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Submitted via electronic mail to lynn@nerc.org and rcohen@csg.org

September 15, 2005

Re: Comments of Hewlett-Packard Company on the NERC and CSG/ERC Discussion Draft

Dear Ms. Rubinstein, Ms. Cohen, and Committee Members:

Thank you for the opportunity to provide the comments of Hewlett-Packard Company ("HP") to the Northeast Recycling Council ("NERC") and Council of State Governments/Eastern Regional Conference ("CSG/ERC") working group and Committee on the second draft of the Discussion Draft "An Act Providing for the Recovery, Reuse and Recycling of Used Electronic Devices" ("Discussion Draft"). It has been a pleasure to work with the group and individual members of the Committee. We appreciate the Committee's consideration of our July 21, 2005 comment letter on the first draft of the Discussion Draft. We look forward to continued involvement in this collaborative process.

HP supports the Discussion Draft's overall approach of allowing manufacturers to choose whether to meet their recycling responsibilities by establishing a take back program or submitting a payment to the state. Indeed, this is the approach that HP uses in its Product Stewardship Solution. As drafted, however, the Discussion Draft raises numerous legal, policy, and implementation issues.

HP has five major recommendations for the Discussion Draft:

1) *The manufacturer recycling obligation should be based on return share, not market share.* Because the number of units sold by a manufacturer in a given year bears no relationship to the number of that manufacturer's units returned for recycling, current market share is not a correct basis for a product stewardship approach -- for either a manufacturer payment or a manufacturer take back alternative. The current market share approach is also unfair to new market entrants. It makes them pay for recycling products produced by other companies that are still in business. Under a product stewardship approach, a manufacturer's recycling obligation should be based on the cost of recycling that manufacturer's products returned for recycling -- its return share.

2) *The Corporation should be eliminated due primarily to accountability and legal problems; at a minimum, it should be made voluntary.* HP appreciates the changes made in the Corporation's responsibilities from the first draft of the Discussion Draft. The Corporation's remaining responsibilities, however, pose substantial legal and policy problems. The Corporation's primary responsibilities are basic, and traditional, government functions. Having a private corporation responsible for these functions raises concerns of accountability, legality, expertise, conflicts of interest, and efficiency. Because the Corporation is not necessary for implementing the recycling program envisioned by the Discussion Draft and suffers from serious problems, HP recommends eliminating the Corporation. If the Corporation is retained, HP recommends providing

that manufacturers could voluntarily form and/or join a corporation as a method for meeting their obligations under the Act. If neither of these alternatives is adopted, HP recommends that a state should not propose legislation that includes the Corporation without first obtaining a legal opinion that the Corporation would be legal.

3) *The scope of products should be limited to CRT devices or, at most, video display devices from households.* Given the complexity and expense of implementing a recycling system, limiting the scope of the Discussion Draft to CRT devices will enable all stakeholders to acquire expertise and develop an efficient recycling infrastructure for these products before considering the inclusion of other products. No enacted state electronics recycling legislation contains a scope as broad as the Discussion Draft scope. If the Committee wishes to include a broader scope than CRT devices, HP recommends that, at most, video display devices be covered. Desktop printers should not be covered because they have not been identified as a concern due to either toxicity or resource conservation.

The Discussion Draft should address covered electronic devices only from households. For a company, managing the disposition of older equipment is an ordinary and appropriate cost of doing business, and ample recycling opportunities are available. Manufacturers should not be compelled to subsidize the recycling and waste management costs of other businesses and institutional entities. The business-to-business exclusion in Section 6(1) poses serious implementation problems and does not resolve this issue.

4) *The manufacturer take back alternative should be modified to improve implementation and create an effective manufacturer responsibility option.* HP appreciates the changes to the manufacturer take back “alternative” from the first draft of the Discussion Draft. To correct fundamental operational problems that remain, HP has several recommendations that would make the manufacturer alternative an implementable and effective option. A manufacturer’s payment should be a simple registration fee with the amount specified in the Discussion Draft. To qualify for the take back alternative, a manufacturer should be required to recycle its return share, as determined by the Agency, of the household covered electronic device waste stream. The Discussion Draft should clearly establish the objective demonstrations to the Agency that a manufacturer has to make to use the take back alternative. Overall, because manufacturer take back programs provide numerous benefits to consumers and the state, the Discussion Draft should provide a take back alternative for manufacturers that encourages manufacturers to provide their own programs.

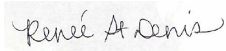
5) *The wholesale manufacturer tax faces Constitutional problems and should be restructured as a manufacturer recycling payment (based on return share) for those manufacturers who do not establish a take back program.* The provisions in the Discussion Draft governing the manufacturer fee (which is, in effect, a manufacturer excise tax) and the manufacturer reporting obligations raise a number of troublesome issues. The Commerce Clause of the U.S. Constitution imposes significant limitations on state taxation of transactions in interstate commerce. It is likely that the tax and reporting obligations would fail to meet the substantial nexus requirement and that the tax would fail to meet the fair apportionment requirement. If the manufacturer tax is not eliminated from the Discussion Draft, HP recommends that a state should not propose legislation that includes this tax without first obtaining a legal opinion that the tax would be legal. A manufacturer recycling payment based on return share, as in HP’s Product Stewardship Solution, would not face these Constitutional problems.

Legal and policy analysis supporting HP’s recommendations is provided in the Attachment. In addition, the Attachment provides section-by-section detailed comments and recommendations on the Discussion Draft to address other HP concerns.

Also enclosed with our comments is a White Paper that provides a comprehensive description of HP's Product Stewardship Solution and the implementing HP Model CRT Device Recycling Act. We urge the Committee to consider HP's approach. HP's approach provides flexibility, efficiency, competition, and cost-effectiveness benefits that are not found in the Discussion Draft. At the same time, HP's approach avoids legal, policy, and implementation issues raised by the Discussion Draft.

HP looks forward to working with the Committee to modify the Discussion Draft to address HP concerns. The Committee's effort to seek a regional solution to the challenge of improving electronics recycling in the Northeast and Mid-Atlantic states is an important step toward creating a workable national approach.

Sincerely,

A handwritten signature in cursive script that reads "Renee St. Denis". The signature is written in black ink on a light-colored background.

Renee St. Denis
Director, Americas Product Take Back
Hewlett-Packard Company

Attachment

Enclosure

**Comments of
Hewlett-Packard Company
On the NERC and CSG/ERC Discussion Draft:
An Act Providing for the Recovery, Reuse and Recycling
of Used Electronic Devices
September 15, 2005**

In the comments that follow, we discuss HP's five major recommendations for the Discussion Draft. We then provide section-by-section detailed comments and recommendations on the Discussion Draft to address other HP concerns.

I. MAJOR RECOMMENDATIONS

A. The Manufacturer Recycling Obligation Should Be Based on Return Share, Not Market Share.

In the Discussion Draft, manufacturer taxes¹ are determined by multiplying a manufacturer's "U.S. national market share in the previous calendar year for that unit . . . by the percentage of the national population represented by the state in the most recent U.S. decennial census." Sec. 6(1). This market share approach is problematic in theory and in practice.

1. Market Share v. Return Share

Because the number of units sold by a manufacturer in a given year bears no relationship to the number of that manufacturer's units discarded, current market share is not a correct basis for a product stewardship approach. An existing manufacturer that no longer makes desktop/personal computers ("PCs"), for instance, would have no current sales, but many thousands of that manufacturer's previously produced PCs could be discarded. Why should current PC manufacturers pay to recycle that manufacturer's products? Why should that manufacturer have no financial obligation to the state?

The current market share approach is also unfair to new market entrants. For instance, if a newly formed company begins to manufacture portable computers, its products likely will not begin showing up in the waste stream for several years. Why should that new company in its first year of operation have to pay a tax based on its *current* market share to fund recycling of portable computers produced *many years ago* by other companies that are still in business? The appropriate time for that new company to pay for recycling is when its products need to be recycled. To ensure that involvement in a state recycling system is comprehensive, new market entrants could be required to register with the state and pay a registration fee.²

In sum, basing a manufacturer tax on current market share is theoretically unsound and logically disconnected from actual recycling costs and responsibilities.

Under a product stewardship approach, a manufacturer's recycling obligation should be based on the cost of recycling that manufacturer's products returned for recycling. Thus, a manufacturer recycling payment should be used, based on return share. Under HP's Product Stewardship Solution, manufacturers must take responsibility for their "equivalent share" of CRT devices --

¹ Because the fee proposed in the Discussion Draft would be applied to fund recycling programs for the benefit of the general public, and not specifically for the benefit of the manufacturer paying the fee, it is, in effect, an excise tax rather than a fee. We therefore properly refer to it as a "tax" in this discussion.

² We note that because the responsibility for recycling orphan products does not actually belong to any existing entities, new market entrants, along with existing manufacturers, could be required to pay a share of orphan product recycling costs.

including orphan CRT devices -- discarded by households (individual consumers and home businesses). They can do this either (1) by establishing a recycling program or (2) by paying the state reasonable collection, consolidation, and recycling costs for their equivalent share. Equivalent share obligations are calculated for all manufacturers whose covered products are collected in local government recycling programs. This approach ensures that current and historic manufacturers take responsibility for their actual contribution to the covered product waste stream and that new market entrants begin incurring responsibility as soon as their products enter the waste stream. Finally, all current sellers of covered products must register with the state (and pay a registration fee). HP urges the Committee to consider this return share approach.

2. Implementation Problems

In practice, the determination of manufacturer taxes in Section 6 of the Discussion Draft is not implementable. First, the calculation is described as the U.S. national market share (percent) for that unit multiplied by the percentage of the national population represented by the state. This is a percent times a percent. Determination of the tax amount requires an additional variable: the total number of that unit sold in the U.S. during the previous year. Section 7(1)(a)(i) on manufacturer reports poses the same issue.

Second, the Discussion Draft does not identify where the Agency will obtain the data necessary to establish manufacturer market shares. Pursuant to Section 7(1)(a)(i), manufacturers have to report to the Corporation “[a]n estimate of the number of covered electronic devices sold by the manufacturer in the State during the previous calendar year, calculated as its U.S. national market share in the previous calendar year for that unit multiplied by the percentage of the national population represented by the state in the most recent U.S. decennial census.” This calculation, as shown above, is not functional.

Assuming the nonfunctional aspect of this equation is remedied, problems still remain. Pursuant to Section 6(2), the Agency must annually establish manufacturer market shares. Will the Agency rely on the “estimates” contained in manufacturer reports submitted to the Corporation pursuant to Section 7(1)(a)(i) to do so? If not, what is the function of the Section 7(1)(a)(i) reporting requirement? But if the Agency’s determination of manufacturer market shares is based on the “estimates” contained in manufacturer reports, then what is the function of the preliminary market share petition process under Section 6(2)? That is, if manufacturers themselves determine the basis for their taxes, why would they need to be able to challenge Agency determinations? And if the Agency uses information from manufacturer reports, how will it reconcile different base numbers (e.g., the number of CRT-based televisions sold in the U.S. during the preceding year) from different manufacturers? In addition to these fundamental operational questions raised by the Agency’s market share determinations, such determinations raise procedural due process and taxpayer privacy issues. See Part I(E)(2).

Third, the Discussion Draft provides that the “data shall exclude figures for sales involving business-to-business contracts that provide end-of-life take-back programs for covered electronic devices.” Sec. 6(1). The Discussion Draft does not state where the Agency will obtain such figures. The annual reports submitted by manufacturers pursuant to Section 7(1) do not contain information on business-to-business contracts. Where would the Agency get this information? If the Discussion Draft were modified to require manufacturers to submit this information, what procedures would the Agency use to verify this information? And how would the Agency maintain the confidentiality of confidential business information (such as a manufacturer’s number and size of business-to-business contracts) while still making public the decisions it has made and the bases for those decisions? See Sec. 6(2)(c)(i). See Part I(E)(2) (discussing legal issues posed by the public nature of this tax determination process). For policy reasons, as discussed in Part I(C), the scope of the Discussion Draft should be limited to households and not include businesses at all.

Fourth, the Discussion Draft does not explain what a “unit” is. “Covered electronic device” is defined as “desktop/personal computers, computer monitors, portable computers, desktop printers, CRT-based televisions, and non-CRT-based televisions.” Sec. 1(h). Does this mean that there are seven different types of “units”?

Finally, the Discussion Draft does not explain where either manufacturers or the Agency will obtain data on the number of units sold nationally. For the calculation, the data presumably must be divided into the seven categories of units created by the Discussion Draft and exclude business-to-business contracts as described in the Discussion Draft. HP knows of no source for this information. If such information is available, the Discussion Draft should specify its source. If such information is not available, the Discussion Draft faces a fundamental implementation problem.

B. The Corporation Should Be Eliminated Due Primarily to Accountability and Legal Problems; At a Minimum, It Should Be Made Voluntary.

In our July 21, 2005 comments on the first draft of the Discussion Draft, HP recommended that the proposed Corporation be eliminated or, at the least, limited in its functions to those that are clearly legal. HP appreciates the changes made in the Corporation’s responsibilities from the first draft of the Discussion Draft. The Corporation’s remaining responsibilities, however, pose substantial legal and policy issues. Because the Corporation is not necessary for implementing the recycling program envisioned by the Discussion Draft and suffers from serious problems, HP recommends eliminating the Corporation. If the Corporation is retained, HP recommends providing that manufacturers could voluntarily form and/or join a corporation as a method for meeting their obligations under the Act. If neither of these alternatives is adopted, HP recommends that a state should not propose legislation that includes the Corporation without first obtaining a legal opinion that the Corporation would be legal.

The Corporation’s primary responsibilities are to collect taxes, review claims for reimbursement, disburse reimbursements, ensure that recycling opportunities are available throughout the state, and organize and coordinate public outreach. These are basic, and traditional, government functions. Having a private corporation responsible for these functions raises concerns of accountability, conflicts of interest, legality, expertise, and efficiency.

First, even though the Corporation established by the Discussion Draft is a private corporation, it is not accountable to the state or to the public. If the Corporation fails to meet any of the obligations assigned to it by the Discussion Draft, including meeting the state total recovery goal, it is not subject to any penalty and the state has no means to remedy the situation.³ In contrast, if a manufacturer running a take back program fails to demonstrate annually that it met its share of the state total recovery goal, it would be required to pay the difference between the lower administrative fee and the higher manufacturer tax as well as a (currently unspecified) penalty. *See* Sec. 6(6). In addition, manufacturers are subject to enforcement under Section 18. The lack of Corporation accountability in the Discussion Draft is a serious and fundamental problem.

Second, many state Constitutions forbid the suspension, surrender, or contracting away of the state’s powers of tax collection and/or the expenditure of tax revenues. Because collection of a state tax by a private corporation is likely unprecedented in most states, the legality of the

³ It might be assumed that the state could at least terminate or dissolve the Corporation, but even that power is not provided to the state in the Discussion Draft. Dissolution is not an effective remedy, however, because it neither corrects nor imposes a penalty for the Corporation’s failures.

Corporation's collection authority is uncertain. In some states, expenditure of tax revenues or of all public moneys must be controlled by a public agency or instrumentality.⁴

Third, the Corporation would receive and administer government-imposed taxes on manufacturers. The state tax collection and administration function is currently performed by a state tax agency. The Corporation lacks the expertise of existing tax collecting agencies and is unlikely ever to acquire equivalent expertise. The Corporation also lacks the regulatory infrastructure of the state agency, an infrastructure that is essential to both the functioning of the agency in a manner that accords with due process and to the ability of the agency to enforce the taxpayer requirements it administers.

Fourth, under Section 9(1), the Corporation would be organized as a 501(c)(3) corporation, presumably a charitable corporation. The directors of the Corporation would have a fiduciary duty to carry out the purposes of the Corporation. Because nine of the eleven Board members are either manufacturers, retailers, or reuse/recycling entities, however, conflicts of interest are inevitable. The broad mandate of the Corporation -- to distribute tax proceeds to reuse/recycling entities and make recommendations for manufacturer tax adjustments, among other functions -- opens the door to self-dealing. Generally, charitable corporations are subject to supervision of the state attorney general, and board members are subject to state rules on recusal. Given that the Corporation is, in effect, an outsourcing of government decisionmaking, difficult issues of conflicts of interest, potential self-dealing, and recusal of Board members are likely to be commonplace.

Fifth, we believe that the Corporation may have been developed to increase the efficiency of the recycling system. If so, HP's experience with private third-party organizations in Europe has shown that third-party organizations are more expensive and more bureaucratic than a private system. A few manufacturers on the Corporation's Board will not compensate for the Corporation's monopoly status or create the efficiencies of a private system. Moreover, establishing a private corporation to handle the funds and activities of a government program raises many questions. Fundamentally, will the Corporation's payroll, human resources, IT, and other groups simply duplicate staff that already exist in a state agency? From a simple, practical perspective, who will establish the pay scale for the Corporation's employees? Will this pay scale differ from that of state employees? What type of benefit and retirement system will the Corporation provide? Will it differ from that of state employees? Because the Corporation is not accountable to the state, or the public, these "practical" questions are not trivial. Under the Discussion Draft, the Corporation could pay its staff whatever it pleased without being subject to remedial action by the state. The only limitation on Corporation spending is that the Corporation available funds are five percent of total fees paid by manufacturers. *See* Section 9(5).

If the Corporation is not eliminated, HP recommends providing for voluntary corporations that are limited in function. The manufacturers forming the corporations could establish Boards of Directors comprised solely of manufacturers or others, and manufacturers could choose whether to form and/or join a corporation as a method for meeting their obligations under the Act. The Agency would be responsible for the traditional government functions currently assigned to the Corporation. This would remedy the accountability, legality, expertise, conflicts of interest, and efficiency problems discussed above.

⁴ A representative example of a "public funds" restriction is Article CIII of the Amendments to the Massachusetts Constitution, which provides that:

No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both.

C. The Scope of Products Should Be Limited to CRT Devices or, at most, Video Display Devices from Households.

The products addressed by the Discussion Draft -- “covered electronic devices” -- are defined broadly: “desktop/personal computers, computer monitors, portable computers, desktop printers, CRT-based televisions, and non-CRT-based televisions.” Sec. 1(h). The consumers addressed by the Discussion Draft are also defined broadly: “an individual who purchases a covered electronic device in a transaction that is a sale, including but not limited to a business, corporation, limited partnership, or non-profit corporation.” Sec. 1(f). HP recommends that the Committee narrow the scope to cathode ray tube (“CRT”) containing computer monitors and televisions, with a screen size greater than 9 inches measured diagonally, from households.

1. CRT Devices

The three states that have implemented statewide electronics recycling programs to date -- California, Maine, and Maryland -- all cover a narrower scope than that proposed in the Discussion Draft.⁵ Given the complexity and expense of implementing a recycling system, limiting the scope of the Discussion Draft to CRT devices will provide a “walk before you run” approach. This will enable all stakeholders to acquire expertise and develop an efficient recycling infrastructure for these products before considering the inclusion of other products.

Moreover, EPA has stated that it is not aware of any non-CRT computer components or electronic products that would generally be hazardous wastes. *See* 67 Fed. Reg. 40508, 40512 (July 12, 2002). EPA is now in the process of finalizing a rule that would conditionally exclude CRTs being recycled from the definition of solid waste.

If the Committee wishes to include a broader scope than CRTs, HP recommends that, at most, only video display devices be covered. This approach would be generally consistent with both California’s and Maine’s programs and would result in a list that is easily identifiable for consumers, retailers, and local governments.

Desktop printers should not be included as “covered electronic devices” in the Discussion Draft. Desktop printers have not been identified as a concern due to either toxicity or resource conservation. In addition, recycling costs for desktop printers have not been established through data collection. Under Section 10(4), the Agency must establish an annual reimbursement schedule for the reasonable costs of collecting, recycling, and reusing different types of covered electronic devices. The data to establish such a schedule have not been collected. In these ways, desktop printers are similar to DVD players and VCRs. “Television peripherals” (e.g., cable or satellite receivers, VCRs, and DVDs) were included as “covered electronic devices” in the first draft of the Discussion Draft. They have been deleted. Similarly, desktop printers should be deleted.

2. Households

While the first draft of the Discussion Draft was (albeit ambiguously) limited to households, the current Discussion Draft is much broader. The Discussion Draft should be limited -- in both the

⁵ California’s program under SB20/50 addresses *video display devices* containing a screen greater than four inches measured diagonally that is *identified as hazardous* in regulations adopted by the California Department of Toxics Substances Control. *See* Cal. Pub. Resources code § 42463(f). Maine’s collection and recycling program covers *computer monitors and televisions* containing a screen that is greater than four inches measured diagonally; for computer central processing units, there is only a labeling requirement. *See* 38 M.R.S.A. § 1610. Maryland’s program addresses only *computers*, meaning desktop personal computers or laptops, including the computer monitor. *See* Code of Maryland § 9-1701(D).

manufacturer tax and take back alternative provisions -- to covered electronic devices only from households.

For a company, managing the disposition of older equipment is an ordinary and appropriate cost of doing business. Manufacturers of covered electronic devices should not be compelled to subsidize the recycling and waste management costs of other businesses and institutional entities. A household limitation is particularly appropriate because businesses and institutional entities already have ample recycling opportunities available to them and already are subject to waste management regulatory constraints that are not imposed on households.

Section 6(1) attempts to limit the scope of consumers by providing that “[t]he data shall exclude figures for sales involving business-to-business contracts that provide end-of-life take-back programs for covered electronic devices.” As discussed in Part I(A)(2), this business-to-business exclusion poses serious implementation problems. Moreover, business-to-business transactions are not always subject to contract.

Finally, it is inconsistent to exclude from the tax determination sales involving business-to-business contracts that provide end-of-life take-back programs but not to exclude sales to non-business customers (e.g., households, home businesses) that provide end-of-life take-back programs.

To the extent that landfill disposal of electronic devices is problematic, the problem is devices from households and small businesses. The Discussion Draft should be limited accordingly.

D. The Manufacturer Take Back Alternative Should Be Modified to Improve Implementation and Create an Effective Manufacturer Responsibility Option.

Section 6(4) of the Discussion Draft provides that, in lieu of the tax based on national market share under Section 6(1), a manufacturer that has implemented a take-back program for covered products shall be entitled to pay a “lower, administrative fee” in the current calendar year if it makes specific demonstrations to the Agency. HP appreciates the changes to the take back “alternative” from the first draft of the Discussion Draft. To correct fundamental operational problems that remain, HP has several recommendations that would make the manufacturer alternative an implementable and effective option.

First, Section 6(4) requires manufacturers to pay a “lower, administrative fee” but fails to specify what this fee will be. Would this fee be based on manufacturer market share as is the non-take-back alternative fee? How much lower will this “administrative fee” be? The manufacturer’s payment should be a simple registration fee with the amount specified in the Discussion Draft.

Second, to qualify for the take back alternative, a manufacturer has to demonstrate that it achieved (1) the state total recovery goal, as multiplied by its Agency-established market share for that calendar year, (2) the annual reuse goal within the annual state total recovery goal, and (3) the annual recycling goal within the annual state total recovery goal. These goals are pounds per capita values established by the Agency. They are presumably based on an expectation by the Agency of how many pounds of covered electronic devices (divided into seven types of “units”) that consumers in the state may discard in the coming year. As discussed more fully in Part II(J)(2) below, such goals are necessarily arbitrary: they bear no relation to actual recycling needs in the state.

To qualify for the take back alternative, a manufacturer should be required to recycle its return share, as determined by the Agency, of the household covered electronic device waste stream. HP’s recommendation to base both manufacturer payments and the alternative recycling obligations on return share will result in a system that is internally consistent, linked to actual

recycling behavior and needs in the state, and more easily implemented than the system proposed in the Discussion Draft.

Third, Sections 6(4)-(6) create an ambiguous and unworkable scheme that requires manufacturers to pay double their fair share. Under Section 6(4), a manufacturer wishing to pay the lower, administrative fee in the current calendar year (“year 2”) has to demonstrate to the Agency that “*in the previous calendar year*” (“year 1”) the manufacturer met specific requirements. This means that in year 1 the manufacturer must pay the higher fee/tax *and* run a take-back program that achieves the specific requirements in order to qualify for the lower, administrative fee in year 2. This is a double payment requirement. Then, under Section 6(5), a manufacturer “who demonstrates that it *will satisfy the requirements* set forth in [Section 6(4)] above during the first year following the effective date of this Act” (“year 1”) shall pay the lower fee plus a one-time registration fee. How could a manufacturer demonstrate that it *will satisfy* the requirements set forth in Section 6(4) in year 1 when no state total recovery goal will be in effect prior to year 1? These fundamental drafting problems in Section 6(4)-(6) will discourage manufacturers from implementing take back programs. The Discussion Draft should clearly establish the objective demonstrations to the Agency that a manufacturer has to make to use the take back alternative.

Overall, because manufacturer take back programs provide numerous benefits to consumers and the state, the Discussion Draft should provide a take back alternative for manufacturers that encourages manufacturers to provide their own programs. Manufacturer take back programs, which are often run in conjunction with retailers, could considerably expand the number of collection centers and have longer hours than municipal collection centers. To the extent that manufacturers take back their own products, they will have incentive to invest in design-for-the-environment improvements in their products. Manufacturer take back programs can operate efficiently, and likely at a lower cost per pound than government-run programs.

E. The Wholesale Manufacturer Tax Faces Constitutional Problems and Should Be Restructured as a Manufacturer Recycling Payment (Based on Return Share) for Those Manufacturers Who Do Not Establish a Take Back Program.

Section 6 of the Discussion Draft proposes the imposition of a per-unit tax imposed upon sales of covered electronic devices to consumers in the enacting state, but collected from the manufacturer of the devices and measured by a market share method. The provisions in the Discussion Draft governing this tax raise a number of troublesome issues. The associated reporting obligations in Section 7 of the Discussion Draft raise some of the same issues associated with the tax itself, and additional procedural issues. If the wholesale manufacturer sales tax is not eliminated from the Discussion Draft, HP recommends that a state should not propose legislation that includes this tax without first obtaining a legal opinion that the tax would be legal.

1. Issues Under the Commerce Clause of the U.S. Constitution

The Commerce Clause of the United States Constitution imposes significant limitations on state taxation of transactions in interstate or foreign commerce. A tax affecting interstate commerce will pass muster under the Commerce Clause only if it “is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state.” *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

Because the tax proposed by the Discussion Draft would by its terms apply to sales of covered electronic devices by manufacturers both within the enacting state and outside the enacting state (including manufacturers in other states), it will violate the United States Constitution unless it satisfies all the requirements imposed by *Complete Auto*. As proposed in the Discussion Draft, however, it is likely that the tax and reporting obligations would fail to meet the substantial nexus requirement and that the tax would fail to meet the fair apportionment requirement.

With respect to taxes on sales, the “substantial nexus” test requires that the taxpayer have some physical presence in the taxing state. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). The court in *Quill* therefore held that a state may not require a mail-order seller to collect sales taxes on its interstate sales. Since the manufacturers who would be liable for the excise tax proposed by the Discussion Draft would be one step further removed from contact with the enacting state than the mail-order seller in *Quill*, it follows *a fortiori* that the proposed tax could not be applied to manufacturers that did not have a physical presence in the enacting state. Moreover, just as the sellers in *Quill* could not be required to administer and collect a sales tax even though the ultimate tax was paid by their customers, it is doubtful that an enacting state would have authority to require out-of-state manufacturers to comply even with the reporting obligations of the proposed legislation in the absence of a physical presence linking the manufacturer to the enacting state.

The proposed tax also is not “fairly apportioned” within the meaning of *Complete Auto*. The Discussion Draft proposes to apportion the tax among states on a capitation basis: each manufacturer’s tax obligation would be based on the manufacturer’s national market share multiplied by a fraction representing the ratio of the enacting state’s population to the national population. Although this mechanism may appear to be internally consistent, it is not reasonably calculated to ensure that the enacting state taxes “only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.” *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989); *see also Container Corp of America v. Franchise Tax Bd.*, 463 U.S. 159, 169-70 (1983). While the courts have approved many different formulas for apportionment — based, for instance, on the location of the taxpayer’s customers, the place where it makes its sales, the location of its property, or the place where customers are billed — there do not appear to be any cases approving apportionment based upon factors having *nothing whatsoever to do with the taxpayer’s business*, such as state population ratios. There is no particular reason to believe that local sales of covered electronic devices will always, or even generally, correspond to the size of the local population. Because the measure of the tax is not tied to the scope of a taxpayer’s activities within the enacting state, it does not comply with *Complete Auto*.

2. Procedural Issues Raised by Reporting Requirements

Even if the proposed tax itself could pass constitutional muster, the reporting requirements that would be imposed on manufacturers under the Discussion Draft would raise a number of difficult legal issues. Because a manufacturer’s tax liability is based on a determination of the manufacturer’s market share, and because the Discussion Draft proposes to determine those market shares on a centralized basis, the mechanism for determining market shares necessarily pits one manufacturer against others. Section 6(2) of the Discussion Draft envisions that the administering agency would announce “preliminary” market shares on an annual basis, after which manufacturers would be afforded an opportunity to challenge the preliminary numbers. The Discussion Draft would then require the Agency to consider all of the individual challenges and to publish a written record resolving all of the challenges and establishing “final” market shares.

This public process in which manufacturers are required not only to challenge the governmental determination of their own tax liabilities, but also, in effect, to refute or minimize the challenges being brought by their competitors, raises issues of procedural due process and taxpayer privacy. Due process requires some sort of individualized consideration of taxpayer challenges to their proposed liabilities. A system that aggregates all of the challenges makes it impossible to provide that sort of individual assessment.

The publicity of the proposed system is also problematic: it eliminates the expectation of privacy that is uniformly provided by taxing systems that take account of sensitive financial information such as market share data. It is fundamentally unfair to put taxpayers to a choice between overpaying their tax liabilities and publicizing sensitive business information. Publicity also operates as a disincentive to taxpayer compliance where the taxpayer might otherwise provide

information that would result in a higher liability. Finally, such a public assessment system may violate statutory protections afforded to trade secrets.

II. DETAILED COMMENTS ON THE DISCUSSION DRAFT

A. Definitions (Section 1)

1) “Recycling.” - Section 1(s) defines “recycling” as “any process by which covered electronic devices that would otherwise become solid waste are collected, separated, and processed to be returned to use in the form of raw materials or products, in accordance with environmental standards established by the Agency.” This definition overlaps with the definition of “reuse” (“returned to use in the form of . . . products”) and includes collection -- both of which are discrete activities under the Act. Such overlap will cause problems in, for instance, the Agency’s establishment of a reimbursement schedule and the reimbursement process. For clarity and accuracy, HP recommends modifying the definition of “recycling” as follows:

“Recycling” means the processing of waste covered electronic devices or their component materials for recovery of a usable product. “Recycling” does not include reuse, repair, refurbishment, or any other process through which covered electronic devices are returned to use.

2) “Covered electronic recycler,” “Historic Product,” “Orphan Products,” and “Retail Sales.”⁶ - These terms are defined in Section 1 but not used elsewhere in the Discussion Draft. The definitions of these terms should be deleted from Section 1.

B. Scope of Products (Section 2)

HP recommends limiting the scope of the Discussion Draft to CRT-containing computer monitors and televisions with a screen size greater than 9 inches measured diagonally discarded by households in the state. See Part 1(C).

Section 2 includes the following bracketed language: “[The scope of products may be modified by _____].” This language introduces the possibility that individual states that adopt the Act could allow the Agency or the Corporation to modify the scope of the Act. Due to the substantial financial impact of the Act on manufacturers, neither the Agency nor the Corporation should be able to modify the product scope. The Legislature should retain this authority. HP recommends deletion of the bracketed language.

C. Sales Prohibition (Section 4)

Section 4(1) provides that “[a] manufacturer not in compliance with all reporting, financial, and other requirements of this Act is prohibited from offering a covered electronic device for sale in this State.” Under Section 4(2), the Corporation shall maintain a list of “all manufacturers in compliance with all reporting, financial, and other requirements of this Act and post the list on an Internet Web site.”

The way this sales prohibition is drafted raises serious due process concerns. First, Section 4 has the Corporation making the “non-compliance” determination. This is not an appropriate responsibility for a private corporation, particularly where the Corporation may be considering the compliance status of a manufacturer whose competitors sit on the Board of the Corporation. A decision of this consequence should be made only by a public agency.

⁶ The term “Household” is also defined in Section 1 but not used elsewhere in the Discussion Draft. Because the scope of the Discussion Draft should be limited to covered electronic devices from households, this term should be retained. See Part I(C).

Second, the Discussion Draft does not establish a procedure for making the compliance determination. Given the substantial economic consequences to a manufacturer found not to be in compliance, this determination procedure should provide the manufacturer with appropriate due process procedures, such as a right to review and challenge the evidence relied on by the decisionmaker, including a right to submit its own evidence, a right to a hearing, and a right to judicial review of the final decision. And, until the determination decision is final, including any judicial review process, the manufacturer's name should not be omitted from the list of manufacturers in compliance. In its current form, Section 4 should be omitted from the Discussion Draft.

D. Labeling Requirement (Section 5)

Section 5 requires manufacturers to label covered electronic devices with the manufacturer's brand and a "Web site address and toll-free telephone number that maintains current information about how and where to properly recycle or reuse the device."⁷ Although labeling covered electronic devices with the manufacturer's brands is appropriate and necessary, inclusion of a web site and toll-free telephone number on a product label is inefficient, burdensome, and ineffective.

Under Section 10(10), both the Corporation and the Agency must maintain on their Web sites "complete and up-to-date listings of where consumers can bring covered electronics products for reuse and recycling." These are straightforward and sufficient means of conveying recycling information to consumers.

State-specific labeling requirements are extremely burdensome for manufacturers. Even if the ten Northeast states adopted identical provisions for manufacturer labeling (which is not guaranteed), the forty other states may adopt forty different labeling requirements. Manufacturer compliance with labeling regulations would become complex, expensive, and likely impossible. Even if possible, this requirement would raise the prices that consumers pay for products while offering no real benefit.

Because each state could have a different labeling requirement, it might be impossible for a manufacturer to comply with potentially 50 different labeling requirements. The requirement may also be impossible if manufacturers would be unable to change the way they do business with wholesalers and distributors, requiring each wholesaler and distributor to inform the manufacturer where each product is sent for sale at retail. Even this would not solve the problem, however, because the retailer might then sell that product to an out-of-state purchaser.

This labeling requirement would force manufacturers to create unwieldy labels that, in effect, comply with every state requirement due to the distribution system for electronics. Many manufacturers sell to wholesalers or large clients, who then distribute the equipment in various states. Manufacturers have limited information on where their devices are actually sold, except when they are direct retailers.

Finally, web site addresses often change. Although the web site and telephone number information on labels would presumably be accurate when consumers purchase covered electronic devices, consumers do not need the information upon purchase. Rather, they will need to know it years later when they wish to discard the devices. At that point, the label information may no longer be accurate. Consumers should turn to the current Agency or Corporation Web sites.

Thus, HP recommends deletion of Section 5(ii).

⁷ Section 7(2) requires manufacturers to make collection and recycling information available to consumers through "the use of a toll-free telephone number *or* Internet Web site labeled on the device." (emphasis added). Thus, Sections 5 and 7(2) are inconsistent: Section 5 uses "and" and Section 7(2) uses "or."

E. Financing Mechanism (Section 6)

1) Tax Setting and Review. Section 6(8) requires establishment of a two-tier tax schedule, but does not specify who is responsible for such establishment. Section 6(8) then requires an unspecified entity (the Agency?), in cooperation with the Corporation, to review, at a public hearing, the tax, but does not specify the criteria for such review.

Given the substantial financial impact of the tax on manufacturers, the amount of the initial tax should be established legislatively, i.e., specified in the Act. In addition, the Discussion Draft should require the Agency to establish the criteria for tax review and method for tax adjustment through notice-and-comment rule-making. And the Agency, not the Corporation, should be the only entity with authority to adjust the tax.

2) Additional Issues. See Part I where HP discusses concerns with the basis of the manufacturer tax, the manufacturer take back alternative, and the legality of the manufacturer tax. See also Part II(K)(1) where HP discusses problems with the “fully funded” provision.

F. Manufacturer Responsibility (Section 7)

1) Manufacturer Reports. Section 7(1)(a)(i) requires manufacturer reports to include an estimate of the number of covered electronic devices sold by the manufacturer in the State during the previous calendar year. As discussed in Part I(A)(2), this calculation is nonfunctional, and the purpose of submitting this information is unclear.

2) Confidential Business Information (“CBI”). Section 7(1)(a) requires the manufacturer reports submitted to the Corporation pursuant to Section 7(1) to contain information on material content, recyclable content, “plans for further increasing design for recycling,” and other issues. Much of this information will be CBI. Although Section 7(6) requires the Corporation and Agency to maintain the information in compliance with state law, this token protection is unacceptable. The Corporation’s Board contains five manufacturers of covered electronic devices. These manufacturers will be direct competitors of the other manufacturers submitting reports and yet they will be privy to other manufacturers’ CBI.

The only way to remedy this problem is for manufacturers to submit their annual reports to the Agency and for only the Agency to have access to this information. The CBI problem underscores the inappropriateness of establishing a private corporation to fulfill a government function. As discussed in Part I(B), HP recommends eliminating the Corporation.

3) Consumer Information. As discussed in Part II(D), inclusion of a web site and toll-free telephone number on a product label, as required by Sections 5 and 7(2), is inefficient, burdensome, and ineffective. Section 7(2) requires manufacturers also to include collection and recycling information in the packaging, or accompanying the sale, of covered electronic devices. As with state-specific labels, state-specific information in packaging or accompanying sales will be difficult, if not impossible, for manufacturers to provide. Manufacturers have limited information on where their devices are actually sold, and information in packaging may no longer be accurate at the point at which a consumer wishes to discard the device. Thus, Section 7(2) should be deleted.

G. Retailer Responsibility (Section 8)

Section 8 requires retailers to provide covered electronic device collection and recycling information “through the use of either a toll-free telephone number or Web site, information included in the packaging, or information provided accompanying the sale of the covered electronic device.” As discussed in Part II(D), under Section 10(10), both the Corporation and the Agency must maintain on their Web sites “complete and up-to-date listings of where consumers

can bring covered electronics products for reuse and recycling.” Section 10(10) provides straightforward and sufficient means of conveying recycling information to consumers. Thus, Section 8 should be deleted.

H. Not-for-Profit Corporation (Section 9)

See Part I(B) where HP discusses its legal and policy concerns with the Corporation. HP recommends eliminating the Corporation.

I. Corporation Responsibilities (Section 10)

1) Use of Taxes. Section 10(7) provides that the Corporation shall “use the fees for the sole purpose of fulfilling its responsibilities under the Act.” The Corporation’s responsibilities are enumerated in Section 10(2)-(10). Despite this apparent limitation on the Corporation’s use of funds, there are many uncertainties in terms of what the Corporation could do.

As discussed in Part I(B), HP recommends eliminating the Corporation. Alternatively, if manufacturers could voluntarily form and/or join a corporation as a method for meeting their obligations under the Act, and the Agency were responsible for the traditional governmental functions that the Discussion Draft assigns to the Corporation, the resultant model would be legally viable.

2) Approval to Receive Payments. Under Section 10(8)(i), the Corporation must report to the Agency and the Legislature “[a] list of all parties participating in the system whom the Corporation has designated as *approved to receive payments.*” (emphasis added). Similarly, under Section 15(1), the Corporation must make recovery, reuse, and recycling payments to “*an authorized or approved entity.*” (emphasis added). Then, in Section 1(i), the term “covered electronic recycler” is defined as “one that is *approved* by the Corporation for compensation” (emphasis added), but this term is not used elsewhere in the Discussion Draft. These provisions suggest that the Corporation conducts some sort of approval/authorization process, but the Discussion Draft contains no such process.

Under Section 16, the Agency establishes performance requirements for collection, transportation, reuse organizations, and recyclers to be able to receive funds from the Corporation, and the Corporation maintains a Web site of entities and organizations that have met the performance standards. How is it determined whether an entity meets the performance standards? If an entity meets the performance standards, is it “approved” by the Corporation? Is there a difference between being “authorized” or “approved”?

Two organizations with reuse and recycling experience (one not-for-profit, one for-profit), as well as five manufacturers and two retailers, will sit on the Board of the Corporation. See Section 13(1). Because these organizations/companies may compete directly with entities that are trying to gain the “approval” of the Corporation, it is inappropriate for the Corporation to make approval determinations.

HP recommends that the Agency, not the Corporation, have the authority to determine who may receive payments for collection, transportation, reuse, and recycling services.

J. Annual Recovery, Reuse and Recycling Goals (Section 11)

1) Requirement of 100% Recovery. Under Section 11(1), “[w]ithin 10 years of enactment of this legislation, 100% of covered electronic devices shall be recovered for reuse and recycling.” What does this 100% requirement mean?

Does it mean that 100% of covered electronic devices *that are discarded by consumers* must be recovered for reuse and recycling? Section 17 of the Discussion Draft imposes a disposal ban that goes into effect two years after enactment of the Act. Under this disposal ban, persons are prohibited from disposing any covered electronic device in any solid waste disposal facility in the State. This means that all covered electronic devices that are discarded by consumers will be recovered for reuse and recycling. Thus, it is unclear what function the 100% requirement serves.

Alternatively, does the 100% requirement mean that all used (but no longer in use) covered electronic devices, such as those stored in attics and garages, must be recovered for reuse and recycling? If so, how would the Agency ever determine that this requirement is satisfied? If this is the meaning of the 100% requirement, manufacturers cannot be held responsible and/or liable for failing to meet this requirement that results from consumers who decide to continue to store their covered electronic devices.

As discussed in Part I(A), HP recommends requiring manufacturers to take responsibility for their equivalent share of CRT devices discarded by households. To the extent that a manufacturer does not meet 100% of its recycling obligation, the manufacturer has a predetermined payment obligation to the state for the shortfall.

2) Annual Total Recovery Goal. Under Section 11(2), the Agency shall establish, and update as necessary, statewide “recovery, reuse, and recycling goals” for covered electronic devices to ensure that the 100% recovery goal is met. The “annual total recovery goal” shall be in pounds per capita. There are two fundamental conceptual problems with this goal.

First, assuming that the 100% requirement means that 100% of covered electronic devices that are discarded by consumers are recovered for reuse and recycling, the 100% requirement simply means that no covered electronic devices are ending up in the solid waste disposal system. It does not mean that some specific number of pounds of covered electronic devices per capita are being discarded and subsequently recovered. The 100% requirement and the annual total recovery goal(s) are conceptually different. The requirement in Section 11(2) is akin to requiring a certain number of apples to add up to an orange.

Second, a pounds per capita goal is necessarily arbitrary. Consumers own their covered electronic devices and will keep them for as long as they desire. Consumers are not required to “turn in” their covered electronic devices just because they have ceased using them. In addition, consumer use patterns and the lifetime of covered electronic devices vary widely. Due to these factors, the Agency cannot predict in advance how many pounds of covered electronic devices consumers in the state may decide to discard in any given year. Absent objective criteria, such goals may be merely aspirational ones. Because manufacturers running a take back program as an alternative to the tax would be required to meet these goals, however, manufacturers may be forced to offer incentives to consumers to discard their covered electronic devices. The per capita goals would then have the unintended and perverse effect of shortening the useful lives of products and forcing obsolescence.

The goal of the Act should be to ensure that covered electronic devices being discarded by households do not end up in the solid waste disposal system. This goal is effected through the disposal ban in Section 17. Thus, HP recommends deletion of Section 11(1) & (2).

3) Reuse. Section 11(2)(c) requires the total recovery goal to include goals for reuse and recycling. “Reuse” is defined to include “repair and the continued use of whole systems or components.” *See* Sec. 1(v). It is unclear how the Agency could decide in advance what percentage of discarded covered electronic devices should be reused versus recycled. On what would the Agency base this determination? Whether a discarded covered electronic device should be reused or recycled should be decided, on an individual basis, by reuse/recycling entities themselves, and, on a system basis, by the marketplace.

4) Additional or Alternative Actions. Section 11(2)(d) provides that “[i]f the recovery, reuse, and recycling goals are not met, the [Agency] is authorized to adopt and implement regulations that may create additional or alternative actions for the purposes of meeting these goals.” Given that the recovery, reuse, and recycling goals are in units of pounds per capita, “additional or alternative actions” would seem to require the Agency to increase the pounds of covered electronic devices that consumers choose to discard. For instance, would the Agency require consumers to discard, rather than store, unwanted covered electronic devices? This seems unlikely. In addition, it is unclear why the “Agency” is in brackets. Only the Agency (and not the Corporation) has rule-making authority under the Act. Overall, HP recommends deletion of this provision.

K. Fees for the Collection, Reuse or Recycling of Covered Electronic Products (Section 12)

1) No Fees. Section 12(1) prohibits persons or entities participating in the statewide program funded by the Corporation and manufacturers operating take back programs from charging a fee to consumers for collection, reuse or recycling of covered electronic devices. Similarly, Section 6(4) requires that manufacturers implementing a take back program “fully fund[] (at no direct cost to the consumer, local or regional government, including for collection, transportation or otherwise) the collection, reuse and recycling of the covered electronic devices.”

The coverage of these two provisions is unclear. Do they require manufacturers to fund personal household pickups? Direct curbside pickups? Collection after a consumer delivers a covered electronic device to a collection center? We note that in the Electronic Manufacturers’ Coalition White Paper, only the “basic costs of collection” are reimbursed. *See* Electronic Manufacturers’ Coalition for Responsible Recycling, *End-of-Life Management of Electronics* (May 2005), at 12. Would the same approach be used here? Sections 6(4) and 12(1) should be revised to address these questions.

Under HP’s Product Stewardship Solution, manufacturers that choose to provide a recycling program can select among many approaches to obtaining their equivalent share of CRT devices. These methods include mail-back services; return to collection centers, retail locations, or other locations designated by the manufacturer; deposit into a consolidation program run by a local government or private party with whom the manufacturer has negotiated an agreement; or other methods developed by manufacturers. The flexibility of this approach enables each manufacturer to be innovative and to develop the most effective and efficient method for obtaining its equivalent share. Whatever business models a manufacturer chooses to finance its program -- whether marketing incentives, trade-in discounts, take-back charges, or other means -- each manufacturer must demonstrate that it recycled its equivalent share of CRT devices each year or pay the state for the reasonable cost of collecting, consolidating, and recycling the shortfall. Thus, the approach assures both accountability and flexibility. And there is no issue of who funds what collection costs.

2) Sales Receipt. Section 12(2) requires that the “unit fee” paid to the Corporation be stated on the sales receipt for the covered electronic device. This requirement would be expensive and burdensome for retailers to implement, requiring them to modify their customer billing practices. In addition, because the tax is not added to the price of a covered electronic device but would show up on a customer’s receipt, this requirement is likely to cause consumer confusion. These disadvantages are not offset by any apparent advantages. Indeed, it is not clear what purpose this requirement serves.

L. Reimbursement for Collection, Transportation, Reuse, & Recycling (Section 15)

1) Approval to Receive Payments. See Part II(I)(2) above.

2) “Individual resident.” Under Section 15(1)(a), in order for a collection, transportation, reuse, or recycling entity to receive payment, it must submit proof that the covered electronic device was collected from “an individual resident of the State after the effective date of the Act.” If “resident” is defined narrowly, akin to a “household,” there is a lack of consistency between the manufacturer tax, which is based on all sales of covered electronic devices to “consumers” in the state, and the people/entities that are served by the collection, transportation, reuse, and recycling services funded by the manufacturer taxes. As discussed in Part I(C), the Discussion Draft should be limited in scope to covered electronic devices only from households.

M. Environmentally Sound Management Requirements (Section 16)

1) Demonstrating Compliance. Section 16(2) requires all entities that wish to be eligible to receive funds from the Corporation to “at a minimum, demonstrate compliance with the United States Environmental Protection Agency’s (EPA) Guidance on Environmentally Sound Management of Electronic devices as issued and available on the EPA’s Web site in addition to any other requirements mandated by state law.”

We have a number of procedural questions on this provision. How would entities “demonstrate compliance”? Is this provision, in effect, a certification requirement? If so, should entities submit a certification to the Agency and/or the Corporation? Would the certification be one-time or annual? What should the certification contain? We are not aware of any U.S. EPA guidance entitled “Environmentally Sound Management of Electronic devices.” Does the provision intend to refer to the U.S. EPA’s *“Plug-In to eCycling: Guidelines for Materials Management”*?

Assuming that Section 16(2) is referring to the *“Plug-In to eCycling”* Guidelines, the Guidelines are not a one-size-fits-all regulatory scheme that is appropriate for all situations. At the outset, the Guidelines state the following:

These guidelines are intended to be used as a framework for considering the acceptance of partners to the Plug-In Campaign. The Agency developed these guidelines based on what we believe, on a general basis, to be the most important elements for protection of human health and the environment in managing end-of-life electronics. However, the Agency is open to the possibility that not all aspects of these guidelines are critical in all cases of end-of-life management. That is, the Agency recognizes that, on a facility-specific basis, there may be practices that do not conform with every element of these guidelines, yet these practices may also ensure the protection of human health and the environment.

U.S. EPA, *Plug-In to eCycling: Guidelines for Materials Management* (May 2004), at 2.

Due to the guideline, rather than regulatory, nature of the Guidelines, HP recommends requiring “substantial accomplishment” of the Guidelines, rather than “compliance.”

2) Corporation Web Site. Under Section 16(3), the Corporation must maintain a Web site of entities and organizations that have met the performance standards. Does this mean that the Corporation must independently and affirmatively determine which entities and organizations have met the standards? If so, such Corporation determinations raise concerns of both resource availability (to verify compliance for potentially hundreds or even thousands of collection, transportation, reuse, and recycling entities) and due process (see Part II(C)).

N. Enforcement (Section 18)

Although Section 18 allows the Attorney General and the Agency to initiate independent action to enforce the provisions of the Act, it fails to specify that any person not in compliance with the Act

could be subject to civil penalties. Civil penalties are important to establishing a level playing field. Section 18 should be modified to address this problem. *See, e.g.*, HP's Model CRT Device Recycling Act, Sec. 14.

O. Effective Date (Section 21)

Section 21 specifies that the Act shall take effect 90 days after the date of enactment. The implications of this provision are unclear. Under Section 9(4), manufacturers are not required to pay fees/taxes until the Corporation has been fully incorporated and legally constituted or designated. Are manufacturers also not required to pay fees/taxes until the Agency establishes the statewide recovery, reuse, and recycling goals for covered electronic devices under Section 11(2)? (Presumably so because the manufacturer take back alternative under Section 6(4) depends on these goals.) When does the sales prohibition under Section 4 take effect? This cannot occur until it is known whether a manufacturer is in compliance or not. When does the labeling requirement under Section 5 take effect? When are manufacturer annual reports under Section 7(1) due? By what date must retailers post and provide collection and recycling information under Section 8? By what date must the Corporation submit a budget to the Agency and the Legislature under Section 9(5)? Overall, the Discussion Draft does not set out a clear or complete implementation timeline.