



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Public Availability of Settlement Agreements in Agency Enforcement Proceedings

### Committee on Regulation

Proposed Recommendation | December 15, 2022

#### Proposed Amendments

**This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).**

1 Many statutes grant administrative agencies authority to adjudicate whether persons have  
2 violated the law and, for those found to have done so, order them to pay a civil penalty, provide  
3 specific relief, or take some other remedial action.<sup>1</sup> Some administrative enforcement  
4 proceedings result in a final agency adjudicative decision. But in many, perhaps most, such  
5 proceedings, a settlement is reached, either before or after an adjudication is formally initiated.<sup>2</sup>

6 Settlements can play an important role in administrative enforcement proceedings by  
7 allowing parties to resolve disputes more efficiently and effectively. Indeed, both the  
8 Administrative Procedure Act and Administrative Dispute Resolution Act (ADRA) recognize the  
9 importance of settlements in resolving enforcement proceedings,<sup>3</sup> and the Administrative

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<sup>1</sup> This Recommendation addresses only settlements reached in administrative enforcement proceedings, not those reached in federal court cases brought by agencies. For purposes of this Recommendation, "enforcement proceedings" is used broadly to include both investigative and trial-like adjudicative proceedings, whether the parties to the proceeding include the agency or instead only non-agency parties. The Administrative Conference addressed settlement agreements reached in court cases in Recommendation 2020-6, *Agency Litigation Webpages*, 86 Fed. Reg. 6624 (Jan. 22, 2021).

<sup>2</sup> Michael Asimow, *Greenlighting Administrative Prosecution: Checks and Balances on Charging Decisions 1* (Jan. 21, 2022) (report to the Admin. Conf. of the U.S.).

<sup>3</sup> See 5 U.S.C. §§ 554(c)(2), 556(c)(6)–(8), 571–584.



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10 Conference has similarly recommended that agencies consider using alternative means of dispute  
11 resolution.<sup>4</sup>

12 Unlike final orders and opinions issued in the adjudication of cases, settlement  
13 agreements ordinarily do not definitively resolve disputed factual and legal matters,  
14 authoritatively decide whether a violation has taken place, or establish binding precedent.  
15 Nevertheless, public access to settlement agreements can be desirable for several reasons. First,  
16 disclosure of settlement agreements can help regulated entities and the general public understand  
17 how the agency interprets the laws and regulations it enforces and exercises its enforcement  
18 authority. Second, public access to settlement agreements **can help promote** accountable and  
19 transparent government. The public has an interest in evaluating how agencies enforce the law  
20 and use public funds. **By disclosing how agencies interact with different regulated entities, public**  
21 **access may also help guard against bias.** Third, high-profile settlements, such as those that  
22 involve large dollar amounts or require changes in business practices, often attract significant  
23 public interest. Fourth, the terms of a settlement agreement may also affect the interests of third  
24 parties, such as consumers, employees, or local communities.<sup>5</sup>

25 However valuable public access to settlement agreements might be, federal law generally  
26 does little to mandate their proactive disclosure. Generally applicable statutes such as the  
27 Freedom of Information Act (FOIA) and ADRA typically require disclosure only when members  
28 of the public specifically request the agreements in which they are interested. They do not  
29 generally require proactive disclosure on agency websites, as FOIA does for final adjudicative

Commented [CA1]: Proposed Amendment from Council #1

Commented [CA2]: Proposed Amendment from Council #2  
(see parallel amendment at line 65)

<sup>4</sup> See, e.g., Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, ¶¶ 8, 12, 81 Fed. Reg. 94,314, 94,315 (Dec. 23, 2016); Admin. Conf. of the U.S., Recommendation 88-5, *Agency Use of Settlement Judges*, 53 Fed. Reg. 26,030 (July 11, 1988); Admin. Conf. of the U.S., Recommendation 86-8, *Acquiring the Services of “Neutrals” for Alternative Means of Dispute Resolution*, 51 Fed. Reg. 46,990 (Dec. 30, 1986); Admin. Conf. of the U.S., Recommendation 86-3, *Agencies’ Use of Alternative Means of Dispute Resolution*, 51 Fed. Reg. 25,643 (July 16, 1986).

<sup>5</sup> See Elysa Dishman, Public Availability of Settlement Agreements in Agency Enforcement Proceedings 1, 6–7 (September-Nov. 30, 2022) (draft report to the Admin. Conf. of the U.S.).



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30 orders and opinions.<sup>6</sup> Nevertheless, many agencies do post settlement agreements on their  
31 websites.<sup>7</sup>

32 There may, of course, be reasons for agencies not to proactively disclose settlement  
33 agreements. Settlement agreements, or information contained within them, may be exempted or  
34 protected from disclosure. Confidential commercial information, for example, is exempted from  
35 disclosure under FOIA.<sup>8</sup> In addition, the promise of confidentiality may encourage candor, help  
36 parties to achieve consensus, and yield more efficient resolution of disputes. And as a practical  
37 matter, there may be little public interest in large volumes of factually and legally similar  
38 settlement agreements, such that the costs to agencies required to proactively disclose them,  
39 especially costs associated with deleting sensitive or protected information, might outweigh the  
40 benefits of proactive disclosure to the public.

Commented [CA3]: Proposed Amendment from Council #3  
(see footnote)

Commented [CA4]: Proposed Amendment from Council #4

41 This Recommendation encourages agencies to develop policies that recognize the  
42 benefits of proactively disclosing settlement agreements in administrative enforcement  
43 proceedings and account for countervailing interests. It builds on several other recommendations  
44 of the Administrative Conference that encourage agencies to proactively disclose other important  
45 materials related to the adjudication of cases, including orders and opinions, supporting records,  
46 adjudication rules and policies, and litigation materials.<sup>9</sup> In offering the best practices that  
47 follow, the Conference recognizes that settlement agreements vary widely in many respects,  
48 including in their terms, their effects on the interests of third parties, and the degree of public  
49 interest they attract. It also recognizes that not all agencies can bring the same resources to bear  
50 in providing public access to settlement agreements.

<sup>6</sup> See 5 U.S.C. § 552(a)(2).

<sup>7</sup> See Dishman, *supra* note 5, at 21.

<sup>8</sup> 5 U.S.C. § 552(b)(4); compare *Seife v. FDA*, 43 F.4th 231 (2d. Cir. 2022), with *Am. Small Bus. League v. U.S. Dep't of Def.*, 411 F. Supp. 3d 824, 836 (N.D. Cal. 2019).

<sup>9</sup> See Recommendation 2020-6, *supra* note 1; Admin. Conf. of the U.S., Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).



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RECOMMENDATION

- 51 1. To inform regulated entities and the general public about administrative enforcement,  
52 agencies should develop policies addressing **whether and** when to post on their websites  
53 settlement agreements reached in administrative enforcement proceedings—that is, those  
54 proceedings in which a civil penalty or other coercive remedy was originally sought  
55 against a person for violating the law. Settlement agreements addressed in these policies  
56 should include those reached before **and after** adjudicative proceedings are formally  
57 initiated.
- 58 2. In determining which settlement agreements to post on its website, an agency should  
59 consider factors including:
- 60 a. The extent to which disclosure would help regulated entities and the general  
61 public understand how the agency interprets the laws and regulations it enforces  
62 and exercises its enforcement authority;
  - 63 b. The extent to which disclosure would promote accountability and transparency,  
64 such as by allowing the public to evaluate agency administrative enforcement and  
65 use of public funds, **and help guard against bias**;
  - 66 c. The extent to which particular types of settlement agreements are likely to attract  
67 public interest;
  - 68 d. The extent to which disclosure might deter regulated entities from reaching  
69 settlements and resolving disputes expeditiously;
  - 70 e. The extent to which disclosure, even after redaction or anonymization, would  
71 adversely affect sensitive or legally protected interests involving, among other  
72 things, national security, law enforcement, confidential business information,  
73 personal privacy, or minors; and
  - 74 f. The extent to which disclosure would impose significant administrative costs on  
75 the agency or, conversely, whether it would save the agency time or money by  
76 reducing the volume of requests for disclosure.
- 77 3. An agency that chooses generally not to post individual settlement agreements on its  
78 website—for example **because agreements are confidential** or do not vary considerably in

Commented [CA5]: Proposed Amendment from Council #5

Commented [CMA6]: Proposed Amendment from Special Counsel Jeffrey Lubbers

Commented [CA7]: Proposed Amendment from Council #2 (see parallel amendment at lines 20-21)

Commented [CMA8]: Comment #1 from Senior Fellow Alan B. Morrison: "My principal question relates to whether settlement agreements can ever be confidential - see line 75. I would like to discuss this at the plenary."



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- 79 terms of their factual contexts or the legal issues they raise—should consider other means  
80 to provide information about settlements, including by posting on its website:
- 81 a. A form or template commonly used for settlement agreements;
  - 82 b. A representative sample of settlement agreements;
  - 83 c. Settlement agreements that entail especially significant legal issues;
  - 84 d. Settlement agreements that, because of their facts, are likely to attract significant  
85 public interest;
  - 86 e. A summary of each settlement or settlement trends; and
  - 87 f. A sortable or searchable database that lists information about settlement  
88 agreements, such as case types, dates, case numbers, parties, and key terms.
- 89 4. When an agency posts settlement agreements or information about settlement agreements  
90 on its website, it should redact any information that is sensitive or otherwise protected  
91 from disclosure, and delete identifying details to the extent required to prevent a clearly  
92 unwarranted invasion of personal privacy. An agency should also consider using  
93 pseudonyms for private persons in settlement agreements that include sensitive personal  
94 information.
- 95 5. An agency posting settlement agreements on its website should do so in a timely manner.
- 96 6. An agency should present settlement agreements or information about settlement  
97 agreements on its website in a clear, logical, and readily accessible, and comprehensive  
98 fashion. In so doing, the agency should consider providing access to the settlement  
99 agreements or information about them through:
- 100 a. A webpage dedicated to agency enforcement activities that is easily accessed  
101 from the agency’s homepage, a site map, and site index;
  - 102 b. A webpage dedicated to an individual enforcement proceeding, such as a docket  
103 webpage, that also includes any associated materials (e.g., case summaries, press  
104 releases, related adjudication materials, links to any related actions); and
  - 105 c. A search engine that allows users to easily locate settlement agreements and sort,  
106 narrow, or filter them by case type, date, case number, party, and keyword.

**Commented [CMA9]:** Comment #2 from Senior Fellow Alan B. Morrison: "I am not sure (line 87) that 'sensitive' information can be protected as there is no FOIA exemption for that. Also, since the parties are in control of what goes in the settlement agreement - other than the legal terms which should be public - I am not clear why there should be any sensitive information in such agreements at all. But if there is, then I would add 'posted' at the end of line 88."

**Commented [CA10]:** Proposed Amendment from Council #6

**Commented [CA11]:** Proposed Amendment from Council #7

**Commented [CMA12]:** Comment #3 from Senior Fellow Alan B. Morrison: "I would insert after 'homepage,' the phrase 'and includes' and delete the comma after 'map' to make clear that the desired access is from the home page and not from the site map or site index."

**Commented [CMA13]:** Comment #4 from Senior Fellow Alan B. Morrison: "I do not understand the meaning of 'case summaries,' especially the plural since the subsection refers to an individual proceeding."



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7. When an agency posts settlement agreements on its website, it should include a statement that settlement agreements are provided only for informational purposes and do not establish precedent that controls decision making in unrelated cases.

**Commented [CA14]:** Proposed Amendment from Council #8