Market Trends 2018/19: Brexit Disclosure

A Lexis Practice Advisor® Practice Note by Helen Shouhua Yu and Gonzalo Go, Mayer Brown LLP

Helen Shouhua Yu
Mayer Brown LLP

Gonzalo Go
Mayer Brown LLP

This market trends article identifies Brexit-related disclosures that offer detailed discussions of its effects, including how Brexit might impact the company, its employees, management, operations, and prospects. The company name, its industry, and the type of filing are also provided in each sample disclosure for reference. This article concludes with recommendations on how to enhance Brexit-related disclosures and how to make them consistent with SEC's expectations.

Brexit and Its Resulting Uncertainties

The United Kingdom (UK) held a referendum on June 23, 2016, in which a slim majority voted in favor of leaving the European Union (EU) in an action commonly referred to as Brexit. The UK House of Commons passed a bill on February 8, 2017, authorizing the government to proceed with exit talks with the EU. On March 29, 2017, the British government tendered its formal notice to withdraw from the EU pursuant to Article 50 of the Lisbon Treaty. This withdrawal was supposed to take effect on the effective date of the withdrawal agreement, which was initially March 29, 2019, if no agreement had been reached by then. The UK House of Commons rejected the withdrawal agreement on January 15, 2019 (432 to 202 votes), March 12, 2019 (391 to 242 votes), and March 29, 2019 (334 to 286 votes). Since the withdrawal agreement was not approved on March 29, 2019, the new Brexit date was set on April 12, 2019 (and later extended to October 31, 2019) pursuant to Article 50 of the Lisbon Treaty. This extension was the result of a special European Council summit wherein the EU leaders met and agreed to provide the UK a six-month extension with the option to leave the EU earlier if its prime minister can secure the UK House of Commons' support for her Brexit deal. The UK will have to communicate to the EU until that date its intended action steps moving forward (i.e., ask for another extension, Brexit without any deal with the EU, etc.). Brexit brought considerable uncertainty to the UK's political and trade relationship with the EU and also as to the terms and conditions of its exit. It raised speculation as to which laws, rules, and regulations the UK will choose to retain or discard in connection with its withdrawal.

The UK economy remains resilient but experienced little growth in 2017, 2018, and early 2019. Financial analysts attributed this slowdown to the effects of Brexit-related uncertainties on business investments and confidence, higher inflation, and the weaker UK pound sterling, which negatively affected consumer demand and spending power. As Brexit's political, legal, regulatory, and economic effects continue to evolve, companies have the duty to ascertain and disclose the effects these may have on their businesses. Right after Brexit, several companies across various industries had already begun disclosing Brexit-related risks in their filings with the Securities and Exchange Commission (SEC). These disclosures generally were included in the Business, Risk Factors, and Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A) sections of SEC filings. Most of the initial Brexit disclosures were generic boilerplate provisions or laundry list of riks applicable to almost any company. These disclosures simply included general statements about Brexit and its uncertain effects but did not exactly disclose how Brexit might impact the company, its employees, management, operations, and prospects. This article identifies some Brexit-related disclosures that offer more detailed discussions of effects.

Brexit Disclosures in the Business Section

Item 101(a) (17 C.F.R. § 229.101) of Regulation S-K requires a reporting company to describe the general development of its business, including the material areas specific to it. In their Brexit disclosures in the Business section, companies mentioned that Brexit could materially impact the future regulatory regime that applies to their businesses, products, services, and employees in the UK. Only a few companies specified how, to what degree, and which aspect of their businesses would be affected by Brexit. Here are some examples of Brexit disclosures in the Business section:

- **Offering Registration**
  - "We are making all reasonable preparations to ensure, in any scenario, that services can continue to be provided in the UK and throughout the EEA, post-Brexit. Accordingly, we have established a new legal entity in the Netherlands, Tradeweb EU B.V., and will offer services from a new Amsterdam office. We received approval in early 2019 from Dutch regulatory authorities to operate an MTF, an OTF and an APA, essentially replicating our current UK regulatory permissions. As a result of this approval, we now operate two MTFs, two OTFs and two APAs in Europe, increasing the complexity of the business." *[Tradeweb Markets Inc., Form S-1/A filed April 2, 2019 (SIC 6200—Security & Commodity Brokers, Dealers, Exchanges & Services)]*
- **Periodic Reports**
  - "Our product for row crops is sold separately as Regalia Rx and for international markets, where the Regalia trademark is allowed, as Regalia Maxx. While we previously submitted Regalia for registration in the EU, which is one of the largest fungicide markets in the world, we recently withdrew the EU application due to Brexit and plan to resubmit using the Netherlands rather than the United Kingdom (UK) as the designated rapporteur." *[Marrone Bio Innovations Inc., Form 10-K filed March 29, 2019 (SIC 2870—Agricultural Chemicals)]*
  - "Several factors which are currently unknown will influence Brexit's impact on our business, including the form Brexit will take. We operate a staging facility in the UK, where certain core network elements and customer premises equipment is configured before being shipped to both UK and EU locations. The UK is currently also the central location of our stores of spare replenishment in our European operations. In respect to our UK workforce, we do not anticipate any adverse impact from Brexit as only a small percentage of the workforce are EU nationals. The same is true of UK nationals working in our EU located workforce. We are currently monitoring Brexit developments, reviewing our supply chain alternatives, and assessing the short- and long-term implications of Brexit on our operations. Nonetheless, based on current information, we do not anticipate Brexit will have a substantial impact on our business." *[Level 3 Parent, LLC, Form 10-K filed March 19, 2019 (SIC 4813—Telephone Communications (Except Radiotelephone)]*

Brexit Disclosures in the Risk Factors Section

Item 503(c) (17 C.F.R. § 229.503) of Regulation S-K requires a description of material risks (including Brexit-related risks, if material) that impact a business, and how these risks affect the issuer or an investment in the securities being offered. For further information, see Market Trends 2016/17: Risk Factors, Top 10 Practice Tips: Risk Factors, and Risk Factor Drafting for a Registration Statement. The disclosure has to be in plain English, and not a sweeping general statement applicable to any issuer or offering. For further information on plain English, see Top 10 Practice Tips: Drafting a Registration Statement and Glossaries in Prospectuses and Annual Reports — Background. Here are some examples of Brexit disclosures in the Risk Factor section:

- **Offering Registration**
  - "On March 29, 2017, the UK invoked Article 50 of Lisbon Treaty to initiate complete withdrawal from the European Union by March 30, 2019, and therefore, the regulatory drug approval process in that country may be significantly different from the current drug regulatory policies in the European Union. We currently are considering holding our clinical trials in the UK, among other countries, and therefore

this event could significantly impact our efforts to successfully bring [our lead product candidate] PRP, to market. It is not yet possible for us to determine the impact of the UK's withdrawal from the European Union, but any additional costs or delays in obtaining approvals may hinder our ability to conduct clinical trials or market PRP in the UK." *[Propanc Biopharma, Inc., Form S-1 filed February 25, 2019 (SIC 2834—Pharmaceutical Preparations)]*

- **Prospectuses**
  - "Although it is not possible to predict fully the effects of the UK's exit from the EU, it could have a material adverse effect on, amongst other things, European fund managers, companies, and investors, and could therefore have a material adverse effect on our investment in the European Cities Fund. Furthermore, the UK's future financial services regulatory regime is unclear. Much of the UK's financial services regulation is derived from EU law. During the life of our investment in the European Cities Fund it is likely that the investment manager of the fund will incur additional costs in determining the impact of the UK's future relationship with the EU, and any changes in law and regulation on, amongst other things, its management structure, the structure and its underlying Investments. Should the European Cities Fund investment manager deem it appropriate, there may be a restructure as a result of the effects of the UK leaving the EU and investors may be liable for some or all of the restructuring expenses incurred in relation to this." *[Nuveen Global Cities Reit, Inc., Form 424B3 filed March 29, 2019 (SIC 6798—Real Estate Investment Trusts)]*
  - "Brexit has created uncertainty with regard to the status of the United Kingdom as an 'adequate country' for the purposes of data transfers outside the European Economic Area, or EEA. In particular, it is unclear how data transfers to and from the United Kingdom will be regulated. These changes may require us to find alternative bases for the compliant transfer of personal data from the United Kingdom to the U.S., and we are monitoring developments in this area. If our operations are found to be in violation of any of the aforementioned requirements, we may be subject to penalties, including civil or criminal penalties, criminal prosecution, monetary damages, the curtailment or restructuring of our operations, loss of eligibility to obtain approvals from the FDA, or exclusion from participation in government contracting, healthcare reimbursement or other government programs, including Medicare and Medicaid, or the imposition of a corporate integrity agreement with the Office of Inspector General of the Department of Health and Human Services, any of which could adversely affect our financial results." *[Alnylam Pharmaceuticals, Inc., Form 424B5 filed January 15, 2019 (SIC 2834—Pharmaceutical Preparations)]*
- **Periodic Reports**
  - "Particularly in a dynamic regulatory environment, anticipated changes to laws and regulations may require us to invest in compliance efforts or otherwise expend resources before changes are certain. For example, the ongoing uncertainty around Brexit, including relating to timing and the range of possible outcomes, has required us to consider and in some cases implement strategies for mitigating potential disruptions to our supply chain." *[The TJX Companies, Inc., Form 10-K filed April 3, 2019 (SIC 5651—Retail—Family Clothing Stores)]*
  - "Our Retail Pharmacy International and Pharmaceutical Wholesale divisions have substantial operations in the United Kingdon and other member countries of the European Union[…] Given the complexity and uncertainty surrounding the potential withdrawal and negotiations, including with respect to terms of trade and customs, there can be no assurance regarding the terms, timing or consummation of any such arrangements, including whether there will be any additional extensions, an orderly withdrawal or a so-called 'hard Brexit' with no continuing U.K. participation in the EU's Single Market or the EU Customs Union. The proposed withdrawal could, among other potential outcomes, adversely affect the tax, tax treaty, currency, operational, legal and regulatory regimes to which our businesses in the region are subject. The withdrawal could also, among other potential outcomes, disrupt the free movement of goods, services and people between the United Kingdom and the European Union and significantly disrupt trade between the United Kingdom and the European Union and other parties. Further, uncertainty around and developments regarding these and related issues has contributed to deteriorating market conditions and could further adversely impact consumer and investor confidence and the economy of the United Kingdom and the economies of other countries in which we operate and cause significant volatility in currency exchange rates. In the event of a 'hard Brexit,' the related risks and uncertainties could be further exacerbated." *[Walgreens Boots Alliance, Inc., Form 10-Q filed April 2, 2019 (SIC 5912—Retail—Drug Stores & Proprietary Stores)]*

Brexit Disclosures in the MD&A Section

Item 303(a) (17 C.F.R. § 229.303) of Regulation S-K requires a discussion of a company's financial condition and changes in financial condition and results of operations, and any known trends or factors that management believes to be important to the company's results of operations. This includes known trends, commitments, events, or uncertainties that will likely have a material impact on the business. The MD&A discussion should not be merely generic or boilerplate disclosures but should reflect how particular facts and circumstances affect the company and its business. For further information on MD&A, see Management's Discussion and Analysis of Financial Condition and Results of Operations and Management's Discussion and Analysis Section Drafting Checklist. Here are some examples of Brexit disclosures in the MD&A section of periodic reports:

- **Business Trends**
  - "The potential impacts of United Kingdom's withdrawal from the European Union remain unclear and could adversely impact certain areas of our business, including, but not limited to, an increase in duties and delays in the delivery of merchandise from our Netherlands DC to our stores and direct-to-consumer customers in the United Kingdom if trade barriers materialize at ports of entry and departure. The potential impacts of United Kingdom's withdrawal from the European Union could also adversely impact the operations of our vendors. To mitigate our risk, our team has begun to proactively prepare for potential adverse impacts by collaborating across the organization as well as working with external partners to develop the necessary contingency plans. We have also taken actions to reduce, to the extent possible, the potential material impact of any incremental duty exposure." *[Abercrombie & Fitch Co., Form 10-K filed April 1, 2019 (SIC 5651—Retail—Family Clothing Stores)]*
  - "Our United Kingdom building services segment revenues were $340.7 million in 2017 compared to $326.3 million in 2016. The increase in revenues was the result of new contract awards within the commercial and institutional market sectors, partially offset by a decrease in project activity with existing customers. This segment's revenues were negatively impacted by $15.9 million related to the effect of unfavorable exchange rates for the British pound versus the United States dollar. The unfavorable exchange rates for the year ended December 31, 2017 resulted, in part, from the 2016 decision by the United Kingdom to exit the European Union." *[EMCOR Group, Inc., Form 10-K filed February 21, 2019 (SIC 1731—Electrical Work)]*
- **Forward-Looking Statements**
  - "[O]ur actual results may differ materially from those expressed or implied in such forwardlooking statements due to known or unknown risks and uncertainties that exist in our operations and business environment, including but not limited to [. . .] the impact of the UK leaving the European Union (Brexit) on our UK operations . . ." *[Aptargroup Inc., Form 10-K filed February 21, 2019 (SIC 3089—Plastic Products, Not Elsewhere Classified)]*
  - "As treaties between the U.K. and the E.U. have not been finalized, as of January 1, 2019, we intend to write business in the E.U. through our recently established European subsidiary in Luxembourg as our U.K.-domiciled subsidiary will presumably no longer provide a platform for our operations throughout the European continent. As a result of such structural changes and modification to our European operations, the complexity and cost of regulatory compliance of our European business has increased and will likely continue to result in elevated expenses." *[CNA Financial Corp., Form 10-K filed February 13, 2019 (SIC 6331—Fire, Marine & Casualty Insurance)]* For further information on forward-looking statements, see Forward-Looking Statement: Drafting a Compliant Statement, Safe Harbors for Forward-Looking Statements, and Forward-Looking Statements Safe Harbor Checklist.
- **General Economic Conditions**
  - "Brexit and any further departures from the European Union (EU) could threaten 'open-sky' policies under which EU-based carriers operate freely within the EU. Losing open-sky flight rights could have a significant negative impact on the health of the Company's European lessees and, as a result, the financial performance and condition of the Company." *[Aerocentury Corp., Form 10-K filed March 19, 2019 (SIC 7359—Services—Equipment Rental & Leasing, Not Elsewhere Classified)]*
- **Regulatory and Legal Environment**
  - "The Company has a London-based business and the ability for it to passport its employees to conduct a financial services business in the EU post-Brexit is in considerable doubt. In addition, a number of its London-based employees do not hold British

passports, although a number have applied for and received the right to continue to be employed in the United Kingdom . . . Given the lack of clarity on the ultimate post-Brexit relationship between Great Britain and the EU, the Company cannot fully determine what, if any, impact Brexit may have on its operations, both inside and outside the United Kingdom. The Company has opened an office in Frankfurt, Germany in the EU for its investment banking business and it will be available in the eventuality that it is needed in order to continue to conduct a securities business in the EU post-Brexit." *[Oppenheimer Holdings, Inc., Form 10-K filed March 1, 2019 (SIC 6211—Security Brokers, Dealers & Flotation Companies)]*

- o "It is possible that the United Kingdom may leave the EU without having negotiated terms of its withdrawal (no deal Brexit). If there is a no deal Brexit, tax treaties between the United Kingdom and member states of the EU will displace certain EU directives now in effect including the Parent / Subsidiary Directive. The Parent Subsidiary Directive currently eliminates withholding taxes on the payment of dividends between associated companies of different EU member states. The United Kingdom tax treaties with EU member states generally permit withholding taxes to be applied at reduced rates. If there is a no deal Brexit, our tax expense may increase due to the imposition of withholding taxes on dividends paid from our EU subsidiaries to our United Kingdom subsidiaries." *[MKS Instruments, Inc., Form 10-K filed February 26, 2019 (SIC 3823—Industrial Instruments for Measurement, Display & Control)]*

- **Results of Operations**

  - o "Other income (expense) primarily consists of foreign currency exchange gains (losses) on transactions with Omega Flex Limited, our United Kingdom (UK) subsidiary. During 2016, the British Pound weakened, largely as a result of the UK's vote to exit the European Union. As a result, the Company recognized currency related losses of $474,000 for 2016. The British Pound stabilized during 2017, and therefore the Company only recognized a loss of $38,000 during the year." *[Omega Flex, Inc., Form 10-K filed March 11, 2019 (SIC 3430—Heating Equipment, Except Electronic & Warm Air, & Plumbing Fixtures)]*
  - o "Following the anticipated withdrawal of the UK from the EU, we will continue to have a substantial presence in London in addition to its offices and operations across the UK and EU. Our primary aim is to ensure a seamless transition and to offer certainty and continuity of service for all our customers and business partners, regardless of location or the final outcome of the Brexit negotiations. Total costs incurred in 2018 related to our relocation of European insurance companies, and other Brexit related costs, were $11 million, and the expected costs for 2019 are projected to be immaterial." *[Chubb Ltd., Form 10-K filed February 28, 2019 (SIC 6331—Fire, Marine & Casualty Insurance)]*

Market Outlook

Brexit Disclosure Enhancements

On December 6, 2018, SEC Chair Jay Clayton remarked that "the 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 the SEC. On March 15, 2019, SEC Division of Corporation Finance Director William Hinman noted that "investors are better served by understanding the lens through which each company's management looks at its exposure" and advised that in crafting Brexit disclosures one has to "satisfy the curiosity of a thoughtful, deliberative board member considering the impact of Brexit on the company's business, operations and strategic plans."

Brexit undeniably brought significant uncertainties to the future relationship between the UK and the EU, including as to how the UK's withdrawal terms (or the lack thereof) may adversely affect global economic conditions and financial market stability, liquidity, and operations. The following steps may be helpful in preparing the required Brexit-related disclosures in SEC-filed documents:

1. **Identify Brexit-perceived effects**. A company should specify which Brexit-perceived effects may have an impact on it. At present, it is prudent to monitor:

   a) How foreign direct investments in the UK will be affected by tariffs, trade, regulatory, tax, and other free trade agreements to be entered into by the UK –and–

   b) The post-Brexit laws and regulations on intellectual property rights, immigration, employment, environment, supply chain logistics, data protection, and health and safety.

   Similarly, for financial services companies, it will be essential to monitor whether the UK will continue to follow post-financial crisis regulations and whether selling services across the EU (known as passporting) will continue to be available.

2. **Link these effects to potentially affected business segments.** A company should point out what parts of its

business are expected to be affected by the Brexit impact it earlier identified. It may be:

a) A business operation in a certain geographic region that may be affected if there will be a significant disruption in the free movement of goods, services, and people between the UK and te EU

b) A product formulation being tested and patented in the EU that will be subsequently used in the UK

c) A critical group of personnel who may be forced to migrate –or–

d) Any of its entities that will likely be affected by increased legal and regulatory complexities, potential disruption to the UK's access to its free trade agreements, consequent changes in tariffs on exported and imported goods, or similar impacts

3. **Describe what and how long the anticipated Brexit effects will last**. A company should thereafter provide a reasonable estimate on how each anticipated effect will affect that business segment and for how long. It should not only focus on the negative effects on financial condition, operating results, and cash flows, but also should underscore any favorable effects Brexit may have on the company.

4. **Mention planned and actual action steps to manage Brexit effects.** A company should also specify:

a) Whether it will seek to obtain new licenses or establish new headquarters or move employees

b) If it has any plans for managing Brexit-related risks, such as possible hedging activity for the anticipated foreign currency exchange rate fluctuations or currency devaluation

c) The probability of an inventory write-downs, fixed asset impairments, or fair market value measurement modifications –and–

d) How it plans to address the possible higher potential costs of conducting business in Europe

It could also show how its provisions for doubtful accounts will be recalibrated in case of an economic downturn and the ability of its customers to pay for the products and services they already have purchased are compromised.

While the global business community awaits how Brexit will ultimately be implemented (or if Brexit will ultimately push through at all), a company may be guided by the foregoing in carefully evaluating and disclosing in its SEC filings Brexit's potential and actual effects on its business and risk profile.

For a further discussion of Brexit, see Market Trends 2017/18: International Capital Markets — Legal and Regulatory Trends.

Helen Shouhua Yu, Of Counsel, Mayer Brown LLP

Helen Yu is counsel at Mayer Brown's New York office and a member of the Capital Markets practice. She focuses on debt securities offerings by financial institutions under continuous offering programs that are registered under the Securities Act or that are exempt from registration under Rule 144A and Section 3(a)(2) of the Securities Act. Helen has extensive experience with debt securities offerings, including investment grade securities and structured products linked to equities, commodities, currencies and interest rates. Helen also has experience in public offerings of equity securities and warrants.

Earlier in her career, Helen served for more than six years as legal counsel for a Chinese national non-profit social and economic organization in Beijing, advising organization members on compliance issues and handling commercial disputes.

Helen has Chinese Lawyer and Chinese Legal Counsel Qualification Certificates. She is fluent in Mandarin Chinese.

Gonzalo Go, Associate, Mayer Brown LLP

Gonzalo D.V. Go III is an associate in Mayer Brown's Corporate & Securities practice. He advises issuers, investment banks and sponsors in public and private offerings of equity and debt securities, including initial public offerings; follow-on offerings; investment grade, high-yield debt offerings; covered bonds; real estate investment trusts and structured products linked to equities, commodities, interest rates, currencies and other underlying assets.

G earned his LLM from Columbia Law School, where he served as a student senator and graduated as the class speaker, a Harlan Fiske Stone scholar and a recipient of the Parker School Recognition of Achievement in International and Comparative Law. He earned his JD, with honors, from the Ateneo Law School and his BS in Accountancy, with honors, from De La Salle University.

G's prior professional experiences include being (i) a capital markets associate in another global law firm in New York, (ii) the legal director of a multinational fast-food chain headquartered in the Philippines, where he gained extensive experience in managing legal risks in various business activities such as business development and expansion, customer relations, operations, real estate, franchising, marketing, human resources, purchasing, finance, corporate communications, tax and government relations, (iii) a member of the faculty of the Ateneo Law School and (iv) a tax associate in a tier-one law firm in the Philippines. G is also a lawyer and a certified public accountant in the Philippines.