

111TH CONGRESS  
1ST SESSION

# H. R. 2861

To amend the Securities Exchange Act of 1934 to provide for rules and standards relating to the election of boards of directors and certain requirements relating to compensation of executives.

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## IN THE HOUSE OF REPRESENTATIVES

JUNE 12, 2009

Mr. PETERS (for himself, Ms. WATERS, Mr. DINGELL, Mr. WELCH, Mr. HOLT, Mr. DEFAZIO, and Mr. CAPUANO) introduced the following bill; which was referred to the Committee on Financial Services

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## A BILL

To amend the Securities Exchange Act of 1934 to provide for rules and standards relating to the election of boards of directors and certain requirements relating to compensation of executives.

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 “Shareholder Empower-  
5 ment Act of 2009”.

6 **SEC. 2. MAJORITY VOTING FOR DIRECTORS.**

7 The Securities Exchange Act of 1934 is amended by  
8 adding after section 16 the following new section:

1 **“SEC. 16A. ELECTION OF DIRECTORS.**

2 “(a) STANDARDS RELATING TO ELECTION OF DI-  
3 RECTORS.—

4 “(1) COMMISSION RULES.—Not later than 270  
5 days after the date of enactment of this section, the  
6 Commission shall, by rule, direct the national securi-  
7 ties exchanges and national securities associations 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 paragraph (2). Such rules shall provide  
11 for appropriate procedures for an issuer to have an  
12 opportunity to cure any defects that would be the  
13 basis for such a prohibition before the imposition of  
14 such prohibition.

15 “(2) STANDARDS FOR ELECTION OF DIREC-  
16 TORS.—

17 “(A) MAJORITY VOTING.—Each issuer  
18 shall, to the extent permitted under State law,  
19 provide in its governing documents that—

20 “(i) directors in uncontested elections  
21 shall be elected by a majority of the votes  
22 cast as to each nominee; and

23 “(ii) in contested elections where the  
24 number of nominees exceeds the number of  
25 directors to be elected, directors shall be  
26 elected by the vote of a plurality of the

1            shares represented at any meeting and en-  
2            titled to vote on the election of directors.

3            “(B) RESIGNATION POLICY.—Each issuer  
4            shall also, to the extent permitted under State  
5            law, adopt procedures under which any director  
6            who is not elected to a new term shall offer to  
7            tender his or her resignation to the board of di-  
8            rectors. The board of directors, with the advice  
9            of a committee of the board if such a committee  
10           has been established for that purpose, shall de-  
11           termine what action should be taken as to that  
12           resignation and shall publicly disclose its deci-  
13           sion and the rationale for that decision within  
14           a reasonable period after certification of the  
15           election results.

16           “(b) SHAREHOLDER ACCESS TO THE PROXY IN DI-  
17           RECTOR ELECTIONS.—

18           “(1) RULE.—Not later than 270 days after the  
19           date of enactment of this section, the Commission  
20           shall, by rule, require that in proxy statements and  
21           proxies, authorizations or consents prepared by an  
22           issuer pursuant to section 14, the issuer shall iden-  
23           tify and provide security holders with an opportunity  
24           to vote on candidates for the board of directors who  
25           have been nominated by holders in the aggregate at

1 least 1 percent of the issuer’s voting securities for  
2 at least 2 years prior to a record date established by  
3 the issuer for a meeting of security holders.

4 “(2) APPLICATION.—This rule shall specify the  
5 information to be provided to an issuer by security  
6 holders who nominate candidates for inclusion in an  
7 issuer’s proxy materials under this section and shall  
8 require the issuer to disclose information about such  
9 candidates in the issuer’s proxy materials to the  
10 same extent that information must be disclosed  
11 about candidates nominated by the issuer. This rule  
12 shall apply only when eligible security holders have  
13 nominated fewer than a majority of the number of  
14 directors then authorized to serve on the board of di-  
15 rectors, and the rule shall specify procedures to be  
16 followed if different security holders nominate can-  
17 didates sufficient to constitute a majority of the  
18 board of directors.

19 “(3) EFFECTIVE DATE.—The rule shall apply  
20 to proxy voting for meetings of security holders held  
21 on or after January 1, 2010, except to the extent  
22 that a meeting was originally scheduled to be held  
23 in 2009, but was adjourned to 2010.

24 “(c) BROKER DISCRETIONARY VOTING IN  
25 UNCONTESTED DIRECTOR ELECTIONS.—Not later than

1 270 days after the date of enactment of this section, the  
2 Commission shall by, rule, require that a broker shall not  
3 be allowed to vote securities on an uncontested election  
4 to the board of directors of an issuer to the extent that  
5 the beneficial owner of those securities has not provided  
6 specific instructions to the broker. The rule shall apply  
7 to proxy voting for meetings of security holders held on  
8 or after January 1, 2010, except to the extent that a meet-  
9 ing was originally scheduled to be held in 2009, but was  
10 adjourned to 2010.

11 “(d) INDEPENDENT CHAIRMAN OF THE BOARD OF  
12 DIRECTORS.—

13 “(1) COMMISSION RULES.—Not later than 270  
14 days after the date of enactment of this section, the  
15 Commission shall, by rule, direct the national securi-  
16 ties exchanges and national securities associations to  
17 prohibit the listing of any security of an issuer that  
18 is not in compliance with the requirements of any  
19 portion of paragraph (2). Such rules shall provide  
20 for appropriate procedures for an issuer to have an  
21 opportunity to cure any defects that would be the  
22 basis for such a prohibition before the imposition of  
23 such prohibition.

24 “(2) INDEPENDENT CHAIRMAN OF THE BOARD  
25 OF DIRECTORS.—Each issuer shall provide in its

1 governing documents or a public statement of cor-  
2 porate policy that, to the extent possible and con-  
3 sistent with the issuer’s status as a publicly traded  
4 company, the chairman of the board of directors  
5 shall be an independent director who has not pre-  
6 viously served as an executive officer of the issuer.  
7 Such rule shall be implemented with due regard for  
8 contracts in existence on the date of enactment of  
9 this section. For purposes of this subsection, an  
10 ‘independent director’ shall be one who during the  
11 preceding 5 years has not been—

12 “(A) employed by the issuer in an execu-  
13 tive capacity;

14 “(B) an employee, director or owner great-  
15 er than 20 percent of the beneficial shares of a  
16 firm that is a paid adviser or consultant to the  
17 issuer;

18 “(C) employed by a significant customer or  
19 supplier of the issuer;

20 “(D) a party to a personal services con-  
21 tract with the issuer, as well as with the  
22 issuer’s Chair, chief executive officer, or other  
23 senior executive officer;

24 “(E) an employee, officer or director of a  
25 foundation, university or other non-profit orga-

1 nization that receives the greater of \$100,000  
2 or 1 percent of total annual donations from the  
3 issuer;

4 “(F) a relative of an executive of the  
5 issuer;

6 “(G) part of an interlocking directorate in  
7 which the issuer’s chief executive officer or an-  
8 other executive serves on the board of another  
9 issuer employing that director; and

10 “(H) engaged in any other relationship  
11 with the issuer or senior executives that the  
12 Commission determines would not render that  
13 director an independent director.”.

14 **SEC. 3. EXECUTIVE COMPENSATION REQUIREMENTS.**

15 The Securities Exchange Act of 1934 is further  
16 amended by adding after the section 16A, as added by  
17 section 2, the following new section

18 **“SEC. 16B. EXECUTIVE COMPENSATION REQUIREMENTS.**

19 “(a) SHAREHOLDER APPROVAL OF EXECUTIVE COM-  
20 PENSATION.—

21 “(1) ANNUAL SHAREHOLDER VOTE ON EXECU-  
22 TIVE COMPENSATION.—Any proxy or consent or au-  
23 thorization for an annual or other meeting of an  
24 issuer shall permit a separate vote by shareholders  
25 to approve the compensation of senior executive offi-

1 cers, as disclosed pursuant to the compensation dis-  
2 closure rules of the Commission (which disclosure  
3 shall include the compensation discussion and anal-  
4 ysis, the compensation tables, and any related mate-  
5 rial).

6 “(2) NON-BINDING NATURE OF VOTE.—A  
7 shareholder vote described in paragraph (1) shall not  
8 be binding on the board of directors of an issuer and  
9 may not be construed as overruling a decision by  
10 such board, nor to create or imply any additional fi-  
11 duciary duty by such board, nor shall such vote be  
12 construed to restrict or limit the ability of security  
13 holders to make proposals for inclusion in proxy ma-  
14 terials related to executive compensation.

15 “(3) DEADLINE FOR RULES.—Not later than 1  
16 year after the date of enactment of this section, the  
17 Commission shall issue any final rules and regula-  
18 tions required by this section.

19 “(4) EXCEPTION.—This provision shall not  
20 apply to any issuer who is subject to a similar  
21 recoupment requirement under another provision of  
22 Federal law.

23 “(b) INDEPENDENT COMPENSATION ADVISERS.—

24 “(1) REQUIREMENT.—Not later than 1 year  
25 after the date of enactment of this section, the Com-

1 mission shall, by rule, require that if an issuer's  
2 board of directors or a committee thereof retains an  
3 individual adviser or advisory firm in conjunction  
4 with negotiating employment contracts or compensa-  
5 tion agreements with the issuer's executives, the in-  
6 dividual adviser and his or her firm shall be inde-  
7 pendent of the issuer, its executives and directors,  
8 and shall report solely to the board of directors or  
9 the committee thereof responsible for executive com-  
10 pensation. The rule shall further require that issuers  
11 shall not agree to indemnify or limit the liability of  
12 compensation advisers or advisory firms.

13           “(2) DETERMINATION.—In determining the ex-  
14 tent to which an adviser or advisory firm is inde-  
15 pendent of an issuer within the meaning of this sec-  
16 tion, the Commission shall consider such matters  
17 as—

18           “(A) the extent (as measured by annual  
19 fees and other relevant metrics) to which an in-  
20 dividual adviser or advisory firm provides serv-  
21 ices in conjunction with negotiating employment  
22 contracts or compensation agreements with the  
23 issuer's executives, as compared to other serv-  
24 ices that the adviser or advisory firm provides  
25 to the issuer or executives;

1           “(B) whether individual advisers are per-  
2           mitted to hold equity and do hold equity in the  
3           issuer; and

4           “(C) whether an advisory firm’s incentive  
5           compensation plan links the compensation of in-  
6           dividual advisers to the advisory firm’s provi-  
7           sion of other services to the issuer.

8           “(c) CLAWBACKS OF UNEARNED PERFORMANCE-  
9           BASED PAY.—

10           “(1) COMMISSION RULES.—Not later than 270  
11           days after the date of enactment of this section, the  
12           Commission shall, by rule, direct the national securi-  
13           ties exchanges and national securities associations to  
14           prohibit the listing of any security of an issuer that  
15           is not in compliance with the requirements of any  
16           portion of paragraph (2). Such rules shall provide  
17           for appropriate procedures for an issuer to have an  
18           opportunity to cure any defects that would be the  
19           basis for such a prohibition before the imposition of  
20           such prohibition.

21           “(2) RECOUPMENT OF UNEARNED COMPENSA-  
22           TION.—An issuer’s board of directors or a committee  
23           thereof shall develop and disclose a policy for review-  
24           ing unearned bonus payments, incentive payments,  
25           or equity payments that were awarded to executive

1 officers owing to fraud, financial results that require  
2 restatement, or some other cause. The policy should  
3 require recovery or cancellation of any unearned  
4 payments to the extent that it is feasible and prac-  
5 tical to do so.

6 “(3) EXCEPTION.—This provision shall not  
7 apply to any issuer who is subject to a similar  
8 recoupment requirement under another provision of  
9 Federal law.

10 “(d) SEVERANCE AGREEMENTS TIED TO PERFORM-  
11 ANCE.—

12 “(1) COMMISSION RULES.—Not later than 270  
13 days after the date of enactment of this section, the  
14 Commission shall, by rule, direct the national securi-  
15 ties exchanges and national securities associations to  
16 prohibit the listing of any security of an issuer that  
17 is not in compliance with the requirements of any  
18 portion of paragraph (2). Such rules shall provide  
19 for appropriate procedures for an issuer to have an  
20 opportunity to cure any defects that would be the  
21 basis for such a prohibition before the imposition of  
22 such prohibition.

23 “(2) SEVERANCE AGREEMENTS TIED TO PER-  
24 FORMANCE.—An issuer’s board of directors or a  
25 committee thereof shall not enter into agreements

1 providing for severance payments to a senior execu-  
2 tive officer who is terminated because of poor per-  
3 formance as an executive, as determined by the  
4 board of directors. To the extent that an issuer is  
5 able to terminate a senior executive officer for cause,  
6 poor performance by the executive, as determined by  
7 the board of directors, shall be considered as one  
8 such cause. The rule shall be implemented with due  
9 regard for contracts in existence on the date of en-  
10 actment of this section.

11 “(e) IMPROVED DISCLOSURE OF COMPENSATION  
12 TARGETS.—Not later than 1 year after the date of enact-  
13 ment of this section, the Commission shall, by rule, require  
14 additional disclosure of specific performance targets that  
15 are used by issuers to determine a senior executive offi-  
16 cer’s eligibility for bonuses, equity and incentive com-  
17 pensation. The Commission shall consider methods to im-  
18 prove disclosure in situations when it is claimed that dis-  
19 closure would result in competitive harm to the issuer, in-  
20 cluding, requirements that the issuer describe its past ex-  
21 perience with similar target levels, disclose any inconsis-  
22 tencies between compensation targets and targets set in  
23 other contexts, submit a request for confidential treatment  
24 of the performance targets under Commission rules, or

- 1 disclose the data after disclosure would no longer be con-
- 2 sidered competitively harmful.”.

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