Notices

Federal Register
Vol. 88, No. 9
Friday, January 13, 2023

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Assembly of the Administrative Conference of the United States adopted three recommendations at its hybrid (virtual and in-person) Seventy-eighth Plenary Session: Precedential Decision Making in Agency Adjudication, Regulatory Enforcement Manuals, and Public Availability of Settlement Agreements in Agency Enforcement Proceedings.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2022–4, Matthew Gluth; and for Recommendations 2022–5 and 2022–6, Alexandra Sybo. For each of these recommendations the address and telephone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW, Washington, DC 20036; Telephone 202–480–2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591–596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see *www.acus.gov.*

The Assembly of the Conference met during its Seventy-eighth Plenary Session on December 15, 2022, to consider three proposed recommendations and conduct other business. All three recommendations were adopted.

Recommendation 2022–4, *Precedential Decision Making in Agency Adjudication.* This recommendation identifies best practices on the use of precedential decisions in agency adjudication. It addresses whether agencies should issue precedential decisions and, if so, according to what criteria; what procedures agencies should follow to designate decisions as precedential and overrule previously designated decisions; and how agencies should communicate precedential decisions internally and publicly. It also recommends that agencies codify their procedures for precedential decision making in their rules of practice.

Recommendation 2022–5, *Regulatory Enforcement Manuals.* This recommendation identifies best practices for agencies regarding the use and availability of enforcement manuals—that is, documents that provide agency personnel with a single, authoritative resource for enforcement-related statutes, rules, and policies. It recommends that agencies present enforcement manuals in a clear, logical, and comprehensive fashion; periodically review and update them as needed; ensure enforcement personnel can easily access them; and consider making manuals, or portions of manuals, publicly available.

Recommendation 2022–6, *Public Availability of Settlement Agreements in Agency Enforcement Proceeding.* This recommendation identifies best practices for providing public access to settlement agreements reached during administrative enforcement proceedings. It recommends that agencies develop policies addressing when to post such agreements on their websites; provides factors for agencies to consider in determining which agreements to post on their websites; and identifies best practices for presenting settlement agreements in a clear, logical, and accessible manner without disclosing sensitive or otherwise protected information.

The Conference based its recommendations on research reports and prior history that are posted at: *https://www.acus.gov/meetings-and-events/plenary-meeting/78th-plenary-session.*

Authority: 5 U.S.C. 595.

Dated: January 10, 2023.

Shawne C. McGibbon,

General Counsel.

Appendix—Recommendations of the Administrative Conference of the United States

Administrative Conference Recommendation 2022–4

Precedential Decision Making in Agency Adjudication

Adopted December 15, 2022

It is a tenet of our system of justice that like cases be treated alike. Agencies use many different mechanisms to ensure such consistency, predictability, and uniformity when adjudicating cases, including designating some or all of their appellate decisions as precedential.[1] Agencies can also use precedential decision making to communicate how they interpret legal requirements or intend to exercise discretionary authority, as well as to increase efficiency in their adjudicative systems.[2]

An agency's decision is precedential when an agency's adjudicators must follow the decision's holding unless the precedent is distinguishable or until it is overruled. Many agencies use some form of precedential decision making. Some agencies treat all agency appellate decisions as precedential, while others treat only some appellate decisions as precedential. Additionally, some agencies highlight nonprecedential decisions that may be useful to adjudicators by labeling them ''informative,'' ''notable,'' or a similar term.[3] In any of these cases, precedential decisions can come from an agency head or heads, adjudicators exercising the agency's authority to review hearing-level decisions, adjudicators who review hearing-level decisions but whose decisions are subject to (usually discretionary) agency-head review, or adjudicators other than the agency head who have statutory authority to issue final decisions. Rarely do hearing-level adjudicators issue precedential decisions.

[1] Other mechanisms include rulemaking, quality assurance programs, appellate review, aggregate decision making, and declaratory orders. *See, e.g.,* Admin. Conf. of the U.S., Recommendation 2021–10, *Quality Assurance Systems in Agency Adjudication,* 87 FR 1722 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2020–3, *Agency Appellate Systems,* 86 FR 6618 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2016–2, *Aggregation of Similar Claims in Agency Adjudication,* 81 FR 40260 (June 21, 2016); Admin. Conf. of the U.S., Recommendation 2015–3, *Declaratory Orders,* 80 FR 78161 (Dec. 16, 2015).

[2] *See* Christopher J. Walker, Melissa Wasserman & Matthew Lee Wiener, Precedential Decision Making in Agency Adjudication (Dec. 6, 2022) (report to the Admin. Conf. of the U.S.).

[3] *See id.* at 28, 37 & app. G (discussing the use of ''adopted decisions'' at the U.S. Citizenship and Immigration Services).

This Recommendation provides best practices for agencies in considering whether and how to use precedential decisions in their adjudicative systems. It begins by recommending that agencies determine whether they issue appellate decisions that may lend themselves to use as precedent and, if they do, whether to treat all or some appellate decisions as precedential. For agencies that treat only some decisions as precedential, the Recommendation sets forth criteria for deciding which ones to treat as such, and it identifies procedures for agencies to consider using when designating decisions as precedential, such as the solicitation of public input.

For agencies that use some form of precedential decision making, this Recommendation provides best practices for identifying decisions which are precedential and making information about such decisions available internally and to the public. Some of these practices build on the Freedom of Information Act's requirement that agencies post on their websites all final orders and opinions and its general prohibition against agencies relying on, using, or citing an order or opinion as precedent against a private party if it has not been indexed and posted online.[4]

The Recommendation concludes by urging agencies to address their use of, and procedures for, precedential decision making in procedural rules published in the **Federal Register** and *Code of Federal Regulations.*

Recommendation

Use of Precedential Decision Making

1. Agencies should determine whether, and if so when, to treat their appellate decisions as precedential, meaning that an adjudicator must follow the decision's holding in subsequent cases, unless the facts of the decision are distinguishable or until the holding is overruled. In determining whether to treat all, some, or no appellate decisions as precedential, agencies should consider:

a. The extent to which they issue decisions that would be useful as precedent and are written in a form that lends itself to use as precedent;

b. The extent to which they issue decisions that mainly concern only case-specific factual determinations or the routine application of well-established policies, rules, and interpretations to case-specific facts; and

c. The extent to which they issue such a large volume of decisions that adjudicators cannot reasonably be expected to identify those which should control future decisions.

2. Agencies that treat only some appellate decisions as precedential should consider treating a decision as precedential if it:

a. Addresses an issue of first impression;

b. Clarifies or explains a point of law or policy that has caused confusion among adjudicators or litigants;

c. Emphasizes or calls attention to an especially important point of law or policy that has been overlooked or inconsistently interpreted or applied;

d. Clarifies a point of law or policy by resolving conflicts among, or by harmonizing or integrating, disparate decisions on the same subject;

e. Overrules, modifies, or distinguishes existing precedential decisions;

f. Accounts for changes in law or policy, whether resulting from a new statute, federal court decision, or agency rule;

g. Addresses an issue that the agency must address on remand from a federal court; or

h. May otherwise serve as a necessary, significant, or useful guide for adjudicators or litigants in future cases.

3. Agencies should not prohibit parties from citing nonprecedential decisions in written or oral arguments.

4. Agencies should consider identifying nonprecedential decisions that may be useful to adjudicators by designating them ''informative,'' ''notable,'' or a similar term.

Processes and Procedures for Designating Precedential Decisions

5. Agencies' procedures for designating decisions as precedential should not be unduly time consuming or resource intensive.

6. Prior to designating an appellate decision as precedential, agencies should consider soliciting input from appellate adjudicators not involved in deciding the case.

7. Agencies should consider implementing procedures by which appellate adjudicators can issue precedential decisions to resolve important questions that arise during hearing-level proceedings. Options include procedures by which, on an interlocutory basis or after a hearing-level decision has been issued:

a. Hearing-level adjudicators may certify specific questions in cases or refer entire cases for precedential decision making;

b. Appellate adjudicators on their own motion may review specific questions in cases or entire cases for precedential decision making; and

c. Parties may request that appellate adjudicators review specific questions in cases or entire cases for precedential decision making.

8. Agencies should consider establishing a process by which adjudicators, other agency officials, parties, and the public can request that a specific nonprecedential appellate decision be designated as precedential.

9. Agencies should consider soliciting amicus participation or public comments in cases in which they expect to designate a decision as precedential, particularly in cases of significance or high interest. That could be done, for example, by publishing a notice in the **Federal Register** and on their websites, and by directly notifying those persons likely to be especially interested in the matter. In determining whether amicus participation or public comments would be valuable in a particular case, agencies should consider the extent to which the case addresses broad policy questions whose resolution requires consideration of general or legislative facts as opposed to adjudicative facts particular to the parties.

10. When an agency rejects or disavows the holding of a precedential decision, it should expressly overrule the decision, in whole or in part as the circumstances dictate, and explain why it is doing so.

Availability of Precedential Decisions

11. Agencies that treat only some appellate decisions as precedential should clearly identify precedential decisions as such. Such agencies should also identify those precedential decisions in digests and indexes that agencies make publicly available.

12. Agency websites, as well as any agency digests and indexes of decisions, should clearly indicate when a precedential decision has been overruled or modified.

13. Agencies should ensure that precedential decisions are effectively communicated to their adjudicators.

14. Agencies should update any manuals, bench books, or other explanatory materials to reflect developments in law or policy effected through precedential decisions.

15. Agencies should consider posting on their websites brief summaries of precedential decisions, a digest of precedential decisions, and an index, organized topically, of precedential decisions.

16. Subject to available resources, agencies should consider tracking, on their own or in coordination with commercial databases, and making available to agency officials and the public the subsequent history of precedential decisions, including whether they have been remanded, set aside, modified following remand by a federal court, or superseded by statute or other agency action, such as a rule.

Rules on Precedential Decision Making

17. As part of their rules of practice, published in the **Federal Register** and codified in the *Code of Federal Regulations,* agencies should adopt rules regarding precedential decision making. These rules should:

a. State whether all, some, or none of the agency's appellate decisions are treated as precedential;

b. Describe the criteria and process for designating decisions as precedential, if the agency considers some but not all of its decisions as precedential;

c. Specify who has authority to designate decisions as precedential, if the agency considers some but not all of its decisions as precedential;

d. Explain the legal effect of precedential decisions in subsequent cases;

e. Define any terms the agency uses to identify useful nonprecedential decisions, such as ''informative'' or ''notable,'' and describe the criteria and process for designating these decisions;

f. Explain for what purposes a party may cite a nonprecedential decision, and how the agency will treat it;

g. Describe any opportunities for amicus or other public participation in precedential decision making; and

h. Explain how precedential decisions are clearly identified as precedential, how they are identified when overturned, and how they are made available to the public.

18. Agencies should use clear and consistent terminology in their rules relating to precedential decisions. Agencies that distinguish between ''published'' decisions and ''nonpublished'' or ''unpublished'' decisions (or some other such terminology) should identify in their rules of practice the

[4] *See* 5 U.S.C. 552(a)(2)(A).

relationship between these terms and the terms ''precedential'' and ''nonprecedential.''

19. Agencies should consider soliciting public input when they materially revise existing or adopt new procedural regulations on the subjects addressed above, unless the costs outweigh the benefits of doing so in a particular instance.

Administrative Conference Recommendation 2022–5

Regulatory Enforcement Manuals

Adopted December 15, 2022

Many agencies are responsible for detecting, investigating, and prosecuting potential violations of the laws they administer. Statutes and agency rules govern the exercise of agencies' enforcement authority and direct the activities of enforcement personnel. Agencies' policies: (a) explain and interpret relevant statutes and rules; (b) establish standards, priorities, and procedures for detecting and investigating suspected violations, issuing complaints against suspected violators, and prosecuting cases before an administrative body or a federal court; (c) describe how enforcement staff interact with other agency personnel and persons outside the agency; and (d) set forth processes for soliciting and receiving complaints about alleged violations from members of the public.

Many agencies have developed documents, often called ''enforcement manuals,'' that provide their personnel with a single, comprehensive resource regarding enforcement-related laws and policies. Enforcement manuals provide a way for agencies to effectively communicate such policies, which would otherwise be dispersed within a voluminous body of separate documents, and to ensure that agency enforcement is internally consistent, fair, efficient, effective, and legally sound.[1] Although enforcement manuals do not necessarily bind agencies as a whole, it is also sometimes appropriate for agencies, as an internal agency management matter, to direct enforcement personnel to act in conformity with an enforcement manual.[2]

Enforcement manuals can also be a useful, practical resource for the public. The Freedom of Information Act (FOIA) requires agencies to post on their websites ''administrative staff manuals and instructions to staff that affect a member of the public.'' [3] Although several courts of appeals have held that this provision does not apply to some portions of enforcement manuals,[4] by providing public access to them, agencies can improve awareness of and compliance with relevant policies while promoting transparency more generally.

Enforcement manuals may contain information that agencies should not disclose. Disclosure of some portions of enforcement manuals might, for example, enable persons to circumvent the law by revealing forms of noncompliance that will not lead to investigation or enforcement. Accordingly, FOIA exempts from disclosure records or information that ''would disclose techniques and procedures for law enforcement investigations or prosecutions'' or ''guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.'' [5] FOIA also allows agencies to withhold records that fall within the attorney work-product privilege. This exemption may encompass information provided to enforcement personnel about litigation strategies and legal theories, the disclosure of which could adversely affect the integrity of adversarial proceedings.[6] Agencies cannot rely on these exemptions reflexively, however. Since 2016, agencies may withhold information under FOIA only if they ''reasonably foresee that disclosure would harm an interest protected by'' an exemption or if disclosure is prohibited by law.[7] In other circumstances, agencies should disclose their enforcement manuals, or at least the non-exempt portions of the manual.

This Recommendation offers agencies best practices for developing, managing, and disseminating enforcement manuals. It builds on several recommendations the Administrative Conference has previously adopted regarding the development, management, and dissemination of agency procedural rules and guidance documents.[8] In offering these recommendations, the Conference recognizes that enforcement manuals may not be appropriate for all agencies, given differences in the volume and complexity of documents that govern their enforcement activities, resources available to agencies, and the differing informational needs of persons affected by or interested in agency enforcement activities.

Recommendation

Developing Enforcement Manuals

1. Subject to available resources, agencies responsible for investigating and prosecuting potential violations of the laws that they administer should develop an enforcement manual—that is, a document that provides personnel a single, comprehensive resource for enforcement-related statutes, rules, and policies—if doing so would improve the communication of enforcement-related policies to agency personnel and promote the fair and efficient performance of enforcement functions consistent with established policies.

2. In developing enforcement manuals, agencies should consider, among other things:

a. Identifying the office or individual within the agency under whose name and authority the manual is being issued;

b. Identifying which offices within the agency are directed to act in conformity with the manual;

c. Describing the manual's purpose, scope, and organization;

d. Describing the manual's legal effect, including a disclaimer, if applicable, that the manual does not bind the agency as a whole;

e. Identifying the statutes and rules that govern the agency's enforcement activities;

f. Identifying any ''safe harbors'' (*i.e.,* conduct that does not trigger agency enforcement actions);

g. Describing criteria for selecting among options available to the agency to compel remedial action, procedures for formally initiating agency adjudicative or judicial proceedings, and criteria for making criminal referrals;

h. Identifying the office or individual within the agency that is empowered to receive, and potentially to act on, any complaint that the agency personnel who are conducting an investigation or other enforcement action are engaging in unlawful or inappropriate conduct;

i. Describing procedures for soliciting and receiving information about alleged violations from persons outside the agency;

j. Identifying criteria used to classify the severity of alleged violations, recommend or assess penalties or other remedies, or prioritize investigations or prosecutions;

k. Describing procedures for conducting investigations, inspections, audits, or similar processes;

l. Describing policies governing communications between enforcement personnel and other agency personnel, the subjects of enforcement actions, and other persons outside the agency;

m. Explaining procedures for determining if records or information are legally protected from unauthorized disclosure, and procedures for handling such records or information;

n. Addressing when agency personnel may publicly disclose information about an enforcement proceeding, such as by issuing a press release, and the nature of information that may be disclosed;

o. Identifying guidelines for both informally adjudicating and negotiating settlements with the subjects of enforcement actions; and

p. Explaining how and by whom the manual is developed, periodically reviewed for accuracy, and updated.

3. Agencies should ensure that the contents of enforcement manuals are presented in a clear, logical, and comprehensive fashion, and include a table of contents and an index.

Managing Enforcement Manuals

4. Agencies should periodically review their enforcement manuals and update them

[1] *See* Jordan Perkins, Regulatory Enforcement Manuals 1, 9 (Dec. 9, 2022) (report to the Admin. Conf. of the United States).

[2] *See* Admin. Conf. of the U.S., Recommendation 2017–5, *Agency Guidance Through Policy Statements,* ¶ 3, 82 FR 61734, 61736 (Dec. 29, 2017).

[3] 5 U.S.C. 552(a)(2)(C).

[4] *See, e.g., Smith* v. *NTSB*, 981 F.2d 1326 (D.C. Cir. 1993); *Stokes* v. *Brennan*, 476 F.2d 699 (5th Cir. 1973).

[5] *Id.* § 552(b)(7)(E).

[6] *See* ACLU of *N. Cal.* v. *U.S. DOJ*, 880 F.3d 473, 486–88 (9th Cir. 2018); *Nat'l Ass'n of Crim. Def. Lawyers* v. *U.S. DOJ Exec. Off. for U.S. Attys.*, 844 F.3d 246, 254 (D.C. Cir. 2016).

[7] 5 U.S.C. 552(a)(8)(A).

[8] *See* Admin. Conf. of the U.S., Recommendation 2021–7, *Public Availability of Inoperative Agency Guidance Documents,* 87 FR 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2019–3, *Public Availability of Agency Guidance Documents,* 84 FR 38931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2019–1, *Agency Guidance Through Interpretive Rules,* 84 FR 38927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018–5, *Public Availability of Adjudication Rules,* 84 FR 2142 (Feb. 6, 2019); Recommendation 2017–5, *supra* note 2.

as needed to ensure that they accurately reflect current law and policies. When agencies update their enforcement manuals, the manuals should prominently display the date of the update and identify what changes were made.

5. Agencies with enforcement manuals should develop procedures for reviewing and keeping them up to date. These procedures should address:

a. How often the enforcement manual, in whole or in part, is reviewed for accuracy and updated if necessary;

b. Which office or individual within the agency is responsible for periodically reviewing the enforcement manual, in whole or in part; and

c. How and by whom changes to the enforcement manual are drafted, reviewed, approved, and implemented.

6. To ensure that enforcement personnel can easily access current versions of enforcement manuals, agencies should make enforcement manuals available in a searchable, electronic format in an appropriate location on an internal network.

7. Agencies should solicit feedback on their enforcement manuals from their personnel and consider that feedback in reviewing and revising their manuals.

Disseminating Enforcement Manuals to the Public

8. Agencies should make their enforcement manuals, or portions of their manuals, publicly available on their websites when doing so would improve public awareness of relevant policies and compliance with legal requirements or promote transparency more generally, and if they have adequate resources available to ensure publicly available enforcement manuals remain up to date. Agencies should not include information in publicly available versions of enforcement manuals that would reflect litigation strategies or legal theories, the disclosure of which would adversely affect the integrity of adversarial proceedings, or enable persons to circumvent the law.

9. When agencies post publicly available versions of enforcement manuals, they should post the manuals in an easily identified location on their websites, in a user-friendly format, and with an introduction sufficient to ensure that potentially interested persons—including members of historically underserved communities, who may be unfamiliar with the existence, purpose, and legal effect of enforcement manuals—can easily find and use them.

10. When agencies issue or revise publicly available enforcement manuals, they should provide notice to the public of such actions, for example by placing a notice on the agency's website, issuing a press release, making an announcement on social media, or publishing a notice of availability in the **Federal Register**.

11. Agencies that make enforcement manuals publicly available should solicit feedback on them, from persons interested in or affected by agency enforcement proceedings, including possibly in a public forum and through direct outreach.

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 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 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

[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 FR 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 FR 94314, 94315 (Dec. 23, 2016); Admin. Conf. of the U.S., Recommendation 88–5, *Agency Use of Settlement Judges,* 53 FR 26030 (July 11, 1988); Admin. Conf. of the U.S., Recommendation 86–8, *Acquiring the Services of ''Neutrals'' for Alternative Means of Dispute Resolution,* 51 FR 46990 (Dec. 30, 1986); Admin. Conf. of the U.S., Recommendation 86–3, *Agencies' Use of Alternative Means of Dispute Resolution,* 51 FR 25643 (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.).

[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 FR 6622 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2018–5, *Public Availability of Adjudication Rules,* 84 FR 2142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017–1, *Adjudication Materials on Agency Websites,* 82 FR 31039 (July 5, 2017).

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 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.

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 web page dedicated to agency enforcement activities that is easily accessed from the agency's homepage, site map, and site index;

b. A web page dedicated to an individual enforcement proceeding, such as a docket web page, 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.

7. When an agency posts settlement agreements on its website, it should include a statement that settlement agreements are provided only for informational purposes.

[FR Doc. 2023–00628 Filed 1–12–23; 8:45 am]

BILLING CODE 6110–01–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by February 13, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Produce Safety University Nomination and Course Evaluation.

OMB Control Number: 0584–NEW.

Summary of Collection: The collection of information is necessary for people to attend Produce Safety University (PSU), a training course designed to help child nutrition professionals identify and manage food safety risks associated with fresh produce. The PSU course is designed to be a train-the trainer immersion course, where participants are expected to conduct further training with their peers using the information they obtain during PSU.

Need and Use of the Information: FNS will collect course nomination from child nutrition professionals and State agency staff who wish to attend PSU. State agencies may nominate individuals to attend PSU and receive annual logistic information through a letter from FNS. The letter to States includes a link to theonlinecourse nomination. Toensure that PSU provides the most appropriate training content that is tailored to the audience, it is necessary to know the occupational make-up of each training co-hort. Therefore, job titles and the name of the organization nominees represent will be collected.Collecting this information on the course nomination will ensure that the Office of Food Safety offers this training opportunity equally among each of the States and seven FNS Regions. Contact information is needed from participants to support their learning experience; when PSU training sessions are held virtually, physical course materials are shipped to each participant. These materials include