



# STATE BOARD OF EQUALIZATION

## STAFF LEGISLATIVE ENROLLED BILL ANALYSIS

Date Amended	<b>Enrolled</b>	Bill No:	<b>SB 50</b>
Tax:	<b>Covered Electronic Waste Recycling Fee</b>	Author:	<b>Sher</b>
Related Bills:	<b>AB 901 (Jackson)</b>		

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

### BILL SUMMARY

Among other things, this bill would:

- Require the State Board of Equalization (BOE) to collect the covered electronic waste recycling fees, and
- Revise the operative date for the imposition of the covered electronic waste recycling fee from November 1, 2004 to January 1, 2005.

### ANALYSIS

#### Current Law

#### Covered Electronic Waste Recycling Fee

Chapter 8.5 (commencing with Section 42460) of Part 3 of Division 30 of the Public Resources Code enacted the Electronic Waste Recycling Act of 2003 (the Act). Among other things, the Act imposes, **on and after November 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 retailer selling a covered electronic device to a consumer is required to collect a covered electronic waste recycling fee from the consumer for each covered device sold by the retailer in the following amounts:

- Six dollars (\$6) for each covered electronic device with a screen size of less than 15 inches measured diagonally.
- Eight dollars (\$8) for each covered electronic device with a screen size greater than or equal to 15 inches but less than 35 inches measured diagonally.
- Ten dollars (\$10) for each covered electronic device with a screen size greater than or equal to 35 inches measured diagonally.

The CIWMB is authorized to collect the covered electronic waste recycling fee pursuant to the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code). However, the California Integrated Waste Management Board (CIWMB) may contract with the BOE or another party for collection of the covered electronic waste recycling fee.

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The Act also provides that a civil liability in an amount of up to two thousand five hundred dollars (\$2,500) per offense may be administratively imposed by the CIWMB for each sale of a covered electronic device for which a covered electronic waste recycling fee has not been paid. In addition, a civil penalty in an amount of up to five thousand dollars (\$5,000) per offense may be imposed by a *superior court* for each sale of a covered electronic device for which a covered electronic waste recycling fee has not been paid.

### **Integrated Waste Management Fee**

Under current law, Section 48000 of the Public Resources Code imposes an integrated waste management fee on each operator of a disposal facility based on the amount, by weight or volumetric equivalent, as determined by the CIWMB, of all solid waste disposed of at each disposal site. The fee is currently set at \$1.34 per ton of solid waste disposed.

The integrated waste management fee is collected by the BOE and, after payment of refunds and administrative costs of collection, deposited in the Integrated Waste Management Account.

Section 40121 defines "disposal facility" to mean any facility or location where disposal of solid waste occurs.

Section 40200 defines a "transfer station" to include those facilities utilized to receive solid wastes, temporarily store, separate, convert, or otherwise process the materials in the solid wastes, or to transfer the solid wastes directly from smaller to larger vehicles for transport, and those facilities utilized for transformation.

### **Proposed Law**

This bill would revise the imposition of the covered electronic waste recycling fee to require, on and after **January 1, 2005**, a consumer to pay a covered electronic waste recycling fee upon the purchase of a new or refurbished covered electronic device in amounts specified in existing law. A retailer is required to collect the covered electronic waste recycling fee from the consumer at the time of the retail sale and to separately state the covered electronic waste recycling fee on the receipt given to the consumer at the time of sale. A retailer may retain 3 percent of the covered electronic waste recycling fee as reimbursement for all costs associated with the collection of the fee and would transmit the remainder of the fee to the state, as specified.

A retailer could elect to make the covered electronic waste recycling fee payment on behalf of the consumer. In such case, the retailer must provide an express statement to that effect on the receipt given to the consumer at the time of sale. If a retailer pays the covered electronic waste recycling fee on behalf of the consumer, the fee would be a debt owed by the retailer to the state, and the consumer would not be liable for the fee.

### **Collection and Administration**

This bill would require the BOE to collect covered electronic waste recycling fees from retailers and deposit those fees in the Electronic Waste Recovery and Recycling Account. The BOE would collect the fees pursuant to the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code. For purposes of the Fee Collection Procedures Law, a retailer and a consumer would be deemed to be a feepayer.

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The covered electronic waste recycling fee would be due and payable quarterly on or before the last day of the month following each calendar quarter. The payments would be accompanied by a return in the form as prescribed by the BOE, including, but not limited to, electronic media. The BOE would be authorized to require the payment of the fee and the filing of returns for other than quarterly periods.

The BOE would be prohibited from accepting or considering a petition for redetermination of fees determined (billed) if the petition is founded upon the grounds that an item is or is not a covered electronic device. The BOE would also be prohibited from accepting or considering a claim for refund of fees paid if the claim is founded upon the grounds that an item is or is not a covered electronic device. The BOE would forward to the Department of Toxic Substances Control (DTSC) any appeal of a determination or claim for refund that is based on the grounds that an item is or is not a covered electronic device.

### **The Electronic Waste Recovery and Recycling Account**

This bill would require that all fees collected pursuant to the Electronic Waste Recycling Act of 2003 be deposited into the Electronic Waste and Recovery and Recycling Account (Account). The funds in the Account would be continuously appropriated without regard to fiscal year for the following purposes:

- To pay refunds of the covered electronic waste recycling fee.
- To make electronic waste recovery payments to an authorized collector of covered electronic waste, as provided.
- To make electronic waste recycling payments to covered electronic waste recyclers.
- To make payments to manufacturers that take back a covered electronic device from a consumer in this state for purposes of recycling the device at a processing facility.

The money in the Account could also be expended for the following purposes, only upon appropriation by the Legislature in the annual Budget Act:

- For the administration of the Act by the CIWMB and the DTSC.
- To reimburse the BOE for its administrative costs of registering, collecting, making refunds, and auditing retailers and consumers in connection with the covered electronic waste recycling fee.
- To provide funding to the DTSC to implement and enforce hazardous waste control laws, as described.
- To establish the public information program to educate the public in the hazards of improper covered electronic device storage and disposal and on the opportunities to recycle covered electronic devices.

### **Definitions**

For purposes of the Act, this bill would revise and add definitions for the following terms:

- "Consumer" would mean a person who purchases a new or refurbished covered electronic device in a transaction that is a retail sale or in a transaction to which a use tax applies, as specified.

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- "Covered electronic device" would mean a video display device containing a screen greater than four inches, measured diagonally, that is identified in the regulations adopted by the DTSC, as specified.  
A "covered electronic device" would not include (1) a video display device that is a part of a motor vehicle, as defined, or any component part of a motor vehicle assembled by, or for, a vehicle manufacturer or franchised dealer, including replacement parts for use in a motor vehicle, (2) a video display device that is contained within, or a part of a piece of industrial, commercial, or medical equipment, including monitoring or control equipment, (3) a video display device that is contained within specified appliances, or (4) an electronic device, on and after the date that it ceases to be a covered electronic device.
- "Person" would be defined to mean an individual, trust firm, joint stock company, business concern, corporation, including, but not limited to, a government corporation, partnership, limited liability company, and association. Notwithstanding Section 40170, "person" would also include a city, county, city and county, district, commission, the state or a department, agency, or political subdivision thereof, an interstate body, and the United States and its agencies and instrumentalities to the extent permitted by law.
- "Refurbished" would mean a device that the manufacturer has tested and returned to a condition that meets factory specifications for the device, has repackaged, and has labeled as refurbished.
- "Retailer" would mean a person who makes a retail sale of a new or refurbished covered electronic device. "Retailer" would also include a manufacturer of a covered electronic device who sells that covered electronic device directly to a consumer through any means, including, but not limited to, a transaction conducted through a sales outlet, catalog, or the Internet, or any other similar electronic means.
- "Retail sale" would have the same meaning as retail sale is defined under Section 6007 of the Revenue and Taxation Code. A retail sale would not include the sale of a covered electronic device that is temporarily stored or used in California for the sole purpose of preparing the covered electronic device for use thereafter solely outside the state, and that is subsequently transported outside the state and thereafter used solely outside the state.

### **Miscellaneous**

This bill would require, on or before August 1, 2005, and, thereafter, no more frequently than annually, and no less frequently than biennially, the CIWMB, in collaboration with the DTSC, to review, at a public hearing, the covered electronic waste recycling fee and make adjustments to the fee to ensure that there are sufficient revenues in the account to fund the covered electronic waste recycling program established pursuant to the Act. Adjustments to the fee that are made on or before August 1 would apply to the calendar year beginning the following January 1.

Section 42485 prohibits the CIWMB or the DTSC from implementing the Act if federal law changes, as provided, or a court holds that the law is invalid. This bill would add Section 42486 to provide the necessary authority to collect fees, make refunds or deposit funds for fees related to liabilities which accrued prior to the inoperative date of the Act.

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This bill would require the Director of Finance to transfer, as a loan, up to five million dollars (\$5,000,000) from the General Fund, and up to twenty-five million dollars (\$25,000,000) from any special fund authorized by law, to the CIWMB, to implement the changes made to the Act. Any loan made must be repaid on or before November 1, 2005, and prior to making any expenditure from the Electronic Waste and Recovery and Recycling Account for refunds, recovery payments to collectors, recycling payments to recyclers, or payments to manufacturers.

### **Health and Safety Code Provisions**

This bill would add Section 25214.10.1 to the Health and Safety Code to require the DTSC to adopt regulations that identify electronic devices that the DTSC determines are presumed to be, when discarded, a hazardous waste.

On or before October 1, 2004, and every April 1 thereafter, a manufacturer would be required to send a notice, as specified, to any retailer that sells that electronic device manufactured by the manufacturer. The notice would identify the electronic device, inform the retailer that the electronic device is a covered electronic device and is subject to the covered electronic waste recycling fee. The manufacturer would also be required to send a copy of that notice to the BOE. With respect to a refurbished covered electronic device, the manufacturer would be required to comply with the notice requirements only if that manufacturer directly supplies the refurbished covered electronic device to the retailer.

A covered electronic device identified in the regulations adopted on or before July 1, 2004, by the DTSC would be subject to the covered electronic waste recycling fee on and after January 1, 2005. Thereafter, a covered electronic device identified in the regulations adopted by the DTSC would be subject to the covered electronic waste recycling fee on and after July 1 of the year subsequent to the year in which the covered electronic device is first identified in the regulations.

Section 25214.10.1 also provides that if the manufacturer of an electronic device, as specified, obtains the concurrence of the DTSC that an electronic device, when discarded, would not be a hazardous waste, the electronic device would cease to be a covered electronic device. Such an electronic device would not be subject to the covered electronic waste recycling fee on the first day of the quarter that begins not less than 30 days after the date that the DTSC provides the manufacturer with a written non-hazardous concurrence for the electronic device. No later than ten (10) days after the date that the DTSC issues a written non-hazardous concurrence to the manufacturer, the DTSC would be required to do both of the following:

- Post on the DTSC's Web site a copy of the non-hazardous concurrence, including, but not limited to, an identification and description of the electronic device to which the concurrence applies.
- Send a copy of the non-hazardous concurrence, including, but not limited to, an identification and description of the electronic device to which the concurrence applies, to the CIWMB and the BOE.

And lastly, Section 25214.10.1 would provide immunity from civil penalties imposed by the CIWMB or superior court to a retailer who unknowingly sells, or offers for sale, in this state a covered electronic device for which the covered electronic waste recycling fee has not been collected or paid. The immunity would apply if the failure

to collect the fee were due to the failure of the BOE to inform the retailer that the electronic device was subject to the fee.

### **Integrated waste management fee**

Section 48000 would require the CIWMB and the BOE to ensure that all the integrated waste management fees for solid waste imposed that are collected at a transfer station are paid to the BOE, as specified.

**The bill would become effective immediately as an urgency statute.**

### **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.

Senate Bill 20 (Sher, Ch. 526, Stats. 2003) enacted the Electronic Waste Recycling Act of 2003. 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. The Act authorizes the CIWMB to contract with the BOE or another party for collection of the fee.

Assembly Bill 901 (Jackson, Ch. 84, Stats. 2004) extended the operative for the fee from July 1, 2004, to November 1, 2004.

### **COMMENTS**

1. **Sponsor and purpose.** This bill is sponsored by the author and is intended to clarify certain terms, exemptions and reporting and fee requirements in the Act, and to mandate the BOE to collect the covered electronic waste recycling fee.

The provision requiring the CIWMB and BOE to ensure collection of the integrated waste management fees collected at transfer stations is intended to address a concern that transfer stations, which are not subject to the integrated waste management fee, may be collecting the additional fee and not remitting those additional amounts collected to the BOE.

2. **Key amendments.** The **August 26, 2004**, amendments: 1) provide immunity from civil penalties for a retailer that has not paid the covered electronic waste recycling fee on a covered electronic device if the BOE failed to inform the retailer that the device was subject to the fee; 2) revise the operative date for adjustments to the fee; and 3) restructure the loan to the CIWMB to implement the changes made to the Act. The amendments also require the CIWMB and the BOE to ensure the integrated waste management fees that are collected by a “transfer station” are paid to the BOE.

The **August 23, 2004**, amendments revise the operative date for the fee to January 1, 2005, increase the loan amount for purposes of implementing the Act, and add an urgency clause. The amendments also delete the definition for "industrial, commercial, or medical equipment", and delete the definition for "vendor" and its related provisions.

The **August 16, 2004**, amendments make several technical corrections to address BOE concerns, delete the CIWMB responsibility to establish a call center and to notify retailers of their covered electronic waste recycling fee obligations, and provide funding for the BOE's start-up and on-going administrative costs.

The **June 21, 2004**, amendments change the operative date of the covered electronic waste recycling fee from July 1, 2004 to November 1, 2004, revise various definitions, and modify the purposes for which moneys in the Electronic Waste Recovery and Recycling Account may be expended. The amendments also make several other technical corrections to the Act.

3. **Could the state require out-of-state retailers to remit a covered electronic waste 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 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 contact 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 a state from 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 retailer of a covered 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. In such case, this bill would require the consumer to remit the covered electronic waste recycling fee to the BOE by making that consumer a “feepayer” pursuant to the Fee Collection Procedures Law.

4. **Bill should define “industrial, commercial, or medical equipment”.** In order for the exclusion of industrial, commercial, or medical equipment from the definition of covered electronic device to be administered consistently with the author’s intent, and to simply clarify what this term means, it is suggested that “industrial, commercial, or medical equipment” be defined in the bill. Without a definition, the statute could require interpretation through the regulatory process.
5. **Penalty immunity.** This bill would relieve a retailer from the penalties imposed pursuant to Public Resources Code Section 42474 *if the BOE failed to inform the retailer that the electronic device was subject to the fee.*

The BOE uses several different methods to inform and notify tax and fee payers of tax and fee information. These methods include, but are not limited to, news releases, important and special notices, tax information bulletins, newsletters, and its Web site. As such, notification may be provided directly or indirectly to retailers depending as to whether or not the retailer is registered as a feepayer for purposes of the covered electronic waste recycling fee. It would be difficult, and in some cases impossible for the BOE to directly notify all retailers of the covered electronic devices subject to the fee. For example, a retailer that fails to register with the BOE for purposes of the covered electronic waste fee program would likely not be mailed a notice of electronic devices subject to the fee. In such case, that retailer would be informed indirectly through news releases, Sales and Use Tax Information Bulletins, Excise Taxes newsletters, or the BOE’s Web site.

With respect to electronic devices deemed to be a covered electronic device and subject to the fee, the BOE would inform retailers of those *types* of electronic devices that are listed in the regulations adopted by the DTSC. The BOE could also notify retailers that a specific electronic device is subject to the fee. However, the BOE’s ability to notify retailers whether a specific electronic device is subject to the fee solely depends on whether a manufacturer sends the BOE a copy of a retailer notice\* identifying a electronic device manufactured by that manufacturer as a covered electronic device and subject to the fee.

6. **Does the integrated waste management fee provision impact the BOE?** This bill would require the CIWMB and the BOE to ensure that all integrated waste management fees collected at a transfer station be remitted to the BOE.

However, the integrated waste management fee is imposed on each operator of a disposal facility, and not on a transfer station. Since a transfer station does not fall within the definition of a “fee payer,” the BOE cannot require a transfer station to return amounts collected to the customer or remit amounts collected to the BOE as “excess fee reimbursement” pursuant to Revenue and Taxation Code Section 45651.5. As such, this provision would not impact the BOE.

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\* Pursuant to Section 25214.10.1(c)(2)

7. **Related legislation.** Assembly Bill 901 (Jackson, Ch. 84, Stats. 2004) revised the operative date of the covered electronic waste recycling fee from July 1, 2004 to November 1, 2004.

### **COST ESTIMATE**

The BOE would incur substantial non-absorbable costs associated with the workload to adequately develop and administer a new fee program. This workload would include notifying and registering fee payers, developing computer programs, mailing and processing returns and payments, carrying out compliance and audit efforts to ensure proper reporting, developing regulations, training staff, and answering inquiries from the public. These costs were estimated to be \$4,640,000 beginning in fiscal year 2004-05, and \$5,929,000 annually thereafter.

### **REVENUE ESTIMATE**

#### **Background, Methodology, and Assumptions**

The Act imposes a fee on covered electronic devices in the following amounts: (1) \$6 for each covered electronic device with a screen size of less than 15 inches measured diagonally, (2) \$8 for each covered electronic device with screen size greater than or equal to 15 inches but less than 35 inches measured diagonally, and (3) \$10 for each covered electronic device with a screen size greater than or equal to 35 inches measured diagonally.

In the *Selected E-Waste Diversion in California* study in 2001, the CIWMB projected that in year 2004, 3.5 million television units would be sold in California and 5.4 million monitors, adding up to sales of 8.9 million covered electronic devices.

In a 2001 presentation by Electronic Industries Alliance (EIA) titled *Cathode Ray Tube Manufacturing and recycling: Analysis of Industry Survey*, CRT's (televisions, monitors) sold in year 2000 by North American dealers was highlighted. The CRT's were categorized based on size (inches). We merged both CRT's and grouped them in the 3 groups as proposed by the bill:

#### **Units Sold in Year 2000 – TV's & Monitors**

	<b>(millions)</b>	<b>(percentage)</b>
Less than 15 inches	24.9	33%
15 or more than 15 inches, less than 35	50.1	66%
More than 35 inches	1.2	2%
Total North American	76.2	100%

Using those ratios, the 2004 sales projection by CIWMB is broken down into the 3 size groups and fees applied to estimate revenue:

**California: 2004 Projected Sales Grouped in Inches as Bill Proposes & Estimated Revenue**

	(millions) Units	(millions) Revenue
Less than 15 inches ((33% × 8.9 million units) × \$6 )	2.9	\$17.5
15 or more than 15 inches, less than 35 ((66% × 8.9 million units) × \$8)	5.9	46.9
More than 35 inches ((2% × 8.9 million units) × \$10)	0.1	1.4
	8.9	\$65.8

By analyzing 2003 US Census retail statistics, we estimate that at least 24.6% of television and computer monitor sales occur during the period between November and December. Based on this, we estimate that the new collection fee date of January 1, 2005 (initial effective date was November 1, 2004) would result in a revenue loss of \$16.2 million (24.6% × \$65.8 million = \$16.2 million).

**Revenue Summary**

This bill would result in a revenue loss of \$16.2 million for the Electronic Waste and Recovery and Recycling Account.

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