Claw-back and revision of bonuses: new rules per 1 January 2014

Directors' bonuses can be revised if they are unreasonably high and can be clawed back if they are awarded on the basis of incorrect information. Furthermore, a new rule states that if the value of the shares held by directors increases as a result of a public offer, the difference in value will be deducted from their remuneration. Any such revision, claw-back or deduction, has to be reported in the explanatory notes to the annual accounts.

Revision and claw-back of bonuses

These rules apply to:

- public limited liability companies (*NVs*), whether or not listed
- financial institutions
- co-operative enterprises (*coöperaties*) and private limited liability companies (*BVs*) which qualify as a bank
- mutual insurance companies (*onderlinge waarborgmaatschappijen*) which qualify as an insurance company

The rules apply to bonuses granted to both executive and non-executive directors. In financial institutions, the rules also apply to persons who determine the institution's day-to-day policy.

A bonus not yet paid may be revised if paying the bonus would be unacceptable according to the standard of reasonableness and fairness, ie if it would be unreasonably high (or unreasonably low). The power to revise bonuses is vested in the corporate body authorised to determine them. For the purpose of revision of bonuses, a bonus is defined as remuneration made conditional upon the realisation of specific targets or the occurrence of certain circumstances.

A bonus paid on or after 1 January 2014 may be clawed back if it was based on incorrect information concerning the realisation of specific targets or circumstances the bonus was made conditional upon. The power to claw-back bonuses is vested in the company, represented by its directors, as well as in the company's supervisory board or, if the company has a one-tier board, in the non-executive directors. Furthermore, the general meeting of shareholders is authorised to appoint a special representative for this purpose.

Deduction of increase in value of shares from directors' remuneration

If the value of the shares, depositary receipts of shares or options held by directors increases as result of the announcement of a public offer, the company is obliged to deduct the difference from their remuneration. This obligation also exists when the company announces a (de)merger proposal and when the board intends to enter into certain major transactions and submits them for approval to the shareholders meeting pursuant to article 2:107a of the Dutch Civil Code.

These rules apply to listed public companies (*NVs*) of which the shares have been admitted to trading on a regulated European market. The rules only apply if the announcements concerned are made on or after 1 January 2014. The rules concern shares, depositary receipts of shares and options received by directors as part of their remuneration.

The value of the shares is determined (on the basis of the days' closing price) on the three following moments:

- four weeks before the announcement of the public offer or the (de)merger proposal, or before the submission for approval to the shareholders meeting of the intended major transaction

- four weeks after the public offer has ended, the (de)merger resolution has been adopted or the approval for the intended major transaction has been given
- on the date the director sells his shares or the date his appointment terminates

If the value on the last date is higher than that on the first date, the difference will be deducted from the director's remuneration (to a maximum of the increase in value between the first date and the second date).

The law provides that these rules will expire automatically on 1 July 2017. The rules will be evaluated before 1 July 2016.

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Directors' remuneration as an agenda item in shareholders meeting

In respect of 'open' public companies (*NVs*), the remuneration of (managing and supervisory) directors in the previous financial year has to be put on the agenda as a separate item prior to the agenda item of adoption of the annual accounts.

Other amendments of Dutch company law

On 1 January 2014, the 2014 Financial Markets Amendment Act (*Wijzigingswet Financiële Markten 2014*) enters into force. The Act contains some amendments of Dutch company law, the two most important of which are:

- The exemption from the obligation to prepare consolidated accounts no longer applies to legal entities whose securities are admitted to trading on a regulated market as defined in the Financial Supervision Act or in a system similar to a regulated market in a state which is not a member state.
- The term for adoption of the annual accounts for private limited companies (*BVs*) whose securities are admitted to trading on a regulated market as defined in the Financial Supervision Act, is decreased to four months. This term cannot be extended and exemption from this obligation is not possible.