

112TH CONGRESS
2D SESSION

S. 3382

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 SENATE OF THE UNITED STATES

JULY 12, 2012

Mr. GRASSLEY (for himself, Mr. KYL, Mr. CORNYN, Mr. LEE, Mr. PAUL, and Mr. COBURN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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 2012”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act—

1 (1) the terms “agency” and “agency action”
2 have the meanings given those terms under section
3 551 of title 5, United States Code;

4 (2) the term “covered civil action” means a civil
5 action—

6 (A) seeking to compel agency action;

7 (B) alleging that the agency is unlawfully
8 withholding or unreasonably delaying an agency
9 action relating to a regulatory action that would
10 affect the rights of—

11 (i) private persons other than the per-
12 son bringing the action; or

13 (ii) a State, local, or tribal govern-
14 ment; and

15 (C) brought under—

16 (i) chapter 7 of title 5, United States
17 Code; or

18 (ii) any other statute authorizing such
19 an action; and

20 (3) the term “covered settlement agreement”
21 means—

22 (A) a consent decree or settlement agree-
23 ment entered into in a covered civil action; and

24 (B) any other consent decree or settlement
25 agreement that requires agency action relating

1 to a regulatory action that affects the rights
2 of—

3 (i) private persons other than the per-
4 son bringing the action; or

5 (ii) a State, local, or tribal govern-
6 ment.

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

8 (a) PLEADINGS AND PRELIMINARY MATTERS.—In
9 any covered civil action—

10 (1) the agency against which the covered civil
11 action is brought shall publish the complaint in a
12 readily accessible manner, including by making the
13 complaint available online; and

14 (2) a party may not make a motion for entry
15 of a consent decree or to dismiss the covered civil ac-
16 tion pursuant to a settlement agreement until after
17 the end of the period during which a person may in-
18 tervene.

19 (b) INTERVENTION.—

20 (1) REBUTTABLE PRESUMPTION.—In consid-
21 ering a motion to intervene in a covered civil action
22 by a person who alleges that the agency action in
23 dispute would affect the person, the court shall pre-
24 sume, subject to rebuttal, that the interests of the

1 person would not be represented adequately by the
 2 existing parties to the covered civil action.

3 (2) STATE, LOCAL, AND TRIBAL GOVERN-
 4 MENTS.—In considering a motion to intervene in a
 5 covered civil action by a State, local, or tribal gov-
 6 ernment, the court shall take due account of whether
 7 the movant—

8 (A) administers jointly with an agency that
 9 is a defendant in the covered civil action the
 10 statutory provisions that give rise to the regu-
 11 latory action to which the covered civil action
 12 relates; or

13 (B) administers an authority under State,
 14 local, or tribal law that would be preempted by
 15 the regulatory action to which the covered civil
 16 action relates.

17 (c) SETTLEMENT NEGOTIATIONS.—Efforts to settle
 18 a covered civil action shall—

19 (1) be conducted pursuant to the mediation or
 20 alternative dispute resolution program of the court
 21 or by a district judge other than the presiding judge,
 22 magistrate judge, or special master, as determined
 23 appropriate by the presiding judge; and

24 (2) include any party that intervenes in the cov-
 25 ered civil action.

1 (d) PUBLICATION OF AND COMMENT ON COVERED
2 SETTLEMENT AGREEMENTS.—

3 (1) IN GENERAL.—Not later than 60 days be-
4 fore the date on which a covered settlement agree-
5 ment is filed with a court, the agency seeking to
6 enter the covered settlement agreement shall publish
7 in the Federal Register and online—

8 (A) the proposed covered settlement agree-
9 ment; and

10 (B) a statement providing—

11 (i) the statutory basis for the covered
12 settlement agreement; and

13 (ii) a description of the terms of the
14 covered settlement agreement, including
15 whether it provides for the award of attor-
16 neys' fees or costs and, if so, the basis for
17 including the award.

18 (2) PUBLIC COMMENT.—

19 (A) IN GENERAL.—An agency seeking to
20 enter a covered settlement agreement shall ac-
21 cept public comment during the period de-
22 scribed in paragraph (1) on any issue relating
23 to the matters alleged in the complaint in the
24 covered civil action or addressed or affected by
25 the proposed covered settlement agreement.

1 (B) RESPONSE TO COMMENTS.—An agency
2 shall respond to any comment received under
3 subparagraph (A).

4 (C) SUBMISSIONS TO COURT.—When mov-
5 ing that the court enter a proposed covered set-
6 tlement agreement or for dismissal pursuant to
7 a proposed covered settlement agreement, an
8 agency shall—

9 (i) inform the court of the statutory
10 basis for the proposed covered settlement
11 agreement and its terms;

12 (ii) submit to the court a summary of
13 the comments received under subparagraph
14 (A) and the response of the agency to the
15 comments;

16 (iii) submit to the court a certified
17 index of the administrative record of the
18 notice and comment proceeding; and

19 (iv) make the administrative record
20 described in clause (iii) fully accessible to
21 the court.

22 (D) INCLUSION IN RECORD.—The court
23 shall include in the court record for a civil ac-
24 tion the certified index of the administrative

1 record submitted by an agency under subpara-
2 graph (C)(iii).

3 (3) PUBLIC HEARINGS PERMITTED.—

4 (A) IN GENERAL.—After providing notice
5 in the Federal Register and online, an agency
6 may hold a public hearing regarding whether to
7 enter into a proposed covered settlement agree-
8 ment.

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

11 (i) the agency shall—

12 (I) submit to the court a sum-
13 mary of the proceedings;

14 (II) submit to the court a cer-
15 tified index of the hearing record; and

16 (III) provide access to the hear-
17 ing record to the court; and

18 (ii) the full hearing record shall be in-
19 cluded in the court record.

20 (4) MANDATORY DEADLINES.—If a proposed
21 covered settlement agreement requires an agency ac-
22 tion by a date certain, the agency shall, when mov-
23 ing for entry of the covered settlement agreement or
24 dismissal based on the covered settlement agree-
25 ment, inform the court of—

1 (A) any required regulatory action the
 2 agency has not taken that the covered settle-
 3 ment agreement does not address;

4 (B) how the covered settlement agreement,
 5 if approved, would affect the discharge of the
 6 duties described in subparagraph (A); and

7 (C) why the effects of the covered settle-
 8 ment agreement on the manner in which the
 9 agency discharges its duties is in the public in-
 10 terest.

11 (e) SUBMISSION BY THE GOVERNMENT.—

12 (1) IN GENERAL.—For any proposed covered
 13 settlement agreement that contains a term described
 14 in paragraph (2), the Attorney General or, if the
 15 matter is being litigated independently by an agency,
 16 the head of the agency shall submit to the court a
 17 certification that the Attorney General or head of
 18 the agency approves the proposed covered settlement
 19 agreement. The Attorney General or head of the
 20 agency shall personally sign any certification sub-
 21 mitted under this paragraph.

22 (2) TERMS.—A term described in this para-
 23 graph is—

24 (A) in the case of a consent decree, a term
 25 that—

1 (i) converts into a duty a discre-
2 tionary authority of an agency to propose,
3 promulgate, revise, or amend regulations;

4 (ii) commits an agency to expend
5 funds that have not been appropriated and
6 that have not been budgeted for the civil
7 action in question;

8 (iii) commits an agency to seek a par-
9 ticular appropriation or budget authoriza-
10 tion;

11 (iv) divests an agency of discretion
12 committed to the agency by statute or the
13 Constitution of the United States, without
14 regard to whether the discretion was
15 granted to respond to changing cir-
16 cumstances, to make policy or managerial
17 choices, or to protect the rights of third
18 parties; or

19 (v) otherwise affords relief that the
20 court could not enter under its own au-
21 thority upon a final judgment in the civil
22 action; or

23 (B) in the case of a covered settlement
24 agreement other than a consent decree, a term
25 that—

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

9 (ii) commits the agency to expend
10 funds that have not been appropriated and
11 that have not been budgeted for the civil
12 action in question; or

13 (iii) for a covered settlement agree-
14 ment that commits the agency to exercise
15 in a particular way discretion which was
16 committed to the agency by statute or the
17 Constitution of the United States to re-
18 spond to changing circumstances, to make
19 policy or managerial choices, or to protect
20 the rights of third parties, provides a rem-
21 edy for a failure by the agency to comply
22 with the terms of the covered settlement
23 agreement other than the revival of the
24 civil action resolved by the covered settle-
25 ment agreement.

1 (f) REVIEW BY COURT.—

2 (1) AMICUS.—A court considering a proposed
3 covered settlement agreement shall presume, subject
4 to rebuttal, that it is proper to allow amicus partici-
5 pation relating to the covered settlement agreement
6 by any person who filed public comments on the cov-
7 ered settlement agreement under subsection (d)(2).

8 (2) REVIEW OF DEADLINES.—

9 (A) PROPOSED CONSENT DECREES.—For
10 a proposed covered settlement agreement that is
11 a consent decree, a court shall not approve the
12 covered settlement agreement unless the pro-
13 posed covered settlement agreement allows suf-
14 ficient time and incorporates adequate proce-
15 dures for the agency to comply with chapter 5
16 of title 5, United States Code, and other appli-
17 cable statutes that govern rulemaking and, un-
18 less contrary to the public interest, the provi-
19 sions of any Executive order that governs rule-
20 making.

21 (B) OTHER SETTLEMENT AGREEMENTS.—

22 For a proposed covered settlement agreement
23 other than a consent decree, a court shall en-
24 sure that the covered settlement agreement al-
25 lows sufficient time and incorporates adequate

1 procedures for the agency to comply with chap-
2 ter 5 of title 5, United States Code, and other
3 applicable statutes that govern rulemaking and,
4 unless contrary to the public interest, the provi-
5 sions of any Executive order that governs rule-
6 making.

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 settlement
12 agreements entered by the agency; and

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

14 (A) each covered settlement agreement en-
15 tered by the agency; and

16 (B) any award of attorneys fees or costs in
17 a civil action resolved by a covered settlement
18 agreement entered by the agency.

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

20 If an agency moves a court to modify a covered settle-
21 ment agreement and the basis of the motion is that the
22 terms of the covered settlement agreement are no longer
23 fully in the public interest due to the obligations of the
24 agency to fulfill other duties or due to changed facts and

1 circumstances, the court shall review the motion and the
2 covered settlement agreement de novo.

3 **SEC. 5. EFFECTIVE DATE.**

4 This Act shall apply to—

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

7 (2) any covered settlement agreement proposed
8 to a court on or after the date of enactment of this
9 Act.

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