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Preparing For Greater E-Waste Legislation

Law360, New York (January 06, 2009) -- Recently, there has been increased media attention concerning the environmental consequences of electronic waste ("e-waste") that is exported from North America to countries lacking strong environmental regulations and enforcement like China, Ghana, India and Nigeria.

This past November, for example, CBS's "60 Minutes" aired a story on an illegal e-waste dump in Guiyi, China, where workers discarded electronic devices to reclaim lead, gold, copper and other valuable materials in component parts.[1]

A virtual wasteland of forgotten consumer appliances, most of which is believed to have originated from North America, the unregulated Guiyi dump spans over an acre and is littered with thousands of old computer monitors ("cathode ray tubes" or "CRTs"), cell phones, computer keyboards and printers.

E-waste workers dismantle these materials, often by open burning, and discard them into drainage ditches resulting in the release of a host of toxic contaminants into the environment.

The environmental concern is obvious: lead, chromium, mercury, PCBs, dioxins and polybrominated diphenyl ethers are released from the e-waste into the local water supply.

The alarming statistics regarding the detrimental environmental impact of this practice reveal that more than 80 percent of the children living in the area show signs of lead poisoning, and pregnancies in the area end in miscarriages at a rate six times the national average.

Although the improper disposal of e-waste is a relatively new issue in the mainstream media, federal and state legislators, environmental groups and the electronic industry have been grappling with how to address depressed recycling rates for e-waste for several years.

The growing environmental problems caused by e-waste shipped overseas, however, are prompting some to consider focusing American e-waste legislation on preventing the export of e-waste by recycling companies to poorly regulated countries.

The U.S. Environmental Protection Agency estimates that Americans produce 2.63 million tons of e-waste each year, making e-waste the fastest growing segment of the municipal waste stream. Nearly half of all heavy metals found in municipal landfills, including lead, mercury and cadmium, are believed to originate from discarded electronic devices.

In addition to heavy metals, electronic devices contain chlorinated solvents, brominated flame retardants and polyvinyl chlorides.

Despite the risk that these materials pose to groundwater and air, recycling industry experts estimate that only 12.5 percent of all e-waste generated by American consumers is collected for recycling.

In order to encourage greater e-waste recycling, the EPA has excluded or exempted much e-waste from the definitions of "waste" and "hazardous waste" under the Resource Conservation and Recovery Act of 1976 ("RCRA"), which prohibits the export of hazardous waste from the United States to other nations unless the EPA obtains prior written permission from the other nation's competent authority.

This exclusion, unfortunately, has led to the largely unrestricted export of toxic e-waste to underregulated nations.

To address the export problem, the EPA issued a new rule in January 2007 intended to streamline management requirements for recycling used CRTs and glass removed from CRTs under RCRA.

The new CRT rule also set forth requirements for exporting CRTs and established an oversight role for EPA whenever used CRTs are exported from the United States.

Notwithstanding this new rule, however, the Government Accountability Office ("GAO") claims that the EPA has not done nearly enough to decrease the unregulated export of electronic waste to China, India and Nigeria.[2]

In a recent report on e-waste, the GAO criticized the EPA for failing to control e-waste exports, noting that the "EPA has done little to ascertain the extent of noncompliance" and that the EPA has established no plans or timetables to develop an enforcement program for e-waste.

According to GAO, since the CRT rule took effect in January 2007, Hong Kong officials have intercepted 26 containers of illegally exported CRTs. EPA, however, has since penalized only one violator, and then only well after the shipment was identified by GAO.

Although EPA officials have acknowledged CRT rule compliance problems, the EPA apparently claims that because of the relative newness of the CRT rule, it has been focusing its efforts on educating the regulated community instead of enforcement.

Unimpressed, the GAO report observes that this explanation does not explain why so many companies that are aware of the rule are nevertheless apparently willing to violate it.

The GAO report recommends:

- (1) revising RCRA regulations to cover exported used electronics beyond CRTs;
- (2) submitting a legislative package to Congress for ratifying the Basel Convention, an international regime governing the import and export of hazardous wastes; and
- (3) working with Customs and Border Protection and other federal agencies to improve identification and tracking of exported e-waste.

The report also speculated that the EPA's ineffectiveness might be attributed to the lack of a clear national e-waste policy and the EPA's decision to limit its e-waste rule to CRTs. With a hodgepodge of state e-waste statutes, GAO suggested that American businesses might be confused by the plethora of state and local e-waste statutes.

Comprehensive federal e-waste legislation has languished in the House of Representatives since February 2005, apparently due to a lack of consensus and interest.

The proposed bill, the National Computer Recycling Act ("NCRA"), if passed, would require the EPA to develop and implement a national "cradle-to-cradle" framework for e-waste recycling and impose a recycling fee to manufacturers and retailers of new computers.

In addition, NCRA would require the EPA to establish minimum federal performance requirements and incentives and reward manufacturers for making clean products at the front end and reusing and recycling products at the back end of the manufacturing process.

More recently, bills have been introduced in the House and Senate that seek to ban the export of all e-waste to developing countries. These draft bills express concern for the growing export problem, but do not address any penalties for illegal export.

It is not clear, therefore, whether Congress will seek to penalize only e-waste recycling companies that flout the export ban, or whether Congress might impose a strict liability framework that would penalize those manufacturers and retailers whose e-waste ends up overseas.

Given this uncertainty, manufacturers and retailers of electronic devices should consider implementing procedures now to ensure that their e-waste is not illegally exported. Some strategic options to consider in establishing procedures to limit potential liability include the following:

- Investigate whether the EPA, or any other federal, state or local agency has sanctioned any proposed e-waste recycler for exporting e-waste prior to engagement;

- Add provisions that proscribe the export of e-waste to service contracts with e-waste recyclers, require certification from recyclers that e-waste will not be exported and indemnify the customer from liability in the event that a customer's e-waste is nevertheless exported;
- Include an assessment of e-waste recycling procedures as part of environmental, health and safety audits, with an emphasis on verifying that documentation from recycling companies reflect domestic recycling;
- Provide consumers and retailers that purchase electronic devices manufactured, assembled or sold by your company with a list of recycling companies willing to certify that they do not export e-waste.

Federal e-waste legislation has long been in the making and the media's recent focus on the environmental and health problems posed by exported e-waste may spark renewed Congressional interest in passing comprehensive e-waste legislation.

It is unclear whether future legislation will impose penalties for violating the export ban, and whether legislation will target manufacturers and retailers in addition to the actual exporters of e-waste. Manufacturers and retailers need not, however, wait to establish policies and procedures to mitigate potential liability from exported e-waste.

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