughly described how the advisory
31 board's input will be addressed by and incorporated into the plan
32 pursuant to paragraph (g) of subdivision 2 of section 27-3309 of this
33 title;

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

43 (d) the plan takes into consideration a post-consumer content rate and
44 recovery and recycling rates that will create or enhance markets for
45 recycled materials, there is a plan to adjust the minimum rates on an
46 annual basis, and the plan incentives waste prevention and reduction.
47 Such post-consumer content rates, and such adjustments to the rates,
48 shall take into consideration: (i) changes in market conditions,
49 including supply and demand for post-consumer recycled plastics, recov-
50 ery rates, and bale availability both domestically and globally; (ii)
51 recycling rates; (iii) the availability of recycled materials suitable
52 to meet the minimum recycled content goals, including the availability
53 of high-quality recycled materials, and food-grade recycled materials;
54 (iv) the capacity of recycling or processing infrastructure; (v) utili-
55 zation rates of the material; and (vi) the progress made by producers in
56 meeting the post-consumer recycled targets by material type;

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

4 (f) the plan adequately considers the state's solid waste management
5 policy set forth in section 27-0106 of this article;

6 (g) The department may establish additional plan requirements in addi-
7 tion to those identified herein to fulfill the intent of this title;
8 provided, however, that any additional requirements shall be established
9 one year prior to a required submission of a plan unless such additional
10 requirements are in relation to the power granted to the department in
11 subdivision 4 of section 27-3305 of this title.

12 3. No later than six months after the date the plan is approved, the
13 producer, or producer responsibility organization, shall implement the
14 approved plan. The department may rescind the approval of an approved
15 plan at any time with cause and documented justification.

16 § 27-3313. Collection and convenience.

17 A producer or producer responsibility organization shall provide for
18 widespread, convenient, and equitable access to collection opportunities
19 for the covered materials and products identified under the producer or
20 producer responsibility organization's plan at no additional cost to
21 residents. Such opportunities shall be provided to all residents of New
22 York in a manner that is as convenient as the collection of municipal
23 solid waste. A producer responsibility organization shall ensure
24 services continue for curbside recycling programs that a municipality
25 serves as of the effective date of this article, either directly or
26 through a contract to provide services, and that such services are
27 continued through the plan. A producer responsibility plan may not
28 restrict a jurisdiction's resident's ability to contract directly with
29 third parties to obtain recycling collection services if residents have
30 the option to enter into such contracts as of the effective date of this
31 title, as long as the resident still voluntarily chooses to contract
32 directly with the third party. A producer responsibility organization
33 may rely on a range of means to collect various categories of covered
34 materials or products so long as covered materials and products
35 collection options include curbside recycling collection services
36 provided by municipal programs, municipal contracted programs, solid
37 waste collection companies, or other approved entities as identified by
38 the department if:

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

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

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

48 4. The provider of the residential curbside recycling service agrees
49 to the producer responsibility organization service provider costs
50 arrangement.

51 5. (a) The producer or producer responsibility organization shall
52 adopt a list of minimum types of readily recyclable materials and
53 products based on available collection and processing infrastructure and
54 recycling markets for covered materials and products. The producer or
55 producer responsibility organization shall update and adopt the list on
56 an annual basis, in consultation with the advisory board, in response to

1 collection and processing improvements and changes in recycling end
2 markets. If there are multiple lists, the department shall compile the
3 lists and shall publish a compiled list to the public. Such lists may
4 vary by geographic region depending on regional markets and regional
5 collection and processing infrastructure.

6 (b) All municipalities or private recycling service providers shall
7 provide for the collection and recycling of all identified materials and
8 products contained on the list of minimum recyclables, based on
9 geographic regions, in order to be eligible for reimbursement; provided,
10 however, nothing shall penalize a municipality or private recycling
11 service for recovering and recycling materials that are generated in the
12 municipality or geographic region that are not included on the list of
13 minimum types of recyclable covered materials or products as long as it
14 can be demonstrated that such materials have a market as determined by
15 the department in consultation with the producer or producer responsi-
16 bility organization. Reimbursement shall cover recycling of all covered
17 materials and products so long as the program includes at least the
18 minimum recyclable list.

19 (c) The department may grant an exception of the requirements in para-
20 graph (b) of this subdivision upon a written showing by the municipality
21 or private recycling service that compliance with the requirement is not
22 practicable for a specific identified product or material and if the
23 department finds it is in the best interest of the intent of this title
24 to grant them an extension; provided, however, that the extension grant-
25 ed by the department shall not exceed twelve months.

26 § 27-3315. Outreach and education.

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

- 30 (a) proper end-of-life management of covered products and materials;
31 (b) the location and availability of curbside recycling and additional
32 drop-off collection opportunities;
33 (c) how to prevent litter of covered materials and products in the
34 process of collection; and
35 (d) recycling instructions that are: consistent statewide, except as
36 necessary to take into account differences among local laws and process-
37 ing capabilities; easy to understand; and easily accessible.

38 2. The outreach and education required pursuant to subdivision 1 of
39 this section shall:

- 40 (a) be designed to achieve the management goals of covered products
41 under this title, including the prevention of contamination of covered
42 products;
43 (b) incorporate, at a minimum, electronic, print, web-based, and
44 social media elements that municipalities could utilize at their
45 discretion;
46 (c) be coordinated across programs to avoid confusion for consumers;
47 (d) include, at a minimum: consulting on education, outreach, and
48 communications with local governments and other stakeholders; coordinat-
49 ing with and assisting local municipal programs, municipal contracted
50 programs, solid waste collection companies, and other entities providing
51 services; and developing and providing outreach and education to the
52 diverse ethnic populations in the state; and
53 (e) a plan to work with participating producers to label or mark
54 covered products, in accordance with reasonable labeling standards, with
55 information to assist consumers in responsibly managing and recycling
56 covered materials and products.

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

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

9 5. The producer responsibility organization shall undertake outreach,
10 education, and communications that assist in attaining or exceeding the
11 recovery and recycling rates.

12 § 27-3317. Reporting requirements and audits.

13 1. One year after a producer or producer responsibility organization's
14 first plan is approved, and annually thereafter, each producer, or
15 producer responsibility organization acting as their designated agent,
16 shall submit a report to the department that details the performance for
17 the prior year's program. The report shall be posted on the department's
18 website and on the website of the producer, or producer responsibility
19 organization acting as their designated agent. Such annual report shall
20 include:

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

25 (b) a description of the status of achieving the recovery and recycl-
26 ing rates as set forth in the plan pursuant to this title and what
27 efforts are proposed in the event of failing to achieve such rates;

28 (c) a description on the status of achieving the post-consumer recy-
29 clered content rates as set forth in the plan pursuant to this title, and
30 what efforts are proposed in the event of failing to achieve such rates;

31 (d) the amount of covered materials and products collected in the
32 state by material type;

33 (e) the amount and type of covered materials and products collected in
34 the state by the method of disposition by material type;

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

37 (g) information regarding the independently audited financial state-
38 ments detailing all payments received and issued by the producers
39 covered by the approved plan;

40 (h) a copy of the independent audit;

41 (i) a detailed description of whether the program compensates muni-
42 cipalities, solid waste collection, sorting and processing facilities, and
43 other approved entities for their recycling efforts and other related
44 services provided by the above entities;

45 (j) samples of all educational materials provided to consumers or
46 other entities;

47 (k) a detailed list of efforts undertaken and an evaluation of the
48 methods used to disseminate such materials including recommendations, if
49 any, for how the educational component of the program can be improved;
50 and

51 (l) A detailed description of investments made in infrastructure and
52 market development as related to this title.

53 2. The department shall not require public reporting of any confiden-
54 tial information that the department finds to be protected proprietary
55 information. For purposes of this title, protected proprietary informa-
56 tion shall mean information that, if made public, would divulge compet-

1 itive business information, methods or processes entitled to protection
2 as trade secrets of such producer or producer responsibility organiza-
3 tion or information that would reasonably hinder the producer or produc-
4 er responsibility organization's competitive advantage in the market-
5 place.

6 § 27-3319. Antitrust protections.

7 A producer or producer responsibility organization that organizes the
8 collection, transportation, and procession of covered materials and
9 products, in accordance with a producer responsibility plan approved
10 under this title, shall not be liable for any claim of a violation of
11 antitrust, restraint of trade, or unfair trade practice arising from
12 conduct undertaken in accordance with the program pursuant to this
13 title; provided, however, this section shall not apply to any agreement
14 establishing or affecting the price of a covered material, product, or
15 the output or production of any agreement restricting the geographic
16 area or customers to which a covered material or product will be sold.

17 § 27-3321. Penalties.

18 1. Except as otherwise provided in this section, any person or entity
19 that violates any provision of or fails to perform any duty imposed
20 pursuant to this title or any rule or regulation promulgated pursuant
21 thereto, or any term or condition of any registration or permit issued
22 pursuant thereto, or any final determination or order of the commission-
23 er made pursuant to this article or article 71 of this chapter shall be
24 liable for a civil penalty not to exceed five hundred dollars for each
25 violation and an additional penalty of not more than five hundred
26 dollars for each day during which such violation continues.

27 2. (a) Any producer or producer responsibility organization who
28 violates any provision of or fails to perform any duty imposed pursuant
29 to this title or any rule or regulation promulgated pursuant thereto,
30 including compliance with requirements related to the producer responsi-
31 bility plan, or any term or condition of any registration or permit
32 issued pursuant thereto, or any final determination or order of the
33 commissioner made pursuant to this article or article 71 of this chapter
34 shall be liable for a civil penalty not to exceed five thousand dollars
35 for each violation and an additional penalty of not more than one thou-
36 sand five hundred dollars for each day during which such violation
37 continues. For a second violation committed within twelve months of a
38 prior violation, the producer or producer responsibility organization
39 shall be liable for a civil penalty not to exceed ten thousand dollars
40 and an additional penalty of not more than three thousand dollars for
41 each day during which such violation continues. For a third or subse-
42 quent violation committed within twelve months of any prior violation,
43 the producer or producer responsibility organization shall be liable for
44 a civil penalty not to exceed twenty thousand dollars and an additional
45 penalty of six thousand dollars for each day during which such violation
46 continues.

47 (b) All producers participating in a producer responsibility organiza-
48 tion shall be jointly and severally liable for any penalties assessed
49 against the producer responsibility organization pursuant to this title
50 and article 71 of this chapter.

51 3. Civil penalties under this section shall be assessed by the depart-
52 ment after an opportunity to be heard pursuant to the provisions of
53 section 71-1709 of this chapter, or by the court in any action or
54 proceeding pursuant to section 71-2727 of this chapter, and in addition
55 thereto, such person or entity may by similar process be enjoined from
56 continuing such violation and any permit, registration or other approval

1 issued by the department may be revoked or suspended or a pending
2 renewal denied.

3 4. The department and the attorney general are hereby authorized to
4 enforce the provisions of this title and all monies collected shall be
5 deposited to the credit of the environmental protection fund established
6 pursuant to section 92-s of the state finance law.

7 § 27-3323. State preemption.

8 Jurisdiction in all matters pertaining to costs and funding mechanisms
9 of producer responsibility organizations relating to the recovery of
10 covered materials shall, by this title, be vested exclusively in the
11 state; provided, however, that nothing in this section shall preclude
12 any city, town, village or other local planning units from determining
13 what materials shall be included for recycling in a municipal recycling
14 collection program or shall preclude any person from coordinating, for
15 recycling or reuse, the collection of covered materials and products.

16 § 27-3325. Authority to promulgate rules and regulations.

17 The commissioner shall have the power to promulgate rules and regu-
18 lations necessary and appropriate for the administration of this title.

19 § 27-3327. Other assistance programs.

20 Nothing in this title shall impact an entity's eligibility for any
21 state or local incentive or assistance program to which they are other-
22 wise eligible.

23 § 27-3329. Severability.

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

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