these are world class multinational competitors like Hewlett Packard, Intel, Sun Microsystems, and Apple Computer, have been accused of violating the antifraud provisions of the securities laws. Companies in Texas, like Compaq Computer and Texas Instruments, are equally as vulnerable to these kinds of suits.

Mr. Speaker, the current securities litigation system is seriously impacting the competitiveness and productivity of America's technology companies. This is also affecting our ability to create jobs.

In summary, I believe we have demonstrated that the current securities litigation system promotes meritless litigation, shortchanges investors, and costs jobs.

Mr. Speaker, I want to commend the gentleman from Virginia [Mr. BLILEY], our chairman, for moving this forward in an expeditious manner. I would also be remiss if I did not congratulate the gentleman from California [Mr. COX], and the gentleman from Louisiana [Mr. TAUZIN] for the hours that they have put in, not only in this session but in previous sessions, in advancing what I think is a very important and substantial reform in our legal system.

The SPEAKER pro tempore. The Chair yields the gentleman from Massachusetts [Mr. MARKEY] an additional 1½ minutes, due to a little conflict up here.

Mr. MARKEY. Mr. Speaker, I yield 4 minutes to the gentleman from Michigan [Mr. DINGELL].

(Mr. DINGELL asked and was given permission to revise and extend his remarks.)

Mr. DINGELL. Mr. Speaker, this bill is a scandalous piece of legislation. It was conceived in the most scandalous and outrageous abuse of the legislative and conference process that I have ever seen in this institution. It sanctifies the most outrageous kind of fraud and misbehavior imaginable. It is a bill that would be beloved by Mike Milken, Ivan Boesky, and Charles Keating. And, by the great scoundrels of the past like Sam Insul and the greatest of all, Mr. Ponzi.

It will permit the skinning of widows and orphans. It will permit raids on pension funds, on the funds at colleges, universities, and churches, and on the moneys held and managed by local governments and States for their pensions and other citizens. It undoes over 60 years of law that has enabled investors to take action to protect themselves against the worst kinds of misbehavior.

How does it do this, DINGELL, you may ask. Well, I am going to tell you.

The safe-harbor provision provides civil immunity in private enforcement actions for any ''untrue—forward-looking—statement of material fact''—written or oral—so long as that predictive statement is ''accompanied by meaningful cautionary statements.'' Furthermore, the provision expressly eliminates the duty of corporate insiders to update their predictions if subsequent events make them false.

In a word, this conference report therefore immunizes deliberate fraud. And, in a very sad day indeed, on November 15, 1995, the SEC—reportedly under threats to have its budget cut—wrote a letter to the Senate saying not that SEC endorsed the provision, but only indicating withdrawal of opposition this provision, representing the first time in that agency's history, that I am aware of, that it has supported a national policy that immunizes deliberate fraud from civil liability.

The conference report places highly burdensome pleading requirements on plaintiffs in securities cases, and deletes a key amendment proposed by Senator SPECTER and adopted by the Senate, which clarified that the heightened pleading standard could be satisfied by evidence of a defendant's motive and opportunity to commit securities fraud. The conference report also contains an automatic discovery stay.

The bill's elevated pleading standard for scienter—i.e., the plaintiff must ''state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind''—will require average investors without discovery to know and state facts in pleadings that are only knowable after discovery.

The conference report does not restore aiding and abetting liability in private suits nor does it provide a reasonable extension of the statute of limitations.

The conference report imposes a one-sided loser pays rule on plaintiffs which would require plaintiffs to pay the entire legal fees and expenses of corporate defendants, while a defendant who files spurious motions and pleadings would have to pay only reasonable attorney fees and other expenses incurred as a direct result of the violation.

The conference report establishes an unconscionable discretionary bond requirement to cover the payment of fees and expenses, with no limitations on the amount of the bond. Asking a person who may have already lost their life savings to put up as collateral their house or money set aside for the college education of their children in a meritorious case is just plain wrong.

This is a blue print for fraud: company executives can issue false predictive statements, promising investors anything they want, as along as they dress them up with cautionary statements. Investors can sue in the case of egregious, deliberate fraud, but they would have to meet the new pleading standards for intent, and the bill does not let them engage in discovery to get the facts. Moreover, if the fraudsters can hide the facts for 36 months, they are home free. And you may get stuck with the company's entire legal bill.

Ooops! I almost forgot to tell you about the holy water that we sprinkled on accountants, lawyers, and investment bankers. The bill's failure to restore aiding and abetting liability, coupled with the bill's proportionate liability provision, means that the company can go bankrupt and the executives can hide their ill gotten gains in an offshore bank account and investors are out of luck.

Accountants, lawyers, and investment bankers can look the other way, and engage in reckless behavior that assists the fraud, and not have to pay.

In the Keating case, for example, of some $240 million that was ultimately recovered by some 23,000 innocent investors, about 70 percent, or $168 million, was recovered against unscrupulous accountants, lawyers and brokers who were accessories to the fraud. Now, these rascals would be immunized under the law as a result of our failure to take this opportunity to restore aiding and abetting liability. These investors, totally devoid of any culpability, absolutely innocent, many of them elderly retirees, if this were the law at the time they brought their action, would have recovered some $16 million as opposed to the $240 million that they actually lost and recovered.

This is an outrageous piece of legislation. It has been vigorously and strongly opposed by the well-respected Money magazine in four consecutive issues and by local and national newspaper editorials across the country. It is also opposed by the U.S. Conference of Mayors and the National League of Cities, the Fraternal Order of Police, the International Association of Firefighters, State Attorneys General, the Association of the Bar of the City of New York, the Consumer Federation of America, and the National Council of Individual Investors. I am including representative samples of their commentaries at the conclusion of my remarks for the RECORD.

In closing, I say shame on the Congress for considering it. I say, greater shame upon us if we pass it and shame on anybody who has anything to do with it. If this abomination passes the Congress, I strongly urge President Clinton to veto this bill and send it back with instructions for us to craft balanced, bipartisan legislation that ends frivolous lawsuits without sanctifying fraud and undermining the legal rights of wronged investors.

I include for the RECORD the following material.

[From the Miami Herald, Nov. 14, 1995]

LIARS' BILL OF RIGHTS?

While most of the country is paying attention to the feud over the federal budget, a sinister piece of legislation is making its way through Congress unnoticed. This bill lets companies report false information to investors. That's right, it essentially licenses fraud. It has passed both houses in slightly different forms. A compromise bill will be written soon. If it passes, President Clinton ought to slay it in its tracks.

This bill is a story of good intentions. Some companies have been plagued by frivolous lawsuits from investors who aren't happy with the company's performance. The investor allege, in essence, that the company had forecast good results and then didn't deliver. That, say the plaintiffs, constitutes fraud.

Well, often it doesn't. Investing has risks, including market downturns. When investors sue over mere bad luck, they cost companies money, clog courts, and drain profits from other investors.

Trouble is, by trying to stop this abuse, Congress mistook a simple answer for the right answer. Its solution, in plain terms, was to declare virtually all promises by all companies to be safe from legal challenge. Under this ''remedy,'' company executives now can promise investors anything they like, with not so much as a nod to reality.

They can't legally lie about the past, but if their claims are ''forward-looking,'' they can promise you the moon to get you to invest, and no one can sue them later for being misleading.

Well, almost no one. The bill would allow legal action in the case of egregious, deliberate fraud, but you'd have to prove that it was intentional. And you'd have just three years to discover the fraud and furnish your proof.

It's rare enough to prove outright intent under the best circumstances, but under this bill, if executives can stiff-arm you for just 36 months (not a big challenge), they'd be home free. And then—in another hair-raising provision of the bill—you'd be stuck for the company's entire legal bill. Facing such a risk, no small investor, no matter how badly cheated, would ever dare sue.

This bill evidently struck many members of Congress as a simple answer to a nagging problem. It's nothing of the kind. The problem is real enough, but its solution isn't simple. And it certainly doesn't reside in a law authorizing phony statements to investors.

President Clinton should veto this blunder. Then, when the fight over the budget is over, Congress can take time to think up a more rational solution to the problem.

[From the Houston Chronicle, Nov. 17, 1995]

INSECURITIES

In testimony on a bill to curtail frivolous securities fraud lawsuits, Sen. Robert Bennett, R-Utah, recalled that his father once, as a director of a mutual fund board, had been sued for looting assets, as directors had given themselves a raise (in tandem with increased profits). The suit was settled for $100,000, as had been the case each year the attorney had filed the identical lawsuit. The meritless suit would have been too costly to litigate, the senior Bennett was told.

Those familiar with the world of securities litigation know these scenarios are not uncommon. Such lawsuits are infuriating, harmful to business and investors alike, and they deserve congressional attention to stamp them out.

Charged with enacting laws to douse brush fires in the tort system, Congress instead wants to burn the system to the ground.

Earlier this year, lawmakers passed bills in the House and Senate that threatened to cripple the ability of even legitimate plaintiffs to recoup money swindled by unscrupulous corporate executives, lawyers and accountants. More recently, in meetings to which bill opponents said they were not invited, members of Congress and lobbyists worked out a compromise that is as deadly to investor rights as the original bills.

The compromise guarantees small investors, defined as having a net worth less than $200,000, full recovery if they lose more than 10 percent of their assets in a securities fraud. But why should a person who likely saved over most of his or her life have to lose so much money before being entitled to full compensation in court? And, while $200,000 may sound generous, many Americans in many areas of the country would surpass that amount based solely on their home value.

The compromise allows the Securities and Exchange Commission to sanction lawyers and accountants who knew of fraud and did nothing to stop it, but it does not allow defrauded investors to sue them. That is inadequate redress and promises to shift the burden of policing such cases entirely onto the government.

Proponents brag that the compromise offers no lawsuit protection to companies whose ''forward-looking statements'' contain knowingly false information and do not contain detailed warnings. What comfort can be gained from such statements if inclusion of a ''cautionary statement'' nullifies investor protections?

Consumer groups oppose the compromise for the burdens it will place on small investors. But attorneys general of various states and associations of public finance officers also are in opposition because they fear the legislation would expose public funds, such as those invested by counties and school districts, to greater fraud risks.

Congress certainly must act against ''professional plaintiffs'' and ''entrepreneurial attorneys'' who file baseless securities fraud claims in pursuit of blackmailed settlements. But lawmakers must work harder than they have to cap lawsuit abuse without putting the life savings of small investors at risk.

[From the San Francisco Chronicle, Nov. 27, 1995]

OPENING THE DOOR TO FRAUD

If a House-Senate conference committee meeting tomorrow does not result in significant changes to legislation regarding investment fraud lawsuits, President Clinton should quickly veto the bill.

Compromise has softened some of the anticonsumer aspects of the legislation, which has the stated goal of eliminating frivolous class-action securities fraud lawsuits. But despite the worthwhile aim, the provisions of a draft conference report on HR 1058 and S 240 go far beyond curbing trivial court actions and instead would wipe out important protections against hustlers of fraudulent securities.

In a letter asking Clinton to veto the bill, San Francisco's chief administrative officer, Bill Lee, noted that the legislation would ''erode investor protections in a number of ways: it fails to restore the liability of aiders and abettors of fraud for their actions; it limits many wrongdoers from providing full compensation to innocent fraud victims, by eroding joint and several liability; it could force fraud victims to pay the full legal fees of large corporate defendants if the lose; it provides a blanket shield from liability for companies that make knowingly fraudulent predictions about an investment's performance and risks; and it would preserve a short, three-year statute of limitations for bringing fraud actions, even if fraud is not discovered until after that time.''

Securities fraud lawsuits are the primary means for individuals, local governments and other investors to recover losses from investment fraud—whether that fraud is related to money invested in stocks, bonds, mutual funds, individuals retirement accounts, pensions or employee benefit plans.

As the draft report stands, investors would be the losers. And their hopes of receiving convictions in suits similar to those against such well-known con men as Michael Milken and Ivan Boesky would be severely hampered.

In the name of the little guy, Clinton should not let that happen.

[From the New York Times, Nov. 30, 1995]

OVERDRAWN SECURITIES REFORM

The securities bill that Congress is about to pass addresses a nagging problem, frivolous lawsuits by investors against corporations, but in such cavalier fashion that it may end up sheltering some forms of fraud against investors. President Clinton should veto the bill and demand at least two fixes to protect truly defrauded investors.

The bill seeks with good reason to protect corporate officials who issue honest but unintentionally optimistic predictions of corporate profitability. In some past cases, opportunistic shareholders have waited for a company's stock price to fall, then sued on the grounds that their money-losing investments were based on fraudulent misrepresentations of the company's financial prospects. Their game was to use these ''strike'' suits to threaten companies with explosively expensive litigation in the cynical attempt to win lucrative settlements.

Such suits are a real, if infrequent, problem that can discourage responsible management from issuing information that investors ought to know. The bill would stymie these suits in part by immunizing predictions of corporate profitability that are accompanied by descriptions of important factors—like pending government regulatory action—that could cause financial predictions to provide false. But the language is ambiguous, leading critics to charge that it would protect corporate officials who knowingly issue false information. The President should ask Congress for clarification.

Some provisions of the bill would protect investors by, for example, requiring accountants to report suspected fraud. But other provisions threaten to shut off valid suits. The bill would prevent private litigants from going after lawyers and accounts for inattention that allows corporate fraud. Worse, the bill limits the authority of the Securities and Exchange Commission to sue accountants and others for aiding fraud. The bill would also provide a short statute of limitation that could easily run out before investors discover they have been victimized.

Mr. Clinton should demand that Congress extend the statute of limitations so that investors will have time to file suit after they discover fraud. He should also demand that the bill restore the S.E.C.'s full authority to sue accounts who contribute to corporate fraud. So far, Mr. Clinton has been curiously restrained. A well-targeted veto might force this bill back on the right track.

[From the Bond Buyer, Dec. 4, 1995]

SECURITIES LITIGATION REFORM: A MATTER OF PRINCIPLE

(By Craig T. Ferris)

WASHINGTON.—There are moments when an issue should be decided solely on principle, not politics.

One of those moments will occur late this week when the House and Senate are expected to send President Clinton the securities litigation reform legislation that a conference committee finalized last week.

When the bill arrives on his desk, Clinton should veto the measure on principle because it is bad legislation that could undermine investor confidence in the municipal market.

Despite a few changes from the original House and Senate bills, the final measure is still what state and local groups have termed ''a bad bill that has resulted from bad House and Senate bills.''

While some backers of the measure say it is needed to curb frivolous securities fraud lawsuits, state and local representatives, plus investor groups, contend that it will hurt investors and prevent individuals, local governments, and pension plans from filing legitimate securities fraud lawsuits.

The bill is substantially flawed, particularly because it does not extend the statute of limitations for securities fraud actions and does not restore the ability of investors to sue aiders and abettors of securities fraud.

Sen. Paul Sarbanes, D-Md., raised and excellent point last Tuesday night when he told conferees that the final bill does not do enough to protect local governments that invest the money of taxpayers and retirees in securities.

''As any reader of the newspaper knows, local governments are often victims of unscrupulous brokers. These government officials want meaningful remedies if they are defrauded,'' Sarbanes said.

He also said 11 state attorneys general oppose the measure because they argue it would ''curtail our efforts to fight securities fraud and to recover damages for our citizens if any of our state or local funds suffer losses due to fraud. In a letter, the attorneys general told Sarbanes the legislation ''is unwise public policy in light of rising securities fraud and substantial losses suffered by states and public institutions from high-risk derivatives investments.''

These are all excellent reasons why Clinton should veto the measure. Unfortunately, politics may overshadow principle.

Clinton and the Securities and Exchange Commission are under pressure to support the measure—both from House and Senate Republicans who will have a strong say in the funding levels for the SEC and from Senate Republicans who are considering whether to confirm Clinton's two pending nominees for seats on the SEC.

Those pressures appear to be major reasons why the SEC has done little to push the conference committee to include greater protection for investors, particularly state and local governments.

But even if Clinton ignores politics and vetoes the bill, it is likely to become law anyway.

The original House and Senate bill were approved by veto-proof 329-to-99 and 70-to-29 votes, and there is every reason to believe that the final version of the legislation will be approved by both chambers by similar margins.

Despite those drawbacks, the president should stand on principle and veto the measure. It is a bad bill and it should not become law.

[From Money, September 1995]

CONGRESS AIMS AT LAWYERS AND ENDS UP SHOOTING SMALL INVESTORS IN THE BACK

[By Frank Lalli, managing editor]

Imagine a law that makes it much easier for crooks to swindle investors and far more difficult for the victims to sue to get their money back. A law so extreme that it would:

Allow executives to deliberately lie about their firm's prospects.

Prohibit investors from suing the hired guns who assist a fraudulent company, the so-called aiders and abettors, including the accountants, brokers, lawyers and bankers.

Ratify a court ruling that throws out any suit that isn't filed within three years after the fraud took place, even if no one discovers the crime until after that deadline.

And potentially force investors and their lawyers who lose a case to pay the winner's entire legal fees, if the judge later rules that the suit was not justified.

Sounds too radical to be real, doesn't it? Yet legislation that would do all this and more has passed both the House and Senate by overwhelming margins (325 to 99 and 69 to 30). It is now headed for a conference committee where the relatively minor conflicts are expected to be ironed out.

The more responsible members of Congress who backed the effort were looking for a way to discourage frivolous securities suits. But several powerful financial lobbyists and their pals ended up putting small investors in the crosshairs instead. At a time when massive securities fraud has become one of this country's growth industries, this law would cheat victims out of whatever chance they may have of getting their money back. For instance, had this law been on the books thousands of fraud victims might not have collected anything, rather than the billions they rightfully recovered by suing the operators behind such notorious scams as Charles Keating's $288 million savings and loan swindle, the $460 million Towers Financial fraud and Prudential Securities more than $1.3 billion limited partnership hustle.

Take Bill Ayers, 53, a Vietnam War vet who runs a prosperous engineering consulting firm in Crystal City, Va. In the mid-'80s, he plowed more than $1 million into bonds issued by First Humanics, before realizing that the nursing-home chain was built on fraud. He wasn't alone. In all, at least 4,000 people invested more than $80 million in 21 separate bond offers. Despite all that money, Humanics declared bankruptcy in 1989, and the company head, Leo (''Lee'') Sutliffe surfaced on his Florida yacht with the nursing homes' former interior decorator.

How did a sophisticated guy like Ayers get fooled? Simple, really. He relied on the company projections, which turned out to be phony, and on bond feasibility reports by Touche Ross (now Deloitte & Touche), which were shoddy. ''In reality,'' says Ayers, ''the accounting system was nonexistent.'' For example, in one case, Touche Ross counted closet space as patient rooms. Then to get the profit-per-room projections to actually work, at least one home slashed its daily food budget to less than $3 per patient.

When Ayers finally caught on five years later, he led a successful class-action lawsuit that ultimately was settled for $45 million from the accountants, lawyers and bank trustees. Sutliffe, meanwhile, got 15 months in federal prison for mail fraud and was fined $1 million.

''But I'd be out of luck under this new law,'' says Ayers. Sutliffe's lies about the chain's profitability and the bonds' 10 percent to 14 percent yields would have been protected. His aiders and Abettors, principally Touche Ross, also would have been shielded. And before Ayers could have filed the class-action claim, he and his fellow plaintiffs might have been forced to post a prohibitive multimillion-dollar bond to cover the defendants' legal fees just in case the suit was later thrown out of court. What's worse, he would not have been able to sue in any event because he did not discover the fraud within the three-year time limit; in fact, the statute of limitations would have run out on nearly every Humanics' victim. As Ayers put it: ''This law will hurt the people who've already been hurt by the frauds.''

So how could such misguided legislation get this far? It's an interesting tale that illustrates how thoroughly the 104th Congress has become the Lobbyists' Congress. Ironically, one of the original ideas behind this reform legislation last year was to increase the three-year statute of limitations imposed by an ill-advised Supreme Court decision. But after the Republicans swept to power, major political contributors, led by the Big Six accounting firms that are smarting over billion-dollar judgments against them in the S&L scandals, helped draft this legislation to attack what they called an ''explosion'' of frivolous securities suits. They got their way, despite the lack of evidence of any such explosion. The true measure of indiscriminate litigiousness—the number of companies sued each year—has remained relatively level for the past 20 years. What's more, 80 percent of federal judges, who are largely Reagan and Bush appointees, think frivolous suits are a minor concern.

In the final analysis, this legislation, which Sen. Alfonse D'Amato (R-N.Y.), for one, has hailed as ''a big win for American consumers,'' would actually be a grand slam for the sleaziest elements of the financial industry at the expense of ordinary investors.

To make matters worse, this law will soon be followed by other G.O.P.-backed reforms that aim to reduce the information investors get while also curtailing securities regulation. Former Securities and Exchange Commissioner Rick Roberts, a Bush appointee, says he fears these initiatives could undermine our securities markets. ''If you look at the whole picture, Congress is taking away the right to bring an action if there's a financial fraud; it's [cutting] the level of information investors receive; and, third, [it] will try to slash the SEC budget so there are no public remedies,'' Roberts told Money's Ruth Simon. ''If I was an investor, I would be getting very queasy about plugging my money into the securities market.''

But the financial fat cats haven't sung yet. There is still time to stop these reckless efforts, starting with this litigation reform bill. President Clinton's counsel, Abner Mikva, told Money's Peter Keating: ''I think the President would not sign it, [but] we use the word 'veto' very sparingly around here.'' If you would like to join Money in urging the President to veto this litigation bill, please send us your thoughts, and we will relay them with our endorsement to the President and to key congressional lawmakers. Write to: Protect Our Rights, Money, Room 32–38, Time & Life Building, Rockefeller Center, New York, N.Y. 10020; or send electronic mail to: letters@moneymag.com.

[From MONEY Magazine, October 1995]

LET'S STOP THIS CONGRESS FROM HELPING CROOKS CHEAT INVESTORS LIKE YOU

''I never thought I would urge Bill Clinton to do anything but retire,'' wrote Miles W. Haupt of Poulsbo, Wash. ''But please add my name to your list of people requesting a presidential veto of the small investor rip-off bill you wrote about in September.'' Haupt is just one of more than 400 MONEY readers who have joined us in urging the President to veto the litigation reform legislation steaming through Congress. This misguided law would, in fact, help white-collar criminals get away with cheating investors. As I write this on Sept. 1, we are receiving 60 letters of support a day; we've gotten a grand total of six in opposition.

The tone of the letters runs from dismay to disgust. The largest number argue that the legislation would undermine confidence in the securities markets. For example, Lester K. Smith of De Kalb, Ill. wrote: ''For many years the government has said that Americans do not save and invest enough. Now they want to take away most of the legal safeguards which allow us to save and invest without fear of being cheated.'' Anastasia R. Touzet of Flora, Miss. concluded: ''Are we going back to having to buy gold and silver coins and burying them in the backyard? Is this the America everybody wants? I don't.''

Others focused on the special interests that helped draft the bills, with Elizabeth J. Granfield of New Canaan, Conn., for one, mocking the ''FOR SALE sign on the congressional lawn.'' Bill Follek echoed that theme on the Internet: ''Congress is trying to flat out legalize white-collar crime; that's what this Congress means by reform.''

But the angriest responses by far came from Republicans denouncing their own party for pushing these bills. ''I am a 64-year-old lifelong Republican,'' wrote John A. Cline of Virginia Beach, ''but I'm fed up with the party's assault on the public. These acts will backfire. I very well may vote for a third person or even for 'what's his name' who's in there now.'' Another lifelong Republican, 78-year-old George W. Humm of New Richmond, Ohio, who spent 45 years in the securities business and now arbitrates brokerage disputes, said he was appalled and only hoped Clinton ''has the guts to veto this monstrous bill.''

Also, Thomas Denzler of New York City pointed out that ''tort reform is not necessarily a bad idea'' and then quickly added: ''But in the area of securities, it is a stupid and venal idea. Shame on Robert Dole and Newt Gingrich.'' And Donald J. Scott of Henderson, Nev. summed up the tenor of the outcry in one sentence: ''The Contract with America is going down the drain.''

The legislation that swept through Congress this summer by overwhelming margins (325–99 and 69–30) would do four things:

Allow executives to deliberately lie about their firm's prospects.

Stop investors from suing hired guns who assist fraudulent firms, including accountants, lawyers, brokers and bankers.

Give investors just three years to sue, even if the fraud isn't discovered until after that statute of limitations expires.

Make investors who lose a case potentially liable for the winner's entire legal fees.

As we noted in last month's column, lawmakers originally intended to curb frivolous securities suits. But those good intentions got picked clean by powerful lobbyists, led by major accounting firms, who came swooping down on the bills like hungry crows. The accounting firms and their pals want to protect their wallets after being forced to pay billions in fines and settlements in recent years for their part in various scams—from the savings and loan scandals to the notorious MiniScribe swindle.

Operating through various political action committees and other corporate fund-raising efforts, the major accounting firms and their lobbyists contributed well over $3.3 million to legislators' campaigns—50% more than they gave in '92. In February, for instance, one so-called grass-roots operation sent out software that let members customize letters to selected lawmakers in ''a minute or two.'' In all, a quite sophisticated and effective campaign.

The two bills—HR 1058 and S 240—are now headed for a conference committee to iron out minor conflicts. So at this point, the only way this legislation will get stopped is if the President vetoes it when it hits his desk, perhaps as early as this month. (For more on other ill-advised securities reforms, see ''How Washington Could Tip the Scales Against Investors'' on page 122.)

You can still make your voice heard. Send your thoughts to us; we will relay them to the President and key lawmakers. Write: Protect Our Rights, Money, Room 32–38, Time & Life Building, Rockefeller Center, New York, N.Y. 10020; send E-mail to: letters@moneymag.com.

[From Money Magazine, November 1995]

YOUR 1,000 LETTERS OF PROTEST MAY STOP THIS CONGRESS FROM JEOPARDIZING INVESTORS

You got through to the President. More than 1,000 money readers so far have written us urging President Clinton to veto this Congress' misguided securities litigation reform, as this column proposed in September and October. Bette Hammer of North Port, Fla. summed up your message: ''These bills are legalizing white-collar crime.'' As we said we would, we have been forwarding every one of your letters to the President and to key Washington lawmakers.

What will happen? Will the President veto the legislation? Will lawmakers rework it into an acceptable form? Or will the President back off to win favor with powerful business interests, particularly those in California's Silicon Valley that he may need so he can get re-elected?

There were no clear answers as we wrote this column in early October. But this much we do know: Your deep disgust with this so-called reform is having a profound impact in Washington. One source told Money Washington bureau chief Tereas Tritch: ''To say 'Money magazine' has become the shorthand phrase for all the editorial opposition to these bills.'' Furthermore, as we were preparing this column, the President sent us the letter here expressing his serious objections to the proposed law. It concludes with a promise: ''As we seek to develop thoughtful, balanced reforms to our nation's securities laws, I will keep your readers' views in mind.''

He would be wise to do that. There are a lot of votes at stake. Take M.L. and A.H. Spratley of Chatsworth, Calif. They describe themselves as ''registered Republican(s) for over 40 years who have never voted for a Democrat . . . but now have no choice but to vote for Mr. Clinton in 1996.'' That is, unless he fails to ''veto the outrageous bills.'' A politically savvy source summed up the situation this way: ''If the President vetoes this, he may win the vote of the common man, but he may lose the money and support of high-tech that he needs to win in California.''

Whatever the outcome, however, the struggle over the securities litigation reform bills, H.R. 1058 and S. 240, offers a picture-window view of how laws are being created by the lobbyists and for the lobbyists in this 104th Congress. And, more positively, it also provides a revealing peek at the potentially enormous power that ordinary people have when they find a way to amplify their voices, as they are doing on this issue.

A little background: Earlier this year, following a multimillion-dollar lobbying effort by accountant, high-tech and securities interests, the House and Senate passed differing versions of securities litigation reform, each with overwhelming bipartisan support (325 to 99, and 69 to 30). Lawmakers said they wanted to discourage frivolous securities suits. That is a fine goal. But as one moderating amendment after another was voted down, the legislation the Republican majority and the lobbyists produced went far beyond curbing meritless lawsuits to all but legalizing securities fraud. For example, though the Senate bill would have similar effects, the House bill would definitely undercut investors in at least two specific ways:)

Defrauded investors could no longer collect damages from company executives who tricked them out of their money by deliberately lying about their firms' prospects.

And if investors sued and lost, the judge could more easily force them and their lawyers to pay the winners' entire legal fees. As a consequence, a number of legitimate cases would never get filed. Sen. Arlen Specter (R-Pa.), for one, foresees ''a profoundly chilling effect on litigation brought under the securities acts.''

In addition, both bills failed to reinstate fundamental investor protections stripped away by two recent, ill-advised Supreme Court decisions:

Defrauded investors can no longer sue hired guns who assist a dishonest company, the firm's so-called aiders and abettors, including accountants, brokers, lawyers and bankers.

And, worse, investors cannot sue at all if they fail to file within three years after the fraud occurs, even when the crime is not discovered until after the deadline.

In his letter to Money, the President clearly rejects the House version, which is more extreme than the Senate alternative. ''I could not support that bill,'' he writes. But he holds out hope that the Senate bill could get improved enough for him to sign it into law. The horse-trading would normally be done by a hand-picked committee of bipartisan lawmakers from both houses. But partly because of your 1,000 letters of protest, the Republicans calling the procedural shots are stalling on convening such a House-Senate conference committee.

Key Republicans, and some nervous lobbyists, fear that House conservatives, notably Chris Cox (R-Calif.), would insist on preserving a few of the House's most extreme provisions in the committee's final compromise bill. If that happened, odds would soar that the President would veto the bill, and that many Senate Democrats and a few Republicans who voted for the Senate version would switch over and sustain the veto. Result: No securities litigation reform at all.

To avoid that scenario, Senate Republicans are trying to convince House colleagues to accept the current Senate version as the final bill. The President might veto that one also. But chances are, he would not do that unless he was sure enough Senate Democrats who supported that version—including Massachusetts' Edward Kennedy, New Jersey's Bill Bradley and West Virginia's Jay Rockefeller—were willing to flip-flop to sustain his veto.

You can bet that the lobbyists who have been pressing for years to protect their corporate clients from being sued for fraud will have a lot to say about the Republican tactics and the outcome. MONEY has learned that the big accountants, who were shaken by the billion-dollar judgments against them in the savings and loan scandal, would be more than satisfied to get today's Senate bill. Securities industry lobbyists would go along with it too; their hot-button issue is retaining the truncated three-year statute of limitations on fraud suits. Fortunately for them, Sen. Alfonse D'Amato (R-N.Y.), who has accepted more than $800,000 in campaign contributions since 1989 from the securities industry, deleted a provision that would have extended the time limit to five years. People don't call him The Senator from Wall Street for nothing.

However, only lobbying interests are demanding the House bill's bullet-proof protection for lying executives. The Senate language, though also ludicrously lax, does at least allow for executives to get in trouble for statements ''knowingly made with the purpose and actual intent of misleading investors.'' The burden would be on the investors, though; they would have to prove that the company official actually intended to defraud them, rather than, say, simply tried to entice them with recklessly inflated claims. If the Senate version becomes law, Sen. Paul Sarbanes (D-Md) says, ''A lot of very fast games by some very fast artists are going to be played on the investing public.'' Still, a Washington source says: ''Silicon Valley is insatiable. Unless they're protected from fraud, they won't go along.''

So what will the President do if today's Senate bill lands on his desk as the final legislation? Or if he gets an only slightly altered version?

We can only hope that he stands up for small investors like you by vetoing it. Anything less could undermine the public's confidence in the financial markets. Why? Because while Congress is trying to slam the courthouse door shut, it is also threatening to force securities cops off the beat. Late in September, for example, the Senate voted to cut the Securities and Exchange Commission's budget by 10%, even though the reduction might well compel the SEC to lay off enforcement agents.

What should you do? Obviously, if you believe as we do that today's securities litigation legislation foolishly sacrifices investors' interests on the altar of radical reform, keep writing to us. We will relay your thoughts to the key lawmakers and to the President.

Write to: Protect Our Rights. MONEY, Room 32–28, Time & Life Building, Rockefeller Center, New York, N.Y. 10020. Send a fax to: 212–522–0119. Or send E/mail to: letters@moneymag.com.

[From Money Magazine, December 1995]

NOW ONLY CLINTON CAN STOP CONGRESS FROM HURTING SMALL INVESTORS LIKE YOU

The debate over Congress' reckless securities litigation reform has come down to this question: Will President Clinton decide to protect investors, or will he give companies a license to defraud shareholders?

Late in October, Republican congressional staffers agreed on a so-called compromise version of the misguided House and Senate bills. Unfortunately, the new bill jeopardizes small investors in several ways. Yet it will likely soon be sent to Clinton for his signature. The President should not sign it. He should veto it. Here's why:

The bill helps executives get away with lying. Essentially, lying executives get two escape hatches. The bill protects them if, say, they simply call their phony earnings forecast a forward-looking statement and add some cautionary boiler-plate language. In addition, if they fail to do that and an investor sues, the plaintiffs still have to prove the executives actually knew the statement was untrue when they issued it, an extremely difficult standard of proof. Furthermore, if executives later learn that their original forecast was false, the bill specifically says they have no obligation to retract or correct it.

High-tech executives, particularly those in California's Silicon Valley, have lobbied relentlessly for this broad protection. As one congressional source told Money's Washington, D.C. bureau chief Teresa Tritch: ''High-tech execs want immunity from liability when they lie.'' Keep that point in mind the next time your broker calls pitching some high-tech stock based on the corporation's optimistic predictions.

Investors who sue and lose could be forced to pay the winner's court costs. The idea is to discourage frivolous lawsuits. But this bill is overkill. For example, if a judge ruled that just one of many counts in your complaint was baseless, you could have to pay the defendant firm's entire legal costs. In addition, the judge can require plaintiffs in a class action to put up a bond at any time covering the defendant's legal fees just in case they eventually lose. The result: Legitimate lawsuits will not get filed.

Even accountants who okay fraudulent books will get protection. Accountants who are reckless, as opposed to being co-conspirators, would face only limited liability. What's more, new language opens the way for the U.S. Supreme Court to let such practitioners off the hook entirely. If such a lax standard became the law of the land, the accounting profession's fiduciary responsibility to investors and clients alike would be reduced to a sick joke.

Moreover, the bill fails to re-establish an investor's right to sue hired guns, such as accountants, lawyers and bankers who assist dishonest companies. And it neglects to lengthen the tight three-year time limit investors now have to discover a fraud and sue.

Knowledgeable sources say the White House is weighing the bill's political consequences, and business interests are pressing him hard to sign it. ''The President wants the good will of Silicon Valley,'' says one source. ''Without California, Clinton is nowhere.''

We think the President should focus on a higher concern. Our readers sent more than 1,500 letters in support of our past three editorials denouncing this legislation. As that mail attests, this bill will undermine the public's confidence in our financial markets. And without that confidence, this country is nowhere.

FRATERNAL ORDER OF POLICE, NATIONAL LEGISLATIVE PROGRAM,
Washington, DC, November 30, 1995.

Hon. JOHN D. DINGELL,
U.S. House of Representatives
2328 Rayburn House Office Building
Washington, D.C. 20515–2216

DEAR CONGRESSMAN DINGELL: The attached letter to President Clinton reflects our strong opposition to the Securities Litigation Reform Act (S240/HR1058).

While the letter urges the President to veto the bill, we haven't discarded the possibility that Congress will do the right thing—that is, to protect investors from fraud, and, where fraud occurs, protect the rights of investors to seek redress.

When a citizen needs protection, public safety personnel are there. On behalf of the 270,000 rank and file police officers who belong to the Fraternal Order of Police, we ask for your help, and your protection, on this critically important legislative issue.

Sincerely,

GILBERT G. GALLEGOS,
National President,
Fraternal Order of Police.

FRATERNAL ORDER OF POLICE, NATIONAL LEGISLATIVE PROGRAM,
Washington, DC, November 29, 1995.

Hon. WILLIAM JEFFERSON CLINTON,
President of the United States,
Washington, DC.

DEAR PRESIDENT CLINTON: On behalf National the Fraternal Order of Police, I urge you to veto the ''Securities Litigation Reform Act'' (HR1058/S240). The recently released draft of the House/Senate conference report clearly reflects a dramatic reduction in the ability of private, institutional and government investors to seek redress when victimized by investor fraud.

As a matter of fact, the single most significant result of this legislation would be to create a privileged class of criminals, in that it virtually immunizes lawyers, brokers, accountants and their accomplices from civil liability in cases of securities fraud.

This bad end is reached because of several provisions of the legislation: first, it fails to restore the liability of aiders and abettors of fraud for their actions; second, it limits wrongdoers from providing full compensation to victims of fraud by eroding joint and several liability; third, it could force fraud victims to pay the full legal fees of corporate defendants if the defrauded party loses; and, finally, it retains the short three year statute of limitations for bringing fraud actions, even in cases where the fraud is not discovered until after three years has elapsed.

Mr. President, our 270,000 members stand with you in your commitment to a war on crime; the men and women of the F.O.P. are the foot soldiers in that war. On their behalf, I urge you to reject a bill which would make it less risky for white collar criminals to steal from police pension funds while the police are risking their lives against violent criminals.

Please veto HR1058/S240.

Sincerely,

GILBERT G. GALLEGOS,
National President,
Fraternal Order of Police.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Washington, DC, November 29, 1995.

DEAR REPRESENTATIVE: The AFL–CIO opposes the conference agreement on H.R. 1058, the Securities Litigation Reform Act of 1995. The conference agreement significantly weakens the ability of stockholders and pension plans to successfully sue companies which use fraudulent information in forward-looking statements that project economic growth and earnings. There is a new ''safe harbor'' provision in this conference agreement that allows evidence of misleading economic information to be discounted in court if it is accompanied by ''appropriate cautionary language.''

The AFL–CIO believes this compromise will vastly increase the difficulties that investors and pension plans would have in recovering economic losses. Similarly, the joint and several liability provisions in this bill provide added, and unwarranted, protection for unscrupulous companies, stockbrokers, accountants and lawyers.

In short, this bill tips the scales of justice in favor of the companies and at the expense of stockholders and pension plans. Both of these latter groups are forced to rely exclusively on information provided by these companies when evaluating a stock, but this information would not be able to used in court to recover economic damages for misleading information.

The Congress should reject the conference agreement on H.R. 1058.

Sincerely,

PEGGY TAYLOR,
Director, Department of Legislation.

NATIONAL COUNCIL OF INDIVIDUAL INVESTORS,
Washington, DC, November 27, 1995.

Hon. WILLIAM J. CLINTON,
President of the United States,
The White House, Washington, DC.

DEAR MR. PRESIDENT: We are writing to express our opposition to the recent draft conference report on the Securities Litigation Reform legislation (H.R. 1058/S. 240). We share the concerns of the bills' sponsors that truly frivolous lawsuits harm all Americans. We believe the framework for securities litigation should be improved to more adequately protect the interests of individual investors.

Unfortunately, the draft conference report fails to treat the American investor fairly. For example, as currently drafted, the bill would have cost the victims of the Keating savings and loan fraud over $200 million more than they otherwise lost. Of particular concern to us are the failure to increase the statute of limitations in securities fraud cases, the ''safe harbor'' provisions that reduce the standards for accuracy in forward looking statements, the ''aiding and abetting'' provision which limits investors' ability to recover fraud-created losses, and the ''most adequate plaintiff'' provision naming the largest investor to be the plaintiff.

The National Council of Individual Investors (NCII) is an independent, non-profit membership organization of individual investors established to help them improve their investment performance through education and advocacy.

The fact that the draft conference report does not fairly balance industry concerns with the needs of investors is best demonstrated by its failure to extend the statute of limitations. Specifically, the draft conference report ignores entirely the devastating practical effects of the U.S. Supreme Court's 1991 Lampf decision. Although the Senate bill as introduced included a provision to lengthen the statute of limitations for investors to file securities fraud actions from three years to five years, this provision was dropped.

The result is that defrauded investors will continue to be forced to file suit for redress within one year after discovering the fraud, but in no case more than three years after the fraud was committed. Virtually every law enforcement official—including the SEC and state securities administrators—supports a longer limitation period. The failure to extend the limitation period will make it virtually impossible for defrauded investors to recover in cases of sophisticated and complex frauds that easily can remain concealed for many years. For example, the current statute of limitations for federal cases had to be waived in the billion dollar fraud case against Prudential Securities, Inc. to provide redress for the tens of thousands of victims of securities fraud.

Also of grave concern to us is the draft conference report's safe harbor for forward looking statements. Incredibly, the conference report prevents investors from recovering losses created by reckless and even deliberately fraudulent statements (including oral statements), so long as the perpetrators accompany the fraudulent statements with ''cautionary'' language saying actual results ''may differ.'' Supporters of the expanded safe harbor claim that it will result in an increased flow of market information. We strongly favor increased investor access to information that is truthful. Obviously however, investors are harmed, not helped, by inaccurate information.

Moreover, in a radical departure from existing law, the draft conference report undermines companies' well-established ''duty to update'' information on their performances. Under this doctrine, even if a statement or prediction is true when made, there is a duty to correct such a statement if it becomes materially misleading in light of later events. The conference report takes language from the House bill that was not in the Senate bill stating that corporate insiders have no duty to update their predictions even if they turn out to be false. Forcing investors to rely on information known to be false is clearly unfair.

Investors also need effective remedies when they become victims of fraud. Particularly when swindlers have bankrupted a company, investors must be able to look to those who facilitated the fraud for compensation. Here again, the draft conference report fails to protect individual investors. Instead, it protects those who ''aid and abet'' frauds from civil liability by letting the U.S. Supreme Court's decision in the Central Bank case stand and from SEC action when their conduct is reckless.

We favor higher standards of ethics for those professionals on whom investors rely for information and counsel. Unfortunately, the draft conference report lowers those standards and, by doing so, reduces the likelihood that investors will have effective recourse when they are victims of fraud.

Finally, the conference report draft undermines the rights of individual investors, particularly small ones, in class action suits. Under current law, the court may name any member of a class, to be a representative of the class, regardless of whether he or she lost $1,000 or $1,000,000. The draft conference report includes a provision from the Senate bill defining the ''most adequate plaintiff'' as the plaintiff with the ''largest financial interest'' in the case. This provision compromises the rights of individual investors by requiring the court to appoint the largest investor, which in many instances will be an institutional investor, whose interests may differ dramatically from the small individual investor. For example, the largest investor may be able to accept settlements with less than full recoveries or may be more concerned with maintaining good relations with corporate defendants.

In the interest of protecting individual investors from securities fraud, protecting the capital markets from inaccurate information, and protecting the right to redress for small investors, we strongly urge you to oppose, and if necessary, veto this legislation.

Sincerely,

GERRI DETWEILER,
Policy Director.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,
New York, NY, November 15, 1995.

The PRESIDENT,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: We are writing on behalf of the Association of the Bar of the City of New York to urge that certain changes be made in the proposed ''Private Securities Litigation Reform Act of 1995'', as it currently appears in the form of a Draft Conference Report dated October 23, 1995.

The Association's Committee on Securities Regulation and Committee on Federal Courts have studied intensively the proposed legislation in its various versions, have submitted detailed reports to Committees of both the House and Senate,[1] and have testified before both the House and Senate subcommittees. There is much about the proposed legislation that is commendable. It takes significant steps to redress abuses identified by Congress, including prohibition of the payment of referral fees to brokers, of the making of bonus payments to individual plaintiffs, and of the payment of attorneys' fees from SEC disgorgement funds. Our prior reports recommended these steps and also supported the enhanced disclosure of settlement terms to class members now contained in Section 102 and the proportionate liability concept contained in Section 202. The Association opposed other proposals (*e.g.,* ''loser pays'' provisions, provisions modifying the fraud on the market theory, and provisions redefining the recklessness scienter standard) that were wisely deleted from the proposed legislation.

Nevertheless, the proposed legislation should not become law unless certain provisions are changed: certain provisions relating to forward-looking statements that are fundamentally inconsistent with the objectives of the securities laws and the interests of investors, and other provisions relating to Rule 11 of the Federal Rules of Civil Procedure that would be even more onerous than a prior version of Rule 11 that was found to be unworkable and an unreasonable burden on an already burdened civil justice system, and that reflect a lack of balance in certain respects. In addition, if the foregoing changes are made, there are certain other provisions of the proposed legislation that we believe should be changed in order to improve the quality of the bill.

PROVISIONS THAT REQUIRE CHANGE

Safe Harbor for Forward-Looking Statements

The safe harbor provision is at the heart of our concern about the proposed legislation. The proposed statutory language, while superficially appearing to track the concepts and standards of the leading cases in this field, in fact radically departs from them and could immunize artfully packaged and intentional misstatements and omissions of known facts.

Existing law distinguishes between projections, expressions of belief and other ''soft'' information, and statements of existing facts. The former are protected by the ''bespeaks caution'' doctrine if they are sufficiently hedged with concrete warnings tailored to the uncertainties that affect the outcome predicted. But a knowingly false statement or omission of material facts known today would not be protected by hedging language. For example, a prediction about the future success of a new drug could be protected by the bespeaks caution doctrine if the uncertainties that attend the development and introduction of new drugs are adequately described. But a failure to disclose that the company's tests to date were already known to have raised substantial questions about the drug's safety or efficacy would not be protected by cautionary language about the necessity and difficulty of securing FDA approval.

The proposed legislation does not reflect this distinction between statements about or omissions of currently existing facts and projections and other soft information. Its definition of ''forward-looking statement'' now covers any ''statement of the assumptions underlying or relating to [a projection or other forward-looking statement] . . .'' [proposed Section 13A(i) of the 1933 Act]. Assuming that the standards for protection discussed in the next paragraph are met, even a knowingly false statement of an assumption would not give rise to liability. And even an omission to state, for example, the results of the company's testing would not give rise to liability (again, assuming the standards are met) because the proposed legislation protects any ''omission of a material fact . . . with respect to any forward-looking statement . . .'' [proposed Section 13A(c)(1)(A) of the 1933 Act].

Proposed Section 13A(c)(1) of the 1933 Act provides that a defendant is not liable with respect to a forward-looking statement if and to the extent that either of the following occur:

1. The forward-looking statement is identified as such and ''is accompanied by meaningful cautionary statements identifying substantive factors that could cause actual results to differ materially from those projected in the forward-looking statement.'' or
2. The plaintiff fails to prove that the defendant (or an officer of a defendant corporation) had ''actual knowledge . . . that it was an untrue statement of a material fact or omission of a material fact. . . .''

Accordingly, under the proposed legislation, even if the plaintiff proves that the statement or omission of a currently existing material fact was known to be false, the existence of cautionary language would be enough to protect that knowing falsehood.

Protecting knowingly false statements or omissions of material existing facts is not consistent with the purposes of the federal securities laws and encourages exactly the kind of conduct those laws were designed to eliminate. There is no public policy objective that justifies protecting that kind of conduct in our capital markets. This significant problem can be eliminated by simply adding language to make it clear that the safe harbor does not protect misstatements or omissions of existing material facts that would otherwise give rise to liability.

Finally, the statutory language does not require the cautionary statement to be addressed to the risks that are foreseeable or

[1] ''Report on Private Securities Litigation Reform Legislation'' (S. 1976, the Dodd-Domenici Bill), the Record of the Association of the Bar of the City of New York (the ''Record''), Vol. 50, No. 1, Jan/Feb 1995 and ''Report on Title II of H.R. 10 (HR 1058) ''Reform of Private Securities Litigation,'' The Record, Vol. 50, No. 5, June, 1995.

most likely to occur. The approach in federal case law has been to require ''[not just any cautionary language . . . [but] disclaimers . . . [that] relate directly to that on which investors claim to have relied.'' Kline v. First Western Government Securities, Inc., 24 F.3d 480, 489 (3d Cir. 1994); see, e.g., Harden v. Raffensperger, Hughes & Co., 65 F.3d 1392 (7th Cir. 1995); In re Worlds of Wonder Securities Litigation, 35 F.3d 1407 (9th Cir. 1994); In re Donald J. Trump Casino Securities Litigation, 7 F.3d 357, 371–72 (3d Cir. 1933), cert. denied, 114 S. Ct. 1219 (1994) (''cautionary statements must be substantive and tailored to the specific future projections, estimates or opinions in the prospectus which the plaintiffs challenge'').

Section 13A(c)(1)(A)(i) should be revised to make it clear that cautionary statements are only ''meaningful'' if they identify the substantive factors that are most likely to cause actual results to differ materially—that is, they should be ''tailored'' to the real risks associated with the forward-looking statement.

Sanctions Against Lawyers and Parties

Section 103 of the proposed legislation provides for mandatory findings, upon the final adjudication of any case, as to whether each party and counsel has complied with Rule 11 of the Federal Rules of Civil Procedure. If the rule has been violated, under the proposed legislation the imposition of sanctions against an offending party or lawyer is mandatory. There is a presumption that an offending plaintiff or plaintiff's lawyer must pay all the legal fees and costs of the entire action, while an adverse finding against a defendant or defendant's lawyer creates a presumption that the defendant or defense counsel must pay the fees and costs directly caused by the dereliction. There are a number of serious problems with Section 103.

In its current form, Rule 11 authorizes federal courts to impose sanctions for pleadings, motions, and other steps that are taken for the purpose of harassment, are frivolous, are without evidentiary support, or are otherwise abusive. There is neither a mandatory finding nor mandatory sanctions. Prior to 1993, the rule provided for mandatory sanctions, but findings were made only upon the motion of an opposing party. The result was a large volume of collateral litigation. The Rule was changed in 1993 upon the recommendation of a nonpartisan advisory committee and after approval by the Supreme Court and the Congress. Those amendments to Rule 11 were designed, among other things, to reduce the collateral litigation by clarifying the rule's standards and removing the requirement of mandatory findings and mandatory sanctions will bring back a high level of collateral litigation in this area, a burden which the justice system can ill afford. Indeed, a major purpose of the proposed legislation is to reduce litigation.

Earlier drafts of the proposed legislation had included a ''loser pays'' provision, which was rejected by the Congress. The proposed legislation, by creating a presumption that the sanctions for violation of Rule 11 in connection with a plaintiff's complaint should be payment of all the legal fees and costs of the action, takes a significant step back in the direction of a ''loser pays'' rule.

While Section 103 permits the court to relieve counsel or a litigant from such draconian sanctions upon proof by the person seeking relief that the award would impose an unreasonable burden or would be unjust, or that the Rule 11 violation was de minimis, the threat that a hostile judge would impose sanctions that could wipe out a lawyer or litigant would have a chilling effect on even the most meritorious suits.

We believe that Rule 11 should remain in its current form, which accords substantial discretion to the parties in deciding whether to request sanctions and to the trial judge in tailoring the sanctions to the wrongdoing.

OTHER COMMENTS

Pleading Requirements

The pleading requirement regarding the defendants' state of mind is more demanding in the proposed legislation than in S. 240. The proposed legislation would require that in a private action for money damages where the plaintiff must show 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 required state of mind.''

This language is derived from the case law developed in the United States Court of Appeals for the Second Circuit, but it incompletely sets forth the Second Circuit standard. *See Shields v. Citytrust Bancorp., Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). On the Senate floor, Senator Specter offered an amendment, which was adopted by the Senate and contained in S. 240, that was designed to adopt the complete Second Circuit standard used by the courts: 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.

Without the complete Second Circuit standard, courts would be given no guidance by the proposed legislation as to how a plaintiff can plead the required state of mind without the benefit of access to the defendants' thought processes and internal documents. Moreover, elimination of the Specter amendment might constitute evidence of legislative intent that such standard may not be used by the courts for guidance.

Enforcement Actions Based On Aiding and Abetting

The proposed legislation ineffectively deals with the consequences of the Supreme Court's decision in the *Central Bank* case, in which the Court held that there is no implied civil liability for aiding and abetting fraudulent conduct in violation of Rule 10b–5 promulgated under the 1934 Act. While its holding related to private litigation, the reasoning of the Court in *Central Bank* has led some to question the SEC's authority to prosecute aiders and abettors.

The proposed legislation does not restore aiding and abetting liability in private actions. In cases where the issuer has gone bankrupt, even though others have acted knowingly and in spite of the proposed legislation's adoption of proportionate liability, injured investors may be left with no recourse under the federal securities laws. The proposed legislation confirms the SEC's authority to pursue aiding and abetting claims, which we support. But the SEC can only prevail if the defendant has ''knowingly provide[ed] substantial assistance'' to the primary wrongdoer, thereby probably barring the Commission from pursuing aiders and abettors who act recklessly.

As stated in our Report on S. 1976, we believe that this restriction on the ability of the Commission to act is unwise. Some recent notorious cases have involved professional whose reckless conduct permitted unscrupulous but ultimately judgment-proof promoters to defraud the investing public of hundreds of millions of dollars. Since liability in SEC actions would be limited to aiders and abettors who know of the fraudulent conduct and render substantial assistance anyway, the legislation could provide an incentive to professionals to close their eyes to red flags suggesting the existence of fraud in order to avoid obtaining actual knowledge.

Very truly yours,

STEPHEN J. FRIEDMAN,
Chairman,
Committee on Securities Regulation.

EDWIN G. SCHALLERT,
Chairman,
Committee on Federal Courts.

Mr. BLILEY. Mr. Speaker, I yield 2 minutes to the gentlewoman from California [Ms. HARMAN].

(Ms. HARMAN asked and was given permission to revise and extend her remarks.)

Ms. HARMAN. Mr. Speaker, I thank the gentleman from Virginia, Mr. BLILEY, for yielding and commend him, my colleague and friend from Orange County, Mr. COX, and the bipartisan group in both bodies who have worked so hard to bring the securities litigation reform conference report to the floor. I join them in strong support of the conference report and urge the House to vote for it.

Early in March, the House began the process of enacting a much needed reform of our securities laws. Today's conference report builds on that effort and melds the best features of both the House and Senate-passed bills into a measure worthy of support.

As many of my colleagues have already stated, the future of our Nation's competitive advantage lies in our ability to develop products that are on the cutting edge of technology and research. The business ventures which undertake such activities are among the fastest growing segments of our economy. Indeed, they are the pride of our economy and, for many of us, the pride of our districts and States.

As a corporate lawyer, I am well aware that many of these business ventures are saddled by the costs and distractions of unwarranted and meritless lawsuits, filed when stock prices fluctuate for reasons beyond the control of business management. The consequences of these abusive suits are costly legal proceedings that, in virtually every 10b–5 case, lead to settlements. Despite the absence of wrongdoing by management or management's advisers, corporations are essentially forced to pay large sums to avoid even larger expenses associated with putting on a legal defense.

During our debate in March, for example, I cited several cases, including that of Sun Microsystems, the world's leading manufacture of computer work stations, Silicon Graphics of Mountain View, and Rykoff-Sexton of Los Angeles. They are only a few of the many examples of the huge waste in resources defending, as well as prosecuting, meritless cases.

Also targeted without regard to their actual culpability are deep pocket defendants, including accountants, underwriters, and individuals who may be