17-227

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VIZIO, INC.,

Plaintiff-Appellant,

v.

ROBERT J. KLEE, in his official capacity as the Commissioner of the State of Connecticut Department of Energy and Environmental Protection,

Defendant-Appellee.

On Appeal from the U.S. District Court for the District of Connecticut

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OPENING BRIEF OF APPELLANT VIZIO, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel certifies that Appellant VIZIO, Inc., a company incorporated in California, has no parent corporation and that no publicly held corporation owns 10% or more of VIZIO's stock.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this suit, which challenges the constitutionality of a state law pursuant to the Commerce Clause of the U.S. Constitution, under 28 U.S.C. § 1331. The district court entered a final judgment of dismissal on December 29, 2016, and Appellant VIZIO, Inc. filed a timely notice of appeal on January 23, 2017. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Whether the State of Connecticut's "E-Waste Law," which directly and disproportionately ties a television manufacturer's in-state regulatory fees to commercial activity that occurs wholly outside Connecticut, violates the Commerce Clause of the U.S. Constitution.

INTRODUCTION

No individual State can penalize a manufacturer's success in the national marketplace to further its own local goals. Yet that is exactly what Connecticut has done. By expressly tying a television manufacturer's regulatory burden not to its Connecticut-based conduct but rather to its sales *nationwide*, Connecticut has taken the extraordinary (and, until quite recently, unprecedented) step of calculating in-state fees based on out-of-state conduct. Although Connecticut thus extends its regulatory regime to commerce "among the several states," our Constitution's Commerce Clause makes that prerogative Congress's alone.

About half the States have enacted some form of "extended producer responsibility" legislation, known as "E-Waste Laws," to fund the recycling of used consumer electronic devices. Those laws have taken a number of divergent approaches to deciding who pays and how much. Some states, like California, charge consumers an "advanced recovery fee" on every new sale made in the state; that fee funds the recycling program. Other states, like Virginia, require electronics manufacturers to "take back" their own products for recycling at no charge to consumers. Still others bill each manufacturer based on the percentage of its own devices that are returned for in-state recycling, *i.e.*, the "return share." That last approach, in fact, is the one Connecticut has adopted to fund recycling of all consumer electronic devices *except* televisions.

For televisions, however, Connecticut has elected to take a different—and manifestly unconstitutional—approach. Instead of allocating recycling charges to each manufacturer based on how many of its televisions were actually recycled in Connecticut, or even how many were actually sold in Connecticut, Connecticut charges each manufacturer based on how many were sold in *every state across the country* (*i.e.*, its *national* market share). The upshot is that the more televisions VIZIO sells in California, Texas, Hawaii, or anywhere else in the United States, the more it owes to Connecticut.

That approach cannot be squared with the Commerce Clause. It is settled law that a state statute may not be "appli[ed] *** to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-337 (1989) (internal quotation marks and citation omitted). But the E-Waste law does just that, in unmistakable terms. And it does so in a way that subjects VIZIO and other television manufacturers to the risk of multiple levies for the same out-of-state transaction, such as when VIZIO pays for recycling of the same television twice: once in Connecticut (based on the initial sale outside of Connecticut) and again in the state of purchase or return.

That blatant extraterritorial reach is not the only problem with Connecticut's national-market-share approach. VIZIO's national market share is *higher* than its

market share in Connecticut. Making matters worse, many of the products being recycled today are bulky, lead-containing, and now obsolete cathode ray tube ("CRT") televisions, which VIZIO never sold. As a result, VIZIO, whose newer, smaller, and less toxic products constitute an infinitesimal fraction of the overall recycling stream, is being forced to pick up the tab based on a *national* metric that bears zero relation to recycling costs incurred in Connecticut, and on a *weight* metric that bears zero relationship to the products VIZIO puts in the marketplace. That all contravenes the established Commerce Clause rule that "user fees" implicating interstate commerce must "fairly approximate" a regulated entity's use of the program and not exceed the benefits conferred. Yet the district court refused even to analyze the E-Waste Law under the "user fee" framework—despite the fact that it also (prematurely) short-circuited the separate *Pike* balancing inquiry.

Because the E-Waste law fails under any of these Commerce Clause theories, this Court should reverse the dismissal of the complaint.

STATEMENT OF THE CASE

A. Connecticut's E-Waste Law

Connecticut, like many other states, requires manufacturers to bear the costs of recycling televisions and other electronic devices through its "E-Waste Law." *See* An Act Concerning the Collection and Recycling of Covered Electronic

Devices, Pub. Act No. 07-189 (2007) (codified as amended at CONN. GEN. STAT. §§ 22a-629 to 22a-640); CONN. AGENCIES REGS. §§ 22a-630(d)-1, 22a-638-1.

The E-Waste Law requires manufacturers currently selling covered electronic devices (directly or indirectly) in Connecticut to fund the entire state-wide electronics recycling program. Each "manufacturer" that "manufactures or manufactured covered electronic devices" and "supplies them to any *** distribution network" that reaches Connecticut must "participate in the state-wide electronics recycling program" to "implement and finance the collection, transportation and recycling of [those] devices." CONN. GEN. STAT. §§ 22a-629(7), 22a-631(a); *see id.* § 22a-629(5), (7) (definitions). For computers, monitors, and printers, costs are allocated based on "return share": each manufacturer's fees are calculated using a formula that takes into account the weight of its own products returned for recycling, plus a portion of products that either cannot be tied to any manufacturer or were produced by a manufacturer that is no longer in the market (so-called "orphan devices"). CONN. AGENCIES REGS. § 22a-638-1(g)(l)(C) & (j)(3).

For the recycling of televisions, however, the E-Waste Law does not distribute costs among manufacturers based on their share of products that are actually recycled in Connecticut. Rather, the Law provides that the program "shall be funded by allocating *** cost[s] *** among the manufacturers *** based on a

sliding scale that is representative of the manufacturer's [television] market share." CONN. GEN. STAT. § 22a-631(a). That means that each television manufacturer funds the recycling of all televisions in a current-market-share-dependent amount, regardless of the actual portion of that manufacturer's devices in the Connecticut recycling stream.

Critically, instead of tying each television manufacturer's costs to current *Connecticut* sales data, the "manufacturer's market share" is "based upon available *national market share data*" for that manufacturer. CONN. GEN. STAT. § 22a-631(a) (emphasis added); *see* JA14 (noting that costs "each manufacturer is responsible for is based on its current National Market Share"). Connecticut's television recycling-fee formula multiplies (i) the particular manufacturer's "national market share"; (ii) the "total pounds recycled" in Connecticut, regardless of manufacturer; and (iii) a State-approved price per pound. CONN. GEN. STAT. § 22a-631(a), (c)(4)(B), (7)(A); *see also* CONN. AGENCIES REGS. § 22a-638-1(j)(6). The State also charges manufacturers an annual fee—again based on national market share—that is used to cover costs associated with administering the program. *See* CONN. GEN. STAT. § 22a-630(d); CONN. AGENCIES REGS. § 22a-630(d)-1(d); *see* JA13 (noting that "annual registration fees *** are based on a sliding scale that is representative of the manufacturer's current share of sales in the national television market").

Although the E-Waste Law is a State program, it requires the actual recycling of covered devices to be performed by covered electronic recyclers ("CERs"). These entities, though privately owned, are closely overseen by the State. Connecticut approves recyclers to become CERs by way of an application process in which the State considers, *inter alia*, (i) the recycler's qualifications and experience for managing and recycling electronic waste; (ii) its proposed procedures and process flow; (iii) the transporters and recycling/disposal facilities it intends to use; and (iv) the recycling fees it intends to charge. CONN. AGENCIES REGS. § 22a-638-1(b)(2)-(5). Once approved, a CER is obligated to notify the State of changes to information contained in its application, and the State maintains discretion to revoke, suspend, or modify a CER's approval based on certain conditions. *Id*. § 22a-638-1(b)(7)(B), (8)(A). CERs must also comply with numerous E-Waste regulations, including separation requirements, recordkeeping and reporting obligations, standards for recycling and disposal, and other mandates to ensure that transporters and recycling and disposal facilities comply with applicable permits. *Id.* § 22a-638-1(c)-(e).

B. Impact on VIZIO[1]

VIZIO, headquartered in California and founded in 2002, is a new entrant to the television market by industry standards. JA236, ¶ 32. In that relatively short time, VIZIO has enjoyed tremendous growth in national market share. JA236, ¶ 32. At the same time, VIZIO has spearheaded a number of environmental initiatives and supported recycling laws that require television manufacturers to fund the recycling of their products based on their contribution to the recycling stream. JA226, ¶ 1; JA233, ¶ 20.

VIZIO's customers are almost exclusively large retailers that, at their discretion, resell VIZIO televisions to consumers nationwide. JA236, ¶ 33. VIZIO's market share thus varies from state to state, largely based on factors outside of its control. None of VIZIO's retail customers is headquartered in Connecticut or uses a distribution center in Connecticut, and VIZIO's direct television sales in Connecticut are negligible. *See* JA237, ¶ 34 (noting "97 sales in 2012 and 42 sales in 2013"). Available data indicate that, in recent years, VIZIO's Connecticut market share of television sales has been materially lower than its national market share. JA238, ¶ 39; JA243, ¶ 56.

[1] The following facts are taken from the amended complaint, JA225-253, which substantially incorporates the allegations of the original complaint, JA90-JA117. The original complaint contains certain additional factual allegations related to the Commerce Clause claims that the district court dismissed in its first order.

For a variety of reasons, including VIZIO's relative youth and its lower Connecticut market share, televisions manufactured by VIZIO are also recycled infrequently in Connecticut. *See* JA238, ¶ 39 ("[M]any or most of the products being counted to formulate VIZIO's National Market Share are not being sold or disposed of by any person within Connecticut's borders."). A recent study of 23,000 pounds of televisions recycled in Connecticut revealed not a single VIZIO product. JA226, ¶ 2.

In addition, VIZIO has never sold the older, bulkier, CRT televisions that make up much of the recycling stream today. JA227, ¶ 3. CRT televisions frequently weigh up to ten times as much as VIZIO's flat panel televisions. JA227, ¶ 3. They are also more expensive to recycle because they "contain significant quantities of lead." JA108, ¶ 61. By contrast, "VIZIO's flat screen televisions only contain miniscule concentrations of lead in compliance with multiple state and international regulations restricting the use of hazardous materials in consumer electronics." JA108, ¶ 61.

Notwithstanding VIZIO's negligible contribution to Connecticut's recycling stream, VIZIO has already paid (as of the Complaint's filing in 2015) over $2.5 million to satisfy the requirements of the E-Waste Law. JA237, ¶ 34. Those payments were based on the State's determination that VIZIO's national market share stood between 14% and 17% from 2012 through 2015—the second highest

national market share of all participating television manufacturers. JA226, ¶ 2. In 2013, the national market share Connecticut assigned to VIZIO was estimated to be 25%-50% higher than its Connecticut market share. JA243, ¶ 56.

C. Procedural History

VIZIO brought suit for declaratory and injunctive relief, alleging (as relevant here) that the E-Waste Law's method of allocating recycling costs violates the Commerce Clause of the U.S. Constitution. VIZIO argued that the E-Waste Law (i) constitutes *per se* unconstitutional extraterritorial "regulat[ion of] goods in commerce beyond the boundaries of the state"; (ii) "charges user fees that are not a fair approximation of each manufacturer's use of Connecticut's E-Waste Program and are excessive in relation to the benefit conferred"; and (iii) contravenes *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) by imposing "burdens *** on interstate commerce" that "outweigh the local benefits to Connecticut residents." JA110-111, ¶¶ 67-82. The district court rejected those arguments and, in separate orders, granted the State's Rule 12(b)(6) motions to dismiss both VIZIO's original and amended complaints.

1. In the first of two rulings, the district court acknowledged at the outset the Supreme Court's holding in *Healy v. Beer Institute, Inc.* that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects

within the State." JA26 (quoting *Healy*, 491 U.S. at 336-337). But analyzing extraterritoriality solely in terms of whether the E-Waste Law *directly controls* television prices or television sales outside of Connecticut, the court found that the E-Waste Law controls neither. JA25-37. According to the court, the E-Waste Law merely creates downstream impacts by imposing costs on VIZIO that could be passed onto consumers. JA30. If VIZIO is dissatisfied with its regulatory burden, the court continued, its only recourse is "to withdraw from the Connecticut market by stopping its direct sales into the state and by contractually requiring that its retail customers do the same, or by otherwise changing its distribution processes to ensure that its products are not offered for sale in this state." JA33.

The district court also found that the E-Waste Law did not fail *Pike*'s balancing test because any "incidental burden[s] *** as between interstate and intrastate commerce" do not outweigh the putative local benefits. JA23. In so finding, the court characterized VIZIO's pre-discovery, pleading-stage allegations of burdens as "conclusory." JA24. The court also found it "[s]ignificant[]" that VIZIO "ha[d] not alleged that the health and safety interests that the benefits of the E-waste Law advance are illusory." JA24. From that premise, the court reasoned that the E-Waste Law's interference with interstate commerce could not "overcome" the "strong presumption of validity" afforded to it in light of its stated purpose of improving public health and safety. JA24-25. Accordingly, the court

concluded as a matter of law that the E-Waste law did not "disparately burden[] interstate commerce." JA25.

As to VIZIO's "user fee" claim, the district court recognized that, under *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 716-717 (1972), a user fee is constitutional only if it "(1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce." JA38 (citation and quotation marks omitted). The court declined to apply that framework to the recycling fees charged under the E-Waste Law, however, holding that those "charges *** do not even constitute 'user fees' subject to the Commerce Clause." JA38. In its view, "user fees" are "charge[s] imposed by the State for the use of state-owned or state-provided transportation or other facilities and services," while under the E-Waste Law "recycling activities are carried out by CERs, all of whom are private entities who use their own facilities and services." JA38 (citation and quotation marks omitted). The court thus concluded, regardless of the degree of state control over or regulation of these "private entities," that the charges Connecticut requires manufacturers to pay CERs under the E-Waste Law are not "user fees" because they are not paid directly to the State. JA38.

Although the district court accepted that the E-Waste Law's additional registration and administrative fees constitute user fees, the court deemed them

permissible under *Evansville*. Those fees, the court reasoned, apply to all manufacturers wherever located; are limited to amounts necessary to cover expenses incurred by the State in the administration of the program; and fairly approximate a manufacturer's use of the recycling program over time "[b]ecause nothing lasts forever" and "every television sold will eventually need to be recycled under the E-Waste Law." JA39-40.

2. Although dismissing the lion's share of VIZIO's Commerce Clause claims, the district court granted VIZIO leave to replead additional facts in support of a narrow "extraterritorial pricing" theory. JA37; JA60. In its amended complaint, JA225-253, VIZIO noted that the E-Waste Law has the practical effect of regulating commerce beyond its borders, JA278-279, because of its explicit dependence on the company's national market share: the lower the price VIZIO charges outside Connecticut, the higher its national market share—and the higher its bill from Connecticut. JA242, ¶ 54. The district court dismissed the amended complaint on the understanding "that the E-Waste Law merely affects rather than directly controls VIZIO's interstate prices." JA76. The court reasoned that VIZIO's extraterritoriality challenge required a showing of direct control of interstate pricing, and rejected the notion that the Commerce Clause protects against extraterritorial regulation more broadly. JA78-79.

SUMMARY OF ARGUMENT

Connecticut's approach to allocating costs for television recycling under the E-Waste Law violates the Commerce Clause for three independent reasons.

1. Connecticut's approach contravenes the longstanding rule that state laws may not be "'appli[ed] *** to commerce that that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" *Healy*, 491 U.S. at 336 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982)). By determining fees for recycling based on *national* sales data, the E-Waste Law ties VIZIO's in-state recycling costs to televisions sales that bear no connection to Connecticut. Moreover, the E-Waste Law effectively compels VIZIO to pay twice to recycle the same product—once in the state where the television is sold or recycled, and once again in Connecticut. Such a regulatory scheme—explicitly predicated on interstate commercial activity and resulting in duplicative financial burdens for interstate commercial entities—runs afoul of the prohibition on extraterritorial application of state laws and is invalid *per se*.

2. The E-Waste Law also violates the separate Commerce Clause doctrine providing that a "user fee" is constitutional only if it "is based on some fair approximation of use or privilege for use" and is not "excessive in comparison with the governmental benefit conferred." *Evansville*, 405 U.S. at 716-717. Connecticut charges VIZIO based on a national market share that is up to 50%

higher than its Connecticut market share and a price-per-pound calculation that fails to account for the fact that VIZIO's products weigh one tenth as much as the older televisions being recycled today. As a consequence, VIZIO's costs under the E-Waste Law do not "fairly approximate" its share of the recycling burden and are "excessive" in relation to the benefits conferred (*i.e.*, the amount *actually expended* to recycle its products). That VIZIO is directed to pay recycling fees to pervasively regulated private entities rather than to the State itself does not absolve Connecticut of its obligation to ensure that the fees it imposes pursuant to the E-Waste Law meet the *Evansville* standard.

3. Lastly, the E-Waste Law fails *Pike* balancing because the burdens it imposes on interstate commerce far outweigh any putative local benefits. VIZIO pleaded facts sufficient to allege that the E-Waste Law's method of allocating costs imposes a disparate burden on interstate commerce and offers minimal health and safety benefits relative to alternatives, such as a return-share model. The district court erred in dismissing VIZIO's *Pike* claim, which necessarily compels a fact-intensive inquiry, under Rule 12(b)(6).

STANDARD OF REVIEW

This Court reviews the district court's rulings dismissing VIZIO's Commerce Clause claims *de novo*. *See Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004).

ARGUMENT

CONNECTICUT'S E-WASTE LAW VIOLATES THE COMMERCE CLAUSE

"The Constitution's affirmative grant of power to Congress '[t]o regulate Commerce *** among the several States,' U.S. CONST. ART. I, § 8, cl. 3, has long been construed to imply a negative counterpart, commonly referred to as the dormant Commerce Clause, restraining state authority over interstate commerce." *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 63-64 (2d Cir. 2010) (alteration and ellipsis in original). That "implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce" has invalidated a variety of laws that control, discriminate against, or otherwise burden interstate commerce. *Healy*, 491 U.S. at 326 n.1. Among other limitations, the "Commerce Clause *** precludes the application of a state [law] to commerce that takes place wholly outside of the State's borders." *Id.* at 336 (internal quotation marks and citation omitted) (ellipsis in original). Such laws are "virtually *per se* invalid under the Commerce Clause." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

Connecticut's E-Waste Law violates the Commerce Clause in three independent ways: (1) it levies fees based on extraterritorial conduct and requires VIZIO to pay twice for recycling the same television by directly tying VIZIO's Connecticut recycling payment obligations to sales nationwide; (2) it charges "user

fees" that do not "fairly approximate" VIZIO's share of Connecticut's recycling burden and are "excessive" in relation to the benefits conferred; and (3) it burdens interstate commerce to a degree that far outweighs any putative local benefits. For each of these reasons, the district court's dismissal of VIZIO's Commerce Clause claims should be reversed.

A. The E-Waste Law's Assessment Of Fees Based On Sales Wholly Outside Of Connecticut Is Unconstitutionally Extraterritorial

1. The Commerce Clause prohibits extraterritorial application of state laws.

The notion that "[n]o State can legislate except with reference to its own jurisdiction" has been a fixture of constitutional jurisprudence for well over a century. *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). As the Supreme Court explained in 1892, "[l]aws have no force themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states." *Huntington v. Attrill*, 146 U.S. 657, 669 (1892); *see also Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) ("The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others."), *overruled in part on other grounds by Shaffer v. Heitner*, 433 U.S. 186 (1977).

With respect to the Commerce Clause, the prohibition on extraterritorial regulation emanates from the Framers' intent to build a national government

capable of regulating commerce between the states. Without such a "unity of commercial, as well as political, interests," the Framers feared that interstate commerce would be "fettered, interrupted, and narrowed by a multiplicity of causes" advanced by local interests. THE FEDERALIST NO. 11, at 63 (Alexander Hamilton) (Hallowell ed., 1826). By affording Congress the power "[t]o regulate [c]ommerce *** among the several States," Art. 1, § 8, cl. 3, the Constitution "reflected *** the Framers['] *** conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Comptroller of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)) (internal quotation marks omitted).

Addressing the prohibition on extraterritorial regulation in *Healy*, the Supreme Court took note of "the Constitution's special concern *** with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy*, 491 U.S. at 335-336. In line with that concern, the Court announced the rule that "the Commerce Clause *** precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Id.* at 336

(internal quotation marks and citation omitted). Like laws that discriminate against interstate commerce (and thus undermine the Commerce Clause's anti-protectionist rationale), state laws that purport to regulate extraterritorially (and thus threaten the effective functioning of the national economic union) "[are] invalid *per se*." *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 168 (2d Cir. 2005) (citation and quotation marks omitted).

Although *Healy* itself concerned a law purporting to control prices outside the enacting state's jurisdiction, the rule the Court articulated was not limited to those circumstances. Rather, the Court observed that, "at a minimum," its cases stood for several "propositions," including the prohibition against extraterritorial application of domestic law. 491 U.S. at 336 (citing *Edgar*, 457 U.S. at 642-643).

Underscoring the breadth of the rule it announced, *Healy* relied on *Edgar v. MITE Corp.*, a plurality opinion that the Court explained "significantly illuminates the contours of the constitutional prohibition on extraterritorial legislation." *Healy*, 491 U.S. 333 n.9 (citing 457 U.S. 624). Far afield from pricing, *Edgar* concerned an Illinois law that required in-state registration of a takeover offer for the shares of companies with substantial Illinois connections and that empowered the Illinois Secretary of State to take steps to protect shareholders—whether or not those shareholders resided in Illinois—in certain situations involving fraud or inequity. 457 U.S. at 626-627. Consistent with *Healy*, *Edgar* focused on the "practical

effect[s]" of the Illinois law in finding that it violated the Commerce Clause. 457 U.S. at 643.

The extraterritoriality principle articulated in *Healy* (and *Edgar*) has particular force when a state attempts to reach outside its borders to levy charges on interstate commercial activities. In that context, the extraterritoriality principle precludes a state from "tax[ing] value earned outside its borders." *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777 (1992). "The reason the Commerce Clause includes this limit is self-evident" and harkens back to the Framers' intent to enable a national economic system predicated on unfettered commerce between the states. *Id*. "In a Union of 50 States, to permit each State to tax activities outside its borders would have drastic consequences for the national economy, as businesses could be subjected to severe multiple taxation." *Id*. at 777-778. To avoid those consequences, and to prevent the "economic Balkanization" that would occur if states were permitted to reach commercial activity outside their borders, *Wynne*, 135 S. Ct. at 1794, the Constitution precludes extraterritorial state regulation.

2. The E-Waste Law explicitly sweeps in out-of-state sales and imposes a double burden on interstate manufacturers.

By using out-of-state sales data to allocate recycling costs, the E-Waste Law violates the rule that state laws may not be "'appli[ed] *** to commerce that takes place wholly outside of the State's borders.'" *Healy*, 491 U.S. at 336 (quoting

Edgar, 457 U.S. at 642-643). As a consequence, Connecticut's Law falls into the category of state regulations the Supreme Court deems extraterritorial and invalid *per se*. *Id.*

Under the E-Waste Law, a television manufacturer's recycling fees are driven by its "national market share," which is defined as an "approximat[ion] [of] the number of units sold that are attributable to each manufacturer," using data on "the number of units shipped" and "retail sales data" anywhere in the United States. CONN. AGENCIES REGS. § 22a-638-1(g)(2). Accordingly, a vast majority of the market share used to calculate VIZIO's recycling costs consists of sales occurring in other states—*i.e.*, sales that bear "no connection" to Connecticut, *Edgar*, 457 U.S. at 642; *accord Allied Signal*, 504 U.S. at 777 (Commerce Clause requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax") (internal quotation marks and citation omitted).

Notwithstanding their lack of connection to the State, Connecticut's E-Waste Law reaches every one of VIZIO's out-of-state sales. Specifically, the Law attaches a recycling payment obligation to each incremental sale and penalizes VIZIO's success in the national marketplace with a higher recycling bill in Connecticut. *See* CONN. AGENCIES REGS. § 22a-638-1(j)(6) ("amount due *** shall be calculated" by multiplying "the manufacturer's [national] market share" by

the total weight of all recycled televisions, plus state-approved fee). In other words, VIZIO's costs under the E-Waste Law rise and fall based on televisions sales that have nothing whatsoever to do with Connecticut.

By design then, the E-Waste Law ties VIZIO's Connecticut recycling fees to its out-of-state commercial activity and, in so doing, intrudes on interstate commerce. Indeed, the E-Waste Law's intrusion on interstate commerce is far more explicit than the intrusion effected by the law invalidated in *Edgar*. There, the Illinois law's application to out-of-state shareholders was incidental: By covering corporations with significant Illinois ties, the law reached shareholders who might *happen* to live outside of Illinois. *Edgar*, 457 U.S. at 626-627. In contrast, the E-Waste Law *expressly targets* interstate commerce by mandating that "[m]arket share information shall be based upon available *national* market share data." CONN. GEN. STAT. § 22a-631(a) (emphasis added).

Compounding the problem, the E-Waste Law exposes VIZIO to the kind of duplicative financial burden the Commerce Clause forbids. Because VIZIO's national sales are factored into its Connecticut recycling fees, the out-of-state sales are "double counted" when the other state imposes (in compliance with the Commerce Clause) recycling fees based on the number of VIZIO televisions sold within its borders. And if the other state charges (also in compliance with the Commerce Clause) recycling fees based on the weight of VIZIO televisions

returned for recycling in that state (*i.e.*, return share), VIZIO is charged twice to recycle the same product: Having paid Connecticut based on a national market share derived from all of its sales nationwide, VIZIO incurs a duplicative cost *each time* a customer returns a VIZIO television in another state that charges VIZIO to recycle its discarded products. *See* JA13 (district court observation that "[s]ome state programs *** assign allocations based on television units returned for recycling"). The Commerce Clause plainly prohibits that result. *See Allied Signal*, 504 U.S. at 778; *see also Wynne*, 135 S. Ct. at 1795 (commerce clause "'forbids'" subjecting interstate commerce "'to the risk of a double tax burden to which intrastate commerce is not exposed'") (quoting *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1938)).

3. The district court took an overly constricted view of the extraterritorial limitation.

The district court disposed of VIZIO's extraterritoriality argument by taking a pinched view of Commerce Clause jurisprudence. According to the district court, the Commerce Clause's extraterritoriality theory is limited to state laws that "directly control interstate prices," JA79 (quoting *Healy*, 491 U.S. at 336), or otherwise directly "dictate or restrict the manner or terms upon which Plaintiff's out-of-state sales take place," JA36. In its second order, the district court went so far as to reject VIZIO's argument "that the *Healy* line of cases should be read as

prohibiting more than just statutes that directly regulate prices based on pricing in other states." JA78.

Restricting *Healy* to price-control statutes or similar direct control of out-of-state conduct cannot be reconciled with Supreme Court's longstanding commitment to enforcing the rule against extraterritorial regulation. Nor can it be squared with any number of courts of appeals decisions (including from this Circuit) applying *Healy* and other Supreme Court precedents. As noted above, in *Healy*—indeed, in the same paragraph the district court quotes—the Supreme Court acknowledged that its cases "stand *at a minimum*" for several "propositions," the first of which is that "the 'Commerce Clause *** precludes the application of a state statute to commerce that takes place wholly outside of the State's borders.'" 491 U.S. at 336 (ellipsis in original) (emphasis added) (quoting *Edgar*, 457 U.S. at 642-643).

To be sure, price control or other direct control of out-of-state conduct is one manner in which a state may run afoul of the prohibition on extraterritorial regulation. But as the Court's discussion in *Healy* indicates, that does not represent the outer bound of Commerce Clause protection. Even where a state law's regulatory connection to national market share is more attenuated than here, for example, this Court has recognized a potential Commerce Clause claim. *See Grand River*, 425 F.3d at 172-173 (reversing dismissal of Commerce Clause

challenge to state statute requiring manufacturer to pay "a national-market-share-dependent amount"). Although the Court in *Grand River* considered the impact on price of the use of national market share data, it did not require the sort of direct link the district court demanded; it instead accepted the basic notion that tying a payment obligation to national market share "affects interstate pricing decisions" in a broader sense. *Id.* at 173.

Unsurprisingly, several other circuits confronted with the scope of the prohibition on extraterritorial regulation have explicitly rejected the district court's straitened view of the Commerce Clause. As the Seventh Circuit explained:

> Although cases like *Healy* *** involved price affirmation statutes, the principles set forth in these decisions are not limited to that context. *Healy* itself discusses the general principle that "the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," and then refers to the more "specific[]" application of that principle, that "a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states[.]" *See Healy*, 491 U.S. at 336 (quotation and citation omitted). The breadth of the principle is demonstrated by its use by the plurality in [*Edgar*].

National Solid Wastes Mgmt. Ass'n v. Meyer, 63 F.3d 652, 659-660 (7th Cir. 1995) (first and second alterations in original); *see, e.g.*, *North Dakota v. Heydinger*, 825 F.3d 912, 919-920 (8th Cir. 2016) (holding that the "categorical approach to the Commerce Clause would be contrary to well-established Supreme Court jurisprudence"; on the contrary, "the Supreme Court has never so limited the

doctrine, and indeed has applied it more broadly" in *Edgar*); *American Beverage Ass'n v. Snyder*, 735 F.3d 362, 374 (6th Cir. 2013) (noting that although the Supreme Court's extraterritoriality decisions concern price-affirmation statutes, "the Sixth Circuit has applied the extraterritorial doctrine to product labeling restrictions").

The Ninth Circuit's recent *en banc* decision in *Sam Francis Foundation v. Christies, Inc.*, 784 F.3d 1320, 1325 (9th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 795 (2016), teaches how the Commerce Clause precludes a state from tying payment obligations to out-of-state sales—even without any further control or restriction of that sale. That case involved a California statute requiring a seller of fine art residing in California to pay royalties to the artist *regardless of where the sale occurred*. For instance, a California resident that acquired a sculpture and later sold that sculpture outside California would owe a royalty for that sale, even if neither the sculpture nor the buyer had any connection to California. The court of appeals "easily conclude[d]" that the statute "violate[d] the dormant Commerce Clause as an impermissible regulation of wholly out-of-state conduct" because "[t]hose sales have no necessary connection with the state other than the residency of the seller." *Id.* at 1323-1324.

The same is true of VIZIO's televisions sold outside of Connecticut: Under the E-Waste Law, VIZIO's recycling payment obligation attaches to every

television VIZIO sells *regardless of where that television is purchased*, even if the buyer is not a Connecticut resident and the television is never recycled in Connecticut. And making this case even easier than *Sam Francis Foundation*, whenever the state of sale or return charges a fee based on in-state sales or return share, the E-Waste Law compels VIZIO to pay twice to recycle the same product. The Commerce Clause prohibits such extraterritorial application of state laws, and the district court's contrary conclusion should be reversed.

B. The E-Waste Law Imposes An Impermissible User Fee

Aside from its overtly extraterritorial character, the E-Waste Law suffers from another fatal Commerce Clause defect: it imposes an unconstitutional "user fee" on interstate commerce. When a state or locality levies a fee for the use of facilities or services, courts employ the test articulated in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines* to determine whether the fee violates the Commerce Clause. 405 U.S. 707. To pass muster under *Evansville*, a fee must be "based on some fair approximation of use or privilege for use"; *and* must not be "excessive in comparison with the governmental benefit conferred." *Id.* at 716-717; *see also Northwest Airlines Inc. v. County of Kent*, 510 U.S. 355, 369 (1994)

(reciting *Evansville* test). The recycling and administrative fees imposed by the E-Waste Law cannot survive that proportionality test.[2]

1. The E-Waste Law's recycling and administrative fees fail Evansville.

a. The first prong of the *Evansville* test essentially asks a question of allocation: whether the "policy at issue reflects 'rational distinctions among different classes of' [users] ***, so that each user, on the whole, pays some approximation of his or her fair share" of the collective burden. *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 98 (2d Cir. 2009) (citation omitted).

The E-Waste Law provides that a television manufacturer's annual registration fee—separate and apart from the recycling fee—is "based on a sliding scale that is representative of the manufacturer's market share of" covered electronic devices in the state. CONN. GEN. STAT. § 22a-631(a). But, as explained above, the registration fee is actually based on the manufacturer's share of the *national* market (*i.e.*, percentage of total television sales nationwide). *Id.* A television manufacturer's recycling fee is also calculated based on national market share: by multiplying the manufacturer's national market share by the total weight

[2] In addition to the two prongs articulated above, a user fee fails the *Evansville* test if it discriminates against interstate commerce. *See Evansville*, 405 U.S. at 717. That prong is not at issue here.

of all televisions recycled and a State-approved price per pound. *Id*. § 22a-631(c)(4)(B), (7)(A); *see also* CONN. AGENCIES REGS. § 22a-638-1(j)(6).

For manufacturers like VIZIO, Connecticut's formula results in fees that do not "fair[ly] approximat[e]" their share of Connecticut's recycling burden. Because VIZIO's national market share is pegged at 17% even though that figure is as much as 50% higher than its Connecticut market share, *see* JA238, ¶ 39; JA243, ¶ 56, both its registration and recycling fees are excessive. And because VIZIO has never sold the older, heavier, and more expensive-to-recycle CRT model televisions that make up much of today's recycling stream, JA227, ¶ 3, VIZIO's recycling burden is disproportionately inflated by the E-Waste Law's price-per-pound calculation.

Connecticut's response to this stark inequity is to claim that any discrepancies will even out over time. "[B]y using current market share [data] as a central component of the cost formula," the State asserts, "the E-waste law directly ties [VIZIO's] costs to the number of VIZIO televisions that are currently entering the Connecticut market." Mot. to Dismiss at 37, *VIZIO, Inc. v. Klee*, 15:-cv-00929-VAB (D. Conn. Aug. 20, 2015), ECF No. 21 ("Mot. to Dismiss"). The State contends that because those televisions will ultimately be discarded and recycled, VIZIO's "costs under the E-waste Law are directly related to its own contribution to the e-waste problem, and ultimately to its own responsibility for recycling

televisions *over time*." *Id*. (emphasis added); *see also* JA39 (district court accepting that "[b]ecause nothing lasts forever," Connecticut's administrative fees charged to VIZIO "roughly approximate its use of Connecticut's e-waste recycling program over time, which is enough to satisfy the constitutional standard") (internal citation omitted).

Connecticut's attempt to defend its approach under *Evansville's* "fair approximation" prong suffers from at least two flaws. *First*, the State's argument is predicated on its claim that "the E-waste Law directly ties [VIZIO's] costs to the number of VIZIO televisions that are currently entering the Connecticut market." Mot. to Dismiss at 37. As should be clear by now, that is not the case. Rather, the E-Waste Law directly ties VIZIO's costs to the number of VIZIO televisions entering the *national* market. Consequently, Connecticut's defense of the E-Waste Law hinges entirely on its assumption that VIZIO's Connecticut market share mirrors—or, at a minimum, "fair[ly] approximat[es]"—its national market share. *See id.* at 5-6, 9. But Connecticut freely admits that it has no information about VIZIO's Connecticut market share. *Id.*; *see* JA275 ("There is no Connecticut market share data."). And VIZIO's complaint, which alleges that VIZIO's national market share is up to 50% higher than its Connecticut market share, contradicts the State's critical (and uninformed) assumption. *See* JA238, ¶ 39; JA243, ¶ 56.

Second, even if VIZIO's Connecticut market share *did* mirror its national market share, the amount VIZIO pays for recycling under the E-Waste Law would still be disproportionate to its contribution to the recycling stream. The State adds a new (and, for its purposes, highly convenient) caveat to the *Evansville* standard: the "fair approximation" need only be shown "over time." Mot. to Dismiss at 27. This sleight of hand is revealing. By claiming that VIZIO's payments will approximate its use "over time," Connecticut acknowledges (as it must) that VIZIO's current payments are not proportional to VIZIO's share of the recycling burden as it exists now.

As alleged in the complaint, CRT televisions being recycled today "often weigh more than 10 times as much as VIZIO's flat panel televisions," JA227, ¶ 3, and virtually no VIZIO products are currently being recycled in Connecticut, JA91, ¶ 2. For the State's it-all-comes-out-in-the-wash theory to be correct, then, VIZIO would have to be selling at least ten televisions in Connecticut today for each older, CRT-model television (*from every other brand*) currently being recycled. This imbalance, coupled with the fact that VIZIO's Connecticut market share is materially smaller than its national market share, means that the E-Waste Law does not support the State's theory that costs will even out eventually.

To be sure, *Evansville* demands "rough approximation rather than precision." 405 U.S. at 716 (internal quotation marks and citation omitted). But

by using a "market share" approach that makes absolutely no effort to account for which manufacturer's products are actually being recycled *today*, Connecticut has not allocated costs based on *any* calculation of each manufacturer's share of the recycling burden—"rough approximation" or otherwise. Instead, it has saddled current market participants with costs attributable to the manufacturers of televisions sold years (or even decades) ago. Where, as here, a manufacturer is not responsible for the placement of those televisions into the recycling stream—indeed, has never sold products as burdensome to recycle as old CRT model televisions—it cannot be said that the manufacturer is paying anything resembling its fair share of the costs of recycling.

b. *Evansville*'s second prong asks whether the fee at issue is "excessive in relation to the benefit it confers to the [payer]," *Selevan*, 584 F.3d at 98, or "manifestly disproportionate to the services rendered," *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622 n.12 (1981).

The E-Waste Law fails this prong of the *Evansville* test largely for the same reasons it fails the first. As this Court has observed, a fee that "confer[s] no benefit" on a particular group of payers "is not a fair approximation of the use of the facilities supported by the fee and is also excessive in relation to the benefits enjoyed or available to be enjoyed." *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 86 (2d Cir. 2009).

The costs expended to recycle VIZIO televisions today are minimal. As noted above, a survey of over 23,000 pounds of televisions collected for recycling in Connecticut revealed not a single VIZIO product. JA91, ¶ 2. Information from states that collect data on televisions returned for recycling confirms that VIZIO products account for negligible amounts of the recycling stream. In Washington, for example, VIZIO's return share in two studies was calculated at 0.09% and 0.16% of the total waste stream collected and invoiced. JA108, ¶ 60.

Nonetheless, with a market share (based on current nationwide sales) of 17%, VIZIO pays more in recycling costs than every other television manufacturer required to participate in Connecticut's E-Waste program, save one. Because VIZIO's national market share in 2013 was up to 50% higher than its Connecticut market share, for example, VIZIO overpaid even on a current-market-share basis by as much as $150,000 that year alone—*before* accounting for the fact that VIZIO's burden is disproportionately inflated still further due to the much higher costs of recycling obsolete CRT televisions compared to modern flat-panel televisions.

By any accounting, the sums VIZIO pays to Connecticut are "manifestly disproportionate" to the amount expended to recycle VIZIO televisions discarded in that State. *Commonwealth Edison Co.*, 453 U.S. at 622 n.12. Even accepting Connecticut's view that a manufacturer's share of the recycling burden should be

assessed "over time" and that Connecticut may charge today's market participants for recycling costs attributable to yesterday's television manufacturers, VIZIO is still paying an amount that far exceeds the benefits of the services provided (*i.e.*, the costs *actually attributable* to recycling VIZIO's products).

2. The district court erred in refusing to analyze the E-Waste Law's recycling charges under Evansville.

Despite VIZIO's unrebutted contention that the fees it pays pursuant to the E-Waste Law are grossly disproportionate to the amount expended to recycle its products, the district court refused to assess the constitutionality of the E-Waste Law's recycling fees under *Evansville*. Instead, without even allowing discovery, the court categorically dismissed VIZIO's claim on the tenuous ground that the recycling charges "do not even constitute 'user fees' subject to the Commerce Clause." JA38. For that conclusion, the district court relied on a footnote in *Oregon Waste Systems Inc. v. Department of Environmental Quality*, 511 U.S. 93 (1994), in which the Supreme Court stated that its user fee cases "apply only to 'charge[s] imposed by the State for the use of state-owned or state-provided transportation or other facilities and services.'" *Id.* at 103 n.6 (quoting *Commonwealth Edison Co.*, 453 U.S. at 621).

The Supreme Court's passing statement in *Oregon Waste* was pure dictum and, in any event, does not apply here. In *Oregon Waste*, the Court invalidated a surcharge imposed on the disposal of waste generated out of state because it

facially discriminated against interstate commerce and could not be justified as a "compensatory tax." 511 U.S. 93. Although the Court noted that *Evansville* was inapposite because the landfills in question were owned by private entities, the Court went on to say that "even if the surcharge could somehow be viewed as a user fee, it could not be sustained as such, given that it discriminates against interstate commerce." *Id.* at 103 n.6 (citing *Evansville*, 405 U.S. at 717). Hence, the Court's statement that the *Evansville* test did not apply because the landfills were privately owned was not necessary to its holding: with or without that conclusion, the law in question was facially discriminatory and invalid *per se*, and could not be salvaged by resort to the compensatory tax doctrine. *See Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 508 (2d Cir. 1996) ("'Dictum' generally refers to an observation which appears in the opinion of a court which was unnecessary to the disposition of the case before it. It is a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding.") (internal quotation marks and citations omitted).

By relying on the Supreme Court's footnoted dictum to excuse the E-Waste Law from Commerce Clause dictates under *Evansville*, the district court got *Oregon Waste* exactly backwards. Significantly, the Supreme Court did *not* find that Oregon was free to impose the fees it charged for disposing of out-of-state

waste; rather, the Court determined that the levy at issue violated the Commerce Clause because it discriminated against interstate commerce under a stricter *per se* test. *Oregon Waste*, 511 U.S. at 103 n.6. By using the *Oregon Waste* dictum to *alleviate* the constitutional scrutiny applicable to the E-Waste Law, the district court turned *Oregon Waste* on its head.

In light of the posture of *Oregon Waste*, the Supreme Court had no occasion to discern the circumstances under which the *Evansville* test should apply to state regulatory schemes employing private entities to do work that would otherwise be performed by the state. To wit, the Court did not address whether and to what extent state regulation of private entities necessitates the conclusion that they are effectively arms of the state for Commerce Clause purposes, making the state's regulatory scheme subject to scrutiny under *Evansville*. Here, the degree to which Connecticut regulates all aspects of the recycling of electronic products—including by closely overseeing CERs—compels precisely that result.

As set forth above (pp. 5-8, *supra*), the E-Waste Law, supplemented by regulations, sets out an exhaustive government scheme to implement and finance the collection, transportation, and recycling of covered electronic devices. Connecticut compels manufacturers to participate in the E-Waste program, sets the formula and calculates the market share for the fees that participating manufacturers will be obligated to pay, and identifies and approves the particular

entities with which manufacturers must engage in order to fulfill their recycling obligations. These state-approved entities—CERs—are then subject to continuous oversight by the State: they are approved by way of an application process in which the State considers the recycler's qualifications and experience for managing and recycling electronic waste, its proposed procedures and process flow, and the transporters and recycling and disposal facilities it intends to use. CONN. AGENCIES REGS. § 22a-638-1(b)(2)-(5). The State also considers and approves CERs based on the fees they propose to charge (expressed in price-per-pound). *Id.* Once approved, the State continues to oversee CERs, maintaining discretion to revoke a CER's approval based on certain conditions. *Id*. § 22a-638-1(b)(7)(B), (8)(A). CERs must comply with specific, detailed E-Waste regulations regarding, *inter alia*, separation, recordkeeping, and standards for recycling and disposal. *Id*. § 22a-638-1(c)-(e). In short, CERs act as closely supervised agents of the State from the beginning to the end of the recycling process.

Two examples illustrate the absurdity of the district court's conclusion that *Evansville* does not apply because Connecticut's regulatory scheme depends on private actors. *First*, this Court has held that *Evansville* applies to access tolls for bridges. *Selevan*, 584 F.3d 82. If the fee charged is not "a fair approximation of th[e] [paying] group's use of the bridge," the toll fails *Evansville*. *Id.* at 98. But under the district court's rule, Connecticut could contract with a private company

to build and manage a bridge under the State's close regulation and control; require the private company to collect a fee that was clearly *not* representative of drivers' use of the bridge (such as a one-time, flat toll or registration fee, regardless of actual usage); and nonetheless insulate itself from scrutiny under *Evansville*. A State could do all this through the simple expedient of contracting out its responsibility to construct and maintain what is, in all relevant respects—including from the fee-payer's perspective—plainly a "state-provided facilit[y]." *Id.* at 96.

Second, and even more to the point, if another state (say, Vermont) chose to replicate Connecticut's approach to disposing of electronic waste but elected to use state facilities and personnel to recycle televisions rather than relying on heavily regulated private actors, the law would unquestionably be analyzed (and invalidated) under *Evansville*. It is nonsensical to conclude that this Court should analyze the E-Waste Law under a different and less stringent standard solely on account of Connecticut's decision to contract out the recycling function to private entities. The fig leaf of the Supreme Court's *Oregon Waste* dictum cannot justify that bizarre outcome.

Rather than resting its decision entirely on that dictum, the district court was "bound to make its own inquiry" to determine whether the Supreme Court's user fee cases supply the appropriate constitutional test for the E-Waste Law. *Yuen v. Internal Revenue Serv.*, 649 F.2d 163, 167 (2d Cir. 1981) (district court correctly

engaged in independent review of statutory terms where the Supreme Court addressed those terms only in dicta). This Court has the same duty and discretion. *See, e.g.*, *Donovan v. Red Star Marine Servs., Inc.*, 739 F.2d 774, 782 (2d Cir. 1984) (declining to "follow *** Supreme Court *dicta* since upon plenary consideration, a different result is warranted"); *see also* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1274 (2006) ("The Supreme Court's dicta are not law. The issues so addressed remain unadjudicated. When an inferior court has such an issue before it, it may not treat the Supreme Court's dictum as dispositive. It must adjudicate."). The district court's refusal to apply *Evansville*, particularly in light of the State's extensive control over CERs, cannot survive any considered inquiry.

C. The E-Waste Law Imposes A Burden On Interstate Commerce Clearly Excessive Relative To Putative Local Benefits

If the E-Waste Law is not impermissibly extraterritorial or invalid under the "user fee" analysis set out in *Evansville* (it is both), the relative benefits and burdens of the law must be balanced pursuant to *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. Under *Pike*, a state law that regulates evenhandedly and solely within its jurisdiction may nonetheless contravene the Commerce Clause if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.*

This Court has observed that the *Pike* and *Evansville* tests are similar in purpose. "[I]nasmuch as [*Evansville*] require[s] the court to consider whether the fee supplies a benefit to users of a facility that is at least roughly commensurate with the burden it imposes on them," the test "achieve[s] the same end as *Pike*—the invalidation of state policies that impose an undue burden on interstate commerce." *Selevan*, 584 F.3d at 97. Notably, this Court has also recognized that both inquiries are necessarily fact-dependent and unsuitable for judgment on the pleadings. *Id.* at 98 (noting that the *Evansville* inquiry is an inquiry that is "too fact-dependent to be decided upon examination of the pleadings"); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 264 (2d. Cir. 2001), *aff'd* 550 U.S. 330 (2007) (noting that *Pike* requires a "fact-intensive determination" and remanding to the district court rather than deciding the issue as a matter of law); *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 50 (2d Cir. 2007) (finding that factual issues precluded summary judgment and remanding for district court to perform *Pike* balancing); *Association of Int'l Auto. Mfrs., Inc. v. Abrams*, 84 F.3d 602, 612 (2d. Cir. 1996) (same).

Despite the factbound nature of the inquiry, the district court dismissed VIZIO's *Pike* claim on a motion to dismiss under Rule 12(b)(6). Tellingly, the ultimate *Pike* determinations in the main cases on which the district court relied (*see* JA24-25) came at much later stages of the proceedings. *See Kassel v.*

Consolidated Freightways Corp. of Del., 450 U.S. 662, 670 (1981) (after "14-day [bench] trial"); *United Haulers*, 550 U.S. at 347 (following "remand and after protracted discovery"). The district court's premature decision was predicated on two substantial errors.

First, the district court concluded that VIZIO failed to allege facts sufficient to indicate that the E-Waste Law has "a disparate impact on interstate commerce." JA20. In the court's view, the "degree of interference with interstate commerce" the E-Waste Law inflicts is "essentially non-existent." JA25.

As already explained (*see* pp. 18-24, *supra*), the E-Waste Law imposes substantial burdens on interstate commerce by tying in-state fees to success in the national marketplace and by causing interstate manufacturers like VIZIO to incur multiple recycling fees for a single sale outside Connecticut. By contrast, a television manufacturer located in and limiting its sales to Connecticut would have no such burdens: it would suffer no penalty for its extraterritorial conduct (because it would have no sales outside the State), nor would it be exposed to the "double counting" problem VIZIO faces when paying Connecticut based on its national market share while paying other states based on in-state sales or return share.

These burdens amount to substantial, concrete, and disparate interference with interstate commerce; they are certainly not "non-existent." Even Connecticut acknowledged below—albeit only after the district court had dismissed the *Pike*

claim and narrowed the case to an interstate price control theory—that VIZIO had stated a "classic *Pike*" claim. JA276; *see* JA277 ("[T]here is already a different doctrine that applies [to VIZIO's claim], *Pike*."). The district court was wrong to dismiss VIZIO's real burdens out of hand, at the pleading stage, rather than waiting to balance the harms and benefits on a developed record. That mistake is all the more glaring because Connecticut's preference for a *national* market share approach—versus one of the panoply of approaches other states have chosen that do not run afoul of the Commerce Clause, such as an advanced product recovery fee or return-share model—has *no* "putative local benefits" on this record, and thus should carry no weight in the balance at all.

Second, the district court accepted the State's invitation to accord the E-Waste Law near complete deference on account of the purported "non-illusory health and safety interests at issue." JA25 (VIZIO cannot overcome "strong presumption of validity" afforded to E-Waste Law). But the district court erred in granting the specific aspect of the E-waste Law challenged here a free pass from *Pike* scrutiny. VIZIO's Commerce Clause objection to the E-Waste Law relates solely to the fees charged under the law—and, specifically, the unconstitutional *method* by which those fees are calculated. VIZIO does not challenge (and has not challenged) the State's effort under the E-Waste Law to ensure that electronic waste is recycled or disposed of safely. Because the E-Waste Law's chosen fee

mechanism—in particular, its reliance on national market share—is entirely unrelated to any health-and-safety benefit, any deference normally accorded to such regulations is inapposite here.

Taking the district court's holding to its logical end, as long as the law is facially neutral and at least nominally motivated to further public health or safety, Connecticut could insulate itself from *Pike* balancing no matter how excessive the ultimate interstate burdens were in relation to the putative local benefits. For example, Connecticut could demand that the two largest interstate television manufacturers shoulder the entire cost of the recycling program. And given the district court's further (erroneous) holding that the mandated fees under the E-Waste Law are insulated from *Evansville* scrutiny because they are paid to "private" entities (*see* p. 13, *supra*), the upshot of affirming the district court is that Connecticut's law—even as posited above—would receive no meaningful Commerce Clause scrutiny at all if not found to be invalid *per se*.

That untenable result cannot be squared with this Court's recognition of the link between *Pike* and *Evansville*. "Just as the *Pike* test would uphold as constitutional any state policy that confers a local benefit and does not impose a clearly excessive burden on interstate commerce," the *Evansville* test would uphold as constitutional a "fee schedule [that], on the whole, reflects at least a fair, [even] if imperfect, approximation of the use of facilities for whose benefit they are

imposed." *Selevan*, 584 F.3d at 97 (internal citations and quotation marks omitted) (second alteration in original). It follows that a cost allocation that does *not* fairly approximate an entity's use should not escape close inspection under both *Evansville* and *Pike*.

CONCLUSION

The district court's judgment of dismissal should be reversed.

Respectfully submitted,

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May 4, 2017

CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 9,761 words as determined by Microsoft Word, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rule of Appellate Procedure, and thus complies with the typeface, typestyle, and type-volume requirements set forth in Rule 32(a)(5)-(7)(B) of the Federal Rules of Appellate Procedure.

s/Pratik A. Shah
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May 4, 2017

STATUTORY AND REGULATORY ADDENDUM

ADDENDUM TABLE OF CONTENTS

Connecticut General Statutes

Title 22a. Environmental Protection

Chapter 446N. Covered Electronic Devices

§ 22a-629. Definitions

As used in sections 22a-629 to 22a-640, inclusive, unless the context indicates another meaning or intent:

(1) "Department" means the Department of Energy and Environmental Protection;

(2) "Commissioner" means the Commissioner of Energy and Environmental Protection;

(3) "Cathode ray tube" or "CRT" means a vacuum tube or picture tube used to convert an electronic signal into a visual image;

(4) "Computer" means an electronic, magnetic, optical, electrochemical, or other high-speed data processing device performing a logical, arithmetic or storage function, and may include, but not be limited to, both a computer central processing unit and a monitor, but does not include an automated typewriter or typesetter, a portable handheld calculator, a portable digital assistant or other similar device;

(5) "Covered electronic device" or "CED" means desktop or personal computers, computer monitors, portable computers, CRT-based televisions and non-CRT-based televisions or any other similar or peripheral electronic device specified in regulations adopted pursuant to section 22a-638, sold to consumers, but does not include: (A) An electronic device that is a part of a motor vehicle or any component part of a motor vehicle assembled by, or for, a vehicle manufacturer or franchise dealer, including replacement parts for use in a motor vehicle; (B) an electronic device that is functionally or physically a part of a larger piece of equipment designed and intended for use in an industrial, commercial or medical setting, including diagnostic, monitoring or control equipment; (C) an electronic device that is contained within a clothes washer, clothes dryer, refrigerator, refrigerator and freezer, microwave oven, conventional oven or range, dishwasher, room air conditioner, dehumidifier or air purifier; (D) telephones of any type unless they contain a video display area greater than four inches measured diagonally; or

(E) any handheld device used to access commercial mobile radio service, as such service is defined in 47 CFR 20.3;

(6) "Covered electronic recycler" means a recycler that is approved to recycle covered electronic devices by the department;

(7) "Manufacturer" means any person who: (A) Manufactures or manufactured covered electronic devices under a brand that it licenses, owns or owned, for sale in this state; (B) manufactures or manufactured covered electronic devices without affixing a brand, for sale in this state; (C) resells or has resold in this state under its own brand or label a covered electronic device produced by other suppliers, including retail establishments that sell covered electronic devices under their own brand names; (D) imports or imported into the United States or exports from the United States covered electronic devices for sale in this state; (E) sells at retail a covered electronic device acquired from an importer that is the manufacturer as described in subparagraph (D) of this subdivision, and elects to register in lieu of the importer as the manufacturer for those products; or (F) manufactures or manufactured covered electronic devices, supplies them to any person or persons within a distribution network that includes wholesalers or retailers in this state, and benefits from the sale in this state of those covered electronic devices through such distribution network;

(8) "Manufacturer's brands" means a manufacturer's name, brand name or brand label, and all manufacturer's names, brand names and brand labels for which the manufacturer has legal responsibility, including those names, brand names and brand labels of companies that have been acquired by the manufacturer;

(9) "Monitor" means a separate video display component of a computer that does not contain a tuner, whether sold separately or together with a computer central processing unit or computer box, and includes a cathode ray tube, liquid crystal display, gas plasma, digital light processing or other image projection technology greater than four inches when measured diagonally, and its case, interior wires and circuitry;

(10) "Person" means an individual, trust firm, joint stock company, business concern and corporation, including, but not limited to, a government department, partnership, limited liability company or association;

(11) "Portable computer" means a computer and video display greater than four inches in size that can be carried as one unit by an individual, including, but not limited to, a laptop computer;

(12) “Purchase” means the taking, by sale, of title in exchange for consideration;

(13) “Recycling” means any process by which covered electronic devices that would otherwise become solid waste or hazardous 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 department;

(14) “Registrant” means a manufacturer or group of manufacturers of covered electronic devices that is, or who are, in compliance with the requirements of sections 22a-629 to 22a-640, inclusive;

(15) “Retail sales” includes sales of products through sales outlets, via the Internet, mail order or other means, whether or not the seller has a physical presence in this state;

(16) “Retailer” means a person who owns or operates a business that sells new covered electronic devices in this state by any means to a consumer;

(17) “Sell” or “sale” means any transfer of title for consideration, including, but not limited to, transactions conducted through sales outlets, catalogs or the Internet, or any other similar electronic means, and excluding leases;

(18) “Television” means a stand-alone display system containing a CRT or any other type of display primarily intended to receive video programming via broadcast, having a viewable area greater than four inches when measured diagonally, able to adhere to standard consumer video formats such as PAL, SECAM, NTSC, ATSC and HDTV and having the capability of selecting different broadcast channels and supporting sound capability;

(19) “Video display” means an output surface having a viewable area greater than four inches when measured diagonally that displays moving graphical images or a visual representation of image sequences or pictures, showing a number of quickly changing images on a screen in fast succession to create the illusion of motion, including, but not limited to, a device that is an integral part of the display that cannot be easily removed from the display by the consumer and that produces the moving image on the screen and includes technology using a cathode ray tube, liquid crystal display, gas plasma, digital light processing or other image projection technology;

(20) “Orphan device” means a covered electronic device, excluding CRT-based televisions and non-CRT-based televisions, for which no manufacturer, as defined

in this section, can be identified or for which the manufacturer is no longer in business and has no successor in interest; and

(21) "Market share" means a manufacturer's national sales of a particular product category of CEDs expressed as a percentage of the total of all manufacturers' national sales for such product category of CEDs.

Connecticut General Statutes

Title 22a. Environmental Protection

Chapter 446N. Covered Electronic Devices

§ 22a-630. Registration. Fees. Regulations

(a) Each manufacturer of covered electronic devices shall register with the Department of Energy and Environmental Protection not later than January 1, 2008, and annually thereafter, on a form prescribed by the Commissioner of Energy and Environmental Protection and accompanied by a fee set by the Commissioner of Energy and Environmental Protection in accordance with this section and any regulations adopted pursuant to this section. The department may review, at a public hearing, as necessary, the CED recycling and registration fees.

(b) Not later than January 1, 2008, each manufacturer that has sold more than one hundred CEDs in calendar year 2007 shall pay an initial registration fee of five thousand dollars. On or after January 1, 2008, each manufacturer that has not sold CEDs by any means in the state prior to January 1, 2008, shall pay an initial registration fee of five thousand dollars and an additional fee equivalent to the greater of: (1) One per cent of the prior year's total share of orphan devices expressed in pounds multiplied by fifty cents, or (2) one thousand dollars.

(c) Commencing July 1, 2009, all manufacturers shall pay an annual registration renewal fee as determined by the commissioner in accordance with subsection (d) of this section.

(d) Not later than April 1, 2009, the commissioner shall adopt regulations, in accordance with the provisions of chapter 54,1 to establish annual registration and reasonable fees for administering the program established in sections 22a-629 to 22a-640, inclusive. All fees charged shall be based on factors relative to the costs of administering such program and be based on a sliding scale that is representative of the manufacturer's market share of covered electronic devices in the state. Market share information shall be based on available national market share data. Fees shall be established in amounts to fully cover but not to exceed expenses incurred by the commissioner for the implementation of such program, including the cost of any education or outreach necessary to carry out such program.

Connecticut General Statutes

Title 22a. Environmental Protection

Chapter 446N. Covered Electronic Devices

§ 22a-631. State-wide electronics recycling program. Allocation of cost. Municipal participation. Covered electronic recyclers. Orphan devices. Penalty for nonpayment. Reimbursement. Private programs

(a) On and after July 1, 2009, each manufacturer shall participate in the state-wide electronics recycling program established in this section to implement and finance the collection, transportation and recycling of covered electronic devices, and may participate in a private electronics recycling program. Said state-wide electronics recycling program for the recycling of CRT-based and non-CRT-based televisions shall be funded by allocating the cost of the program among the manufacturers selling CRT-based and non-CRT-based televisions in the state based on a sliding scale that is representative of the manufacturer's market share of CRT-based and non-CRT-based televisions in the state. Market share information shall be based upon available national market share data.

(b) On and after July 1, 2009, each municipality shall provide for the recycling of CEDs generated within its boundaries by participating in the state-wide electronics recycling program. Municipalities that participate in a regional recycling program may elect to participate in the state-wide electronics program through such regional authority. Each municipality or regional authority shall (1) provide for the collection of CEDs from residents within such municipality or region, (2) arrange for the transportation of collected CEDs to a covered electronic recycler, and (3) make information readily available to residents of the municipality or region of the time and location of the collection of CEDs. In providing collection and recycling opportunities to its residents each municipality shall give priority to convenience and accessibility.

(c) On and after July 1, 2009, each covered electronic recycler shall (1) cooperate with any municipality or regional authority to provide for the collection and transportation of CEDs, (2) reimburse a municipality or regional authority for such municipality's or such authority's qualified costs of transportation, (3) recycle all collected CEDs in accordance with the minimum standards established in section 22a-632, (4) (A) for CEDs other than CRT-based televisions and non-CRT-based televisions, maintain a written log that identifies responsible manufacturers by recording the brand and weight of each CED delivered to a covered electronic

recycler and identified upon receipt as generated by a household in the state, and (B) for CRT-based televisions and non-CRT-based televisions, maintain a written log of the total weight of such televisions delivered each month to a covered electronic recycler and identified upon receipt as generated by a household in the state, (5) report to the commissioner any manufacturer that is in arrears for more than ninety days, (6) file a plan for carrying out the provisions of this section on a form approved by the commissioner, and (7) invoice manufacturers quarterly for the reasonable costs of transporting and recycling that the manufacturer is responsible for under this section, with such costs calculated (A) for CRT-based and non-CRT-based televisions, on a sliding scale basis that is representative of the manufacturer's market share of such televisions in the state multiplied by the total pounds recycled, (B) for CEDs other than CRT-based televisions and non-CRT-based televisions on a per pound basis on separate invoices, and (C) for both subparagraphs (A) and (B) of this subdivision, not to exceed fifty cents per pound or an amount determined by the commissioner in regulations adopted pursuant to section 22a-638. Nothing in this subsection shall prohibit a registered manufacturer from entering into a cooperative agreement with a covered electronic recycler to return such manufacturer's CEDs for subsequent recycling by the manufacturer provided the manufacturer certifies to the commissioner that such CEDs have been recycled in accordance with subsection (e) of this section and the manufacturer reimburses the covered electronic recycler for such recycler's qualified costs, as determined by the commissioner.

(d) On and after July 1, 2009, each manufacturer shall pay the reasonable costs of transportation and recycling incurred by a covered electronic recycler for the CEDs attributed to such manufacturer and the manufacturer's pro rata share of orphan devices processed by a covered electronic recycler. A manufacturer's pro rata share of orphan devices shall be calculated as a manufacturer's market share for the preceding calendar year divided by the total market share of all registered manufacturers for the same year multiplied by the total, in pounds, of orphan devices returned. The commissioner may suspend the registration of any manufacturer in arrears for more than ninety days. A manufacturer that has had such manufacturer's registration suspended in accordance with this subsection shall demonstrate that all past due payments and a penalty equivalent to ten per cent of such past due payments has been paid to the commissioner prior to seeking reinstatement of such registration.

(e) Any private program for the collection, transportation and recycling of CEDs shall comply with the standards established in section 22a-632. Any manufacturer participating in a private program shall file a description of such program with

such manufacturer's annual registration, including: (1) The methods that will be used to collect the covered electronic devices, including, but not limited to, the name and locations of all collection and consolidation points; (2) the processes and methods that will be used to recycle recovered covered electronic devices, including a description of the disassembly and physical recovery operation such as crushing, shredding, grinding, glass-to-glass recycling or other operations that will be used; (3) the name and location of all facilities to be utilized; (4) documentation of audits of each processor used in the plan and compliance with processing standards established in section 22a-632; (5) a description of the means that will be utilized to publicize the collection opportunities; and (6) the total weight of CEDs collected, transported and recycled the previous year.

Connecticut General Statutes

Title 22a. Environmental Protection

Chapter 446N. Covered Electronic Devices

§ 22a-632. Compliance with laws, regulations and ordinances required. Performance requirements

(a) On and after July 1, 2009, covered electronic devices collected through any program in Connecticut, whether by manufacturers, retailers, for-profit or not-for-profit corporations, units of government or organized by the commissioner, shall be recycled in a manner that is in compliance with all applicable federal, state and local laws, regulations and ordinances, and shall not be exported for disposal in a manner that poses a significant risk to the public health or to the environment.

(b) The commissioner shall establish performance requirements in order for collectors, transporters and recyclers of covered electronic devices to be eligible to receive funds from the department. All entities shall, at a minimum, demonstrate compliance with the United States Environmental Protection Agency's Plug-In to eCycling Guidelines for Materials Management as issued and available on said agency's Internet web site in addition to any other requirements mandated by state or federal law.

Connecticut General Statutes

Title 22a. Environmental Protection

Chapter 446N. Covered Electronic Devices

§ 22a-633. Brand and labeling required for sale

On and after January 1, 2008, a manufacturer or retailer shall not sell or offer for sale a covered electronic device in the state unless it is labeled with the manufacturer's brand, and the label is permanently affixed and readily visible.

Connecticut General Statutes

Title 22a. Environmental Protection

Chapter 446N. Covered Electronic Devices

§ 22a-634. List of compliant manufacturers. Consultation before sale. Exception

(a) Not later than January 1, 2010, the Commissioner of Energy and Environmental Protection shall post a list of all manufacturers in compliance with the requirements of sections 22a-629 to 22a-640, inclusive, on the department's Internet web site and shall maintain such list after said date. Retailers shall consult the list prior to selling covered electronic devices. A retailer shall not offer for sale in this state a covered electronic device of a manufacturer that is not in compliance with such requirements. A retailer shall be considered to have complied with this responsibility if, on the date that the product was ordered from the manufacturer or its agent, the manufacturer was listed as being in compliance on the department's Internet web site.

(b) Notwithstanding subsection (a) of this section, a retailer may sell any CEDs ordered or in stock at the time of the initial posting of such list by the commissioner, regardless of whether the manufacturer of such CED is on such list, until six months after the initial posting or until June 1, 2010, whichever is earlier.

Connecticut General Statutes

Title 22a. Environmental Protection

Chapter 446N. Covered Electronic Devices

§ 22a-635. Information provided to consumers by retailers. Prohibition against charging consumers

(a) On and after July 1, 2010, a retailer shall provide consumers with information provided by the Department of Energy and Environmental Protection, including a toll-free telephone number and Internet web site. Such information shall be provided in a clear written form and shall be included in the packaging of the covered electronic device or accompany the sale of the covered electronic device. If applicable, each manufacturer shall make readily available to all retailers selling such manufacturer's CEDs information concerning such manufacturer's private program for the collection, transportation and recycling of CEDs that has been submitted to the department, in accordance with section 22a-631.

(b) No Connecticut resident giving seven or fewer covered electronic devices to a collector at any one time shall be charged any fees or costs for the collection, transportation or recycling of such covered electronic devices.

Connecticut General Statutes

Title 22a. Environmental Protection

Chapter 446N. Covered Electronic Devices

§ 22a-636. Prohibition against knowingly placing a covered electronic device in a solid waste facility

On and after January 1, 2011, no person shall knowingly place a covered electronic device or any of the components or subassemblies of such device in any solid waste facility. An owner or operator of a solid waste facility shall not be found in violation of this section if such owner or operator has (1) made a good faith effort to comply with this section, (2) posted, in a conspicuous location at the facility, a sign stating that covered electronic devices or any components thereof shall not be accepted at such facility, and (3) notified, in writing, all collectors registered to haul solid waste to such facility that such devices or components shall not be accepted at the facility. For the purposes of this section, "solid waste facility" means "solid waste facility" as defined in section 22a-207, but does not include transfer stations.

Connecticut General Statutes

Title 22a. Environmental Protection

Chapter 446N. Covered Electronic Devices

§ 22a-637. Cease and desist orders. Suspension or revocation of registration. Injunctions. Civil proceedings

On and after July 1, 2009, the Commissioner of Energy and Environmental Protection may issue cease and desist orders in accordance with section 22a-7 for any violation of sections 22a-629 to 22a-640, inclusive, and suspend or revoke any registration issued by the commissioner under section 22a-630 upon a showing of cause and after a hearing. The courts may grant such restraining orders and such temporary and permanent injunctive relief as may be necessary to secure compliance with sections 22a-629 to 22a-640, inclusive. Civil proceedings to enforce sections 22a-629 to 22a-640, inclusive, may be brought by the Attorney General in the superior court for any judicial district affected by the violation.

Connecticut General Statutes

Title 22a. Environmental Protection

Chapter 446N. Covered Electronic Devices

§ 22a-638. Regulations

The Commissioner of Energy and Environmental Protection shall adopt regulations, in accordance with the provisions of chapter 54,1 to carry out the provisions of sections 22a-629 to 22a-640, inclusive. Such regulations shall include, but not be limited to, provisions that establish (1) a process for approving covered electronic recyclers, (2) a table of qualified reimbursable costs for covered electronic recyclers, (3) standards for operation, accounting and auditing of covered electronic recyclers, (4) a list of covered electronic devices and such list may include additional devices other than those specified in section 22a-629, such as printers, and (5) any other requirements necessary to carry out the provisions of sections 22a-629 to 22a-640, inclusive.

Connecticut General Statutes

Title 22a. Environmental Protection

Chapter 446N. Covered Electronic Devices

§ 22a-639. Preparation of electronics recycling plan. Annual status report

(a) Not later than October 1, 2010, and every three years thereafter, the commissioner shall prepare an electronics recycling plan that establishes state-wide per-capita collection and recycling goals and identifies any necessary actions to achieve such goals. Such report shall be posted on the department's Internet web site.

(b) Not later than October 1, 2010, and annually thereafter, the commissioner shall gather information from registrants and prepare a report regarding the status of the electronics recycling program. Such report shall contain: (1) Sufficient data, as determined by the commissioner, and analysis of such data to evaluate the effectiveness of the state-wide recycling program and the components of such program, and (2) if at any time the federal government establishes a national program for the collection and recycling of electronic devices and the department determines that the federal law substantially meets or exceeds the requirements of sections 22a-629 to 22a-640, inclusive, information on the federal law. Such report shall be posted on the department's Internet web site.

Connecticut General Statutes

Title 22a. Environmental Protection

Chapter 446N. Covered Electronic Devices

§ 22a-640. Participation in regional organization or compact authorized

The commissioner may participate in the establishment and implementation of a regional, multistate organization or compact to assist in carrying out the requirements of sections 22a-629 to 22a-640, inclusive.

Regulations of Connecticut State Agencies

Title 22a. Environmental Protection

Department of Energy and Environmental Protection (4)

Annual Registration Renewal Fee for Manufacturers

Sec. 22a-630(d)-1. Annual registration renewal fee for manufacturers

(a) Definitions.

Terms used in this section shall have the meanings given to them in section 22a-638-1 of the Regulations of Connecticut State Agencies.

(b) Annual Registration Renewal Fee.

(1) Each year, the commissioner shall determine an annual registration renewal fee for each manufacturer. A manufacturer shall submit its annual registration renewal fee with the submission of its annual re-registration. The fee shall be effective for one year. The annual registration renewal fee for each manufacturer shall not be less than $250.00 and shall be based upon:

(A) the expected costs to the department for administering the program established pursuant to chapter 446n of the Connecticut General Statutes for the upcoming year; and

(B) each manufacturer's market share as determined pursuant to section 22a-638-1(g) to (i), inclusive, of the Regulations of Connecticut State Agencies and subsection (c) of this section.

(2) The annual registration renewal fee collected from all manufacturers shall cover, but not exceed, the expenses incurred by the department to administer the program established pursuant to chapter 446n of the Connecticut General Statutes.

(c) Annual Budget. Each year the commissioner shall develop an annual budget for administering the program established pursuant to chapter 446n of the Connecticut General Statutes, including, but not limited to, the cost of any program development, licensing, inspections, enforcement and education and outreach to carry out such program. The budget shall indicate categories of projected costs for administering the program and provide the total projected budget for each category.

The commissioner shall post the budget on the department's website and shall provide the budget to the manufacturers.

(d) Calculation of Annual Registration Renewal Fee.

(1) To determine a manufacturer's annual registration renewal fee, the commissioner shall determine the approximate number of all computers, monitors, televisions and printers sold for the previous year. To the extent feasible, the number of units sold shall be based upon nationally available data, including but not limited to, the number of units shipped, retail sales data, consumer surveys or other nationally available market share data. The commissioner shall divide the approximate number of units sold for each type of CED by the approximate total of all CEDs sold. This will yield a percentage of the total of all CEDs sold that is attributable to each type of CED. The total amount of the department's budget for administrative expenses for the upcoming year shall be apportioned to each type of CED such that the budget for each type of CED shall correspond to the percentage of the total units sold that is attributable to each type of CED. If monitors represent twenty-five (25%) per cent of the total of all CEDs sold, then twenty-five (25%) per cent of the department's budget shall be allocated to the manufacturers of monitors. The portion of the department's budget allocated to each type of CED shall then be allocated among the manufacturers based upon their market share as provided for in section 22a-638-1(g) to (i), inclusive, of the Regulations of Connecticut State Agencies.

(2) Notwithstanding the foregoing, regardless of the market share determination made by the commissioner, no manufacturer shall pay less than $250.00 per year for its annual registration renewal fee.

(e) Notification of Annual Registration Renewal Fee. At least thirty (30) days before the date that an annual registration renewal shall be submitted, the commissioner shall provide a manufacturer, in writing, at the address provided on the manufacturer's registration or a more recent address provided to the commissioner by a manufacturer, the manufacturer's annual registration renewal fee. Where applicable, the notice shall state the amount owed for each type of CED.

(f) Late Fee. A manufacturer who pays its annual registration renewal fee after the date it is due shall pay an additional fee of ten (10%) per cent of such annual registration renewal fee, plus one and one quarter (1 ¼ %) per cent per month or

part thereof that the annual registration renewal fee was late. This subsection shall not prevent the commissioner from pursuing other remedies available by law.

(g) Method of Payment. Unless payment by another means is approved by the commissioner, the annual registration renewal fee shall be paid by certified check or money order made payable to “Department of Environmental Protection”.

(h) Failure to Pay. A manufacturer that does not pay its annual registration renewal fee, or any late fee, shall not be in compliance with the provisions of chapter 446n of the Connecticut General Statutes and this section. Such a manufacturer shall:

(1) not be included in the list of compliant manufacturers posted on the department’s website pursuant to section 22a-634(a) of the Connecticut General Statutes; and

(2) be subject to all of the consequences of being in non-compliance, including, but not limited to, any action provided for by law.

Regulations of Connecticut State Agencies

Title 22a. Environmental Protection

Department of Energy and Environmental Protection (4)

Recycling of Covered Electronic Devices

Sec. 22a-638-1. Standards for the recycling of covered electronic devices

(a) Definitions. As used in this section and section 22a-630(d)-1 of the Regulations of Connecticut State Agencies:

(1) "Cathode ray tube" or "CRT" means cathode ray tube as defined in section 22a-629 of the Connecticut General Statutes;

(2) "Commissioner" means the Commissioner of Energy and Environmental Protection or the Commissioner's designee;

(3) "Computer" means an electronic, magnetic, optical, electrochemical or other high-speed data processing device performing logical, arithmetic or storage functions and includes, but is not limited to, a central processing unit or both a computer central processing unit and a monitor, such as a notebook, laptop or portable device. Computer does not include an automated typewriter or typesetter, a portable handheld calculator, a portable digital assistant or other similar device;

(4) "Consumer" means a person from a household.

(5) "Covered electronic device" or "CED" means a desktop or personal computer, computer monitor, portable computer, printer, CRT-based television and non-CRT-based television sold to consumers, but does not include any of the following, including any component of the following:

(A) an electronic device that is a part of a motor vehicle or any component part of a motor vehicle assembled by, or for, a vehicle manufacturer or franchise dealer, including replacement parts for use in a motor vehicle;

(B) an electronic device that is functionally or physically a part of a larger piece of equipment designed and intended for use in an industrial, commercial or medical setting, including diagnostic, monitoring or control equipment;

(C) an electronic device that is contained within a clothes washer, clothes dryer, refrigerator, refrigerator and freezer, microwave oven, conventional oven or range, dishwasher, room air conditioner, dehumidifier or air purifier;

(D) a telephone of any type unless it contains a video display area greater than four inches measured diagonally; or

(E) any handheld device used to access commercial mobile radio service, as such service is defined in 47 CFR 20.3;

(6) "Covered electronic recycler or CER" means covered electronic recycler as defined in section 22a-629 of the Connecticut General Statutes;

(7) "Department" means the Department of Energy and Environmental Protection;

(8) "Disposal facility" means a facility receiving waste or residue, generated from the recycling of CEDs or their components, for disposal when such waste or residue cannot be recycled any further. A disposal facility includes, but is not limited to, an incinerator or a facility where waste or residue is placed on the land or water;

(9) "Household" means a person, or group of people, living in a single detached dwelling, a residential condominium or a single unit of a multiple unit dwelling, who, pursuant to chapter 446n of the Connecticut General Statutes and this section, provides seven or fewer CEDs at one time for reuse, refurbishment or recycling;

(10) "Manufacturer" means Manufacturer as defined in section 22a-629 of the Connecticut General Statutes;

(11) "Manufacturer's brands" means manufacturer's brands as defined in section 22a-629 of the Connecticut General Statutes;

(12) "Market share" means market share as defined in section 22a-629 of the Connecticut General Statutes;

(13) "Materials of concern" means CEDs or components of CEDs that contain or consist of any of the following:

(A) circuit boards, including, but not limited to, whole or shredded circuit boards;

(B) whole CRTs;

(C) glass from CRTs, except for glass that has been sorted, washed, and culletized and that is destined for use in manufacturing new CRTs or in any other product clearly identified in a CER's application that has been approved by the commissioner;

(D) batteries;

(E) any mercury-containing material; or

(F) any material containing polychlorinated biphenyls (PCBs), including, but not limited to, capacitors and ballasts;

(14) "Mercury-containing material" means a component of a CED or a part of a component of a CED, including, but not limited to, a switch, relay, backlighting or lamp, that contains elemental mercury integral to its function. Mercury-containing material includes phosphor powder prior to or during the retort process;

(15) "Monitor" means monitor as defined in section 22a-629 of the Connecticut General Statutes;

(16) "Operator" means the person responsible for the overall operation of a recycling or disposal facility;

(17) "Orphan device" means orphan device as defined in section 22a-629 of the Connecticut General Statutes;

(18) "Owner" means the person who owns a recycling or disposal facility or part of any such facility;

(19) "Person" means person as defined in section 22a-629 of the Connecticut General Statutes;

(20) "Portable computer" means portable computer as defined in section 22a-629 of the Connecticut General Statutes;

(21) "Printer" means a device that prints text or illustrations on paper and includes, but is not limited to, daisy-wheel, dot-matrix, ink-jet, laser, LCD and LED, line printers or thermal printers, including a device that performs other functions in addition to printing. Printer does not include a device used solely to copy documents, to scan documents or to send documents by facsimile;

(22) “Recycling” or “Recycle” means any process by which a CED or component of a CED that would otherwise become solid waste or hazardous waste is 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 department. Recycling includes, but is not limited to, storing or collecting CEDs or components of CEDs for recycling, and dismantling or shredding CEDs or components of CEDs;

(23) “Recycling facility” means a place or location, including all land and structures or appurtenances, used to collect, store, separate or process CEDs or components of CEDs into raw materials or products. Recycling facility includes, but is not limited to, land and structures or appurtenances used for the disassembly and physical recovery of CEDs, or components of CEDs, including, but not limited to, crushing, shredding, grinding, glass-to-glass recycling or other operations. A recycling facility does not include:

(A) the initial location used to collect CEDs from residents, provided no other activities described in this definition that would otherwise make such facility a recycling facility are conducted; or

(B) a facility where, for no more than ten days, activities incidental to the transportation of CEDs or components of CEDs are conducted, including, but not limited to:

(i) storing pre-packaged CEDs or components of CEDs;

(ii) transferring pre-packaged CEDs or components of CEDs from one mode of transportation to another; or,

(iii) aggregating pre-packaged CEDs or components of CEDs;

(24) “Refurbishment” means, with respect to a CED that functions for its original intended purpose, installing a new electrical cord, making aesthetic improvements only, such as polishing or removing scratches, or upgrading a CED by replacing an operating system or other software, memory or component of a CED, such as a video card, sound card, disc drive or hard drive, that is working, with an upgraded system or software, memory or component of a CED. Other than the installation of a new electrical cord, upgrading a CED does not mean or include the repair of a non-functioning CED, including, but not limited to, repairing or replacing a non-functioning operating system or software, memory or component of a CED, with a functioning one;

(25) “Responsible official” means:

(A) for an individual(s) or sole proprietorship, the individual(s) or proprietor, respectively;

(B) for a corporation, any director or officer empowered by the Board of Directors pursuant to the corporation’s Certificate of Incorporation and any bylaws;

(C) for a limited liability company (LLC), a manager, if the LLC’s Articles of Incorporation vest management of the LLC in one or more managers, otherwise, any member of the LLC;

(D) for a partnership, any partner, subject to the provisions of a statement of partnership authority; and

(E) for a municipal, state or federal agency or department, either a principal executive officer, a ranking elected official or other representative authorized by law.

(26) “Retailer” means retailer as defined in section 22a-629 of the Connecticut General Statutes;

(27) “Reuse” means continuing to use a CED, as is, without modification, for its original intended purpose;

(28) “Sell” or “sale” means sell or sale as defined in section 22a-629 of the Connecticut General Statutes;

(29) “Television” means a stand-alone display system containing a CRT or any other type of display primarily intended to receive video programming via broadcast transmitted over the air or by cable, satellite or other means, having a viewable area greater than four inches when measured diagonally, able to adhere to standard consumer video formats such as PAL, SECAM, NTSC, ATSC and HDTV and having the capability of selecting different broadcast channels and support sound capability. Television includes a television with a built in VCR, DVD or other player;

(30) “Total weight” means weight expressed in pounds; and

(31) “Video display” means video display as defined in section 22a-629 of the Connecticut General Statutes.

(b) Licensing of Covered Electronic Recyclers. (1) In implementing the provisions of chapter 446n of the Connecticut General Statutes and this section, the commissioner may approve of a person who applies to the department to become a CER pursuant to the requirements of this subsection.

(A) A CER shall perform or arrange for:

(i) the transportation and complete recycling of CEDs, including the disposal of waste or residue from recycling activities, or the transportation and reuse or refurbishment of CEDs; and

(ii) the return of CEDs to a manufacturer pursuant to subsection (q) of this section.

(B) (i) a person who performs, or arranges for, only part of the activities necessary to transport and completely recycle CEDs, or only part of the activities necessary to transport and reuse or refurbish CEDs, cannot be approved as a CER.

(ii) A person who cannot provide for the return of CEDs to a manufacturer pursuant to subsection (q) of this section cannot be approved as a CER.

(C) A person shall be approved as a CER by the commissioner to be eligible to receive payment from manufacturers when implementing the provisions of chapter 446n of the Connecticut General Statutes and this section. A person that is not approved by the commissioner as a CER, or whose application has been denied by the commissioner, shall not be eligible for reimbursement by a manufacturer pursuant to chapter 446n of the Connecticut General Statutes and this section.

(2) (A) To apply to become a CER a person shall submit to the commissioner a complete application on a form prescribed by the commissioner. Applications, including renewal applications, will only be accepted for a sixty (60) day period specified by the commissioner each year. For renewal applications, such period shall be at least sixty (60) days before the expiration of an approval issued to a CER under this section. The commissioner shall provide notice of the commencement of the sixty (60) day period to submit applications at least thirty (30) days before the sixty (60) day period begins. The commissioner may provide such notice through a posting on the department's website, advertising in trade publications, sending notice to trade associations and the most recent list of approved CERs, or any other method intended to provide notice. The

commissioner shall provide notice, by mail or by e-mail, directly to anyone who requests that such direct notice be provided. No application will be reviewed if it is submitted before or after the sixty (60) day period designated by the commissioner for the receipt of applications.

(B) Nothing in this subdivision shall prevent the commissioner from requesting, or an applicant from submitting, supplemental information regarding an application that was submitted within the sixty (60) day period for receipt of applications, except at no time shall the commissioner solicit or seek from, or recommend to, an applicant or any other person, a revision or modification to the fee proposed by an applicant pursuant to subdivisions (3)(H) and (I) and subdivision (5)(B) of this subsection. In addition, the commissioner shall not indicate or inform an applicant or any other person, at any time, that a particular fee be proposed pursuant to subdivisions (3)(H) and (I) and subdivision (5)(B) of this subsection, or that a revision or modification to any such fee proposed in an application submitted pursuant to this subdivision or subdivision (11) of this subsection, will increase, decrease or alter, in any way, the likelihood that such application will be approved or disapproved.

(3) An application for a CER shall, at a minimum, include:

(A) the applicant's name, address, contact information, e-mail address and any similar information, including any such information for any person or entity noted in this subdivision. If the applicant is:

(i) a corporation, the application shall include, at a minimum, the state of incorporation, and the names of the principals, including the president and all directors;

(ii) a limited liability company, the application shall include, at a minimum, the state of registration and the names of the managing members of the company;

(iii) a limited partnership, the application shall include, at a minimum, the name of each general and limited partner;

(iv) a general partnership, the application shall include, at a minimum, the name of each general partner; or

(v) not an entity listed in clauses (i) to (iv) of this subparagraph, the application shall include, at a minimum, the name of the person or

persons who will be responsible for compliance with the requirements of chapter 446n of the Connecticut General Statutes and this section;

(B) a description of the applicant's qualifications and experience for the past five (5) years in managing and recycling electronic waste, specifically including CEDs. This description shall include, but need not be limited to, a list and description of current and previous projects or contracts, the dollar value of such projects or contracts, including the price per pound, if ascertainable, charged by the applicant for recycling or other services for any existing project or contract and references regarding the management and recycling of CEDs;

(C) a detailed description of how the activities performed pursuant to this section will be undertaken in compliance with chapter 446n of the Connecticut General Statutes and this section;

(D) a detailed description of the process flow for the activities that will be performed pursuant to chapter 446n of the Connecticut General Statutes and this section, regarding the recycling of CEDs and components of CEDs. This description:

(i) shall include the processes and methods that will be used to recycle CEDs and components of CEDs, including a description of disassembly and physical recovery operations such as crushing, shredding, grinding, glass-to-glass recycling or other operations that will be used; and

(ii) shall include and begin from the point of initial collection from consumers until CEDs or components of CEDs are processed into raw materials or products and residue from recycling CEDs or components of CEDs is disposed of. This description shall include each recycling facility and each disposal facility used to recycle or dispose of CEDs or components of CEDs:

(E) information, pursuant to section 22a-6m of the Connecticut General Statutes, concerning the applicant's compliance with the environmental protection laws of Connecticut, all other states, the federal government and in addition, the environmental protection laws of any other country. This shall include information regarding the applicant and all transporters noted in response to subparagraph (M) of this subdivision and all facilities noted in response to subparagraph (G) of this subdivision recycling or disposing of materials of concern;

(F) the procedures that an applicant will use to:

(i) ensure that a CED came from a household in Connecticut;

(ii) separate CEDs for which a CER can obtain reimbursement from a manufacturer, pursuant to chapter 446n of the Connecticut General Statutes and this section, from other electronic devices for which a CER cannot obtain reimbursement from a manufacturer, including computers, monitors, televisions and printers from non-Connecticut residents or non-household sources;

(iii) identify the brand owner of a CED, excluding televisions;

(iv) record and maintain data required to properly bill manufacturers in accordance with subsection (j) of this section; and

(v) separate and return CEDs to a manufacturer, or to a facility designated by a manufacturer, pursuant to subsection (q) of this section;

(G) a disclosure of all facilities that will be used to comply with the requirements of chapter 446n of the Connecticut General Statutes and this section. This shall include, but not be limited to, all facilities used to recycle CEDs or components of CEDs, and dispose of waste or residue generated from the recycling of CEDs or components of CEDs. If multiple facilities are disclosed for the same activity, describe fully the circumstances under which each facility will be used. For each facility disclosed provide, as applicable:

(i) a description of the storage, dismantling and processing capacity of each facility;

(ii) a description of environmentally preferable practices, if any, (such as building standards or operation and management practices, including energy efficiency practices or a certification by others, e.g., LEED certification, ISO 14001 certification, energy efficiency practices) that will be used in implementing chapter 446n of the Connecticut General Statutes and this section;

(iii) the following information only for each recycling facility that recycles materials of concern and each disposal facility that disposes of materials of concern:

(I) a list of all applicable permits, licenses or approvals, if any, issued by a municipality, state, the federal government or any other country, that are required and that have been or will be obtained to authorize activities undertaken pursuant to chapter 446n of the Connecticut General Statutes and this section; and

(II) a list of the plans in effect at the facility to ensure worker safety, emergency preparedness and prevention, including but not limited to, a contingency plan and emergency procedures, if required by the applicable hazardous waste regulations, emergency response plans, and environmental, health and safety plans; and

(iv) a certification signed by the applicant affirming that:

(I) based upon reasonable investigation, that every facility for which information is being provided under subparagraph (G)(iii) of this subdivision has obtained or will obtain all permits, licenses or approvals needed to authorize activities undertaken pursuant to chapter 446n of the Connecticut General Statutes and this section; and

(II) the applicant has provided the owner or operator of each facility, for which information is being provided under subparagraph (G)(iii) of this subdivision, with a copy of the standards established in subsections (c) to (e), inclusive of this section.

(v) for each recycling facility and each disposal facility subject to the requirements of subparagraph (e)(6)(A) of this section, evidence that each facility has the insurance required by subdivision (e)(6) of this section; and

(vi) for each recycling facility and each disposal facility subject to the requirements of subparagraph (e)(7)(A) of this section, evidence that each facility has the financial assurance or other guarantee, as may be required by subdivision (e)(7) of this section.

(H) the fee, expressed as a price per pound, that the applicant proposes to charge manufacturers for the total cost of transporting and recycling CEDs. The fee may include a reasonable rate of profit or return on investment and costs associated with the following, collectively known as qualified reimbursable costs, provided that any such qualified reimbursable cost is incurred to implement chapter 446n of the Connecticut General Statutes or this section:

(i) providing a storage container;

(ii) loading and unloading CEDs, not including services provided by municipal personnel;

(iii) packaging and labeling CEDs for transport;

(iv) transporting CEDs;

(v) materials, labor, equipment and transportation costs associated with one-day collection events;

(vi) tracking and accounting for CEDs and, for computers, monitors and printers, tracking and accounting by brand and manufacturer;

(vii) recycling CEDs for recovery of useable materials, including, but not limited to, storage of CEDs prior to recycling;

(viii) disposal of the waste or residue from the recycling of CEDs;

(ix) the collection of information required by this section;

(x) billing, recordkeeping and reporting required by this section; and

(xi) general administrative costs, including, but not limited to, billing preparation, telephone and mailing charges;

(I) the fee, expressed as a price per pound, that the applicant proposes to charge if CEDs are returned to a manufacturer, or a facility designated by a manufacturer, pursuant to subsection (q) of this section. The fee may include a reasonable rate of profit or return on investment and costs associated with the following, collectively known as qualified reimbursable costs, provided that any such qualified reimbursable cost is incurred to implement chapter 446n of the Connecticut General Statutes or this section:

(i) providing a storage container;

(ii) loading and unloading CEDs, not including services provided by municipal personnel;

(iii) packaging and labeling CEDs for transport;

(iv) transporting CEDs to a storage facility;

(v) materials, labor, equipment and transportation costs associated with one-day collection events;

(vi) tracking and accounting for CEDs, and for computers, monitors and printers, tracking and accounting by brand and manufacturer;

(vii) storage of CEDs prior to physical transfer to a transporter who will transport the CEDs for or on behalf of a manufacturer, at the manufacturer's expense;

(vii) [FN1] the collection of information required by this section;

(viii) billing, recordkeeping and reporting required by this section; and

(ix) general administrative costs, including but not limited to, billing preparation, telephone, and mailing charges;

(J) to the extent that the fees proposed by the applicant in subparagraphs (H) and (I) of this subdivision are greater than the fees charged or received by the applicant for equivalent or similar services in any existing contract or agreement to which the applicant is a party, a detailed explanation of the reasons for any such difference;

(K) for CEDs to be reused or refurbished, a description of how CEDs will be reused or refurbished and how the applicant will comply with the requirements of this section. This includes, but is not limited to, information concerning procedures for pre-screening CEDs, erasure or destruction of data, labeling, packaging, storing and transporting CEDs, ensuring that CEDs meet legitimate reuse and refurbishment specifications and the disposition of off-specification CEDs or CEDs that may break in transit;

(L) for CEDs or components of CEDs to be exported, a description of how the applicant will comply with the requirements of this section, including, but not limited to, whether and how CEDs will be reused or refurbished or how CEDs or components of CEDs will be recycled once exported, a disclosure of all of the countries to which CEDs or components of CEDs are to be exported, the countries through which CEDs or components of CEDs will travel, the import and export requirements for all such countries, and the disposition of CEDs or components of CEDs that are off-specification, that may break in transit or that are not reused, refurbished or recycled for other reasons;

(M) a disclosure of each transporter used to transport CEDs from the initial site used to collect CEDs from consumers to the initial recycling facility, where CEDs are first dismantled, crushed, shredded or processed in a similar manner. For each such transporter provide:

(i) a description of the transportation and storage capacity for such transporter;

(ii) a list of all applicable permits, licenses or approvals, if any, issued by a state, the federal government or any other country, that are required and that have been or will be obtained to authorize activities undertaken pursuant to chapter 446n of the Connecticut General Statutes and this section; and

(iii) a description of environmentally preferable practices, if any, (such as alternative fuels, fleet operations or energy efficiency practices) that will be used in implementing chapter 446n of the Connecticut General Statutes and this section;

(N) any other information deemed necessary by the commissioner; and

(O) a $250.00 initial application fee.

(4) An applicant shall submit to the commissioner all documents required by subdivision (3) of this subsection in a complete and approvable form. If the commissioner notifies the applicant that any document or submittal is deficient or incomplete, the applicant shall correct the deficiencies and resubmit it within the time specified by the commissioner or, if no time is specified, not later than thirty (30) days after receipt of the commissioner's notice of deficiency or incompleteness. Incompleteness or deficiency shall be a reason for the commissioner to deny an application.

(5) (A) The commissioner shall approve or deny an application and shall notify the applicant, in writing, of the commissioner's decision. For purposes of clauses (i) to (vii), inclusive, and clause (ix) of this subparagraph only, the term applicant shall mean not only the applicant, but shall also include all other persons that the applicant is proposing to use to implement chapter 446n of the Connecticut General Statutes and this section. In deciding whether or not to approve an application, the commissioner shall consider the criteria set forth in clauses (i) to (ix), inclusive, of this subparagraph, based upon the information provided by each applicant and any other information obtained by the commissioner regarding an applicant relating to the requirements of chapter

446n of the Connecticut General Statutes and this section. In deciding whether or not to approve an application, the commissioner shall consider:

(i) whether the application is sufficient and complete, including payment of the required fee, and whether the application provides all of the information required by subdivision (3) of this subsection and clearly and completely describes how CEDs will be reused or recycled;

(ii) whether the qualifications and experience of the applicant demonstrate an ability to transport, manage and recycle or reuse CEDs;

(iii) whether the activities an applicant is proposing to undertake comply with the requirements of chapter 446n of the Connecticut General Statutes and this section;

(iv) whether the compliance history of an applicant demonstrates either an unwillingness or an inability to comply with applicable environmental requirements;

(v) whether the procedures an applicant is proposing to utilize to manage CEDs will be able to effectively perform the tasks specified in subdivision (3)(F) of this subsection;

(vi) whether the transporters and facilities that the applicant is proposing to use to implement chapter 446n of the Connecticut General Statutes and this section, comply with the requirements of chapter 446n of the Connecticut General Statutes, this section and any other applicable requirements;

(vii) whether the transporters and facilities that the applicant is proposing to use to implement chapter 446n of the Connecticut General Statutes and this section use practices, that the commissioner may determine are environmentally preferable, which shall be given a preference in the consideration of whether or not to approve a CER;

(viii) the fees proposed by an applicant, including the following, any of which may provide a basis for denying an application:

(I) whether the fee proposed under subdivision (3)(H) of this subsection exceeds one population standard deviation above the mean, as determined by the commissioner, for the applications under consideration by the commissioner;

(II) whether the proposed fee under subdivision (3)(I) of this subsection exceeds one and one half times the population standard deviation above the mean, as determined by the commissioner, for the applications under consideration by the commissioner;

(III) whether the proposed fees exceed the prevailing rates charged in the industry as determined by the commissioner; or

(IV) whether the proposed fees exceed those charged for equivalent or similar services in any existing contract or agreement to which the applicant is a party, and if so, the sufficiency of any reason for such difference; and

(ix) any other factor deemed significant by the commissioner regarding an applicant relating to the requirements of chapter 446n of the Connecticut General Statutes and this section.

(B) The commissioner may issue an approval for up to, but no more than, three (3) years, provided that if an approval is issued for more than one year:

(i) a CER shall submit, in writing, for the commissioner's review and approval, proposed fees as specified in subdivisions (3)(H) and (3)(I) of this subsection. The proposed fees shall be submitted during the sixty (60) day time period for acceptance of applications, including renewals applications, specified by the commissioner pursuant to subdivision (2) of this subsection;

(ii) fees proposed by a CER pursuant to clause (i) of this subparagraph shall be evaluated and may be denied by the commissioner based upon the criteria specified in subparagraph (A)(viii) of this subdivision;

(iii) the previous fees charged by the CER shall remain in effect until the commissioner approves new fees pursuant to this subparagraph; and

(iv) failure to make a timely submission of proposed fees required by this subparagraph, or the denial of the fees proposed by a CER pursuant to this subparagraph, may be grounds for the revocation of a CER's approval.

(6) Any approval issued to a CER by the commissioner may contain any conditions the commissioner deems necessary to ensure compliance with chapter 446n of the General Statutes and this section or to protect human health

or the environment. If an application is denied, the commissioner shall indicate, in writing, the reasons for any such denial.

(7) (A) Provided the requirements of subdivisions (8) and (9) of this subsection do not apply, whenever any information in a CER's most recent application submitted to the commissioner pursuant to subdivision (3) of this subsection, is inaccurate or misleading, or any relevant information was omitted, a CER shall submit corrected or omitted information, in writing, on a form prescribed by the commissioner, not later than thirty (30) days after the information is no longer accurate or the CER knows or should have known that relevant information was omitted. This requirement shall remain in effect at all times, including after the commissioner issues a CER an approval.

(B) In addition to actions taken under subdivision (12) of this subsection, the commissioner may revoke, suspend or modify an approval based upon any information obtained under this subdivision. The commissioner may, at anytime, request updated information from a CER.

(8) (A) Except as provided for in this subdivision (9) of this subsection, with respect to chapter 446n of the Connecticut General Statutes and this section, a CER approved by the commissioner shall not engage in or utilize any activity, facility or procedure not described or contained in such CER's application approved by the commissioner or approved by the commissioner pursuant to this subdivision.

(B) A CER shall request that the commissioner approve any modification to any information, activity, facility or procedure described or contained in such CER's application in response to subdivision (3)(C), (3)(K) or (3)(L) of this subsection, to any facility listed in response to subdivisions (3)(G) of this subsection which application has been approved by the commissioner, or to any change previously approved by the commissioner pursuant to this subdivision. This requirement shall apply while any approval issued to a CER remains in effect. Any request for a modification pursuant to this subparagraph shall be in writing, on a form prescribed by the commissioner and shall contain the information specified in subdivision (3)(C), (3)(G), (3)(K) or (3)(L), as applicable, depending upon the modification requested by the CER. The provisions of subdivisions (4) and (5) of this subsection shall apply to any such request for a modification. A CER shall not be eligible to receive reimbursement, pursuant to chapter 446n of the Connecticut General Statutes and this section, for costs incurred regarding

an activity, facility or procedure that is not in described or contained in its application or approved by the commissioner pursuant to this subparagraph.

(C) Except as provided for in subdivision (5)(B) of this subsection, the fees approved by the commissioner for the activities specified in subdivisions (3)(H) and (3)(I) of this subsection shall not be modified during the term of any approval issued to a CER. If the commissioner issues an approval for more than one year, the fees for the activities specified in subdivisions (3)(H) and (3)(I) of this subsection may be modified only as provided for in subdivision (5)(B) of this subsection.

(9) A CER approved by the commissioner, shall notify the commissioner of any modification to any information, activity, facility or procedure described or contained in the CER's application in response to subdivision (3)(A), (3)(E) or (3)(F) of this subsection, or a change to any transporter listed in response to subdivision (3)(M) of this subsection which application has been approved by the commissioner, or to any change for which notice has been previously provided to the commissioner pursuant to this subdivision. This requirement shall apply while any approval issued to a CER remains in effect. Any notification of a modification pursuant to this subdivision shall be in writing, on a form prescribed by the commissioner and shall contain the information specified in subdivision (3)(A), (3)(E), (3)(F) or (3)(M), as applicable, depending upon the modification for which a CER is providing notice. Any such notice shall be provided as soon as practicable before or after any such modification, but not later than thirty (30) days after such modification has been made.

(10) A CER may seek to modify any condition in an approval issued by the commissioner. Any such request shall be in writing and shall state the provision for which a modification is requested and the reason for the requested modification. The commissioner shall grant or deny any such request, in writing.

(11) (A) A CER may apply for renewal of its approval by the commissioner and shall do so in the manner prescribed in subdivision (2) of this subsection, using a form prescribed by the commissioner. Unless the form prescribed by the commissioner provides otherwise, a CER shall provide the information prescribed in subdivision (3) of this subsection. The commissioner may require the submission of additional information to determine whether or not to renew the approval for a CER.

(B) Notwithstanding any previous approvals, the commissioner may deny an application for renewal from a previously approved CER. In considering whether to approve or deny a CER's renewal application the commissioner shall consider the information and factors specified in subdivision (5) of this subsection, the CER's performance in implementing chapter 446n of the Connecticut General Statutes and this section and any other information obtained by the commissioner.

(C) A CER's current approval shall remain in effect until the commissioner makes a final determination regarding such CER's renewal application, provided that the CER has submitted the renewal application in a timely manner and the information provided in the renewal application is complete.

(D) There shall be no fee for submitting a renewal application.

(12) In addition to any other reason provided for by law, including, but not limited to, subdivision (5)(B)(iv) of this subsection, the commissioner may revoke, suspend or modify a CER's approval for any of the following reasons:

(A) the commissioner determines that a CER is unwilling or unable to comply with the requirements of chapter 446n of the Connecticut General Statutes or this section;

(B) the CER has failed to disclose all relevant and material facts in its application during any department proceeding associated with the application, or when required by chapter 446n of the Connecticut General Statutes or this section;

(C) for violations of the environmental protection laws of Connecticut, any other state, the federal government, or any other country, by a CER or any person a CER lists in subdivision (3)(G) or (3)(M) of this subsection regarding the implementation of chapter 446n of the Connecticut General Statutes or this section; or

(D) the activities engaged in, or arranged for, by a CER, or any of the persons a CER lists in subdivision (3)(G) or (3)(M) of this subsection, regarding the implementation of chapter 446n of the Connecticut General Statutes or this section, are causing, or are reasonably likely to cause pollution, or are endangering, or may endanger, human health, safety, welfare or the environment.

(13) (A) No person shall act or purport to act under the authority of an approval issued to another CER. An approval issued to a CER may be transferred, provided, that before any transfer occurs, the transfer has been approved, in writing, by the commissioner.

(B) A request to transfer an approval shall be made on a form prescribed by the commissioner. The commissioner may require the submission of additional information to determine whether or not to transfer an approval.

(C) In considering a request to transfer an approval, the commissioner may consider any matter that the commissioner would consider when deciding whether or not to approve an application submitted by a CER, and shall consider whether the proposed transferee is able to comply with any terms and conditions of the approval.

(D) When transferring an approval issued to a CER, the commissioner may include any conditions the commissioner deems necessary to ensure compliance with chapter 446n of the General Statutes and this section or to protect human health or the environment.

(14) The commissioner shall post and maintain a list of the currently approved CERs on the department's website and shall provide any person with such list upon request.

(c) General Standards for the Reuse, Refurbishment and Recycling of CEDs and the Disposal of Waste or Residue Generated from the Recycling of CEDs. A CER shall comply with the requirements of this subsection regarding the reuse, refurbishment or recycling of CEDs and the disposal of waste or residue generated from the recycling of CEDs.

(1) Hierarchy of Management Strategies. A CER shall ensure that reuse, refurbishment and recycling techniques are used to the fullest extent practicable, taking into account technical and economic feasibility, in an effort to minimize disposal of CEDs and their components. A CER shall maintain records to demonstrate its efforts to minimize the disposal of CEDs and their components, including all attempts made to reuse, refurbish or recycle such CEDs and their components.

(2) Separation of CEDs. A CER shall ensure that from the initial collection of a CED by a municipality or other person, until it is weighed and inventoried for billing purposes, there is a system in place to identify, track and differentiate CEDs from all other computers, monitors, printers and televisions from

households outside Connecticut or from non-household sources. A CER shall maintain written procedures regarding such identification, tracking and differentiation and shall make such procedures available to the commissioner, or to a registered manufacturer, upon request.

(3) Record of Computers, Monitors and Printers and Verification of Manufacturers. For each computer, monitor and printer collected pursuant to this section, a CER shall maintain written documentation that identifies, for each calendar month, the manufacturer's name, the brand and weight of each computer, monitor and printer received, and whether at receipt, the computer, monitor or printer was identified as having been generated by a household in Connecticut. A CER shall also determine the total weight of each type of CED (meaning the total weight of computers, of monitors and of printers, each figured separately) returned to a manufacturer or a facility designated by a manufacturer pursuant to subsection (q) of this section and shall maintain written documentation of the total weight of each type of CED. If a CER receives a computer, monitor or printer that is labeled with a manufacturer's brand and that manufacturer is not on the list of registered manufacturers or the list of manufacturers of orphan devices maintained by the commissioner and posted on the department's website, the CER shall notify the commissioner, in writing, not later than ten (10) days after the receipt of any such computer, monitor or printer. The notification shall include the manufacturer and brand of any such computer, monitor or printer, if known.

(4) Record of Televisions and Verification of Manufacturers. A CER shall maintain written documentation of the total weight and number of televisions received each calendar month, and identified at receipt, as generated by a household in Connecticut. A CER shall also determine the total weight of all televisions returned to a manufacturer or a facility designated by a manufacturer pursuant to subsection (q) of this section and shall maintain written documentation of the total weight of all such televisions. If a CER receives a television that is labeled with a manufacturer's brand and that manufacturer is not on the list of registered manufacturers maintained by the commissioner and posted on the department's website or on the list, if one is maintained and posted on the department's website, of television brands for which no manufacturer can be identified or for which the manufacturer is no longer in business, the CER shall notify the commissioner, in writing, not later than ten (10) days after the receipt of any such television. The notification shall include the manufacturer and brand of any such television, if known.

(5) Compliance with Applicable Requirements. A CER shall ensure that each transporter and the owner or operator of each recycling facility and each disposal facility, used to implement the requirements of chapter 446n of the Connecticut General Statutes and this section, possesses any license, permit, authorization or approval required by any governmental entity and remains in compliance with such license, permit authorization or approval and all applicable federal, state and local requirements pertaining to:

(A) the transportation, storage, processing, handling, management and recycling of CEDs and their components; and

(B) the disposal of waste or residue generated from the recycling of CEDs and their components.

A CER may comply with the requirements of this subdivision through various means, including, but not limited to, contractual arrangements, audits, or certifications statements.

(6) Exports.

(A) With respect to any CED collected pursuant to chapter 446n of the Connecticut General Statutes and this section, a CER shall ensure that any person exporting CEDs or components of CEDs pursuant to an agreement with, on behalf of or at the direction of such CER:

(i) complies with all applicable export requirements of the United States;

(ii) complies with all applicable requirements of importing and transit countries regarding the importing and exporting of CEDs, or components of CEDs, into and out of such countries; and

(iii) maintains records documenting such compliance.

(B) (i) Before a CED, or component of a CED, is exported to a country that is not a member of the Organisation for Economic Co-operation and Development, commonly known as an OECD country, a CER shall ensure that any person exporting such CED or component of a CED, pursuant to an agreement with, on behalf of or at the direction of such CER, requests and receives, prior to shipping:

(I) documentation from the Competent Authority of each such transit or import country, that clearly verifies in English that the country legally accepts such imports; or

(II) confirmation from the United States Environmental Protection Agency or other federal agency, that the country legally accepts such imports.

(ii) For purposes of this subparagraph, the term "Competent Authority" means, for countries that have ratified the Basel Convention, the entity that provides documentation concerning the legality of transboundary transactions involving CEDs that the country classifies as Basel wastes. For countries that have not ratified the Basel Convention, the term "Competent Authority" means the national government entity legally responsible for determining the legality of transboundary transactions.

(C) Prior to export, a CER shall ensure that any person exporting a CED or component of a CED pursuant to an agreement with, on behalf of or at the direction of such CER:

(i) removes and handles separately all materials of concern; and

(ii) adequately processes CRTs and CRT glass for use as an industrial feedstock prior to export.

(iii) The provisions of clauses (i) and (ii) of this subparagraph do not apply if:

(I) the export is for purposes of legitimate reuse or refurbishment; or

(II) the CER has documented and ensures that there are regularly monitored controls in place to assure that all materials of concern will be removed in member countries of the Organisation for Economic Co-operation and Development.

(D) A CER shall ensure that CEDs or components of CEDs that are exported, pursuant to an agreement with, on behalf of or at the direction of such CER, are not stored, managed, handled, processed or disposed of in a manner that:

(i) conflicts with any applicable requirement of the locality or country into which CEDs are exported; or

(ii) poses an unreasonable risk to human health or which reasonably can or may be expected to create a source of pollution.

(7) Reporting. A CER shall submit to the commissioner, in accordance with a schedule and form prescribed by the commissioner, a report regarding activities undertaken pursuant to this section. The commissioner may require the submission of the following information in any such report:

(A) a narrative summary of the CER's activities regarding the reuse, refurbishment and recycling of CEDs, including, but not limited to, information concerning the reuse, refurbishment, transportation, storage, recycling of CEDs, including, components of CEDs. This summary may include information concerning CEDs that were exported, the identification of all entities to whom CEDs were exported, how any exported CEDs were either reused, refurbished or recycled, or the number of CEDs that were intended to be reused or refurbished but due to breakage in transit, a determination that a CED is off-specification, or for any other reason, were not reused or refurbished and the disposition of such CEDs;

(B) for computers, monitors, and printers, an accounting, by manufacturer, of the brand, type of device (i.e., computer, monitor, printer), number of units, and total weight by type of device that each month was sent for refurbishment or reuse, was transported or stored, or was sent for recycling, and information about the waste or residue from the recycling of CEDs that was sent for disposal. This accounting shall include computers, monitors and printers received by a CER from all sources, including, but not limited to, a municipality, a one-day collection event or any other source during the reporting period. This accounting shall also clearly identify all computers, monitors and printers that were transported, separated and stored for return to a manufacturer or for transport to a recycling facility of the manufacturer's choice pursuant subsection (q) of this section;

(C) for televisions, an accounting of the number of units and total weight of televisions that each month was sent for refurbishment or reuse, was transported or stored, or was sent for recycling, and information about the waste or residue from the recycling of televisions that was sent for disposal. This accounting shall include televisions received by a CER from all sources, including, but not limited to, a municipality, a one-day collection event, or any other source during the reporting period. This accounting shall also clearly identify all televisions that were transported, separated and

stored for return to a manufacturer or for transport to a recycling facility of the manufacturer's choice pursuant subsection (q) of this section;

(D) the total weight, in pounds, of all electronic waste received by a CER from each municipality or regional collection point in Connecticut on a monthly basis. This shall include electronic wastes received from all sources, including, but not limited to, a municipality, a one-day collection event or any other source during the reporting period. For purposes of this subparagraph, the term "electronic waste" means CEDs and non-CEDs, including, but not limited to, computer peripherals such as keyboards and mice, as well as VCRs, DVD players, telephones, cellular telephones, gaming devices, ipods, MP3 players, and similar electronic devices; and

(E) any other information requested by the commissioner.

(8) Recordkeeping.

(A) A CER shall ensure that the owner or operator of each recycling and disposal facility, used to implement the requirements of chapter 446n of the Connecticut General Statutes and this section, maintains for at least three years:

(i) all records required under this section, including, but not limited to, the records required by subsections (c)(1), (c)(2), (c)(3), (c)(4), (c)(6)(A)(iii), (c)(6)(B)(i)(I), (c)(6)(B)(i)(II), (c)(6)(C)(iii)(II), (d)(2), (d)(5), (e)(1)(B)(i), (e)(1)(B)(ii), (e)(2)(B), (e)(5)(A)(vi), and (e)(5)(B) of this section; and

(ii) records sufficient to demonstrate the movement of CEDs, including components of CEDs into and out of each facility used for the storage or recycling of CEDs, and the disposal of waste or residue generated from the recycling of CEDs, including, but not limited to, commercial contracts, bills of lading or other commercially-accepted documentation, as well as documentation of any brokering transactions.

(B) With respect to CEDs to be reused or refurbished, a CER shall maintain for at least three (3) years, records sufficient to demonstrate the movement of intact CEDs sent for reuse and refurbishment, including, but not limited to, commercial contracts, bills of lading or other commercially-accepted documentation, as well as documentation of any brokering transactions.

(C) All records that are required to be maintained under this section shall be provided to the commissioner upon request. The records shall be provided within the time period specified in any request, or if no time period is specified, not later than fourteen (14) days after the receipt of any such request.

(D) The retention period for all records required by this section shall be extended automatically during the course of any unresolved enforcement action regarding compliance with chapter 446n of the Connecticut General Statutes or this section.

(9) Notification of Cessation of Services. At least forty-five (45) days before a CER ceases to provide services under chapter 446n of the Connecticut General Statutes and this section, a CER shall provide the commissioner and all customers to whom the CER is providing such services, a written notice of its intent to cease providing services.

(d) Specific Standards for the Reuse or Refurbishment of an Intact CED for Its Original Intended Purpose. In addition to the requirements in subsection (c) of this section, a CER shall comply with the requirements in this subsection regarding the reuse or refurbishment of CEDs. The requirements of this subsection apply to an intact CED being reused or refurbished for its original intended purpose and do not apply to a CED being recycled. The requirements of this subsection do not apply to components of a CED that are reused or refurbished after dismantling or after being removed from a CED. For purposes of this section, such components shall be considered to be recycled and remain subject to all of the provisions of this section regarding the recycling of CEDs.

(1) Any activity associated with the reuse or refurbishment of any CED shall not be eligible for reimbursement by a manufacturer pursuant to chapter 446n of the Connecticut General Statutes and this section, except as provided for by agreement pursuant to subsection (k) of this section.

(2) Unless a CER has already determined that a CED will be recycled, a CER shall ensure that each CED is pre-screened to determine if it is practical to reuse or refurbish the CED intact, for its original intended purpose. Any such pre-screening shall, at a minimum, include the testing of each CED to ensure that it can be reused or refurbished for its intended purpose. A CER shall ensure that each CED that successfully passes pre-screening testing is accompanied by a written certification from the tester certifying that such CED is intact and is functioning properly for its original intended purpose. A CER shall maintain a

copy of each written certification provided pursuant to this subdivision. Immediately after determining, based upon pre-screening, that a CED is eligible to be reused or refurbished, a CER shall ensure that any hard drive or similar data storage device in or from such CED meets the Department of Defense, National Institute of Standards and Technology or National Association for Information Destruction standards for data erasure or destruction, or an equivalent standard approved in writing by the commissioner.

(3) Shipments of CEDs that have not been prescreened, as provided for in subdivision (2) of this subsection, or shipments containing both CEDs that have been prescreened for reuse or refurbishment and CEDs that have not been prescreened, shall be considered shipments for recycling and remain subject to all of the provisions of this section regarding the recycling of CEDs. Before shipping any CEDs for reuse or refurbishment a CER shall ensure that:

(A) a CED to be reused or refurbished for its original intended purpose meets legitimate reuse or refurbishment specifications as well as any additional specifications of the consignee or the person that will reuse or refurbish the CEDs; and

(B) the consignee, or if different, the person that will receive any CEDs, has a verified market for the reuse or refurbishment of all CEDs being shipped.

(4) A CER shall ensure that before being transported for reuse or refurbishment a CED is labeled and packaged in a manner that is consistent with preservation of the CED for reuse or refurbishment. Any such CED shall be stored and transported in a manner that does not diminish the value or the usability of the CED for its original intended purpose.

(5) A CER shall maintain records documenting the shipment of CEDs to the consignee for reuse or refurbishment, or if different, the person that will reuse or refurbish such CEDs. At a minimum, such records shall include:

(A) the name and address of the consignee, or if different, the person that will reuse or refurbish such CEDs;

(B) a description of the contents of the shipment and the quantity of each type of CED shipped expressed in pounds;

(C) the specifications of the consignee for the CEDs being shipped, or if different, the person that will reuse or refurbish CEDs and a description of

how the transportation of the CEDs is in conformance with any such specifications;

(D) the amount paid for such CEDs, including any contract or similar document reflecting such payment; and

(E) a bill of lading or similar shipping document noting the shipment and acceptance of the CEDs.

(6) A CER claiming that CEDs are reused or refurbished under this subsection shall, in accordance with a request by the commissioner, including any time frame specified therein, provide:

(A) information demonstrating that there is a known market or disposition for the reuse or refurbishment of intact CEDs for their original intended purpose;

(B) information demonstrating that all CEDs shipped for reuse or refurbishment have been tested and are able to function for their original intended purpose;

(C) information demonstrating that all CEDs that a CER claims are reused or refurbished under this subsection, are in fact, reused or refurbished;

(D) information demonstrating that there is appropriate documentation (such as packaging procedures, contracts or other documents) to substantiate a CER's claim that intact CEDs are being reused or refurbished for their original intended purpose; or

(E) any other information the commissioner requests regarding CEDs that a CER claims were reused or refurbished.

(e) Specific Standards for the Recycling of CEDs and the Disposal of Waste or Residue Generated from the Recycling of CEDs. A CER shall comply with the requirements of this subsection regarding the recycling of CEDs and the disposal of waste or residue from the recycling of CEDs.

(1) General Standards.

(A) A CER shall ensure that all CEDs not reused or refurbished are safely managed and are recycled in a manner that generates value and minimizes waste. A CER shall ensure that any shipments of CEDs for recycling are prepared in a manner appropriate for processing and in a manner that does

not diminish the value of any materials to be recovered from the CEDs being shipped. Shipments of CEDs that have not been prescreened, as provided for in subsection (d)(2) of this section, or shipments containing both CEDs that have been prescreened for reuse or refurbishment and CEDs that have not been prescreened, shall be considered shipments for recycling and remain subject to all of the provisions of this section regarding the recycling of CEDs.

(B) With respect to the waste or residue from the recycling of CEDs which cannot be reused, refurbished or recycled, a CER shall ensure that:

(i) consideration is given to whether the waste or residue has value for energy recovery and if so, that the waste or residue is burned for energy recovery. A CER shall ensure that preference is given to waste-to-energy incineration over incineration without energy recovery or land disposal. For wastes or residues that have value for energy recovery, but for which energy recovery is technically or economically infeasible, a CER shall maintain written documentation to demonstrate any such infeasibility; and

(ii) all wastes or residues are managed safely at facilities that are fully licensed by all appropriate governing authorities and that a written record substantiating compliance with this clause is maintained.

(2) Data Security. A CER shall ensure that, as soon as feasible, a hard drive or similar data storage device in or from any CED that is to be recycled, meets the Department of Defense National Institute of Standards and Technology or National Association for Information Destruction standards for data erasure or destruction or is physically destroyed by means of smelting, pulverizing, or shredding. A CER shall ensure that before any hard drive or similar data storage device meets the data erasure or destruction requirements of this subdivision or is physically destroyed, the hard drive or similar data storage device is maintained in a restricted area with controlled access and that the personal information on any such hard drive or device is secured from access by the general public and any untrained persons or employees. A CER shall also ensure that all employees at any recycling facility where such hard drives or devices are located are trained in data security requirements such that:

(A) any personal information on hard drives or similar data storage devices is secured from access by the general public or any untrained persons or employees; and

(B) a CER maintains records of all employee training provided pursuant to this subdivision, including the content of such training.

(3) Facility Security. A CER shall ensure the owner or operator of each recycling facility and each disposal facility, used to implement chapter 446n of the Connecticut General Statutes and this section, establishes and maintains a functioning security program that controls access to all areas of the facility where CEDs or components of CEDs are present in a manner appropriate for the type of CEDs, or the components of CEDs, being handled and meets the needs of the customer served. A security program shall control access to the facility or the portion of the facility where CEDs or components of CEDs are present and may include, but need not be limited to, badges for employees, an alarm system, metal detectors, surveillance cameras, indoor and outdoor lighting, or perimeter fencing.

(4) Environmental Management System.

(A) A CER shall ensure that the owner or operator of each recycling facility and each disposal facility, used to implement chapter 446n of the Connecticut General Statutes and this section, has an environmental management system in place that is reviewed for updates at least annually or updated more often, as necessary. The environmental management system shall, at a minimum, include a plan that:

(i) describes the facility's risk management objectives for environmental performance and compliance and its plans for attaining these objectives based on a "plan-do-check-act" continual improvement model;

(ii) provides for regular re-evaluation of the plan's environmental health and safety objectives and monitoring of the progress toward achievement of these objectives that shall be conducted and documented by or for the owner or operator of the facility; and

(iii) shall be kept at the facility at all times and made available to the commissioner upon request.

(B) In lieu of compliance with subparagraph (A) of this subdivision, a CER may request that the commissioner recognize that a certification or credential granted by an independent entity meets the requirements of subparagraph (A) of this subdivision. Any such request shall be in writing and shall, at a minimum, provide information about the entity issuing the credential or certification and the requirements to obtain any such

certification or credential. The commissioner shall have the sole discretion to determine whether or not a certification or credential meets, or continues to meet, the requirements of subparagraph (A) of this subdivision and will notify the CER, in writing, of the commissioner's determination. To be able to continue to rely upon a certification or credential approved by the commissioner pursuant to this subparagraph, in lieu of compliance with subparagraph (A) of this subdivision, a CER shall:

(i) ensure that the owner or operator of each recycling facility or each disposal facility, as applicable, maintains compliance with all of the requirements of any such certification or credential;

(ii) notify the commissioner, in writing, whenever the requirements for obtaining such certification or credential change, including a description of all changes made; and

(iii) notify the commissioner, in writing, whenever the certification or credential ceases to exist or is no longer offered or issued.

For purposes of this subdivision an independent entity means an entity that issues a certification or credential concerning environmental management systems and that is not affiliated, employed or subject to control, restriction or limitation by the owner or operator of the recycling or disposal facility issued such certification or credential. Any such entity shall not be affiliated with the owner or operator of any such recycling or disposal facility through any indirect or direct, familial, corporate or financial relationship and shall not render services or provide a certification or credential under an arrangement whereby no fee will be charged if a specified finding or result is attained, or where the payment of a fee, or the amount of the fee, is in any way dependent upon a specified finding or result of such services, certification or credential.

(5) Environmental Health and Safety Measures.

(A) A CER shall ensure that the owner or operator of each recycling facility and each disposal facility, used to implement chapter 446n of the Connecticut General Statutes and this section, takes sufficient measures to safeguard occupational and environmental health and safety in accordance with local, state, national and international laws, regulations, agreements, principles and standards and guidelines. Such measures shall, at a minimum, include:

(i) environmental health and safety training of personnel, including training with regard to material and equipment handling, worker exposure, controlling releases and safety and emergency procedures;

(ii) where materials are shredded or heated, appropriate measures to protect workers, the general public and the environment from hazardous dusts, emissions, and other pollutants. Such measures shall include adaptations in equipment design or operational practices, air flow controls, personal protective devices for workers, pollution control equipment or a combination of these measures;

(iii) an up-to-date, written hazardous materials identification and management plan that specifically addresses lead, mercury, beryllium, cadmium, batteries, toner, phosphor compounds, polychlorinated biphenyls or PCBs and brominated flame retardants and other halogenated materials, with particular focus on the possible generation of by-product dioxins and furans, and any other substance specified in writing by the commissioner;

(iv) an up-to-date, written plan for reporting and responding to pollutant releases, including emergencies, such as accidents, spills, fires and explosions;

(v) proof of liability insurance for pollutant releases, accidents and other emergencies; and

(vi) an environmental health and safety audit performed by a qualified independent auditor. Audits shall be conducted on an annual basis and any recommendations for corrective action resulting from such audits shall be implemented in a timely manner. Documentation of the performance of such audits and of any corrective measures taken in response to such audits shall be retained by the owner or operator of the facility being audited.

(B) A CER shall ensure that the owner or operator of each recycling facility and each disposal facility, used to implement chapter 446n of the Connecticut General Statutes and this section, has a regularly-implemented and documented monitoring and recordkeeping program that tracks key process parameters, compliance with relevant safety procedures, effluents and emissions, and incoming and outgoing materials, residues and wastes, including storage of such materials, residues and wastes.

(C) In lieu of compliance with subparagraph (A) of this subdivision, a CER may request that the commissioner recognize that a certification or credential issued by an independent entity meets all or a portion of the requirements of subparagraph (A) of this subdivision. Any such request shall be in writing and shall, at a minimum, provide information about the entity issuing the credential or certification and the requirements to obtain any such certification or credential. The commissioner shall have the sole discretion to determine whether or not a certification or credential meets, or continues to meet, the requirements of subparagraph (A) of this subdivision and will notify the CER, in writing, of the commissioner's determination. To be able to continue to rely upon a certification or credential approved by the commissioner pursuant to this subparagraph, in lieu of compliance with subparagraph (A) of this subdivision, a CER shall:

(i) ensure that the owner or operator of each recycling facility or each disposal facility, as applicable, maintains compliance with all of the requirements of any such certification or credential;

(ii) notify the commissioner, in writing, whenever the requirements for obtaining such certification or credential change, including a description of all changes made; and

(iii) notify the commissioner, in writing, whenever the certification or credential ceases to exist or is no longer offered or issued.

For purposes of this subdivision an independent entity means an entity that issues a certification or credential concerning environmental health and safety measures and that is not affiliated, employed or subject to control, restriction or limitation by the owner or operator of the recycling or disposal facility issued such certification or credential. Any such entity shall not be affiliated with the owner or operator of any such recycling or disposal facility through any indirect or direct, familial, corporate or financial relationship and shall not render services or provide a certification or credential under an arrangement whereby no fee will be charged if a specified finding or result is attained, or where the payment of a fee, or the amount of the fee, is in any way dependent upon a specified finding or result of such services, certification or credential.

(6) Insurance.

(A) A CER shall ensure that the owner or operator of each recycling facility and each disposal facility, used to implement chapter 446n of the Connecticut General Statutes and this section, that either recycles or disposes of materials of concern shall establish and maintain, at a minimum the following insurance coverage for each such facility, unless such insurance coverage is not offered or is unobtainable:

(i) Commercial General Liability: $1,000,000 combined single limit per occurrence with an annual aggregate of $2,000,000 for bodily injury, personal injury and property damage. Coverage shall extend to independent contractors, products and completed operations, contractual liability and broad form property damage; and

(ii) Pollutant Releases, Accidents, and Other Emergencies ("Pollution Legal Liability"):

(I) for facilities where whole CEDs are dismantled, shredded, crushed or processed in a similar manner: $3,000,000 combined single limit per occurrence with an annual aggregate of $6,000,000 for on-site and off-site bodily injury, property damage or clean up costs including liability for environmental damage resulting from sudden, accidental and gradual pollution in the operation, maintenance, or use of any motor vehicle for transportation of CEDs or any facility operation involving CEDs; and

(II) for all other recycling or disposal facilities: $1,000,000 combined and single limit per occurrence with an annual aggregate of $2,000,000 for on-site and off-site bodily injury, property damage or clean up costs including liability for environmental damage resulting from sudden, accidental and gradual pollution in the operation, maintenance, or use of any motor vehicle for transportation of CEDs or any facility operation involving CEDs.

For the purposes of this subparagraph, insurance coverage shall not be deemed to not be offered or to be unobtainable if the owner or operator of such recycling facility or disposal facility is denied insurance coverage or if such owner or operator elects to not obtain such insurance coverage.

(B) The insurance used to satisfy the requirements of this subdivision shall:

(i) not be "claims made coverage" with the exception of Pollution Legal Liability coverage;

(ii) be primary and non-contributory and shall be maintained throughout the period that a facility is recycling CEDs or components of CEDs, or a facility is disposing of the waste or residue generated by the recycling of CEDs, for which a CER is seeking reimbursement pursuant to chapter 446n of the Connecticut General Statutes and this section; and

(iii) cover any suit, claim, loss, injury, damage, attorney fees, judgments, litigation or any other expense arising out of or alleged to have arisen out of the recycling of CEDs or components of CEDs or the disposal of the waste or residue generated from the recycling of CEDs.

(C) A CER shall immediately notify the commissioner, in writing, by certified mail of any cancellations, expirations or other changes that may affect the coverage used to satisfy the requirements of this subdivision. Such notification shall include:

(i) a detailed description and explanation for such change(s), including corrective action to be taken to rectify the insurance coverage and a schedule for implementing such action; or

(ii) if available, evidence of alternate insurance coverage; and

(iii) a certification that there will be no lapse in coverage.

(D) A CER shall ensure that the owner or operator of each recycling facility and each disposal facility, other than those specified in subparagraph (A) of this subdivision that recycles or disposes of CEDs or components of CEDs pursuant to chapter 446n of the Connecticut General Statutes and this section, establishes and maintains liability insurance for pollutant releases, accidents and other emergencies for any such facility in connection with the recycling or disposal of CEDs or components of CEDs and that such insurance is maintained throughout the period that such facility is recycling CEDs or components of CEDs or disposing of waste or residue from the recycling of CEDs or components of CEDs.

(E) The commissioner may require that a CER ensure that the owner or operator of a recycling or disposal facility obtain and maintain insurance at a specified minimum level or at a level that exceeds the amounts prescribed in this subdivision.

(7) Closure plan and financial assurance or other guarantees.

(A) A CER shall ensure that the owner or operator of each recycling facility and each disposal facility, used to implement chapter 446n of the Connecticut General Statutes and this section that recycles or disposes of materials of concern, has and maintains a closure plan for any such facility. Any such closure plan shall provide a detailed description of the methods and procedures to be utilized for the closure of all of the units or equipment used for recycling CEDs, or components of CEDs, when recycling activities are no longer conducted, and for the disposal of waste or residue generated from the recycling of CEDs, or components of CEDs. The plan shall also include a cost estimate for such closure. The cost estimate shall:

(i) be based on the costs to the owner or operator of the facility to hire a third party to close the facility. A third party is a party who is neither a parent company nor a subsidiary of the owner or operator. The cost estimate shall include, at a minimum, the cost of transporting and recycling or disposing of all CEDs and components of CEDs and decontaminating recycling areas and equipment or containers used in recycling CEDs or disposing of the waste or residue from the recycling of CEDs; and

(ii) not incorporate zero cost for any CED, component of a CED or residue or waste from the recycling of CEDs that may have economic value, but shall incorporate a cost for all of these items.

(B) The closure plan and cost estimate required by subparagraph (A) of this subdivision shall be updated whenever there is a change in operations that affects the cost of closing the facility. Cost estimates shall be adjusted at least annually for inflation using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its “Survey of Current Business” or its Bureau of Economic Analysis news release.

(C) The requirements of subparagraphs (A) and (B) of this subdivision may be met through other means acceptable to the Commissioner, including, but not limited to, a government program that provides the functional equivalent to compliance with such requirements.

(D) A CER shall ensure that the owner or operator of a facility, subject to subparagraph (A) of this subdivision, establishes and maintains an

irrevocable financial assurance instrument or other guarantee to cover 100% of the costs of closing its facility, including any revisions to the closure plan and cost estimate required in subparagraph (B) of this subdivision if any such assurance is required by applicable laws and regulations of the state or locality where a facility is located or by a permit issued by a governmental entity for any such facility.

(E) A CER shall immediately notify the commissioner, in writing, by certified mail of any cancellations, expirations or other changes that may affect the financial assurance coverage used to satisfy the requirements of this subdivision. Such notification shall include:

(i) a detailed description and explanation for such change(s), including corrective action to be taken to rectify the coverage and a schedule for implementing such actions; or

(ii) if available, evidence of alternate financial assurance coverage; and

(iii) a certification that there will be no lapse in coverage.

(8) Audits. A CER shall ensure that a manufacturer, or its designee, is able to conduct an audit of any recycling or disposal facility used to recycle the manufacturer's CEDs or to dispose of waste or residue from the recycling of the manufacturer's CEDs pursuant to chapter 446n of the Connecticut General Statutes and this section. Such audits may include any records that are required to be maintained pursuant to chapter 446n of the Connecticut General Statutes and this section. Such audit shall be conducted by a qualified person during normal business hours and a manufacturer, or its designee, shall provide reasonable notice to the CER and to the owner or operator of the facility to be audited before conducting an audit. The purpose of an audit shall be to evaluate compliance with chapter 446n of the Connecticut General Statutes and this section, and to verify the accuracy of any information provided either to the manufacturer or to the commissioner. A manufacturer may provide the commissioner with the results of any audit it performs and shall provide the results of an audit to the commissioner upon request. Nothing in this subdivision shall affect the commissioner's authority to conduct inspections or to take any other action authorized by law.

(f) Determination of Brands Attributable to a Manufacturer.

(1) The commissioner shall determine the brand or brands attributable to a manufacturer of computers, monitors and printers. This determination shall be

used to implement the requirements of chapter 446n of the Connecticut General Statutes and this section, including, but not limited to, billing by CERs. The commissioner shall make this brand determination each year, or more often as necessary, based upon information provided by manufacturers or CERs, or other information obtained by the department. Such information may include, but is not limited to, information from the department's contractor, the United States Patent and Trademark Office, electronic waste collection programs in other jurisdictions, or information from reputable sources such as the "The Thomas Register", "Gale Trade Name Directory", "Headquarters USA", "Dun and Bradstreet Industry Handbook", trade association directories or other similar sources.

(2) The commissioner shall post a determination of the brands attributable to each manufacturer on the department's website. This determination shall also be provided to each registered manufacturer, in writing, at the most recent address provided to the commissioner by the manufacturer. The commissioner's determination shall constitute a rebuttable presumption that such brand is attributable to a manufacturer. A manufacturer seeking to rebut the commissioner's brand determination shall provide the commissioner with information, in writing, disputing the determination, including the reasons why the determination is incorrect and, if available, identifying the manufacturer that should be responsible for the brand in question. Any supporting documents shall accompany this submission to the commissioner. After the receipt of such information the commissioner shall make a final determination regarding the brand attributable to a manufacturer.

(3) A manufacturer that claims that it is no longer legally responsible for a brand shall notify the commissioner, in writing, on a form prescribed by the commissioner. A manufacturer shall remain legally responsible for a brand until the commissioner makes a brand attribution adjustment pursuant to this subdivision. A manufacturer that becomes legally responsible for a brand that it was not previously responsible for shall notify the commissioner, in writing, on a form prescribed by the commissioner, not later than thirty (30) days after becoming legally responsible for a brand. When providing notice pursuant to this subdivision, a manufacturer shall provide documentation regarding the brand in question and shall provide the commissioner with any information the commissioner requests regarding such brand. After receipt of a notice pursuant to this subdivision, the commissioner shall decide whether or not to make the brand attribution adjustment for which notice was provided. The

commissioner's determination shall be posted on the department's website and shall be provided, in writing, to the CERs and all affected manufacturers.

(4) This subsection shall not be applicable to a manufacturer of televisions.

(g) Determining a Manufacturer's Market Share.

(1) The commissioner shall determine a manufacturer's market share each year. This market share determination shall:

(A) for all manufacturers, be used to determine a manufacturer's annual registration renewal fee;

(B) for manufacturers of televisions, be used for billing by a CER; and

(C) for manufacturers of computers, monitors and printers, be used to determine a manufacturer's responsibility for orphan devices.

(2) For each type of CED, the commissioner shall determine a manufacturer's market share, for the purposes specified in subsection (1) of this section, based upon information that approximates the total number of units sold by all manufacturers for the previous year and approximates the number of units sold that are attributable to each manufacturer. This determination shall be based upon nationally available market share data, including, but not limited to, the number of units shipped, retail sales data, consumer surveys, information provided by the manufacturers, or other nationally available market share data.

(3) (A) For each type of CED, the commissioner shall post on the department's website a determination of the market share attributable to each manufacturer. This determination shall also be provided to each registered manufacturer, in writing, at the address provided on the manufacturer's registration or a more recent address provided to the commissioner by a manufacturer.

(B) The commissioner's determination shall constitute a rebuttable presumption of the market share attributable to a manufacturer. From the date that the proposed market share attributable to each manufacturer is posted on the department's website, a manufacturer shall have not more than thirty (30) days to rebut the commissioner's determination. A manufacturer that does not avail itself of this opportunity shall be precluded from contesting the commissioner's determination of such manufacturer's market share.

(C) A manufacturer seeking to rebut the commissioner's determination shall provide the commissioner with the number of units sold, for the type of CED in question, based upon nationally available data, number of units shipped, retail sales data, consumer surveys or other nationally available data and the source of any such information. The information may concern more than one manufacturer and any supporting documents shall accompany this submission to the commissioner. After the receipt of such information, the commissioner shall make a final determination regarding each manufacturer's market share.

(4) Subject to the provisions of subdivision (6) of this subsection, if, due to inability to pay, the manufacturer of a CED no longer pays its market share, or a similar circumstance arises, the commissioner may reallocate the market share of such a manufacturer to the other manufacturers of that CED. Any such reallocation shall be proportional, based upon the market share of the other manufacturers, provided that:

(A) if the CED is a television, the market share shall be reallocated to manufacturers that have one tenth of one (0.1%) per cent or more of the market share for televisions; or

(B) if the CED is a computer, monitor or printer, the market share shall be reallocated to manufacturers that have one (1%) per cent or more of the market share for the type of CED in question.

(5) Any reallocation of the market share of manufacturers shall be posted on the department's website and be provided, in writing, to the manufacturers at the most recent address provided to the commissioner by a manufacturer. Any reallocation of a manufacturer's market share shall apply prospectively only, from the date that such recalculated market shares are posted on the department's website.

(6) Subdivision (4) of this subsection shall not apply to the transfer of a manufacturer's market share to another person. Such transfers shall be governed by this subdivision. With the written approval of the commissioner, for the purposes specified in subdivision (1) of this subsection, a manufacturer's market share may be transferred to another manufacturer, or to a person that purchases, becomes responsible for, or assumes the liabilities of a manufacturer.

(h) Specific Market Share Provisions Applicable to Orphan Devices.

(1) The commissioner shall post on the department's website and provide each manufacturer, in writing, at the address provided on the manufacturer's registration or a more recent address provided to the commissioner by a manufacturer, the manufacturer's share, based upon its market share, for orphan devices which for purposes of this section shall be known as its pro rata share. This shall include any de minimis share allocated to a manufacturer under subdivision (2) of this subsection.

(2) If pursuant to subsection (g) of this section, the commissioner determines that a manufacturer's market share for a single type of CED, for a one year period, is less than one (1%) per cent of the total market share for that type of CED, such a share shall be deemed to be de minimis. A manufacturer of a de minimis share shall not be responsible for payment of a pro rata share of the orphan devices that are recycled for the corresponding billing year. Rather, de minimis market shares shall be added together, allocated to, and paid for by the manufacturers that have one percent (1%) or more of the market share for the type of CED in question, proportionally, based upon their market share.

(3) This subsection shall not apply to manufacturers of televisions.

(i) Specific Market Share Provisions Applicable to Televisions. If pursuant to subsection (g) of this section, the commissioner determines that a manufacturer's market share for televisions, for a one year period, is less than one tenth of one per cent (0.1%) of the total market share for televisions, such a share shall be deemed to be de minimis. A manufacturer of a de minimis share shall not be responsible for payment of a pro rata share of the televisions that are recycled for the corresponding billing year. Rather, de minimis market shares shall be added together, allocated to, and paid for by the manufacturers that have one tenth of one (0.1%) per cent or more of the market share for televisions, proportionally, based upon their market share.

(j) Amount Owed by a Manufacturer and Billing.

(1) A CER and a manufacturer shall work cooperatively to ensure implementation of a practical and feasible billing system. A CER shall only submit an invoice regarding a CED generated by a household in Connecticut. Before submission of an invoice to a manufacturer, the CER and each manufacturer shall provide each other with the information necessary to facilitate billing and payment. A CER shall not seek reimbursement for costs related to a CED that was not recycled, or for costs associated with a CED that was refurbished or reused, except as may be provided for by agreement

pursuant to subsection (k) of this section. A manufacturer shall pay the initial invoice received from a CER not more than ninety (90) days after the date of receipt of such invoice. Thereafter, all invoices from such CER shall be paid within thirty (30) days of receipt by the manufacturer. A CER shall notify the commissioner, in writing, as soon as possible, whenever a manufacturer is in arrears, for any amount, more than ninety (90) days. The provisions of subdivisions (2) to (8), inclusive, of this subsection may be varied by agreement between a CER and manufacturer, as provided for in subsection (k) of this section.

(2) At a minimum, a CER shall bill a manufacturer quarterly. Unless varied by agreement pursuant to subsection (k) of this section, for the activities and services described in subsections (b)(3)(H) and (b)(3)(I) of this section, a CER shall not charge more than the fees in the most recent application approved by the commissioner submitted by a CER pursuant to subsection (b)(3) of this subsection, or the fees approved by the commissioner pursuant to subsection (b)(5)(B) of this section. If multiple CERs are involved in the recycling of a CED, only one CER shall submit an invoice to a manufacturer. Each invoice from a CER to a manufacturer shall provide the information described in subparagraphs (A) and (B) of this subdivision. This information shall be provided separately for computers, monitors, printers and televisions.

(A) Invoices regarding computers, monitors and printers, with each broken out separately, shall, for the period covered by the invoice, include:

(i) the number of units by brand, for each brand attributable to a manufacturer;

(ii) the total weight by brand, for each brand attributable to a manufacturer;

(iii) the number of units, total weight by brand, if known, for orphan devices;

(iv) the manufacturer’s pro rata share for orphan devices;

(v) the total cost per pound in accordance with the most recent fee approved by the commissioner or agreed to by the CER and the manufacturer; and

(vi) the total amount due from the manufacturer, calculated in accordance with subdivisions (3), (4) and (5) of this subsection.

(B) Invoices regarding televisions shall, for the period covered by the invoice, include:

(i) the total weight for all televisions, which shall include separately, the total weight of all televisions recycled and the total weight of all televisions returned to a manufacturer or to a facility designated by a manufacturer;

(ii) the manufacturer's market share;

(iii) the total cost per pound in accordance with the most recent fee approved by the commissioner or agreed to by the CER and the manufacturer; and

(iv) the total amount due from the manufacturer, calculated in accordance with subdivisions (6), (7) and (8) of this subsection.

(3) The amount due for the period covered by an invoice submitted to a manufacturer for computers, monitors and printers that are recycled, each figured separately, shall be calculated as follows:

AR = [MR + (O x SR)] x R

Where:

AR = the amount due from the manufacturer in U.S. dollars;

MR = total weight, in pounds, of the brands for which the manufacturer is responsible that are recycled;

O = total weight, in pounds, of orphan devices;

SR = the manufacturer's pro rata share of orphan devices, expressed as a decimal, if the manufacturer's share for orphan devices is recycled by a CER. This amount will be zero if the manufacturer's share for orphan devices is returned to a manufacturer or a facility designated by a manufacturer; and

R = fee for the total cost of transporting and recycling CEDs, expressed as a price in U.S. dollars per pound, in accordance with the most recent fee approved by the commissioner or agreed to by the CER and the manufacturer.

(4) The amount due for the period covered by an invoice submitted to a manufacturer for computers, monitors and printers, each figured separately, that

are returned to a manufacturer or a facility designated by a manufacturer pursuant to subsection (q) of this section, shall be calculated as follows:

AD = [MD + (O x SD)] x D

Where:

AD = amount due from the manufacturer in U.S. dollars;

MD = total weight, in pounds, of the brands for which the manufacturer is responsible that are returned to a manufacturer or a facility designated by a manufacturer;

O = total weight, in pounds, of orphan devices;

SD = the manufacturer's pro rata share of orphan devices, expressed as a decimal, if the manufacturer's share for orphan devices is returned to a manufacturer or a facility designated by a manufacturer. This amount will be zero if the manufacturer's share for orphan devices is not returned to a manufacturer or a facility designated by a manufacturer but is recycled by a CER; and

D = fee for the total cost for a computer, monitor or printer, including any orphan devices, being returned to a manufacturer or a facility designated by a manufacturer, expressed as a price in U.S. dollars per pound, in accordance with the most recent fee approved by the commissioner or agreed to by the CER and the manufacturer.

(5) The total amount due for the period covered by an invoice submitted to a manufacturer for computers, monitors and printers, each figured separately, shall be equal to the sum of AR and AD as calculated under subdivisions (3) and (4) of this subsection.

(6) The amount due for the period covered by an invoice submitted to each manufacturer for those televisions that are recycled shall be calculated as follows:

A = WR x MS x R

Where:

A = amount due from the manufacturer in U.S. dollars;

WR = the total weight, in pounds, of all televisions that are recycled;

MS = the manufacturer's market share expressed as a decimal; and

R = fee for the total cost of transporting and recycling CEDs, expressed as a price in U.S. dollars per pound, in accordance with the most recent fee approved by the commissioner or agreed to by the CER and the manufacturer.

(7) The amount due for the period covered by an invoice submitted to each manufacturer for those televisions that are returned to a manufacturer or a facility designated by a manufacturer pursuant to subsection (q) of this section shall be calculated as follows:

A = WD x MS x D

Where:

A = amount due from the manufacturer in U.S. dollars;

WD = the total weight, in pounds, of all televisions that are returned to a manufacturer or to a facility designated by a manufacturer;

MS = the manufacturer's market share expressed as a decimal; and

D = fee for the total cost of televisions being returned to a manufacturer or facility designated by a manufacturer, expressed as a price in U.S. dollars per pound, in accordance with the most recent fee approved by the commissioner or agreed to by the CER and the manufacturer.

(8) When an invoice submitted to each manufacturer includes both televisions that are recycled and other televisions that are returned to a manufacturer, or a facility designated by the manufacturer, the amount due from each manufacturer for televisions shall be the sum of the amount due as calculated under subdivisions (6) and (7) of this subsection.

(k) Agreements or Arrangements between a CER and a Manufacturer.

(1) A CER and a manufacturer may enter into an agreement or establish an arrangement that:

(A) allows the CER to vary the per pound price in its application approved by the commissioner pursuant to subsection (b) of this section or the fees approved by the commissioner pursuant to subsection (b)(5)(B) of this section;

(B) provides for billing arrangements that are different from the arrangements specified in subsections (j) (2) to (8), inclusive, of this section; or

(C) allows the CER to bill the manufacturer for costs associated with the reuse or refurbishment of CEDs.

(2) An agreement or arrangement between a CER and manufacturer may include any limitation on services to be provided by the CER that are otherwise eligible as allowable costs, or may make provision for providing additional services. The provisions of any such agreement or arrangement shall be enforced by the entities entering into such agreement or arrangement. Notwithstanding the terms and conditions of any agreement or arrangement between a CER and a manufacturer, including any agreement or arrangement that limits the services a CER may provide, compliance with chapter 446n of the Connecticut General Statutes and this section, except for the provisions specified in the subdivision (1) of this subsection, shall be required and remain in effect.

(l) Requirements for Printer Manufacturers and Retailers.

(1) Each time the term "CED" is used in chapter 446n of the Connecticut General Statutes and this section, it shall be read to include printers. Notwithstanding the foregoing, compliance with:

(A) subsections (a), (b) and (c) of section 22a-630 of the Connecticut General Statutes regarding printers shall not be required prior to June 1, 2010; and

(B) section 22a-633 of the Connecticut General Statutes regarding printers shall not be required until on or after September 29, 2010.

(2) A manufacturer of printers shall comply with the registration requirements in subsection (o) of this section.

(m) Municipal Requirements.

(1) Definitions. For purposes of this subsection:

(A) "municipality" means any town, city, borough, village, consolidated town and city, consolidated town and borough, or a regional authority representing any such entities; and

(B) “approved plan” means a municipal plan that has been approved by the commissioner.

(2) Submission of a Plan.

(A) Not later than July 1, 2010, a municipality shall submit a plan, in writing, to the commissioner, for the commissioner’s review and written approval. The plan shall be submitted on a form prescribed by the commissioner and shall describe how the municipality will comply with the requirements of section 22a-631(b) of the Connecticut General Statutes, including, but not limited to, how the municipality will give priority to convenience and accessibility in providing collection and recycling opportunities to its residents and any other information deemed necessary by the commissioner.

(B) The commissioner shall notify the municipality, in writing, whether or not the plan submitted is approved. If a plan is not approved, the notification to the municipality shall indicate the reasons for any such disapproval and any municipality receiving such notification shall correct the deficiencies identified by the commissioner and shall submit a revised plan, in writing, within the time frame specified by the commissioner or, if no time is specified, not more than thirty (30) days after receipt of the notification from the commissioner. When approving a plan, the commissioner may include any conditions the commissioner deems necessary to protect human health or the environment, or to ensure compliance with chapter 446n of the Connecticut General Statutes or this section, including, but not limited to, giving priority to convenience and accessibility in providing collection and recycling opportunities to the residents of a municipality.

(C) A municipality shall implement and comply with the plan approved by the commissioner.

(D) Any plan submitted by a municipality and approved by the commissioner before these regulations take effect shall satisfy the requirements of this subdivision.

(3) Modifying a Plan.

(A) A municipality may request a modification to a plan previously approved by the commissioner at any time.

(B) A municipality shall request a modification to an approved plan not more than fifteen (15) days after the date a municipality becomes aware or should become aware:

(i) of any significant or material changes to an approved plan; or

(ii) that information submitted to the commissioner, at any time, is or was inaccurate or misleading or that any relevant information is or was omitted.

(C) Any request to modify a plan previously approved by the commissioner shall be submitted in writing on a form prescribed by the commissioner and, if applicable, shall include any corrected or omitted information. An approved plan shall be modified in accordance with the procedures specified in subdivision (2) of this subsection.

(D) If at any time, the commissioner determines that a municipality's approved plan is deficient or otherwise not in compliance with chapter 446n of the Connecticut General Statutes or this section, the commissioner shall notify the municipality in writing, of such deficiency or non-compliance. Upon receipt of any such notice, the municipality shall address the deficiencies or issues identified by the commissioner and shall submit a revised plan, in writing, within the time specified by the commissioner or, if no time is specified, not more than thirty (30) days after receipt of the notification from the commissioner.

(E) When approving a modification to an approved plan, the commissioner may include any conditions the commissioner deems necessary to protect human health or the environment, or to ensure compliance with chapter 446n of the Connecticut General Statutes or this section, including, but not limited to, giving priority to convenience and accessibility in providing collection and recycling opportunities to the residents of a municipality. A modification shall not be considered part of the municipality's approved plan, unless any such modification is approved by the commissioner in writing.

(F) A municipality shall implement and comply with the modified plan as approved by the commissioner.

(4) Notification of CER. Not later than fifteen (15) days after making arrangements with a CER or CERs, a municipality shall provide written notice to the commissioner identifying the CER or CERs with whom the municipality has made arrangements to implement the requirements of chapter 446n of the

Connecticut General Statutes and this section. If a previously identified CER changes, not later than fifteen (15) days after such change, the municipality shall notify the commissioner in writing of such change and shall identify the new CER or CERs.

(5) No Fee. A municipality shall not charge its residents any fee for the collection, storage, transportation, recycling, reuse or refurbishment of seven or fewer CEDs brought to a collection point, at any one time, pursuant to section 22a-635(b) of the Connecticut General Statutes.

(6) Compliance with Applicable Requirements. A municipality shall comply with all applicable requirements, including, but not limited to, obtaining necessary permits or authorizations, when implementing a plan approved by the commissioner pursuant to this subsection.

(7) Approved Plan Not a Permit or Authorization. A plan approved by the commissioner pursuant to this subsection shall not constitute a permit or authorization to collect, store, recycle or otherwise manage or handle CEDs.

(n) Adding an Electronic Device to the List of CEDs.

(1) The commissioner may add an electronic device to the list of CEDs by adoption of regulations, in accordance with the provisions of chapter 54 of the Connecticut General Statutes. To add a device to the list of CEDs, the commissioner may consider:

(A) information obtained by the department, which may or may not include estimates of the number of such devices shipped, in use, sold, generated or disposed of;

(B) the potential cost savings to municipalities by adding the device to the list of CEDs;

(C) whether the device contains substances that may have an adverse impact to human health or the environment;

(D) existing programs to manage or recycle the device and the efficacy of such programs;

(E) the options available for managing the device, including, but not limited to, the feasibility of reusing or recycling such devices; or

(F) any other factor deemed significant by the commissioner.

(2) When adding an electronic device to the list of CEDs, the commissioner shall make available on the department's website the commissioner's rationale for adding such device, which may include a discussion of the criteria specified in subdivision (1) of this subsection.

(o) Registration Requirements for Manufacturers.

(1) Initial Registration.

(A) Requirements for Manufacturers of Computers, Monitors and Televisions.

(i) In accordance with sections 22a-630(a) and (b) of the Connecticut General Statutes, a manufacturer of CEDs that sold, or offered CEDs for sale by any means in Connecticut prior to January 1, 2008, shall register with the department not later than January 1, 2008 and, if required, shall pay an initial registration fee of five thousand dollars.

(ii) A manufacturer of CEDs that has not sold CEDs by any means in Connecticut before January 1, 2008, but sold or offers CEDs for sale by any means in Connecticut on or after January 1, 2008, but before June 1, 2010, shall register with the department on a form prescribed by the commissioner no later than July 31, 2010.

(iii) A manufacturer of CEDs that has not submitted a registration under clause (i) or (ii) of this subparagraph and has not sold or offered CEDs for sale by any means in Connecticut on or before June 1, 2010, but who sells or offers CEDs for sale by any means in Connecticut after June 1, 2010, shall register with the department on a form prescribed by the commissioner, before the manufacturer sells or offers CEDs for sale in Connecticut.

(iv) A manufacturer, described in clause (ii) or (iii) of this subparagraph, shall submit with the registration required by clause (ii) or (iii) of this subparagraph an initial registration fee of five thousand dollars and an additional fee equivalent to the greater of:

(I) one (1%) per cent of the prior year's total share of orphan devices, for each category of applicable CEDs, expressed in pounds multiplied by fifty cents; or

(II) one thousand dollars.

(v) For purposes of this subparagraph only, the term "CED" shall not include printers.

(B) Registration Requirements for Manufacturers of Printers.

(i) A manufacturer that has already submitted a registration under subparagraph (A)(i) or (ii) of this subdivision and that has sold or offered printers for sale by any means in Connecticut on or before June 1, 2010, shall submit a revised registration to the department, on a form prescribed by the commissioner, not later than July 31, 2010.

(ii) A manufacturer, other than a manufacturer described in clause (i) of this subparagraph, that has sold or offered printers for sale by any means in Connecticut on or before June 1, 2010 shall register with the department, on a form prescribed by the commissioner, not later than July 31, 2010. Such registration shall be accompanied by the annual renewal registration fee determined by the commissioner in accordance with section 22a-630(d)-1 of the Regulations of Connecticut State Agencies.

(iii) A manufacturer, other than a manufacturer described in clause (i) of this subparagraph, that has not sold or offered printers for sale by any means in Connecticut before June 1, 2010, but sells or offers printers for sale by any means in Connecticut after June 1, 2010 shall register with the department, on a form prescribed by the commissioner. Any such registration shall be submitted before the manufacturer sells or offers printers for sale in Connecticut and shall also be accompanied by an initial registration fee of five thousand dollars and an additional fee equivalent to the greater of:

(I) one (1%) per cent of the prior year's total share of orphan devices for printers expressed in pounds multiplied by fifty cents; or

(II) one thousand dollars.

(2) Annual Re-Registration Requirements for Manufacturers of All CEDs. Commencing on a date established by the commissioner, and annually thereafter, a manufacturer that sells or offers CEDs for sale by any means in Connecticut shall re-register with the department on a form prescribed by the commissioner. At least thirty (30) days before the date that any such re-registration is required, the commissioner shall notify a manufacturer, in writing, at the address provided on the manufacturer's registration or a more recent address provided to the commissioner by a manufacturer, of the date

when re-registration is required. Each annual re-registration shall be accompanied by an annual registration renewal fee as determined by the commissioner in accordance with section 22a-630(d)-1 of the Regulations of Connecticut State Agencies.

(3) Revisions to a Registration.

(A) A manufacturer that has submitted a registration to the department shall submit a revised registration to the department, on a form prescribed by the commissioner, whenever:

(i) the manufacturer sells, or offers for sale by any means in Connecticut, a type of CED that the manufacturer has not indicated it is selling, or offering for sale, in any registration or revised registration submitted to the department. The manufacturer shall submit a revised registration prior to selling, or offering for sale, by any means in Connecticut, such CED;

(ii) the manufacturer sells, or offers for sale by any means in Connecticut, a new brand of CED that the manufacturer has not indicated that it is selling or offering for sale in any registration or revised registration submitted to the department. The manufacturer shall submit a revised registration prior to selling, or offering for sale, by any means in Connecticut, such brand of CED;

(iii) the manufacturer no longer sells or offers to sell by any means in Connecticut, a type of CED or brand of CED that the manufacturer has indicated it is selling or offering for sale in any registration or revised registration submitted to the department. The manufacturer shall submit any such revised registration not later than thirty (30) days after the manufacturer no longer sells, or offers to sell, by any means in Connecticut, a type of CED or brand of CED that the manufacturer has indicated it is selling or offering for sale in any registration or revised registration submitted to the department; or

(iv) any other information in any registration or revised registration submitted to the department is no longer accurate, or relevant information was omitted. A manufacturer shall submit such revised registration not later than thirty (30) days after the information is no longer accurate or the manufacturer knows or should have known that relevant information was omitted.

(B) There shall be no fee for the submission of a revised registration under this subdivision.

(4) Miscellaneous Registration Requirements.

(A) No manufacturer shall rely upon or utilize a registration submitted for a CED, or for a brand, that was submitted by another manufacturer.

(B) A manufacturer shall only be required to pay one initial registration fee prescribed in this subsection, even if such manufacturer has submitted an initial registration for one type of CED and later submits another initial registration for another type of CED.

(p) Private Programs. A manufacturer participating in or utilizing a private program shall:

(1) comply with the registration requirements in subsection (o) of this section, including, but not limited to, payment of any required fee;

(2) submit a written description of the private program with its annual registration. The written description shall include, at a minimum, as applied to the private program, the information specified in subparagraphs (C), (D), (E) (G), and if applicable, (K) and (L) of subsection (b)(3) of this section, and any other information specified in section 22a-631(e) of the Connecticut General Statutes. The written description shall also include a written certification attesting to whether all CEDs in the private program will be recycled or reused or refurbished in accordance with chapter 446n of the Connecticut General Statutes and this section. A manufacturer participating in or utilizing a private program shall remain responsible for ensuring that the recycling, reuse or refurbishment of all CEDs is done in compliance with chapter 446n of the Connecticut General Statutes and this section. Whenever any information in the most recent written description submitted to the commissioner pursuant to this subdivision changes, or is inaccurate or misleading, or any relevant information was omitted, a manufacturer shall submit corrected or omitted information, in writing, to the commissioner not later than thirty (30) days after the information changes or is no longer accurate, or the manufacturer knows, or should have known, that relevant information was omitted; and

(3) comply with the reporting requirements in subsection (c)(7) of this section and provide any other information that a CER is or may be required to report or provide to the commissioner.

(q) Returning CEDs to a Manufacturer.

(1) A manufacturer may enter into a cooperative agreement with a CER under which CEDs, for the brands attributable to such manufacturer, are returned to the manufacturer or a facility designated by the manufacturer for recycling, reuse or refurbishment. A manufacturer of computers, monitors or printers, may also enter into a cooperative agreement with a CER under which such manufacturer's share of orphan devices, as determined pursuant to subsection (h) of this section, are returned to the manufacturer or a facility designated by the manufacturer for recycling, reuse or refurbishment. Absent a cooperative agreement, upon the written request of a manufacturer, provided reasonable advance notice has been provided, a CER shall make provisions for the separation and return to the manufacturer or a facility designated by the manufacturer for recycling, reuse or refurbishment, of CEDs for the brands attributable to a manufacturer. Absent a cooperative agreement, upon the written request of a manufacturer of computers, monitors or printers, provided reasonable advance notice has been provided, a CER shall make provisions for the separation and return to the manufacturer or a facility designated by the manufacturer, such manufacturer's share of orphan devices, as determined pursuant to subsection (h) of this section, for recycling, reuse or refurbishment. Under such an arrangement, the CER shall bill the manufacturer, as provided for in subsection (j) of this section.

(2) (A) Before CEDs are returned to a manufacturer pursuant to subdivision (1) of this subsection, the manufacturer shall submit to the commissioner a written description of how CEDs being returned will be recycled. This written description shall include, at a minimum, the information specified in subparagraphs (C), (D), (E), (G), and if applicable, (K) and (L) of subsection (b)(3) of this section and any other information specified in section 22a-631(e) of the Connecticut General Statutes. The written description shall also include a written certification attesting to whether all CEDs being returned to the manufacturer or a facility designated by the manufacturer, will be recycled, reused or refurbished in accordance with chapter 446n of the Connecticut General Statutes and this section. Before a CED is returned pursuant to subdivision (1) of this subsection, a CER shall determine the total weight of each type of CED (meaning the total weight of televisions, of computers, of monitors and of printers, each figured separately) returned to a manufacturer or a facility designated by a manufacturer and shall maintain a written record of the total weight of each type of CED.

(B) A manufacturer requesting that CEDs be returned to it, or to a facility it has designated, pursuant to this subsection shall remain responsible for ensuring that all CEDs are recycled, reused or refurbished in compliance with the requirements of chapter 446n of the Connecticut General Statutes and this section. Whenever any information in the most recent written description submitted to the commissioner pursuant to this subdivision changes, or is inaccurate or misleading, or any relevant information was omitted, a manufacturer shall submit corrected or omitted information, in writing, to the commissioner not later than thirty (30) days after the information changes or is no longer accurate, or the manufacturer knows, or should have known, that relevant information was omitted.

(r) Severability. If any section, subsection, subdivision, subparagraph, clause, subclause, phrase, word or provision of this section shall be adjudged invalid or held unconstitutional, any such final judgment shall not affect the validity of this section as a whole or any part of provision hereof other than the part so adjudged to be invalid or unconstitutional.