



Product Stewardship

Larry Burke

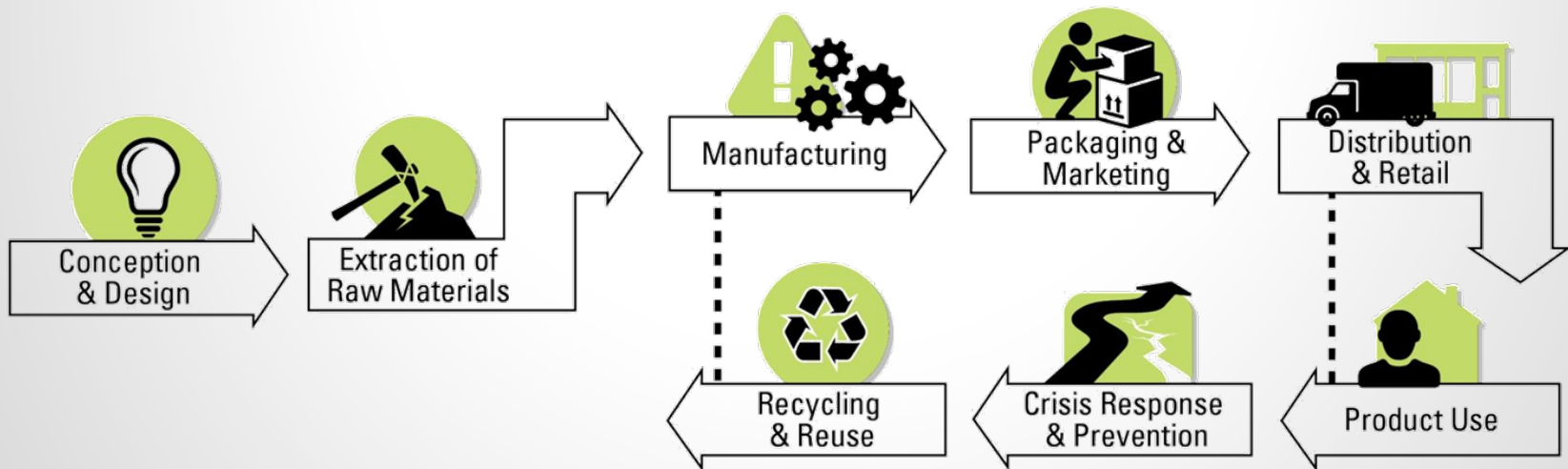
David Rucker

Peter Sergienko

Product Stewardship



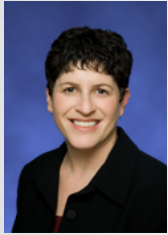
We advise clients through the entire life cycle of a product.



Product Stewardship Team



Conception
& Design



Sheila Fox Morrison (PDX):

Intellectual property;
trademark; copyright; brand
protection; licensing



Extraction of
Raw Materials



Michael Jungreis (ANC):

natural resources
transactions, property,
commercial and corporate
including mining and oil and
gas; complex real property
and commercial
transactions; construction.



Manufacturing



Chip English (DC): FDA (food)
& State Health Departments –
labeling and advertising
regulatory compliance and
audits



Packaging &
Marketing



Nancy Felsten (NY): Packaging
phase issues with specialty in
consumer products, beauty,
OTC monograph products



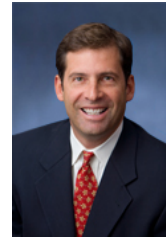
Ronnie London (DC): FCC and
FTC compliance; online and
telephonic marketing &
advertising, including privacy

Product Stewardship Team



Burt Braverman (DC)

Export control compliance, including licensing, due diligence, compliance reviews, government investigations



David Rocker (PDX)

Products liability, children's toys, FDA – medical device



Blake Robinson (PDX)

CPSC and other litigation



Shelly Spandorf (LA)

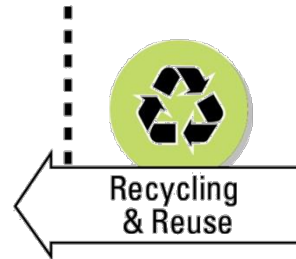
Franchise, product distribution and alternative strategies for expansion and counseling



Andy McStay (PDX)

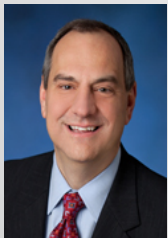
Products liability, insurance and indemnity litigation

Product Stewardship Team



Allison A. Davis (SF)

Antitrust counseling and litigation including distribution issues and mergers, litigation and dispute resolution in food & beverage (food labeling) issues



Dave Ernst (PDX)

Product Recalls; food safety; crisis response



Peter Sergienko (PDX)

Environmental management systems; hazardous waste and recycling



Kerry Shea (SF): Hazardous Waste, universal waste; defense of DOJ and DA enforcement actions; California Unfair Competition and Prop 65 Claims



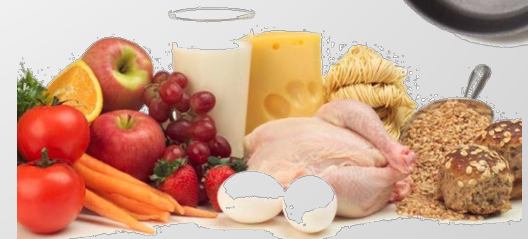
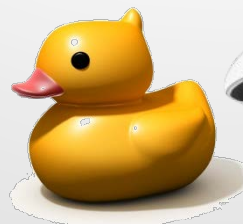
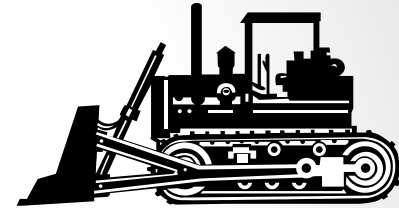
Larry Burke (PDX):

Hazardous waste, radiation, and recycling issues; electronics; pharmaceuticals; pesticidal claims; environmental health and safety

Clients



- Beauty
- Communications
- Construction
- Consumer electronics
- Consumer products
- Cookware
- Food & beverage
- Footwear and apparel
- Heavy equipment
- Medical device
- Military
- OTC monograph products
- Pharmaceutical
- Toys





Products Liability

David Rocker



Products
Liability
Common Law

Products
Liability
Regulatory

Common Law of Products Liability



Strict Liability

Design Defects

vs.

Manufacturing
Defects

Design defect standards



- Risk/Utility Test



- Consumer Expectations Test

How Plaintiffs Pursue Parties

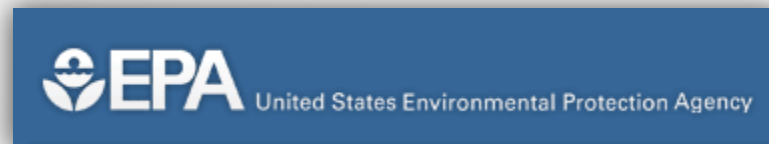
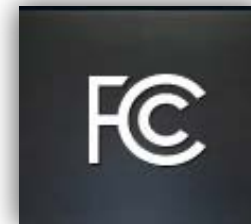


"Seller" States

vs.

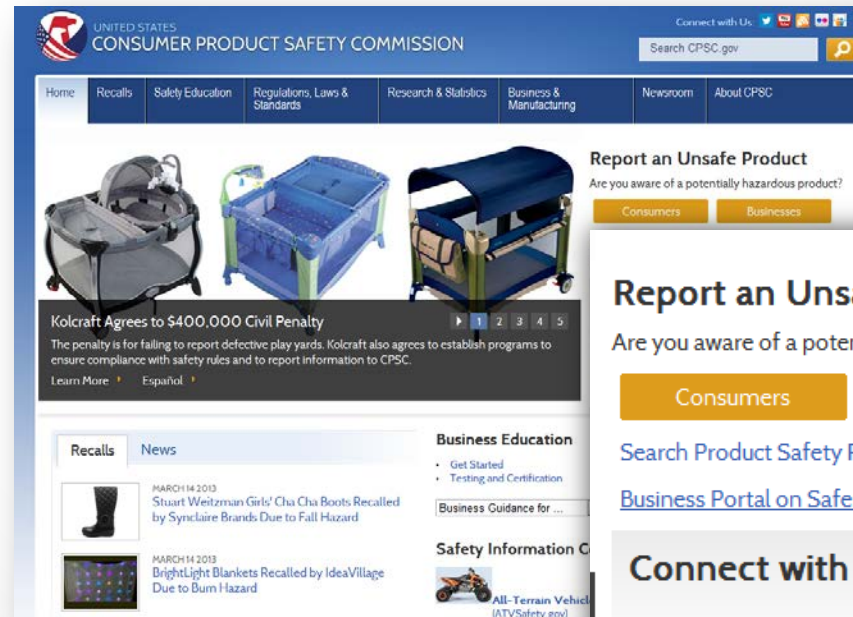
"Manufacturer"
States

Regulatory Law

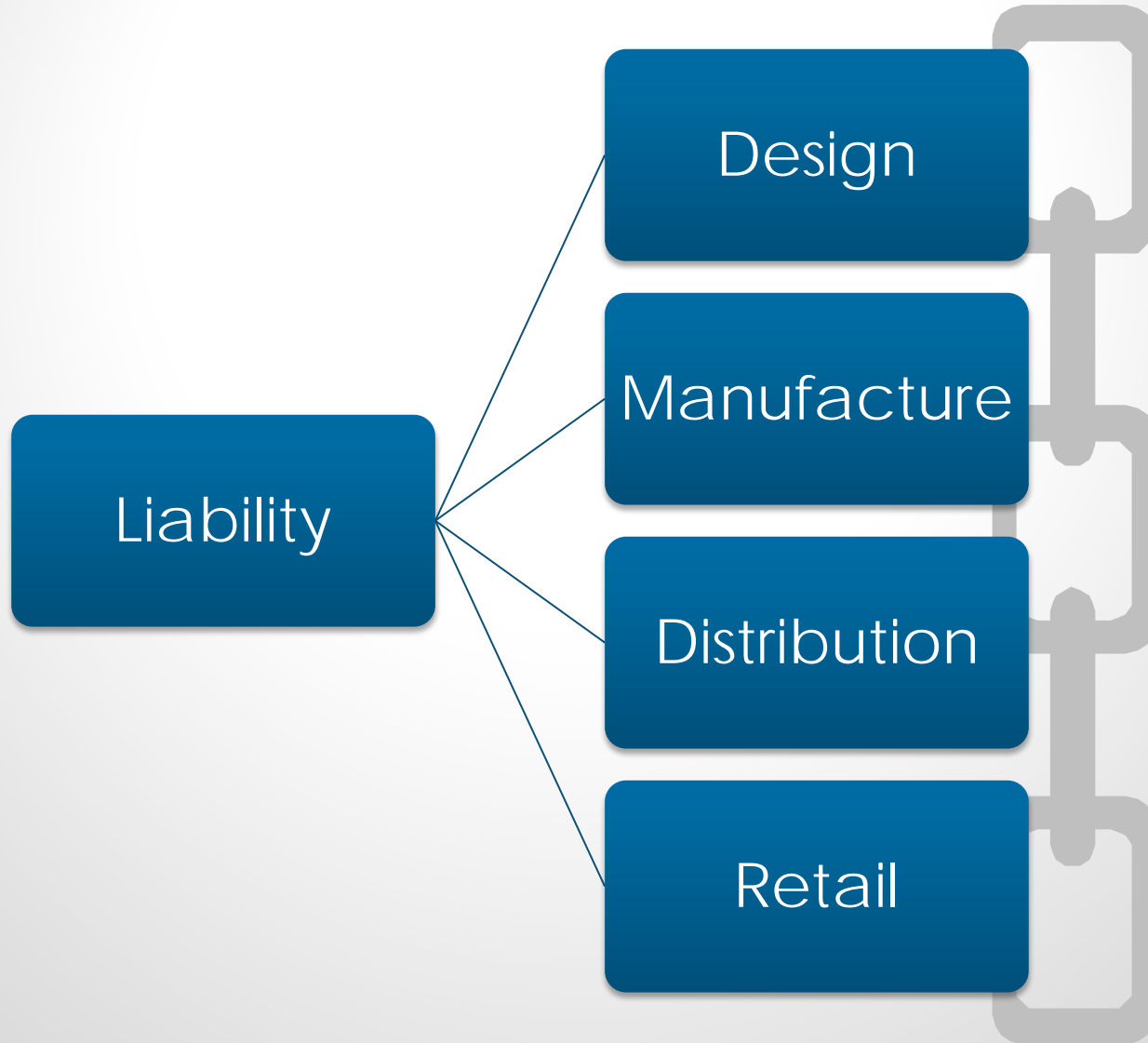




Reporting and Recall Issues



Common Law and Contractual Indemnity



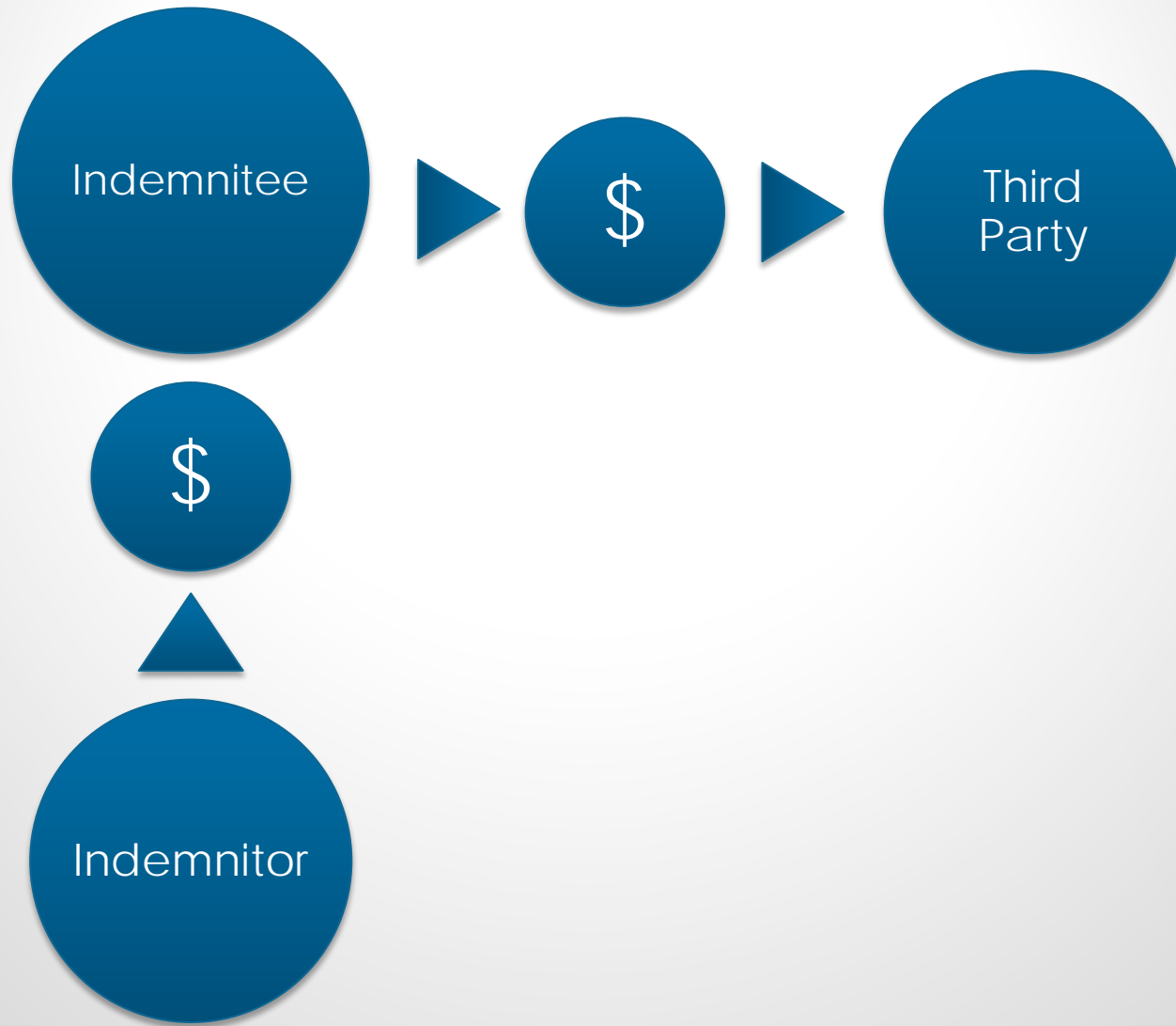


INDEMNITY BASICS

Indemnity – Definition



- An indemnity clause allows you (the “indemnatee”) to seek reimbursement (“indemnity”) for money you are forced to pay to a third party as a result of an injury, physical or monetary, caused by the party from whom you seek the reimbursement (the “indemnitor”).





“Indemnity” v. “Defense”

- The obligation to indemnify and the obligation to defend are two separate concepts.
- General rule – unless the indemnity clause also includes an express obligation to defend, the party who is providing the indemnity has no obligation to provide, nor ability to insist on providing, the defense.



"Active" v. "Passive" Negligence

Passive
negligence is
found in mere
nonfeasance

- Failure to discover a dangerous condition or to perform a duty imposed by law

Active
negligence is
found if an
indemnatee has

- Personally participated in an affirmative act of negligence
- Was connected with negligent acts or omissions by knowledge or acquiescence
- Has failed to perform a precise duty which the indemnatee had agreed to perform

Common Contractual Indemnity Issues



- A. Manufacturer/Retailer
- B. Asset Purchase Agreements
- C. Reseller Agreements

Manufacturers v. Retailers



Historical Norms

- Plaintiff can sue both
- Each liable for own “active negligence”
- Each entitled to indemnity for others “active negligence”

Problems

- Defense costs
- Judgment-proof manufacturers
- Plaintiff’s tactical advantages – defect removal

Modern Trends

- Heavy-handed contract indemnity
- Seller’s indemnity statutes

Indemnity Gaps and Other Practical Problems



- Contract provisions generally cover personal injury or property damage as a result of a design defect or a manufacturing defect
- Insurance generally exists for these risks – Completed Products Coverage
- Often do not cover:
 - A. Warranty claims
 - B. Regulatory liability – recall, sanctions
 - C. Consumer protection claims – Prop. 65
 - D. Unknown defects/failures
 - E. Purely economic loss

Real Life Examples



Snack Alliance

- Acrylamid/Prop. 65

Meyer Corp.

- Regulatory

Iris Vineyards

- Unknown cause of loss

Ridgecrest Development

- Insolvent indemnitee
and failure to
additionally insure



Additional Insured

Larry Burke

Additional Insured ("AI")



- Used to obtain benefit from Commercial General Liability ("CGL") of party doing work
- Protects against vendor, contractor or subcontractor negligence to a customer



AI coverage may arise from:

- Specific endorsement
- Blanket endorsement where contract requires coverage (“only with respect to liability arising out of ‘your work’”)
- Schedule attached to blanket endorsement (“only with respect to liability arising out of your on going operations performed for that insured”)
- Demand to see actual endorsement not just “proof” of insurance

Contractual Indemnity



- Scope may indemnify:
 - For entire liability except sole negligence
 - Except for sole or active negligence
 - Limited to liability caused by indemnitor
 - Some limits may apply to specific indemnities in various jurisdictions



-
- If there is a claim against an AI, the AI needs to :
 - Tender to the insurer
 - Seek indemnification from the indemnitor/insured
 - Put its own insurer on notice



- Must the injury “arise out of” indemnitor’s work?
- One ISO form only covers ongoing operations
- Is the language limited to strict liability for indemnitor’s work?
- Can AI be covered if indemnity is invalid?
 - Yes, the obligations are entirely separate

Defense Cost Issues



- Who controls the defense of AI?
- How are costs allocated between insurers?
 - California causation and Oregon contribution Rules
- Confusion in “Other Insurance” clauses
- What does “primary and noncontributory” mean?

M&A Impacts on Insurance



- Rights may pass to merged company (Asset Purchase least likely to do so)
- Insurance Policy may require consent
 - Court may or may not require such consent
 - Holding may be based on whether insurable event has already occurred
- May even obtain coverage for events outside scope of original coverage



Managing E-Waste

Peter Sergienko

E-Waste Issues



- Application of EPA hazardous waste rules
- State Regulation of E-Waste
- State Electronic Device Recycling Laws



EPA Rules



- Generally, under EPA rules, most “e-waste” in the U.S. is either:
 - Non-hazardous waste
 - Non-waste
- EPA hazardous waste exclusions and exemptions apply to encourage reuse and recycling



Resource Conservation and Recovery Act “RCRA” Exclusions & Exemptions



- To be regulated under RCRA, a material must first be a “waste”
- Wastes must be evaluated to determine if they are hazardous wastes

RCRA Incentives for Reuse & Recycling



- Equipment for potential reuse is not waste
- Waste can be made non-waste by processing – i.e., raw materials/commodities can be produced



Hazardous Waste Exemptions



- Household wastes, including any electronics from households
- Scrap metal for recycling
- Whole circuit boards for recycling
- Precious metals for recycling



Hazardous Wastes



- Hazardous Wastes Exempt unless:
 - Generated by non-households
 - Generated at more than 220 lbs./mo.
 - Have a hazardous waste “characteristic,” e.g., fail TCLP. Examples:
 - CRTs
 - Some laptops, cell phones, etc.
 - Sent for disposal

Wastes Eligible for Special Handling



- Universal wastes are hazardous wastes with streamlined regulatory controls to facilitate treatment/recycling
 - Certain batteries
 - Lamps and other mercury-containing devices
 - Aerosol cans
 - Some states classify e-waste as universal waste.



Universal Waste Regulations



- Universal wastes become wastes when “discarded” (stored prior to disposal)

- Universal waste “handlers”
 - Generate/receive/send
 - Large/small (5,000 kg); No disposal, dilution, or treatment
 - Register with the EPA and possibly state prior to accumulation threshold
 - File annual report and maintain records

Universal Waste Regulations



- Universal Waste Handler Benefits and Requirements
 - Accumulate up to a year
 - Proper storage/labeling
 - Maintain inventory system
 - Personnel Training
 - Respond to releases
 - Ship only to other handlers or destination facilities
 - Track Shipments and maintain records

State Consumer Electronics Recycling Laws



- Currently 25 states have enacted
- Place recycle obligation on consumers
- Coping with 25 different statutes:
 - What are “Covered Devices?”
 - Typical manufacturer obligations.
 - Typical retailer obligations.

States with Recycling Statutes



California	2003	North Carolina	2007
Connecticut	2007	Oklahoma	2008
Hawaii	2008	Oregon	2007
Illinois	2008	Pennsylvania	2010
Indiana	2009	Rhode Island	2008
Maine	2004	South Carolina	2010
Maryland	2005	Texas	2007
Michigan	2008	Utah	2011
Minnesota	2007	Vermont	2010
Missouri	2008	Virginia	2008
New Jersey	2008	Washington	2006
New York	2010	West Virginia	2008
		Wisconsin	2009

“Covered Devices”



- Simple descriptions, e.g. computers, televisions, monitors.
- More expansive descriptions, e.g., video display devices, desktop, notebook and laptop computers, monitors, keyboards, mice, peripherals, DVRs, cable boxes, cords.
- Definitions incorporating functions (high-speed data processing performing logical, arithmetic, or storage functions) or specific equipment, (CPUs, circuit boards)



Manufacturer Obligations



- Register all items and affix brand
- Pay registration fees and complete paperwork
 - Identify items that are not RoHS compliant (i.e., concentrations of lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBBs) and polybrominated diphenyl ethers (PDBEs) exceed standards

Manufacturer Obligations-cont.



- Participate in a state recycling program, an approved manufacturer group program, or create an approved in-house recycling program
- Educate public about recycling options
- Track results/keep records/meet goals
- File annual reports
- Maintain records

Retailer obligations



- Check approved manufacturer products lists prior to sale
- Sell only properly registered/approved products
- Distribute recycling information to customers at time of sale
- Some limited return/storage obligations (e.g., rechargeable batteries)



- Refurbish and reuse
- Value of Materials—less a waste and more towards a resource due to precious, rare earth and base metals including indium, lithium, bismuth, ruthenium, platinum, nickel and gold
- Keep recycling/processing in the U.S.
- Future US and State Regulation
 - More inclusive whether catch-all or component specific: all electronics with hard drive = DVR
 - EPA: voluntary programs/continue to leave it to the states?

