

104TH CONGRESS
1ST SESSION

S. 667

To amend the Securities Exchange Act of 1934 in order to reform the conduct of private securities litigation, to provide for financial fraud detection and disclosure, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 4 (legislative day, MARCH 27), 1995

Mr. BRYAN (for himself and Mr. SHELBY) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

A BILL

To amend the Securities Exchange Act of 1934 in order to reform the conduct of private securities litigation, to provide for financial fraud detection and disclosure, 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 “Private Securities Enforcement Improvements Act of
6 1995”.

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

Sec. 1. Short title; table of contents.

TITLE I—PRIVATE SECURITIES LITIGATION

Sec. 101. Elimination of certain abusive practices and procedural reforms.

Sec. 102. Special requirements for class action complaints; multiple securities class actions; procedure for selecting lead counsel in class actions; early evaluation procedure.

Sec. 103. Requirements for securities fraud actions.

Sec. 104. Proportionate liability and contribution.

Sec. 105. Restoration of aiding and abetting liability.

Sec. 106. Limitations period for implied private rights of action.

Sec. 107. Safe harbor for forward-looking statements.

TITLE II—FINANCIAL FRAUD DETECTION AND DISCLOSURE

Sec. 201. Financial fraud detection and disclosure.

1 **TITLE I—PRIVATE SECURITIES**
 2 **LITIGATION**

3 **SEC. 101. ELIMINATION OF CERTAIN ABUSIVE PRACTICES**
 4 **AND PROCEDURAL REFORMS.**

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

9 “(8) RECEIPT OF REFERRAL FEES.—No broker
 10 or dealer, or person associated with a broker or deal-
 11 er, may solicit or accept remuneration for assisting
 12 an attorney in obtaining the representation of any
 13 customer in any implied private action arising under
 14 this title.”.

15 (b) PROHIBITION ON ATTORNEYS’ FEES PAID FROM
 16 COMMISSION DISGORGEMENT FUNDS.—Section 21(d) of
 17 the Securities Exchange Act of 1934 (15 U.S.C. 78u(d))

1 is amended by adding at the end the following new para-
2 graph:

3 “(4) PROHIBITION ON ATTORNEYS’ FEES PAID
4 FROM COMMISSION DISGORGEMENT FUNDS.—Except
5 as otherwise ordered by the court, funds disgorged
6 solely as the result of an action brought by the Com-
7 mission, or of any Commission proceeding, shall not
8 be distributed as payment for attorneys’ fees or ex-
9 penses incurred by private parties seeking distribu-
10 tion of the disgorged funds.”.

11 (c) ADDITIONAL PROVISIONS APPLICABLE TO CLASS
12 ACTIONS.—Section 21 of the Securities Exchange Act of
13 1934 (15 U.S.C. 78u) is amended by adding at the end
14 the following new subsections:

15 “(i) RECOVERY BY NAMED PLAINTIFFS IN CLASS
16 ACTIONS.—In an implied private action arising under this
17 title that is certified as a class action pursuant to the Fed-
18 eral Rules of Civil Procedure, the share of any final judg-
19 ment or of any settlement that is awarded to class plain-
20 tiffs serving as the representative parties shall be cal-
21 culated in the same manner as the shares of the final judg-
22 ment or settlement awarded to all other members of the
23 class. Nothing in this subsection shall be construed to
24 limit the award to any representative parties of reasonable

1 compensation, costs, and expenses (including lost wages)
2 relating to the representation of the class.

3 “(j) CONFLICTS OF INTEREST.—In an implied pri-
4 vate action arising under this title that is certified as a
5 class action pursuant to the Federal Rules of Civil Proce-
6 dure, if a party is represented by an attorney who directly
7 owns or otherwise has a beneficial interest in the securities
8 that are the subject of the litigation, the court shall, upon
9 motion by any party, make a determination of whether
10 such interest constitutes a conflict of interest sufficient to
11 disqualify the attorney from representing the party.

12 “(k) RESTRICTIONS ON SECRECY.—

13 “(1) RESTRICTIONS ON SETTLEMENTS UNDER
14 SEAL.—In an implied private action arising under
15 this title, the terms and provisions of any settlement
16 agreement between any of the parties shall not be
17 filed under seal, except that on motion of any of the
18 parties to the settlement, the court may order filing
19 under seal for those portions of a settlement agree-
20 ment as to which good cause is shown for such filing
21 under seal. Good cause shall only exist if publication
22 of a term or provision of a settlement agreement
23 would cause direct and substantial harm to any per-
24 son.

1 “(2) RESTRICTIONS ON PROTECTIVE ORDERS
2 AND SEALING OF CASES.—In an implied private ac-
3 tion arising under this title, a court may enter an
4 order restricting the disclosure of information ob-
5 tained through discovery, or an order restricting ac-
6 cess after entry of final judgment to court records,
7 only after making particularized findings of fact that
8 such disclosure or access would cause direct and
9 substantial harm to the competitive or privacy inter-
10 ests of a person.

11 “(1) PAYMENT OF ATTORNEYS’ FEES FROM SETTLE-
12 MENT FUNDS.—In an implied private action arising under
13 this title that is certified as a class action pursuant to
14 the Federal Rules of Civil Procedure, attorneys’ fees
15 awarded by the court from a common fund for the class
16 to counsel for the class shall—

17 “(1) be determined based on—

18 “(A) a reasonable percentage of the
19 amount made available to class members from
20 the common fund; and

21 “(B) a reasonable percentage of the value
22 of any other benefits made available to the
23 class; and

24 “(2) include reasonable expenses incurred in the
25 prosecution of the action.

1 “(m) DISCLOSURE OF SETTLEMENT TERMS TO
2 CLASS MEMBERS.—In an implied private action arising
3 under this title that is certified as a class action pursuant
4 to the Federal Rules of Civil Procedure, a proposed or
5 final settlement agreement that is published or otherwise
6 disseminated to the class shall include the following state-
7 ments, which shall not be admissible for purposes of any
8 Federal or State judicial action or administrative proceed-
9 ing, other than an action or proceeding arising out of such
10 statements:

11 “(1) STATEMENT OF THE BENEFITS OF SET-
12 TLEMENT.—A statement of the total amount of the
13 settlement, fully describing all proposed payments
14 and non-monetary benefits to the class, and a sched-
15 ule setting forth the reasonably anticipated pay-
16 ments to class members.

17 “(2) STATEMENT OF POTENTIAL OUTCOME OF
18 CASE.—

19 “(A) AGREEMENT ON AMOUNT OF DAM-
20 AGES AND LIKELIHOOD OF PREVAILING.—If the
21 settling parties agree on the amount of dam-
22 ages that would be recoverable if the plaintiff
23 prevailed on each claim alleged under this title
24 and the likelihood that the plaintiff would pre-
25 vail—

1 “(i) a statement concerning the
2 amount of such potential damages; and

3 “(ii) a statement concerning the likeli-
4 hood that the plaintiff would prevail on the
5 claims alleged under this title and a brief
6 explanation of the reasons for that conclu-
7 sion.

8 “(B) DISAGREEMENT ON AMOUNT OF
9 DAMAGES OR LIKELIHOOD OF PREVAILING.—If
10 the settling parties do not agree on the amount
11 of damages that would be recoverable if the
12 plaintiff prevailed on each claim alleged under
13 this title or on the likelihood that the plaintiff
14 would prevail on those claims, or both, a state-
15 ment concerning the issue or issues on which
16 the parties disagree.

17 “(3) STATEMENT OF ATTORNEYS’ FEES OR
18 COSTS SOUGHT.—If any of the settling parties or
19 their counsel intend to apply to the court for an
20 award of attorneys’ fees or costs from any fund es-
21 tablished as part of the settlement, a statement indi-
22 cating which parties or counsel intend to make such
23 an application, the amount of fees and costs that
24 will be sought, and a brief explanation of the basis
25 for the application.

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

8 “(5) OTHER INFORMATION.—Such other infor-
 9 mation as may be required by the court.”.

10 **SEC. 102. SPECIAL REQUIREMENTS FOR CLASS ACTION**
 11 **COMPLAINTS; MULTIPLE SECURITIES CLASS**
 12 **ACTIONS; PROCEDURE FOR SELECTING LEAD**
 13 **COUNSEL IN CLASS ACTIONS; EARLY EVALUA-**
 14 **TION PROCEDURE.**

15 The Securities Exchange Act of 1934 (15 U.S.C. 78a
 16 et seq.) is amended by inserting after section 27A the fol-
 17 lowing new section:

18 **“SEC. 27B. SPECIAL PROVISIONS FOR CLASS ACTIONS.**

19 “(a) CERTIFICATION OF COMPLAINTS.—

20 “(1) IN GENERAL.—In an implied private ac-
 21 tion arising under this title that is filed as a class
 22 action pursuant to the Federal Rules of Civil Proce-
 23 dure, each plaintiff seeking to serve as a class rep-
 24 resentative shall provide a certification personally

1 signed by the plaintiff to be filed with the complaint
2 that—

3 “(A) states that the plaintiff has reviewed
4 the complaint and authorized its filing;

5 “(B) states that the plaintiff did not pur-
6 chase the security that is the subject of the
7 complaint at the direction of plaintiff’s counsel;

8 “(C) states that the plaintiff is willing to
9 serve as a class representative, including provid-
10 ing testimony at deposition and trial, if nec-
11 essary;

12 “(D) sets forth all of the plaintiffs’ trans-
13 actions in the security that is the subject of the
14 complaint during the class period specified in
15 the complaint;

16 “(E) identifies all suits under this title
17 which the plaintiff has filed as a class action in
18 the prior 12 months; and

19 “(F) states that the plaintiff will not ac-
20 cept any payment for serving as class represent-
21 ative beyond the plaintiff’s pro rata share of
22 any recovery, except as ordered by the court.

23 “(2) NON-WAIVER OF ATTORNEY-CLIENT PRIVI-
24 LEGE.—The certification filed pursuant to para-

1 graph (1) shall not be construed to be a waiver of
2 the attorney-client privilege.

3 “(b) MULTIPLE SECURITIES CLASS ACTIONS.—

4 “(1) IN GENERAL.—If more than one implied
5 private action arising under this title out of substan-
6 tially the same transaction or occurrence is filed in
7 one or more Federal courts, and any person or en-
8 tity is named as a defendant in more than one such
9 action, each such action shall be deemed a multiple
10 securities class action, and the actions shall be
11 deemed a group of multiple securities class actions.

12 “(2) CONSOLIDATION.—The parties shall
13 promptly call to the attention of each court in which
14 multiple securities class actions are filed the other
15 actions in the group of multiple securities class ac-
16 tions. All the actions in the group of multiple securi-
17 ties class actions shall be transferred or consolidated
18 (or both) in the most convenient forum before one
19 judge as promptly as possible. The Judicial Panel on
20 Multi-District Litigation shall give expedited treat-
21 ment to proceedings involving multiple securities
22 class actions to facilitate their transfer to one dis-
23 trict as promptly as possible.

24 “(3) SELECTION OF LEAD COUNSEL.—When
25 multiple securities class actions are filed, plaintiffs’

1 counsel shall promptly organize themselves and se-
2 lect lead counsel to direct the prosecution of the ac-
3 tions, subject to the approval of the court. If plain-
4 tiffs' counsel do not organize themselves, the court
5 shall promptly designate lead counsel, in no event
6 later than 45 days after the filing of the first mul-
7 tiple securities class action. In selecting or designat-
8 ing lead counsel, plaintiffs' counsel and the court
9 shall not give undue weight to the order of filing the
10 multiple securities class actions.

11 “(4) LATER-FILED CASES.—Any multiple secu-
12 rities class action filed after the case organization
13 period shall be subject to the decisions taken during
14 the case organization period.

15 “(c) EARLY EVALUATION PROCEDURE.—

16 “(1) IN GENERAL.—In an implied private ac-
17 tion arising under this title that is filed as a class
18 action pursuant to the Federal Rules of Civil Proce-
19 dure, if the class representatives and each of the
20 other parties to the action agree and any party so
21 requests, or if the court upon motion of any party
22 so decides, not later than 60 days after the filing of
23 the class action, the court shall order an early eval-
24 uation procedure. The period of the early evaluation
25 procedure shall not extend beyond 150 days after

1 the filing of the first complaint subject to the proce-
2 dure.

3 “(2) REQUIREMENTS.—During the early eval-
4 uation procedure described under paragraph (1)—

5 “(A) defendants shall not be required to
6 answer or otherwise respond to any complaint;

7 “(B) plaintiffs may file a consolidated or
8 amended complaint at any time and may dis-
9 miss the action or actions at any time without
10 sanction;

11 “(C) unless otherwise ordered by the court,
12 no formal discovery shall occur, except that par-
13 ties may propound discovery requests to third
14 parties to preserve evidence;

15 “(D) the parties shall evaluate the merits
16 of the action under the supervision of a person
17 (hereafter in this section referred to as the ‘me-
18 diator’) agreed upon by them or designated by
19 the court in the absence of agreement, which
20 person may be another district court judge, any
21 magistrate-judge or a special master, each side
22 having one peremptory challenge of a mediator
23 designated by the court by filing a written no-
24 tice of challenge not later than 5 days after re-
25 ceipt of an order designating the mediator;

1 “(E) the parties shall promptly provide ac-
2 cess to or exchange all nonprivileged documents
3 relating to the allegations in the complaint or
4 complaints, and any documents withheld on the
5 grounds of privilege shall be sufficiently identi-
6 fied so as to permit the mediator to determine
7 if they are, in fact, privileged; and

8 “(F) the parties shall exchange damage
9 studies and such other expert reports as may be
10 helpful to an evaluation of the action on the
11 merits, which materials shall be treated as pre-
12 pared and used in the context of settlement ne-
13 gotiations.

14 “(3) FAILURE TO PRODUCE DOCUMENTS.—Any
15 party that fails to produce documents relevant to the
16 allegations of the complaint or complaints during the
17 early evaluation procedure described in paragraph
18 (1) may be sanctioned by the court pursuant to the
19 Federal Rules of Civil Procedure. Notwithstanding
20 paragraph (2), subject to review by the court, the
21 mediator may order the production of evidence by
22 any party and, to the extent necessary properly to
23 evaluate the case, may permit discovery of
24 nonparties and depositions of parties for good cause
25 shown.

1 “(4) EVALUATION BY THE MEDIATOR.—

2 “(A) IN GENERAL.—If, at the end of the
3 early evaluation procedure described in para-
4 graph (1), the action has not been voluntarily
5 dismissed or settled, the mediator shall evaluate
6 the action as being—

7 “(i) clearly frivolous, such that it can
8 only be further maintained in bad faith; or

9 “(ii) clearly meritorious, such that it
10 can only be further defended in bad faith;
11 or

12 “(iii) described by neither clause (i)
13 nor clause (ii).

14 “(B) WRITTEN EVALUATION.—An evalua-
15 tion required by subparagraph (A) with respect
16 to the claims against and defenses of each de-
17 fendant shall be issued in writing not later than
18 10 days after the end of the early evaluation
19 procedure and provided to the parties. The eval-
20 uation shall not be admissible in the action, and
21 shall not be provided to the court until a motion
22 for sanctions under paragraph (5) is timely
23 filed.

24 “(5) MANDATORY SANCTIONS.—

1 “(A) CLEARLY FRIVOLOUS ACTIONS.—In
2 an action that is evaluated under paragraph
3 (4)(A)(i) in which final judgment is entered
4 against the plaintiff, the plaintiff or plaintiff’s
5 counsel shall be liable to the defendant for
6 sanctions as awarded by the court, which may
7 include an order to pay reasonable attorneys’
8 fees and other expenses, if the court agrees,
9 based on the entire record, that the action was
10 clearly frivolous when filed and was maintained
11 in bad faith.

12 “(B) CLEARLY MERITORIOUS ACTIONS.—
13 In an action that is evaluated under paragraph
14 (4)(A)(ii) in which final judgment is entered
15 against the defendant, the defendant or defend-
16 ant’s counsel shall be liable to the plaintiff for
17 sanctions as awarded by the court, which may
18 include an order to pay reasonable attorneys’
19 fees and other expenses, if the court agrees,
20 based on the entire record, that the action was
21 clearly meritorious and was defended in bad
22 faith.

23 “(6) EXTENSION OF EARLY EVALUATION PE-
24 RIOD.—The period of the early evaluation procedure
25 described in paragraph (1) may be extended by stip-

1 ulation of all parties. At the conclusion of the period,
2 the action shall proceed in accordance with Federal
3 Rules of Civil Procedure.

4 “(7) FEES.—In an implied private action de-
5 scribed in paragraph (1), each side shall bear equally
6 the reasonable fees and expenses of the mediator
7 agreed upon or designated under paragraph (2)(D),
8 if the mediator is not a judicial officer.”.

9 **SEC. 103. REQUIREMENTS FOR SECURITIES FRAUD AC-**
10 **TIONS.**

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

14 **“SEC. 10A. REQUIREMENTS FOR SECURITIES FRAUD AC-**
15 **TIONS.**

16 “(a) IN GENERAL.—In any private action arising
17 under section 10(b) that is based on a fraudulent state-
18 ment or fraudulent omission, liability for that statement
19 or omission may be established only upon proof that—

20 “(1) the defendant directly or indirectly made
21 that fraudulent statement or omission; and

22 “(2) the defendant made that fraudulent state-
23 ment or fraudulent omission knowingly or recklessly.

24 “(b) APPLICATION.—Subsection (a) does not affect
25 any liability under section 10(b), other than as provided

1 in subsection (a), based on the employment of any device,
2 scheme, or artifice to defraud or on the engagement in
3 any act, practice, or course of business which operates or
4 would operate as a fraud or deceit upon any person.

5 “(c) FRAUDULENT STATEMENT.—For purposes of
6 this section, a fraudulent statement is a statement that
7 contains an untrue statement of a material fact, or omits
8 to state a material fact necessary in order to make the
9 statements made, in light of the circumstances in which
10 they were made, not misleading.

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

18 “(e) RECKLESSLY.—For purposes of subsection (a),
19 a person makes a fraudulent statement recklessly if the
20 person, in making the statement is guilty of highly unrea-
21 sonable conduct that—

22 “(1) involves not merely simple or even inexcus-
23 able negligence, but an extreme departure from
24 standards of ordinary care; and

1 “(2) presents a danger of misleading securities
2 purchasers or sellers that was either known to the
3 defendant or so obvious that the defendant must
4 have been aware of it.

5 “(f) PLEADING REQUIREMENT.—In any private ac-
6 tion described in subsection (a), in which the plaintiff may
7 recover money damages only if it proves that the defend-
8 ant acted as described in subsection (a)(2), the plaintiff
9 shall allege in its complaint facts suggesting that the de-
10 fendant made a fraudulent statement or fraudulent omis-
11 sion knowingly or recklessly.

12 “(g) FRAUD ON THE MARKET.—The Commission
13 shall, by rule, define the circumstances in which it is and
14 is not appropriate for reliance to be presumed under the
15 fraud on the market theory in any action to which sub-
16 section (a) applies. In promulgating such rules, the Com-
17 mission shall consider—

18 “(1) whether the issuer and its securities are
19 regularly reviewed by 2 or more analysts;

20 “(2) the weekly trading volume of any class of
21 securities of the issuer of the security;

22 “(3) the existence of public reports by securities
23 analysts concerning any class of securities of the is-
24 suer of the security;

1 “(4) the eligibility of the issuer of the security,
2 under the rules and regulations of the Commission,
3 to incorporate by reference its reports made pursu-
4 ant to section 13 in a registration statement filed
5 under the Securities Act of 1933 in connection with
6 the sale of equity securities;

7 “(5) a history of immediate movement of the
8 price of any class of securities of the issuer of the
9 security caused by the public dissemination of infor-
10 mation regarding unexpected corporate events or fi-
11 nancial releases; and

12 “(6) any other factors determined by the Com-
13 mission to be appropriate.”.

14 **SEC. 104. PROPORTIONATE LIABILITY AND CONTRIBUTION.**

15 The Securities Exchange Act of 1934 (15 U.S.C. 78a
16 et seq.) is amended by inserting after section 10A (as
17 added by section 103 of this Act) the following new sec-
18 tion:

19 **“SEC. 10B. PROPORTIONATE LIABILITY AND CONTRIBU-**
20 **TION.**

21 “(a) PROPORTIONATE LIABILITY.—

22 “(1) SPECIAL FINDINGS.—In all implied private
23 actions arising under this title involving the fault of
24 more than one defendant, including third-party de-
25 fendants, the court, unless otherwise agreed by all

1 parties, shall instruct the jury to answer special in-
2 terrogatories or, if there is no jury, shall make find-
3 ings, indicating whether such defendant—

4 “(A) acted with a degree of scienter great-
5 er than recklessness; or

6 “(B) at the time of the violation of this
7 title for which liability is claimed, directly or in-
8 directly controlled a defendant who acted with
9 a degree of scienter greater than recklessness.

10 “(2) ALLOCATION OF LIABILITY.—

11 “(A) IN GENERAL.—

12 “(i) RULES OF JOINT AND SEVERAL
13 LIABILITY.—In all private actions arising
14 under this title to which paragraph (1) ap-
15 plies, each liable defendant, including
16 third-party defendants, as to whom an af-
17 firmative finding under paragraph (1) has
18 been made shall be subject to the rules of
19 joint and several liability.

20 “(ii) PROPORTIONATE LIABILITY.—
21 Subject to subparagraph (C), each liable
22 defendant to which clause (i) does not
23 apply, including third-party defendants,
24 shall be proportionately liable for his or
25 her equitable share of the obligation, as de-

1 terminated in accordance with subsection
2 (c)(4).

3 “(B) UNCOLLECTIBLE SHARES.—If, upon
4 motion made under subsection (c)(5), the court
5 determines that all or part of the equitable
6 share of a defendant of the obligation is
7 uncollectible from that defendant, the court
8 shall reallocate any uncollectible amount among
9 those defendants who are jointly and severally
10 liable under subparagraph (A)(i) according to
11 their respective percentages of fault, as deter-
12 mined in accordance with subsection (c)(1).

13 “(C) REALLOCATION.—If there are no de-
14 fendants who are jointly and severally liable
15 (other than defendants whose equitable shares
16 are uncollectible) or if, upon motion made not
17 later than 6 months after reallocation of an
18 uncollectible amount under subparagraph (B),
19 the court shall determine that all or part of
20 such uncollectible amount is uncollectible from
21 defendants who are jointly and severally liable,
22 the court shall reallocate any uncollectible
23 amount among the defendants who are propor-
24 tionately liable under subparagraph (A)(ii), ac-
25 cording to their respective percentages of fault

1 as determined in accordance with subsection
2 (c)(1).

3 “(D) CONTRIBUTION AND CONTINUING LI-
4 ABILITY.—A defendant whose liability is reallo-
5 cated pursuant to subparagraph (B) and (C)
6 shall be subject to contribution under sub-
7 section (b) and to any continuing liability to the
8 plaintiff on the judgment.

9 “(b) RIGHT TO CONTRIBUTION.—Subject to sub-
10 section (f), in an implied private action arising under this
11 title, a right of contribution—

12 “(1) shall exist between or among 2 or more
13 persons who are liable upon the same indivisible
14 claim for the same damages, whether or not judg-
15 ment has been recovered against all or any of such
16 persons;

17 “(2) may be enforced either in the original ac-
18 tion or by a separate action brought for that pur-
19 pose; and

20 “(3) shall be based upon the equitable share of
21 each person of the obligation, as determined in ac-
22 cordance with subsection (c)(4), except that a de-
23 fendant who is jointly and severally liable under sub-
24 section (a)(2)(A)(i) shall not be entitled to contribu-
25 tion for the payment of any amount reallocated

1 under subsection (a)(2)(B) from any party who is
2 proportionately liable under subsection (a)(2)(A)(ii),
3 other than the party whose liability was reallocated.

4 “(c) SPECIAL FINDINGS.—

5 “(1) FAULT OF MULTIPLE PARTIES.—In all im-
6 plied private actions arising under this title involving
7 the fault of more than 1 defendant, including third-
8 party defendants and persons who have been re-
9 leased under subsection (e), the court, unless other-
10 wise agreed by all parties, shall instruct the jury to
11 answer special interrogatories or, if there is no jury,
12 shall make findings indicating—

13 “(A) the amount of damages the plaintiff
14 is entitled to recover; and

15 “(B) the percentage of the total fault that
16 is allocated to each defendant, each third-party
17 defendant, and each person who has been re-
18 leased from liability under subsection (e).

19 “(2) SINGLE PARTY DETERMINATIONS.—For
20 purposes of paragraph (1), the court may determine
21 that 2 or more persons are to be treated as a single
22 party.

23 “(3) COURT CONSIDERATIONS.—In determining
24 the percentages of fault for purposes of this sub-
25 section, the trier of fact shall consider both the na-

1 ture of the conduct of each party at fault and the
2 extent of the causal relation between the conduct
3 and the damages claimed.

4 “(4) DETERMINATION AND ALLOCATION OF
5 DAMAGES.—The court shall determine the award of
6 damages to the plaintiff in accordance with its find-
7 ings, subject to any reduction under subsection (e),
8 and shall enter judgment against each liable defend-
9 ant and third-party defendant on the basis of the
10 rules of joint and several liability or, if applicable, as
11 set forth in subsection (a). For purposes of alloca-
12 tion of liability under subsection (a)(2), and con-
13 tribution under subsections (b) and (d), the court
14 shall also determine and state in the judgment the
15 equitable share of each party of the obligation in ac-
16 cordance with the respective percentages of fault as-
17 signed to each party.

18 “(5) DETERMINATION OF COLLECTIBILITY.—
19 Upon motion made not later than 6 months after
20 judgment is entered in an action arising under this
21 title, the court shall determine whether all or part
22 of the equitable share of a party of the obligation is
23 uncollectible from that party and, except as other-
24 wise provided in subsection (a)(2), shall reallocate
25 any uncollectible amount among the other parties

1 according to their respective percentages of fault. A
2 party whose liability is reallocated shall be subject to
3 contribution and to any continuing liability to the
4 plaintiff on the judgment.

5 “(d) ENFORCEMENT OF CONTRIBUTION.—

6 “(1) IN GENERAL.—In an implied private ac-
7 tion arising under this title, if the proportionate
8 fault of the parties to a claim for contribution—

9 “(A) has been established previously by the
10 court, as provided by subsection (c), a party
11 paying more than its equitable share of the obli-
12 gation, upon motion, may recover judgment for
13 contribution; or

14 “(B) has not been established by the court,
15 contribution may be enforced in a separate ac-
16 tion, whether or not a judgment has been ren-
17 dered against either the person seeking con-
18 tribution or the person from whom contribution
19 is being sought.

20 “(2) TIMING.—In an implied private action
21 arising under this title—

22 “(A) if a judgment has been rendered, an
23 action for contribution shall be commenced not
24 later than 1 year after the date on which the
25 judgment becomes final; or

1 “(B) if no judgment has been rendered, a
2 person bringing an action for contribution
3 shall—

4 “(i) discharge by payment the com-
5 mon liability within the period of the stat-
6 ute of limitations applicable to the plain-
7 tiff’s right of action and commence the ac-
8 tion for contribution not later than 1 year
9 after the date on which such payment is
10 made; or

11 “(ii) agree while the action is pending,
12 to discharge the common liability and, not
13 later than 1 year after the date of the
14 agreement, pay the liability and commence
15 an action for contribution.

16 “(e) EFFECT OF RELEASE.—A release, covenant not
17 to sue, or similar agreement entered into by a plaintiff
18 and a person liable, shall discharge that person from all
19 liabilities for contribution, but shall not discharge any
20 other persons liable upon the same claim unless the agree-
21 ment so provides. Upon such release, covenant not to sue,
22 or similar agreement, the claim of the releasing person
23 against other persons shall be reduced by the amount paid
24 to the releasing person in consideration of such release,
25 covenant not to sue, or similar agreement.

1 “(f) ENCOURAGEMENT OF FINALITY IN SETTLE-
2 MENT DISCHARGE.—

3 “(1) DISCHARGE.—A defendant who, in good
4 faith, settles any private action brought under this
5 title at any time before verdict or judgment is ren-
6 dered shall be discharged from all claims for con-
7 tribution brought by other persons. Upon entry of
8 the settlement by the court, the court shall enter a
9 bar order constituting the final discharge of all obli-
10 gations to the plaintiff of the settling defendant aris-
11 ing out of the action. The order shall bar all future
12 claims for contribution or indemnity arising out of
13 the action—

14 “(A) by nonsettling persons against the
15 settling defendant; and

16 “(B) by the settling defendant against any
17 nonsettling defendants.

18 “(2) REDUCTION.—If a person enters into a
19 settlement with the plaintiff prior to verdict or judg-
20 ment rendered in any private action brought under
21 this title, the verdict or judgment shall be reduced
22 by the amount paid to the plaintiff by that person.”.

1 **SEC. 105. RESTORATION OF AIDING AND ABETTING LIABIL-**
2 **ITY.**

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

6 “(f) PROSECUTION OF PERSONS WHO AID OR ABET
7 VIOLATIONS.—For purposes of subsections (b) and (d),
8 any person who knowingly or recklessly provides substan-
9 tial assistance to another person in the violation of a provi-
10 sion of this title, or of any rule or regulation promulgated
11 under this title, shall be deemed to violate such provision
12 to the same extent as the person to whom such assistance
13 is provided. No person shall be liable under this subsection
14 based on an omission or failure to act unless such omission
15 or failure constituted a breach of a duty owed by such
16 person.”.

17 (b) SECURITIES EXCHANGE ACT OF 1934.—Section
18 20 of the Securities Exchange Act of 1934 (15 U.S.C. 78t)
19 is amended—

20 (1) by adding at the end the following new sub-
21 section:

22 “(e) PROSECUTION OF PERSONS WHO AID OR ABET
23 VIOLATIONS.—For purposes of subsections (d)(1) and
24 (d)(3) of section 21, or an action by a self-regulatory orga-
25 nization, or an express or implied private right of action
26 arising under this title, any person who knowingly or reck-

1 lessly provides substantial assistance to another person in
2 the violation of a provision of this title, or of any rule or
3 regulation promulgated under this title, shall be deemed
4 to violate such provision and shall be liable to the same
5 extent as the person to whom such assistance is provided.
6 No person shall be liable under this subsection based on
7 an omission or failure to act unless such omission or fail-
8 ure constituted a breach of a duty owed by such person.”;
9 and

10 (2) by striking the heading of such section and
11 inserting the following:

12 **“SEC. 20. LIABILITY OF CONTROLLING PERSONS AND PER-**
13 **SONS WHO AID OR ABET VIOLATIONS.”.**

14 (c) INVESTMENT COMPANY ACT OF 1940.—Section
15 42 of the Investment Company Act of 1940 (15 U.S.C.
16 80a–41) is amended by adding at the end the following
17 new subsection:

18 “(f) PROSECUTION OF PERSONS WHO AID OR ABET
19 VIOLATIONS.—For purposes of subsections (d) and (e),
20 any person who knowingly or recklessly provides substan-
21 tial assistance to another person in the violation of a provi-
22 sion of this title, or of any rule, regulation, or order pro-
23 mulgated under this title, shall be deemed to violate such
24 provision to the same extent as the person to whom such
25 assistance is provided. No person shall be liable under this

1 subsection based on an omission or failure to act unless
2 such omission or failure constituted a breach of a duty
3 owed by such person.”.

4 (d) INVESTMENT ADVISERS ACT OF 1940.—Section
5 209(d) of the Investment Advisers Act of 1940 (15 U.S.C.
6 80b-9) is amended—

7 (1) in subsection (d)—

8 (A) by striking “or that any person has
9 aided, abetted, counseled, commanded, induced,
10 or procured, is aiding, abetting, counseling,
11 commanding, inducing, or procuring, or is
12 about to aid, abet, counsel, command, induce,
13 or procure such a violation,”; and

14 (B) by striking “or in aiding, abetting,
15 counseling, commanding, inducing, or procuring
16 any such act or practice”; and

17 (2) by adding at the end the following new sub-
18 section:

19 “(f) PROSECUTION OF PERSONS WHO AID OR ABET
20 VIOLATIONS.—For purposes of subsections (d) and (e),
21 any person who knowingly or recklessly provides substan-
22 tial assistance to another person in the violation of a provi-
23 sion of this title, or of any rule, regulation, or order pro-
24 mulgated under this title, shall be deemed to violate such
25 provision to the same extent as the person to whom such

1 assistance is provided. No person shall be liable under this
2 subsection based on an omission or failure to act unless
3 such omission or failure constituted a breach of duty owed
4 by such person.”.

5 **SEC. 106. LIMITATIONS PERIOD FOR IMPLIED PRIVATE**
6 **RIGHTS OF ACTION.**

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

10 **“SEC. 36. LIMITATIONS PERIOD FOR IMPLIED PRIVATE**
11 **RIGHTS OF ACTION.**

12 “(a) IN GENERAL.—Except as otherwise provided in
13 this title, an implied private right of action arising under
14 this title shall be brought not later than the earlier of—

15 “(1) 5 years after the date on which the alleged
16 violation occurred; or

17 “(2) 2 years after the date on which the alleged
18 violation was discovered.

19 “(b) EFFECTIVE DATE.—The limitations period pro-
20 vided by this section shall apply to all proceedings com-
21 menced after the date of enactment of this section.”.

22 **SEC. 107. SAFE HARBOR FOR FORWARD-LOOKING STATE-**
23 **MENTS.**

24 (a) RULEMAKING.—Not later than 12 months after
25 the date of enactment of this Act, the Commission shall

1 adopt rules or regulations (or amend the rules or regula-
2 tions in effect on the date of enactment of this Act), to
3 provide one or more safe harbors for such forward-looking
4 information, as that term is defined by the Commission,
5 as the Commission may designate, having due regard for
6 the public interest and the protection of investors.

7 (b) CRITERIA.—Rules or regulations adopted (or
8 amended) pursuant to subsection (a) shall specify with re-
9 spect to a safe harbor—

10 (1) the forward-looking information or classes
11 of forward-looking information to be covered by the
12 safe harbor;

13 (2) the securities or classes of securities to be
14 covered by the safe harbor;

15 (3) the issuers of or classes of issuers of securi-
16 ties or other persons to whom the safe harbor shall
17 apply, as appropriate;

18 (4) the criteria the Commission determines to
19 be necessary and appropriate in the public interest
20 and for the protection of investors by which such
21 forward-looking information may be included in the
22 safe harbor; and

23 (5) the provisions of the Securities Act of 1933
24 and the Securities Exchange Act of 1934 to which
25 the safe harbor shall apply.

1 (c) REPORT.—

2 (1) SUBMISSION.—Not later than 30 days after
3 the date of adoption of the rules described in sub-
4 section (a), the Commission shall submit a report to
5 the Committee on Commerce of the House of Rep-
6 resentatives and the Committee on Banking, Hous-
7 ing, and Urban Affairs of the Senate describing such
8 rules.

9 (2) CONTENTS.—The report required by para-
10 graph (1) shall include a description of—

11 (A) the procedures to be followed by the
12 court for making a summary determination
13 early in a judicial proceeding of the applicability
14 of any rule of the Commission to forward-look-
15 ing statements in order—

16 (i) to limit litigation and discovery;

17 and

18 (ii) to promote timely dismissal of
19 claims against issuers of securities based
20 on such forward-looking statements if such
21 statements are in accordance with the
22 rules and regulations of the Commission;

23 (B) the steps that the Commission is un-
24 dertaking to provide clear guidance to issuers of

1 securities and the judiciary regarding the rules
2 prescribed pursuant to subsection (a); and

3 (C) any legislative recommendations relat-
4 ing to forward-looking statements that the
5 Commission determines to be appropriate.

6 (d) SECURITIES EXCHANGE ACT AMENDMENT.—The
7 Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.)
8 is amended by adding at the end the following new section:

9 **“SEC. 37. APPLICATION OF SAFE HARBOR FOR FORWARD-
10 LOOKING STATEMENTS.**

11 “(a) IN GENERAL.—In any implied private action
12 arising under this title that alleges that a forward-looking
13 statement concerning the future economic performance of
14 an issuer registered under section 12 was materially false
15 or misleading, if a party making a motion in accordance
16 with subsection (b) requests a stay of discovery concerning
17 the claims or defenses related to such statement of that
18 party, the court shall grant such a stay until it has ruled
19 on any such motion.

20 “(b) SUMMARY JUDGMENT MOTIONS.—Subsection
21 (a) shall apply to any motion for summary judgment made
22 by a defendant asserting that the forward-looking state-
23 ment was within the coverage of any rule which the Com-
24 mission may have adopted concerning such predictive

1 statements, if such motion is made not later than 60 days
2 after the plaintiff commences discovery in the action.

3 “(c) DILATORY CONDUCT; DUPLICATIVE DISCOV-
4 ERY.—Notwithstanding subsection (a) or (b), the time
5 permitted for a plaintiff to conduct discovery under sub-
6 section (b) may be extended, or a stay of the proceedings
7 may be denied, if the court finds that—

8 “(1) the defendant making a motion described
9 in subsection (b) engaged in dilatory or obstructive
10 conduct in taking or opposing any discovery; or

11 “(2) a stay of discovery pending a ruling on a
12 motion under subsection (b) would be substantially
13 unfair to the plaintiff or other parties to the ac-
14 tion.”.

15 **TITLE II—FINANCIAL FRAUD** 16 **DETECTION AND DISCLOSURE**

17 **SEC. 201. FINANCIAL FRAUD DETECTION AND DISCLOSURE.**

18 (a) AMENDMENTS TO THE SECURITIES EXCHANGE
19 ACT OF 1934.—The Securities Exchange Act of 1934 (15
20 U.S.C. 78a et seq.) is amended by inserting after section
21 13 the following new section:

22 **“SEC. 13A. FRAUD DETECTION AND DISCLOSURE.**

23 “(a) AUDIT REQUIREMENTS.—Each audit required
24 pursuant to this title of an issuer’s financial statements
25 by an independent public accountant shall include, in ac-

1 cordance with generally accepted auditing standards, as
2 may be modified or supplemented by the Commission—

3 “(1) procedures designed to provide reasonable
4 assurance of detecting illegal acts that would have a
5 direct and material effect on the determination of fi-
6 nancial statement amounts;

7 “(2) procedures designed to identify related
8 party transactions that are material to the financial
9 statements or otherwise require disclosure therein;
10 and

11 “(3) an evaluation of whether there is substan-
12 tial doubt about the issuer’s ability to continue as a
13 going concern during the ensuing fiscal year.

14 “(b) REQUIRED RESPONSE TO AUDIT DISCOV-
15 ERIES.—

16 “(1) INVESTIGATION AND REPORT TO MANAGE-
17 MENT.—If, in the course of conducting any audit
18 pursuant to this title to which subsection (a) applies,
19 the independent public accountant detects or other-
20 wise becomes aware of information indicating that
21 an illegal act (whether or not perceived to have a
22 material effect on the issuer’s financial statements)
23 has or may have occurred, the accountant shall, in
24 accordance with generally accepted auditing stand-

1 ards, as may be modified or supplemented by the
2 Commission—

3 “(A) determine whether it is likely that an
4 illegal act has occurred, and if so, determine
5 and consider the possible effect of the illegal act
6 on the financial statements of the issuer, in-
7 cluding any contingent monetary effects, such
8 as fines, penalties, and damages; and

9 “(B) as soon as practicable, inform the ap-
10 propriate level of the issuer’s management and
11 assure that the issuer’s audit committee, or the
12 issuer’s board of directors in the absence of
13 such a committee, is adequately informed with
14 respect to illegal acts that have been detected or
15 have otherwise come to the attention of such
16 accountant in the course of the audit, unless
17 the illegal act is clearly inconsequential.

18 “(2) RESPONSE TO FAILURE TO TAKE REME-
19 DIAL ACTION.—If, having first assured itself that
20 the audit committee of the board of directors of the
21 issuer or the board of directors (in the absence of
22 an audit committee) is adequately informed with re-
23 spect to illegal acts that have been detected or have
24 otherwise come to the attention of the independent
25 public accountant in the course of such accountant’s

1 audit, the independent public accountant concludes
2 that—

3 “(A) any such illegal act has a material ef-
4 fect on the financial statements of the issuer;

5 “(B) senior management of the issuer have
6 not taken, and the board of directors has not
7 caused senior management to take, timely and
8 appropriate remedial actions with respect to
9 such illegal act; and

10 “(C) the failure to take remedial action is
11 reasonably expected to warrant departure from
12 a standard auditor’s report, when made, or
13 warrant resignation from the audit engagement,
14 the independent public accountant shall, as soon as
15 practicable, directly report its conclusions to the
16 board of directors of the issuer.

17 “(3) NOTICE TO COMMISSION; RESPONSE TO
18 FAILURE TO NOTIFY.—An issuer whose board of di-
19 rectors has received a report pursuant to paragraph
20 (2) shall inform the Commission by notice not later
21 than 1 business day after receipt of such report, and
22 shall furnish the independent public accountant
23 making such report with a copy of the notice fur-
24 nished to the Commission. If the independent public
25 accountant making such report does not receive a

1 copy of such notice within the required one-business-
2 day period, the independent public accountant
3 shall—

4 “(A) resign from the engagement; or

5 “(B) furnish to the Commission a copy of
6 its report (or the documentation of any oral re-
7 port given) not later than 1 business day after
8 such failure to receive notice.

9 “(4) REPORT AFTER RESIGNATION.—An inde-
10 pendent public accountant electing resignation under
11 paragraph (3)(A) shall, not later than 1 business
12 day after a failure by an issuer to notify the Com-
13 mission under paragraph (3), furnish to the Com-
14 mission a copy of the accountant’s report (or the
15 documentation of any oral report given).

16 “(c) AUDITOR LIABILITY LIMITATION.—No inde-
17 pendent public accountant shall be liable in a private ac-
18 tion for any finding, conclusion, or statement expressed
19 in a report made pursuant to paragraph (3) or (4) of sub-
20 section (b), including any rules promulgated pursuant to
21 those provisions.

22 “(d) CIVIL PENALTIES IN CEASE-AND-DESIST PRO-
23 CEEDINGS.—If the Commission finds, after notice and op-
24 portunity for hearing in a proceeding instituted pursuant
25 to section 21C, that an independent public accountant has

1 willfully violated paragraph (3) or (4) of subsection (b),
2 the Commission may, in addition to entering an order
3 under section 21C, impose a civil penalty against the inde-
4 pendent public accountant and any other person that the
5 Commission finds was a cause of such violation. The deter-
6 mination whether to impose a civil penalty, and the
7 amount of any such penalty, shall be governed by the
8 standards set forth in section 21B.

9 “(e) PRESERVATION OF EXISTING AUTHORITY.—Ex-
10 cept as provided in subsection (d), nothing in this section
11 limits or otherwise affects the authority of the Commission
12 under this title.

13 “(f) DEFINITION.—As used in this section, the term
14 ‘illegal act’ means any action or omission that violates any
15 law, or any rule or regulation having the force of law.”.

16 (b) EFFECTIVE DATES.—Section 13A of the Securi-
17 ties Exchange Act of 1934, as added by subsection (a)
18 of this section, shall apply to any person registered under
19 that Act that is required to file selected quarterly financial
20 data pursuant to the rules of the Commission for all such
21 reports for any period beginning on or after January 1,
22 1996. Such section shall apply to such reports filed by any
23 other person registered under that Act for any period be-
24 ginning on or after January 1, 1997.

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