

## Retailer Duties Under the California e-Waste Recycling Act

California's Electronic Waste Recycling Act of 2003 ("the Act"), enacted as Senate Bill 20, established a series of requirements for manufacturers and retailers of electronic products that contain cathode ray tubes (CRTs) and Liquid Crystal Display (LCD) panels. When all of these requirements are fully implemented, California will have a comprehensive recycling and disposal program for CRT and LCD products that are sold in California, and will impose European standards banning the sale of CRT and LCD products containing certain substances. Each requirement will have a ripple effect on manufacturers around the world.

This *e-Waste Recycling Bulletin* and subsequent *Bulletins* in this series will apprise readers of key requirements under the Act and current developments in its implementation.

### ▶ Who is a "retailer?"

*e-Waste Recycling Bulletin* 04-I summarized key provisions of the Electronic Waste Recycling Act, and *e-Waste Recycling Bulletin* 04-II explained the meaning of a key term, "covered electronic devices." Turning to more specific provisions of the Act, *e-Waste Recycling Bulletin* 04-III explained the term "manufacturer" and summarized a manufacturer's obligations. This *Bulletin* helps readers to determine who is a "retailer" for purposes of the Act and what the Act requires a retailer to do.

As enacted, the Act defines a "retailer" as a "person who sells a covered electronic device in the state to a consumer but who did not manufacture the device." *Cal. Pub. Res. Code § 42463(o)*. However, the definition of "retailer" also includes "a manufacturer of a covered electronic device who sells that device directly to a consumer through any means, including ... sales outlets, catalogs, or the Internet, or any other, similar electronic means...." *Id.*

"Consumer," in turn, is defined as

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a purchaser or owner of a covered electronic device. "Consumer" also includes a business, corporation, limited partnership, nonprofit organization, or governmental entity, but does not include an entity involved in a wholesale transaction between a distributor and a retailer.

*Cal. Pub. Res. Code § 42463(d)(1)*. Thus, a manufacturer is treated as a retailer if the manufacturer sells the covered electronic device directly to a "consumer" who is neither a distributor nor retailer. Accordingly, and to clarify some misunderstanding that appears to exist in the regulated community, "retail" sales are **not** limited to sales to individuals.

Nevertheless, the Act excludes from the definition of "consumer" any "manufacturer who purchases specialty electronic equipment or medical electronic equipment that is a covered electronic device." *Cal. Pub. Res. Code § 42463(d)(2)(A)*. For purposes of this exclusion, "'specialty electronic equipment' includes, but is not limited to, smoke detectors, heating regulators and thermostats." *Cal. Pub. Res. Code § 42463(d)(2)(C)*. "'Medical electronic equipment' includes, but is not limited to, radiotherapy equipment, cardiology equipment, dialysis equipment, ... laboratory equipment for in-vitro diagnosis, analyzers and freezers." *Cal. Pub. Res. Code § 42463(d)(2)(B)*. Although no guidance currently exists to explain further this statutory language, it appears that an entity that sells specialty electronic equipment or medical electronic equipment to a manufacturer is not considered a retailer under the Act. Entities that intend to rely on this provision and thereby avoid retailer duties under the Act first should confer with counsel.

#### ▶ **What is a retailer required to do?**

The Act, as amended by recent emergency "cleanup" legislation in Assembly Bill 901 ("AB 901"), imposes a fee on the first sale in California of a covered electronic device to a consumer by a retailer as of **November 1, 2004**. The amount of the fee depends on the screen size of the covered electronic device:

- For a screen greater than four inches and less than 15 inches, the recycling fee is \$6.
- For a screen equal to or greater than 15 inches and less than 35 inches, the recycling fee is \$8.
- For a screen 35 inches or larger, the recycling fee is \$10.

The fee is not subject to sales tax. Pursuant to AB 901, retailers of covered electronic devices can retain three percent of the fees collected as reimbursement for their administrative costs. The balance of the fee must be remitted to the state. Details such as how to track fee collection, designation of the agency to receive the fees, and the process for remittance of the fee have not yet been announced.

The Act defines "sale" as any transfer of title for consideration, or transfer of the right to use, as by lease or sales contract. *Cal. Pub. Res. Code § 42463(p)(1)*. Questions may arise, however, about **when** a "sale" occurs, triggering the duty to collect the fee. This is particularly true for companies that take an order on a certain date -- perhaps before November 1, 2004 -- but deliver the shipment on a later date, and perhaps collect payment for the shipment on yet another date. Neither the Act nor the implementing regulations specify when the fee is to be collected under such circumstances. Retailers who are confronted with this question are advised to consult with the implementing agency or with counsel.

In addition to collecting fees, *Cal. Pub. Res. Code § 42465.1* prohibits a person from selling or offering for sale in California, **on and after January 1, 2005**, "a covered electronic device unless the device is labeled with the name of the manufacturer or the manufacturer's brand label, so that it is readily visible." For purposes of this provision, "person" would include "retailers."

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