

6 NYCRR Part 353

Expanded Polystyrene Foam Container and Polystyrene Loose Fill Packaging Reduction REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS

INTRODUCTION

A new Title 30 of Article 27 of the Environmental Conservation Law (ECL), “Expanded polystyrene foam container and polystyrene loose fill packaging ban” established a ban on disposable food service containers that contain expanded polystyrene foam and polystyrene loose fill packaging, which goes into effect on January 1, 2022. This rulemaking is intended to implement the provisions of the “Expanded polystyrene foam container and polystyrene loose fill packaging ban” by defining statutory terms such as “comparable costs” and “undue financial hardship,” and setting forth the details of the financial hardship waiver application process, which are necessary to ensure the bans on expanded polystyrene foam containers and expanded polystyrene loose fill packaging are implemented in a consistent, efficient and effective manner. The regulations will also help ensure that regulated entities clearly understand their compliance obligations and the process for obtaining a financial hardship waiver.

1. EFFECT OF RULE

Part 353 implements Title 30 of ECL Article 27 of the ECL. The implementation of the proposed regulations is not expected to have an adverse effect on small businesses or local governments, however the enactment of the law itself may affect some small businesses.

Although the regulations will not add direct costs to the regulated parties, many of the entities affected by Title 30 may be small businesses.

Based on the categories of small businesses in the New York Small Business Economic Profile for 2018 by the U.S. Small Business Administration, Office of Advocacy, (<https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-NY.pdf> (last visited May 3, 2021)), which provides data regarding small businesses in New York State, the categories which could potentially be impacted by the law include retail trade, accommodation and food services, healthcare and social assistance, wholesale trade, manufacturing, and educational services. These categories make up 620,380 New York State small businesses.

The number of these small businesses that could be affected by the law and regulations, because they currently manufacture, sell or distribute expanded polystyrene foam products that will be banned under the law, is unknown. However, the number of small business affected is very likely less than the total number of businesses documented in this report due to a few factors. For instance, many municipalities in New York already have local laws banning expanded polystyrene foam products, including the counties of Albany, Dutchess, Nassau, Putnam, Suffolk, Ulster, and Westchester, as well as New York City and the City of Oswego. Consequently, about sixty-six percent (66%) of the population in this state is already subject to a local law banning expanded polystyrene foam products. There are also businesses that have voluntarily stopped using expanded polystyrene foam containers and packaging. Once the expanded polystyrene foam ban goes into effect on January 1, 2022, the law and regulations will apply equally to local governments, except for those which currently have a ban in place, as indicated in the law. The law does not apply in New York City because Title 30 does not apply in a city with a population of one million or more that has a local law in place restricting the sale,

offer for sale, or distribution of expanded polystyrene containers and polystyrene loose fill packaging. In addition, any local law, ordinance or regulation of any county will not be preempted if such local law provides environmental protection equal to or greater than Title 30 or the proposed Part 353 regulations, and the county files a written declaration of its intent to administer and enforce such county law with the Department.

Although expanded polystyrene foam is often chosen for its low cost, insulating, and cushioning properties, there are many cost competitive alternatives to foam containers and packaging. Materials such as rigid plastic, paper, aluminum, plant fibers and starches, bioplastics, and reusable items are readily available from many retail or online stores. Some covered food service providers and stores may have increased costs associated with alternative packaging, but these costs will vary depending on what alternative is chosen and the type of container or packaging being replaced. The regulations should have little to no effect on regulated parties who do not currently sell, offer for sale, or distribute banned items. As the ban goes into effect and more entities purchase alternative packaging, this may drive down the cost of alternatives. There are some alternatives that are similar in cost, while others are more costly. Though some materials may show a cost increase, the costs for commonly available alternatives do not appear to be substantial. The law and proposed regulations do not require specific alternatives to be used; the alternatives just cannot contain expanded polystyrene foam. Contamination in the recycling stream caused by expanded polystyrene foam containers and loose fill packaging could decrease, potentially reducing costs associated with contaminated recyclables and increasing the value and marketability of recyclables.

To the extent that stores and manufacturers required to comply with Title 30 are small businesses, those stores and manufacturers will see a decline in sales of banned products within

the state. Stores and manufactures that are small businesses that sell alternative containers and packaging could realize an increase in sales.

There are no specific requirements for local governments, unless a county chooses to file a written declaration with the Department, or a local government agency applies for a financial hardship waiver; however, neither of these actions are required.

2. COMPLIANCE REQUIREMENTS

With respect to the requirements related to Title 30, there will be a change in current business practices for covered food service providers, stores and manufacturers still selling, offering for sale or distributing banned products, as they must comply with the ban by January 1, 2022. The law and regulations do not require specific reporting or recordkeeping, except to the extent that covered food service providers and facilities who choose to apply for a financial hardship waiver will be required to complete an application for a waiver and if the waiver is approved, the approval must be retained and available for inspection at the facility or covered food service provider.

There are no specific compliance requirements for local governments related to Title 30 or proposed Part 353 unless a county does not want its local law to be preempted and files a written declaration with the Department or a local agency applies for a financial hardship waiver. These actions may be pursued but are not required.

3. PROFESSIONAL SERVICES

There are no new professional services anticipated to be required for small businesses or local governments.

4. COMPLIANCE COSTS

As noted above, while the regulations will not add additional direct costs to small businesses or local governments, the enactment of the law itself may impact costs for regulated entities. Many of the entities affected may be small businesses.

With respect to the costs related to Title 30 for covered food service providers and stores that sell, offer for sale or distribute expanded polystyrene foam containers or loose fill packaging, there are a variety of alternative containers and packaging, many of which are cost-competitive and readily available. Some covered food service providers and stores may have increased costs associated with alternative packaging, but these costs will vary depending on what alternative is chosen. For example, switching to reusable containers can save money by reducing disposable food service ware costs, preventing litter, and lowering waste collection and disposal costs. The regulations should have little to no effect on regulated parties who do not currently sell, offer for sale, or distribute products that will be banned. As the ban goes into effect and more entities purchase alternatives, this may drive down the cost of alternatives. Some alternatives are similar in cost and some will cost more. In a cost analysis performed in Maryland, (See <https://takomaparkmd.gov/government/police/neighborhood-services/polystyrene-ban/> (last visited May 3, 2021); <https://documents-takomapark.s3.amazonaws.com/public-works/polystyrene-ban/PW-20150624-cost-for-business-fact-sheet.pdf>) it was estimated that alternatives to expanded polystyrene foam will cost anywhere from \$0.04 cents to \$0.10 more per unit than expanded polystyrene foam items, however costs vary. Any increase in cost would differ based on the quantity of expanded polystyrene foam containers or loose fill packaging a business is selling or distributing. To the extent that stores and manufacturers required to

comply with Title 30 are small businesses, those stores and manufacturers will see a decline in sales of banned items within New York State. Stores and manufactures that are small businesses that sell alternative containers and packaging could realize an increase in sales.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

The requirements related to Title 30 prohibiting the sale, offer for sale or distribution of certain expanded polystyrene foam containers and loose fill packaging are not anticipated to be a technological challenge since many alternative containers and packaging already exist today. With respect to economic impacts, as stated in the Compliance Costs section, some covered food service providers and stores may have increased costs associated with alternative packaging, but costs will vary depending on what alternative is chosen and the type of container or packaging being replaced. The regulations should have little to no effect on regulated parties who do not currently sell or distribute expanded polystyrene foam products that will be banned under the law. There are no economic or technological impacts anticipated for local governments related to the expanded polystyrene foam container and loose fill packaging ban.

6. MINIMIZING ADVERSE IMPACTS

Any adverse economic impacts or additional costs associated with compliance with the implementation of Title 30 are the result of the Legislature's enactment of the ban on expanded polystyrene foam container and polystyrene loose fill packaging ban. Part 353 will not result in any additional direct costs or additional adverse impacts to small businesses or local governments that will not already occur as a result of the law.

Part 353 will implement Title 30's financial hardship waiver provisions, which will help to minimize adverse impacts. Covered food service providers that meet certain criteria (have an annual gross income under \$500,000 per location, do not operate 10 or more locations in New York State, and are not operated according to a franchise agreement), as well as facilities operated by a not-for-profit corporation or by a federal, state, or local government agency that provide food and meals to food insecure individuals, may request from the Department a renewable 12-month hardship waiver of the requirements of Title 30. Hardship waivers may be granted for one or more disposable food service containers to a covered food service provider that demonstrates there is no alternative product of comparable cost that is not composed of expanded polystyrene foam and that the purchase or use of an alternative product would create an undue financial hardship.

The Department intends to undertake efforts to minimize potential impacts by engaging stakeholders through outreach, education, and guidance documents. Small businesses that are manufacturers of alternative containers and packaging could see an increase in sales and employment.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The Department will hold meetings with interested stakeholders, including groups representing small businesses, as well as local government to explain the requirements of the law and collect feedback. The Department will be evaluating the feedback for input into the proposed rulemaking. The proposed regulations are intended to merely implement the requirements of the law.

8. CURE PERIOD OR OTHER OPPORTUNITY FOR AMELIORATIVE ACTION

This rule does not establish or modify a violation or penalties associated with a violation; the law establishes the penalties for violations in Section 71-2730 of Article 71 of the ECL. While the law went into effect immediately, the ban on expanded polystyrene foam containers and polystyrene loose fill packaging in Article 27, Title 30 will not take effect until January 1, 2022, as required by the law. The regulations will be in effect 30 days after filing with the Department of State.

9. INITIAL REVIEW OF RULE

The initial review of this rule shall occur no later than in the third calendar year after the year in which the rule is adopted.