

"(B) if not, after considering all relevant factors, including, but not limited to financial interest in the relief sought, work done to develop and prosecute the case, the quality of the claim, prior experience representing classes, possible conflicting interests, and exposure to unique defenses, shall select and appoint a named plaintiff or plaintiffs to serve as lead plaintiff or plaintiffs of the purported plaintiff class.

"(3) SELECTION OF LEAD COUNSEL.—The lead plaintiff or plaintiffs appointed under paragraph (2) shall, subject to the approval of the court, select and retain counsel to represent the class."

AMENDMENTS SUBMITTED ON JUNE 27, 1995

THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995

D'AMATO AMENDMENT NO. 1476

Mr. D'AMATO proposed an amendment to the bill (S. 240) to amend the Securities 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; as follows:

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

SARBANES (AND LAUTENBERG) AMENDMENT NO. 1477

Mr. SARBANES (for himself and Mr. LAUTENBERG) proposed an amendment to the bill S. 240, supra; 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 to 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."

SARBANES (AND LAUTENBERG) AMENDMENT NO. 1478

Mr. SARBANES (for himself and Mr. LAUTENBERG) proposed an amendment to the bill S. 240, supra; as follows:

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;

GRAHAM AMENDMENT NO. 1479

Mr. GRAHAM proposed an amendment to the bill S. 240, supra; as follows:

On page 104, after line 22, insert the following:

(c) EARLY EVALUATION PROCEDURES.—

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

"(j) EARLY EVALUATION PROCEDURES IN CLASS ACTIONS.—

"(1) IN GENERAL.—In a private action arising under this title that is filed as a class action pursuant to the Federal Rules of Civil Procedure, if the class representatives and each of the other parties to the action agree and any party so requests, or if the court upon motion of any party so decides, not later than 60 days after the filing of the class action, the court shall order an early evaluation procedure. The period of the early evaluation procedure shall not extend beyond 150 days after the filing of the first complaint subject to the procedure.

"(2) REQUIREMENTS.—During the early evaluation procedure described under paragraph (1)—

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

"(B) plaintiffs may file a consolidated or amended complaint at any time and may dismiss the action or actions at any time without sanction;

"(C) unless otherwise ordered by the court, no formal discovery shall occur, except that parties may propound discovery requests to third parties to preserve evidence;

"(D) the parties shall evaluate the merits of the action under the supervision of a person (hereafter in this section referred to as the 'mediator') agreed upon by them or designated by the court in the absence of agreement, which person may be another district court judge, any magistrate-judge or a special master, each side having one peremptory challenge of a mediator designated by the court by filing a written notice of challenge not later than 5 days after receipt of an order designating the mediator;

"(E) the parties shall promptly provide access to or exchange all nonprivileged documents relating to the allegations in the complaint or complaints, and any documents withheld on the grounds of privilege shall be sufficiently identified so as to permit the mediator to determine if they are, in fact, privileged; and

"(F) the parties shall exchange damage studies and such other expert reports as may be helpful to an evaluation of the action on the merits, which materials shall be treated as prepared and used in the context of settlement negotiations.

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

"(4) EVALUATION BY THE MEDIATOR.—

"(A) IN GENERAL.—If, at the end of the early evaluation procedure described in paragraph (1), the action has not been voluntarily dismissed or settled, the mediator shall evaluate the action as being—

"(i) clearly frivolous, such that it can only be further maintained in bad faith;

"(ii) clearly meritorious, such that it can only be further defended in bad faith; or

"(iii) described by neither clause (i) nor clause (ii).

"(B) WRITTEN EVALUATION.—An evaluation required by subparagraph (A) with respect to the claims against and defenses of each defendant shall be issued in writing not later than 10 days after the end of the early evaluation procedure and provided to the parties. The evaluation shall not be admissible in the action, and shall not be provided to the court until a motion for sanctions under paragraph (5) is timely filed.

"(5) MANDATORY SANCTIONS.—

"(A) CLEARLY FRIVOLOUS ACTIONS.—In an action that is evaluated by the mediator under paragraph (4)(A)(i), upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of rule 11(b) of the Federal Rules of Civil Procedure.

"(B) MANDATORY SANCTIONS.—If the court makes a finding under subparagraph (A) that a party or attorney violated any requirement of rule 11(b) of the Federal Rules of

Civil Procedure, the court shall impose sanctions on such party or attorney in accordance with rule 11 of the Federal Rules of Civil Procedure.

“(C) PRESUMPTION IN FAVOR OF ATTORNEYS’ FEES AND COSTS.—

“(i) IN GENERAL.—Subject to clauses (ii) and (iii), for purposes of subparagraph (B), the court shall adopt a presumption that the appropriate sanction for failure of the complaint to comply with any requirement of rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of all of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation.

“(ii) REBUTTAL EVIDENCE.—The presumption described in clause (i) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

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

“(II) the violation of rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

“(iii) SANCTIONS.—If the party or attorney against whom sanctions are to be imposed meets its burden under clause (ii), the court shall award the sanctions that the court deems appropriate pursuant to rule 11 of the Federal Rules of Civil Procedure.

“(6) EXTENSION OF EARLY EVALUATION PERIOD.—The period of the early evaluation procedure described in paragraph (1) may be extended by stipulation of all parties. At the conclusion of the period, the action shall proceed in accordance with Federal Rules of Civil Procedure.

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

(2) SECURITIES EXCHANGE ACT OF 1934.—Section 21 of the Securities Act of 1933 (15 U.S.C. 78a) is amended by adding at the end the following new subsection:

“(I) EARLY EVALUATION PROCEDURES IN CLASS ACTIONS.—

“(1) IN GENERAL.—In any private action arising under this title that is filed as a class action pursuant to the Federal Rules of Civil Procedure, if the class representatives and each of the other parties to the action agree and any party so requests, or if the court upon motion of any party so decides, not later than 60 days after the filing of the class action, the court shall order an early evaluation procedure. The period of the early evaluation procedure shall not extend beyond 150 days after the filing of the first complaint subject to the procedure.

“(2) REQUIREMENTS.—During the early evaluation procedure described under paragraph (1)—

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

“(B) plaintiffs may file a consolidated or amended complaint at any time and may dismiss the action or actions at any time without sanction;

“(C) unless otherwise ordered by the court, no formal discovery shall occur, except that parties may propound discovery requests to third parties to preserve evidence;

“(D) the parties shall evaluate the merits of the action under the supervision of a person (hereafter in this section referred to as the ‘mediator’) agreed upon by them or designated by the court in the absence of agreement, which person may be another district court judge, any magistrate-judge or a special master, each side having one peremptory challenge of a mediator designated by the

court by filing a written notice of challenge not later than 5 days after receipt of an order designating the mediator;

“(E) the parties shall promptly provide access to or exchange all nonprivileged documents relating to the allegations in the complaint or complaints, and any documents withheld on the grounds of privilege shall be sufficiently identified so as to permit the mediator to determine if they are, in fact, privileged; and

“(F) the parties shall exchange damage studies and such other expert reports as may be helpful to an evaluation of the action on the merits, which materials shall be treated as prepared and used in the context of settlement negotiations.

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

“(4) EVALUATION BY THE MEDIATOR.—

“(A) IN GENERAL.—If, at the end of the early evaluation procedure described in paragraph (1), the action has not been voluntarily dismissed or settled, the mediator shall evaluate the action as being—

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

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

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

“(B) WRITTEN EVALUATION.—An evaluation required by subparagraph (A) with respect to the claims against and defenses of each defendant shall be issued in writing not later than 10 days after the end of the early evaluation procedure and provided to the parties. The evaluation shall not be admissible in the action, and shall not be provided to the court until a motion for sanctions under paragraph (5) is timely filed.

“(5) MANDATORY SANCTIONS.—

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

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

“(6) EXTENSION OF EARLY EVALUATION PERIOD.—The period of the early evaluation procedure described in paragraph (1) may be extended by stipulation of all parties. At the conclusion of the period, the action shall proceed in accordance with Federal Rules of Civil Procedure.

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

On page 105, line 5, strike “(j)” and insert “(i)”.

On page 106, line 25, strike “(l)” and insert “(k)”.

On page 108, line 24, strike “(k)” and insert “(j)”.

On page 109, line 8, strike “(l)” and insert “(k)”.

On page 126, line 19, strike “(m)” and insert “(l)”.

On page 127, line 6, strike “(m)” and insert “(l)”.

BOXER AMENDMENT NO. 1480

Mrs. BOXER proposed an amendment to the bill S. 240, supra; as follows:

At the appropriate place in title I, insert the following new section:

SEC. . CONSEQUENCES OF INSIDER TRADING.

(a) SECURITIES ACT OF 1933.—Section 13A of the Securities Act of 1933, as added by section 105 of this Act, is amended by adding at the end the following new subsection:

“(h) CONSEQUENCES OF INSIDER TRADING.—

“(1) IN GENERAL.—Notwithstanding subsection (c), the exclusion from liability provided for in subsection (a) does not apply to a false or misleading forward-looking statement if, in connection with the false or misleading forward-looking statement, the issuer or any officer or director of the issuer—

“(A) purchased or sold a material amount of the equity securities of the issuer (or derivatives thereof), as reflected in filings with the Commission; and

“(B) financially benefited from the forward-looking statement.

“(2) DEFINITION.—For purposes of this subsection, the term ‘material amount’ means—

“(A) with respect to an issuer, equity securities of the issuer of any class having a total value of not less than \$1,000,000; and

“(B) with respect to an officer or director of an issuer, holdings of that officer or director of any class of the equity securities of the issuer having a total value of not less than \$50,000.”.

(b) SECURITIES EXCHANGE ACT OF 1934.—Section 37 of the Securities Exchange Act of 1934, as added by section 105 of this Act, is amended by adding at the end the following new subsection:

“(h) CONSEQUENCES OF INSIDER TRADING.—

“(1) CONSEQUENCES OF INSIDER TRADING.—Notwithstanding subsection (c), the exclusion from liability provided for in subsection (a) does not apply to a false or misleading forward-looking statement if, in connection with the false or misleading forward-looking statement, the issuer or any officer or director of the issuer—

“(A) purchased or sold a material amount of the equity securities of the issuer (or derivatives thereof), as reflected in filings with the Commission; and

“(B) financially benefited from the forward-looking statement.

“(2) DEFINITION.—For purposes of this subsection, the term ‘material amount’ means—

“(A) with respect to an issuer, \$1,000,000 worth of any class of the equity securities of the issuer; and

“(B) with respect to an officer or director of an issuer, \$50,000 worth of the holdings of that person of any class of the equity securities of the issuer.”.

Amend the table of contents accordingly.

BIDEN AMENDMENT NO. 1481

Mr. BIDEN proposed an amendment to the bill S. 240, supra; as follows:

At the appropriate place insert:

SEC. . AMENDMENT TO RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT.

Section 1964(c) of title 18, United States Code, is amended by inserting before the period “, except that no person may rely upon

conduct that would have been actionable as fraud in the purchase of sale of securities to establish a violation of section 1962", provided however that this exception shall not apply if any participant in the fraud is criminally convicted in connection therewith, in which case the statute of limitations shall start to run on the date that the conviction became final.

BINGAMAN (AND BRYAN)
AMENDMENT NO. 1482

Mr. BINGAMAN (for himself and Mr. BRYAN) proposed an amendment to the bill S. 240, supra; as follows:

On page 105, line 25, insert ", or the responsive pleading or motion" after "complaint".
On page 107, line 20, insert ", or the responsive pleading or motion" after "complaint".

SPECTER AMENDMENT NOS. 1483-
1485

Mr. SPECTER proposed three amendments to the bill S. 240, supra; as follows:

AMENDMENT NO. 1483

Beginning on page 105, strike line 1 and all that follows through page 108, line 17, and insert the following:

SEC. 103. SANCTIONS FOR ABUSIVE LITIGATION.

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

"(j) SANCTIONS FOR ABUSIVE LITIGATION.—In any private action arising under this title, if an abusive litigation practice relating to the action is brought to the attention of the court, by motion or otherwise, the court shall promptly—

"(1) determine whether or not to impose sanctions under rule 11 or rule 26(g)(3) of the Federal Rules of Civil Procedure, section 1927 of title 28, United States Code, or other authority of the court; and

"(2) include in the record findings of fact and conclusions of law to support such determination."

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

"(l) SANCTIONS FOR ABUSIVE LITIGATION.—In any private action arising under this title, if an abusive litigation practice relating to the action is brought to the attention of the court, by motion or otherwise, the court shall promptly—

"(1) determine whether or not to impose sanctions under rule 11 or rule 26(g)(3) of the Federal Rules of Civil Procedure, section 1927 of title 28, United States Code, or other authority of the court; and

"(2) include in the record findings of fact and conclusions of law to support such determination."

AMENDMENT NO. 1484

Beginning on page 108, strike line 24 and all that follows through page 109, line 4, and insert the following:

"(k) STAY OF DISCOVERY.—

"(1) IN GENERAL.—In any private action arising under this title, the court may stay discovery upon motion of any party only if the court determines that the stay of discovery—

"(A) would avoid waste, delay, duplication, or unnecessary expense; and

"(B) would not prejudice any plaintiff.

"(2) ADDITIONAL LIMITATIONS ON DISCOVERY.—In any private action arising under this title—

"(A) prior to the filing of a responsive pleading to the complaint, discovery shall be

limited to materials directly relevant to facts expressly pleaded in the complaint; and

"(B) except as provided in subparagraphs (A) and (B), or otherwise expressly provided in this title, discovery shall be conducted pursuant to the Federal Rules of Civil Procedure."

On page 111, strike lines 1 through 7, and insert the following:

"(2) STAY OF DISCOVERY.—

"(A) IN GENERAL.—In any private action arising under this title, the court may stay discovery upon motion of any party only if the court determines that the stay of discovery—

"(i) would avoid waste, delay, duplication, or unnecessary expense; and

"(ii) would not prejudice any plaintiff.

"(B) ADDITIONAL LIMITATIONS ON DISCOVERY.—In any private action arising under this title—

"(i) notwithstanding any stay of discovery issued in accordance with subparagraph (A), the court may permit such discovery as may be necessary to permit a plaintiff to prepare an amended complaint in order to meet the pleading requirements of this section;

"(ii) prior to the filing of a responsive pleading to the complaint, discovery shall be limited to materials directly relevant to facts expressly pleaded in the complaint; and

"(iii) except as provided in clauses (i) and (ii), or otherwise expressly provided in this title, discovery shall be conducted pursuant to the Federal Rules of Civil Procedure."

AMENDMENT NO. 1485

On page 110, strike lines 12 through 19, and insert the following:

"(b) REQUIRED STATE OF MIND.—

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

"(2) STRONG INFERENCE OF FRAUDULENT INTENT.—For purposes of paragraph (1), a strong inference that the defendant acted with the required state of mind may be established either—

"(A) by alleging facts to show that the defendant had both motive and opportunity to commit fraud; or

"(B) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness by the defendant."

D'AMATO (AND SARBANES)
AMENDMENT NO. 1486

Mr. BENNETT (for Mr. D'AMATO for himself and Mr. SARBANES) proposed an amendment to the bill S. 240, supra; as follows:

On page 84, line 11, strike ", if" and insert "in which".

On page 111, beginning on line 2, strike "during the pendency of any motion to dismiss."

On page 111, line 4, insert "during the pendency of any motion to dismiss," after "stayed".

On page 114, line 13, strike "has been."

On page 114, strike line 15 and insert the following: "made—

"(i) was convicted of any felony or misdemeanor";

On page 114, strike line 17 and insert the following: "15(b)(4)(B); or

"(ii) has been made the subject of a ju-"

On page 114, line 20, strike "(i) prohibits" and insert the following:

"(I) prohibits".

On page 115, line 1, strike "(ii) requires" and insert the following:

"(II) requires".

On page 115, line 4, strike "(iii) determines" and insert the following:

"(III) determines".

On page 116, between lines 11 and 12, insert the following:

"(D) made in connection with an initial public offering;

On page 116, line 12, strike "(D)" and insert "(E)".

On page 116, line 17, strike "(E)" and insert "(F)".

On page 118, line 13, before the period insert "that are not compensated through final adjudication or settlement of a private action brought under this title arising from the same violation".

On page 121, line 7, strike "has been,".

On page 121, strike line 9, and insert the following: "made—

"(i) was convicted of any felony or misdemeanor";

On page 121, strike line 11 and insert the following: "15(b)(4)(B); or

"(ii) has been made the subject of a ju-"

On page 121, line 14, strike "(i) prohibits" and insert the following:

"(I) prohibits".

On page 121, line 16, strike "(ii) requires" and insert the following:

"(II) requires".

On page 121, line 19, strike "(iii) determines" and insert the following:

"(III) determines".

On page 122, between lines 20 and 21, insert the following:

"(D) made in connection with an initial public offering;

On page 122, line 21, strike "(D)" and insert "(E)".

On page 123, line 1, strike "(E)" and insert "(F)".

On page 124, line 21, insert before the period "that are not compensated through final adjudication or settlement of a private action brought under this title arising from the same violation".

On page 128, line 25, strike "the liability of" and insert "if".

On page 128, line 25, strike "offers or sells" and insert "offered or sold".

On page 129, line 1, strike "shall be limited to damages if that person".

On page 129, line 9, strike "and such portion or all of such amount" and insert "then such portion or amount, as the case may be,".

On page 131, lines 19 and 20, strike "that person's degree" and insert "the percentage".

On page 131, line 20, insert "of that person" before the comma.

NOTICE OF HEARING

COMMITTEE ON INDIAN AFFAIRS

Mr. MCCAIN. Mr. President, I would like to announce that the Senate Committee on Indian Affairs will be holding a hearing on Wednesday, June 28, 1995, beginning at 9:45 a.m., in room 485 of the Russell Senate Office Building on S. 814, a bill to provide for the reorganization of the Bureau of Indian Affairs, and for other purposes.

Those wishing additional information should contact the Committee on Indian Affairs at 224-2251.