

104TH CONGRESS
1ST SESSION

H. R. 1058

To reform Federal securities litigation, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 27, 1995

Mr. BLILEY (for himself, Mr. FIELDS of Texas, Mr. COX of California, and Mr. TAUZIN) introduced the following bill; which was referred to the Committee on Commerce and, in addition, to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To reform Federal securities litigation, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

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

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Securities Litigation Reform Act”.

6 (b) TABLE OF CONTENTS.—The table of contents for
7 this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Prevention of lawyer-driven litigation.

(a) Plaintiff steering committees to ensure client control of lawsuits.

“Sec. 36. Class action steering committees.

- “(a) Class action steering committee.
 - “(b) Membership of plaintiff steering committee.
 - “(c) Functions of plaintiff steering committee.
 - “(d) Immunity from civil liability; removal.
 - “(e) Effect on other law.”
 - (b) Prohibition on attorneys’ fees paid from Commission disgorgement funds.
- Sec. 3. Prevention of abusive practices that foment litigation.
- (a) Additional provisions applicable to private actions.
 - “Sec. 20B. Procedures applicable to private actions.
 - “(a) Elimination of bonus payments to named plaintiffs in class actions.
 - “(b) Restrictions on professional plaintiffs.
 - “(c) Awards of fees and expenses.
 - “(d) Prevention of abusive conflicts of interest.
 - “(e) Disclosure of settlement terms to class members.
 - “(f) Encouragement of finality in settlement discharges.
 - “(g) Contribution from non-parties in interests of fairness.
 - “(h) Defendant’s right to written interrogatories establishing scienter.”
 - (b) Prohibition of referral fees that foment litigation.
- Sec. 4. Prevention of “fishing expedition” lawsuits.
- “Sec. 10A. Requirements for securities fraud actions.
 - “(a) Scienter.
 - “(b) Requirement for explicit pleading of scienter.
 - “(c) Dismissal for failure to meet pleading requirements; stay of discovery; summary judgment.
 - “(d) Reliance and causation.
 - “(e) Allocation of liability.
 - “(f) Damages.”
- Sec. 5. Establishment of “safe harbor” for predictive Statements.
- “Sec. 37. Application of safe harbor for forward-looking Statements.
 - “(a) Safe harbor defined.
 - “(b) Automatic protective order staying discovery; expedited procedure.
 - “(c) Regulatory authority.”
- Sec. 6. Rule of construction.
- Sec. 7. Effective date.

1 SEC. 2. PREVENTION OF LAWYER-DRIVEN LITIGATION.

2 (a) PLAINTIFF STEERING COMMITTEES TO ENSURE
 3 CLIENT CONTROL OF LAWSUITS.—The Securities Ex-
 4 change Act of 1934 (15 U.S.C. 78a et seq.) is amended
 5 by adding at the end the following new section:

6 **“SEC. 36. CLASS ACTION STEERING COMMITTEES.**

7 “(a) CLASS ACTION STEERING COMMITTEE.—In any
 8 private action arising under this title seeking to recover

1 damages on behalf of a class, the court shall, at the earli-
2 est practicable time, appoint a committee of class members
3 to direct counsel for the class (hereafter in this section
4 referred to as the ‘plaintiff steering committee’) and to
5 perform such other functions as the court may specify.
6 Court appointment of a plaintiff steering committee shall
7 not be subject to interlocutory review.

8 “(b) MEMBERSHIP OF PLAINTIFF STEERING COM-
9 MITTEE.—

10 “(1) QUALIFICATIONS.—

11 “(A) NUMBER.—A plaintiff steering com-
12 mittee shall consist of not fewer than 5 class
13 members, willing to serve, who the court be-
14 lieves will fairly represent the class.

15 “(B) OWNERSHIP INTERESTS.—Members
16 of the plaintiff steering committee shall have
17 cumulatively held during the class period not
18 less than—

19 “(i) the lesser of 5 percent of the se-
20 curities which are the subject matter of the
21 litigation or \$10,000,000 in market value
22 of the securities which are the subject mat-
23 ter of the litigation; or

1 “(ii) such smaller percentage or dollar
2 amount as the court finds appropriate
3 under the circumstances.

4 “(2) NAMED PLAINTIFFS.—Class plaintiffs
5 serving as the representative parties in the litigation
6 may serve on the plaintiff steering committee, but
7 shall not comprise a majority of the committee.

8 “(3) NONCOMPENSATION OF MEMBERS.—Mem-
9 bers of the plaintiff steering committee shall serve
10 without compensation, except that any member may
11 apply to the court for reimbursement of reasonable
12 out-of-pocket expenses from any common fund es-
13 tablished for the class.

14 “(4) MEETINGS.—The plaintiff steering com-
15 mittee shall conduct its business at one or more pre-
16 viously scheduled meetings of the committee, of
17 which prior notice shall have been given and at
18 which a majority of its members are present in per-
19 son or by electronic communication. The plaintiff
20 steering committee shall decide all matters within its
21 authority by a majority vote of all members, except
22 that the committee may determine that decisions
23 other than to accept or reject a settlement offer or
24 to employ or dismiss counsel for the class may be
25 delegated to one or more members of the committee,

1 or may be voted upon by committee members seria-
2 tim, without a meeting.

3 “(5) RIGHT OF NONMEMBERS TO BE HEARD.—

4 A class member who is not a member of the plaintiff
5 steering committee may appear and be heard by the
6 court on any issue relating to the organization or ac-
7 tions of the plaintiff steering committee.

8 “(c) FUNCTIONS OF PLAINTIFF STEERING COMMIT-

9 TEE.—The authority of the plaintiff steering committee
10 to direct counsel for the class shall include all powers nor-
11 mally permitted to an attorney’s client in litigation, includ-
12 ing the authority to retain or dismiss counsel and to reject
13 offers of settlement, and the authority to accept an offer
14 of settlement subject to final approval by the court. Dis-
15 missal of counsel other than for cause shall not limit the
16 ability of counsel to enforce any contractual fee agreement
17 or to apply to the court for a fee award from any common
18 fund established for the class.

19 “(d) IMMUNITY FROM CIVIL LIABILITY; REMOVAL.—

20 Any person serving as a member of a plaintiff steering
21 committee shall be immune from any civil liability for any
22 negligence in performing such service, but shall not be im-
23 mune from liability for intentional misconduct or from the
24 assessment of costs pursuant to section 20B(c). The court

1 may remove a member of a plaintiff steering committee
2 for good cause shown.

3 “(e) EFFECT ON OTHER LAW.—This section does not
4 affect any other provision of law concerning class actions
5 or the authority of the court to give final approval to any
6 offer of settlement.”.

7 (b) PROHIBITION ON ATTORNEYS’ FEES PAID FROM
8 COMMISSION DISGORGEMENT FUNDS.—Section 21(d) of
9 the Securities Exchange Act of 1934 (15 U.S.C. 78u(d))
10 is amended by adding at the end the following new para-
11 graph:

12 “(4) PROHIBITION ON ATTORNEYS’ FEES PAID
13 FROM COMMISSION DISGORGEMENT FUNDS.—Except as
14 otherwise ordered by the court, funds disgorged as the re-
15 sult of an action brought by the Commission, or of any
16 Commission proceeding, shall not be distributed as pay-
17 ment for attorneys’ fees or expenses incurred by private
18 parties seeking distribution of the disgorged funds.”.

19 **SEC. 3. PREVENTION OF ABUSIVE PRACTICES THAT FO-**
20 **MENT LITIGATION.**

21 (a) ADDITIONAL PROVISIONS APPLICABLE TO PRI-
22 VATE ACTIONS.—The Securities Exchange Act of 1934 is
23 amended by inserting after section 20A (15 U.S.C. 78t-
24 1) the following new section:

1 “PROCEDURES APPLICABLE TO PRIVATE ACTIONS

2 “SEC. 20B. (a) ELIMINATION OF BONUS PAYMENTS
3 TO NAMED PLAINTIFFS IN CLASS ACTIONS.—In any pri-
4 vate action under this title that is certified as a class ac-
5 tion pursuant to the Federal Rules of Civil Procedure, the
6 portion of any final judgment or of any settlement that
7 is awarded to class plaintiffs serving as the representative
8 parties shall be equal, on a per share basis, to the portion
9 of the final judgment or settlement awarded to all other
10 members of the class. Nothing in this subsection shall be
11 construed to limit the award to any representative parties
12 of actual expenses (including lost wages) relating to the
13 representation of the class.

14 “(b) RESTRICTIONS ON PROFESSIONAL PLAIN-
15 TIFFS.—Except as the court may otherwise permit for
16 good cause, a person may be a named plaintiff, or an offi-
17 cer, director, or fiduciary of a named plaintiff, in no more
18 than 5 class actions filed during any 3-year period.

19 “(c) AWARDS OF FEES AND EXPENSES.—

20 “(1) AUTHORITY TO AWARD FEES AND EX-
21 PENSES.—If the court in any private action arising
22 under this title enters a final judgment against a
23 party litigant on the basis of a motion to dismiss,
24 motion for summary judgment, or a trial on the
25 merits, the court shall, upon motion by the prevail-

1 ing party, determine whether (A) the position of the
2 losing party was not substantially justified, (B) im-
3 posing fees and expenses on the losing party or the
4 losing party’s attorney would be just, and (C) the
5 cost of such fees and expenses to the prevailing
6 party is substantially burdensome or unjust. If the
7 court makes the determinations described in clauses
8 (A), (B), and (C), the court shall award the prevail-
9 ing party reasonable fees and other expenses in-
10 curred by that party. The determination of whether
11 the position of the losing party was substantially
12 justified shall be made on the basis of the record in
13 the action for which fees and other expenses are
14 sought, but the burden of persuasion shall be on the
15 prevailing party.

16 “(2) SECURITY FOR PAYMENT OF COSTS IN
17 CLASS ACTIONS.—In any private action arising
18 under this title that is certified as a class action pur-
19 suant to the Federal Rules of Civil Procedure, the
20 court shall require an undertaking from the attor-
21 neys for the plaintiff class, the plaintiff class, or
22 both, in such proportions and at such times as the
23 court determines are just and equitable, for the pay-
24 ment of the fees and expenses that may be awarded
25 under paragraph (1).

1 “(3) APPLICATION FOR FEES.—A party seeking
2 an award of fees and other expenses shall, within 30
3 days of a final, nonappealable judgment in the ac-
4 tion, submit to the court an application for fees and
5 other expenses that verifies that the party is entitled
6 to such an award under paragraph (1) and the
7 amount sought, including an itemized statement
8 from any attorney or expert witness representing or
9 appearing on behalf of the party stating the actual
10 time expended and the rate at which fees and other
11 expenses are computed.

12 “(4) ALLOCATION AND SIZE OF AWARD.—The
13 court, in its discretion, may—

14 “(A) determine whether the amount to be
15 awarded pursuant to this section shall be
16 awarded against the losing party, its attorney,
17 or both; and

18 “(B) reduce the amount to be awarded
19 pursuant to this section, or deny an award, to
20 the extent that the prevailing party during the
21 course of the proceedings engaged in conduct
22 that unduly and unreasonably protracted the
23 final resolution of the action.

24 “(5) AWARDS IN DISCOVERY PROCEEDINGS.—
25 In adjudicating any motion for an order compelling

1 discovery or any motion for a protective order made
2 in any private action arising under this title, the
3 court shall award the prevailing party reasonable
4 fees and other expenses incurred by the party in
5 bringing or defending against the motion, including
6 reasonable attorneys' fees, unless the court finds
7 that special circumstances make an award unjust.

8 “(6) RULE OF CONSTRUCTION.—Nothing in
9 this subsection shall be construed to limit or impair
10 the discretion of the court to award costs pursuant
11 to other provisions of law.

12 “(7) PROTECTION AGAINST ABUSE OF PROC-
13 ESS.—In any action to which this subsection applies,
14 a court shall not permit a plaintiff to withdraw from
15 or voluntarily dismiss such action if the court deter-
16 mines that such withdrawal or dismissal is taken for
17 purposes of evasion of the requirements of this sub-
18 section.

19 “(8) DEFINITIONS.—For purposes of this sub-
20 section—

21 “(A) The term ‘fees and other expenses’
22 includes the reasonable expenses of expert wit-
23 nesses, the reasonable cost of any study, analy-
24 sis, report, test, or project which is found by
25 the court to be necessary for the preparation of

1 the party's case, and reasonable attorneys' fees
2 and expenses. The amount of fees awarded
3 under this section shall be based upon prevail-
4 ing market rates for the kind and quality of
5 services furnished.

6 “(B) The term ‘substantially justified’
7 shall have the same meaning as in section
8 2412(d)(1) of title 28, United States Code.

9 “(d) PREVENTION OF ABUSIVE CONFLICTS OF IN-
10 TEREST.—In any private action under this title pursuant
11 to a complaint seeking damages on behalf of a class, if
12 the class is represented by an attorney who directly owns
13 or otherwise has a beneficial interest in the securities that
14 are the subject of the litigation, the court shall, on motion
15 by any party, make a determination of whether such inter-
16 est constitutes a conflict of interest sufficient to disqualify
17 the attorney from representing the class.

18 “(e) DISCLOSURE OF SETTLEMENT TERMS TO CLASS
19 MEMBERS.—In any private action under this title that is
20 certified as a class action pursuant to the Federal Rules
21 of Civil Procedure, any settlement agreement that is pub-
22 lished or otherwise disseminated to the class shall include
23 the following statements:

24 “(1) STATEMENT OF POTENTIAL OUTCOME OF
25 CASE.—

1 “(A) AGREEMENT ON AMOUNT OF DAM-
2 AGES AND LIKELIHOOD OF PREVAILING.—If the
3 settling parties agree on the amount of dam-
4 ages per share that would be recoverable if the
5 plaintiff prevailed on each claim alleged under
6 this title and the likelihood that the plaintiff
7 would prevail—

8 “(i) a statement concerning the
9 amount of such potential damages; and

10 “(ii) a statement concerning the likeli-
11 hood that the plaintiff would prevail on the
12 claims alleged under this title and a brief
13 explanation of the reasons for that conclu-
14 sion.

15 “(B) DISAGREEMENT ON AMOUNT OF
16 DAMAGES OR LIKELIHOOD OF PREVAILING.—If
17 the parties do not agree on the amount of dam-
18 ages per share that would be recoverable if the
19 plaintiff prevailed on each claim alleged under
20 this title or on the likelihood that the plaintiff
21 would prevail on those claims, or both, a state-
22 ment from each settling party concerning the
23 issue or issues on which the parties disagree.

24 “(C) INADMISSIBILITY FOR CERTAIN PUR-
25 POSES.—Statements made in accordance with

1 subparagraphs (A) and (B) concerning the
2 amount of damages and the likelihood of pre-
3 vailing shall not be admissible for purposes of
4 any Federal or State judicial action or adminis-
5 trative proceeding.

6 “(2) STATEMENT OF ATTORNEYS’ FEES OR
7 COSTS SOUGHT.—If any of the settling parties or
8 their counsel intend to apply to the court for an
9 award of attorneys’ fees or costs from any fund es-
10 tablished as part of the settlement, a statement indi-
11 cating which parties or counsel intend to make such
12 an application, the amount of fees and costs that
13 will be sought (including the amount of such fees
14 and costs determined on a per-share basis, together
15 with the amount of the settlement proposed to be
16 distributed to the parties to suit, determined on a
17 per-share basis), and a brief explanation of the basis
18 for the application. Such information shall be clearly
19 summarized on the cover page of any notice to a
20 party of any settlement agreement.

21 “(3) IDENTIFICATION OF LAWYERS’ REP-
22 RESENTATIVES.—The name and address of one or
23 more representatives of counsel for the class who
24 will be reasonably available to answer written ques-
25 tions from class members concerning any matter

1 contained in any notice of settlement published or
2 otherwise disseminated to the class.

3 “(4) OTHER INFORMATION.—Such other infor-
4 mation as may be required by the court, or by any
5 plaintiff steering committee appointed by the court
6 pursuant to section 36.

7 “(f) ENCOURAGEMENT OF FINALITY IN SETTLE-
8 MENT DISCHARGES.—

9 “(1) DISCHARGE.—A defendant who settles any
10 private action arising under this title at any time be-
11 fore verdict or judgment shall be discharged from all
12 claims for contribution brought by other persons
13 with respect to the matters that are the subject of
14 such action. Upon entry of the settlement by the
15 court, the court shall enter a bar order constituting
16 the final discharge of all obligations to the plaintiff
17 of the settling defendant arising out of the action.
18 The order shall bar all future claims for contribution
19 or indemnity arising out of the action—

20 “(A) by nonsettling persons against the
21 settling defendant; and

22 “(B) by the settling defendant against any
23 nonsettling defendants.

24 “(2) REDUCTION.—If a person enters into a
25 settlement with the plaintiff prior to verdict or judg-

1 ment, the verdict or judgment shall be reduced by
2 the greater of—

3 “(A) an amount that corresponds to the
4 percentage of responsibility of that person; or

5 “(B) the amount paid to the plaintiff by
6 that person.

7 “(g) CONTRIBUTION FROM NON-PARTIES IN INTER-
8 ESTS OF FAIRNESS.—

9 “(1) RIGHT OF CONTRIBUTION.—A person who
10 becomes liable for damages in any private action
11 under this title (other than an action under section
12 9(e) or 18(a)) may recover contribution from any
13 other person who, if joined in the original suit,
14 would have been liable for the same damages.

15 “(2) STATUTE OF LIMITATIONS FOR CONTRIBU-
16 TION.—Once judgment has been entered in any such
17 private action determining liability, an action for
18 contribution must be brought not later than 6
19 months after the entry of a final, nonappealable
20 judgment in the action.

21 “(h) DEFENDANT’S RIGHT TO WRITTEN INTERROG-
22 ATORIES ESTABLISHING SCIENTER.—In any private ac-
23 tion under this title in which the plaintiff may recover
24 money damages, the court shall, when requested by a de-
25 fendant, submit to the jury a written interrogatory on the

1 issue of each such defendant's state of mind at the time
2 the alleged violation occurred.”.

3 (b) PROHIBITION OF REFERRAL FEES THAT FO-
4 MENT LITIGATION.—Section 15(c) of the Securities Ex-
5 change Act of 1934 (15 U.S.C. 78o(c)) is amended by add-
6 ing at the end the following new paragraph:

7 “(8) RECEIPT OF REFERRAL FEES.—No broker or
8 dealer, or person associated with a broker or dealer, may
9 solicit or accept remuneration for assisting an attorney in
10 obtaining the representation of any customer in any pri-
11 vate action under this title.”.

12 **SEC. 4. PREVENTION OF “FISHING EXPEDITION” LAWSUITS.**

13 The Securities Exchange Act of 1934 (15 U.S.C. 78a
14 et seq.) is amended by inserting after section 10 the fol-
15 lowing new section:

16 **“SEC. 10A. REQUIREMENTS FOR SECURITIES FRAUD AC-**
17 **TIONS.**

18 “(a) SCIENTER.—

19 “(1) IN GENERAL.—In any private action aris-
20 ing under this title based on a fraudulent statement,
21 liability may be established only on proof that—

22 “(A) the defendant directly or indirectly
23 made a fraudulent statement;

24 “(B) the defendant possessed the intention
25 to deceive, manipulate, or defraud; and

1 “(C) the defendant made such fraudulent
2 statement knowingly or recklessly.

3 “(2) FRAUDULENT STATEMENT.—For purposes
4 of this section, a fraudulent statement is a state-
5 ment that contains an untrue statement of a mate-
6 rial fact, or omits a material fact necessary in order
7 to make the statements made, in the light of the cir-
8 cumstances in which they were made, not mislead-
9 ing.

10 “(3) KNOWINGLY.—For purposes of paragraph
11 (1), a defendant makes a fraudulent statement
12 knowingly if the defendant knew that the statement
13 of a material fact was untrue at the time it was
14 made, or knew that an omitted fact was necessary
15 in order to make the statements made, in the light
16 of the circumstances in which they were made, not
17 misleading.

18 “(4) RECKLESSNESS.—For purposes of para-
19 graph (1), a defendant makes a fraudulent state-
20 ment recklessly if the defendant, in making such
21 statement, is guilty of highly unreasonable conduct
22 that (A) involves not merely simple or even gross
23 negligence, but an extreme departure from standards
24 of ordinary care, and (B) presents a danger of mis-
25 leading buyers or sellers that was either known to

1 the defendant or so obvious that the defendant must
2 have been consciously aware of it. For example, a
3 defendant who genuinely forgot to disclose, or to
4 whom disclosure did not come to mind, is not reck-
5 less.

6 “(b) REQUIREMENT FOR EXPLICIT PLEADING OF
7 SCIENTER.—In any private action to which subsection (a)
8 applies, the complaint shall specify each statement or
9 omission alleged to have been misleading, and the reasons
10 the statement or omission was misleading. The complaint
11 shall also make specific allegations which, if true, would
12 be sufficient to establish scienter as to each defendant at
13 the time the alleged violation occurred. It shall not be suf-
14 ficient for this purpose to plead the mere presence of facts
15 inconsistent with a statement or omission alleged to have
16 been misleading. If an allegation is made on information
17 and belief, the complaint shall set forth with specificity
18 all information on which that belief is formed.

19 “(c) DISMISSAL FOR FAILURE TO MEET PLEADING
20 REQUIREMENTS; STAY OF DISCOVERY; SUMMARY JUDG-
21 MENT.—In any private action to which subsection (a) ap-
22 plies, the court shall, on the motion of any defendant, dis-
23 miss the complaint if the requirements of subsection (b)
24 are not met, except that the court may, in its discretion,
25 permit a single amended complaint to be filed. During the

1 pendency of any such motion to dismiss, all discovery and
2 other proceedings shall be stayed unless the court finds
3 upon the motion of any party that particularized discovery
4 is necessary to preserve evidence or to prevent undue prej-
5 udice to that party. If a complaint satisfies the require-
6 ments of subsection (b), the plaintiff shall be entitled to
7 conduct discovery limited to the facts concerning the alleg-
8 edly misleading statement or omission. Upon completion
9 of such discovery, the parties may move for summary
10 judgment.

11 “(d) RELIANCE AND CAUSATION.—

12 “(1) IN GENERAL.—In any private action to
13 which subsection (a) applies, the plaintiff shall prove
14 that—

15 “(A) he or she had knowledge of, and re-
16 lied (in connection with the purchase or sale of
17 a security) on, the statement that contained the
18 misstatement or omission described in sub-
19 section (a)(1); and

20 “(B) that the statement containing such
21 misstatement or omission proximately caused
22 (through both transaction causation and loss
23 causation) any loss incurred by the plaintiff.

24 “(2) FRAUD ON THE MARKET.—For purposes
25 of paragraph (1), reliance may be proven by estab-

1 lishing that the market as a whole considered the
2 fraudulent statement, that the price at which the se-
3 curity was purchased or sold reflected the market's
4 estimation of the fraudulent statement, and that the
5 plaintiff relied on that market price. Proof that the
6 market as a whole considered the fraudulent state-
7 ment may consist of evidence that the statement—

8 “(A) was published in publicly available re-
9 search reports by analysts of such security;

10 “(B) was the subject of news articles;

11 “(C) was delivered orally at public meet-
12 ings by officers of the issuer, or its agents;

13 “(D) was specifically considered by rating
14 agencies in their published reports; or

15 “(E) was otherwise made publicly available
16 to the market in a manner that was likely to
17 bring it to the attention of, and to be consid-
18 ered as credible by, other active participants in
19 the market for such security.

20 Nonpublic information may not be used as proof
21 that the market as a whole considered the fraudu-
22 lent statement.

23 “(3) PRESUMPTION OF RELIANCE.—Upon proof
24 that the market as a whole considered the fraudu-
25 lent statement pursuant to paragraph (2), the plain-

1 tiff is entitled to a rebuttable presumption that the
2 price at which the security was purchased or sold re-
3 flected the market's estimation of the fraudulent
4 statement and that the plaintiff relied on such mar-
5 ket price. This presumption may be rebutted by evi-
6 dence that—

7 “(A) the market as a whole considered
8 other information that corrected the allegedly
9 fraudulent statement; or

10 “(B) the plaintiff possessed such corrective
11 information prior to the purchase or sale of the
12 security.

13 “(4) REASONABLE EXPECTATION OF INTEGRITY
14 OF MARKET PRICE.—A plaintiff who buys or sells a
15 security for which it is unreasonable to rely on mar-
16 ket price to reflect all current information may not
17 establish reliance pursuant to paragraph (2). For
18 purposes of paragraph (2), the following factors
19 shall be considered in determining whether it was
20 reasonable for a party to expect the market price of
21 the security to reflect substantially all publicly avail-
22 able information regarding the issuer of the security:

23 “(A) The weekly trading volume of any
24 class of securities of the issuer of the security.

1 “(B) The existence of public reports by se-
2 securities analysts concerning any class of securi-
3 ties of the issuer of the security.

4 “(C) The eligibility of the issuer of the se-
5 curity, under the rules and regulations of the
6 Commission, to incorporate by reference its re-
7 ports made pursuant to section 13 of this title
8 in a registration statement filed under the Se-
9 curities Act of 1933 in connection with the sale
10 of equity securities.

11 “(D) A history of immediate movement of
12 the price of any class of securities of the issuer
13 of the security caused by the public dissemina-
14 tion of information regarding unexpected cor-
15 porate events or financial releases.

16 In no event shall it be considered reasonable for a
17 party to expect the market price of the security to
18 reflect substantially all publicly available information
19 regarding the issuer of the security unless the issuer
20 of the security has a class of securities listed and
21 registered on a national securities exchange or
22 quoted on the automated quotation system of a na-
23 tional securities association.

24 “(e) ALLOCATION OF LIABILITY.—

1 “(1) JOINT AND SEVERAL LIABILITY FOR
2 KNOWING FRAUD.—A defendant who is found liable
3 for damages in a private action to which subsection
4 (a) applies may be liable jointly and severally only
5 if the trier of fact specifically determines that the
6 defendant acted knowingly (as defined in subsection
7 (a)(3)).

8 “(2) PROPORTIONATE LIABILITY FOR RECK-
9 LESSNESS.—If the trier of fact does not make the
10 findings required by paragraph (1) for joint and sev-
11 eral liability, a defendant’s liability in a private ac-
12 tion to which subsection (a) applies shall be deter-
13 mined under paragraph (3) of this subsection only
14 if the trier of fact specifically determines that the
15 defendant acted recklessly (as defined in subsection
16 (a)(4)).

17 “(3) DETERMINATION OF PROPORTIONATE LI-
18 ABILITY.—If the trier of fact makes the findings re-
19 quired by paragraph (2), the defendant’s liability
20 shall be determined as follows:

21 “(A) The trier of fact shall determine the
22 percentage of responsibility of the plaintiff, of
23 each of the defendants, and of each of the other
24 persons or entities alleged by the parties to
25 have caused or contributed to the harm alleged

1 by the plaintiff. In determining the percentages
2 of responsibility, the trier of fact shall consider
3 both the nature of the conduct of each person
4 and the nature and extent of the causal rela-
5 tionship between that conduct and the damage
6 claimed by the plaintiff.

7 “(B) For each defendant, the trier of fact
8 shall then multiply the defendant’s percentage
9 of responsibility by the total amount of damage
10 suffered by the plaintiff that was caused in
11 whole or in part by that defendant and the
12 court shall enter a verdict or judgment against
13 the defendant in that amount. No defendant
14 whose liability is determined under this sub-
15 section shall be jointly liable on any judgment
16 entered against any other party to the action.

17 “(C) Except where contractual relationship
18 permits, no defendant whose liability is deter-
19 mined under this paragraph shall have a right
20 to recover any portion of the judgment entered
21 against such defendant from another defendant.

22 “(4) EFFECT OF PROVISION.—This subsection
23 relates only to the allocation of damages among de-
24 fendants. Nothing in this subsection shall affect the

1 standards for liability under any private action arising under this title.

2
3 “(f) DAMAGES.—In any private action to which subsection (a) applies, and in which the plaintiff claims to have bought or sold the security based on a reasonable belief that the market value of the security reflected all publicly available information, the plaintiff’s damages shall not exceed the lesser of—

9 “(1) the difference between the price paid by the plaintiff for the security and the market value of the security immediately after dissemination to the market of information which corrects the fraudulent statement; and

14 “(2) the difference between the price paid by the plaintiff for the security and the price at which the plaintiff sold the security after dissemination of information correcting the fraudulent statement.”.

18 **SEC. 5. ESTABLISHMENT OF “SAFE HARBOR” FOR PREDICTIVE STATEMENTS.**

20 The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by adding at the end the following new section:

1 **“SEC. 37. APPLICATION OF SAFE HARBOR FOR FORWARD-**
2 **LOOKING STATEMENTS.**

3 “(a) SAFE HARBOR DEFINED.—In any action arising
4 under this title based on a fraudulent statement (within
5 the meaning of section 10A), a person shall not be liable
6 for the publication of any projection if—

7 “(1) the basis for such projection is briefly de-
8 scribed therein, with citations (which may be gen-
9 eral) to representative sources or authority, and a
10 disclaimer is made to alert persons for whom such
11 information is intended that the projections should
12 not be given any more weight than the described
13 basis therefor would reasonably justify; and

14 “(2) the basis for such projection is not inac-
15 curate as of the date of publication, determined
16 without benefit of subsequently available information
17 or information not known to such person at such
18 date.

19 “(b) AUTOMATIC PROTECTIVE ORDER STAYING DIS-
20 COVERY; EXPEDITED PROCEDURE.—In any action arising
21 under this title based on a fraudulent statement (within
22 the meaning of section 10A) by any person, such person
23 may, at any time beginning after the filing of the com-
24 plaint and ending 10 days after the filing of such person’s
25 answer to the complaint, move to obtain an automatic pro-
26 tective order under the safe harbor procedures of this sec-

1 tion. Upon such motion, the protective order shall issue
2 forthwith to stay all discovery as to the moving party, ex-
3 cept that which is directed to the specific issue of the ap-
4 plicability of the safe harbor. A hearing on the applicabil-
5 ity of the safe harbor shall be conducted within 45 days
6 of the issuance of such protective order. At the conclusion
7 of the hearing, the court shall either (1) dismiss the por-
8 tion of the action based upon the use of a projection to
9 which the safe harbor applies, or (2) determine that the
10 safe harbor is unavailable in the circumstances.

11 “(c) REGULATORY AUTHORITY.—In consultation
12 with investors and issuers of securities, the Commission
13 shall adopt rules and regulations to facilitate the safe har-
14 bor provisions of this section. Such rules and regulations
15 shall—

16 “(1) include clear and objective guidance that
17 the Commission finds sufficient for the protection of
18 investors,

19 “(2) prescribe such guidance with sufficient
20 particularity that compliance shall be readily ascer-
21 tainable by issuers prior to issuance of securities,
22 and

23 “(3) provide that projections that are in compli-
24 ance with such guidance and that concern the future
25 economic performance of an issuer of securities reg-

1 istered under section 12 of this title will be deemed
2 not to be in violation of section 10(b) of this title.”.

3 **SEC. 6. RULE OF CONSTRUCTION.**

4 Nothing in the amendments made by this Act shall
5 be deemed to create or ratify any implied private right
6 of action, or to prevent the Commission by rule from re-
7 stricting or otherwise regulating private actions under the
8 Securities Exchange Act of 1934.

9 **SEC. 7. EFFECTIVE DATE.**

10 This Act and the amendments made by this Act are
11 effective on the date of enactment of this Act and shall
12 apply to cases commenced after such date of enactment.

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