



MEMORANDUM

Via E-Mail

DATE: December 11, 2006

TO: Firm Clients and Friends

FROM: Bergeson & Campbell, P.C.

RE: EPA Publishes Draft Final Rule Amending and Extending the Exceptions from the Definition of “Pesticide Chemical” and “Pesticide Chemical Residue”

On December 6, 2006, the U.S. Environmental Protection Agency (EPA) published a direct final rule that amended and extended the exceptions from the definition of “pesticide chemical” and “pesticide chemical residue” contained in 40 C.F.R. Section 180.4. 71 Fed. Reg. 70667. The prior definition of “pesticide chemical” and “pesticide chemical residue” under Section 180.4 exempted only food packaging impregnated with insect repellent from these definitions.¹ EPA states that the exemptions were based on EPA’s view at the time of enactment that it had only received applications that called for that particular use and method of application.

The new rule expands the exception to the definition of “pesticide chemical” and “pesticide chemical residue” to include components of food packaging material treated in any manner with any pesticide active ingredient and distributed or sold with the purpose of controlling pests. Currently, packaging material (such as paperboard, polymers, or a coating), is considered to be an inert ingredient when a pesticidal formulation is mixed with it, requiring a separate tolerance (or exemption from a tolerance) from EPA. The effect of the new rule is that food packaging materials that have been treated with a pesticide will no longer be considered pesticide chemical residues, and will be exempt from regulation by EPA (*i.e.*, will not require a tolerance or exemption) under Sections 402(a)(2)(B) and 408 of the Federal Food, Drug, and

¹ “Inert ingredients in food packaging impregnated with an insect repellent when such inert ingredients are the components of the food packaging material (*e.g.*, paper and paperboard, coatings, adhesives, and polymers)” are exempt from the definition of pesticide chemical and pesticide chemical residue. 40 C.F.R. § 180.4.



Memorandum to Firm Clients and Friends
December 11, 2006
Page 2

Cosmetic Act (FFDCA).² The excepted food packaging materials will be regulated instead by the Food and Drug Administration (FDA) as food additives, without regard to the application technique or the mode of action of the active ingredients in the packaging material.

EPA makes it clear in the direct final rule that the active pesticide ingredients must still be registered as pesticides, and any inert ingredients in the pesticide formulation must be the subject of a tolerance or exemption from the requirement of a tolerance. Only the treated packaging material is excepted from registration or tolerance requirements.

EPA indicates that the rule will be effective **February 5, 2007**, without notice unless EPA receives adverse comments in writing by **January 5, 2007**. If EPA receives such comments, it will publish a timely withdrawal.³

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We hope this information is helpful. As always, please call if you have any questions.

² 21 U.S.C. §§ 301, *et seq.*

³ 71 Fed. Reg. at 70667.