

Message

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Todd

I hope I've remembered correctly that you're back from holiday tomorrow - I hope Italy was great. To greet your return, find attached a set of notes that look at issues related to both the US and China, following up on our previous discussions. I trust they're of interest, and I'd be very happy to discuss.

Interesting times re Pruitt, though I doubt it'll make much difference re policy.

More to come.

All best.

Nick

Nick Banner

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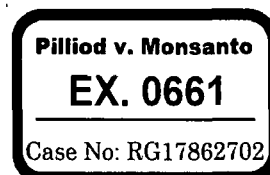
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## *Glyphosate regulation*

*We heard a unanimous view from senior levels of the EPA (and USDA) that glyphosate is not seen as carcinogenic, and that this is highly unlikely to change under this administration – whatever the level of disconnect between political and professional staffers.*

### **The current political environment favours you**

We asked our associates in Washington DC to take the temperature on current regulatory attitudes to glyphosates. The deregulatory and pro-business agenda of the White House is seen as favouring you (note, we refer to “Monsanto” in this note, because that it still overwhelmingly how officials and other interlocutors think of the company). A domestic policy adviser at the White House said, for instance: “We have Monsanto’s back on pesticides regulation. We are prepared to go toe-to-toe on any disputes they may have with, for example, the EU. Monsanto need not fear any additional regulation from this administration.”

And an official familiar with thinking in the Secretary’s Office at the US Department of Agriculture (USDA) commented: “We doubt that there is a regulatory risk to Monsanto on glyphosate. The consensus in the administration that this is not a health risk is solid.”

He contrasted this with the US government’s views on GMOs: “The GMO issue is more complicated, as is seed licensing. The balance of opinion among the administration’s core supporters is more mixed on this front, as shown by the level of opposition in the agricultural community to the Bayer deal, leaving Monsanto with less political cover. In talks with the EU and others on GMO products, however, we stand shoulder to shoulder with Monsanto.”

### **The EPA still supports the use of glyphosate...**

There is little doubt that the EPA supports the use of glyphosate. A former EPA lawyer specialising in pesticides and toxic substances was clear on this, his comments buttressing those of the USDA official: “The WHO study is flawed. It is seen as political and leaving out key information. And it is making the issue more contentious than it probably should be.” A current EPA official shared this assessment: “We have made a determination regarding glyphosate and feel very confident of the facts around it. Other international bodies [referring to the WHO] have reached different conclusions, but in our view the data is just not clear and their decision is mistaken.”

The former EPA lawyer also referred to the EPA’s decision to reverse a ban on the use of Chlorpyrifos, proposed under president Obama. Looking ahead, he suggested:



“The way the EPA under the Trump administration has handled Chlorpyrifos might be instructive in how it would handle new science or new developments related to glyphosate.”

**Widening disconnected between professional and political staff**

As you will know, stakeholders in Washington see a widening disconnected between the professional and political layers of staff within most federal agencies. While this appears to be true of various agencies - Health and Human Services, Commerce, Education, Interior, the Food and Drug Administration, and so on - the EPA may be the leading example of this phenomenon.

Said a partner at a prominent DC law firm with extensive contacts at the EPA:  
“Within the EPA we see a total split between the political leadership and the professionals. Climate science is the most obvious area, but environmental pollution, transportation, and toxicology are others.

“In essence, the political leadership favors deregulation and dismisses the expert risk analysis. It is especially averse to theoretical risk analysis, for example on the risks of glyphosate, about which a scientific consensus is yet to form. It is also instinctively dismissive of risk analysis undertaken by international bodies such as the UN and the EU, and NGOs like the Pesticide Action Network.”

With regard to glyphosate, in particular, the differences between political and professional staff are sharp. A political appointee in the Office of the General Counsel remarked: “We think the evidence against glyphosate is very unreliable. We see the WHO and EU condemnations of it as part of their wider campaign against GMO crops and as a virtual non-tariff barrier.”

The professional staffers’ view was represented by one official with the EPA’s Office of Pesticide Programs, who told us: “Our periodic review of glyphosate is likely to conclude that it is not a human carcinogen. However, there is little doubt among officials in our office that the science is evolving and that this assessment may come under professional, activist and public pressure in the coming years. Of course, these doubts about glyphosate at the professional level are not shared by the EPA’s leadership.”

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## *Dicamba*

*The EPA is still considering its position on dicamba, and would like to issue formal guidance in August, if it can muster enough evidence by then. Although there is no question of damage to human health, the ambivalence about dicamba among farmers makes the question politically tough for the EPA and USDA. They are watching the issue, and the potential level of crop damage, closely.*

### **The politics of dicamba are less clear than glyphosate, and so is the EPA's stance**

Dicamba was described within the EPA as "very much a live issue" for its Administrator Scott Pruitt. And a former EPA lawyer specialising in pesticides and toxic substances told us: "The administration is torn on how to think about dicamba. These situations can cause regulatory paralysis. It's hard to tell what the outcome will be and if the EPA or other agencies will take as strong a stance as they've taken when it comes to glyphosate."

A current EPA official explained the difference, as he saw it, between the dicamba and glyphosate cases, and the potential financial implications for Monsanto: "When it comes to dicamba, I don't think the issue is cancer or human health. It is the application, either used correctly or incorrectly, that accounts for crop damage and financial loss. Because the herbicide's marketing scheme and value are linked with genetically modified seeds that are dicamba-resistant, Monsanto stands to lose billions of dollars in reduced demand for both the seeds and the herbicide."

A senior EPA lawyer added: "In the Midwest and South, dicamba is a top issue for agriculture groups. It is an issue that pits farmer against farmer."

Commenting on the timing of more formal guidance by the EPA, a senior lawyer at the agency observed: "Farmers make purchasing decisions late summer and the Administrator would like to give them regulatory certainty before the purchasing season regarding dicamba-resistant pesticide seeds. That would be the ideal situation, but real time data is hard to achieve. We are looking to have a decision by the end of August. Whether we have the info to make a decision is up in the air."

And referring to the merits of the current litigation against you over dicamba, the EPA lawyer continued: "Dicamba is an interesting beast and, in my estimation, is likely to be a tough one to win. This is not a frivolous case. It may be that there is more legitimacy to this case than the average pesticide litigation."

Whether there is crop damage this year - and, if so, how much - is likely to have a significant bearing on the outcome. An official at the FDA's Center for Food Safety and Applied Nutrition explained: "There are class action lawyers with damages



cases lining up against Monsanto on behalf of crop growers injured by vapour drift. While Monsanto has said that they could keep vapour drift from occurring, it has had a damaging impact on US agriculture. This planting season will therefore be important. Monsanto is claiming the same thing won't happen again and we will know at the end of the summer whether there has been crop damage or not."

**The potential repercussions, though, are probably limited**

Irrespective of the merits of a potential case over alleged dicamba-related crop damage, the scope for settlement between the various parties means that the feared financial repercussions for you in this instance may be overstated. The former EPA attorney explained: "Regarding dicamba and VaporGrip, there is probably less concern about litigation, because crop damage claims can be settled. Crop damage issues are relatively modest compared to awards associated with human risk determinations. Adjacent crop damage happens commonly, though there is controversy about whether or not VaporGrip's chemical characteristics predispose them to drift over to adjacent farms."

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## *Reputation*

*Contacts familiar with the industry, and the politics of regulation, see Monsanto (as the company is still known) as overly aggressive in its approach to public debate, which raises risks in relation to litigation. In the short term, you (and the EPA) are likely to face more legal challenges from NGOs as a result of the EPA's permissive approach to regulation. In the longer term, retailers, among others, feel that glyphosate will have to be phased out - though without saying precisely why.*

In the course of speaking to relevant stakeholders about regulatory risks associated with your products, a number of them volunteered views on Monsanto's reputation and standing, and potential risks that arise from this, which may be of interest as you retire the brand name following your merger with Bayer.

A senior executive at Brunswick, the communications and PR group, who has worked on both sides of various Monsanto deals, summarised: "I can understand that Monsanto does not want to concede any legal ground over RoundUp or any other products. But I have less understanding of why it feels it necessary to cultivate a 'bad boy' image in its industry. This dented its chances on the Syngenta deal, for example, and leads to a generally hostile courtroom attitude among jurors in the various cases that it gets involved in - who, I am sure, will be tempted to 'take down' Monsanto on some issue or other just to balance the scales. Even Exxon has softened its 'scorched earth' tactics on climate change."

An experienced agrochemical industry consultant also commented on your image within the industry: "Developments in California on glyphosate are striking a chord with the public. And the dicamba rollout was hardly a model of corporate best practice - even so, Monsanto blamed its own customers. The company regularly goes to 'DEFCON 1' on the slightest challenge from the environmental, academic or scientific community. I am sure Bayer is aware of this and will make adjustments. The issue is one of softening its image, not abandoning its arguments."

### **Some image management is seen as necessary**

In this context, our contacts suggested that Monsanto might be well advised to be more proactive in addressing the views of the company held by various stakeholders, including customers, NGOs, governments, farmers and other agrochemical companies. As the Brunswick executive put it: "Monsanto should do some more enlightened outreach on pesticides and GMO products. The company may think it is self-evidently right on all these fronts, but public opinion, including among its customers in the farming industry and retailers who sell its products, is trending in the opposite direction."



More specifically, we were told that retailers see your recent stance on California's Proposition 65, as counterproductive. Retailers are aware of your decision to challenge the Proposition 65 designation of glyphosate and, for the most part, understand why you have chosen to take this course of action. While no retailer expressed frustration with how you are handling the issue, there was a view that your challenge risks painting you as a poor environmental citizen and could actually accelerate a gradual shift away from glyphosate.

A Costco executive, for example, argued: "Monsanto is making the issue worse by raising the profile of glyphosate. The more aggressive they are, the more ammunition they give the environmental campaign groups to paint them as bad citizens, a reputation that they already suffer from."

#### **Even within the EPA there is unease about your "scientific intransigence"**

Even within the EPA, which supports your position on glyphosate, there is frustration over what some see as your stubborn resistance to taking seriously evidence that challenges your thinking. An official in the Office of Pesticide Programs (which is, admittedly, probably less convinced of the non-toxicity of glyphosate) told us: "There is growing unease in this office at what seems like scientific intransigence by Monsanto to give credibility to any evidence that doesn't fit their view. We would agree with them that such evidence is non-conclusive, but that does not mean that it is without basis."

#### **NGOs can be expected to become more aggressive**

NGOs, in the belief that regulators have taken an overly relaxed approach to Monsanto, are expected to step up their campaigning efforts. A Senate Democratic staffer who helped negotiate reform of the Toxic Substances Control Act in 2016 ventured: "It is my view that industry across the board faces far more serious litigation risk when regulators are lax than when they are strict. There is virtually no inside way today to stop Pruitt and his political team from handing the keys to industry. That will drive NGOs to become hyper-litigious, challenging every agency policy shift, leaning way forward on launching litigation against any substances suspected of causing harm." A senior staffer for a Republican senator added: "I am not aware of a specific product that represents a serious exposure, but I am already seeing an increase in legal activism from the environmental community, and this represents a potential risk to any chemicals and/or pesticide manufacturer."

A lobbyist with the Natural Resources Defense Council, the environmental advocacy group, confirmed: "With the EPA dramatically loosening the regulatory reins and applying its mandate for risk management so narrowly, the only recourse that the NGO community will have is litigation. Our litigation team has been working overtime and is likely to continue doing so, going after both the EPA and companies."



Continuing, he offered this example of industry practice against which the group would campaign: "Traditionally, before the EPA authorises the application of a product within a certain use and environment that could expose endangered fauna, it seeks a consultation with the Fish and Wildlife Service. But with the support of the current EPA leadership, organisations such as CropLife are trying to get around that traditional review process, and the EPA is acting complicit. In the farm bill that recently passed the Senate, CropLife was trying to insert language that would exempt them from exposure to lawsuits stemming from the Endangered Species Act. This would be precedent setting and would represent a major departure from the status quo. However, it is the kind of thing that the industry has been emboldened to do with the support of the administration's deregulatory agenda."

**The greater risk is in the long term**

There also appears to be a growing consensus that, regardless of the outcome of specific cases against RoundUp, glyphosate is likely to be slowly phased out of the market in the medium term. An executive at the National Association of Wheat Growers explained: "It appears that glyphosate use is becoming less tenable as a pesticide, and we are encouraging research into alternatives. It's possible that in 10 years time glyphosate could be phased out, but with the active acquiescence of Monsanto."

Interestingly, there was little agreement among our contacts on why exactly they expected glyphosate products to decline in use over time – just agreement that they would. Broadly speaking, there was a belief that one way or another "the science" would eventually militate against glyphosate use. Some retailers also voiced an expectation that consumer preferences for "organic" alternatives (possibly encouraged by NGOs) would affect the market for glyphosate.

Said a senior executive at Home Depot: "There's not likely to be much short-term risk for a product like RoundUp, and the label isn't really going to matter. However, the bigger risk is in the long term. If the science around glyphosate starts to coalesce and spread beyond California, pressure could start to build on products containing glyphosate. We're going to see how things develop."

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