



Renee St. Denis
Director, Americas Product Take Back
Hewlett-Packard Company
916.785.8034 Tel
916.785.7192 Fax
renee.stdenis@hp.com

Submitted via electronic mail to Ms. Moore [Cynthia.Moore@dnr.state.wi.us]

November 17, 2005

Re: Comments of Hewlett-Packard Company on the Midwest Initiative
Workgroup Discussion Draft (November 2005)

Dear Ms. Moore:

Thank you for the opportunity to provide the comments of Hewlett-Packard Company ("HP") on the Midwest Initiative Workgroup November 2005 Discussion Draft "An Act Providing for the Recovery and Recycling of Used Electronic Devices" ("Discussion Draft"). We appreciate the opportunity to submit these comments on the Discussion Draft and to meet with the Workgroup on November 18 in Chicago. We look forward to continued involvement in this collaborative process.

HP supports the Discussion Draft's overall approach under Section 5, Option A of allowing manufacturers to choose to meet their recycling responsibilities either by establishing a take back program or submitting a payment to the Corporation established by the Discussion Draft. Indeed, this is the general approach that HP uses in its Product Stewardship Solution -- with submission of payments based on return share to the responsible state agency. As drafted, however, the Discussion Draft raises numerous legal, policy, and implementation issues.

In its November 10, 2005 letter inviting participation in the Midwest Initiative process, the Workgroup notes that its Discussion Draft "builds on model legislation developed through [the Northeast Recycling Council ("NERC")] efforts and input from stakeholders." NERC, however, has not completed drafting its model legislation. In fact, NERC is in the process of revising its September 1, 2005 second draft model legislation. On October 31, 2005, NERC circulated to stakeholders proposed revised financing language for review and comment. It is our understanding that NERC intends to continue this revision process for the rest of the proposed NERC model bill.

We think it useful for the Midwest Initiative to consider at its November 18 meeting what is the most practical and efficient process for developing its model legislation. To the extent the Midwest Initiative wants to build on the NERC model legislation, the Initiative should consider deferring drafting model legislation and engaging in a detailed stakeholder review and comment process until NERC completes its work.

On November 8, 2005, HP submitted to the Workgroup HP's White Paper,¹ which provides a comprehensive description of HP's Product Stewardship Solution and the implementing HP Model CRT Device Recycling Act ("HP Model Bill"). Enclosed is a copy of the HP Model Bill. We urge the Workgroup to consider adopting HP's approach. This 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.

If the Workgroup elects not to pursue the HP Model Bill approach, then HP looks forward to working with the Workgroup to modify the Discussion Draft to address HP concerns.

HP has five major recommendations for the Midwest Initiative Discussion Draft.

1) The manufacturer recycling obligation should be based on return share, not market share. Because the number of covered electronic devices sold by a manufacturer in a given year bears no relationship to the number of that manufacturer's devices discarded by consumers and returned for recycling, current market share is not a correct basis for a "sustainable recycling, collection, and processing system," which is what the Midwest Initiative Workgroup has stated as its goal. Current market share is not best for either a manufacturer payment or a manufacturer take back alternative. A 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. Moreover, the current market share approach proposed in the Discussion Draft rests on unsound policy: a fee on one subset of products (video display devices) is used to fund (subsidize) recycling of a much broader range of products (covered electronic devices), and a flat fee of \$10 is imposed on all video display devices regardless of their purchase price and the cost to collect and recycle them. Under a product stewardship approach for a sustainable recycling system, 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 manufacturer take back alternative should be an integral part of any legislation proposed by the Midwest Initiative Workgroup. The Option A manufacturer take back system should be modified to improve implementation and create an effective manufacturer responsibility option. The Option B financing mechanism lacks a manufacturer take back alternative. This is a fundamental omission and eliminates what should be an essential element of any electronics end-of-life management program. HP cannot support an electronics recycling model legislative proposal that lacks a manufacturer take back program.

The Option A financing mechanism has a manufacturer take back alternative. HP supports many aspects of the Option A manufacturer's take back program. But many aspects of the program need to be improved if the manufacturer take back alternative is to be a sound, effective, workable program. HP addresses these issues in our detailed comments. 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

¹ Hewlett-Packard Company, Product Stewardship Solution for Computer Monitors and Televisions (Aug. 2005).

encourages manufacturers to provide their own programs. HP looks forward to working with the Workgroup to develop a sound, effective manufacturer take back program.

3) The Corporation should be eliminated due primarily to accountability and legal problems; at a minimum, it should be made voluntary. The Corporation's responsibilities 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 concept of having a third-party corporation is retained, HP recommends providing that manufacturers could voluntarily form and/or join such a corporation as a method for meeting their obligations under the Act. If creation of the Corporation is retained in the Discussion Draft, HP recommends that a state should not propose legislation that includes the Corporation without first obtaining a legal opinion from the state Attorney General that the Corporation as envisioned in the Discussion Draft would be legal.

4) 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) 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 manufacturer excise tax would fail to meet the substantial nexus and the fair apportionment requirements. 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 from the state Attorney General 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.

5) 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's 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 business, managing the disposition of older electronic equipment is, like disposition of any other tangible business asset, 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.

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Legal and policy analysis supporting HP's recommendations is provided in the Attachment. In addition, the Attachment provides section-by-section detailed comments on and recommendations for Discussion Draft provisions to address other HP concerns. Our comments do not address all concerns raised by the Discussion Draft. HP reserves the right to comment on additional issues when later drafts are circulated for comment.

The Workgroup's effort to seek a regional solution to the challenge of improving electronics recycling in the Midwest states is an important step toward creating a workable national approach. HP looks forward to working collaboratively with the Workgroup to develop a sound electronic recycling program.

Sincerely,

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

Attachment

Enclosure