

# **Response to Challenges to Washington's 2009 Preliminary Return Share List**

On May 31, 2007, the Washington State Department of Ecology (Ecology) published the 2009 Preliminary Return Share List for Washington's Electronic Product Recycling Program. This program is being developed as required by state law (RCW 70.95N) for the recycling of computers, monitors and televisions.

The Preliminary Return Share List provided the names of manufacturers of electronic products covered by the law's requirements and the brand names of those products that Ecology would attribute to each manufacturer. This list also assigned a total estimated percentage, or expected return share, to each manufacturer. This list and other Preliminary Return Share information can be found at <http://www.ecy.wa.gov/programs/swfa/eproductrecycle/returnShare.html>.

Manufacturers had the opportunity to submit a formal challenge to the information Ecology published in the 2009 Preliminary Return Share List. Five challenges were received. Below is a summary of each of those challenges and Ecology's response to each challenge and action taken, if any.

## **1. Thomson, Inc.**

### *Summary of Challenge:*

Ecology attributed three brands to Thomson, Inc. (RCA, Thomson, and Proscan) and that allocation is unfounded. According to RCW 70.95N.020 (14), a manufacturer is defined, in relevant part, as someone who "manufactures or has manufactured a covered electronic product under its own brand names for sale in or into the state."

Thomson states that the TV consumer electronics business under the RCA brand has been owned by three companies over the course of its lifetime: General Electric, Thomson, and TTE Technology. As a result, Thomson asserted that the correct allocation of preliminary return share for RCA branded TVs is as follows:

RCA TVs manufactured on or before September 28, 1987:	GE
RCA TVs manufactured between Sept. 29, 1987 & July 31, 2004:	Thomson
RCA TVs manufactured on or after August 1, 2004:	TTE Technology

Similarly, Thomson licensed the Proscan mark to a manufacturer unrelated to Thomson. The correct allocation of preliminary return share for the Proscan brand is as follows:

All Proscan sets manufactured on or before September 2006:	Thomson
All Proscan sets manufactured on or after October 1, 2006:	ON Corporation

And finally, Thomson has never manufactured or sold a Thomson branded product in the U.S. As a result, Thomson can not be held legally responsible for "Thomson" branded products.

*Ecology's Response:*

According to Thomson, Inc.'s 2006 Manufacturer Registration form, as well as a variety of other commonly available sources, Thomson Inc. is the present owner of the RCA and Proscan brands. The Washington State Legislature defined manufacturer as the brand owner. Therefore, Thompson is fully responsible for the collection, transportation, and recycling of the RCA and Proscan brands under the terms of RCW 70.95N.

The law does address successors in ownership by stating, "Any person acquiring a manufacturer, or who has acquired a manufacturer, shall have all responsibility for the acquired company's covered electronic products, including covered electronic products manufactured prior to July 1, 2006, unless that responsibility remains with another entity per the purchase agreement and the acquiring manufacturer provides the department (Ecology) with a letter from the other entity accepting responsibility for the covered electronic products." See RCW 70.95N.100. Thomson did not provide information to document a successor in ownership.

Thomson is the current and registered owner of the RCA and Proscan brands. Ecology will continue to assign the return shares of those brands to Thomson.

After further research of the Thomson brand, Ecology was unable to determine if a covered electronic product with that brand ever existed. As a result, the Thomson "brand" and the 4,285 lbs of covered electronic products attributed to it in Washington's Preliminary Return Share documents have been placed on the Orphan List for the 2009 Final Return Share list.

## **2. Silicon Graphics, Inc**

*Summary of Challenge:*

The challenge stated that SGI sales data for the last two years indicates there were no SGI monitors sold to businesses in the State of Washington. SGI has always sold exclusively business to business. SGI's high-end systems are not intended for use in households under any circumstances, however, SGI recognizes that there is a remote possibility their products could show up in household wastestreams. SGI stated that if any of their monitors do turn up in the WA waste stream, they will assume complete financial responsibility for their recycling. However, SGI does not agree with their preliminary return share estimated at 26 lbs or 0.001%, by the State of Washington.

*Ecology's Response:*

The rules developed to implement the law are clear in that regardless of where or when covered electronic products are sold, if those products appear in the return share, the manufacturers must participate in a recycling plan. Ecology used the best data available on return share from other states to develop Washington's Preliminary Return Share List. The fact that SGI had one unit show up in those collection events reflects SGI's statement that while their monitors were not intended for households, they can still show up in consumer collection events. As with other manufacturers, SGI is responsible for its products at the end of their useful life.

It is also important to note that the definition of covered entities in RCW 70.95N is not limited to just households, but rather also includes small businesses, small governments, charities and school districts.

No changes were made to SGI's return share assignment as a result of this challenge.

### **3. IBM Corporation**

#### *Summary of Challenge:*

IBM's preliminary return share of 3.82% is arbitrary and not reflective of IBM's true return share in Washington State in 2009. Ecology's estimate is not in accordance with the requirements of the state of Washington's 2006 law on Electronic Product Recycling, Chapter 70.95N.210.

IBM strongly rejects the use of return share count information from pilots and studies done three years ago to allocate collection responsibilities for a program that will not even start until 2009. Three year old pilots and studies are arbitrary predictors for 2009 return share and provide a highly skewed picture of IBM's return share.

IBM proposed two alternative calculations:

- A. Historical Sales Data – IBM believes that it is more reasonable and accurate to use historical sales data to project 2009 returns. One can assume that personal computer (PC) returns in 2009 will be seven (7) years old on average (a commonly used assumption). Thus an appropriate indicator for IBM's 2009 consumer PC return share would be IBM's U.S. consumer market share in 2002, which was 0.54%. IBM believes that this highly pertinent sales data should not be overlooked by Ecology.
- B. Timely Return Share Data – If not possible to use historical sales data, IBM requests that Ecology conduct a sampling of computer returns in the second half of 2008 to gain more recent and accurate data on return share and assign responsibilities based on this more current data.

In addition, IBM clarified that Ecology had incorrectly placed Aptiva on the Orphan List. Aptiva is an IBM brand currently registered in Washington's program.

#### *Ecology's Response:*

The use of historical sales data as proposed by IBM has some merit, but it is not feasible for the task of determining return share in the very dynamic and growing markets for computers, monitors and televisions. Some of the brands listed in the 2009 Preliminary Return Share List were not in existence in 2002 so there is no 2002 sales data for those brands. Furthermore, historic sales data for a single year is not a good predictor of the composition of brands for the many different types of products that will enter the recycling system each year. Ecology believes the existing return share data used to develop the Return Share List is the "best available information regarding return share data" for the first year of the program as required by law (RCW 70.95N.190).

Ecology thanks IBM for the correction regarding the Aptiva brand. The Aptiva brand and the 370 lbs of covered electronic products attributed to it have been added to the brands for which IBM is responsible.

#### **4. JC Penney Corporation**

##### *Summary of Challenge:*

Approximately 10 years ago JC Penney discontinued sales of televisions with the brand names attributed to it on the Preliminary Return Share List (JC Penney, Penncrest, and Accu Scan). Last year in Maine, only 18 televisions with JC Penney brands were collected for recycling.

Many of the manufacturers assigned orphan share responsibility in Maine are also on the Washington State 2009 Preliminary Return Share List. In Maine, these manufacturers have either been assigned the same or a higher orphan pro rata share as JC Penney, but in Washington they are given a lower preliminary return share (about half or even less). Accordingly, JC Penney requests that their return share be made comparable to these lower ranked manufacturers, namely at least half of the currently stated 0.97%.

##### *Ecology's Response:*

The return share data Ecology used to develop the Washington State 2009 Preliminary Return Share List is a compilation of data from four states that recorded brands for all four product categories covered by Washington's law: televisions, monitors, desktop and portable computers. The return share data from Maine was not used by Ecology because the Maine program does not have the same scope of covered electronic products as the Washington program. In addition, the compilation of data from four states was determined by Ecology to be a better representation of return shares expected in Washington than the data from any single state.

The assignment of orphan share responsibility in the Washington State 2009 Preliminary Return Share List is pro rated based on a manufacturer's return share of its identified brands. Ecology believes this is the most equitable means for assigning orphan share responsibility in Washington.

No changes were made to JC Penney's return share assignment as a result of this challenge.

#### **5. ToteVision**

##### *Summary of Challenge:*

The ToteVision that previously manufactured products containing cathode ray tubes went bankrupt. The new ToteVision only makes LCD monitors. Based on annual sales to customers in Washington State, ToteVision's preliminary return share should be 0.002%, not 0.02%.

The challenge included a copy of a court order filed on January 18, 1991, in Bankruptcy Court in Seattle, Washington. This court order allowed the sale of the ToteVision trade names, trademarks and customer lists to the current owner, "...free and clear of all liens, interests and encumbrances..."

*Ecology's Response:*

As has been stated previously in this document, RCW 70.95N.190 directed Ecology to develop the 2009 Final Return Share List for Washington based on the best available return share data.

The information provided to support the claim that the current owner of the ToteVision brand is only responsible for LCD monitors does not meet the criteria set by law. RCW 70.95N states that, "Any person acquiring a manufacturer, or who has acquired a manufacturer, shall have all responsibility for the acquired company's covered electronic products, including covered electronic products manufactured prior to July 1, 2006, unless that responsibility remains with another entity per the purchase agreement and the acquiring manufacturer provides the department (Ecology) with a letter from the other entity accepting responsibility for the covered electronic products."

The court order does not relieve the purchaser and current owner of the ToteVision brand of all liabilities associated with the brand. Also, without a letter from another entity claiming responsibility for CRTs with the ToteVision brand, Washington law is clear that the responsibility for covered electronic products remains with the brand owner.

No changes were made to ToteVision's return share assignment as a result of this challenge.

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