Calendar No. 37

111TH CONGRESS
1ST SESSION

S. 651

To amend the Internal Revenue Code of 1986 to impose an excise tax on excessive bonuses paid by, and received from, companies receiving Federal emergency economic assistance, to limit the amount of nonqualified deferred compensation that employees of such companies may defer from taxation, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 19, 2009

Mr. BAUCUS (for himself, Mr. GRASSLEY, Mr. WYDEN, Ms. SNOWE, Mrs. LINCOLN, Mr. KERRY, Ms. STABENOW, Mr. SCHUMER, Mr. MENENDEZ, Mr. NELSON of Florida, Mr. BINGAMAN, and Ms. CANTWELL) introduced the following bill; which was read the first time

MARCH 23, 2009

Read the second time and placed on the calendar

A BILL

To amend the Internal Revenue Code of 1986 to impose an excise tax on excessive bonuses paid by, and received from, companies receiving Federal emergency economic assistance, to limit the amount of nonqualified deferred compensation that employees of such companies may defer from taxation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Compensation Fairness Act of 2009''.

SEC. 2. EXCISE TAXES ON EXCESSIVE BONUSES PAID BY RECIPIENTS OF FEDERAL EMERGENCY ECONOMIC ASSISTANCE.

(a) IMPOSITION OF TAX.—Chapter 46 of the Internal Revenue Code of 1986 (relating to excise tax on golden parachute payments) is amended by adding at the end the following new section:

''SEC. 4999A. EXCESSIVE BONUSES PAID BY RECIPIENTS OF FEDERAL EMERGENCY ECONOMIC ASSISTANCE.

''(a) IMPOSITION OF TAX.—There is hereby imposed—

''(1) on each Federal emergency economic assistance recipient which pays an excessive bonus, a tax equal to 35 percent of the amount of such bonus, and

''(2) on each covered individual who receives an excessive bonus from such a recipient, a tax equal to 35 percent of the amount of such bonus.

''(b) EXCESSIVE BONUS.—For purposes of this section—

''(1) IN GENERAL.—The term 'excessive bonus' means, with respect to any calendar year—

"(A) any applicable bonus payment paid to a covered individual during such calendar year which is a retention bonus, or

"(B) in the case of applicable bonus payments not described in subparagraph (A), an amount equal to the sum of—

"(i) the portion of such applicable bonus payments paid to a covered individual during such calendar year which is attributable to services performed by such individual during such calendar year, but only to the extent such payments exceed $50,000, plus

"(ii) the portion of applicable bonus payments paid to a covered individual during such calendar year which is attributable to services performed by such individual during any preceding calendar year, but only to the extent such payments (when added to such payments paid during all prior calendar years with respect to services performed during such preceding calendar year) exceed $50,000.

"(2) APPLICABLE BONUS PAYMENTS.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), the term 'applicable bonus payment' means any bonus payment by a Federal emergency economic assistance recipient—

"(i) which is paid after December 31, 2008, and

"(ii) which is payable by reason of services performed by such individual in an applicable calendar year of the Federal emergency economic assistance recipient.

"(B) PAYMENTS AFTER ASSISTANCE PERIOD.—A bonus payment shall not be treated as an applicable bonus payment if it is made after the end date applicable under clause (i)(II) or (ii)(II) of subparagraph (C) (without regard to whether the payment is attributable to services performed before such end date).

"(C) APPLICABLE CALENDAR YEAR.—The term 'applicable calendar year' means, with respect to any Federal emergency economic assistance recipient, any calendar year which includes any portion of the period which—

"(i) in the case of a recipient described in subsection (c)(1)—

“(I) begins on the first date on which the outstanding aggregate assistance received under all programs described in subsection (c)(1)(A) exceeds $100,000,000, and

“(II) ends on the first date on which such outstanding aggregate amount does not exceed $100,000,000, and

“(ii) in the case of a recipient described in subsection (c)(2)—

“(I) begins on the first date on which assistance was received under a program described in subsection (c)(1)(A), and

“(II) ends on the first date on which there is no outstanding assistance provided to such recipient under any such program.

In the case of a person described in subsection (c)(3) with respect to a recipient described in subsection (c)(1) or (2), this subparagraph shall be applied by reference to the same period as is used for such recipient.

"(D) WAIVER OF RESTRICTION ON REPAYMENT OR REDEMPTION.—Any restriction or prohibition under any program described in subsection (c)(1)(A) (or any agreement entered into under such program) on a Federal emergency economic assistance recipient with respect to the repayment of any assistance provided under such program or the redemption of any equity interest shall not apply if such restriction or prohibition would prevent the recipient from reducing its outstanding assistance for purposes of subparagraph (C).

"(3) BONUS PAYMENT.—

"(A) IN GENERAL.—The term 'bonus payment' means any payment which—

"(i) is a payment to a covered individual by a Federal emergency economic assistance recipient for services rendered, and

"(ii) is in addition to any amount payable to such individual for services performed by such individual at a regular hourly, daily, weekly, monthly, or similar periodic rate.

Such term does not include payments to an employee as commissions, contributions to any qualified retirement plan (as defined in section 4974(c)), welfare and fringe benefits, overtime pay, or expense reimbursements.

"(B) EXCEPTION FOR CERTAIN EQUITY PAYMENTS.—

"(i) IN GENERAL.—In the case of a payment other than a retention bonus, such payment shall not be treated as a bonus payment if the payment consists of the granting on or after January 1, 2009, of an equity interest described in clause (ii) but only if no portion of such interest vests before the date which is 3 years after the date on which such interest is granted.

"(ii) EQUITY INTERESTS.—An equity interest is described in this clause if it is—

"(I) a stock option which is granted at its fair market value on the date of the grant,

"(II) a stock appreciation right which is granted at its fair market value on the date of the grant, or

"(III) restricted stock described in section 111(b)(3)(D)(i) of the Emergency Economic Stabilization Act of 2008 (as in effect on the date of the enactment of this section).

"(iii) SECRETARIAL AUTHORITY.—The Secretary may by regulation provide for the application of this subparagraph in the case of a person other than a corporation.

"(4) RETENTION BONUS.—The term 'retention bonus' means any bonus payment to an individual which—

"(A) is contingent on the completion of a period of future service with the Federal emergency economic assistance recipient, the completion of a specific project or other activity for the Federal emergency economic assistance recipient, or such other circumstances as the Secretary may prescribe, and

"(B) is not based on the performance of the individual (other than a requirement that the employee not be separated from employment for cause).

A bonus payment shall not be treated as based on performance for purposes of subparagraph (B) solely because the amount of the payment is determined by reference to a previous bonus payment which was based on performance.

"(c) FEDERAL EMERGENCY ECONOMIC ASSISTANCE RECIPIENT.—For purposes of this subsection, the term 'Federal emergency economic assistance recipient' means—

"(1) any person (other than a bank to which section 585 applies) if at any time after December 31, 2007—

"(A) the Federal Government acquires—

"(i) an equity interest in such person pursuant to a program authorized by the Emergency Economic Stabilization Act of 2008 or the third undesignated paragraph of section 13 of the Federal Reserve Act (12 U.S.C. 343), or

"(ii) any warrant (or other right) to acquire any equity interest with respect to such person pursuant to any such program, and

"(B) the outstanding aggregate amount of the assistance provided to such person under such programs exceeds $100,000,000,

"(2) the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, and

"(3) any person which is a member of the same affiliated group (as defined in section 1504, determined without regard to subsection (b) thereof) as a person described in paragraph (1) or (2).

"(d) COVERED INDIVIDUAL.—For purposes of this section, the term 'covered individual' means, with respect to any Federal emergency economic assistance recipient, any director or officer or other employee of such recipient.

"(e) ADMINISTRATIVE PROVISIONS; SPECIAL RULES.—For purposes of this section—

"(1) ADMINISTRATIVE PROVISIONS.—

"(A) IN GENERAL.—For purposes of subtitle F, the tax imposed by this section with respect to an excessive bonus shall be treated as a tax imposed by subtitle A for the taxable year of the Federal emergency economic assistance recipient or covered individual with or within which ends the calendar year in which payment of the excessive bonus is made.

"(B) WAGE WITHHOLDING.—If an excessive bonus is treated as wages for purposes of section 3402, the amount otherwise required to be deducted and withheld under such section shall be increased by an amount equal to 35 percent of such bonus.

"(C) SPECIAL RULES FOR PAYMENTS TO NONRESIDENT ALIEN INDIVIDUALS.—In the case of a payment of an excessive bonus to a covered individual who is a nonresident alien individual—

"(i) WITHHOLDING.—If section 1441 applies with respect to such payment, the amount otherwise required to be deducted and withheld under such section shall be increased by an amount equal to 35 percent of such bonus.

"(ii) LIABILITY WHERE NO WITHHOLDING.—If section 1441 does not apply to such payment, the person described in subsection (c)(1) or (2) with respect to the excessive bonus (and all persons described in subsection (c)(3) with respect to such person) shall be jointly and severally liable for payment of the tax imposed by subsection (a)(2) with respect to the excessive bonus.

"(2) SPECIAL RULES FOR EARNINGS.—

"(A) INCLUSION OF FUTURE EARNINGS ON EXCESSIVE BONUSES.—Any income (whether actual or notional) for any calendar year which is properly allocable to the portion of any applicable bonus payment which is treated as an excessive bonus (determined after application of subparagraph (B)) shall be treated as an excessive bonus for the calendar year in which paid.

"(B) FUTURE EARNINGS ON PAYMENT NOT TREATED AS EXCESSIVE BONUS.—

"(i) IN GENERAL.—Any income (whether actual or notional) for any calendar year which is properly allocable to the portion of any applicable bonus payment which is not treated as an excessive bonus shall be taken into account as an excessive bonus in the calendar year in which paid to the extent that the sum of—

"(I) the amount of such income in excess of the amount which would have been earned if the return on such portion were a market rate of return, plus

"(II) an amount equal to such portion, plus

"(III) such excess income for any preceding calendar year,

exceeds $50,000.

"(ii) MARKET RATE OF RETURN.—The Secretary shall prescribe by regulation rules governing the calculation of a market rate of return. Such rules shall allow in appropriate cases the treatment of income as based on a market rate of return if the income of the plan is determined by reference to the rate of return on a predetermined investment, including stock or other ownership interests (whether or not publicly traded) in the employer maintaining the plan.

"(3) INDIVIDUAL NOT TAXED IF BONUS REPAID.—If a covered individual repays all or any portion of an applicable bonus payment to the Federal emergency economic assistance recipient before the due date (without regard to extensions) for the individual's return of tax imposed by chapter for the taxable year for which tax under this section would (without regard to this paragraph) have been imposed, then, solely for purposes of applying this title to the covered individual, the portion repaid shall be treated as if it had not been paid to the covered individual.

"(4) NOTICE REQUIREMENTS.—The Secretary shall require each Federal emergency economic assistance recipient to notify, as soon as practicable after the date of the enactment of this subsection and at such other times as the Secretary determines appropriate, the Secretary and each covered individual of the amount of excessive bonuses to which this section applied and the amount of tax deducted and withheld on such bonuses.

"(5) SECRETARIAL AUTHORITY.—The Secretary may prescribe such regulations, rules, and guidance as may be necessary to carry out the provisions of this section, including regulations, rules, and guidance necessary to prevent—

"(A) the recharacterization of a bonus payment as a payment which is not a bonus payment in order to avoid the purposes of this section, or

"(B) the avoidance of the purposes of this section through the use of partnerships or other pass through entities.".

(b) CONFORMING AMENDMENTS.—

(1) The heading and table of sections for chapter 46 of such Code are amended to read as follows:

"CHAPTER 46-TAXES ON CERTAIN EXCESSIVE REMUNERATION

(2) The item relating to chapter 46 in the table of chapters for subtitle D of such Code is amended to read as follows:

(c) EFFECTIVE DATE.—The amendments made by this subsection shall apply to payments of excessive bonuses after December 31, 2008, in taxable years ending after such date.

SEC. 3. LIMITATION ON ANNUAL AMOUNTS WHICH MAY BE DEFERRED UNDER NONQUALIFIED DEFERRED COMPENSATION ARRANGEMENTS OF RECIPIENTS OF FEDERAL EMERGENCY ECONOMIC ASSISTANCE.

(a) IN GENERAL.—Section 409A(a) of the Internal Revenue Code of 1986 (relating to inclusion of gross income under nonqualified deferred compensation plans) is amended—

(1) by striking "and (4)" in subclause (I) of paragraph (1)(A)(i) and inserting "(4), and (5)", and

(2) by adding at the end the following new paragraph:

"(5) ANNUAL LIMITATION ON AGGREGATE DEFERRED AMOUNTS.—

"(A) LIMITATION.—In the case of any Federal emergency economic assistance recipient maintaining a nonqualified deferred compensation plan, the requirements of this paragraph are met if the plan provides that the aggregate amount of compensation which is deferred for any applicable taxable year beginning after December 31, 2008, with respect to a participant under the plan may not exceed $1,000,000. For purposes of this paragraph, only amounts deferred after the date of the enactment of this paragraph shall be taken into account.

"(B) SPECIAL RULES RELATING TO EARNINGS.—

"(i) INCLUSION OF FUTURE EARNINGS.—If an amount is includible under paragraph (1) in the gross income of a participant for any taxable year by reason of any failure to meet the requirements of this paragraph, any income (whether actual or notional) for any subsequent taxable year shall be included in gross income under paragraph (1)(A) in such subsequent taxable year to the extent such income—

"(I) is attributable to compensation (or income attributable to such compensation) required to be included in gross income by reason of such failure (including by reason of this subparagraph), and

"(II) is not subject to a substantial risk of forfeiture and has not been previously included in gross income.

"(ii) EARNINGS COUNTED AGAINST CAP ONLY IF IN EXCESS OF MARKET RATE.—Income (whether actual or notional) which is properly allocable to any participant for any taxable year shall be taken into account in determining whether the requirement of subparagraph (A) is met with respect to the taxable year only to the extent of the excess (if any) of—

"(I) the amount of such income, over

"(II) the amount of such income which would have been earned on the amount to which it is attributable if the return on such amount were a market rate of return.

"(iii) MARKET RATE OF RETURN.—The Secretary shall prescribe by regulation rules governing the calculation of a market rate of return. Such rules shall allow in appropriate cases the treatment of income as based on a market rate of return if the income of the plan is determined by reference to the rate of return on a predetermined investment, including stock or other ownership interests (whether or not publicly traded) in the employer maintaining the plan.

"(C) AGGREGATION RULE.—For purposes of this paragraph, all nonqualified deferred compensation plans maintained by all employers treated as a single employer under subsection (d)(6) shall be treated as 1 plan.

"(D) DEFINITIONS.—For purposes of this paragraph—

"(i) IN GENERAL.—Any term which is used in this paragraph which is also used in section 4999A shall have the same meaning as when used in such section.

"(ii) APPLICABLE TAXABLE YEAR.—The term 'applicable taxable year' means any taxable year which includes the portion of any applicable calendar year (as defined in section 4999A(b)(2)(C)).".

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008, except that the amendments shall only apply to amounts deferred after the date of the enactment of this Act (and to earnings on such amounts).

(2) GUIDANCE RELATING TO CERTAIN EXISTING ARRANGEMENTS.—Not later than 60 days after the date of the enactment of this Act, the Secretary of the Treasury shall issue guidance providing a limited period during which a nonqualified deferred com-

pensation plan adopted before December 31, 2008, may, without violating the requirements of section 409A(a) of such Code, be amended—

(A) to provide that a participant may, no later than December 31, 2009—

(i) terminate participation in the plan, or

(ii) cancel or modify an outstanding deferral election with regard to all or a portion of amounts deferred after the date of the enactment of this Act, to the extent necessary for the plan to meet the requirements of section 409A(a)(5) of such Code (as added by the amendments made by this section),

but only if amounts subject to the termination, cancellation, or modification are, to the extent not previously included in gross income, includible in income of the participant when no longer subject to substantial risk of forfeiture, and

(B) to conform to the requirements of section 409A(a)(5) of such Code (as added by the amendments made by this section) with regard to amounts deferred after the date of the enactment of this Act.

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