

UK Corporate Governance Code Clawback



September 2014

Following the publication of the updated Governance Code we can clarify that the intention of the FRC in relation to the provision on clawback is that companies should have both the ability to be able to recover sums paid and to withhold the payment of any sum.

While it is true that many companies now have provisions to either recover sums paid or to withhold payments, fewer companies have the ability to do both. And in many companies these provisions will not apply to all incentive plans. This is particularly true of cash bonuses, where clawback provisions are less common.

This does mean that in many, if not most, companies the remuneration committee will want to review existing provisions and assess what additional provisions should be included and the situations in which it is anticipated these may be operated or to determine whether to “explain” why this element of the code has not been complied with.

The new Code applies to financial periods starting on, or after, 1 October 2014. Therefore, it is worth noting that the first remuneration reports where compliance with the new Code will need to be reported will be in 2015. So for a company with a financial year ending 31 December 2014, the first requirement to report compliance with the new Code, or to explain any areas of non-compliance, will be in the remuneration report for the financial year ending in 2015.

However, although there is technically no requirement to “explain” non-compliance on this point in the 2014 report it is important to bear in mind that:

- Institutional investor bodies may expect companies to comply with some or all of the new Code provisions sooner rather than later and may adapt their voting guidelines for the next AGM season on this basis. Accordingly, there is scope for negative comment or criticism this year from some shareholders and/or voting bodies.

- A significant number of companies are likely to elect to comply “early” with the new Code (particularly if they already have malus and clawback in place). If this is seen as best practice, non-compliance may attract attention.

Companies may therefore want to consider including, in the next remuneration report, what steps they are taking to address the new guidance.

Given there are a number of things to consider around the introduction of clawback and malus for all variable remuneration, some of which are quite complex, we suggest that even though companies do not need to have all of these provisions in place in the next few months, it is important to start planning for this as soon as possible.

We are holding a webinar to discuss some of the practical implications of introducing clawback and malus provisions on Thursday 25 September at 11.00am. You can register for this session at www.deloitte.co.uk/events using the password ‘update’.

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