



Public Availability of Settlement Agreements in Agency Enforcement Proceedings

Committee on Regulation

Proposed Recommendation for Committee | October 14, 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) encourage
9 parties to determine controversies by consent in appropriate circumstances,³ and the
10 Administrative Conference has similarly recommended that agencies consider using alternative
11 means of dispute resolution.⁴

¹ This Recommendation addresses only settlements reached in administrative enforcement proceedings, not settlements of enforcement lawsuits filed in federal district courts. For purposes of these recommendations, enforcement proceedings has been defined broadly to include both trial-like adjudications and agency investigations and proceedings whether the agency is a party to the proceeding or is only adjudicating the proceedings on behalf of other parties. The Administrative Conference addressed settlement agreements reached in court proceedings 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 or
14 authoritatively decide whether a violation has taken place, nor do they typically have
15 precedential value. Nevertheless, public access to them can be desirable for several reasons.
16 First, because settlement agreements clarify how agencies exercise their enforcement authority
17 and interpret the laws and regulations they enforce, they can help people understand their legal
18 obligations. Second, public access to settlement agreements promotes accountable and
19 transparent government. The public has an interest in evaluating how agencies enforce the law
20 and use public funds. Third, high-profile settlements, such as those that involve high dollar
21 amounts or require changes in business practices, often attract significant public interest. The
22 terms of 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 require proactive disclosure on agency websites, as FOIA does for final adjudicative orders and
29 opinions.⁶ Nevertheless, many agencies do post settlement agreements on their websites.⁷

30 There may, of course, be reasons for agencies not to proactively disclose settlement
31 agreements. Settlement agreements, or information contained within them, may be exempted or
32 protected from disclosure. Confidential commercial information, for example, is exempted from
33 disclosure under FOIA.⁸ As a policy matter, the promise of confidentiality may encourage
34 candor, help parties to achieve consensus, and yield more efficient resolution of disputes. And as

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 [JG1]: 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 a practical matter, there may be little public interest in large volumes of factually and legally
36 similarly settlement agreements, such that the costs to agencies required to proactively disclose
37 them might outweigh the benefits of proactive disclosure to the public.

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

RECOMMENDATION

49 1. Agencies should consider posting on their websites settlement agreements that resolve
50 administrative enforcement proceedings—that is, proceedings in which a civil penalty or
51 other coercive remedy is sought against a person for violating the law—including
52 agreements reached before adjudicative proceedings are formally initiated. In
53 determining whether to post settlement agreements on their websites, agencies should
54 consider factors including:

Commented [JG2]: For Committee discussion: Should the recommendation address circumstances in which multiple agencies are involved in an administrative enforcement proceeding? If so, which agency should decide whether to disclose the agreement and which agency should post it?

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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- 55 a. Whether proactive disclosure of settlement agreements would help members of
56 the public understand their legal obligations by clarifying how agencies exercise
57 their enforcement authority and interpret the laws and regulations they enforce;
58 b. Whether proactive disclosure of settlement agreements would promote
59 accountability and transparency, such as by allowing the public to evaluate how
60 agencies enforce the law and use public funds;
61 c. Whether settlement agreements regularly attract public interest from entities
62 regulated by the agency, third parties affected by settlement agreements, media
63 representatives, or other members of the public;
64 d. Whether proactive disclosure of settlement agreements would reduce the
65 likelihood that parties in administrative enforcement proceedings reach
66 settlements and resolve disputes expeditiously;
67 e. Whether proactive disclosure of settlement agreements would adversely affect
68 sensitive or legally protected interests involving, among other things, national
69 security, law enforcement, confidential business information, personal privacy,
70 minors; and
71 f. Whether proactive disclosure of settlement agreements would impose significant
72 administrative costs on the agency or, conversely, whether it would save the
73 agency time or money by reducing the volume of record requests.
- 74 2. Agencies that settle large volumes of cases that do not vary considerably in terms of their
75 factual contexts or the legal issues they raise should consider posting on their websites:
- 76 a. A representative sample of settlement agreements;
77 b. Settlement agreements that raise particular legal issues, explaining why they are
78 especially significant;
79 c. Settlement agreements that, due to the types of matters they address, are likely to
80 attract significant public interest;
81 d. A form or template commonly used for settlement agreements;
82 e. A summary of settlement trends; or



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- 83 f. A sortable or searchable database that lists settlement agreements and provides
84 information about them (e.g., case type, date, case number, parties, key terms).
- 85 3. When agencies post settlement agreements or information about settlement agreements
86 on their websites, they should redact any information that is sensitive or otherwise
87 protected from disclosure. Agencies should also consider using pseudonyms for private
88 persons in settlement agreements that include sensitive personal information.
- 89 4. When agencies post settlement agreements on their websites, they should do so in a
90 timely manner.
- 91 5. When agencies post settlement agreements or information about settlement agreements
92 on their websites, they should present them in a clear, logical, and comprehensive
93 fashion, for example by:
- 94 a. Maintaining an enforcement webpage, easily accessed from the homepage of the
95 agency's website and through a site map or site index, that generally describes
96 relevant agency enforcement proceedings and, for each completed proceeding,
97 provides access to a copy of the settlement agreement;
- 98 b. Maintaining a docket page for each agency enforcement proceeding that provides
99 access to a copy of the settlement agreement, if available, along with any
100 associated materials (e.g., case summaries, press releases, related adjudication
101 materials, links to any related actions); and
- 102 c. Providing a search engine that allows users to sort, narrow, or filter settlement
103 agreements by case type, date, case number, party, and keyword.