

STATE ENVIRONMENTAL REGULATION

Expert Analysis

Mandatory Electronic Equipment Recycling Takes Hold in New York

Consumer electronics, including televisions and other video equipment, computers, assorted peripherals (such as printers, scanners, and fax machines), audio equipment, and phones make up an increasingly larger share of the municipal solid waste stream. According to the U.S. Environmental Protection Agency (EPA), these kinds of discarded electronics totaled about 2.25 million short tons in 2007.¹ Electronics make up about 2 percent of the current solid waste stream, but the EPA says it is growing two to three times faster than any other segment of solid waste.²

Disposal of electronics may pose significant impacts to the environment, especially where the disposal is not properly managed. Electronics are complex devices and can contain a wide variety of materials, including heavy metals, such as lead, nickel, cadmium, and mercury. These substances can be released into the environment if appropriate precautions are not taken at the time they are discarded.³

In an effort to address these issues, New York now has joined about 20 other states⁴ that have created mandatory electronics recycling programs. New York's Electronic Equipment Recycling and Reuse Act (State Recycling Act) was passed by the Legislature and signed into law by Governor David A. Paterson on May 28, 2010, and adds Article 27, Title 26 to the Environmental Conservation Law (ECL).⁵

Effective next April, the State Recycling Act requires manufacturers to establish a system for the collection, handling, and recycling or reuse of electronic waste.⁶ Manufacturers of covered electronic equipment are responsible for implementing and maintaining an acceptance program for the discarded electronic waste, with oversight by the N.Y. State Department of Environmental Conservation (DEC).⁷

Key Definitions

Of the 21 definitions in ECL §27-2601, the one that is probably most significant is the definition of "covered electronic equipment." This term means a computer (including attached cables, cords, and wiring),⁸ computer peripheral, small electronic equipment, small-scale server, cathode ray tube, or television.⁹ It does not include, among other things, motor vehicles or any part thereof, cameras, video cameras, radios, household appliances such as clothes washers or dryers, microwave or other ovens, telephones,¹⁰ calculators, global positioning

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system receivers, or commercial medical equipment even if such equipment contains a cathode ray tube, a flat panel display or similar video display device if it is not separate from a larger piece of equipment.¹¹

The term "computer" includes desktops and laptops and associated cables and cords permanently affixed to or incorporated into such product.¹² The term "computer peripheral" includes monitors, electronic keyboards; electronic mice or similar pointing devices; and facsimile machines and document scanners or printers intended for use with a computer that weigh less than 100 pounds.¹³

Effective next April, the State Recycling Act requires manufacturers to establish a system for the collection, handling, and recycling or reuse of electronic waste.

"Manufacturer" is another key term and is defined in the State Recycling Act as anyone who "assembles or substantially assembles covered electronic equipment for sale in the state" or who "manufactures covered electronic equipment under its own brand or under other brand names for sale in the state." It also includes an entity that: (1) sells in the state covered electronic equipment under its own brand name; (2) owns a brand name that it licenses to another for use in covered electronic equipment sold in the state; or (3) manufactures covered electronic equipment for sale in the state without affixing a brand name.

Manufacturer does not include, however, an entity that assembles or substantially assembles less than 1,000 units of covered electronic equipment annually in the state or whose primary business is the sale of rebuilt, refurbished or used components.¹⁴

"Retailer" is another important defined term in the State Recycling Act. It covers a person who sells 10 or more items of covered electronic equipment per year in the state, either at a brick and mortar store located in the state, by mail, by catalog, by telephone, by internet or by other electronic means.¹⁵

Collection Requirement

The State Recycling Act incorporates a phased approach to electronics recycling. Beginning April 1, 2011, manufacturers of covered electronic equipment "must accept for collection, handling and recycling or reuse electronic waste for which it is the manufacturer." Manufacturers also "must accept for collection, handling and recycling or reuse one piece of electronic waste of any manufacturer's brand if offered by a consumer with the purchase of covered electronic equipment of the same type by a consumer."¹⁶

Finally, each manufacturer must accept for collection, handling and recycling or reuse the "manufacturer's acceptance standard."¹⁷ This standard is based upon a formula that incorporates the manufacturer's market share, the latest population figures for the state and other specified factors. In 2011, the manufacturer's acceptance standard is equal to the manufacturer's market share times the population times $\frac{3}{4}$ times three pounds. In 2012, the manufacturer's acceptance standard is equal to the manufacturer's market share times the population times four pounds.

In 2013, the manufacturer's acceptance standard is equal to the manufacturer's market share times the population times five pounds. Beginning in 2014, the manufacturer's acceptance standard incorporates into the formula the amount of recycling done for the previous three years.¹⁸ DEC annually determines market shares based upon criteria listed in ECL §27-2603(4)(b) and is required to provide that determination to each manufacturer.

Beginning in 2013, a manufacturer that fails to meet its manufacturer's acceptance standard for the previous calendar year is subject to a recycling surcharge that will be determined based on the amount of covered electronic equipment it actually accepted and what it should have accepted.¹⁹ If a manufacturer accepts at least 90 percent but less than 100 percent of its required acceptance standard, it pays a surcharge equal to 30 cents times the number of additional pounds of electronic waste that it should have accepted. If it accepts at least 50 percent but less than 90 percent of the required acceptance standard, the surcharge is 40 cents times the number of additional pounds of electronic waste that it should have accepted. If it accepts less than 50 percent of its acceptance standard, the surcharge is 50 cents times the number of additional pounds of electronic waste that it should have accepted.²⁰

Interestingly, beginning in 2014, if a manufacturer accepts more than its manufacturer's acceptance standard, it may use the excess weight as electronic waste acceptance credits that it can sell, trade or bank for up to three years.²¹ The State Recycling Act, however,

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limits the use of the credits. No more than 25 percent of a manufacturer's obligation for any calendar year can be met with recycling credits.²²

Registration Required

The State Recycling Act contains a registration requirement.²³ Manufacturers must register by Jan. 1, 2011, with the DEC and pay a \$5,000 registration fee. Among the information a manufacturer must include on its registration form are: (1) a list identifying its brands; (2) a general description of how it will comply with the collection requirements of the State Recycling Act, including specific information on its electronic waste acceptance program in New York and a current list of in-state collection locations; (3) a statement disclosing whether any covered electronic device sold in New York exceeds the maximum concentration values established for lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls, and polybrominated diphenyl ethers under the RoSH standard²⁴ adopted in Europe and, if so, a listing of any covered electronic equipment that is not in compliance with RoSH or for which it received an exemption; and (4) sales data reported by weight for the manufacturer's covered electronic equipment sold in New York for the previous three calendar years, categorized by type to the extent known.

If a manufacturer cannot provide accurate state sales data, it must explain why it cannot provide such data and it has to estimate state sales data by dividing its national sales data by weight by the national population according to the most recent census and multiplying the result by New York's population, or by another method approved by the DEC.

Beginning on April 1, 2011, manufacturers are barred from selling or offering for sale electronic equipment in New York unless they register in advance with the DEC and comply with the electronic waste acceptance requirements.²⁵

Retailers

Retailers also have requirements under the State Recycling Act. Beginning on April 1, 2011, a retailer cannot offer or sell covered electronic equipment unless the manufacturer of the equipment and its brands are registered with the DEC. If a retailer purchased covered electronic equipment from a manufacturer that fails to register by Jan. 1, 2011, the retailer has 180 days after April 1, 2011, to sell that equipment. In addition, a retailer has a similar 180 day grace period from the date a manufacturer's registration is revoked or withdrawn to sell covered electronic equipment it previously purchased from that manufacturer.²⁶

Program Requirements

ECL §27-2605(5) sets forth the minimum requirements for an electronic waste acceptance program.²⁷ These programs must include methods to collect, handle and recycle or reuse the electronic waste, including (i) mail or ship back return programs; (ii) collection or acceptance events conducted by the manufacturer or the manufacturer's agent or designee, including events conducted through local governments or private parties; (iii) fixed acceptance locations such as dedicated acceptance sites operated by the manufacturer or its agent or designee; (iv) agreements with local governments, retail stores, sales outlets, and not-for-profit organizations that have agreed to provide facilities for the collection of electronic waste; (v) community collection events; and (vi) any combination of these or other acceptance methods that "effectively provide for the acceptance of electronic waste for recycling or reuse through means that are available and reasonably convenient to consumers in the state."²⁸

Importantly, at a minimum, manufacturers must ensure that all counties and municipalities within the state with populations of 10,000 or more have at least one method of acceptance that is available within the county or municipality.

Manufacturers must create a public education program to inform consumers about their electronic waste acceptance program, including at a minimum a Web site and a toll-free telephone number and written information included in the product manual that provides sufficient information to allow a consumer to learn how to return the covered equipment for recycling or reuse.

Manufacturers of computers, hard drives, and other covered electronic equipment that have internal memory on which personal or other confidential data can be stored, must also include instructions for how consumers can destroy such data before surrendering the products for recycling or reuse.²⁸

Each manufacturer must accept for collection, handling and recycling or reuse the 'manufacturer's acceptance standard.' This standard is based upon a formula that incorporates the manufacturer's market share, the latest population figures for the state and other specified factors.

The State Recycling Act also imposes a record keeping obligation on manufacturers, requiring that they retain records demonstrating compliance with the law for three years.²⁹ It also provides that manufacturers are responsible for all costs associated with the implementation of an electronic waste acceptance program—and they are not permitted to charge consumers for the collection, handling, recycling and reuse of electronic waste. Manufacturers, however, can charge "business consumers" for these services. A "business consumer" is defined in the law as a for-profit entity with 50 or more full time employees and a not-for-profit entity with 75 or more full time employees. (Section 501(c)(3) not-for-profit entities are excluded from the definition of "business consumer.")³⁰

Disposal Ban

In addition to requiring that manufacturers accept covered electronic waste, effective April 1, 2011, the new law bars manufacturers, retailers and owners and operators of electronic equipment collection sites, consolidation sites and recycling sites from disposing of electronic waste at a solid waste management facility or hazardous waste management facility, and from placing electronic waste for collection that is intended for disposal at a solid waste management facility or hazardous waste management facility.³¹

Effective Jan. 1, 2012, no one other than an individual or household is permitted to place or dispose of any electronic waste in any solid waste management facility, or place electronic waste for collection which is intended for disposal at a solid waste management facility or hazardous waste management facility in New York.³² Beginning Jan. 1, 2015, the electronic equipment waste disposal ban includes individuals and households.

Conclusion

The new State Recycling Act will undoubtedly increase the amount of computers and other electronic equipment that are recycled rather than ending up in municipal landfills. It also increases the obligations

of manufacturers, if they sell or offer for sale covered electronic equipment in New York, making manufacturers responsible for the ultimate disposal of such equipment. It may cause manufacturers to use more environmentally-friendly materials in their products or replace hazardous components with non-hazardous alternatives, as many have already done in response to RoSH, since the burden for disposal is on them.

With the Jan. 1, 2011, registration deadline and the April 1, 2011, recycling requirement quickly approaching, manufacturers must begin to formulate and put in place their recycling programs. Retailers, too, need to begin to evaluate their ordering practices so that they are compliant with the April 1, 2011, deadline.

Epilogue

My Jan. 25 column, "Brownfields Regulation Reaches Critical Stage in New York," reviewed the status of the DEC's expected guidance on the brownfields cleanup program that would have permitted the DEC to issue early eligibility opinions for brownfields sites located in brownfield opportunity areas. In late June, the DEC withdrew its proposed guidance.³³

1. See <http://www.epa.gov/osw/conserves/materials/ecycling/faq.htm#howmuch>.

2. See <http://www.epa.gov/region07/ecycling/index.htm>.

3. See <http://www.epa.gov/osw/conserves/materials/ecycling/faq.htm#howmuch>.

4. See http://www.computertakeback.com/legislation/state_legislation.htm.

5. In 2008, New York City enacted an Electronic Equipment Recycling and Reuse Act, see Local Law 13 of 2008, as supplemented and amended by Local Law 21 of 2008, which was challenged in court. The State Recycling Act expressly preempts any local law or ordinance governing the collection, reuse or recycling of used electronics, which would include the New York City law. (See ECL §27-2619.) The lawsuit challenging the New York City law was voluntarily dismissed after enactment of the State Recycling Act. See *Consumer Electronics Ass'n v. City of New York*, No. 09 Civ. 6583 (WHP) (S.D.N.Y. June 28, 2010) (Stipulation of Voluntary Dismissal and Settlement).

6. ECL §27-2603.

7. ECL §§27-2603, 2605, 2613, 2615 and 2617.

8. The definition of "computer" in the State Recycling Act excludes "automated typewriter or typesetter, a portable hand-held calculator, a portable digital assistant, server or other similar device." ECL §27-2601(2).

9. ECL §27-2601(5).

10. Under the New York State Wireless Recycling Act, which became effective Jan. 1, 2007, all wireless telephone service providers that offer phones for sale must accept cell phones for reuse or recycling. See <http://www.dec.ny.gov/chemical/8818.html>.

11. ECL §27-2601(5).

12. ECL §27-2601(2).

13. ECL §27-2601(3).

14. ECL §27-2601(11).

15. ECL §27-2601(16).

16. ECL §27-2603(1)(b).

17. ECL §§27-2603(2) and (4)

18. ECL §27-2603(d).

19. ECL §27-2603(5).

20. ECL §§27-2603(5)(a), (b) and (c).

21. ECL §27-2603(7).

22. ECL §27-2603(7).

23. ECL §27-2605(1).

24. RoSH stands for the restriction of hazardous substances directive enacted by the European Parliament and Council.

25. ECL §27-2605(4).

26. ECL §27-2607.

27. Manufacturers can satisfy the law's electronic waste collection requirements by agreeing to participate in a collective electronic waste acceptance program with other manufacturers.

28. ECL §27-2607(1) requires that retailers provide purchasers of covered electronic equipment with information about opportunities for the return of electronic waste that has been provided by a manufacturer.

29. ECL §27-2605(6).

30. ECL §27-2605(8).

31. ECL §27-2611.

32. ECL §27-2611(2).

33. See http://www.dec.ny.gov/enb/20100623_not0.html.