

103^D CONGRESS
1ST SESSION

H. R. 417

To amend the Securities Exchange Act of 1934 in order to reform private enforcement of the Federal securities laws, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 5, 1993

Mr. TAUZIN (for himself, Mr. PARKER, Mr. HALL of Texas Mr. ROWLAND, Mr. MONTGOMERY, Mr. SHAW, Mr. MACHTLEY, and Mr. MORAN) introduced the following bill; which was read twice and referred to the Committee on Energy and Commerce

AUGUST 23, 1993

Additional sponsors: Mr. PETERSON of Minnesota, Mr. KYL, Mr. McMILLAN, Mr. SUNDQUIST, Mr. HENRY, Mr. BURTON of Indiana, Mr. PORTER, Mr. LINDER, Mr. PAXON, Mr. RUSH, Mr. SCHAEFER, Mr. HASTERT, Mr. UPTON, Mr. PALLONE, Mr. TOWNS, Mr. McNULTY, Mr. NEAL of North Carolina, Mr. MOORHEAD, Mr. GILLMOR, Mr. GENE GREEN of Texas, Mr. MICHEL, Mr. ZELIFF, Mr. EWING, Mrs. JOHNSON of Connecticut, Mr. HYDE, Ms. LONG, Mr. DURBIN, Mr. BAESLER, Mr. FRANKS of Connecticut, Mr. GUTIERREZ, Mr. CRANE, Mr. QUILLEN, Mr. BARCIA of Michigan, and Mr. BAKER of Louisiana

A BILL

To amend the Securities Exchange Act of 1934 in order to reform private enforcement of the Federal securities laws, and for other purposes.

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

1 **SECTION. 1. SHORT TITLE.**

2 This Act may be cited as the “Securities Private En-
3 forcement Reform Act”.

4 **SEC. 2. FINDINGS.**

5 The Congress finds that—

6 (1) excessive securities litigation is a serious
7 burden on the national economy, diverting limited
8 capital resources to less productive areas;

9 (2) meritless lawsuits filed under Federal secu-
10 rities laws are making it harder for American com-
11 panies to raise capital and attract experienced mem-
12 bers to serve on their boards;

13 (3) in the past 3 years, issuers of 1 out of every
14 12 stocks traded on the New York Stock Exchange
15 have been sued for securities fraud;

16 (4) in the securities fraud area, the civil justice
17 system is being transformed into a nonmerit-based,
18 unjust system, in which professional plaintiffs ex-
19 tract settlements from entrepreneurs, regardless of
20 the merits of the cases filed;

21 (5) such securities lawsuits impose additional
22 costs on publicly traded companies, often force them
23 into bankruptcy, and create job losses within the
24 economy;

25 (6) such securities fraud lawsuits stifle the de-
26 velopment of future products by compelling invest-

1 ment bankers and accounting firms, whose assist-
2 ance is essential for accessing capital markets, to re-
3 sist working with new venture firms because of the
4 higher risk of litigation associated with them; and

5 (7) reform in the securities fraud laws are need-
6 ed to ensure that the courts can properly hear and
7 adjudicate securities fraud cases.

8 **SEC. 3. PRIVATE CIVIL ACTION PROCEDURES.**

9 The Securities Exchange Act of 1934 is amended by
10 inserting after section 20A (15 U.S.C. 78u-1) the follow-
11 ing new section:

12 “PRIVATE CIVIL ACTION PROCEDURES

13 “SEC. 20B. (a) REQUIREMENT OF PROPORTIONATE
14 LIABILITY.—

15 “(1) LIMITATION ON JOINT AND SEVERAL LI-
16 ABILITY.—A defendant who is found liable for dam-
17 ages in an implied private action arising under a
18 provision of this Act may be liable jointly and sever-
19 ally only if the trier of fact specifically determines
20 that the defendant engaged in knowing securities
21 fraud, as defined in paragraph (3).

22 “(2) DETERMINATION OF LIABILITY.—If the
23 trier of fact does not find, pursuant to paragraph
24 (1), that the defendant engaged in knowing securi-
25 ties fraud, the defendant’s liability shall be deter-
26 mined as follows:

1 “(A) The trier of fact shall determine the
2 percentage of responsibility of the plaintiff, of
3 each of the defendants and of each of the other
4 persons or entities alleged by the parties to
5 have caused or contributed to the harm alleged
6 by the plaintiff. In determining the percentages
7 of responsibility, the trier of fact shall consider
8 both the nature of the conduct of each person
9 and the nature and extent of the causal rela-
10 tionship between that conduct and the damage
11 claimed by the plaintiff.

12 “(B) For each defendant, the trier of fact
13 shall then multiply the defendant’s percentage
14 of responsibility by the total amount of damage
15 suffered by the plaintiff that was caused in
16 whole or in part by that defendant and shall
17 enter a verdict or judgment against the defend-
18 ant in that amount. No defendant whose liabil-
19 ity is determined under this subsection shall be
20 jointly liable on any judgment entered against
21 any other party to the action.

22 “(C) Except where contractual relationship
23 permits, no defendant whose liability is deter-
24 mined under this subsection shall have a right

1 to recover from another defendant any portion
2 of the judgment entered against him.

3 “(3) DEFINITION.—A defendant engages in
4 ‘knowing securities fraud’ only if he (A) makes a
5 material representation with actual knowledge that
6 the representation is false or omits to make a state-
7 ment with actual knowledge that, as a result of the
8 omission, one of his material representations is false;
9 and (B) knows that other persons are likely to rely
10 on that misrepresentation or omission. Reckless con-
11 duct by the defendant shall not constitute ‘knowing
12 securities fraud’. The liability in damages, in any, of
13 a defendant who acts in a reckless manner shall be
14 determined in accordance with paragraph (3).

15 “(4) COVERAGE OF PROVISION.—This sub-
16 section relates only to the allocation of damages
17 among defendants. Nothing herein shall affect the
18 standards for liability under any implied private ac-
19 tion arising under a provision of this Act.

20 “(b) AWARDS OF ATTORNEY FEES.—

21 “(1) AUTHORITY TO AWARD FEES.—If the
22 court in any implied private action arising under this
23 Act enters a final judgment against a party litigant
24 on the basis of a motion to dismiss, motion for sum-
25 mary judgment, or a trial on the merits, the court

1 shall, upon motion by the prevailing party, award
2 the prevailing party reasonable fees and other ex-
3 penses incurred by that party unless the court deter-
4 mines that the position of the losing party was sub-
5 stantially justified. If the court determines that the
6 position of the losing party was substantially justi-
7 fied, it shall not award fees and other expenses to
8 the prevailing party. The determination whether the
9 position of the losing party was substantially justi-
10 fied shall be made on the basis of the record which
11 is made in the civil action for which fees and other
12 expenses are sought.

13 “(2) APPLICATION FOR FEES.—A party seeking
14 an award of fees and other expenses shall, within 30
15 days of a final, nonappealable judgment in the ac-
16 tion, submit to the court an application for fees and
17 other expenses that verifies that the party is entitled
18 to such an award under paragraph (1) and the
19 amount sought, including an itemized statement
20 from any attorney or expert witness representing or
21 appearing on behalf of the party stating the actual
22 time expended and the rate at which fees and other
23 expenses are computed.

24 “(3) ALLOCATION AND SIZE OF AWARD.—The
25 court, in its discretion, may—

1 “(A) determine whether the amount to be
2 awarded pursuant to this section shall be
3 awarded against the unsuccessful party, its at-
4 torney, or both; and

5 “(B) reduce the amount to be awarded
6 pursuant to this section, or deny an award, to
7 the extent that the prevailing party during the
8 course of the proceedings engaged in conduct
9 that unduly and unreasonably protracted the
10 final resolution of the matter in controversy.

11 “(4) AWARDS IN DISCOVERY PROCEEDINGS.—
12 In adjudicating any motion for an order compelling
13 discovery or any motion for a protective order made
14 in any implied private action arising under this Act,
15 the court shall award the prevailing party reasonable
16 fees and other expenses incurred by the party in
17 bringing or defending against the motion, including
18 reasonable attorney fees, unless the court finds that
19 special circumstances make an award unjust.

20 “(5) DEFINITIONS.—For purposes of this sub-
21 section—

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

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

7 “(B) The term ‘substantially justified’
8 shall have the same meaning as in section
9 2412(d)(1) of title 28, United States Code.

10 “(c) ABUSIVE PRACTICES.—

11 “(1) SHARES OF AWARDS TO REPRESENTATIVE
12 PLAINTIFFS.—In any implied private action arising
13 under this Act that is certified as a plaintiff class
14 action pursuant to the Federal rules of civil proce-
15 dures, the share of any final judgment or of any set-
16 tlement that is awarded to any party serving as a
17 representative plaintiff shall be calculated in the
18 same manner as the shares of the final judgment or
19 settlement awarded to all other members of the
20 plaintiff class.

21 “(2) REPRESENTATION OF CLASS ACTIONS.—

22 (A) In any implied private action arising under this
23 Act that is certified as a plaintiff class action pursu-
24 ant to the Federal rules of civil procedure, the plain-
25 tiff class may not be represented by (i) any attorney

1 who directly or indirectly owned or otherwise had a
2 beneficial interest in the securities that are the sub-
3 ject of the litigation, or (ii) any attorney affiliated
4 with such an attorney. An attorney who knowingly
5 violates this prohibition shall be barred from rep-
6 resenting any party in any action arising under this
7 Act or under the Securities Act of 1933.

8 “(B) In any implied private action arising
9 under this Act that is certified as a plaintiff class
10 action, an attorney may not represent the plaintiff
11 class if the attorney has paid or is obligated to pay
12 a fee to a third party who assisted him in obtaining
13 the representation of any party to the action. An at-
14 torney who knowingly violates this prohibition shall
15 be barred from representing any party in any action
16 arising under this Act or under the Securities Act of
17 1933.

18 “(3) DISGORGED FUNDS.—(A) Funds disgorged
19 as a result of any action brought by the Commission
20 in Federal court or of any Commission administra-
21 tive action shall not be distributed as payment for
22 attorney fees or expenses incurred by private parties
23 seeking distribution of the disgorged funds.

24 “(B) Any judgment awarded against any person
25 in any implied private action arising under this Act

1 shall be diminished by the amounts, if any, that
2 such person has been or may be required to dis-
3 gorge, pursuant to a court order obtained at the in-
4 stance of the Commission in a proceeding brought
5 under section 21(d) of this Act, or in connection
6 with any Commission administrative action, relating
7 to the same alleged misconduct.

8 “(d) BURDEN OF PROOF.—In any implied cause of
9 action arising under this Act in which the plaintiff may
10 recover money damages only if it proves that the defend-
11 ant acted with scienter, the plaintiff must establish that
12 element of his claim by clear and convincing evidence in
13 order to establish a right to recover money damages.

14 “(e) PLEADING REQUIREMENT.—In any implied
15 cause of action arising under this Act in which the plain-
16 tiff may recover money damages only if it proves that the
17 defendant acted with scienter, the plaintiff must allege in
18 its complaint facts suggesting that the defendant acted
19 with that state of mind.

20 “(f) AIDING AND ABETTING LIABILITY.—In any im-
21 plied cause of action arising under this Act in which the
22 plaintiff may recover damages only if it proves that the
23 defendant acted with scienter, a defendant may be held
24 liable as an aider and abettor only if the plaintiff proves
25 that the defendant knew that another party had violated

1 a provision of this Act and that the defendant, acting with
2 deliberate intent to deceive, manipulate, or defraud for the
3 defendant's own direct pecuniary benefit, provided sub-
4 stantial assistance to the other party's violation. Direct
5 pecuniary benefit shall not include ordinary compensation
6 for services provided.”.

7 **SEC. 4. TIME LIMITATION ON PRIVATE RIGHTS OF ACTION.**

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

11 **“SEC. 36. LIMITATION ON PRIVATE RIGHTS OF ACTION.**

12 “Except as otherwise provided in this Act, any pri-
13 vate right of action arising from a violation of this Act
14 shall be brought not later than the earlier of—

15 “(1) 5 years after the date on which such viola-
16 tion occurred; or

17 “(2) one year after the date on which the viola-
18 tion was discovered or should have been discovered
19 through the exercise of reasonable diligence.”.

20 **SEC. 5. EFFECTIVE DATE.**

21 The provisions of this Act shall apply to all actions
22 commenced on or after the date of the enactment of this
23 Act.

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