

Mary Pitto

From: EWaste@calrecycle.ca.gov
Sent: Monday, September 12, 2011 6:06 PM
To: Mary Pitto
Subject: California E-Waste Updates: Implementing the Electronic Waste Recycling Act

CalRecycle Electronic Product Management ListServ

September 12, 2011

Dear Electronic Waste Stakeholder:

This electronic newsletter is an update on the implementation of California's Electronic Waste Recycling Act of 2003 and other electronic waste (e-waste) management developments in California.

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DTSC / CALRECYCLE E-WASTE STAKEHOLDER MEETING SEPTEMBER 26TH

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DTSC / CalRecycle E-waste Stakeholder Meeting September 26th

California's Department of Toxic Substances Control (DTSC) and Department of Resources Recycling and Recovery (CalRecycle) will hold an electronic waste stakeholder meeting at the Cal/EPA Headquarters Building in Sacramento on Monday, September 26, 2011. A final agenda for the meeting is still being developed, however it is anticipate that the meeting will begin around 9 a.m. and will last several hours.

The primary topic to be discussed will be cathode ray tube (CRT) glass management, particularly regulatory issues relating to the ultimate disposition of CRT glass derived from the recovery and recycling of video displays, such as televisions and monitors.

CRT glass managed in California under universal waste rules currently must be reclaimed through recycling or smelting. However, domestic and global markets for CRT glass are weakening, and identifying appropriate and compliant outlets is increasingly difficult. CRT glass contains hazardous metals such as lead (primarily in the funnel) and barium (primarily in the panel) that require special consideration when handling or processing.

At the meeting, DTSC staff will review existing rules that limit CRT glass management options and explore potential rule changes that could alter certain treatment authorization conditions and possibly allow for disposal. CalRecycle staff will discuss the implications of CRT glass management options on the covered electronic waste (CEW) recycling payment system, and explore what rule changes would be necessary in the CEW program to accommodate an expanded range of CRT glass dispositions.

More detailed information will be posted closer to the meeting date on the CalRecycle website at:
<http://www.calrecycle.ca.gov/Calendar/>

Other Resources:

CEW Payment System Regulations:

<http://www.calrecycle.ca.gov/Laws/Regulations/Title14/Chap08pt2/default.htm>

DTSC Universal Waste Electronics Handler Information:

<http://www.dtsc.ca.gov/HazardousWaste/EWaste/>

Public Resources Code (PRC), Health and Safety Code (HSC), and other statutes:

<http://www.leginfo.ca.gov/calaw.html>

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Please note that e-mail correspondence with the Department of Resources Recycling and Recovery (CalRecycle) related to e-waste management in general, and implementation of the Electronic Waste Recycling Act in particular, should be directed to ewaste@calrecycle.ca.gov

Also note that an archive of past distributions of this newsletter is available at:

<http://www.calrecycle.ca.gov/Electronics/Act2003/Stakeholder/Updates/>

Thank you for your interest in shaping California's e-waste management future.

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To subscribe to or unsubscribe from the E-Waste listserv or other listservs, please go to <http://www.calrecycle.ca.gov/Listservs/>. For information on California's Electronic Waste Recycling Act of 2003 (SB 20) implementation efforts, as well as other relevant developments go to <http://www.calrecycle.ca.gov/Electronics/>.

**FEDERAL GOVERNMENT:****Feds Say State's E-Waste Recycling 'Fee' Is a Tax**

The federal government has entered the tax vs. fee debate by claiming that California is mislabeling a tax as a "fee." At issue is the \$6-to-\$10 California recycling (e-waste) fee that retailers are required to collect from consumers.

In a **May 4, 2011 decision**, the U.S. Government Accountability Office (GAO) concluded that California's "e-waste recycling fee is a tax and that Congress has not legislated a waiver of federal sovereign immunity permitting federal agencies to pay the tax." If the GAO found the charge to be a "fee," there would be no issue of sovereign immunity.

The 17-page GAO decision said "distinguishing a tax from a fee for service ... requires careful analysis, as the line between tax and fee can be a blurry one."

According to the GAO decision, one court has described a classic tax as one satisfying a three-part inquiry – an assessment that (1) is imposed by a legislature upon many, or all, citizens, and (2) raises money that (3) is spent for the benefit of the entire community.

On the other hand, a classic regulatory fee is imposed by an agency upon those subject to its regulation, may serve regulatory purposes, and may raise money to be placed in a special fund to help defray the agency's regulation-related expenses. When the characteristic of a charge places it somewhere between a tax and a fee, the most important factor becomes the purpose underlying the statute or regulation imposing the charge in question. If the ultimate use of the revenue benefits the general public, then the charge will be considered a tax; the charge will more likely be considered a fee if the revenue's benefits are narrowly circumscribed.

In concluding that California's e-waste recycling fee meets the definition of a tax, the GAO said the charge (1) has been levied by the California Legislature against purchasers of covered electronic devices (CEDs) (2) to raise revenue that (3) is to be spent for the public benefit, that is, to fund a statewide program that provides "consumers and the public" with cost-free and convenient opportunities to recycle CEDs.

Payment of the e-waste fee by purchasers of CEDs is not linked to a specific benefit or service provided by the State of California to the payers of the fee. California acknowledges as much, stating that "[t]he fee is not designed to be strictly tied to the device the fee was levied upon" and that CED purchasers are a "relatively anonymous population." Further, consumers are not guaranteed cost-free recycling services in California, nor are they entitled to a refund of the fee if they elect not to avail themselves of recycling services in California. Rather, recycling services from authorized providers are offered to the public at large, and no distinction is made between those who have paid the e-waste recycling fee and those who have not. Thus, the benefit of the e-waste recycling fee is not narrowly circumscribed to the consumers paying the e-waste fee, but rather, is conferred on the general public.

Since **SB 50** (Sher) of 2004 passed each house with more than a two-thirds vote, there is no issue as the legality of the "fee" under Proposition 13. At issue is the immunity of

federal government. More significantly, the federal analysis of fee vs. tax can be used in future debates on the issue, and in discussions over whether legislative vote requirements on bills are mislabeled.

Further, the federal determination creates a problem for California retailers. The Board of Equalization is requiring retailers to collect the fee/tax and will impose assessments and numerous penalties if they do not, but the federal government will not pay the tax to retailers.

Lynn Bartolo, chief of the BOE's Special Taxes and Fees Division, told CalTax:

"We have been in discussions with federal representatives since the eWaste program was implemented. Our position was and continues to be that the California eWaste fee is a fee not a tax and the feds should be paying it when applicable. Staff disagrees with the GAO Decision paper and the analysis upon which they base their conclusion. We are having internal discussions about the paper's impact on our feepayers and whether continued dialog with the feds on this issue would be beneficial (remember, we've been discussing this and attempting to gain their cooperation for five years).

"At the same time, we recognize that the position that the Feds have taken puts our retailers in the unfortunate position of having to make a business decision about whether to make a sale and pay the fee to us without reimbursement from the federal government or not do business with them (sales of covered electronic devices specifically). We are working with BOE's Legislative Division and Legal Department to develop one or more legislative proposals to submit to the Board's Legislative Committee for approval. Our proposal will focus on providing the retailers with additional options to allow them to make sales to the feds and others while remaining compliant with the law, since the obligation to collect/remit the fee is imposed on the retailer. The Legislative Division's annual solicitation for legislative proposals from staff kicks off in the fall (Sept-Nov).

"We recognize that GAO Decision impacts our feepayers and we are doing what we can to address the issue."

(Sources: U.S. Government Accountability Office, "Matter of Administrative Office of the U.S. Courts – California E-Waste Recycling Fee," File B-320998, May 4; E-mail from Lynn Bartolo, chief of the BOE's Special Taxes and Fees Division, August 17.)

August 19, 2011

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