

CONGRESSIONAL ARTICLE I POWERS STRENGTHENING ACT

Section-by-Section Analysis

Title I. Sunshine for Regulations and Regulatory Decrees and Settlements

Section. 101. Short title.

Section 101 sets forth the short title of the bill as the “Sunshine for Regulatory Decrees and Settlements Act of 2017.”

Sec. 102. Definitions.

Under the definitions in Section 102, the bill applies to specific classes of consent decrees and settlements, as follows:

Subsec. 102(1): “Agency” and “Agency action” have the meanings given those terms under 5 U.S.C. § 551.

Subsec. 102(2): “Covered civil action” means a civil action brought under chapter 7 of title 5, United States Code, or any other statute authorizing suit against the United States, to compel agency action alleged to be unlawfully withheld or unreasonably delayed that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of state, local, or tribal governments.

Subsec. 102(3): “Covered consent decree” means any consent decree entered in a covered civil action and any consent decree that requires agency action that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of state, local, or tribal governments.

Subsec. 102(4): “Covered consent decree or settlement agreement” means a covered consent decree and a covered settlement agreement.

Subsec. 102(5): “Covered settlement agreement” means any settlement agreement entered in a covered civil action and any settlement agreement that requires agency action that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of state, local, or tribal governments.

Sec. 103. Consent decree and settlement reform.

Section 103 of the bill sets forth the following requirements applicable to consent decrees and settlement agreements covered by the bill:

Subsec. 103(a)(1)—notice of intent to sue and complaints in covered civil actions must be made publicly available, within 15 days after receipt of service of the notice of intent

to sue or the complaint, respectively, through readily accessible means, including electronic means by the agency against which the action is filed.

Subsec. 103(a)(2)—the opportunity for affected parties to intervene in the litigation must conclude before covered consent decrees and settlement agreements may be proposed to the court.

Subsec. 103(b)(1)—in considering motions to intervene, the court must adopt a rebuttable presumption that an intervenor-movant's rights are not adequately represented by the plaintiff or defendant agency.

Subsec. 103(b)(2)—in considering motions to intervene, the court must take due account of whether the movant is a state, local, or tribal government that co-administers with the federal government the statutory provisions at issue in the litigation or administers state, local or tribal regulatory authority that would be preempted by the defendant agency's discharge of the regulatory duty alleged in the complaint.

Subsec. 103(c)(1)-(2)—if the court grants intervention, it must include the plaintiff, defendant agency, and intervenor(s) in court-supervised settlement talks. Settlement negotiations are to occur in the court's mediation or ADR program or to be presided over by a district judge other than the presiding judge, a magistrate judge, or a special master, as determined appropriate by the presiding judge.

Subsec. 103(d)(1)—the defendant agency must publish in the *Federal Register* and online any proposed consent decree or settlement agreement for no fewer than 60 days of public comment before filing it with the court and must specify the statutory basis for the covered consent decree or settlement. The agency must also publish a description of the covered consent decree or settlement, including whether it provides for an award of attorney's fees.

Subsec. 103(d)(2)(A)—during the 60 day period, the defendant agency must allow public comment on any issue related to the matters alleged in the complaint in the applicable civil action or addressed or affected by the covered consent decree or settlement agreement.

Subsec. 103(d)(2)(B)—the defendant agency must respond to any public comments received.

Subsec. 103(d)(2)(C)—the defendant agency must submit to the court a summary of the public comments and agency responses when it moves for entry of the covered consent decree or dismissal of the case based on the settlement agreement, inform the court of the statutory basis for the proposed covered consent decree or settlement, certify an index of the administrative record for the notice and comment proceeding to the court, and make the administrative record fully accessible to the court.

Subsec. 103(d)(2)(D)—the court must include in the record the index of the administrative record certified by the agency under subparagraph (C) and any documents listed in the index that any party or amicus curiae appearing before the court in the action submits to the court.

Subsec. 103(d)(3)(A)—the defendant agency may, at its discretion, hold a public agency hearing on whether to enter into the proposed consent decree or settlement agreement.

Subsec. 103(d)(3)(B)—If such a hearing is held, then a summary of the proceedings must be filed with the court, the hearing record must be certified to the court and included in the judicial record, and full access to the hearing record must be given to the court.

Subsec. 103(d)(4)—if a proposed consent decree or settlement agreement requires agency action by a date-certain, the defendant agency must inform the court of any uncompleted mandatory agency duties the covered consent decree or settlement agreement does not address, how the covered consent decree or settlement agreement would affect the discharge of those duties, and why the covered consent decree's or settlement agreement's effects on the order in which the agency discharges its mandatory duties is in the public interest.

Subsec. 103(e)(1)-(2)— in the case of a covered consent decree, the Attorney General or, in cases litigated by agencies with independent litigating authority, the defendant agency head, must certify to the court that he or she approves of a proposed covered consent decree that includes terms that: (i) convert into a non-discretionary duty a discretionary authority of an agency to propose, promulgate, revise, or amend regulations; (ii) commit an agency to expend funds that have not been appropriated and that have not been budgeted for the regulatory action in question; (iii) commit an agency to seek a particular appropriation or budget authorization; (iv) divest an agency of discretion committed to the agency by statute or the Constitution of the United States, without regard to whether the discretion was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties; or (v) otherwise affords relief that the court could not enter under its own authority upon a final judgment in the civil action.

In the case of a covered settlement agreement, the Attorney General or, in cases litigated by agencies with independent litigating authority, the defendant agency head, must certify to the court that he or she approves of a proposed covered settlement agreement that provides a remedy for failure by the agency to comply with the terms of the covered settlement agreement other than the revival of the civil action resolved by the covered settlement agreement and that: (i) interferes with the authority of an agency to revise, amend, or issue rules under the procedures set forth in chapter 5 of title 5, United States Code, or any other statute or executive order prescribing rulemaking procedures for a rulemaking that is the subject of the covered settlement agreement; (ii) commits the agency to expend funds that have not been appropriated and that have not been budgeted for the regulatory action in question; or (iii) for a covered settlement agreement that commits the agency to exercise in a particular way discretion which was committed to the

agency by statute or the Constitution of the United States to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

Subsec. 103(f)(1)—when it considers motions to participate as *amicus curiae* in briefing over whether it should enter or approve a consent decree or settlement, the court must adopt a rebuttable presumption that favors *amicus* participation by those who filed public comments on the covered consent decree or settlement agreement during the agency’s notice and comment process.

Subsec. 103(f)(2)(A)-(B)—the court must ensure that a proposed consent decree or settlement agreement allows sufficient time and procedure for the agency to comply with the Administrative Procedure Act and other applicable statutes that govern rulemaking, and, unless contrary to the public interest, any executive orders that govern rulemaking;

Subsec. 103(g)—requires agencies to submit annual reports to Congress on the number, identity, and content of covered civil actions brought against and covered consent decrees and settlement agreements, including the statutory bases of the covered consent decrees and settlement agreements, and the decrees’ and settlements’ related complaints and attorneys’ fee awards.

Sec. 104. Motions to modify consent decrees.

The bill establishes a *de novo* standard of review for the courts’ consideration of motions to modify covered consent decrees and settlement agreements due to agency obligations to fulfill other duties or changed facts and circumstances.

Sec. 105. Effective date.

The bill becomes effective upon enactment and applies to any covered civil action filed or covered consent decree or settlement agreement proposed to a court on or after that date.

Title II. Judgment Fund Transparency

Section 201. Short title.

Section 201 sets forth the short title of the bill as the “Judgment Fund Transparency Act of 2017.”

Sec. 202. Judgment Fund transparency.

Section 202 requires the Department of the Treasury to disclose details after payments are made from the Judgment Fund. Unless the disclosure is prohibited by law (other than section 552a of title 5) or a court order, Treasury must disclose to the public on a website: the agency or entity whose actions gave rise to the claim or judgment, the plaintiff or claimant, the counsel for the plaintiff or claimant, the amount paid, a description of the facts that gave rise to the claim,

the agency that submitted the claim, and any information available on reports generated by the Judgment Fund Payment Search administered by Treasury.

If the payment is made to a foreign state, Treasury must also disclose: the method of payment; the currency denomination used for the payment; and the name and location of each financial institution owned or controlled by a foreign state or an agent of a foreign state through which the payment passed, from which the payment was withdrawn, or that is holding the payment.

This section also requires that the total annual amount paid for attorneys' fees, interest, and all other amounts for all Judgment Fund payments be made publicly available. In addition to the transparency requirements, this bill prohibits Judgment Fund payments to a state sponsor of terrorism or to a foreign terrorist organization.

Title III. Article I Amicus and Intervention

Section 301. Short Title.

Section 301 sets forth the short title of the bill as the "Article I Amicus and Intervention Act."

Sec. 302. Congressional Intervention as of Right

Section 302 amends 28 U.S.C. § 530D to ensure that Congress has sufficient time to review and take steps to intervene in any civil action in which the Attorney General has determined that the Justice Department will not defend the constitutionality of any provision of federal law. Under current law, the Attorney General is simply required to report to Congress any time the Justice Department has decided not to defend the constitutionality of a provision of federal law. The bill would put formal timelines in place as to when such a report must be sent to Congress in order to ensure that Congress has time to act. In addition, it provides Congress with the ability to intervene in any such suit as of right.

Sec. 303. Intervention and Amicus Authority for House of Representatives

This section provides the House with the same right the Senate already has (*see* 2 U.S.C. § 288e) to intervene or file an amicus brief in any legal action or proceeding pending in any court in the United States. In the case of intervention in which standing to intervene is required, this right is limited to cases in which the House has standing to intervene under Article III of the Constitution and the intervention would not significantly delay the pending action.