



Public Availability of Settlement Agreements in Agency Enforcement Proceedings

Committee on Regulation

Proposed Recommendation from Committee | October 28, 2022

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.¹ 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.²

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,³ and the Administrative
10 Conference has similarly recommended that agencies consider using alternative means of dispute
11 resolution.⁴

¹ 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).

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

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

⁴ 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).



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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 them can be desirable for several reasons. First, disclosure of
16 settlement agreements can help regulated entities and the general public understand how the
17 agency interprets the laws and regulations it enforces and exercises its enforcement authority.
18 Second, public access to settlement agreements promotes accountable and transparent
19 government. The public has an interest in evaluating how agencies enforce the law and use
20 public funds. Third, high-profile settlements, such as those that involve high dollar amounts or
21 require changes in business practices, often attract significant public interest. Fourth, the terms of
22 a settlement agreement may also affect the interests of third parties, such as consumers,
23 employees, or local communities.⁵

24 However valuable public access to settlement agreements might be, federal law generally
25 does little to mandate their proactive disclosure. Generally applicable statutes such as the
26 Freedom of Information Act (FOIA) and ADRA typically require disclosure only when members
27 of the public specifically request the agreements in which they are interested. They do not
28 generally require proactive disclosure on agency websites, as FOIA does for final adjudicative
29 orders and opinions.⁶ Nevertheless, many agencies do post settlement agreements on their
30 websites.⁷

31 There may, of course, be reasons for agencies not to proactively disclose settlement
32 agreements. Settlement agreements, or information contained within them, may be exempted or
33 protected from disclosure. Confidential commercial information, for example, is exempted from
34 disclosure under FOIA.⁸ As a policy matter, the promise of confidentiality may encourage

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

⁶ See 5 U.S.C. § 552(a)(2).

⁷ See Dishman, *supra* note 5, at 21.

⁸ 5 U.S.C. § 552(b)(4).



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35 candor, help parties to achieve consensus, and yield more efficient resolution of disputes. And as
36 a practical matter, there may be little public interest in large volumes of factually and legally
37 similar settlement agreements, such that the costs to agencies required to proactively disclose
38 them might outweigh the benefits of proactive disclosure to the public.

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

RECOMMENDATION

- 49 1. To inform regulated entities and the general public about administrative enforcement,
50 agencies should develop policies addressing when to post on their websites settlement
51 agreements reached in administrative enforcement proceedings—that is, those
52 proceedings in which a civil penalty or other coercive remedy was originally sought
53 against a person for violating the law. Settlement agreements addressed in these policies
54 should include those reached before adjudicative proceedings are formally initiated.
- 55 2. In determining which settlement agreements to post on its website, an agency should
56 consider factors including:

⁹ See Recommendation 2020-6, *supra* note 1; Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021); Admin. Conf. of the U.S., 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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- 57 a. The extent to which disclosure would help regulated entities and the general
58 public understand how the agency interprets the laws and regulations it enforces
59 and exercises its enforcement authority;
- 60 b. The extent to which disclosure would promote accountability and transparency,
61 such as by allowing the public to evaluate agency administrative enforcement and
62 use of public funds;
- 63 c. The extent to which particular types of settlement agreements are likely to attract
64 public interest;
- 65 d. The extent to which disclosure might deter regulated entities from reaching
66 settlements and resolving disputes expeditiously;
- 67 e. The extent to which disclosure, even after redaction or anonymization, would
68 adversely affect sensitive or legally protected interests involving, among other
69 things, national security, law enforcement, confidential business information,
70 personal privacy, or minors; and
- 71 f. The extent to which disclosure would impose significant administrative costs on
72 the agency or, conversely, whether it would save the agency time or money by
73 reducing the volume of requests for disclosure.
- 74 3. An agency that chooses generally not to post individual settlement agreements on its
75 website—for example because agreements are confidential or do not vary considerably in
76 terms of their factual contexts or the legal issues they raise—should consider other means
77 to provide information about settlements, including by posting on its website:
- 78 a. A form or template commonly used for settlement agreements;
- 79 b. A representative sample of settlement agreements;
- 80 c. Settlement agreements that entail especially significant legal issues;
- 81 d. Settlement agreements that, because of their facts, are likely to attract significant
82 public interest;
- 83 e. A summary of each settlement or settlement trends; and
- 84 f. A sortable or searchable database that lists information about settlement
85 agreements, such as case types, dates, case numbers, parties, and key terms.



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- 86 4. When an agency posts settlement agreements or information about settlement agreements
87 on its website, it should redact any information that is sensitive or otherwise protected
88 from disclosure. An agency should also consider using pseudonyms for private persons in
89 settlement agreements that include sensitive personal information.
- 90 5. An agency posting settlement agreements on its website should do so in a timely manner.
- 91 6. An agency should present settlement agreements or information about settlement
92 agreements on its website in a clear, logical, readily accessible, and comprehensive
93 fashion. In so doing, the agency should consider providing access to the settlement
94 agreements or information about them through:
- 95 a. A webpage dedicated to agency enforcement activities that is easily accessed
96 from the agency's homepage, a site map, and site index;
- 97 b. A webpage dedicated to an individual enforcement proceeding, such as a docket
98 webpage, that also includes any associated materials (e.g., case summaries, press
99 releases, related adjudication materials, links to any related actions); and
- 100 c. A search engine that allows users to easily locate settlement agreements and sort,
101 narrow, or filter them by case type, date, case number, party, and keyword.