II

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

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A BILL

To increase corporate responsibility, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Investors Rights and Corporate Accountability Act of 2009''.

SEC. 2. FIDUCIARY STANDARD FOR BROKER-DEALERS.

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

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

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

(2) by adding at the end the following:

"(k) STANDARD OF CARE.—Notwithstanding any other provision of this title or the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.), the Commission shall promulgate rules, not later than 1 year after the date of enactment of this subsection, to provide that the standard of care for all brokers and dealers in providing investment advice to retail customers or clients (and any other customers or clients as the Commission may by rule provide) shall be the fiduciary duty established under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.), including the duty to act solely in the best interest of the customer or client, without regard to the financial or other interest of the broker or dealer providing the advice.".

SEC. 3. CLAWBACK OF INCENTIVE COMPENSATION AND BONUSES.

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

(1) by striking "JOINT AND SEVERAL LIABILITY.—Any" and inserting the following: "KNOWING VIOLATIONS.—

"(i) JOINT AND SEVERAL LIABILITY.—Any"; and

(2) by adding at the end the following:

"(ii) INCENTIVE COMPENSATION AND BONUSES.—If the trier of fact specifically determines that a covered person knowingly committed a violation of the securities laws, the covered person shall be ordered to reimburse an issuer for—

"(I) any bonus or other incentive-based or equity-based compensation received by the covered person from the issuer during the period of the violation of the securities laws; and

"(II) any profits realized by the covered person from the sale of securities of the issuer during the period of the violation of the securities laws.".

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

(1) in subsection (a)—

(A) in the matter preceding paragraph (1), by striking ", as a result of misconduct,";

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

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

(2) by adding at the end the following:

“(c) COMMENCEMENT OF ACTION.—A shareholder of an issuer may commence an action on behalf of the issuer under this section if the chief executive officer or the chief financial officer of the issuer has not made a reimbursement required under this section before the expiration of the 90-day period beginning on the date on which the accounting restatement occurs.”.

SEC. 4. PROTECTING THE CONFIDENTIALITY OF WHISTLE-BLOWERS.

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

(1) by striking “In any private action” and inserting the following:

“(A) IN GENERAL.—In any private action”; and

(2) by adding at the end the following:

“(B) CONFIDENTIAL SOURCES.—

“(i) IN GENERAL.—Allegations by a confidential source shall be considered to give rise to a strong inference that the defendant acted with the required state of mind, if the source is described in the complaint with sufficient particularity to support the probability that a person in the situation of the source would possess the information alleged.

"(ii) CONSIDERATIONS.—The weight accorded allegations by a confidential source shall depend on the level of detail provided by the source, the corroborative nature of the other facts alleged (including from other sources), the coherence and plausibility of the allegations, the number of sources, the reliability of the sources, and similar indicia.

"(iii) PROTECTION.—A confidential source described in a complaint shall be accorded the same protection received by a confidential source who provides comparable information to the Commission.

"(iv) NONDISCLOSURE REQUIREMENTS.—Upon motion, a court shall enter an order reasonably limiting the scope of nondisclosure required by a post-employment agreement. An order under this clause may not impair a legitimate interest of a former employer in the confidentiality of documents and information subject to the order.''.

SEC. 5. PROHIBITION ON CERTAIN VOTING BY BROKERS.

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

``(10) The rules of the exchange prohibit any member from granting any proxy to vote any security in connection with an election for membership to the board of directors or analogous governing body of any issuer of a listed security, in the absence of instructions from the beneficial owner of the security regarding the specific election.''.

SEC. 6. INDEPENDENCE OF COMPENSATION ADVISERS.

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

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

``(1) require any adviser retained by the board of directors or a committee of the board of directors of an issuer in conjunction with the negotiation of an employment contract or a compensation agreement with an executive of the issuer—

"(A) to be independent of the issuer and the executives and directors of the issuer; and

"(B) to report solely to the board of directors or the committee of the board of directors responsible for executive compensation; and

"(2) prohibit an issuer from agreeing to indemnify or limit the liability of an adviser described in paragraph (1).".

SEC. 7. AIDING AND ABETTING LIABILITY.

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

"(g) PERSONS THAT AID OR ABET VIOLATIONS.—Any person that provides substantial assistance to another person, with reckless disregard for whether the substantial assistance is in violation of this title, or of any rule or regulation issued under this title, shall be liable in a private action brought under this title, to the same extent as the person to whom the substantial assistance is provided.".

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

''(f) AIDING AND ABETTING.—For purposes of any action brought by the Commission under subsection (e), any person that provides substantial assistance to another person, with reckless disregard for whether the substantial assistance is in violation of this Act, or of any rule, regulation, or order issued under this Act, shall be liable, to the same extent as the person to whom the substantial assistance is provided.''.

SEC. 8. SHAREHOLDER APPROVAL OF GOLDEN PARACHUTE COMPENSATION.

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

''(i) SEVERANCE AGREEMENTS TIED TO PERFORMANCE.—

''(1) COMMISSION RULES.—

''(A) IN GENERAL.—Not later than 270 days after the date of enactment of this subsection, the Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that is not in compliance with the requirements of any portion of paragraph (2).

"(B) OPPORTUNITY TO CURE.—The rules issued under subparagraph (A) shall provide for appropriate procedures for an issuer to have an opportunity to cure any defects that would be the basis for such a prohibition before the imposition of such prohibition.

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

"(2) SEVERANCE AGREEMENTS TIED TO PERFORMANCE.—The board of directors of an issuer, or a committee of such board of directors, may not enter into an agreement providing for severance payments to a senior executive officer who is terminated because of poor performance as an executive, as determined by the board of directors. To the extent that an issuer is able to terminate a senior executive officer for cause, poor performance by the executive, as determined by the board of directors, shall be considered as one such cause.".

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