

Activists Want More Regulation of Used Electronic Exports, But What Is Really Needed Is Simplification

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As anticipated, the Obama administration initially ramped up environmental regulation and attempted to bring the U.S. policy into closer alignment with that of the international community. For example, in late December 2009, the U.S. Environmental Protection Agency (EPA), promulgated a new rule adopting changes to the Organization for Economic Cooperation and Development (OECD) agreement on transboundary movements of hazardous wastes (requiring new procedures for exporters of spent lead-acid batteries for purported recycling). This rule went into effect on July 7, 2010.

But EPA is not moving fast enough for e-waste activists, who welcomed the administration's actions by urging similar changes on e-waste export and, yet again, U.S. ratification of the Basel Convention, the principal international treaty governing the transport of hazardous wastes between countries.

In fact, however, additional regulation is not needed. What is missing is an easy way to understand the morass of requirements that currently exists. Hopefully, this article will provide a start down that road.

Current Regulation of Electronics Exported for Recycling

Federal regulation of solid and hazardous wastes (including "universal wastes") occurs under the authority of the Resource Conservation and Recovery Act (RCRA). EPA promulgates rules under RCRA but delegates implementation and enforcement authority to all the states except Alaska and Iowa. This means that regulatory changes adopted by EPA are only immediately effective in those two states. In every other state, new provisions are effective only if and when the state also adopts them. States are not required to incorporate new federal requirements into their regulations, unless those requirements make the regulations more stringent.

The federal regulations are a floor for states that obtain delegation, and states can impose additional requirements. States can and do adopt some of the regulations but not others, meaning that the law in any given state can be a combination of the federal regulations and unique state provisions. For example, nearly all of the states that have implementation and enforcement authority have adopted the federal regulations governing exports of hazardous waste. Twenty-seven states have adopted the federal regulations excluding

cathode ray tubes (CRTs) from the definition of solid waste. Each of these states may or may not also have adopted additional regulations to supplement either or both of the federal requirements.

Not surprisingly, the highest degree of regulation applies to hazardous waste, and some used electronics are considered hazardous waste under federal law. But the key definitional provisions are complex and confusing. Under RCRA, a generator must determine if a product that has reached its end of life is, or contains, a hazardous waste listed in the federal regulations. If the product does not, the generator still must determine whether the product has the same characteristics as materials that are deemed hazardous waste. Some batteries, mercury-containing equipment, and lamps are listed as a subcategory of hazardous waste, that is subject to reduced requirements.

But, as noted, states can adopt more stringent waste management programs, and many state programs differ from the federal regulations to varying degrees. When considering e-waste, California's variations are the most important, because they are the most expansive.

Moreover, waste identification is only the start of regulation. In general terms, RCRA requires notification to the country of import and consent prior to exporting hazardous waste. With a few small changes, these same requirements apply to the subset of hazardous wastes considered universal wastes.

To make matters more complicated, there also are separate requirements for CRTs, but they are not effective everywhere. As noted above, in 2006, EPA promulgated a rule now adopted by 27 states, that excludes CRTs from the definition of solid waste under RCRA (and thus from the general regulatory scheme) if certain conditions are met. California has adopted a similar rule.

Determining What Requirements Apply

A number of considerations must be evaluated to determine what requirements (if any) apply to an export shipment of e-waste. In general terms, they boil down to these:

From where is it being exported? Despite the piecemeal state-by-state implementation of RCRA, to date, California is the only state that has adopted its own comprehensive regulatory framework for exports. It has many similarities to the federal notice and consent requirements but enough differences to be confusing.

What is being exported? As explained above, export requirements apply to hazardous waste and universal waste. If the product being exported is neither, the notification and consent provisions do not apply. However, depending on whether the product being exported meets only the definition of a hazardous waste, or also qualifies as a universal waste, notification and consent information required vary. There are also special abbreviated requirements for CRTs.

To where is it being exported? In most states, the notification and consent requirements governing exports to OECD member countries have been streamlined. The following are OECD member countries: Australia, Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, South

Korea, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

Why is it being exported? The notification and consent requirements may vary depending on whether the product will be recycled, reused, or discarded.

General Requirements for Exporting

The answers to these questions are important because they allow identification of the requirements for exporting products. These requirements can be sorted into five major sets: (1) Non-California State of Origin, CRT products; (2) Non-California State of Origin, Hazardous Waste Other than CRTs; (3) California State of Origin, CRTs or Electronic Device; (4) California State of Origin, Universal Waste Other than CRTs or Electronic Device; and (5) California State of Origin, Non-RCRA Hazardous Waste.

While a detailed analysis of the requirements for each of these categories is beyond the scope of this article, here is a basic list of the regulations that apply to materials in each category:

- (1) Non-California State of Origin, CRT Products - 40 C.F.R. §§ 261.39, 261.40, and 261.41. Note that EPA's proposed rule amending the definition of solid waste would impact what CRT Products may be exported (see "EPA's Proposed Definition of Solid Waste Broader Than Many Realize," p. 8).
- (2) Non-California State of Origin, Hazardous Waste Other than CRTs - 40 C.F.R. 262 Subparts E and H.
- (3) California State of Origin, CRTs or Electronic Device - Cal. Codes Regs. Tit. 22 §§ 66273.40(a)(3)(A) and 66273.40(a)(3)(B).
- (4) California State of Origin, Universal Waste Other than CRTs or Electronic Devices - Cal. Code Regs. Tit. 22 § 66273.40(a)(1) and 66273.40(a)(2).
- ((5) California State or Origin, Non-RCRA Hazardous Waste - Cal. Code Regs. Tit. 22 § 662.53(b).

Simply seeing this framework, even without the details, is enough to show that it is extraordinarily difficult for responsible companies that want to "do the right thing" to do so.

Dealing with This Complexity

All of the foregoing is confusing, but the most difficult part to assuring compliance is determining whether a product is hazardous and/or universal waste. Since California provides a more comprehensive list than the federal regulations, a conservative compliance approach would be to follow the applicable requirements for all products that are presumed or may be hazardous in California. But this means notification, consent, and other requirements will be completed for products that are not considered hazardous waste.

The alternative, however, also can be burdensome. Testing to determine which products are hazardous waste is a time consuming and expensive process. Where a company is handling only a single or small number of waste streams, this may be feasible. If a wide range of e-waste products are at issue, however, the burdens can become excessive.

In any event, once products are classified, to sort out the applicable regulations, the above framework can provide an initial, basic guidance on what federal law may require for exporting those products.