

# Chemical Industry Update - March 2019

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## 2019 Proxy Season: ESG Related Shareholder Proposals

It is that time of year for many U.S. public companies, with shareholder annual meetings just around the corner. The meetings themselves are often non-events, with the votes gathered in advance via proxies, but the process of seeking proxies involves time, expense and a degree of anxiety. Some of the drama comes from shareholder proposals that seek to hold a vote on a particular matter. These proposals come in all shapes and sizes, some looking for corporate governance changes and others focused on social activism. In fact, last year, Russell 3000 Companies received a record 144 proposals requesting action on social and environmental issues, making this category of proposals larger than any other.

From what we can tell, 2019 seems to be continuing this trend. One shareholder proposal that has been sent to several in the chemical industry relates to plastic waste. It proposes that these companies be required to issue an “*annual report to shareholders . . . on plastic pollution*” and to report on their policies to keep from “*contaminating the environment*” with their products. At least these proposals stop (just short of proposing that companies shutter their plastics businesses altogether.

Climate change is a more established theme, and in recent years shareholder proposals with that focus have garnered significant support in some cases. Following on that success, the number of companies receiving these proposals also appears to be growing. This year, Devon Energy was successful in obtaining permission from the SEC to exclude a proposal that (if passed) would have required it to disclose how its operations align with the greenhouse gas reduction targets under the Paris Climate Accord. The SEC’s No Action letter explained: “*the proposal would require the Company to adopt targets aligned with the goals established by the Paris Climate Agreement. By imposing this requirement, the Proposal would micromanage the company.*” Devon’s success, however, does not mean climate change proposals will go

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away in the future; rather, they will simply need to be fine-tuned to meet SEC guidelines.

### **PFAS Litigation Proliferates While EPA Looks to Designate the Substance Under CERCLA**

Litigation regarding per and polyfluoroalkyl substances (“PFAS”) contamination of drinking water continues to proliferate. These actions relate to both alleged impacts from facilities where the chemicals were manufactured and locations where products containing the chemicals, particularly firefighting foams, were used.

Of particular note, a class-action lawsuit brought by an Ohio firefighter, on behalf of all Americans exposed to PFAS, against eight chemicals companies does not seek damages. Rather, the suit seeks the creation of a PFAS Science Panel with a mandate to conduct “scientific study, research, testing, and/or other work of any kind that is extensive or comprehensive enough, according to Defendants, to generate results that Defendants will accept ... as sufficient to confirm a causal connection between any single or combination of PFAS in human blood and any injury, human disease, adverse human health impact, and/or a risk sufficient to warrant any personal injury compensation or future diagnostic medical testing, including medical monitoring.” Similar to the settlement that created the C8 Science Panel which is looking at the health impacts of certain PFOA exposures, the findings of the PFAS Science Panel being sought in this litigation would be “definitive and binding on all parties.” If successful, this litigation and the creation of a PFAS Science Panel would have far reaching implications for PFAS litigation moving forward.

While advocates continue to use litigation as their main tool to drive the PFAS issue, the Environmental Protection Agency (“EPA”) is also taking action. In February, EPA published an Action Plan, available [here](#), outlining “concrete steps the agency is taking to address PFAS and to protect public health. Among other steps, EPA has begun the process to designate certain PFAS chemicals as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). Designation as a hazardous substance under CERCLA imposes reporting obligations for releases, which could create obligations and liability for entities that use fire suppressant foams containing PFAS. In addition, the designation has the potential to complicate and delay ongoing CERCLA clean-up efforts, at sites where PFAS containing products were used.

### **Commercial Law Update: Tortious Interference Caselaw Developments**

For decades, “tortious interference” has been one of the most commonly pled claims in business dispute cases between competitors. However, in recent years something of a national trend has developed to narrow these claims and to subject them to concrete objective standards. On February 27, 2019 the Utah Supreme Court issued an opinion furthering this national trend.<sup>1</sup>

In *C.R. England v. Swift Transportation Company*, 2019 UT 8, the Court held that to establish a tortious interference with contract claim, a plaintiff must show the defendant’s

interference used “wrongful means.” Previously, a line of Utah authority, had allowed interference with *contract* to be established by showing merely that an actor interfered without “just cause of excuse”—a highly ambiguous standard. The Court explained that the term “wrongful means” requires conduct that is “independently tortious or wrongful” beyond the fact of the interference itself. In another prior case, the Utah court had given list of examples of such “wrongful means”:

violations of statutes, regulations, or recognized common-law rules—or the violation of an established standard of a trade or profession.

In *C.R. England*, the Court addressed what had previously been the softest and most ambiguous of those examples—the violation of “an established standard of a trade or profession.” The Court clarified that established standards of a trade or profession include only “external and objective ones,” that can be proven through “expert testimony regarding *industry-wide customs or practices*, uniform codes, industry-specific regulations.” After *C.R. England*, a plaintiff can no longer rely on what previously had been one of their most frequent strategies—asserting that the defendant’s conduct violated the company’s rules and policies.

The *C.R. England* opinion builds on the Utah Supreme Court’s opinion in *Eldridge v. Johndrow* 2015 UT 21, ¶ 22, 345 P.3d 553, which eliminated a plaintiff’s ability to plead tortious interference by alleging merely that the defendant interfered with an “improper purpose.” Motivation or purpose are inevitably issues of fact, and allowing plaintiffs to bring cases based on the actor’s motivation had long prevented meaningful appellate review and—more to the point—given no guidance as to what conduct was in-bounds and what was out of bounds. This was especially problematic in the context of commercial dealings where juries often found even the most commonplace commercial conduct tortious because it was done with a bad motive.

After these two cases, it is clear that (1) the elements of interference with contract and interference with prospective economic advantage are the same; (2) plaintiff must prove that the defendant interfered by “wrongful means,” and (3) to establish wrongful means by reference to an industry standard will require expert testimony showing that the standard is an external and objective industry-wide standard.

This developing law should give commercial actors more confidence that their conduct will be measured against external and objective industry-wide customs and standards, rather than the vagaries of a jury’s view of their motivations.

### **Importance of Taking Proper Minutes & Limiting Electronic Communications Among Board Members**

On January 22, in *KT4 Partners LLC v. Palantir Technologies, Inc.* the Delaware Supreme Court held that a company’s disregard of corporate formalities meant plaintiffs could have access to director emails and other electronic communications on a §220 books and records request. Also in January, in *Schnatter v. Papa John’s Int’l Inc.*, the Delaware Court of Chancery allowed director text messages to be produced in a Section

220 request. These cases feel almost predictable in hindsight as courts evolve with the times to address the question of whether and when these informal communications between directors can be treated as corporate records and accessible to any interested shareholder. The lesson is an important one: keep an adequate formal record or face the prospect of turning over private emails as the only available substitute. It emphasizes the importance of not just keeping minutes but making sure they have enough substance to them such that courts won't feel a need to look past them. Just as important is for directors to take care not to create an alternative record electronically, particularly not one that conflicts with or undermines the formal record.

### **FTC Challenge to Chemicals Joint Venture Acquisition Clarifies U.S. Antitrust Considerations**

The FTC recently challenged a joint venture's proposed acquisition of an under-construction Polyethylene terephthalate resin (PET) production plant. *See In the Matter of Corpus Christi Polymers LLC*, No. 181-0030. The joint venture was composed of three PET resin producers, who intended to acquire the uncompleted facility following the original manufacturer's bankruptcy. The producers settled the FTC's complaint by restructuring the transaction and agreeing to certain conditions, including restrictions on information sharing and ongoing monitoring.

While the FTC's challenge is a good reminder that even socially beneficial cooperation between competitive firms can raise antitrust risks and scrutiny, we do not perceive any significant shift in the federal antitrust agencies' existing approach to joint ventures. The agencies' longstanding Guidelines acknowledge that "[c]ompetitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs." Competing firms considering entering into a joint venture must ensure that the joint venture has one or more procompetitive business objectives, and they must frankly analyze regulators' likely perspective on actual and potential competitive effects resulting from the joint venture. In particular, competitors need to assess any "restraints" on competition posed by the joint venture, such as agreements on pricing and any output restraints. The basic question is always whether the restraints on competition associated with the joint venture are reasonably necessary (or "reasonably ancillary") to achievement of the joint venture's procompetitive benefits.

In the PET resin joint venture, the FTC's challenge was apparently driven by the potential effects on competition in the PET resin production market. In particular, the North American market was already highly concentrated before the proposed acquisition, with the joint venture members comprising three of only four producers in the market and accounting for nearly 90% of North American PET production capacity. The proposed acquisition would have increased this concentration, and would, under the agencies' longstanding analysis of joint ventures, be likely to substantially reduce competition by allowing the joint venture or its members to more easily exercise their significant power in the PET resin production market. The FTC's concerns were also driven by what it described as high barriers to entry for PET resin production and incumbency advantages

associated with the existing vertical integration of two of the three joint venture members.

The nature and degree of antitrust scrutiny of joint ventures and their activities continues to depend on the nature of each joint venture and its power in the relevant market(s)—always a fact-intensive inquiry. The FTC’s PET resin challenge does not appear to reflect heightened scrutiny in the agencies’ approach to antitrust review of joint ventures generally, nor in the chemicals industry specifically. But proposed joint ventures will always face antitrust risks where the facts indicate significant competitive concerns, such as collaborations between dominant competitors in a highly concentrated market and/or facilitation of competitively sensitive information exchanges beyond the purposes of the joint venture itself.

### **Versum-Entegris Merger & the State of Public Company M&A**

Versum Material’s proposed merger with Entegris Inc. would combine two leading suppliers of specialty materials for semiconductor and other high-tech industries. The January announcement of the merger was an exciting start to chemical industry M&A for 2019. It got more interesting when Merck (a European based company) made a cash offer for Versum. This led to Versum promptly adopting a poison pill shareholder rights plan to put its board firmly in control of its sale process. Naturally, shareholder litigation ensued, and no doubt there will be more twists to come.

Such is the messiness of public company M&A in today’s environment. While closing these deals has always been a careful exercise due to complex fiduciary duties and a shareholder approval process that offers no guarantees, the globalization of public company M&A (as seen in this deal), the rise of hedge fund tactics and evolving shareholder litigation have made getting from signing to closing particularly complicated—so much so that successful mergers of equals have become more and more rare.

### **India-U.S. Trade Friction**

In a worrisome tit-for-tat between the U.S. and India on trade matters, the U.S. announced it is ending preferential trade treatment on a number of Indian imports. While the impacted list includes many chemicals, the dollar impact related to chemicals and downstream products (like textiles) is not expected to be significant. More concerning for the industry would be the proliferation of FDI restrictions, like ones retailers Amazon and Walmart have faced in recent months, that would make it harder as a general matter for U.S. companies to operate there.

### **Notes from All Over**

HSR filing thresholds increased. Minimum size of reportable transactions is now \$84.4 million. See Dorsey’s eUpdate for details.

Andrew Wheeler’s Leadership of the EPA was made official last month with his confirmation by the Senate. NYTimes provides this context on the appointment.

Given that India is the world's sixth largest chemicals producer and fifth largest consumer of chemical products, adoption of a robust chemicals law there would be a big deal. [This article](#) (note: Chemical Watch subscription required) provides a nice overview of the history of India's still-not-adopted chemical policy—and speculation that 2019 might be the year.

Europe's chemicals agency (Echa) has [proposed restrictions on microplastics](#) (which it defines as pieces less than 5 mm in diameter) that would ban their use in certain circumstances and require labeling in others.

The EU's [contingency plan](#) for customs and trade in a “no deal” Brexit includes a proposal to arrange for temporary relief in some categories, such as dual-use products. But more broadly the cliff edge for customs and trade would be applicable. Whether the immediate impact on international trade will be material or not has been fiercely debated.

A potential weakness in D&O Insurance policies was exposed in a recent case. The Court found that directors can be denied coverage under a policy's capacity exclusion if they are operating in dual roles as shareholder representatives. See this [Dorsey update](#) for details.

***Questions or requests? Contact [Troy Keller](#).***

<sup>1</sup> See, e.g., *Alexander v. University of Kentucky*, 2012 W.L. 1068764, \*30 n.34 (E.D.K.Y. 2012) (Kentucky law) (“[I]nterference is not improper where the information provided is truthful. . . .”); *Walnut St. Assocs., Inc. v. Brokerage Concepts, Inc.*, 20 A.3d 468 (Penn. 2011) (adopting Restatement (Second) of Torts § 772; “truthful” information cannot for the basis for a tortious interference claim); *Recio v. Evers*, 771 N.W.2d 121, 132-33 (Neb. 2009); (“[I]f the information provided is truthful, the interference is not ‘improper.’”) *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W. 3d 711, 717 (Texas 2001) (“lawful conduct is not made tortious by the actor's ill will towards another, nor does an actor's lack of ill will make his tortious conduct any less so”).