

Union Calendar No. 170

113TH CONGRESS
1ST SESSION

H. R. 1493

[Report No. 113-230]

To impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 11, 2013

Mr. COLLINS of Georgia (for himself, Mr. WESTMORELAND, Mr. FRANKS of Arizona, Mr. BISHOP of Utah, Mr. CRAMER, Mr. HOLDING, Mrs. ELLMERS, Mr. YOHO, Mr. STUTZMAN, Mr. SOUTHERLAND, Mr. PERRY, Mr. BACHUS, Mr. COBLE, Mr. GARDNER, Mr. GRAVES of Georgia, Mr. MEADOWS, Mr. GOWDY, Mr. GOHMERT, Mr. BENTIVOLIO, Mr. WENSTRUP, Mr. PRICE of Georgia, Mr. GINGREY of Georgia, Mr. BROUN of Georgia, Mr. DAINES, and Mr. KINGSTON) introduced the following bill; which was referred to the Committee on the Judiciary

SEPTEMBER 26, 2013

Additional sponsors: Mr. FARENTHOLD, Mr. LATTA, Mr. ROKITA, Mrs. CAPITO, Mr. ISSA, Mr. NUNNELEE, and Mr. SMITH of Missouri

SEPTEMBER 26, 2013

Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

A BILL

To impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Sunshine for Regu-
5 latory Decrees and Settlements Act of 2013”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act—

8 (1) the terms “agency” and “agency action”
9 have the meanings given those terms under section
10 551 of title 5, United States Code;

11 (2) the term “covered civil action” means a civil
12 action—

13 (A) seeking to compel agency action;

14 (B) alleging that the agency is unlawfully
15 withholding or unreasonably delaying an agency
16 action relating to a regulatory action that would
17 affect the rights of—

18 (i) private persons other than the per-
19 son bringing the action; or

20 (ii) a State, local, or tribal govern-
21 ment; and

22 (C) brought under—

23 (i) chapter 7 of title 5, United States
24 Code; or

1 (ii) any other statute authorizing such
2 an action;

3 (3) the term “covered consent decree” means—

4 (A) a consent decree entered into in a cov-
5 ered civil action; and

6 (B) any other consent decree that requires
7 agency action relating to a regulatory action
8 that affects the rights of—

9 (i) private persons other than the per-
10 son bringing the action; or

11 (ii) a State, local, or tribal govern-
12 ment;

13 (4) the term “covered consent decree or settle-
14 ment agreement” means a covered consent decree
15 and a covered settlement agreement; and

16 (5) the term “covered settlement agreement”
17 means—

18 (A) a settlement agreement entered into in
19 a covered civil action; and

20 (B) any other settlement agreement that
21 requires agency action relating to a regulatory
22 action that affects the rights of—

23 (i) private persons other than the per-
24 son bringing the action; or

1 (ii) a State, local, or tribal govern-
2 ment.

3 **SEC. 3. CONSENT DECREE AND SETTLEMENT REFORM.**

4 (a) PLEADINGS AND PRELIMINARY MATTERS.—

5 (1) IN GENERAL.—In any covered civil action,
6 the agency against which the covered civil action is
7 brought shall publish the notice of intent to sue and
8 the complaint in a readily accessible manner, includ-
9 ing by making the notice of intent to sue and the
10 complaint available online not later than 15 days
11 after receiving service of the notice of intent to sue
12 or complaint, respectively.

13 (2) ENTRY OF A COVERED CONSENT DECREE
14 OR SETTLEMENT AGREEMENT.—A party may not
15 make a motion for entry of a covered consent decree
16 or to dismiss a civil action pursuant to a covered set-
17 tlement agreement until after the end of proceedings
18 in accordance with paragraph (1) and subpara-
19 graphs (A) and (B) of paragraph (2) of subsection
20 (d) or subsection (d)(3)(A), whichever is later.

21 (b) INTERVENTION.—

22 (1) REBUTTABLE PRESUMPTION.—In consid-
23 ering a motion to intervene in a covered civil action
24 or a civil action in which a covered consent decree
25 or settlement agreement has been proposed that is

1 filed by a person who alleges that the agency action
2 in dispute would affect the person, the court shall
3 presume, subject to rebuttal, that the interests of
4 the person would not be represented adequately by
5 the existing parties to the action.

6 (2) STATE, LOCAL, AND TRIBAL GOVERN-
7 MENTS.—In considering a motion to intervene in a
8 covered civil action or a civil action in which a cov-
9 ered consent decree or settlement agreement has
10 been proposed that is filed by a State, local, or tribal
11 government, the court shall take due account of
12 whether the movant—

13 (A) administers jointly with an agency that
14 is a defendant in the action the statutory provi-
15 sions that give rise to the regulatory action to
16 which the action relates; or

17 (B) administers an authority under State,
18 local, or tribal law that would be preempted by
19 the regulatory action to which the action re-
20 lates.

21 (c) SETTLEMENT NEGOTIATIONS.—Efforts to settle
22 a covered civil action or otherwise reach an agreement on
23 a covered consent decree or settlement agreement shall—

24 (1) be conducted pursuant to the mediation or
25 alternative dispute resolution program of the court

1 or by a district judge other than the presiding judge,
2 magistrate judge, or special master, as determined
3 appropriate by the presiding judge; and

4 (2) include any party that intervenes in the ac-
5 tion.

6 (d) PUBLICATION OF AND COMMENT ON COVERED
7 CONSENT DECREES OR SETTLEMENT AGREEMENTS.—

8 (1) IN GENERAL.—Not later than 60 days be-
9 fore the date on which a covered consent decree or
10 settlement agreement is filed with a court, the agen-
11 cy seeking to enter the covered consent decree or
12 settlement agreement shall publish in the Federal
13 Register and online—

14 (A) the proposed covered consent decree or
15 settlement agreement; and

16 (B) a statement providing—

17 (i) the statutory basis for the covered
18 consent decree or settlement agreement;
19 and

20 (ii) a description of the terms of the
21 covered consent decree or settlement agree-
22 ment, including whether it provides for the
23 award of attorneys' fees or costs and, if so,
24 the basis for including the award.

25 (2) PUBLIC COMMENT.—

1 (A) IN GENERAL.—An agency seeking to
2 enter a covered consent decree or settlement
3 agreement shall accept public comment during
4 the period described in paragraph (1) on any
5 issue relating to the matters alleged in the com-
6 plaint in the applicable civil action or addressed
7 or affected by the proposed covered consent de-
8 cree or settlement agreement.

9 (B) RESPONSE TO COMMENTS.—An agency
10 shall respond to any comment received under
11 subparagraph (A).

12 (C) SUBMISSIONS TO COURT.—When mov-
13 ing that the court enter a proposed covered con-
14 sent decree or settlement agreement or for dis-
15 missal pursuant to a proposed covered consent
16 decree or settlement agreement, an agency
17 shall—

18 (i) inform the court of the statutory
19 basis for the proposed covered consent de-
20 cree or settlement agreement and its
21 terms;

22 (ii) submit to the court a summary of
23 the comments received under subparagraph
24 (A) and the response of the agency to the
25 comments;

1 (iii) submit to the court a certified
2 index of the administrative record of the
3 notice and comment proceeding; and

4 (iv) make the administrative record
5 described in clause (iii) fully accessible to
6 the court.

7 (D) INCLUSION IN RECORD.—The court
8 shall include in the court record for a civil ac-
9 tion the certified index of the administrative
10 record submitted by an agency under subpara-
11 graph (C)(iii) and any documents listed in the
12 index which any party or amicus curiae appear-
13 ing before the court in the action submits to the
14 court.

15 (3) PUBLIC HEARINGS PERMITTED.—

16 (A) IN GENERAL.—After providing notice
17 in the Federal Register and online, an agency
18 may hold a public hearing regarding whether to
19 enter into a proposed covered consent decree or
20 settlement agreement.

21 (B) RECORD.—If an agency holds a public
22 hearing under subparagraph (A)—

23 (i) the agency shall—

24 (I) submit to the court a sum-
25 mary of the proceedings;

- 1 (II) submit to the court a cer-
2 tified index of the hearing record; and
3 (III) provide access to the hear-
4 ing record to the court; and
5 (ii) the full hearing record shall be in-
6 cluded in the court record.

7 (4) MANDATORY DEADLINES.—If a proposed
8 covered consent decree or settlement agreement re-
9 quires an agency action by a date certain, the agen-
10 cy shall, when moving for entry of the covered con-
11 sent decree or settlement agreement or dismissal
12 based on the covered consent decree or settlement
13 agreement, inform the court of—

14 (A) any required regulatory action the
15 agency has not taken that the covered consent
16 decree or settlement agreement does not ad-
17 dress;

18 (B) how the covered consent decree or set-
19 tlement agreement, if approved, would affect
20 the discharge of the duties described in sub-
21 paragraph (A); and

22 (C) why the effects of the covered consent
23 decree or settlement agreement on the manner
24 in which the agency discharges its duties is in
25 the public interest.

1 (e) SUBMISSION BY THE GOVERNMENT.—

2 (1) IN GENERAL.—For any proposed covered
3 consent decree or settlement agreement that con-
4 tains a term described in paragraph (2), the Attor-
5 ney General or, if the matter is being litigated inde-
6 pendently by an agency, the head of the agency shall
7 submit to the court a certification that the Attorney
8 General or head of the agency approves the proposed
9 covered consent decree or settlement agreement. The
10 Attorney General or head of the agency shall person-
11 ally sign any certification submitted under this para-
12 graph.

13 (2) TERMS.—A term described in this para-
14 graph is—

15 (A) in the case of a covered consent decree,
16 a term that—

17 (i) converts into a nondiscretionary
18 duty a discretionary authority of an agency
19 to propose, promulgate, revise, or amend
20 regulations;

21 (ii) commits an agency to expend
22 funds that have not been appropriated and
23 that have not been budgeted for the regu-
24 latory action in question;

1 (iii) commits an agency to seek a par-
2 ticular appropriation or budget authoriza-
3 tion;

4 (iv) divests an agency of discretion
5 committed to the agency by statute or the
6 Constitution of the United States, without
7 regard to whether the discretion was
8 granted to respond to changing cir-
9 cumstances, to make policy or managerial
10 choices, or to protect the rights of third
11 parties; or

12 (v) otherwise affords relief that the
13 court could not enter under its own au-
14 thority upon a final judgment in the civil
15 action; or

16 (B) in the case of a covered settlement
17 agreement, a term—

18 (i) that provides a remedy for a fail-
19 ure by the agency to comply with the
20 terms of the covered settlement agreement
21 other than the revival of the civil action re-
22 solved by the covered settlement agree-
23 ment; and

24 (ii) that—

1 (I) interferes with the authority
2 of an agency to revise, amend, or
3 issue rules under the procedures set
4 forth in chapter 5 of title 5, United
5 States Code, or any other statute or
6 Executive order prescribing rule-
7 making procedures for a rulemaking
8 that is the subject of the covered set-
9 tlement agreement;

10 (II) commits the agency to ex-
11 pend funds that have not been appro-
12 priated and that have not been budg-
13 eted for the regulatory action in ques-
14 tion; or

15 (III) for such a covered settle-
16 ment agreement that commits the
17 agency to exercise in a particular way
18 discretion which was committed to the
19 agency by statute or the Constitution
20 of the United States to respond to
21 changing circumstances, to make pol-
22 icy or managerial choices, or to pro-
23 tect the rights of third parties.

24 (f) REVIEW BY COURT.—

1 (1) AMICUS.—A court considering a proposed
2 covered consent decree or settlement agreement shall
3 presume, subject to rebuttal, that it is proper to
4 allow amicus participation relating to the covered
5 consent decree or settlement agreement by any per-
6 son who filed public comments or participated in a
7 public hearing on the covered consent decree or set-
8 tlement agreement under paragraph (2) or (3) of
9 subsection (d).

10 (2) REVIEW OF DEADLINES.—

11 (A) PROPOSED COVERED CONSENT DE-
12 CREES.—For a proposed covered consent de-
13 cree, a court shall not approve the covered con-
14 sent decree unless the proposed covered consent
15 decree allows sufficient time and incorporates
16 adequate procedures for the agency to comply
17 with chapter 5 of title 5, United States Code,
18 and other applicable statutes that govern rule-
19 making and, unless contrary to the public inter-
20 est, the provisions of any Executive order that
21 governs rulemaking.

22 (B) PROPOSED COVERED SETTLEMENT
23 AGREEMENTS.—For a proposed covered settle-
24 ment agreement, a court shall ensure that the
25 covered settlement agreement allows sufficient

1 time and incorporates adequate procedures for
2 the agency to comply with chapter 5 of title 5,
3 United States Code, and other applicable stat-
4 utes that govern rulemaking and, unless con-
5 trary to the public interest, the provisions of
6 any Executive order that governs rulemaking.

7 (g) ANNUAL REPORTS.—Each agency shall submit to
8 Congress an annual report that, for the year covered by
9 the report, includes—

10 (1) the number, identity, and content of covered
11 civil actions brought against and covered consent de-
12 crees or settlement agreements entered against or
13 into by the agency; and

14 (2) a description of the statutory basis for—

15 (A) each covered consent decree or settle-
16 ment agreement entered against or into by the
17 agency; and

18 (B) any award of attorneys fees or costs in
19 a civil action resolved by a covered consent de-
20 cree or settlement agreement entered against or
21 into by the agency.

22 **SEC. 4. MOTIONS TO MODIFY CONSENT DECREES.**

23 If an agency moves a court to modify a covered con-
24 sent decree or settlement agreement and the basis of the
25 motion is that the terms of the covered consent decree or

1 settlement agreement are no longer fully in the public in-
2 terest due to the obligations of the agency to fulfill other
3 duties or due to changed facts and circumstances, the
4 court shall review the motion and the covered consent de-
5 cree or settlement agreement de novo.

6 **SEC. 5. EFFECTIVE DATE.**

7 This Act shall apply to—

8 (1) any covered civil action filed on or after the
9 date of enactment of this Act; and

10 (2) any covered consent decree or settlement
11 agreement proposed to a court on or after the date
12 of enactment of this Act.

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