

Comment from Government Member David Grahn
October 14, 2022

After looking at the resolution and the thoughtful paper that underpins it, I have the following comments for consideration by the committee:

1) I think focusing on an output (should agencies release settlement agreements) and not the outcome (better informing the regulated community and the public about the expectations and approaches it is taking) is a problem. While the supporting paper talks about other means agencies could use to communicate its positions, these were viewed as supplemental to releasing settlement agreements or necessary, but less desirable options, in cases where the agency has a unique confidentiality issue like the EEOC. In addition, this approach, while acknowledging there are competing concerns to releasing settlement agreements, those concerns do not seem to impact to the overall premise that unless specific circumstances exist that make release difficult agencies should release settlement agreements.

I suggest the focus shift from whether or not to release settlement agreements to how and through what tools agencies can better inform their regulated communities and public. This shift brings two advantages: a) You can have a more balanced and broader policy discussion of options that more effectively take into account the competing concerns that weigh against disclosure of settlement agreements (ability to cut deals that better serve the agency's mission and the public) and could lead to more effectively reaching the outcome of a better informed regulated community and public by looking at other means than simply releasing settlement agreements. b) You are more likely to reach agencies that are not releasing settlement agreements to consider doing more of it as part of an overall strategy of better informing their regulated communities and the public. As the policy recommendation is framed now, agencies that are not releasing settlement agreements will likely take the view that "we have already thought about releasing settlement agreements and that just doesn't work for us, we are not the FTC." However, if the conversation is about how to better communicate with its regulated community and the public, then the discussion can be how the release of settlement agreements or information about them can play a role in that.

2) Something that I did not see considered in the recommendation or the paper is how the rise in significance of the Congressional Review Act could impact this. Recently, the Department of Education and USDA issued guidance to make their regulated communities better understand the impact of the *Bostock* Supreme Court decision on how these Departments interpret civil rights enforcement in certain programs. In response, litigation has been filed against this guidance from both Departments on the grounds the guidance meets the requirement of being a rule under the CRA and thus required to be put before Congress before they can be effective. This is just one example of how an expansive application of the CRA could complicate how regulators communicate to regulated communities and the public. Releasing settlements or summaries of settlements could be a way of agencies could communicate with regulated parties that minimize CRA concerns. This is another reason to consider shifting the focus from whether agencies should release settlement agreements to how can agencies better communicate with regulated communities and the public and what role releasing settlement agreements can play.