

A Big Year for State Battery Legislation

February 2013

While the U.S. Congress continues to tie itself up in knots, state legislatures are moving legislation forward on a number of fronts. The world of batteries is one of them.

Legislation that could directly affect one or more segments of the industry is pending or soon to be introduced in a dozen states. Much of it deals with recycling: in Minnesota and California, primary consumer battery stewardship; in Washington and Oregon, small rechargeables; and in Maryland, Wisconsin and Massachusetts, automotive-type lead batteries. But several other bills, aimed at other issues and industries, could affect battery manufacturers and marketers. This article provides an overview of the landscape.

Primary Battery Stewardship

In November 2011, leading primary consumer battery manufacturers—Energizer, Duracell, Rayovac, Panasonic and Kodak—formed the Corporation for Battery Recycling (CBR). Their announced intention was to put in place by March 2013 a voluntary, national recycling program for used primary batteries. A number of single-jurisdiction “foundation programs” have since been implemented to evaluate alternative approaches. But by late 2012, the sponsors had concluded that a fundamental problem had to be addressed to make the system they envisioned work: “free riders.” In practice, it is impossible to run a national program to collect only batteries bearing an identified set of brands. As a result, unless every brand owner supports the program, companies voluntarily paying for it end up paying the cost of collecting and processing batteries put into the marketplace by others. Not surprisingly, the payors find this objectionable.

Authors

David B. Weinberg
Senior Counsel
202.719.7102
dweinberg@wiley.law

Faced with this problem, CBR delayed initiation of the originally envisioned program and began to explore the possibility of supporting mandatory state recycling legislation. This reflected a major change in approach—primary battery manufacturers previously had resisted all legislative mandates.

At the same time, some activists, frustrated by the industry's position, decided to revive earlier mandatory bills. Such a bill since has been introduced in California. In addition, the governor of Minnesota had introduced a broad stewardship bill that covers not only used primary batteries but also paint and carpet. But positive discussions are under way in both states that suggest that legislation that meets the concerns of both industry and activists may emerge. The results of those discussions should become clear shortly.

Small Rechargeable Battery Stewardship

The manufacturers and users of rechargeable batteries got ahead of the stewardship curve in 1994, when they founded what is now known as Call2Recycle®—the most successful industry-sponsored recycling program in the nation, and perhaps the world. As a result of the Call2Recycle® program's activities throughout the U.S. and Canada, over 70 million pounds (35,000 tons) of batteries have been recycled.

Since the establishment of the Call2Recycle® program, very few states have found it necessary to adopt mandates for rechargeable battery recycling. In recent years, however, the same “free rider” problem that bedevils the primary battery industry has become a challenge to Call2Recycle®. As a result, PRBA-The Rechargeable Battery Association has approached legislators in both Washington state and Oregon to urge new legislation. The goal is to maintain the viability of Call2Recycle® without discouraging other programs, such as the successful Batteries Plus and telecom industry efforts.

These efforts are beginning to bear fruit. An effort to obtain favorable legislation never got off the ground in Washington's short 2012 session, but an industry-supported bill (H.B. 1364) was recently reported out of the Washington House Environment Committee. A key element of the bill is a provision that allows operators of *bona fide* plants to collect from companies not supporting *any* program costs the *bona fide* plan incurs in handling the free rider's products. The primary battery legislation under consideration in Minnesota also may be expanded to provide similar rights as to rechargeable battery plans (which already are required under that state's laws.)

Similar legislation also appears likely to be introduced shortly in the Oregon Legislature. How quickly it moves remains to be seen. However, several other more contentious product stewardship issues are also being addressed by the relevant legislative committees this year. The Washington Legislature's activities are likely to be watched closely in Oregon.

Lead Battery Stewardship

Even before the consumer rechargeable industry established the Call2Recycle® program, the lead battery industry's Battery Council International (BCI) had begun to promote state legislation encouraging the collection and recycling of used automotive and similar lead batteries. The effort proved highly successful. As of January 2005, legislation supported by BCI had been adopted in 44 states. Those states account for about

90% of the U.S. population.

In the face of this success, obtaining similar legislation in other states has not been a continuing industry priority. However, as the opportunity has arisen, BCI has sought to do so. Prior to this year, the last bill enacted was in Ohio, in 2007. Now, in 2013, a lead battery recycling bill has been introduced in Maryland, and is receiving strong industry support.

Industry-supported lead battery recycling legislation builds on the very simple—and almost unique—distribution pattern associated with lead batteries: All manufacturing steps are typically done by a single company, and there are few distribution layers between manufacturers and retailers. In addition, there is considerable economic value in used lead batteries. These circumstances are very different from those arising in connection with consumer battery recycling, and have made a deposit-in-lieu-of-trade approach the strategy of choice. And it is hard to argue with success: Without any of the formal programs or bureaucratic complexities associated with other product stewardship schemes, the rate of recycling of lead from batteries has been close to 100% for many years.

Ironically, the leadership shown by the lead battery industry in beginning to promote recycling legislation almost 30 years ago is now causing some frustration. Early bills imposing a deposit requirement set a specific deposit amount: \$5, or sometimes \$10. But as the nominal world price of lead has increased, the value of the lead in a used battery sometimes has exceeded those historically set amounts. This has been addressed in more recent legislation by replacing fixed deposit amounts with floors (e.g., “the deposit shall be no less than \$10”). This allows the private sector to increase deposits when it is necessary to avoid diversion of used batteries from the routine recycling chain.

However, a few states still have on their books the old, fixed-amount provisions. As a result, representatives of retailers and battery manufacturers have been urging those states to replace their flat mandates with floors. 2013 may see movement in response to these efforts. Favorable legislation is expected soon to be introduced in Wisconsin, and there are efforts to do the same in New York.

Other Challenges

Another challenge facing battery recycling programs—particularly those that collect lead batteries, but also those that collect batteries made with other nonferrous metals—is arising in connection with state and local laws aimed at eliminating the market for stolen gutters, piping and other construction materials. Most of these proposed statutes limit the ability of scrap dealers and metals processors to accept questionable materials offered to them. Few in the battery world have any objection to such proposals.

Unfortunately, however, if legislative definitions are not properly drafted, these bills can end up imposing burdens on entities that collect or process metal-containing batteries. In every state where this concern has been raised to date, sponsors have been quick to modify the definitions or take other steps to avoid this inadvertent result. But the issue requires continuing vigilance. For example, one bill of this sort is currently pending in Utah.

And, finally, there is the issue of electronic waste. At this point, two dozen states have e-waste stewardship requirements, and new requirements are being considered in Hawaii, South Carolina and elsewhere. While batteries have never been a target of such legislation, it presents another area where vigilance is necessary to avoid unintended impacts on battery manufacturers and users.