



Administrative Conference Recommendation 2022-6

Public Availability of Settlement Agreements in Agency Enforcement Proceedings

Adopted December 15, 2022

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

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

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.



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Conference has similarly recommended that agencies consider using alternative means of dispute resolution.⁴

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

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

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).

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



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orders and opinions.⁶ Nevertheless, many agencies do post settlement agreements on their websites.⁷

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

This Recommendation encourages agencies to develop policies that recognize the benefits of proactively disclosing settlement agreements in administrative enforcement proceedings and account for countervailing interests. It builds on several other recommendations of the Administrative Conference that encourage agencies to proactively disclose other important materials related to the adjudication of cases, including orders and opinions, supporting records, adjudication rules and policies, and litigation materials.⁹ In offering the best practices that follow, the Conference recognizes that settlement agreements vary widely in many respects, including in their terms, their effects on the interests of third parties, and the degree of public

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); see also *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. ___, 139 S. Ct. 2356 (2019); 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).

⁹ 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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interest they attract. It also recognizes that not all agencies can bring the same resources to bear in providing public access to settlement agreements.

RECOMMENDATION

1. To inform regulated entities and the general public about administrative enforcement, agencies should develop policies addressing whether and when to post on their websites settlement agreements reached in administrative enforcement proceedings—that is, those proceedings in which a civil penalty or other coercive remedy was originally sought against a person for violating the law. Settlement agreements addressed in these policies should include those reached both before and after adjudicative proceedings are formally initiated.
2. In determining which settlement agreements to post on its website, an agency should consider factors including the extent to which:
 - a. Disclosure would help regulated entities and the general public understand how the agency interprets the laws and regulations it enforces and exercises its enforcement authority;
 - b. Disclosure would promote accountability and transparency, such as by allowing the public to evaluate agency administrative enforcement and use of public funds, and help guard against bias;
 - c. Particular types of settlement agreements are likely to attract public interest;
 - d. Disclosure might deter regulated entities from reaching settlements and resolving disputes expeditiously;
 - e. Disclosure, even after redaction or anonymization, would adversely affect sensitive or legally protected interests involving, among other things, national security, law enforcement, confidential business information, personal privacy, or minors; and
 - f. Disclosure would impose significant administrative costs on the agency or, conversely, whether it would save the agency time or money by reducing the volume of requests for disclosure.



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3. An agency that chooses generally not to post individual settlement agreements on its website—for example because certain agreements are required by statute to be confidential or do not vary considerably in terms of their factual contexts or the legal issues they raise—should consider other means to provide information about settlements, including by posting on its website:
 - a. A form or template commonly used for settlement agreements;
 - b. A representative sample of settlement agreements;
 - c. Settlement agreements that entail especially significant legal issues;
 - d. Settlement agreements that, because of their facts, are likely to attract significant public interest;
 - e. A summary of each settlement or settlement trends; and
 - f. A sortable or searchable database that lists information about settlement agreements, such as case types, dates, case numbers, parties, and key terms.
4. When an agency posts settlement agreements or information about settlement agreements on its website, it should redact any information that is sensitive or otherwise protected from disclosure, and redact identifying details to the extent required to prevent an unwarranted invasion of personal privacy.
5. An agency posting settlement agreements on its website should do so in a timely manner.
6. An agency should present settlement agreements or information about settlement agreements on its website in a clear, logical, and readily accessible fashion. In so doing, the agency should consider providing access to the settlement agreements or information about them through:
 - a. A webpage dedicated to agency enforcement activities that is easily accessed from the agency's homepage, site map, and site index;
 - b. A webpage dedicated to an individual enforcement proceeding, such as a docket webpage, that also includes any associated materials (e.g., case summaries, press releases, related adjudication materials, links to any related actions); and
 - c. A search engine that allows users to easily locate settlement agreements and sort, narrow, or filter them by case type, date, case number, party, and keyword.



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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.