

DRAFT REPORT FOR THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**PUBLIC AVAILABILITY OF SETTLEMENT AGREEMENTS IN
AGENCY ENFORCEMENT PROCEEDINGS**

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Report to the Administrative Conference of the United States

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INTRODUCTION

This report examines the public availability of settlement agreements in agency enforcement proceedings. It focuses on agency enforcement in the context of administrative investigations and adjudicative proceedings. Agency enforcement actions through litigation in federal courts and associated settlements is outside the scope of the report. When agencies engage in notice-and-comment rulemaking, there is a centralized website that facilitates public access to information and engagement in the process.¹ Similarly, when agencies engage in litigation in federal courts, there is a centralized, online database where the public can access filings and rulings.² However, in agency enforcement proceedings, defined broadly in this report to include both trial-like adjudications and agency investigations, there is no such central online repository for materials, including settlements.³ Recognizing the lack of centralized accessibility for settlements in agency adjudication, legislation has been repeatedly proposed in Congress to create a centralized database for settlement agreements, but such efforts have stalled.⁴ Instead, agency settlements are scattered across individual agency websites, to the extent they are available online at all.

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¹ Regulations.gov, is dedicated to providing a central electronic clearinghouse to increase public participation in the rulemaking process and was launched pursuant to the E-Government Act of 2002. See REGULATIONS.GOV, <https://www.regulations.gov> (last visited Aug. 13, 2022). Regulations.gov does not include access to all federal agency rulemaking. For a list of participating and non-participating agencies in e-rulemaking on Regulations.gov, see <https://www.regulations.gov/agencies>.

² The federal judiciary has a centralized online database called the Public Access to Court Electronic Records (PACER) system. PACER provides access to most court records filed in federal appellate, district, and bankruptcy courts nationwide. See PUBLIC ACCESS TO COURT ELECTRONIC RECORDS, <https://pacer.uscourts.gov> (last visited Aug. 10, 2022); see also Admin. Conf. of the U.S., Recommendation 2020-6, *Agency Litigation Webpages*, 86 Fed. Reg. 6624 (Jan. 22, 2021).

³ See Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017); Daniel J. Sheffner, *Adjudication Materials on Agency Websites*, Report to the Administrative Conference of the United States, 4 (2017), available at <https://www.acus.gov/public-availability-of-information>.

⁴ See Settlement Agreement Information Database Act of 2022, S.3900 117th Cong. (2022). This legislation has also been proposed in previous Congressional sessions. See, e.g., Settlement Agreement Information Database Act of 2018, H.R. 6777, 115th Cong. (2018).

Federal agencies resolve a vast number of enforcement proceedings through settlement agreements.⁵ Indeed, agencies routinely encourage settlement prior to instigating formal proceedings and throughout the process of administrative enforcement. Settlements allow agencies to resolve disputes more efficiently, conserving resources and obtaining relief for the public more expeditiously. They transmit important information to stakeholders about how agencies approach enforcement and their interpretation of laws and regulations as they apply to specific cases. Regulated entities rely on agency settlements to guide the formulation of their practices and policies and stakeholders who represent clients rely on settlements to advise their clients and advocate for them in settlement negotiations.

In addition, high profile agency enforcement settlements attract significant public interest. They often involve high dollar amounts and require companies to change their governance practices and compliance programs.⁶ For example, the Consumer Financial Protection Bureau (CFPB) recently settled with Bank of America for \$100 million dollars regarding practices that the bank unfairly froze unemployment benefit debit card accounts during the height of the pandemic.⁷ And in 2021, the Federal Trade Commission (FTC) settled with Amazon for \$61.7 million to resolve charges that the company failed to pay Amazon Flex drivers the full amount of tips they received from customers.⁸ The public has an interest in evaluating how the agency is enforcing the law and using taxpayer funds. Settlements that affect business practices may also affect the public as consumers or members of a community, such as how companies handle personal data or remediate environmental incidents.

Despite the importance of agency settlements, there are challenges to accessing them. Generally, agencies are not legally required to provide public access to settlements on their websites. However, many agencies proactively disclose them there. Agency disclosure practices vary considerably in terms of the navigability of their websites to find settlements and the comprehensiveness of settlement information provided.

This study analyzes disclosure laws as they relate to agency settlements and reviews a sample of agency websites for access to settlements. The review shows that agency websites vary considerably in terms of navigability to settlement information and the comprehensiveness of

⁵ See Richard M. Cooper, *The Need for Oversight of Agency Policies for Settling Enforcement Actions*, 59 ADMIN. L. REV. 835 (2007); Dustin Plotnick, *Agency Settlement Reviewability*, 82 FORDHAM L. REV. 1367 (2013); Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest Rulemaking Settlements*, 51 DUKE L. J. 1015, 1019 (2001) (“For several years, regulators have embraced settlements and other alternative dispute resolution techniques as fundamental component of the administrative process...it is commonplace for an agency to offer the opportunity for settlement to parties to an adjudication such as an enforcement proceeding.”)

⁶ See Matthew C. Turk, *Regulation by Settlement*, 66 KANSAS L. REV. 259, 260-61 (2017).

⁷ The settlement required the Bank of America to submit a compliance plan to the CFPB and provide redress to affected consumers. See Federal Regulators Fine Bank of America \$225 Million Over Botched Disbursement of State Unemployment Benefits at Height of Pandemic, available at <https://www.consumerfinance.gov/about-us/newsroom/federal-regulators-fine-bank-of-america-225-million-over-botched-disbursement-of-state-unemployment-benefits-at-height-of-pandemic/> (last visited Sept. 23, 2022).

⁸ The funds will serve as reimbursement for tips illegally withheld. See FTC Approves Final Administrative Consent Order Against Amazon for Withholding Customer Tips from Amazon Flex Drivers, available at <https://www.ftc.gov/news-events/news/press-releases/2021/06/ftc-approves-final-administrative-consent-order-against-amazon-withholding-customer-tips-amazon-flex> (last visited Sept. 23, 2022).

settlement information provided. Interviews were conducted of agency officials and stakeholders to discuss agency disclosure practices and policy considerations surrounding disclosure. This report includes case studies of three agency websites that fall along a spectrum of navigability and comprehensiveness to provide a more in-depth understanding of agency practices and policy considerations for the online disclosure of settlements. The review, interviews, and case studies inform recommendations for agencies to consider in order to increase the accessibility of settlements on their websites.

The report proceeds as follows. Part I provides an overview of the role of settlements in resolving enforcement proceedings and the laws that govern disclosure of agency settlements. Part II discusses the methodology of the agency website review. Part III contains the review analysis discussing navigability tools to locate settlements and the comprehensiveness of settlement information on agency websites. Part IV considers the policy implications involved in making settlements available on agency websites based on interviews with agency officials and stakeholders. Part V presents case studies that highlight a spectrum of agency practices related to navigability and comprehensiveness of settlement information on their websites. Part VI provides recommendations for agencies to consider to increase the public availability of enforcement settlements on their websites.

I. BACKGROUND

A. The Role of Settlements in Agency Enforcement Proceedings

Agency enforcement proceedings—that is agency proceedings in which the sought-after remedy is coercive (i.e., requires a private party to provide specific relief, pay money, etc.)—takes different forms depending on the agency, its mission, and enforcement authority. Agency enforcement proceedings resolve disputes between federal agencies and regulated individuals and entities.⁹ For example, agencies like the Environmental Protection Agency (EPA), CFPB, and FTC bring enforcement actions against individuals and companies for alleged violations of statutes and regulations. Such disputes may be resolved through agency administrative proceedings, as opposed to being litigated in federal district courts. In this instance, the agency is a party to the proceeding and adjudicates the proceeding. The scope of this report is limited to settlements in agency investigations and adjudicative proceedings and does not consider settlements of enforcement actions in federal district court.

Agencies also resolve disputes between private parties arising under federal regulatory programs. For example, the Federal Communications Commission (FCC) adjudicates disputes between communications and utilities companies and the Equal Employment Opportunity Commission (EEOC) adjudicates employment discrimination claims between federal agencies and federal employees. In these cases, the agency is not a party to the proceedings, but adjudicates the dispute between the parties. For purposes of this report, the term “agency enforcement

⁹ See BEN HARRINGTON & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46930, INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW (2021).

proceedings” has been interpreted broadly to consider proceedings whether the agency is a party to the proceeding or not, with the understanding that considerations about the public availability of settlements may differ depending on the agency’s role in the proceeding.

Agency adjudications determine the rights or obligations of specific parties based on facts specific to those parties.¹⁰ There are both formal adjudications (i.e., those governed by the formal adjudication provisions of the Administrative Procedure Act) and informal adjudications (i.e., those not so governed).¹¹ Formal adjudications typically resemble civil bench trial-like proceedings, and, as described in previous ACUS recommendations, many informal adjudications may also may resemble civil bench trial-like proceedings, with an administrative judge presiding over the adjudication.¹² The Administrative Procedure Act (APA) expressly contemplates that administrative proceedings will be settled.¹³ However, settlements are especially important because they now resolve “the vast majority of enforcement actions by federal agencies against public companies and other major institutions.”¹⁴ Agencies often encourage settlement prior to instigating formal proceedings and throughout the process of agency enforcement. Agencies regularly provide respondents multiple opportunities to settle or engage in Alternative Dispute Resolution (ADR) to facilitate settlement of actions.

Settlements are not only important to the parties to the settlement, but they are also important to other regulated entities not included in the settlement. Adjudications often “serve as vehicles for the formulation of agency policies” and “generally provide a guide to action that the agency may be expected to take in future cases.”¹⁵ Settlements transmit important information to stakeholders about the agency’s approach to enforcement and its interpretation of laws and regulations.¹⁶ Although nominally packaged as a resolution of a particular adversarial dispute, scholars have recognized that agencies “leverage those agreements in a manner that effectively establishes new legal standards of general applicability.”¹⁷ In contrast to private party settlements in litigation, settlements in agency enforcement proceedings often have the imprimatur of the agency, demonstrating the agency’s position on the enforcement of statutes and regulations.

¹⁰ *Id.*

¹¹ Formal adjudications being governed by APA’s formal hearing provisions adversarial proceedings and informal proceedings which generally encompasses all other administrative adjudications. *See id.*

¹² *Id.*; Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

¹³ *See* 5 U.S.C. §§ 554(c); 556(c).

¹⁴ *See* Richard M. Cooper, *The Need for Oversight of Agency Policies for Settling Enforcement Actions*, 59 ADMIN. L. REV. 835 (2007); Dustin Plotnick, *Agency Settlement Reviewability*, 82 FORDHAM L. REV. 1367 (2013); Rossi, *supra* note 5, at 1019 (“For several years, regulators have embraced settlements and other alternative dispute resolution techniques as fundamental component of the administrative process...it is commonplace for an agency to offer the opportunity for settlement to parties to an adjudication such as an enforcement proceeding.”)

¹⁵ *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-766 (1969).

¹⁶ *Cf.* Admin. Conf. of the U.S., Recommendation 2020-6, *Agency Litigation Webpages*, 86 Fed. Reg. 6624 (Jan. 22, 2021); Mark Thomson, Report on Agency Litigation Webpages 2–7 (Nov. 24, 2020) (report to the Admin. Conf. of the U.S.).

¹⁷ *See* Matthew C. Turk, *Regulation by Settlement*, 66 KANSAS L. REV. 259, 260 (2017).

Information about settlements is also important to the broader public. Settlements may include the payment of millions of dollars and require companies to undergo significant governance and operational changes.¹⁸ Settlements provide information about how agencies are serving the public, enforcing the law, and spending taxpayer dollars. Transparency about settlements is important for government accountability, legitimacy, and to encourage consistent application of the law. However, with some notable exceptions, it is not the general practice of agencies to voluntarily subject their proposed settlements to any formal or informal public process for scrutiny and comment.¹⁹ That being said, some agencies, such as the FTC, have a notice-and-comment period before final approval of a settlement.²⁰

B. Legal Landscape Governing the Disclosure of Settlements

Despite the importance of agency settlements, federal law generally does not impose explicit obligations on agencies to proactively make settlements publicly available on their websites. However, they would likely be available through a FOIA request made to the agency, subject to any of FOIA's exemptions. The legal framework provides agencies discretion to proactively make them available on their websites or make them available through the FOIA request process. This discretion results in considerable variation in agencies' practices with respect to the accessibility of settlements on agency websites. The following is a brief overview of legal obligations relating to disclosure of settlements on agency websites.

1. Freedom of Information Act (FOIA)

Congress enacted FOIA to “pierce the veil of administrative secrecy and open agency action to the light of public scrutiny.”²¹ Public distrust, corruption, and inefficiency develop “unless the people are permitted to know what their government is up to.”²² An informed citizenry is “vital to the functioning of a democratic society” and to hold the government accountable.²³ To those ends, FOIA generally requires each “federal agency”²⁴ to make “agency records”²⁵ available to the

¹⁸ *See id.*

¹⁹ *See Cooper, supra* note 14, at 836.

²⁰ *See* A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/about-ftc/mission/enforcement-authority>. The Federal Energy Regulatory Commission also has rules concerning comments on proposed settlement agreements. *See* 18 CFR § 385.602 (1986).

²¹ *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quoting *Rose v. Dep't of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)).

²² *Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749 (1989) (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas J. dissenting))

²³ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

²⁴ An “agency” under FOIA “includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” *See* 5 U.S.C. § 552(f)(1).

²⁵ The FOIA statute does not define the term “agency record.” Without a statutory definition, the Supreme Court held that materials qualify as agency records if an agency (1) created or obtained the materials and (2) was “in control of the requested materials at the time the FOIA request was made.” *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989); *see also* 5 U.S.C. § 552 (a)(4)(B) (providing that federal district courts have “jurisdiction to enjoin

public and specifically to any person who requests them.²⁶ It establishes three different mechanisms to require federal agencies to disclose a vast array of government information to the public.²⁷ First, FOIA directs agencies to publish substantive and procedural rules, along with certain other important government materials, in the *Federal Register*.²⁸ Second, on a proactive basis, agencies must electronically disclose a separate set of information that consists of, among other things, “final opinions” and “orders” in agency adjudications and certain “frequently requested records.”²⁹ Third, FOIA requires agencies to disclose, upon request, all covered records not made available pursuant to the proactive disclosure provisions.³⁰

The first two disclosure provisions of FOIA require agencies to proactively disclose specific categories of information to the public, either through publication in the *Federal Register*³¹ or making them available electronically.³² Under the first proactive disclosure requirement—codified as § 522(a)(1)—agencies must publish certain important government materials including “substantive rules of general applicability” and “rules of procedure” in the *Federal Register*.³³ In contrast, the second proactive disclosure requires records to be made available “for public inspection in an electronic format.”³⁴

The second proactive disclosure requirement—codified as § 552(a)(2)—requires agencies to make available four categories of agency materials. These materials include: 1) “final opinions” and “orders,” made “in the adjudication of cases;”³⁵ 2) “statements of policy and interpretations”³⁶ 3) “administrative staff manuals;”³⁷ and 4) frequently requested records.³⁸ This provision is known as the “reading room” provision because historically agencies provided public access to the records

[agencies] from improperly withholding *agency records* and to order the production of *agency records* improperly withheld”) (emphasis added).

²⁶ See 5 U.S.C. § 552.

²⁷ See DANIEL J. SHEFFNER, CONG. RSCH. SERV. R46238, THE FREEDOM OF INFORMATION ACT (FOIA): A LEGAL OVERVIEW (2020)

²⁸ See 5 U.S.C. § 552(a)(1).

²⁹ See 5 U.S.C. § 552 (a)(2).

³⁰ See 5 U.S.C. § 552 (a)(3).

³¹ See 5 U.S.C. § 522(a)(1).

³² See 5 U.S.C. § 522 (a)(2).

³³ See 5 U.S.C. § 552(a)(1). The statute includes the following to be published in the *Federal Register*: “(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions; (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available; (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations; (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and (E) each amendment, revision, or repeal of the foregoing.” *Id.*

³⁴ See 5 U.S.C. § 552(a)(2).

³⁵ See 5 U.S.C. § 552(a)(2)(A). The statute requires an affirmative obligation to make electronically available “final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases.”

³⁶ See 5 U.S.C. § 552(a)(2)(B). The full provision reads “those statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register.”

³⁷ See 5 U.S.C. § 552(a)(2)(C). This provision requires disclosure of “administrative staff manuals and instructions to staff that affect a member of the public.”

³⁸ See 5 U.S.C. § 552(a)(2)(D).

in physical brick-and-mortar reading rooms in agency offices in Washington, D.C. Visiting the reading rooms in person to access agency documents required some amount of sophistication and expenditure of resources (e.g., time and travel expenses).

Congress responded to the rise of the electronic age by amending FOIA in 1996 to require agencies to make records in all four categories of subsection (a)(2) available to the public by “electronic means.”³⁹ In 2016, Congress again amended § 552(a)(2) to specify that records covered by this subsection must be made available “for public inspection in an electronic format.”⁴⁰ Agencies often accomplish this electronic availability requirement by posting records on their websites in a designated area known as a “FOIA Library” or “Electronic Reading Room.”⁴¹ Most recently, the Attorney General has issued FOIA Guidelines with respect to online proactive disclosures stating that, “agencies should post records online as soon as feasible” and “agencies should also maximize their efforts to post more records online quickly and systematically in advance of any public request.”⁴²

For purposes of this report, it is important to analyze § 552(a)(2) with respect to “final opinions” and “orders” and how the requirement relates to settlements in agency proceedings. The affirmative obligation requires disclosure of “final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases.”⁴³ FOIA defines an “order” as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter...”⁴⁴ And an “adjudication” is an “agency process for the formulation of an order.”⁴⁵ “Courts have considered proceedings ‘adjudications’ where agencies decided not to institute judicial proceedings or actually adjudicated a case.”⁴⁶ An agency may only rely or cite as precedent a final order or opinion against a party if the agency has proactively disclosed it or if “the party has actual and timely notice of the terms thereof.”⁴⁷

The requirement of proactive disclosure of opinions and orders was intended by Congress to open to the public the “thousands of orders, opinions...issued by hundreds of agencies,” described as constituting “the bureaucracy’s own form of case law.”⁴⁸ In that vein, the Supreme Court has

³⁹ See Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996).

⁴⁰ See FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

⁴¹ See DEP’T OF JUSTICE OFFICE OF INFORMATION POLICY, GUIDE TO THE FREEDOM OF INFORMATION ACT, PROACTIVE DISCLOSURES 6 (2020 ed.).

⁴² See U.S. Dep’t of Justice, Memorandum from Attorney General Merrick Garland for Heads of Executive Departments, *Freedom of Information Act Guidelines* (March 15, 2022), available at <https://www.justice.gov/ag/page/file/1483516/download>.

⁴³ 5 U.S.C. § 552(a)(2).

⁴⁴ 5 U.S.C. § 551(6). The definition specifically excludes rulemaking as an order but includes licensing. *Id.*

⁴⁵ 5 U.S.C. § 551(7).

⁴⁶ *Tereshchuk v. Bureau of Prisons*, 67 F.Supp.3d 441, 457 (D.D.C. 2014); see, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975) (holding that NLRB appeals and advice memoranda which explained decisions not to file an unfair labor practice complaint effect a final disposition as “unreviewable rejection of the charge filed by the private party”).

⁴⁷ 5 U.S.C. § 552(a)(2)(E).

⁴⁸ See 1966 House Report, HR Rep. No. 1497, at 7 (1966) In the 1966 act, this provision only governed the disclosure of adjudicative opinions and orders, policy statements and interpretations, and staff manuals and instructions (the first three listed in the statute). The previously-requested-records requirement were added to FOIA in 1996 and the

explained that FOIA’s second affirmative disclosure provision “represents a strong congressional aversion to ‘secret agency law.’”⁴⁹ However, due to the impracticality of indexing and disclosing all decisions issued by the agency in physical reading rooms, the Attorney General originally interpreted the provision to only apply to decisions that have “precedential effect.”⁵⁰ A subsequent Attorney General Opinion stated that § 552(a)(2) materials consist of documents that the “agency has treated as authoritative indications of its position on legal or policy questions.”⁵¹

Courts have considered a number of factors in determining whether a document constitutes a “final opinion” or “order.”⁵² They have considered whether the document constitutes “a final, unappealable decision not to pursue a judicial remedy,”⁵³ or explains a “final” agency decision,⁵⁴ whether it has “precedential significance,”⁵⁵ and whether the agency was involved in an adjudication.⁵⁶ Court determinations tend to be highly fact specific and contextual, relating to

“requested 3 or more times prong of 552(a)(2)(D) was added in 2016. See FOIA Improvement Act of 2016, Pub. L. No. 114-185 § 2, 130 Stat. 538, 538.

⁴⁹ See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).

⁵⁰ See U.S. Dep’t of Justice, Attorney General’s Memorandum on the Public Information Section on the Administrative Procedure Act, at 15 (1967).

⁵¹ See Attorney General’s Memorandum on the 1974 Amendments to the Freedom of Information Act 19 (Feb. 1975) (explaining that the “primary purpose of subsection (a)(2) was to compel disclosure of ... agency materials which have ‘the force and effect of law in most cases’” (quoting H.R. Rep. No. 891497, at 7)).

⁵² The determination of whether a document is a final opinion or order is also important with respect to whether an agency can claim FOIA Exemption 5 to withhold the document since the exemption does not apply to final opinions or orders. See *Sears, Roebuck*, 421 U.S. at 148.

⁵³ See *Sears, Roebuck*, 421 U.S. at 155 (holding that NLRB appeals and advice memoranda which explained decisions not to file an unfair labor practice complaint effect a final disposition as “unreviewable rejection of the charge filed by the private party”); *Tereshchuk v. Bureau of Prisons*, 67 F.Supp.3d at 456 (D.C. Circuit considers whether the decision constitutes a “final unappealable decision not to pursue a judicial remedy in an adversarial dispute.”)

⁵⁴ See *Sears, Roebuck*, 421 U.S. at 158-59 (“Since an Advice or Appeals Memorandum explains the reasons for the ‘final disposition’ it plainly qualifies as an ‘opinion’ and falls within 5 U.S.C. 552(a)(2)(A).”)

⁵⁵ See *Sears, Roebuck*, 421 U.S. at 153 (Section 552(a)(2) categories of records constitute the “working law” of an agency because they “have ‘the force and effect of law.’”) (quoting H.R. Rep. No. 1497, at 7 (1966)); *Citizens for Resp. & Ethics in Wash. v. DOJ*, 922 F.3d 480, 486-87 (D.C. Cir. 2019) (finding that plaintiff’s claim that Office of Legal Counsel (OLC) formal written opinions were improperly withheld under subsection (a)(2) “fails as a matter of law” because plaintiff’s allegations “are insufficient to render an OLC opinion the ‘working law’ of an agency,” where plaintiff “does not allege that all of the OLC’s formal written opinions have been adopted by any agency as its own”); *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 679 (D.C. Cir. 2016) (holding that complaint resolution decisions about individual immigration judges are not subject to FOIA’s affirmative disclosure requirement and recognizing that “the affirmative disclosure requirement has long been understood to mandate disclosure of decisions that “constitute the making of law or policy by an agency.”); *Tereshchuk v. Bureau of Prisons*, 67 F.Supp.3d at 456 (“In determining whether Section 552(a)(2) applies, this Circuit...looks to whether the records have ‘precedential significance.’”); *Skelton v. USPS*, 678 F.2d 35, 41 (5th Cir. 1982) (“That [proactive disclosure] requirement was designed to help the citizen find agency statements ‘having precedential significance’ when he becomes involved in ‘a controversy with an agency.’” (quoting H.R. Rep. No. 89-1497, at 8 (1966))); *Viet. Veterans of Am. v. Dep’t of the Navy*, 876 F.2d 164,165 (D.C. Cir. 1989)(rejecting argument that legal opinions issued by Judge Advocates General of Army and Navy must be proactively disclosed because those opinions are not statements of policy that “operate as law”); *Pa. Dep’t of Pub. Welfare v. United States*, Civil Action No. 99-175, 2001 U.S. Dist. LEXIS 3492, at *78 (holding that a FOIA subsection (a)(2) index “must include those matters that the agency considers to be of precedential value”).

⁵⁶ See *Am. Immigr. Laws. Ass’n*, 830 F.3d at 669 (holding that complaint resolution decisions for immigration judges are not “final opinions” rendered in the “adjudication of cases because they do not reflect a final decision about the rights of outside parties); *Rockwell Int’l Corp. v. DOJ*, 235 F.3d 598, 603 (D.C. Cir. 2001)(finding that agency report

particular documents and their characteristics in light of agency procedures.⁵⁷ Thus, it is difficult to make generalized determinations in the abstract about whether a broad class of documents may be considered final opinions or orders across all agencies.⁵⁸

Furthermore, while many courts have relied on “precedential significance” being an important factor for determining the applicability of § 552(a)(2),⁵⁹ some courts have found that “non-precedential” documents are subject to proactive disclosure.⁶⁰ Other courts have cast doubt on whether documents must be “precedential” to be subject to proactive disclosure requirements.⁶¹

Courts have not directly addressed whether settlements in agency enforcement proceedings are “final opinions” or “orders” that are subject to proactive disclosure under § 552(a)(2)(A). However, the issue of whether “pre-litigation settlement agreements”⁶² constituted agency orders was briefed in a district court case.⁶³ In that case, animal welfare organizations brought suit against the Department of Agriculture after the agency removed documents from its website database, including settlement agreements.⁶⁴ The animal welfare organization argued in its district court brief that voluntary settlement agreements were orders because they “close the investigative file” and are final actions by the agency.⁶⁵ In response, the agency argued that voluntary settlement agreements are not orders “made in the adjudication of cases” under the statute because they are not the product of an adjudicatory process at all.⁶⁶ The agency further argued voluntary settlements are based on alleged violations and “reflect pre-adjudicatory actions that serve as alternatives to the initiation of a formal adjudicative proceeding.”⁶⁷ Both the district court and the Ninth Circuit Court of Appeals decided the case on other grounds and thus did not address whether the settlements were subject to proactive disclosure under FOIA.

of voluntarily conducted internal investigation into propriety of Rocky Flats prosecution was not “final opinion” because determination was neither a “case” nor an “adjudication”).

⁵⁷ See Richard Belfiore, Annotation, *What Constitutes a “Final Opinion” or “Order” of Federal Administrative Agency Required to be Made Available for Public Inspection and Copying within Meaning of 5 U.S.C.A. § 552(a)(2)(A)*, 114 A.L.R. Fed. 287, § 2 (1993).

⁵⁸ See *id.* (“None of these determinations, however, can be made in the abstract.”)

⁵⁹ See DEP’T OF JUSTICE OFFICE OF INFORMATION POLICY, *supra* note 41, at 4.

⁶⁰ See *National Prison Project of Am. Civil Liberties Union Foundation, Inc. v. Sigler*, 390 F. Supp. 789, 792–93 (D.D.C. 1975) (determining that parole board decisions denying inmate applications for parole were subsection (a)(2) records because they are agency orders made in adjudication of cases even though they are “not cited as precedent for a subsequent denial of parole.”)

⁶¹ See *New York Legal Assistance v. Board of Immigration Appeals*, 987 F.3d 207 (2021) (discussing the importance of “non-precedential” “unpublished” Board of Immigration decisions and holding that district courts have the authority under FOIA to order the Board to make the decisions available to the public).

⁶² See *Animal Legal Defense Fund v. United States Dep’t of Agriculture*, 935 F.3d 858 n. 6 (9th Cir. 2019) (noting that the agency negotiations pre-litigation settlement agreements when it brings administrative enforcement actions seeking monetary penalties that includes a formal fining of a violation and an agreed-upon fine).

⁶³ See *Animal Legal Defense Fund v. United States Dep’t of Agriculture*, 2017 WL 3478848 (N.D. Cal. 2017).

⁶⁴ See *Animal Legal Defense Fund*, 935 F.3d at 864.

⁶⁵ See *Plaintiffs’ Mot. for Preliminary Injunction* at 7-9, *Animal Legal Defense Fund v. United States Dep’t of Agriculture*, No. 3:17-cv-00949 (N.D. Cal. March 29, 2017).

⁶⁶ See *Def. Opp. to Plaintiffs’ Mot. for Preliminary Injunction*, at 9-10, *Animal Legal Defense Fund v. United States Dep’t of Agriculture*, No. 3:17-cv-00949 (N.D. Cal. April 26, 2017).

⁶⁷ See *id.*

While the question is unsettled, settlements in agency enforcement proceedings likely fall outside of the proactive disclosure requirements of § 552(a)(2)(A). While settlements dispose of agency actions, they are not necessarily based on the agency’s determinations of the merits of the suit or agency findings of violations. Rather, settlements are used to resolve disputes that allege violations. Furthermore, settlements generally lack legal precedential effect or operate with the “force and effect of law” that would apply to regulated entities not party to the settlement.⁶⁸ Rather, settlements tend to be dispositions that are only binding on the agency and respondent in a particular case and not an expression of the overall law or policy of the agency. Even though a settlement may be titled an “order,” it may not be considered a precedential ruling of the agency, but rather an order approving of a settlement between the agency and a particular individual or entity. Whether a decision is precedential is ultimately up to the agency.⁶⁹ ACUS is currently undergoing a project examining precedential decision making in agency adjudication.⁷⁰ In addition, FOIA does not generally require proactive disclosure of the pleadings motions briefs, and other non-decisional materials associated with adjudication proceedings.⁷¹

That being said, courts have determined that a variety of agency documents are “final opinions” or “orders” under FOIA.⁷² For example, the Supreme Court held that Advice and Appeal memoranda which explain the decisions of the General Counsel to the NLRB not to file a complaint are final orders.⁷³ The D.C. Circuit Court of Appeals held that an FTC Commission memorandum explaining the Commission’s reasons for terminating an adjudicatory proceeding or not including a proposed charge in a complaint would constitute a final opinion.⁷⁴ A district court held that an engineer’s reports from which the Internal Revenue Service (IRS) determined the fair market value of timber were final opinions.⁷⁵ It is likely that a court will consider the issue in the context of specific settlements as they relate to particular agency procedures in making a determination, rather than deciding whether all settlements of agency proceedings fall under § 552(a)(2)(A).⁷⁶

Aside from the question of whether settlements are final opinions or orders, settlements may still be required to be proactively disclosed on an agency website if they are “frequently requested records.” The 1996 FOIA amendments added the frequently requested records category to the

⁶⁸ See Leandra Lederman, *Precedent Lost: Why Encourage Settlement and Why Allow Non-Party Involvement in Settlement?*, 75 NOTRE DAME L. REV. 221, 256 (1999) (“Settlement and precedent conflict because the former necessarily precludes the latter.”); Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L. J. 9, 9 (1996) (“American law treats the settlement agreement as a member of the larger family of private contracts.”)

⁶⁹ See Margaret Gilhooley, *The Availability of Decisions and Precedents in Agency Adjudications: The Impact of the Freedom of Information Act Publication Requirements*, 3 ADMIN. L. J. 53, 62 nn.53-54, 83 (1989) (citing *Irons v. Gottschalk*, 548 F.2d 992 (D.C. Cir. 1976), and *Tax Analysts v. IRS*, 362 F. Supp. 1298, 1306 (D.D.C. 1973)).

⁷⁰ The project seeks to identify best practices for the use of precedential decisions in agency adjudication. See *Precedential Decisions Making in Agency Adjudication*, available at <https://www.acus.gov/research-projects/precedential-decision-making-agency-adjudication> (last visited Sept. 21, 2022).

⁷¹ See Sheffner, *supra* note 3.

⁷² See Belfiore, *supra* note 57, at § 2.

⁷³ See *NLRB v. Sears*, 421 U.S. at 155.

⁷⁴ See *Bristol-Meyers Co. v. Federal Trade Commission*, 598 F.2d 18, 25-26 (D.C. Cir. 1978).

⁷⁵ See *Willamette Industries, Inc. v. United States*, 530 F.Supp. 904, 906 (D. Or. 1981).

⁷⁶ See Belfiore, *supra* note 57, at § 2.

reading room provisions.⁷⁷ The obligation to post “frequently requested” records was intended to assist agencies to achieve greater efficiencies by reducing the need to respond to numerous individual requests for the same records and reduce backlog for responding to FOIA requests.⁷⁸ The agency determines whether records “have become or are likely to become the subject of subsequent requests” and indexes such records.⁷⁹ The FOIA Improvement Act of 2016 amended this section to provide that if a record has been “requested three or more times,” it must be proactively disclosed.⁸⁰ By posting frequently requested material, agencies eliminate the need for others to make individualized requests for access, thereby more efficiently providing the public with access to records that are of interest to a broader audience.

Additionally, settlements are generally available to members of the public through the FOIA request process. Agencies are required to disclose covered records not “made available under” the proactive disclosure provisions on a case-by-case basis after receiving a request.⁸¹ Any person may make a FOIA request.⁸² Agencies are required to disclose records when the request for records “(i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed.”⁸³ When an agency receives a proper FOIA request for records, it must make the records “promptly available” unless the records or portions of the records are exempted from disclosure.⁸⁴

There are nine exemptions to FOIA disclosure of information.⁸⁵ The statute seeks to strike a balance between “the right of the public to know and the need of Government to keep information in confidence...”⁸⁶ Information protected by FOIA’s exemptions ranges from certain national security information to geological information about wells.⁸⁷

Different FOIA exemptions may be involved in the disclosure of agency settlement information such as Exemptions 4, 5, and 7(A). For example, Exemption 4 authorizes agencies to withhold from disclosure trade secrets and commercial and financial information that are transmitted to the government.⁸⁸ Regulated entities may submit proprietary, commercial, and financial information to agencies as part of settlement negotiations or such information may be included in terms of the settlement.⁸⁹ Exemption 5 exempts “inter-agency or intra-agency

⁷⁷ See Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231

⁷⁸ See S. Rep. No. 114-4, at 2 (2015), as reprinted in 2016 U.S.C.C.A.N 321, 322 (identifying increasing requests and corresponding backlogs as a barrier to “ensur[ing] that FOIA remains the nation’s premier transparency law.”)

⁷⁹ See 5 U.S.C. § 552(a)(2)(D).

⁸⁰ See FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

⁸¹ See 5 U.S.C § 552(a)(3).

⁸² See Freedom of Information Act Frequently Asked Questions, USDA.Gov., <https://www.usda.gov/oascr/foia-frequently-asked-questions>, (last visited Aug. 13, 2022).

⁸³ See 5 U.S.C § 552(a)(3).

⁸⁴ See *id.*

⁸⁵ See 5 U.S.C § 552(b)(1)-(9). The exemptions permit, but do not require agencies to withhold information.

⁸⁶ See *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (internal quotation marks omitted) (quoting H.R. REP. NO. 1497, at 6 (1966)).

⁸⁷ See 5 U.S.C § 552(b)(1), (9).

⁸⁸ See 5 U.S.C. § 552(b)(4).

⁸⁹ See, e.g., *M/A-Com Inf. Sys. V. HHS*, 656 F.Supp. 691, 692 (D.D.C 1986)(allowing agency to withhold documents with commercial information submitted to the agency as part of settlement negotiations).

memoranda or letters that would not be available by law to party other than agency in litigation with an agency.”⁹⁰ This exemption includes documents that would be protected from civil discovery such as documents protected by the deliberate process privilege, which allows agency to withhold “predecisional materials ‘reflecting deliberative or policy-making processes.’”⁹¹ However, the Supreme Court held that Exemption 5 did not apply to any document which fell within the meaning of “final opinion...made in the adjudication of cases” under 5 U.S.C. § 552(a)(2)(A).⁹² If a court determined that a settlement is a “final opinion” under FOIA’s proactive disclosure requirements, then an agency could not withhold it under Exemption 5. However, an internal agency memorandum evaluating settlement terms or strategy would likely be protected under Exemption 5. Exemption 7(A) authorizes agencies to withhold documents that “could reasonably be expected to interfere with enforcement proceedings.”⁹³ Exemption 7(A) applies to “pending or reasonably anticipated law enforcement proceedings.”⁹⁴ While settlement would generally conclude “a law enforcement proceeding,” investigative documents may be protected under the exemption post-settlement, when an agency retains oversight or some other continuing enforcement responsibility.⁹⁵ However, courts have also refused to allow agencies to withhold drafts of settlement documents or information obtained during settlement negotiations under Exemptions 4, 5, and 7(A).⁹⁶ FOIA authorizes requesters to challenge in federal court an agency’s decision to withhold agency records and federal courts may “enjoin an agency from withholding agency records” and order the production of any records improperly withheld.⁹⁷

Generally, access to agency settlements falls under FOIA’s request disclosure regime as opposed to the proactive disclosure requirements. However, agencies may voluntarily disclose settlements on their websites and many agencies have done so. As a result, agencies have developed their own practices with respect to online settlement disclosure and there is variation among agencies in the availability of settlements on agency websites.

⁹⁰ See 5 U.S.C. § 552(b)(5).

⁹¹ Exemption 5 includes a number of privileges that serve as bases for withhold agency documents such as the deliberative process privilege, attorney client privilege, and the attorney work product protection. See SHEFFNER, *supra* note 27, at 31-33; Skelton v. United States Postal Service, 678 F.2d 35, 38 (5th Cir. 1982).

⁹² See NLRB, *Sears*, 421 U.S. at 148.

⁹³ See 5 U.S.C. § 552(b)(7)(A).

⁹⁴ See Department of Justice Guide to the Freedom of Information Act, Exemption 7A, 2 (2020). Exemption 7A applies to civil actions and regulatory proceedings. *Id.* at 8.

⁹⁵ See, e.g., ABC Home Health Servs v. HHS, 548 F. Supp. 555, 556, 559 (N.D. Ga. 1982) (documents protected when “final settlement” was subject to reevaluation for at least three years because “further proceedings are not foreclosed by the settlement).

⁹⁶ See *Center for Auto Safety v. DOJ*, 576 F. Supp. 739, 751, 753 (D.D.C. 1983) (holding that documents related to a consent decree modification exchanged between the parties in an antitrust enforcement action could not be withheld based on Exemption 5 or 7A); *Phila Newspapers, Inc. v. HHS*, 69 F. Supp.2d 63, 66-67 (D.D.C. 1999) (finding the release of audit statistics and details of settlement from closed investigation of one hospital would not interfere with possible future settlements with other institutions that were being audited but not investigated).

⁹⁷ See 5 U.S.C § 552 (a)(4)(B).

2. The Privacy Act

The Privacy Act of 1974 was a response to concerns about government uses of information collected about private individuals.⁹⁸ The Privacy Act gives individuals greater control over the gathering, dissemination, and accuracy of information collected by agencies.⁹⁹ To protect individual privacy, the Privacy Act constrains executive branch recordkeeping, defines individual rights to access certain records, limits agency disclosure of records containing private information, establishes safeguards, and provides remedies for agency violations.¹⁰⁰ The Privacy Act allows U.S. citizens and permanent residents to access and correct information collected about themselves.¹⁰¹ It permits an “individual” to seek access to his own “record,”¹⁰² if that record is maintained by the agency within a “system of records,”¹⁰³ subject to ten Privacy Act exemptions.¹⁰⁴ Corporations and organizations do not have Privacy Act rights.¹⁰⁵

The right of access under the Privacy Act and FOIA have some overlap.¹⁰⁶ FOIA is an access statute and “is often explained as a means for citizens to know ‘what their Government is up to.’”¹⁰⁷ In contrast, the Privacy Act permits only an “individual” to seek access to his own “record,” and only if that record is maintained by the agency within a “system of records”— i.e., is retrieved by that individual requester’s name or personal identifier.¹⁰⁸

The Privacy Act restricts how records can be shared. It forbids agencies from disclosing “any record in a system of records” without prior written consent of the individual to whom the record

⁹⁸ See ACUS SOURCEBOOK, THE PRIVACY ACT, available at https://sourcebook.acus.gov/wiki/Privacy_Act/view (last visited Aug. 13, 2022).

⁹⁹ See *Miller v. United States*, 630 F. Supp. 347 (E.D.N.Y. 1986).

¹⁰⁰ See ACUS SOURCEBOOK, *supra* note 98.

¹⁰¹ See 5 U.S.C. § 522a(d); MEGHAN M. STUESSY, CONG. RSCH. SERV. R47058, ACCESS TO GOVERNMENT INFORMATION: AN OVERVIEW 9 (2022).

¹⁰² The term “record” means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. 5 U.S.C. § 552a(a)(4).

¹⁰³ the term “system of records” means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. 5 U.S.C. § 552a(a)(5).

¹⁰⁴ The Privacy Act has special, general, and specific exemptions. See 5 U.S.C. § 522a(d)(5); 5 U.S.C. § 522a(j); 5 U.S.C. § 552a(k). For a discussion of Privacy Act Exemptions, see DEP’T OF JUSTICE, OVERVIEW OF THE PRIVACY ACT OF 1974, 338-371(2020).

¹⁰⁵ See, e.g., *Hurry v. FINRA*, 782 F. App’x 600, 602 (9th Cir. 2019) (“The Act applies to records of natural persons only, and only natural persons may sue under the Act.”); see also DEP’T OF JUSTICE, OVERVIEW OF THE PRIVACY ACT OF 1974, 25 (2020).

¹⁰⁶ See generally *Greentree v. U.S. Customs Serv.*, 674 F.2d 74, 76 (D.C. Cir. 1982) (“While the Privacy Act was designed to provide individuals with more control over the gathering, dissemination, and accuracy of agency information about themselves, FOIA was intended to increase the public’s access to governmental information.”).

¹⁰⁷ See *NARA v. Favish*, 541 U.S. 157, 171-72 (2004) (quoting *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

¹⁰⁸ See *Sussman v. Marshals Serv.*, 494 F.3d 1106, 1121 (D.C. Cir. 2007) (concluding that Privacy Act gives individuals “access only to their own records, not to all information pertaining to them that happens to be contained in a system of records”).

pertains, subject to twelve exceptions.¹⁰⁹ An important exception to the requirement to obtain prior consent are records that are required to be disclosed under FOIA.¹¹⁰ The Privacy Act never prohibits a disclosure that the FOIA requires, “but where the FOIA would permit withholding under an exemption, the Privacy Act makes such withholding mandatory upon the agency.”¹¹¹ Thus, if an agency is in receipt of a FOIA request for information about an individual that is contained in a system of records and is not subject to a FOIA exemption, then the agency is required to disclose the information.¹¹² However, if a FOIA exemption—typically, Exemption 6 (personnel and medical files)¹¹³ or Exemption 7(C) (law enforcement information that could be an invasion of personal privacy)¹¹⁴ applies to a protected record, the Privacy Act prohibits an agency from making a “discretionary” FOIA release because that disclosure would not be “required” by the FOIA within the meaning of § 552a(b)(2).¹¹⁵ If disclosure is not required under FOIA, then the exception does not apply and the agency must obtain written consent prior to disclosing the information to a third party.

With respect to settlements in agency enforcement proceedings, the Privacy Act would not prevent agencies from disclosing settlements to third parties if they are required to be disclosed under FOIA. As a threshold matter, the settlement must be a “record” of an individual in a “system of records.” In order to be part of a “system of records,” an agency must retrieve the settlement by the name of the individual or other personal identifier. Agency practices likely vary in how they maintain settlements and retrieve them. Further, it must involve a settlement with protected information about an individual as opposed to a settlement that only contains information about an entity. Since agency settlements often involve entities, the Privacy Act would not bar agencies from disclosing them, unless they contained individual information protected by the Privacy Act and were subject to a FOIA exemption. As discussed above, disclosure of settlements is generally required under FOIA’s request regime. However, if information in the settlement is subject to a FOIA exemption because it contains trade secrets, personnel or medical records, or other law enforcement information that could be an invasion of personal privacy, then that information would be protected from disclosure by the Privacy Act, and the agency would need prior written consent before releasing such information to third parties.

3. Administrative Dispute Resolution Act (ADRA)

Recognizing that administrative proceedings had become increasingly “formal, costly, and lengthy,” Congress passed the Administrative Dispute Resolution Act of 1990 (ADRA).¹¹⁶ The

¹⁰⁹ See 5 U.S.C. § 552a(b).

¹¹⁰ See 5 U.S.C. § 552a(b)(2).

¹¹¹ *News-Press v. DHS*, 489 F.3d 1173, 1189 (11th Cir. 2007).

¹¹² See 5 U.S.C. § 552a(b)(2).

¹¹³ See 5 U.S.C. § 552(b)(6).

¹¹⁴ See 5 U.S.C. § 552(b)(7)(C).

¹¹⁵ See DEP’T OF JUSTICE, OVERVIEW OF THE PRIVACY ACT OF 1974, 90 (2020).

¹¹⁶ See The Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, sec. 2, Nov. 15, 1990 104 Stat. 2736.

statute authorizes and encourages federal agencies to use alternative dispute resolution (ADR).¹¹⁷ ADR has been used to “enable parties to bring to bear their experience to foster creative and acceptable solutions and to produce expeditious decisions requiring fewer resources than litigation and adjudicative processes.”¹¹⁸ The statute provides a nonexclusive list of alternative means of dispute resolution, including “conciliation, facilitation, mediation, factfinding, minitrials, arbitration, and use of ombuds, or any combination thereof.”¹¹⁹ ADRA requires the appointment of dispute resolution specialists to review all programs with ADR potential, provides ADR training, and includes clauses encouraging ADR use in grants and contracts. Parties to a dispute must consent to the use of ADR, and the statute provides a list of situations where the agency is required to consider not using ADR.¹²⁰ In 1996, Congress amended and permanently reauthorized ADRA, enhancing the statute’s confidentiality protections.¹²¹

ADRA seeks to balance both the confidentiality protections necessary for successful negotiations and the transparency required for legitimacy.¹²² The 1996 Act was amended to enhance confidentiality protections.¹²³ Although the 1990 Act established specific criteria for disclosure of ADR communications, confidentiality was undermined because the 1990 Act explicitly stated that it did not exempt any ADR communications from disclosure under FOIA.¹²⁴ There was considerable concern among potential ADR participants that neutrals who were federal government employees could be forced to disclose their notes and documents that were submitted to them by parties.¹²⁵ The 1996 Act broadened the confidentiality protections by 1) creating a clear statutory FOIA exception for ADR communications and 2) broadening the scope of the confidentiality provisions that are generated by a neutral and distributed to all parties to the dispute.¹²⁶

¹¹⁷ See 5 U.S.C. § 572; MARSHALL J. BERGER, ED. FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK (2001).

¹¹⁸ See Pub. L. No. 101-552, sec. 2, Nov. 15, 1990 104 Stat. 2736 (“The Congress finds that---(4) such alternative means can lead to more creative, efficient, and sensible outcomes.”); ACUS SOURCEBOOK, THE ADMINISTRATIVE DISPUTE RESOLUTION ACT, available at https://sourcebook.acus.gov/wiki/Administrative_Dispute_Resolution_Act/view, (last visited Aug. 13, 2022).

¹¹⁹ See 5 U.S.C. § 571(3). The 1996 Act deleted “settlement negotiations” from the definition of “alternative means of dispute resolution” in order to distinguish mechanisms that utilize a third-party neutral from traditional settlement negotiations entered into by agencies. This change was made to clarify that an agency’s use of conventional means of settlement negotiations is not sufficient to fulfill the mandate of the 1996 Act. This means that agencies may not use the existence of settlement negotiations as a reason not to implement ADR completely. See MARSHALL J. BERGER, FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK, 7 (2001).

¹²⁰ See 5 U.S.C. § 572.

¹²¹ See ACUS SOURCEBOOK, THE ADMINISTRATIVE DISPUTE RESOLUTION ACT, *supra* note 121.

¹²² See *id.*

¹²³ See BERGER, *supra* note 119, at 7.

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *id.*

The statute protects parties' and neutrals'¹²⁷ "dispute resolution communications" from voluntary and compulsory disclosure.¹²⁸ "Dispute resolution communications" include "any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant."¹²⁹ Importantly, a "final written agreement" reached as a result of ADR is not a "dispute resolution communication" and thus it is not subject to the confidentiality provisions.¹³⁰ There are limited exceptions to ADRA's confidentiality provisions, such as consent by all the parties or upon court determination in certain circumstances.¹³¹ ADRA also created a clear FOIA exemption for dispute resolution communications between a neutral and party.¹³²

ADRA's confidentiality provisions generally prohibit disclosure of most settlement communications during the ADR process. However, the statute expressly excludes final settlement agreements as part of the "dispute resolution communications" that are protected from disclosure under the statute. Thus, ADRA would not prevent disclosure of final settlement agreements to the public.

4. Federal Records Act (FRA)

The FRA, enacted in 1950 and amended since, governs the collection, retention, and preservation of federal agency records.¹³³ Congress deemed federal records worthy of preservation for the information they provide on the transaction of public business and their documentation of the "organization, functions, policies, decisions, procedures, operations [and] other activities" of the government.¹³⁴ The FRA requires that agencies create and maintain efficient records management programs. The 2016 FOIA Improvement Act modified the FRA by adding a requirement that such programs provide procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format.¹³⁵

The extent to which this requirement will increase disclosure of agency adjudication materials online is an open question. Records chosen for electronic disclosure must be "of general interest or use to the public," as well as "appropriate" for disclosure. While adjudication materials,

¹²⁷A neutral is defined as "an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy." See ACUS SOURCEBOOK, THE ADMINISTRATIVE DISPUTE RESOLUTION ACT, *supra* note 121.

¹²⁸ See 5 U.S.C. § 574.

¹²⁹ See 5 U.S.C. § 571.

¹³⁰ See 5 U.S.C. § 571(5).

¹³¹ See 5 U.S.C. § 574(b)(5). Such exceptions include that the communication has been made public, is required by statute, or a court determines that disclosure is (A) necessary to prevent a manifest injustice; (B) help establish a violation of law; or (C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential. *Id.*

¹³² See 5 U.S.C. § 574(j).

¹³³ See CONG. RSCH. SERV., FEDERAL RECORDS: TYPES AND TREATMENTS (2019).

¹³⁴ See 44 U.S.C. § 3301.

¹³⁵ See 44 U.S.C. § 3102(2).

especially decisions, likely meet this test, the amount of discretion left to agencies in the new provision suggests that the provision will not have significant effects on overall disclosure practices, including on the disclosure of agency settlements.¹³⁶

5. Paperwork Reduction Act (PRA)

The PRA does not mandate the electronic disclosure of agency adjudicatory materials, including settlements, but it does represent an attempt by Congress to promote greater electronic availability of important government records. In an effort to “ensure that the public has timely and equitable access to [agencies’] public information,” the statute directs agencies to “disseminat[e] public information in an “efficient, effective, and economical manner,”¹³⁷ which currently means online disclosure.¹³⁸ The PRA is primarily concerned with minimizing the paperwork burden on regulated entities and ensuring oversight of agency information requests to the Office of Management and Budget (OMB).¹³⁹

The PRA does not in fact require anything to be released to the public.¹⁴⁰ The agency decides what to release and then the PRA determines how that release must occur.¹⁴¹ “Public information” is defined as any information, regardless of form or format, that an agency discloses, disseminates, or makes available to the public.¹⁴² In short, the PRA does not impose an affirmative duty of disclosure.¹⁴³ It does, as a practical matter, require that agencies post what information they do release to a website, but the threshold determination of what information to release lies with the agency and other applicable law that requires disclosure.¹⁴⁴ If an agency does not disclose materials beyond FOIA’s requirements, it is not obligated to do so electronically by the PRA.

6. E-Government Act of 2002

The E-Government Act of 2002 was intended to further the federal government’s approach to information dissemination in the Internet Age.¹⁴⁵ It requires certain information be made available on the agency website. First, it requires agencies, to the extent practicable, to provide online “information about that agency” required to be published in the *Federal Register* under FOIA’s proactive disclosure provisions.¹⁴⁶ Second, it requires that agencies accept electronic

¹³⁶ See Lawrence Tai, *Fast Fixes for FOIA*, 52 HARV. J. ON LEGIS. 455 (2015).

¹³⁷ See 44 U.S.C. § 3506(d)(1)(c).

¹³⁸ See Michael Herz, *Law Lags Behind: FOIA and the Affirmative Disclosure of Information*, 7 CARDOZO PUBLIC LAW, POLICY, AND ETHICS JOURNAL 577, 592 (2009).

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² See 44 U.S.C. § 3502(12).

¹⁴³ See Herz, *supra* note 138, at 593

¹⁴⁴ See *id.*

¹⁴⁵ See ACUS SOURCEBOOK, THE E-GOVERNMENT ACT OF 2002, available at https://sourcebook.acus.gov/wiki/E-Government_Act_of_2002/view (last visited Aug. 13, 2022).

¹⁴⁶ See 44 U.S.C. § 3501 note 116 Stat 2916 (“publicly accessible Federal Government website includes all information about that agency required to be published in the Federal Register under paragraphs (1) and (2) of section 552(a) of title 5, United States Code.”)

submissions for rulemaking.¹⁴⁷ Third, it requires agencies to have an Internet-accessible rulemaking docket that includes all public comments and other materials that by agency rule or practice are included in the agency docket, whether or not submitted electronically.¹⁴⁸ The agency electronic dockets specifically refers to dockets of information submitted for rulemaking purposes, not adjudication.¹⁴⁹

While the E-Government Act may appear to require electronic disclosure of materials disclosed under FOIA's proactive disclosure obligations, including final agency opinions and orders, the provision suffers from several drafting deficiencies that ultimately deprive it of substantial meaning.¹⁵⁰ For example, the section refers to publishing information online that is required to be published in the *Federal Register*; however, agency opinions and orders are not required to be published in the *Federal Register* under FOIA.¹⁵¹ Rather, those agency materials are only required to be made "available for public inspection" in electronic format under FOIA.¹⁵² Even if Congress intended for the E-Government Act to apply to the disclosure of FOIA's § 552(a)(2) materials, it is redundant of FOIA, which already requires the electronic disclosure of § 552(a)(2) materials. Furthermore, the E-Government Act only directs agencies to disclose (a)(2) material online "[t]o the extent practicable as determined by the agency."¹⁵³ This allows the agency discretion to determine whether online disclosure of § 552(a)(2) is practicable, rather than the stronger mandated disclosure approach in FOIA, which requires that the records "shall" be made available.¹⁵⁴

The E-Government Act also requires that agency websites provide direct links to "information made available to the public under subsections (a)(1) and (b)" of FOIA.¹⁵⁵ It appears, upon an initial reading, to impose an obligation on agencies to disclose adjudicatory materials online. However, the Act contains a drafting error that confuses the meaning.¹⁵⁶ Section 552(b) does not "m[ake] information available."¹⁵⁷ It is the section that lists the nine exemptions to FOIA's disclosure requirements that authorize agencies to make records—including (a)(2) materials—unavailable.¹⁵⁸ But even assuming Congress intended that the Act should apply to (a)(2) materials instead of subparagraph (b), such a requirement would again be redundant with FOIA. Furthermore, as discussed in the FOIA section above, agency settlements likely do not fall

¹⁴⁷ See *id.* This includes electronic submissions pursuant to 5 U.S.C. § 553(c), which pertains to allowing interested persons an opportunity to participate in rulemaking through submission of written data, views, or arguments.

¹⁴⁸ See 44 U.S.C. § 3501 note, Publ. L. No. 107-347, 16 Stat 2916.

¹⁴⁹ See *id.*

¹⁵⁰ See Herz, *supra* note 138, at 594-95.

¹⁵¹ See 5 U.S.C. § 552(a)(2).

¹⁵² See Michael B. Gerrard & Michael Herz, *Harnessing Information Technology to Improve the Environmental Impact Review Process*, 12 N.Y.U. ENVTL. L. J. 18, 46 (2003).

¹⁵³ See 44 U.S.C. § 3501 note, Publ. L. No. 107-347, 16 Stat 2916.

¹⁵⁴ See 5 U.S.C. § 552.

¹⁵⁵ See 44 U.S.C. 3501 (note), Section 207 E-Government Act 116 Stat. 2918.

¹⁵⁶ See Gerrard & Herz, *supra* note 152, at 48.

¹⁵⁷ See 5 U.S.C. § 552(b).

¹⁵⁸ See *id.*

under the proactive disclosure provisions of § 552(a)(2), so the E-Government Act provisions described above would also not apply to settlements.

The laws discussed above represent attempts by Congress to increase public transparency through promotion of the online disclosure of important government materials. However, they generally do not require agencies to disclose settlements on their websites, even though settlements are nonetheless, useful in shining light on “secret agency law.”¹⁵⁹ Because proactive disclosure of settlements is generally not required, agencies have varying disclosure practices on their websites. Some agencies have specific policies with respect to public availability of settlements. For example, the EPA, released a policy in March 2022 that the agency would post proposed settlements on its website and allow them to be available for public review and comment.¹⁶⁰ The Department of Interior (DOI) recently reversed a prior policy requiring proposed settlement agreements be posted on the DOI’s Office of the Solicitor’s litigation webpage.¹⁶¹ However, most agencies from the sampled group did not have formal policies with respect to disclosing settlements on their websites, but rather provided general information about FOIA policies and procedures.

This report reviews selected agency practices with respect to the ease of navigating agency websites to find settlements and the comprehensiveness of settlement information found thereon.

II. AGENCY WEBSITE REVIEW METHODOLOGY

Unlike litigation documents in civil actions filed in federal courts, there is no central repository for settlements in administrative enforcement proceedings.¹⁶² Rather, each agency maintains its own website and disclosure practices for settlements vary significantly across agencies. This system results in settlements being scattered across agency websites with varying degrees of accessibility. Access to settlements varies considerably both in terms of ability to easily navigate an agency’s website to find settlements and in the comprehensiveness of settlement information available. This report reviews a selection of agencies to examine different agency practices with

¹⁵⁹ See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).

¹⁶⁰ See Memorandum from Michael S. Regan, Administrator, Consent Decrees and Settlement Agreements to Resolve Environment Claims Against the Agency, available at https://www.epa.gov/system/files/documents/2022-03/ogc-22-000-2698_0.pdf. This policy revoked the prior policy adopted by the EPA Administrator during the Trump administration. See Memorandum of E. Scott Pruitt, Administrator, Directive Promoting Transparency and Public Participation in Consent Decrees, available at <https://archive.epa.gov/epa/newsroom/directive-promoting-transparency-and-public-participation-consent-decrees-and-settlement.html>

¹⁶¹ See Order No. 3408, Recission of Secretary’s Order 3368, available at <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3408.pdf>; see also Press Release, *Interior Department Revokes Secretary’s Order that Wasted Taxpayer Funds, Interfered with Litigation Processes*, available at <https://www.doi.gov/pressreleases/interior-department-revokes-secretarys-order-that-wasted-taxpayer-funds-interfered>.

¹⁶² Settlements between private parties pursuing litigation in federal district courts are often not published on PACER; however, settlements or consent decrees of agency enforcement actions in federal district courts are generally available in the database. Identifying a need for a centralized repository of agency settlements in administrative proceedings, members of Congress have repeatedly introduced legislation to create such a database. See Settlement Agreement Information Database Act of 2022, S.3900 117th Cong. (2022).

respect to disclosure of settlements by considering several factors related to website navigability and the comprehensiveness of settlement information available.

A cross section of agencies was selected for the review. These agencies include independent boards and regulatory agencies,¹⁶³ executive departments (and their subunits),¹⁶⁴ independent administrations,¹⁶⁵ government corporations,¹⁶⁶ older and more newly formed agencies, large and small agencies, and agencies with diverse subject matter expertise. A cross section of agencies was also chosen to include different types of respondents that appear in agency enforcement proceedings such as large companies, financial institutions, small businesses, and individuals. Selection of different types of respondents in agency proceedings was important to consider the role of settlements across a broad spectrum of proceedings, from dispute resolutions with highly regulated and well-resourced companies to proceedings with individuals who do not have long-term relationships with agencies and may be unrepresented by counsel. Furthermore, including a variety of types of respondents informs policy considerations regarding the public interest in settlements and privacy concerns about disclosure.

A review of twenty agency websites was conducted and each website was assessed for the ease of navigating to settlements and comprehensiveness of settlement information on the website. A list of the agencies and their homepages are listed in Appendix A. The following agencies were surveyed:

1. Commodity Futures Trading Commission (CFTC)
2. Consumer Financial Protection Bureau (CFPB)
3. Consumer Product Safety Commission (CPSC)
4. Department of Commerce, National Oceanic and Atmospheric Administration (NOAA)
5. Department of Energy, Federal Energy Regulatory Commission (FERC)
6. Department of Homeland Security, United States Coast Guard (USC)
7. Department of Housing and Urban Development (HUD)
8. Department of Interior (DOI)
9. Department of Labor, Occupational Safety and Health Administration (OSHA)
10. Department of the Treasury, Office of Foreign Asset Control (OFAC)
11. Environmental Protection Administration (EPA)
12. Equal Employment Opportunity Commission (EEOC)
13. Federal Communications Commission (FCC)
14. Federal Deposit Insurance Corporation (FDIC)
15. Federal Housing Finance Agency (FHFA)
16. Federal Maritime Commission (FMC)

¹⁶³ CFTC, CFPB, CPSC, EEOC, FCC, FMC, FTC, NLRB, and SEC are independent regulatory agencies. A list of types of agencies is available at <http://acus.law.stanford.edu/agencies>.

¹⁶⁴ FERC, DHS, DOI, DOJ, HUD, NOAA, OSHA, and OFAC are executive departments and their subunits.

¹⁶⁵ EPA and FHFA are independent administrations.

¹⁶⁶ FDIC and PBGC are government corporations.

17. Federal Trade Commission (FTC)
18. National Labor Relations Board (NLRB)
19. Pension Benefit Guaranty Corporation (PBGC)
20. Securities and Exchange Commission (SEC)

A review of identical questions was completed for each agency. The review consisted of three parts: a background section, a navigability section, and a comprehensiveness section. The form of the survey is provided in Appendix B.

III. AGENCY REVIEW ANALYSIS

The review results show that agencies have varying practices with respect to disclosure of settlements on their websites. Agency websites have differing degrees of navigability and comprehensiveness of information regarding settlements. All the agencies' websites have navigation tools; however, not all navigation tools on the websites lead users to settlement information. Some agency websites had very comprehensive settlement information available, and some had no access to settlement documents at all. There is no uniform standard across agencies for providing settlement information on websites and this variance creates challenges for the public to access settlements across agencies.

A. Website Navigability for Agency Enforcement Settlements

The ease of navigating an agency's website is an important part of making settlements accessible to the public. Thus, the survey included questions about the navigability of agency websites including the presence of an "Enforcement" tab on the menu bar, a search engine, a site map/index, and filtering or advanced search options. For the first three tools, the presence of the function was measured from the agency's homepage, while the filtering or advanced search options were often found on an "Enforcement" webpage, docket webpage, or a search engine results pages. If the agency's website had a tool available that provided access to settlement information, the table was marked with Y (Yes, it was identified) or N (No, it was not identified). If the tool did not lead the user to settlement information, the table was marked with an "N," even if it was a tool available on the website because the scope of this report is the navigability of the website for the purpose of accessing agency settlement information, not the overall navigability of the agency's website.

Below are explanations of each of the tools for purposes of the survey:

- An "**Enforcement Tab**" is a function on the website homepage that provides access to a section of the website containing information about the agency's enforcement functions, including access to enforcement documents such as settlements. This section of the website is often named "Enforcement" but is sometimes titled "Legal Proceedings" or "Laws & Regulations." If there was a link to such a page from the homepage, including if it was in a drop-down box on the menu bar, it was marked as a "Y" on the table reporting presence of the tool.

- A **“Search Engine”** is a tool on an agency homepage that allows users to generate results from the entire website, not results that are specific to a particular section of the website. If a search in the search engine generated links to an “Enforcement” webpage or to information about settlements or accessing them, the table was marked with a “Y.” Common search terms used were “Enforcement,” “Settlement,” “Settlement Agreement,” and “Consent Order.” If a search engine did not generate hits that provided information about agency settlements, the table was marked “N,” even if the agency’s homepage included a search engine since the survey’s purpose was to assess the navigability of the website with respect to settlement information and not the overall navigability of the agency’s website.
- A **“Site Map/Index”** is a tool on an agency homepage that provides a detailed table of contents or an index for the website, with each chapter or subchapter containing links to the respective sections of the website. If the Site Map/Index did not provide links to agency enforcement, the table was marked “N,” even if the agency’s homepage included a Site Map/Index since the purpose of the survey is to assess the navigability of the website with respect to accessing settlement information and not to assess the overall navigability of the agency’s website.
- The **Filters/Advanced Search** is a tool that allows the user to filter data to provide information by select criteria including, for example, year, document type, and substantive area of law. Filters and Advanced Search tools were found on Enforcement webpages, on docket listings, and in search engine results lists on agency websites.

Table 1 Navigability Tools on Agency Websites for Accessing Settlement Information

Agency Name	Enforcement Tab	Search Engine	Site Map	Filters
CFTC	Y	Y	Y	Y
CFPB	Y	Y	N	Y
CPSC	Y	Y	N	Y
DOC, NOAA	N	Y	N	N
DOEN, FERC	Y	Y	Y	Y
DHS, USC	Y	Y	N	N
HUD	N	Y	Y	N
DOI	Y	Y	Y	N
DOL, OSHA	Y	Y	Y	N
DOT, OFAC	Y	Y	N	Y
EPA	Y	Y	Y	Y
EEOC	N	N	N	N
FCC	Y	Y	Y	Y
FDIC	N	Y	Y	Y
FHFA	Y	Y	Y	N
FMC	Y	Y	N	Y
FTC	Y	Y	N	Y
NLRB	Y	Y	Y	Y
PBGC	N	Y	N	N
SEC	Y	Y	Y	Y

Table 1 shows that most agency websites have navigability tools to access settlement information including menu bar tabs, search engines, site maps, and filtering. The results show 15 out of 20 agencies have an Enforcement Tab, 19 have Search Engines, 11 have site maps, and 12 have filtering tools. Table 2 shows the number of agency homepages with each of the tools that lead to settlement information.

Table 2 Number of Enforcement Tabs, Search Engines, Site Maps, and Filters

Enforcement Tab	Search Engine	Site Map	Filters
15/20	19/20	11/20	12/20

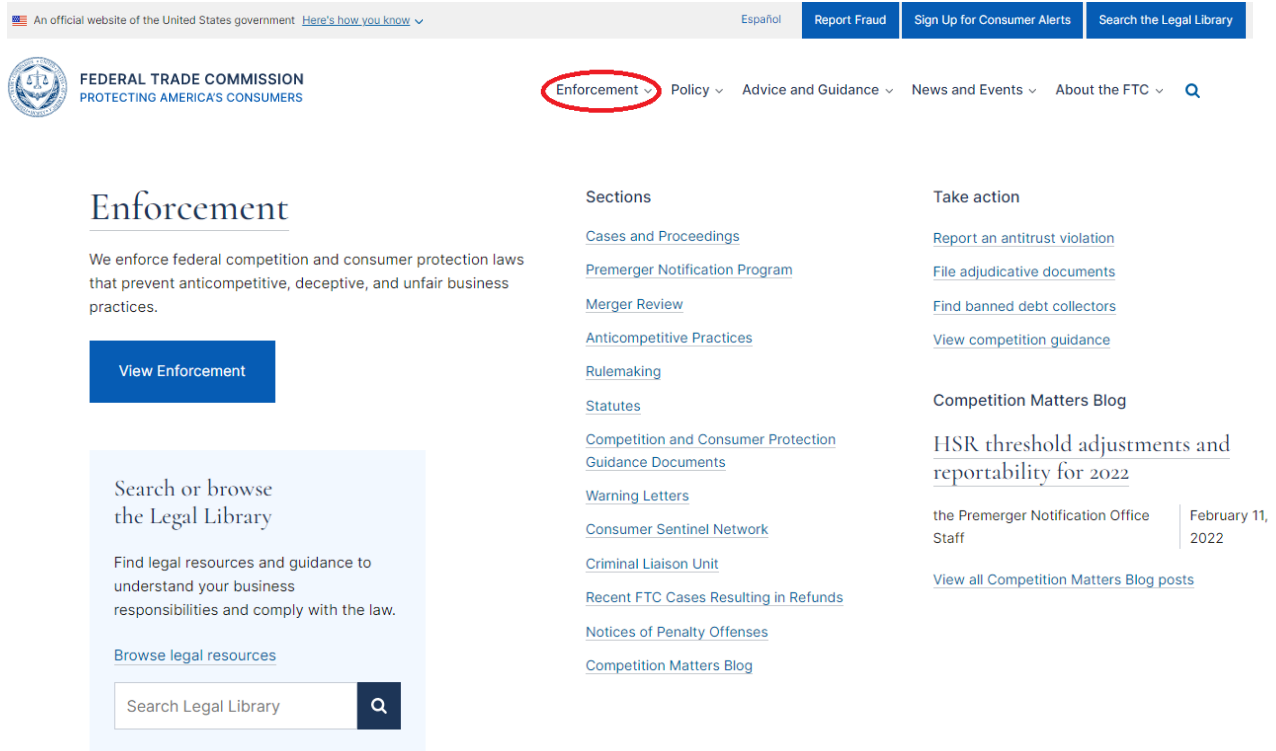
The binary nature of the data on Table 1 can be somewhat misleading since the table does not show the degree of ease in navigating each of the functions. For example, some agencies have more prominent tabs on their menu bars, more effective search engines, searchable site maps, and more detailed filtering, but the data in the table does not differentiate based on the quality of the tool. The qualitative portion of the report provides more insight about the quality of different navigation tools on agency websites. Additionally, the presence of all the tools on a website does not necessarily mean that a particular agency’s website is most navigable. For example, a website with a very visible enforcement tab and an effective search engine, but no site map may be easier to navigate than other agency websites that have all the tools.

1. Enforcement Tabs

Enforcement tabs on agency homepage menu bars were a common navigation tool. Such a tab allows users to easily locate settlement information from an enforcement webpage or a link in a drop-down menu. These tabs were found on fifteen agency websites.¹⁶⁷ However, there was variation in the prominence of the tool on the homepage. In some instances, the Enforcement tab was at the top of its homepage, and in other instances, users were required to navigate a series of drop-down menus to find the tab. Generally, the more prominent the tab, such as along the top menu bar of the homepage, the easier it was to locate enforcement information. For example, the FTC’s homepage has a clearly identifiable Enforcement Tab as the first option on its menu bar on its homepage as depicted in Figure 1.

¹⁶⁷ A menu bar is usually a horizontal or vertical bar found on the top or left-hand side of the website’s homepage that typically contains drop-down menus with links to other pages on the website.

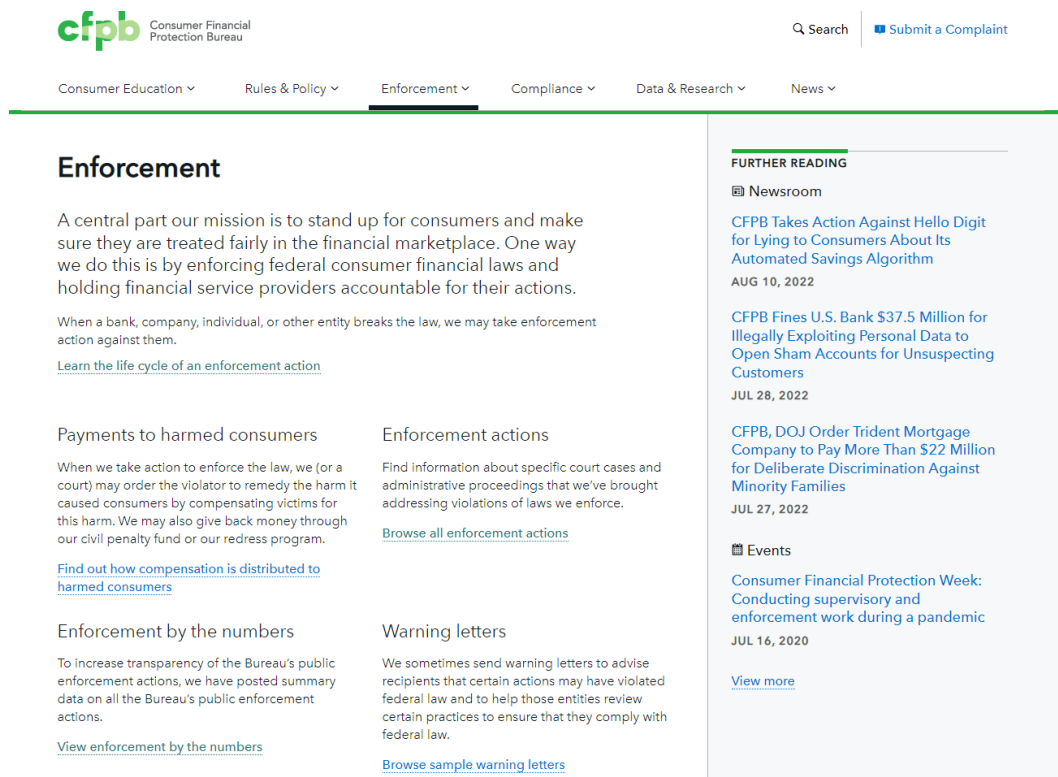
Figure 1 FTC Homepage Menu Bar and Drop-Down Menu



In addition to the labeling the tab “Enforcement,” agencies use a variety of other labels on their menu bars and drop-down menus that provide links to enforcement materials such as settlements. In fact, a minority of agencies in the sample used the label “Enforcement” with most using other terms such as “Law and Regulation,” “Proceedings & Actions,” and “Cases and Decisions.” These tabs often required navigating through a series of drop-down menus with other titles to access settlement information. Tabs and drop-down menus on agency homepages may take users directly to listings of proceedings or administrative case filings.

From the menu bar links, some agencies have webpages dedicated to listing administrative proceedings where the user can search or filter for documents including settlement documents. These Enforcement webpages may also have other information about enforcement actions such as general information about agency enforcement, agency statistics, and news links. This information is helpful, especially for members of the public, to understand the context of settlements or terminology that is important for searching for settlements. Agency websites providing some explanatory information about agency enforcement that is easily understandable and accessible will assist the public in understanding agency enforcement generally and settlements more specifically. Figure 2 shows the enforcement webpage of the CFPB with helpful information about enforcement and a link to enforcement actions.

Figure 2 CFPB Enforcement Webpage



Tabs on menu bars are a particularly important means of creating navigability to settlement documents on agency websites. Highly prominent and clearly labeled tabs on a menu bar and on drop-down menus can be the fastest and most user-friendly way to access enforcement materials, including settlements.

2. Search Engines

While all the agency website homepages reviewed had a search engine, not all of the search engines provided access to settlement information or were equally effective in locating settlement information. Search engines often yielded an unorganized “laundry list” of search hits with varying degrees of relevance to settlement information. However, in other instances, search engines provided easy access to Enforcement webpages with access to settlement documents. Furthermore, some search engines had advanced searching and filtering that allowed users to narrow their search to locate settlement documents and some did not.

Using search engines to locate settlements across agencies is complicated by the fact that agencies use different terminology to refer to settlements. For example, some agencies refer to a settlement as a “consent order,” “settlement agreement,” or “compromise agreement.” In order to find settlements using a search engine, users must try a variety of search terms or be educated about the terminology used for settlements by a particular agency. For purposes of this survey,

the following search terms were used to find settlement information “enforcement,” “settlement,” “settlement agreement,” “consent order,” and “compromise agreement.” Website users without a specialized background may not be aware of the correct terminology to enter when searching for settlements on search engines. Search results from search engines generally included access to settlements or settlement information, but one had to use the correct search term or the case title or docket number to locate a particular case settlement. Furthermore, in some instances, the list of results from the search engine was not ordered chronologically or otherwise, making it difficult to see a body of settlement information.

Many of the websites had filtering available from the search engine results. The sophistication of the filtering options varied. Some websites offered basic filtering options, such as the ability to filter by year. Others had more expansive filtering options that included topic area, type of proceedings, date ranges, and docket numbers. A few agencies had filtering options by document type and included settlements as a document type for which to filter results. The FCC’s website was a notable example of excellent filtering that led to settlement documents. The FCC’s filtering for its search engine results allowed filtering options for topic areas, FCC Bureau involvement, date ranges, FCC docket numbers, and document type. Importantly, the FCC’s document type filter included a tag for settlements labeled “Consent Decree.” Once filtered, the search results were organized in reverse chronological order, tagged, and summarized. Below is a figure showing the FCC filter options on its search engine results page.

Figure 3 FCC Filters on Search Engine Results List

The screenshot shows the FCC's search engine results page for the query "consent decree". The search bar at the top contains "consent decree" and "EDOCS". Below the search bar, it indicates "Displaying Results From: FCC.gov | EDOCS | OPIF Sort By: Best Match". The results show four entries, each with a title, date, description, and document links (PDF, Word, Text). On the right side, there is a "Filter Results" section with "Clear All Filters" and a "Categories" section. The "Document Types" category is expanded, and "Order/Consent Decree (1,295)" is selected and circled in red. Other categories include "Topics/Tags", "FCC Bureaus", "Daily Digest Categories", "ORDER (497)", "Consent Decree (402)", "MO&O (201)", and "News Release (133)". There is also an "Add custom filter" input field. Below the categories, there is a "Dates" section with options for "Released Dates", "Adopted Dates", "Reply Comment Dates", "Last Modified Dates", and "Comment Dates". At the bottom, there is an "FCC Assigned Values" section with options for "Dockets", "FCC Numbers", "DA Numbers", "FCC Records", "File Numbers", "Report Numbers", and "Federal Register Citations".

Search engines are an important tool in locating settlement agreements, especially if there is no means to navigate to an “Enforcement” webpage from the agency’s homepage. For example, the FDIC’s website has an enforcement online docket webpage that includes access to settlement documents. However, it is not easily accessible from the agency homepage. In order to access it, the user must type “enforcement” into the search engine to get the first hit to the “Enforcement Decisions and Orders” webpage. This webpage includes settlement documents.

Search engines are a useful tool for accessing settlement agreements if the user is aware of the right search terms to use. If a website has options for advanced search or filtering on the search results page, the tool can improve navigability to settlements, especially if filtering is specifically designed for settlements.

3. Site Map/Index

Site maps and indexes varied in their effectiveness at directing users to settlements on agency websites. Some websites had site maps and indexes with clear links to “Enforcement” or other webpages with settlement material and some did not. The site maps and indexes also varied in their visibility to the user, with some prominently displayed in the top left-hand corner of the homepage and some at the very bottom of the website in small font.

Site maps were often organized by topic, and indexes were organized alphabetically. Some site maps and indexes contained search engines that allowed the user to search by a term. These tools increased website navigability overall but tended to be less useful than homepage tabs on the menu bar and search engines for quickly locating settlement documents. This may be explained in part by the lack of prominence site maps and indexes had on agency homepages vis-à-vis the high visibility of menu bars and search engines. Site maps were often duplicative of the options on the menu bar on the top of the homepage and less useful if the user had already browsed the menu bar. Thus, a website with highly visible and user-friendly menu bar tabs and search engines may be more navigable to users than a website that has these features and a site map or index but where each tool is less visible and effective. For example, CFPB’s homepage did not have a site map or index, but the website contained a highly visible tab on the menu bar and search engine that was easily navigable without a site map. That being said, websites with other robust tools to locate settlements could also benefit from a site map or index, particularly if the tool has search capabilities and is prominently located.

B. Comprehensiveness of Agency Enforcement Settlement Information

The comprehensiveness of the information available about settlements increases overall transparency and understanding of agency enforcement proceedings. The survey included questions about the comprehensiveness of settlement information on agency websites, including settlement document availability, whether the information was current, and whether supporting materials were available. Below are explanations of each of these categories for purposes of the survey:

- **Settlement Available:** This category measures whether an actual settlement document was available on the agency website. Settlements had various titles such as “consent orders,” “compromise agreements,” or “settlement agreements.” If settlements were available on the agency’s website, a sample settlement was collected. If an agency only had summaries of settlements or press releases describing settlements but no actual settlement documents, the table was marked “N” for this category.
- **Current:** This category measures whether the settlements available on the website were up to date. Where there was a significant gap in time from the current date or it could be confirmed that the agency had entered a settlement that had not been listed, the table was marked “N” for the “Current” category.
- **Supporting Materials:** This category considers whether there were additional supplementary materials or adjudication documents accessible with the settlement. Such materials may include other filings in the proceeding or supplementary materials from the agency such as summaries of the action, press releases, or links to related actions or content.

Table 3 Comprehensiveness of Settlement Information Available on Agency Websites

Agency Name	Settlement Available	Current	Supporting Materials
CFTC	Y	Y	Y
CFPB	Y	Y	Y
CPSC	Y	Y	N
DOC, NOAA	N	N	N
DOEN, FERC	Y	Y	Y
DHS, USC	N	N	N
HUD	Y	N	N
DOI	N	N	N
DOL, OSHA	Y	N	N
DOT, OFAC	Y	N	N
EPA	Y	Y	N
EEOC	N	N	N
FCC	Y	Y	Y
FDIC	Y	Y	N
FHFA	Y	N	N
FMC	Y	Y	N
FTC	Y	Y	Y
NLRB	Y	Y	Y
PBGC	N	N	N
SEC	Y	Y	Y

The table shows that most sample agencies, 15 out of 20, surveyed have actual settlements available on their websites. Of those agencies that have settlements available, most, 11 out of 15, kept settlements up to date on the website. Even fewer number of websites, 7 out of 20, included supporting materials linked to settlements, such as other adjudication documents or documents related to the proceeding such as press releases, explanatory summaries, or links to related proceedings.

Table 4 Number of Agency Websites with Settlement Availability, Current Settlements Available, and Supporting Materials linked to Settlements

Settlement Available	Current	Supporting Materials
15/20	11/20	7/20

1. Settlement Document Available

Agencies having actual settlement documents available on their websites is important to increase transparency and make settlements publicly available. Most agencies sampled have settlements available on their websites. The websites vary in how easy it is for the user to find them and how comprehensive the information is accompanying them. Some agencies provide settlement information on their websites, such as summaries of settlements or press releases about settlements, without providing actual settlement documents. For example, NOAA posts a monthly report of cases charged and resolved that includes a brief description of the settlement terms of the cases resolved.¹⁶⁸ Other websites have a list of settlements, but no links to the actual settlement document. Other agencies do not have any settlements or descriptions available, even if there are other indications on the website that the agency engages in settlements. Most settlements that are available on websites are in .pdf format and the documents were easily viewable and downloadable with a .pdf reader. In many instances, agency websites provide a list of settlements by name of the company or individual entering the settlement and a link to a downloadable .pdf of the settlements.

Settlements on websites have been organized in a variety of ways that contribute to the comprehensiveness of the information available about the settlement and enforcement action. Agencies take different approaches to organizing settlements on their websites. Often agencies list settlements in reverse chronological order by name of the company or individual who entered the settlement. Some websites also provide listings of enforcement actions, including settlements, by topic or statute. For example, the EPA provides a listing of enforcement actions by statute, such as the Clean Water Act.

A particularly helpful way to provide access to settlements is to organize enforcement actions in docket format with a link to all proceeding documents. Docket formats commonly provide a listing of all the documents filed in the action including the settlement. Below is an example of the docket from an EPA administrative proceeding that includes links to all of the documents, including the settlement, titled Consent Agreement and Final Order (CAFO).

¹⁶⁸ See Enforcement Charging Information, OFF. OF GEN. COUNS.: NAT'L OCEANIC AND ATMOSPHERIC ADMIN., <https://www.gc.noaa.gov/enforce-actions-2022.html> (last visited Sept. 26, 2022).

Figure 4 EPA Docket Sheet

The screenshot displays the EPA Administrative Law Judges' E-Docket Database interface. The page title is "Administrative Law Judges' E-Docket Database" and the breadcrumb trail is "You are here: EPA Home » Administrative Law Judges' E-Docket Database » Closed Dockets". The main heading is "Total Petroleum Puerto Rico Corp." with a search icon and the text "Search entire database".

Metadata for the docket includes:

- Status: Closed
- Date Filed: 04/26/2018
- Docket No.: RCRA-02-2018-7101
- Statute(s): Resource Conservation and Recovery Act

An "Index of Filings" section lists 24 items, with the final entry circled in red:

- #1 - 04/27/2018 - Complaint
- #2 - 04/26/2018 - Motion requesting an extension of time to answer.
- #3 - 07/20/2018 - Answer (attachments not scanned)
- #4 - 07/23/2018 - Letter to Chief ALJ Biro requesting assignment of a presiding officer.
- #5 - 07/24/2018 - Invitation Letters to Participate in Mediation
- #6 - 08/08/2018 - Order Initiating Alternative Dispute Resolution Process and Appointing Neutral
- #7 - 10/31/2018 - Report Recommending Termination of ADR Process and Assignment of a Judge for Litigation
- #8 - 11/01/2018 - Order of Designation
- #9 - 11/02/2018 - Prehearing Order
- #10 - 11/23/2018 - Complainant's Status Report and Preliminary Statement
- #11 - 12/04/2018 - Respondent's Preliminary Statement
- #12 - 12/12/2018 - Joint Motion Requesting an Extension of Time to File Consent Agreement and Final Order
- #13 - 12/13/2018 - Order Granting Joint Motion Requesting an Extension of Time to File Consent Agreement and Final Order
- #15 - 01/31/2019 - Order on Agency's Motion Requesting Extension of Time
- #16 - 03/18/2019 - Complainant's Motion Requesting a 10-Day Extension of Time to File Consent Agreement and Final Order
- #17 - 03/19/2019 - Order on Agency's Motion Requesting 10-Day Extension of Time
- #18 - 04/01/2019 - Complainant's Motion Requesting a Final 15-Day Extension of Time to File CAFO
- #19 - 04/02/2019 - Order on Agency's Motion for 15-Day Extension of Time
- #20 - 04/23/2019 - Joint Motion Requesting an Extension of Time to Allow for Additional Inquiry and Certification
- #21 - 04/24/2019 - Order on Joint Motion for Extension of Time
- #22 - 06/13/2019 - Complainant's Prehearing Exchange
- #24 - 09/24/2019 - CAFO (Reg. II date-stamped final copy)

Agencies have used dockets or grouped documents to display settlements and related documents on the same webpage. Settlements can be grouped with related documents even if an agency does not have contested proceedings with several documents on its docket page. It is common for agencies to enter into settlement negotiations prior to instigating a formal proceeding. When a settlement agreement is reached, the agency often posts both the complaint or a stipulation of facts and settlement at the same time on a webpage, sometimes with links to other explanatory materials, like press releases, and summaries.

Using a docket style page or grouping documents related to the settlement on the same page allows website users to understand the broader enforcement action by having other adjudication documents in addition to the settlement. As discussed further below, grouping documents on the same page also facilitates access to other supporting information such as press releases, summaries, and links to related actions.

2. Current Settlement Information

Overall, most agencies that had settlement documents available on their websites have kept their postings current. Many settlements are listed chronologically or in reverse chronological order, so it is relatively easy to confirm that they are current. However, there are instances where agencies have not kept the settlement listings up to date. For example, the most recent “Corporate Settlement Agreement” listed on OSHA’s webpage is from 2020. However, when a search for “corporate settlement agreement” is entered into the search engine, the search reveals press releases that discuss settlements in 2022 but do not have settlements linked to them. Sometimes agencies provide updated information about settlements on their websites as part of news releases,

but do not update their Enforcement webpages or settlement lists with the information. Agencies should keep settlement information up to date on their websites and make sure that recent settlements are included on settlement lists or on Enforcement webpages. If settlement information is not updated on the website, it would be helpful for agencies to provide an explanation about what settlements are available or when the website will be made current.

3. Supporting Materials

Another measure of comprehensiveness is the supporting materials related to the settlement provided on the website. Related information can help the user understand the settlement and the overall enforcement action. Some examples of related information include pleadings, briefs, opinions, and orders in agency proceedings. As discussed in the FOIA section above, agencies are required to affirmatively disclose precedential opinions and orders. However, opinions and orders may not be linked to settlement agreements if the information is not organized in docket format. Other examples of supplementary information include summaries of enforcement actions, press releases, links to agency guidance, and related actions. Fewer agencies provide supplementary information related to settlements, with seven of twenty agencies providing links to supporting information with the settlement. Instead, agencies often provide a list of settlements with no other information linked. However, some agencies provide extensive supplementary information along with links to settlement agreements. Examples of agencies that provide supplementary information include the CFPB, SEC, FTC, and FCC. Supplementary information is particularly helpful to website users to explain settlements in non-legal jargon and to give context for the settlement agreement. Below is an example from the SEC of a summary of a settlement with a link to the actual settlement document.

Figure 5 SEC Summary with Links to Settlement

The screenshot shows the SEC Enforcement page for Tupperware Brands Corporation. On the left is a sidebar with navigation links: Enforcement, About, Enforcement Manual, Public Alerts, Federal Court Actions, Administrative Proceedings, ALJ Decisions, Commission Opinions, Trading Suspensions, Information for Harmed Investors, Data Delivery Standards, and Tips & Complaints. The main content area features the title 'SEC Charges Tupperware Brands Corporation for Internal Controls and Books and Records Failures' and a 'Related Materials' section circled in red, which contains a link to 'Order - Tupperware Brands Corporation'. Below the title, the text reads: 'ADMINISTRATIVE PROCEEDING File No. 3-21180. September 29, 2022 - The Securities and Exchange Commission today charged consumer products company Tupperware Brands Corporation with failing to devise and maintain a sufficient system of internal accounting controls and with failing to maintain accurate books and records from at least 2016 through 2020. Tupperware has agreed to settle the charges and will pay a penalty of \$900,000. According to the SEC's order, Tupperware failed to fully integrate its House of Fuller Mexico ("Fuller Mexico") reporting unit after it acquired the business and implement appropriate policies and procedures. The order finds that Tupperware retained certain legacy policies and practices, failing to recognize the risk that these policies and practices may not adequately address that unit's direct sales model and, over time, lagging financial performance. As a result, Fuller Mexico's management was able to override controls and inaccurately record financial results from at least 2016 through 2020 by: improperly increasing sales via the shipment of unordered products without purchase orders, and improperly reserving for various other expenses at Fuller Mexico. The order against Tupperware finds that it violated Section 13(b)(2)(A) and 13(b)(2)(B) of the Securities Exchange Act of 1934. Without admitting or denying the SEC's findings, Tupperware agreed to cease and desist from committing or causing any violations and any future violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and to pay a civil monetary penalty of \$900,000. The SEC's investigation was conducted by Matthew J. Alexander, Andrea Fox, and Juan Migone, and supervised by Peter J. Rosario, Kevin Guerrero and Stacy L. Bogert.'

IV. POLICY CONSIDERATIONS

Settlements play distinctive roles in different agency proceedings, and agencies have unique missions and procedures that influence their approach to disclosing settlements on their websites. Interviews with agency officials and stakeholders identified benefits and concerns regarding the public availability of settlements on agency websites. For purposes of gaining a wide variety of perspectives, agency officials were interviewed from several agencies as well as stakeholders such as attorneys in private practice that represent clients before agencies and attorneys affiliated with advocacy organizations. Both agency officials and stakeholders discussed the role that settlements play in agency enforcement proceedings and how public availability of settlements on websites serves or undermines agency values and stakeholder interests.

This project addresses the question of whether, and in what circumstances agencies should publicly disclose settlement agreements as a matter of policy. Generally, policy considerations regarding government transparency support public disclosure, particularly when an agency is party to an enforcement proceeding. In addition to increasing government accountability, settlements transmit information about how the agency interprets its enforcement authority and the laws and regulations it enforces, which helps regulated people and entities better comply with the law. However, when agency proceedings involve confidential information of individuals, agencies should consider avenues of disclosure without revealing personal information such as redaction, the use of pseudonyms, or aggregating information. Furthermore, when agencies adjudicate claims of private parties, public disclosure of settlement terms can prevent private parties from resolving disputes.

A. Benefits of Public Availability

Agency officials identified several benefits of settlements being publicly available. They highlighted the important role of public disclosure on government transparency and accountability. Agency officials discussed how public availability of settlements maintains the agency's credibility and dispels concerns about political favoritism in enforcement. Public availability of settlements allows the agency to show how it is carrying out its work and provides the opportunity for the public to evaluate it to hold the agency accountable. Some agency officials discussed how transparency and public availability of settlements is part of the agency's culture and an important part of fulfilling the agency's mission to protect consumers.

Agency officials expressed that public availability of settlements helps achieve the agency's deterrence goals. Settlements often require the respondent to take responsibility, pay penalties, and implement remedial and compliance measures designed to deter the respondent from future violations. Making settlements public sends a message about the agency's response to violations and what regulated entities need to do to comply with the law, which serves the agency's deterrence goals.

Similarly, agency officials discussed how making settlements publicly available transmits information to the regulated community and stakeholders about how the agency interprets the law and its enforcement authority. Publicly available settlements provide notice to the regulated community and an opportunity to change their practices if needed. Additionally, they give guidance to the regulated community about compliance and send messages about best practices. Settlements can be a vehicle to highlight compliance breakdowns, mitigation efforts, and compliance policies that regulated entities can consider in evaluating their own business practices and compliance programs.

Agency officials also pointed out benefits in making settlements public on agency websites to provide equity in access to information and reduce the agency's burden in responding to FOIA requests. Providing access to settlement information on websites eliminates information asymmetry between government officials, who can access the information without visiting a regional office or making a FOIA request, and respondents, who otherwise encounter burdens to access the same information. Allowing both respondents and government officials to access documents on the agency website provides fairer access to respondents as well as easier access to agency personnel. Further, one agency official noted that after an agency put a certain category of records on the agency website, the agency saw a dramatic decline in FOIA requests for those records.¹⁶⁹ Making settlements publicly available on agency websites could similarly lead to a decline in FOIA requests for other agencies, potentially saving the agency considerable time and resources.

Stakeholders also identified several benefits of making settlements publicly available. They discussed the importance of public availability of settlements to increase transparency and government accountability and that the public needs to know how the government is using its resources in enforcement and how amounts paid in settlements are directed.

Stakeholders explained the importance of having access to settlements to provide them with information about how the agency interprets the law and its enforcement authority. Public availability of settlements ensures that there is consistency in settlements for similarly situated respondents, allowing for more uniform application of the law. Stakeholders who advise clients in enforcement proceedings with agencies also discussed the importance of having access to this information to advise their clients to comply with the law and advocate with the agency in settlement negotiations.

Lastly, stakeholders highlighted the need for settlements to be available on agency websites because of the difficulty in accessing documents through FOIA. They discussed the burdensome process of FOIA requests and long delays in obtaining documents. They also discussed the importance of timeliness of accessing documents and how those long delays in receiving FOIA request responses undermined their ability to file lawsuits or otherwise carry out their work.

¹⁶⁹ Conversely, the Department of Agriculture saw a dramatic increase in FOIA requests after removing a database on its website of documents pertaining to licenses and enforcement regarding animal treatment. *See Am. Soc'y for the Prevention of Cruelty to Animals v. Animal and Plant Health Inspection Service*, No. 19-3112, 2021 WL 1163627 at *2-*3 (S.D. N.Y. March 25, 2021).

Making settlements available on agency websites provides easier access to stakeholders and the public.

B. Concerns about Public Availability

Agency officials also expressed some concerns about the public availability of settlements on agency websites. The most prominent concern expressed related to confidentiality and how making some information public might undermine other agency goals like protecting individual privacy and obtaining relief for individuals and consumers. These concerns were expressed particularly with respect to situations where the agency is adjudicating claims on behalf of two parties when the agency is not party to the adjudication. Agency officials discussed how making information public could chill settlement negotiations and frustrate efforts to resolve cases and obtain relief for aggrieved individuals without lengthy contested agency proceedings. There were also confidentiality concerns about individuals and information involved in the settlement that could be embarrassing or impede individuals in their current or future employment. Some agency officials discussed how protecting individual's confidential information was an important part of agency practices and culture.

Agency officials also discussed that the public availability of settlements on agency websites may require increased agency expenditures. In some instances, agency officials considered that website disclosure may in fact invite more FOIA requests, increasing the burden to the agency. Other concerns about increased costs associated with disclosure may be in situations where the agency is settling high volumes of proceedings and it would require considerable agency resources to review settlements and make them available on the website. In some instances, agencies may be settling high volumes of proceedings that are so factually similar that public disclosure of all of them may not provide helpful information to the public, but instead crowd out examples of settlements that could provide helpful information.

Stakeholders also expressed concerns about the public availability of settlements that were primarily associated with confidentiality. Stakeholders discussed privacy considerations for individuals, disclosure of trade secrets, and reputational harm that could occur if settlements were made public. For example, one stakeholder discussed the context where agencies were adjudicating claims between private parties, such as when the FCC adjudicates claims between telecommunications and utilities companies. In those cases, public disclosure of settlements could undermine the parties' settlement efforts and the agency's interest in resolving disputes through private settlement. Stakeholders discussed different ways to potentially address confidentiality concerns in the public disclosure of settlements. Where appropriate, they discussed using redactions or pseudonyms, and providing summaries so identifying information would not be released to the public.

V. AGENCY WEBSITE CASE STUDIES

The case studies present a more detailed analysis of navigation tools and comprehensiveness of settlement information by examining the websites of the FTC, OFAC, and EEOC. The agencies

were chosen to show a cross-section of attributes and practices. The FTC is an independent commission, highly active in enforcement in federal courts and administrative proceedings with a mission that involves consumer protection. OFAC is a subunit of the Department of the Treasury, an administrative department, that is active in administrative enforcement with a mission to enforce sanction laws, often with respondents that are sophisticated and well-represented entities. Lastly, the EEOC has a unique enforcement mission to combat employment discrimination and adjudicates high volumes of cases involving individuals where there are significant confidentiality obligations and privacy concerns.

Each website provides insight to different points along a spectrum of navigability and comprehensiveness with respect to access to agency enforcement settlements. These case studies help inform the recommendations offered in this report and are meant to ensure that recommendations may be suited to agencies with different missions, stakeholders, and policy considerations. All three of the websites discussed in the case studies possess qualities distinct from their settlement disclosure practices. Nothing in this report, therefore, should be taken as an assessment of the websites' overall qualities including their overall navigability or comprehensiveness of information. That said, some websites are more navigable and comprehensive with respect to settlements than others, and the FTC, OFAC, and EEOC websites provide examples of this variation.

A. Federal Trade Commission (FTC)

1. Enforcement Overview

The FTC enforces consumer protection and antitrust laws. Following an investigation, the Commission may initiate an enforcement action using either an administrative or judicial process.¹⁷⁰ In administrative proceedings, the Commission determines whether a practice violates the law. If the respondent elects to settle the charges, it may sign a consent agreement (without admitting liability) and consent to entry of a final order.¹⁷¹ If the Commission accepts the proposed consent agreement, it places the order on the record for thirty days of public comment before determining whether to make the order final.¹⁷² If the respondent elects to contest the charges, the complaint is adjudicated before an administrative law judge (ALJ) in a trial-type proceeding.¹⁷³ After the hearing, the ALJ issues a decision setting forth findings of fact and conclusions of law and recommending either entry of an order to cease and desist or dismissal of the complaint.¹⁷⁴ Any party may appeal the ALJ's decision to the full Commission.¹⁷⁵

¹⁷⁰ See A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/mission/enforcement-authority>.

¹⁷¹ See id.

¹⁷² See id.

¹⁷³ See id.

¹⁷⁴ See id.

¹⁷⁵ See id.

Settlements play an important role in FTC enforcement. They preserve resources that the Commission can commit to helping more consumers. The public availability of settlements on the website helps inform consumers about the existence of scams or frauds and communicates information about consumer restitution available from the settlement. While not binding outside of the parties to the settlement, settlements are a method of communicating how the Commission interprets the law and applies its enforcement authority.¹⁷⁶ Litigated outcomes can be inconsistent, but the Commission has greater ability to provide a consistent message through settlements and shape expectations for regulated entities.

2. Navigability of the FTC's Website

The FTC's website is highly navigable with respect to finding agency settlements in enforcement actions. There are many different user-friendly tools on the FTC's homepage for accessing settlement information such as tabs on the homepage menu bar and a search engine that directs users to the legal document library.

There are multiple tabs prominently displayed on the FTC's homepage menu bar that direct the user to settlement information. The "Enforcement" tab on the FTC homepage is prominently displayed as the first tab in the menu bar at the top of the homepage. The "Enforcement" tab includes a drop-down menu with a list of sections including "Cases and Proceedings," which is listed first in the drop-down menu. On the "Cases and Proceedings" webpage, both civil actions and administrative proceedings are listed in reverse chronological order. Each case has a written summary and a list of case information such as "Type of Action," "Last Updated," "FTC Matter Number," and "Case Status."¹⁷⁷ There is a dedicated search engine for cases and proceedings that allows the user to search by keyword, company/individual name, or case number. There is also the ability to refine the cases and proceedings by using filters for "Record Type," topic area, case status, type of enforcement action, date ranges, and matter number. For purposes of finding settlement orders, it is helpful to filter by cases that are "Closed" under the "Case Status" filter. While extensive, these filters could be improved by providing settlement orders as a record type. The next figure shows filter options on the FTC's Cases and Proceedings webpage.

¹⁷⁶ See Elysa M. Dishman, *Settling Data Protection Law: Multistate Actions and National Policymaking*, 72 ALA. L. REV. 839 (2021).

¹⁷⁷ See *Legal Library: Cases and Proceedings*, FED. TRADE COMM'N, <https://www.ftc.gov/legal-library/browse/cases-proceedings> (last accessed Sept. 26, 2022).

Figure 6 FTC Cases and Proceedings Webpage with Filters

The screenshot displays the FTC Cases and Proceedings webpage with various filters on the left and case details on the right. The filters include Record Types, Mission, Competition Topics, Consumer Protection Topics, Federal Court, Industry, Case Status, Enforcement Type, and Type of Action. The Type of Action filter is currently set to Administrative. The right side shows two case entries: HomeAdvisor, In the Matter of and Intuit Inc., In the Matter of (TurboTax). Each case entry includes a summary, Type of Action, Last Updated date, FTC Matter/File Number, Docket Number, and Case Status.

Refine your results

Displaying 1 - 20 of 1277 Show: 20 ▼ Sort By: Newest ▼

Filters

- Record Types ▼
- Mission ▼
- Competition Topics
 - Any - ◇
- Consumer Protection Topics
 - Any - ◇
- Federal Court
 - Any - ◇
- Industry
 - Any - ◇
- Case Status
 - Any - ◇
- Enforcement Type
 - Any - ◇
- Type of Action ▲
 - Federal
 - Administrative
 - Process Enforcement

HomeAdvisor, In the Matter of

In March 2022, the FTC issued an [administrative complaint](#) against Denver-based HomeAdvisor, Inc. – a company affiliated with Angi – alleging it used a wide range of deceptive and misleading tactics in selling home improvement project leads to service providers since 2014, including small businesspeople operating in the “gig” economy.

Type of Action: Administrative
 Last Updated: September 28, 2022
 FTC Matter/File Number: 1923106
 Docket Number: 9407
 Case Status: Pending

Intuit Inc., In the Matter of (TurboTax)

The Federal Trade Commission is taking action against Intuit Inc., the maker of the popular TurboTax tax filing software, by issuing an administrative complaint against the company for deceiving consumers with bogus advertisements pitching “free” tax filing that millions of consumers could not use. In addition, to prevent ongoing harm to consumers rushing to file their taxes, the Commission also filed a federal district court complaint asking a court to order Intuit to halt its deceptive advertising immediately.

The Commission alleges that the company’s ubiquitous advertisements touting their supposedly “free” products—some of which have consisted almost entirely of the word “free” spoken repeatedly—mislead consumers into believing that they can file their taxes for free with TurboTax. In fact, most tax filers can’t use the company’s “free” service because it is not available to millions of taxpayers, such as those who get a 1099 form for work in the gig economy, or those who earn farm income. In

Once users have filtered the cases, they can click on the case name and access a webpage with case information including tags to related topics, a case summary, and the “Case Timeline.” The Case Timeline includes links to documents in reverse chronological order including case filings, press releases, and commissioner statements. Users can click on links to settlements which are labeled as “Decision and Order,” and settlements are viewable and downloadable as .pdf documents. The next figure shows an example of an FTC case summary and Case Timeline.

Figure 7 FTC Case Summary and Case Timeline

BASF SE, In the Matter of

Tags: [Consumer Protection](#) | [Bureau of Consumer Protection](#) | [Advertising and Marketing](#) | [Children](#) | [Health Claims](#)

Last Updated: February 8, 2022
Case Status: Closed

In the Matter of BASF SE, a corporation, BASF Corporation, a corporation, and DIEM LABS, LLC, a limited liability company, et al.

FTC Matter/File Number: 192 3088

Case Summary

In April 2021, two companies, BASF SE and DIEM Labs, agreed to pay a total of more than \$416,000 to settle FTC charges that they deceptively marketed two dietary fish oil supplements as clinically proven to reduce liver fat in adults and children with non-alcoholic fatty liver disease (NAFLD). The payment will enable the Commission to provide refunds to all consumers who bought either supplement. They also were barred from the allegedly illegal conduct. The Commission announced approval of the final consent orders in June 2021.

Case Timeline

February 8, 2022

[PRESS RELEASE: FTC Sends Full Refunds to Consumers who Bought Deceptively Marketed Fish Oil Supplement](#)

June 1, 2021

[Final Complaint \(2.15 MB\)](#)

[Decision and Order as to Respondents BASF SE and BASF Corporation \(523.56 KB\)](#)

[Decision and Order as to Respondents DIEM Labs, LLC and Related Individuals \(506.48 KB\)](#)

[PRESS RELEASE: FTC Approves Final Administrative Consent Orders against Companies that Deceptively Marketed Fish Oil Supplements with False Claims They Were Clinically Proven to Treat Liver Disease](#)

April 8, 2021

[Federal Register Notice Containing Analysis to Aid Public Comment](#)

April 1, 2021

[Complaint \(1.88 MB\)](#)

[Agreement Containing Consent Order with Respondents BASF SE and BASF Corporation \(385.86 KB\)](#)

[Agreement Containing Consent Order with Respondents DIEM Labs, LLC, and Related Individuals \(370.54 KB\)](#)

[Analysis of Proposed Consent Order to Aid Public Comment \(55.91 KB\)](#)

[PRESS RELEASE: Companies Settle FTC Charges that They Deceptively Marketed Fish Oil Supplements with False Claims They Were Clinically Proven to Treat Liver Disease](#)

In addition to the Enforcement tab on the menu bar, there is also a tab in the top right-hand corner of the FTC's homepage entitled "Search the Legal Library" that directs users to the same link to cases and proceedings and most recent enforcement actions filed. The Enforcement tab menu is also replicated at the bottom of the homepage with all the links from the drop-down menu at the top of the webpage.

The search engine is prominently displayed on the homepage as a magnifying glass icon on the menu bar. The search engine allows users to search the entire website or prompts the user to search the Legal Library instead with a link if the user is searching for legal documents. The search engine provides many search results for the term "settlement agreement" with the initial hits generally being press releases announcing settlements. The results list is not organized chronologically, so it produces a laundry list of results related to settlement agreements, some from cases litigated in federal district courts and some in administrative proceedings. However, the

press releases that appear in the search lists provide links to considerable amounts of materials relating to the case including links to settlement agreements. If a user had a case name and searched for the name and settlement agreement, it is likely that the user could also access the settlement through the search engine. However, using the Legal Library is preferable because of its advanced filtering and organization of legal documents.

While there is no longer a link on the website to a site map, the bottom of the homepage and every other page has replicated the site's menu bar and drop-down menu, which is the type of information that would be on a site map. Furthermore, the ease of use of other features with overlapping abilities to access settlements makes this website navigable despite the lack of a formal site map or index tool.

3. Comprehensiveness of Materials

The FTC's website provides comprehensive information about settlement agreements. Each proceeding has a dedicated page with tagged links to related topics. The top of the page provides case information such as when the record was last updated, the case status, title, and FTC matter number. As shown in Figure 7, the webpage provides a helpful case summary of the action that is written in plain language. Also shown in Figure 7, the Case Timeline provides links to documents in reverse chronological order including press releases, case filings, and statements of FTC Commissioners. Links to settlements, labeled "Decision and Order," are provided in the Case Timeline. The website is up to date and provides users with information about when cases were last updated. The website is very comprehensive, providing a wide variety of information related to the action such as other case filings, press releases, summaries, links to related cases, and statements of commissioners. Providing all the related information on the same webpage allows users to have a fuller understanding of the overall enforcement action in addition to providing access to the settlement document.

In summary, the FTC's website has high levels of navigability and comprehensiveness of information related to settlements of agency enforcement proceedings. Agency websites with similar characteristics include the CFPB, SEC, and FCC.

C. Office of Foreign Assets Control (OFAC)

1. Enforcement Overview

The Office of Foreign Assets Control (OFAC) is a subunit of the Department of the Treasury (Treasury) whose mission is to administer and enforce economic sanctions against targeted foreign countries and regimes, terrorists, international narcotics traffickers, and others, in furtherance of US national security, foreign policy, and economic objectives.¹⁷⁸ OFAC investigates and reviews facts and several enforcement factors to determine whether to initiate a

¹⁷⁸ See 31 C.F.R. § 501 (2022).

civil penalty proceeding.¹⁷⁹ Individuals and entities may settle with OFAC, and “[a] settlement does not constitute a final agency determination that a violation has occurred.”¹⁸⁰ The vast majority of actions are resolved with a cautionary letter or no agency action.¹⁸¹ Of the cases that are not resolved in those manners, the vast majority are settled prior to the issuance of a pre-penalty notice.¹⁸² Actions may be settled after a pre-penalty notice has been issued.¹⁸³ If no settlement occurs, OFAC issues a penalty notice with the amount of civil penalty due to the Department of the Treasury. The issuance of a final penalty notice constitutes a final agency action.¹⁸⁴

Settlements play an important role in OFAC enforcement, expediting resolutions and preserving agency resources. They facilitate respondents adopting robust compliance commitments. Settlements also send compliance messages to the community, highlighting compliance breakdowns, remedial measures, and what compliance measures the agency requires. This information allows for comparison for regulated people and entities to consider whether they have similar practices and need to undertake remedial measures. Settlements put the public on notice of what is required to be compliant with the laws that OFAC enforces. Attorneys who represent clients in OFAC investigations and proceedings follow agency settlements, advise their clients about settlements, and advocate for their clients based on past settlements in negotiations with OFAC.

2. Navigability of OFAC’s Website

OFAC has several navigability tools to locate settlement information including links from the homepage, a search engine, and a site map. First, the OFAC webpage has links to “Civil Penalty and Enforcement Information.” Although these links are not as prominently displayed as on other websites, this website design may be because OFAC is a subunit of Treasury rather than a standalone agency, and its website is part of Treasury’s website rather than its own independent website. For example, OFAC’s “homepage” is part of a “Policy Issues” menu on Treasury’s website. The menu bar links across the top of the website are for Treasury as a whole and not specific to OFAC. In order to access settlement information from OFAC’s webpage, the user must click on a “Civil Penalties and Enforcement Information” link that is under the “Financial Sanctions” policy area tab that is a vertical menu bar on the left side of the page. There is also a link to “Civil Penalties and Enforcement” under the “General OFAC Information and Guidance,” section of OFAC’s webpage. The user must scroll almost to the bottom of the webpage before the link is available and it is one of a number of links listed. There are two links to “Civil Penalties and Enforcement” on OFAC’s website that are labeled relatively easily for a user to identify and access enforcement information, even if they are not as prominently displayed as on other websites.

¹⁷⁹ OFAC Enforcement Guidelines are found in 31 C.F.R. § 501 (2022) and linked on OFAC’s website at https://home.treasury.gov/system/files/126/fr74_57593.pdf.

¹⁸⁰ 31 C.F.R. § 501 app. A (2022).

¹⁸¹ *Id.* (providing explanation of No Action and Cautionary Letters responses to apparent violations)

¹⁸² *Id.* (providing explanation of a pre-penalty notice)

¹⁸³ *Id.*













¹⁸⁴ *Id.*

OFAC also has a search engine that searches just the OFAC site as opposed to the Treasury Department’s overall website. A search for the term “Enforcement” in the search engine provides a link to the “OFAC Civil Penalties and Enforcement Information” page as the first search result. A search for the term “Settlement” provides a link to “Additional Select Settlement Agreements,” which provides access to settlement documents from 2009-2021. The website has high navigability in terms of the small number of clicks necessary to bring the user to actual settlement documents. The search engine could be improved by providing filtering in addition to the search engine for the OFAC site. There is not a site map or index; however, like the FTC’s website, the navigability from the homepage links and search engine makes the settlement information accessible without the site map function. Furthermore, a site map would be a map of the Treasury website site, which may require some navigation tools to identify OFAC specific information on the overall website.

3. Comprehensiveness of Materials

OFAC provides summaries of its settlements on the “Civil Penalties Information Chart” located on its website.¹⁸⁵ It also provides a selection of actual settlement agreements, found by clicking on a link labeled “Selected Settlement Agreements from 2022 to 2009.”¹⁸⁶ OFAC provides settlement summary information on its Civil Penalties Information Chart located prominently at the top of its Civil Penalties and Enforcement webpage. The Civil Penalties Information Chart is organized by year and users can click on hyperlinks of years from 2003-2022 to access settlement summary information. The chart shows the name of the company, the penalty amount, and a link to the Enforcement Release. However, there are no links to the actual settlement documents on the chart. Below is a figure showing OFAC’s 2022 Civil Penalties Information Chart.

Figure 7 OFAC 2022 Civil Penalties Information Chart

CIVIL PENALTIES INFORMATION CHART			
Detailed Penalties/ Findings of Violation Information	Name	Aggregate Number of Penalties, Settlements, or Findings of Violation	Penalties/Settlements Total in USD
09/30/2022 	Tango Card, Inc.	1	116,048.60
09/26/2022 	CFM Indosuez Wealth	1	401,039
09/26/2022 	CA Indosuez Switzerland S.A.	1	720,258
07/21/2022 	MidFirst Bank	1	N/A
07/15/2022 	American Express National Bank	1	430,500
05/27/2022 	Banco Popular de Puerto Rico	1	255,937.86
04/25/2022 	Toll Holdings Limited	1	6,131,855
04/21/2022 	Chisu International Corporation	1	45,908
04/21/2022 	Newmont Corporation	1	141,442
04/01/2022 	S&P Global, Inc.	1	78,750
01/11/2022 	Sojitz (Hong Kong) Limited	1	5,228,298
01/03/2022 	Airbnb Payments, Inc.	1	91,172.29
Year to date totals:		12	13,641,208.75

¹⁸⁵ See Civil Penalties and Enforcement Information, U.S. DEPT. OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/civil-penalties-and-enforcement-information> (last visited Aug. 15, 2022).

¹⁸⁶ See Additional Select Settlement Agreements, U.S. DEPT. OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/civil-penalties-and-enforcement-information/2019-enforcement-information/additional-select-settlement-agreements> (last visited Aug. 15, 2022).

Summaries of settlements on the Civil Penalties Information Chart have increased in detail over the years. Beginning in 2003, settlement information on the website consisted of a chart of monthly settlements with the company name, alleged violations, and settlement amount. OFAC transitioned from a chart to providing brief summaries of actions and settlements and over time began increasing the amount of detail in web posts to become more fulsome and provide more guidance. Starting in 2009, OFAC provided selected actual settlement agreements. The information in recent summaries of settlements, entitled “Enforcement Releases,” provides detailed information about settlement agreements. The information on the Enforcement Releases and settlement agreements substantially overlaps, with much of the information in the settlement agreement provided in the Enforcement Release. However, only selected actual settlements are made available. These are accessible by clicking on a link to Additional Selected Settlements, as opposed to grouping the Enforcement Release and actual settlement together on the Civil Penalties Information Chart.

There is no information on the website about which settlements were selected for inclusion in the selected settlements group or what percentage of total settlements were selected. However, agency officials explained that settlements in egregious cases were selected for online posting. Egregiousness is a formal finding based on factors in OFAC’s enforcement guidelines.¹⁸⁷ Actual settlements of egregious cases are made available in the list of Selected Settlement Agreements in addition to a detailed summary of the settlement in the Civil Penalty Information Chart. The agency provides actual settlements of egregious cases because they highlight the most important cases, and providing selected egregious cases prevents the more important information not being lost among less important non-egregious cases. Nevertheless, all settlements, egregious or not, have summaries that are available in the Civil Penalties Information Chart on the website.

Actual settlement agreements for 2022 are not available by clicking on the link “Selected Settlement Agreements from 2022 to 2009.” The Additional Select Settlement Agreements page provides settlement agreements from 2009-2021. The settlements are organized by year and each settlement is linked to a .pdf of the actual settlement document. Below is a figure showing a portion of the additional selected settlement agreements list with hyperlinks to the actual settlement agreements.



¹⁸⁷ See 31 C.F.R. § 501 (2022).

Figure 8 OFAC Additional Selected Settlement Agreements

Additional Select Settlement Agreements

These select settlement agreements were published by OFAC between 2021 and 2009.

2021 INFORMATION

- Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and Alfa Laval Middle East Ltd. 
- Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and Nordgas, S.r.l. 

2020 INFORMATION

- Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and Berkshire Hathaway, Inc. 
- Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and Generali Global Assistance, Inc. 
- Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and Keysight Technologies, Inc. 
- Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and Comtech Telecommunications Corp. 
- Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and Essentra FZE Company Limited 
- Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and Eagle Shipping International (USA) LLC 

The webpage does not indicate the number of selected settlements available from all OFAC settlements. However, a comparison of enforcement actions listed for 2021 on the Civil Penalty Information Chart shows that two of twenty settlements are provided.¹⁸⁸ For 2020, six of sixteen actual settlements are provided.¹⁸⁹ Given that selected settlements involve egregious cases, it would be helpful to note that information on the webpage to further highlight the importance of those settlements. It would also be helpful to include information about the number provided because it would give insight into the number of settlements that involved a finding of egregiousness.

Supporting materials for settlements may be found on the OFAC website, but the information is not directly linked to the settlements. For example, enforcement releases are not linked to the settlement documents, requiring users to separately search the corresponding year's "Civil Penalties Information Chart" to match up an enforcement release with a settlement agreement. Furthermore, if the search engine is used with the company name and "settlement agreement" search terms, a short summary of the action is available in some instances but is not linked to the Civil Penalty Information Chart or the actual settlement. The enforcement releases, news releases, and summaries provide helpful information in addition to the actual settlement agreement. Grouping the documents together would provide more comprehensive information to the user in a more accessible format.

In summary, OFAC's website has navigability features that allow users to quickly access settlement information. In terms of comprehensiveness, there is access to settlement information such as enforcement releases, news releases, and selected settlement agreements. However, the information is not connected so the user can view the information together on a single page. Furthermore, the agency does not make 2022 actual settlement documents available, and only

¹⁸⁸ See 2021 Enforcement Information, U.S. DEPT. OF THE TREASURY <https://home.treasury.gov/policy-issues/financial-sanctions/civil-penalties-and-enforcement-information/2021-enforcement-information> (last visited Aug. 15, 2022).

¹⁸⁹ See 2020 Enforcement Information, U.S. DEPT. OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/civil-penalties-and-enforcement-information/2020-enforcement-information> (last visited Aug. 15, 2020).

provides a selected number of prior years' settlements on its website. Providing additional information about actual settlements selected for posting on the website would increase the users' understanding of actions where there was a finding of egregiousness.

D. Equal Employment Opportunity Commission (EEOC)

1. Enforcement Overview

The EEOC combats and prevents employment discrimination through the strategic application of the EEOC's law enforcement authorities. The EEOC seeks to prevent unlawful employment discrimination through 1) the administrative (investigation and conciliation) and litigation enforcement mechanisms with private employers;¹⁹⁰ and 2) the adjudicatory and oversight mechanisms for federal employers.¹⁹¹ The complaint process for federal employees is different from the process for non-federal employees.¹⁹² The EEOC can only administratively adjudicate claims and award damages between federal employees and federal agencies. With twenty-four hearing offices around the country, the EEOC handles thousands of hearings by Administrative Judges (AJs) for federal employees and agencies.¹⁹³ This section focuses on the EEOC's federal sector enforcement proceedings.

The EEOC is subject to strict confidentiality provisions with respect to charges¹⁹⁴ and information obtained prior to instituting proceedings under Title VII of the Civil Rights Act, which prohibits employment discrimination based on race, color, religion, sex and national origin.¹⁹⁵ Settlements often occur prior to administrative proceedings or litigation in federal courts. The lack of settlement information publicly available is largely driven by confidentiality obligations

¹⁹⁰ This category also includes other employers such as state and local governments, employment agencies and labor unions.

¹⁹¹ See Fiscal Year 2022 Congressional Budget Justification, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, May 28, 2021, https://www.eeoc.gov/fiscal-year-2022-congressional-budget-justification#_Toc71812506. Federal Employees are required to go through an administrative complaint process before filing a complaint in federal district court. Employees of private employees in some circumstances are required to obtain a "Notice of Right to Sue" from the EEOC prior to filing in federal district court. See <https://www.eeoc.gov/what-you-can-expect-after-you-file-charge>

¹⁹² Federal employees begin the process by filing a complaint with their EEO Office of their agency employer. When the agency has finished its investigation, the agency will issue a notice giving the employee two choices: either request a hearing before an EEOC Administrative Judge, or ask the agency to issue a decision as to whether the discrimination occurred. If the agency issues a decision and no discrimination is found, the employee can appeal the decision to the EEOC or challenge it in federal district court. See Overview of Federal Sector EEO Complaint Process, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/federal-sector/overview-federal-sector-eeo-complaint-process> (last visited Sept. 27, 2022).

¹⁹³ See Fiscal Year 2022 Congressional Budget Justification, *supra* note 191, at 28. According to the EEOC's Congressional Budget Request, the agency handled 8,167 hearings in FY 2020.

¹⁹⁴ See 42 U.S.C.S. § 2000e-5 ("Charges shall not be made public by the Commission.")

¹⁹⁵ See 42 U.S.C.S. § 2000e-8. The provisions states "[i]t shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title." See also 29 C.F.R. § 1601.22 (2022) ("Neither a charge, nor information obtained during the investigation of a charge of employment discrimination under title VII, the ADA, or GINA, nor information obtained from records required to be kept or reports required to be filed pursuant to title VII, the ADA, or GINA, shall be made matters of public information by the Commission prior to the institution of any proceeding under title VII, the ADA, or GINA involving such charge or information.")

required by law and privacy considerations of individuals making employment discrimination claims.

2. Navigability of EEOC's Website

Due to legal confidentiality obligations and privacy considerations, the EEOC website lacks access to settlements. Nevertheless, the website provides general information about EEOC enforcement. Under the drop-down menu of “About the EEOC,” there is a menu titled “Laws and Enforcement,” which provides links to several categories of information including laws and regulations, types of discrimination, mediation, and litigation. On its “Laws and Regulations” page, it has links to types of antidiscrimination laws the agency enforces and links to policy and agency opinions. The website has a portal where parties can submit and access documents electronically; however, the public does not have access to the online portal. There is a webpage with “Selected Noteworthy Federal Sector Appellate Decisions,” but no other adjudication documents, including settlements are available.¹⁹⁶

The EEOC homepage has a search engine. A search for “Enforcement” produces a list of webpages with descriptions of the EEOC’s enforcement activities, but no access to settlement documents. The search engine has a filter that allows the user to filter for appellate briefs in litigated court cases and a link for appellate decisions in administrative cases. A search for the term “settlement” includes examples of forms for settlement agreements with sample terms, but no actual settlement documents.¹⁹⁷ The figure below shows the settlement forms available on the EEOC website.

Figure 9 EEOC Form of Settlement Agreement Webpage



¹⁹⁶ See Selected Noteworthy Federal Sector Appellate Decisions, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, <https://www.eeoc.gov/federal-sector/selected-noteworthy-federal-sector-appellate-decisions> (last visited Aug. 15, 2022).

¹⁹⁷ See Settlement Agreement, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, <https://www.eeoc.gov/federal-sector/settlement-agreement> (last visited Aug. 15, 2022).

The search engine appears to be the only way to access the forms for settlement agreements. Again, the lack of access to settlement documents from the search engine is a result of legal confidentiality requirements.

3. Comprehensiveness of Materials

Settlement is expressly encouraged by the EEOC, both with the employer agency and as part of the administrative proceedings with the AJ.¹⁹⁸ In the context of litigated cases, the EEOC has adopted a policy of non-confidentiality for settlements stating that it serves the “principle of openness” that allows the public to assess the effectiveness of the agency and deter other potential wrongdoers.¹⁹⁹ With respect to adjudication, if the parties reach a settlement, they are required to execute a written settlement agreement and deliver it to the AJ.²⁰⁰ However, the EEOC website does not include actual settlements of its adjudications or even litigated cases. Because the EEOC does not release settlements, there is also not current information provided, nor is there supplemental material available regarding settlements.

There is a link to FOIA information at the bottom of the agency homepage. The FOIA page provides links to agency guidance, opinion letters, and a link to agency’s FOIA E-Library. The page prominently states that there are confidentiality limitations to FOIA disclosures.²⁰¹ For example, the EEOC will not disclose “charges of employment discrimination, charge conciliation information or unaggregated EEO survey data.”²⁰² The FOIA E-Library contains a link to appellate decisions for its adjudication for federal employees.²⁰³ However, the library only contains “selected noteworthy federal sector appellate decisions,” and not all appellate decisions. Due to confidentiality concerns, the EEOC assigns a randomly generated pseudonym for the complainant in its publicly available appellate decisions.²⁰⁴

As mentioned above, legal restrictions on the public disclosure of information explain why so little settlement information is available on the EEOC’s website. Policy considerations also support confidentiality. Individual information about employment discrimination often involves personal information, and public disclosure that an individual has made a complaint can have

¹⁹⁸ See Frequently Asked Questions about Federal Sector Hearing Process, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, <https://www.eeoc.gov/federal-sector/frequently-asked-questions-about-federal-sector-hearing-process#q1> (last visited Aug. 15, 2022) (“Settlement of your case without the necessity for a hearing or issuance of a decision by the AJ is highly encouraged. Settlement discussions are permissible at any stage of proceedings.”) It is part of the agency’s National Enforcement plan. See National Enforcement Plan, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, <https://www.eeoc.gov/b-national-enforcement-plan> (last visited Aug. 15, 2022).

¹⁹⁹ See Settlement Standards and Procedures, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, <https://www.eeoc.gov/settlement-standards-and-procedures#section2e> (last visited Aug. 15, 2022).

²⁰⁰ See Frequently Asked Questions about Federal Sector Hearing Process, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 198.

²⁰¹ See Freedom of Information Act, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, <https://www.eeoc.gov/foia> (last visited Aug. 15, 2022).

²⁰² See Frequently Asked Questions, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, <https://www.eeoc.gov/foia/frequently-asked-questions> (last visited Aug. 15, 2022).

²⁰³ See Selected Noteworthy Federal Sector Appellate Decisions, *supra* note 196.

²⁰⁴ See *id.*

negative consequences in the individual's current or future employment. Confidentiality also provides incentives for employers to resolve complaints quickly and provide individuals relief if doing so will prevent the information from becoming public.

The EEOC's website is primarily focused on educating employers and employees on discrimination and understanding the process of pursuing employment discrimination claims. The EEOC adjudicates claims with individuals where there are likely heightened privacy concerns about disclosure on the agency's website and where confidentiality facilitates settlements to provide relief to individuals. In contrast, the FTC and OFAC, which primarily deal with corporate entities, have an interest in making settlements available to provide guidance about the agency's approach to enforcement and compliance with the law. The EEOC also has high volumes of charges filed, which in addition to confidentiality considerations, could make it burdensome if it were to disclose information about settlements.

In sum, the FTC, OFAC, and EEOC websites each represent different points along a spectrum of comprehensiveness and navigability with respect to agency enforcement settlements. Each agency has public policy considerations that play an important role in the public availability of settlements on their websites. The FTC's website is highly navigable and comprehensive with respect to settlements, which facilitates its public policy goals of providing regulated entities with guidance about agency enforcement. OFAC's website is not as easily navigable as the FTC's website and does not group settlement information together; however, the agency provides detailed summaries of settlements and selected settlement agreements of egregious cases. Like the FTC, OFAC provides settlement information to the public on its website to provide guidance about agency enforcement and compliance with the laws it enforces. Lastly, settlements are not available on the EEOC's website; however, legal confidentiality obligations and privacy considerations explain why settlements are not on the website.

VI. RECOMMENDATIONS

The following recommendations are based on observations from the agency websites surveyed, interviews with agency officials and stakeholders, and the case study analysis. They are presented with the understanding that agencies have unique missions, stakeholders, financial constraints, and confidentiality considerations, and that the distinctiveness of agencies' enforcement and adjudication may limit the development of workable, standardized practices for settlement disclosure. The recommendations have been designed for agencies interested in increasing the navigability of settlements on their websites and the comprehensiveness of settlement information provided thereon. It is intended that these recommendations will not be resource-intensive for agencies to implement, and they will increase transparency and benefits to agencies and their stakeholders.

Many agency websites, both inside and outside of the sampled group, already have implemented some or all the recommendations. These recommendations are directed at agencies

that are not already engaged in any or some of the recommended practices and would like to improve public access to settlement agreements on their websites.

Recommendation 1: Agencies should consider providing actual settlement documents on their websites. Agencies should take into consideration the following factors in their decision to disclose settlements: 1) the interests of the public and relevant stakeholders; 2) the burdens and benefits to the agency; and 3) the need for confidentiality.

Agencies have unique missions and enforcement agendas and are subject to their own resource constraints. This report does not recommend that all agencies replicate the disclosure practices of another agency, but rather that agencies should take into account: 1) the interests of the public and stakeholders in having access to settlements online; 2) the costs to the agency in disclosing them; 3) any offsetting benefits to the agency through disclosure; 4) confidentiality considerations of individuals or entities settling with the agency.

In gaining insights into the agency enforcement, the interests of the public and relevant stakeholders should be construed broadly, with presumption in favor of disclosure. In assessing these interests, agencies should consider the degree to which disclosure settlements would promote greater trust and transparency. Furthermore, agencies should consider the potential decrease in FOIA requests they would receive if settlements were made public on the website.

If not already doing so, agencies should consider providing the actual settlement documents on their agency websites. This is particularly important when the agency is a party to the enforcement action and the settlement provides important information to the public about how the agency uses its resources and interprets the law and its enforcement authority. Given the pervasiveness of settlements, even prior to the agency instigating formal proceedings, previous settlements are increasingly important to the public's understanding of how agencies enforce the law. Summaries and press releases are helpful for understanding settlements but disclosing settlement documents provides greater transparency because the public has the actual agreement between the government and the respondent. Access to settlement documents assists attorneys in advising and representing their clients, counseling compliance, and advocating for consistency in similar cases. The internet allows agencies to provide more information on their websites than was traditionally allowed in physical agency reading rooms. Providing online access to settlement documents increases transparency and may also reduce the number of FOIA document requests.

Agencies may have confidentiality and privacy concerns with respect to settlements, especially when the agencies' enforcement proceedings are with individuals rather than companies. Agencies should consider whether settlements can be sufficiently redacted to protect privacy while at the same time providing insightful information about settlement terms. There may be instances where settlements cannot be released due to confidentiality concerns, which is why a FOIA exemption exists for statutes that forbid disclosure.²⁰⁵ Confidentiality may be particularly important when agencies are adjudicating claims between private parties where disclosure of information may prevent parties from resolving disputes outside of contested

²⁰⁵ See 5 U.S.C. §552(b)(3)(allowing agencies to withhold information if it is "specifically exempted from disclosure by" a non-FOIA statute.)

proceedings or litigation. However, where possible, agencies should consider how to balance confidentiality considerations with transparency.

Recommendation 2: Agencies that settle a high volume of cases or cases that involve significant confidentiality concerns should consider disclosing on their websites a representative case sample, redacting private information, or providing a summary discussing settlements and trends. For agencies making a sample of settlements available, agencies should provide an explanation of why the settlements were chosen or how they are representative of the overall body of settlements.

Agencies should consider ways to provide settlement information on their websites in situations where they adjudicate high volumes of cases and/or there are significant confidentiality concerns about public disclosure. Some agencies have a high volume of proceedings where the cases may not vary significantly in their factual backgrounds or legal analysis such as the EEOC adjudicating federal employee discrimination claims or the Social Security Administration adjudicating benefit claims. Disclosing all settlements may be unduly burdensome to the agency with little corresponding benefit in terms of transparency. In those instances, agencies should consider providing a selected sample of settlements that is representative of common settlement agreements or settlement agreements that are particularly important to the agency. Agencies providing a sample should explain how the settlements are representative of the body of settlements or why certain settlements are important to the agency. Particular settlements may be important to agencies because they involve egregious cases where the public should be aware of the agency's efforts. Or they may be important to publicly disclose because they transmit guidance about compliance measures to regulated entities. Without information from the agency about why a group of settlements is chosen for disclosure, it is harder for the agency to communicate its intended message and the public to understand what is being disclosed by the agency.

Agencies may also consider redactions, pseudonyms, or summaries where there are confidentiality concerns about making settlements available. Where it is necessary and possible to protect confidentiality by redacting or providing a pseudonym in the settlement, agencies should consider doing so to allow settlements to be available on websites. Agencies can also consider providing information about settlements, such as summaries of individual or aggregated settlement information. They can also disclose form agreements that have consistent agency terms and would not provide any identifying information about the parties or respondent. It would also be helpful for agencies to explain why actual settlements are not available on their websites and how they could be requested pursuant to FOIA if there is not an exemption that prevents disclosure.

Recommendation 3: Agencies should consider navigability tools on their websites, such as clear menu bars on their homepages, user-friendly search engines, and site maps or indexes to assist users in accessing settlement information.

Agencies should consider navigability tools, such as menu bar tabs, search engines, and site maps or indexes, to assist users in accessing settlement information. The survey demonstrated that settlements were most accessible when there were descriptive links to "Enforcement" webpages on the agency's homepage menu bar. Agencies should consider the use of links or tabs on the menu bar of the agency homepage that are clearly labeled "Enforcement," "Law &

Regulation,” or another appropriate term. The tab should lead to the webpage with clear links to enforcement materials, including settlements, so the user only needs a few clicks before accessing settlement documents. The Enforcement tab on the homepage may also have a drop-down menu that can directly take the user to documents from agency proceedings.

User-friendly search engines accessible on the homepage also allow users to easily access settlements, particularly if there are filtering capabilities. Search engines should be programmed to link search terms relating to settlements to webpages where settlements are accessible such as “Enforcement” or “Cases and Proceedings” webpages. Search engines may have filtering that allows users to narrow search results to type of proceeding or even document type. Filters that allow users to specifically filter for settlements make them easily accessible through the search engine tool. Search engines may also prompt users to search a “Cases and Proceedings” database instead of the website’s main search engine to quickly access case documents, including settlements. Or they may also have a separate search button labeled for search of their cases and proceedings. For example, the FTC has a “Search the Legal Library” search engine button above a magnifying glass icon, which is the search engine for the entire site.

Agencies should also consider including site maps or indexes on their websites to direct users to Enforcement webpages. Many agencies have site maps or indexes on the homepages, but they are difficult to locate at the very bottom of the homepage in a smaller font. Further, site maps that simply replicate the homepage menu bar are less helpful than site maps and A-Z indexes that have greater listings or search engines. In some instances where agencies have highly navigable menu bars and search engines, a site map or index may be duplicative, but it is worth considering a searchable site map or index in addition to other navigability tools.

Recommendation 4: Agencies should consider providing settlement information in a docket page, case timeline, or other format that groups or links settlements to related information about the proceeding.

Agencies should consider providing settlement information in a format that groups documents about the proceeding together. There are many different formats that group settlement information to other information about the proceeding. Some agencies use a docket format that includes complaints, orders, and settlements in the proceeding with hyperlinks to documents. Other agencies have a case timeline where documents are listed in chronological order that include documents filed in the proceeding as well as press releases, agency statements, and related content. In many instances, an agency will negotiate a settlement prior to instigating a formal administrative proceeding. When a settlement is reached, some agencies will post the settlement and the complaint at the same time on a webpage grouped under the respondent’s name. Even linking a press release or summary to an actual settlement document is a form of grouping documents in a manner that makes it easier for users to access both.

It is difficult for users to understand enforcement actions from freestanding settlement documents. For example, in some instances, it is difficult to understand the charges that are being settled without also having access to the agency’s complaint or charges. Grouping documents allows the user to understand the timeline of the action and access other information about the

proceeding. Where possible, agencies should link listings to the actual documents, such as in .pdf format. By grouping information related to settlements, agencies enhance the value of disclosing them.

Recommendation 5: Agencies should consider providing supplementary material such as press releases, summaries, and links to related actions or topics in addition to settlements.

To provide greater context for settlements and make them more accessible to website users, agencies should consider providing supplemental, explanatory materials related to settlement agreements.²⁰⁶ For example, the FTC Case Timeline webpage includes a summary of the action, press releases, and links to related topics and actions. Many agencies issue press releases announcing settlements and post them on their website, but they do not link press releases to settlement agreements or group them on the same page. Press releases and summaries help users better understand enforcement actions and settlements because they are generally written to be understood by the public as opposed to written in legal jargon. Some agencies produce press releases and summaries as well as disclose settlement agreements, but do not link them together or group them on a page. If agencies choose not to disclose actual settlement documents on their websites, providing summaries and making them easily accessible on an enforcement webpage allows users to have greater understanding of agency enforcement settlements.

Recommendation 6: Agencies should consider providing explanatory information about agency enforcement and proceedings so users can understand the process and how to understand and search for settlements.

Agencies have unique enforcement authority and agency adjudication procedures. It can be difficult for websites users to understand the context of a settlement or what documents to search for without access to explanatory information on the agency's website. Agencies undergo different procedures that can lead to settlement as well as title settlements by different names. For example, a settlement on an agency website may be titled "consent order," "order and decision," "compromise agreement" or "settlement agreement." An explanation on the agency's Enforcement page would help increase understanding and access to settlements. For example, the CFPB enforcement webpage has helpful information about agency enforcement including a link to an explanation of a the "Life Cycle of an Enforcement Action."²⁰⁷ Furthermore, the webpage also provides a short explanation of civil actions and administrative proceedings with a link that provides definitions of terms that relate to the search filtering options. OFAC also provides information about its enforcement process and guidelines, which is very helpful to understanding its enforcement process and settlements. Providing some explanatory information about agency enforcement on the agency website that is easily understandable and accessible will assist the public in understanding the nature of agency enforcement in general and settlements more specifically.

²⁰⁶ ACUS has provided recommendations with respect to adverse public statements that consider the agency purposes of making the information public and the harm to respondents. See Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 3 ACUS 67 (1975) and 86 Harv. L. Rev. 1380 (1973).

²⁰⁷ See Life Cycle of an Enforcement Action, CONSUMER FIN. PROT. BUREAU <https://www.consumerfinance.gov/enforcement/life-cycle-of-enforcement-action/> (last visited Sept. 3, 2022).

Appendix A

Agency Names and Web Addresses

Agency Name	Homepage Web Address
Commodity Futures Trading Commission (CFTC)	https://www.cftc.gov/
Consumer Financial Protection Bureau (CFPB)	https://www.consumerfinance.gov/
Consumer Product Safety Commission (CPSC)	https://www.cpsc.gov/
Department of Commerce, National Oceanic and Atmospheric Administration (NOAA)	https://www.noaa.gov/
Department of Energy, Federal Energy regulatory Commission (FERC)	https://www.ferc.gov/
Department of Homeland Security, United States Coast Guard (USC)	https://www.dhs.gov/keywords/us-coast-guard-uscg
Department of Housing and Urban Development (HUD)	https://www.hud.gov/
Department of Interior (DOI)	https://www.doi.gov/
Department of Labor, Occupational Safety and Health Administration (OSHA)	https://www.osha.gov/
Department of Treasury, Office of Foreign Asset Control (OFAC)	https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information
Environmental Protection Administration (EPA)	https://www.epa.gov/
Equal Employment Opportunity Commission (EEOC)	https://www.eeoc.gov/
Federal Communications Commission (FCC)	https://www.fcc.gov/
Federal Deposit Insurance Corporation (FDIC)	https://www.fdic.gov/
Federal Housing Finance Agency (FHFA)	https://www.fhfa.gov/
Federal Maritime Commission (FMC)	https://www.fmc.gov/
Federal Trade Commission (FTC)	https://www.ftc.gov/
National Labor Relations Board (NLRB)	https://www.nlr.gov/
Pension Benefit Guaranty Corporation (PBGC)	https://www.pbgc.gov/
Securities and Exchange Commission (SEC)	https://www.sec.gov/

Research Questions

Agency:

Website address:

Researcher:

Date:

I. Background Agency Information

- A. Type of Agency: [independent regulatory commissions,²⁰⁸ executive departments (and their subunits),²⁰⁹ independent administrations,²¹⁰ government corporations²¹¹]
- B. Agency Mission
- C. Background on Agency Enforcement Administrative Adjudication

II. Agency Policies

- A. Accessibility of FOIA/Privacy Act Policies
- B. Agency Policies on Accessibility of Enforcement Documents/Settlements

III. Is the website easy to navigate?

- A. *General Navigation Information:*
 - 1. How easy is it to access enforcement settlement information from the agency's home page? Is there an enforcement "tab" or link on the home page?
 - 2. Is there a search engine on the website's home page? Does it direct the user to enforcement materials? Is it helpful?
 - 3. Is there a help function or FAQ page on the website? Does it direct the user to enforcement materials? Is it helpful?

²⁰⁸ CFTC, CFPB, CPSC, EEOC, FCC, FMC, FTC, NLRB, and SEC

²⁰⁹ FERC, DHS, DOI, DOJ, HUD, NOAA, OSHA, OFAC

²¹⁰ EPA, FHFA

²¹¹ FDIC, PBGC

4. Is there a site map or index on the home page? Does it direct the user to enforcement materials? Is it helpful?
5. Are there other language options (which languages?) or disability friendly features?

B. *Specific Settlement Accessibility:*

1. Is there a specific section(s) pertaining to agency enforcement? How does one access it? What is it called?
2. Is it a single enforcement web page or is it spread over topic areas? How are settlements accessed from the agency enforcement page?
3. How are adjudication documents, including settlements organized? Are they organized chronologically or topically?
4. How does one search for documents (e.g., search engine, docket lists, etc.)? Is there ability to search or an advanced search or filter function for settlement information?
5. How comprehensive is the information provided? Is there access to the actual settlement document? Is the settlement information provided updated to be current?
6. What format(s) are the documents in (e.g., .pdf, .txt, .doc)
7. Are any documents listed inaccessible?
8. What other types of documents or information are there related to the adjudication (e.g., press releases, case summaries, press releases, blog posts)? Does the webpage provide access to complaints or other court filings or related agency actions? Is there any explanatory information or guidance material linked to settlement documents?
9. What type of respondents appear most regularly before the agency? Small businesses, individuals, large companies, non-profit organizations?