ARTHUR COX

Update on Non-Financial Reporting Requirements for Irish PLCs listed on NYSE/NASDAQ

Update on Non-Financial Reporting (NFR) Requirements for Irish PLCs listed on NYSE/NASDAQ

The purpose of this publication is to identify and summarise the non-financial reporting ("**NFR**") requirements arising under the European Union (Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups) Regulations 2017 (the "**2017 Regulations**") from the perspective of Irish public limited companies listed on the NYSE/NASDAQ.

WHY ARE THESE OBLIGATIONS RELEVANT TO US-LISTED COMPANIES?

The NFR obligations are derived from the transposition of an EU Directive into Irish law. The Directive applies to companies listed on a regulated market within the EU, but the 2017 Regulations extend the NFR obligations to all large PLCs, including those listed on the NYSE/NASDAQ.

It was assumed that this was a drafting error, as Irish regulations implementing an EU Directive cannot increase the scope of the Directive, and the relevant Irish Government Department was asked to amend the Regulations accordingly. However, after considering the matter, the Department has stated that its view is that all PLCs currently covered by the Regulations (including those listed on the NYSE/ NASDAQ) should make the NFR disclosure.

As a matter of Irish constitutional law, the extension of the NFR obligation to US-listed companies would require primary legislation (an act of the Irish parliament) because it goes beyond the scope of the Directive, and we are continuing to engage with the Department with a view to changing its position on this issue. However, given that the Regulations apply to fiscal years commencing after 1 August 2017, we are now advising Irish companies listed in the United States to make contingency plans on the basis that the NFR obligations will apply to them.

ARE ALL US-LISTED IRISH COMPANIES SUBJECT TO THE NFR REQUIREMENTS?

As the Regulations are currently drafted, they cover any Irish public limited company that:

- meets one or both of the following financial thresholds:
  - total assets exceeding €20 million (€24 million gross in the case of a holding company); *and/or*
  - turnover exceeding €40 million (€48 million gross in the case of a holding company); *and*
- an average number of employees exceeding 500 (for the company or its group).

It is currently irrelevant whether a company that meets these criteria has listed securities, or where such securities are listed.

ARE US-LISTED COMPANIES ALSO REQUIRED TO PUBLISH A "DIVERSITY REPORT"?

No. The 2017 Regulations require certain Irish companies to publish a "diversity report" describing its policies, objectives and results in encouraging diversity in the areas of, inter alia, age, gender and educational/professional background. This obligation does not apply to Irish public limited companies whose shares are solely listed on the NYSE/NASDAQ.

WHAT ARE THE NON-FINANCIAL REPORTING REQUIREMENTS?

Companies must disclose information on the following matters (the "**NFR matters**"):

- environmental matters;
- social and employee matters;
- respect for human rights; and
- bribery and corruption.

The NFR disclosure should include:

- a brief description of the group's business model;
- the information necessary for an understanding of the development, performance, position and impact of the group's activity relating to the NFR matters;
- a description of the group's policies pursued in relation to the NFR matters (or a clear and reasoned description as to why the group does not have policies in relation to the NFR matters), and of the outcome of those policies;
- a description of the due diligence processes the group implements in relation to the NFR matters, and of the principal risks related to the NFR matters that are linked to the group's operations – where "relevant and proportionate", this should include disclosure concerning the group's business relationships, products or services that are likely to cause adverse impacts on the NFR matters, and how the group manages those risks; and
- an analysis of the key performance indicators relevant to the group's business that are employed in relation to the NFR matters and, where appropriate, references to and explanations of amounts included in the accounts that are related to the NFR matters.

Information relating to impending developments or matters in the course of negotiation may be omitted from the NFR disclosure where it could, in the opinion of the directors, seriously prejudice the company's competitive position. However, the reason for omissions must be given, and information should not be omitted if this would prevent a fair and balanced understanding of the group's development, performance, position and the impact of its activities on the NFR matters.

IS THE NFR DISCLOSURE SUBJECT TO AUDIT?

In the course of preparing their audit report, a company's auditors must establish that the NFR disclosure has been made by the company in accordance with the 2017 Regulations. For now, it remains unclear what this means in practice, though auditors are beginning to consider this in detail. When companies have determined the steps they intend to take to comply with the 2017 Regulations, it is recommended that they engage with their auditors to ensure that this will be sufficient to enable their auditors to issue their audit report within the usual timeframes.

IS THE FORMAT FOR THE NON-FINANCIAL DISCLOSURE PRESCRIBED?

The NFR disclosure may be set out:

- in a specific section (the "**NFR section**") in the directors' report for the company's Irish statutory accounts; or
- in a separate standalone document signed by 2 directors on behalf of the company and which is laid before the annual general meeting with the company's balance sheet (the "**NFR report**"). Where a company wishes to publish a separate NFR report, the NFR report must be either:
  - published on the website of the company within 6 months of the financial year end of the company and a statement that the NFR report has been or will be published, and the address of the website where it will be published, must be included in the director's report for the company's Irish statutory accounts; or
  - annexed to the annual return of the company filed with the Companies Registration Office in Dublin.

Given the timing and logistical constraints of preparing a separate NFR report, and the need for auditor sign-off described above, we believe that the latter option will be of limited value to most companies.

Our current expectation is that most companies will include the NFR section in their directors' report, relying, in as far as possible, on cross-references to information publicly available elsewhere, e.g. in the company's annual report, ESG report, etc. The Guidelines on Non-Financial Reporting published by the European Commission (the "**Guidelines**") envisage this "sign-posting" approach.

While the Guidelines are non-binding, given their source they are likely to be regarded as "best practice" in NFR disclosure. The Guidelines emphasise that the NFR disclosure requirements are not prescriptive and encourage flexibility of approach, specifically recognising the broad diversity of businesses and sectors that are subject to the NFR disclosure regime.

Given that the current financial year is the first when the 2017 Regulations will be applicable, we expect market practice in this area to evolve over the next twelve months as companies adapt their approach on NFR disclosure to the specific circumstances of their own business.

WILL THE DIRECTORS' COMPLIANCE STATEMENT NEED TO BE UPDATED?

No. The NFR disclosure obligations do not fall within the 'relevant obligations' covered by the directors' compliance statement.

WHAT ARE THE CONSEQUENCES OF NON-COMPLIANCE?

Failure to comply with the NFR requirements is an offence, but the audit process referred to above is likely to be of considerable reassurance to directors in this area. Where the auditors were satisfied that a company's NFR disclosure complied with the 2017 Regulations, and the information disclosed is accurate, it is hard to envisage circumstances where a company or its directors could be found to be in breach of the 2017 Regulations.

WHAT STEPS SHOULD COMPANIES BE TAKING NOW?

- Review existing policies and reports against the NFR disclosure requirements
- Determine where existing disclosure can be cross-referenced to meet the NFR requirements and identify if additional new disclosure is required

For further information or to view our latest Non-Financial Reporting Requirements webinar, please contact any of the Arthur Cox contacts below.

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OUR TEAM

MAURA MCLAUGHLIN
PARTNER
+353 1 920 1182
maura.mclaughlin@arthurcox.com

STEPHEN RANALOW
PARTNER
+353 1 920 1241
stephen.ranalow@arthurcox.com

GEOFF MOORE
PARTNER
+353 1 920 1216
geoff.moore@arthurcox.com

STEPHEN HEGARTY
PARTNER
+353 1 920 1175
stephen.hegarty@arthurcox.com

CHRIS MCLAUGHLIN
PARTNER
+353 1 920 1026
chris.mclaughlin@arthurcox.com

CIAN MCCOURT
PARTNER
+353 1 920 1446
cian.mccourt@arthurcox.com

JOHN BARRETT
PARTNER
+353 1 920 1027
john.barrett@arthurcox.com

MICHAEL COYLE
PARTNER
+353 1 920 1061
michael.coyle@arthurcox.com

SUZANNE KEARNEY
PROFESSIONAL SUPPORT LAWYER
+353 1 920 1649
suzanne.kearney@arthurcox.com

arthurcox.com

Dublin
+353 1 920 1000
dublin@arthurcox.com

Belfast
+44 289 023 0007
belfast@arthurcox.com

London
+44 207 823 0200
london@arthurcox.com

New York
+1 212 782 3294
newyork@arthurcox.com

Silicon Valley
+1 650 943 2330
siliconvalley@arthurcox.com