Unpaid Elections Workers: As noted in our pre-electoral assessment, the failure of the CEP to pay thousands of electoral workers was attributed as one of the reasons for absenteeism which delayed and closed many BIVs. Demonstrations were reported in several departments.

Administration Capability: As noted in our pre-electoral assessment, electoral workers received minimal or no training on the duties and procedures. This resulted not only in lengthy delays but jeopardized the security and secrecy of the process.

Secrecy of the Ballot: There was widespread disregard for the secrecy of this process. IRI and other delegates reported that the ballot box seals were rarely used. Additionally, the setup of most BIV's did not afford voters secrecy in marking their ballots.

Security of the Ballot: The most flagrant lack of control occurred from the point of the count to the BEC level. Upon arrival of the ballots at the BEC's, observers reported a lack of control of used and unused ballots. The most egregious examples of this known to IRI occurred in the Delmas BEC where clean ballots were marked and substituted for ballots that had arrived from the BIV's; tally sheets were altered.

Disqualification of Candidates: The thoroughly arbitrary process of qualifying candidates led to serious consequences which we anticipated in our pre-election report. While some argued that the number of candidates that were disqualified was not statistically significant, it proved on election day to destabilize the electoral environment in certain areas. The results of this ranged from a low voter turn out in Saint Marc where five candidates for magistrate were left off the ballot to Jean Rabel, where it was reported that followers of independent candidate Henry Desamour burned ballots and closed BIV's because his name did not appear on the ballot.

Voter Turnout: IRI delegates reported low to modest voter turnout in the BIV's they visited. If this remains the case, we believe that it is the consequence of a compressed election timetable, a lack of civic education, and frustration with the electoral process.

It was important for Haiti and the international community to hold this election, but holding an election is simply not enough. The purpose of this election was to create layers of government that can serve as checks and balances on each other and decentralize power as envisioned by the 1987 Constitution. That is why it was important to have an inclusive process, not one marked by exclusion.

It has been IRI's intent throughout this process to be thorough, independent, objective and constructive. In this regard, IRI will maintain a presence in Haiti through the final round of elections and will make recommendations for the formation of the permanent electoral council.

HAITI—IRI PRE-ELECTORAL ASSESSMENT OF THE JUNE 25, 1995, LEGISLATIVE AND MUNICIPAL ELECTIONS, JUNE 24, 1995

I. EXECUTIVE SUMMARY

On June 25, 1995 Haiti will hold elections for 18 Senators, 83 Deputies, 135 mayors and 565 community councils. These elections were originally to be held in December but were postponed several times for a variety of reasons.

This election occurs at a pivotal time for Haiti as it struggles to rejoin the family of democratic nations and offer renewed hope of stability for its people. This election is also critical for the international community as it seeks a benchmark to demonstrate the transition from an internationally dominated country to a Haiti governed by Haitians. For many in the international community, these issues have made the holding of an election far more important than the quality of the election. IRI has sought to evaluate the pre-electoral process and environment for their comparision to minimal standards of acceptability.

ELECTORAL PROCESS

The legal foundation for these elections was a Presidential decree that subverted the legislative process.

The formulation of the Provisional Electoral Council (CEP) itself breached an agreement between the President of the Republic and the political parties to allow the parties to nominate all candidates from which CEP members would be chosen by the three branches of government. Only two of the nine CEP members were chosen from the parties' list.

The voter registration process, to have been administered by the CEP, was complicated by miscalculations of population size, lack of sufficient materials and registration sites, and one million missing voter registration cards.

The CEP review of the over 11,000 candidate dossiers for eligibility was a protracted process that occurred under a cloak of secrecy. When the CEP made its decisions known, by radio, no reasons were given for the thousands of candidates rejected. After vehement protests by the parties, some reasons were supplied and supplemental lists were announced through June 14, thirty-one days after the date the final candidate list was to be announced. This stripped the CEP of its credibility with the political parties. There is still not a final list of approved candidates available.

The sliding scale of registration fees imposed by the CEP—whereby political parties with fewer CEP approved candidates pay larger fees—has made it difficult for many parties to compete. As of June 20, five days before the election, protests against this unusual requirement have gone unanswered.

The ability of the CEP and those under its direction to administer an election is unclear. As of June 20, five days prior to the election, formal instructions for the procedures of election day and the count has yet to be issued; this has prevented the 45,000 persons needed to administer election day from receiving specific training.

As of June 20, those persons designated by the political parties as pollwatchers had not yet received any training from the CEP which could lead to serious confusion on election day.

These actions have led to deep misgivings across the Haitian political spectrum about the ability of the CEP to fulfill the mandate and functions normally executed by election commissions. Political parties had no idea to whom to turn with complaints in the process—the CEP, the President of the Republic, the United Nations Electoral Assistance Unit or the United States Government. Three political parties withdrew from the process as a form of protest.

ELECTORAL ENVIRONMENT

A concern for security is an issue that has permeated every step of the process. The assassination of Mireille Durocher Bertin, a well-known lawyer and leading political opponent of Aristide, only confirmed the fears of the parties and candidates. During the crisis, many elected representatives feared returning to their districts, contributing to the decay of political infrastructure. Candidates have curtailed their campaign activities and have given personal security a higher priority.

The campaign itself began late and has been barely visible until some activities in the last week prior to elections. Given the process and environment surrounding these elections, it is doubtful many of Haiti's recognized political parties could have competed effectively.

The electorate itself is basically uninformed about this election—what it stands for and who is running. There has been no civic education campaign, with the exception of some limited U.S. and U.N. military efforts, to illuminate the purpose of this election.

Similarly, there has been no educational campaign on how to vote, which for a largely illiterate population in Haiti could pose serious difficulties on election day.

Compared to other ''transition elections'' observed by IRI, such as in Russia in 1993, El Salvador in 1994, South Africa in 1994 and even China's Jilan Province village elections in 1994, the pre-electoral process and environment in Haiti has seriously challenged the most minimally accepted standards for the holding of a credible election.

PRIVATE SECURITIES LITIGATION REFORM ACT

The Senate continued with the consideration of the bill.

The PRESIDING OFFICER. Under the previous order, the Chair recognizes the Senator from Maryland to offer an amendment.

AMENDMENT NO. 1478

(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 assistant legislative clerk read as follows:

The Senator from Maryland [Mr. SARBANES] proposes an amendment numbered 1478.

On page 114, strike lines 7 and 8, and insert the following:

''(1) made with the actual knowledge that it was false or misleading;

On page 121, strike lines 1 and 2, and insert the following:

''(1) made with the actual knowledge that it was false or misleading;

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. Mr. President, the previous amendment, the one we just considered, which was not adopted on a vote of 43 to 56, would have sent the matter of defining the parameters of the safe harbor exemption to the Securities and Exchange Commission.

I, of course, argued very strenuously in the consideration of the amendment

that that is where this ought to be done, that it ought not to be done, well, in the committee and now in this Chamber, because the existing definition in the bill has already been amended.

The Senate did not adopt that provision, and the question now arises, if you are going to have a statutory definition, what should it be? What should it be?

This amendment that has been sent to the desk would strike out the language that is in the bill. What the bill says is that the exemption from the liability provided does not apply to a forward-looking statement that is knowingly made with the expectation, purpose, and actual intent of misleading investors.

Earlier the Senator from New York modified that and struck the word ''expectation,'' but the problem still remains, the essential problem which prompted the Chairman of the Securities and Exchange Commission to say, and I quote him, ''I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection.''

So we are now into the question, if the standard in the bill is inappropriate, as I believe strongly it is, and as has been indicated by the Chairman of the Securities and Exchange Commission, and indeed by other securities regulators, State securities regulators, by Government finance officers and others, all of whom in a sense are outside the controversy amongst the economic interests associated with this bill, and represent the public interest, the question now is, is this standard so difficult that all but the most egregious fraudulent efforts would be exempted from liability. And I submit that it is, and the amendment I have sent to the desk is an effort to modify that. The standard provided for in that amendment is made with the actual knowledge that it was false or misleading.

Let me repeat that: Made with the actual knowledge that it was false or misleading.

There are forward-looking statements that would be exempted from liability under the standard in the bill that would not be exempted from liability under the standard of this amendment.

The question then becomes, is the standard in this amendment an appropriate one? And I defy anyone to advance a rationale why a forward-looking statement made with the actual knowledge that it was false or misleading should be protected from liability. I have heard people talk, oh, we are not going to allow knowing fraud to be protected.

That is exactly what this amendment provides. It says that the exemption from liability provided for in this bill does not apply for a forward-looking statement that is made with the actual knowledge that it was false or misleading. And I want to hear from others, if they oppose the amendment, why they believe a forward-looking statement made with the actual knowledge that it was false or misleading ought to be protected from liability.

Mr. President, this is an issue of significance and moment. We have heard from the various securities regulators in opposition to the provision in the committee bill. The National Association of Securities Dealers has written to us in opposition to it, as has the Government Finance Officers Association. SEC, of course, I have already quoted their statement. But let me just point out the Government Finance Officers Association, which represents more than 13,000 State and local government financial officials, county treasurers, city managers, and so on, and which issues securities and invests billions of dollars of public pension and public taxpayer funds every year, wrote of the safe harbor provision in the bill, the standard that we are seeking to change, the one in the bill which says knowingly made with the purpose and actual intent of misleading investors, ''We believe this opens a major loophole through which wrongdoers could escape liability while fraud victims would be denied recovery.''

Let me repeat that: ''We believe this opens a major loophole through which wrongdoers could escape liability while fraud victims would be denied recovery.''

The provision in the bill requires you to show the actual intent of the parties making the forward-looking statement. Not only that, you have to show that it was knowingly made with the purpose of misleading investors. And as originally written also the expectation, although that was stricken earlier in our consideration. So it is now knowingly made with the purpose and actual intent of misleading the investors.

That is what you have to demonstrate in order for the forward-looking statement to lose its immunization from liability. And that is a standard that is so extreme that the Chairman of the Securities and Exchange Commission wrote to us and said, ''I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection.'' And that is the provision which the Government Finance Officers Assocation said, ''We believe this opens a major loophole through which wrongdoers could escape liability while fraud victims would be denied recovery.''

The amendment that I have sent to the desk very simply states that the exemption from liability is lost for a forward-looking statement that is made with the actual knowledge that it was false or misleading, very simply put. You make a forward-looking statement, and you make it with the actual knowledge that it was false or the actual knowledge that it was misleading, and you lose your immunity. You lose your immunity.

Why should anyone who makes a forward-looking statement with an actual knowledge that it was false or misleading have immunity from liability for that forward-looking statement?

That is the issue that is before us by this amendment. It was my preference that this issue be worked out by the Commission. I thought that is where it ought to go in terms of expertise.

If Members want to deal with it here on the floor, then we need to examine it on the standard, address the standard that is in the bill, why I think it opens, as the Government Finance Officers said, a major loophole, or which, as the Chairman of the Commission said, would allow willful fraud to receive the benefit of safe harbor protection. That ought not to be the case. Therefore, I propose to substitute the language ''made with actual knowledge that it was false or misleading.'' No statement made with the actual knowledge that it was false or with the actual knowledge that it was misleading ought to have safe harbor protection.

Mr. President, I yield the floor.

Mr. D'AMATO addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

Mr. D'AMATO. Mr. President, what we are talking about now is what we call in legal jargon the scienter standard. It is not an easy one. It can be difficult to understand. And indeed it can open up an incredible loophole, one that we are attempting to deal with; that is, to permit people to make projections. And they must state—I can have that disclaimer—they must state this is a projection, this is a projection, and that it may not be accurate. I will get the exact verbiage. It may not be accurate.

Whole classes of issuers are exempted, the penny stocks, the mergers and acquisitions. ''Refers clearly that such projections, estimates, or descriptions are forward-looking statements and the risk that the actual results may differ materially from such projections, estimates, or descriptions'' has to be included.

Now, let us read the language, because I have heard this, and I have seen it written, too. It is inaccurate to describe this bill as giving a license to people to knowingly, with intent, defraud. It is just wrong.

Here is the language in the bill. We modified it today because I thought there was one standard that might go above and beyond. The exemption from liability provided for in subsection A does not apply. It does not apply. In other words, you get no exemption. Then on page 114, line 4, it says:

(c) EXCLUSIONS.—The exemption from liability provided for in subsection (a) does not apply to a forward-looking statement that is—

In other words, you get no exemption.

(1) knowingly made with the expectation, purpose, and actual intent of misleading investors.

So if you knowingly make a false statement, knowingly, with the purpose and actual intent of misleading

investors, you are not protected. And that is as it should be. These are projections. Now, I have to ask the question, who knows what someone knows, what is knowledge to them? And once you have that, once you say, if you knowingly made this, all they have to do—the plaintiffs bar this particular group, very small group —is allege that you knowingly made a false statement.

The burden now comes upon that person who has this complaint filed against them to prove that they did not. How do you prove it? How do you prove it? That is why we say, look, it has to be a little tougher. You cannot say, ''You knowingly made this. You knowingly made this, knowingly, with intent, with the purpose to mislead investors.'' It seems to me that that is pretty reasonable.

If a person does that, then you should go after them and hold them. We do. They are not exempt. We get down to the issue of splitting legal hairs and opening the doors for this group of bandits. That is what they are, bandits, absolute bandits; this is the group that, you know, suggests that we make it easier to bring these kinds of suits. We do not want to make it easier to bring suits that have no merit, where people allege someone knowingly, falsely made these statements. All you have to do is allege someone made the statement. Bingo, we have not solved the problem. That brings us right back into court and brings us into the situation where a person gets sued for millions, and has to settle for millions of dollars and/or pay millions of dollars in legal fees against claims that would otherwise be worthless and should get no dollars.

I have to tell you something; that we have sat back for far too long in dealing with this because it was really a very small and almost insignificant portion of the population that was affected. We did not see on a daily basis lawsuits being brought with no claim. We did not see where we had, for example, of 229 cases filed, 229 cases filed, 38 percent used the same repeat plaintiffs; 38 percent used the same cadre. In other words, they were professional plaintiffs. And I have to tell you why we may have cured that and said—by the way, they were paid bonuses. These people, for letting their names be used, got $15,000, $20,000, $25,000 for being professional plaintiffs.

So when we talk about protecting the little guy, we are not protecting the little guy. What we are trying to do is put a stop to and really protect the investors who have their money invested in these small companies, who have the mutual funds, who have those pension funds, which represent trillions of dollars and truly represent millions of people. Give them an opportunity. Give them a say. And do not have their companies savaged by people who are only looking to take care of their own interests. And those are the buccaneering barristers, those lawyers. The term was coined, at least the first time I heard it, by Senator DODD. He happens to be correct. They are sharks who are looking to eat whatever they can and the devil may care as it relates to the harm and the injury that they bring, in many cases, to good people simply by being able to allege that someone knowingly made a misleading statement.

We say, no, you have to go a little further. Knowingly, and you have to show intent. Because who knows what ''knowingly'' is. Show me. You say: I allege you knew it. I say I did not know. But if one has to allege that you knew and you had intent, that is a little more difficult; is it not? I think people are entitled to that presumption. I do not think they should be subjected to these scurrilous lawsuits. And they have taken place. That is why we say ''knowingly, with intent,'' and that you deliberately did this to mislead investors.

It is one thing to have people subjected to suits where there is intent to deliberately mislead, and it is another thing where people have made accidents and now are held to a standard whereby that was an accident and they say, ''You knew.'' You say, ''I did not know.'' You did and you actually made, if the fellow actually made the statement, he made the statement. Nobody can say he actually did not. So the word ''actually,'' that is nothing. They say you have knowledge, claim you have knowledge. Wait, I did not know that it was wrong. I got you in court because all I had to do is say that, well, you did. You had actual knowledge, and if you checked your papers, you would have found out that the projections you were making were off. Now I have him in under a claim of actual knowledge.

Did he really have actual knowledge? No. But it is very easy to allege. And once you allege it, you have him in this revolving door, in the chain. What do his lawyers say to him? ''We can fight it. We may be able to win it.'' But you know what? You may stand to lose, if they get a judgment against you, tens of millions of dollars, and put the company—a startup company —out of business. Or if you are an accountant, yes, we can probably win it. But you can get hit pretty hard. Because you know, these people made this and you saw it and they dragged you in.

I think that when you look at and read what we have put in, not what somebody puts in substitution, tell me how you can read this bill and say, anybody, that we say that you can deliberately lie and mislead with intent, and that we give you safe harbor for that? We do not.

I want to do it, and I will sit down and read once more, there is no exemption from liability where, line 7, a forward looking statement is:

(1) knowingly made with the expectation, purpose, and actual intent of misleading investors.

They are not protected. You can be sued. And if that is the case, you should be sued, no doubt; absolutely. There is nothing that keeps the SEC from doing this, from bringing these suits. Our bill does not protect fraudulent statements or conduct. The administration does not say that it does. It does not say that it does.

A letter, from Abner Mikva, counsel to the President, asked for clarification. I do not think that our bill is unclear on this point. I can clarify it. If it is, this debate should provide important guidance that the bill does not and will not protect fraud. I think this is clarification enough. How many times should we state it? We do not do it, we will not do it, that is not my intent, and I urge my colleagues to oppose the amendment by my distinguished colleague and friend from Maryland.

Mr. SARBANES addressed the Chair.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. Mr. President, the distinguished Senator from New York read the standard that is in the bill, and that is the problem, that standard. Those who are knowledgeable in the securities field have looked at that standard and reached the conclusion that it is an enormous loophole, and it will enable people to engage in willful fraud.

The amendment which I sent to the desk, which would change that language, would not allow a forward-looking statement to claim exemption from liability where the statement was made with the actual knowledge that it was false or misleading.

What every Member has to ask themselves is on what possible basis would you want to give immunity to a forward-looking statement that was made with the actual knowledge that it was false or with the actual knowledge that it was misleading? I submit to you, statements of that sort ought not to be protected from immunity. The bill, as written, would, in effect, allow statements made of that sort to have protection from immunity.

The standard in the bill is so high and so narrow that virtually any forward-looking statement is going to have immunity. The burden of showing purpose and actual intent—before, of course, we also had expectation which the Senators struck from the bill—but to show purpose and actual intent is so heavy that a lot of very fast games by some very fast artists are going to be played on the investing public and is going to cause a lot of people a great deal of grief and harm and damage.

So I urge Members to examine this issue very carefully. This is one of those issues that will come back to haunt you because people are going to be swindled, they are not going to be reachable because of the immunity which the bill provides, and everyone is going to look at what they did and say, ''Why should these people be immunized from liability,'' and the responsibility for immunizing them is going to rest on the people voting on this

amendment and voting on this legislation.

So I very strongly urge the adoption of the amendment.

Now, the letter to which my colleague referred is a letter from the counsel to the President, Judge Mikva. I ask unanimous consent that the 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 quote:

The White House

Washington, June 27, 1995.

DEAR SENATOR SARBANES: I am writing to express the administration's support of your amendment to S. 240. The administration strongly believes the bill's safe harbor provision should not protect a statement made with the actual knowledge that it was false or misleading.

Let me repeat that:

. . . should not protect a statement made with the actual knowledge that it was false or misleading.

The bill's current safe harbor standard would exclude forward-looking statements ''knowingly made with the expectation, purpose, and actual intent of misleading investors.''

And as I noted, let me depart from the text of the letter for a moment, not very long ago, earlier in our proceedings, the Senator from New York struck the word ''expectation'' from the standard that is in the bill.

So he continues then, it now reads:

''knowingly made with the purpose, and actual intent of misleading investors.''

I double checked, and I am told that does not affect the import of this letter, and that knowing of that change, the letter still stands as sent to us. I double checked that in order to be very accurate with my colleagues.

The letter goes on to say:

The Securities and Exchange Commission has opposed the use of this standard because it might allow some defendants to avoid liability for certain false statements.

In the Statement of Administration Policy forwarded to the Senate on June 23, 1995, the administration urged the Senate to clarify whether the safe harbor's current language would protect statements known to be materially false or misleading when made. The Senate can best ensure that the safe harbor would not protect fraudulent statements by adopting an actual knowledge standard, as your amendment proposes.

Let me repeat that:

The Senate can best ensure that the safe harbor would not protect fraudulent statements by adopting an actual knowledge standard, as your amendment proposes.

Sincerely,

ABNER J. MIKVA,
Counsel to the President.

Mr. President, my colleague from New York has suggested, well, we are just splitting legal hairs here. We are engaged in some difficult legal analysis, that is quite true. And I suggested that when we did the previous amendment that the place where this ought to be done is by the SEC. The Senator from New York did not agree with that, and a fairly narrow margin of the Members of this body supported him in that view and, therefore, the burden falls upon us to define the standard here.

The SEC and the State regulators have told us that the standard, as written in the bill, will protect fraud artists. In effect, the bill swings the pendulum too far and the language of the bill goes too far and, therefore, will end up protecting fraud and hurting investors.

This amendment is an effort to bring the pendulum back toward the middle. It still will provide an enhanced safe harbor over what now exists, but it will not go to the extreme lengths of the provision in the bill which all the experts tell us, all the people whose responsibility it is to deal with securities fraud, who work in the field full-time all the time, they all tell us that this will end up protecting fraud artists. As I said, the Chairman of the SEC said:

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

That is what we are talking about here. The substitute standard which I am proposing simply says that you are not going to give protection from liability to a forward-looking statement —listen very carefully to this—to a forward-looking statement that is made with the actual knowledge that it was false or misleading. You cannot make the statement with actual knowledge that it is false or actual knowledge that it is misleading and be protected from liability. And I invite anyone to explain to me why that kind of statement ought to get protection from liability. I would think it is as clear as can be that is the very sort of statement that ought not to get protection from liability. Therefore, I say to my colleagues, if—as apparently has been decided—we are going to write the standard right here, clearly, we must rewrite the standard in the bill. I submit that the standard contained in the amendment is an appropriate standard, if we are going to be concerned about a proper balance that will help to provide some insurance that investors will not be subjected to fraud.

Mr. President, I yield the floor.

EXHIBIT 1

THE WHITE HOUSE,
Washington, DC, June 27, 1995.

Hon. PAUL SARBANES,
U.S. Senate,
Washington, DC.

DEAR SENATOR SARBANES: I am writing to express the Administration's support of your amendment to S. 240. The Administration strongly believes the bill's safe harbor provision should not protect a statement made with the actual knowledge that it was false or misleading.

The bill's current safe-harbor standard would exclude forward-looking statements ''knowingly made with the expectation, purpose, and actual intent of misleading investors.'' The Securities and Exchange Commission has opposed the use of this standard because it might allow some defendants to avoid liability for certain false statements.

In the Statement of Administration Policy forwarded to the Senate on June 23, 1995, the Administration urged the Senate to clarify whether the safe harbor's current language would protect statements known to be materially false or misleading when made. The Senate can best ensure that the safe-harbor would not protect fraudulent statements by adopting an actual knowledge standard, as your amendment proposes.

Sincerely,

ABNER J. MIKVA,
Counsel to the President.

Mr. D'AMATO. Mr. President, I think we have debated this point now over and over. First, let me say, that if the Securities and Exchange Commission has constructive suggestions to make in this area, we stand ready, willing, and able to adopt them. We would be happy to have hearings. But, we have been waiting for the safe harbor standards for 3 years, and we finally have felt compelled to create the safe harbor ourselves. Once again, I direct my colleagues to the letters from Chairman Levitt. He has shared with us the frustration and problems that the business community face. He alludes to these problems and he has recognized that there is a need to begin solving these problems.

Now, if you look at the language of my friend and colleagues' amendment, and then look at the language in S. 240, as it currently exists, it is very clear that the current language means that if you knowingly make a statement with the purpose and intent of misleading investors you will be held liable. This current standard means that you have to demonstrate that this statement was made with an intent to mislead investors. However, the Sarbanes amendment would reduce that standard to just knowing a misstatement was made. That is too easy to allege. That opens the door to meritless suits and that then forces firms to pay huge settlements. That is what we are attempting to stop.

We cannot countenance lying nor can we countenance the making of false statements. But the fact of the matter is, if we use this scienter provision, it will open the door to meritless litigation based only on allegation. This will prove to be a nearly impossible standard—how does one prove that he actually did not know and was not aware of the misstatement? How does one prove that? That is the high burden that we place on the defendant with this standard. With this standard, I feel that firms will be forced to settle and that means payments of millions of dollars.

Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. DODD. Mr. President, how much time remains?

The PRESIDING OFFICER. There is no control of time.

Mr. DODD. Thank you. Mr. President, let me commend my colleague from Maryland, first of all, for offering a creative amendment here. It looks tempting with the language that is offered and the arguments he has given

as to why not just support the replacement language that he has offered, which would strike paragraph one on page 121 and paragraph one on another page—I apologize for not having the page number—and replace what we now have, ''knowingly made with the purpose and intent of misleading investors,'' to ''actual knowledge of false and misleading information,'' I believe is the language of the amendment.

Let me begin, Mr. President, by stating what I hope all of our colleagues will accept is the point here. That is, that we are all after the same goal—certainly, those of us who have spent time over the last 3 or 4 years in trying to deal with the broader issue that this legislation attempts to address. I have tried to strike a balance that will deal with an existing problem that we have identified over these last several days in our debate.

Let us also assume that we have some six, seven, eight pages here in the bill that deal with the issue of safe harbor. An amendment being offered by the Senator from Maryland deals with one clause—an important clause, but nonetheless one aspect of safe harbor.

I said earlier today, Mr. President, that the purpose of safe harbor is designed to encourage the disclosure of information, to encourage the disclosure of information. There is no requirement, under law, that companies disclose information to potential investors. There may be those who want to require that, but the law does not require it.

So the very purpose of having a safe harbor is not just to create some island where people can make statements, futuristic statements, and avoid litigation or be immune, but because we think it is important to elicit from businesses, from industry, from corporations, statements about what they believe the company is likely to be doing.

Good news and bad news. It is not just good news. A forward-looking statement can be bad news about what may happen—product lines that are not necessarily going to live up to earlier expectations.

I hope that everyone would agree that it is in the interests of our country economically to encourage businesses to be forthcoming about information which they possess that will allow for investors to make intelligent, reasonable decisions about whether to buy stock, sell stock, whatever else they may be engaged in. That is why we create a safe harbor. That is the only reason for it.

If you had a law that required businesses to tell everything they know, you would not need safe harbor. No one is suggesting we do that. Proprietary information, businesses trying to make plans for the future, should remain private. In the whole area of securities litigation, the notion of safe harbor is a longstanding notion.

The problem, today, as identified by the Chairman of the Securities and Exchange Commission is that the present safe harbor is not working.

We have heard at length earlier today, and maybe I ought to put in the letter again, the letter of May 19, in which the Chairman of the SEC identifies in paragraph 3 of that letter, ''There is a need for stronger safe harbor than currently exists.''

Mr. President, I ask unanimous consent this letter be printed in the RECORD, because the Chairman of the SEC lays out why that problem exists.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

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, but 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 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. DODD. Mr. President, if you disagree with safe harbor, and wish to apply a standard here that is appealing on its face, but actually undercuts the very intention of the safe harbor, then it seems to me you run the risk of destroying a very important vehicle that causes businesses to voluntarily give information out that is critical. Information, as I say, that could be positive or negative information. So that is the reason it exists.

Now let me cite examples where I believe that the actual knowledge standard, as tempting as it is, can actually just bring us back to the point we are trying to get away from, and that is the litigation that has swamped up in many ways in terms of the ability of these companies to move forward and to, as I said earlier, to give the kind of information that may be necessary.

We all want safe harbor, as I mention. We want a safe harbor that will work. When the chief executive officer of a large industry goes to his general counsel in a very practical way, and says ''Should I tell pension fund investors,''—remember, that is primarily who we are talking about— ''that,'' returning to an earlier example, ''a new disk drive at the heart of their investment in this company, may not quite work as well as we planned.''

We should have a safe harbor that will allow the general counsel to say ''Yes, you can say this without being sued.'' It is so the company now has this information, not required by law, that it share that information. But the CEO says, ''I do not think this disk drive will work quite as well as I planned, and I want to know whether or not to let people know,'' knowing full well what may be the implication in terms of the investors.

Pension funds obviously, I think, are entitled to information even if it is not required to be disclosed. We want to make sure that CEO's can say and tell us what is going on without the fear of millions of dollars in litigation costs. That is the point of this bill—trying to reduce litigation costs.

If we do not make this a very clear division, a very clear division, as to when safe harbor does not apply, it is not going to be safe enough, and that general counsel is then going to say to that CEO, ''You are not required to say anything—don't say anything. Don't say anything.''

Who are the winners and losers, when that decision is made? The general counsel says ''Don't say anything here, don't you dare say anything. You are not required to by law.'' You can never be sued for what he did not say in this case. So they do not do anything.

Mr. SARBANES. Will the Senator yield?

Mr. DODD. If I could finish this train of thought, I will be glad to yield for a question.

We are trying here to get this information out. As the Council of Institutional Investors, representing literally millions of small investors in this country with hundreds of billions of dollars in assets, said in testifying before the SEC, the safe harbor must be 100 percent safe.

Let me go back at that point quickly. There is a fear that Members will think that anything that anybody does in relationship to securities can fall into this safe harbor category. That is not the case at all.

As pointed out by the distinguished junior Senator from Utah today, by the Senator from New York, and myself, let me go back, there are 6 or 7 pages in the bill dealing with safe harbor. This is one line in that entire section.

Safe harbor only applies to statements by issuance and reviewers hired. Statements by stockbrokers are not included. Certain issuers are excluded from safe harbor, including anyone found to have violated securities law, anyone involved in penny stocks, blank check companies, investment companies, IPO's, tender offers, roll-up transactions—all are exempted. Historical information contained in historical financial statements is excluded as well.

I forget to mention this earlier, but in this bill we require cautionary language be included in forward-looking statements so investors can pick up the kind of language that ought to give them a better sense to put them on notice that maybe these predictions are not going to turn out to either be as bad or as good as the company may utter and say. That was never before required.

In the discussion of safe harbor, remember, we are dealing with narrow fact situations here.

Mr. D'AMATO. Will my friend yield for a question?

Mr. DODD. I yield.

Mr. D'AMATO. Is it not true that one of the other provisions never included, safe harbor will now permit the SEC to bring suits for disgorgement, for violation of safe harbor provisions?

Mr. DODD. I was just about to get to that point. That is a second added new provision.

Mr. D'AMATO. That has never been in before?

Mr. DODD. Never before in this legislation. It is all new authority we are extending to the SEC.

To listen to this debate, we would think we have been stripping away and stripping away. What we are doing is providing different vehicles. As we listened and heard testimony, the Council of Institutional Investors represents, I said, millions of people in the country, involving billions of dollars.

They want that information. These pension funds want to know what is going on in these companies. If these companies do not provide that kind of information, these pension funds are not making decisions with all of the information they have when they decide whether or not to invest or not to invest.

So the safe harbor is a critical issue in soliciting that kind of information. That is why it is so important. I think their testimony before the SEC on truly a safe harbor, a 100 percent safe harbor is absolutely critical. Again in the context of what we are talking about, those that are excluded, from the protections of safe harbor.

Now, returning to my earlier example, I illustrate the problem with the amendment of my colleague from Maryland. The CEO in the fact situation I described does not think it will work out as well as it is, and goes to

the general counsel and says, ''should I share this information?''

It turns out the disk drive prediction that he had made was a panic decision; that, in fact, the disk drive turns out to be fine, turns out not to be as bad as he thought. But many shareholders, based on the earlier prediction, sold their stock. Now they sue them for actually knowing that the disk drive was really OK.

Of course when he gets before a jury he will be able to make his case. But the problem is, Mr. President, before you get to the jury, you are probably going to end up with a settlement involving millions of dollars, because there were memos or other information that came across his desk that said, ''Mr. CEO, we think this disk drive will be OK.'' During the discovery period, as a practical matter in litigation, every single paper that crossed that CEO's desk is going to be subject to discovery.

So there on the table is a memo or two or three that says, ''We think this disk drive is not as bad as you think,'' but he felt based on his feelings about this, with the advice of general counsel that he said ''I don't think it will do that well.''

Now you have yourself with actual knowledge—not with intent, not with purpose, to mislead, but with actual knowledge of information—that suggested a different result than what the CEO predicted when he put out a statement that he thought the pension funds ought to know about.

I do not believe that it is in our interest in the safe harbor context—not in other issues of aiding and abetting and joint and several and proportional liability, but in safe harbor context, if it is a standard of actual knowledge of something that existed that contradicted your own statement, thereby you said something misleading, because there was information that reached a different conclusion, and you end up with a lawyer saying ''Look, you know, I don't know how a jury will find with this.'' The Sarbanes language in this bill says ''actual knowledge.''

Mr. SARBANES. Actual knowledge that it was false. Why should anyone be able to make a statement that they have actual knowledge that is false.

Mr. DODD. Misleading. That could be the subject of litigation here. You made a statement that you said you thought this disk drive was going to do poorly. You had information before you that said something else. I sold my stock on the basis of that prediction you put out, that it was not going to do well.

Now I know you had information from your people in your divisions that said it would do fine. You made a prediction it would do poorly. You had actual knowledge there was different information available to you. You cannot tell me about that. As a result, I am suing you, and I think I can collect.

Mr. SARBANES. Do you think he should have told? Do you think he should have had a forward-looking statement that said some have said we have a problem; others say we do not have a problem. Would that not be an honest statement to the potential investors?

Mr. DODD. Let me say to my colleague, another aspect of this bill, here in the safe harbor context, in the safe harbor context, it is our common desire to solicit information from these businesses that do not have to make it forthcoming. I think, frankly, going to the intent and purpose, to disregard intent and purpose of that CEO, and have the mere standard actual knowledge, I think, creates a nightmare. That is my view.

Mr. SARBANES. Is it the Senator's view—will the Senator yield for a question?

Mr. MCCAIN. Regular order. If the Senator asked for the Senator to yield for a question, fine.

The PRESIDING OFFICER (Mr. GRAMS). The Chair reminds the Senator——

Mr. DODD. I am happy to yield to my colleague.

Mr. SARBANES. I just asked the Senator if he would yield for a question.

The PRESIDING OFFICER. A reminder that the Senator must address the Chair to ask a question.

Mr. SARBANES. Mr. President, I ask the Senator if he will yield.

Mr. DODD. I am happy to yield to my colleague.

Mr. SARBANES. Is it the Senator's view that all forward-looking statements are voluntary? As I understand it, the Senator says you are going to dissuade forward-looking statements because these are voluntary things; and, if they have a problem with what the standard is, they will not volunteer the information.

Is that your position?

Mr. DODD. That is the difficulty here. Yes.

Mr. SARBANES. What is your explanation of the language on page 113 of the bill which includes within the definition of a forward-looking statement in paragraph 3, lines 18 through 22, a statement of future economic performance contained in the discussion and analysis of financial condition by the management, or in the results of operations included pursuant to the rules and regulations of the Commission.

Mr. DODD. I do not understand the purpose of the statement.

Mr. SARBANES. It is my understanding that currently under the rules and regulations of the Commission you are required to provide certain information that is in effect a forward-looking statement.

Does the Senator agree to that?

Mr. DODD. I understand that. How much information you have to——

Mr. SARBANES. But you earlier made the statement in effect that this was all voluntary, and that people, if they were dissuaded, would provide no information. The fact is under current SEC requirement they are required to provide some forward-looking information.

Is that correct?

Mr. DODD. The Senator is correct. I stand corrected.

My point here is that soliciting all the necessary information one would like to have is not required by law. Some statements are. The point I was trying to make was in the case of the one that I ascribed to. But the condition of a particular product line, a case could be made that that information would not necessarily be required to be forthcoming.

So my point is that while the temptation to adopt the actual knowledge standard here, in effect we may be undoing the very purpose that I presume is unanimous here. Maybe there are some who disagree with us, but you want a good safe harbor. The purpose of having a safe harbor is that it be safe. If it just be a harbor that is sometimes safe or never safe or rarely safe, then the very purpose for its existence is undermined. As a result, you defeat the very purpose of creating it.

My point here is that a simple standard of actual knowledge can undermine that very desire that I believe is unanimously held in this body to create that safe harbor. So while the standard of actual knowledge is a difficult standard to overcome rhetorically in the subject of debate, in the practical application of it, then I think it is a standard that undermines the very purpose of safe harbor.

I say to my colleague from Maryland and others, they know I have some difficulty even with this standard. I am worried about having a good one that does create the safe harbor, and that does apply to those efforts. My colleague from New York and I and Senator DOMENICI have discussed this at some length. And there are many different ways we may finally get some language here that can be appropriate. But establishing just actual knowledge with no intent or no purpose to mislead, it seems to me, runs the risk of having the very purpose of the safe harbor destroyed.

I cite the factual kind of example involving a good meaning, well intended person—let us assume that most of the people we are talking about here are not inherent crooks. We are talking about decent, competent people who want to do their business appropriately and properly. And sharing information that can then undermine them and end up with significant litigation costs is not exactly serving the purpose of the intent when we desire to put in a safe harbor in the legislation.

The SEC itself, as I said earlier, feels as though the safe harbor needs to be strengthened. Their present standard is ''acted in good faith and reasonable basis for believing what you are saying.'' That, of course, created a mountain of problems over the issue of reasonable basis.

But as I mentioned a moment ago, we have added language here that requires

cautionary language. The Senator from New York has pointed out that we extended to the SEC the authority to go after these matters which may be the best way of recovering, I would say anyway, because they are not necessarily out to just win for themselves but rather win for the investors where they have the knowingly intentionally and with purpose attempted to mislead the investor. That may not be a perfect standard but I think our desire here to have a higher standard makes sense if you understand the value of safe harbor.

Again I will state what I said at the outset. For those who do not believe in safe harbor, adoption of the Sarbanes amendment makes sense because in my view that undermines the safe harbor.

So I would respectfully disagree with my colleague in his amendment, as appealing as it is to the rhetorical sense. I think the net effect of it at the end of the day is that we are going to abandon the safe harbor protection. Information will not be forthcoming that could otherwise help your institutional investors, particularly in terms of deciding whether or not to buy or sell the stock in a particular company.

I think that is a shortcoming, if we adopt this language as part of this bill. I think it will hurt what we have tried to do here with this legislation in trying to strike the balance.

With that, Mr. President, I yield the floor.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. LAUTENBERG. Mr. President, the Chair has an obligation to recognize the Senator who stood up first.

Mr. McCAIN. Mr. President, last September the United States——

Mr. LAUTENBERG addressed the Chair.

The PRESIDING OFFICER. The Senate is out of order. The Senate will be in order. Both Senators were standing. The Senator from Arizona has been standing.

Mr. LAUTENBERG. I have been standing. With all due respect, I have been here, was here before the Senator from Arizona, and I called for recognition from the Chair. And the Chair, as I saw it, deliberately chose to ignore my appeal for recognition. The Chair I guess has that right. But that is not the way this body is to operate.

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

Mr. McCAIN. Mr. President, my friend from New Jersey is obviously upset. Could I ask how long the Senator from New Jersey intended to speak?

Mr. LAUTENBERG. Probably 15 minutes. I am not upset at the Senator from Arizona. I am upset because of common courtesy.

Mr. McCAIN. I understand. May I say that I believe it is a very close call. And, Mr. President, I ask unanimous consent to yield 15 minutes to the Senator from New Jersey, and that as I do so, I have been in these similar situations with very tough calls from the Chair as to who speaks first. I believe the rule of the Senate is who is on their feet and speaks first is who seeks recognition. I believe we were both on our feet. I do not believe that the rule of the Senate is who has been standing the longest.

With that, I ask unanimous consent that the Senator from New Jersey is to be recognized for 15 minutes, and then I would be recognized for my remarks.

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

Mr. LAUTENBERG. The Senator from Arizona is very courteous.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. LAUTENBERG. I respect and appreciate it.

How long does he intend to speak?

Mr. McCAIN. About 10 minutes. Please go ahead. The Senator was on the floor. Please go ahead.

Mr. LAUTENBERG. I thank the Senator from Arizona.

Mr. President, I ask unanimous consent to be added as a cosponsor of the Sarbanes amendment.

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

Mr. LAUTENBERG. Mr. President, as the Senator from Maryland explained, this amendment would modify a provision of S. 240 that I find very troubling. I know that earlier today our colleague from New York tempered somewhat the existing language relating to the safe harbor provision, but Mr. President, I do not think he went far enough.

One goal of this bill is to minimize the existing disincentives to provide detailed forward-looking statements about the economic prospects of their companies.

Everyone agrees that is a desirable goal.

I certainly do.

Indeed, my support is based on personal experience.

Prior to coming to the Senate, I worked in the private sector. I cofounded a company with two others, three of us from poor working-class homes, that today employs over 20,000 people. It is an American success story. I say that because I think it is important to occasionally call on one's background as we review some of the legislation that is proposed in front of us. After the company went public in 1961, I filed countless statements with the SEC as its CEO. As the CEO, I believed that it was important for investors to have as much information as possible.

Each year, I made it a practice to project earnings for the following year. And if it needed modification during the period due to changes and conditions, I quickly went to the public to alert them to any revision. This process had significant rewards because investor confidence in ADP—my company—caused our stock, which is listed on the New York Stock Exchange, to sell at among the highest price-earnings ratios of all listed securities on any exchange.

There used to be a company in the investment business, an old name in the financial world, Kidder-Peabody. And each month they would publish a list known as The Nifty 50. These were the highest price-earnings ratio companies that were listed. They did that for over 265 months, for more than 22 years. Every month they would publish lists of the companies that were among the investors' favorites. The company that led that list was my company, ADP. It was on the list 215 out of 265 months, far more than the next best company which listed among the top list more than 200 times. Obviously, the company did well. It performed well year after year. But it was the investors' belief, the investors' confidence, that they could always count on ADP to tell the truth about what was happening that caused the stock price to swell as the earnings grew.

As I look back at that period, I know that I was in the forefront of CEO's who provided investors with forward-looking statements on my company's financial health. It made sense to me then. It makes sense to me now.

One of the things that I know this bill would like to accomplish is to make sure that the public is as well informed as possible. It is not simply to focus on whether or not litigation is possible or whether there ought to be ceilings on certain claims but, rather, to give the public a chance to know what is going on and at the same time not to encourage frivolous or whimsical lawsuits.

It is important that investors have as much information as they can. Everyone knows, especially in the larger companies, that senior executives in the company know very well what they are expecting to happen over a year, 2, 3, 4, 5 years in advance. It may not be precise, but they have a target; they have a goal. Everyone knows that in addition to the executives within the company, the board of directors has to be notified if there are any changes.

What does that represent? It represents an advantage that people on the inside have over those on the outside who are investing their money. And there is nothing, no reason at all why anyone on the inside ought to have privileged information with which to sell stock or buy stock ahead of the investing public. It is critical that all investors have as much information about the company as they can to make informed investment decisions.

Despite the desire to provide information, many issuers, many companies do not provide sufficient information. They do not because they are concerned about their potential liability, which this bill addresses, should these forecasts turn out to be off the mark. Well, if things change, as I said in my comments, then what ought to happen is the company ought to say: Investors, be prepared. We have to take a hit on

our earnings because of this product or this market or what have you, but we have confidence in the future and this is what we expect. The investors will stay with the ship. This is especially true for the small high-tech companies, which is what my company was. These are companies whose growth we want to encourage. It is not in the public interest for these companies to go out of business because of a lawsuit based on a financial forecast or information which despite the company's best efforts later turns out to be inaccurate. And that can happen despite the best intentions of the company.

I remember how much the stock of biotech companies dropped when we were discussing health care last year. And should those biotech companies be held accountable for this drop? Of course not. We want to protect the research and the innovation that develops from such firms. But I believe that this bill goes too far in the effort to do that.

The recently amended language in S. 240 provides a safe harbor from liability unless the issuer's statement is knowingly made with the purpose and actual intent of misleading investors, and on its face that legislative language looks reasonable. But the committee report notes that purpose and actual intent are separate elements that must be proven by the investor.

To me, this standard, although an improvement over the version reported out of the Banking Committee, is still too high a threshold. This amendment provides safe harbor protections for issuers who make forecasts, but we narrow this protection so that issuers who make statements with the knowledge that the information was false or misleading would be liable. That is a reasonable standard, and it is a standard supported by the SEC and by the administration. It protects those who should be protected. And it does so without creating a safe harbor for those who should be subject to litigation.

It may seem to those listening or who may be watching this debate that the Senator from Maryland and I are splitting hairs with single word changes. However, when the next financial scandal rocks our markets and investors are prevented from recovering their losses caused by intentionally misleading forecasts because they are unable to demonstrate actual intent, those affected investors will certainly feel the difference. We do not want to hurt those investors who are able to demonstrate that an issuer intentionally made a misleading statement but are unable to show actual intent.

I cannot understand this. I say that again as a person who has been on both sides of the matter—as an investor and as an issuer. I believe that the amendment as proposed provides the right balance. If you make a forward-looking statement knowing it was false or misleading, you should not be immune from liability. You have to pay the price for the deception.

Now, I understand why the Senator from New York would want to expand the current safe harbor. Everyone wants that, including the SEC. But I think this bill has gone too far in the other direction. We should not be encouraging or protecting fraudulent statements, which I believe is what S. 240 might inadvertently do.

Mr. President, we have the most efficient markets in the world, and this is due in large part to the reliability of information available to investors. I do not understand why we would want to enact legislation that might jeopardize this.

Once again, I thank my colleague from Arizona for yielding the floor.

I urge my colleagues to support this amendment, and now I yield the floor.

Mr. MCCAIN addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Mr. President, I thank my friend from New Jersey. I say to him I understand the sensitivity of recognition. I remained in the minority party for some 12 years, and I appreciate the sensitivity involved with that. I believe that in all fairness the Chair is required to recognize the person that the Chair hears first, and I as always appreciate his courtesy.

Mr. President, I rise in support of the amendment.

HAITI'S ELECTION

Mr. MCCAIN. Mr. President, last September, the United States sent 20,000 of its sons and daughters to Haiti. Their ostensible mission was defined in the name given to this unopposed invasion of another country—Operation Uphold Democracy. Today, we are told by some Haitian Government Ministers, by the head of Haiti's Provisional Electoral Council, and even by our own Washington Post, that democracy—a form of government that we exported to Haiti at the risk of American lives—may be, in the end, too much to expect from this poor, troubled, violent country.

Few would disagree that what happened last Sunday at least raised questions, serious questions, about whether Haiti's elections were free and fair. But, as I just noted, among the few, were some Aristide ministers; Mr. Remy, the hopelessly incompetent chairman of Haiti's election council; and, again, the Washington Post. In truth, the gross irregularities that plagued last Sunday's election, and the polling that occurred on Monday purportedly to compensate for a small fraction of those irregularities, as well as the mounting evidence of vote counting fraud have made it, in the sensible judgment of Representative PORTER GOSS—''impossible to verify the results of this election.''

Mr. GOSS led an accredited election observation team from the International Republican Institute [IRI]. I have the honor of serving the institute as chairman of its board of directors. I am proud of IRI's work generally, and its work in Haiti specifically. I will talk some more about the quality of that work a little later in my remarks.

I want to first talk briefly about the elections and the gross irregularities that indeed make it impossible to verify the results. It is important to note that no observer of the election—be it OAS observers, or observers on the White House delegation, or even one very candid Government minister in Haiti, will dispute the evidence of irregularities which IRI's observers and these other monitors uncovered. IRI observers found that these elections were, in a word, chaotic.

The headline for today's Washington Post story on the elections was ''Unanimity in Haiti: Elections Were Chaotic.'' Unfortunately, no one seems to have told the Washington Post's editorial writers. Or, possibly, those writers do not believe that the chaos which, in truth, defined these elections seriously undermined their integrity. If that is the judgement of the Washington Post's editors it is a faulty one, and it cannot withstand the weight of the abundant evidence that the election process—from the campaign season through election day to the ballot counting—was plagued by very grave problems.

People can judge for themselves whether these problems have rendered the elections completely unfair and unfree. The IRI delegation's responsibility as impartial observers was to simply call them as they saw them. What they saw was rather discouraging, so discouraging that even Aristide's Minister for Culture, Jean-Claude Bajeux, offered an apology. ''As a member of the Government,'' he said, ''I am not proud of this.'' Minister Bajeux went on to observe that ''instead of improving on the 1990 elections, we have done worse.''

Not surprisingly, the widespread irregularities have prompted opposition parties to reject these elections as fraudulent. That charge was leveled by the mayor of Port-au-Prince, Evans Paul, as well. You will recall, Mr. President, that Mayor Paul's post support for President Aristide was often referred to by President Aristide's supporters in the United States.

Mr. President, let me offer a brief sampling of the irregularities which the IRI delegation documented. I will first read from the executive summary of IRI's pre-election report which evaluated the pre-electoral process and environment for their comparison to minimal standards of acceptability.

The elections were originally to be held in December, but were postponed several times for a variety of reasons.

Mr. President, I ask unanimous consent that the complete executive summary be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows: