

who is Ontario Electronic Stewardship and why are they sending me invoices?

introduction

Some of our clients in the electronics distribution and manufacturing businesses are beginning to receive correspondence from an organization called "Ontario Electronic Stewardship" (or OES). The correspondence refers to some mysterious item called "WEEE" and suggests that significant payments may be required for every computer, television or printer that the business is selling. The payments are connected with what is referred to as "Phase 1," leaving the clear implication that a "Phase 2" will be coming along shortly.

It's a long story No, this is not another Nigerian bank account scam. Nor is Ontario Electronics Stewardship looking for a reliable partner of integrity and sound judgment, just like you, to dispose of funds stolen out of the budget of the Angolan Minister of Oil Sales. The person signing the letter is not the orphaned great-nephew twice removed of the late Jonas Savimbi.

What it does mean is that the Ontario Blue Box program started in the 1980's has been so successful that it has spawned offspring, and the new "Blue Boxlets" need your money to help them Reduce, Reuse and Recycle. The Waste Electrical and Electronic Equipment (WEEE) Program is just one of the younger entities spawned by the Blue Box. We describe below how this family affair got started.

background

The roots of Ontario Electronic Stewardship and the Waste Electrical and Electronic Equipment (WEEE) Program are found in the Ontario residential curbside recycling program known as the Blue Box Program. The program got its name from the blue plastic bins that were introduced to residents of Kitchener, Ontario, in 1983. The bins caught on with Ontario householders and were eventually rolled out to residents right across the province, covering an estimated 4.5 million households.

Until 2002, the Blue Box had been supported by a loose consortium of firms in the soft drink, newspaper, and grocery industries organized at various times as

Corporations in Support of Recycling, the Canadian Industry Packaging Stewardship Initiative and Ontario Multi-Material Recycling Inc. (I and II).

In 2002, legislation was enacted to create a more formal funding structure and to replace the *ad hoc* organizations that had been supporting curbside recycling since the 80s. The *Waste Diversion Act, 2002*, was introduced to provide a stable base for what had become a multi-million dollar program. An umbrella corporation, Waste Diversion Ontario (WDO), was created by the new legislation to replace the predecessors. The Minister of the Environment was given authority under this Act to designate waste materials and to then ask Waste Diversion Ontario to develop a “waste diversion plan” for the waste. The legislation also provides for an industry group (an “Industry Funding Organization” or IFO) to be created for each material or group of materials subject to the Act. The IFO is mandated to draft the waste diversion program for Waste Diversion Ontario to submit to the Minister, to establish appropriate funding levies for the costs of implementing the program, and to collect the funds from the industry participants known as “Stewards.” The Minister has designated the following items as waste materials under the Act: Blue Box Waste (December 2003), Municipal Hazardous or Special Waste (February 2008) and – the focus of this article – Waste Electrical and Electronic Equipment (July 2008).¹

Companies in the consumer products area are already familiar with an industry funding organization known as “Stewardship Ontario.” Stewardship Ontario was the original IFO for the Blue Box industries and has also expanded its reach as the IFO for the various paint, battery, and household chemical manufacturers and distributors covered by the recently established Municipal Hazardous or Special Waste (MHSW) program.

The newspaper companies, grocery stores, and other consumer outlets that generate cans, bottles, paper packaging, and glass that end up in the residential Blue Box are contributors to the Blue Box Program Plan. Their Blue Box fees pay fifty percent (50%) of the Blue Box management costs of Ontario’s municipalities. A parallel program exists for wastes equivalent to the Blue Box materials in the Province of Quebec although there are some differences. It is administered by Eco Enterprises Quebec (EEQ). EEQ also administers the Quebec equivalent to the Municipal Hazardous or Special Waste (MHSW) program. Similar programs exist in other provinces for discrete materials but there seems to be a growing trend for provinces to standardize these programs.

weee program

Waste Diversion Ontario was asked in 2004 by the then-Minister of the Environment to produce a study of the state of Waste Electrical and Electronic Equipment (WEEE) management. The study was tabled in 2005. An Industry Funding Organization called “Ontario Electronic Stewardship” was created in 2007 and a Program Plan for WEEE diversion was filed in 2008. As noted below, the WEEE program is being implemented in stages. This

¹ Used tires were designated in 2003 but there was considerable discussion about the feasibility of a program and only in August 2008 did the Minister make a designation. A program plan is in progress.

Program Plan has been several years in the making and industry leaders like Hewlett-Packard, Sony, and Dell have been very active in its creation.

The initial list of materials designated in 2004 for the WEEE Program (in Ontario Regulation 393/04) was stunningly broad. It included things such as household appliances,² telecommunications equipment,³ toys and sports equipment, medical instruments, and electrical tools. To make the program more manageable, the Government broke it into phases. Phase 1 is the current program, dealing with computers, keyboards, monitors, printers, and televisions. There is further clarification in the technical rules in the 176 pages of the WEEE Program Plan (available at <http://www.wdo.ca>).

weee stewards

The term “Steward” comes from the concept of “Extended Product Stewardship.” In environmental circles, Product Stewardship refers to the responsibility of producers for the products that they produce from cradle to grave. The theory is that a producer will be more conscientious in the design of the product and in particular its final disposition if the producer is bearing the costs. In Ontario, Blue Box Stewards are brand owners, first importers, or franchisees (essentially those persons who sell consumer products in Ontario that produce or contain Blue Box waste). The only requirement for Stewardship is that the party have a “commercial connection” with the product. In other words, this is really a question of who is going to pay the product levies.

For the Waste Electrical and Electronic Equipment (WEEE) program, the Stewards are brand owners, first importers, or “assemblers of non branded products” for sale and use in Ontario that result in WEEE. Materials that are supplied for markets outside Ontario are not included nor are materials that do not end up in the waste stream. But the WEEE levies are not restricted to materials that will end up in the residential Blue Box. They are applicable to both residential materials and ones that end up going to the industrial, commercial and institutional sector. So companies that sell computer monitors that are exclusively used by hospitals or printers that are only used in the banking sector are still going to end up paying levies even though it is clear that the material will not end up in any residential Blue Box.

Since the levies are only to be paid once, if there is some electronic equipment that is distributed by a vendor or distributor in Ontario that has a source in Ontario, it may be that the levy is already being paid. In many cases, the payment of the levies on such equipment sourced in Ontario may be an issue for negotiation with customers or suppliers.

industry stewardship plan

As an alternative to paying the levies to the Ontario Electronic Stewardship, it is possible for a company to take direct responsibility for managing their obligations by creating an Industry

² Household appliances includes blenders, carpet sweepers, dehumidifiers, hairdryers, toasters, and electric toothbrushes.

³ Telecommunications equipment includes CB radios, close-circuit television equipment, PBX hardware, satellite television transmitting and receiving equipment, and telephone carrier switching equipment.

Stewardship Plan (ISP) under the Waste Diversion Act, 2002. Some manufacturers have done this. Most of the Stewards in the various Plans have elected not to choose this route but a high-profile Brand-owner like Sony may wish to do this as part of their own product marketing.

plan levies

Under the Plan, WEEE “Stewards” are required to report on the type and quantity of WEEE they supplied into the Ontario marketplace in the previous year. Based on this, they are required to remit their fees on a monthly basis to cover collection, transportation and processing costs. The relevant fee schedule is set for the 12-month period beginning April 1, 2009. The fees are recalculated on an annual basis and take into account the updated costs and the updated sales figures.

conclusion

Experience with the Blue Box program indicates that the initial WEEE Program Plan will inevitably be less than perfect and that some adjustments will likely be required. There will be over-estimates of some inputs and under-estimates of others that will have to be corrected. The initial Stewardship participation may be deficient and continued education of industry participants will probably be required. In the case of the Blue Box Program, the bottom fell out of the markets in late 2008 for materials such as recycled aluminum and recycled corrugated cardboard, as a result of the recession. Program revenues are calculated on a three-year average so there will not be an immediate collapse but on the longer term, it will lead to bigger deficiencies for the municipalities until markets recover. The same issues may require re-calculation of revenues in the WEEE program as well.

Court challenges were considered in the original Stewardship Ontario Blue Box plan on the basis that it was not a regulatory program but a disguised scheme of taxation that was not properly authorized. Some of the prospective WEEE Stewards may decide to take a fresh look at that issue, especially if the price of the recyclable materials continues to fall. In any event, it is very early days to make any assessment but 2009 promises not to be boring for the electronics industry.

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a cautionary note

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted. © McMillan LLP 2009.