



## BUSINESS LAW SECTION

### AGRIBUSINESS COMMITTEE

THE STATE BAR OF CALIFORNIA

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***PROPOSAL TO PROVIDE THAT CALIFORNIA RETAILERS MAY SELL AN  
UNREGISTERED PESTICIDE THAT IS LAWFUL FOR SALE AND USE IN ANOTHER  
STATE TO A BUYER FOR USE IN THAT OTHER STATE***

### LEGISLATIVE PROPOSAL (BLS-2013-06)

**TO:** Office of Governmental Affairs  
**FROM:** Business Law Section Agribusiness Committee  
**DATE:** March 21, 2012  
**RE:** Proposal to Amend Food and Agriculture Code § 12993

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### SECTION ACTION AND CONTACTS

Date of Approval by Section Executive Committee ((the "Executive Committee"): June 1, 2012  
Approval Vote: For: 14 Against: 0

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## I. Summary of Proposal

This proposed amendment to Food and Agriculture Code Section 12993 would resolve a statutory anomaly under which it is lawful for a California agricultural *dealer* to *manufacture* a product not registered for use in California *for sale to growers in another state*, but is unlawful for a *retailer* to sell that same product to a buyer located in another state, for use in that other state.

### A. Overview

Agricultural retailers are full-service professional businesses that sell fertilizers, pesticides, and other farm inputs to growers. These retailers, also referred to as distributors or dealers, employ Pest Control Advisors (“PCAs”) who assist growers by recommending fertilizer use and timing for better yields, monitoring for pest intrusion and advising on weed and pest control. Pesticide products are registered by the federal Environmental Protection Agency (“EPA”) for use in the United States. EPA receives its authority to register pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act<sup>1</sup> (FIFRA). States are authorized to regulate pesticides under FIFRA and under state pesticide laws. States may place more restrictive requirements on pesticides than the EPA. Pesticides must be registered both by EPA and the state before distribution.<sup>2</sup>

“Before a pesticide may be marketed and used in California, the California Department of Pesticide Regulation (“DPR”) evaluates it thoroughly, under guidelines of the Food and Agricultural Code (“FAC”), to ensure that it will not harm human health or the environment.”<sup>3</sup> This registration process is in addition to the federal review and the resulting label often contains more restrictions than the national label.

California Food and Agriculture Code Section 12841(a) requires payment of a mill tax for any pesticide product registered for use in this state. Section 12841(b) further provides a rebuttable presumption that sales of pesticides into California are intended for use in this state. Finally, under the Food and Agricultural Code 12993, it is “unlawful to sell or deliver into or within California any pesticide that is not registered” by DPR. Pursuant to Section 12993 a California retailer may not take possession of a pesticide product licensed by the EPA for sale and use in a bordering state but unregistered by DPR for use in California.

### B. Pass-Through Sales by California Retailer to Arizona Grower

A reading of the entire Chapter 3 of the Food and Agriculture Code speaks to “use” of a pesticide in California, not sales into California. It is clear that the intent of the pesticide regulations was to prevent *use* of unregistered pesticides in California. It is likely that the legislature never considered the option for a California agricultural retailer to make a sale of a

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<sup>1</sup> 7 U.S.C. § 136 et seq

<sup>2</sup> <http://www.epa.gov/pesticides/regulating/index.htm>

<sup>3</sup> “Regulating Pesticides: The California Story, a Guide to Pesticide Regulation in California,” (October 2001) page 22. <http://www.cdpr.ca.gov/docs/pressrls/dprguide/chap3.pdf>

product to a grower in another state of an EPA labeled product which does not have California registration. The California retailer must purchase or take inventory of an unregistered pesticide product in order to sell a full complement of farm inputs to growers on both sides of the California border. This temporary purchase with the intent to immediately resell the product into another state is known as a pass-through sale.

## II. Statutory Scheme.

In all but Chapter 3 (Mill Assessments) of Food & Agriculture Code Article 3, the statutory language addressed “use” of pesticide products in California. Article 3 seeks to prevent the *use* of pesticide products that have not been registered by California Department of Pesticide Regulation. The relevant statutes provide as follows:

12841. (a) It is unlawful for a person to ***sell for use*** in this state any pesticide products that have been registered by the director for which the mill assessment established by this article, and the regulations adopted pursuant to it, is not paid at the times specified in Section 12843.

(b) Except as provided in subdivision (d), every person ***who sells for use*** in this state a pesticide product that has been registered by the director shall pay to the director the applicable assessment. Those sales expressly include all sales made electronically, telephonically, or by any other means that result in a pesticide product being shipped to or used in this state. There is a ***rebuttable presumption that pesticide products that are sold or distributed into or within this state by any person are sold or distributed for use in this state.***

...

(d) Assessments provided for in this article for sales of registered pesticides that are ***sold for use in this state*** shall be paid by the registrant except as follows:

12841.4. (a) Every registrant of any production agricultural- or structural-use pesticide ***product sold for use*** in this state that is packaged in rigid, nonrefillable, high-density polyethylene (HDPE) containers of 55 gallons or less shall establish a recycling program, or demonstrate participation in a recycling program to ensure HDPE containers are recycled. Container recycling must comply with the American National Standards Institute American Society of Agriculture and Biological Engineers Standard S596, entitled Recycling Plastic Containers from Pesticides and Pesticide-Related Products, as published in February 2006. The records required by these standards shall be maintained for three years and shall be subject to audit by the director.

12842. ***Every person who sells for use in this state*** any pesticide products that have been registered by the director shall maintain in this state, or with the director's permission at another location, an accurate record of all transactions subject to assessment for four years. The records are subject to audit by the director and shall clearly demonstrate proof of payment of all applicable assessments for each registered pesticide product sold for use in this state.

12991. It is unlawful for any person, individually or through another, in connection with any substance or mixture of substances included within the scope of this chapter, to do any of the following:

...

(f) **Purchase for use** in this state a pesticide that is labeled for agricultural use except from a person licensed as a pest control dealer pursuant to Section 12107. Persons using those products shall retain receipts of the purchase of the products for four years and make the receipts available for inspection upon request of the director or the commissioner.

Even Section 12993 contemplates that unregistered products will be manufactured in California but later sold for export. Thus it would be *lawful* for a California agricultural dealer to manufacture a product not registered for *use* in California for *sale* to growers in another state. Section 12993 provides as follows:

12993. It is unlawful for any person to manufacture, deliver, or sell any pesticide or any substance or mixture of substances that is represented to be a pesticide, or to retail any formula for a pesticide in conjunction with the sale or gift of materials that are represented to be the essential ingredients necessary to constitute a pesticide, which is not registered pursuant to this chapter, or for which the registration has been suspended or canceled, except as provided in regulations adopted by the director or as provided in the notice or order of suspension or cancellation. ***This section, however, does not apply to any pesticide product of a registrant that is manufactured solely for export outside this state, and which is so exported.***

### **III. Impact of Current Statutory Scheme.**

As one of the primary examples, California retailers who are situated along the Arizona border are at a disadvantage with their Arizona competitors, all of which service growers in both Arizona and California. In the lush growing region of the Palo Verde Valley, an agricultural retailer in Blythe may support farming clients on both sides of the California/Arizona border. Although the Colorado River may form the basis for the state border, the growing region is not constrained by the California border.

A similar situation could arise with other bordering states. California retailers currently are *prohibited* from selling a product which is lawful for sale and use in another state to a buyer located in that other state. Retailers in those other states do not suffer the same limitation and thus have a strong competitive advantage over their California counterparts.

### **PENDING LITIGATION:**

The Agribusiness Committee is not aware of any pending litigation that would be impacted by the proposed amendments.

### **LIKELY SUPPORT & OPPOSITION:**

The Agribusiness Committee anticipates support from agricultural retailers.

Environmental groups may oppose the proposed amendments. DPR has expressed concern about the risk of unregistered product being used in California. While this concern is certainly meritorious, the risk is no greater than those already tolerated. For instance, inadvertent sales of an unregistered product could occur by a pesticide registrant as well as a distributor, and registrants may manufacture pesticides in California which are not lawful for use in California. Or, for example, an Arizona dealer could sell a California-unregistered product to a farmer with crops on both sides of the Colorado River. These risks, however, are analogous to the chance that a California-registered product could be used in quantities that exceed the label or even that a pesticide would be used on a crop for which it was not registered. These risks are all inherent to the manufacture, sale and use of pesticides. Prohibiting a California retailer from selling a California-unregistered pesticide to a grower in another state does nothing to minimize those risks. Moreover, as noted above, it is lawful for a California agricultural dealer to manufacture a product not registered for use in California for sale to growers in another state.

### **FISCAL IMPACT:**

The proposed amendments could have a positive net impact on the state's economy to the extent they would increase sales by California retailers. Furthermore, the revised statutory language could be tax positive in that California would impose a mill assessment on the sale by a California retailer of a chemical destined for a field outside California. In general, the limited number of chemicals that are restricted from sale by a California retailer to a non-California farm are expensive products; mill tax is based on a percentage of the sale price.

### **GERMANENESS:**

The proposed amendments require the special knowledge, training, experience or technical expertise of the Agribusiness Committee, which has the practical experience to understand how the current statutes and regulations have affected agricultural retailers in California.

### **DISCLAIMER:**

This position is only that of the Agribusiness Committee of the Business Law Section of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the Agribusiness Committee and in the Business Law Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

## Text of Proposal

SECTION 1. Section 12993 of the Food and Agriculture Code is amended to read:

12993. It is unlawful for any person to manufacture, deliver, or sell any pesticide or any substance or mixture of substances that is represented to be a pesticide, or to retail any formula for a pesticide in conjunction with the sale or gift of materials that are represented to be the essential ingredients necessary to constitute a pesticide, which is not registered pursuant to this chapter, or for which the registration has been suspended or canceled, **for use in California,** except as provided in regulations adopted by the director or as provided in the notice or order of suspension or cancellation. This section, however, does not apply to any pesticide product of a registrant that is manufactured solely for export outside this state, **or to a pesticide product that is delivered to a retailer solely for sale and export outside this state,** and which is so exported.