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California Adopts Significant Electronic Recycling and Waste Control Regulations

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by [Peter Hsiao](#), [Andrea L. Tozer](#), [Robert J. Reinhard](#)

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The new year has apparently only strengthened California's resolve to set the pace on environmental initiatives in the United States. Following on the heels of the state's much-publicized greenhouse gas initiatives, California recently promulgated new regulations designed to address potential environmental threats from discarded or improperly recycled electronic products. The new regulations set limits for lead, chromium, mercury, and cadmium content of certain categories of electronic equipment sold in California. Starting in 2007, the sale of some electronic devices containing these substances will be banned in California.

Who will be affected? *Anyone in the world* who makes video display devices with a diagonal screen size greater than four inches (Products) that are offered for sale in California. The regulations also cover retailers and many end users of affected Products.

California anticipates a gathering wave of disposal as the increasing pace of industry innovation motivates consumers to discard old equipment in favor of new technology. Moreover, the wave may not have even begun: California officials estimate that 75% of such waste has not yet been sent to a disposal site but instead is being stored by businesses, schools, households and other users.

Background

The origins of the new regulations date back several years ago when California, dissatisfied with its perception of the lack of action by the federal government, looked to regulatory schemes from international authorities for guidance on how to develop a state plan of action. The most widely recognized effort to address electronic products and waste by upstream controls over the content of the equipment is the European Union (EU) directive 2002/95/EC, commonly known as the Restriction of the Use of Certain Hazardous Substances, or "RoHS" (pronounced "Rose"). The EU RoHS directive bans the use of six hazardous substances in a wide range of electronic equipment. It has also spawned a number of similar initiatives in other countries, most recently in China, whose version may be even broader than the EU's, as it incorporates "precautionary principle" measures such as an obligation to consider product design and other features in the manufacturing process and to verify compliance in state-approved laboratories.

When the federal government did not enact similar RoHS requirements, the California legislature took matters into its own hands and adopted Senate Bill 20 in 2003 (codified in California Health and Safety Code section 25214.10). SB 20 directed California's Department of Toxic Substances Control (DTSC) to issue regulations to implement similar (but not identical—more on this later) RoHS-style prohibitions on sale of electronics containing impermissible amounts of the restricted hazardous substances. (This is distinct from legislation adopted by California and many other states seeking to promote recycling of electronic waste by imposing a point-of-sale electronic waste recycling fee collected by retailers for certain products.)

The New Requirements

On December 22, 2006, DTSC issued emergency regulations to restrict allowable concentrations of the four regulated substances in nine categories of video display electronics devices. Under the California version of RoHS, products containing the substances in excess of allowable maximum concentration values (MCVs) may not be sold or offered for sale in the state if the EU would prohibit those transactions. Despite this apparent overlay, California's requirements are not identical to those imposed by the EU. For example, California has intentionally narrowed the scope of regulated electronic Products from those covered by the EU RoHS directive. Specifically, California's new regulations cover:

- cathode ray tube containing devices (CRT devices);
- cathode ray tubes (CRTs);
- computer monitors containing CRTs;
- laptop computers with liquid crystal displays (LCDs);
- LCD-containing desktop monitors;
- televisions containing CRTs;
- televisions containing LCD screens;
- plasma televisions; and
- portable DVD players with LCD screens.

In addition, California's regulations exclude two EU-regulated substances used as flame retardants.

California regulations similarly exempt video display devices contained within—or as part of— industrial, commercial, or medical equipment, including monitoring or control equipment. Pending further rulemaking, the scope of this exemption remains unclear.

Notwithstanding these differences, California's requirements and those imposed by the EU are the same in many respects for those products to which both apply. For example, DTSC's regulations establish the same MCVs as the EU at 0.1% by weight for lead, mercury, and hexavalent chromium and at 0.01% for cadmium. Similarly, in order to facilitate compliance in the context of the global marketplace, California's emergency rules have automatically adopted several EU special exemptions to the MCV restrictions. Thus, for instance, EU exemptions for lead in CRT glass or in some plasma display panels will be carried over to California.

DTSC accommodated practical business considerations by allowing the prohibition to apply only to covered products *manufactured* after January 1, 2007. Thus existing video display Products that are in the pipeline of international commerce (i.e., on the shelf, in retail inventory, or manufactured and purchased but not yet shipped or received) will not be subject to California's emergency rules. This "sell-through" exemption grants distributors, suppliers, and retailers some breathing room to secure guarantees of compliance with MCVs for lead, mercury, hexavalent chromium, and cadmium regarding Products that will come into their hands in the future. Companies will also have some flexibility to use and sell Products made before the effective date but that require refurbishment, replacement or repair.

During 2007, DTSC intends to further modify the California regulatory scheme to add more detailed requirements. Whether these further rules will actually expand the regulation of these Products or further clarify the adoption of EU or California RoHS exemptions remains to be seen.

Note:

Morrison & Foerster has offices in Europe and China as well as the United States that enable us to address these issues worldwide.

Citations:

Cal. Code Regs. tit. 22, § 66260.202

Waste Recycling Act of 2003, Cal. Health & Safety Code §§ 25214.9-25214.10.2; and Cal. Pub. Res. Code §§ 41516, 42460-42486