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Getting in a Bind—Comparing Executive Compensation Regulations in the U.S. and the U.K.

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GETTING IN A BIND—COMPARING EXECUTIVE COMPENSATION REGULATIONS IN THE U.S. AND THE U.K.

BOBBY V. REDDY*

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INTRODUCTION

Executive compensation generally refers to the pay of inside directors of companies ("executive directors" in U.K. parlance) for the services they provide on an employment basis to the company. In large publicly traded companies, executive compensation has become a hot topic over the decades, especially in relation to the levels of pay, perks, and pensions granted to Chief Executive Officers (CEOs) and, to a lesser extent, Chief Financial Officers (CFOs). In particular, the disparity in pay between those at the top and rank-and-file employees has attracted notoriety.[1] It is not surprising therefore that executive compensation has attracted regulatory scrutiny on both sides of the Atlantic.

Both the U.S. and the U.K. employ regulatory strategies to moderate executive compensation in publicly traded companies, and, perhaps even more so, to encourage the structuring of executive compensation packages in a manner that is perceived to be beneficial to public shareholders. In both jurisdictions the approach has tended to combine enhanced disclosure of executive pay with giving shareholders the opportunity to register their opinions on such compensation—so-called "say-on-pay." However, differences between U.S. and U.K. executive compensation regulations subsist, with the U.K. granting shareholders perceptibly stronger rights. In particular, the U.K. gives shareholders a binding say-on-pay vote, enabling them to veto proposed executive-compensation policies. While say-on-pay also exists in the U.S., the results of any such vote are merely advisory and boards are not legally compelled to comply with the outcomes of such votes. Differences between the two jurisdictions have been highlighted in recent times, with concerns rising in the U.S. that currently applicable regulations have not been successful in moderating executive compensation. Conversely, concerns have been raised in the U.K. that the executive compensation regulatory environment is too onerous and potentially deters both talented individuals from becoming executives of U.K.-listed companies and companies from choosing the London Stock Exchange as a venue for listing in the first place.[2] In a twist to the executive-remuneration story, calls have recently been made that U.K. executives should be paid *more* compensation.[3] Remuneration for executives of publicly traded companies is, on average, greater in the U.S. than in the U.K.,[4] and such a variation has intensified the concerns apparent in the two countries.

With the market for initial public offerings (IPOs) becoming more global, and the existence of large levels of private capital making it more feasible for companies to remain private rather than listing on a stock

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[1] Various interest groups have focused on the divergence between public company CEO pay and rank-and-file employee pay. For the United States, see, for instance, *Company Pay Ratios*, AFL-CIO: EXEC. PAYWATCH, https://aflcio.org/paywatch/company-pay-ratios [https://perma.cc/945F-QHS6] (last visited May 22, 2024). For the United Kingdom, see, for instance, ANDREW SPEKE ET AL., HIGH PAY CTR., RETHINKING REWARD: HIGH PAY CENTRE ANALYSIS OF FTSE 350 PAY RATIO DISCLOSURES (2023).

[2] *See infra* notes 23–25 and accompanying text.

[3] Leah Montebello, *Row Over Fat-Cat Pay Escalates with Leading City Figures Claiming that Chief Executives Should be Paid More to Avoid a Talent Exodus*, THIS IS MONEY (May 7, 2023, 4:51 PM), https://www.thisismoney.co.uk/money/markets/article-12057117/Fat-cat-pay-row-intensifies-bosses-brain-drain-claim.html [https://perma.cc/EK3W-LGJT]; Sarah Butler, *L&G Opens Door for Huge US-Style Bonuses for UK Asset Managers*, GUARDIAN (Dec. 17, 2023, 12:24 PM), https://www.theguardian.com/business/2023/dec/17/l-and-g-investment-manangement-us-style-bonuses-london-listed-firms-pay-policy [https://perma.cc/8L2Q-QF26].

[4] *See infra* notes 26–31 and accompanying text.

exchange,[5] it is no wonder that stock exchanges around the world have been reexamining their corporate governance regimes. Exchanges, and their regulators, are facing a balancing act. On the one hand, they seek to ensure that corporate governance protections for shareholders are robust in order to facilitate an orderly and attractive market for investors, while, on the other hand, they seek to ensure that regulatory requirements are not so severe that they deter companies from listing on the exchange or impede the ability of companies that do list from innovating, taking risks, and maximizing potential benefits for shareholders and other stakeholders alike.[6] Executive compensation regulations constitute one part of that corporate governance mix. However, with respect to executive compensation, the true impact of regulation *per se* on pay can be difficult to determine. In this Article, it will be argued that although, on paper, the U.K. imposes stricter requirements on listed companies in the realm of executive pay than the U.S., in practice it is not clear that the difference in executive pay levels between the U.S. and the U.K. can be purely attributed to the existence of those regulations. Cultural norms and negative attitudes toward high executive compensation likely play a role in the U.K. in restraining executive pay at levels below the U.S., and with executive compensation packages in the U.S. and the U.K. being dominated by variable, performance-based pay, the relative performance of the two markets over time may also drive deviations in the levels of executive remuneration.

This Article will commence by discussing the concerns that have emerged regarding high executive compensation in the U.S. and the U.K. which stirred the regulators in both jurisdictions to act on executive pay but will also note a materializing school of thought in the U.K. that stern executive compensation regulations may be having a detrimental effect on the competitiveness of the London Stock Exchange as a forum for equity listings. The subsequent two sections will outline the executive compensation regulatory regimes in the U.S. and the U.K. The next section will compare the differences between executive compensation regulations in the U.S. and the U.K., noting that the fact that the future pay of executives of U.K.-incorporated listed companies is subject to a binding, rather than advisory, vote of the shareholders is indicative of a stricter corporate governance environment on executive pay in the U.K. The fifth part of this Article will discuss the evidence that the introduction of a binding vote in the U.K. may have had a bearing on executive compensation in the U.K. lagging behind the U.S., before, in part six, discussing the other side of the argument that the binding vote has not had a material impact on U.K. executive pay and that other nonregulatory factors may have been as, or potentially more, important in creating the gap between U.S. and U.K. executive compensation levels. The Article will finish with concluding remarks and policy considerations.

[5] Brian R. Cheffins & Bobby V. Reddy, *Murder on the City Express—Who Is Killing the London Stock Exchange's Equity Market?*, 44 CO. LAW. 215, 216–17 (2023) [hereinafter Cheffins & Reddy, *Murder*].

[6] For a succinct discussion of the "regulatory and contracting paradigms" and the competing pressures on stock exchange regulation, see Brian R. Cheffins & Bobby V. Reddy, *Will Listing Rule Reform Deliver Strong Public Markets for the UK?*, 86 MOD. L. REV. 176, 188–90 (2023) [hereinafter Cheffins & Reddy, *Listing Rule Reform*].

I. CONCERNS ABOUT EXECUTIVE COMPENSATION

"Fat cats," "bloated rodents," and "greedy bastards" are all provocative terms that have been leveled at executives of publicly traded companies over the years,[7] reflecting the concerns that have emerged over high executive pay. It was not only the huge headline figures[8] that attracted public, media, and political opprobrium, but also the precipitous rate of growth of executive compensation. In the U.S., one study found that "realized"[9] mean executive compensation at the top 350 firms in the U.S. rose 1,460% between 1978 and 2021, a rate greater than the growth of the stock market itself.[10] In the U.K., the rise in executive compensation over time has not been quite as steep as seen in the U.S. but the average pay of CEOs of the top 100 listed companies in the U.K. still rose around 375% between 1998 and 2011, again far outstripping the performance of the market.[11] Furthermore, the divergence in pay between CEOs of publicly traded companies and rank-and-file workers has attracted attention. In 2022, the median S&P 500[12] company CEO earned 272 times as much as the median rank-and-file employee.[13] In the U.K., the equivalent ratio for the FTSE 100,[14] an index broadly comparable to the US's S&P 500, was 118:1.[15]

Although the sheer level of executive compensation may have created media storms, at least ostensibly the authorities have also used other justifications for regulatory fiat. Agency cost considerations were prime amongst them. The agency problem is thought to arise where the managers (the economic "agents") of a company are not sufficiently incentivized to manage the company in the interests of shareholders who, as the residual claimants of the profits of the company, could be considered economically, if not legally, as the "principals."[16] Agency costs arise from the need to monitor those managers, the implementation of mechanisms to align the interests of managers with shareholders, and the consequences of self-serving behavior by managers.[17] Some commentators have identified executive compensation packages that reward managers for better company performance as a critical tool in realigning the interests of managers and

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[7] *See*, *e.g.*, Dan Lin et al., *Chief Executive Compensation: An Empirical Study of Fat Cat CEOs*, 7 INT'L. J. BUS. & FIN. RSCH. 27 (2013); Barrie Clement & Colin Brown, *Fury Over 'Greedy Bosses' Attack*, INDEP. (Sept. 14, 1998, 11:02 PM), https://www.independent.co.uk/news/fury-over-greedy-bosses-attack-1198191.html [https://perma.cc/A7GE-BS8C]; Jason Niss, *Business View: The Greedy Bastards in the Boardroom Are Fanning Flames of Discontent*, INDEP. (Oct. 5, 2003), https://www.independent.co.uk/news/business/comment/business-view-the-greedy-bastards-in-the-boardroom-are-fanning-flames-of-discontent-89862.html [https://perma.cc/799P-HRHC].

[8] *See infra* notes 26–28 and accompanying text.

[9] Determining remuneration on a "realized" basis entails only including stock grants once vested and stock options once cashed-in and ownership taken.

[10] JOSH BIVENS & JORI KANDRA, ECON. POL'Y INST., CEO PAY HAS SKYROCKETED 1,460% SINCE 1978 (2022), https://files.epi.org/uploads/255893.pdf [https://perma.cc/EL4U-W53X].

[11] DEP'T FOR BUS., ENERGY & INDUS. STRATEGY [hereinafter DBEIS], CORPORATE GOVERNANCE REFORM 16–17 (2017).

[12] The S&P 500 is an index of the 500 largest (by way of market capitalization) index-eligible companies listed on U.S. stock exchanges.

[13] *Company Pay Ratios*, *supra* note 1.

[14] The FTSE 100 is an index of the 100 largest (by way of market capitalization) index-eligible companies listed on the premium tier of the London Stock Exchange.

[15] ROSIE NEVILLE ET AL., HIGH PAY CENTRE, ANALYSIS OF UK CEO PAY IN 2022, at 1 (2023).

[16] *See, e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); BRIAN R. CHEFFINS, COMPANY LAW: THEORY, STRUCTURE AND OPERATION 45 (1997).

[17] Jensen & Meckling, *supra* note 16, at 308.

shareholders.[18] However, others have also noted that rather than executive compensation being the solution to agency costs, it can represent an agency cost in and of itself.[19] If managers have free rein to set their executive compensation, or at least have significant influence in the establishment of their pay, managerial remuneration simply becomes another avenue for rent-seeking behavior. In the U.K., the perceived failure of executive compensation packages to mitigate agency costs was seen as a key rationale for reinforcing executive compensation regulation in 2012. The goals of the 2012 reforms were to make the pay of company managers more transparent, and to promote a clearer link between pay and company performance.[20] In the U.S., significant executive compensation reforms were made in the shadow of the financial crisis of 2008–2009. Concerns were raised that the financial crisis had been propelled by managers incentivized to pursue short-term goals as a result of executive compensation packages with short-term and easily achievable targets.[21] Again, an incongruence between managerial remuneration and the actual performance of the firms they managed, and a lack of transparency and accountability, were highlighted as prompts for regulatory reform.[22]

If the reasoning for executive compensation regulation is sound, on the flipside, at least in the U.K., a level of unease has developed that it could also create negative externalities. A perception of oppressive regulation of executive compensation has been blamed in the U.K. for both an exodus of talent from the U.K. to the U.S.[23] and compelling U.K. companies to consider shunning the London Stock Exchange in favor of listing on other global exchanges or remaining private.[24] Similarly, the U.K.'s regulatory approach to executive pay has at times been blamed for highly sought-after U.S. executives leaving the U.K. for the warm embrace of their more executive pay-friendly homeland.[25] The same claims and concerns have not garnered traction in the U.S., suggesting that the U.S. employs a substantially more lenient executive compensation regulatory system. The theory plays out accordingly when the actual figures are surveyed. 2022

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[18] *See, e.g.*, Frank H. Easterbrook, *Managers' Discretion and Investors' Welfare: Theories and Evidence*, 9 DEL. J. CORP. L. 540, 553–64 (1984); Nicholas Wolfson, *A Critique of Corporate Law*, 34 U. MIAMI L. REV. 959, 967, 978 (1980); John Armour et al., *Agency Problems and Legal Strategies*, *in* REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW 29, 36 (3d ed. 2017); CHEFFINS, *supra* note 16, at 654.

[19] Lucian Arye Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 783–95 (2002); CHEFFINS, *supra* note 16, at 654.

[20] *See* DEP'T FOR BUS., INNOVATION & SKILLS, IMPROVED TRANSPARENCY OF EXECUTIVE REMUNERATION REPORTING 1 (2012); *see also* Martin Petrin, *Executive Compensation in the United Kingdom—Past, Present, and Future*, 36 CO. LAW. 195, 202 (2016); Fabrizio Ferri & David A. Maber, *Say on Pay Votes and CEO Compensation: Evidence from the UK,* 17 REV. FIN. 527, 528 (2013).

[21] Andrew Dunning, *The Changing Landscape of Executive Compensation After Dodd-Frank*, 30 REV. BANKING & FIN. L. 64, 65 (2010).

[22] *Id*.

[23] Daniel Thomas & Andrew Edgecliffe-Johnson, *Does It Pay for British Executives to Move to the US?*, FIN. TIMES (May 10, 2023), https://on.ft.com/3xDtD46 [https://perma.cc/ZU23-THGR]; Montebello, *supra* note 3; Butler, *supra* note 3.

[24] Anjil Raval, *LSE Chief Calls for Higher UK Executive Pay to Retain Listings*, FIN. TIMES (May 3, 2023), https://www.ft.com/content/596e3474-51a0-4dc1-b865-929658ec74d5 [https://perma.cc/KP88-XTPV]; Julia Hoggett, *We Need a Constructive Discussion on the UK's Approach to Executive Compensation*, LONDON STOCK EXCH. GRP. (May 3, 2023), https://www.lseg.com/en/insights/julia-hoggett-ceo-uk-approach-executive-compensation [https://perma.cc/MJ4U-U9RJ].

[25] *See, e.g.*, Sarah Neville & Sarah Provan, *Smith & Nephew Chief Executive to Step Down Over Low Pay*, FIN. TIMES (Oct. 21, 2019), https://www.ft.com/content/4eed5dd6-f3c9-11e9-a79c-bc9acae3b654 [https://perma.cc/HHC2-F9CD]; Thomas & Edgecliffe-Johnson, *supra* note 23.

mean (median) pay for S&P 500 CEOs was $16.7 million[26] ($14.5 million),[27] as compared to $5.63 million ($4.95 million) for FTSE 100 CEOs.[28] To be sure, on average S&P 500 companies have greater market capitalizations than FTSE 100 companies,[29] and when market capitalization is taken into account, comparing similarly sized U.S.- and U.K.-listed companies, the difference in levels of executive compensation is not as stark.[30] However, even taking into account the larger size of U.S. publicly traded corporations, commentators have suggested that, on a like-for-like basis, U.S. executives can expect to earn thirty to fifty percent more in pay than their U.K. brethren.[31]

After decades of one-way antagonism toward high executive pay in the U.K., it would seem that the debate has become more nuanced. Perhaps those leading the line arguing that U.K. executives should receive *higher* pay represent a minority view, but in the midst of a malaise in the fortunes of the London Stock Exchange, and a regulatory agenda seeking to turn its prospects around,[32] the role of executive pay regulations, and corporate governance generally, in the Exchange's decline will continue to come under scrutiny. However, if low levels of executive pay compared to the U.S. do have a part to play in the decline of the London Stock Exchange, is it fair to blame the U.K.'s regulatory regime? To answer that question, first the regulatory mix evident in each of the two jurisdictions must be outlined.

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[26] *Highest-Paid CEOs*, AFL-CIO: EXEC. PAYWATCH, https://aflcio.org/paywatch/highest-paid-ceos [https://perma.cc/8ZQJ-SBAK] (last visited May 22, 2024).

[27] Freny Fernandes, *Ranked: The Highest Paid CEOs in the S&P 500*, VISUAL CAPITALIST (Sept. 19, 2023), https://www.visualcapitalist.com/the-highest-paid-ceos/ [https://perma.cc/A9S2-JA8A].

[28] NEVILLE ET AL., *supra* note 15, at 1. The raw mean (median) figures of £4.44 million (£3.91 million) have been converted into USD at the prevailing exchange rate as of December 4, 2023.

[29] As of April 27, 2024, the market capitalization of the S&P 500 was $42.732 trillion, giving an average market capitalization per constituent of $85.464 billion. Slickcharts, *Total S&P 500 Market Capitalization* (April 28, 2024), https://www.slickcharts.com/sp500/marketcap#:~:text=The%20S%26P%20500%20has%20a%20market%20capitalization%20of%20%2440.078%20trillion%20dollars [https://perma.cc/JXY4-UG7Z]. As of April 27, 2024, the market capitalization of the FTSE 100 was £1.985 trillion (or $2.479 trillion at the prevailing exchange rate), giving an average market capitalization per constituent of $24.79 billion. London Stock Exchange, *FTSE 100* (April 28, 2024), https://www.londonstockexchange.com/indices/ftse-100 [https://perma.cc/U7M7-SC6F].

[30] *Are UK-Listed Companies Paying the Price for Executive Talent?*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES (June 12, 2023) [hereinafter SKADDEN], https://www.skadden.com/insights/publications/2023/06/are-uk-listed-companies-paying [https://perma.cc/ED27-SCDC]. It should also be noted that differences exist in the manner in which U.S. and U.K. companies disclose equity compensation in total compensation figures, with the former including equity-based awards granted to executives during the fiscal year, and the latter only including equity awards actually "realized" (vested or exercised, see *supra* note 9) during the fiscal year. *See* SKADDEN, *supra*. Such a difference could skew disclosures in favor of higher U.S. executive pay, but when reviewing executive pay over a longer-term perspective (and with the assumption that in any given year the majority of U.K. executives will have been in their roles long enough for equity awards to vest), the differences should smooth out and not create a material impact on the headline comparisons.

[31] *See* BUSINESS, ENERGY AND INDUSTRIAL STRATEGY COMMITTEE, EXECUTIVE REWARDS: PAYING FOR SUCCESS, 2017-9, HC 2018, at 1, 8 n.10 (remuneration committee chair suggesting that U.K. executive pay was about 30-40% lower than in the U.S.); Thomas & Edgecliffe-Johnson, *supra* note 23 (Tom Gosling, an executive fellow at the London Business School, stating that for comparably sized companies a rule of thumb was that CEO pay was about 50% higher in the U.S.).

[32] *See* Cheffins & Reddy, *Listing Rule Reform*, *supra* note 6, at 190–195; Brian R. Cheffins & Bobby V. Reddy, *Law and Stock Market Development in the UK over Time: An Uneasy Match*, 43 OXFORD J. LEG. STUD. 723, 751–52 (2023); Cheffins & Reddy, *Murder*, *supra* note 5, at 218–22.

II. U.S. EXECUTIVE COMPENSATION REGULATIONS

In the U.S., the flagship regulatory reform on executive compensation was 2010's Dodd-Frank Act.[33] As well as bolstering preexisting disclosure requirements[34] for executive compensation arrangements of all U.S. public companies,[35] Dodd-Frank also required that such companies grant shareholders a vote on the compensation of the five highest-paid executive officers once at least every three years.[36] Every six years, shareholders also have the right to vote upon the frequency of such "say-on-pay" votes—every one, two or three years.[37] The say-on-pay measures were largely fashioned on the U.K.'s say-on-pay model that was extant at the time,[38] and consequently the shareholder vote on executive compensation in the U.S. is, crucially, only advisory in nature. If shareholders reject a company's executive compensation, the vote has no legal force and the company is at liberty, from a legal standpoint, to ignore the shareholders' reproach.

Another important feature of Dodd-Frank was its direction to the SEC to mandate that national securities exchanges, such as the New York Stock Exchange (NYSE) and Nasdaq, require that all compensation committee members (or directors performing compensation-setting functions in the absence of a formal committee[39]) of a company listing equity securities on the exchange must be independent.[40] Although even before Dodd-Frank U.S. public companies almost always implemented compensation committees, usually composed of outside directors,[41] to determine executive pay, Dodd-Frank also laid down guidance as to how "independence" could be defined,[42] using enhanced standards after taking Sarbanes-Oxley's[43] interpretation of audit committee independence as inspiration.[44] The direction was a clear riposte to concerns that even when executive compensation was determined by outside directors, those outside directors may suffer conflicts of interest in their decision making.[45]

Dodd-Frank also recognized the predilection for public companies to appoint third-party compensation consultants to assist in the determination

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[33] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C.).
[34] *See, e.g.*, 17 C.F.R. § 229.402 (2024).
[35] Dodd-Frank Act §§ 953–56.
[36] Dodd-Frank Act § 951.
[37] *Id*.
[38] Jill Fisch et al., *Is Say On Pay All About Pay? The Impact of Firm Performance*, 8 HARV. BUS. L. REV. 101, 105 (2018). In relation to the U.K.'s say-on-pay measures in force at the time, see *infra* note 104 and accompanying text.
[39] *SEC Adopts Dodd-Frank Compensation Committee Rules*, HUGHES HUBBARD & REED (July 3, 2012), https://www.hugheshubbard.com/news/sec-adopts-dodd-frank-compensation-committee-rules [https://perma.cc/5M4D-XUQU].
[40] Dodd-Frank Act § 952.
[41] The use of compensation committees comprising independent directors was, pre-Dodd-Frank, driven by investor pressure, a tax rule providing that tax deductibility of compensation was only permissible if compensation was determined by independent directors, and a desire to insulate against legal challenges. *See* Bebchuk et al., *supra* note 19, at 765. In relation to the relevant tax rule, see text accompanying *infra* note 51.
[42] Dodd-Frank Act § 952.
[43] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 12 U.S.C.).
[44] *SOX Redux: Corporate Governance and the Dodd-Frank Act*, HUGHES HUBBARD & REED (July 2010), https://www.hugheshubbard.com/news/sox-redux-corporate-governance-and-the-dodd-frank-act [https://perma.cc/Z2YF-DZQM].
[45] However, it has been noted that even where the compensation committee members are objectively "independent," the influence that the CEO of a company can have on the nomination and reappointment of outside directors can lead to those directors being in thrall to the CEO. Bebchuk et al., *supra* note 19, at 767; *see also* ARTHUR R. PINTO & JAMES A. FANTO, UNDERSTANDING CORPORATE LAW 296 (6th ed. 2023).

and structuring of executive compensation.[46] Although, on its face, the utilization of third parties would seemingly increase objectivity in the compensation determination process, the neutrality of such consultants had been questioned on the basis of their desire to genuflect to CEOs who may be responsible for their appointment by the company or other companies in which the CEO also serves on the board.[47] Such bias would be further exacerbated where the consultant also provides other, more lucrative, non-compensation related consultancy services to companies, the engagement of which is very much in the hands of executives.[48] Accordingly, Dodd-Frank specified that the appointment, remuneration, and oversight of compensation consultants should be in the remit of the compensation committee, and that the compensation committee should take into account various factors that could potentially prejudice the independence of such consultants when resolving whether to appoint them.[49]

Although the shareholder vote under Dodd-Frank is advisory, large U.S. companies have been subject to other potential shareholder-voting requirements through ancillary regulations. In 1993, the Clinton Administration promulgated amendments to the Internal Revenue Code that provided that, *prima facie*, executive compensation above one million dollars would not be tax-deductible from the corporation's profits.[50] Although the measure was enacted in the midst of controversy surrounding rapidly rising executive pay,[51] evidenced by the title of the statutory provision being "Certain *Excessive* Employee Remuneration,"[52] a regulatory preference to reduce agency costs by aligning pay with performance was also evinced by an exemption for components of pay conditional upon the achievement of preestablished and objective performance targets. Such qualifying, performance-based compensation could be tax-deductible (even if above one million dollars) if the performance criteria had been established by a compensation committee consisting of two or more outside directors, and if the shareholders of the company had preapproved the material terms of the performance-based pay.[53] If the performance criteria changed, a new shareholder approval was required, or if the compensation committee had the power to amend the targets required to be attained, shareholder approval was required every five years.[54] Therefore, if a corporation wished to deduct performance-based pay from its profits, it would have to obtain binding approval from its shareholders, and it was not possible for the corporation to propose such a pay structure on the basis that it would be paid whether or not tax deductibility were achieved through shareholder approval.[55] Notably, the dynamics differed from a binding say-on-pay vote in the traditional sense, since a natural reckoning for shareholders would be that the approval would be beneficial to shareholders since it would reduce the tax burden of the corporation (so beneficial to shareholders), whereas, otherwise, there would

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[46] Bebchuk et al., *supra* note 19, at 789.
[47] *Id*. at 790.
[48] *Id*.
[49] Dodd-Frank Act § 952.
[50] 26 U.S.C. § 162(m).
[51] *See Tax Reform: A Deeper Dive into Amended Section 162(m)*, NEWPORT (June 5, 2018), https://www.newportgroup.com/knowledge-center/june-2018-(1)/tax-reform-a-deeper-dive-into-amended-section-162(/ [https://perma.cc/J7M8-GPDU].
[52] § 162(m) (emphasis added).
[53] Regina Olshan & Paula Todd, *Section 162(m): Limit of Compensation*, PRAC. L. 1, 2 (2015), http://us.practicallaw.com/7-501-5106 [https://perma.cc/QY9S-VZDU].
[54] *Id*. at 4.
[55] *Id*.

be no disincentive on the corporation to increase the fixed salary of the relevant executives (which would be regressive in terms of aligning shareholder and executive interests), as the tax position of the corporation would be the same whether or not executive pay was primarily fixed or performance-based. In 2017, however, the Tax Cuts and Jobs Act removed the exemption for performance-based pay, resulting in fixed and performance-based executive pay above one million dollars losing tax deductibility, [56] and, therefore, obviating the tax-based incentive on corporations to put their performance-based pay to a binding shareholder vote.

Shareholder approvals may also be required by U.S.-listed corporations when issuing equity-based pay, or when implementing stock option schemes. At a very basic level, U.S. corporations, including those incorporated in Delaware, must include an authorized share capital figure in its certificate of incorporation. [57] If the company seeks to issue shares (including shares issuable upon the exercise of stock options) above the authorized share capital figure, it must obtain shareholder approval to amend its certificate of incorporation.[58] In practical terms, though, large, publicly traded corporations usually have significant headroom in their authorized share capital figures, rendering amendment unnecessary in most cases of executive pay.[59] However, the listing rules of the NYSE and Nasdaq further provide that shareholder preapproval is required to implement employee equity compensation plans, subject to certain exceptions. [60] As with the erstwhile tax deductibility rules discussed above, [61] though, the undercurrents to such a shareholder vote differ markedly from a conventional say-on-pay vote. For example, the details of the plan put to a shareholder vote will consist of the general terms of the plan rather than the specific levels of equity to be issued to individual executives.[62] Furthermore, shareholders will likely see the benefit of aligning executive pay with shareholder interests through the issuance of equity-based compensation, with the alternative being for the compensation committee to potentially increase fixed pay for executives to retain their services if a relevant equity-compensation plan were vetoed by the shareholders.

A final avenue for shareholder involvement in executive compensation, at least theoretically, is by challenging excessive pay in the courts. However, in practice, the opportunities for a successful outcome are slim. Since excessive pay harms the corporation rather than the shareholders personally and directly, shareholders would be required to pursue such a claim through a derivative action on behalf of the corporation.[63] In Delaware, where most

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[56] Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13601, 131 Stat. 2054 (2017).
[57] *E.g.*, DEL. CODE ANN. tit. 8, § 161 (2024).
[58] *E.g.*, DEL. CODE ANN. tit. 8, § 242(b) (2024).
[59] PINTO & FANTO, *supra* note 45, at 81.
[60] *See* N.Y. STOCK EXCH., LISTED COMPANY MANUAL § 303A.08 (2009); NASDAQ, STOCK MARKET LISTING RULES, at Rule 5635(c). Both the NYSE and Nasdaq provide exceptions where the plans relate to mergers and acquisitions transactions, the need to induce a new employee to the company, or certain tax-optimized, Internal Revenue Code-defined retirement plans and discounted share schemes. Nasdaq also provides an exception where all shareholders of the corporation are able to participate in a warrants or rights offering.
[61] *See* text between *supra* notes 55–56.
[62] Bebchuk et al., *supra* note 19, at 783.
[63] The Delaware Supreme Court has asserted that if the alleged harm has been suffered by the corporation and the corporation itself would benefit from the relevant remedy, any action commenced by a shareholder must be through a derivative claim on behalf of the corporation. Brookfield Asset Management, Inc. v. Rosson, 261 A.3d 1251 (Del. 2021). That decision followed Tooley v. Donaldson, Lufkin, Jenrette, Inc., 845 A.2d 1031 (Del. 2004), and overruled Gentile v. Rosette, 906 A.2d 91 (Del. 2006).

U.S.-listed corporations are listed (and where the vast majority of recent IPO companies are listed),[64] except for derivative claims commenced by creditors when the company is bankrupt,[65] prior to commencing a derivative claim, a shareholder must make a demand on the board to pursue the suit or evidence to the court that such a demand would be futile.[66] The concept of futility is that demand would be futile because the "directors are under an influence which sterilizes their discretion, [and therefore] they cannot be considered proper persons to conduct litigation on behalf of the corporation."[67] The plaintiff must demonstrate doubt that the board as a whole is able to exercise its business judgment without self-interest to conduct litigation on behalf of the corporation.[68] In practice, this means that the plaintiff has to show that at least half of the board benefited from the executive compensation decision or was involved in the executive compensation decision and therefore subject to liability if it is found that their decision making involved misconduct.[69] Even if futility is established though, and a derivative claim can proceed, further impugning the executive compensation decision is likely itself to be a futile endeavor. The court will, in accordance with the business judgment rule, presume that the directors have acted (i) on an informed basis, (ii) in good faith, and (iii) with an honest belief that they were acting in the best interests of the company, and have therefore not breached their fiduciary duties to the company.[70] The business judgment rule may be disapplied if the plaintiff can show that those who made the decision were self-interested,[71] but, since a publicly traded company fully compliant with applicable regulations will have a compensation committee composed of independent directors,[72] it will be

[64] Jens Dammann, Deference to Delaware Corporate Law Precedents and Shareholder Wealth: An Empirical Analysis 2 (May 30, 2019) (unpublished manuscript), https://ssrn.com/abstract=3384446 [https://perma.cc/V6XV-YCCB]; Lucian Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J. L. & ECON. 383, 391 (2003); Jens Dammann & Matthias Schündeln, *The Incorporation Choices of Privately Held Corporations*, 27 J. L. & ECON. ORG. 79, 87 (2011); DEL. DIV. CORPS., 2022 ANNUAL REPORT (stating that nearly 68.2% of Fortune 500 companies are Delaware-registered, and that in 2022, 79% of all U.S. IPO companies were registered in Delaware).
[65] Bernard Black et al., *Outside Director Liability*, 58 STAN. L. REV. 1055, 1093 (2006).
[66] The "demand" requirement stems from the Rules of the Court of Chancery of the State of Delaware, Rule 23.1, which states, "The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort." DEL. CH. R. 23.1.
[67] Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984).
[68] Heather Sultanian, *Delaware Supreme Court Clarifies the Standards for Demand Futility*, HARV. L. SCH. F. CORP. GOVERNANCE (Oct. 27, 2021), https://corpgov.law.harvard.edu/2021/10/27/delaware-supreme-court-clarifies-the-standards-for-demand-futility/ [https://perma.cc/S75R-8ZCQ]. The Delaware Supreme Court recently indicated that demand will be "futile" if it can be shown that at least half of the members of the board (i) received a material personal benefit from the alleged misconduct, (ii) face a substantial likelihood of liability on any of the claims of alleged misconduct, or (iii) lack independence from someone who received a material personal benefit from the alleged misconduct, or who would face a substantial liability on any of the claims of alleged misconduct. United Food & Com. Workers Union v. Zuckerberg, 262 A.3d 1034, 1059 (Del. 2021).
[69] *Id.* Additionally, after the claim has been made, the board could pre-empt futility by forming a special litigation committee that could dismiss the demand if not credible or if it is simply not in the best interests of the company to pursue the claim. The Court will likely defer to the decision of a special litigation committee that is independent and follows a rational procedure. Black et al., *supra* note 65, at 1092.
[70] *Aronson*, 473 A.2d at 812; Cede & Co. v. Technicolor, 634 A.2d 345, 360 (Del. 1993).
[71] Cinerama v. Technicolor, 663 A.2d 1156, 1168 (Del. 1995).
[72] *See supra* notes 40–41 and accompanying text.

challenging to prove that the decision making of the board on executive compensation was not made on a disinterested basis.[73]

Therefore, assuming that the board was fully informed of all the relevant material facts, it is likely that a plaintiff seeking to show that the decision to pay the relevant compensation was not a valid exercise of business judgment would be limited to an assertion that the pay was corporate "waste," with what the corporation had received being so inadequate in value that "no person of ordinary, sound business judgment would deem it worth what the corporation has paid."[74] Given the high threshold, it is likely that a board will be able, except in the most egregious of circumstances or where there is a lack of good faith,[75] to justify high levels of executive pay.[76] Even a recent decision of the Delaware Court of Chancery voiding a potential $56 billion executive compensation package in favor of CEO Elon Musk at Tesla, which was essentially premised on a lack of good faith as a conflicted transaction resulting in the disapplication of the business judgment standard, was unusual on its facts.[77] Conflicted transactions with controlling shareholders, as the court determined Musk to be,[78] are generally assessed on an "entire fairness" standard[79] where the fairness of the price and process of the transaction must be assessed.[80] Although the business judgment standard can be restored if the relevant decision is determined by a committee of independent directors and approved by independent shareholders,[81] in the presence of a controlling shareholder, Delaware law has, until recently, been unclear as to whether transactions can be cleansed in this way, and the links between the controlling shareholder and the board have generally been held to be critical.[82] Nevertheless, ratifying the transaction by a vote of independent shareholders ("majority of the minority") has been an often used and court-endorsed mechanism to shift the burden of proof under the entire fairness standard to the plaintiff.[83] Tesla did purportedly formulate

[73] For an analogy to New York, see Marx v. Akers, 88 N.Y.2d 189, 202 (1996). *See also* Bebchuk et al., *supra* note 19, at 781.
[74] Saxe v. Brady, 184 A.2d 602, 610 (Del. Ch. 1962).
[75] The Delaware Supreme Court has confirmed that a lack of good faith is a separate ground on which a claim could be made on excessive executive pay. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 52–53 (Del. 2006). However, good faith entails acting "in the honest belief that the action taken was in the best interests of the company," Craig W. Palm & Mark A. Kearney, *A Primer of the Basics of Directors' Duties in Delaware: The Rules of the Game (Part I)*, 40 VILL. L. REV. 1297, 1313 (1995), and, therefore, is a subjective determination meaning that as long as directors honestly believed they were acting in the best interest of the corporation, they will not be found liable simply because they made poor decisions or engaged in bad practice (as was found in *In re Walt Disney Co.*).
[76] *See, e.g.*, *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000); *see also* Bebchuk et al., *supra* note 19, at 781; PINTO & FANTO, *supra* note 45, at 307.
[77] *See* Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024).
[78] Elon Musk, in fact, did not hold a majority of the stock or voting rights in Tesla. However, the court still regarded Musk's influence to be sufficiently significant to deem him a *de facto* controller. *See id.* at 497–520.
[79] Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983).
[80] *See* Cede & Co. v. Technicolor, 634 A.2d 345 (Del. 1993).
[81] Tornetta v. Musk, 250 A.3d at 810 (Del. Ch. 2019); *see also* Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014).
[82] Lucian Bebchuk and Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1289. For an example where the business judgment rule was applied to a decision by an independent committee of directors on pay to the corporation's controller, see *Friedman v. Dolan*, No. CV 9425-VCN, 2015 WL 4040806, at *5–8 (Del. Ch. June 30, 2015). More recently (after the case of *Tornetta* was decided), the Delaware Supreme Court has held that it will revert to the business judgment rule upon the approval by a special committee of independent directors and disinterested shareholders in the case of any transaction where a controller has received a non-ratable benefit. *In re Match Grp., Inc. Deriv. Litig.*, 2024 C.A. No. 2020-0505 (Del. April 4, 2024).
[83] Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1115–16 (Del. 1994).

Musk's package through independent directors and put the package to a shareholder vote. However, Musk was determined by the court to be a controlling shareholder with an unusually large level of influence over the company and the Board, and with personal relationships with Board members. He was further found to have substantially participated in the process leading to the Board's approval of his pay.[84] Accordingly, even though the Board put the compensation package to a shareholder vote, the court, in applying the entire fairness review, asserted that the vote was not sufficient to shift the burden of proof to the Plaintiff since the shareholders were not fully informed of the lack of independence of key directors in this context and were misled as to the process through which Musk's compensation was determined.[85] It is likely that the Tesla judgment, which may be appealed, applies specifically on the unique facts of that case and the immense dominance over the company that Musk exerted.[86] Absent such an unusual lack of good faith in the executive compensation formulation process, as has been said in the Delaware Chancery Court, a decision on executive compensation is "a core function of a board of directors exercising its business judgment,"[87] and the courts will show substantive deference to boards of publicly traded companies on executive compensation.

III. U.K. EXECUTIVE COMPENSATION REGULATIONS

The U.K. employs a variety of legislation and regulations related to executive pay. As with the U.S., disclosure and transparency are important facets of the regulatory regime. Companies listed on the Main Market of the London Stock Exchange first became required to clearly disclose components of executive remuneration in 1995 under regulations promulgated under the U.K.'s Listing Rules.[88] In 2002, those disclosure requirements took on a statutory footing, with companies legislation now providing that all "quoted" companies must annually disclose a directors' remuneration report to its shareholders.[89] "Quoted" companies constitute all companies incorporated in England and Wales that are on the Financial Conduct Authority's "Official List" (which includes London Stock Exchange Main Market companies), as well as England- and Wales-incorporated companies listed in a European Economic Area State, on the NYSE, or on Nasdaq.[90] The disclosure requirements for quoted companies were further significantly bolstered in 2013, with the directors' remuneration report being divided into a forward-looking directors' remuneration policy

[84] *Musk*, 310 A.3d at 446, 497–520.
[85] *Id.* at 520–26. Although the Court was not required to determine whether the decision of the board was, in fact, made on an independent basis, it indicated that a majority of the board lacked independence *Id.* at 497 n.546.
[86] *See id.* at 502 ("Musk wielded the maximum influence that a manager can wield over a company.").
[87] *In re* Goldman Sachs Grp., Inc. S'holder Litig., No. CIV.A. 5215-VCG, 2011 WL 4826104, at *38 (Del. Ch. Oct. 12, 2011).
[88] CHEFFINS, *supra* note 16, at 663. The U.K. Listing Rules are the rules set forth in the listing rules sourcebook as published by the Financial Conduct Authority exercising its primary market functions, to which all companies listed on the Main Market of the London Stock Exchange must adhere (the rules thereunder hereinafter referred to as the LRs). *See* FIN. CONDUCT AUTH., FCA HANDBOOK, at LR Listing Rules (2024) [hereinafter U.K. LISTING RULES].
[89] Companies Act 2006, c. 46, §§ 423 & 430 (U.K.).
[90] *Id.* § 385. A quirk of the U.K.'s executive compensation regulations is that if a U.K. company seeks to list on the NYSE or Nasdaq with a view to avoiding such regulations, it will have to change its jurisdiction of incorporation away from the U.K.—this potentially exacerbates the fear that if U.K. companies are lured to overseas exchanges, they will also shift operations over time to a foreign jurisdiction.

report which must outline the compensation that may be paid to directors,[91] and a backward-looking directors' remuneration implementation report which must set out what directors have actually been paid in the previous fiscal year.[92] The reports cover any payments made to directors of the company, as well as to the CEO and deputy CEO in the rare cases when they are not also on the board as directors.

The forward-looking directors' remuneration policy report must extensively summarize the components of executive compensation and any performance measures and targets to the extent that performance-related conditions are attached.[93] Clear graphical information must be provided to delineate how much individual executive directors will receive if the executive attains minimum, expected, or maximum levels of performance,[94] and the degree of consultation with, and consideration of the views of, shareholders and employees on executive pay must be disclosed.[95]

The backward-looking directors' remuneration implementation report must include a "single total figure table" setting out exactly how much each director has received in the previous fiscal year under each component of compensation, as well as a comparison to the sums received in the immediately preceding fiscal year.[96] Further detailed information must be provided for the CEO, including a comparison of how his or her compensation has varied in line with the company's performance on a relative basis to other comparator companies.[97] Changes in directors' remuneration must also be contrasted to changes in rank-and-file employee pay generally.[98]

Shareholders also have tools to intervene in executive compensation. Under statute, all companies incorporated in England or Wales must submit any employment contracts proposed to be awarded to directors for more than two years in length to the shareholders for pre-approval.[99] The premise behind the provision is that shareholders should be given a say on long-term employment contracts which could result in high termination payments if ended prior to the expiry of their terms. Furthermore, under the U.K. Listing Rules, companies listed on the Main Market of the London Stock Exchange must obtain shareholder preapproval prior to implementing any employee share schemes and long-term incentive schemes in which directors can participate.[100] As with the NYSE and Nasdaq rules on equity-based compensation and stock option plans,[101] the relevant rule is subject to exceptions.[102] Discounted stock options granted with an exercise price

[91] *See* The Large and Medium-Sized Companies and Groups (Accounts and Reports) (Amendment) Regulations 2013, SI 2013/1981, Part 4. [hereinafter U.K. Remuneration Regulations 2013] (U.K.).
[92] *See id.* Part 3.
[93] *Id.* at Schedule 8, §§ 25–26.
[94] *Id.* at Schedule 8, § 34.
[95] *Id.* at Schedule 8, §§ 38–40.
[96] *Id.* at Schedule 8, §§ 4–7, 9.
[97] *Id.* at Schedule 8, § 18.
[98] *Id.* at Schedule 8, §§ 9–20.
[99] Companies Act 2006, c. 46, § 188 (U.K.).
[100] U.K. LISTING RULES, *supra* note 88, at LR 9.4.1 R.
[101] *See supra* note 60.
[102] U.K. LISTING RULES, *supra* note 88, at LR 9.4.2 R. Shareholder pre-approval is not required if the arrangement is offered to *all* or *substantially all* employees in the company on similar terms, or if it is implemented to recruit or retain a single director in unusual circumstances.

below the market price of shares at the time of grant are also subject to shareholder preapproval.[103]

Above and beyond shareholder preapproval for long-term contracts and under the U.K. Listing Rules, the U.K. was a trailblazer on say-on-pay with its 2002 shareholder advisory vote on the directors' remuneration report.[104] With the advent of stricter disclosure requirements in 2013, though, the U.K. doubled down on say-on-pay, introducing a two-vote regime that still stands today. Under the 2013 regime, shareholders have, every three years, a binding vote on the forward-looking directors' remuneration policy.[105] The vote must be brought forward if the existing shareholder preapproved directors' remuneration policy is to be revised or if the company has lost a say-on-pay vote in the previous year.[106] The vote is binding, because if the policy is not approved, the previously approved policy must remain in place, and no director may be paid any sums that are not in accordance with a preapproved directors' remuneration policy or that have otherwise been approved by the shareholders.[107] The second part of the two-vote regime is an annual advisory vote on the directors' remuneration implementation report.[108] Such a vote on what directors have already been paid is merely advisory, since any sums so paid cannot be clawed back purely as a result of losing the vote.[109] The concept behind U.K. say-on-pay is that shareholders must approve the compensation policy pursuant to which directors are to be paid, but if those directors are subsequently paid sums unsatisfactory to the shareholders pursuant to the policy to which they have agreed, the shareholders can only express their dissatisfaction in an advisory manner (with the caveat that, as above, the company must then put forth a new directors' remuneration policy for a vote the following year).

As with U.S. public companies, U.K. companies listed on the premium tier of the London Stock Exchange almost uniformly constitute compensation committees consisting exclusively of independent directors.[110] The motivation is not regulatory fiat, but more soft law under the U.K. Corporate Governance Code.[111] The U.K. Corporate Governance Code operates on a "comply-or-explain" basis, pursuant to which companies listed on the premium tier of the London Stock Exchange must comply with the provisions of the Code or explain in their annual reports why they have not done so.[112] Under the Code, it is recommended that companies delegate the determination of executive director pay (and also the pay of the chair and the tier of senior management immediately below the executive directors) to

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[103] *Id.* at LR 9.4.4 R. Exceptions are provided if the option is granted under an employee share scheme offered to all or substantially all the employees of the company, or if granted in connection with a takeover or reconstruction. *See id.* at LR 9.4.5 R.
[104] Pursuant to the now-superseded Companies Act 1985, c. 6, § 241A (U.K.).
[105] Companies Act 2006, c. 46, § 439A (U.K.).
[106] *Id.*
[107] *Id.* §§ 226B & 226C. Any such payments are void. *Id.* § 226E(1); *see also text accompanying infra* note 118.
[108] *Id.* § 439.
[109] *Id.* § 439(5).
[110] Bobby V. Reddy, *Thinking Outside the Box—Eliminating the Perniciousness of Box-Ticking in the New Corporate Governance Code*, 82 MOD. L. REV. 692, 721 n.185 (2019).
[111] For the latest edition, see FIN. REPORTING COUNCIL, UK CORPORATE GOVERNANCE CODE (2024) [hereinafter U.K. CORPORATE GOVERNANCE CODE]. The 2024 edition of the U.K. Corporate Governance Code applies to financial years beginning on or after January 1, 2025.
[112] U.K. LISTING RULES, *supra* note 88, at LR 9.8.6(6)R. Such a company must also make a statement as to how it has applied the principles of the U.K. Corporate Governance Code. U.K. LISTING RULES, *supra* note 88, at LR 9.8.6(5)R; *see also* Reddy, *supra* note 110, at 694; Brian R. Cheffins & Bobby V. Reddy, *Thirty Years and Done—Time to Abolish the UK Corporate Governance Code*, 22 J. CORP. L. STUD. 709, 715–16 (2022).

a compensation committee consisting of three (two in the case of a "smaller" company)[113] or more independent nonexecutive directors.[114] Nearly all companies within the FTSE 350 index comply with these requirements,[115] and, therefore, executive directors should not be directly involved in the potentially agency cost-generating act of setting their own pay. As with the U.S.'s Dodd-Frank, the U.K. Corporate Governance Code establishes criteria that boards should consider when determining whether directors are independent.[116] The Code also recommends that any compensation consultants engaged by the company be selected by the compensation committee rather than by the executives.[117]

Finally, do shareholders of U.K. companies have better prospects than shareholders of U.S. companies in challenging excessive executive compensation in the Courts? In theory, the U.K. does provide legislative avenues to contest executive pay. If a director is paid a sum that is not in accordance with the preapproved directors' remuneration policy, the payment is void,[118] and a derivative claim could be commenced by shareholders on behalf of the company to force the director into paying back the sum to the company. Such an action would only arise if the board had ignored the binding shareholders' vote and breached companies' legislation and would therefore be a rare scenario indeed. Outside of flagrant noncompliance with companies' legislation, shareholders could still maintain a derivative action based upon a claim that executive compensation is so high that it represents a breach by the board of its fiduciary duties. In the U.K., the duties of directors are outlined under statute.[119] A claim for breach of directors' duties in the context of executive compensation would likely be an allegation that the board has exceeded its remunerative power (essentially that the board did not exercise its power for the purposes conferred),[120] or that it was not acting in good faith to promote the success of the company for the benefit of its members as a whole.[121] Although case law precedent exists to confirm that such actions are sound in theory, unless a person is effectively being paid for doing nothing and therefore receiving an unauthorized gift rather than compensation, it is unlikely that the courts will intervene.[122] The courts have maintained that absent a fraud on shareholders or creditors, they should be reluctant to determine whether remuneration is unreasonable, since executive compensation is a decision for internal management.[123] In the case of publicly traded companies, since executive compensation will almost ubiquitously be determined by a committee of independent directors, a plaintiff will encounter further difficulties in maintaining that those directors were not genuinely seeking to

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[113] U.K. CORPORATE GOVERNANCE CODE, *supra* note 111, n.7. A smaller company is defined under the U.K. Corporate Governance Code to be a premium-listed company that was not within the FTSE 350 index of the largest premium-listed index-eligible companies by market capitalization throughout the year immediately prior to the reporting year.
[114] *Id.*, Provision 32.
[115] S*upra* note 110 and accompanying text.
[116] U.K. CORPORATE GOVERNANCE CODE, *supra* note 112, Provision 10.
[117] U.K. CORPORATE GOVERNANCE CODE, *supra* note 112, Provision 35.
[118] Companies Act 2006, c.46, § 226E(1) (U.K.).
[119] *Id.* §170. The specific general duties of directors are outlined in the next seven sections. *Id.* §§ 171–77.
[120] *Id.* § 171.
[121] *Id.* § 172.
[122] *See Re* Halt Garage [1964] 3 All ER 1016 (U.K.).
[123] *See id.*; Smith v. Croft (No. 2) [1988] 1 Ch 114, at 159–64 (U.K.).

promote the success of the company.[124] Another potential approach in the U.K. to challenging executive compensation in the courts is under the "unfair prejudice" heading, and evidencing that the affairs of the company have been conducted in a manner unfairly prejudicial to its shareholders.[125] However, circumstances where such claims have been successful have largely involved closely-held companies where executive compensation has seemingly been used as a method of discriminatingly channeling the profits of the company to certain shareholders over others and where the action was part of a broader package of misconduct that was unfairly prejudicial to certain shareholders.[126] Otherwise, again, courts are hesitant to intervene, and it has been held that judging whether executive compensation is reasonable is an elusive concept, since the court generally does not have a yardstick by which to judge whether compensation is reasonable or unreasonable.[127] In any case, satisfying the unfair prejudice condition (without further evidencing a breach of directors' duties) would require a plaintiff to argue that it had informal rights that the relevant compensation not be so high, and that those rights had been breached in an unconscionable manner.[128] Generally, courts have not been receptive to unfair-prejudice arguments based upon informal rights in publicly traded companies, because to accept the existence and enforcement of such expectations could undermine the credibility of the public markets where investors are making investment decisions based upon the observable constitutions of those companies.[129] In short, an action in the U.K. courts based purely upon an assertion that executive compensation is too high is fraught with peril.

IV. COMPARING EXECUTIVE COMPENSATION GOVERNANCE IN THE U.K. AND THE U.S.

"Easy Money" may have been an aspirational 1980s lifestyle choice,[130] but by the 2000s, the regulatory mood music in relation to executive compensation in both the U.S. and the U.K. had clearly shifted to ensuring that executives had "Earned It."[131] Ties that bind, perhaps, but among the similarities, the binding vote of shareholders on executive pay in the U.K. stands out when comparing the governance of executive compensation in the two jurisdictions.

Shareholders in both the U.S. and the U.K. have similar approval rights over discrete aspects of executive remuneration, including equity-based compensation plans, but in both jurisdictions say-on-pay, or shareholder voting on executive compensation generally, is the headline regulatory apparatus to control executive pay. It is in the sphere of say-on-pay that the U.S. and the U.K. differ most significantly on paper. The critical difference is that in the U.S., shareholder say-on-pay is merely an advisory measure held at least every three years,[132] whereas in the U.K., not only do

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[124] *See Re* Smith & Fawcett Ltd. [1942] Ch 304 (U.K.) (explaining the relevant duty under Companies Act 2006 § 172 is a subjective duty, making proof of breach challenging); *see also* Regentcrest plc v. Cohen [2001] 2 BCLC 80 (U.K.) (same).
[125] Companies Act 2006, c. 46, § 994 (U.K.).
[126] *See* Fowler v. Gruber [2009] CSOH 36 (Scot.); *see also* Booth & others v. Booth & others [2017] EWHC (Ch) 457 (U.K.).
[127] *See, e.g.*, Lloyd v. Casey [2002] 1 BCLC 454 (U.K.).
[128] O'Neill v. Phillips [1999] 2 All ER 961 (HL) (U.K.).
[129] *See Re* Blue Arrow plc [1987] BCLC 585 (U.K.); *see also Re* Tottenham Hotspur plc [1994] 1 BCLC 655 (U.K.); *Re* Astec (BSR) plc. [1998] 2 BCLC 556, 589 (U.K.).
[130] BILLY JOEL, *Easy Money*, *on* AN INNOCENT MAN (Columbia 1983).
[131] THE WEEKND, *Earned it*, *on* BEAUTY BEHIND THE MADNESS (XO 2015).
[132] *See supra* note 36 and accompanying text.

shareholders have an annual advisory vote on payments actually made to executive directors,[133] but, at least every three years, shareholders also have a binding vote on how executive directors will be paid and the components of executive director compensation packages.[134] The U.S.'s say-on-pay system was based upon the U.K.'s pre-2013 regime,[135] but clearly the U.K. authorities discerned that a simple advisory vote was not satisfying the aims of the policy and a binding vote was introduced. Does the binding nature of the U.K.'s say-on-pay system materially result in a stricter corporate governance regime than the U.S.?

From the perspective of voting percentages, the addition of a binding vote does not seem to have given shareholders greater motivation to vote against executive pay. Prior to the advent of the binding vote, U.K. say-on-pay votes in favor of executive pay were on average regularly over ninety percent.[136] Since the introduction of a binding vote, approval rates continue to sit stubbornly above ninety percent.[137] Given those intransigent statistics, it is perhaps unremarkable that say-on-pay voting approvals in the U.S. have followed a similar trend, showing over ninety percent approval rates.[138] The likelihood of executive pay votes being lost outright (a majority of votes not being in favor) is also similar between the U.S. and the U.K., with the failure rate in the U.S. being around two percent,[139] and, in the U.K., since the binding vote came into force, it is rare for more than four companies within the FTSE 350 index to lose say-on-pay votes in any given year.[140] On the basis of voting dissent, it does not appear that the addition of a binding vote in the U.K. has had much impact.

However, voting dissent is only half the story. It has been suggested that one of the consequences of say-on-pay is that boards have become more attuned to shareholder preferences when it comes to executive compensation, and tailor compensation packages pre-shareholder vote in a manner that will not attract shareholder opprobrium.[141] Additionally, it has been contended that say-on-pay has resulted in greater engagement between shareholders and boards on executive compensation which would again tend

[133] *See supra* note 108 and accompanying text.
[134] *See supra* note 105 and accompanying text.
[135] Fisch et al., *supra* note 38.
[136] Martin Conyon & Graham Sadler, *Shareholder Voting and Directors' Remuneration Report Legislation: Say-on-pay in the U.K.,* 18 CORP. GOVERNANCE: INT'L REV. 296, 301 (2010); HIGH PAY CTR., THE STATE OF PAY: ONE YEAR ON FROM THE HIGH PAY COMMISSION 19 (2012); Randall S. Thomas & Christoph Van der Elst, *Say On Pay Around the World*, 92 WASH. U. L. REV. 653, 664–65 (2015).
[137] Deloitte, *Directors' Remuneration in FTSE 100 Companies* (2023); Deloitte, *Directors' Remuneration in FTSE 250 Companies* (2023). [Copies of these reports have been deposited with the editors to maintain on file].
[138] *See* John W. Barry, Shareholder Voice and Executive Compensation 1 (Nov. 20, 2023) (unpublished manuscript), http://dx.doi.org/10.2139/ssrn.4584580 [https://perma.cc/KE7Z-NTP3]; Fisch et al., *supra* note 38, at 102, 106; Thomas & Van der Elst, *supra* note 136, at 661.
[139] Edward A. Hauder, *Bouncing Back from a Low Say-On-Pay Vote*, HARV. L. SCH. F. CORP. GOVERNANCE (Nov. 5, 2018), https://corpgov.law.harvard.edu/2018/11/05/bouncing-back-from-a-low-say-on-pay-vote/ [https://perma.cc/6SLP-9LPA]; Thomas & Van der Elst, *supra* note 136, at 661; Fisch et al., *supra* note 38, at 106.
[140] Data obtained from KPMG LLP, GUIDE TO DIRECTOR'S REMUNERATION for years 2014–2022. As an outlier, in 2012, before the binding vote came into force, in the much vaunted "shareholder spring", six FTSE 350 companies lost say-on-pay votes. Ruth Sullivan, *'Shareholder Spring' Muted*, FIN. TIMES (Aug. 26, 2012), https://on.ft.com/4cihr85 [https://perma.cc/8N2R-2A45].
[141] *See, e.g.*, David F. Larcker et al., *Outsourcing Shareholder Voting to Proxy Advisory Firms*, 58 J. L. & ECON. 173, 190–92, 203 (2015); Ferri & Maber, *supra* note 20, at 546; Peter Iliev & Svetla Vitanova, *The Effect of the Say-on-Pay Vote in the United States*, 65 MGMT. SCI. 4505, 4515 (2019).

to reduce the propensity for negative votes.[142] As such, although voting dissent has not changed materially between advisory and binding votes, the binding vote may have had more of an influence on boards with respect to engaging with shareholders and formulating compensation packages. A possible hypothesis is that a binding vote results in greater jeopardy for boards than an advisory vote, and, therefore, boards are more likely to temper executive pay to ensure that it is not voted down. Equally, from a shareholder perspective, a possible proposition is that shareholders are more likely to exercise their rights to vote down executive compensation when they know that their dissatisfaction will have a meaningful binding effect, and, therefore, the voting statistics on binding say-on-pay votes would have been far more negative if boards had not been moderating compensation packages to a greater extent than with advisory votes. Collating empirical evidence to prove or disprove such a hypothesis is outside the scope of this Article and likely rather challenging,[143] but, as discussed in the next two sections, some circumstantial evidence can be helpful in determining whether the U.K. is indeed a tougher corporate governance environment on executive compensation.

V. EVIDENCE OF THE IMPACT OF THE BINDING VOTE ON EXECUTIVE COMPENSATION

Several studies have investigated the effect of the U.K.'s advisory say-on-pay vote, pre-2013, on executive compensation. The general consensus was that advisory say-on-pay did not necessarily reduce executive compensation or its growth rate, but that shareholders were more likely to vote against pay if a company had performed poorly.[144] The findings from those older studies seem to match U.S. studies on say-on-pay, where of course the vote is also advisory, which have similarly found that shareholders vote against pay when performance is poor.[145] Although there is some correlation between the levels of absolute pay and shareholder dissent, shareholders are more likely to dissent if a company performs poorly whether or not pay is relatively high, and shareholders will generally approve high pay so long as a company is performing well.[146] Studies indicate that advisory votes in both the U.S. and the U.K. have not had the effect of substantially moderating the levels of executive pay or its growth.[147] A potential conclusion is that shareholders, in both the U.K. and the U.S., have been using advisory say-on-pay votes to express their

[142] Thomas & Van der Elst, *supra* note 136, at 730–31; Suren Gomtsian, *Executive Compensation: Investor Preferences During Say-on-Pay Votes and the Role of Proxy Voting Advisors*, 44 LEGAL STUD. 140, 143, 154 (2024); Carsten Gerner-Beuerle & Tom Kirchmaier, *Say on Pay: Do Shareholders Care?* 28 (Eur. Corp. Governance Inst., Finance Working Paper No. 579/2018).
[143] Procuring the necessary evidence would be a challenging task. The requirement of U.K. quoted companies to disclose the extent to which the views of shareholders have been taken into account when formulating directors' remuneration policy was only introduced at the same time as the binding vote requirement in 2013. U.K. Remuneration Regulations 2013, Schedule 8, § 40. Therefore, comparing shareholder engagement pre- and post-binding vote would require a survey of directors who have served on boards pre- and post-2013 to discern any changes in approach to shareholder engagement on executive remuneration and the tailoring of compensation packages to correlate with perceived investor preferences, and the extent to which that has been driven by the addition of a binding vote.
[144] Ferri & Maber, *supra* note 20, at 529–30; Conyon & Sadler, *supra* note 136, at 303–06.
[145] Fisch et al., *supra* note 38, at 119–20; Thomas & Van der Elst, *supra* note 136, at 661.
[146] Fisch et al., *supra* note 38, at 117, 119–20.
[147] Iliev & Vitanova, *supra* note 141, at 4512; Ferri & Maber, *supra* note 20, at 554.

dissatisfaction with company performance, rather than genuinely opining upon the level and structure of executive compensation.[148]

Even with merely advisory say-on-pay votes, though, studies have shown that boards do take significant shareholder dissent seriously, with boards changing pay practices in the light of significant shareholder dissent.[149] However, if that dissent is principally targeted at poor performance, a cogent response of boards would be to ensure that pay is better correlated with performance. Although shareholders have shown a tendency to vote against pay, whether high or low, if performance is poor, at least boards could justify their position by demonstrating that executives have not been rewarded for failure. It is therefore likely that say-on-pay has at least created more of a link to performance and studies do seem to show that executive pay in both the U.K. and U.S. has become more performance-based over time since advisory say-on-pay was introduced.[150] However, whether that satisfies the intended aims of the policy is up for debate. If shareholders are mainly concerned about current performance, it could incentivize the development of pay practices that prioritize short-term performance at the expense of long-term success.[151] Indeed, one U.K. study noted that payments under U.K. executive compensation packages are biased to short-term performance over long-term future performance measures.[152] Additionally, if there were at least concerns at the time say-on-pay was implemented in the U.K. and the U.S. that executive compensation was too high, it is unlikely that advisory say-on-pay would curb the growth of executive pay—pay packages that comprise larger proportions of performance-based pay over fixed-pay are associated with larger overall levels of pay.[153] The raw numbers seem to corroborate that conjecture. In the U.S., the mean CEO pay of S&P 500 corporations was $16.7 million in 2022, an increase of five million dollars (or forty-three percent) from 2012.[154] In the U.K., for the period during which solely advisory say-on-pay was in force, average CEO pay of FTSE 100 companies was approximately £4.5 million in 2012, an increase of approximately £1.7 million (or sixty-one percent) from 2003.[155] Although the rate of growth of CEO pay may have slightly fallen in the post-advisory say-on-pay years in both the U.S.[156]

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[148] *See* Fisch et al., *supra* note 38, at 103, 128; Vicente Cuñat et al., *Say Pays! Shareholder Voice and Firm Performance*, 20 REV. FIN. 1799, 1802 (2016).

[149] In relation to the U.S., see Yonca Ertimur et al., *Shareholder Votes and Proxy Advisors: Evidence from Say On Pay*, 51 J. ACCT. RSCH. 951, 954, 984–85 (2013). In relation to the U.K., see Ferri & Maber, *supra* note 20, at 531.

[150] Betty (H.T.) Wu et al., *"Say on Pay" Regulations and Director Remuneration: Evidence from the UK in the Past Two Decades*, 20 J. CORP. L. STUD. 541, 560–61 (2020); Iliev & Vitanova, *supra* note 141, at 4515; Paul Hodgson, *Surprise Surprise: Say on Pay Appears to Be Working*, FORTUNE (July 8, 2015), http://fortune.com/2015/07/08/say-on-pay-ceos [https://perma.cc/3P6N-6WP5].

[151] Fisch et al., *supra* note 38, at 124.

[152] Wu et al., *supra* note 150, at 561.

[153] *Id.*; Iliev & Vitanova, *supra* note 141, at 4514 (noting it is likely that managers will insist on higher upsides associated with performance-related pay to compensate them for the uncertainty in receiving that pay); *see* Alex Edmans et al., *Executive Compensation: A Survey of Theory and Evidence, in* The HANDBOOK OF THE ECONOMICS OF CORPORATE GOVERNANCE 383, 423 (Benjamin E. Hermalin & Michael S. Weisback eds., 2017); Brian R. Cheffins, *Delaware and the Transformation of the Corporate Governance*, 40 DEL. J. CORP. L. 1, 14 (2015).

[154] *Highest-Paid CEOs*, *supra* note 26.

[155] DBEIS, *supra* note 11, at 17.

[156] Ira Kay et al., *Did Say-on-Pay Reduce or "Compress" CEO Pay?*, PAY GOVERNANCE (Mar. 9, 2017), https://www.paygovernance.com/viewpoints/did-say-on-pay-reduce-and-or-compress-ceo-pay [https://perma.cc/CK2B-5EWQ].

and the U.K.,[157] it is clear that pay continued to rise substantially after advisory say-on-pay was implemented in both jurisdictions.

U.K. studies conducted after the implementation of the two-vote regime, including the binding vote on the directors' remuneration policy report, intimate a different story. Studies have indicated that since the binding vote was introduced, negative votes against pay are more correlated with high levels of maximum executive pay opportunities under remuneration policies even when corporate performance is controlled for,[158] and that executive pay growth has slowed materially since the introduction of the binding vote.[159] Commentators have alluded to the binding vote as being the reason for the change in shareholder tack,[160] perhaps as a result of shareholders becoming more inclined to vote specifically against potentially high pay when they know their vote will have a direct effect and prevent the relevant compensation package coming into effect, or boards moderating executive compensation in the fear that shareholders may legally veto pay packages if proposed pay is too high. Again, the figures appear to substantiate the theory, with executive pay growth slowing in the U.K. since 2013 when the binding vote became effective. In 2013, mean FTSE 100 CEO pay was £4.92 million, and had declined to £4.44 million by 2022 (hitting a high of £5.62 million in 2017).[161] During that period, there were several years during which mean pay fell from the previous year,[162] and executive pay appears to have plateaued to an extent in the U.K.[163]

However, it should be noted that studies have found that post-binding vote, shareholders have been less concerned about the structure of executive pay (or the extent to which performance conditions are stretching),[164] and are often reliant upon the opinions of proxy advisors who analyze the governance arrangements of companies and provide voting recommendations.[165] Although the binding vote has arguably resulted in shareholders using their votes more prominently to moderate the levels of executive pay, it does not seem to have resulted generally in shareholders scrutinizing the detail of executive pay packages more thoroughly on a case-by-case basis. A group of U.K.-based asset managers are the exception to the rule, with one study finding that those U.K. asset managers were more likely to engage with boards more assiduously on executive pay than other shareholders,[166] but overseas shareholders, who hold the majority of U.K. equities,[167] only engaged on a cursory basis and were more likely to slavishly follow the recommendations of proxy advisors.[168] Resource

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[157] DBEIS, *supra* note 11, at 17.
[158] Gerner-Beuerle & Kirchmaier, *supra* note 142, at 20.
[159] Wu et al., *supra* note 150, at 560–62; Gerner-Beuerle & Kirchmaier, *supra* note 142, at 26.
[160] Wu et al., *supra* note 150, at 556–57; 568; Gerner-Beuerle & Kirchmaier, *supra* note 142, at 26.
[161] High Pay Centre, *supra* note 15, at 9. The decline in median pay was less stark, £3.97 million in 2013 to £3.91 million in 2022.
[162] *Id*. at 9. As compared to the previous year, mean FTSE 100 pay fell in 2016, 2018, 2019 and 2020. Note, however, that 2020 and 2021 will have been marked by the COVID-19 pandemic; not only will executive pay have been moderated as a result of a general malaise in the performance of the stock market during the initial phases of the pandemic, but compensation committees were under public pressure to reduce executive fixed wages and use their discretion to constrain bonuses in the face of broader economic woes at a time when many of those companies had accepted Government financial support.
[163] *Id*.
[164] Gerner-Beuerle & Kirchmaier, *supra* note 142, at 20.
[165] *Id*. at 27; Gomtsian, *supra* note 142, at 162.
[166] Gomtsian, *supra* note 142, at 153-154.
[167] Latest data shows that 57.7% of U.K. listed equities are held by overseas investors. OFF. NAT'L STAT., OWNERSHIP OF UK QUOTED SHARES: 2022 (2023).
[168] Gomtsian, *supra* note 142, at 153, 162.

constraints (particularly when executive compensation packages are complicated and onerous to examine in detail), an unfamiliarity with U.K. board members,[169] and a detachment from U.K. social concerns on executive compensation will have led to that lack of engagement by overseas investors.

In summary, it would appear that since the U.K. introduced a binding say-on-pay vote, shareholders have been more likely to vote against proposed executive compensation policies based purely upon the absolute levels of pay potentially available under the policies, with the performance of the relevant company having less influence over voting preferences compared to the previous, advisory-only, say-on-pay regime. Such a trend has coincided with a period during which the growth in executive compensation in the U.K. has broadly leveled off. At first blush, a reasonable conclusion would be that the introduction of the binding vote has had a consequential impact on U.K. executive compensation.

VI. REASONS TO DOUBT THE IMPACT OF THE BINDING VOTE ON EXECUTIVE COMPENSATION

Notwithstanding the circumstantial evidence above that the introduction of a binding vote in the U.K. may have substantively changed the country's executive compensation corporate governance environment, it may be hasty to conclude that the difference in executive compensation regulatory regimes is the causal factor in diverging executive pay trends in the U.S. and the U.K. It is possible that there are more fundamental differences between the jurisdictions beyond regulation. After all, the U.K. and the U.S. may themselves be outliers compared to other countries. For example, a cross-country analysis of say-on-pay examining thirty-eight countries, including the U.S. and the U.K., which was conducted prior to the U.K. introducing a binding vote, found that say-on-pay was associated with lower executive compensation overall,[170] whereas, as discussed above, U.S.-specific and U.K.-specific (pre-binding vote) studies did not reach the same conclusions.[171]

One challenge to the contention that the introduction of a binding vote is the key determinant in the U.K. having a tougher executive compensation environment than the U.S. comes from the U.S.'s flip-flop on tax deductibility requirements.[172] The 1993 shareholder voting requirement to ensure tax deductibility of performance-based pay constitutes in some respects a binding vote on executive compensation, but the effects of that provision are mixed. Some studies have shown that the tax rule did not reduce executive pay or executive pay growth and, although it motivated firms to increase the proportion of performance-based pay, the actual sensitivity of pay to firm performance declined.[173] On the other hand, another study examining the pay of CEOs appointed after the tax rule came

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[169] *Id*. at 164.

[170] Ricardo Correa & Ugur Lel, *Say on Pay Laws, Executive Compensation, Pay Slice, and Firm Valuation Around the World*, 122 J. FIN. ECON. 500, 502, 505–06, 515 (2016).

[171] *See supra* notes 144–47 and accompanying text.

[172] *See* 26 U.S.C. § 162(m) and Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13601, 131 Stat. 2054 (2017); *see also* text accompanying *supra* notes 50 and 56 (explaining the details of the tax deductibility rules and its subsequent withdrawal).

[173] Nancy L. Rose & Catherine Wolfram, *Regulating Executive Pay: Using the Tax Code to Influence Chief Executive Officer Compensation*, 20 J. LAB. ECON. 138, 159, 160, 162, 165 (2002); *see also* Christopher D. Jones, The Million-Dollar Question: Has Congress Missed the Mark with I.R.C. § 162(m) Compensation Deductions Caps? 1, 18, 20 (2012) (unpublished manuscript), http://dx.doi.org/10.2139/ssrn.2048810 [https://perma.cc/Y55L-252Q].

into force (as opposed to the pay of already-incumbent CEOs) found that the tax rule mitigated pay rises when new CEOs were appointed and that those new CEOs were granted pay packages with greater sensitivity to performance.[174] Notwithstanding the inconclusive evidence on the impact of the 1993 tax rule, it seems more conclusive that its withdrawal in 2018 had little to no effect on U.S. corporation pay practices, with no impact upon absolute executive pay levels or upon the proportion of compensation comprising performance-based pay, even though the lack of tax deductibility resulted in the same pay performance-linked packages costing firms more.[175] It would seem that the addition, albeit indirectly, of a binding shareholder say on executive pay had little effect on pay levels or structure in the U.S.

Caution should though be exercised in drawing analogies between the U.S. tax deductibility voting requirements and the more traditional U.K. binding say-on-pay vote, since, as discussed above, different dynamics apply to the vote on tax deductibility for performance-based pay.[176] However, there are further arguments that a U.K.-style binding vote would have little practical impact in the U.S. For example, when comparing a larger group of countries (prior to the U.K.'s binding vote being implemented), a study found that those jurisdictions with advisory votes were associated with lower pay and greater correlations between pay and performance than jurisdictions with binding votes.[177] Some have even suggested that shareholders would be more likely to exercise their rights in an advisory vote regime in this context than a binding vote regime, due to the draconian consequences, and impact on retention, of the corporation losing a binding vote, particularly if the shareholders otherwise approve of the executive team.[178]

Additionally, in some respects an advisory vote could already be considered a *de facto* binding vote. A study examining 2011 voting outcomes found that although U.S. corporations were reluctant to respond to nonbinding votes on general matters, in the context of executive remuneration, corporations would readily revise compensation arrangements in response to significant dissent (even below a majority) upon a say-on-pay vote.[179] The response rate for dissent levels of twenty to twenty-five percent was thirty-two percent, rising to 72.22% and 80.56% for dissent levels of thirty to thirty-five percent and thirty-five to forty percent respectively.[180] One hundred percent of firms revised compensation arrangements if they received dissent of more than forty-five percent.[181] As far as the U.K. is concerned, a 2013 study (examining the U.K.'s advisory say-on-pay period) found that U.K. companies suffering more than twenty percent dissent on advisory say-on-pay votes implemented seventy-five to eighty percent of shareholder requests to remove certain provisions.[182] Even though the votes were advisory, boards may have remained anxious that shareholders could use other powers and rights to remove directors,

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[174] Steven Balsam & David H. Ryan, *Limiting Executive Compensation: The Case of CEOs Hired After the Imposition of 162(m)*, 22 J. ACCT. AUDITING & FIN. 599, 611, 616 (2007).
[175] LeAnn Luna et al., *The Impact of TCJA on CEO Compensation*, 42 J. ACCT. PUB. POL'Y 1, 7–9 (2023).
[176] *See* text between *supra* notes 56–57.
[177] Correa & Lel, *supra* note 170, at 517–18 (reporting findings and caveating their findings by noting that it can be difficult to compare like with like when distinguishing jurisdictions purely on an advisory versus binding basis, due to other differences in the nature and contents of the laws).
[178] Conyon & Sadler, *supra* note 136, at 299.
[179] Ertimur et al., *supra* note 149, at 954.
[180] *Id*. at 985.
[181] *Id*.
[182] Ferri & Maber, *supra* note 20, at 531.

including compensation committee members, from the board.[183] Moreover, the publicity from significant say-on-pay dissent, albeit advisory, could result in indirect penalties and negative outcomes for those receiving the pay and those involved in the relevant decision making.[184] Famously, "outrage constraint," the constraining mechanism on high compensation engendered from concerns about reputational damage and public and market opprobrium,[185] could be exacerbated by reports of significant shareholder dissent. A U.K. study found that sixty-seven percent of directors would rather reduce their pay than suffer the controversy potentially generated by significantly higher-than-average pay levels.[186] Similarly, in the U.S., it was found that directors of corporations that received more than thirty percent dissent on say-on-pay votes saw a diminishment in outside-director board positions at other companies.[187] Clearly advisory votes have more effect than a token slap on the wrist, and absent a change in shareholder approach, the imposition of a binding vote may not be quite the revolution in corporate governance approach that it first appears.

Another aspect that bears consideration is the role of proxy advisors. For instance, the stark increase in U.S. corporations responding to shareholder dissent on advisory say-on-pay votes, when that dissent increases from twenty percent to thirty percent,[188] can perhaps be explained by the fact that, at the time of the relevant study, the guidelines of one of the preeminent proxy advisors, Institutional Shareholder Services (ISS), averred that if a firm received over thirty percent dissent on a say-on-pay vote, and the corporation did not make appropriate modifications to compensation packages, it would recommend a negative vote on say-on-pay the following year and withholding of support for compensation committee members.[189] Moreover, it seems that proxy advisors have a meaningful influence on the outcome of say-on-pay votes. In the U.S., ISS recommendations have been found to have a significant effect on the levels of shareholder dissent on executive compensation.[190] In the U.K., not only do shareholders, particularly overseas shareholders, lean heavily on the advice of proxy advisors,[191] but directors also express concerns about the role of proxy advisors, with a survey finding that seventy-one percent of U.K. company directors believed that proxy advisors had more say over executive compensation than they should.[192] A U.K. study also found that for investors following proxy advice, in recent years, the quantum of pay regularly features as the second most important factor influencing voting (with the

[183] The loss of say-on-pay votes has often subsequently resulted in greater shareholder dissent with respect to the annual director re-elections recommended by Provision 18 of the U.K. Corporate Governance Code. *See* Sullivan, *supra* note 140. The loss of advisory say-on-pay votes in the U.K. has also been known to pressure CEOs and chairs of remuneration committees into resigning. *See, e.g.*, Kate Burgess, *Shake-Up at Shell After Pay Backlash*, FIN. TIMES (Sept. 11, 2009), https://on.ft.com/4eKavC4 [https://perma.cc/U5FK-EHKZ]; Alastair Gray, *Moss Quits After Pay Revolt at Aviva*, FIN. TIMES (May 8, 2012), https://on.ft.com/3xK3VuD [https://perma.cc/PH2Z-TCZU]; Josh Halliday & Lisa O'Connell, *Trinity Mirror Chief Executive Sly Bailey Steps Down*, GUARDIAN (May 3, 2012, 12:47 PM), https://www.theguardian.com/media/2012/may/03/trinity-mirror-sly-bailey-steps-down [https://perma.cc/3E94-LRRE].

[184] Ferri & Maber, *supra* note 20, at 531.

[185] Bebchuk et al., *supra* note 19, at 786.

[186] Alex Edmans et al., *CEO Compensation: Evidence from the Field*, 150 J. FIN. ECON. 1, 6 (2023).

[187] Barry, *supra* note 138, at 1, 4, 12.

[188] Ertimur et al., *supra* note 149, at 954; *see supra* note 180 and accompanying text.

[189] Ertimur et al., *supra* note 149, at 985.

[190] Fisch et al., *supra* note 38, at 118.

[191] Gerner-Beuerle & Kirchmaier, *supra* note 142, at 27; Gomtsian, *supra* note 142, at 153, 162; *see also supra* notes 167 & 168 and accompanying text.

[192] Edmans et al., *supra* note 186, at 7.

structure of pay being the most important).[193] Reverting to the possible impact of the U.K.'s binding vote on pay, the same study found that since 2013 (when the binding vote was introduced), the importance of quantum of pay has largely increased for investors following proxy advice (with the importance of adequate disclosure gradually becoming less important for those voters).[194] One conclusion could be that the binding vote has led to proxy advisors, and those who follow their recommendations, having more confidence to vote against executive compensation packages purely on the basis of high pay because such votes will have real and direct consequences. Such a conclusion would also explain why those proxy advisors do not take the same approach in the U.S. where binding say-on-pay is not in force and ISS recommendations, for example, seem to instead be substantially driven by company performance.[195] However, when scrutinizing the voting of investors in U.K. companies that do not follow proxy advisor recommendations, the picture becomes a little more fuzzy.

It is mainly overseas investors who follow proxy advisor guidance on executive compensation in the U.K.[196] A recurrent group of U.K.-based investors conduct independent in-house scrutiny of investee company executive pay packages on a case-by-case basis with their voting outcomes regularly diverging from proxy advice.[197] Although quantum of pay is, as with investors following proxy guidelines, currently still the second-most important factor influencing the voting of those U.K.-based investors, unlike investors following proxy advisor guidelines, the importance of quantum of pay has remained fairly static for those U.K. investors since 2013 (when the binding vote was introduced).[198] Furthermore, the three largest U.S. fund managers, Blackrock, Vanguard and State Street, also appear to vote on U.K. say-on-pay independently from proxy advice, and for those "big three" investors the absolute level of pay is almost completely irrelevant in their voting decisions.[199] Accordingly, the findings of those studies that show that voting outcomes on say-on-pay after the introduction of the binding vote are correlated with the absolute levels of executive pay,[200] rather than with company performance when only an advisory vote was in force,[201] are most probably a result of the change in approach of overseas investors that follow proxy advisor guidelines (with overseas investors owning a majority of U.K.-listed equities).[202] It seems odd that the introduction of a binding vote should have such a major impact on the U.K. voting outcomes of overseas investors that follow proxy advisor recommendations, while not changing the U.K. voting predilections of U.K.-based investors and large U.S.-based investors. Since the binding vote has not resulted in all types of investors taking a harsher standpoint on the quantum of executive pay, it is possible that proxy advisor guidelines are influenced by specific factors that do not in the same way induce the voting of U.K.-based investors that carefully

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[193] Gomtsian, *supra* note 142, at 155-156.
[194] *Id*. at 156.
[195] Fisch et al., *supra* note 38, at 101–02, 124.
[196] Gomtsian, *supra* note 142, at 153; Reddy, *supra* note 110, at 700 (noting that overseas investors are also more likely to follow proxy advisor recommendations on other governance issues).
[197] Gomtsian, *supra* note 142, at 153.
[198] *Id*. at 156.
[199] *Id*. at 153, 162.
[200] *See supra* notes 158–159 and accompanying text.
[201] *See supra* note 144 and accompanying text.
[202] OFF. NAT'L STAT., *supra* note 167. Although "overseas investors" would include the big three U.S. investors who do not follow proxy guidelines on executive remuneration, even ignoring the big three, the remaining overseas investors would clearly form a large and influential block.

examine executive pay packages on a company-by-company basis or large U.S.-based investors.

A possible suspect when attempting to identify those factors is governance norms. Outside of executive compensation specifically, it has been noted that proxy advisors have a tendency to adhere to governance norms in a jurisdiction (including, in the case of the U.K., recommendations under the U.K. Corporate Governance Code) rather than carefully examining companies on a company-by-company basis and are inflexible in their recommendations even when individual companies have justifiable rationales for deviating from those governance norms.[203] The same has been seen to be the case in the forum of executive compensation.[204] With respect to governance generally, proxy advisors have been known to offer different advice in different jurisdictions based upon local governance norms.[205] It is difficult, though, to identify differing governance norms, *per se*, in the U.K. as compared to the U.S. that would lead to a greater suppression of executive pay in the U.K. in recent years. To be sure, since 2013, initiatives have been launched to encourage greater sensitivity to the gap between executive compensation and general employee pay, including the U.K. Corporate Governance Code introducing recommendations that compensation committees consider rank-and-file employee pay when setting executive compensation, [206] disclosure requirements being enhanced to require comparisons between changes in executive and rank-and-file employee pay and summaries of employee consultations on pay,[207] and the publishing of the ratio of CEO pay to median employee pay becoming mandatory for large companies.[208] However, the evolution of similar governance norms is also evidenced in the U.S. where the disclosure of CEO-to-employee pay ratios is likewise required.[209]

A more likely culprit is that cultural factors and market and social norms may be influencing the advice of proxy advisors, or that executive compensation in the U.K. is more sensitive to "outrage constraint"[210] than in the U.S. Some evidence can be discerned from the finding that ISS recommendations on CEO pay can vary depending upon whether the relevant CEO has been hired from the U.S. or if the U.K.-listed company has its principal operations in the U.S.[211] A U.S. connection seems to give the CEO more leeway on quantum of pay, and it has been noted that proxy advisers opposing compensation levels in the U.K. will often support higher remuneration packages in other jurisdictions.[212] Differing cultural norms would also explain the reticence of the big three U.S.-based investors to prioritize the quantum of executive compensation when voting on pay in U.K. companies.[213] High executive pay is not a key consideration in the

[203] Reddy, *supra* note 110, at 699–700; Helen Thomas, *London's Next Reform? Doing Away with Shareholder Rebellions*, FIN. TIMES, (Nov. 27, 2023), https://on.ft.com/3L4JZ9a [https://perma.cc/K8AL-KNHG].
[204] Gomtsian, *supra* note 142, at 162.
[205] Reddy, *supra* note 110, at 723; Thomas, *supra* note 203.
[206] U.K. CORPORATE GOVERNANCE CODE, *supra* note 111, Provision 32.
[207] U.K. Remuneration Regulations 2013, Schedule 8, §§ 38–40, 19–20; *see also supra* notes 95 & 98 and accompanying text.
[208] The Companies (Miscellaneous Reporting) Regulations 2018, SI 2018/860, § 17 (U.K.).
[209] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 953(b), 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C.).
[210] See *supra* note 185, and accompanying text.
[211] Gomtsian, *supra* note 142, at 157.
[212] Hoggett, *supra* note 24.
[213] Gomtsian, *supra* note 142, at 153, 162; *see also supra* note 199 and accompanying text.

determination of their voting in the U.S., and they continue with the same approach when voting in the U.K.

A perception exists that the U.S. has a prevailing societal and cultural environment more accepting of higher pay,[214] which may well have become reinforced in recent years. Indeed, a 2022 Chicago Booth survey of economists found that respondents were much less likely to agree that U.S. CEOs were paid too much as compared to ten years previously.[215] In contrast, with a faltering U.K. economy (at least compared to the U.S.),[216] attitudes to executive pay may have hardened since the binding vote was introduced in 2013, and the U.K.'s 2022–2024 cost-of-living crisis has seemingly bolstered arguments against high executive pay.[217] Furthermore, reports have suggested that the U.K. media and U.K. politicians are more hostile to high executive pay than their counterparts in the U.S.,[218] and that there is less likelihood that success and commensurately high remuneration will be met by outcry in the U.S.[219] For example, it has been noted that although the U.S.'s median CEO-to-median rank-and-file employee pay ratio is much greater than that of the U.K.,[220] it rarely receives the press attention evident in the U.K.[221] If culture and societal attitudes to executive compensation are relevant factors, the presence or absence of a binding vote will not be a principal determinant of executive pay levels and the approach to pay in the U.S. and U.K. would likely remain the same irrespective of which of the U.S. or U.K. corporate governance regimes were applicable in each of those jurisdictions.

Finally, differences in executive pay levels in the U.S. and the U.K. may be derived from factors inherent in the structure of the relevant pay packages. For example, if the legacy of advisory say-on-pay in both the U.S. and the U.K. was that performance-based pay became a larger part of executive compensation,[222] and if the relevant performance criteria are not sufficiently closely tied to individual firm performance but instead more broadly track the performance of the market as a whole, U.S. and U.K. executive pay levels will vary significantly with market trends. It is widely

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[214] Cheffins & Reddy, *Listing Rule Reform*, *supra* note 6, at 182; Thomas & Van der Elst, *supra* note 136, at 720–21.

[215] *See Is Executive Pay Excessively High?* CHI. BOOTH REVIEW (Dec. 2, 2022), https://www.chicagobooth.edu/review/is-executive-pay-excessively-high#:~:text="While%20there%20are%20extremes%20in,votes%2C%20media%2C%20etc." [https://perma.cc/4F4N-8X6N].

[216] *G20*, WORLD ECON. (June 2024), https://www.worldeconomics.com/Regions/G20/ [https://perma.cc/6D58-ZZQ4] (showing that the compound annual growth rate in gross domestic product (GDP) for the U.K. between 2013 and 2023 was 1.4% as compared to 2.4% for the U.S., and the U.K.'s share of global GDP growth over the same period was only 0.9% compared to 9.7% for the U.S.); Delphine Strauss, *UK's Growth Prospects Worst Among Top Economies, Warns OECD*, FIN. TIMES (Nov. 22, 2022), https://on.ft.com/3xy6Jv1 [https://perma.cc/L7CH-QLYR] (stating that predictions also suggest that the U.K. economy will continue to struggle in the near future compared to other nations within the G20 group consisting of the 20 largest global economies); *see also* Richard Partington, *Average UK Person Has Lost Out on £10,200 Since 2010, Thinktank Says*, GUARDIAN (Jan. 22, 2024), https://www.theguardian.com/business/2024/jan/22/average-uk-person-10200-worse-off-since-2010-thinktank-says?CMP=share_btn_url [https://perma.cc/9SWC-7RWF].

[217] *See, e.g.*, *Soaring CEO Pay Shows "Obscene Levels of Pay Inequality" Say TUC*, INST. EMP. RTS. (Jan. 4, 2024), https://www.ier.org.uk/news/soaring-ceo-pay-shows-obscene-levels-of-pay-inequality-say-tuc/ [https://perma.cc/HUC9-ML6Z]; *Executive Pay Rises Amid Cost-of-Living Crisis*, INST. CHARTERED ACCTS. IN ENG. & WALES (Aug. 31, 2023), https://www.icaew.com/insights/viewpoints-on-the-news/2023/aug-2023/executive-pay-rises-amid-costofliving-crisis [https://perma.cc/DRU2-JW5X].

[218] SKADDEN, *supra* note 30.

[219] Thomas & Edgecliffe-Johnson, *supra* note 23.

[220] *See supra* notes 12–15 and accompanying text.

[221] SKADDEN, *supra* note 30.

[222] See *supra* note 150 and accompanying text.

accepted that the performance of the U.S. exchanges has vastly outstripped that of the London Stock Exchange in recent years. Between 2000 and 2021, the S&P 500 rose 242% as compared to 12.7% for the FTSE 100.[223] More recently, between 2018 and 2022, median market capitalization and revenue for S&P 500 companies rose fifty-two percent and forty percent, respectively, while the equivalent figures for the FTSE 100 were zero and twenty percent.[224] Although a 2013 U.K. study found that compensation committees of FTSE 350 companies had made progress in tying pay to the relative performance of peer comparators,[225] companies in both the U.K. and the U.S. still persist with absolute metrics alongside relative metrics,[226] and to the extent that compensation is constituted by equity awards, the recorded value of those awards in dollar terms will be propelled by the price of the underlying shares (even if those awards are granted based upon the achievement of relative metrics) and, therefore, by the performance of the economy and the stock exchange generally.[227] Accordingly, empirical evidence has suggested that stock market performance as a whole does impact executive pay—a study found that between 2018 and 2022, the disparity in executive pay between the U.S. and the U.K. widened, with median S&P 500 CEO pay increasing twenty-three percent and median FTSE 100 CEO pay only 1.1%, but when the study controlled for market capitalization and revenue growth, the disparity between the two jurisdictions since 2019 actually decreased.[228] It is therefore quite possible that the say-on-pay advisory vote entrenched the trend for stock market and economic performance to substantively affect executive compensation in both the U.S. and the U.K.

The introduction of a binding vote on executive compensation in the U.K. may have coincided with a slowing in the growth of U.K. executive pay to an extent not observed in the U.S., but pinning the cause of that slowing growth on the binding vote is challenging. It is equivocal that the binding vote is a revelation from a governance perspective, with the erstwhile advisory-only system itself having quasi-binding qualities. Additionally, differing and shifting attitudes toward high executive compensation in the U.S. and U.K., and variations in market performance between U.S. exchanges and the London Stock Exchange, may also underpin divergences in U.S. and U.K. executive pay. U.S. and U.K. executive compensation regulations may differ, but it is by no means certain

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[223] Cheffins & Reddy, *Listing Rule Reform*, *supra* note 6, at 180.

[224] Subodh Mishra, *U.S. CEO Compensation Advantage Grows vs. U.K. Peers*, HARV. L. SCH. F. CORP. GOVERNANCE (July 17, 2023), https://corpgov.law.harvard.edu/2023/07/17/u-s-ceo-compensation-advantage-grows-vs-u-k-peers/ [https://perma.cc/6LYG-CPBF].

[225] Mark Farmer & George Alexandrou, *CEO Compensation and Relative Company Performance Evaluation: UK Evidence*, 45 COMP. & BENEFITS REV. 88, 92 (2013). The U.K. Corporate Governance Code also asserts that executive compensation should take into account not only company performance but *also* individual performance. U.K. CORPORATE GOVERNANCE CODE, *supra* note 111, Principle R.

[226] Joseph Kieffer, *Executive Long-Term Incentive Plans*, HARV. L. SCH. F. CORP. GOVERNANCE (Apr. 11, 2019), https://corpgov.law.harvard.edu/2019/04/11/executive-long-term-incentive-plans/ [https://perma.cc/2N96-VT3G]; EQUILAR, PERFORMANCE METRICS IN ANNUAL INCENTIVE PLANS (2014) [Copy deposited with the editors to maintain on file]; Deloitte, *FTSE 100*, *supra* note 137 (together showing that in both the U.S. and the U.K., financial performance metrics tied to annual bonus plans often include measures such as profits/operating income, revenue, earnings and earnings per share which are triggered if the corporation surpasses absolute target thresholds; and further showing that although long-term incentive plans often include more relative performance metrics that compare the corporation's performance to peers (such as relative total shareholder return), more absolute metrics such as earnings per share also persist).

[227] *See, e.g.*, SKADDEN, *supra* note 30.

[228] Mishra, *supra* note 224.

that those contrasting features are responsible for the higher pay granted to executives in U.S. publicly traded companies.

CONCLUSION

Overly high executive compensation has been an accusation levied at executives of both U.S. and U.K. publicly traded companies over the years, and, indeed, compared to rank-and-file worker pay, executive compensation has grown at a startling rate. U.S. and U.K. policymakers have noted both the rampantly rising levels of executive remuneration, and the potentially vital role that executive compensation structure could play in reducing managerial agency costs by aligning the pay of executives with the financial performance of their companies. Accordingly, executive compensation regulations have developed in both jurisdictions that implement mechanisms that restrict a board's ability to formulate executive compensation packages without scrutiny. Many similarities exist between the U.S. and U.K. executive compensation regulatory environments, but there are also differences.

On paper, the U.K. has a more stringent executive pay governance regime than the U.S. The U.S. only mandates an advisory shareholders' say-on-pay at least every three years, whereas the U.K. requires a binding shareholders' vote at least every three years on how executives will be paid in the future and an annual advisory vote on what executives have been paid in the previous fiscal year. Advisory votes in both jurisdictions seemed to precipitate a greater focus on performance-based remuneration, but in terms of reducing the levels of executive pay, shareholders generally only targeted pay at companies that had performed poorly. However, the binding vote in the U.K. has been accompanied by a moderation of executive pay growth in absolute terms.

U.S. corporations now see far greater levels of executive compensation than U.K. companies. In the U.K., that disparity has raised concerns that companies may be deterred from listing in the U.K., instead preferring to remain in the private realm within which say-on-pay, and many disclosure requirements are not in effect, or seeking a flotation on an exchange abroad, such as the U.S., where higher levels of executive pay could be accessible. In relation to the latter, the threat to the U.K. economy is twofold, because U.K.-incorporated companies cannot avoid say-on-pay regulations by listing on the NYSE or Nasdaq and can only evade the rules if they reincorporate in an overseas jurisdiction. Therefore, not only could the rules exile U.K. businesses to the U.S. markets, but they could also lead to those businesses reincorporating and potentially moving managerial operations to the U.S. While the debate in the U.K. has traditionally been focused on the means of constraining executive pay, the narrative has shifted in some quarters to whether executive compensation regulations in the U.K. are *too* strict.

Notwithstanding the evident differences in U.S. and U.K. executive pay governance, it is challenging to come to firm conclusions when assessing the impact of the U.K.'s binding say-on-pay vote. Causation is elusive to establish, and, therefore, it is not axiomatic that the binding vote has resulted in lower executive pay in the U.K., and, equally, that the introduction of a binding vote in the U.S. would result in a decline in executive pay levels. It may be that cultural sensitivities to high pay in the U.K. led to the halt in rampantly rising executive pay, further accentuated by proxy advisors taking a stricter approach to high executive pay in the U.K., as compared to the U.S., in line with social norms. For sure, the binding vote could have

indirectly impacted pay by its very introduction, further bringing societal concerns about executive pay to the fore, but U.K. executive pay may have slowed with or without the binding vote. Moreover, lower levels of executive pay in the U.K. than the U.S. may simply be a manifestation of the greater success of the U.S. markets. With pay being highly geared toward performance-oriented factors, poorly designed performance targets could result in pay being closely tied to the performance of the market as a whole. The preponderance of stock awards in executive compensation packages could also drive greater pay in the U.S. where a stronger U.S. market inevitably results in the value of those stock awards increasing prior to vesting to greater degree than is the case in the U.K. Either way, the reasons for executive pay being lower in the U.K. than the U.S. are likely to be multifaceted.

It is not intended that this Article opine upon the drawbacks, morality or merits of high executive compensation, nor upon whether a relative deficiency in executive pay levels in one jurisdiction could compel companies and executives to list in, or relocate to, other countries. However, from a regulatory perspective, if U.K. policymakers are seeking to level the executive compensation playing field between the U.K. and the U.S., they should not view relaxing existing executive compensation regulations as a silver bullet. It is unlikely that removing the U.K.'s binding say-on-pay vote would have a material impact on executive pay and, therefore, on decisions of companies and executives to inhabit the London Stock Exchange. Bringing U.K. executive pay closer to the U.S. would likely require a change in culture and attitude toward executive pay in the U.K., and also policies that attract to the London Stock Exchange the types of growth companies that have driven the success of the markets in the U.S. rather than the old economy "value" companies that currently dominate the exchange and are favored for their reliable annual dividends.[229] Similarly, in the U.S., if policymakers deem it necessary to constrain executive pay levels, introducing a binding vote on pay is unlikely to be the answer. Again, only a change in public and investor attitude to high pay levels will lead to a material moderation of executive pay. It is easy to get in a bind over regulations and their impact on the markets, but, in the case of executive compensation, it pays to look at the bigger picture before attributing sole responsibility for the divergence in pay levels in the two jurisdictions to differences between U.S. and U.K. regulatory ambits.

[229] Cheffins & Reddy, *Murder*, *supra* note 5, at 222–25.