

## CHAPTER 26-B

## TOXIC CHEMICALS IN FOOD PACKAGING

**§1741. Definitions**

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings. [PL 2019, c. 277, §8 (NEW).]

**1. Alternative.** "Alternative" has the same meaning as in section 1732, subsection 1-B. [PL 2019, c. 277, §8 (NEW).]

**2. Board.** "Board" means the Board of Environmental Protection. [PL 2019, c. 277, §8 (NEW).]

**3. Chemical.** "Chemical" has the same meaning as in section 1732, subsection 1-C. [PL 2019, c. 277, §8 (NEW).]

**4. Commissioner.** "Commissioner" means the Commissioner of Environmental Protection. [PL 2019, c. 277, §8 (NEW).]

**5. Credible scientific evidence.** "Credible scientific evidence" means the results of a study, the experimental design and conduct of which have undergone independent scientific peer review, that are published in a peer-reviewed journal or in a publication of an authoritative federal or international governmental agency, including but not limited to the United States Department of Health and Human Services, National Toxicology Program, Food and Drug Administration and Centers for Disease Control and Prevention; the United States Environmental Protection Agency; the World Health Organization; and the European Union, European Chemicals Agency. [PL 2019, c. 277, §8 (NEW).]

**6. De minimis level.** "De minimis level" means:

A. For a food contact chemical of high concern or priority food contact chemical that is an intentionally added chemical in a food package, the practical quantification limit; or [PL 2019, c. 277, §8 (NEW).]

B. For a food contact chemical of high concern or priority food contact chemical that is a contaminant present in a food package, a concentration of 100 parts per million. [PL 2019, c. 277, §8 (NEW).]

[PL 2019, c. 277, §8 (NEW).]

**7. Department.** "Department" means the Department of Environmental Protection. [PL 2019, c. 277, §8 (NEW).]

**8. Distributor.** "Distributor" has the same meaning as in section 1732, subsection 2. [PL 2019, c. 277, §8 (NEW).]

**9. Food contact chemical of high concern.** "Food contact chemical of high concern" means a chemical identified by the department pursuant to section 1742. [PL 2019, c. 277, §8 (NEW).]

**10. Food package.** "Food package" has the same meaning as in section 1732, subsection 2-C. [PL 2019, c. 277, §8 (NEW).]

**11. Intentionally added chemical.** "Intentionally added chemical" means a chemical that was added during the manufacture of a product or product component to provide a specific characteristic, appearance or quality or to perform a specific function. [PL 2019, c. 277, §8 (NEW).]

**12. Manufacturer.** "Manufacturer" means any person who manufactured a food package or whose brand name is affixed to a food package. In the case of a food package that was imported into the United States, "manufacturer" includes the importer or first domestic distributor of the food package if the person who manufactured or assembled the food package or whose brand name is affixed to the food package does not have a presence in the United States.

[PL 2019, c. 277, §8 (NEW).]

**13. Practical quantification limit.** "Practical quantification limit" means the lowest concentration of a chemical that can be reliably measured within specified limits of precision, accuracy, representativeness, completeness and comparability during routine laboratory operating conditions. The practical quantification limit is based on scientifically defensible, standard analytical methods. The practical quantification limit for a given chemical may be different depending on the matrix and the analytical method used.

[PL 2019, c. 277, §8 (NEW).]

**14. Priority food contact chemical.** "Priority food contact chemical" means a chemical designated by the commissioner pursuant to section 1743.

[PL 2019, c. 277, §8 (NEW).]

**15. Safer alternative.** "Safer alternative" has the same meaning as in section 1732, subsection 5-C.

[PL 2019, c. 277, §8 (NEW).]

#### SECTION HISTORY

PL 2019, c. 277, §8 (NEW).

#### §1742. Identification of food contact chemicals of high concern

In accordance with the requirements of this section, the department shall publish and may revise a list of no more than 10 food contact chemicals of high concern. [PL 2019, c. 277, §8 (NEW).]

**1. Criteria.** A chemical may be included on the list under this section only if:

A. The chemical is included on the list of chemicals of concern published by the department in accordance with Title 38, section 1693 or the chemical has been identified by an authoritative governmental entity on the basis of credible scientific evidence as being:

- (1) A carcinogen, a reproductive or developmental toxicant or an endocrine disruptor;
- (2) Persistent, bioaccumulative and toxic; or
- (3) Very persistent and very bioaccumulative; [PL 2019, c. 277, §8 (NEW).]

B. The department determines that there is strong credible scientific evidence that the chemical is a reproductive or developmental toxicant, endocrine disruptor or human carcinogen; and [PL 2019, c. 277, §8 (NEW).]

C. The department determines that there is strong credible scientific evidence that the chemical meets one or more of the following additional criteria:

- (1) The chemical has been found through biomonitoring studies to be present in human blood, human breast milk, human urine or other human bodily tissues or fluids;
- (2) The chemical has been found through sampling and analysis to be present in a food or beverage product; or
- (3) The chemical has been added to or is present in a food package. [PL 2019, c. 277, §8 (NEW).]

[PL 2019, c. 277, §8 (NEW).]

**2. Revisions.** The commissioner shall review the list published pursuant to this section at least every 3 years and shall remove from the list any food contact chemical of high concern that has been designated as a priority food contact chemical pursuant to section 1743 or that no longer meets the criteria of subsection 1. The commissioner may add to the list additional food contact chemicals of high concern that meet the criteria of subsection 1, except that the list under this section may not at any one time include more than 10 food contact chemicals of high concern.

[PL 2019, c. 277, §8 (NEW).]

#### SECTION HISTORY

PL 2019, c. 277, §8 (NEW).

#### §1743. Designation of priority food contact chemicals

The commissioner may designate a food contact chemical of high concern as a priority food contact chemical if: [PL 2019, c. 277, §8 (NEW).]

**1. Chemical included on list of food contact chemicals of high concern.** The food contact chemical of high concern is included on the list of food contact chemicals of high concern published by the department in accordance with section 1742; and

[PL 2019, c. 277, §8 (NEW).]

**2. Additional criteria.** The commissioner finds that the food contact chemical of high concern:

A. Has been found through biomonitoring to be present in human blood, including umbilical cord blood, breast milk, urine or other human bodily tissues or fluids; [PL 2019, c. 277, §8 (NEW).]

B. Has been found through sampling and analysis to be present in a food or beverage product; or [PL 2019, c. 277, §8 (NEW).]

C. Is present in a food package. [PL 2019, c. 277, §8 (NEW).]

[PL 2019, c. 277, §8 (NEW).]

#### SECTION HISTORY

PL 2019, c. 277, §8 (NEW).

#### §1744. Disclosure of information on priority food contact chemicals

**1. Reporting of chemical use.** A person who is a manufacturer or distributor of a food package for sale in the State that contains a priority food contact chemical in any amount greater than a de minimis level shall notify the department in writing unless waived by the commissioner pursuant to this section. This written notice must be made within 180 days after a priority food contact chemical is designated. If the sale in the State of a food package by a manufacturer or distributor does not commence until after the 180-day reporting period ends, this written notice must be made within 30 days of sale of the food package in the State. This written notice must identify the food package, the number of units sold or distributed for sale in the State or nationally, the priority food contact chemical or chemicals contained in the food package, the amount of such chemicals in each unit of the food package and the intended purpose of the chemicals in the food package.

[PL 2019, c. 277, §8 (NEW).]

**2. Supplemental information.** The manufacturer or distributor of a food package that contains a priority food contact chemical shall provide the following additional information if requested by the department:

A. Information on the likelihood that the priority food contact chemical will be released from the food package to the environment during the food package's life cycle and the extent to which users of the food package are likely to be exposed to the chemical; [PL 2019, c. 277, §8 (NEW).]

B. Information on the extent to which the priority food contact chemical is present in the environment or human body; and [PL 2019, c. 277, §8 (NEW).]

C. An assessment of the availability, cost, feasibility and performance, including potential for harm to human health and the environment, of alternatives to the priority food contact chemical and the reason the chemical is used in the manufacture of the food package in lieu of identified alternatives. If an assessment acceptable to the department is not timely submitted, the department may assess a fee on the manufacturer or distributor to cover the costs to prepare an independent report on the availability of safer alternatives by a contractor of the department's choice. [PL 2019, c. 277, §8 (NEW).]

The manufacturer or distributor of a food package that contains a priority food contact chemical may provide additional information to the department regarding the potential for harm to human health and the environment from specific uses of the chemical.

[PL 2019, c. 277, §8 (NEW).]

**3. Waiver of reporting; fee; extension of deadline.** The commissioner may waive all or part of the notification requirement under subsection 1 for one or more specified uses of a priority food contact chemical if the commissioner determines that substantially equivalent information is already publicly available, that the information is not needed for the purposes of this chapter or that the specified use or uses are minor in volume. The department may assess a fee payable by the manufacturer or distributor upon submission of the notification to cover the department's reasonable costs in managing the information collected. The department may extend the deadline for submission of the information required under subsection 1 for one or more specified uses of a priority food contact chemical in a food package if it determines that more time is needed by the manufacturer or distributor to comply with the submission requirement or if the information is not needed at that time.

[PL 2019, c. 277, §8 (NEW).]

**4. Failure to provide notice.** A food package containing a priority food contact chemical may not be sold, offered for sale or distributed for sale in the State if the manufacturer or distributor has failed to provide the information required in this section by the date required in this section. The commissioner shall exempt a food package from this prohibition if, in the commissioner's judgment, the lack of availability of the food package could pose an unreasonable risk to public health, safety or welfare.

[PL 2019, c. 277, §8 (NEW).]

**5. Rulemaking to determine fees.** If the department assesses a fee pursuant to subsection 2, paragraph C or subsection 3, the department shall determine the appropriate fee through major substantive rulemaking, as defined in Title 5, chapter 375, subchapter 2-A.

[PL 2019, c. 277, §8 (NEW).]

## SECTION HISTORY

PL 2019, c. 277, §8 (NEW).

### §1745. Sales prohibition; rules; safer alternatives to priority food contact chemicals

**1. Authority.** The board may adopt rules prohibiting the manufacture, sale or distribution in the State of a food package containing a priority food contact chemical in an amount greater than a de minimis level if the board finds, after consideration of information filed under section 1744 and other relevant information submitted to or obtained by the board, that:

A. Distribution of the food package directly or indirectly exposes consumers to the priority food contact chemical; and [PL 2019, c. 277, §8 (NEW).]

B. One or more safer alternatives to the priority food contact chemical are available at a comparable cost. [PL 2019, c. 277, §8 (NEW).]

If there are several available safer alternatives to a priority food contact chemical, the board may prohibit the sale of a food package that does not contain the safer alternative that is least toxic to human health or least harmful to the environment.

A rule adopted pursuant to this subsection must specify the effective date of the prohibition, which may not be sooner than 2 years after notice of the proposed rule is published as required under Title 5, section 8053, subsection 5.

Rules adopted pursuant to this subsection are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.

[PL 2019, c. 277, §8 (NEW).]

**2. Alternatives assessment; presumptions.** For the purpose of determining whether a safer alternative is available under subsection 1, paragraph B, the board may, in the absence of persuasive evidence to the contrary:

A. Presume that an alternative is a safer alternative if the alternative does not satisfy the criteria under section 1742, subsection 1, paragraph A; [PL 2019, c. 277, §8 (NEW).]

B. Presume that a safer alternative is available if the sale of the food package containing the priority food contact chemical has been banned by another state within the United States based on the availability of a safer alternative; and [PL 2019, c. 277, §8 (NEW).]

C. Presume that a safer alternative is available if the alternative is sold in the United States. [PL 2019, c. 277, §8 (NEW).]

[PL 2019, c. 277, §8 (NEW).]

**3. Implementation.** No later than 180 days prior to the effective date of a prohibition adopted pursuant to subsection 1, the manufacturer or distributor of a food package that contains the priority food contact chemical and that is subject to the prohibition at the time of adoption shall file a compliance plan with the commissioner or seek a waiver under subsection 5. A compliance plan must:

A. Identify the food package that contains the priority food contact chemical; [PL 2019, c. 277, §8 (NEW).]

B. Specify whether compliance will be achieved by discontinuing the sale of the food package in the State or by substituting a safer alternative in the food package; and [PL 2019, c. 277, §8 (NEW).]

C. If compliance is achieved by substitution of a safer alternative in the food package, identify the safer alternative and the timetable for substitution. [PL 2019, c. 277, §8 (NEW).]

[PL 2019, c. 277, §8 (NEW).]

**4. Responsibility.** The manufacturer or distributor of a food package that contains a priority food contact chemical shall notify persons that offer the food package for sale or distribution in the State of the requirements of this chapter.

[PL 2019, c. 277, §8 (NEW).]

**5. Waiver for specific uses.** The manufacturer or distributor of a food package that contains a priority food contact chemical and that is subject to a prohibition adopted pursuant to subsection 1 may apply to the commissioner for a waiver for one or more specific uses of the priority food contact chemical. The waiver application must, at a minimum:

A. Identify the specific use or uses of the food package for which the waiver is sought; [PL 2019, c. 277, §8 (NEW).]

B. Identify the alternatives considered for substitution of the priority food contact chemical; [PL 2019, c. 277, §8 (NEW).]

C. Explain the basis for concluding that the use of an alternative is not feasible; and [PL 2019, c. 277, §8 (NEW).]

D. Identify the steps that have and will be taken to minimize the use of the priority food contact chemical. [PL 2019, c. 277, §8 (NEW).]

The commissioner may grant a waiver with or without conditions upon finding that there is a need for the food package in which the priority food contact chemical is used and there are no technically or economically feasible alternatives for the use of that chemical in the food package. A waiver may be granted for a term not to exceed 5 years and may be renewed for one or more additional 5-year terms upon written application demonstrating that technically or economically feasible alternatives remain unavailable. The commissioner shall deny or grant a waiver request within 60 days after receipt of a completed waiver application.

[PL 2019, c. 277, §8 (NEW).]

**6. Petitions.** If rulemaking to prohibit the sale of a food package that contains a priority food contact chemical is initiated by petition under Title 5, section 8055, the department shall consider the information submitted in support of the petition but is not obligated to conduct a search of other sources of information on the chemical or its uses. The petitioner bears the burden of demonstrating that the criteria under subsection 1 for adoption of rules are met.

[PL 2019, c. 277, §8 (NEW).]

#### SECTION HISTORY

PL 2019, c. 277, §8 (NEW).

#### §1746. Applicability

The provisions of this chapter do not apply to: [PL 2019, c. 277, §8 (NEW).]

**1. Industry.** A chemical used in or for industry or manufacturing, including chemicals processed or otherwise used in or for industrial or manufacturing processes;

[PL 2019, c. 277, §8 (NEW).]

**2. Retailers.** A retailer of a food package unless the retailer knowingly sells a food package that contains a priority food contact chemical after the effective date of its prohibition under section 1745 for which that retailer has received prior notification from a manufacturer, a distributor or the State;

[PL 2019, c. 277, §8 (NEW).]

**3. Contaminants.** A chemical that occurs in a food package only as a contaminant as long as the manufacturer had in place a manufacturing control program and exercised due diligence to minimize the presence of the contaminant in the food package; or

[PL 2019, c. 277, §8 (NEW).]

**4. Certain manufacturers.** A manufacturer of a food or beverage product that is contained in a food package or to which a food package is applied as long as that manufacturer has less than \$1,000,000,000 of total annual national sales of food and beverage products.

[PL 2019, c. 277, §8 (NEW).]

#### SECTION HISTORY

PL 2019, c. 277, §8 (NEW).

#### §1747. Implementation, administration and enforcement; rules; violations

The department shall implement, administer and enforce this chapter and shall adopt rules as necessary for the implementation, administration and enforcement of this chapter. [PL 2019, c. 277, §8 (NEW).]

**1. Rules.** Except as otherwise provided in this chapter, rules adopted by the department pursuant to this chapter are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A. [PL 2019, c. 277, §8 (NEW).]

**2. Violations.** A person that violates any provision of this chapter is subject to penalties in accordance with Title 38, section 349. [PL 2019, c. 277, §8 (NEW).]

**3. Certificate of compliance.** If there are grounds to suspect that a food package is being offered for sale in violation of this chapter, the department may request that the manufacturer or distributor of the food package provide a certificate of compliance with the applicable provisions of this chapter. Within 30 days of receipt of a request under this subsection, the manufacturer or distributor shall:

A. Provide the department with the certificate attesting that the food package does not contain the priority food contact chemical; or [PL 2019, c. 277, §8 (NEW).]

B. Notify persons who sell the food package in this State that the sale of the food package is prohibited and provide the department with a list of the names and addresses of those notified. [PL 2019, c. 277, §8 (NEW).]

[PL 2019, c. 277, §8 (NEW).]

**4. Regulatory efficiency.** The department may, in exercising its discretionary authority under this chapter, consider the extent to which a food contact chemical of high concern or a priority food contact chemical in a food package is adequately regulated by the Federal Government or an agency of this State to reduce or prevent the same public health threats that would be the basis for addressing the chemical under this chapter.

[PL 2019, c. 277, §8 (NEW).]

#### SECTION HISTORY

PL 2019, c. 277, §8 (NEW).

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