

111TH CONGRESS
2D SESSION

S. 3049

To give shareholders a vote on executive pay, to hold executives accountable for failure or fraud, to structure executive pay to encourage the long-term viability of companies, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 26, 2010

Mr. MENENDEZ introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

A BILL

To give shareholders a vote on executive pay, to hold executives accountable for failure or fraud, to structure executive pay to encourage the long-term viability of companies, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Corporate Executive
5 Accountability Act of 2010”.

6 **SEC. 2. SHAREHOLDER VOTES ON EXECUTIVE PAY.**

7 (a) SHAREHOLDER VOTES ON EXECUTIVE PAY.—

8 Section 14 of the Securities Exchange Act of 1934 (15

1 U.S.C. 78n) is amended by adding at the end the following
2 new subsection:

3 “(i) ANNUAL SHAREHOLDER APPROVAL OF EXECU-
4 TIVE COMPENSATION.—

5 “(1) ANNUAL VOTE.—Any proxy or consent or
6 authorization (the solicitation of which is subject to
7 the rules of the Commission pursuant to subsection
8 (a)) for an annual meeting of the shareholders to
9 elect directors (or a special meeting in lieu of such
10 meeting) where proxies are solicited in respect of
11 any security registered under section 12 occurring
12 on or after the date that is 6 months after the date
13 on which final rules are issued under paragraph (4),
14 shall provide for a separate shareholder vote to ap-
15 prove the compensation of executives as disclosed
16 pursuant to the Commission’s compensation disclo-
17 sure rules for named executive officers (which disclo-
18 sure shall include the compensation committee re-
19 port, the compensation discussion and analysis, the
20 compensation tables, and any related materials, to
21 the extent required by such rules). The shareholder
22 vote shall not be binding on the issuer or the board
23 of directors and shall not be construed as overruling
24 a decision by such board, nor to create or imply any
25 additional fiduciary duty by such board, nor shall

1 such vote be construed to restrict or limit the ability
2 of shareholders to make proposals for inclusion in
3 such proxy materials related to executive compensa-
4 tion.

5 “(2) SHAREHOLDER APPROVAL OF GOLDEN
6 PARACHUTE COMPENSATION.—

7 “(A) DISCLOSURE.—In any proxy or con-
8 sent solicitation material (the solicitation of
9 which is subject to the rules of the Commission
10 pursuant to subsection (a)) for a meeting of the
11 shareholders occurring on or after the date that
12 is 6 months after the date on which final rules
13 are issued under paragraph (4), at which share-
14 holders are asked to approve an acquisition,
15 merger, consolidation, or proposed sale or other
16 disposition of all or substantially all the assets
17 of an issuer, the person making such solicita-
18 tion shall disclose in the proxy or consent solici-
19 tation material, in a clear and simple form in
20 accordance with regulations to be promulgated
21 by the Commission, any agreements or under-
22 standings that such person has with any named
23 executive officers of such issuer (or of the ac-
24 quiring issuer, if such issuer is not the acquir-
25 ing issuer) concerning any type of compensation

(whether present, deferred, or contingent) that is based on or otherwise relates to the acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of the issuer and the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of such executive officer.

“(B) SHAREHOLDER APPROVAL.—Any proxy or consent or authorization relating to the proxy or consent solicitation material containing the disclosure required by subparagraph (A) shall provide for a separate shareholder vote to approve such agreements or understandings and compensation as disclosed, unless such agreements or understandings have been subject to a shareholder vote under paragraph (1). A vote by the shareholders shall not be binding on the issuer or the board of directors of the issuer or the person making the solicitation and shall not be construed as overruling a decision by any such person or issuer, nor to create or imply any additional fiduciary duty by any such person or issuer.

1 “(3) DISCLOSURE OF VOTES.—Every institu-
 2 tional investment manager subject to section 13(f)
 3 shall report at least annually how it voted on any
 4 shareholder vote pursuant to paragraph (1) or (2) of
 5 this section, unless such vote is otherwise required to
 6 be reported publicly by rule or regulation of the
 7 Commission.

8 “(4) RULEMAKING.—Not later than 6 months
 9 after the date of enactment of this Act, the Commis-
 10 sion shall issue final rules to implement this sub-
 11 section.”.

12 (b) DISCLOSURE REQUIREMENTS.—

13 (1) IN GENERAL.—The Commission shall
 14 amend section 229.402 of title 17, Code of Federal
 15 Regulations, to require each issuer to disclose in any
 16 filing of the issuer described in section 229.10(a) of
 17 title 17, Code of Federal Regulations (or any suc-
 18 cessor thereto)—

19 (A) the median of the annual total com-
 20 pensation of all employees of the issuer, except
 21 the chief executive officer (or any equivalent po-
 22 sition) of the issuer;

23 (B) the annual total compensation of the
 24 chief executive officer (or any equivalent posi-
 25 tion) of the issuer; and

1 (C) the ratio of the amount described in
 2 paragraph (1) to the amount described in para-
 3 graph (2).

4 (2) TOTAL COMPENSATION.—For purposes of
 5 this subsection, the total compensation of an em-
 6 ployee of an issuer shall be determined in accordance
 7 with section 229.402(c)(2)(x) of title 17, Code of
 8 Federal Regulations, as in effect on the day before
 9 the date of enactment of this Act.

10 **SEC. 3. EXECUTIVE ACCOUNTABILITY FOR FAILURE OR**
 11 **FRAUD.**

12 (a) CLAWBACK.—

13 (1) SECURITIES EXCHANGE ACT OF 1934.—Sec-
 14 tion 16 of the Securities Exchange Act of 1934 (15
 15 U.S.C. 78p) is amended by adding at the end the
 16 following:

17 “(h) CLAWBACK POLICY.—

18 “(1) LISTING STANDARDS.—The Commission
 19 shall, by rule, direct the national securities ex-
 20 changes and national securities associations to pro-
 21 hibit the listing of any security of an issuer that
 22 does not comply with the requirements of this sub-
 23 section.

24 “(2) RECOVERY OF FUNDS.—The rules of the
 25 Commission under paragraph (1) shall require each

1 issuer to develop and implement a policy providing
2 that, in the event that the issuer is required to pre-
3 pare an accounting restatement due to the material
4 noncompliance of the issuer with any financial re-
5 porting requirement under the securities laws, the
6 issuer shall—

7 “(A) recover from any current or former
8 employee of the issuer who received incentive-
9 based compensation (including stock options
10 awarded as compensation) based on the erro-
11 neous data, an amount equal to the difference
12 between the amount actually paid to the em-
13 ployee and the amount that would have been
14 paid to the employee under the accounting re-
15 statement; and

16 “(B) disclose, together with the accounting
17 restatement—

18 “(i) a list of any bonuses or stock
19 sales by the employees of the issuer that
20 are affected by the accounting restatement,
21 including the amounts of such bonuses or
22 stock sales; and

23 “(ii) the extent to which the employ-
24 ees of the issuer have repaid any amounts
25 under subparagraph (A).”.

1 (2) SARBANES-OXLEY ACT OF 2002.—Section
2 304 of the Sarbanes-Oxley Act of 2002 (15 U.S.C.
3 7243) is amended—

4 (A) in subsection (a)—

5 (i) in the matter preceding paragraph
6 (1), by striking “, as a result of mis-
7 conduct,”;

8 (ii) in paragraph (1), by striking “12-
9 month” and inserting “2-year”; and

10 (iii) in paragraph (2), by striking “12-
11 month” and inserting “2-year”; and

12 (B) by adding at the end the following:

13 “(c) COMMENCEMENT OF ACTION BY COMMISSION.—

14 If the chief executive officer or the chief financial officer
15 of the issuer has not made a reimbursement required
16 under this section before the expiration of the 90-day pe-
17 riod beginning on the date on which the accounting re-
18 statement occurs, the Commission may commence an ac-
19 tion on behalf of the issuer to recover any funds that the
20 chief executive officer or the chief financial officer is re-
21 quired to reimburse under subsection (a).

22 “(d) ACTION BY SHAREHOLDERS.—

23 “(1) IN GENERAL.—A shareholder of an issuer
24 may commence an action on behalf of the issuer in
25 any district court of the United States to recover

1 any funds the chief executive officer or the chief fi-
2 nancial officer is required to reimburse under sub-
3 section (a), if—

4 “(A) the Commission does not commence
5 an action under subsection (c) before the expi-
6 ration of the 120-day period following the date
7 on which the accounting restatement occurs;
8 and

9 “(B) the chief executive officer or the chief
10 financial officer of the issuer has not made a
11 reimbursement required under this section as of
12 the date on which the action is commenced.

13 “(2) STAY OF ACTIONS.—If more than 1 share-
14 holder of an issuer commences an action under this
15 subsection with respect to the same accounting re-
16 statement, a district court shall stay all actions com-
17 menced by the shareholders, except for the action
18 commenced by the shareholder that owns the great-
19 est number of shares of the issuer.”.

20 (b) SHAREHOLDER APPROVAL OF SEVERANCE
21 AGREEMENTS.—The Securities Exchange Act of 1934 (15
22 U.S.C. 78a et seq.) is amended by inserting after section
23 10A the following:

1 **“SEC. 10B. SEVERANCE AGREEMENTS TIED TO PERFORM-**
2 **ANCE.**

3 “(a) COMMISSION RULES.—

4 “(1) IN GENERAL.—Not later than 270 days
5 after the date of enactment of this subsection, the
6 Commission shall, by rule, direct each national secu-
7 rities exchange and national securities association to
8 prohibit the listing of any security of an issuer that
9 is not in compliance with the requirements of any
10 portion of subsection (b).

11 “(2) OPPORTUNITY TO CURE.—The rules issued
12 under paragraph (1) shall provide for appropriate
13 procedures for an issuer to have an opportunity to
14 cure any defects that would be the basis for such a
15 prohibition before the imposition of such prohibition.

16 “(3) CONSIDERATIONS.—The rules issued
17 under paragraph (1) shall be implemented with due
18 regard for contracts in existence on the date of en-
19 actment of this subsection.

20 “(b) SEVERANCE AGREEMENTS TIED TO PERFORM-
21 ANCE.—The board of directors of an issuer, or a com-
22 mittee of such board of directors, may not enter into an
23 agreement providing for severance payments to a senior
24 executive officer who is terminated for cause, as deter-
25 mined by the board of directors.

1 “(c) TERMINATION FOR CAUSE.—For purposes of
2 this section, the term ‘for cause’, when used with respect
3 to the termination of a senior executive officer of an
4 issuer, means termination due to—

5 “(1) the willful and continued failure of the
6 senior executive officer to perform substantially the
7 duties of the senior executive officer with respect to
8 the issuer, unless such failure is due to incapacity
9 resulting from a physical or mental illness of the
10 senior executive officer;

11 “(2) the willful unapproved absenteeism of the
12 senior executive officer, unless such absenteeism is
13 due to a temporary or permanent disability of the
14 senior executive officer;

15 “(3) the senior executive officer willfully engag-
16 ing in misconduct that the board of directors of the
17 issuer reasonably believes does or may materially ad-
18 versely affect the business or operations of the
19 issuer;

20 “(4) a material breach of an employment agree-
21 ment by the senior executive officer;

22 “(5) misconduct by the senior executive officer
23 that is of such a serious or substantial nature that
24 a reasonable likelihood exists that the misconduct
25 would materially injure the reputation of the issuer

1 or a subsidiary of the issuer if the senior executive
2 officer were to remain employed by the issuer;

3 “(6) harassment or discrimination by the senior
4 executive officer against the employees, customers,
5 or vendors of the issuer, in violation of the policies
6 of the issuer;

7 “(7) the misappropriation of funds or assets of
8 the issuer by the senior executive officer for personal
9 use;

10 “(8) the willful violation of the policies or
11 standards of business conduct of the issuer, as de-
12 termined in good faith by the board of directors of
13 the issuer;

14 “(9) the disclosure of confidential information
15 by the senior executive officer in violation of the
16 written policies of the issuer that is demonstrably in-
17 jurious to the issuer;

18 “(10) the conviction of the senior executive offi-
19 cer for, or a plea of guilty or nolo contendere made
20 by the senior executive officer to, a charge of com-
21 mission of a felony; or

22 “(11) any other action that the board of direc-
23 tors of the issuer determines is detrimental or inju-
24 rious to the issuer or the shareholders of the
25 issuer.”.

1 **SEC. 4. LIMITATIONS ON EQUITY COMPENSATION OF EXEC-**
 2 **UTIVE OFFICERS.**

3 Section 16 of the Securities Exchange Act of 1934
 4 (15 U.S.C. 78p) is amended by adding at the end the fol-
 5 lowing:

6 “(j) EQUITY COMPENSATION OF EXECUTIVE OFFI-
 7 CERS.—

8 “(1) DEFINITIONS.—For purposes of this sub-
 9 section—

10 “(A) the term ‘award of equity compensa-
 11 tion’ means an award of share-based compensa-
 12 tion; and

13 “(B) the term ‘executive officer’ has the
 14 same meaning as in section 240.3b–7 of title
 15 17, Code of Federal Regulations, or any suc-
 16 cessor thereto.

17 “(2) LISTING STANDARDS.—The Commission
 18 shall, by rule, direct each national securities ex-
 19 change and registered securities association to pro-
 20 hibit the listing of any security of an issuer that
 21 does not comply with the requirements of this sub-
 22 section.

23 “(3) LIMITATIONS ON EQUITY COMPENSATION
 24 OF EXECUTIVE OFFICERS.—The rules of the Com-
 25 mission under paragraph (2) shall prohibit an execu-
 26 tive officer or member of the board of directors of

1 an issuer who receives an award of equity compensa-
2 tion from selling more than—

3 “(A) 20 percent of the shares that the ex-
4 ecutive officer or member of the board of direc-
5 tors is entitled to receive during the first year
6 following the vesting of the award;

7 “(B) 40 percent of the shares that the ex-
8 ecutive officer or member of the board of direc-
9 tors is entitled to receive during the second year
10 following the vesting of the award, less any
11 shares sold under subparagraph (A);

12 “(C) 60 percent of the shares that the ex-
13 ecutive officer or member of the board of direc-
14 tors is entitled to receive during the third year
15 following the vesting of the award, less any
16 shares sold under subparagraphs (A) and (B);
17 and

18 “(D) 80 percent of the shares that the ex-
19 ecutive officer or member of the board of direc-
20 tors is entitled to receive during the fourth year
21 following the vesting of the award, less any
22 shares sold under subparagraphs (A) through
23 (C).

24 “(4) VESTING.—For purposes of this sub-
25 section, an award of equity compensation vests on

1 the date on which the right of the individual who re-
2 ceives the award to receive or retain shares under
3 the award is no longer contingent on satisfaction of
4 a condition relating to the service or performance of
5 the individual.”.

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