

111TH CONGRESS
1ST SESSION

S. 2813

To increase corporate responsibility, and for other purposes.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 20, 2009

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

A BILL

To increase corporate responsibility, 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 “Investors Rights and
5 Corporate Accountability Act of 2009”.

6 **SEC. 2. FIDUCIARY STANDARD FOR BROKER-DEALERS.**

7 Section 15 of the Securities Exchange Act of 1934
8 (15 U.S.C. 78o) is amended—

9 (1) by redesignating subsection (i), as added by
10 section 303(f) of the Commodity Futures Moderniza-
11 tion Act of 2000 (114 Stat. 2763A–455), and as en-

1 acted into law by section 1(a)(5) of Public Law 106–
2 554, as subsection (j); and

3 (2) by adding at the end the following:

4 “(k) STANDARD OF CARE.—Notwithstanding any
5 other provision of this title or the Investment Advisers Act
6 of 1940 (15 U.S.C. 80b–1 et seq.), the Commission shall
7 promulgate rules, not later than 1 year after the date of
8 enactment of this subsection, to provide that the standard
9 of care for all brokers and dealers in providing investment
10 advice to retail customers or clients (and any other cus-
11 tomers or clients as the Commission may by rule provide)
12 shall be the fiduciary duty established under the Invest-
13 ment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.), in-
14 cluding the duty to act solely in the best interest of the
15 customer or client, without regard to the financial or other
16 interest of the broker or dealer providing the advice.”.

17 **SEC. 3. CLAWBACK OF INCENTIVE COMPENSATION AND BO-**
18 **NUSES.**

19 (a) SECURITIES EXCHANGE ACT OF 1934.—Section
20 21D(f)(2)(A) of the Securities Exchange Act of 1934 (15
21 U.S.C. 78u–4(f)(2)(A)) is amended—

22 (1) by striking “JOINT AND SEVERAL LIABIL-
23 ITY.—Any” and inserting the following: “KNOWING
24 VIOLATIONS.—

1 “(i) JOINT AND SEVERAL LIABIL-
 2 ITY.—Any”; and

3 (2) by adding at the end the following:

4 “(ii) INCENTIVE COMPENSATION AND
 5 BONUSES.—If the trier of fact specifically
 6 determines that a covered person know-
 7 ingly committed a violation of the securi-
 8 ties laws, the covered person shall be or-
 9 dered to reimburse an issuer for—

10 “(I) any bonus or other incen-
 11 tive-based or equity-based compensa-
 12 tion received by the covered person
 13 from the issuer during the period of
 14 the violation of the securities laws;
 15 and

16 “(II) any profits realized by the
 17 covered person from the sale of securi-
 18 ties of the issuer during the period of
 19 the violation of the securities laws.”.

20 (b) SARBANES-OXLEY ACT OF 2002.—Section 304 of
 21 the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7243) is
 22 amended—

23 (1) in subsection (a)—

24 (A) in the matter preceding paragraph (1),
 25 by striking “, as a result of misconduct,”;

1 (B) in paragraph (1), by striking “or filing
 2 with the Commission (whichever first occurs)”;
 3 and

4 (C) in paragraph (2), by striking “during
 5 that 12-month period”; and

6 (2) by adding at the end the following:

7 “(c) COMMENCEMENT OF ACTION.—A shareholder of
 8 an issuer may commence an action on behalf of the issuer
 9 under this section if the chief executive officer or the chief
 10 financial officer of the issuer has not made a reimburse-
 11 ment required under this section before the expiration of
 12 the 90-day period beginning on the date on which the ac-
 13 counting restatement occurs.”.

14 **SEC. 4. PROTECTING THE CONFIDENTIALITY OF WHISTLE-**
 15 **BLOWERS.**

16 Section 21D(b)(2) of the Securities Exchange Act of
 17 1934 (15 U.S.C. 78u-4(b)(2)) is amended—

18 (1) by striking “In any private action” and in-
 19 serting the following:

20 “(A) IN GENERAL.—In any private ac-
 21 tion”; and

22 (2) by adding at the end the following:

23 “(B) CONFIDENTIAL SOURCES.—

24 “(i) IN GENERAL.—Allegations by a
 25 confidential source shall be considered to

1 give rise to a strong inference that the de-
2 fendant acted with the required state of
3 mind, if the source is described in the com-
4 plaint with sufficient particularity to sup-
5 port the probability that a person in the
6 situation of the source would possess the
7 information alleged.

8 “(ii) CONSIDERATIONS.—The weight
9 accorded allegations by a confidential
10 source shall depend on the level of detail
11 provided by the source, the corroborative
12 nature of the other facts alleged (including
13 from other sources), the coherence and
14 plausibility of the allegations, the number
15 of sources, the reliability of the sources,
16 and similar indicia.

17 “(iii) PROTECTION.—A confidential
18 source described in a complaint shall be ac-
19 corded the same protection received by a
20 confidential source who provides com-
21 parable information to the Commission.

22 “(iv) NONDISCLOSURE REQUIRE-
23 MENTS.—Upon motion, a court shall enter
24 an order reasonably limiting the scope of
25 nondisclosure required by a post-employ-

1 ment agreement. An order under this
 2 clause may not impair a legitimate interest
 3 of a former employer in the confidentiality
 4 of documents and information subject to
 5 the order.”.

6 **SEC. 5. PROHIBITION ON CERTAIN VOTING BY BROKERS.**

7 Section 6(b) of the Securities Exchange Act of 1934
 8 (15 U.S.C. 78f(b)) is amended by adding at the end the
 9 following:

10 “(10) The rules of the exchange prohibit any
 11 member from granting any proxy to vote any secu-
 12 rity in connection with an election for membership
 13 to the board of directors or analogous governing
 14 body of any issuer of a listed security, in the absence
 15 of instructions from the beneficial owner of the secu-
 16 rity regarding the specific election.”.

17 **SEC. 6. INDEPENDENCE OF COMPENSATION ADVISERS.**

18 Section 16 of the Securities Exchange Act of 1934
 19 (15 U.S.C. 78p) is amended by adding at the end the fol-
 20 lowing:

21 “(h) INDEPENDENT COMPENSATION ADVISERS.—
 22 Not later than 1 year after the date of enactment of this
 23 subsection, the Commission shall, by rule—

24 “(1) require any adviser retained by the board
 25 of directors or a committee of the board of directors

1 of an issuer in conjunction with the negotiation of
 2 an employment contract or a compensation agree-
 3 ment with an executive of the issuer—

4 “(A) to be independent of the issuer and
 5 the executives and directors of the issuer; and

6 “(B) to report solely to the board of direc-
 7 tors or the committee of the board of directors
 8 responsible for executive compensation; and
 9 “(2) prohibit an issuer from agreeing to indem-
 10 nify or limit the liability of an adviser described in
 11 paragraph (1).”.

12 **SEC. 7. AIDING AND ABETTING LIABILITY.**

13 (a) SECURITIES EXCHANGE ACT OF 1934.—Section
 14 21D of the Securities Exchange Act of 1934 (15 U.S.C.
 15 78u–4) is amended by adding at the end the following:

16 “(g) PERSONS THAT AID OR ABET VIOLATIONS.—
 17 Any person that provides substantial assistance to another
 18 person, with reckless disregard for whether the substantial
 19 assistance is in violation of this title, or of any rule or
 20 regulation issued under this title, shall be liable in a pri-
 21 vate action brought under this title, to the same extent
 22 as the person to whom the substantial assistance is pro-
 23 vided.”.

1 (b) INVESTMENT ADVISERS ACT.—Section 209 of the
 2 Investment Advisers Act of 1940 (15 U.S.C. 80b–9) is
 3 amended by adding at the end the following:

4 “(f) AIDING AND ABETTING.—For purposes of any
 5 action brought by the Commission under subsection (e),
 6 any person that provides substantial assistance to another
 7 person, with reckless disregard for whether the substantial
 8 assistance is in violation of this Act, or of any rule, regula-
 9 tion, or order issued under this Act, shall be liable, to the
 10 same extent as the person to whom the substantial assist-
 11 ance is provided.”.

12 **SEC. 8. SHAREHOLDER APPROVAL OF GOLDEN PARACHUTE**
 13 **COMPENSATION.**

14 Section 16 of the Securities Exchange Act of 1934
 15 (15 U.S.C. 78p), as amended by this Act, is amended by
 16 adding at the end the following:

17 “(i) SEVERANCE AGREEMENTS TIED TO PERFORM-
 18 ANCE.—

19 “(1) COMMISSION RULES.—

20 “(A) IN GENERAL.—Not later than 270
 21 days after the date of enactment of this sub-
 22 section, the Commission shall, by rule, direct
 23 the national securities exchanges and national
 24 securities associations to prohibit the listing of
 25 any security of an issuer that is not in compli-

1 ance with the requirements of any portion of
2 paragraph (2).

3 “(B) OPPORTUNITY TO CURE.—The rules
4 issued under subparagraph (A) shall provide for
5 appropriate procedures for an issuer to have an
6 opportunity to cure any defects that would be
7 the basis for such a prohibition before the im-
8 position of such prohibition.

9 “(C) CONSIDERATIONS.—The rules issued
10 under subparagraph (A) shall be implemented
11 with due regard for contracts in existence on
12 the date of enactment of this subsection.

13 “(2) SEVERANCE AGREEMENTS TIED TO PER-
14 FORMANCE.—The board of directors of an issuer, or
15 a committee of such board of directors, may not
16 enter into an agreement providing for severance pay-
17 ments to a senior executive officer who is terminated
18 because of poor performance as an executive, as de-
19 termined by the board of directors. To the extent
20 that an issuer is able to terminate a senior executive
21 officer for cause, poor performance by the executive,
22 as determined by the board of directors, shall be
23 considered as one such cause.”.

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