

114TH CONGRESS
2D SESSION

S. 2720

To require the Securities and Exchange Commission to amend certain regulations, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 17, 2016

Ms. BALDWIN (for herself, Mr. MERKLEY, Mr. SANDERS, and Ms. WARREN) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

A BILL

To require the Securities and Exchange Commission to amend certain regulations, 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 “Brokaw Act”.

5 **SEC. 2. BENEFICIAL OWNERSHIP AND SHORT INTERESTS.**

6 (a) AMENDMENTS TO RULE 13d-1.—

7 (1) IN GENERAL.—Not later than 1 year after
8 the date of enactment of this Act, the Securities and
9 Exchange Commission shall amend section 240.13d-

1 1 of title 17, Code of Federal Regulations, by strik-
2 ing subsection (a) and inserting the following:

3 “(a) Any person who—

4 “(1) after directly or indirectly acquiring the
5 beneficial ownership of any equity security of a class
6 described in subsection (i), is directly or indirectly
7 the beneficial owner of more than 5 percent of the
8 class shall, not later than 2 business days after the
9 acquisition, file with the Commission a statement
10 containing the information required by Schedule
11 13D, as described in section 240.13d–101; and

12 “(2) after acquiring a direct or indirect short
13 interest in an equity security of a class described in
14 subsection (i), has a direct or indirect short interest
15 representing more than 5 percent of the class shall,
16 not later than 2 business days after the acquisition,
17 file with the Commission a statement containing in-
18 formation that is substantially similar to the infor-
19 mation required by Schedule 13D, as described in
20 section 240.13d–101.”.

21 (2) PROMULGATION OF REGULATION.—Not
22 later than the date on which the Securities and Ex-
23 change Commission makes the amendments required
24 by paragraph (1), the Commission shall promulgate
25 a regulation detailing the information that shall be

1 submitted to the Commission under section
2 240.13d-1(a)(2) of title 17, Code of Federal Regula-
3 tions, as added by paragraph (1).

4 (b) AMENDMENTS TO RULE 13d-3.—Not later than
5 1 year after the date of enactment of this Act, the Securi-
6 ties and Exchange Commission shall amend section
7 240.13d-3 of title 17, Code of Federal Regulations—

8 (1) in subsection (a)—

9 (A) in the undesignated matter preceding
10 paragraph (1), by striking “and 13(g)” and in-
11 serting “, 13(g), and 13(s)”;

12 (B) in paragraph (1), by striking “and/
13 or,”;

14 (C) in paragraph (2), by striking the pe-
15 riod at the end and inserting “; or”; and

16 (D) by adding at the end the following:

17 “(3) A pecuniary or indirect pecuniary interest
18 in such security.”; and

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

20 “(e) For the purposes of calculating, with respect to
21 a derivative instrument, the 5 per centum figure described
22 in sections 13(d)(1), 13(g)(1), and 13(s)(1) of the Act,
23 a person—

24 “(1) may use—

1 “(A) the number of shares that may be de-
2 livered to the person or by the person on the ex-
3 ercise of the rights under the derivative instru-
4 ment;

5 “(B) the number of shares by reference to
6 which the amount payable under the derivative
7 instrument is derived or determined;

8 “(C) in the case of stock futures contracts,
9 the product obtained by multiplying the con-
10 tract multiplier by the number of contracts
11 held;

12 “(D) in the case of a cash settled deriva-
13 tive the number of shares in the contract if the
14 contract allows for a cash equivalent of the clos-
15 ing price of the share; or

16 “(E) when determining the number of out-
17 standing shares of a class of equity securities,
18 the guidance provided under section 13d-1(j);

19 “(2) shall, with respect to a derivative instru-
20 ment that does not have a delta that is equal to one
21 (including cash-settled options), use the number of
22 shares that the person could purchase with the cash
23 that would result from the product that is obtained
24 by multiplying the delta by the number of exposed
25 shares;

1 “(3)(A) may not take the difference between
2 the percentage of a class of equity security in which
3 the person has a short interest (as described in sec-
4 tion 13(s)(3) of the Act) and the percentage of that
5 class of equity security in which the person has a
6 long interest; and

7 “(B) shall use the greater percentage of which
8 the person has—

9 “(i) a short interest (as described in sec-
10 tion 13(s)(3) of the Act) in a class of equity se-
11 curity; or

12 “(ii) a long interest in a class of equity se-
13 curity; and

14 “(4) shall calculate beneficial ownership in accord-
15 ance with subsection (d)(1).

16 “(f) For the purposes of this section—

17 “(1) the term ‘delta’ means, with respect to a
18 financial instrument, the proportion that reflects the
19 change in the value of the instrument to the change
20 in the value of the underlying asset;

21 “(2) the term ‘derivative instrument’—

22 “(A) means any—

23 “(i) option, warrant, convertible secu-
24 rity, stock appreciation right, or similar
25 right—

1 “(I) whether or not the right or
2 instrument shall be subjected to set-
3 tlement in the underlying equity secu-
4 rity; and

5 “(II) with an exercise, exchange,
6 or conversion privilege, or right to a
7 settlement payment at a price related
8 to an equity security; or

9 “(ii) similar instrument with a value
10 derived in whole or in part from the value
11 of an equity security; and

12 “(B) does not include—

13 “(i) rights of a bona fide pledgee of
14 securities to sell the pledged securities;

15 “(ii) rights of all holders of a class of
16 securities of an issuer to receive securities
17 pro rata, or obligations to dispose of secu-
18 rities, as a result of a merger, exchange
19 offer, or consolidation involving the issuer
20 of the securities;

21 “(iii) rights or obligations to sur-
22 render a security, or to have a security
23 withheld, upon the receipt or exercise of a
24 derivative security or the receipt or vesting
25 of equity securities, in order to satisfy the

1 exercise price or the tax withholding con-
2 sequences of receipt, exercise, or vesting;

3 “(iv) interests in broad-based index
4 options, broad-based index futures, and
5 broad-based publicly traded market baskets
6 of stocks approved for trading by the ap-
7 propriate authority of the Federal Govern-
8 ment;

9 “(v) interests or rights to participate
10 in employee benefit plans of the issuer held
11 by employees or former employees of the
12 issuer; or

13 “(vi) options granted to an under-
14 writer in a registered public offering for
15 the purpose of satisfying over-allotments in
16 the offering;

17 “(3) the term ‘immediate family’—

18 “(A) means a person’s—

19 “(i) brother-in-law;

20 “(ii) child;

21 “(iii) daughter-in-law;

22 “(iv) father-in-law;

23 “(v) grandchild;

24 “(vi) grandparent;

25 “(vii) mother-in-law;

1 “(viii) parent;

2 “(ix) sibling;

3 “(x) sister-in-law;

4 “(xi) son-in-law;

5 “(xii) spouse;

6 “(xiii) stepchild; or

7 “(xiv) stepparent; and

8 “(B) includes adoptive relationships;

9 “(4) the term ‘indirect pecuniary interest’—

10 “(A) includes—

11 “(i) ownership of any derivative in-
12 strument that contains the direct or indi-
13 rect opportunity to profit from, or share in
14 any profit derived from, an increase in the
15 value of the subject security, including the
16 right to acquire the subject security
17 through the exercise or conversion of a de-
18 rivative instrument, whether or not the
19 right is exercisable on the date the right is
20 obtained;

21 “(ii) securities held by immediate
22 family members of an individual who share
23 the same household of the individual, ex-
24 cept that the presumption of beneficial

1 ownership in this circumstance shall be re-
2 buttable;

3 “(iii) the proportionate interest of a
4 general partner in the portfolio securities
5 held by a general or limited partnership,
6 where the proportionate interest, as evi-
7 denced by the partnership agreement in ef-
8 fect at the time of the transaction and the
9 most recent financial statements of the
10 partnership, shall be the greater of—

11 “(I) the share of the profits of
12 the general partner, including—

13 “(aa)(AA) profits attributed
14 to any limited partnership inter-
15 ests held by the general partner;
16 and

17 “(BB) any other interests in
18 profits that arise from the pur-
19 chase and sale of the sale of the
20 portfolio securities of the part-
21 nership; or

22 “(II) the share of the partnership
23 capital account belonging to the gen-
24 eral partner, including the share at-

1 tributable to any limited partnership
2 held by the general partner;

3 “(iv) subject to subparagraph (B)(ii),
4 a performance-based fee received by any—

5 “(I) broker;

6 “(II) dealer;

7 “(III) bank;

8 “(IV) insurance company;

9 “(V) investment company;

10 “(VI) investment adviser;

11 “(VII) investment manager; or

12 “(VIII) trustee or person per-
13 forming a similar function;

14 “(v) a right to dividends only if the
15 right is separated or separable from the
16 underlying security or securities; and

17 “(vi) interest in securities held by a
18 trust, to the extent that—

19 “(I) with respect to a trustee of
20 the trust—

21 “(aa) the trustee receives a
22 performance-based fee that is not
23 of the kind described in subpara-
24 graph (B)(ii); or

1 “(bb) an immediate family
2 member of the trustee is a bene-
3 ficiary of the trust;

4 “(II) with respect to a bene-
5 ficiary of the trust, the beneficiary—

6 “(aa) has investment control
7 over trust assets; or

8 “(bb) shares investment con-
9 trol over trust assets with the
10 trustee of the trust; and

11 “(III) with respect to a settlor of
12 the trust, the settlor—

13 “(aa) reserves the right to
14 revoke the trust without the con-
15 sent of another person; and

16 “(bb) exercises or shares in-
17 vestment control over securities
18 held by the trust; and

19 “(B) does not include—

20 “(i) an asset-based fee;

21 “(ii) a performance-based fee, regard-
22 less of when payable, that is calculated
23 based upon net capital gains or net capital
24 appreciation generated from—

25 “(I) a portfolio; or

1 “(II) from the overall perform-
2 ance of a fiduciary over a period of
3 not less than 1 year; and

4 “(iii) a situation in which equity secu-
5 rities of an issuer do not account for more
6 than 10 percent of the market value of a
7 portfolio;

8 “(5) the term ‘pecuniary interest’ means the di-
9 rect or indirect opportunity to profit from, or share
10 in any profit derived from, a transaction in the sub-
11 ject security; and

12 “(6) the term ‘person’ includes—

13 “(A) 2 or more persons acting as a part-
14 nership, limited partnership, syndicate, or other
15 group, or otherwise coordinating the actions of
16 the persons, for the purpose of—

17 “(i) acquiring, holding, or disposing of
18 securities of an issuer;

19 “(ii) seeking to control or influence
20 the board, management, or policies of an
21 issuer; or

22 “(iii) evading, or assisting others in
23 evading, the designation as a ‘person’
24 under this paragraph; or

1 “(B) a hedge fund (as that term is defined
2 in section 13(h) of the Bank Holding Company
3 Act of 1956 (12 U.S.C. 1851(h)) or a group of
4 hedge funds or persons that are, as determined
5 by the Commission, working together to evade
6 the requirements of section 13(d), 13(g), or
7 13(s) of the Act.”.

8 (c) SHORT INTERESTS.—Section 13 of the Securities
9 Exchange Act of 1934 (15 U.S.C. 78m) is amended by
10 adding at the end the following:

11 “(s) DISCLOSURE OF SHORT INTERESTS.—

12 “(1) IN GENERAL.—A person who, after acquir-
13 ing a direct or indirect short interest in an equity
14 security of a class described in paragraph (2), has
15 a direct or indirect short interest representing more
16 than 5 per centum of the class, shall, not later than
17 2 business days after the acquisition, file with the
18 Commission a statement containing information that
19 is substantially similar to the statement required
20 under subsection (d)(1).

21 “(2) COVERED CLASSES.—

22 “(A) IN GENERAL.—The requirements of
23 paragraph (1) shall apply to the following class-
24 es of securities:

1 “(i) Any equity security of a class
2 which is registered pursuant to section 12.

3 “(ii) Any equity security of an insur-
4 ance company which would have been re-
5 quired to be registered in accordance with
6 section 12 except for the exemption con-
7 tained in section 12(g)(2)(G).

8 “(iii) Any equity security issued by a
9 closed-end investment company registered
10 under the Investment Company Act of
11 1940 (15 U.S.C. 80a-1 et seq.).

12 “(B) EXCEPTION.—The requirements of
13 paragraph (1) shall not apply to an equity secu-
14 rity that belongs to a nonvoting class.

15 “(3) SHORT INTEREST.—For purposes of this
16 section, a person shall be deemed to have a short in-
17 terest in a security if the person, directly or indi-
18 rectly, through any contract, arrangement, under-
19 standing, relationship, or otherwise, has the oppor-
20 tunity to profit from, or share in any profit derived
21 from, any decrease in the value of the security, in-
22 cluding—

23 “(A) an interest resulting from trans-
24 actions in the security, including the sale of the

1 security by the person when the person does not
2 own the security;

3 “(B) a derivative instrument (as defined in
4 section 240.13d–3(f)(2) of title 17, Code of
5 Federal Regulations);

6 “(C) an interest resulting from a securities
7 transaction by members of the immediate fam-
8 ily (as defined in section 240.13d–3(f)(3) of
9 title 17, Code of Federal Regulations) sharing
10 the same household as the person, except that
11 the presumption of the short interest in that
12 circumstance is rebuttable;

13 “(D) the proportionate interest of a gen-
14 eral partner in the securities transaction by a
15 general or limited partnership, which, as evi-
16 denced by the partnership agreement in effect
17 at the time of the transaction and the most re-
18 cent financial statements of the partnership,
19 shall be the greater of—

20 “(i) the share of the profits of the
21 partnership of the general partner, includ-
22 ing—

23 “(I)(aa) profits attributed to any
24 limited partnership interests held by
25 the general partner; and

1 “(bb) any other interests in prof-
2 its that arise from the purchase and
3 sale of the portfolio securities of the
4 partnership; or

5 “(ii) the share of the partnership capital
6 account of the general partner, including the
7 share attributable to any limited partnership in-
8 terest held by the general partner;

9 “(E) a performance-related fee, other than
10 an asset-based fee, received by any—

11 “(i) broker;

12 “(ii) dealer;

13 “(iii) bank;

14 “(iv) insurance company;

15 “(v) investment company;

16 “(vi) investment adviser;

17 “(vii) investment manager; or

18 “(viii) trustee or person performing a
19 similar function; and

20 “(F) an interest of a person in securities
21 transactions by a trust.

22 “(4) EXCEPTION TO PERFORMANCE-RELATED
23 FEE.—A person shall not be deemed to have a short
24 interest in a security because of a performance-re-
25 lated fee described in paragraph (3)(E) if—

1 “(A) the performance-related fee, regard-
2 less of when payable, is calculated based upon
3 net capital gains or net capital appreciation
4 generated from—

5 “(i) a portfolio; or

6 “(ii) the overall performance of the fi-
7 duciary over a period of not less than 1
8 year;

9 “(B) interests resulting from transactions
10 in the securities of the issuer do not account for
11 more than 10 percent of the market value of a
12 portfolio; and

13 “(C) the fee is only a right to a non per-
14 formance-related fee.

15 “(5) USE OF CONTRACT OR OTHER DEVICE TO
16 EVADE REQUIREMENTS.—A person shall be deemed
17 to have a short interest in the security if the person,
18 directly or indirectly, creates or uses a trust, proxy,
19 power of attorney, pooling arrangement, or any
20 other contract, arrangement, or device to divest the
21 person of a short interest in a security or to prevent
22 the vesting of the short interest in a security as part
23 of a plan to evade the reporting requirements of this
24 section.

1 “(6) AGGREGATION.—All securities of the same
 2 class in which a person has a short interest, regard-
 3 less of the form of the short interest, shall be aggre-
 4 gated in calculating the number of shares in which
 5 the person has a short interest.

6 “(7) EXCEPTIONS.—Notwithstanding para-
 7 graphs (3) and (6)—

8 “(A) a person shall be deemed to have a
 9 short interest in a security if the person has the
 10 right to acquire, not later than 60 days after
 11 the date on which the right is obtained, a short
 12 interest in the security—

13 “(i) through the exercise of any—

14 “(I) option;

15 “(II) warrant; or

16 “(III) right;

17 “(ii) in accordance with the power to
 18 revoke a—

19 “(I) trust;

20 “(II) discretionary account; or

21 “(III) similar arrangement; or

22 “(iii) in accordance with the auto-
 23 matic termination of a—

24 “(I) trust;

25 “(II) discretionary account; or

1 “(III) similar arrangement;

2 “(B) a person shall be deemed to have a
3 short interest in a security immediately upon
4 acquisition of the security if the person acquires
5 the security—

6 “(i) by the means described in sub-
7 paragraph (A); and

8 “(ii)(I) with the purpose of changing
9 or influencing the control of the issuer; or

10 “(II) in connection with, or as a par-
11 ticipant in, a transaction having the pur-
12 pose of changing or influencing the control
13 of the issuer;

14 “(C) any securities not outstanding which
15 are subject to a provision described in subpara-
16 graph (A)(i)—

17 “(i) shall be deemed to be outstanding
18 for the purpose of computing the percent-
19 age of outstanding securities of the class
20 shorted by a person; and

21 “(ii) shall not be deemed to be out-
22 standing for the purpose of computing the
23 percentage of outstanding securities of the
24 class by any other person; and

1 “(D) subparagraphs (A) through (C) shall
2 remain applicable for the purpose of deter-
3 mining the obligation to file with respect to the
4 underlying security even though the option,
5 warrant, or right is—

6 “(i) of a class of equity security, as
7 defined in section 240.13d-1(i) of title 17,
8 Code of Federal Regulations, or any suc-
9 cessor thereto; and

10 “(ii) may give rise to a separate obli-
11 gation to file.”.

12 (d) **EFFECTIVE DATE.**—The amendments made by
13 subsections (b) and (c) shall take effect on the date on
14 which the Securities and Exchange Commission makes the
15 amendments required under subsection (a).

○