# Rep. Christopher Cox:

## His Anti-Investor Record Should Disqualify Him From Leading the SEC

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# Rep. Christopher Cox: His Anti-Investor Record Should Disqualify Him From Leading the SEC

*"We've got brokers' advocates; we've got exchange advocates; we've got investment banker advocates; and we are the investor's advocate."*

– William O. Douglas,
Former Securities and Exchange Commission chairman, 1937-39,
and U.S. Supreme Court justice[1]

The latter part of this proclamation from the third chairman of the Securities and Exchange Commission – "we are the investor's advocate" – is oft-quoted. The former, however, is not. Perhaps it should be. For it makes clear that the SEC's role is not to conciliate and mediate among competing interests in the vast system that feeds capital to the nation's economy – they have their own representatives. Instead, the SEC's role is to stand squarely for the interests of investors.

It is here that the nomination of Congressman Christopher Cox (R-Calif.) to become the SEC's next chairman collides with the vision of Douglas and others who have run this important agency in the seven decades since its founding in the wake of the Great Depression. In Rep. Cox, a nine-term congressman from Southern California, President George W. Bush has named a defender of corporate interests, who, for example, has led efforts to make it harder for investors to seek redress for fraud, and who, arguably, has even made it more likely such abuse will occur. Public Citizen's examination of Rep. Cox's own securities-related legislative record makes this clear. It also reveals a lawmaker with relatively little legislative activity in securities matters. Moreover, Rep. Cox's record shows he has not been an advocate for the independence of the very agency he would now lead.

Only a generation ago, the stock market and securities were of little direct interest to most Americans. But today, with half of U.S. households now owning stocks,[2] the question of who leads the SEC has become a pocketbook issue across the nation. With the increasing importance of securities investments in such things as 401(k) retirement plans, the United States can ill afford a chairman lacking a distinguished record of investor protection, or a strong record of support for the SEC and its oversight and regulatory responsibilities. This is especially true in the post-Enron era, where some necessary reforms are yet to be enacted, even as pressure builds to relax measures already approved.

As the U.S. Senate prepares to consider Rep. Cox's nomination to head the SEC, this report presents a detailed look at his background on securities matters since his 1989 arrival in Congress. Major findings include:

## Voting Record

- Rep. Cox's overall securities-related voting record is strongly anti-investor. On major legislation addressing corporate and accounting reform, investor legal rights and protection of retirement investments, Rep. Cox cast only one vote out of 22 – 4.5 percent – in support of investors.

- Even when lesser, or uncontroversial, legislation is considered (such as improving disclosure of information), Rep. Cox's record shows he voted in support of investors only 22.2 percent – 8 out of 36 votes – of the time.

- Rep. Cox is often cited as having supported the Sarbanes-Oxley corporate reform act of 2002. But in fact, each of seven votes Rep. Cox cast on amendments to the bill in committee or on the House floor was against stronger investor protection. It was only after the WorldCom scandal broke, causing a public uproar, that Rep. Cox cast his only pro-investor vote – to approve the conference committee version of the bill, which included most of the House-defeated pro-investor amendments. Rep. Cox also displayed little concern for the bill when it was in committee, missing 7 of 13 committee votes.

- In seven chances, Rep. Cox did not cast a single pro-investor vote on retirement investment protection bills that moved through the House after employees of a number of companies, including Enron, saw retirement savings wiped out. He voted to ease conflict-of-interest standards for financial advisors; against giving employees a seat on the board of directors of their own retirement plans; and against allowing employees to freely sell company stock held in their retirement plans.

- Rep. Cox has voted to block efforts by the SEC and the Financial Accounting Standards Board to require corporations to expense the value of stock options granted to employees. Stock options are an important accounting issue because they are often a significant way employees are compensated, especially in younger firms. If the value of option-based compensation is not reflected as an expense, a company's financial statements may not provide an accurate depiction of the firm's finances.

## Sponsored Legislation

- As a legislator, Rep. Cox has been surprisingly inactive in securities matters. In his nine terms in Congress, Rep. Cox is the named sponsor of 178 pieces of legislation. But just four of them – 2.2 percent – have dealt with securities issues. An energetic co-sponsor of legislation, Rep. Cox has lent his name to 1,988 pieces of legislation. Yet only 19 of them – 1.0 percent – have dealt with securities.

- Excluding legislation judged to be neutral, 69 percent of the securities-related legislation Rep. Cox has sponsored or co-sponsored has been against investor interests.

- Rep. Cox's signature legislative achievement – his sponsorship of the Private Securities Litigation Reform Act of 1995 (PSLRA) – made it substantially more difficult for investors to sue to recover losses due to fraud. Moreover, evidence is now emerging indicating that the act, ostensibly aimed at so-called frivolous lawsuits, is having the effect that critics feared: Barring meritorious lawsuits in which investors are legitimately entitled to recover damages. Thus, even as Rep. Cox is under consideration to head the nation's leading investor protection agency, his legislation evidently is preventing investors with legitimate claims from recovering losses.

- As objectionable as the PSLRA was from an investor advocate standpoint, it would have been worse still if the law was enacted as Rep. Cox introduced it. That version, which was significantly amended as it proceeded through the legislative process, would have been an even greater disservice to investor interests, by providing even more liberal provisions for companies to dodge liability for fraud. This initial version thus gives an even clearer view of how strongly Rep. Cox has favored industry interests.

- The other major securities-related bill Rep. Cox sponsored sought to interfere with the work of accounting standard-setters and to preserve a method of accounting widely criticized for its potential to be used to mislead investors and allow companies to paper over problems. Rep. Cox's bill, dealing with accounting treatment of corporate acquisitions, drew an unusual public rebuke from the head of the Financial Accounting Standards Board as "an unwarranted and unwise intrusion" into rules designed to better protect investors.

### A Hostile Attitude Toward Regulation

- The securities industry is carefully regulated, based on a history of investor abuse. Rep. Cox, however, has consistently displayed an antagonistic attitude toward federal regulation and oversight.

- Rep. Cox's most far-reaching anti-regulatory move may have been his co-sponsorship of the "regulatory freeze" passed by the House in 1995 but ultimately rejected by the Senate as too extreme. The House version would have instituted a broad regulatory moratorium across the government.

- Also significant is Rep. Cox's support of efforts to sharply reduce the budget of the Government Accountability Office, which is the leading oversight and investigative agency for the legislative branch of the federal government.

# Rep. Cox's Voting Record: Supporting Industry Over Investors

This section examines Rep. Cox's voting record on securities-related matters since he joined Congress in 1989. It includes major pieces of legislation, such as the Private Securities Litigation Reform Act and the Sarbanes-Oxley Act, as well as other bills addressing significant investor protection issues, such as financial adviser conflicts of interest and safety of retirement investments. All available recorded votes – a total of 36 – are examined, as drawn from a broad review of financially related legislation based on the methodology described below.

Overall, Rep. Cox's support of the investor advocacy position has been weak, with him casting favorable votes only 22.2 percent of the time. It has been dramatically weaker – at only 4.5 percent – on the most significant securities-related legislation of recent years. (Figure 1)

**Figure 1: Summary of Rep. Cox's Voting Support for Investors**

| | All Legislation Examined 1989-2005 | Major Securities Legislation of Recent Years ** |
|---|---|---|
| Number of items considered | 36 | 22 |
| Votes in support of investor advocate position | 8 | 1 |
| **Percentage supporting investors** | **22.2%** | **4.5%** |

** Private Securities Litigation Reform Act, Sarbanes-Oxley Act and retirement investment protection legislation

Source: Public Citizen analysis of information from the Library of Congress' Thomas legislative information system.

## Methodology

In examining a voting record, final votes often tell only part of the story. Preliminary votes, such as those on amendments, can be as revealing as final votes; in fact, they can be at odds with ultimate votes. For instance, Rep. Cox voted to support the final version of the Sarbanes-Oxley Act of 2002, which was Congress' most important post-Enron reform. Yet before that vote, he voted against investor interests on several amendments. Public Citizen's analysis includes final votes and amendments, where available.

Public Citizen identified legislation for this examination two ways: The first was through interviews with people knowledgeable about securities-related legislation, including current or former Congressional staff members, and those with consumer or investor advocacy groups. The second was through searching the Library of Congress' Thomas legislative information system, using index terms assigned by the system, as well as by examining committees that handle relevant legislation. In all, the search initially identified several thousand bills and amendments of possible interest. About 90 percent of those were not securities-related, and of several hundred items remaining, many did not have recorded votes. There were many more securities-related

bills introduced in Congress during Rep. Cox's tenure than are reflected in this examination. But most were never brought up for votes, or were considered by voice votes for which there is no record of an individual member's vote.

After legislation was identified as being securities-related, items with recorded votes were included in the analysis. Finally, only after relevant legislation with recorded votes was identified for inclusion, Public Citizen determined Rep. Cox's votes.

In following sections, Rep. Cox's votes on securities-related legislation are compared to positions supporting investor interests.

## The Private Securities Litigation Reform Act of 1995

For investors, the Private Securities Litigation Reform Act – sponsored by Rep. Cox – is among the most significant legislation enacted in recent memory. Through changes to rules governing lawsuits in federal courts, the act makes it substantially more difficult for investors who believe they have been defrauded to seek redress in court. The act stirred strong opposition among consumer and investor advocates, and is discussed in depth later in this report. Its ostensible purpose was to choke off "frivolous" lawsuits designed to extract settlements from companies, but new evidence suggests, as critics feared, that it is standing as a barrier to meritorious cases.

| Item | Description | Investor Advocate Position | Cox Vote |
|---|---|---|---|
| ***MAIN BILL*** Private Securities Litigation Reform Act H.R. 1058 | Made it more difficult for investors to file securities fraud lawsuits. Placed a higher burden on plaintiffs, who must be much more specific in their complaints; limited damages recoverable; provided companies a "safe harbor" from liability for "forward-looking" statements about a security's projected performance. (Passed 320-102 [3]) | N | Y |
| ***AMENDMENTS*** H.Amdt.266 | To prohibit securities lawsuit claims under the Racketeer Influenced and Corrupt Organizations Act. (Passed 292-124) | N | Y |
| H.Amdt.269 | Defendant's failure to investigate whether statements are false or misleading is not reckless if the failure was not deliberate. Replaced earlier amendment, which sought to strike so-called "I forgot" defense providing that defendants are not reckless if they forgot to disclose information, or if disclosure did not come to mind. (Passed 252-173) | N | Y |
| H.Amdt.270 | To exempt from the bill's provisions securities fraud cases involving derivatives.[4] (Failed 162-261) | Y | N |
| H.Amdt.271 | To allow state and local governments to continue to file securities fraud lawsuits under existing law for three years after enactment; aim was to allow time to determine whether fraud occurred. (Failed 179-248) | Y | N |
| H.Amdt.274 | To eliminate provisions requiring claimants, in initial complaints, to specify each statement or omission alleged to be misleading. (Failed 168-255) | Y | N |

| Item | Description | Investor Advocate Position | Cox Vote |
|---|---|---|---|
| H.Amdt.275 | To replace "loser pays" requirements with provisions requiring losing party's attorney to pay legal costs and expenses of prevailing party if the court determines losing party's case was brought for an improper purpose, was unwarranted, lacked evidentiary support, or unless the court determined losing party was principally responsible. (Failed 167-254) | Y | N |

### The Sarbanes-Oxley Act of 2002

The Sarbanes-Oxley corporate reform act is the most significant post-Enron reform approved by Congress. Rep. Cox is often cited as having supported the act.[5] But examination of both committee and floor votes shows Rep. Cox voted against all seven amendments that he considered in committee and on the House floor that would have strengthened the act, and initially backed a weak version – sharply criticized by investor advocates – that passed the House. It was only after the WorldCom scandal made headlines, and when a much stronger conference committee version passed the House overwhelmingly, that Rep. Cox cast a pro-investor vote. Most of the amendments Rep. Cox voted against were later included in the conference committee version. Rep. Cox was also absent for seven of 13 votes taken when the bill was being marked up in his own Financial Services Committee.

| Item | Description | Investor Advocate Position | Cox Vote |
|---|---|---|---|
| ***MAIN BILL*** Sarbanes-Oxley Act H.R. 3763 (Conference version) | To protect investors by improving accuracy and reliability of corporate disclosures. Conference committee version passed three months after the House version and disclosure of new corporate scandals. Conference version was stronger than an already stronger Senate bill and included several pro-investor amendments defeated earlier in the House. (Passed 423-3)[6] | Y | Y |
| ***AMENDMENTS*** Committee amendment #1b | To allow the SEC to seize profits gained through illegal corporate activities. However, the proposal was vague, made seizures difficult, and directed the government to consider company interests before investor interests. (Passed 36-25) | N | Y |
| Committee amendment #1m | To strengthen the independence of stock analysts by barring them from recommending stocks they own and by banning certain payments to stock analysts. (Failed 25-37) | Y | N |
| Committee amendment #1cc | To reduce conflict of interest created when corporate executives award consulting contracts to directors who make decisions about executive pay. Would have forbade directors from receiving income beyond regular director's fees. (Failed 20-38) | Y | N |

| Item | Description | Investor Advocate Position | Cox Vote |
|---|---|---|---|
| Committee amendment #1dd | To require that corporate boards' executive compensation committees be comprised of directors without financial ties to the company or its executives, and to require boards to get investor approval of executive stock option plans. (Failed 22-34) | Y | N |
| Committee amendment #1hh | To establish stronger conflict-of-interest standards for corporate auditors by forbidding accountants from auditing non-audit work they themselves performed. (Failed 18-40) | Y | N |
| H.Amdt.458 | Amendment contained many provisions from defeated committee amendments, including:<br>• Granting powers to new federally authorized agency to oversee accounting industry.<br>• Restricting non-audit services auditors could provide to a company, and allowing the company's audit committee to oversee non-audit services provided by their accounting firm.<br>• Requiring corporate executives to certify their financial statements.<br>• Reducing conflicts of interest for stock analysts whose firms also perform services for the corporations they analyze.<br>• Allowing SEC to bar executives and officers who commit fraud from other corporate positions, and to force them to return compensation received in connection with wrongdoing. (Failed 202-219) | Y | N |
| Motion to Recommit (Roll no. 109; functioning like an attempt to amend) | To send bill back to committee with instructions to add reforms contained in President Bush's corporate reform plan, including:<br>• Allowing SEC to remove corporate officers who commit fraud and ban them from other corporate positions.<br>• Allowing SEC to force corporate officers to return pay for periods when engaged in fraud.<br>• Requiring corporate executives to certify their financial statements. (Failed 205-222) | Y | N |

Notes: Initial House approval (334-90) and House committee approval (49-12) not included because bill at that stage lacked key reforms later contained in the Senate and conference committee version. Amendment to create Federal Bureau of Audits also not included.

## Retirement Investment Protection Legislation

The fallout from fraud can be especially painful for investors whose losses are concentrated in their retirement accounts. This is especially true as the 401(k) plan has eclipsed the traditional defined benefit pension plan as employees' main form of funding their retirements. As a result, there has been federal legislation addressing workers' retirement savings and the nature of investment advice that employees might receive through employer-sponsored accounts. Of the

seven chances Rep. Cox had to cast pro-investor votes to help workers and retirees, he sided with industry each time.

| Congress | Item | Description | Investor Advocate Position | Cox Vote |
|---|---|---|---|---|
| 107th | H.R. 2269 | To lift conflict-of-interest protections barring financial companies from giving investment advice to participants of retirement plans the companies administer. Bill required some disclosures, but these were judged inadequate by consumer groups. (Passed 280-144) | N | Y |
| | | *Amendment (H.Amdt.387):* To require financial advisors to disclose conflicts, and to allow employees access to other advisors if desired. (Failed 180-243) | Y | N |
| 107th | H.R. 3762 | Package of retirement changes. Would allow employees to divest company stock held in 401(k) accounts after three-year period, and bar employers from requiring employees to invest in company stock. Would prevent executives from selling stock during "blackout" periods when employees barred from selling. But would also lift conflict-of-interest provisions as in H.R. 2269; and would roll back requirement that companies provide many of their employees with same pension plan offered to executives. (Passed 255-163) | N | Y |
| | | *Amendment (H.Amdt.453):* To give employees a seat on the board of their pension plan; bar investment advisor conflicts of interest; preserve equality law for worker and executive pension plans; allow employees to sell company stock faster. (Failed 187-232) | Y | N |
| | | *Motion to recommit (Roll no. 91; functioning like an attempt to amend):* To require equal treatment for executive and worker pension plans under tax and corporate bankruptcy laws; aimed at ensuring executives cannot protect their pensions while those of workers are devalued. (Failed 204-212) | Y | N |

| Congress | Item | Description | Investor Advocate Position | Cox Vote |
|---|---|---|---|---|
| 108th | H.R. 1000 | To protect employee pension investments from excessive concentration in an employer's securities; also lifted conflict-of-interest protections on investment advice for employees. (Passed 271-157)<br><br>*Amendment (H.Amdt.131):* To require executive pensions be subject to the same rules as other employees, and to provide independent investment advice. (Failed 193-236) | N<br><br>Y | Y<br><br>N |

## Other Legislation of Interest

| Congress | Item | Description | Investor Advocate Position | Cox Vote |
|---|---|---|---|---|
| 102nd | H.R. 6 | Precursor to what later became the Financial Modernization Act (Gramm-Leach-Bliley) of 1999, which broke down long-standing barriers between different types of financial services companies, including securities firms.<br><br>*Amendment (H.Amdt.376):* The bill removed barriers between financial companies, but enacted firewalls between banks and affiliated securities firms, and barred certain affiliations with banks. The amendment Cox supported would have removed those firewalls, potentially encouraging damaging conflicts of interest. (Failed 200-216)<br><br>Note: Through the 1990s, financial services deregulation was a recurrent theme in Congress. The vote on H.R. 6 here, plus votes on other versions in later Congresses, are omitted because the bills were broad-ranging and included many non-securities provisions, or had effects that were positive, negative and neutral for investors. | --<br><br>N | --<br><br>Y |
| 104th | H.R. 3005 | Capital markets deregulation; to preempt much of states' regulation of securities. (Passed 407-8) | N | Y |
| 105th | S.1260 | Major follow-on to the Private Securities Litigation Reform Act of 1995; to preempt state laws and force virtually all securities fraud class action lawsuits into federal court under restrictive PSLRA rules. This denied defrauded investors access to investor protections – such as liability for aiding and abetting – not available under federal law. (Passed 319-82) | N | Y |

| Congress | Item | Description | Investor Advocate Position | Cox Vote |
|---|---|---|---|---|
| 106th | H.R. 1089 | To direct SEC to require improved disclosure of after-tax returns to investors in investment company prospectuses or annual reports. (Passed 358-2) | Y | Y |
| 106th | H.R. 1400 | To require SEC to adopt rules to improve public dissemination of bond trading information. (Passed 332-1) | Y | Y |
| 107th | H.R. 3764 | To authorize significantly higher SEC budget and implement pay parity for SEC staff, a move designed to improve agency performance. (Passed 422-4) | Y | Y |
| 107th | H.R. 1408 | To require financial regulators, including securities regulators, to develop procedures for sharing of anti-fraud information. (Passed 392-4) | Y | Y |
| 107th | H.R. 5118 | To increase penalties for securities fraud. (Passed 391-28) | Y | Y |
| 108th | H.R. 658 | To streamline hiring of SEC accountants, economists and securities compliance examiners. (Passed 423-0) | Y | Y |
| 108th | H.R. 2420 | To improve disclosure of mutual fund costs and to improve mutual fund governance. (Passed 418-2) | Y | Y |
| 108th | H.R. 3574 | To require expensing of stock options granted to senior executives, but otherwise delay or bar expensing of options. (Passed 312-111) | N | Y |
| | | *Amendment (H.Amdt.711):* To eliminate requirement that, for purpose of setting value of stock option expenses, it be assumed that stock prices do not change over time. Critics said this was unrealistic and would lead to the value of stock options being set at zero. (Failed 126-296) | Y | N |
| | | *Amendment (H.Amdt.712):* To preserve SEC authority to establish accounting principles or standards on its own initiative. (Failed 114-308) | Y | N |
| | | *Amendment (H.Amdt.713):* To back role of the SEC and Financial Accounting Standards Board in setting standards for securities issuers. (Failed 127-293) | Y | N |

Note: On S.1260, Rep. Cox was a member of the House-Senate conference committee that drafted the conference version of the bill, which became the final legislation as approved. Only Rep. Cox's vote on the final legislation is included.

# Rep. Cox's Sponsorship of Legislation: A Thin Record, Hostile to Investors

The securities industry today is a complex, worldwide business undergoing significant change in many areas. The SEC thus requires a chair with broad experience in securities and investor protection. When legislators migrate from lawmaking to regulation, they typically do so based on subject matter expertise developed through their legislative activities. Rep. Cox is touted as one of the most knowledgeable members of Congress about the securities industry. But examination of his legislative sponsorship record shows that he has been surprisingly inactive in securities matters.

In his nine terms in Congress, Rep. Cox has consistently introduced or co-sponsored bills on such topics as assisting developing democracies in the former Soviet Union, lowering taxes on beer and recognizing the birthday of Ronald Reagan. In all, he is the named sponsor of 178 pieces of legislation. But just four of them – 2.2 percent – have dealt with securities issues. An energetic co-sponsor of legislation, Rep. Cox has lent his name to 1,988 pieces of legislation. Yet only 19 of them – 1.0 percent – have dealt with securities. (Figure 2)

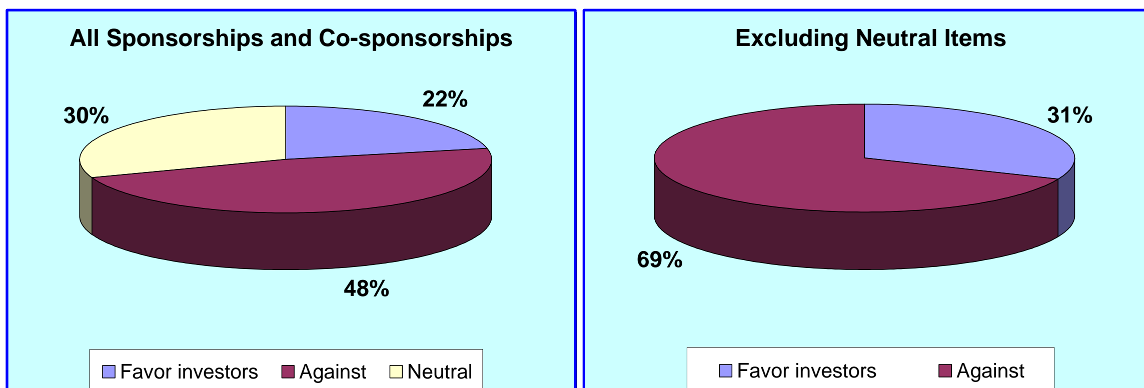
**Figure 2: Summary of Rep. Cox's Sponsorship and Co-sponsorship of Legislation**

| Congress | Bills / Items Sponsored | Number / Percent Securities-Related | Bills / Items Co-Sponsored | Number / Percent Securities-Related |
|---|---|---|---|---|
| 101st | 11 | 0 / 0 % | 276 | 0 / 0 % |
| 102nd | 17 | 0 / 0 % | 433 | 1 / 0.2 % |
| 103rd | 28 | 0 / 0 % | 380 | 4 / 1.1 % |
| 104th | 23 | 3 / 13.0 % | 176 | 0 / 0 % |
| 105th | 10 | 0 / 0 % | 166 | 2 / 1.2 % |
| 106th | 25 | 1 / 4.0 % | 193 | 5 / 2.6 % |
| 107th | 23 | 0 / 0 % | 132 | 4 / 3.0 % |
| 108th | 27 | 0 / 0 % | 164 | 2 / 1.2 % |
| 109th | 14 | 0 / 0 % | 68 | 1 / 1.5 % |
| **Total** | **178** | **4 / 2.2 %** | **1,988** | **19 / 1.0 %** |

Source: Public Citizen analysis of information from the Library of Congress' Thomas legislative information system.

The subject matter of the 23 securities-related items Rep. Cox has sponsored or co-sponsored has not been investor-friendly. Public Citizen determined that 48 percent of the items were against investor interests, 30 percent favored investor interests and 22 percent were neutral. (Figure 3) Excluding the neutral legislation, 69 percent of the securities-related legislation sponsored or co-sponsored by Rep. Cox has been against investor interests. Figure 4 provides an item-by-item evaluation of the 23 pieces of legislation.[7]

## Figure 3: Summary of 23 Pieces of Securities Legislation Sponsored or Co-sponsored by Rep. Cox




Source: Public Citizen analysis of information from the Library of Congress' Thomas legislative information system.

## Figure 4: Item-by-Item Analysis of 23 Pieces of Securities Legislation Sponsored or Co-sponsored by Rep. Cox

| Congress | Item | Type | Description | Investor Advocate Position |
|---|---|---|---|---|
| 102nd | H.R. 2410 | Co-sponsor | To promote employee stock ownership plans for companies typically owned by the wealthy and structured to avoid paying corporate income tax. | Neutral |
| 103rd | H.Con.Res.98 | Co-sponsor | Opposing transparency move by Financial Accounting Standards Board to require recognizing value of stock options as an expense. | Against |
| 103rd | H.R. 417 | Co-sponsor | To limit defendant's liability in securities fraud cases. | Against |
| 103rd | H.R. 2088 | Co-sponsor | Employee stock ownership; see H.R. 2410 above. | Neutral |
| 103rd | H.R. 2759 | Co-sponsor | To allow corporations to issue "performance stock options," while barring recognizing the value of options as an expense. | Against |
| 104th | H.R. 1058 | Sponsor | To make it more difficult for investors to sue companies for fraud. | Against |
| 104th | H.Amdt.266 | Sponsor | To bar securities lawsuit claims under the Racketeer Influenced and Corrupt Organizations Act. | Against |
| 104th | H.Amdt.269 | Sponsor | In investor lawsuits, failure to investigate whether statements are false or misleading is not reckless if the failure was not deliberate. | Against |

| Congress | Item | Type | Description | Investor Advocate Position |
|---|---|---|---|---|
| 105th | H.R. 1689 | Co-sponsor | To limit investor class action lawsuits in state courts; to effectively force such actions into federal court, where restrictions are greater. | Against |
| 105th | H.R. 4213 | Co-sponsor | To limit fees collected by the SEC. | Neutral |
| 106th | H.R. 5365 | Sponsor | To delay transparency move by the Financial Accounting Standards Board to eliminate a potentially misleading form of accounting for corporate mergers and acquisitions. | Against |
| 106th | H.R. 887 | Co-sponsor | To require disclosure of a corporation's contributions to non-profit groups in which a director or officer of the company was a director or trustee of the non-profit. | Favor |
| 106th | H.R. 1089 | Co-sponsor | To require improved disclosure of after-tax effects of portfolio turnover on mutual funds' returns to investors. | Favor |
| 106th | H.R. 1256 | Co-sponsor | SEC fees; H.R. 4213 above. | Neutral |
| 106th | H.R. 1400 | Co-sponsor | To improve collection and dissemination of bond price information. | Favor |
| 106th | H.R. 2441 | Co-sponsor | SEC fees; see H.R. 4213 above. | Neutral |
| 107th | H.R. 3745 | Co-sponsor | Non-profit disclosure; see H.R. 887 above. | Favor |
| 107th | H.R. 3763 | Co-sponsor | To improve accuracy and reliability of corporate disclosures. | Favor |
| 107th | H.R. 3764 | Co-sponsor | Authorizing SEC appropriations. | Neutral |
| 107th | H.R. 5050 | Co-sponsor | To create Market Integrity Commission to study corporate governance and impact of corporate governance on commerce. | Neutral |
| 108th | H.R. 1372 | Co-sponsor | To bar or delay SEC from recognizing new accounting standards for treatment of stock options. | Against |
| 108th | H.R. 3574 | Co-sponsor | To require expensing of stock options granted to senior company officers, but otherwise delay or bar expensing of options. | Against |
| 109th | H.R. 913 | Co-sponsor | Stock options; see H.R. 1372 above. | Against |

Source: Public Citizen analysis of information from the Library of Congress' Thomas legislative information system.

Notes:

– On H.R. 1058: Rep. Cox is not officially listed as the sponsor of H.R. 1058, the Private Securities Litigation Reform Act, but is acknowledged as being its sponsor. He also identifies himself as its sponsor.

– On H.R. 4213: Following growth in stock trading volume in the 1990s, the SEC was collecting fees greater than its annual budget. The move to cut SEC fees was contentious; fees collected in excess of the SEC budget had become general government revenue, so reducing SEC fees would require cuts or additional revenue elsewhere. However, at the same time, investor advocates urgently complained that while the fees exceeded the SEC budget, the SEC itself had become seriously under-funded. The fee reduction legislation, they say, missed an opportunity to provide the agency with needed additional resources. The under-funding hurt the SEC's ability to monitor companies and the markets, the advocates say, and was a significant factor in scandals such as Enron and WorldCom.

– H.Amdt.266 and H.Amdt.269 are floor amendments that the Thomas system classifies as separately sponsored pieces of legislation. Public Citizen's examination adopts that convention.

Two pieces of legislation Rep. Cox sponsored stand as his most substantive securities-related activities, and most clearly illustrate his alignment with industry interests over investors.

- **Rep. Cox's Private Securities Litigation Reform Act of 1995**

Rep. Cox's most notable sponsorship of securities-related legislation is the Private Securities Litigation Reform Act of 1995. Through changes to rules governing lawsuits in federal courts, the act makes it substantially more difficult for investors who believe they have been defrauded to seek redress in court. The PSLRA stirred great concern among consumer and investor advocates, and is discussed in depth later in this report. Its ostensible purpose was to choke off "frivolous" lawsuits designed to extract settlements from companies, but new evidence suggests, as critics feared, that it is standing as a barrier to meritorious cases.

- **Rep. Cox's Attempt to Preserve Potentially Misleading Accounting**

In a move that drew an unusual public rebuke from independent accounting standards-setters, Rep. Cox favored corporate interests over investors through sponsorship of legislation dealing with accounting treatment of corporate acquisitions.

There are different ways to account for such transactions, and the treatment had been the subject of great controversy, for fear that earnings can be manipulated or companies' difficulties can be papered over. As a result, in an effort to make companies' representations to the investing public more accurate and complete, the Financial Accounting Standards Board[8] in the late 1990s moved to eliminate so-called "pooling of interests" accounting in mergers and acquisitions, in favor of the "purchase" method,[9] saying such a move would make transactions more transparent and better understood by investors.[10] In 2000, however, Rep. Cox introduced a bill – H.R. 5365 – to impose a moratorium blocking transition to the new standard.[11]

As two commentators said of Rep. Cox's proposal in a noted trade journal at the time: "(He is) actually joining a conspiracy to defraud part of (his) constituency." They continued:

> "After decades of controversy, the Financial Accounting Standards Board is ready to force the United States to catch up to the rest of the world by finally burying pooling of interests. Some accountants who oppose these changes have gone to Washington with large bags of coins. They've gotten what they've paid for: Members of Congress threatening to intervene with legislation. Legislation introduced by (Rep. Cox) would force FASB to defer implementing its ban. It is surely no coincidence that (Rep. Cox is) from California, where poolings are more common than hot tubs. The underlying premise is that abolishing pooling of interests will damage high-tech industry by making mergers too costly. What they're missing is that this strategy aims to trick the stockholders, including ordinary citizens, as well as pension funds and mutual funds, into accepting a rate of return that is inappropriately low for the risk that they're facing." [12]

So objectionable was Rep. Cox's unsuccessful attempt that the FASB chairman even demanded that Congress stop meddling, denouncing Rep. Cox's bill as:

> "an unwarranted and unwise intrusion in the FASB's ability to continue to establish high-quality accounting standards in the private sector on an independent basis....The issues

> before the FASB are always controversial with many people arguing all sides. The bottom line is that FASB standards are established in an open and independent manner without undue influence from any special interest group....The legislation introduced in the House must be seen for what it is – legislative interference with the FASB's ability to do its job." [13]

Thus, the head of one of the most important bodies for maintaining corporate financial integrity and protecting investor interests took the highly unusual step of publicly branding Rep. Cox as hindering its work.

# Rep. Cox's Signature Legislation: Protecting Companies, Raising the Bar For Defrauded Investors

On March 7, 1995, Rep. Cox rose in the House of Representatives to offer up an amendment to his own bill. The bill was a measure to make it much more difficult for investors to sue companies for investment fraud. His amendment, meanwhile, would tighten the screws further still, by barring suits under the Racketeer Influenced and Corrupt Organizations (RICO) Act. RICO, which can produce treble-damage recoveries for those suffering losses, has, among other uses, been a valuable tool in corruption cases stemming from the 1980s savings and loan scandals. The House, flush with Republican gains from the 1994 elections, approved Rep. Cox's amendment.

At the same time Rep. Cox stood before his colleagues, a number of school districts in central Pennsylvania were investing money with two Pennsylvania investment firms in a scam about to go bust. But due to Rep. Cox's bill, the school districts would find their options limited as they sought to recover an estimated $70 million in losses.

The school districts' experience is just one way Rep. Cox's legislation – the Private Securities Litigation Reform Act – has lessened the protection for swindled investors as many more Americans have become investors. The school money was intended for school building projects, and initially, the investment arrangement had been lucrative. But it turned into a Ponzi scheme, as the investment firms began putting the school money into complicated, risky investments that produced large losses. Ultimately, in September 1997, the Securities and Exchange Commission stepped in, declaring the investment program a securities fraud. Trying to get their money back, the school districts sued in federal court under RICO.

But under terms of Rep. Cox's amendment, the school districts were barred from bringing RICO claims; their action was dismissed. Although the districts have since recovered a good deal of their losses, the barrier Rep. Cox erected to suing under RICO may have cost the districts tens of millions of dollars. (Most notably, the RICO Act allows for recovery of legal fees and the potential for treble damages. In the schools' case, fees are estimated at $8 million to $10 million. Even if a RICO action is not successful in its own right, the potential of its application can create pressure that leads to higher settlements.) "It took away a tool that would have been useful – that's very clear," says their attorney, Richard A. Finberg.[14]

The PSLRA, enacted over a presidential veto, is the signature securities-related legislation of Rep. Cox's career in the House[15] and is the most visible indicator of where his loyalties will lie if he is confirmed as SEC chairman.

At the time the PSLRA was enacted, there was concern that some securities litigation had become questionable. Yet there was also concern the law would go too far. As President Bill

Clinton said in his veto message:

> "While it is true that innocent companies are hurt by frivolous lawsuits and that valuable information may be withheld from investors when companies fear the risk of such suits, it is also true that there are innocent investors who are defrauded and who are able to recover their losses only because they can go to court. It is appropriate to change the law to ensure that companies can make reasonable statements and future projections without getting sued every time earnings turn out to be lower than expected or stock prices drop. But it is not appropriate to erect procedural barriers that will keep wrongly injured persons from having their day in court." [16]

The PSLRA was, and remains, troubling for the many ways, singly and in combination, that it makes it more difficult for investors to seek redress for investment losses. Its chief provisions are:

- **A statutory "safe harbor" for forward-looking statements.** This provides shelter from liability under federal securities law for projections and other forward-looking statements that were not known to be false when made, or that were accompanied by "meaningful" cautionary statements. Such statements must identify important factors that could cause actual results to differ from the projected ones.

- **Strict pleading standards.** Plaintiffs must specify each statement alleged to have been misleading and the reason(s) why it was misleading. When seeking damages that are available only upon a showing the defendant acted with a particular state of mind, the complaint must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." Ordinarily, complaints can be more generalized, with specific details to be added later upon discovery, or developed at trial.

- **Stay of discovery.** Discovery is the process by which plaintiffs obtain, under court sanction, information important to their case from the other side. Ordinarily, liberal standards for discovery prevail, but the PSLRA suspends discovery while a motion to dismiss is pending. Some complain that the combination of the strict pleading standards (above) and stay of discovery puts plaintiffs in a Catch-22 situation: Required to file a detailed complaint, but barred from obtaining those details by the stay of discovery.

- **Limits on damages.** When a plaintiff seeks to establish damages according to the market price of a security, the PSLRA limits the damages to the difference between the price paid by the plaintiff and the average price during a 90-day period following correction of a misstatement or omission. A system of "proportionate" damages was also established for defendants who are not found to have "knowingly" committed a violation. That replaced "joint and several" liability, in which one defendant could be liable for all damages.

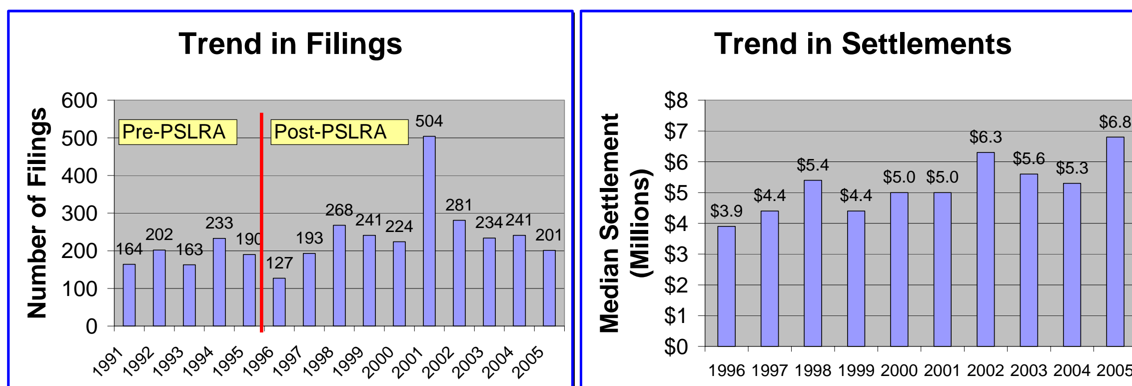
- **RICO not available.** As noted above, the act eliminates securities fraud as an action allowable under RICO.

- **Weaker standards for "aiding and abetting."** The PSLRA authorized the SEC to bring enforcement actions against those knowingly providing assistance to another in violation of securities law. This was intended to confirm SEC authority in the wake of a U.S. Supreme Court decision that had undermined it. But the act, by limiting the provision to those acting knowingly, left the SEC's authority as more limited than before the court decision. It also failed to restore aiding and abetting liability for private lawsuits, investor advocates complained.[17]

## The PSLRA Ten Years Later: The Fears of Critics Coming True

At first glance, it might appear the PSLRA has not been successful in corralling investor lawsuits as proponents hoped. The annual number of filings has most often been higher since 1996, the first full year after the PSLRA was enacted. (Figure 5) Shareholder class action settlements are growing, and expected to hit a record for 2005, driven in part by a $6.1 billion settlement in the WorldCom fraud case.

**Figure 5: Trends in Securities Fraud Filings and Settlements Since Enactment of the PSLRA**




Source: NERA Economic Consulting

The reason for these increases likely lies in something of an aberration – a number of big fraud cases filed following bursting of the stock market bubble in 2000-02. The volume and size of those cases have likely drowned out what otherwise would have been evident as the PSLRA's effect, at least in part and for the time being, observers say. "What really overwhelms the effect of the reform is the effect of market conditions," says Laura E. Simmons, co-author of Cornerstone Research reporting on the PSLRA.[18] "The dominant effect is what's going on in the market." Because it can take several years to settle a securities class action case, this effect is expected to continue until perhaps 2007.

But the gross numbers don't reflect important PSLRA-inspired changes that are happening nonetheless:

- The dismissal rate for federal securities class action cases has doubled, from 20.3 percent of dispositions in 1991-1995, to 39.3 percent from 1996 to 2002.
- And even when cases are not dismissed, many proceed with a considerably narrower scope, such as through parties or allegations being dropped or the period over which damages are calculated being shortened. This is difficult to document, but has been observed anecdotally.[19]

Such results show that, measured by the goals its sponsors set, "the law was fairly effective," says Elaine Buckberg, co-author of NERA Economic Consulting research on the PSLRA.[20] "It's not preventing cases from being filed, it's filtering them."

But while, from proponent's standpoint, the law may be working, recent experience also suggests investors' fears are being realized.

"**Immunizing" fraud.** Before the PSLRA was enacted, consumer and investment groups, and others, warned that the safe harbor provisions could actually encourage fraud, by shielding companies and their executives from liability. At the same time, the PSLRA provision substituting proportionate liability for joint and several liability (discussed above) works particularly to the advantage of auditors, who have played a pivotal role in the scandals of recent years that have cost investors many billions of dollars. Even if culpable, auditors are usually less so than members of management. As a practical matter, that means accounting firms know their liability will be substantially curtailed so long as their actual knowledge of fraud is not proven.

Some, including Columbia University Law School Professor John Coffee, an authority on securities matters, say the diminished legal threat could have set the stage for the Enron Corp. scandal and other accounting irregularity cases. "Those who made out best (under the PSLRA) were the accountants, because they became virtually litigation-proof," he says.[21]

**Throwing out the good with the bad.** The ostensible reason for the PSLRA was to stem so-called frivolous litigation. The chief complaint was that plaintiffs attorneys were filing lawsuits unsupported by true fraud, if only to pressure a company into a lucrative settlement. But from the start, investor advocates and others were concerned the law would shut out legitimate litigation in which investors were genuinely entitled to damages. Today, new research indicates that meritorious lawsuits are being barred from the courts or producing lesser compensation for victims.

In a recently published paper, New York University law professor Stephen J. Choi examined cases involving "pre-filing hard evidence" of fraud, which was defined to include an accounting restatement announced before filing of a suit or an SEC investigation or enforcement action.[22] Such authoritative evidence suggesting fraud helps plaintiffs meet PSLRA requirements, including the stricter pleading standards before any discovery has taken place.

Lack of such hard evidence does not necessarily mean a suit is without merit. Indeed, in the pre-PSLRA era, many claims without pre-filing hard evidence produced settlements above what observers call "nuisance value." Through discovery allowed after filing of a suit – in pre-PSLRA

days, at least – attorneys often gained more information against a defendant, which produced a better outcome for defrauded investors.

Today, however, Choi's research indicates the PSLRA has had a "disproportionate and large negative impact" on meritorious cases lacking pre-filing hard evidence of fraud. He has found that before the PSLRA, 64.9 percent of cases without pre-filing hard evidence of fraud resulted in a "non-nuisance" outcome – that is, damages or compensation greater than what could be attributed to a nuisance action lacking any substance or justification.

But if the same cases had been brought after the PSLRA, he estimates, only 45.8 percent – or perhaps as low as 24.3 percent, depending on methodology – of the cases would produce a similar outcome. Thus, the estimated reduction in cases producing meritorious damages ranges from 29.4 percent to 62.6 percent.

In other words, in the post-PSLRA world, meritorious cases now have a greater likelihood of being dismissed or producing lower-value settlements. "The PSLRA operated less like a selective deterrence against fraud and more as a simple tax on all litigation (including meritorious suits)," Choi writes.

Similarly, Duke University law professor James D. Cox (hereinafter "Prof. Cox," to distinguish from Rep. Cox) says evidence suggests meritorious claims are also losing out in another way.[23] It revolves around the period of time when fraud is determined to have occurred.

Previous research that Prof. Cox and others have done shows there can be questionable fluctuations in the price of a security preceding the time when news of a corporate scandal actually breaks, such as when a company is forced to revise its financial statements or executives announce an earnings shortfall. Those early fluctuations may well be dwarfed by what happens once news of a scandal gets out, but they nevertheless can be significant, if only as an indicator of questionable behavior.

A critical factor in a securities fraud lawsuit is the "class period" – the length of time during which fraud is alleged to have occurred. The longer the period, the greater damages can be. Before enactment of the PSLRA, Prof. Cox says, the class period often would have included at least some of the time before the scandal broke, to reflect those pre-scandal price fluctuations. Today, however, plaintiffs and their attorneys appear to be drawing the class period more tightly – omitting some or all of the time of the early price fluctuations – for fear of making allegations a judge will rule don't meet the PSLRA's heightened pleading standards.

As the class period shortens, some investors' claims will be squeezed out of the lawsuit. As a result, Prof. Cox says, meritorious claims by investors hurt during the early portion of a scandal, but before hard evidence of it becomes apparent, are not being reflected. "We find enough to make us think there are injured investors outside the class period that are not being included in the class period, because of the pleading requirements," Prof. Cox says. Worse still, "the people who lose the most money are the people at the front end of the lie."

Legitimate claims falling by the wayside are exactly what critics feared most about the PSLRA.

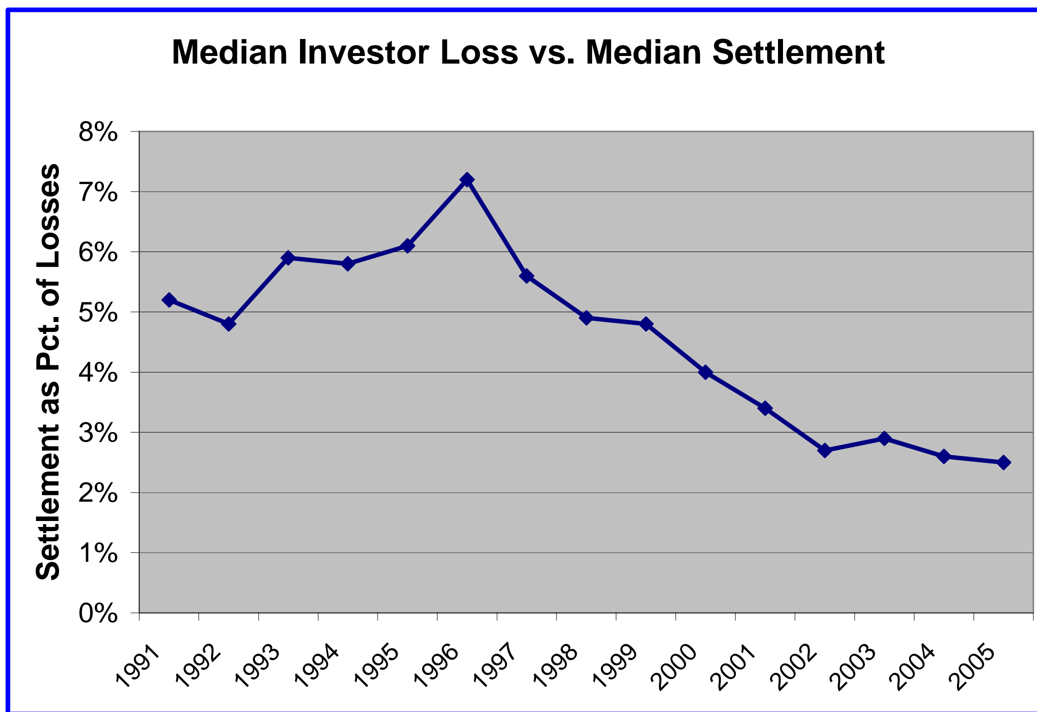
There is some indication awareness of this phenomenon is growing. As the California Supreme Court said in a 2003 securities fraud decision:

> "When Congress enacted the Private Securities Litigation Reform Act of 1995…it was almost entirely concerned with preventing non-meritorious suits. But events since 1998 have changed the perspective. The last few years have seen repeated reports of false financial statements and accounting fraud, demonstrating that many charges of corporate fraud *were neither speculative nor attempts to extort settlement money, but were based on actual misconduct.* … Eliminating barriers that deny redress to actual victims of fraud now assumes an importance equal to that of deterring non-meritorious suits." (emphasis added)[24]

Additionally, beyond any impact on victim compensation, the PSLRA, in discouraging meritorious actions, has also lowered the deterrence to fraud that the threat of litigation represents. This could increase the need for enforcement activities, Choi says.

**Stemming fraud victims' recoveries.** Since enactment of the PSLRA, there has been a steady, steep decline in the portion of losses investors are recovering through fraud litigation. This has been noted by several researchers, and is illustrated in statistics compiled by NERA Economic Consulting. (Figure 6)

**Figure 6: Investor Recoveries Sliding Since Enactment of the PSLRA**




Source: NERA Economic Consulting

Some who compile these figures are not yet ready to pronounce them an impact of the PSLRA.[25] For instance, it has long been true that as investor losses become larger, the amount recovered, as a fraction of the losses, becomes smaller.[26] So, given that recent cases have involved larger

damages, a decline in the ratio is to be expected. Another possible explanation is the notion that investors who bring securities actions often remain shareholders after a settlement is reached. This would be especially true for so-called institutional investors, such as pension funds, investment management companies and the like. Larger settlements mean bigger payoffs for investors, of course, but also a greater burden for the company – which can work against the plaintiffs' interests as continuing shareholders. Thus, after a point, there can be less incentive to pursue larger settlements.

However, this trend of lower recovery of losses is not inconsistent with other outcomes discussed above – the fact that some fraud may effectively be immunized, thus encouraging, or failing to discourage, such activity; and that some meritorious cases are being screened from the system or reduced in value. Duke University's Cox believes the PSLRA has indeed played a role, by changing the risk-reward calculus for plaintiffs and their attorneys. By making it harder to win securities cases, the law has increased the risk of bringing an action – among other things, it costs more to document the specific allegations required, and there is a greater chance a case will be dismissed or restricted in scope. "There are lots of things cutting against the plaintiff's side," he says.

In turn, that heightened risk likely provides a greater incentive for plaintiffs to settle, he says, which helps produce lower recoveries. It may also be that judges, who play a more active role in the facts of a case under PSLRA, send signals to the parties that influence settlements, Prof. Cox says.

In all, it is probably an exaggeration to say the PSLRA wouldn't exist but for Rep. Cox. But it is equally clear Rep. Cox was a major force behind it. That, as noted earlier, is telling for how much he values the concerns of investors relative to those of companies and securities insiders. Meanwhile, evidence is beginning to appear that suggests critics' fears of Rep. Cox's legislation was well-placed.

## Unvarnished Cox: If the PSLRA Was Enacted as He Originally Wrote It

As objectionable as the PSLRA was to investor advocates, it would have been worse still if Rep. Cox's initial version, as introduced in the House, had been enacted into law. His initial version gives an even clearer view of how strongly Rep. Cox favored the interests of industry over investors.

In Rep. Cox's original version, only the most extreme form of misconduct would have produced liability. Even gross negligence would not have been actionable, while those with histories of criminal fraud, or who had been ordered to cease fraudulent activity, would have nevertheless been eligible to use "safe harbor" provisions for avoiding liability. With selected commentary from former SEC Chairman Arthur Levitt – widely acknowledged as an investor advocate during his 1993-2001 tenure – Figure 7 tallies some of Rep. Cox's initial provisions of the PSLRA that did not make it into law.

## Figure 7: Selected Portions Rep. Cox's PSLRA As Introduced in the House

| Item In Rep. Cox's Original PSLRA | Issue / Commentary |
|---|---|
| Payment of other side's fees and expenses. | Could have erected a major barrier to filing actions, as the loser could have been required to pay the winner's fees and expenses.<br>*"Imagine you're a small investor whose nest egg of $10,000 loses its value overnight, due to the sudden disclosure that a company has withheld its true earnings. Two hours after the meter has started ticking at the law firm hired by the defendant, one senior partner alone has already racked up $1,000 in fees. Within a month, you're weighing the possibility of paying lawyers' fees that are dozens, if not hundreds of times larger than your whole investment; that strikes me as a powerful deterrent, no matter how legitimate your claim."*<br>– Arthur Levitt<br>SEC chairman, 1993-2001 [27] |
| High standard of "scienter" – actual knowledge of wrongdoing by defendant. Included "I forgot" defense for companies. | Would have established a high threshold for liability for fraudulent statements; liability allowed only if defendant made statements knowingly or recklessly. The bill set a narrow limit for what constitutes recklessness: "not merely simple or even gross negligence, but an extreme departure from standards of ordinary care." For example, the bill said, "a defendant who genuinely forgot to disclose, or to whom disclosure did not come to mind, is not reckless."<br>*"We want corporations to worry about the accuracy of their disclosures, because that is the best way to assure the markets of a continuous stream of accurate information. Any higher scienter standard threatens the process that has made our markets what they are. Indeed, an actual knowledge standard could create a legal incentive to ignore indications of fraud. The phrase 'ignorance is bliss' could take on new meaning."*<br>– Arthur Levitt [28] |
| Reliance on fraudulent statements | Would have raised the bar significantly for proving liability; could have made some class actions impossible. Plaintiff would have had to prove they knew of, and relied upon, statement in question.<br>*"This is antithetical to our entire system of disclosure, which is premised on the notion that when information is disclosed generally, it is incorporated into market prices…When someone buys stock at a price affected by misrepresentations, the buyer has in effect bought the misrepresentations, whether or not he or she actually read the statements in question – and that buyer simply must have recourse."*<br>– Arthur Levitt [29] |
| "Safe harbor" for forward-looking statements | Would have provided much more liberal standard to let companies avoid liability for statements about future prospects. Even those with histories of criminal fraud, or who had been ordered to cease fraudulent activity, would have been eligible for the safe harbor. Firms could have avoided liability by disclaimer and if projection "(was) not inaccurate" when made. |

# Rep. Cox's Aversion to Regulation Undercuts His Ability to Lead An Agency That Protects Through Regulation

The securities industry is carefully regulated, and not by accident. The SEC itself was born from abuses that helped trigger the Great Depression, and the corporate scandals of the last five years vividly underscore the continuing need for regulation and oversight to protect investors.

A fair question, then, about anyone who would lead the SEC is: What is their temperament toward regulation and oversight? This is not an idle question for the agency today. In recent years, the SEC has enacted important protections aimed at increasing transparency and restoring investor confidence. These include implementing the Sarbanes-Oxley corporate reform law and addressing operations of hedge funds and mutual funds.

At the same time, investor advocates say, important work remains to be done, including: providing additional protections for mutual fund investors; cleaning up abusive broker-dealer sales practices, and promoting minority shareholder rights.

There is a legitimate debate to be had about the size and role of government in American society. But the securities industry's long history of investor abuse makes a compelling case for the SEC's regulatory mission. In the case of Rep. Cox, there is reason for investors to be concerned if he becomes chairman of the agency, because he has consistently displayed an antagonistic attitude toward federal regulation and oversight.

Rep. Cox was careful after his nomination to praise the SEC as "one of the best run agencies in the federal government."[30] But the congressman has pressed for regulatory moratoriums, across-the-board reductions in the size of the federal government, and efforts to sharply reduce funding of government auditors and investigators.

Rep. Cox's most far-reaching anti-regulatory move may have been his co-sponsorship of the "regulatory freeze" passed by the House in 1995 but ultimately rejected by the Senate as too extreme.[31] The House version would have instituted a broad moratorium on federal rules across the government.[32]

Also significant is Rep. Cox's support of efforts during the 102nd Congress in 1991-92 to sharply reduce the budget of the Government Accountability Office (then known as the General Accounting Office), which is the leading oversight and investigative agency for the legislative branch of the federal government. Responding to critics who defended the agency, Rep. Cox urged privatizing what he charged was a biased and incompetent agency.[33] "A stuck pig squeals," he said, "and this is pork." [34] Figure 8 illustrates Rep. Cox's support of anti-regulatory measures.

### Figure 8: Rep. Cox's Support of Anti-Regulatory Measures

| Congress | Bill | Action | Description |
|---|---|---|---|
| 102nd | H.Amdt.98 | Sponsor | To cut appropriations for the General Accounting Office by $107.5 million, or nearly 25 percent. |
| 102nd | H.Amdt.637 | Sponsor | To cut appropriations for the General Accounting Office by $108 million, or nearly 25 percent. |
| 102nd | H.R. 1897 | Co-sponsor | To limit the number of civilian employees in each branch of the federal government to 1990 levels starting in 1994. |
| 102nd | H.R. 2595 | Co-sponsor | To limit the number of civilian employees in each branch of the federal government to 1990 levels starting in 1991. |
| 102nd | H.R. 5550 | Co-sponsor | To require, each year between 1993 and 1997, that executive branch agencies significantly reduce overhead expenses. |
| 104th | H.R. 450 | Co-sponsor | To place a moratorium on implementation of most federal regulations passed between November 1994 and December 1995. |
| 108th | H.R. 1227 | Co-sponsor | To establish a Federal Agency Sunset Commission, armed with subpoena power, to review and recommend federal agencies for abolishment. |

## ENDNOTES

[1] As quoted in remarks by then-Securities and Exchange Commission Chairman Arthur Levitt, to the National Legal Center for the Public Interest, Washington, D.C, March 29, 1995; available at http://www.sec.gov/news/speech/speecharchive/1995/spch044.txt. Tenure of William O. Douglas as SEC chairman from Securities and Exchange Commission Historical Society; see http://www.sechistorical.org/collection/papers/1930/1934_paper0007.html
[2] "Equity Ownership in America," Investment Company Institute and the Securities Industry Association. See http://www.ici.org/statements/res/arc-rpt/rpt_02_equity_owners.pdf.
[3] This vote was on House approval of the conference committee report. Other House votes to approve were approval of the initial House version and overriding the president's veto.
[4] A derivative is a contract whose value is based on the performance of an underlying financial asset, index or other investment. *Dictionary of Finance and Investment Terms,* fourth edition, Barron's Educational Series, Inc., 1995.
[5] See, for example, "Bush Nominates Rep. Cox for SEC Post," Fox News, June 22, 2005, available at http://www.foxnews.com/story/0,2933,158381,00.html; and "Hedge funds cheering for Cox," CNN/Money, July 12, 2005, available at http://money.cnn.com/2005/07/12/markets/hedgefunds_cox/.
[6] See generally: Michael Steel, "Republicans Rebuff Democrats on Accounting Oversight Bill," *National Journal*, April 11, 2002; Michael Steel, "Accounting Oversight Bill Clears House Panel," *National Journal*, April 16, 2002; Tim Green and Wayne Berson, "Navigating the New GAO Independence Standards, *WashingtonCPA Online*, November/December 2002.
[7] Evaluation of legislation is based on content at time of introduction.
[8] The Financial Accounting Standards Board is a non-government organization that establishes accounting and reporting standards for preparation of financial reports; the standards are officially recognized as authoritative by the Securities and Exchange Commission and the American Institute of Certified Public Accountants. For more information, see www.fasb.org.
[9] Under pooling of interests accounting for business combinations, the balance sheets of the respective firms are added together, item by item, on an as-is basis. Under purchase accounting, by contrast, the buying company treats the acquired company as an investment, and any premium paid over the fair market value of the assets is reflected on the buyer's balance sheet as goodwill. An acquirer might pay more than fair market value to take advantage of brand recognition or a good reputation. Under accounting principles, goodwill resulting from an above-market value purchase price is written off as an expense over time. Under the pooling method, no such expense is created. The higher expenses stemming from the purchase method mean, in turn, that reported profits are lower. Because reported earnings are generally higher under the pooling method, most companies prefer it to the purchase method, particularly when the amount of goodwill is sizeable. Adapted from Barron's, *supra.*
[10] See http://www.fasb.org/news/nr012401.shtml. Eliminating pooling of interests accounting in favor of the purchase method "requir(es) that the current values of the assets and liabilities exchanged be reported to investors. Without the information that the purchase method provides, investors are left in the dark as to the real cost of one company buying another and, as a result, are unable to track future returns on the investment." See also http://www.fasb.org/st/summary/stsum141.shtml.
[11] H.R.5365 did not become law, as its only action was to be referred to committee.
[12] Excerpted from *Accounting Today*, by Paul B. W. Miller, University of Colorado at Colorado Springs, and Paul R. Bahnson, Boise State University, December 18, 2000.
[13] "FASB Chairman Takes Round-House Swing At Capitol Hill 'Interference,' " *Securities Week*, December 11, 2000.
[14] This account based on interviews with Finberg and Bald Eagle Area School District Superintendent Daniel F. Fisher, as well as the opinion issued by the U.S. Court of Appeals for the Third Circuit, affirming the U.S. District Court's dismissal of the case on grounds it was barred by the Private Securities

Litigation Reform Act of 1995. See *Bald Eagle Area School Dist. v. Keystone Financial, Inc.*, 189 F.3d 321 (3d Cir. 1999). The recoveries by the school districts came via state court actions.
[15] As noted earlier, Rep. Cox is not officially listed as the sponsor of H.R. 1058, the Private Securities Litigation Reform Act, but is widely acknowledged as effectively being its sponsor, and he identifies himself as its sponsor.
[16] As reported in the Congressional Record, December 20, 1995 (House), pages H15214-H15224.
[17] Description of PSLRA provisions adapted from *Report To The President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995*, U.S. Securities and Exchange Commission, Office of the General Counsel, April 1997.
[18] Interview with the authors. See: "Post-Reform Act Securities Settlements; Updated Through December 2004," by Laura E. Simmons and Ellen M. Ryan, Cornerstone Research, Inc., 2005.
[19] This information from interview with, and reports prepared by, Elaine Buckberg, NERA Economic Consulting, New York. For case dismissal statistics, 2002 selected as ending point because cases typically take several years to reach disposition.
[20] Interview with the authors. See, most recently, "Recent Trends in Shareholder Class Action Litigation: Are WorldCom and Enron the New Standard," by Elaine Buckberg, Todd Foster and Ronald I. Miller, NERA Economic Consulting, 2005.
[21] Correspondence with the authors. See also, "The Enron Debacle and Gatekeeper Liability: Why Would the Gatekeepers Remain Silent?", testimony of John C. Coffee Jr. before the U.S. Senate Committee on Commerce, Science and Transportation, December 18, 2001.
[22] "Do the Merits Matter Less After the Private Securities Litigation Reform Act?", Stephen J. Choi, New York University Law School, February 2005. Available through the Social Science Research Network at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=558285.
[23] Interview with the authors.
[24] See *Small v. Fritz Companies, Inc.*, 65 P.3d 1255, 1263 (Cal. 2003).
[25] Simmons and Buckberg, *supra*.
[26] NERA's Buckberg estimates the relationship as: On average, a 1 percent increase in investor loss results in a 0.4% increase in size of expected settlement. This is because, it is believed, as losses grow larger, a liable party has less means to pay the full amount.
[27] Remarks by SEC Chairman Arthur Levitt before the Securities Regulation Institute, San Diego, January 25, 1995, available at http://www.sec.gov/news/speech/speecharchive/1995/spch023.txt.
[28] *Id.*
[29] *Id.*
[30] Press release, Office of the Press Secretary, "President Nominates Congressman Chris Cox as SEC Chairman," June 2, 2005, available at http://www.whitehouse.gov/news/releases/2005/06/20050602-4.html.
[31] Bob Benenson, "Senate Passes up 'Freeze' Plan, Substitutes Regulatory Review," *CQ Weekly*, April 1, 1995.
[32] Jeanne Ponessa, "Regulatory Freeze Stalls, Paperwork Bill Advances," *CQ Weekly*, February 11, 1995.
[33] Juliet Eilperin, "GAO's Reports Under Fire," *Roll Call*, July 24, 1995.
[34] Beth Schwinn, "Cox Amendment Crashes and Burns on Floor," *States News Service*, June 24, 1992.