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CONFIDENTIAL

February 28, 2020

The Honorable Stephen S. Hershey, Jr.  
Maryland Senate  
420 James Senate Office Building  
Annapolis, Maryland 21401-1991

Re: <sup>HB 1442</sup> Senate Bill 840 – “Environment – Expanded Polystyrene Food Service Products - Definition”

Dear Senator Hershey:

You have made a confidential inquiry about whether, under Chapters 579 and 580 of the Laws of Maryland 2019, an out-of-state egg carton producer is prohibited from shipping empty expanded polystyrene (“EPS”) food service product egg cartons into the state for the purpose of allowing a Maryland egg producer to ship packaged eggs in such cartons out-of-state. In my view, the answer to that question is no.

You also inquired about whether, under the enactments, a Maryland egg producer is prohibited from selling eggs packaged in EPS food service product egg cartons to in-state food service businesses. In my view, if a Maryland egg producer received eggs that have been pre-packaged in EPS food service product egg cartons before selling them in-state, the answer is no. If the Maryland egg producer is the one packaging the eggs in EPS food service product egg cartons for sale in the State, the answer to that question, while less clear, is likely still no.

Under § 9-2203(a) and (b) of the Environment Article (“EN”), on or after July 1, 2020, a person is prohibited from selling or offering in the State an EPS food service product, and a food service business or school is prohibited from selling or providing food or beverages in an EPS food service product. The prohibitions do not apply to a person storing a food service product for later distribution outside the State. EN § 9-2203(c).

“Expanded polystyrene food service product” means a product made of expanded polystyrene that is: (1) used for selling or providing food or beverages; and (2) intended by the manufacturer to be used once for eating or drinking, or generally recognized by the public as an item to be discarded after one use. EN § 9-2201(c)(1). An EPS food service product, in pertinent part, includes “[c]artons for eggs,” but does not include food that has “been packaged in expanded

The Honorable Stephen S. Hershey, Jr.  
February 28, 2020  
Page 2

polystyrene containers before receipt by a food service business[.]” EN § 9-2201(c)(2) and (3). “Food service business” means “a business in the State that sells or provides food or beverages for consumption on or off the premises.” EN § 9-2201(d).

With respect to whether an out-of-state egg carton producer is prohibited under the enactments from shipping empty EPS food service product egg cartons into the State for the purpose of allowing a Maryland egg producer to ship packaged eggs in such cartons out-of-state, in my view, the exception established in EN § 9-2203(c) for “storing a food service product for later distribution outside the State,” was intended by the General Assembly to apply to, and permit, EPS food service products that will be sold out-of-state, including all entities in the distribution chain. In other words, a Maryland egg producer who sells, stores, or distributes eggs out-of-state in an EPS food service product egg carton is likely exempt from the prohibitions in EN § 9-2203(a) and (b).

You also inquired whether a Maryland egg producer is prohibited from selling eggs packaged in EPS food service product egg cartons to in-state food service businesses. “Cartons for eggs” are expressly included in the definition of EPS food service products under EN § 9-2201(c)(2). However, the definition of EPS food service product does not include food that has “been packaged in expanded polystyrene containers before receipt by a food service business[.]” EN § 9-2201(c)(3). Under EN § 9-2203(a), on or after July 1, 2020, “a person may not sell or offer for sale in the State” an EPS food service product.

If a Maryland egg producer received eggs that were pre-packaged in EPS food service product egg cartons before selling them in-state, in my view, the producer is likely not prohibited from selling the eggs in-state. The eggs in that instance would constitute a food that had been packaged in EPS containers “before receipt by a food service business,” which is exempted from the definition of EPS food service product under EN § 9-2201(c)(3). Accordingly, the pre-packaged product would not be covered by the prohibition against the sales or provision of food in an EPS food service product.

Less clear is whether a Maryland egg producer falls within the definition of a “food service business” under EN § 9-2201(d). If it does, the egg producer is likely prohibited from packaging its eggs in EPS food service product egg cartons for sale in the State. However, if an egg producer is outside the scope of the definition of “food service business,” it is not subject to the sales prohibition under EN § 9-2203(b), and likely may sell eggs in the State packaged in EPS food service product egg cartons.

In my view, the more reasonable interpretation of the scope of the definition of “food service business” in EN § 9-2201(d) does not appear to apply to a wholesale food manufacturer/producer (such as an egg producer) that does not sell food intended for immediate consumption. Consequently, in my view, a Maryland egg producer who is packaging the eggs in

The Honorable Stephen S. Hershey, Jr.

February 28, 2020

Page 3


EPS food service product egg cartons for sale in the State is likely not prohibited from selling eggs to in-state food service businesses, because it likely falls outside the scope of a "food service business."

The definition of "food service business" in EN § 9-2201(d) is "a business in the State that sells or provides food or beverages for consumption on or off the premises[,]" and includes "a business or institutional cafeteria, including a cafeteria operated by or on behalf of the State or a local government." If "food service business" was intended by the legislature to include food manufacturers/producers, the definition could have been limited to a "business in the State that sells or provides food or beverages." The fact that the General Assembly included the additional limiting language that the food or beverage be sold or provided "for consumption on or off the premises" suggests an intent that a covered food or beverage business engages in sales of food that is ready for consumption on or off the seller's premises.

I have not found anything in the legislative history of the enactments that suggests the more expansive scope of the definition. However, in light of the possibility that the definition may be capable of alternative interpretations, the General Assembly may wish to clarify its intent with respect to the scope and application of the prohibitions and definitions in the subtitle through legislation.

I hope that this is responsive to your request. If you need any additional information or have any questions, please feel free to contact me.

Sincerely,



Jeremy M. McCoy  
Assistant Attorney General