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December 11, 2018

## **SEC Chair Reminds Reporting Companies of the Importance of Brexit-Related Disclosures**

Since the June 2016 Brexit referendum, we have chronicled in a series of alerts the tremendous level of uncertainty and the potentially far reaching effects of the different Brexit scenarios. Even at this late date, as the headlines amply demonstrate, there are a number of plausible Brexit scenarios – a withdrawal deal (though probably not the one presented to Parliament) could be approved, the current government could fall, a new election could be held, a second referendum could be authorized, Britain could exit without a deal or the Article 50 process could be halted. With the March 29, 2019 deadline looming, one might assume that the situation would be clarified shortly. But perhaps not. And even if a deal is approved, the ultimate nature of the trading relationship between Britain and the European Union could be some years away from being finalized. The “backstop” that has drawn the ire of so many may or may not survive in its current form, and that too will have implications well beyond March 29, 2019.

Businesses have to varying degrees – depending perhaps on the extent to which the direct effects of Brexit were tangible or depending on the view taken as to potential outcomes – been focused on contingency planning, and depending on which direction this process goes those plans may or may not need to be put into effect. Listed companies have had one additional challenge since the referendum – which is to meet their public disclosure obligations and provide investors and the markets with meaningful disclosure about the potential effects of Brexit on their operations, their results and their prospects.

Public companies are not alone in worrying about Brexit; securities regulators have from time to time highlighted the obvious: Brexit has the potential to pose a range of challenges for businesses and the markets, depending on which scenario or combination of scenarios plays out. Particularly as long as a no-deal exit cannot be foreclosed, a myriad of materially adverse developments could be only a few months away. In this respect, public companies, regardless of where they are listed, need to assess the potential impact of the various plausible scenarios and craft appropriate disclosure in their risk factor sections, business descriptions and analysis of results. In Britain, the Financial Reporting Council has from time to time addressed the disclosure implications of Brexit. We can now add to that list the Securities and Exchange Commission.

On December 6<sup>th</sup>, as Parliament was debating the Withdrawal Agreement and related Political Declaration, SEC Chairman Clayton, at an event hosted by Columbia University’s School of International Public Affairs, reviewed the SEC’s achievements in 2018 and outlined his views on its rulemaking agenda and priorities for 2019. He also took this opportunity to highlight a few significant risks the SEC staff is monitoring, and he had this to say about Brexit:

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[T]he potential effects of Brexit on U.S. investors and securities markets, and on global financial markets more broadly, is a matter of increased focus for me and many of my colleagues at the SEC. To be direct, I am concerned that:

1. The potential adverse effects of Brexit are not well understood and, in the areas where they are understood, are underestimated.
2. The actual effects of Brexit will depend on many factors, some of which may prove to be beyond the control of the U.K. and E.U. authorities.
3. Our markets, at many levels—from multinational companies, to market infrastructure, to investment products and services—are international, and the effects of Brexit will be international, including on U.S. markets and our Main Street investors.
4. The actual effects of Brexit are likely to manifest themselves in advance of implementation dates and, based on corporate disclosures, some of those effects are upon us.
5. The actual effects of Brexit will depend in large part on the ability of U.K., E.U. and E.U. member state officials to provide a path forward that allows for adjustment without undue uncertainty, disruption or cost. That is a tall order that I believe requires: (a) a broad understanding of market interdependencies—knowledge that goes well beyond the labor and financial markets; (b) foresight—people and firms will act in their own interests and the interests of their shareholders; and (c) flexibility—miscalculations are inevitable and will need to be addressed promptly. More generally, limiting the adverse effects of Brexit requires a willingness of governmental authorities to look beyond potential immediate, local economic and other opportunities provided by a blunt transition and pursue a course that focuses on broad, long-term economic performance and stability. While many involved in the Brexit process agree with this perspective, and some important steps have been taken, I do not yet see wide acceptance of this principle.

To be clear, these are my personal views, but it is appropriate to share them as they are reflective of the SEC's approach to Brexit. The SEC's responsibility is primarily related to the effects of Brexit on our capital markets. For example, I have directed the staff to focus on the disclosures companies make about Brexit and the functioning of our market utilities and other infrastructure.

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We have seen a wide range of disclosures, even within the same industry. Some companies have fairly detailed disclosures about how Brexit may impact them, while others simply state that Brexit presents a risk. I would like to see companies providing more robust disclosure about how management is considering Brexit and the impact it may have on the company and its operations.

With regard to market utilities and infrastructure, following the 2016 Brexit vote, SEC staff commenced discussions with other U.S. financial authorities, with our U.K. and E.U. counterparts, and with market participants, all with an eye toward identifying and planning for potential Brexit-related impacts on U.S. investors and markets. These discussions are ongoing, and I expect their pace to increase.

Certain of these points were aimed, to borrow the Chairman's phrase, at "market utilities and infrastructure," but others go to the heart of public company disclosure. For SEC reporting companies, the disclosure roadmap should be well understood, the key being to properly address in the Management's Discussion and Analysis of Financial Condition and Results of Operations known trends and uncertainties that will, or that are reasonably likely to, favorably or unfavorably, impact the company's financial condition and results of operations, and to then carry the relevant themes across to risk factors, the note on forward-looking statements and other sections as appropriate. Generic explanations or warnings do not suffice; rather, the SEC requires the disclosure to be tailored to the company and its financial statements, and to address how the company and its financial statements are specifically affected by Brexit and its consequences. The challenge, obviously, in the context of Brexit is the difficulty in predicting likely outcomes, and the potential impact of those likely outcomes on the company, its industry, and the markets more broadly.

At the very least, reporting companies should remain mindful that Brexit – regardless of what transpires in the coming few weeks – will be on the minds of securities regulators, not to mention boards of directors, shareholders, other stakeholders and market participants.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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