



**STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS**

Date Amended	06/02/03	Bill No:	SB 20
Tax:	Hazardous Electronics Device Recycling and Recovery Fee	Author:	Sher and Romero
Board Position:		Related Bills:	

This analysis will only address the bill's provisions that impact the Board.

BILL SUMMARY

This bill would require a manufacturer of a hazardous electronic device either to implement a recovery system or to remit to the Integrated Waste Management Board (IWMB) a hazardous electronics device recycling and recovery fee on each hazardous electronic device sold by the manufacturer in the state, as specified. This bill would also authorize the IWMB to solicit and use any and all expertise available in other state agencies, including, but not limited to, the State Board of Equalization (Board).

Summary of Amendments

The amendments to this bill since the previous analysis delete the provision that would have declared that the bill take effect immediately as an urgency statute.

ANALYSIS

Current Law

Under existing law, there is no fee on the hazardous electronic devices sold in this state.

Proposed Law

This bill would add Chapter 8.5 (commencing with Section 42460) to Part 3 of Division 30 of the Public Resources Code as the Hazardous Electronic Waste Recovery, Reuse, and Recycling Act of 2003 (Act). Among its provisions, this bill would prohibit a person from selling a hazardous electronic device to a consumer in this state unless the IWMB determines the manufacturer of that hazardous electronic device demonstrates compliance with this measure by either:

- Establishing and implementing a hazardous electronic device recovery system that is certified by the IWMB for the collection, handling, transportation, processing, recovery, reuse, and recycling of the hazardous electronic waste that results from the hazardous electronic device sold by that manufacturer, or
- Paying a hazardous electronic device recycling and recovery fee.

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With respect to the fee alternative, a manufacturer of a hazardous electronic device would be authorized to remit to the IWMB a hazardous electronics device recycling and recovery fee on each hazardous electronic device sold by the manufacturer in the state.

The IWMB would be required to calculate the amount of the fee required to be paid by a manufacturer by subtracting the average scrap value, including any negative scrap value, of the hazardous electronic device sold by that manufacturer, or the hazardous waste disposal cost of that device, from the average cost of collecting, processing, and recycling the hazardous electronic scrap.

The hazardous electronics device recycling and recovery fee would be paid to entities for the collection, processing, and recycling of hazardous electronic waste, in a form and manner determined by the IWMB.

This bill would define a "hazardous electronic device" to mean any consumer product, component, or device that requires an alternating current or direct current electrical charge for operation and that the department determines is a hazardous material or a hazardous waste. A hazardous electronic device would include, but not be limited to, a television, video monitor, computer monitor, or any other device that has one or more cathode ray tubes (CRTs) containing lead.

This bill would also define "manufacturer" to mean any person who manufactures a hazardous electronic device and sells that hazardous electronic device in this state.

The IWMB would deposit any fees or fines collected into the Hazardous Electronic Waste Recovery, Reuse, and Recycling Account, which would be created in the Integrated Waste Management Fund. The funds in the Hazardous Electronic Waste Recovery, Reuse, and Recycling Account would be expended by the IWMB, upon appropriation by the Legislature, for the purposes of implementing the Act and for the following purposes:

- To provide recycling incentive payments to hazardous electronics material handlers that collect and process hazardous electronics and hazardous electronic devices, as specified.
- To provide grant funds to local governments for the cleanup of illegally dumped hazardous electronic devices and to establish and maintain local programs that supplement private sector programs for the convenient and cost-effective collection and recycling of hazardous electronics and hazardous electronic devices.
- To provide grants to nonprofit agencies that accept for recycling hazardous electronics and hazardous electronic devices.
- To provide financial incentives to manufacturers of hazardous electronic devices to encourage consumers to return the devices for processing, or recycling, and to assist manufacturers in collecting, processing, or recycling hazardous electronic devices.
- To establish a public information program to educate the public on the hazards of improper hazardous electronic device storage and disposal and on the opportunities to recycle hazardous electronic devices.

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- To provide funding to the department to implement and enforce specified provisions of the Health and Safety Code that relates to hazardous electronic devices, and any regulations adopted by the department pursuant to that chapter.

The IWMB would be authorized to solicit and use any and all expertise available in other state agencies, including, but not limited to, the Department of Toxic Substances Control (DTSC), the Department of Conservation, and the Board.

The bill would also declare that the imposition of a hazardous electronics device recycling and recovery fee would not result in the imposition of a tax within the meaning of Article XIII A of the California Constitution, because the amount and nature of the fee would have a fair and reasonable relationship to the adverse environmental burdens imposed by the disposal of hazardous electronic devices and there is a sufficient nexus between the fee imposed and the use of those fees to support the recycling and reuse of these devices.

The bill would become operative January 1, 2004.

Background

In 2002, Senator Sher introduced Senate Bill 1523, which would have placed a \$10 advanced recycling fee on the sale of all new CRTs sold in California. Senate Bill 1523 passed both houses of the Legislature, but was vetoed by the Governor. In his veto statement, Governor Davis said he would rather see California legislation modeled after the product stewardship approach in the European Union, and that he was willing to sign legislation in 2003 that “challenges industry to assume greater responsibility for the recycling and disposal of electronic waste.” The veto statement also stated: “I challenge the industry to lead the way and devise an innovative solution for the source reduction, recycling and safe disposal of electronic waste . . . Moreover, we simply must demonstrate our leadership and compassion by making sure that California's electronic waste is not irresponsibly sent to underdeveloped nations.” In response to the Governor’s challenge, Senator Sher introduced Senate Bill 20.

In General

According to information from the CIWMB and DTSC websites: "E-waste is a popular, informal name for electronic products nearing the end of their 'useful life.' Computers, televisions, VCRs, stereos, copiers, and fax machines are common electronic products. Many of these products can be reused, refurbished, or recycled. Unfortunately, electronic discards is one of the fastest growing segments of our nation's waste stream. In addition, some researchers estimate that nearly 75 percent of old electronics are in storage, in part because of the uncertainty over how to manage the materials.

“The term "E-waste" is loosely applied to consumer and business electronic equipment that is near or at the end of its useful life. There is no clear definition for E-waste; for instance, whether or not items like microwave ovens and other similar "appliances" should be grouped into the category have not yet been determined. Certain components of some electronic products contain materials that render them hazardous, depending on their condition and density. For instance, California regulation currently views nonfunctioning CRTs (cathode ray tubes) from televisions and monitors as hazardous.

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"CRTs, often called "picture tubes," convert an electronic signal into a visual image. A typical CRT contains between two and five pounds of lead. Lead is a toxic substance which may cause lead poisoning and can be especially harmful to young children. If products containing lead are disposed of to the trash, the lead can potentially contaminate the soil and our water supplies. When tested, most CRT's exceed the regulatory threshold for lead and are identified as hazardous waste when discarded. "

COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by the author and is intended to ensure that electronic or "E" wastes, are properly collected, recycled, refurbished, or disposed.
2. **Key amendments.** The **June 2, 2003**, amendments delete the provision that would have declared that the bill take effect immediately as an urgency statute.

The **May 21, 2003**, amendments that could impact the Board declare that the bill would take effect immediately as an urgency statute and make other technical corrections.

The **May 6, 2003**, amendments require a manufacturer of a hazardous electronic device to remit to the IWMB a hazardous electronics device recycling and recovery fee on each hazardous electronic device sold by the manufacturer in the state, as specified. This bill would also authorize the IWMB to solicit and use any and all expertise available in other state agencies, including, but not limited to, the Board.

3. **Could the state require out-of-state manufacturers to remit a hazardous electronics device recycling and recovery fee?** Various Supreme Court cases have focused on states' ability to impose the use tax on out-of-state firms making sales to in-state customers. In 1967 the Supreme Court ruled in *National Bellas Hess, Inc. v. Illinois Department of Revenue*, 386 U.S. 753 (1967), that a firm that has no link to a state except mailing catalogs to state residents and filling their orders by mail cannot be subject to that state's sales or use tax. The Court ruled that these mail order firms lacked substantial physical presence, or nexus, required by the Due Process Clause and the Commerce Clause of the United States Constitution.

In the 1977 case of *Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274 {51 L.Ed.2d 326, 97 S.Ct. 1076} the Court articulated that, in order to survive a Commerce Clause challenge, a tax must satisfy a four part test: 1) it must be applied to an activity with a substantial nexus with the taxing State, 2) it must be fairly apportioned, 3) it does not discriminate against interstate commerce, and 4) it must be fairly related to the services provided by the State.

North Dakota enacted anti-National Bellas Hess legislation with the expressed purpose of creating nexus with mail order firms selling to consumers in the state, in an attempt to compel out-of-state retailers to collect the use tax on mail order sales and test the continuing validity of the National Bellas Hess decision. The statute was challenged, and in 1992 the Supreme Court issued a ruling in *Quill Corporation v. North Dakota* (1992) 504 U.S. 298. The Court in *Quill* applied the *Complete Auto Transit* analysis and held that satisfying due process concerns does not require a

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physical presence, but rather requires only minimum contacts with the taxing state. Thus when a mail-order business purposefully directs its activities at residents of the taxing state, the Due Process Clause does not prohibit the state's requiring the retailer to collect the state's use tax. However, the Court held further that physical presence in the state was required for a business to have a "substantial nexus" with the taxing state for purposes of the Commerce Clause. The Court therefore affirmed that in order to survive a Commerce Clause challenge, a retailer must have a physical presence in the taxing state before that state can require the retailer to collect its use tax.

Based on the above cases, it is questionable whether the state could require an out-of-state manufacturer of a hazardous electronic device, who has no physical presence in California, to remit a fee in order for that device to be sold to a consumer in this state. Further, it should be noted that this bill would define a "manufacturer" to mean any person who *both* manufactures a hazardous electronic device and sells that hazardous electronic device in this state. Based on that definition, it is unclear if the restrictions would apply to an out-of-state manufacturer that has no physical presence in the state, since without a physical presence it is possible that a sale of the device that ends up in California would not have been made by the manufacturer in this state.

4. **Disposition of fee revenues.** Proposed Section 42471 would require that the hazardous electronics device recycling and recovery fee be paid to entities for the collection, processing, and recycling of hazardous electronic waste, as specified. However, proposed Section 42476 would require that any fees or fines (including the hazardous electronics device recycling and recovery fee) collected be deposited into the Hazardous Electronic Waste Recovery, Reuse, and Recycling Account and expended, upon appropriation by the Legislature, for purposes specified in the bill. Accordingly, proposed Sections 42471 and 42476 conflict with respect to the disposition of the fee revenues. To avoid confusion, the bill should be amended to address this concern.
5. **The Board's authority to collect.** It is suggested that this bill be amended to specify that the Board is authorized to collect the hazardous electronic device recycling and recovery fee pursuant to the Fee Collection Procedures Law if the IWMB were to contract with the Board to collect the fee. The Fee Collection Procedures Law contains "generic" administrative provisions for the administration and collection of fee programs to be administered by the Board. The Fee Collection Procedures Law was added to the Revenue and Taxation Code to allow bills establishing a new fee to reference this law, thereby only requiring a minimal number of sections within the bill to provide the necessary administrative provisions. Among other things, the Fee Collection Procedures Law includes collection, reporting, refund and appeals provisions, as well as providing the Board the authority to adopt regulations relating to the administration and enforcement of the Fee Collection Procedures Law.

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It is further suggested that the IWMB handle the petitions for redetermination and approve the claims for refund based upon the grounds that the IWMB improperly or erroneously calculated the amount of the fee or identified the wrong feepayer. It would be difficult for Board staff to resolve feepayer protests and claims based on actions of another state agency, and in doing so could result in a significant number of additional appeals conferences and Board hearings. Accordingly, the following language is suggested:

42475. (f) If the board contracts with the State Board of Equalization to collect the fee imposed in Section 42471, the State Board of Equalization may collect that fee pursuant to the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code).

(g) No petition for redetermination of fees determined by the board pursuant to Section 42471(b) shall be accepted or considered by the State Board of Equalization if the petition is founded upon the grounds that the board has improperly or erroneously calculated the amount of the fee pursuant to Section 42471(b) or has incorrectly determined that the person is subject to the fee. Any appeal of a determination based on the grounds that the amount of the fee was improperly or erroneously calculated or that the person is not responsible for the fee shall be accepted by the State Board of Equalization and forwarded to the board for consideration and decision.

(h) No claim for refund of fees paid pursuant to Section 42471 shall be accepted or considered by the State Board of Equalization if the claim is founded upon the grounds that the board has improperly or erroneously calculated the amount of the fee pursuant to Section 42471(b) or has incorrectly determined that the person is subject to the fee. Any claim for refund based on the grounds that the amount of the fee was improperly or erroneously calculated or that the person is not responsible for the fee shall be accepted by the State Board of Equalization and forwarded to the board for consideration and decision.

It is also suggested that the bill be amended to reimburse the IWMB, or its agent, for its costs of collection and making refunds associated with the Hazardous Electronic Waste Recovery, Reuse, and Recycling Account. Furthermore, it is suggested that the bill specify a due date for the fee and to authorize the payment of refunds on overpayments of the fee. Board staff is willing to work with the author's office in drafting appropriate amendments.

- 6. Overriding federal government or court actions.** Proposed Section 42485 would prohibit the IWMB from implementing the Act if federal law changes, as provided, or a court holds that the law is invalid. However, the proposed section does not indicate what would occur should the Act be implemented prior to a change in federal law or court action. Would the provisions of the Act cease in such a case? If that is the author's intent, Section 42485 should be amended to cover the cessation of the Act in the event the contingencies occur in the future. For example, the bill should provide for what would happen to the amounts on deposit in the Hazardous

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Electronic Waste Device Recovery Reuse, and Recycling Account, and address how refunds would be made.

In addition, proposed Section 42485 should be rewritten to more closely reflect the language of the bill. That is, it should (1) refer to "hazardous electronic devices" instead of "cathode ray tube devices", (2) refer to "manufacturers" instead of "cathode ray tube device manufacturers, retailers, handlers, processors and recyclers", and (3) refer to imposition of the fee on manufacturers rather than to collection of the fee from consumers.

7. **Other technical concerns.** In order to avoid any ambiguity with administration of the proposed Act, the author may wish to amend the bill to address the following concerns:

- This bill would prohibit a "person" from selling a hazardous electronic device to a consumer in this state. As such, the term "person" should be defined.
- Section 42466 provides specified recovery and recycling targets that are measured as a percentage of the hazardous electronic devices sold by that manufacturer in the state in the previous year. What if a person other than the manufacturer is the seller? It is suggested that the percentage be based on the number of devices manufactured by the manufacturer that are sold (by any person) in this state.
- The terminology throughout the bill is inconsistent. That is, the bill variously refers to "recovery, reuse and recycling"; "recovery and recycling"; "recycling or recovery"; "recycling and reuse"; "recycling and disposal"; "recycled or resold"; "refurbishing and recycling"; "collection or return"; "recovery system"; "return, recycle and dispose"; "recycle, refurbish or reuse"; "recycling refurbishment or reuse"; "collecting, processing and recycling"; "collection, handling, transportation, dismantling, processing, refurbishment, and recycling". It is suggested for clarification purposes that the bill define a simple term such as "recovery" to include all of the above elements.
- The terms "recovery plan" and "recovery system" should be defined.
- The bill refers to a "hazardous electronics device," "hazardous electronic device," and "hazardous electronics waste device." However, the only defined term in the bill is "hazardous electronic device."
- Section 42471 would require the IWMB to calculate the amount of the fee to be paid by each manufacturer based on the average scrap value, and the average cost of collecting and recycling. It is recommended that the bill provide guidelines as to how such averages are to be determined.
- Section 42474 is not clear who would be liable for civil penalties. For example, who would be liable for civil penalties in a case where a person, other than the manufacturer, sold a hazardous electronic device in this state that is not covered by a hazardous electronic device recovery system or the fee?

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COST ESTIMATE

The Board would incur non-absorbable costs to adequately develop and administer a new fee program. These costs would include developing computer programs, mailing and processing billings and payments, developing regulations, training staff, and answering inquiries from the public. A detailed cost estimate is pending.

REVENUE ESTIMATE

This measure does not specify the amount of the hazardous electronic device recycling and recovery fee. Accordingly, a revenue estimate could not be prepared.

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