

STATE OF CALIFORNIA
DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY
EMERGENCY RULEMAKING ACTION
PROCESSING PAYMENT EMERGENCY REGULATIONS

NOTICE OF PROPOSED EMERGENCY ACTION

The Department of Resources Recycling and Recovery (CalRecycle/Department) is proposing emergency regulations to amend section 2975, Subchapter 12, Chapter 5, Division 2, Title 14, of the California Code of Regulations (CCR) that lays out the reasonable financial return calculation for processing payments paid to recyclers.

The Department has complied with the requirement to provide notice of the proposed emergency rulemaking pursuant to Government Code section 11346.1(a)(2).

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to OAL, OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

The written comment period permits any interested person, or their authorized representative, to submit written comments addressing the proposed amendments to the Department. Written comments which offer recommendations, objections, support, or opposition for the proposed amendment, should indicate the amended section to which the comment or comments are directed.

Comments on the proposed emergency regulations must be submitted directly to OAL within five calendar days of when OAL posts the proposed emergency regulations on the OAL web site. Comments on proposed emergency regulations should be submitted

to the OAL Reference Attorney by mail to 300 Capitol Mall, Suite 1250, Sacramento, California 95814, by fax to (916) 323-6826, or by e-mail to staff@oal.ca.gov.

When you submit a comment to OAL, you must also submit a copy of your comment to CalRecycle to BevContainerRegs@CalRecycle.ca.gov or to:

Sharon Siozon

Processing Payment Emergency Regulations

Department of Resources Recycling and Recovery, Division of Recycling

801 "K" Street, MS 19-01

Sacramento, CA 95814

OAL will confirm that the agency has received the comment before considering it. The comment must state that it is about an emergency regulation currently under OAL review and include the topic of the emergency.

The public comment period will commence on December 2, 2020 when the emergency regulations are posted on OAL's website. The public comment period will close on December 7, 2020. Written comments should be sent to the Department and received before the close of the public comment period, no later than 5:00 p.m. on December 7, 2020. Additionally, we request that written comments reference a subsection or section of the proposed action. Written comments received by the Department after the close of the public comment period will not be responded to in the rulemaking file.

Copies of the text, the Finding of Emergency, and all of the information upon which this proposal is based are available upon request and at our website accessible at the following internet address: www.calrecycle.ca.gov/Laws/Rulemaking/. The rulemaking file is also available for review during normal business hours at the Department, 801 "K" Street, 19th Floor, Sacramento, California. Please contact the agency contact person, Sharon Siozon, at (916) 322-1760 if you wish to review the rulemaking file in person. General or substantive questions regarding this file may also be directed to Sharon Siozon.

The rulemaking documents are posted on CalRecycle's website at the following internet address: <http://www.calrecycle.ca.gov/Laws/Rulemaking/>.

If you have any questions regarding this proposed emergency action, please contact Sharon Siozon at (916) 322-1760 or sharon.siozon@calrecycle.ca.gov.

FINDING OF EMERGENCY

The adoption of these regulations is deemed to be an emergency pursuant to PRC section 14536.1 which provides that "if the department determines that it is necessary to adopt or amend regulations to implement section 14575, the department may adopt or amend those regulations as emergency regulations. The Office of Administrative Law shall consider those regulations to be necessary for the immediate preservation of the public peace, health and safety, and general welfare for purposes of section 11349.6 of the Government Code. Notwithstanding subdivision (e) of section 11346.1 of the Government Code, the emergency regulations adopted or amended pursuant to this section shall be repealed 180 days after the effective date of the regulations, unless the department complies with Chapter 3.5 (commencing with section 11340) of Part 1 of Division 3 of Title 2 of the Government Code."

The Department of Resources Recycling and Recovery (CalRecycle/Department) is proposing emergency regulations to amend section 2975, Subchapter 12, Chapter 5, Division 2, Title 14, of the California Code of Regulations (CCR) that lays out the reasonable financial return calculation for processing payments paid to recyclers. The term "recycler" for purposes of this rulemaking has the same definition as in Public Resources Code (PRC) section 14519.5., i.e., "recycler" means a recycling center, dropoff or collection program, or curbside program. These entities receive processing payments which reimburse recyclers for the difference between the cost of recycling beverage container material and the value a recycler receives when it sells that material as scrap. For calendar year 2021, the Department is proposing using a reasonable financial return of ten percent when calculating processing payments instead of the Dun

and Bradstreet index as stated in regulations. This change will help support beverage container recycling in California by establishing a reasonable financial return that provides a balance between the risk associated with operating a beverage container recycling center under current market conditions and a return on investment that retains current operators.

FINDING OF NECESSITY

The California Beverage Container Recycling Program (BCRP) was established as a California Redemption Value (CRV) deposit and return system to create convenient beverage container recycling opportunities in the state. The Department is tasked with ensuring consumers throughout the state have convenient recycling options to return their CRV beverage containers to and claim their deposit.

When the BCRP was created thirty-three years ago, the law provided for a “reasonable financial return” for recyclers to provide sufficient economic incentive to ensure the recovery of the beverage containers. This “reasonable financial return” was further clarified in the CCR section 2975 which states that “The statewide average reasonable financial return for recycling centers shall be equal to the statewide average allowable costs calculated in section 2960 of this subchapter, multiplied by the average return on costs for the scrap and waste materials industry as determined from data contained in the most recent Dun and Bradstreet Standard Three Year Norm Report (Published by Dun and Bradstreet Credit Services).” Due to adverse market conditions, the 2017 average return on costs for the scrap and waste materials industry reported by Dun and Bradstreet resulted in a negative reasonable financial return for the first time. To address the negative reasonable financial return and declining scrap values, the Department enacted emergency regulations effective December 12, 2019, to raise the reasonable financial return for calendar year 2020 to 10 percent. The emergency regulations were allowed to expire by operation of law effective June 10, 2020 since the rates for 2020 were set on December 2019, achieving the objective of the emergency regulations.

The Department is currently seeking a legislative solution to set the reasonable financial return, but no such permanent change has been set at this time. While a permanent legislative solution is preferred, the Department is in the process of permanent rulemaking as an alternative. PRC section 14575(a) requires that the processing fee and processing payment rate be set on or before January 1. With a legislative solution still pending and anticipating a longer rulemaking process due to limitations in processes from the global pandemic, the Department is pursuing emergency rulemaking to ensure that the desired rates are set for calendar year 2021. This emergency rulemaking will set the reasonable financial return for calendar year 2021 at 10 percent for all recyclers.

The Department proposes to amend or add the following sections to the California Code of Regulations, Title 14, Division 2, Chapter 5, Subchapter 12, Article 2:

Section 2975 will be amended to establish a specified reasonable financial return of ten percent of the statewide average allowable costs provided in section 2960 of these regulations.

Section 2975 amends the regulations to authorize a reasonable financial return that is equal to ten percent of the statewide average allowable costs in section 2960. In response to feedback from industry that the reasonable financial return needs to be stable from year to year and that the Dun and Bradstreet index is not an accurate reference for the profitability of a recycling center, the Department has selected ten percent in an attempt to provide a financial incentive that balances the risk of operating a recycling center and mirrors the financial incentive policies of other recycling programs operated by the Department. A more detailed description of how the ten percent was chosen can be found in the Informative Digest below.

AUTHORITY

These regulations are submitted pursuant to the Department's authority under Public Resources Code (PRC) sections 14530.5(b), 14536, and 14536.1.

REFERENCE

Title 14 CCR amended section 2975 is intended to implement, interpret and make specific PRC sections 14501(f) and (g), 14518.5, and 14575.

INFORMATIVE DIGEST

The California Beverage Container Recycling and Litter Reduction Act, AB 2020/Margolin, Chapter 1290, Statutes of 1986 (Act), created the BCRP and established the Division of Recycling to administer the BCRP. The intent of the Act is to provide increased and convenient beverage container redemption and recycling opportunities for consumers. This is accomplished through the establishment of the CRV for eligible beverage containers and working with industry participants such as recyclers and processors who are certified by the Department.

Section 14501(f) of the Act establishes the purpose of the BCRP, including to create and maintain a marketplace where it is profitable to establish sufficient recycling centers and locations to provide consumers with convenient recycling opportunities. The responsibility to provide convenient, efficient, and economical redemptions opportunities rests jointly with manufacturers, distributors, dealers, recyclers, processors, and the Department (section 14501(g)). Section 14518.5 defines the term “processing payment.” Section 14575 establishes the processing fee, paid by beverage manufacturers and offset by the Beverage Container Recycling Fund (Fund), and the processing payment, paid to recyclers.

The Department annually establishes the reasonable financial return each January that is applied to the calculation of the processing payment. The source used to determine the reasonable financial return, as specified in regulation, is the most recent average net profit ratio of businesses classified as scrap and waste materials as reported by Dun and Bradstreet. For the first time since the BCRP began using the Dun and Bradstreet index in 2001, the reasonable financial return was a negative value for 2017. The reasonable financial return was calculated to be -5.85 percent of allowable costs, a reflection of the overall losses, rather than profits, of the recycling industry. This resulted

in lower processing payments to recyclers than the amount necessary to cover the cost of recycling. At the same time, low prices for scrap material, along with other factors such as difficulty in finding locations willing to host recycling centers, led some recycling centers to close, leaving communities with fewer places for people to redeem CRV containers. To address those circumstances, the Department enacted emergency regulations effective November 16, 2017 and December 13, 2018 that raised the calendar year 2018 and 2019 reasonable financial return to 11.5 percent for non-rural recyclers and 16.6 percent for rural region recycling centers.

The market pressures that began in 2017 have continued into 2020, as demonstrated by sustained low scrap prices and additional recycling center closures, and conditions are not expected to improve in 2021. These fluctuations have triggered the Department to initiate regulations that implement a more stable rate. To provide a more stable and consistent payment structure to recyclers than what would be provided under the current regulations, the Department implemented a fixed reasonable financial return of ten percent for 2020 and seeks to do the same for calendar year 2021.

Ten percent is a commonly used as a benchmark for a reasonable rate of return on investment. The average annual return for the S&P 500 since its inception in 1928 through 2017 was approximately ten percent¹. Additionally, the Federal government utilizes a 10 percent return on the cost of a contract as a reasonable profit amount for a private entity to make when providing a contractual service for the government². A ten percent reasonable financial return is also utilized by the Departments' e-waste program to incentivize e-waste collectors and processors to collect and process e-waste material that is otherwise expensive and burdensome to recycle and/or reuse. In establishing the ten percent reasonable financial return for the e-waste program, the Department

¹ "What is the Average Annual Return for the S&P 500"; retrieved from [Investopedia Average Annual Return](#)

² 2019 Federal Acquisition Regulation Section 15.404-4 Contracting by Negotiation: Profit; retrieved from [Federal Acquisition Regulation](#)

³ CIWMB meeting May 20, 2008, agenda item 9, attachment 3, retrieved from [CIWMB Meeting Notes](#) (Attachment 1)

considered both industry profitability and a reasonable rate of return needed to attract new entrants into e-waste collection and processing³.

While actual returns in investment are highly variable by the size and location of a recycler, the Department believes that a guaranteed return of ten percent is considered a reasonable rate because the returns from investing in a recycling business need to be competitive with the returns expected from other available investments. Providing a competitive return will maintain investments in recycling center operations as well as investments in infrastructure needed to deliver clean material required to meet increasingly stringent end-user specifications.

The Department finds that an emergency exists to amend existing regulations in order to implement statutory mandates of PRC section 14575. The proposed regulations would amend section 2975 of the CCR Title 14. Natural Resources, Division 2. Department of Conservation, Chapter 5. Division of Recycling, Subchapter 12, Article 2. The adoption of these regulations is deemed to be an emergency pursuant to PRC section 14536.1 which provides that “if the department determines that it is necessary to adopt or amend regulations to implement section 14575, the department may adopt or amend those regulations as emergency regulations. The Office of Administrative Law shall consider those regulations to be necessary for the immediate preservation of the public peace, health and safety, and general welfare for purposes of section 11349.6 of the Government Code. Notwithstanding subdivision (e) of section 11346.1 of the Government Code, the emergency regulations adopted or amended pursuant to this section shall be repealed 180 days after the effective date of the regulations, unless the Department complies with Chapter 3.5 (commencing with section 11340) of Part 1 of Division 3 of Title 2 of the Government Code)”.

There are no federal regulations or statutes comparable to these proposed regulations. The proposed regulations are not inconsistent or incompatible with existing state regulations. The BCRP is unique to the state of California, and there is not a similar

program within the state. There are no other matters prescribed by statute applicable to this specific state agency or to any specific regulation or class of regulations.

SPECIFIC AGENCY STATUTORY REQUIREMENTS

There are no specific agency statutory requirements relevant to this rulemaking.

LOCAL MANDATE DETERMINATION

The proposed regulations do not impose a mandate on local agencies or school districts.

FISCAL IMPACT ESTIMATE

A 10-year average (2010-2019) reasonable financial return based on the Dun and Bradstreet index of three percent was used as the baseline to determine the fiscal impact of setting the reasonable financial return at ten percent. The Dun and Bradstreet value has been exceptionally unstable during the last four years, making the carry-over of last year's value unreliable to use as a baseline to determine the fiscal impact of this proposal.

Using a three percent baseline reasonable financial return if these emergency regulations are not adopted, a ten percent reasonable financial return will provide an additional \$13.2 million in processing payments to recyclers funded by \$11.2 million from the Fund which is financed by unredeemed CRV deposits and a \$2.5 million increase in processing fee revenue paid by beverage manufacturers, based on the method for determining processing fees and payments prescribed in PRC section 14575. The Fund has sufficient resources to pay for the proposed additional processing fee offsets without impacting other mandatory payments.

The proposed emergency regulations will not result in either costs or savings to any other State Agency, local agencies or school districts. No State Agency will have any costs, savings, or revenue changes. The Fund will see additional costs and

consequently declines in revenue, but none of the costs are incurred by a State Agency directly through administrative or operational expenses. Approximately four percent of processing payment recipients are local government entities who run recycling programs. The total amount of additional processing payments these local government entities will collectively receive is approximately \$162,400 annually and is not expected to have a significant impact. Further, these proposed emergency regulations will not result in any non-discretionary cost or savings to any local agencies, nor will they result in cost or savings to federal funding to the State.

DOCUMENTS RELIED UPON

The Department utilized the following historical sources:

Investopedia: What is the Average Annual Return for the S&P 500?; retrieved from:

[Investopedia Average Annual Return](#)

2019 Federal Acquisition Regulation Section 15.404-4 Contract by Negotiation: Profit;

retrieved from: [Federal Acquisition Regulation](#)

California Integrated Waste Management Board (CIWMB): Meeting Agenda Notes; May

20, 2008, agenda item 9, attachment 3, retrieved from: [CIWMB Meeting Notes](#) See

Attachment 1

PROPOSED REGULATION TEXT ⁴

DIVISION OF RECYCLING

DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY

CALIFORNIA CODE OF REGULATIONS

TITLE 14. NATURAL RESOURCES

DIVISION 2. DEPARTMENT OF CONSERVATION

CHAPTER 5: DIVISION OF RECYCLING

SUBCHAPTER 12. DOR REQUIREMENTS

ARTICLE 2. PROCESSING FEES AND PROCESSING PAYMENTS

§ 2975. REASONABLE FINANCIAL RETURN CALCULATION.

The [begin strikethrough] statewide average [end strikethrough] reasonable financial return for recycling centers shall be equal to [begin underline] 10 percent of [end underline] the statewide average allowable costs calculated in section 2960 of this subchapter [begin strikethrough] , multiplied by the average return on costs for the scrap and waste materials industry as determined from data contained in the most recent Dun and Bradstreet Standard Three Year Norm Report (Published by Dun and Bradstreet Credit Services) [end strikethrough] .

Authority: Section 14530.5(b), [begin underline] 14536, and 14536.1, [end underline] Public Resources Code. Reference: Sections 14501(f) and (g), 14518.5 and 14575(a) and (b), Public Resources Code.

⁴ Proposed Regulation Text has been illustrated for greater accessibility. Proposed changes are illustrated with additions in underlining and the following bracketed text: [begin underline], [end underline], to show where the new text is being added. Proposed text for deletion (repeal) is shown in strikethrough with the additional bracketed text [begin strikethrough] and [end strikethrough] to denote the beginning and end of stricken text.