

113TH CONGRESS  
1ST SESSION

# S. 714

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.

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## IN THE SENATE OF THE UNITED STATES

APRIL 11, 2013

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

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## 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—

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;

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

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

23                   (B) any other consent decree that requires  
24      agency action relating to a regulatory action  
25      that affects the rights of—

1 (i) private persons other than the per-  
 2 son bringing the action; or

3 (ii) a State, local, or tribal govern-  
 4 ment;

5 (4) the term “covered consent decree or settle-  
 6 ment agreement” means a covered consent decree  
 7 and a covered settlement agreement; and

8 (5) the term “covered settlement agreement”  
 9 means—

10 (A) a settlement agreement entered into in  
 11 a covered civil action; and

12 (B) any other settlement agreement that  
 13 requires agency action relating to a regulatory  
 14 action that affects the rights of—

15 (i) private persons other than the per-  
 16 son bringing the action; or

17 (ii) a State, local, or tribal govern-  
 18 ment.

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

20 (a) **PLEADINGS AND PRELIMINARY MATTERS.**—

21 (1) **IN GENERAL.**—In any covered civil action,  
 22 the agency against which the covered civil action is  
 23 brought shall publish the notice of intent to sue and  
 24 the complaint in a readily accessible manner, includ-  
 25 ing by making the notice of intent to sue and the

1 complaint available online not later than 15 days  
2 after receiving service of the notice of intent to sue  
3 or complaint, respectively.

4 (2) ENTRY OF A COVERED CONSENT DECREE  
5 OR SETTLEMENT AGREEMENT.—A party may not  
6 make a motion for entry of a covered consent decree  
7 or to dismiss a civil action pursuant to a covered set-  
8 tlement agreement until after the end of proceedings  
9 in accordance with paragraph (1) and subpara-  
10 graphs (A) and (B) of paragraph (2) of subsection  
11 (d) or subsection (d)(3)(A), whichever is later.

12 (b) INTERVENTION.—

13 (1) REBUTTABLE PRESUMPTION.—In consid-  
14 ering a motion to intervene in a covered civil action  
15 or a civil action in which a covered consent decree  
16 or settlement agreement has been proposed that is  
17 filed by a person who alleges that the agency action  
18 in dispute would affect the person, the court shall  
19 presume, subject to rebuttal, that the interests of  
20 the person would not be represented adequately by  
21 the existing parties to the action.

22 (2) STATE, LOCAL, AND TRIBAL GOVERN-  
23 MENTS.—In considering a motion to intervene in a  
24 covered civil action or a civil action in which a cov-  
25 ered consent decree or settlement agreement has

1        been proposed that is filed by a State, local, or tribal  
 2        government, the court shall take due account of  
 3        whether the movant—

4                (A) administers jointly with an agency that  
 5                is a defendant in the action the statutory provi-  
 6                sions that give rise to the regulatory action to  
 7                which the action relates; or

8                (B) administers an authority under State,  
 9                local, or tribal law that would be preempted by  
 10               the regulatory action to which the action re-  
 11               lates.

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

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

20                (2) include any party that intervenes in the ac-  
 21                tion.

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

24                (1) IN GENERAL.—Not later than 60 days be-  
 25                fore the date on which a covered consent decree or

1 settlement agreement is filed with a court, the agen-  
2 cy seeking to enter the covered consent decree or  
3 settlement agreement shall publish in the Federal  
4 Register and online—

5 (A) the proposed covered consent decree or  
6 settlement agreement; and

7 (B) a statement providing—

8 (i) the statutory basis for the covered  
9 consent decree or settlement agreement;  
10 and

11 (ii) a description of the terms of the  
12 covered consent decree or settlement agree-  
13 ment, including whether it provides for the  
14 award of attorneys' fees or costs and, if so,  
15 the basis for including the award.

16 (2) PUBLIC COMMENT.—

17 (A) IN GENERAL.—An agency seeking to  
18 enter a covered consent decree or settlement  
19 agreement shall accept public comment during  
20 the period described in paragraph (1) on any  
21 issue relating to the matters alleged in the com-  
22 plaint in the applicable civil action or addressed  
23 or affected by the proposed covered consent de-  
24 cree or 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 con-  
6 sent decree or settlement agreement or for dis-  
7 missal pursuant to a proposed covered consent  
8 decree or settlement agreement, an agency  
9 shall—

10 (i) inform the court of the statutory  
11 basis for the proposed covered consent de-  
12 cree or settlement agreement and its  
13 terms;

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

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

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

24 (D) INCLUSION IN RECORD.—The court  
25 shall include in the court record for a civil ac-

tion the certified index of the administrative record submitted by an agency under subparagraph (C)(iii) and any documents listed in the index which any party or amicus curiae appearing before the court in the action submits to the court.

(3) PUBLIC HEARINGS PERMITTED.—

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

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

(i) the agency shall—

(I) submit to the court a summary of the proceedings;

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

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

(ii) the full hearing record shall be included in the court record.

(4) MANDATORY DEADLINES.—If a proposed covered consent decree or settlement agreement re-

quires an agency action by a date certain, the agency shall, when moving for entry of the covered consent decree or settlement agreement or dismissal based on the covered consent decree or settlement agreement, inform the court of—

(A) any required regulatory action the agency has not taken that the covered consent decree or settlement agreement does not address;

(B) how the covered consent decree or settlement agreement, if approved, would affect the discharge of the duties described in subparagraph (A); and

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

(e) SUBMISSION BY THE GOVERNMENT.—

(1) IN GENERAL.—For any proposed covered consent decree or settlement agreement that contains a term described in paragraph (2), the Attorney General or, if the matter is being litigated independently by an agency, the head of the agency shall submit to the court a certification that the Attorney General or head of the agency approves the proposed

1 covered consent decree or settlement agreement. The  
2 Attorney General or head of the agency shall person-  
3 ally sign any certification submitted under this para-  
4 graph.

5 (2) TERMS.—A term described in this para-  
6 graph is—

7 (A) in the case of a covered consent decree,  
8 a term that—

9 (i) converts into a nondiscretionary  
10 duty a discretionary authority of an agency  
11 to propose, promulgate, revise, or amend  
12 regulations;

13 (ii) commits an agency to expend  
14 funds that have not been appropriated and  
15 that have not been budgeted for the regu-  
16 latory action in question;

17 (iii) commits an agency to seek a par-  
18 ticular appropriation or budget authoriza-  
19 tion;

20 (iv) divests an agency of discretion  
21 committed to the agency by statute or the  
22 Constitution of the United States, without  
23 regard to whether the discretion was  
24 granted to respond to changing cir-  
25 cumstances, to make policy or managerial

1 choices, or to protect the rights of third  
2 parties; or

3 (v) otherwise affords relief that the  
4 court could not enter under its own au-  
5 thority upon a final judgment in the civil  
6 action; or

7 (B) in the case of a covered settlement  
8 agreement, a term—

9 (i) that provides a remedy for a fail-  
10 ure by the agency to comply with the  
11 terms of the covered settlement agreement  
12 other than the revival of the civil action re-  
13 solved by the covered settlement agree-  
14 ment; and

15 (ii) that—

16 (I) interferes with the authority  
17 of an agency to revise, amend, or  
18 issue rules under the procedures set  
19 forth in chapter 5 of title 5, United  
20 States Code, or any other statute or  
21 Executive order prescribing rule-  
22 making procedures for a rulemaking  
23 that is the subject of the covered set-  
24 tlement agreement;

1 (II) commits the agency to ex-  
 2 pend funds that have not been appro-  
 3 priated and that have not been budg-  
 4 eted for the regulatory action in ques-  
 5 tion; or

6 (III) for such a covered settle-  
 7 ment agreement that commits the  
 8 agency to exercise in a particular way  
 9 discretion which was committed to the  
 10 agency by statute or the Constitution  
 11 of the United States to respond to  
 12 changing circumstances, to make pol-  
 13 icy or managerial choices, or to pro-  
 14 tect the rights of third parties.

15 (f) REVIEW BY COURT.—

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

25 (2) REVIEW OF DEADLINES.—

1           (A) PROPOSED COVERED CONSENT DE-  
2 CREES.—For a proposed covered consent de-  
3 cree, a court shall not approve the covered con-  
4 sent decree unless the proposed covered consent  
5 decree allows sufficient time and incorporates  
6 adequate procedures for the agency to comply  
7 with chapter 5 of title 5, United States Code,  
8 and other applicable statutes that govern rule-  
9 making and, unless contrary to the public inter-  
10 est, the provisions of any Executive order that  
11 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 stat-  
19 utes that govern rulemaking and, unless con-  
20 trary to the public interest, the provisions of  
21 any Executive order that governs rulemaking.

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

1           (1) the number, identity, and content of covered  
2       civil actions brought against and covered consent de-  
3       cree or settlement agreements entered against or  
4       into 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 con-  
15      sent decree or settlement agreement and the basis of the  
16      motion is that the terms of the covered consent decree or  
17      settlement agreement are no longer fully in the public in-  
18      terest due to the obligations of the agency to fulfill other  
19      duties or due to changed facts and circumstances, the  
20      court shall review the motion and the covered consent de-  
21      cree or settlement 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  
3           of enactment of this Act.

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