



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public Availability of Settlement Agreements in Agency Enforcement Proceedings

Committee on Regulation

Proposed Recommendation for 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 Settlement 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 (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.

⁸ 5 U.S.C. § 552(b)(4).

Commented [A1]: For Committee discussion: Should the recommendation address or distinguish among differences in settlement agreements (e.g., which agency official approved the settlement agreement, using what criteria, under what authority, etc.)?



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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 similarly 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, such as confidentiality and efficient dispute
42 resolution. It builds on several other recommendations of the Administrative Conference that
43 encourage agencies to proactively disclose other important materials related to the adjudication
44 of cases, including orders and opinions, supporting records, adjudication rules and policies, and
45 litigation materials.⁹ In offering the best practices that follow, the Conference recognizes that
46 settlement agreements vary widely in many respects, including in their terms, their effects on the
47 interests of third parties, and the degree of public interest they attract. It also recognizes that not
48 all agencies can bring the same resources to bear in providing public access to settlement
49 agreements.

RECOMMENDATION

- 50 1. ~~As part of their overall portfolio of ways to~~ To inform their regulated communities/entities
51 and the general public about their work administrative enforcement, agencies should
52 develop policies addressing when to post on their websites settlement agreements reached
53 in administrative enforcement proceedings,—that is, those proceedings in which a civil
54 penalty or other coercive remedy is sought against a person for violating the law.;
55 Settlement agreements addressed in these policies should include those reached before
56 adjudicative proceedings are formally initiated, ~~should be posted on their websites.~~

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 ~~Administrative enforcement proceedings are proceedings in which a civil penalty or other~~
58 ~~coercive remedy is sought against a person for violating the law.~~

59 2. In determining which settlement agreements to post on ~~its-their~~ websites, ~~an agency~~
60 ~~agencies~~ should consider factors including:

- 61 a. The extent to which disclosure would help ~~those the agency regulates~~ regulated
62 entities and the general public understand how the agency interprets the laws and
63 regulations it enforces and exercises its enforcement authority-;
- 64 b. The extent to which disclosure would promote accountability and transparency,
65 such as by allowing the public to evaluate ~~evaluation of the agency's~~
66 administrative enforcement ~~work~~ and uses of public funds;
- 67 c. The extent to which ~~that-particular~~ types of settlement agreements ~~is-are~~ likely to
68 attract public interest;
- 69 d. The extent to which disclosure might deter ~~other~~ regulated entities from reaching
70 settlements and resolving disputes expeditiously;
- 71 e. The extent to which disclosure, even after redaction or anonymization, would
72 adversely affect sensitive or legally protected interests involving, among other
73 things, national security, law enforcement, confidential business information,
74 personal privacy, or minors, ~~in a manner unlikely to be cured consistent with~~
75 paragraph (4) of these recommendations; and
- 76 f. The extent to which disclosure would impose significant administrative costs on
77 the agency or, conversely, whether it would save the agency time or money by
78 reducing the volume of requests for disclosure.

79 3. Agencies ~~that choosing-choose~~ generally not to post individual settlement agreements on
80 their websites, ~~--~~ for example because agreements ~~frequently pose~~ are confidentiality
81 ~~concerns~~ or do not vary considerably in terms of their factual contexts or the legal issues
82 they raise, ~~--~~ should consider other means ~~to achieve the goals of disclosure to provide~~
83 information about settlements summarized in paragraph (2), including by posting on their
84 websites:

- 85 a. A form or template commonly used for settlement agreements;



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- 86 b. A representative sample of settlement agreements;
- 87 c. Settlement agreements that entail especially significant legal issues ~~warranting~~
88 disclosure;
- 89 d. Settlement agreements that, ~~for other reasons~~ because of their facts, are likely to
90 attract significant public interest;
- 91 e. A summary of each settlement or settlement trends; and
- 92 f. A sortable or searchable database that lists information about settlement
93 agreements, such as case types, dates, case numbers, parties, and key terms.
- 94 4. When agencies post settlement agreements or information about settlement agreements
95 on their websites, they should redact any information that is sensitive or otherwise
96 protected from disclosure. Agencies should also consider using pseudonyms for private
97 persons in settlement agreements that include sensitive personal information.
- 98 5. Agencies ~~should post~~ posting settlement agreements on their websites should do so in a timely
99 manner.
- 100 6. Agencies should present settlement agreements or information about settlement
101 agreements on their websites in a clear, logical, readily accessible, and comprehensive
102 fashion. In so doing, agencies should consider providing access to ~~a copy of~~ the
103 settlement agreements ~~s~~ or information about ~~it~~ them through:
- 104 a. ~~Providing access to a copy of the settlement agreement or information about it~~
105 ~~through a~~ An enforcement webpage dedicated to agency enforcement activities,
106 that is easily accessed from the agency's homepage, a site map, and site index;
- 107 b. ~~Providing access to a copy of the settlement agreement or information about it~~ A
108 webpage dedicated to an individual enforcement proceeding, such as a docket
109 webpage, that also includes any associated materials (e.g., case summaries, press
110 releases, related adjudication materials, links to any related actions) ~~through a~~
111 docket webpage; and
- 112 c. ~~Providing access to a~~ A search engine that allows users to easily locate settlement
113 agreements and sort, narrow, or filter ~~settlement agreements~~ them by case type,
114 date, case number, party, and keyword.