An Overview of Recent Changes to Corporate Governance Frameworks as it Pertains to Executive Remuneration*

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This article seeks to study at the recent changes in regulation, both of a legislative and self-regulatory nature, in the field of corporate governance as it pertains to executive remuneration. The main point of departure of the article will be recent societal unrest in light of the growing income gap and the advent of the recent global economic recession. Firstly, a theoretical underpinning for the remuneration of directors is provided, addressing philosophical and economic reasons in this regard. Secondly, different methods of executive remuneration are briefly set out and evaluated. Finally, a comparative analysis of the changes over recent years in several countries, namely the United States of America (US), the United Kingdom (UK), Australia and South Africa (RSA), are undertaken, in order to see how the approach has shifted with regard to evaluating executive remuneratiom. All of the countries mentioned have adapted their regulatory practices, some to a relatively negligible extent, whereas others (such as the US, whose structure could be seen to have been lacking initially) have been completely overhauled. In concluding, the article highlights and comments on the most current debates related to the regulation of executive remuneration.

1. INTRODUCTION

With the advent of globalisation, the digital age and knowledge economy, there has never before been a time in the history of mankind when ordinary people have had access to as much information as they have currently. The right of access to information has become a legal norm which is widely accepted as fundamental in most of civilised society. This right, along with the principle of freedom of the press, has led to a revolution in the media, both mainstream and informal. Subsequently, it

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has become increasingly difficult for individuals and corporations, especially those of a highly public nature, to act in any manner without some form of public scrutiny.

One of the pre-eminent issues that arise as a result of the above-mentioned status quo, from a corporate governance perspective, is that converning executive remuneration.[1] In the light of past global corporate scandals such as that of ENRON, Parmalat and Worldcom, as well as the massive divergence that traditionally occurs between compensation for executives and workers in the lower rungs of the corporate ladder, especially in developing countries, it is relatively easy to comprehend why the public at large, including shareholders, is searching for more bang for their proverbial buck. From both an economic and moral perspective, questions are being asked as to what the reasons and the effects are of such remuneration policies. This question has now yet again become relevant due in part to the recent global recession, owing to perceptions that it was partly brought about by corporate greed, and the tensions in this regard have been exacerbated by global backlashes such as the "Occupy" movement.[2] Most recently, Switzerland has even agreed to a public referendum on the capping of executive pay.[3]

This paper seeks to dicuss and analyse some of the issues concerning executive remuneration. It will firstly examine the theories and perspectives thereof in order to establish a base for the inquiry where after it will give a brief outline of the most common forms of compensation for purposes of its analysis of executive remineration. Lastly, it will give a brief overview of corporate governance trends in the US and UK, with a focus on how regulations have changed.

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[1] Also known, *inter alia*, as director's remuneration, director's compensation and executive compensation. Unless otherwise stated, these terms will be regarded as having the same meaning.

[2] The movement, which started off with the "Occupy Wall Street" protests in September of 2011, has since moved to several other countries. The movement's manifesto may be found at http://www.occupyagenda.org/, and a general overview of its reach and impact can be found online on several news sites such as http://www.guardian.co.uk/world/occupy-movement and http://topics.nytimes.com/top/reference/timestopics/organizations/o/occupy_wall_street/index.html (last accessed on 23 February 2012).

[3] AFP "Swiss support rises for reduced executive pay" published in The Local on 24 October 2013 (available at http://www.thelocal.ch/20131024/swiss-backing-rises-for-reduced-exec-pay – Last accessed 2 November 2013).

2. THEORIES, PRINCIPLES AND PERSPECTIVES IN EXECUTIVE REMUNERATION

The standard position in English Law is that a director has no automatic right to remuneration by virtue of the fact that he or she is the director of a company.[4] This principle has also been accepted in South Africa.[5] However, it is common cause that the directors of most profit-driven companies are not only paid but also generally very well-paid at that. Accordingly, it is important to analyse why this is the case.

The theoretical approach to corporations and that of executive remuneration has a strong economic base. Bruce, Buck and Main[6] identify three major economic theories which are relevant, namely the principal-agent theory, the stakeholder theory and the institutional theory. The principal-agent theory relies on the assumption that ownership and control in a firm is vested in two distinct bodies (i.e. a company is owned by its shareholders, but control is given to the directors by the shareholders), and that this is maintained by virtue of "arms-length contracting."[7] It further proposes that both the agent (the directors, in our case) and the principal (the shareholders) are motivated through rational self-interest. However, the rational self-interest governing these two players, and, subsequently, their incentives, can sometimes be divergent: the agent wants to ensure he 'looks good' and therefore, doesn't take too many risks, whereas the principal wants the highest potential profit which sometimes involves taking risks which might yield high returns.[8]

However, it is submitted that the converse of this situation may also at times occur, where a director, whose remuneration is linked to a particular aspect of company performance may be given a perverse incentive to take risks which yield high personal return in the short-run, but which may have catastrophic effects in the long run. The latter situation, arguable, is quite similar to what has recently occurred in the banking sector, especially when one takes into account the controversy related to the bonus payments of senior employees at the American International Group in March

[4] *In Re Beeton & Co Ltd* [1913] 2 Ch 279.
[5] Cassim et al, *Contemporary Company Law* (2nd Edition), Juta (2012) at 454.
[6] Bruce, Buck and Main *Top Executive Remuneration: A View from Europe,* Journal of Management Studies Volume 42 Number 7 (November 2005) at 1494.
[7] Bruce, Buck and Main (2005) at 1494.
[8] Bahar *Executive Compensation: Is Disclosure Enough?,* Université de Genève Working Paper (December 2005) at 3.

2009.[9] In order to diminish the effect of these occurrences, the principal-agent theory proposes that shareholders have to "craft executive pay arrangements that cause a top management team motivated by self-interest to maximise shareholder value."[10] Therefore, executives will be remunerated on such a basis that is high enough for them to take risks for the greater good of the company, at the expense of potentially looking bad.

A sympathetic view of the role of the directors of a company is given by proponents of the stakeholder theory; in this theory, it is assumed that directors do not have such a high level of self-interest, but that they will make decisions for the company based on the consideration of all stakeholders thereof.[11] In other words, directors will first consult with relevant groups of the 'company community at large' (i.e. the shareholders, workers, labour unions, etc.) before making a decision, in the hope that it will be for the greater good of all involved. Critics of this model argue that directors still act in a self-serving manner, albeit only on a long-term rather than a short-term basis.[12] Proponents of the stakeholder theory point out that it is able to explain why certain directors actively, and voluntarily, involve themselves in processes of corporate governance reform, and that there is also a far lesser emphasis on large pay packages.[13] While the former statement can be corroborated through the willing cooperation of companies in the formation of self-regulatory codes (such as the Combined Code in the UK and the King Reports in RSA), it is uncertain whether the latter statement is nothing more than academic idealism, as the fact that directors make decisions based on the greater good of the company and community does not necessarily exclude the fact that they might still be expecting to be rewarded for it, as it is submitted that they are, at the end of the day, also part of the community of stakeholders of a company.

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[9] Mintz, *Off with their heads: Samples of AIG Outrage*, Bloomberg BusinessWeek (17 March 2009), retrievable online at http://www.businessweek.com/bwdaily/dnflash/content/mar2009/db20090317_032819.htm (last accessed on 23 February 2011).
[10] Bruce, Buck and Main (2005) at 1494.
[11] Bruce, Buck and Main (2005) at 1495.
[12] Bruce, Buck and Main (2005) at 1496.
[13] *Supra*.

In contrast with the above-mentioned approaches, the institutional theory does not present itself as an alternate model *per se*, but rather serves to complement and amend the other models. It proposes the view that certain institutions, both external and relating to a company internally, as well as other related fields and sectors within a given context, may have inherent applicability when it comes to influencing perspectives surrounding executive remuneration.[14] Put in context, the economist Scott points out that executive remuneration "must be socially legitimate in relation to the prevailing regulatory, normative and cognitive influences on firms and these societal functions must be reconciled with organizational efficiency."[15] Therefore, when determining remuneration, one must take into account the social, functional and political pressures that may affect a firm in a direct or indirect manner.[16] It is submitted that this, in light of some of the events already mentioned above, is seemingly now more pertinent than ever before.

The above economic theories do not explicitly propound a notion as to how much executives should be paid, but rather provide a potential means of determination, and one can also identify certain philosophical reasons as to why executives are recompensed in the manner that they sometimes are. Shields, O' Donnell and O'Brien point out several of the considerations that can be used to justify current trends in executive remuneration. Firstly, it must be noted that the job of an executive is dynamic, in terms of content and complexity, and that there has been a constant increase in terms of the risk and responsibility of these positions over the past few years. It is also pointed out that the tenure for executives has also dramatically shortened, with the average 'lifespan' of a CEO being between three and five years.[17] A further justification is the seeming scarcity of executive talent,[18] and the opinion that one is only able to attract and maintain managerial ability through 'premium compensation.' This problem is also worsened by the competition created through the globalisation of the labour market, where executives can easily migrate if they believe there is potential for better remuneration elsewhere. It is however submitted that the

[14] Bruce, Buck and Main (2005) at 1496.
[15] As quoted in the article of Bruce, Buck and Main (2005) at 1497.
[16] Bruce, Buck and Main (2005) at 1497.
[17] Shields, O' Donnell and O'Brien *The Buck stops here: Private Sector Executive Remuneration in Australia,* Labour Council of New South Wales (2003) at 12.
[18] *Supra* .

true 'mobility' of executives may be overestimated,[19] as countries may still impose legislation and regulations frustrating labour competition, such as policies relating to the acquisition of work permits and incentives for companies to hire local talent. Over and above this, the emotional and social impact of movement across borders may also play a significant role.

There are, naturally, also contrasting opinions as to the philosophical justification for executive remuneration. It is quickly pointed out that one should be wary of distributive injustice when it comes to determining compensation.[20] This is especially relevant in developing nations such as South Africa, and in those cases where one sees downsizing or downgrading in a firm, be it due to an economic slump or other reasons, but where there are still consistent rises in executive pay. It is contended that not only does overly high executive pay potentially lead to perverse incentives to undermine good corporate governance,[21] but also to potentially manipulate market place perceptions of the company. This relates to the phenomenon of "signal jamming," where companies sometimes use tactics of marketing, false innovation and the 'parking' of devalued assets into subsidiary companies in order to appear more profitable and appealing. Furthermore, executives with overly exorbitant exercised share options may harm the share value of a company they should opt for dumping their shares in exchange for capital gain.[22] These forms of conduct and their economic side-effects can easily be corroborated by an analysis of recent corporate scandals and their aftermath, such as the case of ENRON.

Bahar opines that there are three divergent perspectives when it comes to determining executive remuneration, namely moral, economic and intrinsic imperatives.[23] From a moral perspective, in the process one should incorporate principles of fairness when determining remuneration packages, as well as attempting to resolve the criticism of the media, labour unions, political institutions and the public at large. The author however notes that this can be seen as a double standard, as it imposes moral

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[19] Shields, O' Donnell and O'Brien (2003) at 13.
[20] Shields, O' Donnell and O'Brien (2003) at 14.
[21] Shields, O' Donnell and O'Brien (2003) at 15.
[22] Shields, O' Donnell and O'Brien (2003) at 18.
[23] Bahar (2005) at 2.

restrictions on compensation in business, but not for athletes and entertainers.[24] It is respectfully submitted that such a point of view is fallacious, as it does not compare apples with apples, and somewhat underplays the impact that business, or rather the decisions of businesses, can have on the economy of a country. The economic perspective is where one seeks to address the inefficiencies created by, in particular, the principal-agent theory - and, to a lesser extent, the inadequacies of the other theories - to determine compensation accordingly.[25] Lastly, the intrinsic perspective denotes that one should structure remuneration in such a way that it does not have an adverse effect on the intrinsic motivation (such as esteem, prestige and self-actualisation) which should be experienced by executives. Accordingly, it propounds that executive remuneration should be low in order to ensure that executives do not become “self-centred profit-seekers.”[26]

In conclusion, it is submitted that not one of these theories, principles or perspectives is absolute or immune to criticism. It would be prudent to take a holistic approach when evaluating executive remuneration, as well as how to determine it. Under certain circumstances, and in certain countries, some may be more relevant than others. Accordingly, one should endeavour to be mindful of and incorporate several of the above-mentioned aspects when making a decision as to how to structure an executive remuneration scheme.

3. FORMS OF EXECUTIVE REMUNERATION

Now that a base for the enquiry into executive remuneration has been established, it is prudent to have an idea of the various forms of compensation that are potentially considered. Du Plessis, McConvill and Bagaric provide some insight as to what can be construed as remuneration.[27] Over and above this, the second iteration of the King Committee Report on Corporate Governance (2002) contained a very broad definition of what entails remuneration,[28] and is also a useful source. Between these two sources, one is able to triangulate and compile a list of considerations that include:

- Salaries

[24] *Supra*.
[25] Bahar (2005) at 3-4.
[26] Bahar (2005) at 4-5.
[27] Du Plessis, McConvill and Bagaric *Principles of Contemporary Corporate Governance*, Cambridge University Press (2005) at 231-232.
[28] Par 2.5.4.

- Fees and wages
- Non-cash benefits
- Bonuses annually accrued
- Dividends annually accrued
- Pension contributions
- Payments in relation to retirement and termination from office
- Shares issued and options granted
- Sign-on payments
- Restraint payments
- Generic Cash Benefits

Stapledon[29] divides these considerations into two general categories, namely remuneration which is tied to company performance (generally the most contentious issue)[30] and that which is not. It should be noted that, traditionally, once a director is entitled to remuneration, there is no presumption that a company should turn a profit in order for it to be paid out,[31] a position which is accepted as trite in South Africa.[32] Performance-based remuneration can also be further divided into short-term and long-term incentives.[33] This categorisation is convenient, although not absolute, as one can see on closer inspection, and therefore shall be used when discussing and analysing these different forms.

3.1 Remuneration tied to Company Performance

3.1.1 Short-term Incentives

Short-term incentives would generally include annual salary, fees and/or wages of an executive, as well as any bonuses paid out. Annual salaries would not be construed by some writers as a short-term incentive, although Stapledon points out that it would normally be adjusted in relation to the past performance of a company and an executive, and should therefore be regarded as such.[34] The payment of bonuses to

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[29] Stapledon *Executive performance-related compensation: the difficulty in truly aligning with shareholder returns*, 23 Wisconsin International Law Journal 505 (2005) at 506-510.

[30] Aspects of this have already been explored, and shall be elaborated on further below.

[31] *Re Halt Garage (1964) Ltd* [1982] 3 All ER (ChD) at 1038.

[32] Cassim (2012) at 456.

[33] Stapledon (2005) at 506-510.

[34] Stapledon (2005) at 507.

executives is seen as common cause in most countries, and would generally be approximately 50% of the annual salary of an executive.[35]

It would seem that there is a greater emphasis on short-term incentives in companies from the UK and Australia. However this is traditionally a relatively small component when it comes to the remuneration of American executives.[36] Whereas these bonuses are traditionally calculated on the basis of external performance (i.e. the value of shares and the profit of the company), Stapledon notes that there is a movement towards using internal performance as a measure. This internal performance measure incorporates both quantitative and qualitative aspects, looking at aspects such as return on equity, cost management, total operating margins, and value of new business, as well as performance relative to competitors and market conditions, stakeholder perspectives, personal leadership, effective teamwork at senior management levels and strategic positioning.[37]

3.1.2 Long-term Incentives

Long-term incentives include shares issued, as well as any options granted for shares, to executives. It is generally regarded as one of the most complex and contentious issues in corporate governance.[38] According to Jensen, Murphy and Wruck, these incentives form nearly half of the average American executive's actual annual income, and have steadily risen over the past few years.[39] Cheffins and Thomas, using different data, speculate that this amount may amount to up to two thirds of US executives' income, almost double that which is awarded to executives in any other country.[40] It is therefore quite easy to see why this issue is controversial.

Traditionally, share options gave executive directors the right to purchase shares at a specified period in the future. These shares were acquired with their own money and the price thereof was normally set at the market share value of the date of their

[35] Cheffins and Thomas *The globalization (Americanization?) of Executive Pay*, 1 Berkeley Business Law Journal 233 (2004) at 242.
[36] *Supra*.
[37] Stapledon (2005) at 507.
[38] Cooper *The ICSA Handbook of Good Boardroom Practice*, ICSA Publishing Ltd, London (2004) at 105.
[39] Jensen, Murphy and Wruck *Remuneration: Where we've been, how we got to here, what are the problems, and how to fix them,* ECGI Finance Working Paper No 44/2004 (2004) at 31.
[40] Cheffins and Thomas (2004) at 242-243.

employment or the commencement of the option scheme.[41] According to Stapledon this is still the most popular option in Australian companies.[42] However, since the development of the Greenbury Code of 1995, there has slowly but surely been a shift in how share option schemes were managed and set up.[43] These new schemes, commonly known as Long-term Incentive Plans (LTIP), have started gaining popularity among companies as an alternative to the traditional option.

Because a company is able to devise its own LTIP, there is no governing hard and fast rule, although three major variations have seemingly crystallised in practice, namely, restricted share schemes, sometimes referred to as Zero Exercise Price Options (ZEPO),[44] matching share schemes, and deferred bonus plans. In the case of 'restricted share schemes,' the right to a set amount of shares vests in a director, at no cost, and are released to him or her at the end of a fixed period if he/she is able to meet certain performance requirements. Matching share schemes refer to plans where executives buy shares at the current market price and hold them for a fixed period, thereafter the company will, depending on performance, match the amount of shares bought. The last LTIP, namely that of deferred bonus plans, refers to when executives are required to use a portion of their annual bonus to purchase shares. These shares are then held in trust for a fixed period, thereafter the company will match the amount bought.[45]

3.2 Other Forms of Remuneration

Alternate forms of remuneration, which traditionally would not have even been considered as such before the greater emphasis on good corporate governance, include benefits such as so-called "signing bonuses," and allowances on travel, vehicles, rent and relocation. Some authors also note that loans made to directors by the company should be included, as these loans generally tend to be over long periods and at very low interest rate.[46] Often the most contentious issue in this seemingly grey category would be that of payments relating to retirement and termination of service. These

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[41] Cooper (2004) at 106.
[42] Stapledon (2005) at 508.
[43] Cooper (2004) at 106.
[44] Stapledon (2005) at 508.
[45] Cooper (2004) at 108.
[46] Du Plessis, McConvill and Bagaric (2005) at 232. In this regard, it is also relevant to note that the South African Companies Act of 2008 includes a definition that states that the difference between the market value interest rate of a loan and the interest rate payable by a director to the company is also seen to be a form of remuneration.

payments, which are commonly known as "golden handshakes," have created massive public outrage in the past, as they directly contradict the notion that executive pay should be an incentive for future performance.[47]

4. Corporate Governance Trends in Anglo-American systems

4.1 The United States of America

4.1.1 Status quo prior to the recession

Traditionally, the US has a dual system of corporate governance, incorporating both legislation (such as the infamous Sarbanes-Oxley Act of 2002),[48] and self-regulatory codes in the form of the listing requirements such as the New York Stock Exchange (NYSE) and the NASDAQ Stock Exchange.[49] Surprisingly, given the massive impact it had on most other aspects of American corporate law, Sarbanes-Oxley is silent when it comes to executive remuneration, except for two aspects:[50] Section 304 allows for 'claw-backs' of certain bonuses in instances such as where there is a reporting error, and section 402 deals with conflict of interest situations, which also places a prohibition on any loans to directors. With the exception of these provisions, most principles regarding this issue were to be found in listing requirements.

Prior to the recession, the last amendments to the NYSE listed company manual with regard to corporate governance took place in late 2004.[51] This version of the manual stated that all listed companies must have a compensation committee consisting solely of independent directors. The committee had to set up a charter to address, among other things, the committee's purpose and responsibilities in terms of the review and recommendations of executive remuneration. It was also charged with the task of determining and approving the compensation level of the CEO of the company.[52] Furthermore, it also required shareholder approval of any form of 'equity compensation plan' (i.e. share option scheme).[53]

[47] Hill and Yablon *Corporate Governance and Executive Remuneration: Rediscovering Managerial Positional Conflict*, 25 University of New South Wales LJ 294 (2002) at 300.
[48] HR 3763.
[49] Hill *Regulatory Responses to Global Corporate Scandals*, University of Sydney Legal Studies Research Paper No 06/35 (2006) at 15.
[50] *Hill Regulating Executive Remuneration: International Developments in the Post-Scandal Era*, 3 European Company Law 64 (2006) at 74.
[51] NYSE Regulation: Corporate Governance: Historical Reference Material (Available at http://www.nyse.com/regulation/nyse/1101074752625.html) – Last accessed on 9 May 2011).
[52] NYSE Listed Company Manual, Rule 303A.05 (As amended on 3 November 2004).
[53] NYSE Listed Company Manual, Rule 303A.08 (As amended on 3 November 2004).

Originally the NASDAQ requirements regarding corporate governance could be found in Market Place Rule 4350. This section contained similar principles to the NYSE, but with two marked differences. Firstly, it did not make the establishment of a compensation committee mandatory, but proclaimed that, in the absence of one, a majority of independent directors had to determine and approve the compensation level for the CEO of the company. Secondly, it also required that the compensation committee (or a majority of independent directors) had to determine and approve the compensation level of the other executive directors.[54]

From the above, it is clear that the issue of executive compensation was not an especially serious concern prior to the recession. In 2007, the Securities and Exchange Commission (SEC) launched an in-depth enquiry into the matter, and proposed the adoption of new rules and possible legislation with regard to disclosure concerning compensation. These proposed rules would also have broadened the scope and definition of what is considered to be executive remuneration.[55] SEC Commissioner Roel Campos, in a speech made on 23 January 2007, stated that special emphasis would be placed on disclosure surrounding "the specific circumstances that would trigger payments or the provision of other benefits, [and] the estimated payments and benefits that would be provided in each covered circumstance."[56] He also called for companies to be more wary when establishing remuneration schemes, and to consider setting up so-called negotiation teams when doing so. The above notwithstanding, the SEC did not issue any further statements in this regard until the events which sparked the recent global recession.

4.1.2 Status quo following the recession

As a result of the financial crisis, US lawmakers introduced a flurry of proposed legislation to address the problems brought about by the recession,[57] and the rules of major stock exchanges were also overhauled.

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[54] NASDAQ Rules, Market Place Rule 4350(c)(3) (Effective until 13 April 2009).
[55] Hill, 3 European Company Law (2006) at 77.
[56] "Speech by SEC Commissioner: Remarks Before the 2007 Summit on Executive Compensation" (23 January 2007) (Available at http://www.sec.gov/news/speech/2007/spch012307rcc.htm - Last accessed on 8 May 2011).
[57] A substantial amount of bills (most of which never went past the introduction phase) are given when doing a rudimentary search on the Library of Congress' THOMAS Database (http://thomas.loc.gov)

The most notable piece of legislation to be passed in the wake of the economic meltdown was most assuredly the Emergency Economic Stabilization Act of 2008,[58] which was passed in latter part of 2008, and came into effect almost immediately thereafter. The Act established new structures, instituted the Troubled Assets Relief Program[59] (commonly referred to as the "bailout package") and also introduced new provisions relating to the taxation of executive remuneration in the financial sector. Section 111 of the Act deals with corporate governance and executive remuneration, and binds any financial institution that sold troubled assets to the state.[60] If the assets were sold directly to the state, appropriate standards for corporate governance must be met. These standards include:

> (A) **limits on compensation** that exclude incentives for senior executive officers of a financial institution to take unnecessary and excessive risks **that threaten the value of the financial institution** during the period that the Secretary holds an equity or debt position in the financial institution;
> (B) a provision for the **recovery** by the financial institution **of any bonus or incentive compensation** paid to a senior executive officer **based on statements** of earnings, gains, or other criteria **that are later proven to be materially inaccurate**; and
> (C) a **prohibition** on the financial institution making any **golden parachute payment** to its senior executive officer during the period that the Secretary holds an equity or debt position in the financial institution.[61]" (my emphasis)

In instances where an institution's assets were purchased through an auction, and where the total value of the purchase exceeds $300 million, any new employment contracts with golden parachute clauses are prohibited.[62] In terms of Section 302 of the Act, the Internal Revenue Code was amended to deny tax deductions for executives earning in excess of $500,000,[63] and additional provisions regarding parachute payments were also introduced.[64] Despite these changes, the EESA has not always been met with approbation. Cain,[65] in his analysis of the process of enactment of EESA, points out that the Act was unnecessarily rushed, with several aspects not well thought through, ultimately leaving the American taxpayer in a precarious

[58] Division A, HR 1424, Hereinafter the EESA.
[59] Title 1 of Division A, HR 1424, Hereinafter referred to as TARP.
[60] Section 111(a).
[61] Section 111(b)(2).
[62] Section 111(b)(3).
[63] Section 302(a).
[64] Section 302(a).
[65] Cain, *Congress' first recipe to bail out the financial institutions of the United States is leaving the taxpayers with a sour taste in their mouths*, 29 JNAALJ 213.

position at times. In this regard, he points out inadequacies relating to the authorities charged with the oversight and implementation of the Act,[66] and argues for amendments which would strengthen the applicability of guidelines accompanying EESA,[67] while also providing for more specific reporting standards for companies receiving relief to foster greater accountability and transparency.[68]

Whereas the abovementioned legislation only dealt with the financial sector, other changes were also introduced. The NYSE Listed Company Manual underwent several amendments during the course of 2009[69] and 2013,[70] where the duties and powers of the compensation committee have also been expanded. They are now tasked with the direct responsibility of “review[ing] and approv[ing] corporate goals and objectives relevant to CEO compensation, evaluat[ing] the CEO's performance in light of those goals and objectives, and, either as a committee or together with the other independent directors (as directed by the board), determin[ing] and approv[ing] the CEO's compensation level based on [such an] evaluation.”[71] They must also make recommendations with regard to the compensation of other executives, as well as incentive-compensation and equity-based plans that are subject to board approval.[72] Furthermore, shareholders must still approve any and all equity compensation plans, as well as any revisions made thereto.[73] Although the aforementioned principle remains unchanged from the previous iterations of the rules, the definitions regarding what constitutes equity compensation, as well as the provisions relating to exemptions from approval, have been greatly expanded.

NASDAQ Market Place Rule 4350 was repealed in its entirety to make way for more comprehensive provisions regarding corporate governance.[74] The new provisions can be found in the Rule 5600 Series, and all companies applying to list or currently listed

[66] Cain, 29 JNAALJ 213 at 242.
[67] Cain, 29 JNAALJ 213 at 268.
[68] Cain, 29 JNAALJ 213 at 271-277.
[69] Adopted in terms of SR-NYSE-2009-89 on 25 November 2009.
[70] Adopted in terms of SR-NYSE-2012-49 on 11 January 2013.
[71] NYSE Listed Company Manual, Rule 303A.05(b)(i)(A).
[72] NYSE Listed Company Manual, Rule 303A.05(b)(i)(B) .
[73] NYSE Listed Company Manual, Rule 303A.08.
[74] Adopted on 19 March 2009 in terms of SR-NASDAQ-2009-018, with subsequent minor amendments at later dates.

on the NASDAQ must comply with the qualitative requirements set out therein.[75] Rule 5605(d) states that the remuneration of both the CEO and other executives must be determined, or recommended to the board for determination, by independent directors constituting a majority of a board's independent directors in a vote in which only they may participate, or by a compensation committee comprising solely independent directors. There are limited instances in which a company may allow non-independent directors to vote or form part of the compensation committee, and they must also disclose additional information in such cases. Furthermore, shareholder approval is also now required "prior to the issuance of securities when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants[.][76]"

In addition to the above, according to the preamble, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009[77] was enacted to "promote the financial stability of the US by improving accountability and transparency in the financial system." The Act brought about several amendments and additions to the law relating to executive remuneration, including shareholder approval for standard remuneration and golden parachute schemes,[78] and measures for ensuring the independence of compensation committees.[79] The SEC requires that relevant companies must disclose the remuneration of the CEO in relation to the financial performance of the company itself.[80] Lastly, policies regarding the recovery of any incentive-based remuneration which was awarded due to erroneous calculations in financial statements must be adopted and implemented.[81]

In March 2011, the Securities and Exchange Commission proposed new rules relating to listing standards for compensation committees and consultants,[82] as well as new

[75] NASDAQ Rule 5601.
[76] NASDAQ Rule 5635(c).
[77] HR 4173.
[78] Section 951.
[79] Section 952.
[80] Section 953.
[81] Section 954.
[82] "SEC Proposes Rules Requiring Listing Standards for Compensation Committees and Compensation Consultants," Press Release 2011-78 (Available at http://www.sec.gov/news/press/2011/2011-78.htm – Last accessed on 8 May 2011).

proposals regarding disclosure of incentive-based compensation arrangements.[83] It is thus clear that the recession has resulted in the US legislature and regulatory bodies taking a stronger position regarding issues of corporate governance and executive remuneration and has placed it as a priority topic on their current agenda.

4.2 The United Kingdom

4.2.1 Prior to the recession

The UK corporate governance scene is traditionally a self-regulatory one, with the greatest sources of self-regulation generally being based on the Combined Code on Corporate Governance,[84] as well as the UK Listing Authority's Listing Rules (as used by the London Stock Exchange).[85] The Combined Code was established mainly as a result of the recommendations of the 2003 Higgs Report, and incorporates aspects derived from several older corporate governance reports, such as the Cadbury, Greenbury, and Hampel and Smith reports.[86]

Prior to the recession, the Combined Code's amendments were last made in 2006, and stipulated that a company should under normal circumstances establish a remuneration committee consisting of at least three independent directors.[87] The principle underlying this provision is that no director should have the power to determine or be involved in determining his own compensation.[88] This committee would be charged with the task of evaluating and determining all forms of executive remuneration, including pension rights and any form of compensation.[89] Suggestions as to how certain forms of remuneration should be considered, such as how pension and bonuses should be calculated, were set out in Schedule A of the code. The Code also propounded that a pay system based on performance was to be preferred in

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[83] "SEC Proposes Rules on Disclosure of Incentive-Based Compensation Arrangements at Financial Institutions," Press Release 2011-57 (Available at http://www.sec.gov/news/press/2011/2011-57.htm - Last accessed on 8 May 2011).

[84] As issued by the Financial Reporting Council.

[85] Financial Services Authority Handbook: Listing Rules (Available at http://www.fsa.gov.uk/pages/doing/ukla/ - Last accessed 8 May 2011).

[86] Hill, University of Sydney Legal Studies Research Paper (2006) at 15.

[87] Provision B.2.1.

[88] Provision B.2.

[89] Provision B.2.2.

principle.[90] Furthermore, the code recommended that shareholders should be invited to approve any new LTIPs, as well as any major amendments to old schemes.[91]

The Listing Rules complemented the Combined Code's provisions appropriately by placing certain mandatory requirements on companies in terms of disclosure to its shareholders. Listing Rule 9.8.8 stated that all listed companies must compile a shareholders' report containing details on the executive remuneration policy, as well as details on various aspects of individual directors' remuneration, such as total remuneration, significant payments, pension contributions and LTIPs, to but name a few.

From a statutory perspective, there is not a lot of regulation regarding the relevant issue. The 2006 Companies Act[92] states that members of a quoted company must vote to approve the directors' remuneration report for a given financial year.[93] Failure to do so would constitute an offence.[94] However, given as this vote related to the report and not the remuneration policy as such, it is submitted that it was more of an advisory nature.

Thompson notes that the post-Cadbury era face of corporate governance seems to have improved and that the abovementioned self-regulatory codes had a positive effect. This, he argues, can be seen in the fact that a greater emphasis was placed on corporate performance, and that the amounts paid out in severance packages also decreased significantly.[95]

4.2.2 Status quo in the UK following the recession

From a legislative point of view, a few substantial changes have been made, especially with relation to listed companies. New regulations regarding the general rights and powers of shareholders have been introduced,[96] as well as much more

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[90] Provision B.1.1.
[91] Provision B.2.4.
[92] UK Companies Act 2006, c.46.
[93] Section 439(1).
[94] Section 440.
[95] Thompson *The Impact of Corporate Governance Reforms on the Remuneration of Executives in the UK*, Corporate Governance Volume 13 Number 1 (2005) at 24.
[96] The Companies (Shareholders' Rights) Regulations 2009, SI No 1632.

detailed regulations on the content of remuneration reports,[97] specifically with regard to how individual remuneration packages are set out.[98] Most notably, the Enterprise and Regulatory Reform Act 2013[99] inserts a new section in the 2006 Companies Act[100] which now states that the members of a quoted company must vote to approve the director's remuneration policy at an accounts meeting at least every three years.[101] Provisions are also made for subsequent votes in case a policy is rejected,[102] and a failure to comply is subject to the same penalties as found in Section 440.[103] Accordingly, the vote on director's remuneration is now a binding one rather than advisory.

Since the recession there have been three revisions of the Combined Code, one in June 2008, another in June 2010, and the most recent in September 2012 (where it was also renamed as the 'UK Corporate Governance Code'). The provisions relating to remuneration have remained largely unchanged, even though the 2010 version is slightly more nuanced. The 2008 revision states that pay-outs or grants made under all incentive schemes, including new grants under existing share option schemes, should be subject to challenging performance criteria reflecting the company's objectives. Furthermore, consideration should be given to criteria which reflect the company's performance relative to a group of comparator companies in some key variables such as total shareholder return.[104] In comparison, a similar principle in the 2010 version states that criteria should include non-financial performance metrics where appropriate, and that remuneration policies should be compatible with risk policies and systems.[105] It is submitted that these nuanced changes were made in order to ensure compliance with the 2009 EC recommendations relating to remuneration.[106] The 2012 revision uses the exact same wording for the entire section,[107] as well as

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[97] The Large and Medium-sized Companies and Groups (Accounts and Reports) (Amendment) Regulations 2013, SI No 1981.
[98] Section 4, Schedule 8 to SI No 1981 of 2013.
[99] 2013, c.24.
[100] Section 439A.
[101] Section 439A(1).
[102] Section 439A(2).
[103] Section 439A(6).
[104] Financial Reporting Council, *The Combined Code on Corporate Governance (June 2008)* at 23.
[105] Financial Reporting Council, *The Combined Code on Corporate Governance (June 2010)* at 27.
[106] Recommendation 2009/384/EC on remuneration policies in the financial services sector, as well as Recommendation 2009/385/EC on directors´ remuneration.
[107] Financial Reporting Council, *The UK Corporate Governance Code (September 2012)* at 21-23.

Schedule A dealing with the design of performance-related remuneration packages,[108] and it is submitted that this position therefore remains largely unchanged in this particular regard. The original Combined Code used a "comply or explain" approach, which has subsequently been re-affirmed in later versions.[109] Arcot, Bruno and Faure-Grimaud,[110] criticised this approach in the Combined Code, pointing out that the wording lends itself more to the "apply or explain" approach, similar to what has been adopted in the Netherlands and in RSA, whereby a company must directly comply with the recommendations of the Code, or otherwise demonstrate, if it is unable to do so, how it intends to incorporate or implement the principles of the Code in another way. The authors argue that this would be a more beneficial way of dealing with a self-regulating system, after analysing a trend in UK companies to lapse into complacence after initial compliance, and fail to provide proper explanation for their subsequent inability to comply. Notwithstanding the name given to the approach, it very much seems that the 2012 Code follows the principle of "apply or explain." This is evidenced by the single new addition to the 2012 Code's section relating to the principle of "Comply or Explain," being the following proviso:

> "It should set out the background, provide a clear rationale for the action it is taking, and describe any mitigating actions taken to address any additional risk and maintain conformity with the relevant principle. **Where deviation from a particular provision is intended to be limited in time, the explanation should indicate when the company expects to conform with the provision.**"[111] (Own Emphasis)

The financial sector has also received specific attention from the EU, initially in the form of Directive 2010/76/EU, which, *inter alia,* deals with the supervisory review of remuneration policies in the financial sector. In terms of the Directive, member states must require that financial institutions have "robust governance arrangements" including "remuneration policies and practices that are consistent with and promote sound and effective risk management."[112] In terms of the Impact Assessment relating to the Directive, the amendments were proposed due to findings that financial remuneration schemes of institution failed to align employees' incentives with the

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[108] *The UK Corporate Governance Code (September 2012)* at 27.
[109] *The Combined Code on Corporate Governance (June 2010)* at 5; *The UK Corporate Governance Code (September 2012)* at 4.
[110] Arcot, Bruno & Faure-Grimaud, *Corporate Governance in the UK: Is the Comply or Explain Approach working?*, 30 INRLEC 193 at 200.
[111] *The UK Corporate Governance Code (September 2012)* at 4.
[112] Article 1(3)(a).

long-term objectives of the company[113] as well as a lack of express requirements to supervise risks arising in connection with remuneration policies.[114] The relevant principles have also been adopted as part of the Remuneration Code in the Financial Conduct Authority's Handbook.[115] Directive 2010/76/EU has recently been replaced by the introduction of Directive 2013/36/EU and its related regulations,[116] which must be effected by member states by 31 December 2013, and which will bring about substantial oversight and stringent regulation of remuneration in this sector, including, most notably, the capping of bonuses. The Directive has generated significant debate, and is both an intricate and extensive source of regulation in and of itself. However, an in-depth analysis of this sector-specific instrument falls outside of the scope of this more general discussion.

4.3 Australia

4.3.1 Status quo prior to the recession

Du Plessis, McConvill and Bagaric state that there are traditionally three main sources that can be used to determine corporate governance in Australia. These sources include legislation, the so-called 'hybrids', which include listing rules and best practice recommendations, and 'soft law,' or voluntary self-regulatory codes.[117] Prior to the recession, the most notable reforms relevant to executive remuneration occurred in terms of legislation promulgated under the Company Law Economic Reform Program (CLERP), as well as through the adoption of certain accounting standards. The Listing Rules of the Australian Stock Exchange (ASX) was also amended to further strengthen certain principles.[118]

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[113] European Commission, *Accompanying document to the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Capital Requirements Directive on trading book, securitization issues and remuneration policies* (2009) at 17.

[114] European Commission (2009) at 18.

[115] UK Financial Conduct Authority Handbook - SYSC 19A (found at https://fshandbook.info/FS/html/FCA, last accessed 2 November 2013).

[116] EU Regulation No 575/2013. The Directive and Regulations are collectively referred to as the Fourth Capital Requirements Directive, or CRD IV.

[117] Du Plessis, McConvill and Bagaric (2005) at 112-122.

[118] Clarkson, Van Bueren and Walker *Chief executive officer Remuneration disclosure quality: corporate responses to an evolving disclosure environment*, Accounting and Finance 46 (2006) at 773-775.

Hill regards the most influential legislation introduction during this period to be that of the CLERP 9 Act of 2004.[119] The CLERP 9 Act imposed pertinent changes on how corporate governance was viewed from the government's perspective, and managed to lay down several fundamental provisions regarding, *inter alia*, executive remuneration.[120] Schedule 5 of CLERP 9 introduced enhanced disclosure requirements in terms of informing shareholders, gave them the right to an advisory, non-binding vote on remuneration[121] and also emphasised that there should be a link between levels of compensation and company performance.[122] This entailed the incorporation of remuneration reports as part of the directors' annual report, which had to disclose the remuneration policy of the company, as well as the individual remuneration for directors and the five highest paid executives. It also tightened up on provisions regarding severance payment, thereby giving shareholders the power to approve any and all termination packages by means of a vote.[123]

Rule 4.10.3 of the ASX Listing Rules[124] stipulated that all listed companies must either comply with the ASX Corporate Governance Council's Principles of Good Corporate Governance and Best Practice Recommendations,[125] or explain why they did not do so. Principle 9 set out rules and recommendations surrounding executive remuneration. The most notable recommendations are: that companies should disclose remuneration policy;[126] that a remuneration committee charged with evaluating and approving aspects of remuneration and mostly consisting of independent directors, should be set up for the company:[127] and that companies must ensure that payment of equity-based compensation is made in accordance with shareholder approval.[128] Rule 10.14 of the Listing Rules also states that a company may not permit a director, associate of a director, or any other person in a similar relationship to acquire shares under an employee incentive scheme without the approval of ordinary shareholders.

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[119] Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 103 of 2004.
[120] Hill, University of Sydney Legal Studies Research Paper (2006) at 8.
[121] CLERP 9 Act, Schedule 5, Article 7.
[122] CLERP 9 Act, Schedule 5, Articles 11-14.
[123] CLERP 9 Act, Schedule 5, Article 5. For further reading, see Du Plessis, McConvill and Bagaric, *Principles of Contemporary Corporate Governance,* Cambridge University Press (2005) at 161-162
[124] The last relevant amendment of which prior to the recession was at 24 October 2005.
[125] The relevant version prior to the recession was the First Edition Corporate Governance Guidelines (2003).
[126] Recommendation 9.1 at page 51.
[127] Recommendation 9.2 at page 54.
[128] Recommendation 9.4 at page 56.

4.3.2 Status quo following the recession

Since the beginning of the recession, the ASX Corporate Governance Council has issued a second edition of their Corporate Governance Principles and Recommendations, which was amended again in 2010.[129] Whereas the principles in the new edition are similar to those entrenched in the original, the practice recommendations have been developed and expanded. Principle 8 states that companies should ensure that the level and composition of remuneration is sufficient and reasonable and that its relationship to performance is clear.[130] Recommendation 8.1 stipulates that the board still has the ultimate say regarding remuneration, although a committee should make recommendations to the board, while being provided with enough information and resources so as to enable them to fully advise the board accordingly. Notably, it is recommended that a remuneration policy should be designed in such a way that it motivates senior executives to pursue long-term growth and success of the company and demonstrate a clear relationship between their performance and subsequent remuneration.[131] Recommendation 8.3 also stipulates that companies should clearly distinguish between the remuneration of executive and non-executive directors. For executive directors, remuneration packages should involve a balance between fixed and incentive pay, reflecting short and long-term performance objectives appropriate to the company's circumstances and goals.[132] Shareholder notification and approval for all aspects of remuneration are also recommended. The Principles also follow a "if not, why not?" approach, similar to the "comply or explain" approach used by the Combined Code.[133] Recently, the Corporate Governance Council has proposed that a the Principles be revised and a third edition be issued.[134]

During 2011, the Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act[135] was introduced. The Act incorporated regulations relating to remuneration consultants and remuneration policy

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[129] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations with 2010 Amendments*, 2nd Edition (2010).
[130] ASX Corporate Governance Council (2010) at 38.
[131] Recommendation 8.1 at page 39.
[132] Recommendation 8.1 at page 39.
[133] ASX Corporate Governance Council (2010) at 5.
[134] ASX Corporate Governance Council, *Review of the Corporate Governance Principles and Recommendations: Public Consultation* (16 August 2013).
[135] Act No 42, 2011.

recommendations into existing Australian corporate law. In accordance with these new provisions, remuneration consultants must be approved by the board or remuneration committee.[136] Furthermore, consultants must provide their recommendations free of undue influence by either the board or remuneration committee, and may not disclose their recommendations to any executive director in isolation, or any other person who is not a member of the board or remuneration committee.[137] Executive directors are not allowed to put at risk any part of their remuneration which has yet to vest in themselves, or which is still subject to certain conditions. Furthermore, they are also not allowed to take part in the advisory vote regarding remuneration reports.[138] Notably, the so-called "two-strike" rule is introduced through provisions which states if a 25% or more of a company's members vote against the acceptance of the remuneration report at two consecutive annual general meetings, the directors must allow for a 'spill resolution' where their positions may be vacated. If the resolution passes with a simple majority, a special general meeting must be held within 90 days and all directors (excluding the managing director) will need to stand for re-election.[139]

4.4 South Africa

4.4.1 Prior to the recession

Corporate governance was largely regulated by the 2002 King Committee Report on Corporate Governance (commonly known as King II). King II was a self-regulatory voluntary code which relied on the principle that companies should either comply, or explain as to why they are unable or unwilling to do so. It did, however, ensure a greater influence on the South African sphere of corporate governance than most voluntary codes, owing to the fact that Schedule 22 of the Johannesburg Stock Exchange (JSE) Listing Requirements decreed that companies must adhere to the report's code of corporate practice and conduct (commonly referred to as the King II Code) should they wish to be or remain listed.[140]

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[136] Section 206K of the Corporations Act, as amended.
[137] Section 206L.
[138] Section 206J.
[139] Sections 250U to 250Y.
[140] Mongalo *Corporate Law and Corporate Governance*, New Africa Books Claremont (2003) at 225.

The provisions regarding executive remuneration can be found in Paragraph 2.5 of King II Code. The general principle, as set out it Paragraph 2.5.1, is that levels of remuneration be sufficient in attracting, retaining and motivating executives of a high quality calibre on a board of directors. This is further strengthened by the notion in Paragraph 2.5.5 that performance-based remuneration should constitute a substantial portion of total pay (in a sense, this principle coincided with the Combined Code). It recommends that companies should set up a remuneration committee, which consists of a majority of independent directors and must be chaired by an independent director. This committee should make recommendations regarding the remuneration framework of the company, as well as the individual remuneration packages of the executive directors. Ultimately, the power to approve still lay in the hands of the board, although executive directors are warned against playing any part in decision-making regarding their own remuneration.[141]

Other notable recommendations included that companies should disclose the members of their remuneration committee, and that its chair should be accountable at the Annual General Meeting of the company.[142] Furthermore, it stated that companies should provide full disclosure of the remuneration of individual directors.[143]

There are some issues in terms of executive remuneration regulated by virtue of legislation, most notably that of "golden handshakes." Section 227 of the former Companies Act[144] stated that a company may not make any payments, or grant any benefits or advantages, to a director or past director in order to compensate him/her for his/her loss of office through termination or retirement unless there is a special resolution passed by the company. Furthermore, any payments made in compensation or consideration for loss of office or otherwise, as relates to share option schemes or take-overs, are also considered to be invalid. These payments shall only be seen as valid if full particulars are disclosed to the members of the company for their approval. Sections 295 to 297 also laid down provisions that a company should disclose any security given for and loans made to directors (be it before or after their appointment), as well as details regarding its pension schemes for directors, in their

[141] Paragraph 2.5.2.
[142] Paragraph 2.5.3.
[143] Paragraph 2.5.4.
[144] Act 61 of 1973, as amended.

financial statements. Over and above this, Tables A[145] and B[146] (the standard Articles of Association for public and private companies as found in Schedule 1 of the 1973 Act), also provided for shareholders to approve a remuneration policy framework from time to time.

4.4.2 Status quo following the recession

The South African company law regime has recently undergone a total change of character, with the introduction of a completely new Act[147] and a new version of the King Report and Code.[148] These changes did not necessarily happen as a result of the recession, but one would to present a strong case to state that it did not have some kind of effect on the development thereof.

The third iteration of the King Report contains three over-arching principles regarding executive remuneration, namely that companies should remunerate directors and executives fairly and responsibly,[149] disclose the remuneration of each individual director and certain senior executives,[150] and that shareholders should approve the company's remuneration policy.[151] In line with these principles, the Code recommends, *inter alia*, that remuneration policies aligned with the strategy of the company and linked to individual performance should be adopted,[152] which addresses aspects relating to:

- all benefits paid to directors;
- the salaries of the three most highly-paid employees who are not directors;
- the policy on base pay;
- participation in share incentive schemes;
- the use of benchmarks;
- incentive schemes to encourage retention;
- justification for salaries above the median;
- material payments that are *ex gratia* in nature;

[145] Article 54.
[146] Article 55.
[147] Companies Act 71 of 2008 , as amended.
[148] Institute of Directors South Africa, *King Report on Corporate Governance in South Africa* (2009) (hereinafter King III).
[149] Principle 2.25.
[150] Principle 2.26.
[151] Principle 2.27.
[152] Recommended Practice 2.25.1.

- policies regarding executive employment; and
- the maximum expected potential dilution as a result of incentive awards.[153]

The remuneration committee should aid in the setup of such policies,[154] and integrated, detailed remuneration reports relating to them should also be compiled. Another significant change to the Code is that former versions adopted a “comply or explain” approach, whereby companies who didn’t adhere to recommendations simply had to explain why it did not do so. King III, on the other hand, has opted for a new “apply or explain” approach.[155]

The new Companies Act has several provisions relevant to the issue of executive remuneration. Section 30(4) states that the annual financial statements of a company must contain, *inter alia*, details regarding the remuneration and benefits of each director or person holding a prescribed office in the company. The relevant information disclosed must meet particular prescribed minimum standards.[156] It must be noted that the definition given to ‘remuneration’ in terms of the Act is also quite broad.[157] The issuing of shares for incentive schemes for directors must also be approved by means of special resolution.[158] Provisions regarding loans and financial assistance to directors can also be found in Section 45. Notably, remuneration may only be paid to directors if it is provided for in the Memorandum of Incorporation,[159] and only in accordance with a special resolution approved by the shareholders every two years.[160] Cassim notes that these provisions are an attempt to curtail excessive remuneration,[161] although it is submitted this is not necessarily always the effect that they will have in practice. Naidoo also opines that while the approval of overall remuneration policies are welcome, the board should still have some discretion and

[153] Recommended Practice 2.25.3.
[154] Recommended Practice 2.25.2.
[155] *King Report on Corporate Governance in South Africa* (2009), Introduction and Background, Paragraph 3.
[156] Section 30(5).
[157] Section 30(6).
[158] Section 41.
[159] Section 66(8).
[160] Section 66(9).
[161] Cassim (2012) at 455.

responsibility when it comes to the remuneration of specific directors in terms of the adopted policy framework.[162]

5. Concluding remarks

Executive remuneration, especially from the perspective of good corporate governance, is a system that has greatly developed in the last decade or so. As can be seen from the above discussion, it is clear that the recent economic shock and scandals in the global financial services sector has had an impact on the regulation of corporate governance. But these developments clearly also leave much room for improvement. Whereas previous scandals led to wide-spread reform with regard to aspects of financial oversight and risk management within companies themselves, the most recent ones have definitely had a more profound effect on how the public view remuneration practices.

In many jurisdictions it would seem that latest regulations and provisions were imposed as more of a knee-jerk reaction to recent crises than as a system which evolved organically. This particular phenomenon is not something foreign to the field, and it is submitted that when it comes to policies and practices of company oversight, there is rarely a perfect answer, and problems (and problematic perceptions) are often only addressed as and when it becomes a prickly issue, that is, reactively rather than proactively. This should not be seen as a failure of systems of corporate governance, as there is unfortunately always scope for abuse when discretion is given.

Seemingly, there are two interesting debates which have arisen following the global recession; one generally relating to self-regulating codes, and the other specifically dealing with the aspect of executive remuneration. With regard to the former, there is currently some speculation as to whether the traditional "comply or explain" model for self-regulating systems has become somewhat dated. In this regard, countries such as South Africa, the Netherlands and Finland have adopted the modified "apply or explain" approach,[163] whereas other countries such as Australia and the UK have, at

[162] Naidoo, *Corporate Governance: An Essential Guide for South African Companies* (2nd Edition), LexisNexis (2009) at 154.
[163] International Chamber of Commerce, *Finland and Netherlands opt to apply and explain* (12 January 2004) available at http://www.iccwbo.org/corporate-governance/id3109/index.html (last accessed on 26 February 2012).

least on paper, re-affirmed their dedication to "comply or explain" with both providing greater nuance and clarification to their understanding of its intended nature and extent. There are some who would argue that the two phrases are interchangeable, but it is submitted that the "apply or explain" approach places a greater emphasis on self-reflection and the principle of substance over form.

A specific development when it comes to the regulation of executive remuneration is the adoption by several countries of so-called "say-on-pay" policies, including all of the countries discussed above (although different countries have adopted different stances in this regard). "Say-on-pay" relates to some form of shareholder involvement, and often outright approval of remuneration schemes, either for directors in general or on an individual basis. A distinction should also be drawn between countries which have adopted a binding process, and where it is merely advisory. The question as to what the goal of "say-on-pay" is, or whether it is in any way effective, has been hotly contested. Gordon is quick to point out that "say-on-pay" has had little to no effect on the steady rise of executive pay in the UK, [164] but does note certain positive effects such as increased consultation between companies and large shareholders, and that the instances where directors are paid for their failures have become less common.[165] Delman lists several potential problems with "say-on-pay," mainly dealing with shareholders who do not always have the necessary insight or resources to enable them to make meaningful decisions relating to company policy of such a nature.[166] It is submitted that, whereas "say-on-pay" does have certain systemic failings, and is definitely not the most effective tool to curb excessive pay, it does however serve to promote greater transparency with regards remuneration practices, which generally tends to lead to greater accountability, especially in light of the intense scrutiny that companies are placed under in modern times.

The miasma of issues surrounding executive remuneration is not something that can be properly addressed in a single paper, and this particular paper is only a preliminary

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[164] Gordon, *"Say on pay": Cautionary notes on the UK experience and the case for shareholder opt-in,* 46 HVJL 323 at 353.
[165] Gordon 46 HVJL 323 at 343-344.
[166] Delman, *Structuring say-on-pay: A comparative look at global variations in shareholder voting on executive compensation*, 2010 Colum. Bus. L. Rev. 583 at 608-620.

discourse in addressing legislation, regulation and problems posed by executive remuneration and related matters. In concluding, the question as to whether the current regulations in place will address the issues at hand is one that is difficult to answer. It is also not overly cynical to believe that there will be further tendency of scandals or occurrences where executives are exorbitantly paid even where there are no expectations of beneficial return for a company or its stakeholders. One can only hope that through a decent mixture of self-regulation (where one also inherently needs a dash of self-discipline and accountability) and legislation the situation may in the future be adequately addressed.