Citizen Petition to Initiate Rulemaking
To Require Safer Alternatives to Bisphenol A (BPA) in
Food and Beverage Packaging for Young Children

Exhibit 2: Public Law 2007, Chapter 643 (H.P. 1432 - L.D. 2048) "An Act To Protect Children's Health and the Environment from Toxic Chemicals in Toys and Children's Products"

PLEASE NOTE: The Office of the Revisor of Statutes ***cannot*** perform research, provide legal advice, or interpret Maine law. For legal assistance, please contact a qualified attorney.

Public Law

123rd Legislature

Second Regular Session

Chapter 643

H.P. 1432 - L.D. 2048

An Act To Protect Children's Health and the Environment from Toxic Chemicals in Toys and Children's Products

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 38 MRSA §1609, sub-§10, as enacted by PL 2007, c. 296, §1, is repealed.

Sec. 2. 38 MRSA c. 16-D is enacted to read:

CHAPTER 16-D

TOXIC CHEMICALS IN CHILDREN'S PRODUCTS

§ 1691. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. **Alternative.** "Alternative" means a substitute process, product, material, chemical, strategy or combination of these that serves a functionally equivalent purpose to a chemical in a children's product.

2. **Chemical.** "Chemical" means a substance with a distinct molecular composition or a group of structurally related substances and includes the breakdown products of the substance or substances that form through decomposition, degradation or metabolism.

3. **Chemical of high concern.** "Chemical of high concern" means a chemical identified by the department pursuant to section 1693.

4. **Chemical of low concern.** "Chemical of low concern" means a chemical for which adequate toxicity and environmental data are available to determine that it is not a chemical of high concern, a chemical of moderate concern or a chemical of unknown concern.

5. **Chemical of moderate concern.** "Chemical of moderate concern" means a chemical identified by an authoritative governmental entity on the basis of credible scientific evidence as being suspected of causing an adverse health or environmental effect listed in section 1693, subsection 1.

6. Chemical of unknown concern. "Chemical of unknown concern" means a chemical for which insufficient data are available to classify it as a chemical of high concern, a chemical of moderate concern or a chemical of low concern.

7. Children's product. "Children's product" means a consumer product intended for use by children, such as baby products, toys, car seats, personal care products and clothing, and any consumer product containing a chemical of high concern that when used or disposed of will likely result in a child's or a fetus's being exposed to that chemical.

8. Consumer product. "Consumer product" means any item sold for residential or commercial use, including any component parts and packaging. "Consumer product" does not include a food or beverage or an additive to a food or beverage, a tobacco product or paper or forest products or a pesticide regulated by the federal Environmental Protection Agency. "Consumer product" also does not include a drug or biologic regulated by the federal Food and Drug Administration or the packaging of a drug or biologic regulated by the federal Food and Drug Administration if the packaging is regulated by the federal Food and Drug Administration.

9. Distributor. "Distributor" means a person who sells consumer products to retail establishments on a wholesale basis.

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

11. Priority chemical. "Priority chemical" means a chemical identified as such by the commissioner pursuant to section 1694, subsection 1.

12. Safer alternative. "Safer alternative" means an alternative that, when compared to a priority chemical that it could replace, would reduce the potential for harm to human health or the environment or that has not been shown to pose the same or greater potential for harm to human health or the environment as that priority chemical.

§ 1692. Declaration of policy

It is the policy of the State, consistent with its duty to protect the health, safety and welfare of its citizens, to reduce exposure of children and other vulnerable populations to chemicals of high concern by substituting safer alternatives when feasible. By enactment of this chapter, the Legislature confers upon the department the regulatory power to collect information on chemical use and prohibit the sale of children's products containing priority chemicals when safer alternatives are available. The policy represented in this chapter is in furtherance of the toxics use reduction policies under chapter 26.

§ 1693. Identification of chemicals of high concern

1. Criteria. By January 1, 2010, the department, in concurrence with the Department of Health and Human Services, Maine Center for Disease Control and Prevention, shall publish a list of chemicals of high concern. A chemical may be included on the list only if it has been identified by an authoritative governmental entity on the basis of credible scientific evidence as being known as:

A. A carcinogen, a reproductive or developmental toxicant or an endocrine disruptor;

B. Persistent, bioaccumulative and toxic; or

C. Very persistent and very bioaccumulative.

2. Revisions. The department may periodically review and revise the list of chemicals of high concern. The department may add chemicals to the list if, in the judgment of the Department of Health and Human Services, Maine Center for Disease Control and Prevention, the chemical meets one or more of the criteria in subsection 1. The department may remove a chemical from the list of chemicals of high concern based on evidence that the chemical is not present in a children's product or otherwise would not be subject to the requirements of this chapter.

§ 1694. Identification of priority chemicals

1. Designation. The commissioner may designate a chemical of high concern as a priority chemical if the commissioner finds, in concurrence with the Department of Health and Human Services, Maine Center for Disease Control and Prevention:

A. The chemical has been found through biomonitoring to be present in human blood, including umbilical cord blood, breast milk, urine or other bodily tissues or fluids;

B. The chemical has been found through sampling and analysis to be present in household dust, indoor air, drinking water or elsewhere in the home environment;

C. The chemical has been found through monitoring to be present in fish, wildlife or the natural environment;

D. The chemical is present in a consumer product used or present in the home;

E. The chemical has been identified as a high production volume chemical by the federal Environmental Protection Agency; or

F. The sale or use of the chemical or a product containing the chemical has been banned in another state within the United States.

The commissioner shall designate at least 2 priority chemicals by January 1, 2011.

2. Updates. The commissioner shall review the list of chemicals of high concern at least every 3 years and may designate additional priority chemicals if the commissioner finds that the chemicals meet one of the criteria listed in subsection 1.

The commissioner shall adopt rules to implement the provisions of this section. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

§ 1695. Disclosure of information on priority chemicals

1. **Reporting of chemical use.** Not later than 180 days after a priority chemical is identified pursuant to section 1694, a person who is a manufacturer or distributor of a children's product for sale in the State that contains a priority chemical shall notify the department in writing unless waived by the commissioner pursuant to this section or exempt from this chapter pursuant to section 1697. This written notice must identify the children's product, the number of units sold or distributed for sale in the State or nationally, the priority chemical or chemicals contained in the children's product, the amount of such chemicals in each unit of children's product and the intended purpose of the chemicals in the children's product.

2. **Supplemental information.** The manufacturer or distributor of a children's product that contains a priority chemical shall provide the following additional information if requested by the department:

A. Information on the likelihood that the chemical will be released from the children's product to the environment during the children's product's life cycle and the extent to which users of the children's product are likely to be exposed to the chemical;

B. Information on the extent to which the chemical is present in the environment or human body; and

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 chemical and the reason the priority chemical is used in the manufacture of the children's product 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.

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

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 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 chemical in a children's product 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.

4. **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.

§ 1696. Sales prohibition; rules; safer alternatives to priority chemicals

1. Authority. The board may adopt rules prohibiting the manufacture, sale or distribution in the State of a children's product containing a priority chemical if the board finds, after consideration of information filed under section 1695 and other relevant information submitted to or obtained by the board, that:

A. Distribution of the children's product directly or indirectly exposes children and vulnerable populations to the priority chemical; and

B. One or more safer alternatives to the priority chemical are available at a comparable cost.

If there are several available safer alternatives to a priority chemical, the board may prohibit the sale of children's products that do not contain the safer alternative that is least toxic to human health or least harmful to the environment.

A rule established pursuant to this subsection must specify the effective date of the prohibition, which may not be sooner than 12 months 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.

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 is not a chemical of high concern;

B. Presume that a safer alternative is available if the sale of the children's product containing the priority chemical has been banned by another state within the United States;

C. Presume that a safer alternative is available if the children's product containing the priority chemical is an item of apparel or a novelty; and

D. Presume that a safer alternative is available if the alternative is sold in the United States.

3. Implementation. No later than 180 days prior to the effective date of a prohibition adopted under subsection 1, the manufacturer or distributor of a children's product that contains the priority 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 children's product that contains the priority chemical;

B. Specify whether compliance will be achieved by discontinuing the sale of the children's product in the State or by substituting a safer alternative in the product; and

C. If compliance is achieved by substitution of a safer alternative in the product, identify the safer alternative and the timetable for substitution.

4. **Responsibility.** A manufacturer or distributor of a children's product containing a priority chemical shall notify persons that offer the product for sale or distribution in the State of the requirements of this chapter.

5. **Waiver for specific uses.** The manufacturer or distributor of a children's product that contains a priority 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 chemical. The waiver application must, at a minimum:

A. Identify the specific children's product use or uses for which the waiver is sought;

B. Identify the alternatives considered for substitution of the priority chemical;

C. Explain the basis for concluding that the use of an alternative is not feasible; and

D. Identify the steps that have and will be taken to minimize the use of the priority chemical.

The commissioner may grant a waiver with or without conditions upon finding that there is a need for the children's product in which the priority chemical is used and there are no technically or economically feasible alternatives for the use of the priority chemical in the children's product. Waivers 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 waiver requests within 60 days after receipt of a completed waiver application.

6. **Petitions.** If rulemaking to prohibit the sale of a children's product containing a priority 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.

§ 1697. Applicability

1. **Used products.** This chapter does not apply to chemicals in used products.

2. **Industry.** The requirements of this chapter do not apply to priority chemicals used in or for industry or manufacturing, including chemicals processed or otherwise used in or for industrial or manufacturing processes.

3. **Transportation.** The requirements of this chapter do not apply to motor vehicles as defined in Title 29-A, section 101, subsection 42 or watercraft as defined in Title 12, section 13001, subsection 28 or their component parts, except that the use of priority chemicals in detachable car seats is not exempt.

4. **Combustion.** The requirements of this chapter do not apply to priority chemicals generated solely as combustion by-products or that are present in combustible fuels.

5. **Retailers.** A retailer is exempt from the requirements of this chapter unless that retailer knowingly sells a children's product containing a priority chemical after the effective date of its prohibition for which that retailer has received prior notification from a manufacturer, distributor or the State.

6. **Mercury-added products.** The commissioner may designate mercury or a mercury compound as a priority chemical for the purpose of adopting rules under section 1696 to prohibit the manufacture, sale or distribution of a mercury-added product that is not regulated under section 1661-C or 1667 prior to the effective date of this section. The disclosure requirements of section 1695 do not apply to the manufacturer or distributor of a children's product that contains the designated mercury or mercury compound if the manufacturer has complied with the notification requirement under section 1661-A.

7. **Telecommunications.** The disclosure requirements of section 1695 do not apply to a service provider whose name appears on a telecommunications device unless the service provider is the actual manufacturer of the device. As used in this subsection, "service provider" has the meaning set out in Title 35-A, section 7107, subsection 1, paragraph C.

8. **Food and beverage packaging.** A container or packaging for a food or beverage product is exempt from the requirements of this chapter, unless that product is intentionally marketed or intended for the use of children under 3 years of age.

§ 1698. Interstate clearinghouse to promote safer chemicals

The department is authorized to participate in an interstate clearinghouse to promote safer chemicals in consumer products in cooperation with other states and governmental entities. The department may cooperate with the interstate clearinghouse to classify existing chemicals in commerce into one of 4 categories: chemicals of high concern, chemicals of moderate concern, chemicals of unknown concern and chemicals of low concern.

The department may also cooperate with the interstate clearinghouse in order to organize and manage available data on chemicals, including information on uses, hazards and environmental concerns; to produce and inventory information on safer alternatives to specific uses of chemicals of concern and on model policies and programs; to provide technical assistance to businesses and consumers related to safer chemicals; and to undertake other activities in support of state programs to promote safer chemicals.

§ 1699. Education and assistance

As resources allow, the department shall develop a program to educate and assist consumers and retailers in identifying children's products that may contain priority chemicals.

§ 1699-A. Enforcement and implementation

1. **Failure to provide notice.** A children's product containing a priority chemical may not be sold, offered for sale or distributed for sale in this State if the manufacturer or distributor has failed to provide information required under section 1695 by the date required in that section. The commissioner shall exempt a children's product from this prohibition if, in the commissioner's judgment, the lack of availability of the children's product could pose an unreasonable risk to public health, safety or welfare.

2. Certificate of compliance. If there are grounds to suspect that a children's product is being offered for sale in violation of this chapter, the department may request the manufacturer or distributor of the product to provide a certificate of compliance with the provisions of this chapter. Within 10 days of receipt of a request under this subsection, the manufacturer or distributor shall:

A. Provide the department with the certificate attesting that the children's product does not contain the priority chemical; or

B. Notify persons who sell the product in this State that the sale of the children's product is prohibited and provide the department with a list of the names and addresses of those notified.

§ 1699-B. Donations to the State

The department, through the Governor, may accept donations, grants and other funds to carry out the purposes of this chapter.

Sec. 3. Initial list of chemicals of high concern. By January 1, 2010, the Department of Environmental Protection, in consultation with the Department of Health and Human Services, Maine Center for Disease Control and Prevention, shall identify an initial list of chemicals of high concern in accordance with the Maine Revised Statutes, Title 38, section 1693. In developing the list, the departments may consider:

1. Chemicals identified as "Group 1 carcinogens" or "Group 2A carcinogens" by the World Health Organization, International Agency for Research on Cancer;

2. Chemicals identified as "known to be a human carcinogen" and "reasonably anticipated to be a human carcinogen" by the Secretary of the United States Department of Health and Human Services pursuant to the Public Health Service Act, 42 United States Code, Section 241(b)(4), as amended;

3. Chemicals identified as "Group A carcinogens" or "Group B carcinogens" by the United States Environmental Protection Agency;

4. Chemicals identified as reproductive or developmental toxicants by:

A. The United States Department of Health and Human Services, National Toxicology Program, Center for the Evaluation of Risks to Human Reproduction; and

B. The California Environmental Protection Agency, Office of Environmental Health Hazard Assessment pursuant to the California Health and Safety Code, Safe Drinking Water and Toxic Enforcement Act of 1986, Chapter 6.6, Section 25249.8;

5. Chemicals identified as known or likely endocrine disruptors through screening or testing conducted in accordance with protocols developed by the United States Environmental Protection Agency pursuant to the Federal Food, Drug and Cosmetic Act, 21 United States Code, 346a(p), as amended by the federal Food Quality Protection Act (Public Law 104-170) or the federal Safe Drinking Water Act, 42 United States Code, Section 300j-17;

6. Chemicals listed on the basis of endocrine-disrupting properties in Annex XIV, List of Substances Subject to Authorisation, Regulation (EC) No 1907/2006 of the European Parliament concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals;

7. Persistent, bioaccumulative and toxic chemicals identified by:

A. The State of Washington Department of Ecology in Washington Administrative Code, Chapter 173-333; or

B. The United States Environmental Protection Agency in 40 Code of Federal Regulations, Part 372; and

8. A very persistent, very bioaccumulative chemical listed in Annex XIV, List of Substances Subject to Authorisation, Regulation (EC) No 1907/2006 of the European Parliament concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals.

Sec. 4. Stakeholder group convened. Prior to designation of a priority chemical pursuant to the Maine Revised Statutes, Title 38, section 1694, subsection 1, the Commissioner of Environmental Protection shall convene a stakeholder group that includes representatives of consumer product manufacturers, chemical manufacturers, retailers, trade associations, nonprofit health organizations, business and environmental groups and other affected parties and shall invite the participation of independent experts with relevant experience with chemicals. The commissioner shall seek recommendations from the group on:

1. Development of a protocol to be utilized for the designation of priority chemicals;

2. The responsibilities, activities and proposed rules necessary to implement Title 38, chapter 16-D; and

3. Stakeholder issues of concern.