

The Shareholder Empowerment Act of 2009

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On June 12, 2009, Representative Gary Peters (D-MI) introduced the Shareholder Empowerment Act of 2009, a bill aimed at increasing corporate governance standards relating to director elections and executive compensation. If enacted, the bill would amend the Securities Exchange Act of 1934 by requiring the SEC to adopt rules regarding the following items:

Majority Voting for Directors. Stock exchanges would be required to adopt listing standards requiring that, in uncontested elections, director nominees must receive a majority of the votes cast to be elected. Plurality voting would continue to apply in contested elections. Issuers would also be required to adopt procedures whereby any director who is not re-elected must offer his or her resignation to the board, and the board must determine what action to take as to the resignation and publicly disclose its decision and rationale.

Proxy Access. Shareholders would be permitted to vote on director candidates who are nominated by shareholders who have held at least 1% of the issuer's voting securities for at least two years prior to the record date for the meeting. This rule would apply only when such shareholders nominate less than a majority of the authorized number of directors and would require issuers to disclose information about such candidates in their proxy materials.

Broker Discretionary Voting. Brokers would be prohibited from voting securities in uncontested director elections without specific instructions from beneficial owners.

Independent Chairman. Stock exchanges would be required to adopt listing standards requiring each issuer to implement a policy that its chairman of the board must be an independent director who has not previously served as an executive officer of the issuer.

Non-Binding "Say on Pay" Vote. Issuers would be required to obtain a separate non-binding vote from shareholders regarding the compensation of senior executive officers as disclosed in their proxy materials, including the compensation discussion and analysis, compensation tables and related materials.

Independent Compensation Advisors. Advisors retained by a board or board committee in conjunction with negotiating executive employment contracts or compensation agreements would be required to be independent from the issuer and report solely to the board or committee.

Clawbacks of Unearned Pay. Stock exchanges would be required to adopt listing standards requiring issuers to develop and disclose policies for reviewing and, to the extent feasible and practicable, recovering or canceling unearned bonus payments, incentive payments or equity payments that were awarded to executive officers due to fraud, financial results that require restatement or other just cause.

No Severance Agreements for Poor Performance. Stock exchanges would be required to adopt listing standards prohibiting issuers from entering into agreements providing for severance payments to executive officers who are

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terminated for poor performance. To the extent that an executive officer may be terminated for cause, poor performance by the executive, as determined by the board, would constitute one example of cause.

Disclosure of Performance Targets.

Issuers would be required to provide additional disclosure of the specific performance targets used to determine senior executive officers' eligibility for bonuses, equity awards and incentive compensation, and the SEC would be directed to consider methods to improve disclosure in situations where issuers claim that disclosure would result in competitive harm. These methods could include required disclosure of past experience with similar targets or mandated confidential treatment requests.

The bill proposes many of the same corporate governance reforms set forth in the Shareholder Bill of Rights Act of 2009, which was introduced by Senators Charles Schumer and Maria Cantwell on May 19, 2009. If the bill passes, the details regarding its operation and scope will not be known until subsequent rulemaking by the SEC and stock exchanges. Regardless of whether the bill is adopted, it will continue to fuel the debate over what types of corporate governance reforms should move forward and put pressure on the SEC to take action on its numerous outstanding and contemplated rule proposals.

This client alert is for general information purposes and should not be regarded as legal advice.