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Sent: Thursday, April 09, 2015 9:20 AM

To: Mattress EPR

Cc: Harley, Ashley@CalRecycle; Castagneto, Nicole@CalRecycle; Mike O'Donnell

Subject: ISPA Comments on Proposed Changes to Regulations to Implement the Used Mattress Recovery and Recycling Act

Please see attached comments from the International Sleep Products Association.

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April 9, 2015

Caroll Mortensen
Director
Department of Resources Recycling and Recovery
1001 I Street
Sacramento, CA 95812-4025

Dear Director Mortensen:

The International Sleep Products Association (ISPA) submits these comments to the California Department of Resources Recycling and Recovery (CalRecycle) regarding proposed changes issued on March 18, 2015 to Proposed Regulations for the Used Mattress Recovery and Recycling Program (the Proposed Changes).

ISPA is the trade association for the mattress industry. In 2013 ISPA created the Mattress Recycling Council (MRC), a 501(c)(3) non-profit organization, to implement and administer mattress recycling programs in states that have enacted mattress recycling laws. CalRecycle has certified MRC as a Mattress Recycling Organization (MRO) to implement the California mattress recycling program mandated by the Used Mattress Recovery and Recycling Act, as amended (the Act), codified at Cal. Pub. Res. Code Chap. 21.

Background

ISPA notes there are several provisions in the Proposed Changes that exceed the authority granted to CalRecycle by the Act. By operation of provisions in the proposed regulations, if CalRecycle deems the MRO's plan to be incomplete because it lacks non-statutory data, or the description provided does not meet with the agency's satisfaction, CalRecycle must consider the MRO's plan ineligible for approval. Without an approved plan, the MRO has not complied with the law. Thus, by mandating that the MRO's plan include something for which it has no legal authority to require, CalRecycle could well refuse to approve the MRO's plan for reasons not permitted by the Act, thereby subjecting the organization to possible penalties, fines, and other corrective action for having violated the Act.

But the underlying statute and general principles of California administrative law do not permit such a result.¹ The Act allows CalRecycle to disapprove a plan submitted by an MRO only if "the plan does not comply with this chapter." Cal. Pub. Res. Code, § 42987.3(b).

¹ As noted in ISPA's comments dated March 27, 2014 commenting on CalRecycle's draft regulations, in promulgating any regulation, California agencies must meet certain statutory standards. California's administrative procedures law requires that proposed rules be in harmony with, and not conflict with or contradict, applicable law. They must be supported by substantial evidence that the regulation is necessary to effectuate the purpose of the statute that the regulation implements. Finally, the regulations must be written so that their meaning will be easily understood by those directly affected by the rules. Our analysis is guided by these standards.

1. **§18962 (a)(2)(C)**

The Proposed Changes add the following to the goals, methods, and activities that the mattress recycling plan “shall ... contain”:

(C) Describe proper end of life management of used mattresses, including but not limited to, a description of how the program will prevent cross contamination of mattresses by bed bugs.

MRC objects to this Proposed Change because it exceeds the bounds of the Act. The Act requires neither the MRO nor the program to address the topic of bed bugs.

MRC recognizes that end-of-life management practices are important to the mattress recycling process, and that bed bugs can be a nuisance and are sometimes found in used mattresses. Therefore, MRC intends to require that all parties that handle discarded mattresses under the program, and that are under contract with MRC, to follow best practices with regard to end-of-life product management, including the prevention of bed bug cross contamination.

Therefore, we urge CalRecycle to modify this Proposed Change to read as follows:

(C) Describe proper end of life management of used mattresses, which may include a description of practices used by transporters and recyclers contracted by the mattress recycling organization to, including but not limited to, a description of how the program will prevent cross contamination of mattresses by bed bugs.

2. **§18962 (a)(2)(D)**

The Proposed Change reads as follows:

(D) Describe how the program will increase the quantity of materials recovered and recycled, and market development activities that will be conducted in order to ensure these materials will be used.

The Act authorizes the first part of this Proposed Change, which requires the plan to describe “how the program will increase the quantity of materials recovered and recycled.” However, the balance of the Proposed Change, which requires the plan to describe the MRO’s “market development activities that will be conducted in order to ensure these materials will be used,” exceeds the bounds of the Act.

In this regard, Cal. Pub. Res. Code, § 42987.1(d) provides that the plan include:

(d) *Methods to increase the number of used mattresses diverted from landfills, reduce the number of illegally dumped used mattresses, and increase the quantity of used materials recovered through this process and recycled for other uses.*

(Emphasis added.)

However, no provision in the Act requires the MRO to include in the plan any information regarding market development activities, let alone such activities that will ensure that the recycled materials will be used. As a practical matter, it would be impossible for the MRO to guarantee such a result.

The program at the outset must rely exclusively on existing scrap markets purchasing the recycled materials therefore it will be difficult to discuss market development activities at that time. In the future, the MRO may voluntarily undertake research or other programs to promote market development.

Since CalRecycle lacks the authority to require the MRO to include this information in the plan, we urge the agency to revise the Proposed Change to read as follows:

(D) Describe how the program will increase the quantity of materials recovered and recycled, ~~and~~ The plan may describe market development activities that will may be conducted in order to ensure increase the use of these materials will be used.

In addition, CalRecycle could add this concept to the annual report requirements set forth in §18964 of the proposed regulations (see comment #5).

3. **§18962 (a)(2)(E)**

The Proposed Change reads as follows:

(E) Describe how the program will provide convenient and efficient delivery of services without unnecessary duplication of effort and expense, including, but not limited to, contractual agreements.

This provision appears to be based on Cal. Pub. Res. Code, § 42987.1(i), which reads as follows:

(i) A description of methods used to coordinate activities with existing used mattress collecting and recycling programs, including existing nonprofit mattress recyclers, and with other relevant parties as appropriate, with regard to the proper management or recycling of discarded or abandoned mattresses, for purposes of providing the efficient delivery of services and avoiding unnecessary duplication of effort and expense.

The exact purpose of this Proposed Change is not clear. However, we understand that this change is intended to respond to public comments seeking information in the plan regarding convenient drop off and collection opportunities for various parties that may wish to participate in the program. Since the requirements above are already included in the Act we suggest adding the following language to provide further clarity and address the concerns raised in public comments:

(E) Describe the methods the MRO will use to coordinate activities with existing used mattress collecting and recycling programs, as required by § 42987.1(i). The plan may describe how the program will provide regular and convenient and efficient mattress collection and drop-off services. ~~delivery of services without unnecessary duplication of effort and expense, including, but not limited to, contractual agreements.~~

4. **§18962 (a)(2)(F)**

This Proposed Change reads as follows:

(F) Describe how consumers of mattresses in California will have a convenient opportunity to recycle and properly manage their used mattresses, including the number, location, and type of collection points in the program.

We note that the Act requires the plan to include information about how the MRO intends to inform consumers about drop off options. Specifically, as noted above, Cal. Pub. Res. Code, § 42987.1(n) provides:

(n) Providing outreach efforts and education to consumers, manufacturers, and retailers, for the purpose of promoting the recycling of used mattresses and options available to consumers for the free drop off of used mattresses.

We also note that virtually the same requirement set forth in Proposed Change (F) is already included in §18964 (b)(5) of the proposed regulations, which details requirements for the MRO's annual report. This is a much more logical point at which to require the MRO to report such information. Once the program is implemented and as it develops, the amount, location and types of collection points in the program will change.

This information will undoubtedly evolve after the plan is submitted, as the program implementation date approaches and thereafter. Additionally, by adding this requirement to the plan requirements, the MRO could be required to submit an updated plan every time this information changes. Therefore, we urge CalRecycle to delete this provision and instead rely on the virtually identical obligation in the annual reporting requirements.

Should CalRecycle nevertheless decide not to delete this provision in favor of covering the subject in §18962, we urge the agency to modify (F) to read as follows:

~~(F) Describe how consumers of mattresses in California will have a convenient opportunity to recycle and properly manage~~ In addition to describing how the MRO will inform California consumers about mattress drop off options as required by § 42987.1(n), the plan may describe consumers' options for conveniently dropping off their used mattresses for recycling, including the number, location, and type of collection points in the program.

5. **§18964**

As discussed above in comment #2, we suggest adding text on market development activities to the annual report section. We suggest a new provision be added to section §18964 worded as follows:

A description of market development activities, if any, that have been undertaken during the period covered by the annual report to increase the quantity of materials recovered and recycled.

6. **§18964 (b)(8)(A)**

The Proposed Change to this provision includes the addition of the following sentence:

When describing the uses for the recycled materials, the annual report shall identify the secondary markets and end uses of those materials.

MRC anticipates that in most cases, it will be possible to identify the secondary markets for recycled mattress materials. But identifying all of the end uses of those materials may prove difficult, if not impossible, because the materials may change hands several times before their final end use is known. For example, recycled fabric, foam, steel and wood sold to scrap dealers could be used in a number of different applications that are not known when the goods leave the recycler's premises.

MRC will require its contracted recyclers to disclose who is purchasing these materials and how they are processed. MRC will then include such information in its annual report. Therefore, it is reasonable only to require the MRC to provide information to which it has ready and convenient access from its contracted recyclers, and not to require it to include in its annual report information that it cannot readily obtain, compile, or verify.

In addition, the Proposed Change should make clear that the MRO is not being required to disclose in the annual report any data that a recycler might consider to be proprietary business information including, but not limited to, customer names, quantities, prices, trade secrets, etc.

Based on these considerations, we urge CalRecycle to modify the Proposed Change as follows:

(A) Quantitative information on subdivisions (b), (c), (d), (e), (f), (g), and (j) section 42990.1 of the Public Resources Code, including conversion factor(s), if used. When describing the uses for the recycled materials, the annual report shall identify, based on information provided by recyclers to the mattress recycling organization, the types of secondary markets and end uses of to which those materials are sold, and their potential end uses, if known by the organization. The organization shall not be required to provide any information that it, its contracted recyclers or other service providers considers to be proprietary business information including but not limited to customer names, quantities, prices, trade secrets, etc.

Please contact me if you have any questions regarding these comments.

Sincerely,



Ryan Trainer
President
International Sleep Products Association