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## SENATE COMMITTEE ON APPROPRIATIONS

Senator Anthony Portantino, Chair  
2021 - 2022 Regular Session

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### **AB 478 (Ting) - Solid waste: thermoform plastic containers: postconsumer thermoform recycled plastic: commingled rates**

**Version:** July 5, 2021

**Urgency:** No

**Hearing Date:** August 23, 2021

**Policy Vote:** E.Q. 5 - 1, JUD. 8 - 2

**Mandate:** Yes

**Consultant:** Ashley Ames

**Bill Summary:** This bill would establish minimum recycled content requirements for thermoform plastic containers, as specified; redefine “commingled rate” for purposes of California’s Bottle Bill program; and require the Department of Resources Recycling and Recovery (CalRecycle) to exclude thermoform plastic for purposes of calculating the commingled rate for each type of plastic container.

#### **Fiscal Impact:**

- CalRecycle estimates one-time costs of \$539,000 (special fund) in 2022-23 to develop regulations and reporting mechanisms for plastic thermoform producers, as well as ongoing costs of \$660,000 annually beginning in 2024-25 for a position to assist with data analysis and corrective action plans. In 2025-26, additional resources would be required for auditing. CalRecycle notes that AB 478 as written does not provide enforcement authority to CalRecycle for the purpose of ensuring compliance with the requirements regarding the commingled rate. The inclusion of enforcement authority for the requirements regarding the commingled rate would increase the fiscal estimate associated with this bill.

**Background:** For over three decades, CalRecycle has been tasked with reducing disposal of municipal solid waste and promoting recycling in California through the IWMA. Under IWMA, the state has established a statewide 75 percent source reduction, recycling, and composting goal by 2020 and over the years the Legislature has enacted various laws relating to increasing the amount of waste that is diverted from landfills. According to CalRecycle’s State of Disposal and Recycling for Calendar Year 2019, published February 12, 2021, 42.2 million tons of material were disposed into landfills in 2019.

According to CalRecycle’s report, an estimated 28.9 million tons of waste were recycled or diverted in California in 2019, resulting in a statewide recycling rate of 37%, down from 40% in 2018, and a peak of 50% in 2014. Based on these trends, it is unlikely that the state will meet its diversion goals.

Thermoforms include a wide range of plastic packaging created by heating sheets of plastic and then formed into a specific shape in a mold. Common thermoforms include plastic “clamshell” trays used for take-out food, plastic egg cartons, and bakery trays. Most thermoforms are PET, but can be made from a wide range of plastic resins, including polypropylene (PP), and PS, including expanded polystyrene (EPS). In California, thermoforms have included relatively high quantities of recycled content; however, the source of its PET has been PET bottles, not thermoforms. While providing an important market for recycled bottle plastic, recycling PET bottles into thermoforms

means that the bottle is recycled once and then discarded (thermoforms usually end up in landfills). Under AB 793 (Ting), Chapter 115, Statutes of 2020, bottle manufacturers are required to include recycled content to ensure that bottles are recycled back into bottles.

In jurisdictions that accept thermoforms in curbside recycling, only thermoforms made out of PET are usually accepted. The majority of PET thermoforms collected are baled with other PET, primarily bottles, even though bottles and thermoforms generally cannot be recycled together. As a result, recyclers separate the thermoforms from the bottles and the thermoforms are discarded.

**Proposed Law:** This bill would:

1. Define the following relevant terms:
  - a. “Postconsumer thermoform recycled plastic” is plastic produced from the recovery, separation, collection, and reprocessing of a thermoform plastic container that would otherwise be disposed of or processed as waste after consumer use.
  - b. “Producer” is:
    - i. A person who manufactures thermoform plastic containers (thermoform container or container) in the state under that person’s own name or brand and who sells or offers for sale the containers in the state; or
    - ii. If there is no person who meets requirement (i), a person who imports the thermoform container as the owner or licensee of a trademark or brand under which the container is sold or distributed in the state; or
    - iii. If there is no person who meets requirement (i) or (ii), a person or company who offers for sale, sells, or distributes the thermoform container in the state.
    - iv. The term excludes a person or company that produces, harvests, and packages an agricultural commodity on the site where the commodity was grown or raised.
  - c. “Thermoform plastic container” is a plastic container such as a clamshell or other rigid, nonbottle packaging, formed from sheets of extruded resin and used to package items such as fresh produce, baked goods, nuts, and deli items. The term does not include:
    - i. A lid or seal made of a different type of plastic.
    - ii. Thermoform containers that are medical devices or products.
    - iii. A refillable container that would ordinarily be returned to the manufacturer to be refilled and resold.
    - iv. A plastic beverage container subject to the California Beverage Container Recycling and Litter Reduction Act.
    - v. A thermoform container of a resin type for which the total amount of the type sold in California is either (1) less than 1,000,000 pounds for a resin type other than expanded polystyrene, or less than 50,000 pounds of expanded polystyrene.
    - vi. A thermoform container that is designed to be, and eligible to be labeled as, compostable.

2. For purposes of the commingled rate under the California Beverage Container Recycling and Litter Reduction Act, redefine the “commingled rate” to mean the ratio of empty beverage containers to all other containers of the same material type and form, as defined by CalRecycle, and require CalRecycle, for purposes of calculating the comingled rate for each type of plastic container, to exclude thermoform plastic.
3. Require that the total of the thermoform containers, as defined, offered for sale, sold, distributed, or imported by a producer in this state meet the following average content requirements, averaged across the total number of containers:
  - a. Beginning January 1, 2024, no less than 10 percent postconsumer recycled plastic per year.
  - b. Beginning June 1, 2027, either:
    - i. No less than 20 percent postconsumer thermoform recycled plastic per year, if the recycling rate for each resin type of thermoform container is equal to or exceeds 50 percent for the year 2026; or
    - ii. No less than 25 percent postconsumer thermoform recycled plastic per year, if the recycling rate for each resin type of thermoform container is less than 50 percent for the year 2026.
  - c. Beginning June 1, 2030, either:
    - i. No less than 20 percent postconsumer thermoform recycled plastic per year, if the recycling rate for each resin type of thermoform container is equal to or greater than 75 percent for the year 2029; or
    - ii. No less than 30 percent postconsumer thermoform recycled plastic per year, if the recycling rate for each resin type of thermoform container is less than 75 percent for calendar year 2029.
4. Require CalRecycle to determine the recycling rate for each resin type of thermoform container for purposes of the requirements, and to consider reports submitted by recycling operations, information from producers, and any other relevant information received.
5. Provide that, beginning January 1, 2024, a producer that does not meet the minimum postconsumer thermoform plastic content shall be subject to a penalty, which will begin to be collected annually on March 1, 2025, unless a reduction has been approved. A producer assessed penalties may receive a payment plan, subject to approval, and CalRecycle may grant a one-time extension for payment if certain emergencies occur.
6. Require CalRecycle to assess the administrative penalty by calculating the amount in pounds in the aggregate of virgin and postconsumer thermoform recycled plastic used by the producer to produce thermoform plastic containers sold or offered for sale in the state; the penalty shall be assessed by calculating the difference between the content of postconsumer recycled plastic the producer should have used and the amount actually used, and charging either \$.20 or \$4.00 per pound of the difference, depending on the type of plastic.
7. Authorize CalRecycle to conduct audits and investigations and take enforcement actions as necessary for compliance. CalRecycle must keep confidential all

business trade secrets and proprietary information about manufacturing processes and equipment gathered during the course of an audit or investigation, and business trade secrets and proprietary information that meet the definition in Section 3426.1 of the Civil Code are exempt from disclosure under the CPRA.

8. Permit CalRecycle to consider granting a reduction of the administrative penalties provided above based on the presence of anomalous market conditions, disruption in or lack of supply of recycled plastic due to unforeseen circumstances or event, or if the recycling rate is 60 percent or higher and there is a lack of supply due to purchases from other industries.
  - a. In order to receive a reduction, a producer must submit to CalRecycle a corrective action plan explaining its failure to satisfy the postconsumer recycled plastic requirements and the steps the producer will take to meet the requirements next year.
  - b. A corrective action plan approved by CalRecycle will include a compliance deadline and any additional penalties that may be imposed if the producer fails to comply.
9. Create the Thermoform Recycling Enhancement Penalty Account in the State Treasury and provides that the penalties described above shall be deposited therein.
10. Require producers to annually report to CalRecycle the amount in pounds and by resin type of virgin plastic and postconsumer thermoform recycled plastic used to manufacture the thermoform plastic containers sold or offered for sale in the state in the previous calendar; and requires CalRecycle to post the collected information on its website.
11. Require an importer or manufacturer of a thermoform plastic container that first sells the container in or into the state, and that exceeds specified annual sales volumes, to register with, and pay a registration fee to, CalRecycle, and file annual reports relating to the volume of containers it sells into the state and the amount of PCR contained in those containers.
12. Require an entity that purchases at least a specified volume of thermoform plastic containers in the state, to satisfy the above-described PCR content requirements or provide documentation establishing that the portion of the containers not exported out of the state satisfied the above-described PCR content requirements; and maintain records of purchases as required by CalRecycle. If an entity exports a specified volume or more from the state on an annual basis, it must report to CalRecycle the total pounds of exported plastic by resin type.
13. Provide that the following acts done pursuant to the thermoform PCR requirements do not violate the Cartwright Act or the Unfair Practices Act:
  - a. Acts taken solely to increase the collection, processing, and recycling of scrap plastic materials by a producer that affects scrap values, the quantities of materials being recycled, or the method of invoicing the sale of thermoform plastic containers.

- b. The formation of a nonprofit organization that may include two or more producers and that establishes specifications for different grades or classifications of thermoform plastics, which may affect the scrap value of those grades or classifications, the quantity or quality of materials being recycled, or the method of invoicing the sale of thermoform plastic containers.
14. Provide that the exemption to the Cartwright and Unfair Practices Acts set forth in item 11) above does not apply to any agreement between two or more producers establishing or affecting the price of plastic materials, including, but not limited to, virgin plastic, postconsumer recycled plastic, and thermoform plastic products, or the output or production of thermoform plastic products, or any agreement restricting the geographic area or customers to which thermoform plastic products will be sold.

**Related Legislation:**

AB 1276 (Carrillo, 2021) would expand and revise the existing prohibition on distributing single-use plastic straws, except upon request, to apply to all single-use foodware accessories and standard condiments. This bill is pending before this committee.

SB 54 (Allen, 2021) would prohibit producers of single-use, disposable packaging or single-use, disposable food service ware products from offering for sale, selling, distributing, or importing in or into the state such packaging or products that are manufactured on or after January 1, 2032, unless they are recyclable or compostable. SB 54 was placed on the Senate inactive file.

SB 38 (Wieckowski, 2021) would require distributors of beverage containers in the state to form a beverage container stewardship organization, which would be required to develop and submit to the department a plan, annual report, and budget for the recovery and recycling of empty beverage containers in the state similar to that described in the Used Mattress Recovery and Recycling Act. SB 38 is pending before the Assembly Committee on Natural Resources.

AB 842 (Cristina Garcia, 2021) would enact the California Circular Economy and Plastic Pollution Reduction Act, which establishes a comprehensive regulatory scheme for producers, retailers, and wholesalers of single-use packaging, as defined, and single-use products, as defined, made partially or entirely of plastic, to be administered by CalRecycle. AB 842 is pending before the Assembly Natural Resources Committee.

AB 881 (Lorena Gonzalez, 2021) would provide that, for purposes of regional requirements to divert a certain percentage of recyclable material from disposal, exporting the material out of the country, as specified, constitutes disposal. AB 881 is on the Senate floor.

AB 793 (Ting, Ch. 115, Stats. 2020) establishes a timeframe for minimum recycled content for plastic bottle beverage manufacturers, provides an off-ramp for CalRecycle to determine whether or not the minimum content requirements are appropriate given the market conditions of recycled plastics, and sets flexible penalties for manufactures that do not meet the requirements.

AB 792 (Ting, 2019) established similar recycling-related requirements as AB 793 (Ting, Ch. 115, Stats. 2020) but on a more aggressive timeline. AB 792 was vetoed by Governor Gavin Newsom, who stated in his veto message that late-added amendments to the bill would result in a costly, burdensome process that undermines the worthy intent of the legislation.

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