David Weinberg
Wiley Rein LLP/Counsel for Battery Council International

Electronics Waste and Spent Lead Acid Batteries Capacity Building Workshop
4-6 December 2007: Tijuana, Mexico

Title of presentation: The US SLAB Regulatory Framework

I am with a law firm in Washington and I also serve as counsel for the Battery Council International, which is a trade association for lead battery manufacturers, which is why I'm here.

What I do want to talk to you about today is the U.S. lead acid battery recycling program, the regulatory context in which it operates. I'm kind of like the sandwich here, the meat in the sandwich I suppose, having the governmental people from both Canada and Mexico on either side of me, I'm in the middle telling you what goes on in North, in the North American central area between Canadian and Mexican authorities, and it's a complicated regulatory scheme, but it affects activities whether they're in Washington, DC or elsewhere in the United States or in Canada or in Mexico. And it's important in understanding this scheme to understand the policy issues that are being balanced out within the scheme.

Obviously, one recycles because one wants to reuse valuable materials. I doubt that I have to tell people in this room that the price of lead is at near all-time highs. 10-15 years ago we were talking about lead at prices that barely covered and sometimes did not cover the cost of recycling in the neighborhood of 30 cents a pound. I haven't looked today but I suspect the price of lead at the London Metal Exchange is somewhere about $1.30 to $1.40 a pound. Today it's been as high as $1.80 a pound in the last six weeks. So clearly there is a valuable material here to be recycled. Secondly, and very important and particularly important for those of you who are thinking about bringing spent batteries into a new area for recycling is the need to avoid environmental problems and disasters. When the United States Superfund Program was first established a little more than 20 years ago, a large number of the hazardous waste sites that subsequently had to be cleaned up, were locations in which recycling purportedly had been done and had not been done very well. Under U.S. law, and it has had impact in Mexico and Canada as well, the companies that were the sources of those purportedly recycled materials were held responsible for the costs of cleaning up those inadequate recycling facilities. So this became a very strong incentive to encourage safe recycling and environmentally sound recycling of the batteries. Third, we have always been interested in – and it seems odd right now with the price of lead where it is – but we have always been interested in trying to ensure that recycling occurs regardless of the relative value of lead. The price of lead and like other commodities on the world markets goes up and down. When the price is $1.40 a pound, you don't have to provide many incentives to do recycling, but when the price goes down, there are needs to have incentives in place to assure that that recycling

occurs, and that also is a policy that has been reflected in the U.S. system. And finally, a fourth policy is the importance of lead to lead battery manufacturers. At simplest level, lead is the single biggest cost element in a battery. A typical automotive battery, for example, weighs about 20-21 lbs. It has about 20-21 lbs of lead in it. Well, if lead is at $1.00 a lb, that means $20, if lead is at $1.80 a lb it means in the mid-thirties. Those batteries sell for, on the retail market, anywhere from $50 to $100 U.S., a little bit more some places. But you can see that the lead is a major cost element to the battery manufacturer who of course sells at wholesale, not at retail.

So there are three key elements in the U.S. regulatory scheme. First there are the regulations under the Resource Conservation and Recovery Act or RCRA. Those were first adopted in 1980. Those regulations were first adopted in 1980. In 1995, an additional set of regulations referred to as the Universal Waste Regulations were adopted, and these deal with smaller products that are used, generally on a household basis, and they do include certain kinds of lead-acid batteries. Now, interestingly, at the time those regulations were adopted, small sealed lead-acid batteries were being used in many consumer uses, particularly in camcorders. At this point in time, there is very little market for consumer use of small sealed lead-acid batteries. Those have been replaced by batteries with other chemistries, so we don't have as much interest in this universal waste rule from the lead-acid side as we did a decade ago when the rule was first adopted.

The second element goes to the liability concern that I mentioned before. Under our Super Fund statute, which was enacted in 1980, we have put the responsibility for cleanup of inadequately run facilities, which have become contaminated, on manufacturers of products which arrived in those locations. This was a matter of considerable concern to the battery industry and other industries and led to the enactment in 1999 of a specific exemption for recycling, an exemption that says that the manufacturer, the person who arranges for the disposal of the waste, is not responsible if he is sending this material to a properly permitted facility.

The third piece we have are state recycling laws which follow a very similar pattern, one which the industry has strongly endorsed around the country. So let me talk about all three of these things, and then at the end I want to come back and mention a little bit about export data and some of the flaws in the export data.

There are two fundamental sections of the U.S. regulations that deal with lead-acid batteries, spent lead-acid batteries. The first in the Code of Federal Regulations, and CFR refers to the Code of Federal Regulations, 40 means the volume of the Federal Regulations, and it is Section 266.80. In any event, 40CFR Part 266.80 is a specific provision that deals with lead-acid battery recycling. And it was adopted with the encouragement of the battery and secondary smelter industry in North America at the time that the RCRA Regulations were first adopted, 27 years. It essentially says that if the batteries are being collected and sent for recycling, the generator, the collector of the batteries, who is viewed as the generator of the waste, the collector of the batteries, is not subject to the very comprehensive, complex regulatory scheme that otherwise applies to chemical wastes and other hazardous waste disposal. The materials still have to be

packaged properly and shipped properly, but a lot of the paperwork and a lot of the other requirements that would be imposed on, for example, drums of chemical waste, do not apply to the used spent lead-acid batteries. However, when those batteries are sent to a secondary smelter for storage, they are regulated under RCRA to make sure that they are stored in a safe way. Now the actual operation of that secondary smelter is subject to lots of permitting, and I think you're going to hear lots about that later on, but that's not part of what we view as the lead-acid battery recycling regulatory chain. The recycling regulatory chain is designed to make it simpler to get those batteries back to the smelters for recycling, as I said that there is a second regulation, the so-called Universal Waste Rule adopted at 40 CFR Part 273 that deals principally with consumer-size products and it provides an alternative mechanism, but it is essentially the same thing, it is an exemption for these batteries. Bottom line, when batteries are being sent for recycling they have minimum regulation under the Waste Management Regulations in North America. These regulations by and large are delegated to the states to enforce. So although U.S. EPA has established the regulations, California or Texas on the southern tier actually is enforcing these regulations in all the states on the northern tier. Of course they are enforcing the regulations there. There are a handful in which the federal government actually regulates.

As I said, another strong incentive for recycling lead-acid batteries and doing it well was the federal Superfund statute, the statute that makes people who arrange for disposal of hazardous materials, responsible for the cleanup costs associated with those materials if they are mishandled, and many battery companies were required to pay millions and millions of dollars to clean up locations which they had completely lawfully sent materials over the years for recycling, when this statute was passed many years after those activities had occurred. And we and others – I know there is going to be a speaker here from the Institute for Scrap Recycling Industries who is a strong proponent of this – worked to get a provision added into the law to incentivize safe recycling. And this provision which is in section 127 E of the Superfund law – Section 127 is a broad recycling section, E deals with lead-acid batteries in particular – says that if a generator of the waste, in this case spent lead-acid batteries, sends those materials to a facility that is in compliance with the regulations and has an "objectively reasonable basis" to believe that there will be recycled, recycling there and has exercised reasonable care, that that entity cannot be held responsible for the conditions should that site later become a cleanup target. Now these are all carefully crafted lawyers' words, and I suspect that I am one of the few lawyers in the room today, and I can see people's eyes glaze over when they see it, but I will explain to you that there are about four pages of explanation in this statute of what is an objectively reasonable basis to believe that there will be recycling and what is the standard of care that is exercise of reasonable care. But the bottom line at the end of the day is, if you are acting responsibly as a battery collector in North America and send the materials for recycling at a legitimately well-run facility, you do not face federal Super Fund liability. And that was a very, very important incentive to see good recycling.

And then the third piece was the first bit of product stewardship law. We started promoting lead-acid battery recycling from BCI almost 25 years ago and we developed a

statute, a concept that is now in place in virtually, well in 37 states. Most of the U.S. population lives in states that have formally adopted this law, and even those who don't live in states where it's formally on the books, are following it. It actually was included a decade or so ago in a federal law that dealt with lead issues which ultimately didn't pass for other reasons, but there was a broad consensus amongst the battery industry and the environmental community that this was a logical, rational, sound approach to recycling lead-acid batteries. I show this here not because you are going to read it, but to say this is what the simple legislation looks like, it is available in detail on the Battery Council's website, which is www.batterycouncil.org, and this material I'm giving today will be put up there as well as a lot of other useful information. But here are the key elements of this law, which as I say has been adopted in most states in the United States. First, it bans disposal of lead-acid batteries in landfills and other waste management facilities…disposal facilities. Second, it requires a deposit in lieu of trade. Now the specific mechanisms here vary a little bit from state to state. Some of the state laws, which have been on the book for five years, say the deposit shall be $5.00. Others say the deposit shall be at least $5.00 or at least $10.00, the concept being if you buy an automotive battery or another lead battery, but obviously the biggest part of this marketplace is lead batteries, if you buy an automotive battery, you pay price A, but if you bring back a junk battery - I know the technical term is SLAB but we still call them junks – if you bring back a junk you get your deposit back. Now this works very well and in fact given the current price of lead, the deposits tend to be much higher today than just the minimums that are established by these statutes. One of the ironies is we have a half a dozen or so states whose statutes say the specific amount of the deposit, and we have some people who are saying you can't pay a larger deposit, which of course is completely counterproductive to encouraging the recycling of the batteries, and it's something we're working on, trying to persuade the few states that have taken that view that there is any such limitation. But in any event, the third element of this rule is that retailers are required to take back the junks. That is, if you sell lead batteries, you have to take back a battery trade unit in trade. In fact, most of the statutes say you have to take as much as two for one. Now, with batteries of the value they are today, this is obviously less important than it was when batteries, when lead was at 27 1/2 cents a pound. But it means that no matter what happens to the price of lead, and it will go back down, no matter what happens to the price of lead, this system is still going to work, there's still going to be a deposit of some amount that will be an incentive for the consumer. The statute further says that the wholesalers and manufacturers must take back the junks from the retailers, so the retailers are not stuck holding a pile of these things. The one incentive that the retailers get is to keep the, in most states, to keep any unclaimed deposits. And of course the manufacturers work out commercial arrangements with the retailers that address the fact that they are getting junks back and give credits for those things, but that's done on a company-by-company basis, not by virtue of a mandate. And finally the law requires that all those junks go back to a properly permitted secondary smelter recycling facility.

This is a map (on slide) that shows you the states which have, as a matter of state law, something along the lines of what I have just described for you. The largest state there that does not have the model is Ohio. The Ohio legislature, the Senate, is going to

consider that bill probably his week. So Ohio is very likely to be a blue state on this map in the next several weeks. And if you look at the states and you know about the population of the United States, you can see that the vast majority of the population lives in states which have adopted the BCI model.

Now lastly, there's my information, I've given you the Battery Council's website. It's www.batterycouncil.org.

But lastly I want to tell you about one very, very important issue to this audience. And that is the unreliability of the U.S. customs export data on export of junk batteries – SLABs if you will – to Mexico. Those of you who have followed this information know that over the last couple of years there was a huge jump in the reported exports of SLABs to Mexico. The Battery Council thought that that was probably wrong and raised this question with the Bureau of Customs, which is the agency that collects that data. They have been looking at it for several months and have told us within the last ten days that those numbers are being corrected. It's not a minor correction. The data which are currently available from Customs, but they haven't published them yet – I have the data and I will be happy to give them to anybody who gives me a card afterwards or whatever, gives me their contacts – are going to show a reduction in the reported exports of lead-acid batteries from the United States to Mexico in 2004 by 81% and a reduction in the number of units exported from the United States to Mexico in 2005 – which is the last year in which we have data – of 87%. So those numbers, if you've been using those numbers in your business decisions and business planning, you want to rethink if you were making any reliance on those numbers. What essentially has happened for those of you who work on the details here, is that they have substantially reduced the units that were in the HTS code, the 2500 code, which is the one that deals with waste and scrap sent for recovery, and very modestly increased the numbers that were in the spent lead-acid battery number, that's the 0540 number, and although I doubt there will ever be any formal announcement of this, my understanding is that for the two years that were in effect here, there were some reports that were made by weight, which were understood to have been made when they did the data to refer to units and if you have 20 lbs of lead in a battery and you've reported 20 instead of one, you end up with a reduction that gets you very close at the end of the day to these 80+% corrections. So that will be formally announced I'm sure very quietly at some point because nobody likes to admit that they make a mistake, but that data is now available for anybody who would like to obtain it.