BILL FLORES, CHAIRMAN

RSC THE REPUBLICAN STUDY COMMITTEE

H.R. 712—Sunshine for Regulatory Decrees and Settlements Act of 2015 (Rep. Collins, R-GA)

CONTACT: Jennifer Weinhart, 202-226-0706

FLOOR SCHEDULE:

Scheduled for consideration on January 7, 2016, under a structured rule.

TOPLINE SUMMARY:

H.R.712 would limit the ability of defendant Federal regulators and pro-regulatory plaintiffs to use so-called sue-and-settle tactics. Such settlement agreements and consent decrees are used to create new regulations, reorder regulatory priorities, limit the authority of future administrations, and limit the rights to state and local co-regulators that are affected by the decrees and agreements. This bill also includes H.R. 1759, the ALERT Act of 2015, which requires agencies to provide detailed disclosures on regulations, and H.R. 690, the Providing Accountability through Transparency Act, to improve communication to the public regarding new Federal regulations.

COST:

According to the Congressional Budget Office (CBO) estimate, implementing H.R. 712 would cost $7 million over the FY 2016-2020 due to increased litigation times. CBO estimates that implementing H.R. 1759 would cost less than $1 million over the FY 2016-2020 period. Finally, CBO estimates that implementing H.R. 690 would have no significant cost over the next five years.

CONSERVATIVE CONCERNS:

There are no substantive concerns.

- **Expand the Size and Scope of the Federal Government?** No.
- **Encroach into State or Local Authority?** No.
- **Delegate Any Legislative Authority to the Executive Branch?** No.
- **Contain Earmarks/Limited Tax Benefits/Limited Tariff Benefits?** No.

DETAILED SUMMARY AND ANALYSIS:

TITLE I—Sunshine for Regulatory Decrees and Settlements

Consent decrees and settlement agreements have been abused in the past to bind executive discretion using judicial authority. In litigation against Federal defendants, this problem has arisen with accusations that the agency action has been unlawfully withheld or delayed at the Federal level. According to the Committee Report, this usage of consent decrees and settlement agreements has been refined into a tactic known as "sue-and-settle" litigation, in which defendant regulatory agencies, like the Environmental Protection Agency, have failed to meet mandatory deadlines for new regulations or have allegedly delayed discretionary action. Plaintiffs then have strong cases on liability grounds, giving them a great deal of

leverage over defendant agencies. Defendant agencies are then given incentive to cooperate with potential or actual litigation, and negotiate a settlement to solve the issue. Once this decree or agreement is in place, the defendant then has a litigation-founded reason to expedite action, resulting in pro-regulatory ends and an improper reorganization of agency priorities.

Because of this system, pro-regulation plaintiffs seek out vulnerable agencies and exploit them by threatening lawsuits. The subsequent agreements often are a surprise to state, local, or tribal regulators who also share responsibility for the regulatory issues at hand. This system also, because of the quick window, undercuts the timelines normally necessary for agency actions, often minimizing or eliminating the public participation and analytical requirements of several regulatory process statutes. This also allows the executive branch to allow agencies to quickly review new regulations by the Office of Information and Regulatory Affairs, through executive order to the rule making process. Such sue-and-settle tactics were used by the Obama Administration to issue the EPA's Maximum Achievable Control Technology rules for utilities, cement plants, and oil and gas drilling, and New Source Performance Standards for utilities, oil refiners, and oil and gas drillers.

Title I of this legislation would address the problem of "sue-and-settle" decrees and agreements by requiring greater transparency in litigation activities. Specifically, agencies would be required to publish notices of intent to sue, decrees, complaints, settlements, and attorneys' fee awards and report them to Congress. Notices of intent to sue would have to be made publicly available within 15 days of receipt of service of notice of intent to sue.

Agencies that submit consent decrees to the court would be required to explain how the decree would further public interest, and how it would affect other mandatory duties of the agency, or any uncompleted mandatory agency duties. Any proposed settlement agreement or consent decree would be required to be published in the Federal Register 60 days prior to filing with the court, to allow for public notice and comment, which in turn must be published. Any comments received would receive a response from the defendant agency. Efforts to settle would be required to also include mediation or alternative dispute resolution. Parties that may be affected by proposed regulations would be given the ability to weigh in, prior to the adoption of consent decrees or settlement agreements requiring regulations. The defendant agency would be allowed, at its discretion, to hold a public agency hearing on whether to enter a consent decree or settlement agreement, a summary of which would be then filed with the court.

Title I would provide for greater rights for parties affected by sue-and-settle cases. Agencies would not be permitted to propose decrees or settlements to the courts unless all parties affected by proposed regulations have the opportunity to intervene and participate in settlement negotiations, and the proposed agreements or decrees are published for public notice and comment, with the record submitted to court. When considering motions to intervene, courts would be required to adopt a rebuttable presumption, that an intervenor-movant's rights are not satisfactorily represented by the defendant agency or plaintiff. The court would also be required to consider whether the movant is a state, local, or tribal government that is a co-administrator of the statutory provisions at issue, or if it is a state, local, or tribal government that with authority that would be preempted by a defendant agency's discharge of the regulatory duty referred to in the complaint. If an intervention is granted, the plaintiff, defendant agency, and intervenor would be included in settlement discussions.

If a proposed consent decree or settlement agreement requires agency action by a certain date, the agency would be required to inform the courts of any regulatory action the agency has not undertaken that the consent decree or settlement agreement does not address, how it would improve the discharge of these duties, and why the effects of the covered consent decree or settlement agreement is in the public interest. Courts considering proposed consent decrees and settlements would be required to assure compliance with normal rulemaking procedures, and account for any agencies' other competing mandatory.

The Attorney General or the defendant agency head involved in the litigation would be required to certify to the court that he approves of any proposed covered consent decree if it includes terms that: (1) provide for the conversion of a discretionary duty to propose, promulgate, amend, or revise regulations into a non-discretionary duty; (2) commit an agency to expend funds that haven't been appropriated or budgeted for the action in question; (3) commit an agency to seek an appropriation or budget authorization; (4) divest an agency of discretion provided to it by the Constitution or by statute; (5) or otherwise affords relief that the court could not make using its own authority in final judgement in a civil case.

Similarly, the Attorney General or the defendant agency head involved in the litigation would be required to certify to the court that he approves of a proposed covered settlement agreement if it provides remedy for agency failure to comply with the terms of the covered settlement agreement, other than reviving the civil action resolved by said covered settlement agreement, and includes terms that: (1) interferes with agency authority to amend, revise, or issue rules under Chapter 5, Title 5 of the U.S. Code, or any other statute or executive order; (2) commit an agency to expend funds that haven't been appropriated or budgeted for the action in question; or (3) for covered settlement agreements that allow the agency to act in a certain way by the Constitution or statute to respond to changing circumstances, to make policy choices, or to protect third party rights.

When considering motions to participate as amicus curae, the court would be required to adopt a rebuttable presumption that would favor amicus participation by those that filed public comments.

The court would also be required to ensure that proposed consent decrees or settlement agreements have enough time to comply with the Administrative Procedure Act and any other applicable statutes pertaining to rulemaking. Agencies would be required to submit annual reports to Congress on civil actions, covered consent decrees, and covered settlement agreements. This legislation would establish a de novo standard for review of considerations of motions to modify covered consent decrees or settlement agreements.

This legislation was included in the House passed bill, H.R. 2804, the All Economic Regulations are Transparent act, in the 113th Congress. The Legislative Bulletin for that bill can be found here. The Committee Report can be found here.

TITLE II—All Economic Regulations are Transparent

Title II of this legislation, the All Economic Regulations are Transparent (H.R. 1759, the ALERT Act of 2015), addresses the requirement for the Executive Branch to make semiannual and annual disclosures about planned regulations and overall regulatory costs. These disclosures help America's job creators so they can plan for the impacts of new regulations on their budgets, hiring, and operations. This Administration has frequently failed to release these disclosures on time. In 2012, the Administration made neither disclosure until after the general election, issuing them in December. Further, even when made on time, current disclosures do not provide real-time information on when regulations will be issued, and what costs they impose.

Title II addresses the issues relating to semiannual and annual disclosures by requiring agencies to provide more details about planned regulations, their expected costs, final rules, and cumulative regulatory costs. This section would require monthly online updates of information regarding planned regulations and their costs, so those affected have timely information so they can plan for their impacts. These updates would be submitted to the Office of Information and Regulatory Affairs (OIRA) and would include a summary, legal basis, objectives, cost, economic effects, update on the status of the rulemaking, and other pertinent information, including a schedule for completion. The first publication would require the cost-benefit analyses for all proposed and final rules within the last 10 years. This section would prevent new regulations from becoming effective unless disclosures are made within the six months prior to the issuance of a regulation.

Committee Reports for the ALERT Act can be found here and here.

TITLE III—Providing Accountability through Transparency

Title III of this legislation, the text of the Providing Accountability through Transparency Act (H.R. 690), would improve communication to the public regarding planned, new Federal regulations. Many everyday Americans affected by Federal regulations are upset that as published, they are often too difficult for ordinary Americans to understand. This section would rectify this problem, by requiring general notices of proposed rulemakings to include a web address of a plain language summary, not greater than one hundred words, of a proposed rule. This summary would also be required to be posted on the regulations.gov website.

The Committee Report for the Providing Accountability through Transparency Act can be found here.

Judiciary fact sheets pertaining to this legislation can be found here, here, and here.

Amendments

1. Johnson (D-GA) — This amendment would provide for an exception from the bill's requirements for any rule, consent decree, or settlement agreement, that the Director of the Office of Management and Budget determines would cause net job creation, and whose benefits are greater than its costs.
2. Lynch (D-MA) — This amendment would alter Title II of the legislation, to require federal agencies to provide an estimate of the benefits of proposed regulations. It would also require the Office of Information and Regulatory Affairs to include their annual cumulative assessment, the total benefits of proposed and final agency rules.
3. Cummings (D-MD), Connolly (D-VA) — This amendment would strike the requirement for rules to appear in agency-specific monthly publications from Title II of the legislation.
4. Cummings (D-MD), Connolly (D-VA) — This amendment would exempt independent establishments from Title II requirements.
5. Goodlatte (R-VA), Chaffetz (R-UT) — Manager's Amendment — This amendment would include small technical and conforming changes to clarify deadlines and improve nomenclature and grammar.
6. Foxx (R-NC), Messer (R-IN) — This amendment would require monthly reporting of unfunded mandates to the Office of Information and Regulatory Affairs (OIRA). If would also require the reporting of unfunded mandates imposed in OIRA's yearly assessment of agency rulemaking.
7. Jackson Lee (D-TX) — This amendment would clarify that the Title II exception to the rule requiring agency-specific monthly publication should take effect when there is any threat to health or safety or other emergency, and not just in the case of imminent

Groups in Support

U.S. Chamber of Commerce Coalition Letter

COMMITTEE ACTION:

H.R. 712 was introduced on February 4, 2015 and was referred to the House Committee on the Judiciary, where it was reported favorably on June 25, 2015. H.R. 1759 was introduced on April 13, 2015 and was referred to the House Committees on the Judiciary and Oversight and Government Reform. It was reported favorably by both Committees on July 29, 2015. H.R. 690 was introduced on February 3, 2015, and was referred to the House Committee on the Judiciary, where it was reported favorably on June 25, 2015.

ADMINISTRATION POSITION:

A Statement of Administration Policy can be found here.

CONSTITUTIONAL AUTHORITY:

According to the sponsor, Congress has the power to enact H.R. 712 pursuant to: Article I, Section 1 of the United States Constitution, Article I, Section 8 of the United States Constitution, including, but not limited to, Clauses 1, 3, and 18, and Article III of the United States Constitution, Section 2.

According to the sponsor, Congress has the power to enact H.R. 1759 pursuant to: Article I, Section 1 of the United States Constitution, in that the legislation concerns the exercise of legislative powers generally granted to Congress by that section, including the exercise of those powers when delegated by Congress to the Executive; Article I, Section 8 of the United States Constitution, in that the legislation concerns the exercise of specific legislative powers granted to Congress by that section, including the exercise of those powers when delegated by Congress to the Executive; and, Article I, Section 8, clause 18 of the United States Constitution, in that the legislation exercises legislative power granted to Congress by that clause ``to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.''

According to the sponsor, Congress has the power to enact H.R. 690 pursuant to: Article 1, Section 8, Clause 18, ``To make all Laws which shall be necessary and proper from carrying into Execution from foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department of Officer thereoff.''

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