STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS

Date Amended:	**05/24/04**	Bill No:	**SB 1180**
Tax:	**Mercury Lamp Recycling Fee**	Author:	**Figueroa**
Board Position:		Related Bills:	**AB 1699 (Laird)**

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

BILL SUMMARY

This bill would require each manufacturer and each distributor who sells a fluorescent lamp in this state to pay a fluorescent lamp recycling fee.

The Department of Toxic Substances Control (DTSC) would be authorized to collect the fluorescent lamp recycling fee or may contract with the State Board of Equalization (Board) or another party for collection of the fees due.

Summary of Amendments

The amendments since the previous analysis delete the requirement for each retail seller to collect the fluorescent lamp recycling fee from the retail purchaser at the time of sale, add a January 1, 2010 repeal date for the California Mercury Lamp Recycling Act of 2004, and make other technical corrections.

ANALYSIS

Current Law

Sales and Use Tax

Under existing law, a state and local sales and use tax is imposed on the sale or use of tangible personal property in this state, including fluorescent lamps. Currently, the total combined sales and use tax rate is between 7 ¼ percent to 8 ½ percent, depending on the location in which the merchandise is sold.

Environmental Fee

Under existing law, Section 25205.6 of the Health and Safety Code provides that corporations in industry groups that use, generate, store, or conduct activities in this state related to hazardous materials pay an annual fee to the Board. This environmental fee is based on the number of employees employed by a corporation in the state during the previous calendar year.

The environmental fee is adjusted annually to reflect increases or decreases in the cost of living during the prior fiscal year, as measured by the California Consumer Price Index. The fee rates for the 2004 calendar year are as follows:

This staff analysis is provided to address various administrative, cost, revenue and policy issues; it is not to be construed to reflect or suggest the Board's formal position.

Number of Employees	Annual Fee Rate
1 – 49	$0
50 – 74	$236
75 – 99	$416
100 – 249	$830
250 – 499	$1,779
500 – 999	$3,322
1,000 or more	$11,275

The annual fee is paid to the Board and deposited into the state's Toxic Substances Control Account.

Proposed Law

This bill would add Article 10.9.1 (commencing with Section 25219.3) to Chapter 6.5 of Division 20 of the Health and Safety Code known as the California Mercury Lamp Recycling Act of 2004 (Act). Among other things, this bill would require each manufacturer and each distributor who sells a fluorescent lamp in this state to pay a fluorescent lamp recycling fee to the DTSC. The amount of the fee would be set by the DTSC at an amount that is sufficient to pay for the cost of recycling the fluorescent lamp, to cover the costs of establishing grant programs, as specified, and the costs of administering the Act. A distributor would not be required to pay a fee for the sale of a fluorescent lamp for which the manufacturer has previously paid a fee.

The DTSC would be required to collect the fluorescent lamp recycling fees pursuant to the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code). However, the bill would allow the DTSC to contract with the Board or another party for collection of the fluorescent lamp recycling fees.

On and after January 1, 2005, each manufacturer and each distributor would be required to calculate the number of fluorescent lamps that the manufacturer or distributor sells quarterly in the state.

On and after July 1, 2005, each manufacturer and each distributor would be required to determine the amount of the fee for sales calculated, as specified, that are subject to the fee. The fee revenues for those lamps sold on and after January 1, 2005, until March 1, 2005, would be transmitted to the DTSC on or before **July 1, 2005.** Thereafter, the fee revenues would be transmitted to the DTSC on or before the last day of the month following each quarter, accompanied by forms prescribed by the DTSC.

FISCAL PROVISIONS

The DTSC would deposit all fee revenues collected into the Fluorescent Lamp Recycling Subaccount, which this bill would create within the Hazardous Waste Control Account, except the DTSC may retain an amount of each fee that is equivalent to the costs of administering the collection of the fee.

The bill specifies that all fluorescent lamp recycling fees collected, and any interested earned upon that money, would be deposited into the Fluorescent Lamp Recycling Subaccount.

This bill would allow the funds in the Fluorescent Lamp Recycling Subaccount to be expended by the DTSC and the California Integrated Waste Management Board (IWMB), upon appropriation by the Legislature, for all of the following purposes:

- Making recycling incentive payments, as provided, to a fluorescent lamp recycler that collects and processes fluorescent lamps in compliance with specified regulatory provisions.
- Providing grant funds to local governments to assist in the convenient and cost effective collection and processing of fluorescent lamps as a universal waste.
- Establishing a recycling incentive grant program, including paying recycling incentive payments, to a retail seller or wholesaler that collects and transports fluorescent lamps in compliance with specified regulatory provisions.
- Educating the public of the hazards of improper fluorescent lamp waste disposal and on the opportunities to recycle fluorescent lamp waste, as specified.
- Implementing the Act.
- Undertaking any activity necessary to ensure the safe and proper collection, handling, and transportation of fluorescent lamps.

This bill would authorize the Controller to loan funds from the Hazardous Waste Control Account, for deposit in the Fluorescent Lamp Recycling Account, in the amount necessary to implement the Act during the 2005 calendar year. The DTSC would be required to repay the loan as soon as there is sufficient money in the Fluorescent Lamp Recycling Subaccount to repay the amount loaned, but no later than 18 months after the date of the loan. Interest on the loan would be paid at the rate accruing during the loan period to moneys in the Pooled Money Investment Account.

MISCELLANEOUS

The Act would remain in effect only until January 1, 2010, and as of that date would be repealed, unless a later enacted statute, that is enacted before January 1, 2010, deletes or extends that date.

This bill would become effective January 1, 2005.

COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by the author and is intended to enhance the recycling infrastructure as a means of lessening the damaging effects of mercury released from this waste stream.
2. **Key amendments.** The **May 24, 2004**, amendments delete the requirement for each retail seller to collect the fluorescent lamp recycling fee from the retail purchaser at the time of sale, add a January 1, 2010 repeal date for the California Mercury Lamp Recycling Act of 2004, and make other technical corrections.

3. **The Board could not administer a new fee program with a January 1, 2005, effective date without risk to its Revenue Database Consolidation (RDC) Project.** Since April 2004 and running through the remainder of the 2004 calendar year, the Board is implementing the RDC project. The RDC project involves extensive changes to the Integrated Revenue Information System (IRIS), the Board's primary tax administration system. The RDC project implementation and stabilization efforts will occupy significant Board staff resources for the rest of 2004.

   In addition, the Board is currently in the process of developing, testing and implementing technology changes related to new legislatively mandated programs* enacted in 2002 and 2003. This effort has been included in the multi-year, multi-phase RDC project and will be on-going through the end of 2004.

   Since this bill would create a new fee program as of **January 1, 2005**, programming to the Board's computer system would be required at the end of 2004, which is during the final stages of the RDC Project. Making any modifications at the end of the system development would put the Board's RDC project, including the programming for the new legislatively mandated programs, at substantial risk. Because of this risk, the Board can not add a new tax or fee program to its system until early 2005. It is therefore suggested that the bill be amended to make the fee operative no earlier than **July 1, 2005**, if it is anticipated that the DTSC would contract with the Board for the collection of this fee.

4. **The Fee Collection Procedures Law is specific to the Board.** In its current form, the bill provides in Section 25219.5(b)(3) that the DTSC "may collect the fees imposed pursuant to this section pursuant to the Fee Collection Procedures Law…" .

   However, the Fee Collection Procedures Law contains "generic" administrative provisions specific to the Board 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 be collected by the Board 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 provides the Board the authority to adopt regulations relating to the administration and enforcement of the Fee Collection Procedures Law.

   As such, Section 25219.5(b)(3) should be amended to provide that if the DTSC elects to contract with the Board to collect the fee, the Board shall collect the fee in accordance with the Fee Collection Procedures Law.

5. **Could the state require out-of-state manufacturers, distributors or retailers to remit a fluorescent lamp recycling 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

*SB 1049 (Water Rights Fee), AB 71 (Cigarette and Tobacco Products Licensing Act), and SB 1701 (Alternative Cigarette and Tobacco Stamps)

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 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 preceding cases, it is questionable whether the state could require an out-of-state manufacturer, distributor or retailer of a fluorescent lamp, who has no physical presence in California, to remit a fee. Furthermore, this bill requires each manufacturer and each distributor who sells a fluorescent lamp **in this state** to pay the fee. Sales by out-of-state manufacturers or distributors where the property is shipped from outside the state into California generally occur **outside this state**. As such, it appears that the fee may not apply to out-of-state manufacturers or distributors (whether or not they have a physical presence in the state) since their sale may not occur **in this state**.

6. **This measure could increase local sales and use tax revenues.** Sales and use tax is due based on the gross receipts or sales price of tangible personal property in this state. It is presumed that the manufacturer/distributor fluorescent lamp recycling fee would be passed on to the ultimate consumer through an increase in the retail selling price of fluorescent lamps. Accordingly, the amount of the sale of these products to which the sales or use tax applies would correspondingly increase.

7. **Bill could set a precedent.** Imposing varying fees on specific commodities complicates tax administration and could set a precedent for establishing multiple fees on other classes of tangible personal property. This results in increasing administrative costs to the Board and an increased record-keeping burden on feepayers.

   In 2003, SB 20 (Sher, Ch. 526) enacted the Electronic Waste Recycling Act of 2003 (Act). Among other things, the Act imposes, on and after July 1, 2004, a covered electronic waste recycling fee upon the first sale in the state of a covered electronic

device to a consumer by a retailer. A "covered electronic device" is defined to mean, in part, a cathode ray tube, cathode ray tube device, flat panel screen, or any other similar video display device with a screen size that is greater than four inches in size measured diagonally and which the department determines, when discarded or disposed, would be a hazardous waste.

According to the DTSC's publication "Managing Universal Wastes in California," both fluorescent lamps and cathode ray tube devices are considered to be Universal Wastes when they are no longer useful or are discarded. For purposes of efficiency, the author may want to consider pursuing a Universal Waste Fee to be imposed upon all products determined by the DTSC to be a Universal Waste with fee revenues used for recycling programs. A single program would be less costly to collect and administer and may be less burdensome to retailers.

8. **Suggested amendments**. Board staff has many technical concerns with this measure. Among other things, these concerns include the following:

   - A distributor would not be required to pay a fee for the sale of a fluorescent lamp for which a fee has previously been paid by the manufacturer. However, it is not clear how a distributor would know whether or not the manufacturer has paid the fee. Furthermore, how would a distributor be protected when a manufacturer claims it will pay the fee, but does not?
   - On and after January 1, 2005, a manufacturer/distributor is required to calculate the number of fluorescent lamps that they sell quarterly in the state. It is not clear what the purpose is for this language. If it is to provide the operative date of the fee, this language should be struck and an operative date added to Section 25219.5(a).
   - The manufacturer/distributor fee would be remitted on a quarterly basis. However, the initial remittance of the manufacturer/distributor fee only would be for a two month period; January 1, 2005 through March 1, 2005.
   - A date by which the DTSC is required to set the manufacturer/distributor fluorescent lamp recycling fee rate and notify the Board should be specified. Further, it is recommended that such date be at least 8 weeks prior to the effective date of the rate to provide Board staff sufficient time to notify industry.
   - It is recommended that the bill be amended to authorize the payment of refunds on overpayments of the fee.
   - Referenced terms, such as "retail purchaser" and "fluorescent lamp," should be defined.
   - This bill would authorize the Controller to loan funds from the Hazardous Waste Control Account, for deposit in the **Fluorescent Lamp Recycling Account**, in the amount necessary to implement the Act during the 2005 calendar year. It appears that the loaned funds should be deposited into the Fluorescent Lamp Recycling **Subaccount**.
   - Staff has other suggested technical corrections to make the fluorescent lamp recycling fee provisions consistent with other taxes and fees administered by the Board.

Board staff is available to work with the author's office in drafting appropriate amendments.

9. **Related Legislation.** Assembly Bill 1699 (Laird) would require, on and after July 1, 2005, every retail purchaser who purchases a fluorescent lamp to pay a fluorescent lamp recycling fee in the amount determined by the DTSC to the retail seller for each fluorescent lamp purchased in the state. That bill, however, would not require the Board to administer and collect the fee.

COST ESTIMATE

The provisions of this bill would authorize the DTSC to contract with the Board to perform collection functions related to the fluorescent lamp recycling fee. The Board would be reimbursed by DTSC for its preparation and ongoing costs to administer the fee.

If the DTSC were to contract with the Board to collect the proposed fee, the Board would incur new non-absorbable costs associated with the workload to adequately develop and administer this new fee program. This workload would include registering fee payers, developing computer programs, mailing and processing returns and payments, conducting audits, 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 fluorescent lamp recycling fee. Accordingly, a revenue estimate could not be prepared.

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