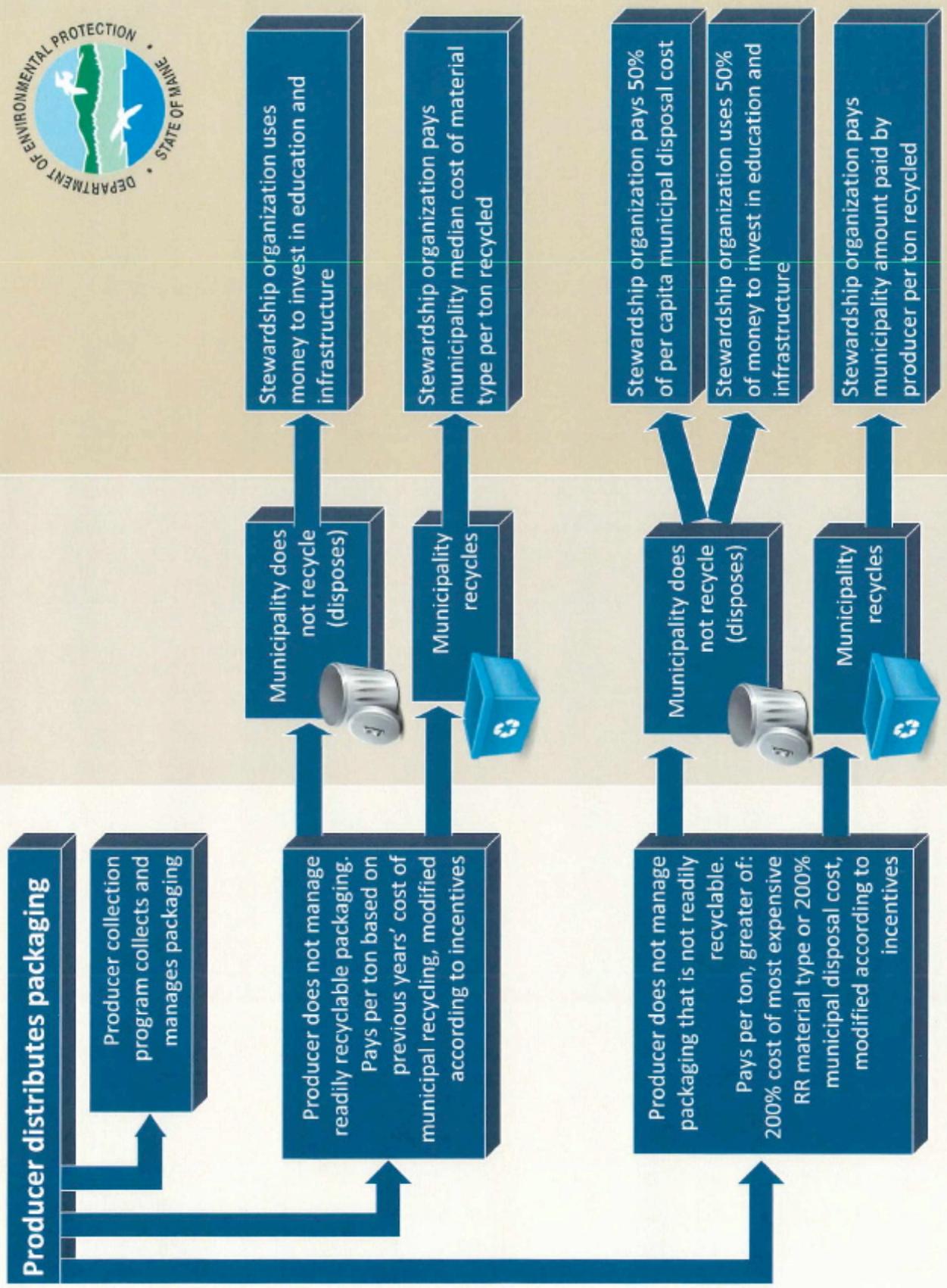


An Act to Support and Increase the Recycling of Packaging

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An Act to Support and Increase the Recycling of Packaging
(Department of Environmental Protection draft, January 8, 2020)

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

Sec. 1. 38 MRSA §1777 is enacted to read:

§1777. Stewardship program for packaging

- 1. Findings; purpose.**
- 2. Program established.** A stewardship program for packaging distributed in the State of Maine (“program”) is established in accordance with this section

Under this section, producers of packaging pay into a packaging stewardship fund based on the weight of packaging material they distribute in the State and report to a stewardship organization to facilitate these payments. Producers can offset part of or all this responsibility by recycling packaging of the same material type for which they are responsible. Producers can lessen this responsibility by distributing less packaging and by redesigning packaging to make it more valuable in the recycling system or conform with other stewardship program incentives.

The department chooses a stewardship organization to manage these payments and their distribution through a competitive bidding process. After selecting the organization, the department approves or rejects the stewardship organization’s detailed plan for the management of payments and oversees the stewardship organization’s work. The department also enforces this section by banning the sale of products of those producers that fail to participate.

The stewardship organization uses producer payments to reimburse municipal recycling and solid waste management programs, cover its program related administrative costs and those of the department, and invest in education and infrastructure to improve recycling outcomes in Maine. The stewardship organization creates and receives approval for a packaging stewardship plan that guides administration of these payments.

Municipalities will continue to be responsible for their recycling and solid waste management programs. Those that choose to participate in the packaging stewardship program and provide the information required by the stewardship organization, will receive payment from that organization to help offset their costs of recycling and disposing of packaging. Payments for recycling will be based on median costs of similar municipalities while those for disposal will be per capita, thereby providing incentive to increase the efficiency and effectiveness of recycling programs.

- 3. Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

- A. “Activities based costing” is a method of distributing the cost of a process among its component streams according to the share of the total cost assumed as a result of the processing of that stream.
- B. “Brand” has the same meaning as in 38 MRS. §1771.
- C. “Commissioner” means the commissioner of the Department of Environmental Protection.
- D. “Department” means the Maine Department of Environmental Protection.
- E. “Franchise” means a business that licenses its proprietary knowledge, processes and trademarks to other parties, allowing those parties to sell a product or provide a service under the business’s name.
- F. “Material type” means:
 - 1) A discrete packaging material, or
 - 2) A category consisting of packaging materials that have similar management needs and values.
- G. “Municipality” means a single municipality as defined in 30-A M.R.S. §7201 or a regional association as defined in 38 MRS §1303-C (24). Plantations, tribal nations, and county governments are considered municipalities for the purposes of this section.
- H. “Packaging” means a material used for containment, protection, handling, delivery, and presentation of products that may leave a point of sale with the product’s ultimate consumer. Packaging does not include material subject to 38 M.R.S. §3101-3118 or packaging that can be expected to last at least 5 years and is used for the long-term protection or storage of a product.
- I. “Packaging collection program” means a program for the management of packaging operated by an individual producer or a group of producers and approved by the department.
- J. “Packaging stewardship fund” means the fund, managed by the approved packaging stewardship organization, into which producers make payments and from which the stewardship organization reimburses municipalities, pays for its and the department’s administrative costs, and invests in recycling education and infrastructure.
- K. “Participating municipality” means a municipality that provides the information required by subsection (7)(B) and is, therefore, eligible for reimbursement payments.
- L. “Producer” has the same meaning as in 38 M.R.S. §1771.

- M. “Readily-recyclable” refers to packaging that can be sorted by entities processing recyclables from Maine and for which, during the previous two calendar years, there was a consistent market, meaning recyclers were willing to pay for fully sorted material at the door of their facilities in quantities equal to or in excess of material supply. This does not include material types that recyclers accept in low quantities or sort out of material during additional processing steps: if material recyclers do not desire a full bale of a specific material type, that material type is not readily recyclable.
- N. “Recycling” has the same meaning as in 38 M.R.S. §1771.
- O. “Similar municipalities” are those municipalities with similar geographic locations with respect to processing centers and/or end markets and similar population sizes.
- P. “Stewardship organization” means the entity chosen by the department and charged with coordinating the payments required by this section and managing investments in education and infrastructure.
- Q. “Toxicity of packaging” refers to the presence in packaging of the chemicals identified in 32 M.R.S. §1731-1747 as prohibited, food contact chemicals of high concern, or priority food contact chemicals.

4. Applicability.

- A. Producers. Producers distributing packaging into the State must participate in the stewardship program unless they are small producers that demonstrate they:
 - (1) Generate less than \$1,000,000 in gross revenue during the year in question,
 - (2) Distribute less than 1 ton of packaging in Maine during the year in question, or
 - (3) Sell all their products at a single point of retail sale.A producer includes all members of a franchise in Maine.
- B. Municipalities. Municipalities that choose to participate in the packaging stewardship program and provide the information required by the stewardship organization will be eligible to receive payments from that organization.

5. Packaging stewardship organization.

- A. Selection. The department will choose the packaging stewardship organization through a competitive bidding process, Resulting contracts will cover ten years of operation and be contingent upon stewardship organization compliance with all terms of its contract and approved plan.
 - (1) Proposals must include:

- a. Evidence that the stewardship organization will be administered by individuals with adequate training and qualifications;
 - b. A plan for receiving and considering the comments of stakeholders during the writing of the stewardship plan and thereafter;
 - c. A plan for administering the packaging stewardship fund, including
 - i. Staffing plans for managing the fund, providing reporting support to producers and municipalities, and administering payments, and
 - ii. A plan for the allocation and dispersion of funding designated for education and infrastructure, which must:
 - 1. Identify strategies for improving the recycling system; and
 - 2. Allow stakeholders to recommend funding allocation and prioritization including via a grant process that would allow municipalities, producers, and packaging collection programs to utilize a portion of the funding; and
 - iii. A financial assurance plan that ensures that any and all monies remaining in the packaging stewardship fund if/when the stewardship organization's contract expires or is terminated are immediately and exclusively forfeited and available to the department. Under these circumstances the department is authorized to administer the product stewardship fund and make expenditures from it until a successor product stewardship organization is selected.
 - d. A budget outlining the costs of administering the stewardship plan which can overestimate administration costs but cannot underestimate them. The budget must also outline startup costs that will not be ongoing and include a method of estimating producer payments for the first year of program operation, collecting these payments early to fund the stewardship organization's first year of operation, and rectifying these estimated payments following producer reporting of packaging distributed during year one.
 - e. Assurance that the organization will not share any information provided by producers and labeled as proprietary with any entity other than the department.
- (2) The stewardship organization will administer the stewardship program until:
- a. It reaches the end of its 10-year contract with the department and fails to win the competitive bidding for the next 10 years of program operation;
 - b. The department determines that the stewardship organization is not operating in a manner consistent with its contract and/or approved stewardship plan and requires

corrective actions, and the stewardship organization fails to complete the corrective actions within the timeframe provided; or

- c. It is otherwise unable to continue to perform its duties.

Funds remaining in the packaging stewardship fund at the time of expiration or termination of the product stewardship organization's contract will be managed in accordance with the financial assurance plan described in 4(A)(1)(c)(iii) above and as approved by the department.

B. Duties. The selected stewardship organization is responsible for:

- (1) Submitting a packaging stewardship plan to the department for review and approval in accordance with subsection (6), adjusting it as necessary during the approval process, implementing it, and updating it as necessary during implementation.
- (2) Administering the stewardship program in a manner consistent with its approved plan;
- (3) Managing education and infrastructure investments; and
- (4) Reporting annually to the department. The stewardship organization will report the following to the department on an annual basis:
 - a. Contact information;
 - b. A list of participating producers and their brands;
 - c. Amounts by material type, of all packaging distributed in or into the state by each producer;
 - d. Amount of material collected and managed through packaging collection programs that is credited to each producer, as applicable;
 - e. A complete accounting of payments made to and by the stewardship organization during the previous calendar year that includes calculations used to determine producer payments and municipal reimbursements;
 - f. A list of any known obligated producers that are not participating with the stewardship organization; and
 - g. An analysis of education and infrastructure investments including results of prior investments and a proposal for investments to be made in the year ahead.

Lists amounts and calculations will be included in the larger report and will also be provided in Excel or some other manipulable format.

6. Packaging stewardship plan.

- A. Stewardship plan content. Within 180 days of department selection in accordance with subsection (5)(A), the stewardship organization will propose a stewardship plan. The department will approve a plan that includes the following:
- (1) An implementation schedule that is based on stakeholder feedback and is not unnecessarily lengthy.
 - (2) A schedule of adjustments to a producer's market share to reflect the producer's use of recycled content in packaging, the toxicity of the producer's packaging, and other incentives in line with industry standards. The schedule must incentivize recycled content at multiple levels with benefits of sufficient magnitude to solicit changes, as indicated by the results of past fee modulation schemes or similar situations in other jurisdictions; incentivize improvements in the toxicity of packaging with respect to each of the toxics identified in 32 M.R.S. 1731-1747; and consider stakeholder input on the inclusion of additional adjustments that reflect standards used in the packaging and recycling industries.
 - (3) A description of the information to be collected from each producer for use in determining producer payment that provides all information necessary to ensure proper payment; an analysis of the extent to which required reporting is harmonized with the reporting required by other jurisdictions; a plan to facilitate the provision of necessary information by producers, including a mechanism, created with producer input, by which producers can receive reporting assistance; and a timeline for gathering this information, charging the producer and receiving payment that considers producer input.
 - (4) A description of how the stewardship organization will calculate the following using information reported by municipalities:
 - a. Activities-based collection cost for each readily-recyclable material type for a municipality using curbside collection;
 - b. Activities-based collection and on-site processing cost for each readily-recyclable material type for a municipality utilizing a drop-off site for both material that is source separated and processed onsite and material that is sent to a processing facility as part of a multi-material recycling stream;
 - c. Activities-based transportation cost of recycling for each readily-recyclable material type;
 - d. Activities-based collection cost for each non-readily recyclable material type collected as municipal solid waste (MSW); and

- e. Activities-based transportation cost for each non-readily recyclable material type collected as MSW.

The methods for calculating activities-based costing must, to the extent feasible, reflect best available data provided through a stakeholder input process and may not require the collection of information that municipalities cannot provide.

- (5) A copy of the form, developed with municipal input, that it will use to collect the information needed to calculate activities-based costing and that collects all data necessary to ensure proper payment; information on how it will work with municipalities to facilitate provision of necessary information including a mechanism for assisting municipalities with reporting that has been developed with municipal input; the timeline, developed with municipal input, by which it will expect to receive information from participating municipalities and a description of how and when reimbursements will be made to municipalities based on the requirements laid out in subsection (9), including a sample information form to accompany reimbursements that conveys the calculations used to determine payment.
- (6) A description of the frequency, coordination, funding, and sampling procedures of representative third-party audits of baled material leaving processing facilities in the State to determine, at a minimum, the extent to which tons sold reflects the tons of each packaging material type recycled and the ultimate destination and use of materials. The plan cannot extrapolate the results of audits from one facility to another facility using different processing equipment or levels of sorting effort, must make use of random samples, must allow a processing facility to request an audit if it can provide a credible reason why an audit result that is being applied to its material is not representative of current operations, and must consider input from processing the ties to limit the disruptiveness of audits.
- (7) The date by which the stewardship program will report to the department on an annual basis.

B. Department approval of a stewardship plan. The commissioner will review a plan and approve or deny the plan within 120 days of its receipt by the department. Plan approvals cannot exceed a period of 5 years. Decisions concerning the approval or denial of stewardship plans may be appealed in accordance with provisions of the department's "*Rule Concerning the Processing of Applications and other Administrative Matters*", 06-096 C.M.R. ch. 2.

- (1) If the commissioner determines that a submitted plan fails to meet all applicable requirements, the commissioner will provide written notice describing the reasons for rejecting the plan. No later than 45 days after receiving written notice rejecting a submitted plan, the stewardship organization may revise and resubmit the plan to the commissioner. The commissioner will review the revised plan, decide whether to approve it and provide written notice within 45 days of receipt of the revised plan.

- (2) If the commissioner denies a stewardship plan and the stewardship organization either loses its appeal of the decision or decides not to appeal, the department will terminate the stewardship organization's contract granted in accordance with subsection (5)(A).
- (3) If the commissioner approves a submitted plan, the commissioner will provide written notice of the plan's approval.
- (4) The stewardship organization will submit any proposed modifications to an approved plan to the department for review and approval. Modifications are not effective until after they have been approved by the commissioner. The department may waive a fee accompanying a modification to an approved plan.

7. **Producer responsibility.**

A. Payment. Producers will pay into the packaging stewardship fund for packaging materials distributed in or into the State and not managed through an approved packaging collection program in accordance with the packaging stewardship organization's approved plan.

- (1) For packaging material types designated as readily-recyclable, a producer will pay the previous year's statewide cost per ton of recycling a material type multiplied by its share of tons of the material type distributed during the previous year. A producer's share will be based on its market share by weight of the total material distributed and adjusted to reflect the producer's use of recycled content in packaging, the toxicity of the producer's packaging, and other incentives in line with industry standards as provided by the stewardship program plan.

Producer's adjusted tons / total adjusted tons * total tons distributed and not collected
* previous year's price per ton

- (2) For each ton of a packaging material type not designated as readily-recyclable, a producer will pay the greater of
 - a. 200% of the per ton cost of recycling the most expensive material type classified as readily recyclable, or
 - b. 200% of the previous year's state-wide per ton disposal cost calculated as the total cost of MSW tons sent for disposal by participating municipalities during the previous calendar year divided by tons sent.

B. Reporting. Producers will report total tons of packaging distributed in or into the State by material type packaging characteristics relevant to fee modulation criteria outlined in the stewardship plan, and a list of their brands to the stewardship organization on an annual basis in accordance with the stewardship organization's approved plan.

C. Producer collection programs. Producers may establish a packaging collection program,

individually or collectively, to collect and manage packaging in this State, thereby offsetting part of or all an obligation to pay into the packaging stewardship fund.

- (1) Packaging collection programs must submit a plan to the State for approval at least once every 5 years. The commissioner will review a plan and approve or deny the plan within 120 days of its receipt by the department. The commissioner will approve plans that:
 - a. Provide convenient, free, statewide collection opportunities;
 - b. Reuse, deconstruct, and/ or recycle materials such that material is transformed into usable commodities to the extent feasible. Material collected must be reused for its original purpose, recycled, or sent for waste to energy. Waste to energy will only count in cases where the material is not readily-recyclable and the packaging collection program puts forth a plan for the future reuse or recycling of the material. In such cases, waste to energy will not count toward material management for more than 5 years;
 - c. Include effective education and outreach strategies for reaching consumers in all areas of the State;
 - d. Include a description of how the program will accurately measure the amount of packaging collected, reused, recycled, incinerated for waste to energy, and otherwise disposed by material type.

Producers must submit any proposed modifications to an approved packaging: collection program plan for review in accordance with this section. Modifications are not effective until after they have been approved by the commissioner. The department may waive a fee accompanying a modification to an approved plan.

- (2) For material managed through an approved packaging collection program to offset a payment responsibility,
 - a. The packaging collected and managed must be the same material type as the packaging the producer wants to offset; and
 - b. The packaging collection program must report annually to the department and the packaging stewardship organization: tonnage collected, reused, recycled, incinerated for waste to energy and disposed; the number of tons managed by material type that should be attributed to each individual producer; and a list of collection opportunities and education and outreach expenditures fulfilling the requirements of subsection (7)(C)(1).

If the department determines that a collection program is not being operated in a manner consistent with its approved plan, it will require corrective actions. If the collection program fails to complete the corrective actions within the timeframe

provided, material managed from the end of the timeframe until such a time when the corrective actions are complete will not offset payment responsibility and the producer(s) would be required to submit payment into the product stewardship fund in accordance with the provisions of subsection (7).

8. Participating municipalities.

- A. Optional participation. Municipalities may choose to participate in the packaging stewardship program.
- B. Reporting required for participation. Participating municipalities must report to the stewardship organization the data necessary to determine their costs of recycling and disposal of MSW.
 - (1) To facilitate the stewardship organization's determination of the cost of recycling participating municipalities must report data related to their costs of collection and on-site processing, transportation and, value of material sent.
 - (2) To facilitate the stewardship organization's determination of the cost of MSW disposal, participating municipalities must report their disposal tipping, fee tons sent for disposal, total MSW transportation cost to disposal, and data related to their cost of collection and on-site processing.

Municipalities will report this data on a form provided by the stewardship organization and approved by the department during stewardship plan approval.

9. Packaging stewardship fund. Producers will pay into the packaging stewardship fund in accordance with subsection (7)(A). The stewardship organization will manage the fund as follows.

- A. Reimbursements to participating municipalities. The stewardship organization will use money in the packaging stewardship fund to reimburse participating municipalities.
 - (1) Data to be used in reimbursement calculations. In its calculations of municipal reimbursements, the stewardship organization will use data on recycling cost, MSW cost, and MSW tons disposed collected from participating municipalities in accordance with its approved plan and recycling data reported to the department by recycling establishments in accordance with 38 MRSA §2145. The stewardship organization will use information on tons shipped by a recycling establishment and the results of its audits identifying the amount of packaging of each material type in the average bale to determine the total number of tons recycled by municipalities sending material to that establishment. The stewardship organization will use information on tons received by generator to attribute a percentage of a recycling establishment's volume of materials recycled to a municipality. In cases where groups of municipalities jointly send material to a recycling establishment, those municipalities can provide the stewardship organization with more specific data

identifying the amount of material from each municipality. If a group of municipalities does not provide more specific data, the stewardship organization will assume an equal amount of material came from each resident and assign pounds recycled to municipalities accordingly.

(2) Reimbursement calculations. The stewardship organization shall calculate reimbursements as follows:

- a. For recycling packaging of readily-recyclable material types, the stewardship organization will reimburse municipalities based on the median per ton recycling cost of similar municipalities. The stewardship organization will calculate median per ton recycling costs of each group of similar municipalities for each material type annually using the previous year's municipal cost data and the following formula to calculate municipal cost:

(total collection and onsite processing cost + total transportation cost to the material market – total value to the municipality of the material sent) / tons of material sent.

The stewardship organization will reimburse municipalities an amount equal to the reporting year's median per ton recycling cost for similar municipalities for a material type multiplied by the tons of that material type recycled by the municipality during the reporting year.

- b. For recycling packaging of material types not designated as readily-recyclable, the stewardship organization will reimburse each participating municipality at an amount equal to the reporting year's cost per ton to producers for a particular material type as defined in subsection (7)(A)(2), multiplied by the tons of that material type recycled by the municipality during the reporting year.
- c. The stewardship organization will provide each participating municipality with a per capita payment to help cover the cost of disposing packaging that is not readily-recyclable, based on the cost of collection and transportation of MSW for similar municipalities and a disposal method payment that varies based on the disposal option used.

Disposal method payments will distinguish between 1) disposal by waste to energy, 2) disposal at landfill by municipalities without a waste to energy option with available capacity within 100 miles, and 3) disposal at landfill by municipalities with a waste to energy option with available capacity within 100 miles. For the first two groups of municipalities, disposal method payments will equal the total cost in tipping fees of tons sent by each group during the previous calendar year divided by the number of tons sent. For the third group of municipalities the disposal method payment will be 50% of the total cost in tipping fees for tons sent by these municipalities during the previous calendar year divided by the number of tons sent.

The per capita payment will be for 50% of the packaging that is not readily recyclable that a municipality's residents can be expected to generate based on state-wide sales data and will be calculated as follows:

(median per ton MSW collection cost for similar municipalities + median per ton MSW transportation cost for similar municipalities + per ton disposal method payment (.5) (total tons of non-readily-recyclable packaging placed on the market in Maine and not managed through a producer collection program or municipal recycling program) (population of the municipality / Maine population)

B. Excess producer payments. The stewardship organization will use producer payments made in excess of the amount necessary to reimburse municipalities as follows:

- (1) The stewardship organization will use a portion of excess producer payments to cover its actual operating cost, which may not exceed the cost estimated in its contract with the department and must be verifiable through a third party audit, and the program administration costs of the department as established in department rule.
- (2) The stewardship organization will propose investments in education and infrastructure to support packaging recycling in the State in accordance with the priorities and procedures laid out in its contract with the department.
 - a. Criteria. The department will develop rules outlining the criteria to be used in approving proposed investments.
 - b. Process. The department will approve or deny proposed investments within 90 days of receiving a proposal at which point the stewardship organization will have 15 days to suggest an alternative proposal for the money in question and the department will have another 90 days to approve or deny the alternative. Decisions may be appealed in accordance with provisions of the department's "*Rule Concerning the Processing Applications and other Administrative Matters*", 06-096 C.M.R. ch. 2.
- (3) The stewardship organization will pay the remainder of excess producer payments to the department for distribution through the "Maine Solid Waste Grant Diversion Program" established by 38 M.R.S. §2201, except that excess payments from the first year of operation necessary to cover the cost of stewardship organization operation during the second year will be kept by the stewardship organization and used for that purpose.

10. Sales prohibition.

A. Producer responsibility. A producer not in compliance with this section may not distribute packaging into this State. A producer not in compliance with this section will provide the necessary support to retailers to ensure the producer's packaging is not

distributed in this State.

- B. Retailer responsibility. A retailer may not distribute into this State packaging of a producer that is not in compliance with this section.
- C. Department responsibility. The department will maintain lists of compliant producers and producers that are out of compliance. The department will publish these lists on its website and maintain a list of interested retailers to inform of any changes to these lists.

11. Department administration and enforcement of program.

- A. Rules. The department will administer this section and adopt rules to facilitate its administration. Rules adopted pursuant to this subsection are routine technical rules as defined in 5 M.R.S. §8071-8074 and will include the following:
 - (1) Rules setting fees for:
 - a. Review of the stewardship organization plan,
 - b. Review of packaging collection program plans, and
 - c. Review of packaging collection program annual reports;
 - (2) Rules setting the cost of department oversight of the stewardship-organization;
 - (3) Rules outlining criteria to be used in approving investment proposals; and
 - (4) Other rules necessary for the purposes of implementing, administering and enforcing this section.
- B. Defining readily-recyclable and material types. The department will convene a group of processors and recyclers managing Maine recyclables on an annual basis to define material types and identify those that are readily recyclable.
- C. Defining similar municipalities. The department will group similar municipalities annually based on geography and population size.
- D. Review of annual reports. The department will review annual reports of packaging collection plans and the stewardship organization to ensure continued compliance and provide recommendations or corrective actions as necessary if implementation is not consistent with an approved plan.
- E. Follow up on required corrective actions.
 - (1) Corrective actions for producer collection programs. The department will make determinations concerning timeframes during which material managed through

producer collection programs cannot be used to offset obligations as outlined in subsection (7)(C).

- (2) Corrective actions for the stewardship organization. If the stewardship organization fails to take corrective actions to align implementation to its approved plan and termination is in the best interest of the department, the department will terminate the contract of the stewardship organization and begin a new selection process.

12. Antitrust protections. A producer, packaging collection program, or stewardship organization, including officers, members, employees and agents thereof, is immune from liability for conduct under state laws relating to antitrust restraint of trade, unfair trade practices, and other regulation of trade or commerce only to the extent necessary to plan and implement compliance with this section,

13. Proprietary information.

- A. Data submitted to the department. Any sales data submitted to the department pursuant to the reporting requirements of this section is confidential and must be handled by the department in the same manner as confidential information is handled under 38 MRS §1310-B.
- B. Data submitted to the stewardship organization. Any sales data submitted to the stewardship organization pursuant to the reporting requirements of this section is confidential and cannot be shared with any entity except the department.