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Brussels to the Point

e-Newsletter



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This newsletter is sent by NautaDutilh

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New Guidelines for Preparation of the Corporate Governance Statement in the Annual Report

by Anne Tilleux

On 14 February 2012, the Corporate Governance Committee issued eight new guidelines to help companies better explain why they derogate from particular provisions of the Corporate Governance Code ("the 2009 Code").

Since the entry into force of the Act of 6 April 2010, the management report of a company whose shares are admitted to trading on a regulated market (Euronext Brussels) must include a corporate governance statement, in which the company explains why it has decided not to apply certain provisions of the 2009 Code.

However, it became apparent that the corporate governance statement did not always clearly indicate the provisions of the 2009 Code from which the company derogated and was even less clear when it came to the reasons justifying such derogations (the "comply or explain" principle) (see *Etude FSMA n° 40 (septembre 2011): Les premières déclarations de gouvernement d'entreprise: étude de suivi de l'Etude n° 38/ Studie FSMA nr. 40 (september 2011): De eerste verklaringen inzake deugdelijk bestuur: opvolgingsstudie van Studie nr. 38*). The explanations provided were often formalistic and superficial. Listed companies are not always aware of their obligations and do not always know how to improve corporate governance reporting.

In order to improve the quality of corporate governance reporting, the Corporate Governance Committee recently issued eight guidelines to help companies better explain non-compliance with the 2009 Code. These eight guidelines are briefly summarised below.

1. The comply or explain principle for the 2009 Code is binding and companies must therefore indicate which sections of the 2009 Code they do not comply with and provide a reasoned explanation for any derogations.
2. The corporate governance statement cannot rely solely, explicitly or implicitly on the general belief that application of the Code is inadequate or inappropriate. In other words, mere criticism of the 2009 Code, its principles and/or provisions does not justify derogating from it.

3. If a company derogates from a provision of the 2009 Code, its reasons for doing so must be explained in the corporate governance statement, ideally in a separate section. This means that companies must review each provision of the Code to verify compliance.
4. Companies are advised to first mention which provisions of the Code they do not respect and to then explain the reasons for such derogations, if any.
5. The board of directors is responsible for determining derogations from the 2009 Code and for providing a clear explanation for each derogation. A detailed explanation is required. The board can be assisted by one or more advisory committees, such as the remuneration committee, composed of non-executive directors, including independent directors.
6. The board of directors must approve the reasons cited to justify derogations from the 2009 Code. These reasons must be specific to each company and relate to the company's defining characteristics and situation (e.g. sector, size, structure, international character, etc.). Explanations must be sufficiently substantive, informative and based on the company's specific circumstances. Vague arguments and general statements, without any real connection to the company's situation, have little informative value. The explanations must be sufficiently detailed and provide a clear view of the reasons for the derogation, so that readers can assess the impact of the information provided. If a derogation is temporary, the board must explain why this is the case and how long the situation is expected to last.
7. The reasons for derogating from the 2009 Code must be submitted to the general meeting of shareholders along with the annual report, which includes the corporate governance statement. The committee stresses that these reasons must be explained with sufficient clarity to enable true dialogue with shareholders if they do not accept the company's position.
8. The reasons for derogating from the 2009 Code must be submitted each year to the board of directors for evaluation in light of the company's situation and future prospects.

A certain degree of flexibility must exist with regard to application of the 2009 Code. Specific circumstances, in particular the size and complexity of the company and the nature of the risks and challenges it faces, must be borne in mind. Companies should not only justify non-compliance but also describe the solutions they have chosen in light of the circumstances. These eight guidelines should not obscure the fact that derogations from the 2009 Code are the exception rather than the rule.

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