

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 by email to regulations@calrecycle.ca.gov or by mail to:

Vivian Cruz

Processing Payment Emergency Regulations

Department of Resources Recycling and Recovery, Regulations Unit

1001 "I" Street, MS-24B

Sacramento, CA 95812

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 **October 21, 2022** when the emergency regulations are posted on OAL's website. The public comment period will close on **October 27, 2022**. Written comments should be sent to OAL and the Department and received before the close of the public comment period, no later than 12:00 midnight on October 27, 2022. 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: <https://calrecycle.ca.gov/Laws/Rulemaking/>. The rulemaking file is also available for review during normal business hours at the Department, 1001 "I" Street, 24th Floor, Sacramento, California. Please contact the agency contact person, Vivian Cruz, at (916) 341-6581 if you wish to review the rulemaking file in person.

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

If you have any questions regarding this proposed emergency action, please contact Vivian Cruz, at (916) 341-6581 or regulations@calrecycle.ca.gov.

FINDING OF EMERGENCY

The adoption of these regulations is deemed to be an emergency pursuant to Public Resource Code (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 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 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 2023, 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 stable return on investment that is consistent with the return rate for other types of investments and contracted government services.

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-six 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.

The Dun and Bradstreet Report discontinued publication of the index value for scrap and materials waste industry index in 2019. The Department enacted emergency regulations to set the reasonable financial return to ten percent for calendar year 2020, 2021 and 2022. To address the negative reasonable financial return, the historical instability of the Dun and Bradstreet index, and in response to feedback from industry that the Dun and Bradstreet index used to determine the reasonable financial return was not an accurate reference for the profitability of a recycling center, a ten percent reasonable financial return was chosen as it provides a financial incentive comparable

to investing funds in other business ventures or stocks and is the same as rates paid by other government entities for similarly contracted work.

The Department is in the process of permanent rulemaking. PRC section 14575(a) requires that the processing fee and processing payment rate be set on or before January 1. With the permanent rulemaking at the stage of preparing for initial submission to OAL, the Department is pursuing emergency rulemaking to ensure that the desired rates are set for calendar year 2023. This emergency rulemaking will set the reasonable financial return for calendar year 2023 at ten percent for all recyclers.

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

CCR 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.

AUTHORITY

These regulations are submitted pursuant to the Department's authority under Public Resources Code (PCR) 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 14501(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.

PCR section 14501(f) 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 (PCR section 14501(g)). PCR Section 14518.5 defines the term “processing payment.” PCR 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. In 2017, for the first time since the BCRP began using the Dun and Bradstreet index in 2001, the reasonable financial return was a negative value. 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 that set the reasonable financial return to 11.5 percent for non-rural recyclers and 16.6 percent for rural region recycling centers for calendar year 2018 and 2019. A ten percent reasonable financial return was set for calendar years 2020, 2021 and 2022.

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 2022 and seeks to do the same for calendar year 2023 in place of the discontinued Dun and Bradstreet index utilized in the regulations.

Ten percent is commonly used as a benchmark for a reasonable rate of return on investment. The average annualized return for the S&P 500 since its inception in 1926 through 2018 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' Covered Electronic Waste (CEW) Recycling 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 CEW recycling program, the Department 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 financial return 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.

¹ "What is the Average Annual Return for the S&P 500"; retrieved from Investopedia Average Annual Return (Attachment 3)

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

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

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 in order to implement statutory mandates of PRC section 14575. 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 proposed amendment achieves the objective of the authorizing statute to provide a reasonable financial return for recycling centers. The proposed amendment provides the following benefits that are aligned with this objective:

- A ten percent reasonable financial return provides a competitive return to entities investing in and operating beverage container recycling programs as compared to other investment opportunities.
- A fixed reasonable financial return is more stable than a fluctuating reasonable financial return resulting from the current regulation which entails the risk of applying a negative return and adds consistency to the processing payment amount provided to recyclers.
- Certified recyclers will receive an additional \$11.33 million annually in processing payments as compared to the average three percent reasonable financial return determined from Dun and Bradstreet.
- CalRecycle will not have to pay an annual fee for the report containing the

financial return rate.

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.

In comparison to the historical reasonable financial return average of three percent, a ten percent reasonable financial return will provide an additional \$11.33 million in processing payments to recyclers funded by \$9.14 million from the Fund which is financed by unredeemed CRV deposits and a \$2.63 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 63 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 \$482,000 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:

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)

Investopedia: "What is the Average Annual Return for the S&P 500?" retrieved from: Investopedia Average Annual Return (See Attachment 2)

2019 Federal Acquisition Regulation Section 15.404-4 Contract by Negotiation: Profit; retrieved from: Federal Acquisition Regulation (See Attachment 3)