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Senate

(Legislative day of Monday, June 19, 1995)

The Senate met at 9:15 a.m., on the expiration of the recess, and was called to order by the President pro tempore [Mr. THURMOND].

The PRESIDENT pro tempore. Today's prayer will be offered by Commissioner Hodder, national commander of the Salvation Army.

PRAYER

The guest Chaplain, Commissioner Kenneth L. Hodder, national commander of the Salvation Army, offered the following prayer:

Let us pray:

Lord, at the beginning of this new workday, we ask for an enlarged capacity to care for others.

Help us to care—really care—for all those with whom we serve in this Chamber. Many of us are carrying personal and painful burdens of which others are unaware. So help us to work with each other with a gracious spirit of caring, one that reaches beyond the obvious and ministers to the hidden.

And help us to care—really care—for this Nation of others. Surely people matter most. Assist us, then, as we struggle to balance our ideas with others' aspirations, our causes with others' concerns, and our passions with others' needs.

We pledge to assist You in answering this prayer by our thinking, speaking, and doing this day.

And it is in Your strong name that we ask these things and offer ourselves. Amen.

PRIVATE SECURITIES LITIGATION REFORM ACT

The PRESIDENT pro tempore. Under the previous order, the Senate will now resume consideration of S. 240, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 240) to amend the Securities and Exchange Act of 1934 to establish a filing deadline and to provide certain safeguards to ensure that the interests of investors are well protected under the implied private action provisions of the act.

The Senate resumed consideration of the bill.

Pending:

Bryan amendment No. 1474, to restore the liability of aiders and abettors in private actions.

Boxer-Bingaman amendment No. 1475, to establish procedures governing the appointment of lead plaintiffs in private securities class actions.

RECOGNITION OF THE ACTING MAJORITY LEADER

The PRESIDENT pro tempore. The distinguished acting majority leader.

SCHEDULE

Mr. BROWN. Mr. President, this morning, the leaders' time has been reserved, and the Senate will immediately resume consideration of S. 240, the securities litigation bill. There will be 30 minutes of debate in relation to the pending Bryan amendment regarding aiding and abetting, to be followed by 30 minutes on the Boxer amendment regarding lead plaintiff.

At the hour of 10:15 this morning, there will be two stacked rollcall votes on or in relation to the pending amendments.

The Senate will stand in recess today from the hour of 12:30 p.m. to 2:15 p.m. for the weekly policy luncheons to meet.

Mr. President, at this time I suggest the absence of a quorum, and I ask unanimous consent that the time be divided equally.

The PRESIDENT pro tempore. Without objection, it is so ordered. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BRYAN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDENT pro tempore. Without objection, it is so ordered.

PRIVATE SECURITIES LITIGATION REFORM ACT

The Senate continued with the consideration of the bill.

AMENDMENT NO. 1474

Mr. BRYAN. Mr. President, if I might inquire of the Chair, it is my understanding that on the Bryan amendment, there is a time agreement in which the distinguished chairman of the Banking Committee has 15 minutes allotted to him and the proponents of the Bryan amendment have 15 minutes; is that correct?

The PRESIDENT pro tempore. The Senator is correct.

Mr. BRYAN. Mr. President, I yield myself 8 minutes out of my allocated time.

Mr. President, for the benefit of my colleagues, for six decades, the foundation upon which public confidence in the American securities market has been built rests upon two fundamental premises: First, effective regulation by the Securities and Exchange Commission; second, the right of individual investors who have been defrauded to pursue a private cause of action against those wrongdoers.

Mr. President, I greatly fear that S. 240, as it is being processed through this Chamber, will, for all intents and purposes, emasculate that private cause of action, which has been so important in keeping the American securities market safe and sound and investor confidence high. Those are not just statements made by the Senator from Nevada. The former Chairman of the SEC, Mr. Breeden, the last Republican Chairman, made similar statements in

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

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testimony before the Banking Committee during his tenure. The current Chairman, Mr. Levitt, has also made that proposition.

The amendment before us seeks to correct a decision by the Supreme Court decided last year by a narrow 5-to-4 margin that wipes out liability for aiders and abettors.

Now, there has been much debate on the floor of the Senate about proportionate liability, joint and several liability, intentional misconduct, knowing misconduct, and reckless misconduct. None of those distinctions makes a whit of difference if this amendment is not granted, because under the current State of the law, no aider and abettor is liable under that theory, irrespective of his or her misconduct. Everyone is home free.

I cannot conceive of a public policy that would support that conclusion. And, indeed, the prime sponsors of this legislation have previously written—I refer to the distinguished Senator from Connecticut and the senior Senator from New Mexico—expressing their support for restoration of aider and abettor liability.

Interspersed throughout all of this debate has been a great antipathy to plaintiff's lawyers. I understand that antipathy and I do not, for a moment, doubt that there has been some misconduct, and some provisions in S. 240 deal with that misconduct. But let me point out that aiders and abettors are also lawyers, and if misconduct on the part of the plaintiff's bar ought to be addressed—as it ought to—under what theory of social or economic justice, can we assert that those who are part of the conspiracy itself—lawyers and accountants, primarily, and to some extent bankers—in effect, be given a blank check? If they did not sign their names to any of the statements, in effect, they have no liability.

Now, is this theoretical? Is it esoteric? No. If the state of law at the time of the Keating actions—one of the most notorious securities frauds of this century—were in the form that it is today, here is what would occur. My colleagues will recall that Mr. Keating, the primary wrongdoer, was bankrupt. No recovery from him. Some $262 million were recovered as a result of the Keating fraud by private investors. Jeri Mellon, a retired woman who lives in Henderson, NV, a suburb of Las Vegas, who came back, most of her savings were lost as a result of the fraud. She joined with others similarly situated in a class action to recover money. They recovered $262 million.

If that action were brought today, because aiding and abetting is no longer a part of the law as a result of the Central Bank of Denver case—I might add, the Court, in deciding that case, said, look, we do not believe that the statute can be construed to apply to aider and abettor liability, but we sure as the devil believe that there ought to be liability. So this was not a value judgment made by the Court that aiders and abettors ought not to be available. Here are some of the aiders and abettors: Parker Milliken, Kay Sholer, Sidley & Austin, Michael Milken; $121 million of the overall value of $262 million would be wiped out if that action was filed today. So we are down now to $141 million.

Previously, I offered for the consideration of the Senate a recommendation shared by the SEC, by the State Securities Association, by every regulator, by consumer groups, by those charged with public finance responsibilities at the State and local government level, to extend the statute of limitations, which is currently limited to 1 to 3, to make it a 2-year to 5-year statute of limitations.

Had the action against Charles Keating been brought today, 20 percent of the class claims would have been barred because of this restricted statute of limitations. Another $28 million in recovery, wiped out.

These are people like the Jeri Mellons. I suspect that virtually every Member of this Senate has had individuals who lost money as a result of the Keating fraud.

The recovery is down $262 million, to $113 million. Joint and several liability: Under the provisions of S. 240, in order to be jointly and severally liable, you have to either have knowing misconduct or intentional misconduct. Reckless misconduct no longer does it.

Although I recognize a distinction can be made between the two of those, the amendment that Senator SARBANES and I sought to offer in one form or another, sought to make sure that if the primary violator is insolvent, that those who are guilty of reckless misconduct—it is not ordinary negligence, not simple negligence—if a Member of this Chamber goes out this evening, gets in his or her automobile, is involved in an accident and is negligent, that Member is responsible to the party to whom he or she has inflicted the injury. Not so with securities law. Only if they are guilty of reckless misconduct.

In effect, as a result of the changes we make in the joint and several liability, those who are proportionally liable pay only their share. It is estimated that another $67 million would be wiped out in terms of investor recovery if the Keating case were brought today. S. 240 also wipes out the Rico treble damages provision, and another $30 million.

So if the Keating case were brought today, with the state of the law as it exists on this morning as this debate continues, rather than $262 million recovered by innocent investors, many of whom lost their life savings—and a disproportionately large number, small, elderly, retired investors who had little likelihood of ever regaining their loss—$262 million of recovery would be reduced to $16 million.

Mr. President, I ask my colleagues, under what theory of social or economic justice do we want to do this? Sure, we want to get at the plaintiff's lawyers that file frivolous actions, and the enhanced provisions of rule 11 under the Federal Rules of Civil Procedure address that issue.

The amendment before the Senate would simply restore aiding and abetting liability. Zippo, no recovery at all. Intentional misconduct, knowing misconduct, reckless misconduct—not 1 cent could be recovered under a theory of aider and abettor liability under the state of the law today, unless the Bryan amendment is enacted.

May I inquire, I have used my time; how is the time being charged at this point?

The PRESIDING OFFICER (Mr. COVERDELL). The Senator has approximately 3 minutes remaining on his side.

Mr. D'AMATO. Mr. President, this is, admittedly, a very complex subject. We must distinguish between knowingly and intentionally having committed a fraudulent act and recklessly committing an act.

What is the difference between reckless conduct and intentional and knowing fraud? What standard of proof is there between gross negligence, negligence, and recklessness? These are not clear distinctions and it is because of these blurred distinctions that there has been a large body of case law, over the years, trying to make the definitions clear. This is particularly true in the area of reckless conduct; over the years a number of courts have given the interpretation that someone who was not the primary wrongdoer, but participated in the fraud and knowingly and substantially assisted in the fraud could be held liable. This does not seem to me to be reckless conduct but knowing fraud.

Courts have found, over the years, that a firm could be held fully liable for conduct which the average person would consider imprudent, negligent, or careless. Some circuit courts have recognized this so-called aiding and abetting liability as part of the recklessness standard.

Aiding and abetting liability holds the business community to an incredibly high standard, particularly when they can be held liable for damages that are far greater that any damage that they have caused. There is a real culprit to hold liable. The primary wrongdoer is somebody that has really committed fraud, who has practiced avarice and greed, who has wantonly and knowingly broken the law.

The Supreme Court decided that aiding and abetting liability applies to someone who is not the primary wrongdoer but participated in a fraud and knowingly and substantially assisted in the fraud. In the Central Bank of Denver case, the Court decided there was no aiding and abetting liability for private lawsuits involving fraud.

The Supreme Court did not believe that section 10(b) intended to cover aiding and abetting liability. Providing for aiding and abetting liability under

section 10(b) would be contrary to the goals of this legislation.

This bill is aimed at reducing frivolous litigation. Even the Supreme Court recognized that expanding 10(b) to include aiding and abetting liability would lead many defendants to settle to avoid the expense and risk of going to trial.

The Supreme Court said, ''Litigation under rule 10b-a presents a danger vexatiousness, different in degree and in kind, and would require secondary actors to expend large sums even for pretrial defense and the negotiation of settlement.''

As I have said, aiding and abetting liability would require secondary actors—not the primary wrongdoer, the person who has committed the fraud—to expend large sums, even for pretrial defense, and the negotiation of settlement.

Indeed, I do not believe that just because people have made settlements that they were guilty of fraud or that it was right and proper that they were sued.

When 93 percent of the cases—and I know not all the defendants were brought in to these suits for aiding and abetting, I grant that—but 93 percent of the defendants settled. These aiders and abettors are people tangentially involved in the fraud; they are brought into the suits only because they were involved with a scoundrel—a Keating—who was deliberately breaking the law. Often these aiders and abettors are accountants who did not notice the fraud, but possibly should have, yet we would hold them liable as if they committed the fraud. The Supreme Court said last year that aiding and abetting liability did not belong in private lawsuits involving fraud.

Of course, if someone has knowingly, intentionally, misled investors or been involved in committing fraud, they are no longer just aiders and abettors, and can be held liable for their actions.

Under S. 240, people who commit fraud will be treated as primary wrongdoers, as the culpable party, and can be held jointly and severally.

Further, S. 240 grants the Securities and Exchange Commission express authority to prosecute cases against wrongdoers who knowingly aid and abet primary wrongdoers.

This issue is both very interesting and very complex. It is not easy. First, the circuit courts recognized aiding and abetting liability, then the Supreme Court decided there is no place in these lawsuits for this liability. Using the aiding and abetting liability to proceed under rule 10(b) with a lawsuit, which is what this amendment would do, would take us to a standard that the Supreme Court decided should not be applied. Again, I quote that this liability standard ''presents a danger of vexatiousness, different in degree in kind and would require secondary actors to expend large sums, even for pretrial defense and negotiations of settlements.''

This amendment would actually destroy a good part of what this legislation attempts to do in terms of keeping lawyers honest and protecting those people who did not commit fraud, but were associated with those who did. It is my belief that these firms, the so-called aiders and abettors, are only brought in to these suits because of their deep pockets. They are professionals; securities analysts, accountants, and bankers who are involved in some way with the fraudulent party. They get brought in to the lawsuits and have to spend millions of dollars defending themselves. And their lawyers tell them that there is a chance that ''you may be held liable for the full amount.'' Why? Because when the name of a primary wrongdoer like Keating comes up, you are ''guilty by association.''

Any prudent lawyer would have to say that there is a chance you will be held liable if you were involved with a rogue—and there will be more rogues, make no mistake about it. I do not care what kind of legislation we pass here, there will be others who break the laws, who will do terrible things. It is not right that an accountant, law firm or securities broker is dragged in and linked to the fraud because they were asked to counsel and they gave some advice. They did not tell the wrongdoers to lie, they did not participate in fraud, but if they rendered some professional service, by virtue of their being linked with by that fraud they may be held liable by a jury. Do you think that a defendant is going to be able to establish clearly what is reckless conduct and what is not? The jury can find against them and then hold them for hundreds of millions of dollars in damages. That risk is why you have the incredible percentage of settlements.

You heard Senator DODD last evening explain how it was that a prominent firm, one of the big six accounting firms, did $15,000 worth of work, a contract to review something, and was then brought in to the suit. This accounting firm did defend itself and won the case, but in winning the case expended over $6 million. We cannot subject people to that kind of choice. I tell you when that accounting firm is hauled in the next time, it will settle. This amendment would allow a firm that was associated with the fraudulent firm to be fully liable for the damages. This would move us in the wrong direction, so I have to oppose this amendment.

I yield the floor.

The PRESIDING OFFICER. Who seeks recognition?

Mr. BRYAN. Mr. President, may I inquire what the state of time is?

The PRESIDING OFFICER. The Senator from Nevada has 2½ minutes. The Senator from New York has 2 minutes.

Mr. BRYAN. Mr. President, let me, in 2½ minutes, tell my colleagues this amendment has nothing to do with frivolous lawsuits, absolutely nothing. This amendment simply indicates whether or not the Senate of the United States believes that those who counsel, who aid, who provide assistance to those who perpetrate investor fraud, ought to be held responsible. Under the current law, aiders and abettors are not liable. Among that group are the lawyers who have been the focus of much criticism during the course of the debate.

Sidley & Austin, Jones Day. These are law firms. A vote against the Bryan amendment places the individual Senator and this Congress on record as saying this kind of conduct—misconduct in my view—ought to be tolerated, approved, and tacitly accepted. I cannot conceive of such a result.

A decade ago the Congress of the United States enacted a piece of legislation, Garn-St Germain, that led, within a decade, to a savings and loan industry which cost the American taxpayers tens and tens of billions of dollars.

It is my view that S. 240, in its present form, without the kinds of amendments the distinguished Senator from Maryland and I have tried to add, will cause investor losses of those magnitudes over the ensuing years, and essentially private causes of action will be destroyed.

Mr. SARBANES. Will the Senator yield for a question?

Mr. BRYAN. I will be pleased to yield to the Senator.

Mr. SARBANES. Am I correct, under the legislation before us, there could be no liability whatever imposed in a private action for aiding and abetting?

Mr. BRYAN. The Senator is correct, no liability.

Mr. SARBANES. In the Keating case, a large part of the recovery of the victims came from aiders and abettors, did it not?

Mr. BRYAN. If I might respond to the Senator, out of $262 million recovered in a private cause of action—because Mr. Keating himself was bankrupt—$121 million of the $262 million was recovered from aiders and abettors. Under the state of law currently, that $121 million is wiped out.

Mr. SARBANES. What public policy reason could there possibly be for letting aiders and abettors go completely free? I understand there could be an argument about what standards to impose. But on what basis in public policy is it that aiders and abettors go free?

The PRESIDING OFFICER. The time of the Senator from Nevada has expired.

Mr. BRYAN. Might I inquire if the acting floor manager will yield me 1 minute to respond to the question of the Senator from Maryland?

Mr. SARBANES. Mr. President, I ask unanimous consent the Senator be allotted 1 additional minute.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BRYAN. Mr. President, in responding to the question of the Senator from Maryland, I am at a total loss. It

is beyond my comprehension, whether one positions himself or herself in the political spectrum to the left of Fidel Castro or to the right of the Sheriff of Nottingham, under what theory you could say this kind of conduct ought to be encouraged and to simply say to these folks, by and large: Hey, as long as you are looking the other way and not signing any documents, you can, with total impunity under the private cause of action, counsel, aid, and provide tangible help to perpetrators of investor fraud. It is simply incomprehensible, I respond to my good friend.

Mr. SARBANES. I thank the Senator.

The PRESIDING OFFICER. Does the Senator from Colorado seek recognition? You have 2 minutes left. The Chair recognizes the Senator from Colorado.

Mr. BROWN. Mr. President, the distinguished Senator from Nevada, I think, is a very thoughtful Member and brings persuasive arguments to the floor on this and other issues that he takes on. The concern I find, as I listen to this, is the potential of holding someone liable for another's actions when they had no idea that fraud, that action, was taking place. That is what this amendment does. This would hold someone, an accountant, someone else involved in this process who has no idea that a fraud is taking place, this would hold them liable even though they did not commit the fraud and they did not even know about the fraud.

Making someone liable, taking millions of dollars away from them, putting them through this when they did not even know about the action seems to me to be outrageous.

We yield the remainder of our time on this side.

AMENDMENT NO. 1475

The PRESIDING OFFICER. Under the previous order, there will now be 30 minutes debate on the Boxer amendment No. 1475, to be equally divided in the usual form.

The Senator from Colorado.

Mr. BROWN. Mr. President, if the Senator from California is willing, I would like to address an inquiry to her concerning her amendment.

Mrs. BOXER. Certainly.

Mr. BROWN. On the first page of the amendment, on page 98, following through line 100, you put in a subsection and insert the following subsection that reads:

> Not later than 90 days after the date on which a notice is published under subparagraph (A) or (B) of paragraph (1), the court shall determine whether all named plaintiffs acting on behalf of the purported plaintiff's class who have moved the court to be appointed to serve as lead plaintiff under paragraph (1)(A)(ii) have unanimously selected a named plaintiff or plaintiffs to serve as lead plaintiff or plaintiffs of the purported plaintiff class . . . .

I did not read all of that. My question relates to it, and I frankly find it a bit confusing. When we say ''all named plaintiffs acting on behalf of the purported plaintiff class,'' who is it we are describing?

Mrs. BOXER. Everyone in the class. We took it right from your bill. I guess the bill the Senator is supporting; that you have to advertise that class actions are about to take place and every named plaintiff has a chance to vote on who the lead plaintiff shall be. We think this is very democratic. Unlike your bill, the richest investor will be the lead plaintiff.

Mr. BROWN. If the Senator would, my question is I think very specific. When it says all named plaintiffs, who are those? Are those solely the ones who brought the suit?

Mrs. BOXER. Every plaintiff of the class who responded to become part of the suit. There is a 90-day period where they go out and advertise.

Mr. BROWN. It would be the people who brought the suit as well as people who decided to add their names?

Mrs. BOXER. Everyone; all plaintiffs who are interested in being part of the suit gets to vote on who the lead plaintiff shall be.

Mr. BROWN. If that is the case, why do we have language ''acting on behalf of the purported plaintiff class who have moved the court to be appointed to serve as lead plaintiff?'' What if one of the outside plaintiffs has not moved the court to serve to be plaintiff?

Mrs. BOXER. I think the Senator is confusing a very simple straightforward point. We take the language straight out of S. 240. In 90 days, there are newspaper advertisements of general circulation, and everyone who is part of the class is invited to join in the class. At that point in time, all the plaintiffs who are in the suit—and everyone is invited to be in—get to vote on who they want the lead plaintiff to be. If there is not a unanimous selection then the judge appoints.

Mr. BROWN. My question was very specific. The question I have is this: If the intention is to have it include all plaintiffs, why do we modify this by saying ''who have moved the court to be appointed to serve as lead plaintiff''? What if one of the outside plaintiffs that joined the suit does not petition the court to serve as lead plaintiff? Does that mean that they have no voice under subparagraph (a) and they are not required to consent to the naming of lead plaintiff?

Mrs. BOXER. My understanding of this amendment is clear. Everyone who has joined in the suit has an equal say. And if they cannot agree, then the court shall appoint. In S. 240 it is the richest investor. So the answer is all the plaintiffs get to choose.

Mr. BROWN. Let me just say, at least for this Member, I was intrigued by the arguments of the Senator from California last night. As I read the bill, it appears to me that the language here seems to imply that someone who is not in the original filing, or more specifically had not moved the court to be appointed to serve as lead plaintiff, would not have a voice in that unanimous consent required under selection for subparagraph (a).

Mrs. BOXER. No. I would address my friend to page 3 on the selection of lead counsel. The lead plaintiff or plaintiffs appointed under paragraph 2 shall be subject to the approval of the court selecting the named counsel. So everyone has a chance. All the plaintiffs have a chance to vote.

Mr. BROWN. My suggestion would be if the Senator does not want to limit that plaintiff class, having the words ''who have moved the court to be appointed to serve as lead plaintiff,'' I think gives the impression that you have to have been in that group. But the Senator mentioned ''rich'' under the bill. I have looked in the bill. I do not find that term. Could she show me where in the bill this indicates that the richest one determines?

Mrs. BOXER. Certainly I will. Unfortunately, at this point I would need a quorum call to find the exact place because I am working off my amendment. My friend did not tell me he was going to question me about the exact wording of the bill itself. So could we put a quorum call in place? I could find the section.

Mr. BROWN. Mr. President, I suggest the absence of a quorum.

Mr. SARBANES. If the Senator will withhold, the bill says ''in the determination of the court has the largest financial interest in the relief sought by the class'' on page 99 of the bill.

The PRESIDING OFFICER. Who yields time?

Mr. SARBANES. Will the Senator yield so I may respond to his question?

Mr. BROWN. Surely.

Mr. SARBANES. On page 99 of the bill, the language is ''in the determination of the court has the largest financial interest in the relief sought by the class.'' That is the language.

Mr. BROWN. That was not the question. That is an unresponsive answer. The question was where in the bill is ''rich''? The Senator had made the point.

Mr. SARBANES. ''The largest financial interest in the relief sought by the class.''

Mr. BROWN. The Senator from Maryland is telling me ''rich'' is not in the bill, that they use terms with regard to the ''largest financial.''

Mr. SARBANES. The richest person in the sense of having the ''largest financial interest in the relief sought by the class'' is the one you are putting forward.

Mr. BROWN. Mr. President, let me simply note this.

Mr. SARBANES. ''The largest financial interest.''

Mr. BROWN. I believe it is my time. Mr. President, who has the time?

The PRESIDING OFFICER. The Senator from Colorado has the floor.

Mr. BROWN. Mr. President, we all make mistakes in debate on the floor. I certainly am included. The point I wanted to make was that the terms used by the Senator from Maryland

and the Senator from California are in fact not in the bill. The recitation and description of what was in the bill is not in the bill. What was said was inaccurate. Mr. President, I think there is an important point here.

Let us assume you have two lawyers from New York who bring a class action against Wells Fargo. Each one of them is worth $10 million each. The public employees pension fund is also a shareholder of Wells Fargo. The manager of that public employees association has total assets about one-tenth of what the lawyers from New York have. Who is rich? Who is the richest? Are the people worth $10 million, the lawyers in New York, who are professional plaintiffs, the poor ones in this? The answer is obvious. The professional plaintiffs who are worth $10 million each are a lot richer than the person who happens to work for a living and manage the assets of the California employees' pension fund. But the California employees' pension fund has a great deal larger financial interest.

Mr. President, I simply want to assure the Senator from California, for whom I have great respect, that if she is concerned about improving on who we select to be the lead plaintiff, I will join her. But setting up a provision where professional litigants get to name the lead plaintiff and close other people out I think is a problem. The way I read this measure is it says that the people who bring the suit agree, and they may only have one share each. They may be in this only for the purposes of getting a lawsuit and naming the plaintiff and getting to name the lawyer. But if the people who are professional litigants agree and bring the suit, they can name the lead plaintiff. They can control the lawsuit. They can name the lawyer and they can benefit indirectly from the attorney's fees. That is what this is all about.

The Senator has indicated that it is not her intention to exclude those who did not specifically move the court to be appointed as lead plaintiff. It is not her intention to exclude plaintiffs. It may not have done that. But that is the wording of the amendment. If that is not the intention, the language ought to be corrected.

Mr. President, more important than anything else, if her purpose is to get the best lead plaintiff possible, I would suggest that we ought to focus on that question, and that we should not carve out an exception for those who are professional litigants who may have brought the suit.

I reserve the remainder of my time.

Mrs. BOXER addressed the Chair.

The PRESIDING OFFICER. The Chair recognizes the Senator from California.

Mrs. BOXER. I have heard a lot of distortions on this floor, but this one takes the cake. I say to my friends on the other side, if you ask the public who they stand and represent, most people would say it is those in the upper income brackets. And this argument proves the point better than I ever could.

That is correct, I said the ''richest'' investor, and my friend takes great umbrage with that. Let us just say largest investor. That is what you say in the bill. Let us stick with that. Because let me tell you, if S. 240 had been the law of the land during the Keating case, you know who the largest investor was? A company that turned out to be guilty in that case, a codefendant in that case. So just because somebody has the largest investment should not make them automatically the lead plaintiff.

Now, my friend can ignore it all he wants, all he wants, but that is exactly what S. 240 does. And I think it is elitist, I think it is antidemocratic, and I say to my friend that just because you may be wealthier, richer, if you will—and I am not going to change my language—have a bigger investment than everyone else does not make you better than anyone else. And if America stands for anything, it stands for that premise.

Now, I want my friend to know—and he cares a lot about process—that this provision he defends here today—and I ask my friend, was my friend involved in the writing of this bill? I ask my friend from Colorado, did he participate in the markup on this bill?

Mr. BROWN. I am not a member of the committee.

Mrs. BOXER. I think that is a point. He stands up here, and he argues about something he never marked up. The fact is we held a lot of hearings on this, and no one ever brought this issue forward about selecting the lead plaintiff. It was brought 4 days before the markup, with not one hearing. The SEC has concerns about it. The SEC is very concerned about it. They do not know how it would work. They think it is going to lead to more litigation, because what if what the Senator from California says is accurate, that in many cases you are going to have the lead plaintiff be someone who is eventually named as a coconspirator, a codefendant? Imagine the kind of lawsuits that would bring about.

Look, I do not care who is appointed attorney. I could care less. There is going to be an attorney for the class. The question is, should it be automatically the prerogative of the largest investor to determine the course of the case?

Now, in the Boxer amendment, we say, if the plaintiffs cannot agree unanimously—and any plaintiff can be part of that discussion—then the judge gets to select the lead plaintiff based on a number of criteria.

I am very proud that Senator BINGAMAN and many others are supporting me in this amendment. We can twist and turn and chastise people for using plain English on this floor, and maybe my friend just wants to talk about the exact language in the bill. I never thought we did that around here. I thought we tried to get it down to where people can understand. My friend wants me to say the ''largest'' investor? I say the ''richest'' investor, and he takes me on as if I have committed some kind of a sin. I stand by it. I think we need the Boxer amendment. I think we need to send a message from this Chamber that just because you are the largest investor does not give you the right to take over from everybody else, because let me tell you sometimes the largest investor does not really stand that much to lose because maybe he has a very large dollar investment but in accordance with his net worth it is not much, and someone who has invested $5,000 or $10,000 or $20,000 has much more to lose.

I brought to my colleagues' attention yesterday a woman from California who was bilked of $20,000 by Charles Keating. That may not sound like a lot to my Republican friend on the other side, who chastised me for using the word ''rich,'' but I can tell you that $20,000 was the difference for this woman in being able to sleep at night and pay her bills and have a sense of security.

Mr. President, at this time I reserve the remainder of my time and ask, if there is a quorum call, it be divided from each side equally.

The PRESIDING OFFICER. Who yields time?

Mr. BROWN addressed the Chair.

The PRESIDING OFFICER (Mr. CAMPBELL). The Senator from Colorado.

Mr. BROWN. Mr. President, I feel bad that the Senator from California has responded the way she has. At least my experience in this Chamber and the legislative process is that when you read the language and there is a problem with the language and you offer to work on that, Senators are grateful. All of us have an interest in good legislation.

As I read this amendment—and I have quoted the exact language—it says, ''acting on behalf of the purported plaintiff class who have moved the court to be appointed as lead plaintiff.''

As I read that—and I certainly could be wrong; I do not mean to hold myself out as the authority—I think it suggests in very plain English you have to move the court to be appointed as lead plaintiff to come under that category. That means some people could be plaintiffs that would be excluded. That is a drafting problem. It may not be a drafting problem, but it certainly ought to be clarified, and it ought to be clarified for the benefit of the Senator from California.

Now, the Senator from California has talked about democracy in this process. Mr. President, what we are involved with here today, if this amendment passes, is stuffing the ballot box. And let me be specific. You can have one share of stock and bring the class action, and the California public employees trust fund that may have a

million shares of stock and represent 100,000 people may be excluded from the process of selecting the lead plaintiff.

Now, that is not right, and that is not democracy. Should the California public employees trust fund, a retirement fund, that owns a million times as many shares as a professional plaintiff, have more voice? I think they should. If they own a million times as many shares, they surely should have a larger voice in the selection of this.

This amendment stuffs the ballot box. It says the people who brought the suit and who have moved the court to be appointed to serve as lead plaintiff end up, under the first option, being able to dictate who the lead plaintiff is and end up being able to dictate who the lawyer is who gets the fees and ends up being able to help guide the case.

Now, that is wrong. To have a person with one share or five shares control an action where the California public employees trust fund may have a million shares is wrong.

Let me reiterate. If there is interest in adding fairness to this process, we ought to do it. One thing I might mention, because I think what was mentioned on this floor was that the person who has the largest financial interest may well have a conflict of interest, the bill deals with that on page 100.

1. Will not fairly and adequately protect the interests of the class.

Now, that is one of the grounds in which you can exclude someone, even though they may have the largest financial interest.

2. Is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

Both of those, Mr. President, would apply as we have talked.

The PRESIDING OFFICER. The Senator's time has expired.

The Senator from California has 7 minutes 52 seconds remaining.

Mr. SARBANES. Will the Senator yield me just 1 minute?

Mrs. BOXER. Certainly.

The PRESIDING OFFICER. The Senator from Maryland is recognized for 1 minute.

Mr. SARBANES. Mr. President, I wish to say to the Senator from Colorado that my perception of the dispute that arose as between him and the Senator from California was his taking issue with her reference to the ''richest'' plaintiff being named as the lead plaintiff under the bill.

The Senator says, well, the word ''richest'' is not in the bill. That is correct. But what is in the bill is that the lead plaintiff shall be the one who has the largest financial interest, and in that sense I think it is fair to say that is the richest of the plaintiffs, the largest financial interest.

Now, second, the Senator says, well, we have covered the problem of a conflict of interest in the bill. That is a rebuttable presumption and, as someone said last night, it is really written to be almost irrebuttable.

The SEC, which examined this provision of the legislation, having looked at it and having looked at the very provision the Senator is making reference to, said that:

It may create additional litigation concerning the qualifications of the lead plaintiff, particularly when the class member with the greatest financial interest in the litigation has ties to management or interests that may be different from other class members.

So clearly there is a problem here. And the way the bill is written it may place the lead plaintiff position in the hands of people about whom the SEC has raised large and significant questions.

I thank the Senator for yielding.

Mrs. BOXER. I thank my friend.

Mr. BROWN. May I respond?

Mrs. BOXER. Mr. President, how much time do I have?

The PRESIDING OFFICER. Five minutes fifty seconds.

Mrs. BOXER. How much time does the Senator from Colorado have remaining?

The PRESIDING OFFICER. The Senator from Colorado has none.

Mrs. BOXER. I will be glad to yield if I have time at the end, but we are getting down to the last 5 minutes of this discussion.

Mr. SARBANES. Mr. President, I ask unanimous consent that the Senator from Colorado have 1 minute—I had 1 minute—to make a point in response, so the Senator from California can preserve her time in order to make her closing statement.

The PRESIDING OFFICER. Without objection, it is so ordered. The Senator from Colorado has an additional 1 minute.

Mr. BROWN. Mr. President, I want to thank the Senator from Maryland for his kindness. I simply want to join the Senator from Maryland to indicate that I think he has a valid point. If someone has a conflict of interest, obviously that ought to be addressed.

I believe the plain language of the bill on page 100 covers that: ''will not fairly and adequately protect the interest of the class.'' I think that covers it. But if there is better language or more language, I want to assure him I will support it, and I will be glad to join him in that effort.

But, Mr. President, the point remains, we are not dealing with disqualifications on that basis. What we are dealing with is a whole new way to stack the deck, where someone with very few shares who brings the suit can control the action and pick the attorney, and someone who has a lot more shares and yet not be as rich, as has been used on this floor, will be closed out of the process. Stacking the deck is the problem with this amendment. If we eliminate that portion of it, I think we would have something that all parties could work together on.

I yield back any remaining time.

The PRESIDING OFFICER. The Senator's time has expired. Who yields time?

Mrs. BOXER. Mr. President, I want to ask my friend from Colorado a question. My friend from Colorado made two attacks on this Senator's amendment, certainly not on the Senator, so I do not take it personally at all. The two attacks were, one, that the Senator from California said the richest investor and he took umbrage and said, ''Well, wait a minute, the word 'richest' is not in the bill.'' OK, that is right, the largest investor—I say the richest investor. I stand by that, with all due respect.

Second, the Senator says that only a certain number of the plaintiffs can, in fact, vote on who the plaintiff should be. The fact is if the Boxer amendment becomes law, every single potential plaintiff in the country, member of the class action, has an opportunity to be part of the selection. This is not some secret thing of stuffing the ballot box. Any plaintiff who joins the class, petitions the court, votes.

Now, if the Senator believes that the largest investor would not get involved in that, I do not know what the Senator thinks. But the fact is I do not care who the attorney is who gets to represent either side. It does not make a whit's worth of difference to me. What I care is that the lead plaintiff be selected in a way that is fair.

The fact of the matter is that the Banking Committee never held a hearing on this and it shows up in the bill 4 days before the markup. It is wrong to legislate this way. I believe it is elitist.

I pointed out to this Chamber last night that if S. 240 had been law during the Keating case and the richest investor, or as my friend would prefer, the largest investor had been named lead plaintiff, it would have been someone who was guilty along with Keating, someone who actually wound up paying to make those——

Mr. DODD. Will my colleague yield?

Mrs. BOXER. I will not yield at this time. I have very little time. I ask my friend from New Mexico if he wishes to have a couple of minutes in this debate. I will reserve that for him.

Mr. BINGAMAN. Mr. President, I will respond that I would like a couple minutes to support the amendment by the Senator from California.

Mrs. BOXER. I say to my friend, how much time do I have?

The PRESIDING OFFICER. The Senator has 3 minutes.

Mrs. BOXER. I yield 2 minutes to my friend, and then I will conclude.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. BINGAMAN. Let me briefly say I support the effort of the Senator from California to amend the bill in this regard. This provision, this most adequate plaintiff idea, as I understand, was proposed as part of a substitute in committee. There was no hearing held on it. I believe that is the case.

Mr. SARBANES. If I could say, the Senator is correct, there have been no

hearings on this issue. It was not considered at any point until it appeared in the draft.

Mr. BINGAMAN. Mr. President, I think one of the hallmarks of our legal system has always been that a person's right to go to court or a person's right to have his or her case presented in court should not be strictly tied to the person's financial condition. We should not means test justice, as the saying goes.

I think where you get a provision like this where there is a presumption that the plaintiff who has the most invested is the most adequate plaintiff and, therefore, should control the litigation, that comes very close to means testing justice. It causes me great concern that we would have this kind of a provision.

Clearly, there have been groundless lawsuits brought, and that is the purpose. The purpose of this legislation is to deal with that. I understand that. I support this legislation. I am a cosponsor of this legislation, but when I cosponsored it, there was no provision in it for most adequate plaintiff.

Now there is a presumption that those who have the most invested should control the litigation. I do not know that that is always true. I do not know that that should always be the case. Therefore, I do have problems with the bill as it now stands.

The PRESIDING OFFICER. The Senator's 2 minutes have expired.

Mrs. BOXER. I yield the Senator another 25 seconds.

Mr. BINGAMAN. I will just say, the Senator from California has made a very good-faith effort to correct this. I support her efforts. I hope the Senate will adopt her amendment.

The PRESIDING OFFICER. The Senator has 43 seconds remaining.

Mrs. BOXER. Mr. President, I gave an example of if S. 240 was the law and who would be the lead plaintiff in the Keating case. Let me give another example.

The Wall Street Journal reported last night that a Wall Street investment bank filed a class action suit against Avon Products for securities fraud. That Wall Street bank was supposed to represent the interest of small investors, but the Journal reported that that Wall Street bank tried to get Avon to settle the case by giving them $50 million to invest. That is the way they thought they would act in the best interest of the class.

Now I say to my friends, this is absurd. There is no way that small investors would have benefited from that type of a settlement, and this bill would prevent those small investors from discovering the secret deal because they would have to know about it before they could use subpoenas.

I hope my colleagues will support the Boxer-Bingaman amendment.

Mr. BENNETT. Section 102 of the legislation would require courts to consider a motion by a purported class member to become a lead plaintiff and would require courts to appoint as lead plaintiff the class member ''most capable of adequately representing the interests of the class member.'' The bill sets up a rebuttable presumption that the most adequate plaintiff is the person who has made such a motion, who has the largest financial interest in the relief sought by the class, and who satisfies the requirements of rule 23 of the Federal Rules of Civil Procedure. This presumption may be rebutted if a member of the class proves that the presumptively most adequate plaintiff will not fairly and adequately protect the interests of the class or is subject to unique defenses.

What is the purpose of this provision?

Mr. DODD. This provision has two essential purposes. First, it will improve class member choice, by giving class members an opportunity to request service as lead plaintiff. Second, it will enhance a court's ability to appoint as lead plaintiff any class member who has requested service and who otherwise meets the conditions of the provision.

Mr. BENNETT. Would this provision require courts to name any institutional investor as lead plaintiff?

Mr. DODD. No. Under the bill, a court may only appoint a plaintiff who has asked, in a motion to the court, to serve as lead plaintiff. Moreover, the institutional investor who asks to serve must satisfy the conditions of rule 23, which authorizes the court to determine whether such a party should serve as representative plaintiff in order to facilitate management of the case. The court also has to determine that the party who asks to serve has the largest financial interest in the relief sought. Finally, the presumption as to most adequate lead plaintiff could be rebutted under the bill.

Mr. BENNETT. Would the bill require any institutional investor to request that its be appointed as lead plaintiff?

Mr. DODD. No. The bill merely gives each class member the opportunity to request service. In no way does it obligate any member to do so. Institutional and other investors would continue to have the right simply to remain class members and not serve as lead plaintiff, and they may select that approach independent of any responsibility to the other class members or to anyone else.

Mr. BENNETT. Does this bill impose any new fiduciary duty on an institutional investor to its shareholders or beneficiaries, or to other class members, to request service as lead plaintiffs?

Mr. DODD. No. The bill imposes no fiduciary or other obligation on institutions or other plaintiffs to serve or not to serve as lead plaintiffs. Moreover, the court would have no authority to impose such an obligation. For example, rule 23 authorizes the court to make certain determinations about who should serve as representative plaintiff. These determinations concern management of the case, and they do not authorize the court to require a plaintiff to serve as representative due to any perceived responsibility to the other class members or to anyone else.

The PRESIDING OFFICER. All time has expired.

AMENDMENT NO. 1474

The PRESIDING OFFICER. Under the previous order, the question now is on agreeing to amendment No. 1474, offered by the Senator from Nevada [Mr. BRYAN]. The yeas and nays have been ordered.

Mr. SARBANES addressed the Chair.

The PRESIDING OFFICER. The yeas and nays have not been ordered. The Senator from Maryland.

Mr. SARBANES. Mr. President, I believe under the procedure we are following, the Senator has 1 minute to set out his amendment; is that correct?

The PRESIDING OFFICER. That is 2 minutes for debate prior to the second vote.

Mr. D'AMATO. I ask unanimous consent that there be 1 minute equally divided for Senator BRYAN.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. D'AMATO. I do not believe the yeas and nays have been ordered.

The PRESIDING OFFICER. The Senator is correct.

Mr. D'AMATO. I request the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. D'AMATO. As relates to the Boxer amendment, have the yeas and nays have been ordered?

The PRESIDING OFFICER. The yeas and nays have not been ordered.

Mr. D'AMATO. I request the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The Senator from Nevada is recognized.

Mr. BRYAN. Mr. President, I want to make this very clear. I have said it ad nauseam. The Bryan amendment has nothing to do with frivolous lawsuits. The question is whether or not the Senate wants to go on record as tolerating, allowing, and permitting the conduct of aiders and abettors, whether intentional, knowingly, or reckless, to go unpunished. That is the state of the law.

This amendment would say that lawyers, accountants, bankers, and others that aid and abet securities fraud will be held liable. That was the law until the Central Bank case was decided, and the Supreme Court in deciding that case made it clear that they were not saying that aiders and abettors ought not to be liable. They just very narrowly interpreted the statute. We have hit the plaintiffs' lawyers for their frivolous actions, but how can we ignore the conduct of lawyers who counsel

those perpetrating securities fraud? If we fail to adopt the Bryan amendment, we are simply saying to that group of lawyers that you can continue and be free to continue your activities, and that may cost literally hundreds of millions of dollars to innocent investors.

Mr. D'AMATO. Mr. President, I yield 1 minute to Senator DODD.

Mr. DODD. Mr. President, very briefly, what the Senator from Nevada is doing here is raising a whole new standard that was never universally the case prior to the Central Bank of Denver. Here, in the amendment, the standard is knowing and reckless—knowing or reckless. And to include recklessness here, a standard that is so vague the courts have had great difficulty defining it, would be to open up a whole new area of law and allow proportionate liability to be gutted as a result of this amendment. What we have done with this bill is, of course, allowed the SEC to bring a Government action in the aiding and abetting.

Where you do have fraudulent intent, joint and several applies. Proportionate liability does not. In that case, where you have even the casual conduct of an aider and abettor, they would be trapped. We try to avoid when you do not have that standard being met, just a small mistake, which can be the case of a lawyer or accountant, In the process, should not be held fully accountable for the entire cost. So the adoption of this amendment would destroy that very effort which is central to this bill. So, for those reasons, because recklessness is used here—were this to be an actual knowledge—words of art in describing that—I might have some different views on this amendment. But the fact of it is, using the recklessness standard, I think, takes this far beyond where we even were before—before the Supreme Court ruled in the Central Bank of Denver case, where certain courts in this land held it to a much higher standard than recklessness.

So for that reason, I reluctantly urge my colleagues to reject this amendment.

Mr. D'AMATO. May I inquire? I did not know if the Senator from California wanted to use her 1 minute now.

Mrs. BOXER. In between the votes, I believe, is what the unanimous-consent says. I would prefer it before the next vote, before the vote on the Boxer amendment, which is what it said in the unanimous-consent request.

Mr. D'AMATO. Fine.

The PRESIDING OFFICER. The question is on agreeing to amendment No. 1474 offered by Mr. BRYAN.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. BOND (when his name was called). Present.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 39, nays 60, as follows:

[Rollcall Vote No. 286 Leg.]

YEAS—39

Akaka	Feingold	Kohl
Baucus	Feinstein	Lautenberg
Biden	Ford	Leahy
Boxer	Glenn	Levin
Bradley	Graham	McCain
Breaux	Harkin	Moynihan
Bryan	Heflin	Pryor
Bumpers	Hollings	Robb
Byrd	Inouye	Rockefeller
Cohen	Jeffords	Sarbanes
Conrad	Kennedy	Shelby
Daschle	Kerrey	Simon
Dorgan	Kerry	Wellstone

NAYS—60

Abraham	Gorton	Moseley-Braun
Ashcroft	Gramm	Murkowski
Bennett	Grams	Murray
Bingaman	Grassley	Nickles
Brown	Gregg	Nunn
Burns	Hatch	Packwood
Campbell	Hatfield	Pell
Chafee	Helms	Pressler
Coats	Hutchison	Reid
Cochran	Inhofe	Roth
Coverdell	Johnston	Santorum
Craig	Kassebaum	Simpson
D'Amato	Kempthorne	Smith
DeWine	Kyl	Snowe
Dodd	Lieberman	Specter
Dole	Lott	Stevens
Domenici	Lugar	Thomas
Exon	Mack	Thompson
Faircloth	McConnell	Thurmond
Frist	Mikulski	Warner

ANSWERED ''PRESENT''—1

Bond

So the amendment (No. 1474) was rejected.

Mr. D'AMATO. Mr. President, I move to reconsider the vote.

Mr. DOMENICI. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 1475

The PRESIDING OFFICER. Under the previous order there will now be 2 minutes equally divided for debate prior to the second vote, which will be on the Boxer amendment No. 1475. The Senator will withhold until we have order. The Senate will be in order.

The Senator from California [Mrs. BOXER] has 1 minute.

Mr. FORD. Mr. President, the Senate is still not in order. She deserves to be heard.

The PRESIDING OFFICER. The Senate will be in order. The Senator from California.

Mrs. BOXER. Mr. President, very briefly, if S. 240 as currently written had been the law then, the lead plaintiff in the Keating case would have been one of the guilty parties in the Keating case. That is because S. 240 says the judge must choose the largest investor as the lead plaintiff and the largest investor in the Keating case turned out to be a party to the fraud.

Let us not allow this outrage. This ''largest investor'' language was added, without public hearings, 4 days before markup. The SEC has problems with it.

The Boxer-Bingaman amendment says the following, that after advertising for 90 days, all the plaintiffs——

The PRESIDING OFFICER. The Senator will withhold until we have order. The Senate will be in order.

The Senator from California.

Mrs. BOXER. The Boxer-Bingaman amendment says that after advertising for 90 days, all the plaintiffs get to select the lead plaintiff. If they cannot agree unanimously, then the judge will choose the lead plaintiff, taking into consideration all factors, including conflicts of interest, who the largest investor is, et cetera. Just because someone is rich should not automatically make them the lead plaintiffs. Support Boxer-Bingaman.

The PRESIDING OFFICER. The Senator from New York [Mr. D'AMATO] is recognized for 1 minute.

Mr. D'AMATO. Mr. President, our bill stops the kind of outrageous conduct where the same handful of plaintiffs bring multiple complaints. Mr. Cooperman has been a plaintiff 14 times and has always chosen the same law firm.

Mr. Shore, 10 times, a professional plaintiff.

Mr. Shields, seven times.

Mr. Steinberg, seven times.

William Steiner, six times. They become the lead plaintiffs, they pick the attorneys. Our legislation would prohibit that.

This legislation would give due deference to lead the case to someone who has a real financial stake, not a phony professional plaintiff. This amendment would keep alive that race to the courthouse. That is why I urge a ''no'' vote.

The PRESIDING OFFICER. Does the Senator yield the remainder of his time?

Mr. D'AMATO. Yes.

The PRESIDING OFFICER. The question occurs on the amendment of the Senator from California. The yeas and nays have been ordered.

The clerk will call the roll.

The bill clerk called the roll.

Mr. BOND (when his name was called). Present.

The PRESIDING OFFICER (Mr. THOMAS). Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 41, nays 58, as follows:

[Rollcall Vote No. 287 Leg.]

YEAS—41

Akaka	Ford	Levin
Baucus	Glenn	McCain
Biden	Graham	Moynihan
Bingaman	Harkin	Pell
Boxer	Heflin	Pryor
Bradley	Hollings	Robb
Breaux	Inouye	Rockefeller
Bryan	Jeffords	Roth
Bumpers	Kennedy	Sarbanes
Byrd	Kerrey	Shelby
Conrad	Kerry	Simon
Daschle	Kohl	Specter
Dorgan	Lautenberg	Wellstone
Feingold	Leahy	

NAYS—58

Abraham	Coverdell	Frist
Ashcroft	Craig	Gorton
Bennett	D'Amato	Gramm
Brown	DeWine	Grams
Burns	Dodd	Grassley
Campbell	Dole	Gregg
Chafee	Domenici	Hatch
Coats	Exon	Hatfield
Cochran	Faircloth	Helms
Cohen	Feinstein	Hutchison

Inhofe	Mikulski	Simpson
Johnston	Moseley-Braun	Smith
Kassebaum	Murkowski	Snowe
Kempthorne	Murray	Stevens
Kyl	Nickles	Thomas
Lieberman	Nunn	Thompson
Lott	Packwood	Thurmond
Lugar	Pressler	Warner
Mack	Reid	
McConnell	Santorum	

ANSWERED ''PRESENT''—1

Bond

So the amendment (No. 1475) was rejected.

Mr. D'AMATO. Mr. President, I move to reconsider the vote.

Mr. SARBANES. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 1476

Mr. D'AMATO. Mr. President, I believe under the consent order my friend and colleague from Maryland, Senator SARBANES, is to be recognized for the purpose of offering an amendment. I have asked him to give me the opportunity—and if it looks like I am looking around, I am, because staff was supposed to prepare an amendment dealing with the issue of safe harbor. And in that provision we call for knowingly, intent, and expectation.

If I could have a copy of the bill itself, at page 121 of the bill it says, ''knowingly made.'' These are statements that are knowingly made with the expectation, purpose and actual intent of misleading investors.

There is a very real question as to what do we mean by ''expectation,'' and do we go too far? I do not believe it is a word that is necessary. I think it is gilding the lily, and for that purpose I would submit an amendment, the purpose of which is to delete the word ''expectation,'' so that it would then read: ''knowingly made with the purpose and actual intent of misleading investors.''

I ask unanimous consent that I might be able to submit this amendment and have it considered at this time.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

The clerk will report the amendment.

The bill clerk read as follows:

The Senator from New York [Mr. D'AMATO] proposes an amendment numbered 1476:

On page 121, line 1, delete the word ''expectation,''.

Mr. D'AMATO. Mr. President, I have no illusions. I recognize that this amendment does not answer all those questions or go as far as some might like. But I certainly think it clears up something that would raise a question and is a move in the right direction, and I urge its adoption.

Mr. SARBANES. Mr. President, I welcome the amendment from the Senator from New York. We spoke earlier about introducing it at this point ahead of the general debate on safe harbor. I am quite amenable to that because I want to get a substantive result. This provision was going to be a part of the debate had this not happened, I think as the Senator from New York well recognizes, but we are willing to forego the debate points in order to try to clean something out of the bill. There is still plenty wrong with it, and I am going to address that when we have the general debate on safe harbor. But I support this modification that is being made in the bill, and I hope the Senate will accept the amendment.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

Mr. D'AMATO. I am advised—and I mention this to my colleague and friend—that there is another area of the bill that we will have to modify because it is referred to a second time. But rather than do that at this point in time, I suggest that we go forward, and then later on I will make that modification.

Mr. SARBANES. Why not go ahead?

Mr. D'AMATO. On page 114, line 7, we delete the word ''expectation'' as well. This was not done in the first. I ask that the amendment be modified.

The PRESIDING OFFICER. The amendment is so modified.

The amendment, as modified, is as follows:

On page 121, line 1, delete the word ''expectation,''.

On page 114, line 7, delete the word ''expectation,''.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

So the amendment (No. 1476), as modified, was agreed to.

Mr. D'AMATO. Mr. President, I move to reconsider the vote.

Mr. SARBANES. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. SARBANES. Mr. President, I think under the order I am to be recognized at this point?

The PRESIDING OFFICER. The Senator is correct.

AMENDMENT NO. 1477

(Purpose: To amend the safe harbor provisions of the bill)

Mr. SARBANES. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Maryland [Mr. SARBANES], for himself and Mr. LAUTENBERG, proposes an amendment numbered 1477.

Mr. SARBANES. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

Beginning on page 112, strike line 1 and all that follows through page 126, line 14, and insert the following:

SEC. 105. SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS.

(a) CONSIDERATION OF REGULATORY OR LEGISLATIVE CHANGES.—In consultation with investors and issuers of securities, the Securities and Exchange Commission shall consider adopting or amending rules and regulations of the Commission, or making legislative recommendations, concerning—

(1) criteria that the Commission finds appropriate for the protection of investors by which forward-looking statements concerning the future economic performance of an issuer of securities registered under section 12 of the Securities Exchange Act of 1934 will be deemed not be in violation of section 10(b) of that Act; and

(2) procedures by which courts shall timely dismiss claims against such issuers of securities based on such forward-looking statements if such statements are in accordance with any criteria under paragraph (1).

(b) COMMISSION CONSIDERATIONS.—In developing rules or legislative recommendations in accordance with subsection (a), the Commission shall consider—

(1) appropriate limits to liability for forward-looking statements;

(2) procedures for making a summary determination of the applicability of any Commission rule for forward-looking statements early in a judicial proceeding to limit protracted litigation and expansive discovery;

(3) incorporating and reflecting the scienter requirements applicable to implied private actions under section 10(b); and

(4) providing clear guidance to issuers of securities and the judiciary.

(c) SECURITIES EXCHANGE ACT OF 1934.—Title I of the Securities Exchange Act of 1934 (15 U.S.C. 73a et seq.) is amended by inserting after section 13 the following new section:

''SEC. 37. APPLICATION OF SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS.

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

''(b) SUMMARY JUDGMENT MOTIONS.—Subsection (a) shall apply to any motion for summary judgment made by a defendant asserting that a forward-looking statement was within the coverage of any rule which the Commission may have adopted concerning such predictive statements, if such motion is made not less than 60 days after the plaintiff commences discovery in the action.

''(c) DILATORY CONDUCT; DUPLICATIVE DISCOVERY.—Notwithstanding subsection (a) or (b), the time permitted for a plaintiff to conduct discovery under subsection (b) may be extended, or a stay of the proceedings may be denied, if the court finds that—

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

''(2) a stay of discovery pending a ruling on a motion under subsection (b) would be substantially unfair to the plaintiff or to any other party to the action.''.

Mr. SARBANES. Mr. President and Members of the Senate, this is the issue of safe harbor. I know many Members have heard about this issue. In my judgment, it is an extremely important issue which we now seek to develop. We have actually addressed five major issues in this bill: Joint and several liability, statute of limitations, aiding and abetting, and safe harbor, and the lead plaintiff amendment that was offered by my distinguished colleague from California.

Now, Mr. President, this is an extremely important amendment. It is a very complex issue and some very able people have worked very hard to understand it and try to address it. I hope to develop it here over a reasonably short period.

This amendment that I have sent to the desk, this particular amendment, does not try to define in the statute the standard for safe harbor. That may come later. What this amendment seeks to do is simply to put into this bill the provision on the issue of safe harbor that was in the bill introduced by Senator DODD and Senator DOMENICI.

I want to say to my colleagues who sponsored that bill that this amendment is the provision you cosponsored. The provision that is in the bill before us dealing with safe harbor is not the provision that was in the bill which you cosponsored.

Some may say, ''Well, that's all right, I want the provision that's in this bill.'' But others may not say that. Every Member should understand that the provision that was in the bill which they cosponsored—a significant number of Members cosponsored—is the provision that is in the amendment at the desk. That is the safe harbor provision that people signed on to.

And what Senator DODD and Senator DOMENICI had done is, in effect, create a regulatory safe harbor. They had placed the burden, as it were, on the Securities and Exchange Commission to come up with a definition of safe harbor, and it set out certain standards by which the Commission would be governed.

This is an extremely important matter. It is one about which the Chairman of the Commission is very much concerned. And I submit to my colleagues, at some point in this legislative process, Members ought to stop, look and listen and ask themselves whether they want to continue to be at variance or at odds with very strongly held opinions of the regulators, of the Chairman of the SEC, of the States securities regulators, particularly in a matter as difficult and as complex as the safe harbor issue.

The regulators disagree with a majority of this body on the statute of limitations issue, but the statute of limitations issue is a relatively easily understood issue. The question was, are you going to have 1 and 3 years, or 2 and 5 years? That is not the safe harbor issue.

On May 19, the Chairman of the Securities and Exchange Commission wrote to the Banking Committee a four-page letter entirely devoted to the safe harbor issue. Only the safe harbor issue was discussed in that four-page letter.

The letter itself is complex, let alone the issue. The letter reflects the complexity of the issue.

In that letter, the Chairman states his interest in trying to have changes in the securities litigation issue. He concedes that he would like to see improvements in existing safe harbor provisions. He talks about the need to get accurate forward projections, but he also talks about the need to protect investors.

Mr. President, I ask unanimous consent that the full letter be printed in the RECORD at the end of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. SARBANES. Mr. President, I am quoting:

> A carefully crafted safe harbor protection for meritless private lawsuits should encourage public companies to make additional forward looking disclosure that would benefit investors. At the same time, it should not compromise the integrity of such information which is vital to both investor protection and the efficiency of the capital markets, the two goals of the Federal securities law.

Later he says, and I quote him:

> A safe harbor must be balanced. It should encourage more sound disclosure without encouraging either omission of material information or irresponsible and dishonest information.

Let me repeat that:

> A safe harbor must be balanced. It should encourage more sound disclosure without encouraging either omission of material information or irresponsible and dishonest information.
>
> A safe harbor must be thoughtful so that it protects considered projections but never fraudulent ones. A safe harbor must also be practical. It should be flexible enough to accommodate legitimate investor protection concerns that may arise on both sides of the issue.
>
> This is a complex issue in a complex industry and it raises almost as many questions as it answers. Should the safe harbor apply to information required by Commission rule, including predictive information contained in the financial statements, for example, pension liabilities and over-the-counter derivatives? Should it extend to oral statements? Should there be a requirement that forward looking information that has become incorrect be updated if the company or its insiders are buying or selling securities? Should the safe harbor extend to disclosures made in connection with a capital raising transaction on the same basis as more routine disclosures as well? Are there categories of transactions, such as partnership offerings or going private transactions, that should be subject to additional conditions?
>
> There are many more questions that have arisen in the course of the Commission's exploration of how to design a safe harbor. We have issued a concept release, received a large volume of comment letters in response and held 3 days of hearing, both in California and Washington. In addition, I have met personally with most groups that might conceivably have an interest in the subject—corporate leaders, investment groups, plaintiffs lawyers, defense lawyers, State and Federal regulators, law professors and even Federal judges.
>
> The one thing I can state unequivocally is that this subject eludes easy answers.

Let me repeat that last statement. This is Chairman Levitt:

> The one thing I can state unequivocally is that this subject eludes easy answers.

Then he goes on to say:

> Given these complexities and in light of the enormous amount of care, thought and work that the Commission has already invested in the subject, my recommendation would be that you provide broad rulemaking authority to the Commission to improve the safe harbor.

He then goes on to address considerations if the committee tries to put in a legislative standard, instead of having a regulatory safe harbor. I think Chairman Levitt was absolutely right. That is obviously what Senators DODD and DOMENICI thought when they put in their bill. I do not know how many other people who cosponsored that bill agreed that, in effect, giving this assignment to the Securities and Exchange Commission was the way to do it. As Chairman Levitt said:

> Given these complexities and in light of the enormous amount of care, thought and work that the Commission has already invested in the subject, my recommendation would be that you provide broad rulemaking authority to the Commission to improve the safe harbor.

That is not what was done. The provision that was in the original bill, which is the amendment that is at the desk, was dropped from the bill and instead a legislative standard was substituted.

The provision that was in the bill that is on Members' desks, the original bill, is at page 19 through 22, and those pages, as Members can all see, have been stricken. That is what Members originally signed on to, and that provision has been, as you can see, lined out in this bill, and instead an effort has been made for this body to define the standard in an extremely complex matter. As Chairman Levitt said:

> The one thing I can state unequivocally is that this subject eludes easy answers.

We have just seen an example of that. My distinguished colleague from New York, just before I offered this amendment, got up to offer an amendment to amend the standard that is in the bill. In other words, here we are, they are conceding that the standard in the bill goes too far and needs to be corrected, so we just amended it. I indicated I welcome that amendment because I think this standard that is in the bill, even with the amendment, is an improper standard. But the fact that the amendment was offered is a demonstration of the point I am trying to make about the complexity of this issue and the wisdom of the original approach to, in effect, charge the Commission with the responsibility of defining the safe harbor provision, a matter which the chairman has indicated he was, in fact, working on. Now, as people who were here just a few minutes ago noted, not only was it amended, but then my distinguished colleague from New York neglected to amend another section of the bill which also needed to be amended. So you get some sense of how we are dealing with a very difficult issue. Here we are trying to jury-rig it at the last minute. Now, later, if I have to, I will try to deal with the legislative standard, but I think that fools are rushing in where angels fear to tread,

with all due respect to my colleagues. This is a matter that ought to be put to the Securities and Exchange Commission, just as Senators DODD and DOMENICI proposed in their initial legislation.

On May 19, Chairman Levitt wrote the Banking Committee a four-page letter on safe harbor only. This safe harbor is a catastrophe waiting to happen. And Members must keep in mind the danger that the safe harbor is going to become a haven for pirates. As I have said earlier, it will turn into a pirate's cove. That is where they will shield themselves in order to really perpetrate some egregious frauds on the investing public.

Subsequent to the letter of May 19 from the Chairman of the Securities and Exchange Commission, the majority within the Banking Committee, including the sponsors of the earlier bill, departed from their approach in terms of charging the Commission with the responsibility of developing a safe harbor. I mean, the Commission are the experts, they can hold the hearings, and I will discuss in a minute the hearings they held in trying to resolve this matter. But a majority decided that, well, no, they were going to do a legislative standard.

Efforts began to develop an appropriate legislative standard in discussions with the SEC and others and with members of the committee on both sides, including those of us that are now opposing this legislation. But the end result of that discussion, unfortunately, was an inability to come to an agreement. The definition, the standard in the bill I think is just fraught with danger. In fact, it was just amended by the proponents of this legislation here on the floor only a moment or two ago. They took out one element of it right here, obviously recognizing themselves the deficiencies in it. That illustrates the problem with this body trying to formulate a legislative standard.

I welcome that substantive change, but I do think it illustrates, in a rather demonstrative way, the problem with this body trying to write the legislative standard rather than letting the SEC do it. Now, if we have to write it, I will try to do it, but I think it is a mistake. This is an opportunity for Members, in effect, to go back to the provision that was in the bill.

Let me read what Chairman Levitt said about the provision that was in the markup document. In other words, after this week of working, the committee moved with a document that had this definition, and this is what the Chairman said:

> As Chairman of the Securities and Exchange Commission—

This letter came on the morning of the markup.

> I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection.

And then he discussed the problems that he saw with the provision that is in this legislation. The Chairman of the Securities and Exchange Commission said, ''I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection.''

Mr. DOMENICI. Will the Senator yield for a question?

Mr. SARBANES. Certainly.

Mr. DOMENICI. Does not the safe harbor provision do just that—make sure that willful fraud is still covered, expressly stating that the safe harbor does not apply to knowing fraud?

Mr. SARBANES. I say to the Senator that I do not believe it does so.

Mr. DOMENICI. I do not know what else we can put in.

Mr. SARBANES. That is why Chairman Levitt wrote the letter. He read the provision in the bill.

Mr. DOMENICI. He wrote the letter about a lot of other issues besides that. We addressed his concerns about willful fraud. We have knowledge and intent, which exempt people from the safe harbor.

Mr. SARBANES. This letter was written the morning of the markup and was directed to the very provision in the bill, as brought out of the committee. Senator Levitt wrote an earlier letter, which I quoted from earlier. I do not know if the Senator was on the floor.

Mr. DOMENICI. He is not a Senator yet, is he? Arthur Levitt is not a Senator.

Mr. SARBANES. Chairman Levitt.

Mr. DOMENICI. I wanted to correct the RECORD.

Mr. SARBANES. I am not sure who to apologize to about that.

Mr. DOMENICI. Just to clear up the RECORD.

Mr. SARBANES. I will not try to reach a conclusion, but I do lay out a general apology for anyone who may have been offended by it. There may be differing views of the matter.

But Chairman Levitt wrote an earlier letter, which I quoted from at some length. At one point, it looked like maybe, if we were going to do a statutory definition, we might be able to arrive at an appropriate one. That did not work. The comment I just quoted is what he had to say about the provision that is in the bill. This came to us on the morning of the markup.

Now, the Dodd-Domenici bill—and I must say to my two colleagues that had we stuck with your bill, the number of issues in dispute here on the floor would have been fewer. There still would have been some.

Your bill also had in it the statute of limitations issue, and it had an approach on safe harbor which I think was acceptable, which left us, of course, with the joint and several, on which there is, I think, a sharp difference in perception and philosophy. I recognize that. And there is the aiding and abetting issue.

But the bill was introduced in the last Congress on March 24, 1994. I believe I am correct. If I am in error about that, I hope the two cosponsors will correct me, both of whom are here on the floor.

Now, that bill contained in it this charge to the SEC, which is in the amendment that is at the desk, I say to my distinguished colleagues. This amendment is your language, verbatim, from the bill as you introduced it and the bill which a lot of Members cosponsored.

The SEC put out their concept release on safe harbor on October 13, 1994. Let me just read the summary of their concept release and notice of hearing:

> The Securities and Exchange Commission is soliciting comment on current practices relating to disclosure of forward-looking information. In particular, the Commission seeks comment on whether the safe harbor provisions for forward-looking statements set forth in rule 175 under the Securities Act of 1933, rule 3b–6 under the Securities Exchange Act of 1934, rule 103(a) under the Public Utility Holding Company Act of 1935, and rule 0–11 under the Trust Indenture Act of 1939 are effective in encouraging disclosure of voluntary forward-looking information and protecting investments, or, if not, should be revised, and if revised, how?
>
> The Commission also seeks comment on various changes to the existing safe harbor provisions that have been suggested by certain commentators. Finally, the Commission is announcing that public hearings will be held beginning February 13, 1995, to consider these issues.

They went on to say:

> Comments should be received on or before January 11, 1995. Public hearings will begin at 10 a.m. on February 13, 1995. Those who wish to testify at the hearings must notify the Commission in writing of their intention to appear on or before December 31, 1994.

So the Commission is moving to try to develop a safe harbor. I think it moved relatively promptly after it saw this signal of, in effect, charging them with this mandate.

The Commission received 150 responses on the safe harbor issue. That is more witnesses, by far, more witnesses by far, than the Banking Committee has heard from on all securities litigation issues. The Banking Committee hearings with respect to the safe harbor were eclipsed by the SEC.

The SEC held public hearings, 2 days in Washington, February 13 and February 14. Then a day in California on February 16.

At those public hearings they had 62 witnesses in all. Venture capitalists, law professors, corporate executives, plaintiff's lawyers, defense lawyers, institutional investors.

Mr. President, these are the hearing records of the SEC with respect to the matter of safe harbor for forward-looking statements.

Now, I submit to my colleagues that it is—I do not want to say sheer folly, because at some point we may have to try to work out a legislative standard—but it is certainly imprudent conduct, at the least, to be trying to develop a standard here instead of allowing the Securities and Exchange Commission to develop the standard, which was recognized by the original sponsors of this legislation.

I assume they will argue, ''Well, the Commission had not done it, and therefore we are going to go ahead and do

it.'' The fact is, the Commission is working to do it and trying to struggle through some very difficult and complex issues as the Chairman of the Commission has stated.

He set out a number of questions which I read earlier, and I defy any Member of this body to take those questions and go through them and give me an easy answer to them. Not only do I defy the Members, I defy their staffs to go through it, to go through those questions and work through them—the ones that the Chairman outlined in his letter; of course, there are many others, as he indicated—and give me an easy response.

As the Chairman pointed out, ''A safe harbor must be balanced. It should encourage more sound disclosure without encouraging either omission of material information, or irresponsible and dishonest information.''

Actually, Chairman Levitt and others recognize the need to have more disclosure of information. That is a desirable objective. The question is, what safeguards do we have to ensure that this disclosure of information is not going to set people up to be exploited in fraudulent schemes?

Chairman Levitt went on to say, ''A safe harbor must be thoughtful so that it protects considered projections but never fraudulent ones. A safe harbor must also be practical. It should be flexible enough to accommodate legitimate investor protection concerns that may arise on both sides of the issue. This is a complex issue and a complex industry. It raises almost as many questions as one answers.''

He then details some of those questions, and then goes on to say, ''There are many more questions that have arisen in the course of the Commission's exploration of how to design a safe harbor. We have issued a concept release, received a large volume of comment letters and response, and held 3 days of hearings, both in California and Washington. In addition, I have met personally with most groups that might conceivably have an interest in the subject. Corporate leaders, investor groups, plaintiff's lawyers, defense lawyers, State and Federal regulators, law professors, and even Federal judges. The one thing I can state unequivocally, is that this subject eludes easy answers.''

He then goes on to state his basic conclusion, which is, ''Given these complexities and in light of the enormous amount of care, thought, and work that the Commission has already invested in the subject, my recommendation would be that you provide broad rulemaking authority to the Commission to improve the safe harbor.''

Mr. President, that is what the amendment at the desk does. I urge its adoption. I yield the floor.

EXHIBIT 1

U.S. SECURITIES AND EXCHANGE COMMISSION,
Washington, DC, May 19, 1995.

Hon. ALFONSE M. D'AMATO,
Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: As Chairman of the Securities and Exchange Commission I have no higher priority than to protect American investors and ensure an efficient capital formation process. I know personally just how deeply you share these goals. In keeping with our common purpose, both the SEC and the Congress are working to find an appropriate ''safe harbor'' from the liability provisions of the federal securities laws for projections and other forward-looking statements made by public companies. Several pieces of proposed legislation address the issue of the safe harbor and the House-passed version, H.R. 1058, specifically defines such a safe harbor.

Your committee is now considering securities litigation reform legislation that will include a safe harbor provision. Rather than simply repeat the Commission's request that Congress await the outcome of our rulemaking deliberations and thereby run the risk of missing an opportunity to provide input for your own deliberations, I thought I would take this opportunity to express my personal views about a legislative approach to a safe harbor.

There is a need for a stronger safe harbor than currently exists. The current rules have largely been a failure and I share the disappointment of issuers that the rules have been ineffective in affording protection for forward-looking statements. Our capital markets are built on the foundation of full and fair disclosure. Analysts are paid and investors are rewarded for correctly assessing a company's prospects. The more investors know and understand management's future plans and views, the sounder the valuation is of the company's securities and the more efficient the capital allocation process. Yet, corporate America is hesitant to disclose projections and other forward-looking information, because of excessive vulnerability to lawsuits if predictions ultimately are not realized.

As a businessman for most of my life, I know all too well the punishing costs of meritless lawsuits—costs that are ultimately paid by investors. Particularly galling are the frivolous lawsuits that ignore the fact that a projection is inherently uncertain even when made reasonably and in good faith.

This is not to suggest that private litigation under the federal securities laws is generally counterproductive. In fact, private lawsuits are a necessary supplement to the enforcement program of the Commission. We have neither the resources nor the desire to replace private plaintiffs in policing fraud; it makes more sense to let private forces continue to play a key role in deterrence, than to vastly expand the Commission's role. The relief obtained from Commission disgorgement actions is no substitute for private damage actions. Indeed, as government is downsized and budgets are trimmed, the investor's ability to seek redress directly is likely to increase in importance.

To achieve our common goal of encouraging enhanced sound disclosure by reducing the threat of meritless litigation, we must strike a reasonable balance. A carefully crafted safe harbor protection from meritless private lawsuits should encourage public companies to make additional forward-looking disclosure that would benefit investors. At the same time, it should not compromise the integrity of such information which is vital to both investor protection and the efficiency of the capital markets—the two goals of the federal securities laws.

The safe harbor contained in H.R. 1058 is so broad and inflexible that it may compromise investor protection and market efficiency. It would, for example, protect companies and individuals from private lawsuits even where the information was purposefully fraudulent. This result would have consequences not only for investors, but for the market as well. There would likely be more disclosure, but would it be better disclosure? Moreover, the vast majority of companies whose public statements are published in good faith and with due care could find the investing public skeptical of their information.

I am concerned that H.R. 1058 appears to cover other persons such as brokers. In the Prudential Securities case, Prudential brokers intentionally made baseless statements concerning expected yields solely to lure customers into making what were otherwise extremely risky and unsuitable investments. Pursuant to the Commission's settlement with Prudential, the firm has paid compensation to its defrauded customers of over $700 million. Do we really want to protect such conduct from accountability to these defrauded investors? In the past two years or so, the Commission has brought eighteen enforcement cases involving the sale of more than $200 million of interests in wireless cable partnerships and limited liability companies. Most of these cases involved fraudulent projections as to the returns investors could expect from their investments. Promoters of these types of ventures would be immune from private suits under H.R. 1058 as would those who promote blank check offerings, penny stocks, and roll-ups. It should also address conflict of interest problems that may arise in management buyouts and changes in control of a company.

A safe harbor must be balanced—it should encourage more sound disclosure without encouraging either omission of material information or irresponsible and dishonest information. A safe harbor must be thoughtful—so that it protects considered projections, but never fraudulent ones. A safe harbor must also be practical—it should be flexible enough to accommodate legitimate investor protection concerns that may arise on both sides of the issue. This is a complex issue in a complex industry, and it raises almost as many questions as one answers: Should the safe harbor apply to information required by Commission rule, including predictive information contained in the financial statements (e.g. pension liabilities and over-the-counter derivatives)? Should it extend to oral statements? Should there be a requirement that forward-looking information that has become incorrect be updated if the company or its insiders are buying or selling securities? Should the safe harbor extend to disclosures made in connection with a capital raising transaction on the same basis as more routine disclosures as well? Are there categories of transactions, such as partnership offerings or going private transactions that should be subject to additional conditions?

There are many more questions that have arisen in the course of the Commission's exploration of how to design a safe harbor. We have issued a concept release, received a large volume of comment letters in response, and held three days of hearings, both in California and Washington. In addition, I have met personally with most groups that might conceivably have an interest in the subject: corporate leaders, investor groups, plaintiff's lawyers, defense lawyers, state and Federal regulators, law professors, and even Federal

judges. The one thing I can state unequivocally is that this subject eludes easy answers.

Given these complexities—and in light of the enormous amount of care, thought, and work that the Commission has already invested in the subject—my recommendation would be that you provide broad rulemaking authority to the Commission to improve the safe harbor. If you wish to provide more specificity by legislation, I believe the provision must address the investor protection concerns mentioned above. I would support legislation that sets forth a basic safe harbor containing four components: (1) protection from private lawsuits for reasonable projections by public companies; (2) a scienter standard other than recklessness should be used for a safe harbor and appropriate procedural standards should be enacted to discourage and easily terminate meritless litigation; (3) ''projections'' would include voluntary forward-looking statements with respect to a group of subjects such as sales, revenues, net income (loss), earnings per share, as well as the mandatory information required in the Management's Discussion and Analysis; and (4) the Commission would have the flexibility and authority to include or exclude classes of disclosures, transactions, or persons as experience teaches us lessons and as circumstances warrant.

As we work to reform the current safe harbor rules of the Commission, the greatest problem is anticipating the unintended consequences of the changes that will be made in the standards of liability. The answer appears to be an approach that maintains flexibility in responding to problems that may develop. As a regulatory agency that administers the Federal securities laws, we are well situated to respond promptly to any problems that may develop, if we are given the statutory authority to do so. Indeed, one possibility we are considering is a pilot safe harbor that would be reviewed formally at the end of a two year period. What we have today is unsatisfactory, but we think that, with your support, we can expeditiously build a better model for tomorrow.

I am well aware of your tenacious commitment to the individual Americans who are the backbone of our markets and I have no doubt that you share our belief that the interests of those investors must be held paramount. I look forward to continuing to work with you on safe harbor and other issues related to securities litigation reform.

Thank you for your consideration.

Sincerely,

ARTHUR LEVITT.

Mr. BENNETT. Mr. President, I ask the Senator from Maryland to pay attention closely to this since it concerns him directly.

I ask unanimous consent that the vote occur on or in relation to the Sarbanes amendment No. 1477 at 2:15 today and that the time between the beginning of the debate and 2:15 be equally divided in the usual form.

Mr. SARBANES. Reserving the right to object, first of all, could I inquire of the Chair, what is the time situation?

The PRESIDING OFFICER. We began consideration of this amendment at 11:09.

Mr. SARBANES. So the Senator has used 30 minutes.

The PRESIDING OFFICER. Thirty-five.

Mr. SARBANES. Mr. President, I am agreeable to dividing the time between now and 12:30 equally, and then having half an hour after lunch, equally divided, and then going to a vote on the amendment.

Mr. BENNETT. Mr. President, I would like to confer with the chairman of the Banking Committee before agreeing to that. I have no personal objection to it. I would think we ought to bring Senator D'AMATO into the discussion.

Mr. SARBANES. Fine. I was not aware of this request until I just heard it. I do think we should have some time after the caucus on the debate—after the conference luncheon.

Mr. BENNETT. Mr. President, I propound a unanimous-consent request that the time between now and 12:30 be equally divided on this issue, and leave the unanimous-consent request as to the exact time of the vote for a later request.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BENNETT. Mr. President, I have heard the Senator from Maryland talk at great length about all of the hearings and the comments and the legal aspects of this.

Once again, I would like to talk about it from the standpoint of the chief executive officer, struggling to maintain the investor confidence in his company, and bring an appropriate return to investors, and talk about how this safe harbor circumstance would actually work.

A chief executive officer, having been one, sees dozens, maybe hundreds, of memorandum, every week. He engages in any number of conversations with individuals in the company in any given week about any particular subject. That is the fact against which I want to paint the picture of how this thing works.

We have been having this discussion about weakening a standard, safe harbor; where should the threshold be? I think the issue comes down, do we want a safe harbor or not? If we want one, it has to be safe, or we should not go through the exercise.

Now, the opponents have suggested that the safe harbor in the bill is, in fact, a pirate's cove.

Let me list, Mr. President, the pirates who are not welcome in this cove. That is, the pirates who would be denied the right to sail into this particular harbor, by the bill.

A blank check company, a blind investment pool that does not tell anybody how they invest, a penny stock company, a rollup transaction, a going private transaction. Not to imply these people are pirates, but they could not get into the cove. A mutual fund. It is very significant that that is on the list because that is where most of the seniors invest their money. They do not go out and individually pick stocks unless they have some experience at that. They buy a mutual fund. A mutual fund cannot come into this particular harbor. A limited partnership. A tender officer. Anyone filing certain ownership reports with the SEC. Or information in the financial statements is excluded. And of course any company that has recently committed a violation of the antifraud provisions of the securities laws cannot sail into the harbor.

Those kinds of restrictions are already out there. So the safe harbor is not for the pirates. It is for the people who do not fall into those categories.

Now, for those in the harbor, they have some requirements written into the bill. They must clearly state that any projection they are making is, in fact, a statement about the future, and they must clearly state, here in the words of the bill, ''The risk that actual results may differ materially from such projections, states, or descriptions.''

In other words, there is not a risk that we might be off a day or two. There is not a risk that we might be off a penny or two. There is a risk that the actual results may differ materially from the projections or estimates. Then, of course, we have the language that the bill does not permit companies to take advantage of the safe harbor if they act with ''the purpose and actual intent of misleading investors.'' This is the language of the bill that we have before us.

Those are the requirements in this particular harbor; those that prevent people from coming in in the first place and those who govern the people who are there.

Let me explain why it is important that we not further lower the threshold that we have established with the words ''purpose'' and ''actual intent of misleading investors.'' Here is how things work in an actual company, as I say speaking from experience as a chief executive officer. You gather all of your people around you. You look at the memos and the other reports that come out, and you inevitably find that there is a difference of opinion about just about everything going on in your company. Let us talk about a new product.

Some of your people say to you, ''Oh. Our product, product X, will be available right on schedule in August. You can depend on it. You can take it to the bank.'' Others will say, ''No. We are a little worried. We may not make it in August. We have this problem. We have that problem. Our supplier may not come through. We may miss the target date.'' You are the chief executive officer. You have to decide. You have a meeting coming up with a group of security analysts, and they are going to ask you point blank, ''When will product X be on the market?'' You want to give them the very best information you can.

So you sift through all of this and ultimately you have to make a decision. And you decide based on the track record of the people who are advising you that you think product X is a pretty good bet to be on line in August just as you anticipated it would. You go before the analyst meeting. And they say

to you, ''When will product X be available?'' You say, ''Well, it is my best judgment that it will be available in August. I have to qualify that by saying that is my estimate. I tell you there are some people in the company who do not think it will be available in August. But the best I can tell, my guess, my prediction, is that we will deliver product X in August.'' He can maybe put some other caveats in. You know, this is very sophisticated. The analysts do not hear any of that. They are like pollsters. ''Who is ahead? Who is going to win the election?'' ''No. We want to know what your numbers say right now.'' And they do not listen to the caveats. The CEO can put in all the caveats he wants. But they are going to walk away saying, ''He predicted that is going to come out in August.''

Now we get to August. What happens? Any one of a number of things happens. Frankly, they do not have to be the kinds of things projected in the memo that the division manager who said it might not happen in August included. There could be a hurricane in Florida where one of your suppliers is and the supplier cannot provide the parts that you were depending on. There was no way you could predict that. There are any number of things that could have happened. But you get to August, and the company puts out a press release saying product X has been delayed and will not be introduced until sometime later in the fall.

Bang—the analysts pound the stock. There is wild speculation. I have seen those. We have all seen those. They go through the marketplace—all kinds of rumors, the company has serious problems, their management is in difficulty, so and so is going to get fired, the stock drops 10 percent, and within a week strike suits are filed naming the company, its chief executive officer, and a bunch of other officers for conspiring to put out false information about product X and misleading the marketplace.

Product X comes out in September. It is a great hit. The stock price recovers. Presumably nobody is hurt. But, frankly, all of that is irrelevant because the legal machinery is now in motion and they do not care what is happening to the product or the company. Whether they want to or not, the top management of that company must now focus on an issue that is irrelevant to the management of the business; and, if I may, Mr. President, to the detriment of the investors in that company because the investors in that company want top management focusing on sales. They want top management focusing on efficiency. They want top management focusing on cutting costs and opening new markets. But instead they have a situation where in the name of the investors the legal machinery is forcing the top management of that company to focus on something totally unproductive—coming up with a defense against the charges that they mislead the public.

Discovery: That great word in the legal lexicon; discovery starts, and it goes to every piece of paper that has to do with product X, and every memorandum that may have crossed the CEO's desk. And they find the memo from the fellow who says, ''I don't think we are going to be ready in August.'' And, bingo, we have a smoking gun. No reference is made to the other opinions now. In court the reference is all going to hammer in on this one fateful memo, and, ''Mr. CEO, did you read this memo?'' If, he says yes, he not only has knowledge that product X was not going to come in, he has actual knowledge, not just imputed knowledge, actual knowledge. He admits he read the memo. Nail him to the wall.

That is what happens if he does not have the safe harbor that we have written into this act. Let us assume that this company is not one of those that is kept out of the harbor, the list I read in the beginning. It is one of those that is allowed into the harbor and without the harbor that is what happens.

Now suppose we have the reckless standard that people have argued for. This would be a very easy standard for a plaintiff's lawyer to meet in the circumstance I have described. Arguably any projection about the future is reckless. ''You do not know, Mr. CEO, that the future is going to produce this product in August. It was reckless of you to say that you would have it in August. You may have believed it but it was a reckless statement.'' There is no protection for the CEO in this circumstance with the term ''reckless.'' No. He needs the safe harbor of the bill.

And the question is how safe should that harbor be? Well, if we had the simple knowledge standard that the SEC suggests, the question is, ''Well, did you know that this product would not meet its date in August? Well, here is a memo in the company. It came over your desk. You read it. If you did not know, you should have known.'' Simple knowledge can be twisted in the hands of a careful lawyer, and the CEO has a very difficult time explaining this circumstance.

So a knowledge standard, even an actual knowledge standard, is not going to be a safe harbor. It is not going to protect the CEO. And again the point, Mr. President, it is not going to be for the benefit of the investors because the CEO is not going to be able to be doing what he is hired by the investors to do—run the company. He is going to be worrying about this particular problem.

This is the kind of thing that drives companies to settle out of court and to say, ''Well, we really did not do anything wrong but in order to get back to the business of making products and out of the business of prosecuting lawsuits, we will settle even though we are pretty sure we did not do anything wrong.''

No. What we need to have is what we have in this bill, a safe harbor that says not only did the CEO have knowledge but he acted with the purpose and actual intent of misleading investors. Now that no one can tolerate. That clearly must not be allowed. But it must be the purpose and actual intent of misleading investors before the CEO is driven out of the harbor.

Why actual intent? Because without it intent can be implied in a number of circumstances. ''You saw this memo, the very fact that you decided to ignore it in your presentation to the security analyst, Mr. CEO, implies that you intended to deceive them.'' No. The standard must be higher than that. You must prove that he had the actual intent, that he had the purpose of deceiving investors before you drag him into that area.

Is this a high threshold? I think it is an appropriate threshold because it fits the reality of the circumstances, and it prevents plaintiffs from accusing companies and officers of committing fraud simply because documents of differing opinions exist somewhere in the file. You have to go beyond that. You have to prove actual intent.

If I may stray into waters that I probably should not, since I have not gone to law school, but I have had some experience in this area, it is a little like the standards that we apply in the first amendment.

If a newspaper inadvertently prints something that is inaccurate, they cannot be held for libel unless it is proven that they acted with malice, with actual intent, if you will, to harm the reputation of the individual. Thus free speech is allowed to go forward unimpeded, however damaging it is to the individual involved. Having been the individual involved in some circumstances, I know how hard sometimes that is to accept.

But that is the standard we have created in that circumstance, and I think the language in this bill holds that same kind of standard.

Now, Mr. President, I come to the final question, which is what I think we should focus on here. Whom are we trying to protect? With all of this legislation, whom do we seek to benefit? What is the purpose of all of this? Are we trying to protect CEO's? Are we trying to protect lawyers? Are we trying to protect security analysts and newspapers that report things? Whom are we trying to protect at base by all of this legislation? The answer, Mr. President, is the investor. The purpose of this legislation is to protect the investor and his or her investment.

Look at every issue that we are talking about here through that particular lens. Is it good for the investor or is it bad for the investor? Is it good for the investor to have the CEO feel constrained about talking about the prospects of his company? Is it good for the investor to have the CEO being hedged about by lawyers who tell him when he goes before the security analyst: You cannot talk about this; you cannot talk about that; you cannot make any speculation of any kind lest you run

the risk of exposing yourself to these kinds of suits later on.

I submit that it is good for the investor to have the CEO be as open and candid as he possibly can be and to say to the security analyst: Yes, it is my judgment that product X will be on the market in August. Because what if he is right and product X is on the market in August, and he did not tell anybody that and they did not have the opportunity to buy the stock in the expectation that that would be the case?

Is it good for the investors to have him say: I have differences of opinion within the company; there are some people who do not think it will be.

Yes, it is good for the investors to have him be as candid and open as possible. And the only way you can get that kind of candid, open discussion is if you have a safe harbor in which that honest CEO can sail knowing that he will be protected from the waves and whims of the shark suits that are out there.

Is it good for the investor or is it bad for the investor to have the CEO's attention diverted into lawsuits that have nothing whatever to do with the management of the company? I submit it is bad for the investor to have the CEO concentrating on things other than the things for which he was hired. And ultimately, is it good for the investor or is it bad for the investor to have the company paying out millions of dollars in legal fees on issues that are tangential to the company's performance?

I submit it is bad for the investor, and it becomes doubly bad for the investor when, as we have seen over and over again in the debate on this bill, the highest percentage of those fees and fines being paid out by the investor—those are the investor's moneys; those are not the CEO's moneys. When you say those are the company's moneys, there is only one source of company money, and that is the investor. That is the investor's money going out, with the vast bulk of it going out to the plaintiff's attorneys and not the investor. They say: Oh, look, we are protecting the investor. Look at the money that is going back to the investor.

No, the money is going back to the lawyer, and in the meantime all of the money and attention and activity on behalf of the management of the company has been focusing on this suit.

That is why they settle, Mr. President. They settle because it is good for the investors and for them to get this thing behind them. But it would be better for the investors if honest executives who have no intent and no purpose of deceiving have a safe harbor from which they can explain to the public the things that are going on in the company and make statements about the future fully hedged about with protections that say these are speculations so that the investor then has information from which to make his or her own intelligent decisions.

So, Mr. President, I oppose the amendment by the distinguished Senator from Maryland. I enjoy serving with him on the Banking Committee. I enjoy the intellect and I enjoy the thoroughness with which he approaches these decisions, and I hope he recognizes it is not an act of disrespect on my part when I say I disagree with him on this amendment and intend to vote against it and urge my colleagues to do the same.

Now, Mr. President, I ask unanimous consent that at 2:15 p.m. today, Senator KASSEBAUM be recognized in morning business for not to exceed 5 minutes, and that at the hour of 2:20 p.m. there be 40 minutes of debate on the Sarbanes amendment No. 1477, equally divided in the usual form, with the vote occurring on or in relation to the Sarbanes amendment at 3 p.m. today, with no second-degree amendments in order to the amendment; further, that following the disposition of the Sarbanes amendment No. 1477, Senator SARBANES be recognized to offer an amendment regarding safe harbor.

Mr. SARBANES. Reserving the right to object, Mr. President, I have indicated a desire to have an up-or-down vote on the amendment. Does the Senator have any problem with that?

Mr. BENNETT. Mr. President, I have no problem with that, but I cannot bind other Senators who may wish to make a motion to table.

Mr. President, I would have no objection to that.

Mr. SARBANES. So with that amendment to the unanimous consent request, I have no objection.

Mr. BENNETT. Yes, on the Sarbanes amendment there would be no motion to table.

Mr. SARBANES. Right.

The PRESIDING OFFICER (Mr. ASHCROFT). Without objection, it is so ordered.

Mr. DODD addressed the Chair.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, I thank the Chair.

Let me just, if I can, make a couple of observations here about this amendment and the history——

The PRESIDING OFFICER. Who yields time?

Mr. DODD. How much time remains?

The PRESIDING OFFICER. All of the time remaining is under the control of the Senator from Maryland.

Mr. SARBANES. Mr. President, I do not think that is correct, in all fairness to my colleague. I wish to be fair. I think the agreement was we would divide equally the time between 11:10, as I understood it, when we went——

Mr. BENNETT. Mr. President, I ask unanimous consent that the previous unanimous-consent be amended to be as the Senator from Maryland remembers it.

Mr. SARBANES. I thought that is what it was.

It would not be fair to divide the time from 11:45 equally since the time before 11:45 was consumed, not quite but primarily, on one side. That is not really fair to my colleagues, and I recognize that. I think if we divided it—was it from 11:15 on?

Mr. BENNETT. It was 11:09.

Mr. SARBANES. If that time were divided equally, what would the time situation now be?

The PRESIDING OFFICER. The Senator from Maryland would have 10 minutes, and the Senator from Utah would have 10 minutes.

Mr. BENNETT. I ask unanimous consent that that be the state of the time from this time until we break for lunch.

The PRESIDING OFFICER. Without objection, it is so ordered.

The PRESIDING OFFICER. Who yields time?

Mr. SARBANES. And that would mean from the time we went on this amendment, all time would have been equally divided; is that correct?

The PRESIDING OFFICER. That is correct.

Mr. SARBANES. Yes.

Mr. BENNETT. Mr. President, I yield such time as he may consume to the Senator from Connecticut.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. I thank my colleague from Utah. I yield myself 5 minutes. If the Chair would remind me at the end of 5 minutes so as not to take too much time on this because a lot has been said already about it.

Mr. President, let me make a couple of observations to underscore the point that my colleague from Utah has already addressed. Some of my colleagues have said that the safe harbor provisions of S. 240 do not go as far as some would suggest. First, our provisions of safe harbor limit significantly the circumstances in which the safe harbor applies.

I think it is very important to lay out as clearly as I can here, what is included and what is excluded.

The safe harbor provisions of S. 240 apply only—only—to statements made by issuers or outside reviewers retained by issuers. Statements by stockbrokers are not protected at all under S. 240's safe harbor. Certain issuers are excluded. Not all issuers are included; some are excluded from safe harbor, including anyone who has violated securities laws within the prior 3 years. Penny stock companies, blank check companies, investment companies, all companies, Mr. President, are excluded from the safe harbor when they engage in certain types of transactions such as IPO's, initial public offerings. The tender offers, rollup transactions, all of those are excluded. So this is a very narrow provision here. All information contained in historical financial statements is excluded as well.

Second, Mr. President, the safe harbor applies only to projections or estimates that are identified—they must be identified—as forward looking statements and that refer ''clearly and

proximately'' to ''the risk that actual results may differ materially''—that is the language, ''the risk that actual results may differ materially''—from the projection or estimate.

That goes right to the heart of what the Senator from Utah was talking about. This is a very narrow area we are talking about, and the point is to create a safe harbor. Why do you create a safe harbor? Because we are trying to solicit from these issuers as much information as possible so that a potential buyer can have as much awareness as possible about where this stock or where this company is likely to go. It is in the interest of the investor that we get as much of that information as possible.

There is no requirement in law that an issuer even put out forward looking statements. In fact, what has happened lately is a lot of them have retreated from that very advantageous idea because of the very situation we find ourselves in today. So it is in our interest to solicit this kind of information, but in doing so, we say, ''Look, we want you to share as much information about where you think this company is going, where this stock is going so that investors will make intelligent decisions.''

In doing so, if you do anything—and we say very clearly in the bill if you do anything that knowingly with purpose or intent of misleading investors, on page 121 of this bill, we now take out the word ''expectation''—knowingly made with the purpose or intent of misleading investors, then you are excluded. Not only excluded, you are subject to the penalties of the law.

So anyone who knowingly with intent to mislead in those forward looking statements is subject to the provisions of the law that apply in this piece of legislation before us. But the idea is to get that information out, and it seems to me that is in everyone's interest.

You have to strike that balance. There are those who are opposed to safe harbor. I disagree with them; I understand it. I do not think anyone who has really looked at the larger issues would agree with it. So we have attempted with this legislation to craft the safe harbor provisions.

My colleague from Maryland has correctly pointed out that in the earlier bill we introduced some 17 months ago, we asked the SEC to try to develop a regulatory scheme to deal with safe harbor. I must say, I have heard now for the last 2 days a lot of these kudos and praise over the bill that we introduced last March. I would very much have liked to have passed a bill in the previous Congress in this area, but I could not get that kind of support.

I ask unanimous consent that I may be able to proceed for 5 additional minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DODD. Mr. President, I wish we had some of that support. The very people today who find the previous bill so attractive, I must say candidly, were not exactly racing to support the legislation when it potentially could have been adopted in the last Congress.

Putting that aside, let me also point out to my colleagues, having made the offer 17 months ago to have the SEC move, frankly, the SEC has not moved, and I am convinced today they would not move on this.

There is ample evidence to indicate that that suspicion of mine is correct. In a June 22 edition of the Bureau of National Affairs publication, which follows legislation dealing with financial institutions, under securities, the headline is, ''SEC safe harbor initiative may be overtaken by litigation reform.'' Following are several pertinent paragraphs I think support what I am saying:

> Although one agency official stated in late March that SEC action in its October concept release was imminent, that has not materialized. Rather, the SEC remains at the concept-release stage on the initiative. Its inaction during the 8 months since release was issued has been attributed by some observers to some differences of opinion within the Commission on various issues connected with the initiative.

Another Commissioner, Richard Roberts, told BNA June 21 that there are bona fide reasons that the Commission did not act quickly on the concept release, including questions about the agency's authority in the area of forward looking information.

Again, we just were not getting the action in this area.

It is a complex area. The Senator from Maryland is absolutely correct. Anyone who suggests otherwise has not spent any time looking at this. But I will argue, despite the fact that our original bill tried to get the SEC to come forward in this area—in fact they have not—that there is a good case to be made that leaving these matters just up to the regulatory bodies or, as we have seen in other cases dealing with aiding and abetting, for instance, to the courts, is not a wise way to go ultimately.

In many matters here, we ought to be trying to establish through the legislative process what our intent is. So while I welcomed in the past the SEC's efforts in this regard, that was not forthcoming. Now it is being suggested by those who opposed the bill last year that I ought to go back to my earlier position on this matter, even though the SEC did not move in this area, given the 17 months they had an opportunity to do so.

Letters are being bandied about. The letter of May 19 from the Chairman of the SEC certainly recognizes that there is a need to strengthen the safe harbor provisions. In fact, in paragraph 3 of Chairman Levitt's letter on May 19, he says:

> There is a need for a stronger safe harbor than currently exists. The current rules have largely been a failure, and I share the disappointment of issuers that the rules have been ineffective in affording protection for forward-looking statements. Our capital markets are built on the foundation of full and fair disclosure. Analysts are paid and investors are rewarded for correctly assessing a company's prospects. The more investors know and understand management's future plans and views, the sounder the valuation is of the company's securities and the more efficient the capital allocation process. Yet, corporate America is hesitant to disclose projections and other forward-looking information because of excessive vulnerability to lawsuits if predictions ultimately are not realized.

It goes on to talk about how he was a businessman all his life, and so forth, and lays out some specific areas and talks on page 2 of this letter, in the last paragraph:

> A safe harbor must be balanced, should encourage more sound disclosure, without encouraging either omission or material information or irresponsible and dishonest information. Safe harbor must be thoughtful so that it protects considered projections, but never fraudulent ones.

I invite my colleagues to look at the language on page 121 of our bill, where we specifically lay out, No. 1, knowingly—talking about projections—knowingly made with the purpose and actual intent of misleading investors.

So we clearly there are saying if you make a knowingly fraudulent statement, a misleading—not even fraudulent but misleading statement—a knowingly misleading statement, that you are not protected by the safe harbor provisions. Is this perfect? I cannot say that it is. But I will say it conforms to what the Chairman of the SEC says, that the present situation is not working very well. We know when we see what is happening with the forward-looking statement; they are being contracted and contracted and contracted. That is the practical effect of the environment we live in today. That does not serve the investor community well, Mr. President.

With those reasons, with all due respect and great admiration for my colleague from Maryland, throwing this back into the court of the SEC I do not think is going to advance our cause in dealing with clear reform in the area of safe harbor that is needed.

I urge my colleagues to reject the amendment offered by the Senator from Maryland.

Mr. SARBANES. Mr. President, I listened very carefully to both of my colleagues and I would like to, very quickly, address some of the points they made. I think the Senator from Connecticut is being extremely unfair to the SEC in terms of saying that they did not pick up on this. They have picked up on it. Whether they should have picked up sooner is the question. But they did issue a period for comment, and that was in October 1994, and they received comments—over 150. They then held hearings in the first part of this year. The Chairman, I think, of the SEC, as the Senator quoted him in the letter, has indicated that he wants to do something about safe harbor. The Senator quoted him correctly.

Mr. President, I ask unanimous consent that a letter from Chairman Levitt, dated May 25, 1995, be printed in the RECORD at the end of my statement.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. SARBANES. The real question here is not whether we should improve safe harbor. The question is, who is going to try to do it? Where is the best place to do that? This amendment says that the best place to do that is at the SEC, and that this body is not equipped to try to work through this complex issue; and if it tries to do it, the law of unintended consequences is going to bring a lot of potentially devastating developments.

The proposal to have it done at the SEC is, of course, the proposal which the Senators from Connecticut and New Mexico had when they first introduced the bill—the bill which Members cosponsored. Members who cosponsored this legislation were cosponsoring a provision with respect to safe harbor, which is exactly the amendment at the desk. That provision was subsequently changed in the committee. That is not the provision that was in the legislation which Members were signing onto as cosponsors.

Chairman Levitt has warned us of the danger that the provision in the bill will protect fraud. Safe harbor is a grant of immunity, an exemption from any liability. Safe harbor, in effect, says that you are immunized altogether. So it is very important to properly define the safe harbor. I have been interested in Members—first of all, the chairman amended the statutory provision in the bill on safe harbor shortly a while ago here on the floor, recognizing that this effort to write this statutory standard was deficient, I assume.

My colleague from Connecticut is citing provisions in the bill where certain activities cannot get safe harbor. He specifically precludes them from doing that and he went through some of them. All of those are things that developed. We got concerned about penny stocks when they were used as an abuse. Who knows what the next abuse is going to be down the road? If the SEC does this, they are in the business of being able to adjust to the abuses as they come. The SEC can, in effect, modify the framework. These listings of exceptions to the safe harbor standard in the rule are a demonstration, in my judgment, of the inappropriateness of trying to write the standard here, as opposed to letting it be done by the regulatory authorities.

The forward-looking statements in this bill are broadly defined. They include both oral and written statements. Now, we want a lot of the information, but it is the kind of information investors use in deciding whether to purchase a particular stock.

Now, the Chairman of the SEC himself has said they want—in fact, the Senator quoted one member of the SEC who said maybe they were not moving as quickly because they had some doubts about their statutory authority to do so. Of course, his original proposal would have provided that statutory authority. So if that is an inhibition, the amendment eliminates that and any doubts with respect to the SEC's ability to move ahead. The Commission received 150 comment letters in response to the release. It has worked closely with a vast representation of the industry. In fact, when Chairman Levitt testified in April of this year, he said:

> From the Commission's perspective, an appropriate legislative approach is contained in the Domenici-Dodd bill. This provision would allow the Commission to complete its rulemaking proceeding and take appropriate action after its evaluation of the extensive comments and testimony already received. Based on the Commission's experience with this issue to date, we believe there is considerable value in proceeding with rulemaking which can more efficiently be administered, interpreted and, if needed, modified than can legislation.

The North American Securities Administrators Association, the Government Finance Officers Association, the National League of Cities, and nine other groups, in a letter to the committee, on the 23d of May, expressed the same view, saying:

> We believe the more appropriate response is SEC rulemaking in this area.

Unfortunately, the committee print substitute to S. 240, unlike the bill as introduced, abandoned this approach in favor of trying to formulate a statutory safe harbor.

This is contrary to all the advice we are receiving from the regulators. Everybody gets up here and says this interest group wants this and this interest group wants that. I recognize that. I have been the first to state that you have these interest groups clashing over this thing. But what are the public interest officials telling us—those whose responsibility it is to serve the public interest, not one or another of these economic interest groups—what are they telling us? Of course, what they are telling us is that the approach in my amendment is the approach to follow.

The standard that is in the legislation, I think, is going to allow fraud to occur. In fact, Chairman Levitt, on the morning of the markup, wrote about the language that is in the bill before us. He stressed that this language failed to adhere to his belief that a safe harbor should never protect fraudulent statements. Let me quote him:

> I continue to have serious concerns about the safe harbor fraud exclusion as it relates to the stringent standard of proof that must be satisfied before a private plaintiff can prevail. As Chairman of the Securities and Exchange Commission, I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection.

He had seen the language. That is a comment on the very language that is in this bill. He said:

> . . . I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection.

Others have criticized this provision as well. The Government Finance Officers Association, representing more than 13,000 State and local government financial officials, county treasurers, city managers, and so forth, wrote on the safe harbor provision in the bill:

> We believe this opens a major loophole through which wrongdoers could escape liability while fraud victims would be denied recovery.

I say to my colleagues, no one is arguing here that we do not need to do something to improve safe harbor. The issue framed by this amendment is, who should do it? I submit, as I indicated earlier, in an issue of this complexity, it is better that it be done by the Securities and Exchange Commission.

The North American Securities Administrators Association represents 50 State securities regulators. They said:

> We believe this opens a major loophole through which wrongdoers could escape liability while fraud victims would be denied recovery.

These are on the front line of defense against securities fraud. They are really the regulators closest to the individual investors. They call the provision in this bill an overly broad safe harbor, making it extremely difficult to sue when misleading information causes investors to suffer losses.

AARP has also written calling for replacement of the safe harbor provision, with a directive to the SEC to issue a rule which structures a safe harbor that protects both legitimate business and investors.

Given the broad definition in this legislation of forward-looking statements, discussed above, it is crucial that the legislation not shield such statements when they are false. Encouraging reasonable disclosures is one thing. Allowing fraudulent projections is another. Actually, that kind of safe harbor would hurt investors trying to make intelligent investment decisions and penalize companies trying to communicate honestly with their shareholders. It runs counter to the whole premise of our Federal securities laws, which has helped to give us strong markets. The fraud must be deterred, and the fraud must be punished when it occurs.

Mr. President, I think it is important that safe harbor not protect fraudulent statements and, in my judgment, the best way to address this issue is to, in effect, use the approach that was initially in the legislation charging the SEC with developing a safe harbor regulation—a process now engaged in.

These are the transcripts of the hearings they held on the issue. They received over 150 comment statements and letters, and they have engaged in an extensive discussion with a whole range of people who have acquaintance and knowledge in this area.

I very much hope the body will adopt the amendment.

EXHIBIT 1

U.S. SECURITIES AND EXCHANGE COMMISSION,
Washington, DC, May 25, 1995.

Hon. ALFONSE M. D'AMATO,
Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I understand that this morning you and the members of the Banking Committee will be considering S. 240 and that you will be offering an amendment in the nature of a substitute. While I have not had the opportunity to analyze fully the May 24th manager's amendment to the Committee print, I appreciate your leadership and efforts to address the concerns of the Commission in drafting your alternative.

The safe harbor provision in the amendment, in my opinion, is preferable to the blanket approach of H.R. 1058. It addresses a number of the concerns pertaining to the size of the safe harbor and the exclusions from the safe harbor. The Committee staff appears to be genuinely interested in the Commission's views of its draft legislation and has attempted to be responsive. I was pleased to see the latest draft deleted the requirement that a plaintiff must read and actually rely upon the misrepresentation before a claim is actionable. Your attempt to tailor the breadth of the safe harbor of the Securities Exchange Act of 1934 to the more narrow safe harbor of the Securities Act of 1933 was encouraging. However, I continue to believe that the definition should be further narrowed to parallel the items contained in my letter of May 19th. Moreover, there remain a number of troubling issues.

I continue to have serious concerns about the safe harbor fraud exclusion as it relates to the stringent standard of proof that must be satisfied before a private plaintiff can prevail. As Chairman of the Securities and Exchange Commission, I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection. The scienter standard in the amendment may be so high as to preclude all but the most obvious frauds. I believe that there should be a direct relationship between the level of scienter required to prove fraud and the types of statements protected by the safe harbor. My letter of May 19th indicated the discreet list of subjects that are suitable for safe harbor protection, assuming a simple ''knowing'' standard. Accordingly, if the Committee is unwilling to lower the proposed scienter level to a simple ''knowing'' standard, the safe harbor should not protect forward-looking statements contained in the management's discussion and analysis section. This would be better left to Commission rulemaking.

In addition to my concerns about the safe harbor, there is no complete resolution of two important issues for the Commission. First, there is no extension of the statute of limitations for private fraud actions from three to five years. Second, the draft bill does not fully restore the aiding and abetting liability eliminated in the Supreme Court's Central Bank of Denver opinion. I am encouraged by the Committee's willingness to restore partially the Commission's ability to prosecute those who aid and abet fraud; however, a more complete solution is preferable.

I also wish to call you attention to a potential problem with the provision relating to Rule 11 of the Federal Rules of Civil Procedure. I worry that the standard employed in your draft may have the unintended effect of imposing a ''loser pays'' scheme. The greater the discretion afforded the court, the less likely this unintended consequence may appear.

I would like to express my particular gratitude for the courtesy and openness displayed by the Committee and its staff. I hope we will continue to work together to improve the bill so as to reduce costly litigation without compromising essential investor protections.

Thank you for your consideration.

Sincerely,

ARTHUR LEVITT.

RECESS UNTIL 2:15 P.M.

The PRESIDING OFFICER. Under the previous order, the Senate will stand in recess until the hour of 2:15 p.m.

There being no objection, the Senate, at 12:33 p.m., recessed until 2:15 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer (Mr. KYL).

Mr. BROWN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BRADLEY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BRADLEY. Mr. President, I ask unanimous consent that I may proceed as if in morning business for up to 3 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from New Jersey is recognized.

Mr. BRADLEY. I thank the Chair.

(The remarks of Mr. BRADLEY and Mrs. KASSEBAUM pertaining to the introduction of S. 969 are located in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

PRIVATE SECURITIES LITIGATION REFORM ACT

The Senate continued with the consideration of the bill.

The PRESIDING OFFICER. The time from now until 3 p.m. will be reserved for debate on the Sarbanes amendment with the time to be equally divided in the usual manner.

Mr. DOMENICI addressed the Chair.

The PRESIDING OFFICER. The Senator from New Mexico.

AMENDMENT NO. 1477

Mr. DOMENICI. Mr. President, I have discussed this with Senator D'AMATO. Some of the time remaining will be allocated to me by him. So let me start by yielding myself 7 minutes from our side.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DOMENICI. Mr. President, speaking now of the safe harbor amendment that is before us, and the safe harbor language that is in the bill, I first want to call to the Senate's attention the chilling effects on voluntary disclosure that exist today because of our failure to have an adequate safe harbor for voluntary statements about future conditions.

First:

Seventy-five percent of the American Stock Exchange CEO's surveyed have limited disclosure of forward-looking information.

That is according to an April 1994 survey.

Limited disclosure:

Seventy-one percent of more than 200 entrepreneurial companies surveyed are reluctant to discuss the companies performance. (National Venture Capital Association, 1994.)

Nearly 40 percent of investor relation personnel surveyed at 386 companies have cut back on voluntary disclosure of information to the investment community. (National Investor Relations Institute, March 1994.)

Fear of litigation is the number one obstacle to enhance voluntary disclosure by corporate managers. (Harvard Business School study, 1994.)

Less than 50 percent of companies with earnings result significantly above or below analysts' expectations released information voluntarily. That information, too, is from one of our great universities, the University of California, (November 1993.)

Mr. President, it has been asked why, originally in the Dodd-Domenici or Domenici-Dodd bills we did not have this statutory safe harbor language.

Mr. President, fellow Senators, the truth of the matter is that it has been 4 years since we first started this exercise of trying to get this law. And the final draft, more or less, of what is being alluded to as the Dodd-Domenici or Domenici-Dodd bill is 3 years old.

For those who are questioning why we do not adopt the original bill's language on safe harbor, let me just suggest that such an approach's time has come and gone. If the Senators suggesting the regulatory approach would have all come to the party 3 years ago, the bill would have been enacted. But nobody would. So what happened is we had in that bill asked that the Securities and Exchange Commission solve this problem.

Mr. President, for various reasons the Securities and Exchange Commission is not able to solve the safe harbor problem. They have had numerous hours of hearings, Commissioners are split, we are short two Commissioners. There are vacancies. Entrenched staff of that institution are arguing back and forth on philosophy and language. Meanwhile, the status quo continues, and here we sit with an unfixed safe harbor even though Congress has asked them to fix it.

Last year in appropriations, Mr. President, fellow Senators, I put in the appropriations bill report language that the SEC needed to create a new safe harbor and to report back to us by the end of the fiscal year. The provision called upon them to tell the people of this country what the safe harbor would be since the SEC wanted to develop it. They have not done it. It is almost time for another appropriations bill. And they have not done it.

Let me suggest that inaction and gridlock at the SEC do not mean we should not do something. In fact, I do