SELECTED CHALLENGES IN THE SOUTH AFRICAN ANTI-MARKET ABUSE ENFORCEMENT FRAMEWORK IN RELATION TO SOME ASPECTS OF THE FINANCIAL MARKETS*

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SUMMARY

The objective of this article is to provide an overview analysis of the challenges and/or flaws in the current anti-market abuse-enforcement framework in relation to some selected specific aspects of the financial markets in South Africa. This is primarily done to increase awareness on the part of the policy makers and other relevant stakeholders and to innovate possible solutions to such flaws in order to enhance the enforcement of the market-abuse prohibition in South Africa. Moreover, this is done to investigate whether the current South African anti-market abuse-enforcement framework is robust enough to deal with some market abuse-related challenges that manifested during the recent global financial crisis. In relation to this, the article seeks to explore this and other enforcement-related concerns by, first, taking a closer look at the adequacy of the South African anti-market abuse-enforcement framework with regard to remuneration structures and crisis management. Secondly, the adequacy of the South African anti-market abuse-enforcement framework with regard to management of risk will be discussed. Lastly, the adequacy of the aforementioned enforcement framework will be examined in relation to accounting standards.

1 INTRODUCTION

It is submitted that there is no comprehensive and satisfactory definition of "market abuse" that exists to date.[1] Be that as it may, for the purposes of this article "market abuse" is used as a generic term referring to insider trading

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* This article was influenced in part, by the doctoral thesis of Chitimira, entitled *A Comparative Analysis of the Enforcement of Market Abuse Provisions* (2012) LLD Thesis, Nelson Mandela Metropolitan University (see 125–187). In this regard, I wish to acknowledge the expert input of Professor Lawack.

[1] See further Fischel and Ross "Should the Law Prohibit 'Market Manipulation' in Financial Markets" 1991 *Harvard LR* 503 506; and Avgouleas *The Mechanics and Regulation of Market Abuse: A legal and Economic Analysis* (2005) 104.

and market manipulation.[2] In South Africa, the anti–market abuse laws were introduced in the late 1990s but nonetheless the enforcement of such laws to combat market abuse activities has remained problematic to date.[3] Consequently, this article seeks to reveal that the enforcement of market-abuse laws has been and still is, problematic in South Africa.[4] In this regard,

2 These practices are outlawed in South Africa and several other countries globally in a bid to, *inter alia*, avoid their potential negative effects such as low investor confidence and poor market integrity.

3 Jooste "A Critique of the Insider Trading Provisions of the 2004 Securities Services Act" 2006 *SALJ* 437 441–460; Osode "The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?" 2000 *Journal of African Law* 239; Van Deventer "New Watchdog for Insider Trading" 1999 *FSB Bulletin* 2 3; the King Task Group into Insider Trading Legislation *Minority Report on Insider Trading* 1997 paragraph 3.4 as summarised in Beuthin and Luiz *Beuthin's Basic Company Law* (2000) 235–238; the Van Wyk de Vries Commission of Inquiry into the Companies Act of 1973; Bhana "Take-Over Announcements and Insider Trading Activity on the Johannesburg Stock Exchange" 1987 *South African Journal of Business Management* 198–208; Botha "Control of Insider Trading in South Africa: A Comparative Analysis" 1991 *SA Merc LJ* 1–18; Botha "Increased Maximum Fine for Insider Trading: A Realistic and Effective Deterrent?" 1990 *SALJ* 504–508; and also see generally Chitimira *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* (LLM-dissertation, University of Fort Hare, 2008) 41–72. See related comments by Van Deventer "Anti-Market Abuse Legislation in South Africa" (10 June 2008) 1–5 http://www.fsb.co.za/public/marketabuse/FSBReport.pdf (accessed 2013-05-05); and see further Myburgh and Davis "The Impact of South Africa's Insider Trading Regime: A Report for the Financial Services Board" (25 March 2004) 8–33 http://www.genesis-analytics.com/public/FSBReport.pdf (accessed 2013-02-09). Notwithstanding the fact that this Myburgh and Davis report was published in 2004 before the Securities Services Act 36 of 2004, hereinafter "the Securities Services Act", came into effect and the fact that it was somewhat influenced by the opinions of the interviewees, it shall be referred to in this article where necessary, not as the only basis or evidence of the existence of market-abuse activity in the South African financial markets but as a pointer on how market abuse laws were enforced in South Africa prior to the enactment of the Financial Markets Act 19 of 2012, hereinafter "the Financial Markets Act", which came into effect on 3 June 2013. Notably, the Securities Services Act has now been repealed and will be referred to only where necessary for historically comparative purposes. Moreover, the Myburgh and Davis report and a few other selected and available sources will be referred to throughout this article because there are currently very few new sources on the enforcement of the market-abuse prohibition in South Africa, especially under the Financial Markets Act. Also see Bhattacharya and Daouk "The World Price of Insider Trading" 2002 *Journal of Finance* 75–108; and Lyon and Du Plessis *The Law of Insider Trading in Australia* (2005) 159–168 for related comparative analysis in other countries.

4 See further related comments by Van Deventer (10 June 2008) 1–5 http://www.fsb.co.za/public/marketabuse/FSBReport.pdf (accessed 2013-05-05); and Myburgh and Davis (25 March 2004) 8–33 http://www.genesis-analytics.com/public/FSBReport.pdf (accessed 2013-02-09). Luiz "Prohibition Against Trading on Inside Information–The Saga Continues" 1990 *SA Merc LJ* 328–332; Luiz "Insider Trading Regulation – If at First You Don't Succeed…" 1999 *SA Merc LJ* 136–151; Jooste "Insider Trading: A New Clamp-Down" 1991 *BML* 248–250; Jooste "Insider Dealing in South Africa–The Criminal Aspects" 1990 *De Ratione* 21–28; Henning and Du Toit "The Regulation of False Trading, Market Manipulation and Insider Trading" 2000 *Journal for Juridical Science* 155 155-165; Osode "The Regulation of Insider Trading in South Africa: A Public Choice Perspective" 1999 *African Journal of International and Comparative Law* 688–708; Van der Lingen "Tougher Legislation to Combat Insider Trading" 1997 *FSB Bulletin* 10; Van Zyl "Aspekte van Beleggersbeskerming in die Suid-Afrikaanse Reg" 1992 *Transactions of the Center for Business Law* 231-357; Chanetsa "Insider Trading is Notoriously Hard to Prosecute" *Business Report* 26 April 2004; *Pretorius v Natal South Sea Investment Trust* 1965 (3) SA 410 (W), were the courts failed to convict the suspected insider-trading offenders. Also see Bhattacharya and Daouk 2002 *Journal of Finance* 75–108; Lyon and Du Plessis *The Law of Insider Trading in Australia* 159–168 for

the article provides an overview analysis of the challenges and/or flaws in the current anti-market abuse-enforcement framework in relation to some selected specific aspects of the financial markets in South Africa.[5] This is primarily done to increase awareness on the part of the policy makers and other relevant stakeholders and to innovate possible solutions to such flaws in order to enhance the enforcement of the market-abuse prohibition in South Africa. Moreover, this is done to investigate whether the current South African anti-market abuse enforcement framework is robust enough to deal with some market abuse-related challenges that manifested during the recent global financial crisis. In relation to this, the article seeks to explore this and other enforcement-related concerns by, first, taking a closer look at the adequacy of the South African anti-market abuse-enforcement framework with regard to remuneration structures and crisis management. Secondly, the adequacy of the South African anti-market abuse-enforcement framework with regard to management of risk will be discussed. Lastly, the adequacy of the aforementioned enforcement framework will be examined in relation to accounting standards.

2 GAPS AND FLAWS IN THE CURRENT ANTI-MARKET ABUSE-ENFORCEMENT FRAMEWORK IN RELATION TO SELECTED ASPECTS OF THE FINANCIAL MARKETS

The enforcement of the market-abuse prohibition in relation to some specific aspects of the South African financial markets as well as selected market-abuse challenges that manifested during the recent global financial crisis[6]

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further related comparative analysis on the enforcement of market-abuse laws in other jurisdictions.

[5] See the discussion that will ensue later under paragraph 2 below.

[6] The global financial crisis began in the subprime mortgage market of the United States of America (the US) approximately during the period between 2005 and 2006. Notably, increased loan incentives like the provision of relatively easy initial loan terms caused many borrowers to mistakenly believe that they would be able to repay their loans quickly at more favourable terms. Nonetheless, high default rates on subprime and adjustable rate mortgages increased sharply thereafter. Subprime mortgages were a type of loan which gave access to housing to people who did not have the required guarantees to be eligible for ordinary loans and as such, they were high yield mortgages which attracted enormous risks of defaults on the part of the borrowers. The US's subprime mortgages were further classified into securitisation issues, known as mortgage-backed securities which were later sold on the financial markets. In this regard, securitisation refers to a financial operation which enables the sharing of financial risks. Surplus inventory houses and increased interest rates led to a relative drop in the housing prices in the US in 2006 to 2007, and refinancing became a tall order. Defaults and foreclosures soared from around 11% at the beginning of 2006 to over 20% in 2008. About US$8 trillion losses were recorded by owners of stock in the US corporations while losses in other countries were averagely estimated at about 23% and 40%. The US subprime-owned houses were now lower than their initial mortgage loan by September 2010. In a nutshell, the 2007 to 2009 global financial crisis was *inter alia* triggered in part by the inability of the borrowers to repay their subprime mortgages primarily because of their alleged overextending; the resetting of higher interest rates on adjustable rate mortgages; predatory lending and speculation; bad monetary and housing policies; flawed government regulation as well as financial products that distributed and/or concealed the risk of high mortgage defaults. See Swart *The Legal Framework Pertaining to Selected Segments of the Financial Market* (LLM Dissertation, Nelson

will be briefly discussed below to investigate whether the current South African anti-market abuse-enforcement framework[7] is robust enough to deal with such aspects and challenges across all the South African financial markets.

2 1 Remuneration structures and crisis management

Crisis management includes the development of effective and adequate methods and framework to regulate the rescuing of financial institutions facing bankruptcy and other economic-related problems without necessarily disrupting the financial markets or the economy of the country concerned. On the other hand, remuneration structures include long-term and short-term measures employed by financial institutions to compensate their employees and other relevant stakeholders without triggering economic risks.[8] During the global financial crisis, various gaps were highlighted in the remuneration and crisis-management structures involving several financial institutions.[9]

2 1 1 Overview of the international best practice

In October 2010, the European Commission (the EC)[10] published its crisis-management recommendations dealing with preparatory and preventative measures; provision of early intervention powers to supervisors when problems are detected and the adoption of harmonised rules relating to the resolution of a bank.[11] More specifically, the EC recommended the adoption of common rules for preventative measures such as recovery and resolution plans for banks and allowing supervisors to request affected banks to change their business operations and corporate structure. The EC further recommended that supervisors should intervene once they are certain that a bank is likely to fail to meet its capital requirements in order to prohibit the payment of dividends as well as to force the affected bank to stop some

Mandela Metropolitan University, 2011) 98; Paulo "Europe and the Global Financial Crisis Explained in 10 Sheets: Taking Stock of the EU's Policy Response" April 2011 *Fondation Robert Schuman* 3 http://www.robert-schuman.eu/frs-fichecrisefi-qe200-en.pdf (accessed 2013-07-04); also see related comments by Le Vine and Malgadi "Mortgage Crises, Derivatives and Economic Chaos" 2009 http://asbbs.org/files/2009/PDF/M/MalgadiA2.pdf (accessed 2013-07-17); and Anonymous "Reason for Global Recession: In Plain Simple English" http://www.theindianblogger.com/problems/reasons-for-global-recession-in-plain-simple-english (accessed 2013-07-07).

7 This refers to the anti-market abuse-enforcement framework as provided in the Financial Markets Act.

8 Bernanke "Financial Regulation and Supervision after the Crisis: The Role of the Federal Reserve" http://www.federalreserve.gov/newsevents/speech/bernanke20091023a.htm (accessed 2013-08-18).

9 See the Secretariat of the European Banking Committee "Financial Turbulence: Following Up the October 2007 Ecofin" http://ec.europa.eu/internal_market/bank/docs/ebc/ebc 170308_en.pdf (accessed 2011-07-14); also see the International Organisation of Securities Commissions (the IOSCO) *Objectives and Principles* June 2010 11 http://www.iosco.org/library/pbdocs/pdf/IOSCOPD329.pdf (accessed 2013-07-07).

10 See the EC *Communication on an EU Framework or Crisis Management in the Financial Sector* 20 October 2010 *Final Com* 579.

11 Verhelst "Addressing the Financial Crisis: The EU's Incomplete Regulatory Response" 2010 *Egmont Institute for International Relations Paper 39* 15–17 http://www.egmontinstitute.be.ep39.pdf (accessed 2013-07-08).

specific business activities.[12] Apart from the harmonising rules which only apply when a financial institution in question has no prospect of recovery, the EC proposed the improvement of cross-border cooperation in the preparation and management of a bank crisis.[13] If adopted, this proposal could prevent cross-border market-abuse practices which might occur as a result of flawed crisis-management structures in the European Union (the EU). Accordingly, the EU heads of states and government further proposed the establishment of a new permanent crisis-management mechanism which was reported to be more effective in 2013.[14] The IOSCO recommended the establishment of appropriate measures to address any risks that may arise in the financial markets in order to protect investors.[15] In addition, the International Monetary Fund (the IMF) has, on behalf of the Group of Twenty (the G20), published its proposal document, called *Crisis Management and Resolution for a European Banking System* which *inter alia* provides a cross-border regulatory and enforcement framework for insolvent financial institutions.[16] This document recommended the development of an adequate crisis-management regulatory framework that deals with failing banks and other cross-border financial institutions facing insolvency.[17] It also stipulated that bail-out funds for banks and other institutions facing bankruptcy should continue to be carefully and timeously employed for crisis management to prevent them from being abused and used as an insurance premium by banks or financial institutions.[18] Moreover, the Basel Committee on Banking Supervision (the BCBS) recommended some cross-border crisis resolutions which include cross-border cooperation and information sharing; exit strategies and market discipline; adoption of sound national resolution powers; frameworks for coordinated resolution of financial groups; strengthening risk-mitigation mechanisms and reduction of complexities and inter-connectedness of group structures and operations.[19] Nevertheless, it appears that most of these recommendations were only applicable to banks and no specific reference is made to other financial institutions. Again, no specific reference was made on crisis-management measures that could be employed in the event of systemic risks caused by market-abuse practices. Similarly, in April 2009, the Financial Stability Board proposed some principles to tackle poor management of crisis by promoting effective

[12] Verhelst 2010 16 http://www.egmontinstitute.be.ep39.pdf (accessed 2013-07-08).

[13] *Ibid.*

[14] Paulo April 2011 *Fondation Robert Schuman* 21 http://www.robert-schuman.eu/frs-fichecrisefi-qe200-en.pdf (accessed 2013-07-04).

[15] Also see further related remarks by the IOSCO *Objectives and Principles* June 2010 11 http://www.iosco.org/library/pbdocs/pdf/IOSCOPD329.pdf (accessed 2013-07-07).

[16] The IMF *A Fair and Substantial Contribution by the Financial Sector-Interim Report for the G20* 2010 13; Verhelst 2010 17 http://www.egmontinstitute.be.ep39.pdf (accessed 2013-07-08); South African Reserve Bank *Annual Report Bank Supervision Department* 2009 24; and also see the IMF *Crisis Management and Resolution for a European Banking System* March 2010 1 http://www.imf.org/external/pubs/ft/wp/2010/wp1070.pdf (accessed 2013-08-29).

[17] The IMF *Crisis Management and Resolution for a European Banking System* March 2010 1 28 and 29 http://www.imf.org/external/pubs/ft/wp/2010/wp1070.pdf (accessed 2013-08-29).

[18] Verhelst 2010 17 http://www.egmontinstitute.be.ep39.pdf (accessed 2013-07-08).

[19] The Bank for International Settlements (the BIS) *Report and Recommendations of the Cross-border Bank Resolution Group* September 2009 1 2 and 3 http://www.bis.org/publ/bcbs162.pdf (accessed 2013-08-28).

coordination of regulators and cross-border information sharing among like-minded regulators to combat cross-border market-abuse activities.[20]

With regard to remuneration structures, the EC recommended some measures to regulate the remuneration of directors in general, as well as directors of financial institutions across the financial industry to prevent too high bonuses being paid to these directors at the expense of investors.[21] These recommendations were nonetheless less effective because they were not legally binding. To remedy this flaw, the EU Capital Requirements Directive III[22] adopted legally binding rules dealing with the governance of remuneration policies, independent control of remuneration in financial institutions, remuneration-committee and transparency rules that mandate financial institutions to publish information on their remuneration polices and methodologies.[23] These rules could strengthen corporate governance and remuneration standards in the EU by promoting internal risk-management measures and long-term transparent remuneration policies.[24] Additionally, in 2010, the EC proposed amendments to the rules governing investor-compensation schemes. These amendments include introducing a fixed €50 000 compensation for financial institutions that are affected by risks such as fraud, negligence and market abuse, new funding arrangements, and compliance with Deposit Guarantee Schemes' new rules and mandatory Insurance Guarantee Schemes.[25] Likewise, the United States Securities and Exchange Commission (the SEC) adopted new compensation rules to promote prompt disclosure of information relating to key areas of risk, compensation, corporate governance and director qualifications.[26] The stated new rules now oblige financial institutions and companies to disclose their remuneration policies and practices of all their employees whenever such policies or practices might have a negative effect on certain financial products of the company or financial institution concerned.[27] According to Schapiro, "short-term compensation incentives can drive long-term risk" and "management and boards of directors should be more accountable" for any asymmetric remuneration packages which result in their employees being paid unreasonably large sums of money during the short-term period, especially when such packages might give rise to market abuse and other

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[20] See the Financial Stability Forum "FSF Principles for Cross-border Cooperation on Crisis Management" http://www.financialstabilityboard.org/publictions/r_0904c.pdf (accessed 2013-08-28).

[21] The EC *Recommendation on Remuneration Policies in the Financial Services Sector C(2009) 3159* 30 April 2009 3; the EC *Recommendation Complimenting Recommendations 2004/913/EC and 2005/162/EC as Regards the Regime for the Remuneration of Directors of Listed Companies C(2009)3177* 30 April 2009.

[22] Council of the EU *Directive 2010 Amending Directives 2006/48/EC and 2006/49/EC Regarding Capital Regarding Capital Requirements for the Trading Book, Re-securitisations and the Supervisory Review of Remuneration Policies* 2010/EU/PE-CONS 35/10.

[23] Verhelst 2010 25–27 http://www.egmontinstitute.be.ep39.pdf (accessed 2013-07-08).

[24] Paulo April 2011 *Fondation Robert Schuman* 15–16 http://www.robert-schuman.eu/frs-fichecrisefi-qe200-en.pdf (accessed 2013-07-04).

[25] Verhelst 2010 20–22 http://www.egmontinstitute.be.ep39.pdf (accessed 2013-07-08).

[26] Schapiro *Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis* 14 January 2010 18.

[27] *Ibid*.

long-term systemic risks to the investors.[28] The IMF recommended that companies and financial institutions should employ risk-based remuneration structures.[29] The BCBS also issued its *Compensation Principles and Standards Assessment Methodology* to increase transparency and compliance on the part of the financial institutions.[30] In the same light, the Financial Stability Board proposed a review of compensation structures to align them with possible systemic risks and promote transparent supervision and involvement of all relevant stakeholders in the drafting of compensation policies.[31] It is reported that the G20 has already adopted these proposals.[32] However, it remains uncertain whether these compensation and crisis-management proposals will be successfully enforced at an international level, especially with regard to combating possible cross-border market-abuse practices.

2 1 2 *Evaluation of the South African anti-market abuse-enforcement framework*

As is the case in some countries, the responsibility of crisis management in South Africa is vested in the South African Reserve Bank (the SARB) as opposed to the Financial Services Board (the FSB).[33] The SARB is reportedly in the process of enforcing the relevant *FSF Principles for Cross-border Cooperation on Crisis Management* in its own regulatory framework.[34] However, the same cannot be said regarding other crisis-management recommendations from the BCBS, the IMF and the IOSCO.[35] Notwithstanding its ongoing enforcement efforts, the SARB should consider amending its crisis-management policies[36] in accordance with the applicable international best practice and other practices by similar international regulatory authorities. In this regard, it is suggested that the SARB should consider adopting the newly revised crisis-management rules employed in the EU and the US.[37] Although the SARB pledged to create new vibrant cross-border crisis-management forums and new requirements for crisis interventions, it is submitted that the crisis-management responsibility should be removed from the SARB and placed in an independent self-regulatory body like the FSB to promote transparency, less bureaucracy and less

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[28] Schapiro *Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis* 14 January 2010 18–19.

[29] Goodspeed "Global Financial Crisis: What happened and What Happens Next?" 2009 *South African Financial Markets Journal* (no pages).

[30] The BIS *Compensation Principles and Standards Assessment Methodology* January 2010 1 http://www.bis.org/publ/bcbs166.pdf (accessed 2013-08-28).

[31] See the Financial Stability Board *FSF Principles for Sound Compensation Practices* April 2009 2 http://www.financialstabilityboard.org/publications/r_094b.pdf (accessed 2013-08-28).

[32] See the G20 "The Global Plan for Recovery and Reform 2 April 2009" http://www.g20.org/Documents/final-communique.pdf (accessed 2013-08-27).

[33] SARB *Annual Report* 2009/2010 28.

[34] SARB *Annual Report Bank Supervision Department* 2008 14.

[35] It is unclear whether the SARB has also considered or commenced enforcing crisis-management proposals from these organisations as discussed in paragraph 2 1 1 above.

[36] SARB *Annual Report Bank Supervision Department* 2008 14.

[37] See paragraph 2 1 1 above.

governmentally-induced bias.[38] If effectively enforced in South Africa, this approach could prevent the financial risks posed by cross-border market-abuse activities. In relation to listed companies, the Strate Limited's Participant Failure Manual seeks to prevent some of the systemic risks as part of its crisis-management strategy in regulated markets.[39] There is no provision under the market-abuse Chapter X in the Financial Markets Act[40] which expressly provides for market abuse-related crisis-management measures. Despite this, the Financial Markets Act has other provisions which may be enforced to prevent systemic financial risks. For example, an exchange,[41] central securities depository,[42] clearing house[43] (including an independent clearing house)[44] and/or a trade repository[45] is now required to inform the registrar of securities services, the Governor of the SARB and/or the Minister of Finance as soon as they become aware of any matter that may pose systemic risks to the financial markets. Additionally, the Financial Markets Act now requires an exchange,[46] central securities depository (including an external central securities depository),[47] clearing house[48] (including an independent clearing house)[49] and a trade repository[50] to maintain security and back-up procedures to ensure the integrity of the records of transactions effected, cleared or settled through them to address and prevent possible systemic financial crises.

With regard to remuneration measures, there is no legislation that expressly and specifically deals with remuneration issues in South Africa to discourage companies and other financial institutions from triggering systemic risks by adopting flawed remuneration policies that encourage market-abuse practices in the financial markets. Apart from some compensation-regulatory rules employed by the Johannesburg Stock Exchange Limited (the JSE),[51] the market-abuse provisions as contained in the Financial Markets Act[52] do not expressly provide for the regulation and enforcement of compensation measures. In relation to this, an adequate and comprehensive national statute should be enacted to provide an

38 This approach is also employed in the US where the SEC and not the Treasury Department or the Federal Reserve Bank, deals mainly with crisis management, see generally paragraph 2 1 1 above.

39 Strate Limited *Participant Failure Manual* 20.

40 See ss 77; 78; 80; 81 and 82.

41 S 10(2)(f) of the Financial Markets Act.

42 S 30(2)(h) of the Financial Markets Act.

43 S 50(2)(b) read with s 48(1)(e); (f); (g) and (h) of the Financial Markets Act.

44 S 50(3)(d) read with s 53 of the Financial Markets Act.

45 S 55(1)(c) read with (b); (d) and (e) of the Financial Markets Act.

46 S 8(1)(g) read with (d) and (e) of the Financial Markets Act.

47 S 28(1)(h) of the Financial Markets Act.

48 S 48(1)(g) of the Financial Markets Act.

49 Generally see s 48(1)(g) and (h) of the Financial Markets Act.

50 S 55(1)(e) of the Financial Markets Act. In line with the G20 recommendations, a trade repository is obliged to maintain a centralised electronic database of the records of transactions (including the over the counter derivative transactions) reported to it to enhance transparency, risk assessment and market surveillance in over-the-counter derivative markets to combat market abuse and other illicit activities, see s 1 of the Financial Markets Act.

51 The JSE *Annual Report* 2009 39.

52 See ss 77; 78; 80; 81 and 82.

enforcement framework for crisis management and compensation measures across the financial industry and all financial markets in South Africa. This statute should be modelled on the applicable proposals, as earlier stated,[53] from the Financial Stability Board, the IMF, the EU and the BIS.[54] The proposed legislation should provide:

(a) appropriate minimum compliance requirements for relevant persons;

(b) measures for coordination and information sharing;

(c) strict capital requirements;

(d) liability for persons who create long-term systemic risks;

(e) a designated independent national regulator responsible for the enforcement of its provisions in both the regulated and unregulated financial markets;

(f) specific provisions for compensation and crisis management dealing with possible financial systemic risks caused by market-abuse practices;

(g) a mandatory disclosure requirement on the part of companies and other financial institutions to disclose their quarterly remuneration-policy reports; and

(h) appropriate civil, criminal and administrative penalties against the offenders.[55]

2 2 Management of risk

Management of risk involves identifying, evaluating, understanding and adopting appropriate rules and measures that help to mitigate and/or ameliorate possible risks that may negatively affect the integrity, safety, soundness, viability and profitability of an organisation or company.[56] It is reported that flawed risk-management and overall risk-oversight measures employed by many financial institutions and regulatory bodies also influenced the global financial crisis.[57]

2 2 1 Overview of the international best practice

The EC has, on the basis of the Larosière group recommendations, proposed a new framework of European financial supervision. This

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[53] See paragraph 2 1 1 above.

[54] The BIS *Compensation Principles and Standards Assessment Methodology* January 2010 1 http://www.bis.org/publ/bcbs166.pdf (accessed 2013-08-28).

[55] This could prevent perverse governmental incentives and asymmetric remuneration policies or bail-outs that favour big companies facing bankruptcy over smaller companies (the so-called “too big to fail” phenomenon) and possible systemic risks and market-abuse activities in the South African financial markets. See further Schapiro *Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis* 14 January 2010 2.

[56] See the US Senate Permanent Subcommittee on Investigations *Wall Street and the Financial Crisis: Anatomy of a Financial Collapse Majority and Minority Staff Report* 13 April 2011 182.

[57] Schapiro *Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis* 14 January 2010 2.

framework includes the development of the European Banking Authority, the European Insurance and Occupational Pensions Authority, the European Securities and Markets Authority and the European Systemic Risk Board (the ESRB) to tackle systemic financial risks through enhanced macro- and microprudential supervision, as well as coordinated cooperation and information sharing among the regulatory bodies.[58] The EC further proposed:

(a) the adoption of less complex measures and less opacity of financial products, especially with regard to securitisation;

(b) less reliance on credit-rating agencies;

(c) increased transparency in regulated markets and over-the-counter derivatives markets to combat market abuse;

(d) revision of remuneration schemes; and

(e) measures that restore good corporate governance by reviewing the supervisory role of senior management and reviewing the role of shareholders, financial supervisors and external auditors.[59]

Furthermore, an "early warning system" was adopted by the ESRB[60] to *inter alia* identify dangers in the entire financial system, issue warnings and recommendations regarding the measures to be taken by the EU Council as a whole or by a specific member state, and to publish any possible risks. The EC also proposed the reviewing of the EU Directive on Insider Dealing and Market Manipulation[61] in order to provide strict sanctions for market-abuse practices and extend its scope to cover over the counter derivative markets and new financial instruments.[62] In the United Kingdom, it is stated that the Bank of England will replace the Financial Services Authority in risk management,[63] while in the US, the SEC introduced several changes in an attempt to revamp its risk-management strategies.[64] According to Schapiro,

58 This new supervisory and enforcement framework was approved by the European Parliament and adopted by the European Council of Ministers on 17 November 2010. See Paulo April 2011 *Fondation Robert Schuman* 6 and 10 http://www.robert-schuman.eu/frs-fichecrisefi-qe200-en.pdf (accessed 2013-07-04).

59 Paulo April 2011 *Fondation Robert Schuman* 6 and 10 http://www.robert-schuman.eu/frs-fichecrisefi-qe200-en.pdf (accessed 2013-07-04); and Verhelst 2010 25–26 http://www.egmont institute.be.ep39.pdf (accessed 2013-07-08).

60 The ESRB is mainly responsible for the overall policing of systemic risks in the European financial markets. Paulo April 2011 *Fondation Robert Schuman* 10 http://www.robert-schuman.eu/frs-fichecrisefi-qe200-en.pdf (accessed 2013-07-04).

61 See the Directive of the European Parliament and Council of 28 January 2003 on insider dealing and market manipulation (market abuse) 2003/6/EC [2003] OJ L96/16 (hereinafter "the EU Market Abuse Directive").

62 Paulo April 2011 *Fondation Robert Schuman* 15–16 http://www.robert-schuman.eu/frs-fichecrisefi-qe200-en.pdf (accessed 2013-07-04); Verhelst 2010 27 http://www.egmont institute.be.ep39.pdf (accessed 2013-07-08); and also see related comments by Nanto *The Global Financial Crisis: Analysis and Policy Implications* Congressional Research Service Report 2 October 2009 35 http://www.crc.gov/congressional/Research/Service/Report. RL34742.pdf (accessed 2013-07-12).

63 Kaufmann and Weber "The Role of Transparency in Financial Regulation" 2010 *Journal of International Economic Law* 779 780–782.

64 Schapiro *Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis* 14 January 2010 2.

"consistent and vigorous enforcement is a vital part of risk management and crisis avoidance particularly in time and areas of substantial financial innovation".[65] In line with this, the Financial Crisis Inquiry Commission was mandated to investigate the causes of the global financial crisis and to recommend appropriate measures to avoid the recurrence of such crisis in future.[66] This Commission requested the SEC to enhance its securities-laws enforcement to combat fraud and market-abuse practices.[67] In response to this mandate, the SEC's Enforcement Division introduced measures such as strict enforcement of all securities laws and the adoption of even-handed enforcement methods to promote fair and proper functioning of the financial markets.[68] It further enforced strict requirements pertaining to the transparent disclosure of possible risks and non-public material information to ensure timely dissemination of accurate information to investors and avoidance of systemic risks.[69] Other measures employed by the SEC to curb the occurrence of systemic risks include working closely with the Financial Fraud Enforcement Task Force and the Special Inspector General for the Troubled Asset Relief Program and establishing an Office of Market Intelligence in its Enforcement Division to investigate and to address complaints or tips regarding the combating of systemic risks.[70]

The IOSCO *Technical Committee Standing Committee 3 on Regulation of Market Intermediaries* recommended rigorous risk-management and prudential supervision of the best practices by originators of assets and their due diligence as well as investor-suitability issues with regard to the

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65 *Ibid*.

66 *Ibid*.

67 *Ibid*.

68 Consequently, it is reported that the SEC opened 2 610 investigations and brought 1 991 cases involving various securities violations like fraud, insider trading, market manipulation and other related misconduct by broker-dealers, investment advisors and transfer agents in the 2009 financial year. Additionally, the SEC reportedly brought 664 enforcement actions; ordered offenders to disgorge US$2.09 billion in ill-gotten gains; ordered offenders to pay penalties of about US$256 million; sought 71 emergency temporary restraining orders to stop ongoing misconduct and market-abuse practices as well as 82 asset freezes to protect investors in 2009 after the global financial crisis. See Schapiro *Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis* 14 January 2010 2-3. Although this SEC enforcement history alone cannot prove its effectiveness in risk management, it is submitted that the FSB should consider implementing some relevant and applicable risk-management measures from the SEC to improve its enforcement of the market-abuse ban in South Africa.

69 Accordingly, the SEC managed to obtain some landmark-enforcement actions involving six broker-dealer companies who allegedly misrepresented the liquidity of auction-rate securities; brought similar actions against the managers of the Reserve Primary Fund for failing to disclose material facts regarding US$620 billion value of its money market fund's investments in Lehman Brothers following its bankruptcy on 05 May 2009; sought an enforcement action against the Bank of America Corporation for misleading investors about the bonuses that were being paid to Merrill Lynch and company executives during its US$50 billion acquisition of Merrill Lynch; Countrywide Financial executives were also charged with fraud and insider trading and other high profile companies charged with market abuse or other securities violations include Credit Suisse; Bear Stearns & Brookstreet Securities Corporation. Schapiro *Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis* 14 January 2010 3–7.

70 Schapiro *Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis* 14 January 2010 7-12.

intermediaries' distribution to complex financial products investors.[71] This Committee further proposed the reviewing of liquidity-risk management and liquidity standards in order to supplement the proposals of the BIS as well as the capital charges for risks listed in its trading book. Moreover, this Committee proposed a mandatory requirement on the part of service providers and issuers to maintain the currency of reports, where possible, over (a) the life of securitised products in question; and (b) the establishment of independent service providers, engaged by or on behalf of, an issuer where an opinion or service provided by such providers may influence investors' decisions to acquire securitised products.[72] The BCBS has, on behalf of the BIS, revised its risk-management measures[73] and in the same vein, the *Technical Committee Standing Committee 3 on Regulation of Market Intermediaries* proposed a review of the Senior Supervisors Group's risk-management standards.[74] Similarly, the Counterparty Risk Management Policy Group-III recommended that bigger financial intermediaries should prevent systemic risks caused by perverse incentives by taking appropriate risk-management measures.[75]

2 2 2 *Evaluation of the South African anti-market abuse enforcement framework*

There is no specific provision in Chapter X of the Financial Markets Act which expressly provides for risk-management measures that are targeted at combating market abuse-related systemic risks in all the South African financial markets. However, the Financial Markets Act[76] stipulates that an exchange must provide rules that prudently deal with capital adequacy, guarantee- and risk-management requirements with which all the different categories of authorised users or different activities of an authorised user's business must comply. Furthermore, the Financial Markets Act's risk-management requirements are apparently restricted to exchange rules

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[71] See the IOSCO Task Force on Unregulated Financial Markets and Products Technical Committee *Unregulated Financial Markets and Products Final Report* September 2009 10 http://www.iosco.org/library/pbdocs/pdf/IOSCOPD301.pdf (accessed 2013-07-07).

[72] The IOSCO Task Force on Unregulated Financial Markets and Products Technical Committee *Final Report* 2009 21–23; 25–27 and 34–35 http://www.iosco.org/library/pbdocs/pdf/IOSCOPD301.pdf (accessed 2013-07-07); and also see further the IOSCO-Committee on Payment and Settlement Systems (CPSS) *CPSS-IOSCO Working Group on the Review of the Recommendations for Central Counterparties* 20 July 2009 http://www.iosco.org/news/pdf/IOSCONEWS161.pdf (accessed 2013-08-31).

[73] See further the BIS "The Basel Committee and Regulatory Reform" http://www.bis.org/speeche/sp10011.pdf?frames=0 (accessed 2013-08-28).

[74] This review addressed risk-management issues such as the use of appropriate incentives; corporate governance; reliance on effective internal controls; mitigation of risks and information sharing. For further related analysis, see the Financial Stability Board *Senior Supervisors Group Report on Risk Management Lessons from the Global Banking Crisis of 2008* March 2008 http://www.financialstabilityboard.org/publications/r_0910a.pdf?frames=0 (accessed 2013-08-28).

[75] The IOSCO Task Force on Unregulated Financial Markets and Products Technical Committee *Final Report* 2009 17 http://www.iosco.org/library/pbdocs/pdf/IOSCOPD301.pdf (accessed 2013-07-07); and Counterparty Risk Management Policy Group III *Containing Systemic Risk: The Road to Reform* 6 August 2008 27 and 89–90.

[76] S 17(2)(c) read with s 8(1)(d).

relating to listed securities and, as a result, possible market-abuse systemic risks that are perpetrated in the over the counter derivative transactions are not covered.[77] On the other hand, the Financial Markets Act has,[78] in line with the recommendations of the G20 and the IOSCO, introduced new definitions of "securities"; "external central securities depository" to enable cost-effective cross-border settlement of securities; "trade repository" and two types of clearing houses, namely an "independent clearing house"[79] with its own rules and clearing members, and the "associated clearing house"[80] appointed by an exchange and regulated by the rules of the relevant exchange. Notably, an independent clearing house is not appointed by an exchange and may act as a central counter party in the clearing of unlisted securities in line with the recommendations of the G20 and the IOSCO in order to reduce systemic risks, especially in the over-the-counter derivatives markets.[81] In addition, as earlier stated,[82] an exchange,[83] central securities depository,[84] clearing house[85] (including an independent clearing house)[86] and/or a trade repository[87] is now required, as soon as they become aware of any matter that may pose systemic risk to the financial markets, to inform the registrar of securities services and to maintain security and back-up procedures to ensure the integrity of the records of transactions which they effected, cleared or settled to address and prevent possible systemic financial risks. The Financial Markets Act also require the central securities depository (including an external central securities depository), exchange, clearing house (including an independent clearing house) and the trade repositories to establish and maintain effective, efficient, reliable, secure systems and sustainable infrastructure to perform the securities services for which they are licensed so as to prevent systemic financial risks.[88] It is reported that the registrar of securities services will take appropriate administrative enforcement action against those that fail to comply with these requirements.[89] The Companies Act[90] provides that companies should have their own internal rules to assess and promote the effective enforcement of their risk-management measures. However, this Act does not clearly provide whether its risk-management measures are applicable to governmental departments, non-governmental organisations and other

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77 S 17(2)(c) read with s 8(1)(d). In this regard, policy makers should consider enacting risk-management provisions that have clear minimum compliance requirements and that are applicable to risks in both the regulated and unregulated markets, in line with the EC risk-management proposals. See paragraph 2 2 1 above.

78 See s 1.

79 *Ibid*.

80 See s 1 read with ss 49, 50, 52, 53 and 64.

81 S 50(3) read with s 53 of the Financial Markets Act.

82 See paragraph 2 1 2 above.

83 S 10(2)(f) read with 8(1)(d) and (g) of the Financial Markets Act.

84 S 28(1)(d), (f), (g) and (h) of the Financial Markets Act.

85 S 50(2)(b) read with s 48(1)(e), (f), (g) and (h) of the Financial Markets Act.

86 S 50(3)(c) read with s 53 of the Financial Markets Act.

87 S 55(1)(c) read with (b), (d), (e) and (f) of the Financial Markets Act.

88 Ss 8(1)(d), (e) and (f); 10(2)(a) read with (c) and (f); 28(1)(c); 30(2)(v); 48(1)(e) and (f); 50(2)(a); and 55(1)(d) and (e) of the Financial Markets Act.

89 National Treasury *Explanatory Memorandum on the Financial Markets Bill 2011* August 2011 23–24.

90 71 of 2008, hereinafter "the Companies Act 2008". See s 94(7)(i).

institutions across the entire financial sector. Likewise, the Strate Limited's Enterprise Risk Management Division offers the initial investigation, detection, assessment, isolation and prevention of potential systemic risks that could occur in the financial markets to the detriment of investors.[91] Nonetheless, these risk-management rules are only internally applicable to the functions of the Strate Limited and as such, they may not be legally binding on other companies. The SARB has its own internationally comparable *Risk Management Policy* which provides the steps and procedures to be followed to prevent systemic risks in the financial markets and the economy at large.[92] Nevertheless, it is unclear whether this *Risk Management Policy* is statutorily binding upon all the companies and relevant persons at a national level in South Africa.

The JSE's Equity Rules,[93] the Derivatives Rules,[94] the Yield-X Rules[95] and the Equities Directives[96] deal with the minimum requirements and internal measures to identify, control and curb risks such as financial loss, fraud, professional misconduct, counterparty credit risks, maladministration and non-disclosure of material information. It is hoped that the JSE has incorporated into its own risk-management framework the Bond Exchange of South Africa (the BESA)'s Rule C10.3 which provided some risk-management measures like internal disclosure of accurate financial statements, adoption of high ethical standards and continuous monitoring of authorised users by appointed compliance officers. Similarly, the FSB's Audit Risk Management Committee deals with its own risk-assessment and policy measures.[97] However, unlike the SEC,[98] the FSB is not statutorily empowered to oversee the issuers' risk-management measures to prevent market abuse-related systemic risks in the South African financial markets. In relation to this, it hoped that the policy makers will, in line with the EC proposals,[99] statutorily empower an independent regulatory agency to enforce the risk-management measures across all the South African financial sectors and financial markets.

2 3 Accounting standards

Accounting standards can be defined to include the issuing of financial statements, auditing and reporting measures and the accurate and timeous

[91] For further related comments see the Strate Limited "Risk Management" http://www.strate.co.za/aboutstrate/overview/risk%20management.aspx (accessed 2013-08-28).

[92] This policy was modeled in part, on the Committee of Sponsoring Organisations Enterprise Risk Management Framework and not on the G20 or the IOSCO recommendations, see the SARB *Annual Report* 2008/2009 15 and 16.

[93] Equities Rules 4.70.1 to 4.70.5.

[94] Derivative Rules 16.10.9.

[95] Yield-X Rule 10.220.9.

[96] Equities Directive DA2.1 to 2.2.

[97] The FSB *Annual Report* 2010 93 and 94.

[98] See paragraph 2 2 1 above.

[99] *Ibid*.

disclosure of all relevant financial information by companies or financial institutions to the investors.[100]

2 3 1 Overview of the international best practice

Following the Enron Corporation's collapse, the bankruptcy of Lehman Brothers and other related cases that manifested during the global financial crisis, the International Accounting Standards Board (the IASB) revised its regulations to *inter alia* enhance the adequacy of accounting standards.[101] Consequently, in an attempt to discourage effectively the propagation of complex or misleading value of assets and liabilities held in the balance sheets and managerial dissimulation especially in relation to financial products that are traded in unregulated financial markets, the IASB adopted new regulatory standards to reclassify some securities (excluding credit-default swaps derivatives) into investment categories when they comply with certain requirements.[102] Similarly, the Generally Accepted Accounting Principles proposed the adoption of adequate and flexible accounting standards to enable fair pricing of financial instruments globally.[103] The Financial Accounting Standard Board (the FASB) also issued proposals for prompt disclosure and increased comparability in fair value of market prices.[104] The IOSCO *Technical Committee Standing Committee 1 on Multinational Disclosure and Accounting* proposed that the issuer's accounting practices pertaining to financial statements, balance sheets and reporting systems should be comparable to the international best practice.[105] The EC proposed a review of the role of auditing companies in assessing the accuracy, financial position and financial statements of their audited

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[100] See generally Buiter *Lessons From the Global Financial Crisis for Regulators and Supervisors* (2009) paper presented at the *Global Financial Crisis: Lessons and Outlook Workshop*, at Kiel, 2009-05-8 25–26.

[101] Buiter *Lessons From the Global Financial Crisis for Regulators and Supervisors* 25–26.

[102] The IASB has now established three categories of securities or assets classification, namely the assets "held for trading"; assets "available for sale" and assets "held for investment". Nevertheless, concerns have been raised that the assets "held for investment" category's market prices are rigidly disclosed only through balance sheets as opposed to the profit and loss account, giving rise to market manipulation by financial institutions and other related companies. Buiter *Lessons From the Global Financial Crisis for Regulators and Supervisors* 24–26.

[103] Ceresney, Eng and Nuttall "Regulatory Investigations and the Credit Crisis: The Search for Villains" 2009 *American Criminal LR* 225 247.

[104] The FASB and the SEC's Office of the Chief Accountant issued regulations that deal with the use of accurate fair value accounting standards and adequate valuation models by companies. See the SEC's Office of the Chief Accountant and the FASB "Staff Clarifications on Fair Value Accounting" 30 September 2008 http://www.sec.gov/news/press/2008/2008-234.htm (accessed 2013-09-01); Ceresney, Eng and Nuttall 2009 *American Criminal LR* 225, 247 and 249–250; and the FASB *Accounting for Certain Investments in Debt and Equity Securities Statement 115* 1993 110–111.

[105] See related remarks by the IOSCO *Objectives and Principles* June 2010 8 http://www.iosco.org/library/pbdocs/pdf/IOSCOPD329.pdf (accessed 2013-07-07); the IOSCO Task Force on Unregulated Financial Markets and Products Technical Committee *Final Report* 2009 8–9 http://www.iosco.org/library/pbdocs/pdf/IOSCOPD301.pdf (accessed 2013-07-07).

companies to curb conflicts of interest and market abuse.[106] It also proposed that companies should appoint their own supervisors who will select the auditing companies to contract and change such companies on a regular basis to prevent market abuse and conflict of interests.[107] Additionally, it recommended the adoption of measures that increase competition among the auditing companies globally in order to prevent systemic risks.[108] The EC also recommended that auditing companies operating in a member state should be given a European passport to operate across the other European member states.[109] While this could increase competition among auditing companies across Europe, it is submitted that the latter recommendation may, if not effectively enforced, create serious cross-border market-abuse supervisory challenges for the regulatory bodies. The G20 proposed that the International Financial Reporting Standards (the IFRS) and other related accounting institutions should develop standardised accounting standards that are commonly applicable internationally before the end of 2011.[110] Under the impetus of the G20, the IMF recently revised its lending rules and bilateral and multilateral surveillance measures to promote transparent and standardised accounting standards in order to detect and prevent market abuse and other related financial-markets' risks.[111] The BCBS's *Guiding Principles for the Replacement of 1AS 39* recommended *inter alia* that accounting companies, supervisors and regulators should develop and enforce their own transparent accounting standards extra-territorially.[112] It is submitted that this recommendation should be cautiously and effectively enforced to avoid conflicts of interest on the part of the regulators as well as violating the *autrefois* acquit or *autrefois*-convict doctrine to the detriment of the offenders.

[106] Directive 2006/43/EC/OJ L 157 *On Statutory Audits of Annual Accounts and Consolidated Accounts* 17 May 2006 87-107; and the EC *Green Paper on Audit Policy Lessons from the Crisis Final COM (2010) 561* 13 October 2010.

[107] For instance, when the contracted auditing company also offers other none-auditing services to the same company that it audits, see Verhelst 2010 25–27 http://www.egmontinstitute.be.ep39.pdf (accessed 2013-07-08).

[108] In other words this proposal discourages companies from depending only on KPMG, Deloitte, Ernst &Young and Pricewater House Coopers alone as this monopoly may give rise to insider trading or the misuse of material information relating to the securities of the companies involved.

[109] Verhelst 2010 13–14 http://www.egmontinstitute.be.ep39.pdf (accessed 2013-07-08); and Paulo April 2011 *Fondation Robert Schuman* 8–13 http://www.robert-schuman.eu/frs-fichecrisefi-qe200-en.pdf (accessed 2013-07-04).

[110] See further the G20 "Declaration on Strengthening the Financial System-London 2 April 2009" http://www.g20.org/Documents/Fin_Deps_Fin_Reg_Annex_020409_1615final.pdf (accessed 2013-08-27); and Paulo April 2011 *Fondation Robert Schuman* 7–8 http://www.robert-schuman.eu/frs-fichecrisefi-qe200-en.pdf (accessed 2013-07-04).

[111] Paulo April 2011 *Fondation Robert Schuman* 7–8 http://www.robert-schuman.eu/frs-fichecrisefi-qe200-en.pdf (accessed 2013-07-04).

[112] These principles were largely influenced by the G20 proposals, see further the BIS *Guiding Principles for the Replacement of IAS 39* 2009 2 http://www.bis.org/publ/bcbs161.pdf (accessed 2013-08-28).

2 3 2 *Evaluation of the South African anti-market abuse-enforcement framework*

There is no legislation that solely and expressly provides an enforcement framework for market abuse-related accounting-standards violations in South Africa. However, accounting-standards violations are generally outlawed under different legislations, for example, the Companies Act 2008 provides that companies must keep: (a) correct, accurate and complete accounting records; (b) financial statements that are consistent with the financial reporting standards in any of the official languages at their registered offices; and (c) annual financial statements that show the present state of affairs of their business transactions.[113] It further stipulates that accounting-regulations and reporting standards must be sound and comparable to the international best practice.[114] These provisions do not seem to prohibit illicit accounting and auditing standards by companies that also operate their businesses in other jurisdictions. This gap could be providing a safe hub for such companies to engage in cross-border market-abuse activities without incurring liability. The Financial Advisory and Intermediary Services Act[115] has accounting standards that are nonetheless only applicable to financial services and companies that offer such services.[116] Likewise, the Financial Services Board Act[117] stipulates that the chief executive officer and other relevant persons should take appropriate measures to enforce compliance with the international accounting standards. In addition, the Financial Markets Act has some provisions that are, *inter alia*, aimed at providing certainty as regards the accounting standards that apply in respect of financial statements and to mandate a clearing house and its members, nominees of regulated persons and trade repositories to comply with the generally accepted auditing and accounting standards.[118] However, neither of these Acts has specific designated regulatory agencies to enforce their accounting standards to combat fraud and market abuse or penalties that could be imposed on the offenders in such instances. The JSE Listing Requirements obliges all listed companies to develop adequate and accurate reporting and accounting standards that are consistent with the South African Statements of Generally Accepted Accounting Practice and the IFRS.[119] It is hoped that the JSE will continue to employ the BESA Listing Disclosure Requirements which provided accounting rules for bonds and related derivatives companies to combat commodity-based market-abuse practices.[120] Furthermore, it is hoped that a specific legislation will be enacted in future to enforce auditing, accounting and financial reporting

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113 Ss 28 and 29(1).
114 S 29(5)(a) and (b) read with subsection (4); and ss 30 and 31.
115 37 of 2002, hereinafter "the Financial Advisory and Intermediary Services Act".
116 S 19.
117 97 of 1990, hereinafter "the Financial Services Board Act", see s 17.
118 Ss 89 to 93 read with clause 55(1)(f); also see s 45(1)(a); and (3)(c) and similar provisions in the Auditing Professions Act 26 of 2005.
119 S 18.13 of the JSE Listing Requirements.
120 S 5.13 of the BESA Listing Disclosure Requirements.

standards uniformly across the financial industry to combat fraud and market-abuse-related accounting violations in South Africa.[121]

3 CONCLUDING REMARKS

Notwithstanding the fact that South Africa has made numerous efforts to combat market-abuse practices, a lot may still need to be done to reduce the negative effects caused by such practices in the South African financial markets.[122] Therefore, despite the fact that the JSE was rated as the number-one stock exchange by the World Federation of Exchanges with regard to regulation in 2010,[123] it is submitted that the existing gaps in the enforcement of the market-abuse prohibition in relation to some specific aspects of the South African financial markets could weaken the stability and integrity of the South African financial markets in future. Consequently, it is recommended that the crisis-management responsibility should be removed from the SARB and placed in an independent self-regulatory body like the FSB to promote transparency and less bureaucracy.[124] It is additionally hoped that an adequate and comprehensive statute will be enacted in the future to provide an effective enforcement framework for crisis-management and compensation measures across the financial services industry and all the financial markets in South Africa to curb market-abuse activities.[125] Moreover, it is submitted that the policy makers should, in line with the EC proposals,[126] statutorily empower an independent regulatory agency to enforce the risk-management measures across all the South African financial sectors and financial markets.[127] Additionally, it is hoped that a specific legislation will be enacted in future to enforce auditing uniformly, accounting and financial reporting standards across the financial industry to combat fraud and market-abuse-related accounting violations and to enhance comparability with international accounting best practice.[128] In relation to this, the FSB should consider consistently employing other detection strategies like engaging more brokerages and companies that tape or digitally record telephonic orders and other transactions from clients to their agencies in order to isolate all possible market-abuse activities timeously. In a nutshell, it is hoped that the recommendations as enumerated in this article will be utilised by the relevant stakeholders in the future to enhance the combating of market-abuse activities in South Africa.

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[121] See paragraph 2 3 1 above, for related international best practice proposals.
[122] Cassim "An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 1)" 2008 *SA Merc LJ* 33–36.
[123] National Treasury *Reviewing the Regulation of Financial Markets in South Africa: Policy Document Explaining the Financial Markets Bill 2011* August 2011 5.
[124] See paragraph 2 1 2 above.
[125] *Ibid*.
[126] See paragraph 2 2 1 above.
[127] See paragraph 2 2 2 above.
[128] See paragraph 2 3 2 above.