

ELECTRONICS TAKE ← BACK COALITION

Take it back

Make it green

Recycle responsibly

March 14, 2008

Jonathan Birdsong, Rep. Mike Thompson's Office
Greg Regan, Rep. Louise Slaughter's Office
Caroline Ahearn, Rep. Albert Wynn's Office
Chris Foster, Rep. Mary Bono Mack's Office
Greg McIlvaine, Rep. Zach Wamp's Office
Dave Berick, Sen. Ron Wyden's Office
Joel Merkel and Michael Daum, Sen. Maria Cantwell's Office
Chris Slevin and David Hodapp, Sen. Sherrod Brown's Office

Dear Congressional Staff Members:

The Electronics TakeBack Coalition is pleased to have the opportunity to comment on the Draft Concepts Paper for federal e-waste legislation. We appreciate the effort and many hours of work that has gone into creating this proposal.

First, we'd like to say that we are very happy to see the legislation anchored in the key concept of producer responsibility, with performance goals tied to each manufacturer. We believe that without performance goals for the companies, we are unlikely to see significant efforts to really make recycling convenient and reasonable for consumers. And we think this is a problem that warrants significant effort on the part of the manufacturers.

Second, we also applaud you for including a provision to address the export issue. We have some specific comments on the details on how this might work, but we specifically wanted to acknowledge the fact that you are trying to deal with this crucial piece of the problem in this paper. We believe that any e-waste legislation is incomplete without addressing it.

Third, we are pleased to see that you are approaching this as a policy that would not pre-empt the good work that the States have already been doing on this issue, but instead tries to reinforce that, and harmonize it. This is another core concept we support in federal legislation.

Key Concerns

We do have some overall primary concerns about this proposal:

1. Who pays for recycling?

While it's clear that manufacturers must pay registration fees, and they must set up programs, it's not clear that manufacturers actually have to pay for the cost of recycling, collection and transportation. It also doesn't say this should be free to consumers. Both of these concepts are critical to us – that recycling be free at "disposal" time for consumers, and that manufacturers are paying for this, and internalizing the cost. One of the core concepts of producer responsibility is its role in encouraging green design. But if the manufacturers don't pay for this, or can simply charge a fixed fee up front, then a primary advantage of producer responsibility - the ongoing incentive to modify

product design to reduce recovery costs - is lost.

2. Are there adequate registration fees to cover federal and state costs?

We support the use of registration fees to offset government administrative costs. Manufacturer registration fees would pay both for EPA overhead costs and for administrative costs for the States who get authorized. But we have an overall concern that this number might be enormous, and something the manufacturers are unwilling to pay. So we would suggest that some costing out on this be done sooner than later to see if the financing mechanism here will even work. The concept of allowing the States to seek authorization to administer the program is great. But we are wary of any unfunded mandates here, where they get authorization, then there isn't enough money for them to do the job.

3. Definitions of hazardous waste.

We are concerned about the blanket statement removing covered electronic devices from the definition of hazardous waste. We think this may have been suggested as a simple way to put e-waste under export control, but by removing it all from the entire definition of hazardous waste (not just for purposes of export) there are some ramifications to the States that this doesn't solve. Many of their enforcement laws and waste management regulations are based on those definitions, so if the definitions are nullified, it leaves the States in a bind. Perhaps it would be better to think about adding the new subsection to RCRA for purposes of export controls, and that clearly supersedes the various exemptions to the definitions created to allow these materials to be exported (circuit board exemption, scrap metal exemption, etc.).

4. Export controls.

Adequate export controls – that close the door on dumping our e-waste in developing countries – is one of the most important pieces of a federal program. It's something we can't do at the state level. So you will see a lot of our comments are related to the export issue. We are concerned that this proposal appears to apply export controls only to whole covered electronic devices (CEDs) and not necessarily to the components or separated or shredded materials, even though they are still, indeed, hazardous. By considering these as "commodities," which we think is your intent, you are removing them from export controls. This is actually no better than the status quo, which we so desperately need to fix. We would like to see a clear commitment to not violating the laws of importing and transit countries as part of this document, which is consistent with EPA's "Plug In to e-Cycling" guidelines. We have made many specific suggestions in our "Detailed Comments" that we think will strengthen the export section.

5. Does this promote reuse?

We are not sure this proposal includes anything that encourages more reuse to occur. One option would be to give extra credit towards manufacturers' goals for equipment diverted from recycling (not just for their regular asset recovery business) and going into reuse. In the green seal section, designing products built to be 100% upgradeable should be a specifically stated goal.

Detailed Comments

In working on state e-waste legislation, we have learned that with an issue as complex as this one, it's not until you get into the details of the program that it becomes clearer what any given proposal actually means. We are excited by the possibility of a meaningful federal program, and want to get into the details that will help make it so. We are providing comments in the same order as the sections in the document.

Purpose

1. One stated principle is to eliminate land disposal of products containing reusable commodities or materials. We believe that the principle should also include eliminating the incineration, including waste to energy burning, of e-waste. These products are so toxic when they are burned, often emitting dioxin, that incineration should not be permitted.
2. Under the global market principle, we would like to see a commitment to not violating the laws of other countries – specifically the importing and transit countries where we send our e-waste.

General Principles

1. The blanket removal of e-waste from the definition of hazardous waste is problematic, as we explained above, and would have some unintended consequences for States.
2. We do not agree that this program should sunset after 15 years. The need will continue (as consumer sales continue) and because recyclers will be making significant investments to build infrastructure, and will want to see the supply continue beyond just 15 years.

Handling and Management of CEDs:

We would like to see the document state a waste management hierarchy, in this order:

1. Extend life of electronic products as long as possible and appropriate, including reuse of component parts;
2. Recover constituent materials to the greatest extent possible
3. Dispose of toxic materials only in hazardous waste facilities designed and permits to accept concentrated toxins.

EPA Role

The EPA would have a very large responsibility under this bill, for deciding how high to "set the bar" in key areas – collection goals, recycler standards, determining what products are covered, and deciding what should be considered "hazardous." This leaves a lot of latitude for one agency – particularly an agency that is often at odds with the States and other stakeholders on the very question of where to "set the bar" when it comes to environmental regulation. Therefore, we think it's important that this legislation provide very clear direction in each area where the EPA has responsibility, that their mandate is to set high standards and act in specific ways.

Establishing Recycling Requirements. We support the idea of establishing high standards that recyclers must follow, to be eligible to participate in this program. This is an industry plagued by irresponsible, low-road practices, badly in need of standards and enforcement. But we think that simply setting recycler standards will

have little impact (other than confusion) if there is not also some kind of compliance auditing requirement with real enforcement. Assuming that it will be the manufacturers contracting the recyclers, they could be required to perform the audits. Also, we believe the bill language should specify high performance standards, going beyond the usual weak requirement that companies simply have some kind of environmental management system in place or simply have certain ISO audits. The bill should encourage some very specific responsible behaviors, and prevent other specific irresponsible behaviors. This is a complex issue that warrants more discussion than is appropriate in these comments. We would be happy to provide more details on this.

State Authorization

State cost reimbursements. Before seeking authorization, States need to be able to know what kind of administrative fees they will be able to receive to cover their costs. It's important that the States do not end up with an unfunded mandate. While the bill does allow them to petition to charge their own fee to manufacturers on top of the federal fee, they should have a mechanism for determining whether this will be necessary before they even request authorization to participate in this program.

Consistency with Federal Rules. The paper states: The state program has to be consistent with the federal rules. The term "consistent with federal rules" needs to be more clearly defined. While the document is clear that states can go farther than the federal program (which is a very good element), what if the state program includes something that the EPA doesn't support, like a ban on the use of prison labor for recycling. Is that grounds for losing state authorization?

State enforcement.

States do not have the capacity to enforce the export provision. It should be clearly stated under the state enforcement expectations that States will not be expected to enforce the export provision, but also explain who does and how that will be adequately funded. It should also be clearer exactly what kinds of enforcement the States will be expected to do.

Definitions

Manufacturer. The definition of manufacturer includes a somewhat confusing approach for how to deal with licensees, as well as with certain cases of importers. This has been a problem with the state legislation also, so we have spent some time working on developing a definition. We recommend the following language, which was devised in consultation with NGOs and State agencies in ME and WA (to avoid confusing language they had in their bills).

***"Manufacturer"** means a person who:*

- a) Has a physical presence and legal assets in the United States of America and*
- (1) Manufactures or manufactured a covered electronic device under its own brand or label;*
- (2) Sells or sold under its own brand or label a covered electronic device produced by other suppliers; or*
- (3) Owns a brand that it licenses or licensed to another person for use on a covered electronic device; or*

*(b) Imports or imported a covered electronic device into the United States that is manufactured by a person without a presence in the United States; or
(c) Sells at retail a covered electronic product acquired from an importer that is the manufacturer as described in (b) of this subsection, and elects to register in lieu of the importer.*

Covered Electronic Devices and Scope

CEDs. Using the same list of “Covered Electronic Devices” both for defining what products should be covered under the manufacturers’ recycling programs, and for determining which products should fall under export controls is both confusing and problematic, particularly if you use the criteria of “commodity value” to decide whether something should be covered or not. If something has hazardous properties, it should fall under export controls, whether or not it has any commodity value. Therefore we recommend that the term CEDs not be used to define what falls under export controls, and instead we offer a separate definition for that purpose (see that section below).

We would recommend the following revised definition for CEDS:

(1) Televisions, monitors, laptops, and other video display devices, capable of presenting images electronically on a screen, with a viewable area greater than four inches when measured diagonally, and may include cathode ray tubes, flat panel displays, plasma displays, liquid crystal displays, rear and front enclosed projection devices, and other similar displays that exist or may be developed.

(2) Computers, including any central processing units, desktops, servers, gaming computers

We would certainly support an even broader starting list for covered products, if the manufacturers would support it. But as long as there is your mechanism for expanding the scope, we can live with a smaller starting list.

Expanding the scope of CEDs. Again, we suggest that the term CEDs only apply to the products covered by the manufacturer recycling plans, not what’s subject to the export language (see more below). We suggest adding two more criteria - toxicity, and recovery rates - to the other criteria already listed: product volume, commodity value and environmental risk. Toxicity speaks to potential worker health and safety issues. Recovery rates address whether the products are already being recycled without being covered (whether or not they have commodity value.)

This duty to oversee the expansion of the product scope is another area where more specific guidance in the legislation is important, particularly with regard to the criteria of assessing environmental risk. Typically, the EPA doesn’t even test new electronic products as new categories come onto the market. When they do, they use only one test (the TCLP) to determine whether a product poses an “environmental risk”. This is a test that estimates landfill leaching, although many believe this doesn’t work well for all electronic products. It is also not an appropriate test for determining risk from municipal incinerators, open burning, or shredding – three common end-of-life processes for electronics. This is an area where the States are using more up-to-date science and testing methodology, but the EPA is unwilling to acknowledge their results. Therefore, this section (expanding the scope criteria) should be developed in much more detail, describing more specifics for how determinations will be made, what tests will be used, requiring that tests be done

that can that determine hazards from incineration, open burning, and shredding, as well as land filling, etc.

Scope of materials for export control

The following materials of concern should be subject to the export notice and consent provisions, or any other kinds of export controls, in this bill:

- 1) Electronic equipment, parts, and materials derived from them destined for recycling or disposal but not for direct reuse (as defined in 3(a) below), that consist of or contain any of the following:
 - a. lead, cadmium, or beryllium-containing circuit boards (whole, shredded, or in any form);
 - b. cathode ray tubes (CRTs);
 - c. CRT glass (processed and unprocessed, including cleaned CRT cullet);
 - d. batteries containing lead, mercury, or cadmium or flammable solvents (e.g. Lithium Ion batteries) or;
 - e. mercury-, beryllium- and Poly Chlorinated Biphenyls PCB-containing components, lamps and devices (e.g. LCD display lamps)
 - f. toners and toner cartridges of all kinds.

- 2) Non-working or untested parts or devices exported for repair containing any of the materials or components listed in #1. (This is because there is a large volume of e-waste being exported supposedly for reuse, but in fact it consists of non-working and non-reparable products)

- 3) Excluded from this scope:
 - a) Materials for Direct Re-use: fully functional equipment and parts that are fully tested, certified and labeled as working, and that are not intended for disposal or recycling, but for donation, re-use or resale. Parts and equipment for direct re-use must be exported only as certified as being fully tested and labeled as such and demonstrated to have a re-use market in the recipient country.

Manufacturers Requirements

Define terms. We suggest that “reasonably available” and “reasonably achievable” be more clearly defined. We hope this program will mandate collection goals that serve to drive the industry to make more recycling happen. Many companies will want to set the bar for “reasonably achievable” to mean the quantity that will come in with little effort. We are already seeing this play out in the States. It is important that this bill clearly states that the goal is for a significant amount of recycling to occur, and that the amount will need to keep on increasing to keep up with new sales. This is especially important when given that manufacturers can select any of the program collection methods.

Free To Consumers

There is no requirement here that the recycling should be free to consumers. We believe that if consumers must pay a fee at recycling time, this is a strong disincentive for recycling. Businesses are accustomed to paying for recycling

especially those that qualify as “large generators” of hazardous waste. On the other hand, consumers are known to often draw the line there, and will decide to either leave their product in storage or trash it. If this is to be a producer responsibility approach, then the manufacturers must clearly be paying for recycling their products, and internalizing the costs.

Performance Requirements

Green Seal

We like the concept of incentives offered in this bill. But we are not sure that both performance in collection and “greening” products should be lumped together into one “green” label. The name “green seal” implies green products, so there might be confusion there. The bill should suggest a clear process for deciding what criteria will be used for products to be considered “green.” We are unaware of any clear standards that adequately evaluate Design For Recyclability, so it would be helpful if the bill outlined a process for arriving at that important criteria.

Recycler Standards. See comments under EPA role, above. Also, the EPA would need clear authorization to go beyond current (weak) laws here in setting standards. At the national stakeholder dialogue on recycler standards, they are unwilling to go beyond current laws even for a voluntary standard. In giving the EPA the authority to “revise, waive or extend deadlines for meeting performance requirements,” the bill should specify the circumstances under which such revisions, waivers, or extensions would be granted. We would like to see the standards specifically prohibit the use of prison labor for toxic e-waste recycling.

Export Provision

What’s covered by the export provision – see comments above under Scope of Products.

Who is covered? The bill should clarify that “exporters” includes brokers (most export is done via waste trade brokers) and the manufacturers, as well as recyclers.

Eligible recyclers. The bill should require the use of registered recyclers who have been audited and shown to be in compliance with the recycling standards.

Timing. We recommend promulgating regulations within 1 year, not 2.

Two Part Standards. The bill suggests starting with some baseline standards, and then conducting an assessment of the need for more comprehensive standards. We think that if meaningful recycling standards are meant to be a part of this program, they need to be established before this program is rolled out. The bill should be specific (as explained above under EPA role) about setting the bar high for these standards. We don’t support the two-tier concept of requiring all recyclers to follow baseline standards, then offering incentives for recyclers who live up to higher standards. There should be one mandatory standard for how recyclers handle e-waste under any federally sanctioned program. Recyclers who don’t want to live up to high standards need not participate in this program.

EPA Notification. We recommend adding the requirement that the “competent authority” in the receiving and transit country must be notified. If we are not dealing with the designated “competent authority” we may get incorrect information from that country. You can find plenty of recyclers who have “permits” from countries that came from an agency other than the competent authority, in violation of the country’s laws. The proposal says, “The export of CEDs is prohibited unless the

receiving country consents to the intended export.” We suggest adding the term “in writing” so that consent must be given in writing. If written consent is not received, the export should not be allowed.

We would like to see a clearly stated commitment by the US to honor the principle of not violating the laws of other countries – the transit and importing countries. (Most of the e-waste exporting currently happening is in violation of the laws of the receiving countries.)

The proposal suggests modeling the law on the CRT rule, but modeling it on 40 CFR Part 262 Subparts E and H (as well as the Plug In guidelines) will be more in line with what the importing countries require – which includes shipment by shipment notice and consent (not annual).

Contents of the notification. The export notification should contain: information on specific contents, volume, port of departure and arrival, the receiving recycler and country, how and at which facility the CEDs will be recycled.

Disallowing export. The proposal says that if a receiving country (we’d like to add “or transit country”) objects to the export of CEDs, or withdraws a prior consent, EPA will notify the exporter in writing. We suggest you make it clear that the EPA will also therefore disallow such exports.

Clarify working equipment exception. The export of CEDs that are not certified as being fully functional and labeled as such should be prohibited unless the receiving country consents in writing to the intended export, on a shipment-by-shipment basis.

Transparency. We would like to see additional language requiring transparency on notifications and responses from the countries.

Alternative approach to exporting notice and consent. Another approach to solving the problem of dumping toxic e-waste on developing countries is for the U.S. to simply ban the export of the “materials of concern” (as defined above under Scope of Materials for Export) to developing countries (non-OECD countries). This would eliminate the whole notice and consent process, and could allow resources to be focused on enforcement.

Promoting better recycling performance. In the Green Seal section, “design for recycling” is one of the criteria. But recycling has come to mean mostly just shredding and smelting equipment – and by looking only at volumes of this kind of recycling, we are encouraging “design to grind.” One piece of that “design for recycling” equation is an analysis of the actual level of material recovery and then the ability to remanufacture using those materials that are recovered. There are no Life Cycle Assessment or accounting systems that set recycling performance standard for material recovery, resource conservation, energy efficiency, etc. EPA should collect data that tracks the fate of different type of materials. For example, EPA should be responsible for tracking and collecting data on which recovered products and materials are most frequently smelted, what recovered materials have secondary markets, which materials are most toxic, and what designs are cost effective, what recycling processing system is most efficient and environmentally sustainable to recycle etc. EPA should make this information available to the industry and to the public in order to improve recycling systems.

The Electronics TakeBack Coalition welcomes the opportunity to talk with you about all these details, and looks forward to the dialogue in the coming months.

Thanks again for your hard work on this important issue.

Sincerely,

A handwritten signature in black ink that reads "Barbara Kyle". The signature is written in a cursive style with a large, prominent initial 'B'.

Barbara Kyle
National Coordinator