

SENATE BILL NO. 382

INTRODUCED BY

HARR

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING PRIVATE SECURITIES LITIGATION LAWS; ESTABLISHING REQUIREMENTS FOR SECURITIES FRAUD ACTIONS; PROVIDING SANCTIONS FOR ABUSIVE LITIGATION; LIMITING DAMAGES; CREATING A SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS; REGULATING JOINT AND SEVERAL LIABILITY; REGULATING CONTRIBUTION AMONG PARTIES FOUND TO BE JOINTLY AND SEVERALLY LIABLE; AMENDING SECTIONS 27-1-702 AND 27-1-703, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Requirements for securities fraud actions.

(1) In any private action arising under this part, if the plaintiff alleges that the defendant made an untrue statement or omitted a material fact necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading, the complaint must specify each statement alleged to have been misleading and the reason or reasons why the statement is misleading. If an allegation regarding the statement or omission is made on information and belief, the complaint must state with particularity all facts on which that belief is based.

(2) In any private action arising under this part in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint must, with respect to each act or omission alleged to violate this part, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

(3) In any private action arising under this part, the court shall on the motion of any defendant, dismiss the complaint if the requirements of subsections (1) and (2) are not met.

(4) (a) In any private action arising under this part, all discovery and other proceedings must be stayed during the pendency of any motion to dismiss unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(b) During the pendency of any stay of discovery pursuant to this subsection (4), unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint

1 shall treat all documents, data compilations, including electronically recorded or stored data, and tangible
2 objects that are in the custody or control of the party and that are relevant to the allegations as if they were
3 the subject of a continuing request for production of documents from an opposing party under the Montana
4 Rules of Civil Procedure.

5 (5) A party aggrieved by the willful failure of an opposing party to comply with subsection (4) may
6 apply to the court for an order awarding appropriate sanctions.

7 (6) In any private action arising under this part, the plaintiff has the burden of proving that the act
8 or omission of the defendant alleged to violate this title caused the loss for which the plaintiff seeks to
9 recover damages.

10

11 **NEW SECTION. Section 2. Sanctions.** (1) In any private action arising under this part, upon final
12 adjudication of the action, the court shall include in the record specific findings regarding compliance by
13 each party and each attorney representing any party with each requirement of Rule 11 of the Montana
14 Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

15 (2) If the court makes a finding under subsection (1) that a party or attorney violated any
16 requirement of Rule 11 of the Montana Rules of Civil Procedure as to any complaint, responsive pleading,
17 or dispositive motion, the court shall impose sanctions on the party or attorney in accordance with Rule
18 11. Prior to making a finding that any party or attorney has violated Rule 11, the court shall give the party
19 or attorney notice and an opportunity to respond.

20 (3) (a) Subject to subsections (3)(b) and (3)(c), for the purposes of subsection (2), the court shall
21 adopt a presumption that the appropriate sanction:

22 (i) for failure of any responsive pleading or dispositive motion to comply with any requirement of
23 Rule 11 is an award to the opposing party of the reasonable attorney fees and other expenses incurred as
24 a direct result of the violation; and

25 (ii) for substantial failure of any complaint to comply with any requirement of Rule 11 is an award
26 to the opposing party of the reasonable attorney fees and other expenses incurred in the action.

27 (b) The presumption described in subsection (3)(a) may be rebutted only upon proof by the party
28 or attorney against whom sanctions are to be imposed that:

29 (i) the award of attorney fees and other expenses will impose an unreasonable burden on that party
30 or attorney and would be unjust and the failure to make an award would not impose a greater burden on

1 the party in whose favor sanctions are to be imposed; or

2 (ii) the violation of Rule 11 was de minimis.

3 (c) If the party or attorney against whom sanctions are to be imposed meets its burden under
4 subsection (3)(b), the court shall award the sanctions that the court considers appropriate pursuant to Rule
5 11.

6

7 **NEW SECTION. Section 3. Defendant's right to written interrogatories.** In any private action
8 arising under this part in which the plaintiff may recover money damages, the court shall, when requested
9 by a defendant, submit to the jury a written interrogatory on the issue of each defendant's state of mind
10 at the time the alleged violation occurred.

11

12 **NEW SECTION. Section 4. Limitation on damages.** (1) The provisions of this section limit any
13 damages otherwise available under this part.

14 (2) Except as provided in subsection (3), in any private action arising under this part in which the
15 plaintiff seeks to establish damages by reference to the market price of a security that is traded in a national
16 securities market, the award of damages to the plaintiff may not exceed the difference between the
17 purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean
18 trading price of that security during the 90-day period beginning on the date on which the information
19 correcting the misstatement or omission that is the basis for the action is disseminated to the market.

20 (3) In any private action arising under this part in which the plaintiff seeks to establish damages by
21 reference to the market price of a security, if the plaintiff sells or repurchases the subject security prior to
22 the expiration of the 90-day period described in subsection (2), the plaintiff's damages may not exceed the
23 difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the
24 security and the mean trading price of the security during the period beginning immediately after
25 dissemination of information correcting the misstatement or omission and ending on the date on which the
26 plaintiff sells or repurchases the security.

27 (4) For purposes of this section, the mean trading price of a security must be an average of the daily
28 trading price of that security, determined as of the close of the market each day during the 90-day period
29 referred to in subsection (2).

30

1 **NEW SECTION.** **Section 5. Applicability of safe harbor for forward-looking statements.** (1) For
2 the purposes of this section, the following definitions apply:

3 (a) "Forward-looking statement" means:

4 (i) a statement containing a projection of revenue; income per share, including income loss;
5 earnings per share, including earnings loss; capital expenditures; dividends; capital structure; or other
6 financial items;

7 (ii) a statement of the plans and objectives of management for future operations, including plans
8 or objectives relating to the products or services of the issuer;

9 (iii) a statement of future economic performance, including any statement contained in a discussion
10 and analysis of financial condition by the management or in the results of operations;

11 (iv) any statement of the assumptions underlying or relating to any statement described in
12 subsection (1)(a)(i), (1)(a)(ii), or (1)(a)(iii);

13 (v) any report issued by an outside reviewer retained by an issuer, to the extent that the report
14 assesses a forward-looking statement made by the issuer; or

15 (vi) a statement containing a projection or estimate of other items as may be specified by rule or
16 regulation of the commissioner.

17 (b) "Going private transaction" has the meaning given that term under the rules or regulations of
18 the United States securities and exchange commission issued pursuant to section 13(e) of the Securities
19 Exchange Act of 1934, 15 U.S.C. 78m(e).

20 (c) "Investment company" has the same meaning as in section 3(a) of the federal Investment
21 Company Act of 1940, 15 U.S.C. 80a-3(a).

22 (d) "Penny stock" has the same meaning as in section 3(a)(51) of the Securities Exchange Act of
23 1934, 15 U.S.C. 78c(a)(51), and the rules and regulations or orders issued pursuant to that section.

24 (e) "Person acting on behalf of an issuer" means an officer, director, or employee of the issuer.

25 (f) The terms "blank check company", "direct participation investment program", "executive officer
26 of an entity", "limited liability company", "partnership", and "rollup transaction" have the meanings given
27 those terms by rule or regulation of the commissioner.

28 (2) This section applies only to a forward-looking statement made by:

29 (a) an issuer that, at the time that the statement is made, is subject to the reporting requirements
30 of section (13)(a) or (15)(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(a) or 15 U.S.C.

1 78o(d);

2 (b) a person acting on behalf of an issuer subject to the provisions of subsection (2)(a);

3 (c) an outside reviewer retained by an issuer subject to the provisions of subsection (2)(a) making
4 a statement on behalf of that issuer; or

5 (d) an underwriter, with respect to information provided by an issuer subject to the provisions of
6 subsection (2)(a) or information derived from information provided by that issuer.

7 (3) Except to the extent otherwise specifically provided by rule, regulation, or order of the
8 securities and exchange commission, this section does not apply to a forward-looking statement:

9 (a) that is made with respect to the business or operations of the issuer, if the issuer:

10 (i) during the 3-year period preceding the date on which the statement was first made:

11 (A) was convicted of any felony or misdemeanor described in section 15(b)(4)(B)(i) through (iv) of
12 the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(4)(B), or was convicted under 30-10-306;

13 (B) has been made the subject of a judicial or administrative decree or order arising out of a
14 governmental action that:

15 (I) prohibits future violations of the antifraud provisions of state or federal securities laws;

16 (II) requires that the issuer cease and desist from violating the antifraud provisions of state or federal
17 securities laws; or

18 (III) determines that the issuer violated the antifraud provisions of state or federal securities laws;

19 (ii) makes the forward-looking statement in connection with an offering of securities by a blank
20 check company;

21 (iii) issues penny stock;

22 (iv) makes the forward-looking statement in connection with a rollup transaction; or

23 (v) makes the forward-looking statement in connection with a going private transaction; or

24 (b) that is:

25 (i) included in a financial statement prepared in accordance with generally accepted accounting
26 principles;

27 (ii) contained in a registration statement of, or otherwise issued by, an investment company;

28 (iii) made in connection with a tender offer;

29 (iv) made in connection with an initial public offering;

30 (v) made in connection with an offering by, or relating to the operations of, a partnership, a limited

1 liability company, or a direct participation investment program; or

2 (vi) made in a disclosure of beneficial ownership in a report required to be filed with the United
3 States securities and exchange commission pursuant to section 13(d) of the Securities Exchange Act of
4 1934, 15 U.S.C. 78m(d).

5 (4) Except as provided in subsection (3), in any private action arising under this part that is based
6 on an untrue statement of a material fact or omission of a material fact necessary to make the statement
7 not misleading, a person referred to in subsection (2) is not liable with respect to any forward-looking
8 statement, whether written or oral, if and to the extent that:

9 (a) the forward-looking statement is identified as a forward-looking statement and is accompanied
10 by meaningful cautionary statements identifying important factors that could cause actual results to differ
11 materially from those in the forward-looking statement or is immaterial; or

12 (b) the plaintiff fails to prove that the forward-looking statement:

13 (i) if made by a natural person, was made with actual knowledge by that person that the statement
14 was false or misleading; or

15 (ii) if made by a business entity, was made by or with the approval of an executive officer of that
16 entity and made or approved by that officer with actual knowledge by that officer that the statement was
17 false or misleading.

18 (5) In the case of an oral forward-looking statement made by an issuer that is subject to the
19 reporting requirements of section 13(a) or section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C.
20 78m(a) or 15 U.S.C. 78o(d) or by a person acting on behalf of the issuer, the requirement in subsection
21 (4)(a) must be considered satisfied under the following circumstances:

22 (a) if the oral forward-looking statement is accompanied by a cautionary statement that the
23 particular oral statement is a forward-looking statement and that the actual results could differ materially
24 from those projected in the forward-looking statement; and

25 (b) (i) if the oral forward-looking statement is accompanied by an oral statement that additional
26 information concerning factors that could cause actual results to differ materially from those in the
27 forward-looking statement is contained in a readily available written document or portion of the written
28 document;

29 (ii) the accompanying oral statement referred to in subsection (5)(b)(i) identifies the document or
30 portion of the document that contains the additional information about those factors relating to the

1 forward-looking statement; and

2 (iii) the information contained in that written document is a cautionary statement that satisfies the
3 standard established in subsection (4)(a).

4 (6) Any document filed with the commissioner or with the securities and exchange commission or
5 generally disseminated must be considered to be readily available for purposes of this section. This section
6 does not impose upon any person a duty to update a forward-looking statement.

7 (7) On any motion to dismiss based on subsection (4)(a), the court shall consider:

8 (a) any statement cited in the complaint; and

9 (b) any cautionary statement accompanying the forward-looking statement that is not subject to
10 material dispute and that is cited by the defendant.

11 (8) In any private action arising under this part, the court shall stay discovery, other than discovery
12 that is specifically directed to the applicability of the exemption provided for in this section, during the
13 pendency of any motion by a defendant for summary judgment that is based on the grounds that:

14 (a) the statement or omission upon which the complaint is based is a forward-looking statement
15 within the meaning of this section; and

16 (b) the exemption provided for in this section precludes a claim for relief.

17

18 **NEW SECTION. Section 6. Prohibition of referral fees.** A broker, dealer, or person associated with
19 a broker or dealer, may not solicit or accept, directly or indirectly, remuneration for assisting an attorney
20 in obtaining the representation of any person in any private action under this part or under the Securities
21 Act of 1933, 15 U.S.C. 77a, et seq.

22

23 **NEW SECTION. Section 7. Prohibition of attorney fees from disgorgement funds.** Except as
24 otherwise ordered by the court upon motion by the commissioner or, in the case of an administrative
25 action, as otherwise ordered by the commissioner, funds disgorged as the result of an action brought by
26 the commissioner or as a result of any administrative action may not be distributed as payment for attorney
27 fees or expenses incurred by private parties seeking distribution of the disgorged funds.

28

29 **NEW SECTION. Section 8. Prosecution of persons aiding violations.** For purposes of any action
30 brought by the commissioner under 30-10-304, 30-10-305, or 30-10-306, for violations of 30-10-301

1 through 30-10-303, any person that knowingly provides substantial assistance to another person in
2 violation of a provision of this part or of any rule or regulation issued under this part must be considered
3 to be in violation of that provision to the same extent as the person to whom the assistance is provided.
4

5 NEW SECTION. **Section 9. Loss causation.** In any action arising under this part, if any portion or
6 all of the amount recoverable represents other than the depreciation in value of the subject security
7 resulting from a part of the prospectus or oral communication not being true or omitting to state a material
8 fact required to be stated in the prospectus or oral communication or necessary to make the statement not
9 misleading, then that portion or amount is not recoverable with respect to the liability of that person.
10

11 NEW SECTION. **Section 10. Proportional liability.** (1) For purposes of this section, the following
12 definitions apply:

13 (a) "Covered person" means:

14 (i) a defendant in any private action arising under this title; or

15 (ii) a defendant in any private action arising under section 11 of the Securities Act of 1933, 15
16 U.S.C. 77k, who is an outside director of the issuer of the securities that are the subject of the action.

17 (b) "Outside director" has the meaning given that term by rule or regulation of the securities and
18 exchange commission.

19 (2) For the purposes of this section, a covered person knowingly commits a violation of Montana
20 securities laws:

21 (a) with respect to an action that is based on an untrue statement of material fact or omission of
22 a material fact necessary to make the statement not misleading, if:

23 (i) that covered person makes an untrue statement of a material fact, with actual knowledge that
24 the representation is false or omits a fact necessary in order to make the statement made not misleading
25 with actual knowledge that as a result of the omission, one of the material representations of the covered
26 person is false;

27 (ii) persons are likely to reasonably rely on that misrepresentation or omission; and

28 (iii) with respect to an action that is based on any conduct that is not described in subsection
29 (2)(a)(i), the covered person engages in that conduct with actual knowledge of the facts and circumstances
30 that make the conduct of that covered person a violation of the securities laws.

1 (3) Reckless conduct by a covered person may not be construed to constitute a knowing
2 commission of a violation of the securities laws by that covered person.

3 (4) This section may not be construed to create, affect, or in any manner modify the standard for
4 liability associated with any action arising under federal securities laws or Montana securities laws.

5 (5) Any covered person against whom a final judgment is entered in a private action is liable for
6 damages jointly and severally only if the trier of fact specifically determines that the covered person
7 knowingly committed a violation of federal securities laws or Montana securities laws.

8 (6) Except as provided in subsection (5), a covered person against whom a final judgment is entered
9 in a private action is liable solely for the portion of the judgment that corresponds to the percentage of
10 responsibility of that covered person as determined under subsection (8).

11 (7) In any case in which a contractual relationship permits, a covered person that prevails in any
12 private action may recover the attorney fees and costs of that covered person in connection with the
13 action.

14 (8) In any private action, the court shall instruct the jury to answer special interrogatories or, if
15 there is not a jury, shall make findings with respect to each covered person and each of the other persons
16 claimed by any of the parties to have caused or contributed to the loss incurred by the plaintiff, including
17 persons who have entered into settlements with the plaintiff or plaintiffs, concerning:

18 (a) whether the person violated federal securities laws or Montana securities laws;

19 (b) the percentage of responsibility of the person, measured as a percentage of the total fault of
20 all persons who caused or contributed to the loss incurred by the plaintiff; and

21 (c) whether the person knowingly committed a violation of the securities laws.

22 (9) The responses to interrogatories or findings, as appropriate, under subsection (8) must specify
23 the total amount of damages that the plaintiff is entitled to recover and the percentage of responsibility of
24 each covered person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs.

25 (10) In determining the percentage of responsibility under this section, the trier of fact shall
26 consider:

27 (a) the nature of the conduct of each covered person found to have caused or contributed to the
28 loss incurred by the plaintiff or plaintiffs; and

29 (b) the nature and extent of the causal relationship between the conduct of each covered person
30 and the damages incurred by the plaintiff or plaintiffs.

1 (11) Notwithstanding subsection (8), upon a motion that is made not later than 6 months after a
2 final judgment is entered in any private action, if the court determines that all or part of the share of the
3 judgment of the covered person is not collectible against that covered person and is also not collectible
4 against a covered person described in subsection (5), each covered person described in subsection (5) is
5 liable for the uncollectible share as follows:

6 (a) Each covered person is jointly and severally liable for the uncollectible share if the plaintiff
7 establishes that:

8 (i) the plaintiff is an individual whose recoverable damages under the final judgment are equal to
9 more than 10% of the net worth of the plaintiff; and

10 (ii) the net worth of the plaintiff is equal to less than \$200,000.

11 (b) With respect to any plaintiff not described in subsection (11)(a), each covered person is liable
12 for the uncollectible share in proportion to the percentage of responsibility of that covered person, except
13 that the total liability of a covered person under this subsection (11)(b) may not exceed 50% of the
14 proportionate share of that covered person, as determined under subsection (8).

15 (12) For purposes of subsection (11) net worth must be determined as of the date immediately
16 preceding the date of the purchase or sale, as applicable, by the plaintiff of the security that is the subject
17 of the action and must be equal to the fair market value of assets, minus liabilities, including the net value
18 of the investments of the plaintiff in real and personal property, including personal residences.

19 (13) The total payments required pursuant to subsection (11) may not exceed the amount of the
20 uncollectible share.

21 (14) A covered person against whom judgment is not collectible is subject to contribution and to
22 any continuing liability to the plaintiff on the judgment.

23 (15) To the extent that a covered person is required to make an additional payment pursuant to
24 subsection (11), that covered person may recover contribution:

25 (a) from the covered person originally liable to make the payment;

26 (b) from any covered person liable jointly and severally pursuant to subsection (5);

27 (c) from any covered person held proportionately liable pursuant to this section who is liable to
28 make the same payment and has paid less than that person's proportionate share of that payment; or

29 (d) from any other person responsible for the conduct giving rise to the payment that would have
30 been liable to make the same payment.

1 (16) The standard for allocation of damages under subsections (5) and (6) and the procedure for
2 reallocation of uncollectible shares under subsection (11) may not be disclosed to members of the jury.

3 (17) (a) A covered person who settles any private action at any time before a final verdict or
4 judgment must be discharged from all claims for contribution brought by other persons. Upon entry of the
5 settlement by the court, the court shall enter a bar order constituting the final discharge of all obligations
6 to the plaintiff of the settling covered person arising out of the action. The order must bar all future claims
7 for contribution arising out of the action:

8 (i) by any person against the settling covered person; and

9 (ii) by the settling covered person against any person, other than a person whose liability has been
10 extinguished by the settlement of the settling covered person.

11 (b) If a covered person enters into a settlement with the plaintiff prior to final verdict or judgment,
12 the verdict or judgment must be reduced by the greater of:

13 (i) an amount that corresponds to the percentage of responsibility of that covered person; or

14 (ii) the amount paid to the plaintiff by that covered person.

15 (18) A covered person who becomes jointly and severally liable for damages in any private action
16 may recover contribution from any other person who, if joined in the original action, would have been liable
17 for the same damages. A claim for contribution must be determined based on the percentage of
18 responsibility of the claimant and of each person against whom a claim for contribution is made.

19 (19) In any private action determining liability, an action for contribution must be brought not later
20 than 6 months after the entry of a final, nonappealable judgment in the action, except that an action for
21 contribution brought by a covered person who was required to make an additional payment pursuant to
22 subsection (11) may be brought not later than 6 months after the date on which the payment was made.

23
24 **NEW SECTION.** **Section 11. Construction.** [Sections 1 through 10] may not be considered to
25 create or ratify any implied private right of action or to prevent the commissioner, by rule or regulation,
26 from restricting or otherwise regulating private actions under Montana securities laws.

27
28 **Section 12.** Section 27-1-702, MCA, is amended to read:

29 **"27-1-702. Comparative negligence -- extent to which contributory negligence bars recovery in**
30 **action for damages.** ~~Contributory~~ Except as provided in [section 10], contributory negligence shall may not

1 bar recovery in an action by any person or ~~his~~ the person's legal representative to recover damages for
 2 negligence resulting in the death of a person or injury to a person or property if ~~such~~ the negligence was
 3 not greater than the negligence of the person or the combined negligence of all persons against whom
 4 recovery is sought, but any damages allowed ~~shall~~ must be diminished in the proportion to the amount of
 5 negligence attributable to the person recovering."

6
 7 **Section 13.** Section 27-1-703, MCA, is amended to read:

8 **"27-1-703. Multiple defendants -- determination of liability.** (1) Except as provided in subsections
 9 (2) and (3), whenever the negligence of a party in any action is an issue, each party against whom recovery
 10 may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has
 11 the right of contribution from any other person whose negligence may have contributed as a proximate
 12 cause to the claimant's injury ~~complained of~~.

13 (2) A party whose negligence is determined to be 50% or less of the combined negligence of all
 14 persons described in subsection (4) is severally liable only and is responsible only for the amount of
 15 negligence attributable to that party, except as provided in subsection (3). The remaining parties are jointly
 16 and severally liable for the total less the amount attributable to the claimant.

17 (3) A party may be jointly liable for all damages caused by the negligence of another if both acted
 18 in concert in contributing to the claimant's damages or if one party acted as an agent of the other.

19 (4) On motion of any party against whom a claim is asserted for negligence resulting in death or
 20 injury to person or property, any other person whose negligence may have contributed as a proximate
 21 cause to the claimant's injury ~~complained of~~ may be joined as an additional party to the action. For
 22 purposes of determining the percentage of liability attributable to each party whose action contributed to
 23 the claimant's injury ~~complained of~~, the trier of fact shall consider the negligence of the claimant, injured
 24 person, defendants, and third-party defendants. The liability of nonparties, including persons released from
 25 liability by the claimant and persons immune from liability to the claimant, must also be considered by the
 26 trier of fact, as provided in subsection (6). The trier of fact shall apportion the percentage of negligence of
 27 all persons listed in this subsection. Contribution must be proportional to the liability of the parties against
 28 whom recovery is allowed. Nothing contained in this section makes any party indispensable pursuant to
 29 Rule 19, Montana Rules of Civil Procedure.

30 (5) If for any reason all or part of the contribution from a party liable for contribution cannot be

1 obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the
2 noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution
3 from the noncontributing party. A party found to be 50% or less negligent for the injury complained of is
4 liable for contribution under this section only up to the percentage of negligence attributed to that party.

5 (6) (a) In an action based on negligence, a defendant may assert as a defense that the damages
6 of the claimant were caused in full or in part by a nonparty, which may be referred to as a nonparty
7 defense.

8 (b) In determining the percentage of liability attributable to persons who are parties to the action,
9 the trier of fact shall consider the negligence of nonparties, including persons released from liability by the
10 claimant and persons immune from liability to the claimant, if a nonparty defense is properly asserted in
11 accordance with this subsection (6). A finding of negligence of a nonparty is not a presumptive or
12 conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty.

13 (c) The burden of proof as to a nonparty's liability is on the defendant or defendants who
14 affirmatively plead the nonparty defense, but this subsection (6) does not relieve the claimant of the burden
15 of proving that negligence on the part of the defendant or defendants contributed as a proximate cause to
16 the injury of the claimant or alter other proof requirements.

17 (d) A nonparty defense must be affirmatively pleaded as a part of the answer. A defendant who
18 gains actual knowledge of a nonparty defense after the filing of that defendant's answer may plead the
19 defense with reasonable promptness, as determined by the trial court, in a manner that is consistent with:

20 (i) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense;

21 (ii) giving the claimant a reasonable opportunity to defend against a nonparty defense; and

22 (iii) giving the claimant a reasonable opportunity, if appropriate, to add the nonparty as an additional
23 defendant to the action before the expiration of the period of limitation applicable to the claim. However,
24 this subsection (iii) does not extend the period of limitation or revive the action if the period of limitation
25 has expired.

26 (e) If a defendant asserts a nonparty defense, the defendant shall notify each nonparty who the
27 defendant alleges caused the claimant's injuries, in whole or in part. Notification must be made by mailing
28 the defendant's answer to each nonparty at the nonparty's last-known address by certified mail, return
29 receipt requested.

30 (7) The provisions of this section do not apply to [section 10]."

1 **NEW SECTION.** **Section 14. Codification instruction.** [Sections 1 through 11] are intended to be
2 codified as an integral part of Title 30, chapter 10, part 3, and the provisions of Title 30, chapter 10, part
3 3, apply to [sections 1 through 11].

4

5 **NEW SECTION.** **Section 15. Effective date.** [This act] is effective on passage and approval.

6

-END-

1 SENATE BILL NO. 382

2 INTRODUCED BY HARP

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING PRIVATE SECURITIES LITIGATION
5 LAWS; ESTABLISHING REQUIREMENTS FOR SECURITIES FRAUD ACTIONS; PROVIDING SANCTIONS FOR
6 ABUSIVE LITIGATION; LIMITING DAMAGES; CREATING A SAFE HARBOR FOR FORWARD-LOOKING
7 STATEMENTS; REGULATING JOINT AND SEVERAL LIABILITY; REGULATING CONTRIBUTION AMONG
8 PARTIES FOUND TO BE JOINTLY AND SEVERALLY LIABLE; AMENDING SECTIONS 27-1-702 AND
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15 material fact necessary in order to make the statements made, in light of the circumstances in which they
16 were made, not misleading, the complaint must specify each statement alleged to have been misleading
17 and the reason or reasons why the statement is misleading. If an allegation regarding the statement or
18 omission is made on information and belief, the complaint must state with particularity all facts on which
19 that belief is based.

20 (2) In any private action arising under this part in which the plaintiff may recover money damages
21 only on proof that the defendant acted with a particular state of mind, the complaint must, with respect
22 to each act or omission alleged to violate this part, state with particularity facts giving rise to a strong
23 inference that the defendant acted with the required state of mind.

24 (3) In any private action arising under this part, the court shall on the motion of any defendant,
25 dismiss the complaint if the requirements of subsections (1) and (2) are not met.

26 (4) (a) In any private action arising under this part, all discovery and other proceedings must be
27 stayed during the pendency of any motion to dismiss unless the court finds, upon the motion of any party,
28 that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

29 (b) During the pendency of any stay of discovery pursuant to this subsection (4), unless otherwise
30 ordered by the court, any party to the action with actual notice of the allegations contained in the complaint

1 shall treat all documents, data compilations, including electronically recorded or stored data, and tangible
2 objects that are in the custody or control of the party and that are relevant to the allegations as if they were
3 the subject of a continuing request for production of documents from an opposing party under the Montana
4 Rules of Civil Procedure.

5 (5) A party aggrieved by the willful failure of an opposing party to comply with subsection (4) may
6 apply to the court for an order awarding appropriate sanctions.

7 (6) In any private action arising under this part, the plaintiff has the burden of proving that the act
8 or omission of the defendant alleged to violate this title caused the loss for which the plaintiff seeks to
9 recover damages.

10

11 **NEW SECTION. Section 2. Sanctions.** (1) In any private action arising under this part, upon final
12 adjudication of the action, the court shall include in the record specific findings regarding compliance by
13 each party and each attorney representing any party with each requirement of Rule 11 of the Montana
14 Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

15 (2) If the court makes a finding under subsection (1) that a party or attorney violated any
16 requirement of Rule 11 of the Montana Rules of Civil Procedure as to any complaint, responsive pleading,
17 or dispositive motion, the court shall impose sanctions on the party or attorney in accordance with Rule
18 11. Prior to making a finding that any party or attorney has violated Rule 11, the court shall give the party
19 or attorney notice and an opportunity to respond.

20 (3) (a) Subject to subsections (3)(b) and (3)(c), for the purposes of subsection (2), the court shall
21 adopt a presumption that the appropriate sanction:

22 (i) for failure of any responsive pleading or dispositive motion to comply with any requirement of
23 Rule 11 is an award to the opposing party of the reasonable attorney fees and other expenses incurred as
24 a direct result of the violation; and

25 (ii) for substantial failure of any complaint to comply with any requirement of Rule 11 is an award
26 to the opposing party of the reasonable attorney fees and other expenses incurred in the action.

27 (b) The presumption described in subsection (3)(a) may be rebutted only upon proof by the party
28 or attorney against whom sanctions are to be imposed that:

29 (i) the award of attorney fees and other expenses will impose an unreasonable burden on that party
30 or attorney and would be unjust and the failure to make an award would not impose a greater burden on

1 the party in whose favor sanctions are to be imposed; or

2 (ii) the violation of Rule 11 was de minimis.

3 (c) If the party or attorney against whom sanctions are to be imposed meets its burden under
4 subsection (3)(b), the court shall award the sanctions that the court considers appropriate pursuant to Rule
5 11.

6

7 **NEW SECTION. Section 3. Defendant's right to written interrogatories.** In any private action
8 arising under this part in which the plaintiff may recover money damages, the court shall, when requested
9 by a defendant, submit to the jury a written interrogatory on the issue of each defendant's state of mind
10 at the time the alleged violation occurred.

11

12 **NEW SECTION. Section 4. Limitation on damages.** (1) The provisions of this section limit any
13 damages otherwise available under this part.

14 (2) Except as provided in subsection (3), in any private action arising under this part in which the
15 plaintiff seeks to establish damages by reference to the market price of a security that is traded in a national
16 securities market, the award of damages to the plaintiff may not exceed the difference between the
17 purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean
18 trading price of that security during the 90-day period beginning on the date on which the information
19 correcting the misstatement or omission that is the basis for the action is disseminated to the market.

20 (3) In any private action arising under this part in which the plaintiff seeks to establish damages by
21 reference to the market price of a security THAT IS TRADED ON A NATIONAL SECURITIES MARKET, if
22 the plaintiff sells or repurchases the subject security prior to the expiration of the 90-day period described
23 in subsection (2), the plaintiff's damages may not exceed the difference between the purchase or sale price
24 paid or received, as appropriate, by the plaintiff for the security and the mean trading price of the security
25 during the period beginning immediately after dissemination of information correcting the misstatement or
26 omission and ending on the date on which the plaintiff sells or repurchases the security.

27 (4) For purposes of this section, the mean trading price of a security must be an average of the daily
28 trading price of that security, determined as of the close of the market each day during the 90-day period
29 referred to in subsection (2).

30

1 NEW SECTION. **Section 5. Applicability of safe harbor for forward-looking statements.** (1) For
2 the purposes of this section, the following definitions apply:

3 (a) "Forward-looking statement" means:

4 (i) a statement containing a projection of revenue; income per share, including income loss;
5 earnings per share, including earnings loss; capital expenditures; dividends; capital structure; or other
6 financial items;

7 (ii) a statement of the plans and objectives of management for future operations, including plans
8 or objectives relating to the products or services of the issuer;

9 (iii) a statement of future economic performance, including any statement contained in a discussion
10 and analysis of financial condition by the management or in the results of operations;

11 (iv) any statement of the assumptions underlying or relating to any statement described in
12 subsection (1)(a)(i), (1)(a)(ii), or (1)(a)(iii);

13 (v) any report issued by an outside reviewer retained by an issuer, to the extent that the report
14 assesses a forward-looking statement made by the issuer; or

15 (vi) a statement containing a projection or estimate of other items as may be specified by rule or
16 regulation of the commissioner.

17 (b) "Going private transaction" has the meaning given that term under the rules or regulations of
18 the United States securities and exchange commission issued pursuant to section 13(e) of the Securities
19 Exchange Act of 1934, 15 U.S.C. 78m(e).

20 (c) "Investment company" has the same meaning as in section 3(a) of the federal Investment
21 Company Act of 1940, 15 U.S.C. 80a-3(a).

22 (d) "Penny stock" has the same meaning as in section 3(a)(51) of the Securities Exchange Act of
23 1934, 15 U.S.C. 78c(a)(51), and the rules and regulations or orders issued pursuant to that section.

24 (e) "Person acting on behalf of an issuer" means an officer, director, or employee of the issuer.

25 (f) The terms "blank check company", "direct participation investment program", "executive officer
26 of an entity", "limited liability company", "partnership", and "rollup transaction" have the meanings given
27 those terms by rule or regulation of the commissioner.

28 (2) This section applies only to a forward-looking statement made by:

29 (a) an issuer that, at the time that the statement is made, is subject to the reporting requirements
30 of section (13)(a) or (15)(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(a) or 15 U.S.C.

- 1 78o(d);
- 2 (b) a person acting on behalf of an issuer subject to the provisions of subsection (2)(a);
- 3 (c) an outside reviewer retained by an issuer subject to the provisions of subsection (2)(a) making
- 4 a statement on behalf of that issuer; or
- 5 (d) an underwriter, with respect to information provided by an issuer subject to the provisions of
- 6 subsection (2)(a) or information derived from information provided by that issuer.
- 7 (3) Except to the extent otherwise specifically provided by rule, regulation, or order of the
- 8 securities and exchange commission, this section does not apply to a forward-looking statement:
- 9 (a) that is made with respect to the business or operations of the issuer, if the issuer:
- 10 (i) during the 3-year period preceding the date on which the statement was first made:
- 11 (A) was convicted of any felony or misdemeanor described in section 15(b)(4)(B)(i) through (iv) of
- 12 the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(4)(B), or was convicted under 30-10-306;
- 13 (B) has been made the subject of a judicial or administrative decree or order arising out of a
- 14 governmental action that:
- 15 (I) prohibits future violations of the antifraud provisions of state or federal securities laws;
- 16 (II) requires that the issuer cease and desist from violating the antifraud provisions of state or federal
- 17 securities laws; or
- 18 (III) determines that the issuer violated the antifraud provisions of state or federal securities laws;
- 19 (ii) makes the forward-looking statement in connection with an offering of securities by a blank
- 20 check company;
- 21 (iii) issues penny stock;
- 22 (iv) makes the forward-looking statement in connection with a rollup transaction; or
- 23 (v) makes the forward-looking statement in connection with a going private transaction; or
- 24 (b) that is:
- 25 (i) included in a financial statement prepared in accordance with generally accepted accounting
- 26 principles;
- 27 (ii) contained in a registration statement of, or otherwise issued by, an investment company;
- 28 (iii) made in connection with a tender offer;
- 29 (iv) made in connection with an initial public offering;
- 30 (v) made in connection with an offering by, or relating to the operations of, a partnership, a limited

1 liability company, or a direct participation investment program; or

2 (vi) made in a disclosure of beneficial ownership in a report required to be filed with the United
3 States securities and exchange commission pursuant to section 13(d) of the Securities Exchange Act of
4 1934, 15 U.S.C. 78m(d).

5 (4) (A) Except as provided in subsection (3), in any private action arising under this part that is
6 based on an untrue statement of a material fact or omission of a material fact necessary to make the
7 statement not misleading, a person referred to in subsection (2) is not liable with respect to any
8 forward-looking statement, whether written or oral, if and to the extent that:

9 ~~(a)~~(I) the forward-looking statement is identified as a forward-looking statement and is accompanied
10 by meaningful cautionary statements identifying important factors that could cause actual results to differ
11 materially from those in the forward-looking statement or is immaterial; or

12 ~~(b)~~(II) the plaintiff fails to prove that the forward-looking statement:

13 ~~(i)~~(A) if made by a natural person, was made with actual knowledge by that person that the
14 statement was false or misleading; or

15 ~~(ii)~~(B) if made by a business entity, was made by or with the approval of an executive officer of that
16 entity and made or approved by that officer with actual knowledge by that officer that the statement was
17 false or misleading.

18 ~~(5)~~(B) In the case of an oral forward-looking statement made by an issuer that is subject to the
19 reporting requirements of section 13(a) or section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C.
20 78m(a) or 15 U.S.C. 78o(d) or by a person acting on behalf of the issuer, the requirement in subsection
21 (4)(a) must be considered satisfied under the following circumstances:

22 ~~(a)~~(I) if the oral forward-looking statement is accompanied by a cautionary statement that the
23 particular oral statement is a forward-looking statement and that the actual results could differ materially
24 from those projected in the forward-looking statement; and

25 ~~(b)~~ ~~(i)~~(II) if the oral forward-looking statement is accompanied by an oral statement that additional
26 information concerning factors that could cause actual results to differ materially from those in the
27 forward-looking statement is contained in a readily available written document or portion of the written
28 document;

29 ~~(ii)~~(III) IF the accompanying oral statement referred to in subsection ~~(5)~~~~(b)~~~~(i)~~ (4)(B)(II) identifies the
30 document or portion of the document that contains the additional information about those factors relating

1 to the forward-looking statement; and

2 ~~(iii)~~(IV) IF the information contained in that written document is a cautionary statement that satisfies
3 the standard established in subsection (4)(a).

4 ~~(6)~~(C) Any document filed with the commissioner or with the securities and exchange commission
5 or generally disseminated must be considered to be readily available for purposes of this section.

6 (5) This section does not impose upon any person a duty to update a forward-looking statement.

7 ~~(7)~~(6) On any motion to dismiss based on subsection (4)(a), the court shall consider:

8 (a) any statement cited in the complaint; and

9 (b) any cautionary statement accompanying the forward-looking statement that is not subject to
10 material dispute and that is cited by the defendant.

11 ~~(8)~~(7) In any private action arising under this part, the court shall stay discovery, other than
12 discovery that is specifically directed to the applicability of the exemption provided for in this section,
13 during the pendency of any motion by a defendant for summary judgment that is based on the grounds
14 that:

15 (a) the statement or omission upon which the complaint is based is a forward-looking statement
16 within the meaning of this section; and

17 (b) the exemption provided for in this section precludes a claim for relief.

18

19 **NEW SECTION. Section 6. Prohibition of referral fees.** A broker, dealer, or person associated with
20 a broker or dealer, may not solicit or accept, directly or indirectly, remuneration for assisting an attorney
21 in obtaining the representation of any person in any private action under this part or under the Securities
22 Act of 1933, 15 U.S.C. 77a, et seq.

23

24 **NEW SECTION. Section 7. Prohibition of attorney fees from disgorgement funds.** Except as
25 otherwise ordered by the court upon motion by the commissioner or, in the case of an administrative
26 action, as otherwise ordered by the commissioner, funds disgorged as the result of an action brought by
27 the commissioner or as a result of any administrative action may not be distributed as payment for attorney
28 fees or expenses incurred by private parties seeking distribution of the disgorged funds.

29

30 **NEW SECTION. Section 8. Prosecution of persons aiding violations.** For purposes of any action

1 brought by the commissioner under 30-10-304, 30-10-305, or 30-10-306, for violations of 30-10-301
2 through 30-10-303, any person that knowingly provides substantial assistance to another person in
3 violation of a provision of this part or of any rule or regulation issued under this part must be considered
4 to be in violation of that provision to the same extent as the person to whom the assistance is provided.

5

6 **NEW SECTION. Section 9. Loss causation.** In any **PRIVATE** action arising under this part, if any
7 portion or all of the amount recoverable represents other than the depreciation in value of the subject
8 security resulting from a part of the prospectus or oral communication not being true or omitting to state
9 a material fact required to be stated in the prospectus or oral communication or necessary to make the
10 statement not misleading, then that portion or amount is not recoverable with respect to the liability of that
11 person.

12

13 **NEW SECTION. Section 10. Proportional liability.** (1) For purposes of this section, the following
14 definitions apply:

15 (a) "Covered person" means:

16 (i) a defendant in any private action arising under this title; or

17 (ii) a defendant in any private action arising under section 11 of the Securities Act of 1933, 15
18 U.S.C. 77k, who is an outside director of the issuer of the securities that are the subject of the action.

19 (b) "Outside director" has the meaning given that term by rule or regulation of the securities and
20 exchange commission.

21 (2) For the purposes of this section, a covered person knowingly commits a violation of Montana
22 securities laws:

23 (a) with respect to an action that is based on an untrue statement of material fact or omission of
24 a material fact necessary to make the statement not misleading, if:

25 (i) that covered person makes an untrue statement of a material fact, with actual knowledge that
26 the representation is false or omits a fact necessary in order to make the statement made not misleading
27 with actual knowledge that as a result of the omission, one of the material representations of the covered
28 person is false;

29 (ii) persons are likely to reasonably rely on that misrepresentation or omission; and

30 (iii) with respect to an action that is based on any conduct that is not described in subsection

1 (2)(a)(i), the covered person engages in that conduct with actual knowledge of the facts and circumstances
2 that make the conduct of that covered person a violation of the securities laws.

3 (3) Reckless conduct by a covered person may not be construed to constitute a knowing
4 commission of a violation of the securities laws by that covered person.

5 (4) This section may not be construed to create, affect, or in any manner modify the standard for
6 liability associated with any action arising under federal securities laws or Montana securities laws.

7 (5) Any covered person against whom a final judgment is entered in a private action is liable for
8 damages jointly and severally only if the trier of fact specifically determines that the covered person
9 knowingly committed a violation of federal securities laws or Montana securities laws.

10 (6) Except as provided in subsection (5), a covered person against whom a final judgment is entered
11 in a private action is liable solely for the portion of the judgment that corresponds to the percentage of
12 responsibility of that covered person as determined under subsection (8).

13 (7) In any case in which a contractual relationship permits, a covered person that prevails in any
14 private action may recover the attorney fees and costs of that covered person in connection with the
15 action.

16 (8) In any private action, the court shall instruct the jury to answer special interrogatories or, if
17 there is not a jury, shall make findings with respect to each covered person and each of the other persons
18 claimed by any of the parties to have caused or contributed to the loss incurred by the plaintiff, including
19 persons who have entered into settlements with the plaintiff or plaintiffs, concerning:

20 (a) whether the person violated federal securities laws or Montana securities laws;

21 (b) the percentage of responsibility of the person, measured as a percentage of the total fault of
22 all persons who caused or contributed to the loss incurred by the plaintiff; and

23 (c) whether the person knowingly committed a violation of the securities laws.

24 (9) The responses to interrogatories or findings, as appropriate, under subsection (8) must specify
25 the total amount of damages that the plaintiff is entitled to recover and the percentage of responsibility of
26 each covered person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs.

27 (10) In determining the percentage of responsibility under this section, the trier of fact shall
28 consider:

29 (a) the nature of the conduct of each covered person found to have caused or contributed to the
30 loss incurred by the plaintiff or plaintiffs; and

1 (b) the nature and extent of the causal relationship between the conduct of each covered person
2 and the damages incurred by the plaintiff or plaintiffs.

3 (11) Notwithstanding subsection (8), upon a motion that is made not later than 6 months after a
4 final judgment is entered in any private action, if the court determines that all or part of the share of the
5 judgment of the covered person is not collectible against that covered person and is also not collectible
6 against a covered person described in subsection (5), each covered person described in subsection (5) is
7 liable for the uncollectible share as follows:

8 (a) Each covered person is jointly and severally liable for the uncollectible share if the plaintiff
9 establishes that:

10 (i) the plaintiff is an individual whose recoverable damages under the final judgment are equal to
11 more than 10% of the net worth of the plaintiff; and

12 (ii) the net worth of the plaintiff is ~~equal to~~ less than \$200,000.

13 (b) With respect to any plaintiff not described in subsection (11)(a), each covered person is liable
14 for the uncollectible share in proportion to the percentage of responsibility of that covered person, except
15 that the total liability of a covered person under this subsection (11)(b) may not exceed 50% of the
16 proportionate share of that covered person, as determined under subsection (8).

17 (12) For purposes of subsection (11) net worth must be determined as of the date immediately
18 preceding the date of the purchase or sale, as applicable, by the plaintiff of the security that is the subject
19 of the action and must be equal to the fair market value of assets, minus liabilities, including the net value
20 of the investments of the plaintiff in real and personal property, including personal residences.

21 (13) The total payments required pursuant to subsection (11) may not exceed the amount of the
22 uncollectible share.

23 (14) A covered person against whom judgment is not collectible is subject to contribution and to
24 any continuing liability to the plaintiff on the judgment.

25 (15) To the extent that a covered person is required to make an additional payment pursuant to
26 subsection (11), that covered person may recover contribution:

27 (a) from the covered person originally liable to make the payment;

28 (b) from any covered person liable jointly and severally pursuant to subsection (5);

29 (c) from any covered person held proportionately liable pursuant to this section who is liable to
30 make the same payment and has paid less than that person's proportionate share of that payment; or

1 (d) from any other person responsible for the conduct giving rise to the payment that would have
2 been liable to make the same payment.

3 (16) The standard for allocation of damages under subsections (5) and (6) and the procedure for
4 reallocation of uncollectible shares under subsection (11) may not be disclosed to members of the jury.

5 (17) (a) A covered person who settles any private action at any time before a final verdict or
6 judgment must be discharged from all claims for contribution brought by other persons. Upon entry of the
7 settlement by the court, the court shall enter a bar order constituting the final discharge of all obligations
8 to the plaintiff of the settling covered person arising out of the action. The order must bar all future claims
9 for contribution arising out of the action:

10 (i) by any person against the settling covered person; and

11 (ii) by the settling covered person against any person, other than a person whose liability has been
12 extinguished by the settlement of the settling covered person.

13 (b) If a covered person enters into a settlement with the plaintiff prior to final verdict or judgment,
14 the verdict or judgment must be reduced by the greater of:

15 (i) an amount that corresponds to the percentage of responsibility of that covered person; or

16 (ii) the amount paid to the plaintiff by that covered person.

17 (18) A covered person who becomes jointly and severally liable for damages in any private action
18 may recover contribution from any other person who, if joined in the original action, would have been liable
19 for the same damages. A claim for contribution must be determined based on the percentage of
20 responsibility of the claimant and of each person against whom a claim for contribution is made.

21 (19) In any private action determining liability, an action for contribution must be brought not later
22 than 6 months after the entry of a final, nonappealable judgment in the action, except that an action for
23 contribution brought by a covered person who was required to make an additional payment pursuant to
24 subsection (11) may be brought not later than 6 months after the date on which the payment was made.

25
26 **NEW SECTION. Section 11. Construction.** [Sections 1 through 10] may not be considered to
27 create or ratify any implied private right of action or to prevent the commissioner, by rule or regulation,
28 from restricting or otherwise regulating private actions under Montana securities laws.

29
30 **Section 12.** Section 27-1-702, MCA, is amended to read:

1 **"27-1-702. Comparative negligence -- extent to which contributory negligence bars recovery in**
 2 **action for damages.** ~~Contributory~~ Except as provided in [section 10], contributory negligence shall ~~may~~ not
 3 bar recovery in an action by any person or ~~his~~ the person's legal representative to recover damages for
 4 negligence resulting in the death of a person or injury to a person or property if ~~such~~ the negligence was
 5 not greater than the negligence of the person or the combined negligence of all persons against whom
 6 recovery is sought, but any damages allowed ~~shall~~ must be diminished in the proportion to the amount of
 7 negligence attributable to the person recovering."
 8

9 **Section 13.** Section 27-1-703, MCA, is amended to read:

10 **"27-1-703. Multiple defendants -- determination of liability.** (1) Except as provided in subsections
 11 (2) and (3), whenever the negligence of a party in any action is an issue, each party against whom recovery
 12 may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has
 13 the right of contribution from any other person whose negligence may have contributed as a proximate
 14 cause to the claimant's injury ~~complained of~~.

15 (2) A party whose negligence is determined to be 50% or less of the combined negligence of all
 16 persons described in subsection (4) is severally liable only and is responsible only for the amount of
 17 negligence attributable to that party, except as provided in subsection (3). The remaining parties are jointly
 18 and severally liable for the total less the amount attributable to the claimant.

19 (3) A party may be jointly liable for all damages caused by the negligence of another if both acted
 20 in concert in contributing to the claimant's damages or if one party acted as an agent of the other.

21 (4) On motion of any party against whom a claim is asserted for negligence resulting in death or
 22 injury to person or property, any other person whose negligence may have contributed as a proximate
 23 cause to the claimant's injury ~~complained of~~ may be joined as an additional party to the action. For
 24 purposes of determining the percentage of liability attributable to each party whose action contributed to
 25 the claimant's injury ~~complained of~~, the trier of fact shall consider the negligence of the claimant, injured
 26 person, defendants, and third-party defendants. The liability of nonparties, including persons released from
 27 liability by the claimant and persons immune from liability to the claimant, must also be considered by the
 28 trier of fact, as provided in subsection (6). The trier of fact shall apportion the percentage of negligence of
 29 all persons listed in this subsection. Contribution must be proportional to the liability of the parties against
 30 whom recovery is allowed. Nothing contained in this section makes any party indispensable pursuant to

1 Rule 19, Montana Rules of Civil Procedure.

2 (5) If for any reason all or part of the contribution from a party liable for contribution cannot be
3 obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the
4 noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution
5 from the noncontributing party. A party found to be 50% or less negligent for the injury complained of is
6 liable for contribution under this section only up to the percentage of negligence attributed to that party.

7 (6) (a) In an action based on negligence, a defendant may assert as a defense that the damages
8 of the claimant were caused in full or in part by a nonparty, which may be referred to as a nonparty
9 defense.

10 (b) In determining the percentage of liability attributable to persons who are parties to the action,
11 the trier of fact shall consider the negligence of nonparties, including persons released from liability by the
12 claimant and persons immune from liability to the claimant, if a nonparty defense is properly asserted in
13 accordance with this subsection (6). A finding of negligence of a nonparty is not a presumptive or
14 conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty.

15 (c) The burden of proof as to a nonparty's liability is on the defendant or defendants who
16 affirmatively plead the nonparty defense, but this subsection (6) does not relieve the claimant of the burden
17 of proving that negligence on the part of the defendant or defendants contributed as a proximate cause to
18 the injury of the claimant or alter other proof requirements.

19 (d) A nonparty defense must be affirmatively pleaded as a part of the answer. A defendant who
20 gains actual knowledge of a nonparty defense after the filing of that defendant's answer may plead the
21 defense with reasonable promptness, as determined by the trial court, in a manner that is consistent with:

22 (i) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense;

23 (ii) giving the claimant a reasonable opportunity to defend against a nonparty defense; and

24 (iii) giving the claimant a reasonable opportunity, if appropriate, to add the nonparty as an additional
25 defendant to the action before the expiration of the period of limitation applicable to the claim. However,
26 this subsection (iii) does not extend the period of limitation or revive the action if the period of limitation
27 has expired.

28 (e) If a defendant asserts a nonparty defense, the defendant shall notify each nonparty who the
29 defendant alleges caused the claimant's injuries, in whole or in part. Notification must be made by mailing
30 the defendant's answer to each nonparty at the nonparty's last-known address by certified mail, return

1 receipt requested.

2 (7) The provisions of this section do not apply to [section 10]."

3

4 NEW SECTION. Section 14. Codification instruction. [Sections 1 through 11] are intended to be
5 codified as an integral part of Title 30, chapter 10, part 3, and the provisions of Title 30, chapter 10, part
6 3, apply to [sections 1 through 11].

7

8 NEW SECTION. SECTION 15. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID
9 PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT]
10 IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID
11 APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.

12

13 NEW SECTION. Section 16. Effective date. [This act] is effective on passage and approval.

14

-END-

1 SENATE BILL NO. 382

2 INTRODUCED BY HARP

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING PRIVATE SECURITIES LITIGATION
5 LAWS; ESTABLISHING REQUIREMENTS FOR SECURITIES FRAUD ACTIONS; PROVIDING SANCTIONS FOR
6 ABUSIVE LITIGATION; LIMITING DAMAGES; CREATING A SAFE HARBOR FOR FORWARD-LOOKING
7 STATEMENTS; ~~REGULATING JOINT AND SEVERAL LIABILITY; REGULATING CONTRIBUTION AMONG~~
8 ~~PARTIES FOUND TO BE JOINTLY AND SEVERALLY LIABLE; AMENDING SECTIONS 27-1-702 AND~~
9 ~~27-1-703, MCA;~~ AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

10
11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

12
13 **NEW SECTION. Section 1. Requirements for securities fraud actions -- DEFINITION.** (1) In any
14 private action arising under this part, if the plaintiff alleges that the defendant made an untrue statement
15 or omitted a material fact necessary in order to make the statements made, in light of the circumstances
16 in which they were made, not misleading, the complaint must specify each statement alleged to have been
17 misleading and the reason or reasons why the statement is misleading. If an allegation regarding the
18 statement or omission is made on information and belief, the complaint must state with particularity all facts
19 on which that belief is based.

20 (2) In any private action arising under this part in which the plaintiff may recover money damages
21 only on proof that the defendant acted with a particular state of mind, the complaint must, with respect
22 to each act or omission alleged to violate this part, state with particularity facts giving rise to a strong
23 inference that the defendant acted with the required state of mind.

24 (3) In any private action arising under this part, the court shall on the motion of any defendant,
25 dismiss the complaint if the requirements of subsections (1) and (2) are not met.

26 (4) (a) In any private action arising under this part, all discovery and other proceedings must be
27 stayed during the pendency of any motion to dismiss unless the court finds, upon the motion of any party,
28 that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

29 (b) During the pendency of any stay of discovery pursuant to this subsection (4), unless otherwise
30 ordered by the court, any party to the action with actual notice of the allegations contained in the complaint

1 shall treat all documents, data compilations, including electronically recorded or stored data, and tangible
2 objects that are in the custody or control of the party and that are relevant to the allegations as if they were
3 the subject of a continuing request for production of documents from an opposing party under the Montana
4 Rules of Civil Procedure.

5 (5) A party aggrieved by the willful failure of an opposing party to comply with subsection (4) may
6 apply to the court for an order awarding appropriate sanctions.

7 (6) In any private action arising under this part, the plaintiff has the burden of proving that the act
8 or omission of the defendant alleged to violate this title caused the loss for which the plaintiff seeks to
9 recover damages.

10 (7) AS USED IN [SECTIONS 1 THROUGH 9], "PRIVATE ACTION ARISING UNDER THIS PART"
11 MEANS AN ACTION AGAINST A PERSON REFERRED TO IN [SECTION 5(2)].

12

13 NEW SECTION. Section 2. Sanctions. (1) In any private action arising under this part, upon final
14 adjudication of the action, the court shall include in the record specific findings regarding compliance by
15 each party and each attorney representing any party with each requirement of Rule 11 of the Montana
16 Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

17 (2) If the court makes a finding under subsection (1) that a party or attorney violated any
18 requirement of Rule 11 of the Montana Rules of Civil Procedure as to any complaint, responsive pleading,
19 or dispositive motion, the court shall impose sanctions on the party or attorney in accordance with Rule
20 11. Prior to making a finding that any party or attorney has violated Rule 11, the court shall give the party
21 or attorney notice and an opportunity to respond.

22 (3) (a) Subject to subsections (3)(b) and (3)(c), for the purposes of subsection (2), the court shall
23 adopt a presumption that the appropriate sanction:

24 (i) for failure of any responsive pleading or dispositive motion to comply with any requirement of
25 Rule 11 is an award to the opposing party of the reasonable attorney fees and other expenses incurred as
26 a direct result of the violation; and

27 (ii) for substantial failure of any complaint to comply with any requirement of Rule 11 is an award
28 to the opposing party of the reasonable attorney fees and other expenses incurred in the action.

29 (b) The presumption described in subsection (3)(a) may be rebutted only upon proof by the party
30 or attorney against whom sanctions are to be imposed that:

1 (i) the award of attorney fees and other expenses will impose an unreasonable burden on that party
2 or attorney and would be unjust and the failure to make an award would not impose a greater burden on
3 the party in whose favor sanctions are to be imposed; or

4 (ii) the violation of Rule 11 was de minimis.

5 (c) If the party or attorney against whom sanctions are to be imposed meets its burden under
6 subsection (3)(b), the court shall award the sanctions that the court considers appropriate pursuant to Rule
7 11.

8
9 **NEW SECTION. Section 3. Defendant's right to written interrogatories.** In any private action
10 arising under this part in which the plaintiff may recover money damages, the court shall, when requested
11 by a defendant, submit to the jury a written interrogatory on the issue of each defendant's state of mind
12 at the time the alleged violation occurred.

13
14 **NEW SECTION. Section 4. Limitation on damages.** (1) The provisions of this section limit any
15 damages otherwise available under this part.

16 (2) Except as provided in subsection (3), in any private action arising under this part in which the
17 plaintiff seeks to establish damages by reference to the market price of a security that is traded in a national
18 securities market, the award of damages to the plaintiff may not exceed the difference between the
19 purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean
20 trading price of that security during the 90-day period beginning on the date on which the information
21 correcting the misstatement or omission that is the basis for the action is disseminated to the market.

22 (3) In any private action arising under this part in which the plaintiff seeks to establish damages by
23 reference to the market price of a security **THAT IS TRADED ON A NATIONAL SECURITIES MARKET**, if
24 the plaintiff sells or repurchases the subject security prior to the expiration of the 90-day period described
25 in subsection (2), the plaintiff's damages may not exceed the difference between the purchase or sale price
26 paid or received, as appropriate, by the plaintiff for the security and the mean trading price of the security
27 during the period beginning immediately after dissemination of information correcting the misstatement or
28 omission and ending on the date on which the plaintiff sells or repurchases the security.

29 (4) For purposes of this section, the mean trading price of a security must be an average of the daily
30 trading price of that security, determined as of the close of the market each day during the 90-day period

1 referred to in subsection (2).

2

3 **NEW SECTION. Section 5. Applicability of safe harbor for forward-looking statements.** (1) For
4 the purposes of this section, the following definitions apply:

5 (a) "Forward-looking statement" means:

6 (i) a statement containing a projection of revenue; income per share, including income loss;
7 earnings per share, including earnings loss; capital expenditures; dividends; capital structure; or other
8 financial items;

9 (ii) a statement of the plans and objectives of management for future operations, including plans
10 or objectives relating to the products or services of the issuer;

11 (iii) a statement of future economic performance, including any statement contained in a discussion
12 and analysis of financial condition by the management or in the results of operations;

13 (iv) any statement of the assumptions underlying or relating to any statement described in
14 subsection (1)(a)(i), (1)(a)(ii), or (1)(a)(iii);

15 (v) any report issued by an outside reviewer retained by an issuer, to the extent that the report
16 assesses a forward-looking statement made by the issuer; or

17 (vi) a statement containing a projection or estimate of other items as may be specified by rule or
18 regulation of the commissioner.

19 (b) "Going private transaction" has the meaning given that term under the rules or regulations of
20 the United States securities and exchange commission issued pursuant to section 13(e) of the Securities
21 Exchange Act of 1934, 15 U.S.C. 78m(e).

22 (c) "Investment company" has the same meaning as in section 3(a) of the federal Investment
23 Company Act of 1940, 15 U.S.C. 80a-3(a).

24 **(D) (I) "ISSUER" HAS THE MEANING PROVIDED IN 30-10-103.**

25 **(II) THE TERM DOES NOT INCLUDE A BROKER-DEALER AS DEFINED IN 30-10-103.**

26 ~~(E)~~ "Penny stock" has the same meaning as in section 3(a)(51) of the Securities Exchange Act
27 of 1934, 15 U.S.C. 78c(a)(51), and the rules and regulations or orders issued pursuant to that section.

28 ~~(F)~~ "Person acting on behalf of an issuer" means an officer, director, or employee of the issuer.

29 ~~(G)~~ The terms "blank check company", "direct participation investment program", "executive
30 officer of an entity", "limited liability company", "partnership", and "rollup transaction" have the meanings

1 given those terms by rule or regulation of the commissioner.

2 (2) This section applies only to a forward-looking statement made by:

3 (a) an issuer that, at the time that the statement is made, is subject to the reporting requirements
4 of section (13)(a) or (15)(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(a) or 15 U.S.C.
5 78o(d);

6 (b) a person acting on behalf of an issuer subject to the provisions of subsection (2)(a);

7 (c) an outside reviewer retained by an issuer subject to the provisions of subsection (2)(a) making
8 a statement on behalf of that issuer; or

9 (d) an underwriter, with respect to information provided by an issuer subject to the provisions of
10 subsection (2)(a) or information derived from information provided by that issuer.

11 (3) Except to the extent otherwise specifically provided by rule, regulation, or order of the
12 securities and exchange commission, this section does not apply to a forward-looking statement:

13 (a) that is made with respect to the business or operations of the issuer, if the issuer:

14 (i) during the 3-year period preceding the date on which the statement was first made:

15 (A) was convicted of any felony or misdemeanor described in section 15(b)(4)(B)(i) through (iv) of
16 the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(4)(B), or was convicted under 30-10-306;

17 (B) has been made the subject of a judicial or administrative decree or order arising out of a
18 governmental action that:

19 (I) prohibits future violations of the antifraud provisions of state or federal securities laws;

20 (II) requires that the issuer cease and desist from violating the antifraud provisions of state or federal
21 securities laws; or

22 (III) determines that the issuer violated the antifraud provisions of state or federal securities laws;

23 (ii) makes the forward-looking statement in connection with an offering of securities by a blank
24 check company;

25 (iii) issues penny stock;

26 (iv) makes the forward-looking statement in connection with a rollup transaction; or

27 (v) makes the forward-looking statement in connection with a going private transaction; or

28 (b) that is:

29 (i) included in a financial statement prepared in accordance with generally accepted accounting
30 principles;

- 1 (ii) contained in a registration statement of, or otherwise issued by, an investment company;
- 2 (iii) made in connection with a tender offer;
- 3 (iv) made in connection with an initial public offering;
- 4 (v) made in connection with an offering by, or relating to the operations of, a partnership, a limited
5 liability company, or a direct participation investment program; or
- 6 (vi) made in a disclosure of beneficial ownership in a report required to be filed with the United
7 States securities and exchange commission pursuant to section 13(d) of the Securities Exchange Act of
8 1934, 15 U.S.C. 78m(d).

9 (4) (A) Except as provided in subsection (3), in any private action arising under this part that is
10 based on an untrue statement of a material fact or omission of a material fact necessary to make the
11 statement not misleading, a person referred to in subsection (2) is not liable with respect to any
12 forward-looking statement, whether written or oral, if and to the extent that:

13 ~~(a)(I)~~ the forward-looking statement is identified as a forward-looking statement and is accompanied
14 by meaningful cautionary statements identifying important factors that could cause actual results to differ
15 materially from those in the forward-looking statement or is immaterial; or

16 ~~(b)(II)~~ the plaintiff fails to prove that the forward-looking statement:

17 ~~(i)(A)~~ if made by a natural person, was made with actual knowledge by that person that the
18 statement was false or misleading; or

19 ~~(ii)(B)~~ if made by a business entity, was made by or with the approval of an executive officer of that
20 entity and made or approved by that officer with actual knowledge by that officer that the statement was
21 false or misleading.

22 ~~(5)(B)~~ In the case of an oral forward-looking statement made by an issuer that is subject to the
23 reporting requirements of section 13(a) or section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C.
24 78m(a) or 15 U.S.C. 78o(d) or by a person acting on behalf of the issuer, the requirement in subsection
25 (4)(a) must be considered satisfied under the following circumstances:

26 ~~(a)(I)~~ if the oral forward-looking statement is accompanied by a cautionary statement that the
27 particular oral statement is a forward-looking statement and that the actual results could differ materially
28 from those projected in the forward-looking statement; and

29 ~~(b) (i)(II)~~ if the oral forward-looking statement is accompanied by an oral statement that additional
30 information concerning factors that could cause actual results to differ materially from those in the

1 forward-looking statement is contained in a readily available written document or portion of the written
2 document;

3 ~~##~~(III) IF the accompanying oral statement referred to in subsection ~~(5)(b)(i)~~ (4)(B)(II) identifies the
4 document or portion of the document that contains the additional information about those factors relating
5 to the forward-looking statement; and

6 ~~###~~(IV) IF the information contained in that written document is a cautionary statement that satisfies
7 the standard established in subsection (4)(a).

8 ~~(6)~~(C) Any document filed with the commissioner or with the securities and exchange commission
9 or generally disseminated must be considered to be readily available for purposes of this section.

10 (5) This section does not impose upon any person a duty to update a forward-looking statement.

11 ~~(7)~~(6) On any motion to dismiss based on subsection (4)(a), the court shall consider:

12 (a) any statement cited in the complaint; and

13 (b) any cautionary statement accompanying the forward-looking statement that is not subject to
14 material dispute and that is cited by the defendant.

15 ~~(8)~~(7) In any private action arising under this part, the court shall stay discovery, other than
16 discovery that is specifically directed to the applicability of the exemption provided for in this section,
17 during the pendency of any motion by a defendant for summary judgment that is based on the grounds
18 that:

19 (a) the statement or omission upon which the complaint is based is a forward-looking statement
20 within the meaning of this section; and

21 (b) the exemption provided for in this section precludes a claim for relief.

22
23 **NEW SECTION. Section 6. Prohibition of referral fees.** A broker, dealer, or person associated with
24 a broker or dealer, may not solicit or accept, directly or indirectly, remuneration for assisting an attorney
25 in obtaining the representation of any person in any private action under this part or under the Securities
26 Act of 1933, 15 U.S.C. 77a, et seq.

27
28 ~~**NEW SECTION. Section 7. Prohibition of attorney fees from disgorgement funds.**~~ Except as
29 otherwise ordered by the court upon motion by the commissioner or, in the case of an administrative
30 action, as otherwise ordered by the commissioner, funds disgorged as the result of an action brought by

1 ~~the commissioner or as a result of any administrative action may not be distributed as payment for attorney~~
 2 ~~fees or expenses incurred by private parties seeking distribution of the disgorged funds.~~

3

4 **NEW SECTION. Section 7. Prosecution of persons aiding violations.** For purposes of any action
 5 brought by the commissioner under 30-10-304, 30-10-305, or 30-10-306, for violations of 30-10-301
 6 through 30-10-303, any person that knowingly provides substantial assistance to another person in
 7 violation of a provision of this part or of any rule or regulation issued under this part must be considered
 8 to be in violation of that provision to the same extent as the person to whom the assistance is provided.

9

10 **NEW SECTION. Section 8. Loss causation.** In any PRIVATE action arising under this part, if any
 11 portion or all of the amount recoverable represents other than the depreciation in value of the subject
 12 security resulting from a part of the prospectus or oral communication not being true or omitting to state
 13 a material fact required to be stated in the prospectus or oral communication or necessary to make the
 14 statement not misleading, then that portion or amount is not recoverable with respect to the liability of that
 15 person.

16

17 **NEW SECTION. Section 10. Proportional liability.** (1) ~~For purposes of this section, the following~~
 18 ~~definitions apply:~~

19 ~~(a) "Covered person" means:~~

20 ~~(i) a defendant in any private action arising under this title; or~~

21 ~~(ii) a defendant in any private action arising under section 11 of the Securities Act of 1933, 15~~
 22 ~~U.S.C. 77k, who is an outside director of the issuer of the securities that are the subject of the action.~~

23 ~~(b) "Outside director" has the meaning given that term by rule or regulation of the securities and~~
 24 ~~exchange commission.~~

25 ~~(2) For the purposes of this section, a covered person knowingly commits a violation of Montana~~
 26 ~~securities laws:~~

27 ~~(a) with respect to an action that is based on an untrue statement of material fact or omission of~~
 28 ~~a material fact necessary to make the statement not misleading, if:~~

29 ~~(i) that covered person makes an untrue statement of a material fact, with actual knowledge that~~
 30 ~~the representation is false or omits a fact necessary in order to make the statement made not misleading~~

1 with actual knowledge that as a result of the omission, one of the material representations of the covered
2 person is false;

3 (ii) persons are likely to reasonably rely on that misrepresentation or omission; and

4 (iii) with respect to an action that is based on any conduct that is not described in subsection
5 (2)(a)(i), the covered person engages in that conduct with actual knowledge of the facts and circumstances
6 that make the conduct of that covered person a violation of the securities laws.

7 (3) Reckless conduct by a covered person may not be construed to constitute a knowing
8 commission of a violation of the securities laws by that covered person.

9 (4) This section may not be construed to create, affect, or in any manner modify the standard for
10 liability associated with any action arising under federal securities laws or Montana securities laws.

11 (5) Any covered person against whom a final judgment is entered in a private action is liable for
12 damages jointly and severally only if the trier of fact specifically determines that the covered person
13 knowingly committed a violation of federal securities laws or Montana securities laws.

14 (6) Except as provided in subsection (5), a covered person against whom a final judgment is entered
15 in a private action is liable solely for the portion of the judgment that corresponds to the percentage of
16 responsibility of that covered person as determined under subsection (8).

17 (7) In any case in which a contractual relationship permits, a covered person that prevails in any
18 private action may recover the attorney fees and costs of that covered person in connection with the
19 action.

20 (8) In any private action, the court shall instruct the jury to answer special interrogatories or, if
21 there is not a jury, shall make findings with respect to each covered person and each of the other persons
22 claimed by any of the parties to have caused or contributed to the loss incurred by the plaintiff, including
23 persons who have entered into settlements with the plaintiff or plaintiffs, concerning:

24 (a) whether the person violated federal securities laws or Montana securities laws;

25 (b) the percentage of responsibility of the person, measured as a percentage of the total fault of
26 all persons who caused or contributed to the loss incurred by the plaintiff; and

27 (c) whether the person knowingly committed a violation of the securities laws.

28 (9) The responses to interrogatories or findings, as appropriate, under subsection (8) must specify
29 the total amount of damages that the plaintiff is entitled to recover and the percentage of responsibility of
30 each covered person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs.

1 ~~(10) In determining the percentage of responsibility under this section, the trier of fact shall~~
2 ~~consider:~~

3 ~~(a) the nature of the conduct of each covered person found to have caused or contributed to the~~
4 ~~loss incurred by the plaintiff or plaintiffs; and~~

5 ~~(b) the nature and extent of the causal relationship between the conduct of each covered person~~
6 ~~and the damages incurred by the plaintiff or plaintiffs.~~

7 ~~(11) Notwithstanding subsection (8), upon a motion that is made not later than 6 months after a~~
8 ~~final judgment is entered in any private action, if the court determines that all or part of the share of the~~
9 ~~judgment of the covered person is not collectible against that covered person and is also not collectible~~
10 ~~against a covered person described in subsection (5), each covered person described in subsection (5) is~~
11 ~~liable for the uncollectible share as follows:~~

12 ~~(a) Each covered person is jointly and severally liable for the uncollectible share if the plaintiff~~
13 ~~establishes that:~~

14 ~~(i) the plaintiff is an individual whose recoverable damages under the final judgment are equal to~~
15 ~~more than 10% of the net worth of the plaintiff; and~~

16 ~~(ii) the net worth of the plaintiff is equal to less than \$200,000.~~

17 ~~(b) With respect to any plaintiff not described in subsection (11)(a), each covered person is liable~~
18 ~~for the uncollectible share in proportion to the percentage of responsibility of that covered person, except~~
19 ~~that the total liability of a covered person under this subsection (11)(b) may not exceed 50% of the~~
20 ~~proportionate share of that covered person, as determined under subsection (8).~~

21 ~~(12) For purposes of subsection (11) net worth must be determined as of the date immediately~~
22 ~~preceding the date of the purchase or sale, as applicable, by the plaintiff of the security that is the subject~~
23 ~~of the action and must be equal to the fair market value of assets, minus liabilities, including the net value~~
24 ~~of the investments of the plaintiff in real and personal property, including personal residences.~~

25 ~~(13) The total payments required pursuant to subsection (11) may not exceed the amount of the~~
26 ~~uncollectible share.~~

27 ~~(14) A covered person against whom judgment is not collectible is subject to contribution and to~~
28 ~~any continuing liability to the plaintiff on the judgment.~~

29 ~~(15) To the extent that a covered person is required to make an additional payment pursuant to~~
30 ~~subsection (11), that covered person may recover contribution:~~

1 ~~(a) from the covered person originally liable to make the payment;~~

2 ~~(b) from any covered person liable jointly and severally pursuant to subsection (5);~~

3 ~~(c) from any covered person held proportionately liable pursuant to this section who is liable to~~
4 ~~make the same payment and has paid less than that person's proportionate share of that payment; or~~

5 ~~(d) from any other person responsible for the conduct giving rise to the payment that would have~~
6 ~~been liable to make the same payment.~~

7 ~~(16) The standard for allocation of damages under subsections (5) and (6) and the procedure for~~
8 ~~reallocation of uncollectible shares under subsection (11) may not be disclosed to members of the jury.~~

9 ~~(17) (a) A covered person who settles any private action at any time before a final verdict or~~
10 ~~judgment must be discharged from all claims for contribution brought by other persons. Upon entry of the~~
11 ~~settlement by the court, the court shall enter a bar order constituting the final discharge of all obligations~~
12 ~~to the plaintiff of the settling covered person arising out of the action. The order must bar all future claims~~
13 ~~for contribution arising out of the action:~~

14 ~~(i) by any person against the settling covered person; and~~

15 ~~(ii) by the settling covered person against any person, other than a person whose liability has been~~
16 ~~extinguished by the settlement of the settling covered person.~~

17 ~~(b) If a covered person enters into a settlement with the plaintiff prior to final verdict or judgment,~~
18 ~~the verdict or judgment must be reduced by the greater of:~~

19 ~~(i) an amount that corresponds to the percentage of responsibility of that covered person; or~~

20 ~~(ii) the amount paid to the plaintiff by that covered person.~~

21 ~~(18) A covered person who becomes jointly and severally liable for damages in any private action~~
22 ~~may recover contribution from any other person who, if joined in the original action, would have been liable~~
23 ~~for the same damages. A claim for contribution must be determined based on the percentage of~~
24 ~~responsibility of the claimant and of each person against whom a claim for contribution is made.~~

25 ~~(19) In any private action determining liability, an action for contribution must be brought not later~~
26 ~~than 6 months after the entry of a final, nonappealable judgment in the action, except that an action for~~
27 ~~contribution brought by a covered person who was required to make an additional payment pursuant to~~
28 ~~subsection (11) may be brought not later than 6 months after the date on which the payment was made.~~

29
30 NEW SECTION. Section 9. Construction. [Sections 1 through 40 8] may not be considered to

1 create or ratify any implied private right of action or to prevent the commissioner, by rule or regulation,
2 from restricting or otherwise regulating private actions under Montana securities laws.

3

4 ~~Section 12. Section 27-1-702, MCA, is amended to read:~~

5 ~~"27-1-702. Comparative negligence — extent to which contributory negligence bars recovery in~~
6 ~~action for damages. Contributory~~ Except as provided in [section 10], contributory negligence shall ~~may not~~
7 ~~bar recovery in an action by any person or his~~ the person's legal representative to recover damages for
8 ~~negligence resulting in the death of a person or injury to a person or property if such the negligence was~~
9 ~~not greater than the negligence of the person or the combined negligence of all persons against whom~~
10 ~~recovery is sought, but any damages allowed shall must be diminished in the proportion to the amount of~~
11 ~~negligence attributable to the person recovering."~~

12

13 ~~Section 13. Section 27-1-703, MCA, is amended to read:~~

14 ~~"27-1-703. Multiple defendants — determination of liability. (1) Except as provided in subsections~~
15 ~~(2) and (3), whenever the negligence of a party in any action is an issue, each party against whom recovery~~
16 ~~may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has~~
17 ~~the right of contribution from any other person whose negligence may have contributed as a proximate~~
18 ~~cause to the claimant's injury complained of.~~

19 ~~(2) A party whose negligence is determined to be 50% or less of the combined negligence of all~~
20 ~~persons described in subsection (4) is severally liable only and is responsible only for the amount of~~
21 ~~negligence attributable to that party, except as provided in subsection (3). The remaining parties are jointly~~
22 ~~and severally liable for the total less the amount attributable to the claimant.~~

23 ~~(3) A party may be jointly liable for all damages caused by the negligence of another if both acted~~
24 ~~in concert in contributing to the claimant's damages or if one party acted as an agent of the other.~~

25 ~~(4) On motion of any party against whom a claim is asserted for negligence resulting in death or~~
26 ~~injury to person or property, any other person whose negligence may have contributed as a proximate~~
27 ~~cause to the claimant's injury complained of may be joined as an additional party to the action. For~~
28 ~~purposes of determining the percentage of liability attributable to each party whose action contributed to~~
29 ~~the claimant's injury complained of, the trier of fact shall consider the negligence of the claimant, injured~~
30 ~~person, defendants, and third party defendants. The liability of nonparties, including persons released from~~

1 liability by the claimant and persons immune from liability to the claimant, must also be considered by the
2 trier of fact, as provided in subsection (6). The trier of fact shall apportion the percentage of negligence of
3 all persons listed in this subsection. Contribution must be proportional to the liability of the parties against
4 whom recovery is allowed. Nothing contained in this section makes any party indispensable pursuant to
5 Rule 19, Montana Rules of Civil Procedure.

6 ~~(6) If for any reason all or part of the contribution from a party liable for contribution cannot be~~
7 ~~obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the~~
8 ~~noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution~~
9 ~~from the noncontributing party. A party found to be 50% or less negligent for the injury complained of is~~
10 ~~liable for contribution under this section only up to the percentage of negligence attributed to that party.~~

11 ~~(6) (a) In an action based on negligence, a defendant may assert as a defense that the damages~~
12 ~~of the claimant were caused in full or in part by a nonparty, which may be referred to as a nonparty~~
13 ~~defense.~~

14 ~~(b) In determining the percentage of liability attributable to persons who are parties to the action,~~
15 ~~the trier of fact shall consider the negligence of nonparties, including persons released from liability by the~~
16 ~~claimant and persons immune from liability to the claimant, if a nonparty defense is properly asserted in~~
17 ~~accordance with this subsection (6). A finding of negligence of a nonparty is not a presumptive or~~
18 ~~conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty.~~

19 ~~(c) The burden of proof as to a nonparty's liability is on the defendant or defendants who~~
20 ~~affirmatively plead the nonparty defense, but this subsection (6) does not relieve the claimant of the burden~~
21 ~~of proving that negligence on the part of the defendant or defendants contributed as a proximate cause to~~
22 ~~the injury of the claimant or alter other proof requirements.~~

23 ~~(d) A nonparty defense must be affirmatively pleaded as a part of the answer. A defendant who~~
24 ~~gains actual knowledge of a nonparty defense after the filing of that defendant's answer may plead the~~
25 ~~defense with reasonable promptness, as determined by the trial court, in a manner that is consistent with:~~

26 ~~(i) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense;~~

27 ~~(ii) giving the claimant a reasonable opportunity to defend against a nonparty defense; and~~

28 ~~(iii) giving the claimant a reasonable opportunity, if appropriate, to add the nonparty as an additional~~
29 ~~defendant to the action before the expiration of the period of limitation applicable to the claim. However,~~
30 ~~this subsection (iii) does not extend the period of limitation or revive the action if the period of limitation~~

1 has expired.

2 ~~(e) If a defendant asserts a nonparty defense, the defendant shall notify each nonparty who the~~
3 ~~defendant alleges caused the claimant's injuries, in whole or in part. Notification must be made by mailing~~
4 ~~the defendant's answer to each nonparty at the nonparty's last known address by certified mail, return~~
5 ~~receipt requested.~~

6 ~~(7) The provisions of this section do not apply to [section 10]."~~

7

8 NEW SECTION. Section 10. Codification instruction. [Sections 1 through 44 9] are intended to
9 be codified as an integral part of Title 30, chapter 10, part 3, and the provisions of Title 30, chapter 10,
10 part 3, apply to [sections 1 through 44 9].

11

12 NEW SECTION. SECTION 11. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID
13 PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT]
14 IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID
15 APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.

16

17 NEW SECTION. Section 12. Effective date. [This act] is effective on passage and approval.

18

-END-

MOTION TO TAKE FROM TABLE,
PRINT & PLACE ON 2ND READING

JUDICIARY COMMITTEE

1 SENATE BILL NO. 382

2 INTRODUCED BY HARP

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING PRIVATE SECURITIES LITIGATION
5 LAWS; ESTABLISHING REQUIREMENTS FOR SECURITIES FRAUD ACTIONS; PROVIDING SANCTIONS FOR
6 ABUSIVE LITIGATION; LIMITING DAMAGES; CREATING A SAFE HARBOR FOR FORWARD-LOOKING
7 STATEMENTS; ~~REGULATING JOINT AND SEVERAL LIABILITY; REGULATING CONTRIBUTION AMONG~~
8 ~~PARTIES FOUND TO BE JOINTLY AND SEVERALLY LIABLE; AMENDING SECTIONS 27-1-702 AND~~
9 ~~27-1-703, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."~~

10

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

12

13 **NEW SECTION. Section 1. Requirements for securities fraud actions -- DEFINITION.** (1) In any
14 private action arising under this part, if the plaintiff alleges that the defendant made an untrue statement
15 or omitted a material fact necessary in order to make the statements made, in light of the circumstances
16 in which they were made, not misleading, the complaint must specify each statement alleged to have been
17 misleading and the reason or reasons why the statement is misleading. If an allegation regarding the
18 statement or omission is made on information and belief, the complaint must state with particularity all facts
19 on which that belief is based.

20 (2) In any private action arising under this part in which the plaintiff may recover money damages
21 only on proof that the defendant acted with a particular state of mind, the complaint must, with respect
22 to each act or omission alleged to violate this part, state with particularity facts giving rise to a strong
23 inference that the defendant acted with the required state of mind.

24 (3) In any private action arising under this part, the court shall on the motion of any defendant,
25 dismiss the complaint if the requirements of subsections (1) and (2) are not met.

26 (4) (a) In any private action arising under this part, all discovery and other proceedings must be
27 stayed during the pendency of any motion to dismiss unless the court finds, upon the motion of any party,
28 that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

29 (b) During the pendency of any stay of discovery pursuant to this subsection (4), unless otherwise
30 ordered by the court, any party to the action with actual notice of the allegations contained in the complaint

1 shall treat all documents, data compilations, including electronically recorded or stored data, and tangible
 2 objects that are in the custody or control of the party and that are relevant to the allegations as if they were
 3 the subject of a continuing request for production of documents from an opposing party under the Montana
 4 Rules of Civil Procedure.

5 (5) A party aggrieved by the willful failure of an opposing party to comply with subsection (4) may
 6 apply to the court for an order awarding appropriate sanctions.

7 (6) In any private action arising under this part, the plaintiff has the burden of proving that the act
 8 or omission of the defendant alleged to violate this title caused the loss for which the plaintiff seeks to
 9 recover damages.

10 (7) AS USED IN [SECTIONS 1 THROUGH 9], "PRIVATE ACTION ARISING UNDER THIS PART"
 11 MEANS AN ACTION AGAINST A PERSON REFERRED TO IN [SECTION 5(2)].

12
 13 **NEW SECTION. Section 2. Sanctions.** (1) In any private action arising under this part, upon final
 14 adjudication of the action, the court shall include in the record specific findings regarding compliance by
 15 each party and each attorney representing any party with each requirement of Rule 11 of the Montana
 16 Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

17 (2) If the court makes a finding under subsection (1) that a party or attorney violated any
 18 requirement of Rule 11 of the Montana Rules of Civil Procedure as to any complaint, responsive pleading,
 19 or dispositive motion, the court shall impose sanctions on the party or attorney in accordance with Rule
 20 11. Prior to making a finding that any party or attorney has violated Rule 11, the court shall give the party
 21 or attorney notice and an opportunity to respond.

22 (3) (a) Subject to subsections (3)(b) and (3)(c) for the purposes of subsection (2), the court shall
 23 adopt a presumption that the appropriate sanction:

24 (i) for failure of any responsive pleading or dispositive motion to comply with any requirement of
 25 Rule 11 is an award to the opposing party of the reasonable attorney fees and other expenses incurred as
 26 a direct result of the violation; and

27 (ii) for substantial failure of any complaint to comply with any requirement of Rule 11 is an award
 28 to the opposing party of the reasonable attorney fees and other expenses incurred in the action.

29 (b) The presumption described in subsection (3)(a) may be rebutted only upon proof by the party
 30 or attorney against whom sanctions are to be imposed that:

1 (i) the award of attorney fees and other expenses will impose an unreasonable burden on that party
2 or attorney and would be unjust and the failure to make an award would not impose a greater burden on
3 the party in whose favor sanctions are to be imposed; or

4 (ii) the violation of Rule 11 was de minimis.

5 (c) If the party or attorney against whom sanctions are to be imposed meets its burden under
6 subsection (3)(b), the court shall award the sanctions that the court considers appropriate pursuant to Rule
7 11.

8
9 **NEW SECTION. Section 3. Defendant's right to written interrogatories.** In any private action
10 arising under this part in which the plaintiff may recover money damages, the court shall, when requested
11 by a defendant, submit to the jury a written interrogatory on the issue of each defendant's state of mind
12 at the time the alleged violation occurred.

13
14 **NEW SECTION. Section 4. Limitation on damages.** (1) The provisions of this section limit any
15 damages otherwise available under this part.

16 (2) Except as provided in subsection (3), in any private action arising under this part in which the
17 plaintiff seeks to establish damages by reference to the market price of a security that is traded in a national
18 securities market, the award of damages to the plaintiff may not exceed the difference between the
19 purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean
20 trading price of that security during the 90-day period beginning on the date on which the information
21 correcting the misstatement or omission that is the basis for the action is disseminated to the market.

22 (3) In any private action arising under this part in which the plaintiff seeks to establish damages by
23 reference to the market price of a security **THAT IS TRADED ON A NATIONAL SECURITIES MARKET**, if
24 the plaintiff sells or repurchases the subject security prior to the expiration of the 90-day period described
25 in subsection (2), the plaintiff's damages may not exceed the difference between the purchase or sale price
26 paid or received, as appropriate, by the plaintiff for the security and the mean trading price of the security
27 during the period beginning immediately after dissemination of information correcting the misstatement or
28 omission and ending on the date on which the plaintiff sells or repurchases the security.

29 (4) For purposes of this section, the mean trading price of a security must be an average of the daily
30 trading price of that security, determined as of the close of the market each day during the 90-day period

1 referred to in subsection (2).

2
3 **NEW SECTION. Section 5. Applicability of safe harbor for forward-looking statements.** (1) For

4 the purposes of this section, the following definitions apply:

5 (a) "Forward-looking statement" means:

6 (i) a statement containing a projection of revenue; income per share, including income loss;
7 earnings per share, including earnings loss; capital expenditures; dividends; capital structure; or other
8 financial items;

9 (ii) a statement of the plans and objectives of management for future operations, including plans
10 or objectives relating to the products or services of the issuer;

11 (iii) a statement of future economic performance, including any statement contained in a discussion
12 and analysis of financial condition by the management or in the results of operations;

13 (iv) any statement of the assumptions underlying or relating to any statement described in
14 subsection (1)(a)(i), (1)(a)(ii), or (1)(a)(iii);

15 (v) any report issued by an outside reviewer retained by an issuer, to the extent that the report
16 assesses a forward-looking statement made by the issuer; or

17 (vi) a statement containing a projection or estimate of other items as may be specified by rule or
18 regulation of the commissioner.

19 (b) "Going private transaction" has the meaning given that term under the rules or regulations of
20 the United States securities and exchange commission issued pursuant to section 13(e) of the Securities
21 Exchange Act of 1934, 15 U.S.C. 78m(e).

22 (c) "Investment company" has the same meaning as in section 3(a) of the federal Investment
23 Company Act of 1940, 15 U.S.C. 80a-3(a).

24 **(D) (I) "ISSUER" HAS THE MEANING PROVIDED IN 30-10-103.**

25 **(II) THE TERM DOES NOT INCLUDE A BROKER-DEALER AS DEFINED IN 30-10-103.**

26 ~~(E)~~ (E) "Penny stock" has the same meaning as in section 3(a)(51) of the Securities Exchange Act
27 of 1934, 15 U.S.C. 78c(a)(51), and the rules and regulations or orders issued pursuant to that section.

28 ~~(F)~~ (F) "Person acting on behalf of an issuer" means an officer, director, or employee of the issuer.

29 ~~(G)~~ (G) The terms "blank check company", "direct participation investment program", "executive
30 officer of an entity", "limited liability company", "partnership", and "rollup transaction" have the meanings

1 given those terms by rule or regulation of the commissioner.

2 (2) This section applies only to a forward-looking statement made by:

3 (a) an issuer that, at the time that the statement is made, is subject to the reporting requirements
4 of section (13)(a) or (15)(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(a) or 15 U.S.C.
5 78o(d);

6 (b) a person acting on behalf of an issuer subject to the provisions of subsection (2)(a);

7 (c) an outside reviewer retained by an issuer subject to the provisions of subsection (2)(a) making
8 a statement on behalf of that issuer; or

9 (d) an underwriter, with respect to information provided by an issuer subject to the provisions of
10 subsection (2)(a) or information derived from information provided by that issuer.

11 (3) Except to the extent otherwise specifically provided by rule, regulation, or order of the
12 securities and exchange commission, this section does not apply to a forward-looking statement:

13 (a) that is made with respect to the business or operations of the issuer, if the issuer:

14 (i) during the 3-year period preceding the date on which the statement was first made:

15 (A) was convicted of any felony or misdemeanor described in section 15(b)(4)(B)(i) through (iv) of
16 the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(4)(B), or was convicted under 30-10-306;

17 (B) has been made the subject of a judicial or administrative decree or order arising out of a
18 governmental action that:

19 (I) prohibits future violations of the antifraud provisions of state or federal securities laws;

20 (II) requires that the issuer cease and desist from violating the antifraud provisions of state or federal
21 securities laws; or

22 (III) determines that the issuer violated the antifraud provisions of state or federal securities laws;

23 (ii) makes the forward-looking statement in connection with an offering of securities by a blank
24 check company;

25 (iii) issues penny stock;

26 (iv) makes the forward-looking statement in connection with a rollup transaction; or

27 (v) makes the forward-looking statement in connection with a going private transaction; or

28 (b) that is:

29 (i) included in a financial statement prepared in accordance with generally accepted accounting
30 principles;

1 (ii) contained in a registration statement of, or otherwise issued by, an investment company;

2 (iii) made in connection with a tender offer;

3 (iv) made in connection with an initial public offering;

4 (v) made in connection with an offering by, or relating to the operations of, a partnership, a limited
5 liability company, or a direct participation investment program; or

6 (vi) made in a disclosure of beneficial ownership in a report required to be filed with the United
7 States securities and exchange commission pursuant to section 13(d) of the Securities Exchange Act of
8 1934, 15 U.S.C. 78m(d).

9 (4) (A) Except as provided in subsection (3), in any private action arising under this part that is
10 based on an untrue statement of a material fact or omission of a material fact necessary to make the
11 statement not misleading, a person referred to in subsection (2) is not liable with respect to any
12 forward-looking statement, whether written or oral, if and to the extent that:

13 ~~(b)(I)~~ the forward-looking statement is identified as a forward-looking statement and is accompanied
14 by meaningful cautionary statements identifying important factors that could cause actual results to differ
15 materially from those in the forward-looking statement or is immaterial; or

16 ~~(b)(II)~~ the plaintiff fails to prove that the forward-looking statement:

17 ~~(i)(A)~~ if made by a natural person, was made with actual knowledge by that person that the
18 statement was false or misleading; or

19 ~~(i)(B)~~ if made by a business entity, was made by or with the approval of an executive officer of that
20 entity and made or approved by that officer with actual knowledge by that officer that the statement was
21 false or misleading.

22 ~~(5)(B)~~ In the case of an oral forward-looking statement made by an issuer that is subject to the
23 reporting requirements of section 13(a) or section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C.
24 78m(a) or 15 U.S.C. 78o(d) or by a person acting on behalf of the issuer, the requirement in subsection
25 (4)(a) must be considered satisfied under the following circumstances:

26 ~~(a)(I)~~ if the oral forward-looking statement is accompanied by a cautionary statement that the
27 particular oral statement is a forward-looking statement and that the actual results could differ materially
28 from those projected in the forward-looking statement; and

29 ~~(b) (i)(II)~~ if the oral forward-looking statement is accompanied by an oral statement that additional
30 information concerning factors that could cause actual results to differ materially from those in the

1 forward-looking statement is contained in a readily available written document or portion of the written
 2 document;

3 ~~##~~(III) IF the accompanying oral statement referred to in subsection ~~(5)(b)(i)~~ (4)(B)(II) identifies the
 4 document or portion of the document that contains the additional information about those factors relating
 5 to the forward-looking statement; and

6 ~~###~~(IV) IF the information contained in that written document is a cautionary statement that satisfies
 7 the standard established in subsection (4)(a).

8 ~~(6)(C)~~ Any document filed with the commissioner or with the securities and exchange commission
 9 or generally disseminated must be considered to be readily available for purposes of this section.

10 (5) This section does not impose upon any person a duty to update a forward-looking statement.

11 ~~(7)(6)~~ On any motion to dismiss based on subsection (4)(a), the court shall consider:

12 (a) any statement cited in the complaint; and

13 (b) any cautionary statement accompanying the forward-looking statement that is not subject to
 14 material dispute and that is cited by the defendant.

15 ~~(8)(7)~~ In any private action arising under this part, the court shall stay discovery, other than
 16 discovery that is specifically directed to the applicability of the exemption provided for in this section,
 17 during the pendency of any motion by a defendant for summary judgment that is based on the grounds
 18 that:

19 (a) the statement or omission upon which the complaint is based is a forward-looking statement
 20 within the meaning of this section; and

21 (b) the exemption provided for in this section precludes a claim for relief.

22

23 **NEW SECTION. Section 6. Prohibition of referral fees.** A broker, dealer, or person associated with
 24 a broker or dealer, may not solicit or accept, directly or indirectly, remuneration for assisting an attorney
 25 in obtaining the representation of any person in any private action under this part or under the Securities
 26 Act of 1933, 15 U.S.C. 77a, et seq.

27

28 ~~**NEW SECTION. Section 7. Prohibition of attorney fees from disgorgement funds.** Except as~~
 29 ~~otherwise ordered by the court upon motion by the commissioner or, in the case of an administrative~~
 30 ~~action, as otherwise ordered by the commissioner, funds disgorged as the result of an action brought by~~

1 ~~the commissioner or as a result of any administrative action may not be distributed as payment for attorney~~
 2 ~~fees or expenses incurred by private parties seeking distribution of the disgorged funds.~~

3
 4 **NEW SECTION. Section 7. Prosecution of persons aiding violations.** For purposes of any action
 5 brought by the commissioner under 30-10-304, 30-10-305, or 30-10-306, for violations of 30-10-301
 6 through 30-10-303, any person that knowingly provides substantial assistance to another person in
 7 violation of a provision of this part or of any rule or regulation issued under this part must be considered
 8 to be in violation of that provision to the same extent as the person to whom the assistance is provided.

9
 10 **NEW SECTION. Section 8. Loss causation.** In any PRIVATE action arising under this part, if any
 11 portion or all of the amount recoverable represents other than the depreciation in value of the subject
 12 security resulting from a part of the prospectus or oral communication not being true or omitting to state
 13 a material fact required to be stated in the prospectus or oral communication or necessary to make the
 14 statement not misleading, then that portion or amount is not recoverable with respect to the liability of that
 15 person.

16
 17 ~~**NEW SECTION. Section 10. Proportional liability.** (1) For purposes of this section, the following~~
 18 ~~definitions apply:~~

19 ~~(a) "Covered person" means:~~

20 ~~(i) a defendant in any private action arising under this title; or~~

21 ~~(ii) a defendant in any private action arising under section 11 of the Securities Act of 1933, 15~~
 22 ~~U.S.C. 77k, who is an outside director of the issuer of the securities that are the subject of the action.~~

23 ~~(b) "Outside director" has the meaning given that term by rule or regulation of the securities and~~
 24 ~~exchange commission.~~

25 ~~(2) For the purposes of this section, a covered person knowingly commits a violation of Montana~~
 26 ~~securities laws:~~

27 ~~(a) with respect to an action that is based on an untrue statement of material fact or omission of~~
 28 ~~a material fact necessary to make the statement not misleading, if:~~

29 ~~(i) that covered person makes an untrue statement of a material fact, with actual knowledge that~~
 30 ~~the representation is false or omits a fact necessary in order to make the statement made not misleading~~

1 with actual knowledge that as a result of the omission, one of the material representations of the covered
2 person is false;

3 (ii) persons are likely to reasonably rely on that misrepresentation or omission; and

4 (iii) with respect to an action that is based on any conduct that is not described in subsection
5 (2)(a)(i), the covered person engages in that conduct with actual knowledge of the facts and circumstances
6 that make the conduct of that covered person a violation of the securities laws.

7 (3) Reckless conduct by a covered person may not be construed to constitute a knowing
8 commission of a violation of the securities laws by that covered person.

9 (4) This section may not be construed to create, affect, or in any manner modify the standard for
10 liability associated with any action arising under federal securities laws or Montana securities laws.

11 (5) Any covered person against whom a final judgment is entered in a private action is liable for
12 damages jointly and severally only if the trier of fact specifically determines that the covered person
13 knowingly committed a violation of federal securities laws or Montana securities laws.

14 (6) Except as provided in subsection (5), a covered person against whom a final judgment is entered
15 in a private action is liable solely for the portion of the judgment that corresponds to the percentage of
16 responsibility of that covered person as determined under subsection (8).

17 (7) In any case in which a contractual relationship permits, a covered person that prevails in any
18 private action may recover the attorney fees and costs of that covered person in connection with the
19 action.

20 (8) In any private action, the court shall instruct the jury to answer special interrogatories or, if
21 there is not a jury, shall make findings with respect to each covered person and each of the other persons
22 claimed by any of the parties to have caused or contributed to the loss incurred by the plaintiff, including
23 persons who have entered into settlements with the plaintiff or plaintiffs, concerning:

24 (a) whether the person violated federal securities laws or Montana securities laws;

25 (b) the percentage of responsibility of the person, measured as a percentage of the total fault of
26 all persons who caused or contributed to the loss incurred by the plaintiff; and

27 (c) whether the person knowingly committed a violation of the securities laws.

28 (9) The responses to interrogatories or findings, as appropriate, under subsection (8) must specify
29 the total amount of damages that the plaintiff is entitled to recover and the percentage of responsibility of
30 each covered person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs.

1 ~~(10) In determining the percentage of responsibility under this section, the trier of fact shall~~
2 ~~consider:~~

3 ~~(a) the nature of the conduct of each covered person found to have caused or contributed to the~~
4 ~~loss incurred by the plaintiff or plaintiffs; and~~

5 ~~(b) the nature and extent of the causal relationship between the conduct of each covered person~~
6 ~~and the damages incurred by the plaintiff or plaintiffs.~~

7 ~~(11) Notwithstanding subsection (8), upon a motion that is made not later than 6 months after a~~
8 ~~final judgment is entered in any private action, if the court determines that all or part of the share of the~~
9 ~~judgment of the covered person is not collectible against that covered person and is also not collectible~~
10 ~~against a covered person described in subsection (5), each covered person described in subsection (5) is~~
11 ~~liable for the uncollectible share as follows:~~

12 ~~(a) Each covered person is jointly and severally liable for the uncollectible share if the plaintiff~~
13 ~~establishes that:~~

14 ~~(i) the plaintiff is an individual whose recoverable damages under the final judgment are equal to~~
15 ~~more than 10% of the net worth of the plaintiff; and~~

16 ~~(ii) the net worth of the plaintiff is equal to less than \$200,000.~~

17 ~~(b) With respect to any plaintiff not described in subsection (11)(a), each covered person is liable~~
18 ~~for the uncollectible share in proportion to the percentage of responsibility of that covered person, except~~
19 ~~that the total liability of a covered person under this subsection (11)(b) may not exceed 50% of the~~
20 ~~proportionate share of that covered person, as determined under subsection (8).~~

21 ~~(12) For purposes of subsection (11) net worth must be determined as of the date immediately~~
22 ~~preceding the date of the purchase or sale, as applicable, by the plaintiff of the security that is the subject~~
23 ~~of the action and must be equal to the fair market value of assets, minus liabilities, including the net value~~
24 ~~of the investments of the plaintiff in real and personal property, including personal residences.~~

25 ~~(13) The total payments required pursuant to subsection (11) may not exceed the amount of the~~
26 ~~uncollectible share.~~

27 ~~(14) A covered person against whom judgment is not collectible is subject to contribution and to~~
28 ~~any continuing liability to the plaintiff on the judgment.~~

29 ~~(15) To the extent that a covered person is required to make an additional payment pursuant to~~
30 ~~subsection (11), that covered person may recover contribution.~~

- 1 ~~(a) from the covered person originally liable to make the payment;~~
 2 ~~(b) from any covered person liable jointly and severally pursuant to subsection (5);~~
 3 ~~(c) from any covered person held proportionately liable pursuant to this section who is liable to~~
 4 ~~make the same payment and has paid less than that person's proportionate share of that payment; or~~
 5 ~~(d) from any other person responsible for the conduct giving rise to the payment that would have~~
 6 ~~been liable to make the same payment.~~

7 ~~(16) The standard for allocation of damages under subsections (5) and (6) and the procedure for~~
 8 ~~reallocation of uncollectible shares under subsection (11) may not be disclosed to members of the jury.~~

9 ~~(17) (a) A covered person who settles any private action at any time before a final verdict or~~
 10 ~~judgment must be discharged from all claims for contribution brought by other persons. Upon entry of the~~
 11 ~~settlement by the court, the court shall enter a bar order constituting the final discharge of all obligations~~
 12 ~~to the plaintiff of the settling covered person arising out of the action. The order must bar all future claims~~
 13 ~~for contribution arising out of the action:~~

- 14 ~~(i) by any person against the settling covered person; and~~
 15 ~~(ii) by the settling covered person against any person, other than a person whose liability has been~~
 16 ~~extinguished by the settlement of the settling covered person.~~

17 ~~(b) If a covered person enters into a settlement with the plaintiff prior to final verdict or judgment,~~
 18 ~~the verdict or judgment must be reduced by the greater of:~~

- 19 ~~(i) an amount that corresponds to the percentage of responsibility of that covered person; or~~
 20 ~~(ii) the amount paid to the plaintiff by that covered person.~~

21 ~~(18) A covered person who becomes jointly and severally liable for damages in any private action~~
 22 ~~may recover contribution from any other person who, if joined in the original action, would have been liable~~
 23 ~~for the same damages. A claim for contribution must be determined based on the percentage of~~
 24 ~~responsibility of the claimant and of each person against whom a claim for contribution is made.~~

25 ~~(19) In any private action determining liability, an action for contribution must be brought not later~~
 26 ~~than 6 months after the entry of a final, nonappealable judgment in the action, except that an action for~~
 27 ~~contribution brought by a covered person who was required to make an additional payment pursuant to~~
 28 ~~subsection (11) may be brought not later than 6 months after the date on which the payment was made.~~

29
 30 NEW SECTION. Section 9. Construction. [Sections 1 through ~~10~~ 8] may not be considered to

1 create or ratify any implied private right of action or to prevent the commissioner, by rule or regulation,
2 from restricting or otherwise regulating private actions under Montana securities laws.

3
4 ~~Section 12. Section 27-1-702, MCA, is amended to read:~~

5 ~~"27-1-702. Comparative negligence—extent to which contributory negligence bars recovery in~~
6 ~~action for damages. Contributory~~ Except as provided in [section 10], contributory negligence shall ~~may not~~
7 ~~bar recovery in an action by any person or his~~ the person's legal representative to recover damages for
8 negligence resulting in the death of a person or injury to a person or property if such the negligence was
9 not greater than the negligence of the person or the combined negligence of all persons against whom
10 recovery is sought, but any damages allowed shall must be diminished in the proportion to the amount of
11 negligence attributable to the person recovering."

12
13 ~~Section 13. Section 27-1-703, MCA, is amended to read:~~

14 ~~"27-1-703. Multiple defendants—determination of liability. (1) Except as provided in subsections~~
15 ~~(2) and (3), whenever the negligence of a party in any action is an issue, each party against whom recovery~~
16 ~~may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has~~
17 ~~the right of contribution from any other person whose negligence may have contributed as a proximate~~
18 ~~cause to the claimant's injury complained of.~~

19 ~~(2) A party whose negligence is determined to be 50% or less of the combined negligence of all~~
20 ~~persons described in subsection (4) is severally liable only and is responsible only for the amount of~~
21 ~~negligence attributable to that party, except as provided in subsection (3). The remaining parties are jointly~~
22 ~~and severally liable for the total less the amount attributable to the claimant.~~

23 ~~(3) A party may be jointly liable for all damages caused by the negligence of another if both acted~~
24 ~~in concert in contributing to the claimant's damages or if one party acted as an agent of the other.~~

25 ~~(4) On motion of any party against whom a claim is asserted for negligence resulting in death or~~
26 ~~injury to person or property, any other person whose negligence may have contributed as a proximate~~
27 ~~cause to the claimant's injury complained of may be joined as an additional party to the action. For~~
28 ~~purposes of determining the percentage of liability attributable to each party whose action contributed to~~
29 ~~the claimant's injury complained of, the trier of fact shall consider the negligence of the claimant, injured~~
30 ~~person, defendants, and third-party defendants. The liability of nonparties, including persons released from~~

1 liability by the claimant and persons immune from liability to the claimant, must also be considered by the
 2 trier of fact, as provided in subsection (6). The trier of fact shall apportion the percentage of negligence of
 3 all persons listed in this subsection. Contribution must be proportional to the liability of the parties against
 4 whom recovery is allowed. Nothing contained in this section makes any party indispensable pursuant to
 5 Rule 19, Montana Rules of Civil Procedure.

6 ~~(5) If for any reason all or part of the contribution from a party liable for contribution cannot be~~
 7 ~~obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the~~
 8 ~~noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution~~
 9 ~~from the noncontributing party. A party found to be 50% or less negligent for the injury complained of is~~
 10 ~~liable for contribution under this section only up to the percentage of negligence attributed to that party.~~

11 ~~(6) (a) In an action based on negligence, a defendant may assert as a defense that the damages~~
 12 ~~of the claimant were caused in full or in part by a nonparty, which may be referred to as a nonparty~~
 13 ~~defense.~~

14 ~~(b) In determining the percentage of liability attributable to persons who are parties to the action,~~
 15 ~~the trier of fact shall consider the negligence of nonparties, including persons released from liability by the~~
 16 ~~claimant and persons immune from liability to the claimant, if a nonparty defense is properly asserted in~~
 17 ~~accordance with this subsection (6). A finding of negligence of a nonparty is not a presumptive or~~
 18 ~~conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty.~~

19 ~~(c) The burden of proof as to a nonparty's liability is on the defendant or defendants who~~
 20 ~~affirmatively pled the nonparty defense, but this subsection (6) does not relieve the claimant of the burden~~
 21 ~~of proving that negligence on the part of the defendant or defendants contributed as a proximate cause to~~
 22 ~~the injury of the claimant or alter other proof requirements.~~

23 ~~(d) A nonparty defense must be affirmatively pleaded as a part of the answer. A defendant who~~
 24 ~~gains actual knowledge of a nonparty defense after the filing of that defendant's answer may plead the~~
 25 ~~defense with reasonable promptness, as determined by the trial court, in a manner that is consistent with:~~

26 ~~(i) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense;~~

27 ~~(ii) giving the claimant a reasonable opportunity to defend against a nonparty defense; and~~

28 ~~(iii) giving the claimant a reasonable opportunity, if appropriate, to add the nonparty as an additional~~
 29 ~~defendant to the action before the expiration of the period of limitation applicable to the claim. However,~~
 30 ~~this subsection (iii) does not extend the period of limitation or revive the action if the period of limitation~~

1 has expired.

2 ~~(e) If a defendant asserts a nonparty defence, the defendant shall notify each nonparty who the~~
3 ~~defendant alleges caused the claimant's injuries, in whole or in part. Notification must be made by mailing~~
4 ~~the defendant's answer to each nonparty at the nonparty's last known address by certified mail, return~~
5 ~~receipt requested.~~

6 ~~(7) The provisions of this section do not apply to [section 10]."~~

7

8 **NEW SECTION. Section 10. Codification instruction.** [Sections 1 through 44 9] are intended to
9 be codified as an integral part of Title 30, chapter 10, part 3, and the provisions of Title 30, chapter 10,
10 part 3, apply to [sections 1 through 44 9].

11

12 **NEW SECTION. SECTION 11. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID**
13 **PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT]**
14 **IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID**
15 **APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.**

16

17 **NEW SECTION. Section 12. Effective date.** [This act] is effective on passage and approval.

18

-END-

1 SENATE BILL NO. 382

2 INTRODUCED BY HARP

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING PRIVATE SECURITIES LITIGATION
5 LAWS; ESTABLISHING REQUIREMENTS FOR SECURITIES FRAUD ACTIONS; PROVIDING SANCTIONS FOR
6 ABUSIVE LITIGATION; LIMITING DAMAGES; CREATING A SAFE HARBOR FOR FORWARD-LOOKING
7 STATEMENTS; ~~REGULATING JOINT AND SEVERAL LIABILITY; REGULATING CONTRIBUTION AMONG~~
8 ~~PARTIES FOUND TO BE JOINTLY AND SEVERALLY LIABLE; AMENDING SECTIONS 27-1-702 AND~~
9 ~~27-1-703, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."~~

10
11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

12
13 **NEW SECTION. Section 1. Requirements for securities fraud actions -- DEFINITION.** (1) In any
14 private action arising under this part, if the plaintiff alleges that the defendant made an untrue statement
15 or omitted a material fact necessary in order to make the statements made, in light of the circumstances
16 in which they were made, not misleading, the complaint must specify each statement alleged to have been
17 misleading and the reason or reasons why the statement is misleading. If an allegation regarding the
18 statement or omission is made on information and belief, the complaint must state with particularity all facts
19 on which that belief is based.

20 (2) In any private action arising under this part in which the plaintiff may recover money damages
21 only on proof that the defendant acted with a particular state of mind, the complaint must, with respect
22 to each act or omission alleged to violate this part, state with particularity facts giving rise to a strong
23 inference that the defendant acted with the required state of mind.

24 (3) In any private action arising under this part, the court shall on the motion of any defendant,
25 dismiss the complaint if the requirements of subsections (1) and (2) are not met.

26 (4) (a) In any private action arising under this part, all discovery and other proceedings must be
27 stayed during the pendency of any motion to dismiss unless the court finds, upon the motion of any party,
28 that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

29 (b) During the pendency of any stay of discovery pursuant to this subsection (4), unless otherwise
30 ordered by the court, any party to the action with actual notice of the allegations contained in the complaint

1 shall treat all documents, data compilations, including electronically recorded or stored data, and tangible
 2 objects that are in the custody or control of the party and that are relevant to the allegations as if they were
 3 the subject of a continuing request for production of documents from an opposing party under the Montana
 4 Rules of Civil Procedure.

5 (5) A party aggrieved by the willful failure of an opposing party to comply with subsection (4) may
 6 apply to the court for an order awarding appropriate sanctions.

7 (6) In any private action arising under this part, the plaintiff has the burden of proving that the act
 8 or omission of the defendant alleged to violate this title caused the loss for which the plaintiff seeks to
 9 recover damages.

10 (7) AS USED IN [SECTIONS 1 THROUGH 9], "PRIVATE ACTION ARISING UNDER THIS PART"
 11 MEANS AN ACTION AGAINST A PERSON REFERRED TO IN [SECTION 5(2)].

12

13 NEW SECTION. **Section 2. Sanctions.** (1) In any private action arising under this part, upon final
 14 adjudication of the action, the court shall include in the record specific findings regarding compliance by
 15 each party and each attorney representing any party with each requirement of Rule 11 of the Montana
 16 Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

17 (2) If the court makes a finding under subsection (1) that a party or attorney violated any
 18 requirement of Rule 11 of the Montana Rules of Civil Procedure as to any complaint, responsive pleading,
 19 or dispositive motion, the court shall impose sanctions on the party or attorney in accordance with Rule
 20 11. Prior to making a finding that any party or attorney has violated Rule 11, the court shall give the party
 21 or attorney notice and an opportunity to respond.

22 (3) (a) Subject to subsections (3)(b) and (3)(c), for the purposes of subsection (2), the court shall
 23 adopt a presumption that the appropriate sanction:

24 (i) for failure of any responsive pleading or dispositive motion to comply with any requirement of
 25 Rule 11 is an award to the opposing party of the reasonable attorney fees and other expenses incurred as
 26 a direct result of the violation; and

27 (ii) for substantial failure of any complaint to comply with any requirement of Rule 11 is an award
 28 to the opposing party of the reasonable attorney fees and other expenses incurred in the action.

29 (b) The presumption described in subsection (3)(a) may be rebutted only upon proof by the party
 30 or attorney against whom sanctions are to be imposed that:

1 (i) the award of attorney fees and other expenses will impose an unreasonable burden on that party
2 or attorney and would be unjust and the failure to make an award would not impose a greater burden on
3 the party in whose favor sanctions are to be imposed; or

4 (ii) the violation of Rule 11 was de minimis.

5 (c) If the party or attorney against whom sanctions are to be imposed meets its burden under
6 subsection (3)(b), the court shall award the sanctions that the court considers appropriate pursuant to Rule
7 11.

8
9 **NEW SECTION. Section 3. Defendant's right to written interrogatories.** In any private action
10 arising under this part in which the plaintiff may recover money damages, the court shall, when requested
11 by a defendant, submit to the jury a written interrogatory on the issue of each defendant's state of mind
12 at the time the alleged violation occurred.

13
14 **NEW SECTION. Section 4. Limitation on damages.** (1) The provisions of this section limit any
15 damages otherwise available under this part.

16 (2) Except as provided in subsection (3), in any private action arising under this part in which the
17 plaintiff seeks to establish damages by reference to the market price of a security that is traded in a national
18 securities market, the award of damages to the plaintiff may not exceed the difference between the
19 purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean
20 trading price of that security during the 90-day period beginning on the date on which the information
21 correcting the misstatement or omission that is the basis for the action is disseminated to the market.

22 (3) In any private action arising under this part in which the plaintiff seeks to establish damages by
23 reference to the market price of a security **THAT IS TRADED ON A NATIONAL SECURITIES MARKET**, if
24 the plaintiff sells or repurchases the subject security prior to the expiration of the 90-day period described
25 in subsection (2), the plaintiff's damages may not exceed the difference between the purchase or sale price
26 paid or received, as appropriate, by the plaintiff for the security and the mean trading price of the security
27 during the period beginning immediately after dissemination of information correcting the misstatement or
28 omission and ending on the date on which the plaintiff sells or repurchases the security.

29 (4) For purposes of this section, the mean trading price of a security must be an average of the daily
30 trading price of that security, determined as of the close of the market each day during the 90-day period

1 referred to in subsection (2).

2
3 **NEW SECTION. Section 5. Applicability of safe harbor for forward-looking statements.** (1) For

4 the purposes of this section, the following definitions apply:

5 (a) "Forward-looking statement" means:

6 (i) a statement containing a projection of revenue; income per share, including income loss;
7 earnings per share, including earnings loss; capital expenditures; dividends; capital structure; or other
8 financial items;

9 (ii) a statement of the plans and objectives of management for future operations, including plans
10 or objectives relating to the products or services of the issuer;

11 (iii) a statement of future economic performance, including any statement contained in a discussion
12 and analysis of financial condition by the management or in the results of operations;

13 (iv) any statement of the assumptions underlying or relating to any statement described in
14 subsection (1)(a)(i), (1)(a)(ii), or (1)(a)(iii);

15 (v) any report issued by an outside reviewer retained by an issuer, to the extent that the report
16 assesses a forward-looking statement made by the issuer; or

17 (vi) a statement containing a projection or estimate of other items as may be specified by rule or
18 regulation of the commissioner.

19 (b) "Going private transaction" has the meaning given that term under the rules or regulations of
20 the United States securities and exchange commission issued pursuant to section 13(e) of the Securities
21 Exchange Act of 1934, 15 U.S.C. 78m(e).

22 (c) "Investment company" has the same meaning as in section 3(a) of the federal Investment
23 Company Act of 1940, 15 U.S.C. 80a-3(a).

24 **(D) (I) "ISSUER" HAS THE MEANING PROVIDED IN 30-10-103.**

25 **(II) THE TERM DOES NOT INCLUDE A BROKER-DEALER AS DEFINED IN 30-10-103.**

26 ~~(E)~~ (E) "Penny stock" has the same meaning as in section 3(a)(51) of the Securities Exchange Act
27 of 1934, 15 U.S.C. 78c(a)(51), and the rules and regulations or orders issued pursuant to that section.

28 ~~(F)~~ (F) "Person acting on behalf of an issuer" means an officer, director, or employee of the issuer.

29 ~~(G)~~ (G) The terms "blank check company", "direct participation investment program", "executive
30 officer of an entity", "limited liability company", "partnership", and "rollup transaction" have the meanings

1 given those terms by rule or regulation of the commissioner.

2 (2) This section applies only to a forward-looking statement made by:

3 (a) an issuer that, at the time that the statement is made, is subject to the reporting requirements
4 of section (13)(a) or (15)(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(a) or 15 U.S.C.
5 78o(d);

6 (b) a person acting on behalf of an issuer subject to the provisions of subsection (2)(a);

7 (c) an outside reviewer retained by an issuer subject to the provisions of subsection (2)(a) making
8 a statement on behalf of that issuer; or

9 (d) an underwriter, with respect to information provided by an issuer subject to the provisions of
10 subsection (2)(a) or information derived from information provided by that issuer.

11 (3) Except to the extent otherwise specifically provided by rule, regulation, or order of the
12 securities and exchange commission, this section does not apply to a forward-looking statement:

13 (a) that is made with respect to the business or operations of the issuer, if the issuer:

14 (i) during the 3-year period preceding the date on which the statement was first made:

15 (A) was convicted of any felony or misdemeanor described in section 15(b)(4)(B)(i) through (iv) of
16 the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(4)(B), or was convicted under 30-10-306;

17 (B) has been made the subject of a judicial or administrative decree or order arising out of a
18 governmental action that:

19 (i) prohibits future violations of the antifraud provisions of state or federal securities laws;

20 (ii) requires that the issuer cease and desist from violating the antifraud provisions of state or federal
21 securities laws; or

22 (iii) determines that the issuer violated the antifraud provisions of state or federal securities laws;

23 (ii) makes the forward-looking statement in connection with an offering of securities by a blank
24 check company;

25 (iii) issues penny stock;

26 (iv) makes the forward-looking statement in connection with a rollup transaction; or

27 (v) makes the forward-looking statement in connection with a going private transaction; or

28 (b) that is:

29 (i) included in a financial statement prepared in accordance with generally accepted accounting
30 principles;

- 1 (ii) contained in a registration statement of, or otherwise issued by, an investment company;
- 2 (iii) made in connection with a tender offer;
- 3 (iv) made in connection with an initial public offering;
- 4 (v) made in connection with an offering by, or relating to the operations of, a partnership, a limited
- 5 liability company, or a direct participation investment program; or
- 6 (vi) made in a disclosure of beneficial ownership in a report required to be filed with the United
- 7 States securities and exchange commission pursuant to section 13(d) of the Securities Exchange Act of
- 8 1934, 15 U.S.C. 78m(d).

9 (4) (A) Except as provided in subsection (3), in any private action arising under this part that is

10 based on an untrue statement of a material fact or omission of a material fact necessary to make the

11 statement not misleading, a person referred to in subsection (2) is not liable with respect to any

12 forward-looking statement, whether written or oral, if and to the extent that:

13 ~~(a)~~(I) the forward-looking statement is identified as a forward-looking statement and is accompanied

14 by meaningful cautionary statements identifying important factors that could cause actual results to differ

15 materially from those in the forward-looking statement or is immaterial; or

16 ~~(b)~~(II) the plaintiff fails to prove that the forward-looking statement:

17 ~~(i)~~(A) if made by a natural person, was made with actual knowledge by that person that the

18 statement was false or misleading; or

19 ~~(ii)~~(B) if made by a business entity, was made by or with the approval of an executive officer of that

20 entity and made or approved by that officer with actual knowledge by that officer that the statement was

21 false or misleading.

22 ~~(5)~~(B) In the case of an oral forward-looking statement made by an issuer that is subject to the

23 reporting requirements of section 13(a) or section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C.

24 78m(a) or 15 U.S.C. 78o(d) or by a person acting on behalf of the issuer, the requirement in subsection

25 (4)(a) must be considered satisfied under the following circumstances:

26 ~~(a)~~(I) if the oral forward-looking statement is accompanied by a cautionary statement that the

27 particular oral statement is a forward-looking statement and that the actual results could differ materially

28 from those projected in the forward-looking statement; and

29 ~~(b)~~ ~~(i)~~(II) if the oral forward-looking statement is accompanied by an oral statement that additional

30 information concerning factors that could cause actual results to differ materially from those in the

1 forward-looking statement is contained in a readily available written document or portion of the written
 2 document;

3 ~~##(III)~~ IF the accompanying oral statement referred to in subsection ~~(5)(b)(i)~~ (4)(B)(ii) identifies the
 4 document or portion of the document that contains the additional information about those factors relating
 5 to the forward-looking statement; and

6 ~~##(IV)~~ IF the information contained in that written document is a cautionary statement that satisfies
 7 the standard established in subsection (4)(a).

8 ~~(6)(C)~~ Any document filed with the commissioner or with the securities and exchange commission
 9 or generally disseminated must be considered to be readily available for purposes of this section.

10 (5) This section does not impose upon any person a duty to update a forward-looking statement.

11 ~~(7)(6)~~ On any motion to dismiss based on subsection (4)(a), the court shall consider:

- 12 (a) any statement cited in the complaint; and
- 13 (b) any cautionary statement accompanying the forward-looking statement that is not subject to
 14 material dispute and that is cited by the defendant.

15 ~~(8)(7)~~ In any private action arising under this part, the court shall stay discovery, other than
 16 discovery that is specifically directed to the applicability of the exemption provided for in this section,
 17 during the pendency of any motion by a defendant for summary judgment that is based on the grounds
 18 that:

- 19 (a) the statement or omission upon which the complaint is based is a forward-looking statement
 20 within the meaning of this section; and
- 21 (b) the exemption provided for in this section precludes a claim for relief.

22
 23 NEW SECTION. Section 6. Prohibition of referral fees. A broker, dealer, or person associated with
 24 a broker or dealer, may not solicit or accept, directly or indirectly, remuneration for assisting an attorney
 25 in obtaining the representation of any person in any private action under this part or under the Securities
 26 Act of 1933, 15 U.S.C. 77a, et seq.

27
 28 ~~NEW SECTION. Section 7. Prohibition of attorney fees from disgorgement funds.~~ Except as
 29 otherwise ordered by the court upon motion by the commissioner or, in the case of an administrative
 30 action, as otherwise ordered by the commissioner, funds disgorged as the result of an action brought by

~~the commissioner or as a result of any administrative action may not be distributed as payment for attorney fees or expenses incurred by private parties seeking distribution of the disgorged funds.~~

NEW SECTION. Section 7. Prosecution of persons aiding violations. For purposes of any action brought by the commissioner under 30-10-304, 30-10-305, or 30-10-306, for violations of 30-10-301 through 30-10-303, any person that knowingly provides substantial assistance to another person in violation of a provision of this part or of any rule or regulation issued under this part must be considered to be in violation of that provision to the same extent as the person to whom the assistance is provided.

NEW SECTION. Section 8. Loss causation. In any PRIVATE action arising under this part, if any portion or all of the amount recoverable represents other than the depreciation in value of the subject security resulting from a part of the prospectus or oral communication not being true or omitting to state a material fact required to be stated in the prospectus or oral communication or necessary to make the statement not misleading, then that portion or amount is not recoverable with respect to the liability of that person.

~~**NEW SECTION. Section 10. Proportional liability.** (1) For purposes of this section, the following definitions apply:~~

~~(a) "Covered person" means:~~

~~(i) a defendant in any private action arising under this title; or~~

~~(ii) a defendant in any private action arising under section 11 of the Securities Act of 1933, 15 U.S.C. 77k, who is an outside director of the issuer of the securities that are the subject of the action.~~

~~(b) "Outside director" has the meaning given that term by rule or regulation of the securities and exchange commission.~~

~~(2) For the purposes of this section, a covered person knowingly commits a violation of Montana securities laws:~~

~~(a) with respect to an action that is based on an untrue statement of material fact or omission of a material fact necessary to make the statement not misleading, if:~~

~~(i) that covered person makes an untrue statement of a material fact, with actual knowledge that the representation is false or omits a fact necessary in order to make the statement made not misleading~~

1 ~~with actual knowledge that as a result of the omission, one of the material representations of the covered~~
2 ~~person is false;~~

3 ~~(ii) persons are likely to reasonably rely on that misrepresentation or omission; and~~

4 ~~(iii) with respect to an action that is based on any conduct that is not described in subsection~~
5 ~~(2)(a)(i), the covered person engages in that conduct with actual knowledge of the facts and circumstances~~
6 ~~that make the conduct of that covered person a violation of the securities laws.~~

7 ~~(3) Reckless conduct by a covered person may not be construed to constitute a knowing~~
8 ~~commission of a violation of the securities laws by that covered person.~~

9 ~~(4) This section may not be construed to create, affect, or in any manner modify the standard for~~
10 ~~liability associated with any action arising under federal securities laws or Montana securities laws.~~

11 ~~(5) Any covered person against whom a final judgment is entered in a private action is liable for~~
12 ~~damages jointly and severally only if the trier of fact specifically determines that the covered person~~
13 ~~knowingly committed a violation of federal securities laws or Montana securities laws.~~

14 ~~(6) Except as provided in subsection (5), a covered person against whom a final judgment is entered~~
15 ~~in a private action is liable solely for the portion of the judgment that corresponds to the percentage of~~
16 ~~responsibility of that covered person as determined under subsection (8).~~

17 ~~(7) In any case in which a contractual relationship permits, a covered person that prevails in any~~
18 ~~private action may recover the attorney fees and costs of that covered person in connection with the~~
19 ~~action.~~

20 ~~(8) In any private action, the court shall instruct the jury to answer special interrogatories or, if~~
21 ~~there is not a jury, shall make findings with respect to each covered person and each of the other persons~~
22 ~~claimed by any of the parties to have caused or contributed to the loss incurred by the plaintiff, including~~
23 ~~persons who have entered into settlements with the plaintiff or plaintiffs, concerning:~~

24 ~~(a) whether the person violated federal securities laws or Montana securities laws;~~

25 ~~(b) the percentage of responsibility of the person, measured as a percentage of the total fault of~~
26 ~~all persons who caused or contributed to the loss incurred by the plaintiff; and~~

27 ~~(c) whether the person knowingly committed a violation of the securities laws.~~

28 ~~(9) The responses to interrogatories or findings, as appropriate, under subsection (8) must specify~~
29 ~~the total amount of damages that the plaintiff is entitled to recover and the percentage of responsibility of~~
30 ~~each covered person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs.~~

1 ~~(10) In determining the percentage of responsibility under this section, the trier of fact shall~~
2 ~~consider:~~

3 ~~(a) the nature of the conduct of each covered person found to have caused or contributed to the~~
4 ~~loss incurred by the plaintiff or plaintiffs; and~~

5 ~~(b) the nature and extent of the causal relationship between the conduct of each covered person~~
6 ~~and the damages incurred by the plaintiff or plaintiffs.~~

7 ~~(11) Notwithstanding subsection (9), upon a motion that is made not later than 6 months after a~~
8 ~~final judgment is entered in any private action, if the court determines that all or part of the share of the~~
9 ~~judgment of the covered person is not collectible against that covered person and is also not collectible~~
10 ~~against a covered person described in subsection (5), each covered person described in subsection (5) is~~
11 ~~liable for the uncollectible share as follows:~~

12 ~~(a) Each covered person is jointly and severally liable for the uncollectible share if the plaintiff~~
13 ~~establishes that:~~

14 ~~(i) the plaintiff is an individual whose recoverable damages under the final judgment are equal to~~
15 ~~more than 10% of the net worth of the plaintiff; and~~

16 ~~(ii) the net worth of the plaintiff is equal to less than \$200,000.~~

17 ~~(b) With respect to any plaintiff not described in subsection (11)(a), each covered person is liable~~
18 ~~for the uncollectible share in proportion to the percentage of responsibility of that covered person, except~~
19 ~~that the total liability of a covered person under this subsection (11)(b) may not exceed 50% of the~~
20 ~~proportionate share of that covered person, as determined under subsection (9).~~

21 ~~(12) For purposes of subsection (11) net worth must be determined as of the date immediately~~
22 ~~preceding the date of the purchase or sale, as applicable, by the plaintiff of the security that is the subject~~
23 ~~of the action and must be equal to the fair market value of assets, minus liabilities, including the net value~~
24 ~~of the investments of the plaintiff in real and personal property, including personal residences.~~

25 ~~(13) The total payments required pursuant to subsection (11) may not exceed the amount of the~~
26 ~~uncollectible share.~~

27 ~~(14) A covered person against whom judgment is not collectible is subject to contribution and to~~
28 ~~any continuing liability to the plaintiff on the judgment.~~

29 ~~(15) To the extent that a covered person is required to make an additional payment pursuant to~~
30 ~~subsection (11), that covered person may recover contribution.~~

1 ~~(a) from the covered person originally liable to make the payment;~~
 2 ~~(b) from any covered person liable jointly and severally pursuant to subsection (5);~~
 3 ~~(c) from any covered person held proportionately liable pursuant to this section who is liable to~~
 4 ~~make the same payment and has paid less than that person's proportionate share of that payment; or~~
 5 ~~(d) from any other person responsible for the conduct giving rise to the payment that would have~~
 6 ~~been liable to make the same payment.~~

7 ~~(16) The standard for allocation of damages under subsections (5) and (6) and the procedure for~~
 8 ~~reallocation of uncollectible shares under subsection (11) may not be disclosed to members of the jury.~~

9 ~~(17) (a) A covered person who settles any private action at any time before a final verdict or~~
 10 ~~judgment must be discharged from all claims for contribution brought by other persons. Upon entry of the~~
 11 ~~settlement by the court, the court shall enter a bar order constituting the final discharge of all obligations~~
 12 ~~to the plaintiff of the settling covered person arising out of the action. The order must bar all future claims~~
 13 ~~for contribution arising out of the action:~~

14 ~~(i) by any person against the settling covered person; and~~

15 ~~(ii) by the settling covered person against any person, other than a person whose liability has been~~
 16 ~~extinguished by the settlement of the settling covered person.~~

17 ~~(b) If a covered person enters into a settlement with the plaintiff prior to final verdict or judgment,~~
 18 ~~the verdict or judgment must be reduced by the greater of:~~

19 ~~(i) an amount that corresponds to the percentage of responsibility of that covered person; or~~

20 ~~(ii) the amount paid to the plaintiff by that covered person.~~

21 ~~(18) A covered person who becomes jointly and severally liable for damages in any private action~~
 22 ~~may recover contribution from any other person who, if joined in the original action, would have been liable~~
 23 ~~for the same damages. A claim for contribution must be determined based on the percentage of~~
 24 ~~responsibility of the claimant and of each person against whom a claim for contribution is made.~~

25 ~~(19) In any private action determining liability, an action for contribution must be brought not later~~
 26 ~~than 6 months after the entry of a final, nonappealable judgment in the action, except that an action for~~
 27 ~~contribution brought by a covered person who was required to make an additional payment pursuant to~~
 28 ~~subsection (11) may be brought not later than 6 months after the date on which the payment was made.~~

29
 30 **NEW SECTION. Section 9. Construction.** [Sections 1 through ~~40~~ 8] may not be considered to

1 create or ratify any implied private right of action or to prevent the commissioner, by rule or regulation,
2 from restricting or otherwise regulating private actions under Montana securities laws.

3
4 ~~Section 12. Section 27-1-702, MCA, is amended to read:~~

5 ~~"27-1-702. Comparative negligence — extent to which contributory negligence bars recovery in~~
6 ~~action for damages. Contributory~~ Except as provided in (section 10), contributory negligence shall may not
7 ~~bar recovery in an action by any person or his~~ the person's ~~legal representative to recover damages for~~
8 ~~negligence resulting in the death of a person or injury to a person or property if such the negligence was~~
9 ~~not greater than the negligence of the person or the combined negligence of all persons against whom~~
10 ~~recovery is sought, but any damages allowed shall must be diminished in the proportion to the amount of~~
11 ~~negligence attributable to the person recovering."~~

12
13 ~~Section 13. Section 27-1-703, MCA, is amended to read:~~

14 ~~"27-1-703. Multiple defendants — determination of liability. (1) Except as provided in subsections~~
15 ~~(2) and (3), whenever the negligence of a party in any action is an issue, each party against whom recovery~~
16 ~~may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has~~
17 ~~the right of contribution from any other person whose negligence may have contributed as a proximate~~
18 ~~cause to the claimant's injury complained of.~~

19 ~~(2) A party whose negligence is determined to be 50% or less of the combined negligence of all~~
20 ~~persons described in subsection (4) is severally liable only and is responsible only for the amount of~~
21 ~~negligence attributable to that party, except as provided in subsection (3). The remaining parties are jointly~~
22 ~~and severally liable for the total loss the amount attributable to the claimant.~~

23 ~~(3) A party may be jointly liable for all damages caused by the negligence of another if both acted~~
24 ~~in concert in contributing to the claimant's damages or if one party acted as an agent of the other.~~

25 ~~(4) On motion of any party against whom a claim is asserted for negligence resulting in death or~~
26 ~~injury to person or property, any other person whose negligence may have contributed as a proximate~~
27 ~~cause to the claimant's injury complained of may be joined as an additional party to the action. For~~
28 ~~purposes of determining the percentage of liability attributable to each party whose action contributed to~~
29 ~~the claimant's injury complained of, the trier of fact shall consider the negligence of the claimant, injured~~
30 ~~person, defendants, and third party defendants. The liability of nonparties, including persons released from~~

1 liability by the claimant and persons immune from liability to the claimant, must also be considered by the
2 trier of fact, as provided in subsection (6). The trier of fact shall apportion the percentage of negligence of
3 all persons listed in this subsection. Contribution must be proportional to the liability of the parties against
4 whom recovery is allowed. Nothing contained in this section makes any party indispensable pursuant to
5 Rule 19, Montana Rules of Civil Procedure.

6 (5) If for any reason all or part of the contribution from a party liable for contribution cannot be
7 obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the
8 noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution
9 from the noncontributing party. A party found to be 50% or less negligent for the injury complained of is
10 liable for contribution under this section only up to the percentage of negligence attributed to that party.

11 (6) (a) In an action based on negligence, a defendant may assert as a defense that the damages
12 of the claimant were caused in full or in part by a nonparty, which may be referred to as a nonparty
13 defense.

14 (b) In determining the percentage of liability attributable to persons who are parties to the action,
15 the trier of fact shall consider the negligence of nonparties, including persons released from liability by the
16 claimant and persons immune from liability to the claimant, if a nonparty defense is properly asserted in
17 accordance with this subsection (6). A finding of negligence of a nonparty is not a presumptive or
18 conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty.

19 (c) The burden of proof as to a nonparty's liability is on the defendant or defendants who
20 affirmatively plead the nonparty defense, but this subsection (6) does not relieve the claimant of the burden
21 of proving that negligence on the part of the defendant or defendants contributed as a proximate cause to
22 the injury of the claimant or alter other proof requirements.

23 (d) A nonparty defense must be affirmatively pleaded as a part of the answer. A defendant who
24 gains actual knowledge of a nonparty defense after the filing of that defendant's answer may plead the
25 defense with reasonable promptness, as determined by the trial court, in a manner that is consistent with:

26 (i) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense;
27 (ii) giving the claimant a reasonable opportunity to defend against a nonparty defense; and
28 (iii) giving the claimant a reasonable opportunity, if appropriate, to add the nonparty as an additional
29 defendant to the action before the expiration of the period of limitation applicable to the claim. However,
30 this subsection (iii) does not extend the period of limitation or revive the action if the period of limitation

1 ~~has expired.~~

2 ~~(e) If a defendant asserts a nonparty defense, the defendant shall notify each nonparty who the~~
3 ~~defendant alleges caused the claimant's injuries, in whole or in part. Notification must be made by mailing~~
4 ~~the defendant's answer to each nonparty at the nonparty's last known address by certified mail, return~~
5 ~~receipt requested.~~

6 ~~(7) The provisions of this section do not apply to [section 10]."~~

7

8 **NEW SECTION. Section 10. Codification instruction.** [Sections 1 through ~~44~~ 9] are intended to
9 be codified as an integral part of Title 30, chapter 10, part 3, and the provisions of Title 30, chapter 10,
10 part 3, apply to [sections 1 through ~~44~~ 9].

11

12 **NEW SECTION. SECTION 11. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID**
13 **PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT]**
14 **IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID**
15 **APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.**

16

17 **NEW SECTION. Section 12. Effective date.** [This act] is effective on passage and approval.

18

-END-