

Implications Of The Obama Administration's National Strategy For Electronics Stewardship

David E. Markert and
David B. Weinberg

WILEY REIN LLP

On July 20, the Obama administration released its long-awaited National Strategy for Electronics Stewardship. It describes a number of activities that the federal government will take in the next few years to ensure the proper handling of its used electronics and spur the growth of the U.S. electronics recycling industry. These activities have practical and financial implications for electronics manufacturers, electronics recyclers and government contractors. Companies should be working now with the administration to identify efficiencies and improvements that can be made in the National Strategy.

David Weinberg is Chair of the Environment & Safety Practice and has more than 35 years of experience in administrative and environmental law, specializing in environmental, occupational health and safety, transportation, product safety and pesticide matters. Regularly rated by Chambers USA as one of Washington, DC's "Leading Lawyers" in his field, Mr. Weinberg is commended for maintaining his "position as a leader in occupational health and safety, transportation, product safety, electronics and battery issues and pesticide regulation" (2011), and for possessing "a phenomenal level of experience" and providing "excellent analysis and strategic advice" (2010). He also has been listed for over a dozen years in The Best Lawyers in



David E.
Markert



David B.
Weinberg

Overview Of The National Strategy

The National Strategy was developed by the federal Interagency Task Force on Electronics Stewardship (Task Force). The Task Force, which was established last fall, is co-chaired by the White House Council on Environmental Quality (CEQ), the U.S. Environmental Protection Agency (EPA) and the General Services Administration (GSA). President Obama charged the Task Force with preparing the National Strategy in a

America, rated by the Euromoney Legal Media Group as one of the world's leading environmental lawyers and named one of "America's top 20 environmental lawyers" by the Guide to the World's Leading Environment Lawyers. He may be reached at (202) 719-7102.

David Markert is an Associate in the firm's Environment & Safety Practice. He counsels a broad range of clients on environmental and safety matters, with a particular focus on pesticides, clean air, endangered species and e-waste management issues. He also assists clients in matters relating to enforcement and defense of patent and intellectual property rights. Please call him at (202) 719-7496.

November 2010 Presidential Proclamation.

The Task Force identified four overarching goals for the National Strategy. These goals are to:

- build incentives for the design of "greener" electronics;
- ensure that the federal government leads by example;
- increase the safe and effective management of used electronics in the U.S.; and
- reduce harm from U.S. exports of e-waste.

For each goal, the Task Force laid out the action items required to achieve that goal and the projects it believes necessary to implement each action item. A detailed breakdown of the action items and projects associated with each goal, including target completion dates, is provided in an online annex to the National Strategy. The following projects are particularly notable for their potential impacts and likelihood of implementation:

- launching a "Greener Products Website" to help consumers more easily find information about greener products;
- expanding the Electronic Product Environmental Assessment Tool (EPEAT) – a global registry for greener electronics targeted to institutional purchasers (which currently covers only laptops, desktops and monitors) – to consider environmental impacts across entire product lifecycles and to cover additional products;
- revising the Federal Management Regulation to include a requirement that federal agencies only dispose of non-functional electronic equipment through contracts that stipulate the use of third-

Please email the authors at dweinberg@wileyrein.com or dmarkert@wileyrein.com with questions about this article.

party-certified refurbishers or recyclers;

- expanding the use of manufacturer take-back agreements in federal electronics purchase, rental, and service contracts, and requiring the use of third-party-certified recyclers in manufacturer take-back programs;
- removing all products that are not ENERGY STAR or EPEAT certified, where practicable, from GSA's standing government-wide information technology acquisition contracts;
- developing workplace safety guidance for the electronics recycling and related industries; and
- proposing new commodity classification numbers (*i.e.*, Schedule B numbers) and other regulatory changes that will allow better tracking of CRTs and other electronics exported for reuse and recycling.

The National Strategy supports ratification of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, but it does not prohibit the export of the federal government's used electronics to developing countries. Instead, it includes projects that are aimed at gathering better data on exports, enforcing existing regulations on CRT exports and sharing best practices for recycling with developing countries. This approach has been roundly criticized by the Electronics TakeBack Coalition and other non-governmental organizations (NGOs).

Implications For Industry

Because the federal government is the country's largest purchaser of electronics, the National Strategy has significant implications. With respect to electronics recyclers, these implications are clear: a recycler must be certified if it wants to profit from the federal government's business. GSA underscored this point in a recent press release, observing that "[r]equiring that [federal government computers] end their useful lives at a certified recycler could mean big business," and that "[c]ertified electronics recyclers can anticipate a wealth of opportunities in working for the U.S. government."

The implications of the National Strategy for electronics manufacturers and government contractors are less certain and highly dependent on the particular products and services offered. In the near term, however, some potentially significant implications for companies in these industries include:

Manufacturers risk losing the government's business if they do not commit to use only certified recyclers. A key component of the National Strategy is the use of electronics recyclers certified to a third-party certification standard (*e.g.*, R2 or e-StewardsÆ). The National Strategy includes a number of projects that are intended to move industry toward exclusive use of certified recyclers. The development of manufacturer take-back agreements, mentioned above, is one of these projects. GSA intends to begin piloting the use of such agreements, which would include the use of certified recyclers, by May 31, 2012. Another project, which is already underway, involves obtaining commitments from manufacturers to use only certified recyclers. Dell, Sony and Sprint signed such commitments at the ceremony unveiling the National Strategy. They agreed in the commitments to work toward using only certified recyclers to manage 100 percent of the used electronics they collect by 2014.

Companies that do not have ENERGY STAR or EPEAT products will be at a competitive disadvantage for the government's business. As noted above, the National Strategy calls for GSA to remove, to the maximum extent practicable, electronic products that are not ENERGY STAR or EPEAT certified from its standing government-wide information technology acquisition contracts. GSA will do this as the contracts expire and become eligible for renewal. The National Strategy also calls for the Department of Defense to promote green electronics as a source-selection preference.

Companies will come under greater pressure to publicly disclose more data and information about their recycling practices. Greater sharing by industry of recycling practices is an important component of the National Strategy. Under the commitments they signed, Dell, Sony and Sprint agreed to post information about their recycling practices on a website within 30 to 90 days of the National Strategy's unveiling. Among the pieces of information they agreed to post is the total volume of used electronics recycled by state; the volume of used electronics recycled at third-party-certified recyclers; and the volume of electronics collected from businesses and institutions and, separately, from consumers. The companies' actions establish a new base-

line for transparency that NGOs are likely to leverage in their quest to increase the pressure on other electronics manufacturers to disclose more information about their recycling practices.

The National Strategy also is likely to have spillover effects on the recycling programs that electronics manufacturers operate in the two-dozen states with producer responsibility laws. The National Strategy's emphasis on certified recyclers, for example, could lead manufacturers to use only certified recyclers in their state e-waste recycling programs if they are not doing so already. In addition, the planned revisions to the regulations that govern U.S. exports of used electronics will force many manufacturers to change the practices they use to finally dispose of the electronics collected through state compliance programs.

How Stakeholders Should Respond To The National Strategy

Electronics manufacturers, electronics recyclers and government contractors need to evaluate their product and service offerings against the National Strategy to determine the scope of the administrative and financial impacts on their businesses. They should then assess what internal changes to their businesses, if any, are necessary to mitigate these impacts. At a minimum, companies that sell electronic equipment or related services to federal agencies, and especially GSA, *should be preparing now to operate a take-back program that uses certified recyclers* if they do not already have such a program.

In addition, industry stakeholders should be prepared to work with the administration to identify efficiencies and improvements that can be made in the National Strategy. The National Strategy includes many opportunities for industry to provide input on the Task Force's activities and the strategy's overall direction. One such opportunity will occur this fall, when EPA and GSA plan to convene multi-stakeholder groups to address the challenges of green electronics design and the development of standards for products that are not currently covered by EPEAT. Stakeholders should take advantage of this and the other opportunities to work collaboratively with the administration in order to ensure that they are not burdened with impractical or cost-prohibitive requirements under the National Strategy.