

STATE OF NEW YORK

1185

2021-2022 Regular Sessions

IN SENATE

January 8, 2021

Introduced by Sens. KAMINSKY, HOYLMAN, KRUEGER, MAY, SERRANO -- 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 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 weight 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 recycling, reuse and recovery of covered material and
7 products through investments in the end-of-product-life management of
8 products.

9 § 2. Article 27 of the environmental conservation law is amended by
10 adding a new title 31 to read as follows:

TITLE 31

EXTENDED PRODUCER RESPONSIBILITY ACT

Section 27-3101. Definitions.

14 27-3103. Producer responsibilities.

15 27-3105. Funding mechanism.

16 27-3107. Producer responsibility plan.

17 27-3109. Producer responsibility plan approval.

18 27-3111. Collection and convenience.

19 27-3113. Outreach and education.

20 27-3115. Reporting requirements and audits.

21 27-3117. Antitrust protections.

22 27-3119. Penalties.

23 27-3121. State preemption.

24 27-3123. Authority to promulgate rules and regulations.

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

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1 27-3125. Severability.

2 § 27-3101. Definitions.

3 1. "Activity-based costs" shall mean a method of distributing the cost
4 of a process among its component streams according to the share of the
5 total cost assumed as a result of the processing of that stream.

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

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

16 (i) is used to contain, protect, wrap or present products at any stage
17 in the movement of the product from the responsible party to the ulti-
18 mate user or consumer, including tertiary packaging used for transporta-
19 tion or distribution directly to a consumer;

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

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

25 (b) Paper products: this class includes:

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

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

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

32 (1) flyers;

33 (2) brochures;

34 (3) booklets;

35 (4) catalogs;

36 (5) telephone directories;

37 (6) newspapers;

38 (7) magazines;

39 (8) paper fiber; and

40 (9) paper used for writing or any other purpose.

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

43 (i) rigid plastics:

44 (1) polyethylene terephthalate (PET);

45 (2) polyethylene (PE);

46 (3) polyvinyl chloride (PVC);

47 (4) polypropylene (PP);

48 (5) polystyrene (PS);

49 (6) poly coated fiber;

50 (7) multi-layered plastics;

51 (8) other (BPA, Compostable Plastics, Polycarbonate and LEXAN);

52 (ii) flexible plastics:

53 (1) polyethylene (PE);

54 (2) polyvinyl chloride (PVC);

55 (3) polypropylene (PP);

56 (4) poly coated fiber;

1 (5) multi-layered plastics;

2 (6) other (BPA, Compostable Plastics, Polycarbonate and LEXAN).

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

5 (i) paper products that could become unsafe or unsanitary to recycle
6 by virtue of their anticipated use;

7 (ii) literary, text, and reference bound books; and

8 (iii) beverage containers as defined in section 27-1003 of this arti-
9 cle.

10 3. "Curbside recycling" means a recycling program that serves single
11 and multi-family residential units, schools, state or local agencies, or
12 institutions that is operated by a municipality pursuant to a contract
13 with the municipality, private entity, or other public agency or through
14 approved local solid waste management plans.

15 4. "Post-consumer recycled content" means the content of a product
16 made of recycled materials derived from post-consumer recycled materials
17 or feedstock.

18 5. "Producer" means: (a) the person who manufactures the covered mate-
19 rial or product under such person's own name or brand and who sells or
20 offers for sale the covered material or product in the state; or

21 (b) the person who imports the covered material or product as the
22 owner or licensee of a trademark or brand under which the covered mate-
23 rial or product is sold or distributed in the state; or

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

26 A producer shall not include a municipality or a local government
27 planning unit.

28 6. "Producer responsibility organization" means a not-for-profit
29 organization designated by a group of producers to act as an agent on
30 behalf of each producer to develop and implement a producer responsibil-
31 ity plan.

32 7. "Readily-recyclable" means packaging that can be sorted by entities
33 processing recyclables from New York and for which, during the previous
34 two calendar years, there was a consistent market, meaning recyclers
35 were willing to pay for fully sorted material at the door of their
36 facilities in quantities equal to or in excess of material supply. This
37 does not include material types that recyclers accept in low quantities
38 or sort out of material during additional processing steps; if material
39 recyclers do not desire a full bale of a specific material type, that
40 material type is not readily recyclable.

41 8. "Recycling" means to separate, dismantle or process the materials,
42 components or commodities contained in covered products for the purpose
43 of preparing the materials, components or commodities for use or reuse
44 in new products or components. "Recycling" does not include energy
45 recovery or energy generation by means of combustion, or landfill
46 disposal of discarded covered products or discarded product component
47 materials.

48 9. "Recycling rate" means the percentage of discarded covered products
49 that is managed through recycling or reuse, as defined by this title,
50 and is computed by dividing the amount of discarded covered products
51 collected and recycled or reused by the total amount of discarded
52 covered products collected over a program year.

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

11. "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.

§ 27-3103. 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.

§ 27-3105. Funding mechanism.

1. A producer responsibility organization shall establish program participation charges for producers through the producer responsibility plan pursuant to section 27-3107 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 waste collection schema in the particular jurisdiction;

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

(c) Whether the covered material or product would typically be 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 or by an independent party designated by the department 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 activity-based costs 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 activity-based cost mechanism shall be based on the cost of residential curbside collection, on-site processing cost for each readily-recyclable material, cost of non-readily recyclable material types, 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. 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.

§ 27-3107. 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 in the development of the plan;

(c) the covered materials 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 reasonable costs from the producer responsibility organization for the activity-based costs, including, as applicable, any administrative, sorting, collection, transportation, or processing costs, if the producer responsibility organization uses existing services through a municipality;

1 (f) a proposed minimum post-consumer recycled material content rate
2 requirement and minimum recycling rate for materials. The minimum recy-
3 cling rate shall be varied for each recycled material and shall include
4 paper products, glass, metal, and plastic;

5 (g) a description of a public education program pursuant to section
6 27-3113 of this title;

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

11 (i) a description of how a municipality will participate, on a volun-
12 tary basis, with collection and how existing municipal waste collection
13 infrastructure will be used;

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

17 (k) a description of how the producer, or producer responsibility
18 organization, will meet or exceed the minimum recycling rate for a prod-
19 uct;

20 (l) a description of the process for end-of-life management, including
21 recycling and disposal, using environmentally sound management prac-
22 tices;

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

26 (n) a process to address concerns and questions from customers and
27 consumers; and

28 (o) any other information as specified by the department through regu-
29 lations.

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

33 § 27-3109. Producer responsibility plan approval.

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

39 (a) the plan adequately addresses all elements described in section
40 27-3107 of this title with sufficient detail to demonstrate that the
41 objective of the plan will be met;

42 (b) the producer has undertaken satisfactory consultation with stake-
43 holders and has provided an opportunity for stakeholder input in the
44 implementation and operation of the plan prior to submission of the
45 plan;

46 (c) the plan adequately provides for: (i) the producer collecting and
47 funding the costs of collecting and processing products covered by the
48 plan or reimbursing a municipality; (ii) the funding mechanism to cover
49 the entire cost of the program; (iii) convenient and free consumer
50 access to collection facilities or collection services; and (iv) an
51 evaluation system for the fee structure, which shall be evaluated on an
52 annual basis by the producer responsibility organization and re-submit-
53 ted to the department annually;

54 (d) the plan takes into consideration a post-consumer content rate and
55 recycling rate that will create or enhance markets for recycled materi-
56 als and there is a plan to adjust the minimum rates on an annual basis.

1 Such rates shall take into consideration current state and federal
2 rates;

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

6 2. No later than six months after the date the plan is approved, the
7 producer, or producer responsibility organization, shall implement the
8 approved plan. The department may rescind the approval of an approved
9 plan at any time.

10 § 27-3111. Collection and convenience.

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

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

30 2. The category of paper is suitable for residential curbside recycl-
31 ing collection and can be effectively sorted by the facilities receiving
32 the curbside collected material;

33 3. The provider of the residential curbside recycling service agrees
34 to include the category of covered materials and products as an accepted
35 material;

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

39 5. The provider of the residential curbside recycling service agrees
40 to the producer responsibility organization activity-based costs
41 arrangement.

42 § 27-3113. Outreach and education.

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

46 (a) proper end-of-life management of covered products and beverage
47 containers;

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

50 (c) how to prevent litter of covered products and beverage containers;
51 and

52 (d) recycling and composting instructions that are: consistent state-
53 wide, except as necessary to take into account differences among local
54 laws and processing capabilities; easy to understand; and easily acces-
55 sible.

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

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

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

7 (c) include, at a minimum: consulting on education, outreach, and
8 communications with local governments and other stakeholders; coordinat-
9 ing with and assisting local municipal programs, municipal contracted
10 programs, solid waste collection companies, and other entities providing
11 services; and developing and providing outreach and education to the
12 diverse ethnic populations in the state; and

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

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

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

24 § 27-3115. Reporting requirements and audits.

25 1. On or before one year after a producer or producer responsibility
26 organization's first plan is approved, and annually thereafter, each
27 producer, or producer responsibility organization acting as their desig-
28 nated agent, shall submit a report to the commissioner that details the
29 program for the prior year's program. The report shall be posted on the
30 department's website and on the website of the producer, or producer
31 responsibility organization acting as their designated agent. Such annu-
32 al report shall include:

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

37 (b) the overall weight of covered materials and products collected in
38 the state;

39 (c) the weight and type of covered materials and products collected in
40 the state by the method of disposition;

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

43 (e) information regarding the independently audited financial state-
44 ments detailing all deposits received and refunds paid by the producers
45 covered by the approved plan, and revenues and expenditures for any fees
46 associated with the approved plan that may be charged separately and
47 identified on the consumer receipt of sale;

48 (f) a copy of the independent audit;

49 (g) a detailed description of whether the program compensates munici-
50 palities, solid waste collection, sorting, and reprocessing companies,
51 and other approved entities for their recycling efforts and other
52 related services provided by the above entities;

53 (h) samples of all educational materials provided to consumers or
54 other entities; and

1 (i) a detailed list of efforts undertaken and an evaluation of the
2 methods used to disseminate such materials including recommendations, if
3 any, for how the educational component of the program can be improved.

4 2. The department shall not require public reporting of any confiden-
5 tial information that the department finds to be protected proprietary
6 information. For purposes of this title, protected proprietary informa-
7 tion shall mean information that, if made public, would divulge compet-
8 itive business information, methods or processes entitled to protection
9 as trade secrets of such producer or producer responsibility organiza-
10 tion or information that would reasonably hinder the producer or produc-
11 er responsibility organization's competitive advantage in the market-
12 place.

13 § 27-3117. Antitrust protections.

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

19 § 27-3119. Penalties.

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

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

7 § 27-3121. State preemption.

8 Jurisdiction in all matters pertaining to activity-based costs and
9 funding mechanisms of producer responsibility organizations relating to
10 the recovery of covered materials by this title, vested exclusively in
11 the state. Any provision of any local law or ordinance, or any rule or
12 regulation promulgated thereto, governing covered materials and products
13 recycling shall, upon the effective date of this title, be preempted;
14 provided however, that nothing in this section shall preclude a person
15 from coordinating, for recycling or reuse, the collection of covered
16 materials and products.

17 § 27-3123. Authority to promulgate rules and regulations.

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

20 § 27-3125. Severability.

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

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