

Union Calendar No. 367

118TH CONGRESS
2D SESSION

H. R. 3446

[Report No. 118–443]

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

MAY 17, 2023

Mrs. SPARTZ (for herself, Mr. CRAWFORD, Mr. MOOLENAAR, Mr. CLOUD, Mr. STEWART, Mr. TIFFANY, and Mrs. LESKO) introduced the following bill; which was referred to the Committee on the Judiciary

APRIL 5, 2024

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in *italie*]

[For text of introduced bill, see copy of bill as introduced on May 17, 2023]

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 Regulatory*
5 *Decrees and Settlements Act of 2023”.*

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 an 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 settlement
14 agreement” means a covered consent decree and a cov-
15 ered 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 re-
21 quires agency action relating to a regulatory ac-
22 tion 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 or
12 complaint, respectively.

13 (2) *ENTRY OF A COVERED CONSENT DECREE OR*
14 *SETTLEMENT AGREEMENT.*—A party may not make a
15 motion for entry of a covered consent decree or to dis-
16 miss a civil action pursuant to a covered settlement
17 agreement until after the end of proceedings in ac-
18 cordance with paragraph (1) and subparagraphs (A)
19 and (B) of paragraph (2) of subsection (d) or sub-
20 section (d)(3)(A), whichever is later.

21 (b) *INTERVENTION.*—

22 (1) *REBUTTABLE PRESUMPTION.*—In considering
23 a motion to intervene in a covered civil action or a
24 civil action in which a covered consent decree or set-
25 tlement agreement has been proposed that is filed by

1 a person who alleges that the agency action in dispute
 2 would affect the person, the court shall presume, sub-
 3 ject to rebuttal, that the interests of the person would
 4 not be represented adequately by the existing parties
 5 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 been
 10 proposed that is filed by a State, local, or tribal gov-
 11 ernment, the court shall take due account of whether
 12 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 relates.

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

23 (1) be conducted pursuant to the mediation or
 24 alternative dispute resolution program of the court or
 25 by a district judge other than the presiding judge,

1 *magistrate judge, or special master, as determined*
 2 *appropriate by the presiding judge; and*

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

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

7 *(1) IN GENERAL.—Not later than 60 days before*
 8 *the date on which a covered consent decree or settle-*
 9 *ment agreement is filed with a court, the agency seek-*
 10 *ing to enter the covered consent decree or settlement*
 11 *agreement shall publish in the Federal Register and*
 12 *online—*

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

15 *(B) a statement providing—*

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

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

23 *(2) PUBLIC COMMENT.—*

24 *(A) IN GENERAL.—An agency seeking to*
 25 *enter a covered consent decree or settlement*

1 *agreement shall accept public comment during*
2 *the period described in paragraph (1) on any*
3 *issue relating to the matters alleged in the com-*
4 *plaint in the applicable civil action or addressed*
5 *or affected by the proposed covered consent decree*
6 *or settlement agreement.*

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

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

16 *(i) inform the court of the statutory*
17 *basis for the proposed covered consent decree*
18 *or settlement agreement and its terms;*

19 *(ii) submit to the court a summary of*
20 *the comments received under subparagraph*
21 *(A) and the response of the agency to the*
22 *comments;*

23 *(iii) submit to the court a certified*
24 *index of the administrative record of the no-*
25 *tice and comment proceeding; and*

1 (iv) make the administrative record de-
2 scribed in clause (iii) fully accessible to the
3 court.

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

12 (3) *PUBLIC HEARINGS PERMITTED.*—

13 (A) *IN GENERAL.*—After providing notice in
14 the Federal Register and online, an agency may
15 hold a public hearing regarding whether to enter
16 into a proposed covered consent decree or settle-
17 ment agreement.

18 (B) *RECORD.*—If an agency holds a public
19 hearing under subparagraph (A)—

20 (i) the agency shall—

21 (I) submit to the court a sum-
22 mary of the proceedings;

23 (II) submit to the court a certified
24 index of the hearing record; and

1 (III) provide access to the hearing
2 record to the court; and

3 (ii) the full hearing record shall be in-
4 cluded in the court record.

5 (4) MANDATORY DEADLINES.—If a proposed cov-
6 ered consent decree or settlement agreement requires
7 an agency action by a date certain, the agency shall,
8 when moving for entry of the covered consent decree
9 or settlement agreement or dismissal based on the cov-
10 ered consent decree or settlement agreement, inform
11 the court of—

12 (A) any required regulatory action the
13 agency has not taken that the covered consent de-
14 cree or settlement agreement does not address;

15 (B) how the covered consent decree or settle-
16 ment agreement, if approved, would affect the
17 discharge of the duties described in subparagraph
18 (A); and

19 (C) why the effects of the covered consent de-
20 cree or settlement agreement on the manner in
21 which the agency discharges its duties is in the
22 public interest.

23 (e) SUBMISSION BY THE GOVERNMENT.—

24 (1) IN GENERAL.—For any proposed covered
25 consent decree or settlement agreement that contains

1 a term described in paragraph (2), the Attorney Gen-
2 eral or, if the matter is being litigated independently
3 by an agency, the head of the agency shall submit to
4 the court a certification that the Attorney General or
5 head of the agency approves the proposed covered con-
6 sent decree or settlement agreement. The Attorney
7 General or head of the agency shall personally sign
8 any certification submitted under this paragraph.

9 (2) *TERMS.*—A term described in this paragraph
10 is—

11 (A) in the case of a covered consent decree,
12 a term that—

13 (i) converts into a nondiscretionary
14 duty a discretionary authority of an agency
15 to propose, promulgate, revise, or amend
16 regulations;

17 (ii) commits an agency to expend
18 funds that have not been appropriated and
19 that have not been budgeted for the regu-
20 latory action in question;

21 (iii) commits an agency to seek a par-
22 ticular appropriation or budget authoriza-
23 tion;

24 (iv) divests an agency of discretion
25 committed to the agency by statute or the

1 *Constitution of the United States, without*
2 *regard to whether the discretion was grant-*
3 *ed to respond to changing circumstances, to*
4 *make policy or managerial choices, or to*
5 *protect the rights of third parties; or*

6 *(v) otherwise affords relief that the*
7 *court could not enter under its own author-*
8 *ity upon a final judgment in the civil ac-*
9 *tion; or*

10 *(B) in the case of a covered settlement*
11 *agreement, a term—*

12 *(i) that provides a remedy for a failure*
13 *by the agency to comply with the terms of*
14 *the covered settlement agreement other than*
15 *the revival of the civil action resolved by the*
16 *covered settlement agreement; and*

17 *(ii) that—*

18 *(I) interferes with the authority of*
19 *an agency to revise, amend, or issue*
20 *rules under the procedures set forth in*
21 *chapter 5 of title 5, United States*
22 *Code, or any other statute or Executive*
23 *order prescribing rulemaking proce-*
24 *dures for a rulemaking that is the sub-*

1 *ject of the covered settlement agree-*
2 *ment;*

3 *(II) commits the agency to expend*
4 *funds that have not been appropriated*
5 *and that have not been budgeted for the*
6 *regulatory action in question; or*

7 *(III) for such a covered settlement*
8 *agreement that commits the agency to*
9 *exercise in a particular way discretion*
10 *which was committed to the agency by*
11 *statute or the Constitution of the*
12 *United States to respond to changing*
13 *circumstances, to make policy or man-*
14 *agerial choices, or to protect the rights*
15 *of third parties.*

16 *(f) REVIEW BY COURT.—*

17 *(1) AMICUS.—A court considering a proposed*
18 *covered consent decree or settlement agreement shall*
19 *presume, subject to rebuttal, that it is proper to allow*
20 *amicus participation relating to the covered consent*
21 *decree or settlement agreement by any person who*
22 *filed public comments or participated in a public*
23 *hearing on the covered consent decree or settlement*
24 *agreement under paragraph (2) or (3) of subsection*
25 *(d).*

1 (2) *REVIEW OF DEADLINES.*—

2 (A) *PROPOSED COVERED CONSENT DE-*
3 *CREES.*—*For a proposed covered consent decree,*
4 *a court shall not approve the covered consent de-*
5 *cree unless the proposed covered consent decree*
6 *allows sufficient time and incorporates adequate*
7 *procedures for the agency to comply with chapter*
8 *5 of title 5, United States Code, and other appli-*
9 *cable statutes that govern rulemaking and, unless*
10 *contrary to the public interest, the provisions of*
11 *any Executive order that governs rulemaking.*

12 (B) *PROPOSED COVERED SETTLEMENT*
13 *AGREEMENTS.*—*For a proposed covered settle-*
14 *ment agreement, a court shall ensure that the*
15 *covered settlement agreement allows sufficient*
16 *time and incorporates adequate procedures for*
17 *the agency to comply with chapter 5 of title 5,*
18 *United States Code, and other applicable statutes*
19 *that govern rulemaking and, unless contrary to*
20 *the public interest, the provisions of any Execu-*
21 *tive order that governs rulemaking.*

22 (g) *ANNUAL REPORTS.*—*Each agency shall submit to*
23 *Congress an annual report that, for the year covered by the*
24 *report, includes—*

1 (1) *the number, identity, and content of covered*
 2 *civil actions brought against and covered consent de-*
 3 *crees or settlement agreements entered against or into*
 4 *by the agency; and*

5 (2) *a description of the statutory basis for—*

6 (A) *each covered consent decree or settle-*
 7 *ment agreement entered against or into by the*
 8 *agency; and*

9 (B) *any award of attorneys fees or costs in*
 10 *a civil action resolved by a covered consent de-*
 11 *cree or settlement agreement entered against or*
 12 *into by the agency.*

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

14 *If an agency moves a court to modify a covered consent*
 15 *decree or settlement agreement and the basis of the motion*
 16 *is that the terms of the covered consent decree or settlement*
 17 *agreement are no longer fully in the public interest due to*
 18 *the obligations of the agency to fulfill other duties or due*
 19 *to changed facts and circumstances, the court shall review*
 20 *the motion and the covered consent decree or settlement*
 21 *agreement de novo.*

22 **SEC. 5. EFFECTIVE DATE.**

23 *This Act shall apply to—*

24 (1) *any covered civil action filed on or after the*
 25 *date of enactment of this Act; and*

1 (2) *any covered consent decree or settlement*
2 *agreement proposed to a court on or after the date of*
3 *enactment of this Act.*

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[Report No. 118-443]

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