

In the Senate of the United States,

June 28 (legislative day, June 19), 1995.

Resolved, That the bill from the House of Representatives (H.R. 1058) entitled “An Act to reform Federal securities litigation, and for other purposes”, do pass with the following

AMENDMENTS:

Strike out all after the enacting clause and insert:

1 ***SECTION 1. SHORT TITLE; TABLE OF CONTENTS.***

2 (a) *SHORT TITLE.*—*This Act may be cited as the “Pri-*
3 *vate Securities Litigation Reform Act of 1995”.*

4 (b) *TABLE OF CONTENTS.*—*The table of contents for*
5 *this Act is as follows:*

Sec. 1. Short title; table of contents.

TITLE I—REDUCTION OF ABUSIVE LITIGATION

Sec. 101. Elimination of certain abusive practices.

Sec. 102. Securities class action reform.

Sec. 103. Sanctions for abusive litigation.

Sec. 104. Requirements for securities fraud actions.

Sec. 105. Safe harbor for forward-looking statements.

Sec. 106. Written interrogatories.

Sec. 107. Amendment to Racketeer Influenced and Corrupt Organizations Act.

Sec. 108. Authority of Commission to prosecute aiding and abetting.

Sec. 109. Loss causation.

Sec. 110. Study and report on protections for senior citizens and qualified retirement plans.

Sec. 111. Amendment to Racketeer Influenced and Corrupt Organizations Act.

Sec. 112. Applicability.

TITLE II—REDUCTION OF COERCIVE SETTLEMENTS

Sec. 201. Limitation on damages.

Sec. 202. Proportionate liability.

Sec. 203. Applicability.

TITLE III—AUDITOR DISCLOSURE OF CORPORATE FRAUD

Sec. 301. Fraud detection and disclosure.

1 ***TITLE I—REDUCTION OF***
 2 ***ABUSIVE LITIGATION***

3 ***SEC. 101. ELIMINATION OF CERTAIN ABUSIVE PRACTICES.***

4 (a) *PROHIBITION OF REFERRAL FEES.—Section 15(c)*
 5 *of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c))*
 6 *is amended by adding at the end the following new para-*
 7 *graph:*

8 “(8) *PROHIBITION OF REFERRAL FEES.—No*
 9 *broker or dealer, or person associated with a broker*
 10 *or dealer, may solicit or accept, directly or indirectly,*
 11 *remuneration for assisting an attorney in obtaining*
 12 *the representation of any person in any private ac-*
 13 *tion arising under this title or under the Securities*
 14 *Act of 1933.”.*

15 (b) *ATTORNEY CONFLICT OF INTEREST.—*

16 (1) *SECURITIES ACT OF 1933.—Section 20 of the*
 17 *Securities Act of 1933 (15 U.S.C. 77t) is amended by*
 18 *adding at the end the following new subsection:*

1 “(f) *ATTORNEY CONFLICT OF INTEREST.*—In any pri-
2 vate action arising under this title, if a plaintiff is rep-
3 resented by an attorney who directly owns or otherwise has
4 a beneficial interest in the securities that are the subject
5 of the litigation, the court shall make a determination of
6 whether such ownership or other interest constitutes a con-
7 flict of interest sufficient to disqualify the attorney from
8 representing the party.”.

9 (2) *SECURITIES EXCHANGE ACT OF 1934.*—Sec-
10 tion 21 of the Securities Exchange Act of 1934 (15
11 U.S.C. 78u) is amended by adding at the end the fol-
12 lowing new subsection:

13 “(i) *ATTORNEY CONFLICT OF INTEREST.*—In any pri-
14 vate action arising under this title, in which a plaintiff
15 is represented by an attorney who directly owns or other-
16 wise has a beneficial interest in the securities that are the
17 subject of the litigation, the court shall make a determina-
18 tion of whether such ownership or other interest constitutes
19 a conflict of interest sufficient to disqualify the attorney
20 from representing the party.”.

21 (c) *PROHIBITION OF ATTORNEYS’ FEES PAID FROM*
22 *COMMISSION DISGORGEMENT FUNDS.*—

23 (1) *SECURITIES ACT OF 1933.*—Section 20 of the
24 Securities Act of 1933 (15 U.S.C. 77t) is amended by
25 adding at the end the following new subsection:

1 “(g) *PROHIBITION OF ATTORNEYS’ FEES PAID FROM*
2 *COMMISSION DISGORGEMENT FUNDS.—Except as otherwise*
3 *ordered by the court upon motion by the Commission, or,*
4 *in the case of an administrative action, as otherwise ordered*
5 *by the Commission, funds disgorged as the result of an ac-*
6 *tion brought by the Commission in Federal court, or as a*
7 *result of any Commission administrative action, shall not*
8 *be distributed as payment for attorneys’ fees or expenses*
9 *incurred by private parties seeking distribution of the dis-*
10 *gorged funds.”.*

11 (2) *SECURITIES EXCHANGE ACT OF 1934.—Sec-*
12 *tion 21(d) of the Securities Exchange Act of 1934 (15*
13 *U.S.C. 78u(d)) is amended by adding at the end the*
14 *following new paragraph:*

15 “(4) *PROHIBITION OF ATTORNEYS’ FEES PAID*
16 *FROM COMMISSION DISGORGEMENT FUNDS.—Except*
17 *as otherwise ordered by the court upon motion by the*
18 *Commission, or, in the case of an administrative ac-*
19 *tion, as otherwise ordered by the Commission, funds*
20 *disgorged as the result of an action brought by the*
21 *Commission in Federal court, or as a result of any*
22 *Commission administrative action, shall not be dis-*
23 *tributed as payment for attorneys’ fees or expenses in-*
24 *curred by private parties seeking distribution of the*
25 *disgorged funds.”.*

1 **SEC. 102. SECURITIES CLASS ACTION REFORM.**

2 (a) *RECOVERY RULES.*—

3 (1) *SECURITIES ACT OF 1933.*—Section 20 of the
4 *Securities Act of 1933 (15 U.S.C. 77t)* is amended by
5 *adding at the end the following new subsection:*

6 “(h) *RECOVERY RULES FOR PRIVATE CLASS AC-*
7 *TIONS.*—

8 “(1) *IN GENERAL.*—The rules contained in this
9 *subsection shall apply in each private action arising*
10 *under this title that is brought as a plaintiff class ac-*
11 *tion pursuant to the Federal Rules of Civil Procedure.*

12 “(2) *CERTIFICATION FILED WITH COMPLAINTS.*—

13 “(A) *IN GENERAL.*—Each plaintiff seeking
14 *to serve as a representative party on behalf of a*
15 *class shall provide a sworn certification, which*
16 *shall be personally signed by such plaintiff and*
17 *filed with the complaint, that—*

18 “(i) *states that the plaintiff has re-*
19 *viewed the complaint and authorized its fil-*
20 *ing;*

21 “(ii) *states that the plaintiff did not*
22 *purchase the security that is the subject of*
23 *the complaint at the direction of plaintiff’s*
24 *counsel or in order to participate in any*
25 *private action arising under this title;*

1 “(iii) states that the plaintiff is willing
2 to serve as a representative party on behalf
3 of a class, including providing testimony at
4 deposition and trial, if necessary;

5 “(iv) sets forth all of the transactions
6 of the plaintiff in the security that is the
7 subject of the complaint during the class pe-
8 riod specified in the complaint;

9 “(v) identifies any action under this
10 title, filed during the 3-year period preced-
11 ing the date on which the certification is
12 signed by the plaintiff, in which the plain-
13 tiff has sought to serve as a representative
14 party on behalf of a class; and

15 “(vi) states that the plaintiff will not
16 accept any payment for serving as a rep-
17 resentative party on behalf of a class beyond
18 the plaintiff’s pro rata share of any recov-
19 ery, except as ordered or approved by the
20 court in accordance with paragraph (3).

21 “(B) *NONWAIVER OF ATTORNEY-CLIENT*
22 *PRIVILEGE.*—The certification filed pursuant to
23 subparagraph (A) shall not be construed to be a
24 waiver of the attorney-client privilege.

1 “(3) *RECOVERY BY PLAINTIFFS.*—The share of
2 any final judgment or of any settlement that is
3 awarded to a representative party serving on behalf
4 of a class shall be calculated in the same manner as
5 the shares of the final judgment or settlement awarded
6 to all other members of the class. Nothing in this
7 paragraph shall be construed to limit the award of
8 reasonable costs and expenses (including lost wages)
9 directly relating to the representation of the class to
10 any representative party serving on behalf of the
11 class.

12 “(4) *RESTRICTIONS ON SETTLEMENTS UNDER*
13 *SEAL.*—The terms and provisions of any settlement
14 agreement of a class action shall not be filed under
15 seal, except that on motion of any party to the settle-
16 ment, the court may order filing under seal for those
17 portions of a settlement agreement as to which good
18 cause is shown for such filing under seal. For pur-
19 poses of this paragraph, good cause shall exist only if
20 publication of a term or provision of a settlement
21 agreement would cause direct and substantial harm to
22 any party.

23 “(5) *RESTRICTIONS ON PAYMENT OF ATTORNEYS’*
24 *FEEES AND EXPENSES.*—Total attorneys’ fees and ex-
25 penses awarded by the court to counsel for the plain-

1 *tiff class shall not exceed a reasonable percentage of*
2 *the amount of damages and prejudgment interest*
3 *awarded to the class.*

4 “(6) *DISCLOSURE OF SETTLEMENT TERMS TO*
5 *CLASS MEMBERS.—Any proposed or final settlement*
6 *agreement that is published or otherwise disseminated*
7 *to the class shall include each of the following state-*
8 *ments, along with a cover page summarizing the in-*
9 *formation contained in such statements:*

10 “(A) *STATEMENT OF PLAINTIFF RECOV-*
11 *ERY.—The amount of the settlement proposed to*
12 *be distributed to the parties to the action, deter-*
13 *mined in the aggregate and on an average per*
14 *share basis.*

15 “(B) *STATEMENT OF POTENTIAL OUTCOME*
16 *OF CASE.—*

17 “(i) *AGREEMENT ON AMOUNT OF DAM-*
18 *AGES.—If the settling parties agree on the*
19 *average amount of damages per share that*
20 *would be recoverable if the plaintiff pre-*
21 *vailed on each claim alleged under this title,*
22 *a statement concerning the average amount*
23 *of such potential damages per share.*

24 “(ii) *DISAGREEMENT ON AMOUNT OF*
25 *DAMAGES.—If the parties do not agree on*

1 *the average amount of damages per share*
2 *that would be recoverable if the plaintiff*
3 *prevailed on each claim alleged under this*
4 *title, a statement from each settling party*
5 *concerning the issue or issues on which the*
6 *parties disagree.*

7 “(iii) *INADMISSIBILITY FOR CERTAIN*
8 *PURPOSES.—A statement made in accord-*
9 *ance with clause (i) or (ii) concerning the*
10 *amount of damages shall not be admissible*
11 *in any Federal or State judicial action or*
12 *administrative proceeding, other than an*
13 *action or proceeding arising out of such*
14 *statement.*

15 “(C) *STATEMENT OF ATTORNEYS’ FEES OR*
16 *COSTS SOUGHT.—If any of the settling parties or*
17 *their counsel intend to apply to the court for an*
18 *award of attorneys’ fees or costs from any fund*
19 *established as part of the settlement, a statement*
20 *indicating which parties or counsel intend to*
21 *make such an application, the amount of fees*
22 *and costs that will be sought (including the*
23 *amount of such fees and costs determined on an*
24 *average per share basis), and a brief explanation*
25 *supporting the fees and costs sought.*

1 “(D) *IDENTIFICATION OF LAWYERS’ REPRESENTATIVES.*—The name, telephone number,
2 and address of one or more representatives of
3 counsel for the plaintiff class who will be reason-
4 ably available to answer questions from class
5 members concerning any matter contained in
6 any notice of settlement published or otherwise
7 disseminated to the class.
8

9 “(E) *REASONS FOR SETTLEMENT.*—A brief
10 statement explaining the reasons why the parties
11 are proposing the settlement.

12 “(F) *OTHER INFORMATION.*—Such other in-
13 formation as may be required by the court.”.

14 (2) *SECURITIES EXCHANGE ACT OF 1934.*—Sec-
15 tion 21 of the Securities Exchange Act of 1934 (15
16 U.S.C. 78u) is amended by adding at the end the fol-
17 lowing new subsection:

18 “(j) *RECOVERY RULES FOR PRIVATE CLASS AC-*
19 *TIONS.*—

20 “(1) *IN GENERAL.*—The rules contained in this
21 subsection shall apply in each private action arising
22 under this title that is brought as a plaintiff class ac-
23 tion pursuant to the Federal Rules of Civil Procedure.

24 “(2) *CERTIFICATION FILED WITH COMPLAINTS.*—

1 “(A) *IN GENERAL.*—*Each plaintiff seeking*
2 *to serve as a representative party on behalf of a*
3 *class shall provide a sworn certification, which*
4 *shall be personally signed by such plaintiff and*
5 *filed with the complaint, that—*

6 “(i) *states that the plaintiff has re-*
7 *viewed the complaint and authorized its fil-*
8 *ing;*

9 “(ii) *states that the plaintiff did not*
10 *purchase the security that is the subject of*
11 *the complaint at the direction of plaintiff’s*
12 *counsel or in order to participate in any*
13 *private action arising under this title;*

14 “(iii) *states that the plaintiff is willing*
15 *to serve as a representative party on behalf*
16 *of a class, including providing testimony at*
17 *deposition and trial, if necessary;*

18 “(iv) *sets forth all of the transactions*
19 *of the plaintiff in the security that is the*
20 *subject of the complaint during the class pe-*
21 *riod specified in the complaint;*

22 “(v) *identifies any action under this*
23 *title, filed during the 3-year period preced-*
24 *ing the date on which the certification is*
25 *signed by the plaintiff, in which the plain-*

1 *tiff has sought to serve as a representative*
2 *party on behalf of a class; and*

3 *“(vi) states that the plaintiff will not*
4 *accept any payment for serving as a rep-*
5 *resentative party on behalf of a class beyond*
6 *the plaintiff’s pro rata share of any recov-*
7 *ery, except as ordered or approved by the*
8 *court in accordance with paragraph (3).*

9 *“(B) NONWAIVER OF ATTORNEY-CLIENT*
10 *PRIVILEGE.—The certification filed pursuant to*
11 *subparagraph (A) shall not be construed to be a*
12 *waiver of the attorney-client privilege.*

13 *“(3) RECOVERY BY PLAINTIFFS.—The share of*
14 *any final judgment or of any settlement that is*
15 *awarded to a representative party serving on behalf*
16 *of a class shall be calculated in the same manner as*
17 *the shares of the final judgment or settlement awarded*
18 *to all other members of the class. Nothing in this*
19 *paragraph shall be construed to limit the award to*
20 *any representative party serving on behalf of a class*
21 *of reasonable costs and expenses (including lost*
22 *wages) directly relating to the representation of the*
23 *class.*

24 *“(4) RESTRICTIONS ON SETTLEMENTS UNDER*
25 *SEAL.—The terms and provisions of any settlement*

1 *agreement of a class action shall not be filed under*
2 *seal, except that on motion of any party to the settle-*
3 *ment, the court may order filing under seal for those*
4 *portions of a settlement agreement as to which good*
5 *cause is shown for such filing under seal. For pur-*
6 *poses of this paragraph, good cause shall exist only if*
7 *publication of a term or provision of a settlement*
8 *agreement would cause direct and substantial harm to*
9 *any party.*

10 *“(5) RESTRICTIONS ON PAYMENT OF ATTORNEYS’*
11 *FEES AND EXPENSES.—Total attorneys’ fees and ex-*
12 *penses awarded by the court to counsel for the plain-*
13 *tiff class shall not exceed a reasonable percentage of*
14 *the amount of damages and prejudgment interest*
15 *awarded to the class.*

16 *“(6) DISCLOSURE OF SETTLEMENT TERMS TO*
17 *CLASS MEMBERS.—Any proposed or final settlement*
18 *agreement that is published or otherwise disseminated*
19 *to the class shall include each of the following state-*
20 *ments, along with a cover page summarizing the in-*
21 *formation contained in such statements:*

22 *“(A) STATEMENT OF PLAINTIFF RECOV-*
23 *ERY.—The amount of the settlement proposed to*
24 *be distributed to the parties to the action, deter-*

1 *mined in the aggregate and on an average per*
2 *share basis.*

3 “(B) *STATEMENT OF POTENTIAL OUTCOME*
4 *OF CASE.—*

5 “(i) *AGREEMENT ON AMOUNT OF DAM-*
6 *AGES.—If the settling parties agree on the*
7 *average amount of damages per share that*
8 *would be recoverable if the plaintiff pre-*
9 *vailed on each claim alleged under this title,*
10 *a statement concerning the average amount*
11 *of such potential damages per share.*

12 “(ii) *DISAGREEMENT ON AMOUNT OF*
13 *DAMAGES.—If the parties do not agree on*
14 *the average amount of damages per share*
15 *that would be recoverable if the plaintiff*
16 *prevailed on each claim alleged under this*
17 *title, a statement from each settling party*
18 *concerning the issue or issues on which the*
19 *parties disagree.*

20 “(iii) *INADMISSIBILITY FOR CERTAIN*
21 *PURPOSES.—A statement made in accord-*
22 *ance with clause (i) or (ii) concerning the*
23 *amount of damages shall not be admissible*
24 *in any Federal or State judicial action or*
25 *administrative proceeding, other than an*

1 *action or proceeding arising out of such*
2 *statement.*

3 “(C) *STATEMENT OF ATTORNEYS’ FEES OR*
4 *COSTS SOUGHT.—If any of the settling parties or*
5 *their counsel intend to apply to the court for an*
6 *award of attorneys’ fees or costs from any fund*
7 *established as part of the settlement, a statement*
8 *indicating which parties or counsel intend to*
9 *make such an application, the amount of fees*
10 *and costs that will be sought (including the*
11 *amount of such fees and costs determined on an*
12 *average per share basis), and a brief explanation*
13 *supporting the fees and costs sought.*

14 “(D) *IDENTIFICATION OF LAWYERS’ REP-*
15 *RESENTATIVES.—The name, telephone number,*
16 *and address of one or more representatives of*
17 *counsel for the plaintiff class who will be reason-*
18 *ably available to answer questions from class*
19 *members concerning any matter contained in*
20 *any notice of settlement published or otherwise*
21 *disseminated to the class.*

22 “(E) *REASONS FOR SETTLEMENT.—A brief*
23 *statement explaining the reasons why the parties*
24 *are proposing the settlement.*

1 “(F) *OTHER INFORMATION.*—*Such other in-*
2 *formation as may be required by the court.*”.

3 (b) *APPOINTMENT OF LEAD PLAINTIFF.*—

4 (1) *SECURITIES ACT OF 1933.*—*Section 20 of the*
5 *Securities Act of 1933 (15 U.S.C. 77t) is amended by*
6 *adding at the end the following new subsection:*

7 “(i) *PROCEDURES GOVERNING APPOINTMENT OF LEAD*
8 *PLAINTIFF IN CLASS ACTIONS.*—

9 “(1) *EARLY NOTICE TO CLASS MEMBERS.*—

10 “(A) *IN GENERAL.*—*In any private action*
11 *arising under this title that is brought on behalf*
12 *of a class, not later than 20 days after the date*
13 *on which the complaint is filed, the plaintiff or*
14 *plaintiffs shall cause to be published, in a widely*
15 *circulated national business-oriented publication*
16 *or wire service, a notice advising members of the*
17 *purported plaintiff class—*

18 “(i) *of the pendency of the action, the*
19 *claims asserted therein, and the purported*
20 *class period; and*

21 “(ii) *that, not later than 60 days after*
22 *the date on which the notice is published,*
23 *any member of the purported class may*
24 *move the court to serve as lead plaintiff of*
25 *the purported class.*

1 “(B) *ADDITIONAL NOTICES MAY BE RE-*
2 *QUIRED UNDER FEDERAL RULES.—Notice re-*
3 *quired under subparagraph (A) shall be in addi-*
4 *tion to any notice required pursuant to the Fed-*
5 *eral Rules of Civil Procedure.*

6 “(2) *APPOINTMENT OF LEAD PLAINTIFF.—*

7 “(A) *IN GENERAL.—Not later than 90 days*
8 *after the date on which a notice is published*
9 *under paragraph (1)(A), the court shall consider*
10 *any motion made by a purported class member*
11 *in response to the notice, and shall appoint as*
12 *lead plaintiff the member or members of the pur-*
13 *ported plaintiff class that the court determines to*
14 *be most capable of adequately representing the*
15 *interests of class members (hereafter in this sub-*
16 *section referred to as the ‘most adequate plain-*
17 *tiff’) in accordance with this paragraph.*

18 “(B) *CONSOLIDATED ACTIONS.—If more*
19 *than one action on behalf of a class asserting*
20 *substantially the same claim or claims arising*
21 *under this title has been filed, and any party has*
22 *sought to consolidate those actions for pretrial*
23 *purposes or for trial, the court shall not make the*
24 *determination required by subparagraph (A)*
25 *until after the decision on the motion to consoli-*

1 *date is rendered. As soon as practicable after*
2 *such decision is rendered, the court shall appoint*
3 *the most adequate plaintiff as lead plaintiff for*
4 *the consolidated actions in accordance with this*
5 *paragraph.*

6 “(C) *REBUTTABLE PRESUMPTION.*—

7 “(i) *IN GENERAL.*—*Subject to clause*
8 *(ii), for purposes of subparagraph (A), the*
9 *court shall adopt a presumption that the*
10 *most adequate plaintiff in any private ac-*
11 *tion arising under this title is the person or*
12 *group of persons that—*

13 “(I) *has either filed the complaint*
14 *or made a motion in response to a no-*
15 *tice under paragraph (1)(A);*

16 “(II) *in the determination of the*
17 *court, has the largest financial interest*
18 *in the relief sought by the class; and*

19 “(III) *otherwise satisfies the re-*
20 *quirements of Rule 23 of the Federal*
21 *Rules of Civil Procedure.*

22 “(ii) *REBUTTAL EVIDENCE.*—*The pre-*
23 *sumption described in clause (i) may be re-*
24 *butted only upon proof by a member of the*

1 *purported plaintiff class that the presump-*
2 *tively most adequate plaintiff—*

3 *“(I) will not fairly and ade-*
4 *quately protect the interests of the*
5 *class; or*

6 *“(II) is subject to unique defenses*
7 *that render such plaintiff incapable of*
8 *adequately representing the class.*

9 *“(iii) DISCOVERY.—For purposes of*
10 *clause (ii), discovery relating to whether a*
11 *member or members of the purported plain-*
12 *tiff class is the most adequate plaintiff—*

13 *“(I) may not be conducted by any*
14 *defendant; and*

15 *“(II) may be conducted by a*
16 *plaintiff only if the plaintiff first dem-*
17 *onstrates a reasonable basis for a find-*
18 *ing that the presumptively most ade-*
19 *quate plaintiff is incapable of ade-*
20 *quately representing the class.*

21 *“(D) SELECTION OF LEAD COUNSEL.—The*
22 *most adequate plaintiff shall, subject to the ap-*
23 *proval of the court, select and retain counsel to*
24 *represent the class.”.*

1 (2) *SECURITIES EXCHANGE ACT OF 1934.—Section*
2 *21 of the Securities Exchange Act of 1934 (15*
3 *U.S.C. 78a et seq.) is amended by adding at the end*
4 *the following new subsection:*

5 “(k) *PROCEDURES GOVERNING APPOINTMENT OF*
6 *LEAD PLAINTIFF IN CLASS ACTIONS.—*

7 “(1) *EARLY NOTICE TO CLASS MEMBERS.—*

8 “(A) *IN GENERAL.—In any private action*
9 *arising under this title that is brought on behalf*
10 *of a class, not later than 20 days after the date*
11 *on which the complaint is filed, the plaintiff or*
12 *plaintiffs shall cause to be published, in a widely*
13 *circulated national business-oriented publication*
14 *or wire service, a notice advising members of the*
15 *purported plaintiff class—*

16 “(i) *of the pendency of the action, the*
17 *claims asserted therein, and the purported*
18 *class period; and*

19 “(ii) *that, not later than 60 days after*
20 *the date on which the notice is published,*
21 *any member of the purported class may*
22 *move the court to serve as lead plaintiff of*
23 *the purported class.*

24 “(B) *ADDITIONAL NOTICES MAY BE RE-*
25 *QUIRED UNDER FEDERAL RULES.—Notice re-*

1 *quired under subparagraph (A) shall be in addi-*
2 *tion to any notice required pursuant to the Fed-*
3 *eral Rules of Civil Procedure.*

4 *“(2) APPOINTMENT OF LEAD PLAINTIFF.—*

5 *“(A) IN GENERAL.—Not later than 90 days*
6 *after the date on which a notice is published*
7 *under paragraph (1)(A), the court shall consider*
8 *any motion made by a purported class member*
9 *in response to the notice, and shall appoint as*
10 *lead plaintiff the member or members of the pur-*
11 *ported plaintiff class that the court determines to*
12 *be most capable of adequately representing the*
13 *interests of class members (hereafter in this sub-*
14 *section referred to as the ‘most adequate plain-*
15 *tiff’) in accordance with this paragraph.*

16 *“(B) CONSOLIDATED ACTIONS.—If more*
17 *than one action on behalf of a class asserting*
18 *substantially the same claim or claims arising*
19 *under this title has been filed, and any party has*
20 *sought to consolidate those actions for pretrial*
21 *purposes or for trial, the court shall not make the*
22 *determination required by subparagraph (A)*
23 *until after the decision on the motion to consoli-*
24 *date is rendered. As soon as practicable after*
25 *such decision is rendered, the court shall appoint*

1 *the most adequate plaintiff as lead plaintiff for*
2 *the consolidated actions in accordance with this*
3 *paragraph.*

4 “(C) *REBUTTABLE PRESUMPTION.*—

5 “(i) *IN GENERAL.*—*Subject to clause*
6 *(ii), for purposes of subparagraph (A), the*
7 *court shall adopt a presumption that the*
8 *most adequate plaintiff in any private ac-*
9 *tion arising under this title is the person or*
10 *group of persons that—*

11 “(I) *has either filed the complaint*
12 *or made a motion in response to a no-*
13 *tice under paragraph (1)(A);*

14 “(II) *in the determination of the*
15 *court, has the largest financial interest*
16 *in the relief sought by the class; and*

17 “(III) *otherwise satisfies the re-*
18 *quirements of Rule 23 of the Federal*
19 *Rules of Civil Procedure.*

20 “(ii) *REBUTTAL EVIDENCE.*—*The pre-*
21 *sumption described in clause (i) may be re-*
22 *butted only upon proof by a member of the*
23 *purported plaintiff class that the presump-*
24 *tively most adequate plaintiff—*

1 “(I) will not fairly and ade-
2 quately protect the interests of the
3 class; or

4 “(II) is subject to unique defenses
5 that render such plaintiff incapable of
6 adequately representing the class.

7 “(iii) *DISCOVERY.*—For purposes of
8 clause (ii), discovery relating to whether a
9 member or members of the purported plain-
10 tiff class is the most adequate plaintiff—

11 “(I) may not be conducted by any
12 defendant; and

13 “(II) may be conducted by a
14 plaintiff only if the plaintiff first dem-
15 onstrates a reasonable basis for a find-
16 ing that the presumptively most ade-
17 quate plaintiff is incapable of ade-
18 quately representing the class.

19 “(D) *SELECTION OF LEAD COUNSEL.*—The
20 most adequate plaintiff shall, subject to the ap-
21 proval of the court, select and retain counsel to
22 represent the class.”.

1 **SEC. 103. SANCTIONS FOR ABUSIVE LITIGATION.**

2 (a) *SECURITIES ACT OF 1933.*—Section 20 of the Se-
3 curities Act of 1933 (15 U.S.C. 77t) is amended by adding
4 at the end the following new subsection:

5 “(j) *SANCTIONS FOR ABUSIVE LITIGATION.*—

6 “(1) *MANDATORY REVIEW BY COURT.*—In any
7 private action arising under this title, upon final ad-
8 judication of the action, the court shall include in the
9 record specific findings regarding compliance by each
10 party and each attorney representing any party with
11 each requirement of Rule 11(b) of the Federal Rules
12 of Civil Procedure.

13 “(2) *MANDATORY SANCTIONS.*—If the court
14 makes a finding under paragraph (1) that a party or
15 attorney violated any requirement of Rule 11(b) of the
16 Federal Rules of Civil Procedure, the court shall im-
17 pose sanctions on such party or attorney in accord-
18 ance with Rule 11 of the Federal Rules of Civil Proce-
19 dure.

20 “(3) *PRESUMPTION IN FAVOR OF ATTORNEYS’*
21 *FEES AND COSTS.*—

22 “(A) *IN GENERAL.*—Subject to subpara-
23 graphs (B) and (C), for purposes of paragraph
24 (2), the court shall adopt a presumption that the
25 appropriate sanction for failure of the complaint
26 or the responsive pleading or motion to comply

1 with any requirement of Rule 11(b) of the Fed-
2 eral Rules of Civil Procedure is an award to the
3 opposing party of all of the reasonable attorneys'
4 fees and other expenses incurred as a direct re-
5 sult of the violation.

6 “(B) *REBUTTAL EVIDENCE.*—The presump-
7 tion described in subparagraph (A) may be re-
8 butted only upon proof by the party or attorney
9 against whom sanctions are to be imposed
10 that—

11 “(i) the award of attorneys’ fees and
12 other expenses will impose an undue burden
13 on that party or attorney; or

14 “(ii) the violation of Rule 11(b) of the
15 Federal Rules of Civil Procedure was de
16 *minimis.*

17 “(C) *SANCTIONS.*—If the party or attorney
18 against whom sanctions are to be imposed meets
19 its burden under subparagraph (B), the court
20 shall award the sanctions that the court deems
21 appropriate pursuant to Rule 11 of the Federal
22 Rules of Civil Procedure.”.

23 (b) *SECURITIES EXCHANGE ACT OF 1934.*—Section 21
24 of the Securities Exchange Act of 1934 (15 U.S.C. 78u) is
25 amended by adding at the end the following new subsection:

1 “(1) *SANCTIONS FOR ABUSIVE LITIGATION.*—

2 “(1) *MANDATORY REVIEW BY COURT.*—*In any*
3 *private action arising under this title, upon final ad-*
4 *judication of the action, the court shall include in the*
5 *record specific findings regarding compliance by each*
6 *party and each attorney representing any party with*
7 *each requirement of Rule 11(b) of the Federal Rules*
8 *of Civil Procedure.*

9 “(2) *MANDATORY SANCTIONS.*—*If the court*
10 *makes a finding under paragraph (1) that a party or*
11 *attorney violated any requirement of Rule 11(b) of the*
12 *Federal Rules of Civil Procedure, the court shall im-*
13 *pose sanctions in accordance with Rule 11 of the Fed-*
14 *eral Rules of Civil Procedure on such party or attor-*
15 *ney.*

16 “(3) *PRESUMPTION IN FAVOR OF ATTORNEYS’*
17 *FEES AND COSTS.*—

18 “(A) *IN GENERAL.*—*Subject to subpara-*
19 *graphs (B) and (C), for purposes of paragraph*
20 *(2), the court shall adopt a presumption that the*
21 *appropriate sanction for failure of the complaint*
22 *or the responsive pleading or motion to comply*
23 *with any requirement of Rule 11(b) of the Fed-*
24 *eral Rules of Civil Procedure is an award to the*
25 *opposing party of all of the reasonable attorneys’*

1 *fees and other expenses incurred as a direct re-*
2 *sult of the violation.*

3 “(B) *REBUTTAL EVIDENCE.*—*The presump-*
4 *tion described in subparagraph (A) may be re-*
5 *butted only upon proof by the party or attorney*
6 *against whom sanctions are to be imposed*
7 *that—*

8 “(i) *the award of attorneys’ fees and*
9 *other expenses will impose an undue burden*
10 *on that party or attorney; or*

11 “(ii) *the violation of Rule 11(b) of the*
12 *Federal Rules of Civil Procedure was de*
13 *minimis.*

14 “(C) *SANCTIONS.*—*If the party or attorney*
15 *against whom sanctions are to be imposed meets*
16 *its burden under subparagraph (B), the court*
17 *shall award the sanctions that the court deems*
18 *appropriate pursuant to Rule 11 of the Federal*
19 *Rules of Civil Procedure.”.*

20 **SEC. 104. REQUIREMENTS FOR SECURITIES FRAUD AC-**
21 **TIONS.**

22 (a) *SECURITIES ACT OF 1933.*—

23 (1) *STAY OF DISCOVERY.*—*Section 20 of the Se-*
24 *curities Act of 1933 (15 U.S.C. 77t) is amended by*
25 *adding at the end the following new subsection:*

1 “(k) *STAY OF DISCOVERY.*—In any private action
2 arising under this title, during the pendency of any motion
3 to dismiss, all discovery and other proceedings shall be
4 stayed unless the court finds, upon the motion of any party,
5 that particularized discovery is necessary to preserve evi-
6 dence or to prevent undue prejudice to that party.”.

7 (2) *PRESERVATION OF EVIDENCE.*—Section 20 of
8 the Securities Act of 1933 (15 U.S.C. 77t) is amended
9 by adding at the end the following new subsection:

10 “(l) *PRESERVATION OF EVIDENCE.*—It shall be unlaw-
11 ful for any person, upon receiving actual notice that a com-
12 plaint has been filed in a private action arising under this
13 title naming that person as a defendant and that describes
14 the allegations contained in the complaint, to willfully de-
15 stroy or otherwise alter any document, data compilation
16 (including any electronically recorded or stored data), or
17 tangible object that is in the custody or control of that per-
18 son and that is relevant to the allegations.”.

19 (b) *SECURITIES EXCHANGE ACT OF 1934.*—Title I of
20 the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.)
21 is amended by adding at the end the following new section:

1 **“SEC. 36. REQUIREMENTS FOR SECURITIES FRAUD AC-**
2 **TIONS.**

3 *“(a) MISLEADING STATEMENTS AND OMISSIONS.—In*
4 *any private action arising under this title in which the*
5 *plaintiff alleges that the defendant—*

6 *“(1) made an untrue statement of a material*
7 *fact; or*

8 *“(2) omitted to state a material fact necessary in*
9 *order to make the statements made, in the light of the*
10 *circumstances in which they were made, not mislead-*
11 *ing;*

12 *the complaint shall specify each statement alleged to have*
13 *been misleading, the reason or reasons why the statement*
14 *is misleading, and, if an allegation regarding the statement*
15 *or omission is made on information and belief, the plaintiff*
16 *shall set forth all information on which that belief is formed.*

17 *“(b) REQUIRED STATE OF MIND.—*

18 *“(1) IN GENERAL.—In any private action arising*
19 *under this title in which the plaintiff may recover*
20 *money damages only on proof that the defendant*
21 *acted with a particular state of mind, the complaint*
22 *shall, with respect to each act or omission alleged to*
23 *violate this title, specifically allege facts giving rise to*
24 *a strong inference that the defendant acted with the*
25 *required state of mind.*

1 “(2) *STRONG INFERENCE OF FRAUDULENT IN-*
2 *TENT.—For purposes of paragraph (1), a strong in-*
3 *ference that the defendant acted with the required*
4 *state of mind may be established either—*

5 “(A) *by alleging facts to show that the de-*
6 *fendant had both motive and opportunity to*
7 *commit fraud; or*

8 “(B) *by alleging facts that constitute strong*
9 *circumstantial evidence of conscious misbehavior*
10 *or recklessness by the defendant.*

11 “(c) *MOTION TO DISMISS; STAY OF DISCOVERY.—*

12 “(1) *DISMISSAL FOR FAILURE TO MEET PLEAD-*
13 *ING REQUIREMENTS.—In any private action arising*
14 *under this title, the court shall, on the motion of any*
15 *defendant, dismiss the complaint if the requirements*
16 *of subsections (a) and (b) are not met.*

17 “(2) *STAY OF DISCOVERY.—In any private ac-*
18 *tion arising under this title, all discovery and other*
19 *proceedings shall be stayed during the pendency of*
20 *any motion to dismiss, unless the court finds upon*
21 *the motion of any party that particularized discovery*
22 *is necessary to preserve evidence or to prevent undue*
23 *prejudice to that party.*

24 “(3) *PRESERVATION OF EVIDENCE.—It shall be*
25 *unlawful for any person, upon receiving actual notice*

1 *statement, an issuer that is subject to the reporting*
2 *requirements of section 13(a) or section 15(d) of the*
3 *Securities Exchange Act of 1934, a person acting on*
4 *behalf of such issuer, or an outside reviewer retained*
5 *by such issuer, shall not be liable with respect to any*
6 *forward-looking statement, whether written or oral, if*
7 *and to the extent that the statement—*

8 *“(A) projects, estimates, or describes future*
9 *events; and*

10 *“(B) refers clearly (and, except as otherwise*
11 *provided by rule or regulation, proximately)*
12 *to—*

13 *“(i) such projections, estimates, or de-*
14 *scriptions as forward-looking statements;*
15 *and*

16 *“(ii) the risk that actual results may*
17 *differ materially from such projections, esti-*
18 *mates, or descriptions.*

19 *“(2) EFFECT ON OTHER SAFE HARBORS.—The*
20 *exemption from liability provided for in paragraph*
21 *(1) shall be in addition to any exemption that the*
22 *Commission may establish by rule or regulation*
23 *under subsection (e).*

1 “(b) *DEFINITION OF FORWARD-LOOKING STATE-*
2 *MENT.*—For purposes of this section, the term ‘forward-look-

3 *ing statement’ means—*
4 “(1) *a statement containing a projection of reve-*
5 *nues, income (including income loss), earnings (in-*
6 *cluding earnings loss) per share, capital expenditures,*
7 *dividends, capital structure, or other financial items;*

8 “(2) *a statement of the plans and objectives of*
9 *management for future operations;*

10 “(3) *a statement of future economic performance*
11 *contained in a discussion and analysis of financial*
12 *condition by the management or in the results of op-*
13 *erations included pursuant to the rules and regula-*
14 *tions of the Commission;*

15 “(4) *any disclosed statement of the assumptions*
16 *underlying or relating to any statement described in*
17 *paragraph (1), (2), or (3); or*

18 “(5) *a statement containing a projection or esti-*
19 *mate of such other items as may be specified by rule*
20 *or regulation of the Commission.*

21 “(c) *EXCLUSIONS.*—The exemption from liability pro-
22 *vided for in subsection (a) does not apply to a forward-*
23 *looking statement that is—*

24 “(1) *knowingly made with the purpose and ac-*
25 *tual intent of misleading investors;*

1 “(2) except to the extent otherwise specifically
2 provided by rule, regulation, or order of the Commis-
3 sion, made with respect to the business or operations
4 of the issuer, if the issuer—

5 “(A) during the 3-year period preceding the
6 date on which the statement was first made—

7 “(i) was convicted of any felony or
8 misdemeanor described in clauses (i)
9 through (iv) of section 15(b)(4)(B); or

10 “(ii) has been made the subject of a ju-
11 dicial or administrative decree or order
12 arising out of a governmental action that—

13 “(I) prohibits future violations of
14 the anti-fraud provisions of the securi-
15 ties laws, as that term is defined in
16 section 3 of the Securities Exchange
17 Act of 1934;

18 “(II) requires that the issuer cease
19 and desist from violating the anti-
20 fraud provisions of the securities laws;
21 or

22 “(III) determines that the issuer
23 violated the anti-fraud provisions of
24 the securities laws;

1 “(B) makes the forward-looking statement
2 in connection with an offering of securities by a
3 blank check company, as that term is defined
4 under the rules or regulations of the Commission;

5 “(C) issues penny stock, as that term is de-
6 fined in section 3(a)(51) of the Securities Ex-
7 change Act of 1934, and the rules, regulations, or
8 orders issued pursuant to that section;

9 “(D) makes the forward-looking statement
10 in connection with a rollup transaction, as that
11 term is defined under the rules or regulations of
12 the Commission; or

13 “(E) makes the forward-looking statement
14 in connection with a going private transaction,
15 as that term is defined under the rules or regula-
16 tions of the Commission issued pursuant to sec-
17 tion 13(e) of the Securities Exchange Act of
18 1934; or

19 “(3) except to the extent otherwise specifically
20 provided by rule or regulation of the Commission—

21 “(A) included in a financial statement pre-
22 pared in accordance with generally accepted ac-
23 counting principles;

24 “(B) contained in a registration statement
25 of, or otherwise issued by, an investment com-

1 pany, as that term is defined in section 3(a) of
2 the Investment Company Act of 1940;

3 “(C) made in connection with a tender
4 offer;

5 “(D) made in connection with an initial
6 public offering;

7 “(E) made by or in connection with an of-
8 fering by a partnership, limited liability cor-
9 poration, or a direct participation investment
10 program, as those terms are defined by rule or
11 regulation of the Commission; or

12 “(F) made in a disclosure of beneficial own-
13 ership in a report required to be filed with the
14 Commission pursuant to section 13(d) of the Se-
15 curities Exchange Act of 1934.

16 “(d) *STAY PENDING DECISION ON MOTION.*—In any
17 private action arising under this title, the court shall stay
18 discovery during the pendency of any motion by a defend-
19 ant (other than discovery that is specifically directed to the
20 applicability of the exemption provided for in this section)

21 for summary judgment that is based on the grounds that—

22 “(1) the statement or omission upon which the
23 complaint is based is a forward-looking statement
24 within the meaning of this section; and

1 “(2) *the exemption provided for in this section*
2 *precludes a claim for relief.*

3 “(e) *AUTHORITY.—In addition to the exemption pro-*
4 *vided for in this section, the Commission may, by rule or*
5 *regulation, provide exemptions from liability under any*
6 *provision of this title, or of any rule or regulation issued*
7 *under this title, that is based on a statement that includes*
8 *or that is based on projections or other forward-looking in-*
9 *formation, if and to the extent that any such exemption*
10 *is, as determined by the Commission, consistent with the*
11 *public interest and the protection of investors.*

12 “(f) *COMMISSION DISGORGEMENT ACTIONS.—*

13 “(1) *IN GENERAL.—If the Commission, in any*
14 *proceeding, orders or obtains (by settlement, court*
15 *order, or otherwise) a payment of funds from a per-*
16 *son who has violated this title through means that in-*
17 *cluded the utilization of a forward-looking statement,*
18 *and if any portion of such funds is set aside or other-*
19 *wise held for or available to persons who suffered*
20 *losses in connection with such violation, no person*
21 *shall be precluded from participating in the distribu-*
22 *tion of, or otherwise receiving, a portion of such funds*
23 *by reason of the application of this section.*

24 “(2) *JUDGMENT FOR LOSSES SUFFERED.—In*
25 *any action by the Commission alleging a violation of*

1 *this title in which the defendant or respondent is al-*
2 *leged to have utilized a forward-looking statement in*
3 *furtherance of such violation, the Commission may,*
4 *upon a sufficient showing, in addition to all other*
5 *remedies available to the Commission, obtain a judg-*
6 *ment for the payment of an amount equal to all losses*
7 *suffered by reason of the utilization of the forward-*
8 *looking statement that are not compensated through*
9 *final adjudication or settlement of a private action*
10 *brought under this title arising from the same viola-*
11 *tion.*

12 “(g) *EFFECT ON OTHER AUTHORITY OF COMMIS-*
13 *SION.—Nothing in this section limits, either expressly or*
14 *by implication, the authority of the Commission to exercise*
15 *similar authority or to adopt similar rules and regulations*
16 *with respect to forward-looking statements under any other*
17 *statute under which the Commission exercises rulemaking*
18 *authority.*”.

19 (b) *SECURITIES EXCHANGE ACT OF 1934.—Title I of*
20 *the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.)*
21 *is amended by adding at the end the following new section:*

22 **“SEC. 37. APPLICATION OF SAFE HARBOR FOR FORWARD-**
23 **LOOKING STATEMENTS.**

24 “(a) *SAFE HARBOR.—*

1 “(1) *IN GENERAL.*—In any private action arising
2 under this title that is based on a fraudulent
3 statement, an issuer that is subject to the reporting
4 requirements of section 13(a) or section 15(d) of the
5 *Securities Exchange Act of 1934*, a person acting on
6 behalf of such issuer, or an outside reviewer retained
7 by such issuer, shall not be liable with respect to any
8 forward-looking statement, whether written or oral, if
9 and to the extent that the statement—

10 “(A) projects, estimates, or describes future
11 events; and

12 “(B) refers clearly (and, except as otherwise
13 provided by rule or regulation, proximately)
14 to—

15 “(i) such projections, estimates, or de-
16 scriptions as forward-looking statements;
17 and

18 “(ii) the risk that actual results may
19 differ materially from such projections, esti-
20 mates, or descriptions.

21 “(2) *EFFECT ON OTHER SAFE HARBORS.*—The
22 exemption from liability provided for in paragraph
23 (1) shall be in addition to any exemption that the
24 Commission may establish by rule or regulation
25 under subsection (e).

1 “(b) *DEFINITION OF FORWARD-LOOKING STATE-*
2 *MENT.*—For purposes of this section, the term ‘forward-look-
3 *ing statement’ means—*

4 “(1) *a statement containing a projection of reve-*
5 *nues, income (including income loss), earnings (in-*
6 *cluding earnings loss) per share, capital expenditures,*
7 *dividends, capital structure, or other financial items;*

8 “(2) *a statement of the plans and objectives of*
9 *management for future operations;*

10 “(3) *a statement of future economic performance*
11 *contained in a discussion and analysis of financial*
12 *condition by the management or in the results of op-*
13 *erations included pursuant to the rules and regula-*
14 *tions of the Commission;*

15 “(4) *any disclosed statement of the assumptions*
16 *underlying or relating to any statement described in*
17 *paragraph (1), (2), or (3); or*

18 “(5) *a statement containing a projection or esti-*
19 *mate of such other items as may be specified by rule*
20 *or regulation of the Commission.*

21 “(c) *EXCLUSIONS.*—The exemption from liability pro-
22 *vided for in subsection (a) does not apply to a forward-*
23 *looking statement that is—*

24 “(1) *knowingly made with the purpose and ac-*
25 *tual intent of misleading investors;*

1 “(2) except to the extent otherwise specifically
2 provided by rule, regulation, or order of the Commis-
3 sion, made with respect to the business or operations
4 of the issuer, if the issuer—

5 “(A) during the 3-year period preceding the
6 date on which the statement was first made—

7 “(i) was convicted of any felony or
8 misdemeanor described in clauses (i)
9 through (iv) of section 15(b)(4)(B); or

10 “(ii) has been made the subject of a ju-
11 dicial or administrative decree or order
12 arising out of a governmental action that—

13 “(I) prohibits future violations of
14 the anti-fraud provisions of the securi-
15 ties laws;

16 “(II) requires that the issuer cease
17 and desist from violating the anti-
18 fraud provisions of the securities laws;
19 or

20 “(III) determines that the issuer
21 violated the anti-fraud provisions of
22 the securities laws;

23 “(B) makes the forward-looking statement
24 in connection with an offering of securities by a

1 *blank check company, as that term is defined*
2 *under the rules or regulations of the Commission;*

3 “(C) *issues penny stock;*

4 “(D) *makes the forward-looking statement*
5 *in connection with a rollup transaction, as that*
6 *term is defined under the rules or regulations of*
7 *the Commission; or*

8 “(E) *makes the forward-looking statement*
9 *in connection with a going private transaction,*
10 *as that term is defined under the rules or regula-*
11 *tions of the Commission issued pursuant to sec-*
12 *tion 13(e); or*

13 “(3) *except to the extent otherwise specifically*
14 *provided by rule or regulation of the Commission—*

15 “(A) *included in financial statements pre-*
16 *pared in accordance with generally accepted ac-*
17 *counting principles;*

18 “(B) *contained in a registration statement*
19 *of, or otherwise issued by, an investment com-*
20 *pany;*

21 “(C) *made in connection with a tender*
22 *offer;*

23 “(D) *made in connection with an initial*
24 *public offering;*

1 “(E) made by or in connection with an of-
2 fering by a partnership, limited liability cor-
3 poration, or a direct participation investment
4 program, as those terms are defined by rule or
5 regulation of the Commission; or

6 “(F) made in a disclosure of beneficial own-
7 ership in a report required to be filed with the
8 Commission pursuant to section 13(d).

9 “(d) *STAY PENDING DECISION ON MOTION.*—In any
10 private action arising under this title, the court shall stay
11 discovery during the pendency of any motion by a defend-
12 ant (other than discovery that is specifically directed to the
13 applicability of the exemption provided for in this section)
14 for summary judgment that is based on the grounds that—

15 “(1) the statement or omission upon which the
16 complaint is based is a forward-looking statement
17 within the meaning of this section; and

18 “(2) the exemption provided for in this section
19 precludes a claim for relief.

20 “(e) *AUTHORITY.*—In addition to the exemption pro-
21 vided for in this section, the Commission may, by rule or
22 regulation, provide exemptions from liability under any
23 provision of this title, or of any rule or regulation issued
24 under this title, that is based on a statement that includes
25 or that is based on projections or other forward-looking in-

1 *formation, if and to the extent that any such exemption*
2 *is, as determined by the Commission, consistent with the*
3 *public interest and the protection of investors.*

4 *“(f) COMMISSION DISGORGEMENT ACTIONS.—*

5 *“(1) IN GENERAL.—If the Commission, in any*
6 *proceeding, orders or obtains (by settlement, court*
7 *order, or otherwise) a payment of funds from a per-*
8 *son who has violated this title through means that in-*
9 *cluded the utilization of a forward-looking statement,*
10 *and if any portion of such funds is set aside or other-*
11 *wise held for or available to persons who suffered*
12 *losses in connection with such violation, no person*
13 *shall be precluded from participating in the distribu-*
14 *tion of, or otherwise receiving, a portion of such funds*
15 *by reason of the application of this section.*

16 *“(2) JUDGMENT FOR LOSSES SUFFERED.—In*
17 *any action by the Commission alleging a violation of*
18 *this title in which the defendant or respondent is al-*
19 *leged to have utilized a forward-looking statement in*
20 *furtherance of such violation, the Commission may,*
21 *upon a sufficient showing, in addition to all other*
22 *remedies available to the Commission, obtain a judg-*
23 *ment for the payment of an amount equal to all losses*
24 *suffered by reason of the utilization of the forward-*
25 *looking statement that are not compensated through*

1 *final adjudication or settlement of a private action*
2 *brought under this title arising from the same viola-*
3 *tion.*

4 “(g) *EFFECT ON OTHER AUTHORITY OF COMMIS-*
5 *SION.—Nothing in this section limits, either expressly or*
6 *by implication, the authority of the Commission to exercise*
7 *similar authority or to adopt similar rules and regulations*
8 *with respect to forward-looking statements under any other*
9 *statute under which the Commission exercises rulemaking*
10 *authority.”.*

11 (c) *INVESTMENT COMPANY ACT OF 1940.—Section 24*
12 *of the Investment Company Act of 1940 (15 U.S.C. 80a-*
13 *24) is amended by adding at the end the following new sub-*
14 *section:*

15 “(g) *REGULATORY AUTHORITY FOR FORWARD-LOOK-*
16 *ING STATEMENTS.—*

17 “(1) *IN GENERAL.—The Commission shall review*
18 *and, if necessary to carry out the purposes of this*
19 *title, promulgate such rules and regulations as may*
20 *be necessary to describe conduct with respect to the*
21 *making of forward-looking statements that the Com-*
22 *mission deems does not provide a basis for liability*
23 *in any private action arising under this title.*

24 “(2) *REQUIREMENTS.—A rule or regulation pro-*
25 *mulgated under paragraph (1) shall—*

1 “(A) include clear and objective guidance
2 that the Commission finds sufficient for the pro-
3 tection of investors;

4 “(B) prescribe such guidance with sufficient
5 particularity that compliance shall be readily
6 ascertainable by issuers prior to issuance of secu-
7 rities; and

8 “(C) provide that forward-looking state-
9 ments that are in compliance with such guidance
10 and that concern the future economic perform-
11 ance of an issuer of securities registered under
12 section 12 shall be deemed not to be in violation
13 of this title.

14 “(3) *EFFECT ON OTHER AUTHORITY OF COMMIS-*
15 *SION.—Nothing in this subsection limits, either ex-*
16 *pressly or by implication, the authority of the Com-*
17 *mission to exercise similar authority or to adopt*
18 *similar rules and regulations with respect to forward-*
19 *looking statements under any other statute under*
20 *which the Commission exercises rulemaking author-*
21 *ity.”.*

22 **SEC. 106. WRITTEN INTERROGATORIES.**

23 (a) *SECURITIES ACT OF 1933.—Section 20 of the Se-*
24 *curities Act of 1933 (15 U.S.C. 77t) is amended by adding*
25 *at the end the following new subsection:*

1 **SEC. 108. AUTHORITY OF COMMISSION TO PROSECUTE AID-**
2 **ING AND ABETTING.**

3 *Section 20 of the Securities Exchange Act of 1934 (15*
4 *U.S.C. 78t) is amended—*

5 *(1) by striking the section heading and inserting*
6 *the following:*

7 *“LIABILITY OF CONTROLLING PERSONS AND PERSONS WHO*
8 *AID AND ABET VIOLATIONS”;* AND

9 *(2) by adding at the end the following new sub-*
10 *section:*

11 *“(e) PROSECUTION OF PERSONS WHO AID AND ABET*
12 *VIOLATIONS.—For purposes of any action brought by the*
13 *Commission under paragraph (1) or (3) of section 21(d),*
14 *any person that knowingly provides substantial assistance*
15 *to another person in the violation of a provision of this*
16 *title, or of any rule or regulation issued under this title,*
17 *shall be—*

18 *“(1) deemed to be in violation of such provision;*
19 *and*

20 *“(2) liable to the same extent as the person to*
21 *whom such assistance is provided.”.*

22 **SEC. 109. LOSS CAUSATION.**

23 *Section 12 of the Securities Act of 1933 (15 U.S.C.*
24 *77l) is amended—*

25 *(1) by inserting “(a) IN GENERAL.—” before*
26 *“Any person”;*

1 (2) by inserting “, subject to subsection (b),”
2 after “shall be liable”; and

3 (3) by adding at the end the following:

4 “(b) *LOSS CAUSATION*.—In an action described in sub-
5 section (a)(2), if the person who offered or sold such security
6 proves that any portion or all of the amount recoverable
7 under subsection (a)(2) represents other than the deprecia-
8 tion in value of the subject security resulting from such part
9 of the prospectus or oral communication, with respect to
10 which the liability of that person is asserted, not being true
11 or omitting to state a material fact required to be stated
12 therein or necessary to make the statement not misleading,
13 then such portion or amount, as the case may be, shall not
14 be recoverable.”.

15 **SEC. 110. STUDY AND REPORT ON PROTECTIONS FOR SEN-**
16 **IOR CITIZENS AND QUALIFIED RETIREMENT**
17 **PLANS.**

18 (a) *FINDINGS*.—The Congress finds that—

19 (1) *senior citizens and qualified retirement plans*
20 *are too often the target of securities fraud of the kind*
21 *evidenced in the Charles Keating, Lincoln Savings &*
22 *Loan Association, and American Continental Cor-*
23 *poration situations;*

1 (2) *this Act, in an effort to curb unfounded law-*
2 *suits, changes the standards and procedures for secu-*
3 *rities fraud actions; and*

4 (3) *the Securities and Exchange Commission has*
5 *indicated concern with some provisions of this Act.*

6 (b) *IN GENERAL.—Not later than 180 days after the*
7 *date of enactment of this Act, the Securities and Exchange*
8 *Commission shall—*

9 (1) *determine whether investors that are senior*
10 *citizens or qualified retirement plans require greater*
11 *protection against securities fraud than is provided*
12 *in this Act and the amendments made by this Act;*
13 *and*

14 (2) *if so, submit to the Congress a report con-*
15 *taining recommendations on protections that the*
16 *Commission determines to be appropriate to thor-*
17 *oughly protect such investors.*

18 (c) *DEFINITIONS.—For purposes of this section—*

19 (1) *The term “qualified retirement plan” has the*
20 *same meaning as in section 4974(c) of the Internal*
21 *Revenue Code of 1986; and*

22 (2) *the term “senior citizen” means an individ-*
23 *ual who is 62 years of age or older as of the date of*
24 *the securities transaction at issue.*

1 **SEC. 111. AMENDMENT TO RACKETEER INFLUENCED AND**
2 **CORRUPT ORGANIZATIONS ACT.**

3 *Section 1964(c) of title 18, United States Code, is*
4 *amended by inserting before the period “, except that no*
5 *person may rely upon conduct that would have been action-*
6 *able as fraud in the purchase or sale of securities to establish*
7 *a violation of section 1962”:* *Provided however, That this*
8 *exception shall not apply if any participant in the fraud*
9 *is criminally convicted in connection therewith, in which*
10 *case the statute of limitations shall start to run on the date*
11 *that the conviction becomes final.*

12 **SEC. 112. APPLICABILITY.**

13 *The amendments made by this title shall not affect or*
14 *apply to any private action arising under title I of the Se-*
15 *curities Exchange Act of 1934 or title I of the Securities*
16 *Act of 1933 commenced before the date of enactment of this*
17 *Act.*

18 **TITLE II—REDUCTION OF**
19 **COERCIVE SETTLEMENTS**

20 **SEC. 201. LIMITATION ON DAMAGES.**

21 *Section 36 of the Securities Exchange Act of 1934, as*
22 *added by section 104 of this Act, is amended by adding*
23 *at the end the following new subsection:*

24 *“(e) LIMITATION ON DAMAGES.—*

25 *“(1) IN GENERAL.—Except as provided in para-*
26 *graph (2), in any private action arising under this*

1 *title, the plaintiff's damages shall not exceed the dif-*
2 *ference between the purchase or sale price paid or re-*
3 *ceived, as appropriate, by the plaintiff for the subject*
4 *security and the value of that security, as measured*
5 *by the median trading price of that security, during*
6 *the 90-day period beginning on the date on which the*
7 *information correcting the misstatement or omission*
8 *is disseminated to the market.*

9 *“(2) EXCEPTION.—In any private action arising*
10 *under this title in which damages are sought, if the*
11 *plaintiff sells or repurchases the subject security prior*
12 *to the expiration of the 90-day period described in*
13 *paragraph (1), the plaintiff's damages shall not ex-*
14 *ceed the difference between the purchase or sale price*
15 *paid or received, as appropriate, by the plaintiff for*
16 *the security and the median market value of the secu-*
17 *rity during the period beginning immediately after*
18 *dissemination of information correcting the*
19 *misstatement or omission and ending on the date on*
20 *which the plaintiff sells or repurchases the security.”.*

21 **SEC. 202. PROPORTIONATE LIABILITY.**

22 *Title I of the Securities and Exchange Act of 1934 (15*
23 *U.S.C. 78a et seq.) is amended by adding at the end the*
24 *following new section:*

1 **“SEC. 38. PROPORTIONATE LIABILITY.**

2 “(a) *APPLICABILITY.*—*This section shall apply only to*
3 *the allocation of damages among persons who are, or who*
4 *may become, liable for damages in any private action aris-*
5 *ing under this title. Nothing in this section shall affect the*
6 *standards for liability associated with any private action*
7 *arising under this title.*

8 “(b) *LIABILITY FOR DAMAGES.*—

9 “(1) *JOINT AND SEVERAL LIABILITY.*—*A person*
10 *against whom a judgment is entered in any private*
11 *action arising under this title shall be liable for dam-*
12 *ages jointly and severally only if the trier of fact spe-*
13 *cifically determines that such person committed know-*
14 *ing securities fraud.*

15 “(2) *PROPORTIONATE LIABILITY.*—*Except as*
16 *provided in paragraph (1), a person against whom a*
17 *judgment is entered in any private action arising*
18 *under this title shall be liable solely for the portion*
19 *of the judgment that corresponds to the percentage of*
20 *responsibility of that person, as determined under*
21 *subsection (c).*

22 “(3) *KNOWING SECURITIES FRAUD.*—*For pur-*
23 *poses of this section—*

24 “(A) *a defendant engages in ‘knowing secu-*
25 *rities fraud’ if that defendant—*

1 “(i) makes a material representation
2 with actual knowledge that the representa-
3 tion is false, or omits to make a statement
4 with actual knowledge that, as a result of
5 the omission, one of the material representa-
6 tions of the defendant is false; and

7 “(ii) actually knows that persons are
8 likely to rely on that misrepresentation or
9 omission; and

10 “(B) reckless conduct by the defendant shall
11 not be construed to constitute knowing securities
12 fraud.

13 “(c) DETERMINATION OF RESPONSIBILITY.—

14 “(1) IN GENERAL.—In any private action aris-
15 ing under this title in which more than 1 person is
16 alleged to have violated a provision of this title, the
17 court shall instruct the jury to answer special inter-
18 rogatories, or if there is no jury, shall make findings,
19 concerning—

20 “(A) the percentage of responsibility of each
21 of the defendants and of each of the other persons
22 alleged by any of the parties to have caused or
23 contributed to the violation, including persons
24 who have entered into settlements with the plain-
25 tiff or plaintiffs, measured as a percentage of the

1 *total fault of all persons who caused or contrib-*
2 *uted to the violation; and*

3 “(B) *whether such defendant committed*
4 *knowing securities fraud.*

5 “(2) *CONTENTS OF SPECIAL INTERROGATORIES*
6 *OR FINDINGS.—The responses to interrogatories, or*
7 *findings, as appropriate, under paragraph (1) shall*
8 *specify the total amount of damages that the plaintiff*
9 *is entitled to recover and the percentage of respon-*
10 *sibility of each person found to have caused or con-*
11 *tributed to the damages sustained by the plaintiff or*
12 *plaintiffs.*

13 “(3) *FACTORS FOR CONSIDERATION.—In deter-*
14 *mining the percentage of responsibility under this*
15 *subsection, the trier of fact shall consider—*

16 “(A) *the nature of the conduct of each per-*
17 *son; and*

18 “(B) *the nature and extent of the causal re-*
19 *lationship between that conduct and the damages*
20 *incurred by the plaintiff or plaintiffs.*

21 “(d) *UNCOLLECTIBLE SHARE.—*

22 “(1) *IN GENERAL.—Notwithstanding subsection*
23 *(b)(2), in any private action arising under this title,*
24 *if, upon motion made not later than 6 months after*
25 *a final judgment is entered, the court determines that*

1 *all or part of a defendant's share of the judgment is*
2 *not collectible against that defendant or against a de-*
3 *fendant described in subsection (b)(1), each defendant*
4 *described in subsection (b)(2) shall be liable for the*
5 *uncollectible share as follows:*

6 *“(A) PERCENTAGE OF NET WORTH.—Each*
7 *defendant shall be jointly and severally liable for*
8 *the uncollectible share if the plaintiff establishes*
9 *that—*

10 *“(i) the plaintiff is an individual*
11 *whose recoverable damages under the final*
12 *judgment are equal to more than 10 percent*
13 *of the net financial worth of the plaintiff;*
14 *and*

15 *“(ii) the net financial worth of the*
16 *plaintiff is equal to less than \$200,000.*

17 *“(B) OTHER PLAINTIFFS.—With respect to*
18 *any plaintiff not described in subparagraph (A),*
19 *each defendant shall be liable for the uncollectible*
20 *share in proportion to the percentage of respon-*
21 *sibility of that defendant, except that the total li-*
22 *ability under this subparagraph may not exceed*
23 *50 percent of the proportionate share of that de-*
24 *fendant, as determined under subsection (c)(2).*

1 “(2) *OVERALL LIMIT.*—*In no case shall the total*
2 *payments required pursuant to paragraph (1) exceed*
3 *the amount of the uncollectible share.*

4 “(3) *DEFENDANTS SUBJECT TO CONTRIBU-*
5 *TION.*—*A defendant against whom judgment is not*
6 *collectible shall be subject to contribution and to any*
7 *continuing liability to the plaintiff on the judgment.*

8 “(e) *RIGHT OF CONTRIBUTION.*—*To the extent that a*
9 *defendant is required to make an additional payment pur-*
10 *suant to subsection (d), that defendant may recover con-*
11 *tribution—*

12 “(1) *from the defendant originally liable to make*
13 *the payment;*

14 “(2) *from any defendant liable jointly and sever-*
15 *ally pursuant to subsection (b)(1);*

16 “(3) *from any defendant held proportionately*
17 *liable pursuant to this subsection who is liable to*
18 *make the same payment and has paid less than his*
19 *or her proportionate share of that payment; or*

20 “(4) *from any other person responsible for the*
21 *conduct giving rise to the payment that would have*
22 *been liable to make the same payment.*

23 “(f) *NONDISCLOSURE TO JURY.*—*The standard for al-*
24 *location of damages under subsections (b) and (c) and the*

1 *procedure for reallocation of uncollectible shares under sub-*
2 *section (d) shall not be disclosed to members of the jury.*

3 *“(g) SETTLEMENT DISCHARGE.—*

4 *“(1) IN GENERAL.—A defendant who settles any*
5 *private action arising under this title at any time be-*
6 *fore final verdict or judgment shall be discharged*
7 *from all claims for contribution brought by other per-*
8 *sons. Upon entry of the settlement by the court, the*
9 *court shall enter a bar order constituting the final*
10 *discharge of all obligations to the plaintiff of the set-*
11 *tling defendant arising out of the action. The order*
12 *shall bar all future claims for contribution arising*
13 *out of the action—*

14 *“(A) by any person against the settling de-*
15 *fendant; and*

16 *“(B) by the settling defendant against any*
17 *person, other than a person whose liability has*
18 *been extinguished by the settlement of the settling*
19 *defendant.*

20 *“(2) REDUCTION.—If a person enters into a set-*
21 *tlement with the plaintiff prior to final verdict or*
22 *judgment, the verdict or judgment shall be reduced by*
23 *the greater of—*

24 *“(A) an amount that corresponds to the per-*
25 *centage of responsibility of that person; or*

1 “(B) the amount paid to the plaintiff by
2 that person.

3 “(h) CONTRIBUTION.—A person who becomes liable for
4 damages in any private action arising under this title may
5 recover contribution from any other person who, if joined
6 in the original action, would have been liable for the same
7 damages. A claim for contribution shall be determined
8 based on the percentage of responsibility of the claimant
9 and of each person against whom a claim for contribution
10 is made.

11 “(i) STATUTE OF LIMITATIONS FOR CONTRIBUTION.—
12 Once judgment has been entered in any private action arising
13 under this title determining liability, an action for contribution
14 shall be brought not later than 6 months after the
15 entry of a final, nonappealable judgment in the action, except
16 that an action for contribution brought by a defendant
17 who was required to make an additional payment pursuant
18 to subsection (d) may be brought not later than 6 months
19 after the date on which such payment was made.”.

20 **SEC. 203. APPLICABILITY.**

21 The amendments made by this title shall not affect or
22 apply to any private action arising under title I of the Securities
23 Exchange Act of 1934 commenced before the date
24 of enactment of this Act.

1 **TITLE III—AUDITOR DISCLO-**
2 **SURE OF CORPORATE FRAUD**

3 **SEC. 301. FRAUD DETECTION AND DISCLOSURE.**

4 (a) *IN GENERAL.*—The Securities Exchange Act of
5 1934 (15 U.S.C. 78a et seq.) is amended by inserting imme-
6 diately after section 10 the following new section:

7 **“SEC. 10A. AUDIT REQUIREMENTS.**

8 “(a) *IN GENERAL.*—Each audit required pursuant to
9 this title of the financial statements of an issuer by an inde-
10 pendent public accountant shall include, in accordance with
11 generally accepted auditing standards, as may be modified
12 or supplemented from time to time by the Commission—

13 “(1) *procedures designed to provide reasonable*
14 *assurance of detecting illegal acts that would have a*
15 *direct and material effect on the determination of fi-*
16 *nancial statement amounts;*

17 “(2) *procedures designed to identify related*
18 *party transactions that are material to the financial*
19 *statements or otherwise require disclosure therein; and*

20 “(3) *an evaluation of whether there is substan-*
21 *tial doubt about the ability of the issuer to continue*
22 *as a going concern during the ensuing fiscal year.*

23 “(b) *REQUIRED RESPONSE TO AUDIT DISCOVERIES.*—

24 “(1) *INVESTIGATION AND REPORT TO MANAGE-*
25 *MENT.*—*If, in the course of conducting an audit pur-*

1 *suant to this title to which subsection (a) applies, the*
2 *independent public accountant detects or otherwise be-*
3 *comes aware of information indicating that an illegal*
4 *act (whether or not perceived to have a material effect*
5 *on the financial statements of the issuer) has or may*
6 *have occurred, the accountant shall, in accordance*
7 *with generally accepted auditing standards, as may*
8 *be modified or supplemented from time to time by the*
9 *Commission—*

10 *“(A)(i) determine whether it is likely that*
11 *an illegal act has occurred; and*

12 *“(ii) if so, determine and consider the pos-*
13 *sible effect of the illegal act on the financial*
14 *statements of the issuer, including any contin-*
15 *gent monetary effects, such as fines, penalties,*
16 *and damages; and*

17 *“(B) as soon as practicable, inform the ap-*
18 *propriate level of the management of the issuer*
19 *and assure that the audit committee of the is-*
20 *ssuer, or the board of directors of the issuer in the*
21 *absence of such a committee, is adequately in-*
22 *formed with respect to illegal acts that have been*
23 *detected or have otherwise come to the attention*
24 *of such accountant in the course of the audit, un-*
25 *less the illegal act is clearly inconsequential.*

1 “(2) *RESPONSE TO FAILURE TO TAKE REMEDIAL*
2 *ACTION.—If, after determining that the audit commit-*
3 *tee of the board of directors of the issuer, or the board*
4 *of directors of the issuer in the absence of an audit*
5 *committee, is adequately informed with respect to ille-*
6 *gal acts that have been detected or have otherwise*
7 *come to the attention of the accountant in the course*
8 *of the audit of such accountant, the independent pub-*
9 *lic accountant concludes that—*

10 “(A) *the illegal act has a material effect on*
11 *the financial statements of the issuer;*

12 “(B) *the senior management has not taken,*
13 *and the board of directors has not caused senior*
14 *management to take, timely and appropriate re-*
15 *medial actions with respect to the illegal act;*
16 *and*

17 “(C) *the failure to take remedial action is*
18 *reasonably expected to warrant departure from a*
19 *standard report of the auditor, when made, or*
20 *warrant resignation from the audit engagement;*
21 *the independent public accountant shall, as soon as*
22 *practicable, directly report its conclusions to the*
23 *board of directors.*

24 “(3) *NOTICE TO COMMISSION; RESPONSE TO*
25 *FAILURE TO NOTIFY.—An issuer whose board of direc-*

1 *tors receives a report under paragraph (2) shall in-*
2 *form the Commission by notice not later than 1 busi-*
3 *ness day after the receipt of such report and shall fur-*
4 *nish the independent public accountant making such*
5 *report with a copy of the notice furnished to the Com-*
6 *mission. If the independent public accountant fails to*
7 *receive a copy of the notice before the expiration of the*
8 *required 1-business-day period, the independent pub-*
9 *lic accountant shall—*

10 *“(A) resign from the engagement; or*

11 *“(B) furnish to the Commission a copy of*
12 *its report (or the documentation of any oral re-*
13 *port given) not later than 1 business day follow-*
14 *ing such failure to receive notice.*

15 *“(4) REPORT AFTER RESIGNATION.—If an inde-*
16 *pendent public accountant resigns from an engage-*
17 *ment under paragraph (3)(A), the accountant shall,*
18 *not later than 1 business day following the failure by*
19 *the issuer to notify the Commission under paragraph*
20 *(3), furnish to the Commission a copy of the account-*
21 *ant’s report (or the documentation of any oral report*
22 *given).*

23 *“(c) AUDITOR LIABILITY LIMITATION.—No independ-*
24 *ent public accountant shall be liable in a private action*
25 *for any finding, conclusion, or statement expressed in a re-*

1 port made pursuant to paragraph (3) or (4) of subsection
2 (b), including any rule promulgated pursuant thereto.

3 “(d) *CIVIL PENALTIES IN CEASE-AND-DESIST PRO-*
4 *CEEDINGS.*—If the Commission finds, after notice and op-
5 portunity for hearing in a proceeding instituted pursuant
6 to section 21C, that an independent public accountant has
7 willfully violated paragraph (3) or (4) of subsection (b), the
8 Commission may, in addition to entering an order under
9 section 21C, impose a civil penalty against the independent
10 public accountant and any other person that the Commis-
11 sion finds was a cause of such violation. The determination
12 to impose a civil penalty and the amount of the penalty
13 shall be governed by the standards set forth in section 21B.

14 “(e) *PRESERVATION OF EXISTING AUTHORITY.*—Ex-
15 cept as provided in subsection (d), nothing in this section
16 shall be held to limit or otherwise affect the authority of
17 the Commission under this title.

18 “(f) *DEFINITION.*—As used in this section, the term ‘il-
19 legal act’ means an act or omission that violates any law,
20 or any rule or regulation having the force of law.”.

21 (b) *EFFECTIVE DATES.*—The amendment made by
22 subsection (a) shall apply to each annual report—

23 (1) for any period beginning on or after Janu-
24 ary 1, 1996, with respect to any registrant that is re-
25 quired to file selected quarterly financial data pursu-

1 *ant to the rules or regulations of the Securities and*
2 *Exchange Commission; and*
3 *(2) for any period beginning on or after Janu-*
4 *ary 1, 1997, with respect to any other registrant.*

Amend the title so as to read: “An Act to amend the Federal securities laws to curb certain abusive practices in private securities litigation, and for other purposes.”.

Attest:

Secretary.

HR 1058 EAS—2

HR 1058 EAS—3

HR 1058 EAS—4

HR 1058 EAS—5

104TH CONGRESS
1ST SESSION

H. R. 1058

AMENDMENTS