Legal Alert

DE BRAUW BLACKSTONE WESTBROEK

Update on Corporate Governance for Dutch listed companies

28 January 2009

Introduction

A number of developments occurred in the field of corporate governance of Dutch listed companies in 2007 and 2008. For the purpose of this legal alert, the term "Dutch listed companies" refers to Dutch public companies with limited liability ("**NVs**") whose (depositary receipts for) shares are admitted to trading on a regulated market in the European Economic Area ("**EEA**'')[1].

This legal alert outlines the principal developments and provides guidelines on the notice and agenda for the 2009 annual general meeting (the "**2009 AGM**").

Overview of 2007 and 2008

Act on Electronic Means of Communication

The Act on Electronic Means of Communication[2] entered into force on 1 January 2007.

[1] Please note that this legal alert assumes that an NV does not qualify as an investment institution.

[2] *Wet van 20 oktober 2006 tot wijziging van Boek 2 van het Burgerlijk Wetboek ter bevordering van het gebruik van elektronische communicatiemiddelen bij de besluitvorming in rechtspersonen, Stb. 2006, 525*

This Act facilitates the use of electronic means of communication (e.g., communication via internet and email) of inter alia NVs and provides, amongst other things, for:

- shareholders being able to submit requests to hold a general meeting of shareholders ("**general meeting**") or to place items on the agenda for a general meeting electronically, unless the articles of association provide otherwise;
- (i) holders of registered shares being given notice of the general meeting by email, provided that the shareholder concerned consents and the articles of association do not provide otherwise, and (ii) holders of bearer shares being called to the general meeting through a notice on the website;
- inclusion in the articles of association that shareholders may (i) take note of the business transacted at a general meeting, (ii) address the general meeting and (iii) vote at the general meeting by way of electronic means of communication;
- inclusion in the articles of association that votes cast prior to the general meeting via electronic means of communication shall be put on par with votes cast at the general meeting;

- proxies to attend a general meeting and vote at the meeting being established via electronic means;
- shareholders being able to adopt resolutions in writing electronically, unless the articles of association provide otherwise; and
- an extension of the period to set a record date from 7 days to 30 days[3].

Furthermore, this Act clarifies the statutory provision on the binding nomination of members to the supervisory board of companies that are subject to the "structure regime" (*structuurregime*).

Act on Public Offers

The Act on Public Offers[4] entered into force on 28 October 2007. This Act requires shareholders who individually or jointly obtain control (30 percent or more of the voting rights) of a Dutch listed company to make a mandatory bid for all shares held by the remaining shareholders. It also imposes certain restrictions, in particular with respect to the issuing of protective preference shares as a takeover defence, but allows Dutch listed companies to decide for themselves whether their articles of association facilitate or prevent defensive measures by the board.

For a more detailed overview please refer to our legal alert "New Dutch rules on public offers in force as of 28 October 2007. A comprehensive overview." of 23 October 2007, which can be downloaded from our website.

Appendix X to Rulebook II of Euronext Amsterdam

On 14 December 2007, Appendix X ("**Appendix X**") to the General Rules for Euronext Amsterdam Stock Market, Volume II of the Rule Book ("**Rulebook II of Euronext Amsterdam**") was abolished. Appendix X included specific rules on anti-takeover constructions, including accumulation of defensive measures, and applied to companies with a listing on Euronext Amsterdam. Despite the fact that Appendix X has been abolished, it is important to note that the independence of the management board of a protective preference shares foundation as well as of a foundation that has issued depositary receipts for shares, addressed by subsections c and d of the first subsection of article 5:71 of the Financial Markets Supervision Act (*Wet op het financieel toezicht*) (the "**FMSA**"), is based on the former Appendix X and article 118a, subsection 2 of Book 2 of the Dutch Civil Code (*Burgerlijk Wetboek*) ("**DCC**") and as such the independence criteria of the former Appendix X continue to be of importance, both for Dutch listed companies with a listing on Euronext Amsterdam as well as Dutch listed companies with a listing on a regulated market in another EEA member state.

Act on Capital Maintenance Rules

The Act on Capital Maintenance Rules[5] entered into force on 11 June 2008. This Act applies to NVs and provides inter alia for:

- a simplified procedure for the contribution in kind on shares;
- an increase in the maximum number of shares that may be held by an NV in its own share capital (for Dutch listed companies from 10 percent to 50 percent); and
- the ability to provide financial assistance in view of the subscription for shares in the NV's share capital by third parties, provided that certain specific requirements are met, such as for Dutch listed companies approval of the general meeting to be adopted with a 95 percent majority of the votes cast.

If the articles of association of an NV reflect the old statutory provisions, the articles of association should be amended in order for the company to make use of the more flexible provisions as enacted by the Act on Capital Maintenance Rules.

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[3] Upon enactment of the Bill on Shareholders' Rights (see below) a record date fixed at the 21st day prior to the day of the general meeting will be mandatory for Dutch listed companies.

[4] *Wet van 24 mei 2007 tot uitvoering van Richtlijn nr. 2004/25/EG van het Europees Parlement en de Raad van de Europese Unie van 21 april 2004 betreffende het openbaar overnamebod, Stb. 2007, 202*

[5] *Wet van 29 mei 2008 tot uitvoering van richtlijn 2006/68/EG van het Europees Parlement en de Raad van de Europese Unie van 6 september 2006 (PbEU L 264) tot wijziging van richtlijn 77/91/EEG betreffende de oprichting van naamloze vennootschappen en de instandhouding en wijziging van hun kapitaal, Stb. 2008, 195*

Act amending the Accountants' Organisation Supervision Act and Book 2 of the DCC

The Act amending the Accountants' Organisations Supervision Act and Book 2 of the DCC[6] entered into force on 28 June 2008. This Act provides, amongst other things, that the assignment of an auditor to audit the company's annual financial statements can only be withdrawn for good reason. Differences of opinion on the methods of reporting or audit activities do not constitute good reasons. If the assignment of the auditor is (intended to be) withdrawn, the auditor has the right to request to be heard by the general meeting. The management board and the auditor must inform the Netherlands Authority for the Financial Markets *(Autoriteit Financiële Markten)* ("**AFM**") without delay of the withdrawal of the assignment of the auditor or a premature termination of the assignment by the auditor and must provide an explanation thereof.

Decree implementing the Directive on Statutory Audit of Financial Statements

The Decree implementing article 41 of the Directive on Statutory Audit of Financial Statements[7] (the "**Decree**") entered into force on 8 August 2008.

The Decree applies to inter alia Dutch listed companies and requires the establishment of an audit committee comprised of members of the supervisory board, or, in the case of a one-tier board, non-executive directors. At least one member of the audit committee must be independent within the meaning of best practice provision III.2.2 of the Dutch Corporate Governance Code.

The audit committee must comply with the following best practice provisions of the Dutch Corporate Governance Code:

- III.5.4, subsections a, b, c and f (i.e., supervising the management board with respect to (i) the operation of the internal risk management and control systems, (ii) the financial reporting, (iii) the compliance with recommendations and observations of the internal and external auditors, and (iv) the relation with the external auditor, in particular his independence, remuneration and non-audit activities for the company, if any; and
- III.5.7 (i.e., at least one member of the audit committee must be a financial expert).

Additionally, the audit committee must comply with the following principles of the Dutch Corporate Governance Code:

- V.2 (i.e., advising the supervisory board on the nomination of the external auditor and proposing the remuneration of and the assignment of non-audit activities to the external auditor for approval by the supervisory board); and
- V.4 (i.e., receiving the findings of the external auditor on his audit of the annual financial statements).

Instead of an audit committee as referred to above, the Decree also allows for the designation of another corporate body to monitor:

- the financial reporting process;
- the effectiveness of the internal control, audit (if applicable) and risk management systems;
- the statutory audit of the annual financial statements and the consolidated annual financial statements;
- and assess the independence of the external auditor or the audit firm.

Such corporate body must include at least one member who is independent within the meaning of best practice provision III.2.2 of the Dutch Corporate Governance Code. The company should state in its annual report the corporate body concerned as well as its constitution.

[6] *Wet van 12 juni 2008, houdende wijziging van de Wet toezicht accountantsorganisaties en Boek 2 van het Burgerlijk Wetboek, ter implementatie van richtlijn nr. 2006/43/EG van het Europees Parlement en de Raad van de Europese Unie van 17 mei 2006 betreffende de wettelijke controles van jaarrekeningen en geconsolideerde jaarrekeningen, tot wijziging van Richtlijnen 78/660/EEG en 83/349/EEG van de Raad, en houdende intrekking van Richtlijn 84/253/EEG van de Raad (PbEU L 157), Stb. 2008, 243*

[7] *Besluit van 26 juli 2008 tot uitvoering van Richtlijn nr. 2006/43/EG van het Europees Parlement en de Raad van de Europese Unie van 17 mei 2006 betreffende de wettelijke controles van jaarrekeningen en geconsolideerde jaarrekeningen, tot wijziging van de Richtlijnen nr. 78/660/EEG en nr. 83/349/EEG van de Raad van de Europese Gemeenschappen en houdende intrekking van Richtlijn nr. 84/253/EEG van de Raad van de Europese Gemeenschappen, Stb. 2008, 323*

Transparency Act

The Dutch Act implementing the EU Transparency Directive[8] (the "**Transparency Act**") entered into force on 1 January 2009. The Transparency Act has amended the FMSA and applies to inter alia Dutch listed companies. The most significant provisions of the Transparency Act relate to the periodic financial reporting and dissemination of information to and treatment of investors.

Periodic financial reporting

Annual financial report

The annual financial report of Dutch listed companies must be published no later than four months after the end of each financial year. This means a reduction of one month (from five to four). Contrary to former Dutch law, the four-month period cannot be extended by the general meeting and it is no longer possible to apply for dispensation. There is no requirement that the annual financial statements must be adopted by the general meeting within the above-mentioned period.

The annual financial report must include (i) the audited annual financial statements, (ii) the annual report and (iii) a responsibility statement (see below).

Half-yearly financial report

The Transparency Act also introduces the requirement for Dutch listed companies to publish half-yearly financial reports. Although this is a new requirement under Dutch law, it was already a listing requirement of Euronext Amsterdam. The half-yearly financial report must be published as soon as possible but no later than two months after the end of the first six months of the financial year (the current Euronext Amsterdam term is four months).

Interim management statements

The Transparency Act also requires Dutch listed companies to publish an interim management statement ("**IMS**") during each half-year period. An IMS must be made in the period between ten weeks after the beginning and six weeks before the end of the relevant six-month period. The information provided should cover the period between the beginning of the relevant six-month period and the date of publication of the IMS and should include (i) an overview of the important events and transactions that have taken place and their impact on the financial position of the company and its group, and (ii) a general description of the financial position and performance of the company and its group.

No IMS is required if the company already publishes such quarterly financial statements pursuant to laws applicable to it.

Responsibility statement

Both the annual financial report and half-yearly financial report need to include a statement of persons responsible at the company (i.e., responsibility statement). The names and functions of responsible persons must be clearly stated in such statement.

The responsibility statement should – in short – state that, to the best of the knowledge of the persons signing the statement, the annual financial report and the half-yearly financial report, respectively, give a true and fair view (*getrouw beeld*). With regard to the financial report, the responsibility statement should also refer to the fact that the annual report includes a description of the main risks related to the company.

The members of the management board and supervisory board of an NV are currently already required to sign the annual financial statements. The responsibility statement is an additional requirement, but Dutch legislators have stated that it is not intended that the responsibility statement brings about any changes in the Dutch liability

[8] *Wet van 25 september 2008 tot wijziging van de Wet op het financieel toezicht en enige andere wetten ter implementatie van richtlijn nr. 2004/109/EG van het Europees Parlement en de Raad van de Europese Unie van 15 december 2004 betreffende de transparantievereisten die gelden voor informatie over uitgevende instellingen waarvan effecten tot de handel op een gereglementeerde markt zijn toegelaten en tot wijziging van Richtlijn 2001/34/EG (PbEU L 390), Stb. 2008, 476*

rules for annual financial statements of Dutch companies as laid down in the DCC.

Language of financial reports

Dutch listed companies with a listing on Euronext Amsterdam may publish their financial reports in either Dutch or English. If the company has a listing in another EEA state as well, it must also publish in the language determined by the supervisory authority of such state or a language customary in the sphere of international finance. These language rules also apply to "regulated information" (see below).
Pursuant to the DCC, publication of the annual financial statements and the annual report must always be in the Dutch language, unless the general meeting has approved using a foreign language.

Reporting standards

Dutch listed companies must apply International Financial Reporting Standards (IFRS) in their consolidated annual financial statements. The same rules apply to the half-yearly financial statements.

Transitory provisions for financial reporting

The new financial reporting rules take effect for financial years starting on or after 1 January 2008 and will not apply to the whole or part of any annual financial period which commenced before 1 January 2008. So, for example, a Dutch listed company with a financial year starting on 1 January 2008 must apply the Transparency Act for the first time to:

- the annual financial report for 2008;
- the half-yearly report for the first six months of 2009; and
- the IMS for the first interim period (Q1) of 2009.

Information requirements

The Transparency Act also introduces several requirements for Dutch listed companies relating to the dissemination of information and the treatment of shareholders and bondholders.

Equal treatment

A Dutch listed company must ensure equal treatment of its shareholders and bondholders who are in the same position with respect to the provision of information and the charging of costs relating thereto.

Furthermore, the Transparency Act provides that Dutch listed companies:

- inform their shareholders at the start of the general meeting ultimately, on the total number of outstanding shares and voting rights;
- may only provide information to their shareholders electronically, provided that, inter alia, the general meeting has consented thereto.

In addition, shareholders and bondholders may not be prevented from exercising their rights by proxy and Dutch listed companies are required to provide their shareholders with proxy forms for the general meeting.

Regulated information

Dutch listed companies are required to make regulated information publicly available. This provision of the Transparency Act does not apply to companies that are not listed on Euronext Amsterdam and have a listing on a regulated market in only one foreign EEA member state[9].
Regulated information is all information that the company (or any other person who has applied for the admission of financial instruments to trading on a regulated market without the company's consent) is required to disclose under the Transparency Act. This includes for Dutch listed companies:

- the annual and half-yearly financial reports;
- the IMSs;
- the annual information document (unless the company only has a listing outside the Netherlands);
- changes to rights of securities' holders;

[9] These companies should make the regulated information publicly available in accordance with the rules of such foreign EEA member state. However, these companies should nevertheless file the regulated information with the AFM concurrently with publication.

- public offer information; and
- price-sensitive information (unless the company only has a listing outside the Netherlands).

For publication of the annual and half-yearly financial reports and an IMS a press release suffices in which the publication thereof is announced with a reference to the company's website where the information is available in full. However, if it also contains price-sensitive information, it should be disclosed in full in the press release itself.

Dutch listed companies with a listing on Euronext Amsterdam are also required to have a website and publish all price-sensitive information forthwith on their website as well. This information must remain on the website for at least one year.

Method of publication

Regulated information must be disseminated via a press release in the Netherlands. In the event of listings in other EEA states besides the Netherlands, the press release must be issued simultaneously in all the relevant states. The regulated information must also be filed with the AFM concurrently with publication.

Publication of amendments of rights

Dutch listed companies are furthermore obliged to publish all information on amendments to rights attached to a particular class of shares forthwith. This obligation also applies to rights issued by the company to acquire its shares (such as options or convertible notes) and other securities.

Filing with the AFM

The annual financial report (including statements and accompanying documents) of a Dutch listed company must be filed with the AFM within five days of adoption by the general meeting. The AFM will forward these documents within three days to the Trade Register of the Chamber of Commerce. Filing with the AFM is deemed to be a filing with the Chamber of Commerce. Also, the AFM must be notified when the general meeting has not adopted the company's annual financial statements within six months of the end of the financial year.

Please note that the annual financial report must be filed twice with the AFM. Once when it is published (see above) and once when adopted.

Furthermore, a Dutch listed company must inform the AFM, as well as the holder of any regulated market in the EEA on which its securities are admitted to trading, on the draft deed of amendment to its articles of association. Such notice must be made no later than on the day of convocation of the general meeting where the amendment will be voted on.

Please note that currently, Dutch listed companies with a listing on Euronext Amsterdam must already consult with Euronext Amsterdam in advance on any proposed amendment to their articles of association. This requirement has not been affected by the Transparency Act.

For a more detailed overview please revert to our legal alert “Dutch implementation of the EU Transparency Directive per 1 January 2009” of 31 December 2008, which can be downloaded from our website.

Bill on Shareholders' Rights

The Bill on Shareholders' Rights[10] is currently under consideration by the Second Chamber of the Dutch Parliament. This Bill, if enacted, will implement the EU Directive on Shareholders' Rights[11] which should be implemented not later than 3 August 2009.

[10] *Wijziging van boek 2 van het Burgerlijk Wetboek en de Wet op het financieel toezicht ter uitvoering van richtlijn nr. 2007/36/EG van het Europees Parlement en de Raad van de Europese Unie van 11 juli 2007 betreffende de uitoefening van bepaalde rechten van aandeelhouders in beursgenoteerde vennootschappen (PbEU L 184) (31 746)*

[11] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies

As to the general meeting, this Bill provides inter alia for:

- a request of a shareholder to place an item on the agenda for a general meeting to be substantiated;
- abolishment of the escape for the company not to place an item on the agenda for a general meeting based on overriding interest (the general principle of reasonableness and fairness (redelijkheid en billijkheid) will be the only escape);
- a publication of the notice for a general meeting of a Dutch listed company on the company's website as general rule (i.e., no longer an announcement in a Dutch daily newspaper as statutory requirement, unless the articles of association provide for this);
- the notice for a general meeting to be published not later than the 30th day prior to the day of the meeting;
- the notice for a general meeting of Dutch listed companies to include (i) the agenda, (ii) the date and time of the meeting, (iii) the procedure for proxies, (iv) if applicable, the procedure for participation in the meeting and exercise of voting rights by electronic means of communication, and (v) the company's website;
- the obligation for Dutch listed companies to enable shareholders to submit proxies electronically;
- a mandatory record date for Dutch listed companies fixed at the 21st day prior to the day of the meeting;
- the requirement for Dutch listed companies to inform the shareholders, not later than at the start of a general meeting, of the aggregate number of shares and voting rights as per the record date; and
- the requirement for Dutch listed companies to record the voting results for each resolution adopted by the general meeting. Reference to "adopted" or "rejected" suffices unless a shareholder requests the record of the voting results in full (i.e., record of shares that have been validly voted on, both as a number and as a percentage of the issued share capital, the number of votes validly cast, the number of votes cast in favour and against the resolution as well as the abstentions). These results must be posted on the company's website not later than the 15th day following the day of the AGM.
- Furthermore, this Bill requires Dutch listed companies to post the following information on their website not later than the 30th day prior to the day of the meeting:
- the notice for the meeting;
- the aggregate number of shares and voting rights as per the day of the notice for the meeting (broken down per class of shares);
- documents to be presented to the general meeting;
- draft resolutions presented to the general meeting as well as explanatory notes to the agenda; and
- a proxy form and, if applicable, a form regarding the voting prior to the general meeting per letter.

The information should be available on the website for at least one year.

Draft Bill on a One-Tier Board

The Draft Bill on a One-Tier Board[12] is currently under consideration by the Second Chamber of the Dutch Parliament.

One-tier board

This Bill introduces statutory provisions on the one-tier board structure (i.e., a single board comprising both executive and non-executive directors) as an alternative to the two-tier board structure (i.e., a management board and a separate supervisory board).
The one-tier board structure will also be available for companies that are subject to the structure regime.

The tasks of the executive and non-executive directors can be allocated under or pursuant to the articles of association, provided that an executive director cannot (i) act as chairman of the board, (ii) determine the remuneration of executive directors

[12] *Wijziging van Boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen (31 763)*

or (iii) supervise the directors. Nor can an executive director cast a vote on such matters. Tasks that have not been allocated fall within the power of the board as a whole.
In view of potential liability of directors, especially non-executive directors as regards the day-to-day management, it is imperative that the tasks within the one-tier board are allocated precisely.

Binding nomination

It is proposed that the requirement that a binding nomination for the appointment of a member of the management board or supervisory board comprises at least two persons for each vacancy be abolished.

Conflict of interest

The Draft Bill on a One-Tier Board, if enacted, will amend the statutory provisions on conflicts of interest of members of the management board. Whereas current law provides for a restriction of the power of members of the management board to represent the company externally, the Draft Bill on a One-Tier Board departs from the external effect and proceeds on the principle that conflicts of interests have to be dealt with internally. It provides that a member of the management board may not participate in the adoption of a resolution if he/she has a direct or indirect personal conflict of interest with the company. If all members of the management board have a conflict of interest, the resolution concerned shall be adopted by the supervisory board. Failing a supervisory board, the resolution shall be adopted by the general meeting, unless the articles of association provide otherwise. A similar provision shall apply to members of the management board.

The proposed provisions on conflicts of interest are in line with the provisions on conflicts of interest included in the Dutch Corporate Governance Code.

Draft Bill on Corporate Governance

On 3 January 2008, the Dutch Minister of Finance and the Dutch Minister of Justice presented a bill for public consultation implementing the advice of the Monitoring Committee Corporate Governance Code (the "**Monitoring Committee**") of 30 May 2007[13](the "**Draft Bill on Corporate Governance**").
The Draft Bill on Corporate Governance applies to inter alia Dutch listed companies and provides, among other things, for:

- a change to the disclosure obligations for shareholders regarding their voting and capital interest (i.e., decrease of the first threshold from 5 to 3 percent);
- the obligation for shareholders to inform the public of their intentions once such shareholder has obtained a voting or capital interest of 10 percent or more14;
- the possibility and, if requested by one or more shareholders holding at least 10 percent of the shares, the obligation for Dutch listed companies with a listing on Euronext Amsterdam to discover the identity of their shareholders;
- a system for communication between (the company and its) shareholders with respect to Dutch listed companies with a listing on Euronext Amsterdam; and
- an increase in the threshold for shareholders to place items on the agenda for the general meeting (i.e., increase from 1 to 3 percent and abolishment of the supplementary right to put items on the agenda for holders of shares representing a value of at least EUR 50 million).

If upon enactment of the Draft Bill on Corporate Governance the articles of association of an NV reflect the former statutory provisions regarding the right to place items on the agenda, the articles of association should be amended in order for the company to invoke the more strict requirements referred to above.

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[13] *Wijziging van de Wet op het financieel toezicht, de Wet giraal effectenverkeer en het Burgerlijk Wetboek naar aanleiding van het advies van de Monitoring Commissie Corporate Governance Code van 30 mei 2007*

[14] The Dutch Minister of Finance has announced that he intends to replace the proposed obligation by an obligation for holders of voting or capital interest of 3 percent or more to express themselves as to whether or not they object to the company's strategy. To facilitate this requirement, the company's strategy has to be posted on the company's website.

The consultation term ended on 14 February 2008 and the bill is still in draft form.

Draft Bill on a Works Council's Right to Speak

On 18 December 2007, the Dutch Minister of Justice presented a bill for public consultation on a works council's right to explain in the general meeting its position on a proposal to amend or adopt the company's remuneration policy[15] (the "**Draft Bill on a Works Council's Right to Speak**").

The Draft Bill on a Works Council's Right to Speak provides inter alia for:

- the right for the works council of NVs to timely (i.e., prior to the date of the notice for the general meeting) receive a draft of the (revised) remuneration policy to be presented to the general meeting for adoption;
- the obligation for NVs to inform their shareholders prior to the record date of the position of the works council on such remuneration policy; and
- the right of the works council to explain its position on the (revised) remuneration policy at the general meeting.

The Draft Bill on a Works Council's Right to Speak includes a definition of works council and extends the rights referred to above to works councils of subsidiaries, provided that the majority of the employees of the NV and its group companies are employed in the Netherlands. If there is more than one works council, the works councils shall collectively exercise their rights and if a central works council has been established, the rights referred to above shall vest in the central works council.

The consultation term ended on 15 February 2008 and the bill is still in draft form.

2008 Corporate Governance Code

On 10 December 2008, the Monitoring Committee presented a revised Dutch Corporate Governance Code (the "**2008 Corporate Governance Code**"). It is envisaged that the 2008 Corporate Governance Code will in due course be designated by governmental decree as code of conduct as referred to in article 2:391, subsection 5 of Book 2 of the DCC and it shall apply to financial years starting on or after 1 January 2009. This means that a Dutch listed company that wishes to declare in its 2009 annual report that it is in compliance with the 2008 Corporate Governance Code, should be in compliance without delay. As to the contents of the 2008 annual report, the 2008 Corporate Governance Code does not apply, unless provisions that are a reflection of mandatory Dutch law are concerned.

The apply or explain principle will be maintained, except for those provisions of the 2008 Corporate Governance Code that are a reflection of mandatory Dutch law.

In line with the Directive amending the EU Directives on annual accounts and consolidated annual accounts[16] the statutory requirements on the corporate governance statement will, by governmental decree, be extended and the statement needs to include, inter alia, a description of the main features of the internal risk management and control systems in relation to the financial reporting process and such description needs to be audited by the external auditor.

The most significant changes to the existing Dutch Corporate Governance Code relate to:

- corporate social responsibility;
- risk management;
- the role of the management board and the supervisory board in takeover situations;
- remuneration of the management board;
- the role of the supervisory board and diversity in its composition;
- responsibility of shareholders;

[15] *Wijziging van Boek 2 van het Burgerlijk Wetboek in verband met de invoering van een recht voor de ondernemingsraad om een standpunt te bepalen over het bezoldigingsbeleid bij naamloze vennootschappen*

[16] Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending the Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349 /EEC on consolidated accounts, 86/635 EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings

- response period regarding shareholders' requests; and
- provision of information to the general meeting.

Corporate social responsibility

The 2008 Corporate Governance Code provides that the management board and the supervisory board should take into consideration the corporate social responsibility aspects that are relevant to the company's enterprise. The management board must present these corporate social responsibility aspects to the supervisory board for approval. The main elements thereof shall be addressed in the annual report.

Risk management

The 2008 Corporate Governance Code requires a more detailed description in the annual report on the operation of the internal risk management and control systems. The management board must include a description in the annual report of (i) the main risks related to the company's strategy (i.e., strategic and operational risks[17], financial risks, legislative and regulatory risks and financial reporting risks)[18], (ii) the set-up and operation of the internal risk management and control systems regarding the main risks in the financial year concerned[19], and (iii) material defects in the internal risk management and control systems that have been detected in the financial year concerned, if any, and which significant changes to these systems have been made or are planned to be made and that these matters have been discussed with the audit committee and the supervisory board.

In the explanatory notes the Monitoring Committee recommends that the paragraph on risks also addresses the company's risk profile (i.e., the company's attitude towards the risks referred to in the paragraph on risks (*risk appetite*) and, to the extent possible, the company's sensitivity to manifestation of such risks).

Furthermore, the requirements on the scope of the management board's statement in the annual report on the adequacy and effectiveness of the company's internal risk management and control systems (the "**in control statement**") have been made less strict. There is no longer a requirement to state that these systems are adequate and effective without any qualification. This requirement will be replaced by the obligation of the management board to state in the annual report that the internal risk management and control systems provide reasonable assurance that the financial reporting does not contain material inaccuracies and that the risk and control systems have functioned properly.

The revised best practice provisions on the paragraph on risks in the annual report and the in control statement are basically in line with the 2005-2007 guidelines of the Monitoring Committee, provided that the forward-looking statement in the in control statement has been cancelled.

Role of the management board and the supervisory board in takeover situations

When a public offer is prepared on (depositary receipts for) shares in the company's share capital, the management board must ensure that the supervisory board is closely involved in the takeover process. Furthermore, when the company receives a request from a competing bidder, the management board must discuss such request with the supervisory board without delay.

Remuneration of the management board

Level and composition

The most important changes to the level and composition of the remuneration of the management board are:

[17] The Monitoring Committee notes that the remuneration structure of members of the management board and employees may pose an operational risk.

[18] This description is in line with the paragraph on risks to be included in the annual report pursuant to section 391, subsection 1 of Book 2 of the DCC as well as the contents of the responsibility statement referred to in section 5:25c of the FMSA as introduced by the Transparency Act.

[19] In the explanatory notes the Monitoring Committee states that it stands to reason that the management board states which framework or system of standards (such as the COSO framework for internal control) it has applied in the assessment of the internal risk management and control systems.

- the variable part of the remuneration must be linked to predetermined, assessable and influenceable targets that are mainly long-term in nature and must furthermore be appropriate in relation to the fixed part of the remuneration;
- the remuneration structure shall not incite members of the management board to take risks that do not fit in with the company's strategy;
- in determining the level and structure of remuneration, non-financial indicators that are of importance to the company's long-term value creation shall also be taken into account;
- prior to drafting the remuneration policy and prior to fixing the remuneration of individual members of the management board, the supervisory board must analyse the possible outcome of the variable remuneration parts and the effect thereof on the remuneration;
- when fixing the level and structure of the remuneration, the supervisory board shall take into account the scenario analyses performed as well as the impact thereof on the remuneration levels within the enterprise; and
- not only in the case of involuntary resignation but also in the case of voluntary resignation the severance payment shall not exceed one year's base salary[20].

Adjustment / Claw-back

The 2008 Corporate Governance Code provides that:

- the supervisory board is entitled to adjust the value of conditional variable remuneration components granted in a previous financial year upwards or downwards if the value were to result in an unfair outcome due to exceptional circumstances in the period in which the predetermined performance criteria have been or should have been achieved[21]; and
- the supervisory board is entitled to reclaim variable remuneration granted on the basis of incorrect (financial) data[22].

The Corporate Governance Code provides that the remuneration report to be included in the 2008 annual report must provide an overview of the remuneration policy planned in 2009 and subsequent years. When drafting this overview, the supervisory board should take notice of these revised provisions.

Disclosure

The 2008 Corporate Governance Code provides for more detailed information to be included in the remuneration report, enhancing the transparency of the remuneration granted to members of the management board.

Furthermore, the main elements of the employment contract of a member of the management board with the company must be disclosed not later than when convening the general meeting in which he/she is nominated for appointment (currently not later than when the contract is concluded). The information to be provided is extended to severance payments, change of control provisions as well as other payments.

The role of the supervisory board and diversity in its composition

Pursuant to the 2008 Corporate Governance Code, the supervisory board shall supervise the company's relationship with shareholders.

The 2008 Corporate Governance Code furthermore provides that the supervisory board should endeavour to have a mixed composition, in particular with regard to gender and age. In the profile for the supervisory board reference shall be made to the aspects of diversity in the composition of the supervisory board relevant to the company and the supervisory board's specific targets in this respect. To the extent that the actual situation deviates from the profile, the supervisory board

[20] In the explanatory notes the Monitoring Committee states that it stands to reason that in the case of voluntary resignation there shall be no severance payment.

[21] In the explanatory notes the Monitoring Committee states that the supervisory board should endeavour to reflect this right in both new as well as existing employment contracts.

[22] In the explanatory notes the Monitoring Committee states that the supervisory board should endeavour to reflect this right in both new as well as existing employment contracts.

must account for this in the supervisory board's report and indicate how and within which period it expects to achieve the composition referred to in the profile.

Responsibility of shareholders

The 2008 Corporate Governance Code introduces provisions regarding the responsibility of shareholders. It provides that a shareholder may vote at its own discretion. However, shareholders must observe the principle of reasonableness and fairness (*redelijkheid en billijkheid*) in their relationship with the company, its corporate bodies and the co-shareholders. This includes the willingness to enter into a dialogue with the company and the co-shareholders.

In the preamble to the 2008 Corporate Governance Code, the Monitoring Committee states that the greater the interest held by a shareholder in the company, the greater its responsibility towards the company, the minority shareholders and other stakeholders.

Response period regarding shareholders' requests

The 2008 Corporate Governance Code provides that a shareholder shall only exercise its right to place an item on the agenda for a general meeting after consultation with the management board. Furthermore, it introduces a response period for the management board when confronted with the intention of one or more shareholders to place an item on the agenda that may result in a change of the company's strategy, for instance in the form of a dismissal of one or more members of the management board or supervisory board. The response period shall not exceed 180 days, to be counted from the day on which the management board has received the intention up to the day of the general meeting concerned. This means that shareholders who wish to place an item on the agenda that may result in a change of the company's strategy, have to inform the management board of their intention not later than 180 days prior to the day of the general meeting concerned. The management board shall use the response period for further consideration and constructive discussions and to explore alternatives, all under the supervision of the supervisory board. The response period shall also apply in the case of a court's leave to call a general meeting with the intention to place an item on the agenda that may result in a change of the company's strategy. A response period shall not apply in the case of a matter that has already been the subject of a response period or when a shareholder, as a result of a public offer, holds at least 75 percent of the company's issued share capital.

If a shareholder has exercised its right to place an item on the agenda, in the general meeting concerned it shall give an explanation and respond to questions.

The Monitoring Committee recommends that the legislature enact the response period.

Provision of information to the general meeting

The 2008 Corporate Governance Code provides that Dutch listed companies:

- specify in the agenda for the general meeting which items are for discussion and which items are to be put to a vote;
- present material changes to the articles of association as separate voting items;
- present proposals to appoint members of the management board or supervisory board as separate voting items; and
- facilitate that persons entitled to vote at the general meeting can grant voting instructions and proxies to an independent third party.

Furthermore, Dutch listed companies must draw up a policy on bilateral consultations with shareholders and this policy must be posted on the company's website. The Monitoring Committee is of the opinion that this document should clarify the policy applied by the company and include (i) whether the company maintains such consultations, (ii) whether it has a pro-active approach, (iii) what type of shareholders the company aims at, and (iv) at what time of the year it is willing to enter into such consultations.

A revised edition of our handbook “Corporate Governance in Nederland” as well as a revised set of corporate governance tools (such as rules and regulations of the management and supervisory board) will be available in the course of spring 2009.

2009 AGM

Notice of meeting

Most Dutch listed companies already apply a record date for general meetings. Upon enactment of the Bill on Shareholders’ Rights, a record date will be mandatory. It could be considered to apply a record date to the 2009 AGM which, in line with the Bill on Shareholders’ Rights, is set at the 21st day prior to the day of the meeting. However, if the articles of association still refer to a record date to be set no earlier than at the 7th day prior to the day of the meeting, the company concerned should comply with this 7th day requirement.
If the general meeting has not authorised the management board to set a record date and the articles of association do not provide for such authorisation, it is not possible to set a record date.

Furthermore, Dutch listed companies could consider complying with the Bill on Shareholders’ Rights and (i) include the information referred to therein in the notice of the meeting and (ii) send out the notice not later than by the 30th day prior to the day of the meeting.

Pursuant to Rulebook II of Euronext Amsterdam, it is not possible for Dutch listed companies with a listing on Euronext Amsterdam to only post the notice on the website: the company should also place an announcement in a Dutch daily newspaper as well as in the Daily Official List (*Prijscourant*).

Voting instructions and proxies

Pursuant to the Transparency Act, Dutch listed companies may not limit the right of shareholders to grant a proxy for the 2009 AGM and should provide proxy forms to their shareholders (e.g., by posting them on their website). In line with the 2008 Corporate Governance Code, it is advised to facilitate that voting instructions and proxies can be granted to an independent third party. We take the view that the independence of the law firm advising the company in respect of the 2009 AGM can be challenged and therefore advise to appoint another third party to vote on behalf of persons who have granted voting instructions or proxies.

Agenda

General

As referred to above in this legal alert, pursuant to the 2008 Corporate Governance Code, Dutch listed companies should:

- specify in the agenda for the general meeting which items are for discussion and which items are to be put to a vote;
- present material changes to the articles of association as separate voting items;
- present proposals to appoint members of the management board or supervisory board as separate voting items; and
- publish the main elements of the employment contract of a member of the management not later than when convening the general meeting in which he/she is nominated for appointment.

In order to comply with the 2008 Corporate Governance Code, Dutch listed companies are advised to draw up their agenda for the 2009 AGM in line with these requirements and publish the main elements of the employment contract of any candidate member of the management board on their website.

Items to be placed on the agenda

Besides the regular items that Dutch listed companies put on their agenda for the annual general meeting, please find below an overview of additional items regarding the agenda for the 2009 AGM.

In the preamble to the 2008 Corporate Governance Code, Dutch listed companies are recommended to put the corporate governance chapter regarding the main features of their corporate structure and their compliance with the 2008 Corporate Governance Code included in the

annual report on the agenda for the 2010 AGM as a separate discussion item. Dutch listed companies may consider informing their shareholders of their intentions with regard to their compliance with the 2008 Corporate Governance Code in the 2009 AGM. This information can be discussed as part of the discussion of the 2008 annual report. If there has been a substantial change in the company's corporate governance structure or in the compliance with the Dutch Corporate Governance Code however, a discussion of the company's corporate governance should be put on the agenda as a separate item.

As described above in this legal alert, the 2008 Corporate Governance Code includes revised best practice provisions regarding the remuneration of members of the management board. Dutch listed companies should assess whether their remuneration policy complies with such best practice provisions and if not, consider presenting a revised remuneration policy for adoption at the 2009 AGM.

Furthermore, as referred to above in this legal alert, the Transparency Act provides that Dutch listed companies may only provide information to their shareholders electronically, provided that, inter alia, the general meeting has consented thereto. It is advised to put a proposal for such consent on the agenda for the 2009 AGM.

Dutch listed companies should assess whether their articles of association are still up to date. We have drafted a complete overview of possible amendments to the articles of association of Dutch listed companies (including text proposals) reflecting the developments addressed in this legal alert and would be pleased to provide further advice in this respect.

Information at the 2009 AGM / Information to be posted on the company's website

In line with the Transparency Act, Dutch listed companies must inform their shareholders of the total number of outstanding shares and voting rights. Such information should be made public not later than at the start of the 2009 AGM. This is in line with the Bill on Shareholders' Rights, which more specifically refers to "the total number of shares and voting rights *as per the record* date." We advise to provide this information orally at the start of the 2009 AGM and also inform the general meeting of the number of shares and voting rights represented at the general meeting.

As referred to above, the Bill on Shareholders' Rights provides that certain information regarding the general meeting and the voting results must be published on the website of Dutch listed companies. In anticipation of the Bill on Shareholders' Rights being enacted, Dutch listed companies could consider complying with this requirement.

Contact information

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