

111TH CONGRESS  
1ST SESSION

# S. 1964

To require disclosure of financial relationships between brokers and dealers and mutual fund companies, and of certain commissions paid by mutual fund companies.

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IN THE SENATE OF THE UNITED STATES

OCTOBER 28, 2009

Mr. AKAKA 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 require disclosure of financial relationships between brokers and dealers and mutual fund companies, and of certain commissions paid by mutual fund companies.

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 “Mutual Fund Trans-  
5 parency Act of 2009”.

1 **SEC. 2. DISCLOSURE OF FINANCIAL RELATIONSHIPS BE-**  
2 **TWEEN BROKERS AND DEALERS AND MU-**  
3 **TUAL FUND COMPANIES.**

4 (a) IN GENERAL.—Section 15(b) of the Securities  
5 Exchange Act of 1934 (15 U.S.C. 78o(b)) is amended by  
6 adding at the end the following:

7 “(13) CONFIRMATION OF TRANSACTIONS FOR  
8 MUTUAL FUNDS.—

9 “(A) IN GENERAL.—Each broker and deal-  
10 er shall disclose in writing to customers that  
11 purchase the shares of any open-end or closed-  
12 end company registered under section 8 of the  
13 Investment Company Act of 1940 (15 U.S.C.  
14 80a–8) or any interest in a unit investment  
15 trust or municipal securities registered under  
16 this title used for education savings plans—

17 “(i) the amount of any compensation  
18 received or to be received by the broker or  
19 dealer in connection with such transaction  
20 from any sources; and

21 “(ii) such other information as the  
22 Commission determines appropriate.

23 “(B) REVENUE SHARING.—The term ‘com-  
24 pensation’ under subparagraph (A) includes any  
25 direct or indirect payment made by an invest-  
26 ment adviser (or any affiliate of an investment

1           adviser) to a broker or dealer for the purpose  
2           of promoting the sales of securities of an entity  
3           described in subparagraph (A), and payments  
4           made by an underwriter of the fund to a broker  
5           or dealer.

6           “(C) TIMING OF DISCLOSURE.—The disclo-  
7           sure required under subparagraph (A) shall be  
8           provided or sent to a customer not later than  
9           the date of the completion of the transaction.

10          “(D) LIMITATION.—The disclosures re-  
11          quired under subparagraph (A) may not be  
12          made exclusively in—

13               “(i) a registration statement or pro-  
14               spectus of an entity described in subpara-  
15               graph (A); or

16               “(ii) any other filing of an entity de-  
17               scribed in subparagraph (A) with the Com-  
18               mission.

19          “(E) COMMISSION AUTHORITY.—

20               “(i) IN GENERAL.—The Commission  
21               shall issue such final rules or regulations  
22               as are necessary to carry out this para-  
23               graph, not later than 1 year after the date  
24               of enactment of the Mutual Fund Trans-  
25               parency Act of 2009.

1           “(ii) FORM OF DISCLOSURE.—Disclo-  
 2           sures under this paragraph shall be in  
 3           such form as the Commission shall require  
 4           by rule.

5           “(F) DEFINITIONS.—In this paragraph—

6           “(i) the terms ‘open-end company’  
 7           and ‘closed-end company’ have the same  
 8           meanings as in section 5 of the Investment  
 9           Company Act of 1940 (15 U.S.C. 80a-5);

10           “(ii) the term ‘unit investment trust’  
 11           has the same meaning as in section 4 of  
 12           the Investment Company Act of 1940 (15  
 13           U.S.C. 80a-4); and

14           “(iii) the term ‘education savings  
 15           plan’ means a qualified tuition program  
 16           described in section 529(b)(1)(A)(ii) of the  
 17           Internal Revenue Code of 1986.”.

18           (b) DISCLOSURE OF BROKERAGE COMMISSIONS.—  
 19           Section 30 of the Investment Company Act of 1940 (15  
 20           U.S.C. 80a-29) is amended by adding at the end the fol-  
 21           lowing:

22           “(k) DISCLOSURE OF BROKERAGE COMMISSIONS.—  
 23           The Commission, by rule, shall require that brokerage  
 24           commissions as an aggregate dollar amount and percent-  
 25           age of assets paid by an open-end or closed-end company

1 or a unit investment trust or issuer of municipal securities  
2 during the 5-year period preceding the date of the trans-  
3 action be included in any disclosure of the amount of fees  
4 and expenses that may be payable by the holder of the  
5 securities of such company for purposes of—

6 “(1) the registration statement of that com-  
7 pany; and

8 “(2) any other filing of that company with the  
9 Commission, including the calculation of expense ra-  
10 tios.”.

11 **SEC. 3. MUTUAL FUND GOVERNANCE.**

12 (a) INDEPENDENT FUND BOARDS.—Section 10(a) of  
13 the Investment Company Act of 1940 (15 U.S.C. 80a-  
14 10(a)) is amended—

15 (1) by striking “shall have” and inserting the  
16 following: “shall—

17 “(1) have”;

18 (2) by striking “60 per centum” and inserting  
19 “25 percent”;

20 (3) by striking the period at the end and insert-  
21 ing a semicolon; and

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

23 “(2) have as chairman of its board of directors  
24 an interested person of such registered company; or

1           “(3) permit any person (other than an inter-  
2           ested person, as described in paragraph (1)) to serve  
3           as a member of its board of directors, unless that  
4           person—

5                   “(A) is approved or elected by the share-  
6           holders of such registered investment company  
7           at least once every 5 years; and

8                   “(B) has been found, on an annual basis,  
9           by a majority of the directors who are not inter-  
10          ested persons, after reasonable inquiry by such  
11          directors, not to have any material business or  
12          familial relationship with the registered com-  
13          pany, a significant service provider to the com-  
14          pany, or any entity controlling, controlled by, or  
15          under common control with such service pro-  
16          vider, that could reasonably be interpreted as a  
17          conflict of interest or cast doubt on the inde-  
18          pendence of the director.”.

19          (b) ACTION BY INDEPENDENT DIRECTORS.—Section  
20          10 of the Investment Company Act of 1940 (15 U.S.C.  
21          80a–10) is amended by adding at the end the following:

22                   “(i) ACTION BY BOARD OF DIRECTORS.—No action  
23          taken by the board of directors of a registered investment  
24          company may require the vote of a director who is an in-  
25          terested person of such registered investment company.

1 “(j) INDEPENDENT COMMITTEE.—

2 “(1) IN GENERAL.—The members of the board  
3 of directors of a registered investment company who  
4 are not interested persons of such registered invest-  
5 ment company shall establish a committee comprised  
6 solely of such members, which committee shall be re-  
7 sponsible for—

8 “(A) selecting persons to be nominated for  
9 election to the board of directors; and

10 “(B) adopting qualification standards for  
11 the nomination of directors.

12 “(2) DISCLOSURE.—The standards developed  
13 under paragraph (1)(B) shall be disclosed in the reg-  
14 istration statement of the registered investment com-  
15 pany.”.

16 (c) DEFINITION OF INTERESTED PERSON.—Section  
17 2(a)(19) of the Investment Company Act of 1940 (15  
18 U.S.C. 80a-2(a)(19)) is amended—

19 (1) in subparagraph (A)—

20 (A) in clause (iv), by striking “two” and  
21 inserting “5”; and

22 (B) by striking clause (vii) and inserting  
23 the following:

24 “(vii) any natural person who has  
25 served as an officer or director, or as an

1 employee within the preceding 10 fiscal  
2 years, of an investment adviser or principal  
3 underwriter to such registered investment  
4 company, or of any entity controlling, con-  
5 trolled by, or under common control with  
6 such investment adviser or principal under-  
7 writer;

8 “(viii) any natural person who has  
9 served as an officer or director, or as an  
10 employee within the preceding 10 fiscal  
11 years, of any entity that has within the  
12 preceding 5 fiscal years acted as a signifi-  
13 cant service provider to such registered in-  
14 vestment company, or of any entity con-  
15 trolling, controlled by, or under the com-  
16 mon control with such service provider;

17 “(ix) any natural person who is a  
18 member of a class of persons that the  
19 Commission, by rule or regulation, deter-  
20 mines is unlikely to exercise an appropriate  
21 degree of independence as a result of—

22 “(I) a material business or pro-  
23 fessional relationship with the invest-  
24 ment company or an affiliated person  
25 of such investment company;



1                   “(II) a close familial relationship  
2                   with any natural person who is an af-  
3                   filiated person of such investment  
4                   company; or

5                   “(III) any other reason deter-  
6                   mined by the Commission:”; and

7                   (2) in subparagraph (B)—

8                   (A) in clause (iv), by striking “two” and  
9                   inserting “5”; and

10                  (B) by striking clause (vii) and inserting  
11                  the following:

12                   “(vii) any natural person who is a  
13                   member of a class of persons that the  
14                   Commission, by rule or regulation, deter-  
15                   mines is unlikely to exercise an appropriate  
16                   degree of independence as a result of—

17                   “(I) a material business or pro-  
18                   fessional relationship with such invest-  
19                   ment adviser or principal underwriter  
20                   or affiliated person of such investment  
21                   adviser or principal underwriter;

22                   “(II) a close familial relationship  
23                   with any natural person who is an af-  
24                   filiated person of such investment ad-  
25                   viser or principal underwriter; or

1                   “(III) any other reason, as deter-  
2                   mined by the Commission.”.

3           (d) DEFINITION OF SIGNIFICANT SERVICE PRO-  
4 VIDER.—Section 2(a) of the Investment Company Act of  
5 1940 (15 U.S.C. 80a-2(a)) is amended by adding at the  
6 end the following:

7                   “(54) SIGNIFICANT SERVICE PROVIDER.—

8                   “(A) IN GENERAL.—Not later than 270  
9                   days after the date of enactment of the Mutual  
10                  Fund Transparency Act of 2009, the Commis-  
11                  sion shall issue final rules defining the term  
12                  ‘significant service provider’.

13                  “(B) REQUIREMENTS.—The definition de-  
14                  veloped under paragraph (1) shall include, at a  
15                  minimum, the investment adviser and principal  
16                  underwriter of a registered investment company  
17                  for purposes of paragraph (19).”.

18 **SEC. 4. FINANCIAL LITERACY AMONG MUTUAL FUND IN-**  
19 **VESTORS STUDY.**

20           (a) IN GENERAL.—The Securities and Exchange  
21 Commission shall conduct a study to identify—

22                  (1) the existing level of financial literacy among  
23                  investors that purchase shares of open-end compa-  
24                  nies, as that term is defined under section 5 of the

1 Investment Company Act of 1940, that are reg-  
2 istered under section 8 of that Act;

3 (2) the most useful and understandable relevant  
4 information that investors need to make sound fi-  
5 nancial decisions prior to purchasing such shares;

6 (3) methods to increase the transparency of ex-  
7 penses and potential conflicts of interest in trans-  
8 actions involving the shares of open-end companies;

9 (4) the existing private and public efforts to  
10 educate investors; and

11 (5) a strategy to increase the financial literacy  
12 of investors that results in a positive change in in-  
13 vestor behavior.

14 (b) REPORT.—Not later than 1 year after the date  
15 of enactment of this Act, the Securities and Exchange  
16 Commission shall submit a report on the study required  
17 under subsection (a) to—

18 (1) the Committee on Banking, Housing, and  
19 Urban Affairs of the Senate; and

20 (2) the Committee on Financial Services of the  
21 House of Representatives.

22 **SEC. 5. STUDY REGARDING MUTUAL FUND ADVERTISING.**

23 (a) IN GENERAL.—The Comptroller General of the  
24 United States shall conduct a study on mutual fund adver-  
25 tising to identify—

1           (1) existing and proposed regulatory require-  
2           ments for open-end investment company advertise-  
3           ments;

4           (2) current marketing practices for the sale of  
5           open-end investment company shares, including the  
6           use of unsustainable past performance data, funds  
7           that have merged, and incubator funds;

8           (3) the impact of such advertising on con-  
9           sumers; and

10          (4) recommendations to improve investor pro-  
11          tections in mutual fund advertising and additional  
12          information necessary to ensure that investors can  
13          make informed financial decisions when purchasing  
14          shares.

15          (b) REPORT.—Not later than 1 year after the date  
16          of enactment of this Act, the Comptroller General of the  
17          United States shall submit a report on the results of the  
18          study conducted under subsection (a) to—

19                (1) the Committee on Banking, Housing, and  
20                Urban Affairs of the United States Senate; and

21                (2) the Committee on Financial Services of the  
22                House of Representatives.

23 **SEC. 6. POINT-OF-SALE DISCLOSURE.**

24          (a) IN GENERAL.—Section 15(b) of the Securities  
25          Exchange Act of 1934 (15 U.S.C. 78o(b)), as amended

1 by section 2 of this Act, is amended by adding at the end  
2 the following:

3           “(14) BROKER AND DEALER DISCLOSURES IN  
4           MUTUAL FUND TRANSACTIONS.—

5           “(A) IN GENERAL.—Each broker and deal-  
6           er shall disclose in writing to each person that  
7           purchases the shares of an open-end or closed-  
8           end company registered under section 8 of the  
9           Investment Company Act of 1940 (15 U.S.C.  
10          80a-8) or any interest in a unit investment  
11          trust or municipal securities registered under  
12          this title—

13                   “(i) the source and amount, in dollars  
14                   and as a percentage of assets, of any com-  
15                   pensation received or to be received by the  
16                   broker or dealer in connection with such  
17                   transaction from any sources;

18                   “(ii) the amount, in dollars and as a  
19                   percentage of assets, of compensation re-  
20                   ceived in connection with transactions in  
21                   shares of other investment company shares  
22                   offered by the broker or dealer, if materi-  
23                   ally different from the amount under  
24                   clause (i);

1           “(iii) comparative information that  
2           shows the average amount received by bro-  
3           kers and dealers in connection with com-  
4           parable transactions, as determined by the  
5           Commission; and

6           “(iv) such other information as the  
7           Commission determines appropriate.

8           “(B) REVENUE SHARING.—The term ‘com-  
9           pensation’ under subparagraph (A) shall in-  
10          clude any direct or indirect payment made by  
11          an investment adviser (or any affiliate of an in-  
12          vestment adviser) to a broker or dealer for the  
13          purpose of promoting the sales of securities of  
14          a registered investment company.

15          “(C) TIMING OF DISCLOSURE.—The disclo-  
16          sures required under subparagraph (A) shall be  
17          made to permit the person purchasing the  
18          shares to evaluate such disclosures before decid-  
19          ing to engage in the transaction.

20          “(D) LIMITATION.—The disclosures re-  
21          quired under subparagraph (A) may not be  
22          made exclusively in—

23                 “(i) a registration statement or pro-  
24                 spectus of a registered investment com-  
25                 pany; or

1                   “(ii) any other filing of a registered  
2                   investment company with the Commission.

3                   “(E) COMMISSION AUTHORITY.—The Com-  
4                   mission shall promulgate such final rules as are  
5                   necessary to carry out this paragraph not later  
6                   than 1 year after the date of enactment of the  
7                   Mutual Fund Transparency Act of 2009.”.

8                   (b) FIDUCIARY DUTIES.—Section 15 of the Securi-  
9                   ties Exchange Act of 1934 (15 U.S.C. 78o) is amended  
10                  by adding at the end the following new subsection:

11                  “(k) STANDARD OF CARE.—Notwithstanding any  
12                  other provision of this title or the Investment Advisers Act  
13                  of 1940, the Commission shall promulgate rules, not later  
14                  than 1 year after the date of enactment of the Mutual  
15                  Fund Transparency Act of 2009 to provide that the stand-  
16                  ard of care for all brokers and dealers in providing invest-  
17                  ment advice about securities to retail customers or clients  
18                  (and such other customers or clients as the Commission  
19                  may by rule provide) shall be the fiduciary duty estab-  
20                  lished under the Investment Advisers Act of 1940, includ-  
21                  ing, without limitation, the duty to act solely in the best  
22                  interest of the customer or client, without regard to the  
23                  financial or other interest of the broker or dealer providing  
24                  the advice.”.

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