

111TH CONGRESS
1ST SESSION

S. _____

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 non-qualified deferred compensation that employees of such companies may defer from taxation, and for other purposes.

IN THE SENATE OF THE UNITED STATES

Mr. BAUCUS (for himself, Mr. GRASSLEY, Mr. WYDEN, Ms. SNOWE, Mrs. LINCOLN, Mr. KERRY, Mr. SCHUMER, Mr. MENENDEZ, Mr. NELSON of Florida, Mr. BINGAMAN, and Ms. CANTWELL) introduced the following bill; which was read twice and referred to the Committee on

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.

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

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Compensation Fair-
3 ness Act of 2009”.

4 **SEC. 2. EXCISE TAXES ON EXCESSIVE BONUSES PAID BY**
5 **RECIPIENTS OF FEDERAL EMERGENCY ECO-**
6 **NOMIC ASSISTANCE.**

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

11 **“SEC. 4999A. EXCESSIVE BONUSES PAID BY RECIPIENTS OF**
12 **FEDERAL EMERGENCY ECONOMIC ASSIST-**
13 **ANCE.**

14 “(a) IMPOSITION OF TAX.—There is hereby im-
15 posed—

16 “(1) on each Federal emergency economic as-
17 sistance recipient which pays an excessive bonus, a
18 tax equal to 35 percent of the amount of such
19 bonus, and

20 “(2) on each covered individual who receives an
21 excessive bonus from such a recipient, a tax equal to
22 35 percent of the amount of such bonus.

23 “(b) EXCESSIVE BONUS.—For purposes of this sec-
24 tion—

25 “(1) IN GENERAL.—The term ‘excessive bonus’
26 means, with respect to any calendar year—

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

4 “(B) in the case of applicable bonus pay-
5 ments not described in subparagraph (A), an
6 amount equal to the sum of—

7 “(i) the portion of such applicable
8 bonus payments paid to a covered indi-
9 vidual during such calendar year which is
10 attributable to services performed by such
11 individual during such calendar year, but
12 only to the extent such payments exceed
13 \$50,000, plus

14 “(ii) the portion of applicable bonus
15 payments paid to a covered individual dur-
16 ing such calendar year which is attrib-
17 utable to services performed by such indi-
18 vidual during any preceding calendar year,
19 but only to the extent such payments
20 (when added to such payments paid during
21 all prior calendar years with respect to
22 services performed during such preceding
23 calendar year) exceed \$50,000.

24 “(2) APPLICABLE BONUS PAYMENTS.—

1 “(A) IN GENERAL.—Except as provided in
2 subparagraph (B), the term ‘applicable bonus
3 payment’ means any bonus payment by a Fed-
4 eral emergency economic assistance recipient—

5 “(i) which is paid after December 31,
6 2008, and

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

11 “(B) PAYMENTS AFTER ASSISTANCE PE-
12 RIOD.—A bonus payment shall not be treated
13 as an applicable bonus payment if it is made
14 after the end date applicable under clause
15 (i)(II) or (ii)(II) of subparagraph (C) (without
16 regard to whether the payment is attributable
17 to services performed before such end date).

18 “(C) APPLICABLE CALENDAR YEAR.—The
19 term ‘applicable calendar year’ means, with re-
20 spect to any Federal emergency economic as-
21 sistance recipient, any calendar year which in-
22 cludes any portion of the period which—

23 “(i) in the case of a recipient de-
24 scribed in subsection (c)(1)—

1 “(I) begins on the first date on
2 which the outstanding aggregate as-
3 sistance received under all programs
4 described in subsection (c)(1)(A) ex-
5 ceeds \$100,000,000, and

6 “(II) ends on the first date on
7 which such outstanding aggregate
8 amount does not exceed
9 \$100,000,000, and

10 “(ii) in the case of a recipient de-
11 scribed in subsection (c)(2)—

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

16 “(II) ends on the first date on
17 which there is no outstanding assist-
18 ance provided to such recipient under
19 any such program.

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

1 “(D) WAIVER OF RESTRICTION ON REPAY-
2 MENT OR REDEMPTION.—Any restriction or
3 prohibition under any program described in
4 subsection (c)(1)(A) (or any agreement entered
5 into under such program) on a Federal emer-
6 gency economic assistance recipient with respect
7 to the repayment of any assistance provided
8 under such program or the redemption of any
9 equity interest shall not apply if such restriction
10 or prohibition would prevent the recipient from
11 reducing its outstanding assistance for purposes
12 of subparagraph (C).

13 “(3) BONUS PAYMENT.—

14 “(A) IN GENERAL.—The term ‘bonus pay-
15 ment’ means any payment which—

16 “(i) is a payment to a covered indi-
17 vidual by a Federal emergency economic
18 assistance recipient for services rendered,
19 and

20 “(ii) is in addition to any amount pay-
21 able to such individual for services per-
22 formed by such individual at a regular
23 hourly, daily, weekly, monthly, or similar
24 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.

6 “(B) EXCEPTION FOR CERTAIN EQUITY
7 PAYMENTS.—

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

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

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

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

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

6 “(iii) SECRETARIAL AUTHORITY.—
7 The Secretary may by regulation provide
8 for the application of this subparagraph in
9 the case of a person other than a corpora-
10 tion.

11 “(4) RETENTION BONUS.—The term ‘retention
12 bonus’ means any bonus payment to an individual
13 which—

14 “(A) is contingent on the completion of a
15 period of future service with the Federal emer-
16 gency economic assistance recipient, the comple-
17 tion of a specific project or other activity for
18 the Federal emergency economic assistance re-
19 cipient, or such other circumstances as the Sec-
20 retary may prescribe, and

21 “(B) is not based on the performance of
22 the individual (other than a requirement that
23 the employee not be separated from employ-
24 ment for cause).

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

6 “(c) FEDERAL EMERGENCY ECONOMIC ASSISTANCE
7 RECIPIENT.—For purposes of this subsection, the term
8 ‘Federal emergency economic assistance recipient’
9 means—

10 “(1) any person (other than a bank to which
11 section 585 applies) if at any time after December
12 31, 2007—

13 “(A) the Federal Government acquires—

14 “(i) an equity interest in such person
15 pursuant to a program authorized by the
16 Emergency Economic Stabilization Act of
17 2008 or the third undesignated paragraph
18 of section 13 of the Federal Reserve Act
19 (12 U.S.C. 343), or

20 “(ii) any warrant (or other right) to
21 acquire any equity interest with respect to
22 such person pursuant to any such pro-
23 gram, and

1 “(B) the outstanding aggregate amount of
2 the assistance provided to such person under
3 such programs exceeds \$100,000,000,

4 “(2) the Federal National Mortgage Association
5 and the Federal Home Loan Mortgage Corporation,
6 and

7 “(3) any person which is a member of the same
8 affiliated group (as defined in section 1504, deter-
9 mined without regard to subsection (b) thereof) as
10 a person described in paragraph (1) or (2).

11 “(d) COVERED INDIVIDUAL.—For purposes of this
12 section, the term ‘covered individual’ means, with respect
13 to any Federal emergency economic assistance recipient,
14 any director or officer or other employee of such recipient.

15 “(e) ADMINISTRATIVE PROVISIONS; SPECIAL
16 RULES.—For purposes of this section—

17 “(1) ADMINISTRATIVE PROVISIONS.—

18 “(A) IN GENERAL.—For purposes of sub-
19 title F, the tax imposed by this section with re-
20 spect to an excessive bonus shall be treated as
21 a tax imposed by subtitle A for the taxable year
22 of the Federal emergency economic assistance
23 recipient or covered individual with or within
24 which ends the calendar year in which payment
25 of the excessive bonus is made.

1 “(B) WAGE WITHHOLDING.—If an exces-
2 sive bonus is treated as wages for purposes of
3 section 3402, the amount otherwise required to
4 be deducted and withheld under such section
5 shall be increased by an amount equal to 35
6 percent of such bonus.

7 “(C) SPECIAL RULES FOR PAYMENTS TO
8 NONRESIDENT ALIEN INDIVIDUALS.—In the
9 case of a payment of an excessive bonus to a
10 covered individual who is a nonresident alien in-
11 dividual—

12 “(i) WITHHOLDING.—If section 1441
13 applies with respect to such payment, the
14 amount otherwise required to be deducted
15 and withheld under such section shall be
16 increased by an amount equal to 35 per-
17 cent of such bonus.

18 “(ii) LIABILITY WHERE NO WITH-
19 HOLDING.—If section 1441 does not apply
20 to such payment, the person described in
21 subsection (c)(1) or (2) with respect to the
22 excessive bonus (and all persons described
23 in subsection (c)(3) with respect to such
24 person) shall be jointly and severally liable
25 for payment of the tax imposed by sub-

1 section (a)(2) with respect to the excessive
2 bonus.

3 “(2) SPECIAL RULES FOR EARNINGS.—

4 “(A) INCLUSION OF FUTURE EARNINGS ON
5 EXCESSIVE BONUSES.—Any income (whether
6 actual or notional) for any calendar year which
7 is properly allocable to the portion of any appli-
8 cable bonus payment which is treated as an ex-
9 cessive bonus (determined after application of
10 subparagraph (B)) shall be treated as an exces-
11 sive bonus for the calendar year in which paid.

12 “(B) FUTURE EARNINGS ON PAYMENT NOT
13 TREATED AS EXCESSIVE BONUS.—

14 “(i) IN GENERAL.—Any income
15 (whether actual or notional) for any cal-
16 endar year which is properly allocable to
17 the portion of any applicable bonus pay-
18 ment which is not treated as an excessive
19 bonus shall be taken into account as an ex-
20 cessive bonus in the calendar year in which
21 paid to the extent that the sum of—

22 “(I) the amount of such income
23 in excess of the amount which would
24 have been earned if the return on

1 such portion were a market rate of re-
2 turn, plus

3 “(II) an amount equal to such
4 portion, plus

5 “(III) such excess income for any
6 preceding calendar year,

7 exceeds \$50,000.

8 “(ii) MARKET RATE OF RETURN.—

9 The Secretary shall prescribe by regulation
10 rules governing the calculation of a market
11 rate of return. Such rules shall allow in ap-
12 propriate cases the treatment of income as
13 based on a market rate of return if the in-
14 come of the plan is determined by ref-
15 erence to the rate of return on a predeter-
16 mined investment, including stock or other
17 ownership interests (whether or not pub-
18 licly traded) in the employer maintaining
19 the plan.

20 “(3) INDIVIDUAL NOT TAXED IF BONUS RE-
21 PAID.—If a covered individual repays all or any por-
22 tion of an applicable bonus payment to the Federal
23 emergency economic assistance recipient before the
24 due date (without regard to extensions) for the indi-
25 vidual’s return of tax imposed by chapter for the

1 taxable year for which tax under this section would
2 (without regard to this paragraph) have been im-
3 posed, then, solely for purposes of applying this title
4 to the covered individual, the portion repaid shall be
5 treated as if it had not been paid to the covered in-
6 dividual.

7 “(4) NOTICE REQUIREMENTS.—The Secretary
8 shall require each Federal emergency economic as-
9 sistance recipient to notify, as soon as practicable
10 after the date of the enactment of this subsection
11 and at such other times as the Secretary determines
12 appropriate, the Secretary and each covered indi-
13 vidual of the amount of excessive bonuses to which
14 this section applied and the amount of tax deducted
15 and withheld on such bonuses.

16 “(5) SECRETARIAL AUTHORITY.—The Secretary
17 may prescribe such regulations, rules, and guidance
18 as may be necessary to carry out the provisions of
19 this section, including regulations, rules, and guid-
20 ance necessary to prevent—

21 “(A) the recharacterization of a bonus pay-
22 ment as a payment which is not a bonus pay-
23 ment in order to avoid the purposes of this sec-
24 tion, or

1 “(B) the avoidance of the purposes of this
2 section through the use of partnerships or other
3 pass through entities.”.

4 (b) CONFORMING AMENDMENTS.—

5 (1) The heading and table of sections for chap-
6 ter 46 of such Code are amended to read as follows:

“CHAPTER 46-TAXES ON CERTAIN EXCESSIVE REMUNERATION

“Sec. 4999. Golden parachute payments.

“Sec. 4999A. Excessive bonuses paid by recipients of Federal emergency eco-
nomic assistance.”.

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

“Chapter 46. Taxes on excessive remuneration.”.

10 (c) EFFECTIVE DATE.—The amendments made by
11 this subsection shall apply to payments of excessive bo-
12 nuses after December 31, 2008, in taxable years ending
13 after such date.

14 **SEC. 3. LIMITATION ON ANNUAL AMOUNTS WHICH MAY BE**
15 **DEFERRED UNDER NONQUALIFIED DE-**
16 **FERRED COMPENSATION ARRANGEMENTS OF**
17 **RECIPIENTS OF FEDERAL EMERGENCY ECO-**
18 **NOMIC ASSISTANCE.**

19 (a) IN GENERAL.—Section 409A(a) of the Internal
20 Revenue Code of 1986 (relating to inclusion of gross in-
21 come under nonqualified deferred compensation plans) is
22 amended—

1 (1) by striking “and (4)” in subclause (I) of
2 paragraph (1)(A)(i) and inserting “(4), and (5)”,
3 and

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

6 “(5) ANNUAL LIMITATION ON AGGREGATE DE-
7 FERRED AMOUNTS.—

8 “(A) LIMITATION.—In the case of any
9 Federal emergency economic assistance recipi-
10 ent maintaining a nonqualified deferred com-
11 pensation plan, the requirements of this para-
12 graph are met if the plan provides that the ag-
13 gregate amount of compensation which is de-
14 ferred for any applicable taxable year beginning
15 after December 31, 2008, with respect to a par-
16 ticipant under the plan may not exceed
17 \$1,000,000. For purposes of this paragraph,
18 only amounts deferred after the date of the en-
19 actment of this paragraph shall be taken into
20 account.

21 “(B) SPECIAL RULES RELATING TO EARN-
22 INGS.—

23 “(i) INCLUSION OF FUTURE EARN-
24 INGS.—If an amount is includible under
25 paragraph (1) in the gross income of a

1 participant for any taxable year by reason
2 of any failure to meet the requirements of
3 this paragraph, any income (whether ac-
4 tual or notional) for any subsequent tax-
5 able year shall be included in gross income
6 under paragraph (1)(A) in such subse-
7 quent taxable year to the extent such in-
8 come—

9 “(I) is attributable to compensa-
10 tion (or income attributable to such
11 compensation) required to be included
12 in gross income by reason of such fail-
13 ure (including by reason of this sub-
14 paragraph), and

15 “(II) is not subject to a substan-
16 tial risk of forfeiture and has not been
17 previously included in gross income.

18 “(ii) EARNINGS COUNTED AGAINST
19 CAP ONLY IF IN EXCESS OF MARKET
20 RATE.—Income (whether actual or no-
21 tional) which is properly allocable to any
22 participant for any taxable year shall be
23 taken into account in determining whether
24 the requirement of subparagraph (A) is

1 met with respect to the taxable year only
2 to the extent of the excess (if any) of—

3 “(I) the amount of such income,
4 over

5 “(II) the amount of such income
6 which would have been earned on the
7 amount to which it is attributable if
8 the return on such amount were a
9 market rate of return.

10 “(iii) MARKET RATE OF RETURN.—

11 The Secretary shall prescribe by regulation
12 rules governing the calculation of a market
13 rate of return. Such rules shall allow in ap-
14 propriate cases the treatment of income as
15 based on a market rate of return if the in-
16 come of the plan is determined by ref-
17 erence to the rate of return on a predeter-
18 mined investment, including stock or other
19 ownership interests (whether or not pub-
20 licly traded) in the employer maintaining
21 the plan.

22 “(C) AGGREGATION RULE.—For purposes
23 of this paragraph, all nonqualified deferred
24 compensation plans maintained by all employers

1 treated as a single employer under subsection
2 (d)(6) shall be treated as 1 plan.

3 “(D) DEFINITIONS.—For purposes of this
4 paragraph—

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

9 “(ii) APPLICABLE TAXABLE YEAR.—
10 The term ‘applicable taxable year’ means
11 any taxable year which includes the portion
12 of any applicable calendar year (as defined
13 in section 4999A(b)(2)(C)).’.”.

14 (b) EFFECTIVE DATE.—

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

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

1 pensation plan adopted before December 31, 2008,
2 may, without violating the requirements of section
3 409A(a) of such Code, be amended—

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

6 (i) terminate participation in the plan,
7 or

8 (ii) cancel or modify an outstanding
9 deferral election with regard to all or a
10 portion of amounts deferred after the date
11 of the enactment of this Act, to the extent
12 necessary for the plan to meet the require-
13 ments of section 409A(a)(5) of such Code
14 (as added by the amendments made by this
15 section),

16 but only if amounts subject to the termination,
17 cancellation, or modification are, to the extent
18 not previously included in gross income, includ-
19 ible in income of the participant when no longer
20 subject to substantial risk of forfeiture, and

21 (B) to conform to the requirements of sec-
22 tion 409A(a)(5) of such Code (as added by the
23 amendments made by this section) with regard
24 to amounts deferred after the date of the enact-
25 ment of this Act.