

March 16, 2020

## **Draft Mattress Recycling Council California, LLC Contingency Plan**

Contingency plan in the event that:

- I. The California Department of Resources Recycling and Recovery (Department) decertifies the Mattress Recycling Council California, LLC (MRC), or**
  - II. The mattress recycling plan (the plan) expires, is disapproved, or is revoked**
- I. The Department decertifies MRC**
    - A. This may happen for one of two reasons
      - i. MRC informs the Department in writing that it is no longer willing or able to serve as the mattress recycling organization (MRO), or
      - ii. The Department finds that MRC has intentionally violated one or more provisions of Cal. Pub. Res. Code Chapter 388 in a manner that has materially impacted MRC's ability to substantially meet its obligations under MRC's approved mattress recycling plan or if the Department revokes that plan pursuant to § 42993.2 of the Code.
    - B. Following decertification, the Department will:
      - i. Establish a process and schedule that will, to the maximum extent possible, allow for an orderly transition of responsibility from MRC to a successor organization (SO).
      - ii. Certify a SO pursuant to Pub. Res. Code § 42987.
      - iii. If the Department revoked the existing plan, approve a successor plan or amendments to the existing plan proposed by the SO.
      - iv. Decide whether to request MRC to provide transitional services until it has certified a SO and determined that the SO is prepared to assume all financial, statutory, contractual, and other legal responsibilities for implementing its obligations, and if so, for what time period it will require such transitional services.
    - C. If the Department requests that MRC provide transitional services and MRC accepts the request, MRC will, subject to the Department's approval:
      - i. Continue to administer the program, providing transitional services that include:
        1. managing contractors and other service providers;
        2. paying third party transporters to move mattresses from consolidation sites (including public drop-off, planned collection events and large-volume pickups) to MRC contracted mattress recyclers;
        3. paying contracted recyclers to process mattresses;

4. paying invoices and payrolls;
5. maintaining existing consumer drop-off incentives through reimbursements to parties contracted to pay the consumer incentive;
6. processing new and pending applications for, and make payments pursuant to, third parties participating in MRC's illegal dumping initiative;
7. collecting and verifying data that recyclers, renovators and others must report to MRC;
8. funding and managing previously approved and pending research projects;
9. receiving support services from MRC Inc. pursuant to the existing affiliation agreement between MRC Inc. and MRC;
10. providing regular reports to the Department on program operations, and
11. performing other financial and administrative duties in a manner necessary and appropriate to maintain the continuity of the program's operations during the transition process.

- ii. Continue to receive charges remitted pursuant to § 42989.1.

MRC's transitional service period may not exceed 12 months, unless MRC agrees to provide those services for a longer period.

- D. If the Department decides not to request that MRC provide transitional services, or MRC declines to accept such a request by the Department:
  - i. The Department may direct in writing that MRC establish a trust fund or escrow account and transfer all unexpended funds (which means charge revenue in MRC's accounts that MRC is not already obligated to pay pursuant to a contract, claim, or similar mechanism) into that fund or account within 30 days.
  - ii. The trust fund or escrow account shall:
    1. accept charges that would have been remitted to MRC prior to its decertification,
    2. make payments from the trust fund or escrow account as the Department directs in writing to implement the most recently approved plan, and
    3. be subject to reasonable requirements that the Department may set until it certifies a SO.
  - iii. The Department may appoint an agent to administer the program temporarily pending the SO's certification. If requested by the Department, MRC shall seek to transfer operations of the California mattress recycling program to the Department or its agent in an orderly manner as directed by the Department. Operations to be transferred may include, but are not limited to the following:
    1. managing contractors and other service providers;

2. paying third party transporters to move mattresses from consolidation sites (including public drop-off, planned collection events and large-volume pickups) to MRC contracted mattress recyclers;
  3. paying contracted recyclers to process mattresses;
  4. paying invoices and payrolls;
  5. maintaining existing consumer drop-off incentives through reimbursements to parties contracted to pay the consumer incentive;
  6. processing new and pending applications for, and make payments pursuant to, third parties participating in MRC's illegal dumping initiative;
  7. collecting and verifying data that recyclers, renovators and others must report to MRC;
  8. funding and managing previously approved and pending research projects;
  9. providing regular reports to the Department on program operations, and
  10. performing other financial and administrative duties in a manner necessary and appropriate to maintain the continuity of the program's operations during the transition process.
- iv. The trustee or escrow agent shall transfer those funds as the Department directs to a certified SO.
- E. The process for transferring assets and liabilities from MRC to another entity will depend on whether the Department requests MRC to provide transitional services (and MRC agrees to do so).
- F. If MRC is providing transitional services, it will, within 30 days after being notified in writing by the Department that it has certified the SO and determined that the SO has assumed its responsibilities to administer and manage the program. That process will include:
- i. Undertake the process for seeking to transfer to the SO all assets and liabilities, and all financial, statutory, contractual, and other legal rights and responsibilities, including, but not limited to the receipt of the charge remitted pursuant to § 42989.1.
  - ii. The overarching goal of this transfer process is to maintain, to the extent practicable, the continuity of MRC's mattress processing capacity (in terms of MRC's existing mattress recyclers' operations and the services provided by MRC's other service providers, including the implementation of expansion plans, if any, that are pending or underway prior to the start of the transition process). MRC's contractual and other legal rights and responsibilities include but are not limited to the following:
    1. contracts for services to maintain program registration functions (that is, maintaining lists of all manufacturers, distributors, retailers, and renovators participating in the program),

2. agreements to process charge revenue receipts that retailers and other sellers remit to MRC,
  3. contracts for collecting, transporting and processing the discarded mattresses,
  4. a license to use the ReTrac database,
  5. contracts for various consulting services and functions (including communications and public relations, accounting and auditing, research),
  6. agreements to prepare analysis and content for use in MRC's annual reports,
  7. pending litigation, other disputes and claims involving MRC, etc.
- iii. Among other things, the process for seeking to transfer these contractual and other legal rights and obligations to the SO may include novating existing contracts to replace MRC with the SO as one of the contracting parties. This process will commence within 30 days after the Department's notice that it has certified the SO and determined that the SO has assumed its responsibilities to administer and manage the program, but may require more than 30 days to complete, given the number of contracts that would require novation. In addition, it is unknown at this point whether all contractors and service providers will agree to such novations. Some may decline to agree to transfer MRC's contractual rights and responsibilities to the SO.
- iv. MRC may transfer to the SO only those financial liabilities that the Department has approved for transfer (which § 42989.3(3) of the Code defines as including, but not be limited to, notes payable, accounts payable, salaries payable, wages payable, interest payable, other accrued expenses payable, income taxes payable, customer deposits, vendor contracts, and any other contractual liabilities). Transferrable liabilities would include all administrative fees that the Department regularly charges MRC (including increased fees that may result from the Department's involvement in the transition process), but excludes civil or criminal liabilities, fines or penalties issued by the state. Other than the existing contractual and other legal rights and responsibilities summarized in point ii above, MRC's only financial liabilities at this time consist of current payables (that is, invoices for goods and services that MRC has received and booked, and that MRC expects to pay in the near term). At this time, we do not anticipate that this situation will change substantially in the foreseeable future. Within 30 days after being notified in writing by the Department that it has certified the SO and determined that the SO has assumed its responsibilities to administer and manage the program MRC would notify the Department which assets and liabilities MRC intends to transfer to the SO, but the exact timing of that transfer will depend on when the Department notifies MRC in writing which liabilities it approves for transfer. MRC will require a reasonable amount of time after it receives such written notification to effect such transfers.

v. MRC will transfer to the SO information and other data in its possession (including the lists of all manufacturers, distributors, retailers, and renovators participating in the program) and materials (for example, educational materials) that the SO will need to administer and operate the program. As part of its efforts described above to have existing contractors and service providers transfer to the SO all of MRC's rights and obligations under their contracts with MRC, MRC will request that ReTrac amend its contract with MRC to license to the SO rights to use the ReTrac data system that California recyclers use to track the units that they receive and process, but MRC cannot guarantee that ReTrac will agree to such changes.

G. If the Department decides not to request that MRC provide transitional services (or MRC declines to accept such a request by the Department), and the Department instead directs MRC to transfer its unexpended funds to a trust fund or escrow account, the above transfer process will be somewhat different as follows:

- i. MRC will have already transferred to the trust fund or escrow account MRC's legal rights and responsibilities concerning the receipt of the charge remitted pursuant to § 42989.1 when that fund or account was established.
- ii. Within 30 days after the trust fund or escrow account is established, MRC will also undertake the process of seeking to transfer to the SO, if certified (or an agent appointed by the Department, if the SO has not been certified) the remainder of the charge revenue in its accounts (that is, funds already obligated to pay pursuant to a contract, claim or similar mechanism that therefore were not transferred to the trust fund or escrow account initially) and all other assets and liabilities, and all financial, statutory, contractual, and other legal rights and responsibilities in the same manner as described in the preceding paragraph above with regard to the SO.

**II. If the mattress recycling plan expires, or if the Department disapproves a successor plan or amendments to the existing plan, or revokes the existing plan:**

- A. If MRC remains the MRO (that is, if the Department has not decertified MRC), MRC will seek to obtain the Department's approval of a successor plan or amendments to the existing plan.
- B. Regardless of whether MRC, an SO, the Department or an agent appointed by the Department is administering and managing the program, the existing plan will remain in effect until the Department approves a successor plan or amendments to the existing plan.
- C. A manufacturer, renovator, retailer, or distributor that sells mattress in California to a consumer or to an ultimate end user may continue to do so without penalty until an approved successor plan (or amendments to the existing plan) go into effect if it

continues to meet the applicable requirements of Pub. Res. Code Chapter 388, including, but not limited to, §§ 42989.1 (regarding a seller's obligation to collect and remit the charge) and 42992 (regarding a retailer's take-back obligation).

- D. If the Department has not approved a successor plan (or amendments to the existing plan) within one year after decertifying MRC, the Department may modify the existing plan as it deems necessary, including, if a trust fund or escrow account has been established, to direct payments from that fund or account.