

Chemical Industry Update - September 2018

by Troy M. Keller

Liability Watch

Troubling Developments from the Arkema Plant Explosion

The fallout continues from chemical releases triggered at an Arkema facility during Hurricane Harvey. Earlier this month, the plant manager and Arkema's North American CEO were criminally indicted by a Texas grand jury on recklessness charges. The Harris County DA alleges the two are responsible for the reckless release of chemicals when the facility flooded during the hurricane. The two face penalties of up to 5 years in prison.

The American Chemistry Council commented: "*The prosecutor's decision to pursue this course of action is discouraging and sets an alarming and unreasonable precedent of seeking to hold people responsible for acts of nature.*" The indictment follows class action suits by first responders and nearby residents as well as civil claims from Harris and Liberty counties. Whether the fallout from this accident will set a new threshold for risk that manufacturing companies are expected to assume is to be seen and ultimately will depend on the outcome of the legal proceedings.

GDPR Liability

Well . . . the first major legal claim stemming from Europe's data privacy law didn't arise under the EU's authority to seek fines of up to 4% of annual, global revenue for violations. Instead, it came in the form of a securities class action suit in the U.S. Plaintiffs are alleging that Nielsen Holdings (the ratings and analytics company) failed to disclose the extent of the potential impacts on their business model of the data privacy legislation. See this Dorsey eUpdate for the full story.

Corporate Governance

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Delaware Sustainability Statute

Earlier this summer, Delaware enacted a corporate statute permitting businesses to signal their commitment to global sustainability by signing onto a voluntary certification regime. Whether such a certification will prove to be a useful way for chemical stocks to demonstrate their commitment to sustainability is to be seen. Nearly all chemical companies already issue sustainability reports annually. Delaware's certification would provide something of a government imprimatur on a company's efforts, but it comes at the cost of following a detailed process that involves meaningful board level participation. See this [blog post](#) for an interesting analysis of the new regime. As an aside, remember that Delaware (along with several other states) expanded their corporate statute a few years ago to allow companies to be formed as "Benefit Corporations," which would give them a legal basis for making the pursuit of a social purpose equal in priority to that of building shareholder value. (Etsy was the most well-known company to utilize this statute, but it dropped its B Certification in 2017.) The sustainability certification is a different animal but is a child of the same Environmental, Social and Governance (ESG) trend.

"The Accountable Capital Act"

Taking the ESG trend to the extreme, earlier this month, Elizabeth Warren introduced legislation that would, among other things, require large corporations to be chartered by the federal government, have a social purpose and include employees, customers and communities in major decisions. Senator Warren's bill certainly won't progress in any form, but it is only getting the attention it has because the pressures of short-termism and shareholder activism on company management decisions are real.

Environmental & Regulatory

The Affordable Clean Energy Rule

The EPA's newly proposed [Affordable Clean Energy Rule](#) is likely to face stiff legal opposition by environmental groups and some states, and it could be tied up in court for years to come--ironically similar to the fate of the more restrictive Clean Power Plan it is meant to replace. If it comes into effect, the Rule provides significant flexibility for states to promote coal and petroleum energy sources. Whether its effects will have a meaningful impact on utilities or feedstock pricing for the chemical industry is unlikely to be seen for months or years to come, if ever.

EPA Seeking to Drop its Opposition to HFCs

Furthering its campaign of deregulation under Trump, on Tuesday, the EPA filed a brief with the Supreme Court stating it was no longer seeking to limit the use of hydrofluorocarbons (HFCs) under the regulations developed during the Obama administration. Those regulations had been previously overturned by the D.C. Circuit Court of Appeals. Environmentalists and makers of HFC replacements (led by Honeywell) are seeking an appeal with the Supreme Court to reinstate Obama era

limitations.

Transaction Structures that Caught our Eye

Koch Investment in Yuhuang Methanol Complex

It's been reported that Koch Industries is taking a minority position in Yuhuang Chemical's \$1.85 billion methanol project in Louisiana. Koch's investment is likely motivated by commercial purposes: Koch gets an exclusive offtake agreement and (reportedly) permission to construct its own terminal assets for shipping of methanol via rail, truck or marine. But even if the driving force behind the transaction is commercial, this makes Koch a co-investor with Yuhuang, who may like the idea of an iconic industry name associated with its investment in Louisiana.

Cabot Microelectronics Merger Agreement with KMG Chemicals

Cabot announced its \$1.6 billion acquisition of KMG Chemicals earlier this month. The deal structure has KMG shareholders receiving roughly 70% of the consideration in cash and 30% in equity (based on Cabot trading values over the 20 days prior to closing). It's a normal enough merger structure, though at a time when most acquisitions in the Chemical Industry are being done in cash and private equity is flush with it, this structure suggests there is strategic value that investors in both companies are interested in.

Questions or requests? Contact Troy Keller or Ben Machlis.