

## The Role of European Union Directive 2002/95/EC under the California e-Waste Recycling Act

California's Electronic Waste Recycling Act of 2003 ("the Act"), originally enacted as Senate Bill 20 ("SB 20") and recently amended by Senate Bill 50 ("SB 50"), establishes a series of requirements for manufacturers and retailers of "covered electronic devices," which include video display devices with screens larger than four inches (measured diagonally).

When all of the Act's requirements are in effect, California will have a comprehensive recycling and disposal program for covered electronic devices that are sold in California. The State also will impose reporting requirements on manufacturers of covered electronic devices, and will ban the sale of covered electronic devices that contain certain heavy metals, under European Union ("EU") standards for heavy metal content.

Earlier *e-Waste Recycling Bulletins* summarized key provisions of the original Act, the duties of manufacturers and retailers, the possibility of private enforcement actions under California's Unfair Competition Law, and SB 50's changes to the original Act's requirements, including changes to the electronic devices covered by the Act. This *Bulletin*, which is the last regular issue in this series, summarizes the unusual role of European Union legislation, namely, Directive 2002/95/EC, under the Act.

### ► The Act and EU Law

The Act requires California's Department of Toxic Substances Control ("DTSC") to adopt new regulations prohibiting the sale or offering of a covered electronic device in California, if the device is prohibited from being sold in the European Union under Directive 2002/95/EC, known as "the RoHS Directive." *Cal. Health & Safety Code § 25214.10(b)*. The Directive restricts the use of certain hazardous substances, namely, heavy metals, in electrical and electronic equipment in the EU. While DTSC has not yet promulgated any regulations on the Directive, future

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regulations will prohibit the sale or offering of a covered electronic device in California only to the extent that the RoHS Directive, as amended, would prohibit such sale due to the presence of heavy metals. *Cal. Health & Safety Code § 25214.10(b)*. In other words, the Act uses the RoHS Directive solely as a source of standards for the heavy metal content that will be allowed in covered electronic devices sold or offered for sale in California. Reference to the RoHS Directive in the Act does not expand or otherwise change the basic scope of the Act, which is restricted at all times to “covered electronic devices,” as defined by the Act.

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### ▶ **RoHS Directive Bans the Sale of Devices Containing Heavy Metals**

Unlike the Act, which applies only to “covered electronic devices,” namely, video display devices with screens larger than four inches, measured diagonally, as specified by regulation and excluding certain products listed in the Act, the RoHS Directive applies to exhaustively listed categories of electrical and electronic equipment (“EEE”), including the following: household appliances, information technology and telecommunications equipment, consumer equipment, lighting equipment, electrical and electronic tools (except for large-scale stationary industrial tools), toys, leisure and sports equipment, and automatic dispensers.<sup>1</sup> Like the Act, however, the RoHS Directive excludes medical devices and monitoring and control systems.

As of July 1, 2006, the RoHS Directive prohibits the sale of EEE in the categories listed above if the product contains lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (“PBBs”), or polybrominated diphenyl ether (“PBDE”). The prohibition does not apply to spare parts for the repair, or to the reuse, of EEE that is sold in the EU before July 1, 2006. In the Annex to the RoHS Directive, there are significant exemptions to the prohibition on sales of EEE, including the following:

- Mercury in compact fluorescent lamps not exceeding 5 mg per lamp;
- Mercury in straight fluorescent lamps not exceeding 10 mg per lamp;
- Mercury in lamps not specifically mentioned in the Annex;
- Mercury in laboratory equipment;
- Lead as radiation protection;
- Lead in glass of cathode ray tubes, light bulbs, and fluorescent tubes;
- Lead as an alloying element in steel containing up to 0.3 percent lead by weight, aluminum containing up to 0.4 percent lead by weight and as a copper alloy containing up to 4 percent lead by weight;
- Lead in electronic ceramic parts;
- Cadmium oxide on the surface of selenium photocells;
- Cadmium passivation as an anti-corrosion in specific applications;
- Cadmium, mercury, and lead in hollow cathode lamps for atomic absorption spectroscopy and other instruments to measure heavy metals; and
- Hexavalent chromium as an anti-corrosion of the carbon steel cooling system in absorption refrigerators.

Other applications that also may be exempted from the sales prohibition, after evaluation by the European Commission, include the following:

- Deca BDE;
- Mercury in straight fluorescent lamps for special purposes;
- Lead in solders for servers, storage, and storage array systems, network

- infrastructure equipment for switching, signaling, and transmission, as well as network management for telecommunications; and
- Light bulbs.

### ▶ **Future Amendment of the RoHS Directive**

The RoHS Directive's sales ban may be extended to cover other substances, if such substances can be substituted by "more environment-friendly alternatives which ensure at least the same level of protection for consumers." The list of exemptions also may be amended, if the elimination or substitution of a prohibited substance is or is not "technically or scientifically" possible or practicable, or if the negative environmental, health, and/or consumer safety impacts caused by substitution are or are not "likely to outweigh the environmental, health and/or consumer benefits thereof."

Finally, if necessary, the European Commission may establish maximum concentration limits for the banned substances in specific materials and EEE components. Currently, a proposal is pending for a maximum concentration of 0.1 percent by weight for lead, mercury, hexavalent chromium, PBBs, and PBDE and of 0.01 percent by weight for cadmium. The Council of the European Union did not reject the proposal within the timeframe it had to do so, and thus the European Commission is expected to approve it. Before amending the RoHS Directive to change the scope of the exemptions or to introduce maximum tolerable concentration limits, however, the European Commission must consult EEE producers, recyclers, and treatment operators, and environmental organizations.

### ▶ **Scope of DTSC's New Heavy Metals Regulations**

The California Act states that DTSC's regulations "may not require the manufacture or sale of an electronic device that is different than, or otherwise not prohibited by, the European Union under Directive 2002/95/EC [the RoHS Directive]." *Cal. Health & Safety Code § 25214.10(e)*. DTSC acknowledges that this provision is poorly drafted and does not make perfect sense. They interpret it, however, to mean that the agency may not prohibit a device if that device is not prohibited in the European Union under the RoHS Directive due to its heavy metal content. DTSC also may not adopt any regulations that impose conditions or requirements that are in addition to, or more stringent than, the requirements and conditions set forth in the Health and Safety Code section mandating the DTSC regulations that implement the heavy metal standards in the RoHS Directive. *Cal. Health & Safety Code § 25214.10(f)(1)*. In combination, the foregoing two provisions aim to ensure DTSC's faithful application of the EU's standards for heavy metal content with respect to electronic devices covered by the Act.

### ▶ **Timing of DTSC's Regulations**

DTSC's regulations incorporating the heavy metal standards of the RoHS Directive will take effect on January 1, 2007, or on or after the date that the RoHS Directive itself "takes effect, whichever date is later." *Cal. Health & Safety Code § 25214.10(c)*. The RoHS Directive entered into force on the day that it was published in the *Official Journal of the European Union*, namely, February 13, 2003. EU Member States then had until August 13, 2004 to implement the RoHS Directive in their national laws, regulations, and administrative provisions. Accordingly, January 1, 2007 is the latest of the possible dates on which DTSC's heavy metals regulations could take effect, and DTSC has stated its intent to promulgate its new heavy metals

regulations with this deadline in mind.

### ▶ **Updating DTSC's Regulations to Reflect Changes to the RoHS Directive**

DTSC's future regulations on heavy metals in covered electronic devices must reflect the RoHS Directive "as amended." *Cal. Health & Safety Code § 25214.10(c)*. Therefore, we would expect DTSC to update its regulations, once they are promulgated, to reflect future amendments to the RoHS Directive. Furthermore, when interpreting the RoHS Directive, DTSC must consider the published decisions of the Technical Adaptation Committee and of the EU Member States that interpret the requirements of the RoHS Directive. *Cal. Code Health & Safety Code § 25214.10(f)(2)*. Accordingly, we expect a close and ongoing correlation between the heavy metal standards contained in the RoHS Directive and the standards contained in DTSC's regulations on heavy metals in covered electronic devices sold or offered in California. To anticipate changes to DTSC's heavy metals regulations, once promulgated, we advise companies to follow changes to the RoHS Directive by the European Commission and interpretation of the RoHS Directive by the EU Member States.

### ▶ **Annual Reporting Exemption for Qualified Manufacturers**

The Act reduces the reporting obligations of manufacturers who can successfully demonstrate to DTSC that their covered electronic devices comply with the heavy metals standards in the RoHS Directive. Under the Act, each manufacturer of an electronic device who sells a covered electronic device in California must submit an annual report to the Integrated Waste Management Board ("the Board") on the number of electronic devices sold by the manufacturer, the amounts of heavy metals (i.e., mercury, cadmium, lead, hexavalent chromium, and polybrominated biphenyls) and recyclable materials in such devices, and related information. *Cal. Pub. Res. Code § 42465.2*.

A manufacturer has an option, however, to report only on specific applications of compounds used in electronic devices that are exempted from the RoHS Directive. *Cal. Pub. Res. Code § 42465.2(b)*. To qualify for such reduced reporting, however, the manufacturer must satisfy two criteria. First, the manufacturer must document to the satisfaction of DTSC that the manufacturer is in compliance with the heavy metals standards in the RoHS Directive for any covered electronic devices that are not included in the manufacturer's annual report to the Board. *Cal. Pub. Res. Code § 42465.2(b)(1)(A)*. Second, DTSC must affirmatively certify such compliance. *Cal. Pub. Res. Code § 42465.2(b)(1)(A)*.

In other words, the Board will excuse reporting on a manufacturer's devices to the extent that DTSC is fully satisfied that the manufacturer is in compliance with the RoHS Directive's heavy metals standards for such devices. What qualifies as sufficient documentation of compliance to satisfy DTSC is presently unclear, however, as is the mechanism for DTSC to certify such compliance. DTSC will have to develop regulations governing its compliance certification procedures, but the agency has not yet indicated a timetable for doing this.

## **Endnotes**

1. The RoHS Directive is the companion of Directive 2002/96 on Waste Electrical and Electronic Equipment ("WEEE"), which imposes requirements related to the collection, treatment, recycling, and disposal of WEEE.

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