

Memorandum to: E-Recycling stakeholders

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Date: February 22, 2008

Re: **E-Recycling Concept Paper**

As a first step in developing consensus-based legislation to address E-recycling, we have been working on a concept paper to share with stakeholders that proposes a framework for establishing a national electronics recycling program.

The proposed framework represents the collective thinking of the identified Congressional staff and does not necessarily represent every Member's views on every provision.

The attached E-recycling concept paper addresses financing of the program; the handling, management, recycling, and export of covered electronic devices; the role of the states and EPA; and performance requirements. We believe that the document incorporates many of the principles articulated in the E-recycling proposals and comments put forth in the past year by electronics manufacturers, the environmental community, retailers, recyclers, waste handlers, the States, and other interested groups.

We request your comments on the E-Recycling concept paper by **March 14, 2008**. During the last two weeks of March, we plan to set up separate meetings and conference calls with each group of E-Recycling stakeholders to discuss the proposed framework. Thank you for your continued interest in developing a national program.

E-Recycling Concept Paper

February 22, 2008

Title

The National Electronic Products Stewardship Act (NEPSA).

Purpose

To: -- establish a national electronic recycling system that makes reusing and recycling products readily available to consumers;
-- provide a “cradle to cradle” national framework for responsibly addressing increasing volumes of electronic product scrap and end-of-life technologies such as TVs and computers;
-- create incentives for the production and re-use of electronic products with lower environmental impacts;
-- eliminate land disposal of products containing reusable commodities or materials;
-- address global market issues that can be uniquely addressed at the national level such as providing a “level playing field” that deters interstate dumping of scrap products and sham recycling; accelerates adoption of clean product standards; protects consumers’ and recyclers’ health and safety; protects the environment; assures that exports are managed responsibly; defines success; sets benchmarks and disseminates best management practices and programs; and yields an effective, national land disposal ban.

General Principles

Regulates end-of-life electronic products under a new Subchapter of the Resource Conservation and Recovery Act (RCRA). Electronic products covered under the Act are termed “Covered Electronic Devices” (CEDs) and will not be categorized as solid wastes or hazardous wastes. Any EPA rules that currently address the management and handling of these CEDs and categorize these materials as solid or hazardous wastes, or as excluded from the definition of solid waste under RCRA, will become null and void on the effective date of the Act.

Follow an Extended Producer Responsibility (EPR) model with manufacturers and retailers who sell private label products and recyclers sharing the responsibility for establishing and maintaining a national program to collect, transport, reuse and recycle CEDs.

Minimum federal performance requirements for Producer Responsibility Programs with incentives for those manufacturers and retailers-as-manufacturers that exceed the minimum performance requirements and/or who adopt “cradle to cradle” concepts that reward manufacturers for making clean products at the front end and reusing and recycling products at the back end.

The federal program will sunset 15 years after enactment of legislation. The federal program will need to be reauthorized/reinstated to continue.

Handling and Management of CEDs

- Handling and management of CEDs in a manner that protects public health and the environment.
- Savings clause – Materials handled in accordance with all applicable Federal and State laws.

EPA Role

- EPA sets recycling requirements and administers the program.
- Manufacturers, recyclers and retailers not considered manufacturers register with EPA.
- EPA sets registration fees based on volume of CEDs and other criteria to be established by EPA. Registration Fees: (X%) allocated to EPA to cover administration and enforcement of the national program, (X%) allocated to State and local governments in the form of grants to help administer and enforce the national program.
- EPA collects data, determines performance requirements, accepts registrations from manufacturers (definition includes retailers that are also manufacturers), recyclers and retailers not considered manufacturers.
- EPA approves CED exports and is responsible for administration of export notification of receiving countries.

State Authorization

As part of authorization, state programs are at least equivalent to and consistent with the federal rules. Through state authorization, EPA establishes minimum federal standards to prevent overlapping or duplicative state regulatory programs. A state that has received final authorization, known as an authorized state, implements and enforces its E-recycling regulations. Authorized state regulations act “in lieu of” federal regulations.

- States (including those with existing state programs) can apply to EPA for authorization of their electronics product stewardship program.
- RCRA Subtitle C program funding will also be made available to states for carrying out their authorized electronics product stewardship program.

State Authorization Requirements:

- (1) For the state to be the regulatory lead as the implementing agency, it must be authorized by EPA. An authorized state program implements and enforces the program in lieu of the federal government.
- (2) The state program has to be consistent with the federal rules. States may impose requirements that are more stringent or broader in scope than the federal requirements.
- (3) The state’s program must provide adequate enforcement authority to implement its program.
- (4) The state adopts the federal rules either by incorporating them by reference or by creating an analogous set of state regulations through the state legislative process.
- (5) States apply for authorization to EPA and submit specific information related to the state program and how it will be enforced.

- (6) EPA and the state will enter into a memorandum of agreement that describes the state and federal responsibilities, oversight powers of the EPA, and the level of coordination between the states and the Federal government.
- (7) If a state revises its program, it has to submit a modified program description and other documentation to EPA. EPA reviews the proposed changes applying the same criteria used to review the state's initial program authorization. The state's program changes are effective once approved by EPA. Notice of all state program revisions are published in the Federal Register.
- (8) EPA can withdraw state program authorization if the state program no longer complies with the appropriate regulatory requirements and the state fails to amend its program accordingly.
- (9) If a state fails to enforce its authorized program or take timely and appropriate action, EPA may take enforcement action regarding any such authorized program provisions.

State Role/Preemption

Existing state laws governing the collection, transportation and recycling of CEDs covered under this Act are not preempted by the provisions of this Act. In states without such existing laws, this Act will be effective immediately.

States are not precluded or denied from adopting or enforcing any regulation, requirement, or standard of performance with respect to the management and recycling of CEDS that is more stringent than a regulation, requirement, or standard of performance in effect under the federal program for the management and recycling of CEDS.

Definitions

Definition of "manufacturer" (based on WA and OR laws) any existing person:

- (a) who manufactures or manufactured covered electronic devices under a brand that it owns or owned or is or was licensed to use, other than a license to manufacture covered electronic devices for delivery exclusively to or at the order of the licensor;
- (b) who sells or sold covered electronic devices manufactured by others under a brand that the seller owns or owned or is or was licensed to use, other than a license to manufacture covered electronic devices for delivery exclusively to or at the order of the licensor; or
- (c) for whose account covered electronic devices manufactured outside the United States are or were imported into the United States, provided however, if, at the time such covered electronic devices are or were imported into the United States, another person has registered as the manufacturer of the brand of the covered electronic devices, then this paragraph shall not apply.
- (d) Does not include re-manufacturing or refurbishment of CEDs.

Definition of "small manufacturer": less than (X%) of national market share but more than (Y%) are "small manufacturers" or less than (Y%) but their market share in any one state is greater than (Z%).

Manufacturers with less than (Y%) market share and less than (Z%) in any state are exempt.

Re-furbishers and re-manufacturers are not considered manufacturers if their sales are directly to retail customers.

Covered Electronic Devices and Scope

CEDs initially defined as:

- (1) any cathode ray tube, flat panel screen, or similar video display device with a screen size greater than 4 inches measured diagonally, and
- (2) any central processing unit (covers desktop and laptop computers).

EPA would be authorized, by rulemaking, to expand the scope of CEDs in the future (like the Universal Waste Rule) based on product volume, commodity value and environmental risk – and given authority to de-list specific products based on limited volume, product application or risk.

“Qualified products”: initially defined as peripherals, with EPA process for designating specific products, which qualify for partial recycling credit, but are not required to be recycled.

Credits/incentives* provided for collection and recycling of “qualified products” manufactured by the same manufacturer, i.e., IT peripherals (e.g., printers, digital cameras, DVD players, etc.).

Credits/incentives* provided for collection and recycling of CEDs from other brands or orphan products.

Credits/incentives* for collection of volumes exceeding national performance requirements.

(*collection credits, lower registration fees, “Green Seal” label, procurement preferences, etc.)

Manufacturers and Retailers-as-Manufacturers

Within one year (proposed) of the date of enactment, manufacturers (including retailers defined as manufacturers for purposes of this bill) would be required to register with US EPA and develop and submit programs covering collection and recycling of CEDs that they manufacture and sell in the United States. Manufacturer programs must show plan for how they will collect and recycle CEDs in each state where their products are sold. EPA must approve collection, re-use, and recycling program, and each manufacturer will be responsible for maintaining an EPA-approved program.

EPA will be authorized to determine what constitutes an acceptable program, including collection and recycling minimum performance requirements and reporting requirements on quantities of products sold and recovered. However, manufacturer programs must meet minimum qualitative performance requirements:

- provide reasonably available consumer collection capability designed to meet the collection needs of consumers in every state in which that manufacturer’s CEDs are sold including in rural areas;
- attain reasonably achievable annual collection volumes in every state in which that manufacturer’s CEDs are sold; and,

- include consumer education and provision to advertise and promote product reuse and recycling opportunities and programs.

A CED recycling program could include one or more of the following elements or other elements that the manufacturer can certify as effective in meeting plan goals:

Manufacturer take-back of its own branded devices by any means selected by the manufacturer; this may include direct mail-back, collection events, retail store collection points, etc.

Manufacturer sponsored collection events for any brands.

Manufacturer coalition (or manufacturer groups) sponsored collection programs for any brands.

Manufacturer financial support for local government collection programs for any brands.

Recycling coupons, E-Cycling Cards, “virtual currency” or other “market clearing” systems may be employed in accounting for the volumes of electronic product scrap collected, processed, recycled or exported.

“Small Manufacturers” may be eligible for a “pay-as-you-go” alternative plan where they would be required to pay a “capacity surcharge” in lieu of establishing a program. The capacity surcharge would be collected by EPA and allocated to states based on the small manufacturers’ market share in each state. The surcharge would be used to cover the marginal cost of collecting and recycling that manufacturer’s products. Funds could be used to provide incentives to other manufacturers’ required programs to collect these products, to provide incentives to recyclers, retailers or others to collect the products, or pay for states to do so.

Fees

All manufacturers will pay annual registration fees, amounts to be determined by EPA by rule making, including a base fee and a scalable fee tied to market share, not to exceed (X cents/lb), adjusted for inflation.

Scalable fee rates would be reduced up to (X%) for manufacturers whose programs exceed initial performance goals/minimum performance requirements and/or produce substantial volumes of “clean” products (e.g. “Green Seal” see below).

Scaleable fee rates would be increased in direct relationship to shortfalls in meeting performance requirements (see Performance Requirements and Enforcement).

The fees will be used to support the costs of the national electronic products recycling system that will be created under the Act.

Congressional staff is seeking input from stakeholders on the issue of how, in some cases, state and federal fees would be reconciled. One proposal is that if states with existing electronics products recycling laws want to preserve their own fee structure, they would then have a reduced share of federal grant money. States could petition the EPA to levy their own fees if they are needed to ensure that their recycling program and infrastructure are adequate; these fees would only be approved if they are used specifically for the state’s recycling program.

Performance Requirements

Congressional staff remains open to suggestions as to performance requirements, and is seeking comments on the following proposal. Initial performance goals and performance requirements will be instituted based on weight of products sold nationally (i.e., national average, not product weight sold in each state) with incentives provided for recovery of non-covered products either by product type or for brands from other manufacturers, including orphan products. Collection of orphan brands would count as (X lbs) against the performance goal/requirement. Collection of “qualified” electronic products, e.g. peripherals, would count for (X lbs).

For the initial implementation period – (X) years following date of enactment – manufacturers will implement EPA-approved producer responsibility recycling plan in conjunction with retailers, recyclers and state and local governments with an initial goal of achieving a recycling rate of (X%) by weight of annual sales at the end of the period with incentives to reach and exceed that goal during the period. During this (x)-year implementation period, initial performance goals are not subject to enforcement fee-based penalties. However, programs must provide reasonably available consumer collection capability designed to meet the collection needs of consumers in every state in which that manufacturer’s CEDs are sold, and attain reasonably achievable annual collection volumes in each of those states. Compliance with this performance requirement will be confirmed through data collected, for each state, from manufacturers, retailers and recyclers.

During the implementation period, data required by EPA on volume of CEDs sold, recovered and recycled must be submitted annually (proposed). EPA will use this data to revise national program goals and individual manufacturer performance requirements, with the goal of increasing national recycling rates by (X%) per year to attain a national goal of (X%). Once performance requirements are instituted following the implementation period, EPA will continue to collect data on volume of units sold, recovered and recycled annually (proposed) and use this data to revise, as necessary, program goals and performance requirements every (X years).

Following the initial implementation period, EPA will have authority to revise, waive or extend deadlines for meeting performance requirements or require revisions to manufacturers’ plans which fail to achieve performance requirements (also see Enforcement).

Additional incentives will be provided for manufacturers to reach and exceed initial goals and performance requirements. These incentives will include:

- Earn “Green Seal” label – Manufacturers can earn a “Green Seal” based on programs that exceed minimum performance requirements; e.g., recovery of additional products, say X% more than the industry average or collection and performance goal/requirement, and/or use of low risk materials content (incorporate RoHS requirements, compliance with EPEAT for IT and soon EPEAT for TVs, Design for Recycling, RoHS and other standards to be determined, or combination thereof), and/or design for recycling. EPA would oversee the program, but could utilize third party or industry-standards organizations to establish criteria and perform certifications.
- Federal procurement preference for manufacturers with “Green Seal” programs consistent with the approach under RCRA Section 6002.

- Reduced annual registration fees, up to (X%), for manufacturers for programs that exceed performance requirements.

Labeling: All CEDs subject to an approved program will be labeled as registered for sale. Labeling could be accomplished through an alternative EPA approved means, e.g. product registration using a database matched to UPC codes in lieu of a physical label.

Retailers

Retailers considered manufacturers of their own brands of CEDs.

Retailers may only sell registered manufacturers' "labeled" CEDs.

Retailers not considered manufacturers must register, pay an annual block rate fee (based on annual sales) and annually certify that they are in compliance with the sales requirement. (see Enforcement). Exemption process for small businesses and small, independent retail operations with sales of less than (X%) nationally, but not less than (Y%) in any state.

The fees will be used to support the costs of the national electronic products recycling system that will be created under the Act.

Retailers must provide information on recycling program to retail consumers at the time of sale.

Retailers must report sales of CEDs annually to manufacturers and EPA, aggregated by state. Data submitted to EPA will be considered "business proprietary."

Retailers should be incentivized to partner with manufacturers, collectors, refurbishers and recyclers to build and sustain national markets. Retailers' incentives may include:

- Federal "Green Seal" procurement preference, consistent with the approach under RCRA Section 6002, tied to amount collected and/or "clean" products sold (subject to anti-double dip requirement, e.g., collections/sales can't be the result of a manufacturer-sponsored program).
- Retailer registration "block fees" would be reduced if they instituted a collection program.
- Eligible to participate in "small manufacturer" capacity surcharge recycling program.

Sales by individuals via Internet facilities (E-Bay, Craig's List, etc) are not considered retail sales for the purpose of this bill.

Recyclers and Exporters

All recyclers and exporters would be required to register with EPA (or delegated state authority) and meet EPA minimum, enforceable performance standards. Registration would include identification of individual CED recycling and export facilities. This requirement includes federal and state governmental entities, such as federal prison programs like UNICORP.

Manufacturers/retailers/federal/state and local governments can only use recyclers and exporters that are registered with EPA (as of a specified date, to be determined).

EPA would promulgate minimum handling/storage requirements for recyclers and exporters (akin to CRT rule).

EPA, in consultation with other appropriate federal agencies, is directed to conduct an assessment, with notice and opportunity for public comment, of the need for additional or alternative standards for environmental protection and workplace safety for CED recycling facilities within 1 year.

EPA also administers a “Green Seal” certification program for recyclers who exceed minimum performance standards and/or adopt Best Management Practices (e.g., industry association certifications with EPA oversight). Incentives to obtain certification to include:

- reduced registration fees;
- federal procurement preferences consistent with the approach under RCRA Section 6002;
- fast track permitting for new infrastructure or facilities; and,
- fast track notice and consent for exporting scrap products.

Recyclers and exporters would pay an annual registration fee, including a base fee and a scalable fee based on volume of products processed and other criteria to be established by EPA not to exceed (X cent/lb), adjusted for inflation. The fees will be used to support the costs of the national electronic products recycling system that will be created under the Act.

Exports – General Principles

Export system to be modeled on CRT rule

- EPA will promulgate regulations within 2 years of enactment that require exporters of CEDs to notify EPA of an intended export 60 days prior to export;
- The CEDs destined for export will be managed in a manner that will protect human health and the environment taking into account local, regional, and global human health and environmental impacts;
- The export of the CEDs is consistent with international obligations of the United States intended to reduce pollution;
- EPA will provide the notification to the receiving country and any transit countries;
- The export of CEDs is prohibited unless the receiving country consents to the intended export;
- A violation of the terms and conditions for exports of CEDs or the submission of false information in connection therewith shall be considered a prohibited act and shall be subject to penalties, injunctive relief and citizen suits; and
- The export requirements will not affect, replace, or amend prior law relating to the need for consistency with international trade obligations.

Exporter Duties:

(1) The exporter completes a notification that covers exports over a 12 month or lesser period; is in writing; signed and certified by the exporter; and is sent to EPA.

(2) The notification contains: information on volume, frequency of exports, the receiving recycler, how the CEDs will be recycled, and any additional information that EPA may require to

ensure that the CEDs will be managed for export in a manner that protects human health and the environment.

(3) A copy of the Acknowledgment of Consent to Export CEDs must accompany the shipment of CEDS. The shipment must conform to the terms of the Acknowledgment.

EPA Export Duties:

- (1) EPA will provide the exporter's notification for the CEDs to the receiving country and any transit countries;
- (2) When the receiving country consents in writing to the export of CEDs, EPA will forward an Acknowledgement of Consent to Export CEDS to the exporter;
- (3) If a receiving country objects to the export of CEDs, or withdraws a prior consent, EPA will notify the exporter in writing; and
- (4) EPA will also notify the exporter of any responses from transit countries.

Landfill Ban

Phase-in a national ban on land disposal within a reasonable amount time, to be determined by EPA through rulemaking in consultation with state and local governments/municipalities.

Governance

EPA has lead authority for national program. EPA collects data, develops program goals and performance requirements, fee structures, infrastructure capacity assessments, etc. Some program elements could be delegated to a third-party organization (e.g., fee collection), "Green Seal" certification process, etc.

EPA administers grant programs to states and local governments and special districts.

States with preexisting laws would be incentivized to opt in to a national program by receiving shares of revenues and fees. Certain preexisting state laws would sunset once federal legislation is enacted.

Enforcement

If performance requirements are not met, manufacturers/recyclers are subject to increased registration fees the following year, and may also be subject to a flat/fixed fine.

Scalable fees will be increased in direct proportion to the shortfall in meeting enforceable recycling performance requirements, e.g. those in effect after the initial three year phase-in period for manufacturers. (For example, if a manufacturer misses post-phase-in performance goals by 50%, there will be an increase in the annual scalable fee for that manufacturer of 50%.)

In accordance with RCRA, violators of program requirements will be subject to enforcement actions and penalties. EPA and states can revoke or suspend registration status, in all or in part, for both manufacturers and for recyclers/exporters for violations of agency regulations, e.g., failure to accurately report, meet recycling standards, etc.

Civil penalties for retailers that sell unregistered products.

Reporting

Manufacturers (to the extent practicable), recyclers and retailers not considered manufacturers will report annually to EPA on the total weight of CEDs sold, collected and recycled by state. Data will be considered “business proprietary.” EPA will maintain a list of registered manufacturers, recyclers, retailers and exporters available via the Internet and publish an annual list.

Beginning in each year after enactment of the federal legislation, EPA and the Commerce Department will evaluate trends of CED collection, recycling, reuse and export markets in the U.S. and report to Congress on their findings.

EPA will report annually to Congress on all activities carried out under this Act.

The federal program will sunset 15 years following enactment of legislation. To assist Congress in the review of this program during its existence, the GAO shall provide a report to Congress after the 5th, 10th, and 15th years of this federal electronics recycling program. After the final report, EPA must report to Congress on the viability and effectiveness of the federal program. At this time, Congress and the EPA shall review the results and can alter or refine the program to reflect accurately changes in product types, consumer use trends, grant funding uses, and the program’s viability given the economic trends at the time.