

111TH CONGRESS  
1ST SESSION

# S. 2813

To increase corporate responsibility, and for other purposes.

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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

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## 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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