

Developments in Federal  
and State Law

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Editor

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## MANDATORY ELECTRONIC EQUIPMENT RECYCLING COMES TO NEW YORK

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Ever wonder what to do with that outdated or broken computer, television or other electronic device? You may want to dispose of the no-longer-wanted item but read somewhere it may contain hazardous chemicals, such as lead, nickel, cadmium or mercury. Even if you want to throw it in out, the item simply may be too bulky to fit in your garbage can or you may have to pay a surcharge to discard it at the local municipal landfill. Your next instinct may be to place the item in the back of a closet,

under a bed or pile it in a heap in the garage, intending to deal with it "someday." Well, that "someday" has arrived in New York with the enactment of the Electronic Equipment Recycling and Reuse Act (the "Electronics Recycling Act") in May 2010.<sup>1</sup> The purpose of the Electronics Recycling Act is to ensure that New Yorkers have the opportunity to recycle their electronic waste in an environmentally responsible manner, and places the burden for collecting, handling and recycling these items on the manufacturers and retailers, rather than on the consumer. This article will also briefly discuss the newly-enacted New York State Rechargeable Battery Act, which mandates recycling of the source of power used in electronic equipment, and electronic recycling efforts enacted by the European Parliament and Council which predated both New York laws.

### I. Covered Electronic Equipment

The Electronics Recycling Act applies to a variety of common electronic devices, referred to as "covered electronic equipment." This term includes computers (including attached cables, cords, and wiring),<sup>2</sup> computer peripheral, small electronic equipment, small-scale servers, cathode ray tubes, and televisions.<sup>3</sup> Covered electronic equipment 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, calculators, global positioning system receivers, or commercial medical equipment even if such equipment contains a cathode

<sup>1</sup> ECL § 27-2601 *et seq.*

<sup>2</sup> The definition of "computer" in the Electronics 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).

<sup>3</sup> ECL § 27-2601(5).

ray tube, a flat panel display or similar video display device if it is not separate from a larger piece of equipment.<sup>4</sup>

The term "computer" includes desktops and laptops and associated cables and cords permanently affixed to or incorporated into the computer.<sup>5</sup> 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.<sup>6</sup>

## II. Manufacturers

The bulk of the recycling efforts required by the Electronics Recycling Act are aimed at manufacturers. "Manufacturer" is defined 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."<sup>7</sup> It also includes any 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.<sup>8</sup> The new law carves out an exception in that any 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 is not considered a "manufacturer" under the Act.<sup>9</sup>

No later than January 1, 2011, manufacturers must register with the New York State Department of Environmental Conservation (DEC) and pay a one-time registration fee of \$5,000.00.<sup>10</sup> Any entity that subsequently becomes a manufacturer covered by the new law after January 1, 2011, must register with the DEC prior to selling or offering to sell covered electronic equipment in New York.<sup>11</sup>

The seven-page manufacturer registration form is available on the DEC website.<sup>12</sup> Manufacturers must supply the following information on the registration form: (1) the name and contact

information for the manufacturer's primary contact person for its electronic waste acceptance program; (2) a statement about whether the manufacturer will provide its own electronic waste acceptance program or participate in collective programs with other entities; (3) a list of the applicable manufacturer's brands (*i.e.*, the name, brand name or brand label for which the manufacturer has a legal right or interest in); (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 (if a manufacturer cannot provide accurate state sales data, it must explain why it cannot do so 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 DEC); (5) a general description of how it will comply with the collection requirements of the Electronics Recycling Act, including specific information on its electronic waste acceptance program in New York and a current list of in-state collection locations; and (6) 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 RoHS standard<sup>13</sup> adopted in Europe and, if so, a listing of any covered electronic equipment that is not in compliance with RoHS or for which it received an exemption.

Beginning on April 1, 2011, a manufacturer of covered electronic equipment is responsible for implementing and maintaining an electronic waste acceptance program for the discarded electronic waste.<sup>14</sup> As of April 1, 2011, a manufacturer cannot offer for sale or deliver for subsequent sale any covered electronic equipment unless the equipment has a visible, permanent label identifying the manufacturer.<sup>15</sup> A manufacturer of covered electronic equipment "must accept for collection, handling and recycling or reuse electronic waste for which it is the manufacturer."<sup>16</sup> It 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."<sup>17</sup> Finally, each manufacturer

<sup>4</sup> ECL § 27-2601(5).

<sup>5</sup> ECL § 27-2601(2).

<sup>6</sup> ECL § 27-2601(3).

<sup>7</sup> ECL § 27-2601(11).

<sup>8</sup> ECL § 27-2601(11).

<sup>9</sup> ECL § 27-2601(11).

<sup>10</sup> ECL § 27-2605(1).

<sup>11</sup> ECL § 27-2605(3).

<sup>12</sup> This form is available at [http://www.dec.ny.gov/docs/materials\\_minerals\\_pdf/mfrreg101310.pdf](http://www.dec.ny.gov/docs/materials_minerals_pdf/mfrreg101310.pdf).

<sup>13</sup> RoHS stands for the Restriction of Hazardous Substances Directive enacted by the European Parliament and Council.

<sup>14</sup> ECL §§ 27-2603, 2605, 2613, 2615 and 2617. A manufacturer that participates in a collective electronic waste acceptance program, rather than run its own program, still has to register with DEC. The collective electronic waste facility also has to register and pay a \$10,000 registration fee. *See* ECL § 27-2606(7). These facilities also are subject to the January 1, 2011 registration deadline or they must register at least 30 days prior to commencing operations if they are formed after that date. *See* ECL §§ 27-2606(7) and 27-2613.

<sup>15</sup> ECL § 27-2609.

<sup>16</sup> ECL § 27-2603(1)(a).

<sup>17</sup> ECL § 27-2603(1)(b).

must accept for collection, handling and recycling or reuse the "manufacturer's acceptance standard."<sup>18</sup> 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 formulas applicable in the first three years incorporate state-wide recycling or reuse goals that are based upon the state's population multiplied by a poundage factor. In 2011, the poundage factor is 2.25; in 2012, the poundage factor is 4, and in 2013, the poundage factor is 5. Beginning in 2014, the manufacturer's acceptance standard incorporates into the formula the amount of recycling done for the previous three years.<sup>19</sup> DEC is required to annually determine 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.<sup>20</sup> 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 multiplied by the number of additional pounds of electronic waste 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 multiplied by the number of additional pounds of electronic waste it should have accepted. If it accepts less than 50 percent of its acceptance standard, the surcharge is 50 cents multiplied by the number of additional pounds of electronic waste it should have accepted.<sup>21</sup>

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.<sup>22</sup> The Electronics Recycling Act, however, 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.<sup>23</sup>

Beginning on March 1, 2012, and annually thereafter, manufacturers must submit a report to DEC which covers their prior year's activities. The report must be accompanied by an annual reporting fee of \$3,000 plus any recycling surcharge due under ECL § 27-2603.<sup>24</sup>

### III. Electronic Waste Acceptance Program Requirements

ECL § 27-2605(5) sets forth the minimum requirements for an electronic waste acceptance program.<sup>25</sup> 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." 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 that county or municipality.

Manufacturers must also create a public education program to inform consumers about their electronic waste acceptance program, including at a minimum, a Web site on which they list their in-state recycling return locations, 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.<sup>26</sup> 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.<sup>27</sup> Manufacturers also are required to notify retailers that the manufacturers are registered with DEC.<sup>28</sup>

The Electronics Recycling Act also imposes a record keeping obligation on manufacturers, requiring that they retain records demonstrating compliance with the law for three years.<sup>29</sup> It also provides that manufacturers are responsible for all costs associated with the implementation of an electronic waste acceptance

<sup>18</sup> ECL §§ 27-2603(2) and (4).

<sup>19</sup> ECL § 27-2603(d).

<sup>20</sup> ECL § 27-2603(5).

<sup>21</sup> ECL §§ 27-2603(5)(a), (b) and (c).

<sup>22</sup> ECL § 27-2603(7).

<sup>23</sup> ECL § 27-2603(7).

<sup>24</sup> ECL § 27-2617. Electronic waste collection sites also have to submit annual reports, beginning on March 1, 2012 for the prior year. *See id.* § 27-2613.

<sup>25</sup> Manufacturers can satisfy the law's electronic waste collection requirements by agreeing to participate in a collective electronic waste acceptance program with other manufacturers.

<sup>26</sup> ECL § 27-2605(5)(c).

<sup>27</sup> ECL § 27-2605(5)(c). 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 the manufacturer.

<sup>28</sup> ECL § 27-2605(4).

<sup>29</sup> ECL § 27-2605(6).

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.<sup>30</sup>

#### IV. Retailers

Retailers also have a role to play under the Electronics Recycling Act. “Retailer” is defined as a person who sells 10 or more items of covered electronic equipment per year in the state, either at a site located in the state, by mail, by catalog, by telephone, by internet or other electronic means.<sup>31</sup>

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 DEC. If a retailer purchased covered electronic equipment from a manufacturer who fails to register by January 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.<sup>32</sup>

#### V. 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.<sup>33</sup> Effective January 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.<sup>34</sup> Beginning January 1, 2015, the electronic equipment waste disposal ban includes individuals and households.

#### VI. Preemption

The new law contains a preemption provision pursuant to which any local law, ordinance, rule or regulation enacted within New York State concerning electronic waste recycling is preempted as of the effective date of the Act.<sup>35</sup>

This provision effectively preempted New York City’s e-waste recycling law, which was enacted in 2008. This law, among other things, required door-to-door pickups of used electronics from consumers by retailers. The Consumer Electronics Association and other industry groups challenged New York City’s law in federal court on various grounds.<sup>36</sup> In June 2010, shortly after the Electronics Recycling Act was signed into law, the plaintiffs agreed to voluntarily dismiss the lawsuit.

#### VII. Rechargeable Battery Recycling

Six months after enacting the Electronics Recycling Act, New York State expanded its product stewardship recycling program to include rechargeable batteries. Signed into law on December 13, 2010, and effective as of December 5, 2011, the New York State Rechargeable Battery Law<sup>37</sup> is aimed at reducing the disposal of rechargeable batteries into landfills. Rechargeable batteries covered under this statute include nickel-cadmium, sealed lead, lithium ion or any other dry cell capable of being recharged.<sup>38</sup> These are often used in laptops, cell phones and cameras.

Pursuant to the law, disposal of rechargeable batteries as solid waste is prohibited, and violators are subject to a fine of \$50 for their first violation, \$100, for a second violation, and \$200 for subsequent violations within a 12-month period.<sup>39</sup> In addition, manufacturers and retailers are required to create and implement plans to collect rechargeable batteries from consumers for recycling at no cost to consumers.<sup>40</sup> Retailers that have a place of business in the state must accept from any person up to ten rechargeable batteries per day that are of similar size and shape as the rechargeable batteries they sell, regardless of whether the batteries were initially purchased at the retailer or whether the person purchases replacement batteries.<sup>41</sup> In addition, these retailers must post signs at or near the entrance of the facility stating that used rechargeable batteries of the size and shape that are sold at the retailer may not enter the solid waste stream and that the retailer is a collection site for such batteries. The law also

<sup>30</sup> ECL § 27-2605(8). Section 501(c)(3) not-for-profit entities are excluded from the definition of “business consumer.”

<sup>31</sup> ECL § 27-2601(16).

<sup>32</sup> ECL § 27-2607.

<sup>33</sup> ECL § 27-2611.

<sup>34</sup> ECL § 27-2611(2).

<sup>35</sup> ECL § 27-2619.

<sup>36</sup> See *Consumer Electronics Association v. City of New York*, Index No. 09 Civ. 6583 (S.D.N.Y.).

<sup>37</sup> ECL § 27-1801 *et seq.*

<sup>38</sup> Common alkaline batteries are not included under this new law.

<sup>39</sup> ECL § 27-1805, 1809(1).

<sup>40</sup> ECL § 27-1807.

<sup>41</sup> ECL § 27-1807(1)(a).

specifies the language that must appear on these signs and the size of the letters used on these signs advising of the disposal ban and the retailer's acceptance program for used rechargeable batteries.<sup>42</sup> Retailers that sell rechargeable batteries through catalogues or by mail, telephone, or the internet have to provide a notice at the time of purchase or delivery that the consumer can return used rechargeable batteries at no cost to the consumer.<sup>43</sup> Retailers that violate this provision are subject to penalties of \$200 for a first violation, \$400 for a second violation, and \$500 for subsequent violations within a 12-month period.<sup>44</sup> The Rechargeable Battery Law also contains a preemption provision similar to the one in the Electronics Recycling Act.<sup>45</sup>

### VIII. Europe's Waste Electrical and Electronic Equipment Directive

The Electronics Recycling Act and the Rechargeable Battery Law are similar to, although not as comprehensive as, a directive that became effective in the European Union in February 2003 concerning electronic equipment and electronic waste. That year, the European Parliament and Council adopted the Waste Electrical and Electronic Equipment Directive<sup>46</sup> (commonly called the WEEE Directive), which requires each member state to adopt appropriate measures to minimize the disposal of electronic equipment and waste in unsorted municipal waste by August 2004. Pursuant to the WEEE Directive, beginning August 2005, member states were required to ensure that electronic equipment and waste from private households can be returned free of charge to distributors. In addition, the WEEE Directive also requires member states to ensure that, as of December 31, 2006, the collection of electronic equipment and waste from private households achieves a rate of 4 kilograms per inhabitant per year. Currently, the European Parliament and Council are considering amending the WEEE Directive to base collection rates on a percentage of the average weight of electronic equipment placed on the market over the prior years in each member state.

### IX. Conclusion

New York's approach of placing the obligation for recycling on manufacturers should result in greater recycling of these items. Another likely benefit may be that manufacturers redesign their electronics to reduce or eliminate hazardous components as they now have to deal with the recycling and disposal of these items and the potential liability that goes along with disposal of hazardous waste. Many manufacturers of electronic

equipment already have done this re-tinkering to comply with the RoHS standard.

Retailers, too, have new obligations to ensure that they are dealing with registered and compliant manufacturers. Retailers are likely to modify their purchase orders to require representations and indemnities from the manufacturers regarding compliance with the new law. The real beneficiaries of the Electronics Recycling Act are consumers, who now have an easy and cost-free mechanism to deal with their unwanted electronic equipment, and, of course, the environment.

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## LEGAL DEVELOPMENTS

### ASBESTOS

#### Court of Appeals Held that Section of Industrial Code Cannot Be Used to Impose Vicarious Liability Pursuant to Section 241 of the Labor Law

In the 1970s and 1980s, an individual who worked as a boiler-maker during the construction of several power plants was allegedly exposed to asbestos through air-borne dust and contact with asbestos-containing materials. He later contracted mesothelioma and died. The plaintiff and his wife commenced actions against 60 defendants. The complaint included a claim pursuant to Section 241 of the Labor Law against three defendants, which was premised on violations of the Industrial Code, which requires the prevention of air contamination and the removal of dangerous air contaminants. Section 241 imposes vicarious liability on owners and contractors for the conduct of others during construction and renovation work. The three defendants moved for summary judgment, which was granted by the trial court. On appeal, the Appellate Division affirmed, holding that a violation of two regulations of the Industrial Code cannot sustain a Section 241 claim because they were not specific enough. On further appeal, the Court of Appeals affirmed, holding that

<sup>42</sup> ECL § 27-1807(1)(a).

<sup>43</sup> ECL § 27-1807(1)(b).

<sup>44</sup> ECL § 27-1809(3).

<sup>45</sup> ECL § 27-1811.

<sup>46</sup> See Directive 2002/96/EC.