

114TH CONGRESS  
2D SESSION

**S.** \_\_\_\_\_

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

---

IN THE SENATE OF THE UNITED STATES

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 \_\_\_\_\_

---

**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 240.13d-  
2 1(a)(2) of title 17, Code of Federal Regulations, as  
3 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 1  
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 non-voting 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 title  
9 17, Code of Federal Regulations) sharing the  
10 same household as the person, except that the  
11 presumption of the short interest in that cir-  
12 cumstance 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 “(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).