AMENDMENT NO. 2514

At the request of Mr. THUNE, the name of the Senator from Arizona (Mr. KYL) was withdrawn as a cosponsor of amendment No. 2514 intended to be proposed to S. 2237, a bill to provide a temporary income tax credit for increased payroll and extend bonus depreciation for an additional year, and for other purposes.

AMENDMENT NO. 2516

At the request of Mr. FRANKEN, the name of the Senator from Maine (Ms. SNOWE) was added as a cosponsor of amendment No. 2516 intended to be proposed to S. 2237, a bill to provide a temporary income tax credit for increased payroll and extend bonus depreciation for an additional year, and for other purposes.

AMENDMENT NO. 2518

At the request of Mr. THUNE, the names of the Senator from Nebraska (Mr. JOHANNS) and the Senator from Arizona (Mr. KYL) were added as cosponsors of amendment No. 2518 intended to be proposed to S. 2237, a bill to provide a temporary income tax credit for increased payroll and extend bonus depreciation for an additional year, and for other purposes.

AMENDMENT NO. 2521

At the request of Ms. LANDRIEU, the names of the Senator from Delaware (Mr. COONS) and the Senator from Oregon (Mr. MERKLEY) were added as cosponsors of amendment No. 2521 proposed to S. 2237, a bill to provide a temporary income tax credit for increased payroll and extend bonus depreciation for an additional year, and for other purposes.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. ROCKEFELLER:

S. 3378. A bill to establish scientific standards and protocols across forensic disciplines, and for other purposes; to the Committee on Commerce, Science, and Transportation.

Mr. ROCKEFELLER. Mr. President, the criminal justice system relies on forensic science to identify and prosecute criminals and exonerate the falsely accused. But in a pathbreaking 2009 report to Congress, the National Academy of Sciences found that the interpretation of forensic evidence is severely compromised by the lack of supporting science and standards. They concluded, ''The bottom line is simple: In a number of forensic science disciplines, forensic science professionals have yet to establish either the validity of their approach or the accuracy of their conclusions, and the courts have been utterly ineffective in addressing this problem.''

In a series of recent articles, the Washington Post reported on flawed forensic work that may be responsible for the wrongful convictions in thousands of criminal cases. An April Post editorial urged the Justice Department to conduct a full review of all cases that ended in conviction, and a July 11 story reports that the Justice Department and the FBI have now launched such a review. The National Academy of Sciences, the Washington Post, the Innocence Project, and the National Association of Criminal Defense Lawyers, among others, have all called for strengthened forensic science and standards.

The Forensic Science and Standards Act of 2012 responds to this call by promoting research. The bill would establish a National Forensic Science Coordinating Office, housed at the National Science Foundation, NSF, to develop a research strategy and roadmap and to support the implementation of that roadmap across relevant Federal agencies.

NSF would establish a forensic science grant program to award funding in areas specifically identified by the research strategy. NSF would be directed to award two grants to create forensic science research centers to conduct research, build relationships with forensic practitioners, and educate students. All agencies with equities in forensic science would be encouraged to use prizes and challenges to stimulate innovative and creative solutions to satisfy the research needs and priorities identified in the research strategy.

The bill requires standard development. The National Institute of Standards and Technology, NIST, would be directed to develop forensic science standards, in consultation with standards development organizations and other stakeholders. NIST could establish and solicit advice from discipline-specific expert working groups to identify standards development priorities and opportunities.

The bill requires implementing uniform standards. To advise on the application of the new standards, a Forensic Science Advisory Committee chaired by the Director of NIST and the Attorney General would be established. The Advisory Committee, composed of research scientists, forensic science practitioners, and users from the legal and law enforcement communities, would make recommendations to the Attorney General on adoption of standards. The Attorney General would direct the standards' implementation in Federal forensic science laboratories and would encourage adoption in non-Federal laboratories as a condition of Federal funding or for inclusion in national databases.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the text of the bill was ordered to be printed in the RECORD, as follows:

S. 3378

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Forensic Science and Standards Act of 2012''.

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

SEC. 2. FINDINGS.

Congress finds that—

(1) at the direction of Congress, the National Academy of Sciences led a comprehensive review of the state of forensic science and issued its findings in a 2009 report, ''Strengthening Forensic Science in the United States: A Path Forward'';

(2) the report's findings indicate the need for independent scientific research to support the foundation of forensic disciplines;

(3) the report stresses the need for standards in methods, data interpretation, and reporting, and the importance of preventing cognitive bias and mitigating human factors; and

(4) according to the report, forensic science research is not financially well supported, and there is a need for a unified strategy for developing a forensic science research plan across Federal agencies.

SEC. 3. DEFINITIONS.

In this Act:

(1) ADVISORY COMMITTEE.—The term ''Advisory Committee'' means the Forensic Science Advisory Committee established under section 8.

(2) COORDINATING OFFICE.—The term ''Coordinating Office'' means the National Forensic Science Coordinating Office established under section 4.

(3) FORENSIC SCIENCE.—

(A) IN GENERAL.—The term ''forensic science'' means the basic and applied scientific research applicable to the collection, evaluation, and analysis of physical evidence, including digital evidence, for use in investigations and legal proceedings, including all tests, methods, measurements, and procedures.

(B) APPLIED SCIENTIFIC RESEARCH.—In subparagraph (A), the term ''applied scientific research'' means a systematic study to gain knowledge or understanding necessary to determine the means by which a recognized and specific need may be met.

(C) BASIC SCIENTIFIC RESEARCH.—In subparagraph (A), the term ''basic scientific research'' means a systematic study directed toward fuller knowledge or understanding of the fundamental aspects of phenomena and of observable facts without specific applications towards processes or products.

(4) STANDARDS DEVELOPMENT ORGANIZATION.—The term ''standards development organization'' means a domestic or an international organization that plans, develops, establishes, or coordinates voluntary consensus standards using procedures that incorporate openness, a balance of interests, consensus, due process, and an appeals process.

SEC. 4. NATIONAL FORENSIC SCIENCE RESEARCH PROGRAM.

(a) ESTABLISHMENT.—There shall be a national forensic science research program to improve, expand, and coordinate Federal research in the forensic sciences.

(b) NATIONAL ACADEMY OF SCIENCES REPORT ON FORENSIC SCIENCE.—The Director of the National Science Foundation shall contract

with the National Academy of Sciences to develop, not later than 180 days after the date of enactment of this Act, a report that—

(1) identifies the most critical forensic science disciplines, which may include forensic pathology and digital forensics, that require further research to strengthen the scientific foundation in those disciplines; and

(2) makes recommendations regarding research that will help strengthen the scientific foundation in the forensic science disciplines identified under paragraph (1).

(c) NATIONAL FORENSIC SCIENCE COORDINATING OFFICE.—

(1) ESTABLISHMENT.—There is established a National Forensic Science Coordinating Office, with a director and full time staff, to be located at the National Science Foundation. The Director of the Coordinating Office shall be responsible for carrying out the provisions of this subsection.

(2) UNIFIED FEDERAL RESEARCH STRATEGY.—The Coordinating Office established under paragraph (1) shall coordinate among relevant Federal departments, agencies, or offices—

(A) the development of a unified Federal research strategy that—

(i) specifies and prioritizes the research necessary to enhance the validity and reliability of the forensic science disciplines; and

(ii) is consistent with the recommendations in the National Academy of Sciences report on forensic science under subsection (b);

(B) the development of a 5-year roadmap, updated triennially thereafter, for the unified Federal research strategy under subparagraph (A) that includes a description of—

(i) which department, agency, or office will carry out each specific element of the unified Federal research strategy;

(ii) short-term and long-term priorities and objectives; and

(iii) common metrics and other evaluation criteria that will be used to assess progress toward achieving the priorities and objectives under clause (ii); and

(C) any necessary programs, policies, and budgets to support the implementation of the roadmap under subparagraph (B).

(3) ADDITIONAL DUTIES.—The Coordinating Office shall—

(A) evaluate annually the national forensic science research program to determine whether it is achieving its objectives; and

(B) report annually to Congress the findings under subparagraph (A).

(4) DEADLINES.—The Coordinating Office shall submit to Congress—

(A) not later than 1 year after the date of enactment of this Act, the unified Federal research strategy under paragraph (2)(A);

(B) not later than 1 year after the date of enactment of this Act, the initial 5-year roadmap under paragraph (2)(B); and

(C) not later than 1 month after the date it is updated, each updated 5-year roadmap under paragraph (2)(B).

SEC. 5. FORENSIC SCIENCE RESEARCH GRANTS PROGRAM.

(a) ESTABLISHMENT.—Not later than 1 year after the date of enactment of this Act, the National Science Foundation shall establish a forensic science research grants program to improve the foundation and practice of forensic science in the United States based on the recommendations in the unified Federal research strategy under section 4.

(b) MERIT REVIEW.—Each grant under this section shall be awarded on a merit-reviewed, competitive basis.

(c) PUBLICATION.—The National Science Foundation shall support, as appropriate, the publication of research results under this section in scholarly, peer-reviewed scientific journals.

(d) FORENSIC SCIENCE RESEARCH CENTERS.—

(1) IN GENERAL.—As part of the forensic science research grants program under subsection (a), the Director of the National Science Foundation shall establish 2 forensic science research centers—

(A) to conduct research consistent with the unified Federal research strategy under section 4;

(B) to build relationships between forensic science practitioners and members of the research community;

(C) to encourage and promote the education and training of a diverse group of people to be leaders in the interdisciplinary field of forensic science; and

(D) to broadly disseminate the results of the research under subparagraph (A).

(2) TERMS OF DESIGNATION.—

(A) IN GENERAL.—The Director shall designate each forensic science research center for a 4-year term.

(B) REVOCATION.—The Director may revoke a designation under subparagraph (A) if the Director determines that the forensic science research center is not demonstrating adequate performance.

(C) AMOUNT OF AWARD.—Subject to subsection (f), the Director shall award a grant up to $10,000,000 to each forensic science research center. A grant awarded under this subparagraph shall be for a period of 4 years.

(D) LIMITATION ON USE OF FUNDS.—No funds authorized under this section may be used to construct or renovate a building or structure.

(3) REPORTS.—Each forensic science research center shall submit an annual report to the Director, at such time and in such manner as the Director may require, that contains a description of the activities the center carried out with the funds received under this subsection, including a description of how those activities satisfy the requirement under paragraph (2)(D).

(e) EVALUATION.—

(1) IN GENERAL.—The Director of the National Science Foundation shall conduct a comprehensive evaluation of the forensic science research grants program every 4 years—

(A) to determine whether the program is achieving the objectives of improving the foundation and practice of forensic science in the United States; and

(B) to evaluate the extent to which the program is contributing toward the priorities and objectives described in the roadmap under section 4(c)(2)(B).

(2) REPORT TO CONGRESS.—The Director of the National Science Foundation shall report to Congress the results of each comprehensive evaluation under paragraph (1).

(f) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the National Science Foundation to carry out this section—

(1) $34,000,000 for fiscal year 2013;

(2) $37,000,000 for fiscal year 2014;

(3) $40,000,000 for fiscal year 2015;

(4) $43,000,000 for fiscal year 2016; and

(5) $46,000,000 for fiscal year 2017.

SEC. 6. FORENSIC SCIENCE RESEARCH CHALLENGES.

(a) PRIZES AND CHALLENGES.—

(1) IN GENERAL.—A Federal department, agency, or office may assist in satisfying the research needs and priorities identified in the unified Federal research strategy under section 4 by using prizes and challenges under the America COMPETES Reauthorization Act (124 Stat. 3982) or under any other provision of law, as appropriate.

(2) PURPOSES.—The purpose of a prize or challenge under this section, among other possible purposes, may be—

(A) to determine or develop the best data collection practices or analytical methods to evaluate a specific type of forensic data; or

(B) to determine the accuracy of an analytical method.

(b) FORENSIC EVIDENCE PRIZES AND CHALLENGES.—

(1) IN GENERAL.—A Federal department, agency, or office, or multiple Federal departments, agencies, or offices in cooperation, carrying out a prize or challenge under this section—

(A) may establish a prize advisory board; and

(B) shall select each member of the prize advisory board with input from relevant Federal departments, agencies, or offices.

(2) PRIZE ADVISORY BOARD.—The prize advisory board shall—

(A) identify 1 or more types of forensic evidence for purposes of a prize or challenge;

(B) using the samples under paragraph (3), recommend how to structure a prize or challenge that requires a competitor to develop a forensic data collection practice, an analytical method, or a relevant approach or technology to be tested relative to a known outcome or other proposed judging methodology; and

(C) through the Coordinating Office, advise relevant Federal departments, agencies, or offices in designing prizes or challenges that satisfy the research needs and priorities identified in the unified Federal research strategy under section 4.

(3) SAMPLES.—The National Institute of Standards and Technology or the Department of Justice shall provide or contract with a non-Federal party to prepare, for each type of forensic evidence under paragraph (2)(A), a sufficient set of samples, including associated digital data that could be shared without limitation and physical specimens that could be shared with qualified parties, for purposes of a prize or challenge.

(4) FINGERPRINT DATA INTEROPERABILITY.—At least 1 prize or challenge under this section shall be focused on achieving nationwide fingerprint data interoperability if the prize advisory board, the Coordinating Office, or a Federal department, agency, or office identifies an area where a prize or challenge will assist in satisfying a strategy related to this issue.

SEC. 7. FORENSIC SCIENCE STANDARDS.

(a) ESTABLISHMENT.—

(1) IN GENERAL.—The National Institute of Standards and Technology shall—

(A) identify or coordinate the development of forensic science standards to enhance the validity and reliability of forensic science activities, including—

(i) authoritative methods, standards, and technical guidance, including protocols and best practices, for forensic measurements, analysis, and interpretation;

(ii) technical standards for products and services used by forensic science practitioners;

(iii) standard content, terminology, and parameters to be used in reporting and testifying on the results and interpretation of forensic science measurements, tests, and procedures; and

(iv) standards to provide for the interoperability of forensic science-related technology and databases;

(B) test and validate existing forensics standards, as appropriate; and

(C) provide independent validation of forensic science measurements and methods.

(2) CONSULTATION.—

(A) IN GENERAL.—In carrying out its responsibilities under paragraph (1), the National Institute of Standards and Technology shall consult with—

(i) standards development organizations and other stakeholders, including relevant

Federal departments, agencies, and offices; and

(ii) testing laboratories and accreditation bodies to ensure that products and services meet necessary performance levels.

(3) PRIORITIZATION.—When prioritizing its responsibilities under paragraph (1), the National Institute of Standards and Technology shall consider—

(A) the unified Federal research strategy under section 4; and

(B) the recommendations of any expert working group under subsection (b).

(4) REPORT TO CONGRESS.—The Director of the National Institute of Standards and Technology shall report annually, with the President's budget request, to Congress on the progress in carrying out the National Institute of Standards and Technology's responsibilities under paragraph (1).

(b) EXPERT WORKING GROUPS.—

(1) IN GENERAL.—The Director of the National Institute of Standards and Technology may establish 1 or more discipline-specific expert working groups to identify gaps, areas of need, and opportunities for standards development with respect to forensic science.

(2) MEMBERS.—A member of an expert working group shall—

(A) be appointed by the Director of the National Institute of Standards and Technology;

(B) have significant academic, research, or practical expertise in a discipline of forensic science or in another area relevant to the purpose of the expert working group; and

(C) balance scientific rigor with practical and regulatory constraints.

(3) FEDERAL ADVISORY COMMITTEE ACT.—An expert working group established under this subsection shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).

(c) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the National Institute of Standards and Technology to carry out this section—

(1) $5,000,000 for fiscal year 2013;

(2) $12,000,000 for fiscal year 2014;

(3) $20,000,000 for fiscal year 2015;

(4) $27,000,000 for fiscal year 2016; and

(5) $35,000,000 for fiscal year 2017.

SEC. 8. FORENSIC SCIENCE ADVISORY COMMITTEE.

(a) ESTABLISHMENT.—The Director of the National Institute of Standards and Technology and the Attorney General, in collaboration with the Director of the National Science Foundation, shall establish a Forensic Science Advisory Committee.

(b) DUTIES.—The Advisory Committee shall provide advice to—

(1) the Federal departments, agencies, and offices implementing the unified Federal research strategy under section 4;

(2) the National Institute of Standards and Technology, including recommendations regarding the National Institute of Standards and Technology's responsibilities under section 7; and

(3) the Department of Justice, including recommendations regarding the Department of Justice's responsibilities under section 9.

(c) SUBCOMMITTEES.—The Advisory Committee may form subcommittees related to specific disciplines in forensic science or as necessary to further its duties under subsection (b). A subcommittee may include an individual who is not a member of the Advisory Committee.

(d) CHAIRS.—The Director of the National Institute of Standards and Technology and the Attorney General, or their designees, shall co-chair the Advisory Committee.

(e) MEMBERSHIP.—The Director of the National Institute of Standards and Technology and the Attorney General, in consultation with the Director of the National Science Foundation, shall appoint each member of the Advisory Committee. The Advisory Committee shall include balanced representation between forensic science disciplines (including academic scientists, statisticians, social scientists, engineers, and representatives of other related scientific disciplines) and relevant forensic science applications (including Federal, State, and local representatives of the forensic science community, the legal community, victim advocate organizations, and law enforcement).

(f) ADMINISTRATION.—The Attorney General shall provide administrative support to the Advisory Committee.

(g) FEDERAL ADVISORY COMMITTEE ACT.—The Advisory Committee established under this section shall not be subject to section 14 of the Federal Advisory Committee Act (5 U.S.C. App.).

SEC. 9. ADOPTION, ACCREDITATION, AND CERTIFICATION.

The Attorney General—

(1) shall promote the adoption of forensic science standards developed under section 7, including—

(A) by requiring each Federal forensic laboratory to adopt the forensic science standards;

(B) by encouraging each non-Federal forensic laboratory to adopt the forensic science standards;

(C) by promoting accreditation and certification requirements based on the forensic science standards; and

(D) by promoting any recommendations made by the Advisory Committee for adoption and implementation of forensic science standards; and

(2) may promote the adoption of the forensic science standards as a condition of Federal funding or for inclusion in national data sets.

SEC. 10. NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY FUNCTIONS.

Section 2(b) of the National Institute of Standards and Technology Act (15 U.S.C. 272(b)) is amended—

(1) in paragraph (12), by striking ''and'' after the semicolon;

(2) in paragraph (13), by striking the period at the end and inserting ''; and''; and

(3) by adding at the end the following:

''(14) to identify and coordinate the development of forensic science standards to enhance the validity and reliability of forensic science activities.''.

By Mr. DURBIN (for himself, Mr. FRANKEN, Mr. HARKIN, Mr. WHITEHOUSE, and Mr. BROWN of Ohio):

S. 3381. A bill to amend title 11, United States Code, to improve protections for employees and retirees in business bankruptcies; to the Committee on the Judiciary.

Mr. DURBIN. Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the text of the bill was ordered to be printed in the RECORD as follows:

S. 3381

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Protecting Employees and Retirees in Business Bankruptcies Act of 2012''.

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

SEC. 2. FINDINGS.

The Congress finds the following:

(1) Business bankruptcies have increased sharply in recent years and remain at high levels. These bankruptcies include several of the largest business bankruptcy filings in history. As the use of bankruptcy has expanded, job preservation and retirement security are placed at greater risk.

(2) Laws enacted to improve recoveries for employees and retirees and limit their losses in bankruptcy cases have not kept pace with the increasing and broader use of bankruptcy by businesses in all sectors of the economy. However, while protections for employees and retirees in bankruptcy cases have eroded, management compensation plans devised for those in charge of troubled businesses have become more prevalent and are escaping adequate scrutiny.

(3) Changes in the law regarding these matters are urgently needed as bankruptcy is used to address increasingly more complex and diverse conditions affecting troubled businesses and industries.

TITLE I—IMPROVING RECOVERIES FOR EMPLOYEES AND RETIREES

SEC. 101. INCREASED WAGE PRIORITY.

Section 507(a) of title 11, United States Code, is amended—

(1) in paragraph (4)—

(A) by striking ''$10,000'' and inserting ''$20,000'';

(B) by striking ''within 180 days''; and

(C) by striking ''or the date of the cessation of the debtor's business, whichever occurs first,'';

(2) in paragraph (5)(A), by striking—

(A) ''within 180 days''; and

(B) ''or the date of the cessation of the debtor's business, whichever occurs first''; and

(3) in paragraph (5), by striking subparagraph (B) and inserting the following:

''(B) for each such plan, to the extent of the number of employees covered by each such plan, multiplied by $20,000.''.

SEC. 102. CLAIM FOR STOCK VALUE LOSSES IN DEFINED CONTRIBUTION PLANS.

Section 101(5) of title 11, United States Code, is amended—

(1) in subparagraph (A), by striking ''or'' at the end;

(2) in subparagraph (B), by inserting ''or'' after the semicolon; and

(3) by adding at the end the following:

''(C) right or interest in equity securities of the debtor, or an affiliate of the debtor, held in a defined contribution plan (within the meaning of section 3(34) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(34))) for the benefit of an individual who is not an insider, a senior executive officer, or any of the 20 next most highly compensated employees of the debtor (if 1 or more are not insiders), if such securities were attributable to either employer contributions by the debtor or an affiliate of the debtor, or elective deferrals (within the meaning of section 402(g) of the Internal Revenue Code of 1986), and any earnings thereon, if an employer or plan sponsor who has commenced a case under this title has committed fraud with respect to such plan or has otherwise breached a duty to the participant that has proximately caused the loss of value.''.

SEC. 103. PRIORITY FOR SEVERANCE PAY.

Section 503(b) of title 11, United States Code, is amended—

(1) in paragraph (8), by striking ''and'' at the end;

(2) in paragraph (9), by striking the period and inserting a semicolon; and

(3) by adding at the end the following:

''(10) severance pay owed to employees of the debtor (other than to an insider, other senior management, or a consultant retained to provide services to the debtor), under a plan, program, or policy generally applicable to employees of the debtor (but not under an individual contract of employment), or owed pursuant to a collective bargaining agreement, for layoff or termination on or after the date of the filing of the petition, which pay shall be deemed earned in full upon such layoff or termination of employment; and''.

SEC. 104. FINANCIAL RETURNS FOR EMPLOYEES AND RETIREES.

Section 1129(a) of title 11, United States Code is amended—

(1) by adding at the end the following:

''(17) The plan provides for recovery of damages payable for the rejection of a collective bargaining agreement, or for other financial returns as negotiated by the debtor and the authorized representative under section 1113 (to the extent that such returns are paid under, rather than outside of, a plan).''; and

(2) by striking paragraph (13) and inserting the following:

''(13) With respect to retiree benefits, as that term is defined in section 1114(a), the plan—

''(A) provides for the continuation after its effective date of payment of all retiree benefits at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 at any time before the date of confirmation of the plan, for the duration of the period for which the debtor has obligated itself to provide such benefits, or if no modifications are made before confirmation of the plan, the continuation of all such retiree benefits maintained or established in whole or in part by the debtor before the date of the filing of the petition; and

''(B) provides for recovery of claims arising from the modification of retiree benefits or for other financial returns, as negotiated by the debtor and the authorized representative (to the extent that such returns are paid under, rather than outside of, a plan).''.

SEC. 105. PRIORITY FOR WARN ACT DAMAGES.

Section 503(b)(1)(A)(ii) of title 11, United States Code is amended to read as follows:

''(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay or damages attributable to any period of time occurring after the date of commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which the award is based or to whether any services were rendered on or after the commencement of the case, including an award by a court under section 2901 of title 29, United States Code, of up to 60 days' pay and benefits following a layoff that occurred or commenced at a time when such award period includes a period on or after the commencement of the case, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees or of nonpayment of domestic support obligations during the case under this title.''.

TITLE II—REDUCING EMPLOYEES' AND RETIREES' LOSSES

SEC. 201. REJECTION OF COLLECTIVE BARGAINING AGREEMENTS.

Section 1113 of title 11, United States Code, is amended by striking subsections (a) through (f) and inserting the following:

''(a) The debtor in possession, or the trustee if one has been appointed under this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may reject a collective bargaining agreement only in accordance with this section. Hereinafter in this section, a reference to the trustee includes a reference to the debtor in possession.

''(b) No provision of this title shall be construed to permit the trustee to unilaterally terminate or alter any provision of a collective bargaining agreement before complying with this section. The trustee shall timely pay all monetary obligations arising under the terms of the collective bargaining agreement. Any such payment required to be made before a plan confirmed under section 1129 is effective has the status of an allowed administrative expense under section 503.

''(c)(1) If the trustee seeks modification of a collective bargaining agreement, then the trustee shall provide notice to the labor organization representing the employees covered by the agreement that modifications are being proposed under this section, and shall promptly provide an initial proposal for modifications to the agreement. Thereafter, the trustee shall confer in good faith with the labor organization, at reasonable times and for a reasonable period in light of the complexity of the case, in attempting to reach mutually acceptable modifications of such agreement.

''(2) The initial proposal and subsequent proposals by the trustee for modification of a collective bargaining agreement shall be based upon a business plan for the reorganization of the debtor, and shall reflect the most complete and reliable information available. The trustee shall provide to the labor organization all information that is relevant for negotiations. The court may enter a protective order to prevent the disclosure of information if disclosure could compromise the debtor's position with respect to its competitors in the industry, subject to the needs of the labor organization to evaluate the trustee's proposals and any application for rejection of the agreement or for interim relief pursuant to this section.

''(3) In consideration of Federal policy encouraging the practice and process of collective bargaining and in recognition of the bargained-for expectations of the employees covered by the agreement, modifications proposed by the trustee—

''(A) shall be proposed only as part of a program of workforce and nonworkforce cost savings devised for the reorganization of the debtor, including savings in management personnel costs;

''(B) shall be limited to modifications designed to achieve a specified aggregate financial contribution for the employees covered by the agreement (taking into consideration any labor cost savings negotiated within the 12-month period before the filing of the petition), and shall be not more than the minimum savings essential to permit the debtor to exit bankruptcy, such that confirmation of a plan of reorganization is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor (or any successor to the debtor) in the short term; and

''(C) shall not be disproportionate or overly burden the employees covered by the agreement, either in the amount of the cost savings sought from such employees or the nature of the modifications.

''(d)(1) If, after a period of negotiations, the trustee and the labor organization have not reached an agreement over mutually satisfactory modifications, and further negotiations are not likely to produce mutually satisfactory modifications, the trustee may file a motion seeking rejection of the collective bargaining agreement after notice and a hearing. Absent agreement of the parties, no such hearing shall be held before the expiration of the 21-day period beginning on the date on which notice of the hearing is provided to the labor organization representing the employees covered by the agreement. Only the debtor and the labor organization may appear and be heard at such hearing. An application for rejection shall seek rejection effective upon the entry of an order granting the relief.

''(2) In consideration of Federal policy encouraging the practice and process of collective bargaining and in recognition of the bargained-for expectations of the employees covered by the agreement, the court may grant a motion seeking rejection of a collective bargaining agreement only if, based on clear and convincing evidence—

''(A) the court finds that the trustee has complied with the requirements of subsection (c);

''(B) the court has considered alternative proposals by the labor organization and has concluded that such proposals do not meet the requirements of paragraph (3)(B) of subsection (c);

''(C) the court finds that further negotiations regarding the trustee's proposal or an alternative proposal by the labor organization are not likely to produce an agreement;

''(D) the court finds that implementation of the trustee's proposal shall not—

''(i) cause a material diminution in the purchasing power of the employees covered by the agreement;

''(ii) adversely affect the ability of the debtor to retain an experienced and qualified workforce; or

''(iii) impair the debtor's labor relations such that the ability to achieve a feasible reorganization would be compromised; and

''(E) the court concludes that rejection of the agreement and immediate implementation of the trustee's proposal is essential to permit the debtor to exit bankruptcy, such that confirmation of a plan of reorganization is not likely to be followed by liquidation, or the need for further financial reorganization, of the debtor (or any successor to the debtor) in the short term.

''(3) If the trustee has implemented a program of incentive pay, bonuses, or other financial returns for insiders, senior executive officers, or the 20 next most highly compensated employees or consultants providing services to the debtor during the bankruptcy, or such a program was implemented

within 180 days before the date of the filing of the petition, the court shall presume that the trustee has failed to satisfy the requirements of subsection (c)(3)(C).

''(4) In no case shall the court enter an order rejecting a collective bargaining agreement that would result in modifications to a level lower than the level proposed by the trustee in the proposal found by the court to have complied with the requirements of this section.

''(5) At any time after the date on which an order rejecting a collective bargaining agreement is entered, or in the case of an agreement entered into between the trustee and the labor organization providing mutually satisfactory modifications, at any time after such agreement has been entered into, the labor organization may apply to the court for an order seeking an increase in the level of wages or benefits, or relief from working conditions, based upon changed circumstances. The court shall grant the request only if the increase or other relief is not inconsistent with the standard set forth in paragraph (2)(E).

''(e) During a period in which a collective bargaining agreement at issue under this section continues in effect, and if essential to the continuation of the debtor's business or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by the collective bargaining agreement. Any hearing under this subsection shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

''(f) Rejection of a collective bargaining agreement constitutes a breach of the agreement, and shall be effective no earlier than the entry of an order granting such relief. Notwithstanding the foregoing, solely for purposes of determining and allowing a claim arising from the rejection of a collective bargaining agreement, rejection shall be treated as rejection of an executory contract under section 365(g) and shall be allowed or disallowed in accordance with section 502(g)(1). No claim for rejection damages shall be limited by section 502(b)(7). Economic self-help by a labor organization shall be permitted upon a court order granting a motion to reject a collective bargaining agreement under subsection (d) or pursuant to subsection (e), and no provision of this title or of any other provision of Federal or State law may be construed to the contrary.

''(g) The trustee shall provide for the reasonable fees and costs incurred by a labor organization under this section, upon request and after notice and a hearing.

''(h) A collective bargaining agreement that is assumed shall be assumed in accordance with section 365.''.

SEC. 202. PAYMENT OF INSURANCE BENEFITS TO RETIRED EMPLOYEES.

Section 1114 of title 11, United States Code, is amended—

(1) in subsection (a), by inserting '', whether or not the debtor asserts a right to unilaterally modify such payments under such plan, fund, or program'' before the period at the end;

(2) in subsection (b)(2), by inserting after ''section'' the following: '', and a labor organization serving as the authorized representative under subsection (c)(1),'';

(3) in subsection (f), by striking ''(f)'' and all that follows through paragraph (2) and inserting the following:

''(f)(1) If a trustee seeks modification of retiree benefits, then the trustee shall provide a notice to the authorized representative that modifications are being proposed pursuant to this section, and shall promptly provide an initial proposal. Thereafter, the trustee shall confer in good faith with the authorized representative at reasonable times and for a reasonable period in light of the complexity of the case in attempting to reach mutually satisfactory modifications.

''(2) The initial proposal and subsequent proposals by the trustee shall be based upon a business plan for the reorganization of the debtor and shall reflect the most complete and reliable information available. The trustee shall provide to the authorized representative all information that is relevant for the negotiations. The court may enter a protective order to prevent the disclosure of information if disclosure could compromise the debtor's position with respect to its competitors in the industry, subject to the needs of the authorized representative to evaluate the trustee's proposals and an application pursuant to subsection (g) or (h).

''(3) Modifications proposed by the trustee—

''(A) shall be proposed only as part of a program of workforce and nonworkforce cost savings devised for the reorganization of the debtor, including savings in management personnel costs;

''(B) shall be limited to modifications that are designed to achieve a specified aggregate financial contribution for the retiree group represented by the authorized representative (taking into consideration any cost savings implemented within the 12-month period before the date of filing of the petition with respect to the retiree group), and shall be no more than the minimum savings essential to permit the debtor to exit bankruptcy, such that confirmation of a plan of reorganization is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor (or any successor to the debtor) in the short term; and

''(C) shall not be disproportionate or overly burden the retiree group, either in the amount of the cost savings sought from such group or the nature of the modifications.'';

(4) in subsection (g)—

(A) by striking ''(g)'' and all that follows through the semicolon at the end of paragraph (3) and inserting the following:

''(g)(1) If, after a period of negotiations, the trustee and the authorized representative have not reached agreement over mutually satisfactory modifications and further negotiations are not likely to produce mutually satisfactory modifications, then the trustee may file a motion seeking modifications in the payment of retiree benefits after notice and a hearing. Absent agreement of the parties, no such hearing shall be held before the expiration of the 21-day period beginning on the date on which notice of the hearing is provided to the authorized representative. Only the debtor and the authorized representative may appear and be heard at such hearing.

''(2) The court may grant a motion to modify the payment of retiree benefits only if, based on clear and convincing evidence—

''(A) the court finds that the trustee has complied with the requirements of subsection (f);

''(B) the court has considered alternative proposals by the authorized representative and has determined that such proposals do not meet the requirements of subsection (f)(3)(B);

''(C) the court finds that further negotiations regarding the trustee's proposal or an alternative proposal by the authorized representative are not likely to produce a mutually satisfactory agreement;

''(D) the court finds that implementation of the proposal shall not cause irreparable harm to the affected retirees; and

''(E) the court concludes that an order granting the motion and immediate implementation of the trustee's proposal is essential to permit the debtor to exit bankruptcy, such that confirmation of a plan of reorganization is not likely to be followed by liquidation, or the need for further financial reorganization, of the debtor (or a successor to the debtor) in the short term.

''(3) If a trustee has implemented a program of incentive pay, bonuses, or other financial returns for insiders, senior executive officers, or the 20 next most highly-compensated employees or consultants providing services to the debtor during the bankruptcy, or such a program was implemented within 180 days before the date of the filing of the petition, the court shall presume that the trustee has failed to satisfy the requirements of subparagraph (f)(3)(C).''; and

(B) by striking ''except that in no case'' and inserting the following:

''(4) In no case''; and

(5) by striking subsection (k) and redesignating subsections (l) and (m) as subsections (k) and (l), respectively.

SEC. 203. PROTECTION OF EMPLOYEE BENEFITS IN A SALE OF ASSETS.

Section 363(b) of title 11, United States Code, is amended by adding at the end the following:

''(3) In approving a sale under this subsection, the court shall consider the extent to which a bidder has offered to maintain existing jobs, preserve terms and conditions of employment, and assume or match pension and retiree health benefit obligations in determining whether an offer constitutes the highest or best offer for such property.''.

SEC. 204. CLAIM FOR PENSION LOSSES.

Section 502 of title 11, United States Code, is amended by adding at the end the following:

''(l) The court shall allow a claim asserted by an active or retired participant, or by a labor organization representing such participants, in a defined benefit plan terminated under section 4041 or 4042 of the Employee Retirement Income Security Act of 1974, for any shortfall in pension benefits accrued as of the effective date of the termination of such pension plan as a result of the termination of the plan and limitations upon the payment of benefits imposed pursuant to section 4022 of such Act, notwithstanding any claim asserted and collected by the Pension Benefit Guaranty Corporation with respect to such termination.

''(m) The court shall allow a claim of a kind described in section 101(5)(C) by an active or retired participant in a defined contribution plan (within the meaning of section 3(34) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(34))), or by a labor organization representing such participants. The amount of such claim shall be measured by the market value of the stock at the time of contribution to, or purchase by, the plan and the value as of the commencement of the case.''.

SEC. 205. PAYMENTS BY SECURED LENDER.

Section 506(c) of title 11, United States Code, is amended by adding at the end the following: ''If employees have not received wages, accrued vacation, severance, or other benefits owed under the policies and practices of the debtor, or pursuant to the terms of a collective bargaining agreement, for services rendered on and after the date of the commencement of the case, then such unpaid obligations shall be deemed necessary costs and expenses of preserving, or disposing of, property securing an allowed secured claim and shall be recovered even if the trustee has otherwise waived the provisions of this subsection under an agreement with the holder of the allowed secured claim or a successor or predecessor in interest.''.

SEC. 206. PRESERVATION OF JOBS AND BENEFITS.

Title 11, United States Code, is amended—

(1) by inserting before section 1101 the following:

''SEC. 1100. STATEMENT OF PURPOSE.

''A debtor commencing a case under this chapter shall have as its principal purpose the reorganization of its business to preserve going concern value to the maximum extent possible through the productive use of its assets and the preservation of jobs that will sustain productive economic activity.'';

(2) in section 1129(a), as amended by section 104, by adding at the end the following:

''(18) The debtor has demonstrated that the reorganization preserves going concern value to the maximum extent possible through the productive use of the debtor's assets and preserves jobs that sustain productive economic activity.'';

(3) in section 1129(c), by striking the last sentence and inserting the following: ''If the requirements of subsections (a) and (b) are met with respect to more than 1 plan, the court shall, in determining which plan to confirm—

''(1) consider the extent to which each plan would preserve going concern value through the productive use of the debtor's assets and the preservation of jobs that sustain productive economic activity; and

''(2) confirm the plan that better serves such interests.

A plan that incorporates the terms of a settlement with a labor organization representing employees of the debtor shall presumptively constitute the plan that satisfies this subsection.''; and

(4) in the table of sections for chapter 11, by inserting the following before the item relating to section 1101:

''1100. Statement of purpose.''.

SEC. 207. TERMINATION OF EXCLUSIVITY.

Section 1121(d) of title 11, United States Code, is amended by adding at the end the following:

''(3) For purposes of this subsection, cause for reducing the 120-day period or the 180-day period includes the following:

''(A) The filing of a motion pursuant to section 1113 seeking rejection of a collective bargaining agreement if a plan based upon an alternative proposal by the labor organization is reasonably likely to be confirmed within a reasonable time.

''(B) The proposed filing of a plan by a proponent other than the debtor, which incorporates the terms of a settlement with a labor organization if such plan is reasonably likely to be confirmed within a reasonable time.''.

SEC. 208. CLAIM FOR WITHDRAWAL LIABILITY.

Section 503(b) of title 11, United States Code, as amended by section 103 of this Act, is amended by adding at the end the following:

''(11) with respect to withdrawal liability owed to a multiemployer pension plan for a complete or partial withdrawal pursuant to section 4201 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1381) where such withdrawal occurs on or after the commencement of the case, an amount equal to the amount of vested benefits payable from such pension plan that accrued as a result of employees' services rendered to the debtor during the period beginning on the date of commencement of the case and ending on the date of the withdrawal from the plan.''.

TITLE III—RESTRICTING EXECUTIVE COMPENSATION PROGRAMS

SEC. 301. EXECUTIVE COMPENSATION UPON EXIT FROM BANKRUPTCY.

Section 1129(a) of title 11, United States Code, is amended—

(1) in paragraph (4), by adding at the end the following: ''Except for compensation subject to review under paragraph (5), payments or other distributions under the plan to or for the benefit of insiders, senior executive officers, and any of the 20 next most highly compensated employees or consultants providing services to the debtor, shall not be approved except as part of a program of payments or distributions generally applicable to employees of the debtor, and only to the extent that the court determines that such payments are not excessive or disproportionate compared to distributions to the debtor's nonmanagement workforce.''; and

(2) in paragraph (5)—

(A) in subparagraph (A)(ii), by striking ''and'' at the end; and

(B) in subparagraph (B), by striking the period at the end and inserting the following: ''; and

''(C) the compensation disclosed pursuant to subparagraph (B) has been approved by, or is subject to the approval of, the court as reasonable when compared to individuals holding comparable positions at comparable companies in the same industry and not disproportionate in light of economic concessions by the debtor's nonmanagement workforce during the case.''.

SEC. 302. LIMITATIONS ON EXECUTIVE COMPENSATION ENHANCEMENTS.

Section 503(c) of title 11, United States Code, is amended—

(1) in paragraph (1)—

(A) by inserting '', a senior executive officer, or any of the 20 next most highly compensated employees or consultants'' after ''an insider'';

(B) by inserting ''or for the payment of performance or incentive compensation, or a bonus of any kind, or other financial returns designed to replace or enhance incentive, stock, or other compensation in effect before the date of the commencement of the case,'' after ''remain with the debtor's business,''; and

(C) by inserting ''clear and convincing'' before ''evidence in the record''; and

(2) by amending paragraph (3) to read as follows:

''(3) other transfers or obligations, to or for the benefit of insiders, senior executive officers, managers, or consultants providing services to the debtor, in the absence of a finding by the court, based upon clear and convincing evidence, and without deference to the debtor's request for such payments, that such transfers or obligations are essential to the survival of the debtor's business or (in the case of a liquidation of some or all of the debtor's assets) essential to the orderly liquidation and maximization of value of the assets of the debtor, in either case, because of the essential nature of the services provided, and then only to the extent that the court finds such transfers or obligations are reasonable compared to individuals holding comparable positions at comparable companies in the same industry and not disproportionate in light of economic concessions by the debtor's nonmanagement workforce during the case.''.

SEC. 303. ASSUMPTION OF EXECUTIVE BENEFIT PLANS.

Section 365 of title 11, United States Code, is amended—

(1) in subsection (a), by striking ''and (d)'' and inserting ''(d), (q), and (r)''; and

(2) by adding at the end the following:

''(q) No deferred compensation arrangement for the benefit of insiders, senior executive officers, or any of the 20 next most highly compensated employees of the debtor shall be assumed if a defined benefit plan for employees of the debtor has been terminated pursuant to section 4041 or 4042 of the Employee Retirement Income Security Act of 1974, on or after the date of the commencement of the case or within 180 days before the date of the commencement of the case.

''(r) No plan, fund, program, or contract to provide retiree benefits for insiders, senior executive officers, or any of the 20 next most highly compensated employees of the debtor shall be assumed if the debtor has obtained relief under subsection (g) or (h) of section 1114 to impose reductions in retiree benefits or under subsection (d) or (e) of section 1113 to impose reductions in the health benefits of active employees of the debtor, or reduced or eliminated health benefits for active or retired employees within 180 days before the date of the commencement of the case.''.

SEC. 304. RECOVERY OF EXECUTIVE COMPENSATION.

Title 11, United States Code, is amended by inserting after section 562 the following:

''SEC. 563. RECOVERY OF EXECUTIVE COMPENSATION.

''(a) If a debtor has obtained relief under subsection (d) of section 1113, or subsection (g) of section 1114, by which the debtor reduces the cost of its obligations under a collective bargaining agreement or a plan, fund, or program for retiree benefits as defined in section 1114(a), the court, in granting relief, shall determine the percentage diminution in the value of the obligations when compared to the debtor's obligations under the collective bargaining agreement, or with respect to retiree benefits, as of the date of the commencement of the case under this title before granting such relief. In making its determination, the court shall include reductions in benefits, if any, as a result of the termination pursuant to section 4041 or 4042 of the Employee Retirement Income Security Act of 1974, of a defined benefit plan administered by the debtor, or for which the debtor is a contributing employer, effective at any time on or after 180 days before the date of the commencement of a case under this title. The court shall not take into account pension benefits paid or payable under of such Act as a result of any such termination.

''(b) If a defined benefit pension plan administered by the debtor, or for which the debtor is a contributing employer, has been terminated pursuant to section 4041 or 4042 of the Employee Retirement Income Security Act of 1974, effective at any time on or after 180 days before the date of the commencement of a case under this title, but a debtor has not obtained relief under subsection (d) of section 1113, or subsection (g) of section 1114, then the court, upon motion of a party in interest, shall determine the percentage diminution in the value of benefit obligations when compared to the total benefit liabilities before such termination. The court shall not take into account pension benefits paid or payable under title IV of the Employee Retirement Income Security Act of 1974 as a result of any such termination.

''(c) Upon the determination of the percentage diminution in value under subsection (a) or (b), the estate shall have a claim for the return of the same percentage of the compensation paid, directly or indirectly (including any transfer to a self-settled trust or similar device, or to a nonqualified deferred compensation plan under section 409A(d)(1) of the Internal Revenue Code of 1986) to any officer of the debtor serving as member of the board of directors of the debtor within the year before the date of the commencement of the case, and any individual serving as chairman or lead director of the board of directors at the time of the granting of relief under section 1113 or 1114 or, if no such relief has been granted, the termination of the defined benefit plan.

''(d) The trustee or a committee appointed pursuant to section 1102 may commence an

action to recover such claims, except that if neither the trustee nor such committee commences an action to recover such claim by the first date set for the hearing on the confirmation of plan under section 1129, any party in interest may apply to the court for authority to recover such claim for the benefit of the estate. The costs of recovery shall be borne by the estate.

''(e) The court shall not award postpetition compensation under section 503(c) or otherwise to any person subject to subsection (c) if there is a reasonable likelihood that such compensation is intended to reimburse or replace compensation recovered by the estate under this section.''.

SEC. 305. PREFERENTIAL COMPENSATION TRANSFER.

Section 547 of title 11, United States Code, is amended by adding at the end the following:

''(j) The trustee may avoid a transfer to or for the benefit of an insider (including an obligation incurred for the benefit of an insider under an employment contract) made in anticipation of bankruptcy, or a transfer made in anticipation of bankruptcy to a consultant who is formerly an insider and who is retained to provide services to an entity that becomes a debtor (including an obligation under a contract to provide services to such entity or to a debtor) made or incurred on or within 1 year before the filing of the petition. No provision of subsection (c) shall constitute a defense against the recovery of such transfer. The trustee or a committee appointed pursuant to section 1102 may commence an action to recover such transfer, except that, if neither the trustee nor such committee commences an action to recover such transfer by the time of the commencement of a hearing on the confirmation of a plan under section 1129, any party in interest may apply to the court for authority to recover the claims for the benefit of the estate. The costs of recovery shall be borne by the estate.''.

TITLE IV—OTHER PROVISIONS

SEC. 401. UNION PROOF OF CLAIM.

Section 501(a) of title 11, United States Code, is amended by inserting '', including a labor organization,'' after ''A creditor''.

SEC. 402. EXCEPTION FROM AUTOMATIC STAY.

Section 362(b) of title 11, United States Code, is amended—

(1) in paragraph (27), by striking ''and'' at the end;

(2) in paragraph (28), by striking the period at the end and inserting ''; and''; and

(3) by adding at the end the following:

''(29) of the commencement or continuation of a grievance, arbitration, or similar dispute resolution proceeding established by a collective bargaining agreement that was or could have been commenced against the debtor before the filing of a case under this title, or the payment or enforcement of an award or settlement under such proceeding.''.

By Mr. GRASSLEY (for himself, Mr. KYL, Mr. CORNYN, Mr. LEE, Mr. PAUL, and Mr. COBURN):

S. 3382. 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; to the Committee on the Judiciary.

Mr. GRASSLEY. Mr. President, I rise today to introduce important regulatory reform legislation.

Recently, when describing the state of our economy, President Obama said that the private sector was ''doing fine.''

I disagree. I think that the American people disagree with the President's statement.

There are 12.7 million Americans unemployed and another 8.2 million underemployed. 5.4 million Americans have been unemployed for 27 weeks or more.

That's not ''doing fine.''

The Federal Government needs to do everything possible to create an environment that will allow private sector employers to create jobs. To accomplish that, common sense would tell us that the government needs to remove barriers to job creation rather than erect new ones. The Federal Government needs to listen to employers so it can learn from them exactly what it can do to help.

Unfortunately, the Obama administration hasn't listened. In fact, unbelievably it is actually doing the opposite of what employers are saying they need.

Employers are saying that they need relief from job killing regulations.

For example, according to a Gallup survey, small-business owners in the United States are most likely to say that complying with government regulations is the biggest problem facing them today.

Indeed, the burden of regulations is overwhelming. Recently, the Small Business Administration estimated that the Federal regulatory burden has reached $1.75 trillion per year.

So what has the Obama administration's response been?

It is planning to increase the number of regulations.

The Obama administration's regulatory agenda has thousands of regulations in its production line, more than a hundred of which will have a major impact on the economy. Those are on top of more than one thousand regulations already completed.

I am sorry to say that the news gets even worse. On top of the thousands of new regulations it to impose, it appears that the administration is trying to get around the procedures governing how regulations are enacted.

In recent years, consent decrees and settlement agreements have been used to circumvent the laws and procedures that govern how regulations are enacted and to speed up the process in ways that limit the public's ability to fully participate and to exercise the rights guaranteed by our laws.

These consent decrees or settlement agreements may come as a surprise to the regulated industry and the public. They usually establish truncated deadlines for the agency to promulgate a regulation.

The lack of advance notice and the expedited schedule for the proposal and promulgation of regulations allows an agency to avoid the input that comes with meaningful public participation. It may also allow agencies to short-circuit the analytical requirements of regulatory process statutes, such as the Administrative Procedure Act. Expedited deadlines further allow agencies to undercut the review of proposed regulations by the Office of Management and Budget's Office of Information and Regulatory Affairs OIRA.

The practice of using consent decrees and settlement agreements to enact regulations has become known as ''sue-and-settle'' litigation.

The dangers of sue-and-settle litigation and of government by consent decree are not a new problem.

Nearly 30 years ago, Judge Malcom Wilkey of the D.C. Circuit warned about the dangers of collusive consent decrees. In his dissenting opinion in Citizens for a Better Environment v. Gorsuch, Judge Wilkey explained:

> Government by consent decree enshrines at its very center those special interest groups who are party to the decree. They stand in a strong tactical position to oppose changing the decree, and so likely will enjoy material influence on proposed changes in agency policy.
>
> As a policy device, then, government by consent decree serves no necessary end. It opens the door to unforeseeable mischief; it degrades the institutions of representative democracy and augments the power of special interest groups. It does all of this in a society that hardly needs new devices that emasculate representative democracy and strengthen the power of special interests.

Because the Obama administration is trying to dramatically increase the number of regulations, we must make sure that the laws and procedures governing rulemaking are followed and followed in a meaningful way.

The debate about sue-and-settle litigation is important because it raises questions about fairness, transparency and public participation in administrative rulemaking. It also raises the issue of whether meaningful judicial review is taking place.

Under the Administrative Procedure Act and other laws, the public and affected persons, in particular, have a right to adequate notice and an opportunity to comment on a proposed regulation. They also have a right to have their comments fully considered.

However, when sue-and-settle litigation is used real, public participation is effectively eliminated.

Generally speaking, the agreement on how to regulate is reached without the full input of the people and businesses that are affected. Discussions are held and agreements may be reached between government officials and special interest groups outside the public process. This is particularly true where career employees and political appointees at agencies share the agenda of the special interest group suing the agency and use the lawsuit as an opportunity to implement their common goals.

Also, the negotiated deadlines for creating the new regulation can be so accelerated that the public's comments might receive little or no true consideration.

Keep in mind that these regulations often involve complex scientific and

economic issues. Those issues cannot generally be fully and properly considered under a truncated time frame.

Another fundamental aspect of rulemaking is the opportunity to challenge a decision by participating as an intervenor. However, with sue-and-settle litigation, special interest groups and the government may reach an agreement before a lawsuit is even filed. This eliminates the opportunity for members of the public to intervene in the case to protect their interests.

Even where a settlement occurs after affected parties may have been granted intervention, these parties have little or no chance to participate in settlement discussions because they are not invited by the government and the special interest groups.

Moreover, when an agency creates a regulation through sue-and-settle litigation, it reorganizes its work by promising to take specific actions at specific times, before or instead of other projects that may be of greater benefit to the public.

Also, sue-and-settle litigation helps officials and administrations to avoid accountability. Instead of having to answer to the public for controversial regulations and policy decisions, officials are able to point to a court order and maintain that they were required or forced to promulgate a controversial regulation.

The case of American Nurses Association v. Jackson is an example of the sue-and-settle phenomenon.

In that case, a group of environmental organizations sued the Environmental Protection Agency, EPA, in December 2008, challenging the agency's failure to create emissions standards for pollutants from power plants under the Clean Air Act. Subsequently, the Utility Air Regulatory Group, UARG, representing the utility industry, intervened as a defendant in the case.

On October 22, 2009, the plaintiffs and the EPA filed a proposed consent decree. It was the result of a deal struck exclusively between them. They did not include the UARG in their discussions. Although the judge expressed concerns about the exclusion of the UARG from the settlement discussions, she was satisfied when the plaintiffs and the EPA informed her that this practice was the ''norm.''

Under the consent decree, the EPA conceded that it had failed to perform a mandatory duty under the Clean Air Act by failing to issue a ''maximum achievable control technology'', MACT, regulation for power plants. The EPA pledged that it would issue a proposed regulation by March 16, 2011 and a final regulation by November 16, 2011.

The UARG objected to the consent decree. It argued that the proposed decree improperly limited the government's discretion because it required the EPA to find that standards under 112(d) of the Clean Air Act were required. Consequently, the decree prevented the agency from either declining to issue standards or adopting other standards instead of the more burdensome MACT standard.

Although acknowledging the significance of the UARG's arguments, the judge nevertheless rejected them in its short opinion approving the consent decree.

As to the language limiting the EPA's discretion in the rulemaking, the judge stated that the EPA believed itself to be obligated to promulgate 112(d) standards and, ''and by entering this consent decree the Court [wa]s only accepting the parties' agreement to settle, not adjudicating whether EPA's legal position [wa]s correct.'' The judge simply believed that ''[i]f necessary, [the] UARG c[ould] challenge [the] EPA's final rule and its legal position.''

With regard to the UARG's argument that the time frame within which the EPA proposed to carry out the rulemaking was insufficient, the judge noted that she ''appreciate[d]'' the concern that the schedule was too short for the critical and expensive regulatory decisions that would be made. Nevertheless, she held that it was enough that the proposed consent decree allowed for a change of the schedule if needed.

The judge's reasoning on this point was interesting given that she acknowledged in a footnote that under the consent decree, the UARG could not petition for an extension of the deadlines.

In the end, the judge acknowledged that the concerns raised by the UARG were not insubstantial. However, she did not believe that she could gauge the adequacy, or lack thereof, of the schedule. Consequently, in a somewhat cavalier manner the judge concluded that: ''[s]hould haste make waste, the resulting regulations will be subject to successful challenge''. . . . If EPA needs more time to get it right, it can seek more time.''

Unfortunately, it appears that the EPA's proposed regulation contained significant errors. Indeed, the EPA did not analyze the impact of its regulation on electric reliability or provide sufficient time for industry to do so.

In November of 2011, the UARG brought its concerns to the judge, asking for relief from the consent decree.

In particular, it argued that more time was needed to respond to the voluminous comments submitted during the rulemaking process, to fix the serious flaws, and to then more carefully consider the promulgation of a rule with such serious and far-reaching consequences. For example, the schedule under the consent decree only allowed 104 days for the EPA to consider and respond to 20,000 unique, public comments received before it published the final rule. In total, there were 960,000 comments submitted.

The UARG's motion was supported by twenty-four states and Governor Terry Branstad on behalf of the people of Iowa. As part of their amicus brief, they pointed out that the American Coalition for Clean Coal Electricity, ACCCE, had estimated that the rule promulgated under the consent decree would result in the loss of 1.44 million jobs in the United States between 2013 and 2020. Because of the rule, the ACCCE also predicts national electricity price increases in 2016 to average 11.5 percent, with an increase of 23.5 percent in some regions.

The EPA issued a final rule on December 21, 2011, and has argued that the UARG's motion is moot.

As it stands, the rule is among the most costly of rules ever promulgated by the EPA with the agency estimating that the annualized cost at $9.6 billion in 2015. Industry estimates are even higher. Petitions for reconsideration of the rule are pending and more lawsuits are likely.

The EPA could have done it right the first time by crafting a sensible, workable rule that both protects the environment and can be implemented without causing unnecessary job losses or higher electricity prices for hard-working families. Instead, we have flawed, controversial regulation that may have to be rewritten.

Although we don't know how this will all turn out, we have to remember that the process by which this rule was created was the product of a consent decree.

In sum, when special interest groups and agencies engage in sue-and-settle litigation, the end product is a regulation that implements the priorities of the special interest groups. Moreover, these regulations are created under schedules that render notice-and-comment rights a mere formality, eliminating the opportunities for regulated entities, the public and the OIRA to have any input on the content of final regulations.

That is why I'm introducing the Sunshine for Regulatory Decrees and Settlements Act of 2012. Senators KYL, CORNYN, COBURN, LEE and PAUL are cosponsors of the bill.

Representative BENJAMIN QUAYLE of Arizona has introduced a companion bill in the House.

The Sunshine bill endeavors to solve the problems I have outlined. It does this by enacting reasonable pro-transparency measures. I'll just outline a few of those measures.

First, the Sunshine bill provides for greater transparency, requiring agencies publicly to post and report to Congress information on sue-and-settle complaints, decrees and settlements.

Second, the bill prohibits same-day filing of complaints and pre-negotiated consent decrees and settlement agreements in cases seeking to compel agency action. Instead, it requires that consent decrees and settlement agreements be filed only after interested parties have been able to intervene in the litigation and join settlement negotiations and only after any proposed decree or settlement has been published for notice and comment.

Third, the Sunshine bill requires courts considering whether to approve proposed consent decrees and settlement agreements to account for public comments and compliance with regulatory process statutes and executive orders. This bill would facilitate public participation by allowing comment on any issue related to the matters alleged in the complaint or addressed in the proposed agreement. Government agencies would be required to respond to comments, and the court would assess whether the proposed schedule allows sufficient time for real and meaningful, public comment on the regulation.

Fourth, the bill requires the Attorney General or, where appropriate, the defendant agency's head, to certify to the court that he or she has approved any proposed consent decree or settlement agreement that includes terms that: convert into a duty a discretionary authority of an agency to propose, promulgate, revise, or amend regulations, commit an agency to expend funds that have not been appropriated and budgeted, commit an agency to seek a particular appropriation or budget authorization, divest an agency of discretion committed to it by statute or the Constitution, or otherwise afford any relief that the court could not enter under its own authority.

Finally, the Sunshine bill makes it easier for succeeding administrations to successfully move the courts for modifications of a prior administration's consent decrees by providing for de novo review of motions to modify if the circumstances have changed.

Sue-and-settle litigation damages the transparency, public participation and judicial review protections Congress has guaranteed for all of our citizens in the rulemaking process.

Regulations are laws. The procedure and process used to create them are important. They are part of our system. The American system of lawmaking and judicial review is a model for the world. Our system should not be distorted or manipulated.

Regulations must be made in the open, through the procedures and processes established under our laws.

The Sunshine for Regulatory Decrees and Settlements Act will help to ensure that established and well-grounded protections remain in place, while maintaining the government's ability to enter into consent decrees and settlement agreements, when appropriate.

I urge all of my colleagues to work with me and to support this legislation.

AMENDMENTS SUBMITTED AND PROPOSED

SA 2532. Mr. VITTER submitted an amendment intended to be proposed by him to the bill S. 2237, to provide a temporary income tax credit for increased payroll and extend bonus depreciation for an additional year, and for other purposes; which was ordered to lie on the table.

SA 2533. Mr. BARRASSO (for himself, Mr. HATCH, and Ms. SNOWE) submitted an amendment intended to be proposed by him to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2534. Mr. COBURN submitted an amendment intended to be proposed by him to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2535. Mr. COBURN submitted an amendment intended to be proposed by him to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2536. Mr. COBURN submitted an amendment intended to be proposed by him to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2537. Mr. COBURN (for himself and Mr. BURR) submitted an amendment intended to be proposed by him to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2538. Mr. KYL (for himself and Mr. THUNE) submitted an amendment intended to be proposed by him to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2539. Mr. KYL (for himself and Mr. THUNE) submitted an amendment intended to be proposed by him to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2540. Mr. KYL submitted an amendment intended to be proposed by him to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2541. Mr. PAUL submitted an amendment intended to be proposed by him to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2542. Mr. SANDERS submitted an amendment intended to be proposed to amendment SA 2521 proposed by Mr. REID (for Ms. LANDRIEU) to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2543. Mr. SANDERS submitted an amendment intended to be proposed to amendment SA 2521 proposed by Mr. REID (for Ms. LANDRIEU) to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2544. Mr. WYDEN submitted an amendment intended to be proposed by him to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2545. Mr. MANCHIN (for himself and Mr. BEGICH) submitted an amendment intended to be proposed by him to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2546. Mrs. SHAHEEN (for herself and Mr. PORTMAN) submitted an amendment intended to be proposed by her to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2547. Mr. ROBERTS (for himself, Mr. HATCH, Mr. RUBIO, Mr. BURR, Ms. COLLINS, Mr. BROWN of Massachusetts, Mr. COBURN, Mr. ALEXANDER, and Mr. KIRK) submitted an amendment intended to be proposed by him to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2548. Mr. WYDEN submitted an amendment intended to be proposed to amendment SA 2521 proposed by Mr. REID (for Ms. LANDRIEU) to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2549. Ms. SNOWE (for herself and Mr. COBURN) submitted an amendment intended to be proposed to amendment SA 2521 proposed by Mr. REID (for Ms. LANDRIEU) to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2550. Ms. SNOWE (for herself and Mr. COBURN) submitted an amendment intended to be proposed to amendment SA 2521 proposed by Mr. REID (for Ms. LANDRIEU) to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2551. Ms. SNOWE (for herself and Mr. COBURN) submitted an amendment intended to be proposed to amendment SA 2521 proposed by Mr. REID (for Ms. LANDRIEU) to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2552. Ms. SNOWE (for herself and Mr. COBURN) submitted an amendment intended to be proposed to amendment SA 2521 proposed by Mr. REID (for Ms. LANDRIEU) to the bill S. 2237, supra; which was ordered to lie on the table.

SA 2553. Mr. REID (for Mrs. GILLIBRAND (for herself, Mr. ISAKSON, Mr. CHAMBLISS, and Mr. DURBIN)) proposed an amendment to the bill H.R. 2527, to require the Secretary of the Treasury to mint coins in recognition and celebration of the National Baseball Hall of Fame.

TEXT OF AMENDMENTS

SA 2532. Mr. VITTER submitted an amendment intended to be proposed by him to the bill S. 2237, to provide a temporary income tax credit for increased payroll and extend bonus depreciation for an additional year, and for other purposes; which was ordered to lie on the table; as follows:

At the appropriate place, insert the following:

SEC. ___. SUSPENSION OF FINES FOR FIRST-TIME PAPERWORK VIOLATIONS BY SMALL BUSINESS CONCERNS.

Section 3506 of title 44, United States Code (commonly referred to as the ''Paperwork Reduction Act''), is amended by adding at the end the following:

''(j) SMALL BUSINESSES.—

''(1) SMALL BUSINESS CONCERN.—In this subsection, the term 'small business concern' has the same meaning given as in section 3 of the Small Business Act (15 U.S.C. 632).

''(2) IN GENERAL.—In the case of a first-time violation by a small business concern of a requirement regarding the collection of information by an agency, the head of the agency shall not impose a civil fine on the small business concern unless the head of the agency determines that—

''(A) the violation has the potential to cause serious harm to the public interest;

''(B) failure to impose a civil fine would impede or interfere with the detection of criminal activity;

''(C) the violation is a violation of an internal revenue law or a law concerning the assessment or collection of any tax, debt, revenue, or receipt;

''(D) the violation was not corrected on or before the date that is 6 months after the date on which the small business concern receives notification of the violation in writing from the agency; or

''(E) except as provided in paragraph (3), the violation presents a danger to the public health or safety.

''(3) DANGER TO PUBLIC HEALTH OR SAFETY.—

''(A) IN GENERAL.—In any case in which the head of an agency determines under paragraph (2)(E) that a violation presents a danger to the public health or safety, the head of the agency may, notwithstanding paragraph (2)(E), determine not to impose a civil fine on the small business concern if the violation is corrected not later than 24 hours after receipt by the owner of the small business concern of notification of the violation in writing.

''(B) CONSIDERATIONS.—In determining whether to allow a small business concern 24 hours to correct a violation under subparagraph (A), the head of an agency shall take into account all of the facts and circumstances regarding the violation, including—

''(i) the nature and seriousness of the violation, including whether the violation is