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**Sent:** Thursday, March 27, 2014 3:33 PM  
**To:** Mattress EPR  
**Subject:** ISPA Comments on Informal Draft Regulations

Please see attached comments from the International Sleep Products Association.

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March 27, 2014

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

Dear Director Mortensen:

The International Sleep Products Association (ISPA) appreciates the opportunity to provide the following comments regarding the Informal Draft Regulatory Text dated February 20, 2014 (the Draft Text) that the Department of Resources, Recycling and Recovery (the Department) has proposed to implement SB 254, the Used Mattress Recovery and Recycling Act.

SB 254 places the responsibility for planning and implementing a mattress recycling program on a non-profit organization established by the mattress manufacturing industry. The Legislature gave this organization substantial latitude in deciding how best to meet the specific statutory responsibilities identified in SB 254 in an efficient and practical manner. The Legislature designated the Department to play an oversight role, within carefully defined parameters, to confirm whether the organization had met those legal duties, and for the organization and the Department to work collaboratively to achieve the shared goal of increasing the recycling of discarded mattresses in California.

Therefore, in the spirit of this partnership, ISPA provides these comments to identify instances in which the Department's Draft Text is contrary to the specific and detailed requirements that the Legislature enacted in SB 254.

### Introduction

SB 254 established a detailed and straight forward system for facilitating used mattress recycling in an economically efficient and practical manner. It requires an industry-led non-profit mattress recycling organization (the organization) to establish a cost-efficient and practical mattress recycling program in California. The program will be funded by a visible fee collected on all mattress sales in California. As such, in enacting SB 254, the Legislature struck a carefully constructed balance that will increase used mattress recycling, reduce urban blight from illegally dumped mattresses, and cut local and municipal government costs, while at the same time financing the program in a sustainable manner through a point-of-sale fee.

The consumer fee will fund all of the costs that the organization incurs in developing and administering a

mattress recycling system in California. SB 254 provides that such expenses must include reimbursing the Department for costs it incurs that are directly related to implementing and enforcing SB 254 related to the organization's activities. The organization's costs must also include all expenses associated with complying with the reporting and other regulatory requirements set in SB 254 and the Department's implementing regulations. Therefore, mattress consumers in California have a vested interest in the organization meeting its obligations under SB 254 in an efficient and low-cost manner.

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 below is guided by these standards.

In addition to several draft rules that would benefit from clarifications or minor modifications, ISPA's comments concern rules that are either:

- inconsistent with the statutory provision in question or
- are unnecessary to achieve the intended purpose of the law.

For these reasons, ISPA urges the Department either to modify or remove such proposed regulations from the draft rules in order to follow the relevant statutory provisions.

### Comments

Below are ISPA's comments, listed in the order in which they appear in the Draft Text. For ease of reference, we use the following convention in citing the section number, page and line(s) corresponding to the provision in the Draft Text that is the subject of a comment: "**§18960(e) (p2/6-7) Definition of Recycling fee**" refers to the "recycling fee" definition in § 18960(e) that appears on page 2, lines 6 and 7 of the Draft Text.

#### 1. **§18960(b) (p1/26-27) Definition of Brand:**

The Draft Text defines "brand" to mean:

"Brand" means a name, term, symbol, design, type, or any other feature that attributes a mattress to the manufacturer of such mattress.

Given the manner in which mattresses are marketed and sold in the United States, the draft definition is unnecessarily broad and may lead to confusion. Mattresses are marketed by product name. We are aware of no instances in which a non-verbal "symbol," or the design or type of a mattress connotes the product's brand.

The purpose of the brand definition in these draft rules is to assist retailers and the Department with determining whether the manufacturer of a given brand of mattresses is complying with the requirements of SB 254. To further this objective, ISPA suggests that the Department's regulations also provide that a manufacturer's Uniform Registry Number (URN) is an acceptable alternative to providing brand information. All manufacturers of mattresses sold in California must obtain a URN and register that with the California Bureau of Electronic and Appliance Repair, Home Furnishings and Thermal Insulation (the Bureau) (an agency within the Department of Consumer Affairs). The URN may be issued either by the Bureau or by a counterpart in another state that participates in a state mattress registration reciprocity program. A mattress manufacturer must then attach a label to all mattresses that it makes and sells in California that identifies the manufacturer and displays its URN. Each manufacturer uses the same URN for all brands of mattresses that it manufactures.

Mattress retailers in California (and the mattress manufacturers from which retailers purchase their mattresses) are familiar with the URN system. As a result, it will be an easy step to request each mattress manufacturer that registers with the organization to provide its URN, and to include the URN on the list of manufacturers that have complied with SB 254. The retailer can then check its vendors against that list before selling their mattresses in California.

Furthermore, allowing the use of an URN to identify a product's brand will help to speed and simplify enforcement for the Department. When an inspector enters store to examine products, he/she will know to look on the mattress's law label to find the URN. The URN is mandated by law to appear on a mattress law label and will appear on the same place on each label. The inspector then can simply check this number against a list of registered URNs. This will eliminate the need to spend the time inspecting a mattress to identify its brand which may be significantly differently on each mattress.

Therefore, we suggest that the Department (1) narrow the "brand" definition, and (2) add to that definition the URN concept, as follows:

Brand means either a name applied by a manufacturer to one or a group of mattress products that it manufactures, or its Uniform Registry Number issued by the California Bureau of Electronic and Appliance Repair, Home Furnishings and Thermal Insulation or a similar agency in another state.

## **2. §18960(c) (p2/1-2) Definition of Collection:**

The Draft Text defines "collection" to mean:

"Collection" means any method by which a service provider receives used mattresses from a consumer.

This term is defined too narrowly. Under SB 254, mattresses will be collected by a number of parties (e.g., recyclers, retailers, solid waste facilities, etc.) from various sources (e.g., consumers, retailers, a roadside, etc.). As a result, the draft definition will lead to confusion. Furthermore, from the context in

which this term is used in SB 254 (and the Draft Text), we think that its meaning is clear and will not be enhanced with a regulatory definition. Therefore we suggest that this term be deleted from the Draft Text because the statutory definition is sufficient.

**3. §18960(e) (p2/6-7) Definition of Recycling fee:**

The Draft Text defines this term to refer to the terms “recycling charge” or “charge” used in SB 254, but then never uses the defined term in the Draft Text, which could lead to confusion. We request that the Department either delete this term (since it is unnecessary) or actually use it in place of “recycling charge” or “charge.”

**4. §18960(f) (p2/8-9) Definition of Significant or material change:**

The Draft Text defines this as “any” change in a required element of the used mattress recycling plan required by Public Resources Code, § 42987.1. As proposed, this definition is important because a significant or material change to a recycling plan requires that the full plan be reapproved. See §18964(b)(8), at p8/13-15. ISPA is concerned that this definition will produce inefficient results. Just as it is illogical to define “large” to mean “infinitesimal,” the words “significant and material” cannot mean “any.” The efficient administration of SB 254 would be ill-served if the Department were to require plan re-approval for “any” plan change. In fact, changes to some categories of information that SB 254 requires the organization to include in its recycling plan should never trigger a Departmental re-approval review. For example, Public Resources Code, § 42987.1(b) provides that the plan shall include “[t]he names of manufacturers, renovators, and brands covered under the plan.” The Draft Text requires changes to this list of names be made “within 30 days.” See §18961(a)(5) (p3/16-19). As a result, it is quite likely under the Department’s draft rules that with perhaps thousands of participants in the plan, there will be multiple updates to this list each year. Under the Department’s proposed “significant=any change” rule, each of these trivial changes would trigger a costly Departmental re-approval process. There is no reason for the Department to conduct a re-approval review whenever a name is added or deleted from this list. Similarly, there is no reason for the Department to conduct such a re-review for mere typo corrections or other inconsequential changes.

For these reasons, ISPA requests that this definition be changed to read as follows:

“Significant or material change” means a change in a required element of the used mattress recovery and recycling plan that:

- (1) affects the organization’s costs or revenues to the extent that it results in a change to the recycling fee,
- (2) requires a party other than the mattress recycling organization to make a major change in how it participates in the program, or
- (3) reduces the goals set for the organization in the existing approved recycling plan.

This term shall not include changes to information previously provided to the Department pursuant to Public Resources Code, § 42987.1(b) or corrections of typographical errors.

**5. §18961(a)(3) (p3/6-12) Identifying information for each manufacturer, renovator, and retailer participating in the organization:**

As noted above, Public Resources Code, § 42987.1(b) requires the organization to include in its plan “[t]he names of manufacturers, renovators, and brands covered under the plan.”

The Draft Text reads as follows:

List and contact information for each manufacturer, renovator, and retailer participating in the mattress recycling organization, including, but not limited to:

(A) Name of Company

(B) Mailing or corporate address

(C) Individual Web address (if applicable), contact name, title, phone number, and e-mail address of participating manufacturers, renovators, and retailers shall be provided to the department upon request. The requested information shall be submitted within 30 days of the request unless extended as determined by the department.

As proposed, §18961(a)(3) exceeds the bounds of Public Resources Code, § 42987.1(b) in several respects. First, it requires the plan to include certain identifying information for retailers. As quoted above, however, the statute only requires the plan to include names of manufacturers, renovators, and brands, and says nothing about retailers. Therefore, there is no legal authority for the Department to require that the plan also include data for retailers. (Separately, the organization must provide the names of manufacturers and renovators that have registered with the organization. Public Resources Code, § 42993(a). But this requirement is distinct from the information that must be included in the organization's plan, and the two requirements should not be merged together since the Legislature has clearly indicated its intent regarding a plan's content.)

Second, the Draft Text provides that for all three categories of entities (i.e., manufacturers, renovators and retailers) the organization “shall submit as part of the used mattress recovery and recycling plan” (p2/19-20) certain information that is also not required by the statute, “including but not limited to” (p3/4-5) the company's contact information, as well as (upon the Department's request) the company's “Web address (if applicable), contact name, title, phone number and email address.” Although some of this data must only be submitted to the Department “upon request,” the organization will nonetheless have to attempt to collect and maintain all such data should the Department decide to request it.

By operation of other provisions in the Draft Text, if the Department deems organization's plan to be incomplete because it lacks the non-statutory data listed in §18961(a)(3), the Department must consider the organization's plan ineligible for approval. p5/8-13. And without an approved plan, the organization has not complied with the law. Thus, by insisting that the organization submit information for which it has no legal ability to collect (and that no manufacturer or renovator has a legal duty to provide), the

Department could well refuse to approve the organization's plan for reasons not permitted by SB 254, thereby subjecting the organization to possible penalties, fines, and other corrective action for having violated SB 254.

But the underlying statute does not permit such a result. SB 254 allows the Department to disapprove a plan submitted by an organization only if "the plan does not comply with this chapter." Public Resources Code, § 42987.3(b). Therefore, most of the requirements described at p3/6-12 should be deleted because they do not comply with the requirements of SB 254. Specifically, §18961(a)(3) should be amended to read as follows:

List the name of each manufacturer and renovator participating in the mattress recycling organization.

**6. §18961(a)(5) (p3/16-19) Changes to company name lists:**

The Draft Text requires the organization to change its plan to reflect "[a]ny changes to the list of manufacturers, renovators, retailers, and brands shall be submitted to the department within 30 days according to instructions provided by the department." ISPA has several concerns with this provision.

First, as we note in Comment 5, Public Resources Code, § 42987.1(b) requires the plan to include only the names of manufacturers and renovators, and not names of retailers.

Second, the Draft Text is unclear regarding what event triggers the 30-day deadline. Notification of the change by a listed party? Something else? We note that such a process could become unnecessarily burdensome if the organization receives frequent updates to large amounts of contact information that it must collect and retain, which is certainly conceivable in a large state like California, with many companies and individuals that might qualify as a manufacturer or renovator. A better approach would be to require the recycling organization to resubmit the list semi-annually, unless no changes have been made since the last update.

Third, it is unclear who has a duty to correct the identifying information. Logically, ISPA assumes that the Department intended to require that each manufacturer or renovator notify the organizations of changes to its previously submitted data. We urge the Department to make this point clear. In addition, given the ambiguity on this point, we further suggest that the Department clearly state that the organization is not responsible if the data it receives from various parties was reported erroneously to the organization. This would be consistent with the requirements of Public Resources Code, § 42993.1(b).

In addition, we note that updating this information twice each year would not inconvenience mattress manufacturers that enter the California market between the biannual updates. Public Resources Code, § 42993(b) provides as follows:

A manufacturer or renovator that is not listed on the department's Internet Web site pursuant to this section, but demonstrates compliance with this chapter before the next notice is required to be posted pursuant to this section, may request a certification letter from the department stating the manufacturer or renovator is in compliance. The manufacturer or renovator that receives the letter shall be deemed to be in compliance with this chapter.

Based on the foregoing comments, ISPA urges the Department to modify §18961(a)(5) to read as follows:

(5) A mattress recycling organization shall provide a list of manufacturers, renovators, and brands participating in its program according to instructions provided by the department. Every six months, commencing January 1, 2015, the organization shall provide to the department, in accordance with instructions provided by the department, an updated list of participating manufacturers, renovators, and brands that reflects any changes, additions, or corrections to such data that a manufacturer, renovator, brand provides to the organization, unless the organization notifies the department that it has received no changes, additions, or corrections to such lists since its most recent semiannual update. The organization shall not be held responsible in the event that those lists reflect erroneous data provided to the organization by a third party.

**7. §18961(b) (p3/20-23) Do electronic filings satisfy regulatory deadlines?:**

The Draft Text provides that the organization may submit the plan electronically, provided that it sends to the Department a signed copy of a transmittal letter referencing the electronic filing. The Draft Text also provides for electronic submission of required documents in a number of other instances. See e.g., §18963(a) (p6/6-12) (budget submission); §18964(a) (p7/7-14) (organization's annual report submission); §18965(a) (p12/1-4) (recycler's annual report submission); §18966(a) (p12/6-29) (renovator's annual report submission); §18967(a) (p13/22-27) (solid waste facility's annual report submission); §18968(a) (p14/12-18) (advisory committee's annual report submission). Please clarify that whenever a party makes an electronic filing, the electronic filing date serves as the official filing date for purposes of meeting a regulatory or statutory deadline, provided that the hard copy requirement is also satisfied. Accordingly, we suggest that §18961(b) be modified as follows:

The plan may be submitted electronically according to instructions provided by the department. If the plan is submitted electronically, the date of electronic submittal will be considered the date of receipt by the department, provided that the organization also submits to the department a hard copy submittal letter referencing the plan electronic document with the signature of a corporate officer of a mattress recycling organization.

We urge the Department to make similar changes to the other electronic submission provisions in the Draft Text.

**8. §18962(a)(7) (p4/19-24) Education and outreach:**

Public Resources Code, § 42987.1(n) requires that the organization's plan provide:

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 dropoff of used mattresses.

(Emphasis added.) The Draft Text, however, requires the education and outreach efforts also extend to "distributors [and] renovators," which SB 254 does not require. For this reason, we urge the Department to modify §18962(a)(7) to read as follows:

Education and Outreach. Describe the education and outreach efforts to consumers, manufacturers, and retailers to promote used mattress recycling and options available to consumers for the free drop-off of used mattresses, as required by subdivision (n) of section 42987.1 of the Public Resources Code. The description shall include methods of distribution.

The organization may voluntarily choose to include other parties within the scope of its educational outreach efforts, but it will have fully met its statutory obligations with regard to the education element of the plan if its activities are limited to what SB 254 requires (and as noted in the suggested modified text above).

As an alternative, adding one or more provisions to the draft rules identifying activities like this that the Department encourages the organization to perform voluntarily would not be contrary to the specific requirements of SB 254, provided that whether the organization undertakes such voluntary activities (or not) shall not be grounds for the Department to take any adverse action with regard to the Department's approval of the organization's plan, budget, or annual report, or take other adverse action against the organization.

**9. §18962(a)(8) (p4/27-29) Organization's response to Advisory Committee's recommendations:**

Public Resources Code, § 42987.1 (q) provides that the organization must include in its plan:

A report from the advisory committee, established pursuant to paragraph (3) of subdivision (a) of Section 42987, which includes a summary of the consultative process between the advisory committee and the mattress recycling organization during the development of the plan, as well as any other information deemed pertinent by the advisory committee to maximizing the recovery and recycling of used mattresses in the state.

In addition to requiring that the organization's plan include the information described in § 42987.1 (q), the Draft Text also requires that the plan "[i]nclude a description of how the mattress recycling organization addressed the points or recommendations raised in the Advisory Committee Report."

There is no statutory authority for this requirement in SB 254. In proposing this rule, the Department is dictating how the organization must interact with the Advisory Committee. SB 254, however, specifically describes the organization's legal obligations with respect to the Advisory Committee, and provides the Department no authority to increase those obligations. Accordingly, §18962(a)(8) should be modified as follows:

Advisory Committee Report. Include the report by the mattress recycling organization advisory committee as required by subdivision (q) of section 42987.1 of the Public Resources Code.

Alternatively, the Department could add this activity to a list of voluntary actions that the organization may, at its discretion, undertake.

**10. §18962(b) (p5/1-3) Request for additional plan information:**

SB 254 carefully enumerates exactly which categories of information the organization must include in its plan, and clearly defines the Department's authority to request additional plan information. Specifically, Public Resources Code, § 42987.1(r) authorizes the Department only to request other information "that is reasonably related to compliance with the recycling plan and that the organization can reasonably compile."

Section 18962(b), however, contains neither the "relevance-to-compliance" nor the practicality limitations set forth in the statute, and instead broadly asserts that:

The mattress recycling organization submitting the plan shall provide, upon request, additional information to assist the department as may be necessary for the approval of the plan.

As such, the proposed rule is inconsistent with the carefully circumscribed authority that the Legislature gave the Department. The statute is clear regarding the kinds of additional information that the Department may request, yet the draft rule exceeds this narrowly worded authority. Given the expansiveness of the Draft Text, and the clearly limited authority that the Legislature gave the Department, it is imperative that the agency avoid any ambiguity or misunderstanding in this regard, and follow the Legislature's statutorily expressed intentions. Specifically, ISPA urges the Department to modify §18962(a)(8) to read as follows:

The mattress recycling organization submitting the plan shall provide, upon the department's request, additional information that is reasonably related to compliance with the recycling plan and that the organization can reasonably compile.

We note that the Department has followed an approach closely similar to what we propose in specifying the additional information it might require recyclers and renovators to provide in their annual reports. Specifically, in proposed §18965(b)(4) (p12/17-18) and §18966(b)(4) (p13/13-14), the Draft Text requires:

Other information deemed necessary by the department that is reasonably related to compliance with this chapter and that can be reasonably compiled.

Unlike the limitations that the Legislature imposed on the Department's authority to require the organization to include more information in the proposed plan, the Department has no similar statutory limitations on what it may request of recyclers or renovators. Therefore, §18962(b) should be consistent with the requirements of the underlying statute, as expressed in Public Resources Code, § 42987.1(r).

**11. §18962(c)-(e) (p5/4-19) Plan evaluation process:**

The Draft Text contains a number of provisions detailing process the Department may follow in finding the organization's plan to be incomplete or in disapproving the plan. These provisions, however, never state the Department's process for approving the plan. For the sake of completeness and clarity, especially for those readers that will refer only to the regulations and not the underlying statute, ISPA urges the Department to include in these rules two short introductory sentences that describe the overall statutory process, as set forth in Public Resources Code, § 42987.3(a), which reads as follows:

The department shall review the plan for compliance with this chapter and shall approve, disapprove, or conditionally approve the plan within 90 days of receipt of the plan. If the department fails to act within 90 days of the receipt of the plan, the plan shall be deemed approved.

ISPA urges the Department to include these sentences at the start of §18962(c), at p5/4.

**12. §18962(c) (p5/8-10) Is 30 days sufficient to cure an incomplete plan?:**

The Draft Text provides that if the Department finds the plan to be incomplete, the organization has 30 days to cure the deficiencies. The Department asks if 30 days provides a sufficient amount of time. It is impossible to answer this question without knowing the deficiencies to be corrected. For some simple clerical or minor reporting deficiencies, 30 days should be enough. For more complex issues, extra time might be needed. Therefore, we suggest that the Department allow sufficient flexibility to tailor the cure time to the required action, and reword this provision as follows:

If the plan is incomplete, the department shall identify what additional information shall be submitted to make it complete, and the plan normally shall be resubmitted within 30 days, although the department will provide additional time if warranted by the nature of the additional information requested and other relevant factors.

**13. §18962(c) (p5/4-13) Completeness determinations:**

The Draft Text provides that the Department will determine within 30 days if the submitted plan is complete. If complete, the Department will proceed to a full 90-day review of the plan, as required by SB 254. If the Department finds the plan incomplete, it returns the plan to the organization.

ISPA proposes two modifications to this provision:

- A. The Draft Text is silent as to when the 30-day completeness review commences. Logically, it would begin once the plan is received. To avoid any confusion on this point, we request that the provision be modified to state this point clearly.
- B. The organization will need to obtain some plan information from third parties over whom it has no authority to compel performance. For example, the organization must provide the names of covered manufacturers and renovators, and must include a report from the Advisory Committee. Public Resources Code, § 42987.1(b) and (q). Recognizing the fact that the organization cannot control the quality of the data that third parties might provide the organization, SB 254 provides that for enforcement purposes:

The department shall not impose a penalty on the mattress recycling organization pursuant to this section for a failure to comply with this chapter if the organization demonstrates it received false or misleading information from a member of the organization or other party that was the direct cause of its failure to comply.

Public Resources Code, § 42993.1(b). Thus, the organization cannot be held responsible for the accuracy or completeness of information over which it has no control.

Given that the completeness determination can delay the full 90-day review (and could potentially halt further progress if the deficiencies noted by the Department are not timely cured), ISPA urges the Department to apply the concept expressed in Public Resources Code, § 42993.1(b) to its completeness analysis under §18962(c).

Specifically, ISPA suggests that §18962(c) be modified to read as follows (this suggested wording reflects changes proposed in this Comment and Comment 12 above):

The department shall determine if the plan is complete and notify the submitting mattress recycling organization within 30 days after the plan is received. If the department finds that the plan is complete, the department's 90-day review period for consideration of approval of the plan, set forth in section 42987.3 of the Public Resources Code, will commence upon the original date of receipt. If the plan is incomplete, the department shall identify what additional information shall be submitted to make it complete, and the plan normally shall be resubmitted within 30 days, although the department will provide additional time if warranted by the nature of the additional information requested and other relevant factors. If the department determines upon resubmittal that the plan is complete, the department's 90-day review period for consideration of approval of the plan

will commence upon the original date of receipt of the resubmittal. If the organization demonstrates that it has not received information from a member of the organization or other party that is necessary for inclusion in the plan, or if information that the organization has received from a member of the organization or other party is inaccurate, false misleading, or incomplete, the absence of such information under those circumstances shall not warrant a finding that the plan is incomplete.

**14. §18962(d)-(e) (p5/14-19) Consequences of not supplementing a conditionally approved plan:**

The Draft Text provides that if the Department conditionally approves the organization's plan, but the organization fails to cure the deficiencies within 60 days, then the Department must disapprove the plan. The Draft Text provides the Department with no other option.

ISPA urges the Department to adopt a more flexible approach. A decision to conditionally approve a plan has legal consequences, in that the organization may proceed to implement such a plan. Public Resources Code, § 42987.4. In that event, parties will have taken actions in reliance on the conditional approval that may difficult to unwind if the plan is later disapproved.

We urge the Department to modify these rules to:

- allow more time to cure if warranted by the circumstances,
- allow the Department more latitude in deciding how to treat a failure to cure certain deficiencies, and
- provide that disapproval of a conditionally approved plan should be done only sparingly.

For example, if the uncured deficiencies are only technical in nature or are relatively minor, plan disapproval might not be warranted. Furthermore, depending on the nature of the deficiencies identified, it may not be possible to cure them within the 60 days allotted in the Draft Text.

Accordingly, we suggest that §18962(d)-(e) be reworded as follows:

(d) If the department conditionally approves a plan, the department shall identify the deficiencies in the plan and the mattress recycling organization normally shall comply with the conditions of approval within 60 days of the notice date, although the department will provide additional time if warranted by the nature of the deficiencies identified and other relevant factors. If the conditions are met, the department shall approve the plan.

(e) If the department conditionally approves a plan and the conditions are not met, the department shall determine the appropriate remedy, taking into account all relevant circumstances, including the nature of the deficiency and the potential impact of the department's action on interested parties. In particularly egregious situations, the remedies that the department may consider include disapproving the plan.

**15. §18962(g) (p5/28-29) Re-approval of revised budget:**

The Draft Text provides that in the event that the Department must re-approve an existing plan, “[t]he department may also require the mattress recycling organization to resubmit a revised mattress recycling budget.” In the interest of clarity, we urge the Department to elaborate on this provision to state that such action will be taken only when the plan change would have such an impact on the organization’s operating costs or revenues that it would result in a change to the recycling fee. Specifically, we urge the Department to modify the last sentence of §18962(g) to read as follows:

The department may also require the mattress recycling organization to resubmit a revised mattress recycling budget if the plan change would have an impact on the mattress recycling organization’s operating costs or revenues sufficient to change the recycling fee.

**16. §18963(b)(5) (p6/26-28) 2017 requirement:**

The Draft Text provides that “[f]or used mattress recycling program budgets submitted July 1, 2017 and annually thereafter, previous two years of actual expenses shall be included.” Since the program will not commence operation until early 2016, two years of actual expenses will not be available until 2018, and even then, the 2016 data will likely not cover the full year. Therefore, §18963(b)(5) should be changed from 2017 to 2018 (or even 2019).

**17. §18964(b)(5) (p7/29-31) Consumer recycling opportunities:** The Draft Text requires that the following be included in the organization’s annual report:

Description of how each consumer of mattresses in California had an opportunity to recycle and properly manage their used mattresses, including the number, location, and type of collection points in the program.

The Department has exceeded its delegated authority in proposing this draft rule because it is not consistent with the requirements of SB 254. To avoid confusion and misunderstandings, this provision must be changed.

The provisions in SB 254 identifying the specific categories of information that the organization must include in its annual report contain nothing that provides support for the subject of §18964(b)(5). However, the recycling plan requirements set forth in Public Resources Code, § 42987.1 do contain several specific requirements that are relevant to this subject. For example, the plan must include:

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.

Public Resources Code, § 42987.1(d). In addition, the plan must serve low-income communities (§ 42987.1(m)) and allow for consumer drop offs (§ 42987.1(o)).

Therefore, in the interest of clarity and simplicity, and to avoid confusion, ISPA urges the Department to modify §18964(b)(5) by simply referencing these plan requirements as follows:

Description of how the organization has satisfied provisions in its approved recycling plan by addressing requirements in Public Resources Code, § 42987.1(d) that are relevant to serving the used mattress recycling needs of California consumers.

**18. §18964(b)(6) (p8/1-4) Best Management Practices :**

The Draft Text requires that the organization's annual report include a:

Description of best management practices followed by service providers, which may include any training that the mattress recycling organization provided or required of service providers to ensure proper collection and management of used mattresses.

SB 254, however, provides no legal authority for this request. Public Resources Code, § 42990.1(n) simply provides that the Department may only require the organization to include in its annual report "[o]ther information relevant to compliance with the plan."

The Department has exceeded its delegated authority and attempts to use this rule to dictate how the organization will meet its obligations under SB 254. The law, however, does not give the Department the power to do this.

The organization will contract with recyclers and other parties to fulfill its obligations to comply with the requirements of SB 254. As part of this process, the organization will require the recyclers and other "service providers" from which it has contracted collection, transport, recycling, and other services to document that they have met their legal obligations under both those contracts as well as SB 254. The organization may voluntarily choose to provide training, develop or compile best management practices, or use some other means for meeting its legal obligations.

But the organization has no absolutely statutory obligation to comply with the requirements of proposed rule §18964(b)(6) , and its failure to do so or to discuss these topics in its annual report cannot be grounds for finding it has not complied with its annual report obligations under SB 254. Therefore, §18963(b)(6) should be deleted from the Draft Text.

**19. §18963(b)(9)(D) (p9/11-13) End-of-life used mattress management costs:**

The Draft Text requires that the organization's annual report include its:

End-of-life used mattress management costs with line items for collection, transportation, recycling, renovating, reuse, and proper disposal)

The organization will state in its annual report its costs associated with implementing the program, but those costs might not necessarily fit the line items specified in this draft rule. For example, the organization might decide to contract with recyclers that provide collection, transportation, and recycling services for a single fee. In that case, the organization would not be in a position to accurately report

separate costs for collection, transportation, and recycling. For this reason, ISPA urges the Department to modify §18963(b)(9)(D) to read:

End-of-life used mattress management costs with line items (if applicable and if the data are readily available) for collection, transportation, recycling, renovating, reuse, and proper disposal.

**20. §18963(b)(9)(E) (p9-14-15) Fees paid to the Department:**

The Draft Text requires that the organization's annual report include "[p]rogram administration costs including annual administrative fee for service payments to the department." The provision in SB 254 that describes the Department's charges to the organization, however, is worded substantially differently:

The department shall notify the mattress recycling organization of the department's costs that are directly related to implementing and enforcing this chapter relating to the mattress recycling organization's activities. This may include the direct costs associated with regulatory development prior to submittal of the plan required pursuant to Section 42987.1.

Public Resources Code, § 42988.2(a).

To avoid any ambiguity or misunderstanding, it is imperative that the Department follow exactly what the Legislature has authorized. Specifically, the Department should modify §18963(b)(9)(E) to read as follows:

The costs that the department incurs pursuant to Public Resources Code, § 42988.2(a) that are directly related to implementing and enforcing The Used Mattress Recovery and Recycling Act.

**21. §18963(b)(9)(E) (p9/15-16) Full- and part-time staff paid by program:**

The second part of the same provision in the Draft Text requires that the organization's annual report include the "number of mattress recycling organization full- and part-time staff paid from the program."

SB 254, however, does not require that the organization's annual report include this type of information. Public Resources Code, § 42990.1(n) simply provides that the Department may only require the organization to include in its annual report "[o]ther information relevant to compliance with the plan." ISPA can conceive of no situation in which this type of information will assist the department in determining whether the organization or other parties with legal obligations under SB 254 are complying with the law.

The organization has many options for implementing the program. It could hire full- and part-time staff to handle all of its obligations under the law, use third parties to do the same, or use a mixture of staff and

third parties. Obviously, the balance of staff and third parties that the organization chooses to use will have a large impact on the number of staff that it employs. But if the organization meets its legal obligations, the Department has no need or authority to influence the organization's staffing levels. In mandating that the organization must include this type of information in its annual report, it would appear that the Department may again be attempting to dictate how the organization should meet its obligations under SB 254. As we have noted before, such program management considerations are within the organization's exclusive purview and cannot be controlled by the Department.

Therefore, the Department lacks the authority to require the organization to include this information in its annual report. Accordingly, this requirement should be deleted from the Draft Text.

**22. §18963(b)(9)(F) (p9/17-20) Legal costs:**

The Draft Text requires that the organization's annual report include the "[l]egal costs, including a description of amount per type of legal cost including, but not limited to, contract negotiation, general counsel, litigation, and any other type of legal cost incurred by the mattress recycling organization." The Department lacks the legal authority to require the organization's annual report to include this information, and there is no necessity for this information to be included in the annual report. In addition, requiring the organization to segregate its legal costs from its other administrative or operating costs (depending on the nature of the legal services involved) raises serious attorney-client privilege issues as well as concerns about a party's right to counsel. For each of these reasons, §18963(b)(9)(F) should be deleted from the Draft Text.

**23. §18963(b)(9)(H) (p9/23-28) Fee change:**

The Draft Text requires that in the event the organization changes its recycling fee during the first year, its annual report must:

include a description of any changes to the amount of the mattress recycling charge, why the change was made, and how implementation of the change complied with subsection (1) or (2) of subdivision (c) of section 42989 of the Public Resources Code, if applicable.

The Department, however, lacks the authority to require these explanations. Public Resources Code, § 42989(c) requires only the following:

(1) In the first 12 months during which the mattress recycling charge is collected, the mattress recycling organization may change the amount of the mattress recycling charge, in accordance with subdivision (b), and shall provide no less than 90 days' notice to the public before the change in the amount of the charge takes place.

(2) After one year from the date when the collection of the mattress recycling charge commences, the mattress recycling organization may change the amount of the charge in accordance with subdivision (b), but the mattress recycling organization shall not change

the amount of the charge more frequently than annually, and shall provide no less than 180 days' notice to the public before the change in the amount of the charge takes effect.

Furthermore, the fee change provision has no impact on the organization's recycling plan. Therefore, given that the Department's legal authority to require the organization to provide extra information in its annual report is expressly limited to "[o]ther information relevant to compliance with the plan," Public Resources Code, § 42990.1(n), SB 254 provides no legal authority for the Department to add this requirement to the organization's annual report.

Therefore, ISPA requests that the Department delete §18963(b)(9)(H) from the Draft Text.

In the event that the organization makes such a fee change, it may choose to voluntarily provide such an analysis, but its failure to do so would not be grounds for finding that it has not met its statutory responsibility to submit an annual report.

**24. §18963(b)(10) (p9/29-30 and 10/1-4 ) Education and outreach:**

The Draft Text requires that the organization's annual report include:

Education and Outreach. Provide a description of educational materials that were provided to program participants, including but not limited to, retailers, consumers, and contractors during the reporting period, including electronic examples of these materials. Identify any method(s) used to determine the effectiveness of educational and outreach efforts (e.g., surveys, hits on specific web pages, number of participants at events, etc.), if applicable. Describe any changes to those materials that are planned for subsequent years.

Public Resources Code, § 42990.1(i), however, provides simply that the annual report include:

Examples of educational materials that were provided to consumers the first year and any changes to those materials in subsequent years.

Therefore, no legal authority exists for requiring the organization to provide any information beyond examples of consumer education materials. For this reason, we suggest that the Department modify §18963(b)(10) to read:

Education and Outreach. Provide examples of educational materials provided to consumers during the reporting period. Describe any changes made to those materials during the reporting period.

The organization may choose to provide additional information like this voluntarily, but it will have fully met its statutory obligations with regard to the education element of its annual report by including in that report examples of educational materials provided to consumers.

**25. §18964(c) (p11/1-24) Process for assessing completeness of the organization's annual report:**

The draft text describes the process the Department will follow in determining whether the organization's annual report is complete. For that report, the organization must (among other things) obtain information from various parties over which it has no legal or contractual control. For example, SB 254 provides that the organization's annual report, which must be filed by July 1 of each year, must include:

The total volume, number, and weight of used mattresses collected recycled, renovated, and reused in this state during the preceding calendar year, including any conversion factor used to determine the number of mattresses recovered.

Public Resources Code, § 42990.1(j). The organization should be able to obtain information that is responsive to this requirement from recyclers under contract with the organization. However, the organization will have no ability to demand such information from other recyclers (i.e., recyclers not under contract with the organization), or from renovators or retailers of reused products. Furthermore, the organization has no ability to determine whether any information it obtains from such parties is inaccurate or incomplete.

As ISPA has noted above in Comment 13 in connection with the Department's proposed process for determining whether the organization's plan is complete, we also urge the agency to apply to its annual report analysis in §18964(c) the concepts laid out in Public Resources Code, § 42993.1(b), which provides:

The department shall not impose a penalty on the mattress recycling organization pursuant to this section for a failure to comply with this chapter if the organization demonstrates it received false or misleading information from a member of the organization or other party that was the direct cause of its failure to comply.

Therefore, ISPA urges the Department to apply the concept expressed in Public Resources Code, § 42993.1(b) to its completeness analysis under §18964(c) by including the following sentence:

In evaluating the completeness of the annual report, the organization will not be held responsible for the accuracy or completeness of information over which it has no control.

**26. §18965(b)(2)-(3) (p12/8-16) Require recyclers to provide annual reports to the organization, possibly by May 1:**

The Draft Text provides that each recycler must prepare an annual report that contains, among other things:

(2) Quantitative information on the number of used mattresses received from California

sources and out of state sources and recycled in the state during the preceding calendar year. Conversion factor(s), if used, shall also be provided.

(3) Quantitative information on the number of used mattresses from California sources and sent out of state for recycling or other method of disposition.

As noted above in Comment 25, however, the organization's annual report must contain "[t]he total volume, number, and weight of used mattresses collected recycled . . . in this state during the preceding calendar year." Public Resources Code, § 42990.1(j). The information requested by draft rule §18965(b)(2)-(3) could be helpful to the organization for use in its annual report.

Therefore, we urge the Department to require that recyclers provide a copy of their reports to both the Department and the organization, and request that the recyclers provide their reports to the organization by May 1 of each year so that the organization might have time to include this information in its own annual report (although the Department likely lacks the legal authority to mandate that the data be provided to the organization any earlier than July 1 of each year).

**27. §18966(b)(2)-(3) (p13/3-6) Require renovators to provide annual reports to the organization, possibly by May 1:**

In this comment, we raise essentially the same points noted above in Comment 26, but in this case with respect to the annual report obligations of renovators. Public Resources Code, § 42990.1(j) also requires the organization to include in its annual report "[t]he total volume, number, and weight of used mattresses . . . renovated . . . in this state during the preceding calendar year."

Therefore, for the same reasons expressed above, we urge the Department to require that renovators provide a copy of their reports to both the Department and the organization, and request that the renovators provide their report to the organization by May 1 of each year so that the organization might have time to include this information in its own annual report (although the Department likely lacks the legal authority to mandate that the data be provided to the organization any earlier than July 1 of each year).

**28. §18967(b)(2) (p14/1-3) Require solid waste facilities to provide organization specific data by May 1:**

The Draft Text provides that each solid waste facility must prepare an annual report that contains, among other things:

Quantitative information on the number of used mattresses received by that facility that were recycled, renovated, or disposed of within the state in the preceding calendar year. Conversion factor(s), if used, shall also be provided.

For the reasons noted above in Comment 26, the information presented in the annual report could be relevant to the organization's annual report, provided it is provided in time to the organization and is

presented in a format consistent with the statutory categories of data. Accordingly, ISPA urges the Department to modify §18967(b)(2) to read as follows:

Quantitative information, including at minimum the total volume, number, and weight of used mattresses received by that facility that were recycled, renovated, or disposed of within the state in the preceding calendar year. Conversion factor(s), if used, shall also be provided.

**29. §18968(a) (p14/17-18) Designated representative signature:**

This section requires the mattress recycling organization's advisory committee annual report to be "signed by an officer." It is possible that the advisory committee may not have a structure that will result in the designation of an officer. Therefore, we suggest that the Department modify §18968(a) to allow for the annual report to be "submitted by an officer or other appropriate designee or responsible party."

**30. §18969 (p15/4-27) Organization, manufacturer, renovator, and retailer obligations:**

The Draft Text provides:

Each mattress recycling organization, manufacturer, renovator, and retailer required to comply with Chapter 21 (commencing with section 42985), Part 3, Division 30 of the Public Resources Code shall:

(a) Maintain records to support the requirements in this Article. Mattress recycling organizations shall maintain records to support section 18962. Retailers and renovators shall provide access to existing records on all mattresses sold or offered for sale in the state including:

(1) The manufacturer of the mattress.

(2) The date(s) the retailer purchased the mattress from the manufacturer.

(3) The date(s) the retailer sold the mattress.

(4) Certification letter(s) from the department, if provided by a manufacturer, to demonstrate that mattress from the manufacturer is or was subject to a department-approved mattress recycling plan. A retailer shall provide access to a certification letter only if it is being used as proof of compliance, pursuant to subdivision (b) of section 42993 of the Public Resources Code, that a manufacturer not listed on the department's internet website is in compliance and may sell or offer for sale mattresses in California.

(b) Provide the department with reasonable and timely access, as determined by the department, to its facilities, operations, and any relevant records necessary to determine compliance with this Article, upon request. Manufacturers, renovators, and retailers will maintain and provide access to records required by this Article for 3 years. Mattress

recycling organizations will maintain and provide access to records required by this Article for 3 years after submission of the annual report which relies upon those records.

ISPA is concerned that the separate obligations of the organization and the retailers are confusingly mixed in the same provisions. For clarity, we request that §18969 be reorganized slightly as follows:

Each mattress recycling organization, manufacturer, renovator, and retailer required to comply with Chapter 21 (commencing with section 42985), Part 3, Division 30 of the Public Resources Code shall:

(a) Maintain records to support the requirements in this Article.

- i. Mattress recycling organizations shall maintain records to support section 18962.
- ii. Retailers and renovators shall provide access to existing records on all mattresses sold or offered for sale in the state including:
  - (1) The manufacturer of the mattress.
  - (2) The date(s) the retailer purchased the mattress from the manufacturer.
  - (3) The date(s) the retailer sold the mattress.
  - (4) Certification letter(s) from the department, if provided by a manufacturer, to demonstrate that mattress from the manufacturer is or was subject to a department-approved mattress recycling plan. A retailer shall provide access to a certification letter only if it is being used as proof of compliance, pursuant to subdivision (b) of section 42993 of the Public Resources Code, that a manufacturer not listed on the department's internet website is in compliance and may sell or offer for sale mattresses in California.

(b) Provide the department with reasonable and timely access, as determined by the department, to its facilities, operations, and any relevant records necessary to determine compliance with this Article, upon request.

- i. Manufacturers, renovators, and retailers will maintain and provide access to records required by this Article for 3 years.
- ii. Mattress recycling organizations will maintain and provide access to records required by this Article for 3 years after submission of the annual report which relies upon those records.

**31. §18970 (p16/23) Organization not responsible for false or inaccurate data provided by other parties:**

It is important that the Department make clear that underlying statute (Public Resources Code, § 42993.1(b)) states that the organization is not responsible if a party provides it false or misleading information. For this reason, we urge the Department to add the following as a subparagraph to §18970:

The mattress recycling organization shall not be liable for administrative civil penalties for a failure to comply with this chapter if the organization demonstrates it received false or

misleading information from a member of the organization or other party that was the direct cause of its failure to comply.

**32. §18971(c) (p17/20-21) Civil penalties:**

ISPA has two concerns with this provision:

- A. The cited statutory provision is to the paint recycling law, not SB 254. The correct citation for the Department's authority to impose administrative civil penalties under SB 254 is Public Resources Code, § 42993.1(a).
- B. The phrase "in the discretion of the trier of fact in the civil proceeding" does not appear in the relevant statutory provision in SB 254.

To avoid any confusion or misunderstanding, ISPA requests that §18971(c) be modified to read as follows:

(c) The department may impose administrative civil penalties pursuant to the subdivision (a) of section 42993.1 of the Public Resources Code.

**33. §18972 (p17/30 to 18/3) Proprietary data:**

The Draft Text provides that:

Records supplied to the department pursuant to this Article that are, at the time of submission, claimed to be proprietary, confidential, or trade secret shall be subject to the provisions in Title 14, California Code of Regulations, Division 7, Chapter 1, Article 4 (commencing with section 17041), and in subdivision (c) of section 42987.3 of the Public Resources Code.

This provision, however, is substantially different from the simple, straight forward confidentiality provision set forth in SB 254, which reads as follows:

The approved plan shall be a public record, except that financial, production, or sales data reported to the department by the mattress recycling organization is not public record for purposes of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and shall not be open to public inspection. The department may release financial, production, or sales data in summary form only so the information cannot be attributable to a specific manufacturer or retailer or to any other entity.

Public Resources Code, § 42987.3(c).

To avoid any confusion on this important legal provision, ISPA requests that the Department replace §18972 with the following:

Financial, production, or sales data reported to the department by the mattress recycling organization is not public record for purposes of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and shall not be open to public inspection. The department may release financial, production, or sales data in summary form only so the information cannot be attributable to a specific manufacturer or retailer or to any other entity.

\* \* \* \* \*

Please contact the undersigned if you have any questions regarding these comments.

Sincerely,



Ryan Trainer  
President  
International Sleep Products Association