WAIVERS, EXEMPTIONS, AND PROSECUTORIAL DISCRETION: AN EXAMINATION OF AGENCY NONENFORCEMENT PRACTICES

Aaron L. Nielson
J. Reuben Clark Law School
Brigham Young University

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About the Author: Aaron L. Nielson is an associate professor at Brigham Young University Law School. His research has been published in the *University of Chicago Law Review*, *Northwestern Law Review*, *Georgetown Law Journal*, and the *Emory Law Journal*, among others. He currently co-chairs the Rulemaking Committee of the American Bar Association's Section of Administrative Law & Regulatory Practice. Before joining the academy, Professor Nielson was a partner in the Washington, D.C. office of Kirkland & Ellis LLP where he remains of counsel. He also clerked for Justice Samuel A. Alito, Jr. of the U.S. Supreme Court. Each week, he authors a column for the Yale Journal on Regulation's *Notice & Comment* blog that reviews the decisions of the U.S. Court of Appeals for the District of Columbia Circuit.

WAIVERS, EXEMPTIONS, AND PROSECUTORIAL DISCRETION: HOW AGENCIES CHOOSE WHETHER TO ENFORCE THE LAW

Aaron L. Nielson*

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INTRODUCTION

Every day, in countless ways, federal agencies take steps to enforce the law. Agencies, for instance, promulgate regulations, adjudicate disputes, and grant permits—each of which inherently changes the legal status quo. For obvious reasons, a great deal of attention has been paid to these sorts of affirmative activities by agencies to enforce the law. Indeed, for some, the whole idea of administrative law presupposes an agency doing something to change what would otherwise happen if the agency did not exist. As Charles Koch once put it, the very definition of "administrative law" is about "the way certain types of government institutions *do things*."[1]

Yet sometimes, agencies decide *not* to "do things." They decline to enforce the law, either across the board or as applied to individual parties or circumstances. Although nonenforcement of regulatory duties—through means such as waivers, exemptions, and prosecutorial discretion—has received much less attention than affirmative acts by agencies to change the legal status quo, it too is a critical aspect of administrative law that calls out for study and reflection. After all, although nonenforcement often can be beneficial and, in any event, at times may be inevitable,[2] it also raises important questions about administrative predictability and fairness. As the U.S. Court of Appeals for the D.C. Circuit has explained:

> The criteria used to make waiver determinations are essential. If they are opaque, the danger of arbitrariness (or worse) is increased. Complainants the agency "likes" can be excused, while "difficult" defendants can find themselves drawing the short straw. If discretion is not restrained by a test more stringent than "whatever is consistent with the public interest (by the way, as best determined by the agency)," then how to effectively ensure power is not abused?[3]

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[1] CHARLES H. KOCH JR., ADMINISTRATIVE LAW & PRACTICE § 1.3, at 4 (1985) (emphasis added); *see also id.* at 3 (defining "administrative law" as "a system which, in the simplest terms, has only one goal: to deliver government services to its citizens").

[2] *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 831 (1985) (explaining that nonenforcement generally is not subject to judicial review under the Administrative Procedure Act because it requires considering "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all").

[3] NetworkIP, LLC v. FCC, 548 F.3d 116, 127 (D.C. Cir. 2008).

The Administrative Conference of the United States (ACUS) has commissioned this Report to examine agency nonenforcement of otherwise applicable regulatory obligations.[4] In particular, this Report's purpose is to investigate regulatory waivers and exemptions, as well as the closely related concept of prosecutorial discretion. The analysis is intended to be both conceptual and empirical, and to be driven by a very practical goal: identifying ways to improve the nonenforcement process.[5]

The challenge presented by nonenforcement is easy to state but hard to solve. As a general matter, agencies have a great deal of discretion whether to enforce regulatory duties.[6] And like many types of administrative discretion, nonenforcement can be used for laudable purposes. Because resources are finite, it is impossible for agencies to investigate—much less bring enforcement actions against—every violation of statutory or regulatory law. Nor would inflexible enforcement always be desirable. Sometimes generally applicable laws are a poor fit for a particular situation: "'It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.'"[7] Yet at the same time, again as with other forms of discretion,

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[4] This Report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views, and recommendations expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.

[5] Specifically, this Report "draws conceptual distinctions among waivers, exemptions, and prosecutorial discretion; examines current practices in agencies that grant waivers and exemptions; reviews statutory and doctrinal requirements; and makes concrete procedural recommendations for implementing agency best practices." *Regulatory Waivers and Exemptions*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, https://www.acus.gov/research-projects/regulatory-waivers-and-exemptions.

[6] *See, e.g.*, David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 273 (2013) ("[J]udges have treated the decision not to enforce a statutory requirement in an individual case—whether due to lack of resources, concerns about the complications the particular case presents, or any of a myriad of other bureaucratic considerations—as an exercise of an agency's general administrative discretion. The agency's organic statute, therefore, need not expressly confer such a power in order for the agency to exercise it lawfully.") (citations omitted); *Heckler*, 470 U.S. at 838 (Brennan, J., concurring) (explaining that "in the normal course of events, Congress intends to allow broad discretion for its administrative agencies to make particular enforcement decisions").

[7] Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 701 (2014) (quoting 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (Jonathan Elliot. ed., 1836)); *see also id.* at 675 ("[A] central normative reason for separating legislative and executive functions, as articulated by Montesquieu, the Federalist Papers, and other foundational sources, is to create a safety valve that protects citizens from overzealous enforcement of general prohibitions."); *Cf.* Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369, 370 (2010)

agency discretion regarding nonenforcement can be problematic.[8] Indeed, "a central principle of administrative law is (or at least should be) that discretion can be dangerous."[9] Even leaving aside weighty constitutional concerns about the President's duty to faithfully execute the law which are beyond the scope of this Report,[10] nonenforcement may encourage the appearance or perhaps even reality of unfairness and irregularity, for instance when an agency decides to waive requirements for some but not all regulated parties or where the result of nonenforcement is that a potential beneficiary of the administrative scheme finds itself out of luck.[11] The challenge therefore is to strike the proper balance between regulatory flexibility, on one hand, and evenhanded, non-arbitrary administration of the law on the other.

In light of these competing concerns, it is important to understand the theoretical underpinnings of nonenforcement. This question has received some attention by courts and scholars. But it is also important to understand *how* agency approaches to nonenforcement translate into day-to-day decision-making. This practical question, however, has received much less attention. Hence, the time has come for an examination of the mechanics of nonenforcement, with a focus on empirical reality. When it comes to nonenforcement, what factors do agencies consider, and why do they consider them? What procedures do agencies use? Who is involved in the process?

(explaining how a policy of maximalist enforcement forced school officials to expel a third-grader who, on instructions from her grandmother, carried a knife to school to cut her birthday cake).

[8] *See, e.g.*, Richard A. Epstein, *Government By Waiver*, NATIONAL AFFAIRS (2011), https://www.nationalaffairs.com/publications/detail/government-by-waiver (arguing that waiver is dangerous because "when currying the favor of capricious government officials is required for a person's well-being or a firm's very existence, government abuse becomes nearly impossible to oppose").

[9] Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106, 113 (2017); *cf.* Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1652–53 (2015) ("We need not doubt the EEOC's trustworthiness, or its fidelity to law . . . [to] know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence.").

[10] *See* U.S. CONST. art. II, § 3 (stating that the president "shall take Care that the Laws be faithfully executed"). Many scholars have addressed the constitutionality of nonenforcement. *See, e.g.*, Price, *supra* note 7; Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013); Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107 (2000); David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61 (2000); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000). This Report does not attempt to delve deeply into this scholarship.

[11] *See, e.g.*, Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877, 882 n.20 (1989) (expressing concern about nonenforcement because "prejudice and unfairness are more likely to occur in a discretionary process than in a highly structured one").

Are there internal checks, and if so, what are they? How often do regulated parties request nonenforcement, and how often are such requests granted? Are agencies more willing to excuse certain types of conduct? The benefits of nitty-gritty answers to such questions are apparent, but, unfortunately are also difficult to obtain.

The challenge is more difficult, moreover, because agencies themselves differ, both in what Congress has allowed them to do and in culture, institutional design, and function.[12] Congress, for example, may explicitly authorize some agencies to "waive"[13] requirements and also explicitly set out the requirements and procedures for such waivers.[14] Yet Congress might also delegate authority to an agency to create its own procedures, which may allow the agency to create its own "exemption"[15] scheme and standards.[16] Likewise, some agencies may attempt to insulate future conduct while

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[12] *See, e.g.*, Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 233 (2016) (rejecting the conventional account of "administrative agencies as monolithic"); Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58, 64 (2016) (explaining how agency organization may affect outcomes); Katherine A. Trisolini, *Decisions, Disasters, and Deference: Rethinking Agency Expertise After Fukushima*, 33 YALE L. & POL'Y REV. 323, 328 (2015) ("Agencies' approaches to policy decisions will vary substantially depending upon their unique histories, legal mandates, structures, and organizational cultures, all of which affect the balance struck between conflicting demands for efficiency, reasoned analysis, and participation.").

[13] As explained below, for convenience, "waiver" is the term that this Report uses when referring to explicit permission to agencies from Congress to not enforce the law.

[14] *See, e.g.*, Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235, 267 (2016) ("In the new Every Student Succeeds Act, for example, Congress has barred the Secretary of Education from disapproving key waivers based on 'conditions outside the scope of the waiver request' and has further specifically barred waiver conditions prescribing certain academic standards (as the Secretary sought to do through conditional NCLB waiver)." (citing Pub. L. No. 114-95, § 8013 (2016)).

[15] Also as explained below, for convenience, "exemption" is the term that this this Report uses when referring to delegations from Congress to agencies, which the agency then uses to create a nonenforcement scheme. This proper terminology is not clearly established in the literature or U.S. Code and, unfortunately, the terms are often used interchangeably.

[16] *See, e.g.*, 47 C.F.R. § 1.3 ("The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the [Federal Communications] Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."). The statutory authority cited for this regulation provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).

others may instead exercise prosecutorial discretion regarding past conduct; the two types of nonenforcement are similar but not the same.[17]

Similarly, some agencies may forego enforcement only at the request of the regulated party, while others may do so *sua sponte*.[18] Some perhaps may use special procedures when deciding whether to grant waivers or exemptions to States, for instance, in light of federalism concerns. Others potentially may always use the same procedures, regardless of the subject matter at issue. Some agencies, moreover, may have different procedures for different types of policies. And some agencies may do so via ad hoc processes. In short, just as it is a mistake to treat agencies as monoliths, it is a mistake to treat nonenforcement as a monolithic concept.

One purpose of this Report therefore is to disaggregate the concept of nonenforcement in hopes of creating a workable taxonomy, i.e., to identify the different species and subspecies within the broader nonenforcement genus. In truth, there is a wide variety of nonenforcement systems. Indeed, even within a single agency there can be a number of different types of nonenforcement, sometimes each with their own substantive requirements or procedures. For instance, Congress has given the Federal Aviation Administration ("FAA") at least seven grants of waiver authority in Title 49 of the U.S. Code, and that is not the full catalogue of the agency's nonenforcement power.[19]

It is also important to understand how common nonenforcement is (whether absolutely, relatively, or comparatively) and what types of actions are most likely to be the subject of it. For example, some agencies may engage in the practice more often than other agencies, and they may do so more often regarding certain types of conduct than other types. By the same token, some agencies may exercise nonenforcement less often than other agencies in absolute numbers, but yet still grant a higher percentage of requests. And there may be some commonalities across agencies.

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[17] *See, e.g.*, Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control Over Immigration Policy*, 59 DUKE L.J. 1787, 1845 (2010) (distinguishing "ex ante legal channels" from "ex post prosecutorial discretion").

[18] *Compare* 49 C.F.R. § 1180.4(f)(1) ("Upon petition of a prospective applicant, the Board may waive or clarify a portion of these procedures."), *with* 47 C.F.R. § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.").

[19] The FAA's nonenforcement authority is discussed below. *See infra*, Part III.C(ii).

Accordingly, another purpose of this Report is to examine the day-to-day exercises of nonenforcement authority across a number of agencies. To do this, the Report analyzes survey data provided by nine agencies: the Alcohol and Tobacco Tax and Trade Bureau ("TTB") within the Department of the Treasury, the Community Development Financial Institutions Fund ("CDFI") within the Department of the Treasury, the Consumer Financial Protection Bureau ("CFPB"), the Employee Benefits Security Administration ("EBSA") within the Department of Labor, the FAA within the Department of Transportation, the Federal Motor Carrier Safety Administration ("FMCSA") within the Department of Transportation, Federal Transit Authority ("FTA") within the Department of Transportation, the Mine Safety and Health Administration ("MSHA") within the Department of Labor, and the Pipeline and Hazardous Materials Safety Administration ("PHMSA") within the Department of Transportation. Likewise, the author of this Report conducted in-person interviews with officials from the FAA, MSHA, and TTB, plus a phone interview with officials from the CFPB.[20] Based on information learned through these surveys and interviews, it is possible to gain a more thorough understanding of the nonenforcement practices and procedures they use.

The results are fascinating. For instance, nonenforcement is remarkably heterogeneous. The FAA, for instance, receives hundreds (and sometimes even thousands or even, at least once, tens of thousands) of requests for nonenforcement each year. The MSHA, by contrast, received 64 requests in 2014. Similarly, the frequency of granting nonenforcement requests varies a great deal across agencies. The FTA grants nearly 100% of certain types of request for nonenforcement. The CFPB, however, does not believe that it has ever prospectively allowed a specific party or specific parties to engage in otherwise unlawful conduct. Likewise, the FAA makes it a point to publicize essentially all of their nonenforcement decisions in the Federal Register. Indeed, the FAA often opens up its proposed nonenforcement decisions to notice-and-comment participation by the public. The TTB, by contrast, essentially never reveals its nonenforcement decisions, in part because tax information can be especially sensitive. Unsurprisingly, in light of this heterogeneity, agency vocabulary varies widely. Agencies use words like "waiver" and "exemption" in very different ways.

At the same, however, there are some similarities. The FAA, MSHA, and TTB each stressed that the agency only engages in nonenforcement if the regulated party can

[20] Other agencies were asked to participate in the survey or to be interviewed but declined.

credibly guarantee that it has taken steps that will prevent the purpose of the law from being undermined. Thus, neither the FAA nor MSHA will engage in nonenforcement if the proposed modification is not at least as protective as the legal standard, or if enforcing the legal standard would diminish safety, and the TTB will not do so if it threatens revenue collection. Similarly, officials recognized that nonenforcement is a serious subject and some suggested that, to the extent reasonably possible, agencies should change the underlying legal requirements themselves rather than simply finding exceptions to those requirements. Along with the CFPB, these agencies also recognized that there is little prospect of judicial review; indeed, none could recall litigation regarding a nonenforcement decision. Likewise, across all the agencies that contributed to this Report, there are few examples of agencies *sua sponte* engaging in prospective nonenforcement (i.e., excusing noncompliance with the law before it has occurred); usually, they require a regulated party to petition or otherwise ask for such treatment. That said, agencies are reticent to discuss prosecutorial discretion, including whether it is done *sua sponte*.

Finally, this Report identifies best practices. Because nonenforcement decisions are often left to agency discretion, and, indeed, are often not subject to judicial review, it is especially important that agencies be able to exercise nonenforcement fairly and efficiently. Accordingly, this Report urges agencies to generally:

- Publicize nonenforcement programs, policies, and procedures, particularly for prospective nonenforcement.
- Publicize nonenforcement decisions and encourage comment from other affected entities.
- Prepare written explanations of nonenforcement decisions, whether or not the decisions or explanations themselves will be made publicly available.
- Save nonenforcement for "special" cases, including by drafting criteria that prioritize objective characteristics.
- Eliminate outdated or otherwise ineffective regulatory requirements that regularly necessitate nonenforcement.

Although these best practices are not silver bullets, they should help regularize administrative nonenforcement without imposing undue limits on agency discretion.

* * *

This Report proceeds as follows. Part I lays out the background, with particular emphasis on the theoretical discussion to date surrounding nonenforcement. Part II attempts to set forth a taxonomy of nonenforcement by distinguishing between waivers, exemptions, and prosecutorial discretion, and by identifying different categories of each (e.g., broad versus narrow, upon petition or *sua sponte*, etc.). Part III, in turn, is the study. It begins by setting forth the methodology and then analyzes the survey data and sets out case studies based on the interviews with the CFPB, FAA, MSHA, and TTB. Finally, this Report sets out a number of best practices in Part IV.

I. BACKGROUND: AGENCY NONENFORCEMENT

When one thinks of administrative law, what often comes to mind is affirmative conduct by agencies to change the legal status quo. For instances, an agency may promulgate a regulation to create new legal duties or grant new legal privileges.[21] Or an agency may conduct an adjudication to determine whether a party has violated a legal duty and so merits punishment; such a determination of wrongdoing, often with a sanction of some sort, also changes the legal status quo.[22] Likewise, an agency may grant a permit or license.[23] Considering these sorts of everyday examples, one could be forgiven for concluding that administrative law is all about *action*: agencies use executive power to enforce the law.[24]

Sometimes, however, agencies decide *not* to enforce the law. Rather than affirmatively enforcing the law, they may excuse—either prospectively or retrospectively—violations of the law. Sometimes they do this pursuant to express grants of authority,[25] including for reasons that Congress has specifically deemed

[21] *See* 5 U.S.C. § 553 (setting forth process to promulgate a regulation); Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 116 (2011) ("An agency with authority to issue these regulations acts as a delegate of Congress, and a lawfully enacted legislative rule binds the public, the courts, and the agency itself with the force of a statute.").

[22] *See* 5 U.S.C. § 554 (setting forth process for an adjudication); CFTC v. Schor, 478 U.S. 833, 848–49 (1986) (discussing agency adjudicative authority).

[23] *See* 5 U.S.C. § 551(6)–(8) (defining licensing as adjudication even though it shares many of the characteristics of a rulemaking).

[24] City of Arlington v. FCC, 133 S. Ct. 1863, 1873 n.4 (2013).

[25] Congress, for instance, has included waivers in statutory grants of authority for decades and they have been used "intensively since the G. H. W. Bush administration." Edward H. Stiglitz, *Forces of Federalism, Safety Nets, and Waivers*, 18 THEORETICAL INQUIRIES L. 125, 131 (2017).

important.[26] Sometimes, however, they do it pursuant to implicit of grants of authority. For instance, if the agency simply does not have enough resources to do all that is asked of it, it necessarily will allow some violations of the law to go unenforced.

For decades, Congress and the courts have wrestled with how best to address such nonenforcement. After all, even if useful or even sometimes inevitable, agency nonenforcement, like other discretionary powers, presents opportunities for abuse, as well as the appearance of irregularity.[27] Nonenforcement, moreover, has become more controversial in recent years,[28] although even its critics generally recognize that it may have appropriate uses.[29] Accordingly, a balance must be struck. This section addresses various efforts to do so, with particular focus on the language used by Congress in the Administrative Procedure Act (APA)—and how federal courts have construed that language—to address agency nonenforcement of the law.

A. The Administrative Procedure Act and Nonenforcement

The APA, enacted in 1946, governs many aspects of administrative law (subject, of course, to some limitations[30]), including judicial review of agency action.[31] A key feature of the APA, especially as interpreted,[32] is a presumption of reviewability.[33] In

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[26] For instance, for purposes of federalism, waiver to States have been used extensively in welfare and healthcare schemes. *See, e.g.*, Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 1030 (2016).

[27] *See, e.g.*, Richard A. Rosen & David S. Huntington, *Waivers from the Automatic Disqualification Provisions of the Federal Securities Laws*, 29 INSIGHTS, Aug. 2015, at 2, 3 ("In recent years, however, in the wake of the financial crisis, the SEC has taken a harder look at the waiver process, denying waivers in some high-profile cases and generating dissent among the Commissioners about the proper role of waivers.").

[28] *See id.* at 6 ("Until a few years ago, the SEC routinely granted waivers when they were requested, with little comment or dissent. Now, the Commissioners are increasingly outspoken and polarized on decisions about waivers. The current policy debate on the appropriateness of granting waivers turns on several core policy issues, and is divided among political party lines . . . .").

[29] *See* Epstein, *supra* note 8 ("Although all selective waivers may be suspect, there are surely some circumstances under which they are acceptable. Assume, for example, that all the applicants for a new job were supposed to receive their application forms at the same time, but for some reason the instructions were delivered to one applicant a day late. At this point, a waiver extending the deadline by one day would redress an imbalance that arose through no one's fault.").

[30] *See, e.g.*, 5 U.S.C. § 553(a)(1) (excluding "military or foreign affairs" from rulemaking procedures).

[31] *See id.* §§ 701–706.

[32] *See* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014).

application, this "presumption of reviewability" means "statutes will not be held to preclude review unless there is 'clear and convincing' evidence that Congress intended to do so."[34]

Especially in light of a presumption of reviewability, one might think that nonenforcement decisions would be subject to the same sort of judicial review as enforcement decisions. After all, Section 704 declares that "final agency action" is "subject to judicial review" so long as there is "no other adequate remedy in a court."[35] "Agency action," in turn, is defined to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act*."[36] Likewise, Section 706 commands a reviewing court to "compel agency action unlawfully withheld."[37] Thus, so long as the other requirements of judicial review are met, why wouldn't an agency's failure to act ground a judicial challenge?

The APA, however, imposes additional limits on judicial review—limits that may be relevant to nonenforcement. In particular, Section 701 creates two categories of unreviewable agency decisions: "(1) those in which the statute precludes review, and (2) those in which agency action 'is committed to agency discretion by law.'"[38] As Cass Sunstein has explained, these provisions may create more questions than they answer. If the law explicitly commits an *unreviewable* decision to an agency, has it not also, by definition, precluded review?[39] But if the specific statute does not say the agency has unreviewable discretion, why wouldn't the decision be reviewable, especially because the APA empowers courts to review agency decisions for abuses of discretion?[40] The APA, by its plain terms alone, does not readily appear to resolve this textual puzzle.

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[33] *See, e.g.*, U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1816 (2016); Sackett v. EPA, 132 S. Ct. 1367, 1374 (2012).

[34] Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 654–55 (1985) (internal citations omitted).

[35] 5 U.S.C. § 704.

[36] *Id.* § 551(13) (emphasis added).

[37] *Id.* § 706(1).

[38] *Id.* at 657 (citing 5 U.S.C. §§ 701(a)(1), (a)(2)).

[39] *See id.*

[40] *See id.*; *see also* 5 U.S.C. § 706(2)(A) (authorizing a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . an abuse of discretion").

B. Judicial Consideration of Nonenforcement

In recent decades, the federal judiciary has not had many occasions to address agency nonenforcement. The reason is no secret. Ever since the Supreme Court's decision in *Heckler v. Chaney*,[41] agency nonenforcement—or, rather, one type of agency nonenforcement, albeit an especially important one (i.e., non-prosecution)—has been presumptively unreviewable. That said, even after *Heckler*, there are a small number of examples of judicial review of nonenforcement decisions.

(i) The Supreme Court's Build-Up to *Heckler v. Chaney*

The Supreme Court has long struggled to define what the APA means by "committed to agency discretion by law." One of the Court's most important efforts to do so, for instance, was in *Citizens to Preserve Overton Park, Inc. v. Volpe*, decided in 1971.[42] There the Court explained that the APA provision "is a very narrow exception" that merely bars review "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[43] Nothing in *Overton Park*'s analysis necessarily commands that the "committed to agency discretion by law" standard for nonenforcement decisions should be more pro-agency than for enforcement decisions. And, indeed, after *Overton Park* was decided, the Supreme Court did review an agency nonenforcement decision. In *Dunlop v. Bachowski*, the Court held that a judge could order the Secretary of Labor to undertake an investigation.[44] Hence, for a time it appeared that the same sort of judicial review analysis would apply in both enforcement and nonenforcement contexts.

(ii) The Watershed *Heckler* Decision

And then came *Heckler*—one of the most important cases in administrative law.[45] There, a group of death row inmates in Oklahoma and Texas were sentenced to die by

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[41] 470 U.S. 821 (1985).

[42] 401 U.S. 402 (1971).

[43] *Id.* at 410 (quoting S. REP. NO. 79-752, at 26 (1945)).

[44] 421 U.S. 560 (1975).

[45] *See, e.g.*, Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 159 (1996) ("*Heckler v. Chaney* stands as one of the modern landmarks of administrative law."); Kenneth C. Davis, *No Law to Apply*, 25 SAN DIEGO L. REV. 1, 2 (1988) ("The most important decision denying review of administrative action on the ground of 'no law to apply' may now be *Heckler v. Chaney* . . . .").

lethal injection.[46] In response, they petitioned the Food and Drug Administration ("FDA"), "claiming that the drugs used by the States for this purpose, although approved by the FDA for the medical purposes stated on their labels, were not approved for use in human executions."[47] Thus, they urged that the "FDA was required to approve the drugs as 'safe and effective' for human execution before they could be distributed in interstate commerce."[48] Indeed, they even called for "the prosecution of all those in the chain of distribution who knowingly distribute or purchase the drugs with intent to use them for human execution."[49]

The FDA disagreed with that "understanding of the scope of FDA" authority.[50] But the FDA also concluded that even if it could grant such relief, it would not. The agency reasoned that it does not bring enforcement actions against every "'unapproved use of approved drugs'" but rather—generally—only "'when there is a serious danger to the public health or a blatant scheme to defraud.'"[51] According to the FDA, use of drugs for state-authorized execution did not satisfy that standard.[52]

The inmates brought suit under the APA but the district court granted summary judgment against them on the theory that agency decisions "'to *refrain* from instituting investigative and enforcement proceedings are essentially unreviewable by the courts.'"[53] The D.C. Circuit disagreed, reasoning that agency refusals to act are considered "final agency action" under the APA and the APA's explicit exclusion of judicial review for agency decisions "'committed to agency discretion by law'" should be read narrowly in light of the presumption of reviewability.[54]

The Supreme Court, per then-Justice Rehnquist, reversed. Specifically, the Court concluded that the FDA's "inaction was an unreviewable exercise of prosecutorial

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[46] Heckler v. Chaney, 470 U.S. 821, 823 (1985).

[47] *Id.*

[48] *Heckler*, 470 U.S. at 824.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 824–25 (citation not included in original).

[52] *Id.* at 825.

[53] *Id.* (internal citation omitted).

[54] *Id.* at 825–26 (quoting 5 U.S.C. § 701(a)(2)).

discretion" because there was "'no law to apply'"; thus "[s]uch decisions should therefore be presumed unreviewable under the 'committed to agency discretion' exception to the general rule of reviewability under the APA."[55] Rehnquist offered at least four reasons for this conclusion. First, and most importantly, he explained that

> an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.[56]

Second, "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect."[57] Third, "when an agency *does* act to enforce, that action itself provides a focus for judicial review" in a way that is different in kind from nonenforcement.[58] And fourth, "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch."[59]

The Court stressed, however, that the presumption is rebuttable, in particular "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers."[60] But without such "guidelines" from Congress,

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[55] Sunstein, *supra* note 34, at 662 (internal citations omitted).

[56] *See Heckler*, 470 U.S. at 831–32.

[57] *See id.* at 832.

[58] *See id.*

[59] *Id.*

[60] *See id.* at 833; *see also id.* ("Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue.").

the agency's nonenforcement decision—as a rule—cannot be challenged. On this basis the Court distinguished *Dunlop*,[61] in which Congress had specifically ordered (using the word "'shall'") the Secretary of Labor to undertake an investigation if certain predicate requirements were met.[62] The Court concluded with respect to the FDA that Congress had not provided such "guidelines."[63] The Court also suggested, in a footnote, that certain types of nonenforcement may be too significant to escape review.[64]

Justice Brennan concurred because every day "hundreds of agencies" make "[i]ndividual, isolated nonenforcement decisions," and Congress surely "has not intended courts to review such mundane matters."[65] Yet he also emphasized that the Court's decision did not address situations in which "(1) an agency flatly claims that it has no statutory jurisdiction . . . ; (2) an agency engages in a pattern of nonenforcement of clear statutory language . . . ; (3) an agency has refused to enforce a regulation lawfully promulgated and still in effect; or (4) a nonenforcement decision violates constitutional rights."[66] Justice Marshall concurred in the judgment because although it was "easy" to conclude that the FDA's particular decision should not be reviewed, in his view a "'presumption of unreviewability'" goes too far.[67]

(iii) Post-*Heckler* Supreme Court Cases

Since *Heckler*, the Supreme Court has largely continued to take the position that nonenforcement is not reviewable, at least when it comes to a decision not to bring an enforcement action. That said, the Court has also concluded, albeit in somewhat unusual circumstances, that nonenforcement sometimes is subject to review.

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[61] *Dunlop v. Bachowski*, 421 U.S. 560 (1975).

[62] *Heckler*, 470 U.S. at 833 (quoting 29 U.S.C. § 482).

[63] *See id.* at 835–37.

[64] *See, e.g.*, Michael Kagan, *A Taxonomy of Discretion: Refining the Legality Debate About Obama's Executive Actions on Immigration*, 92 WASH. U. L. REV. 1083, 1098 (2015) ("In *Heckler*, the Supreme Court suggested in a footnote that there is some threshold at which an executive's exercise of discretion becomes 'so extreme as to amount to an abdication of its statutory responsibilities.'") (quoting *Heckler*, 470 U.S. at 833 n.4).

[65] *Heckler*, 470 U.S. at 839 (Brennan, J., concurring).

[66] *Id.*

[67] *Id.* at 840 (Marshall, J., concurring in the judgment).

The Court has repeatedly reiterated *Heckler*'s presumption of nonreviewability.[68] Even in finding the presumption overcome, moreover, the Court has stressed the presumption's strength. In *FEC v. Akins*,[69] for instance, the Court concluded that notwithstanding *Heckler*, the agency was required to enforce certain disclosure requirements. But the Court reached this conclusion only because federal law "explicitly" required the agency to act.[70]

In *Massachusetts v. EPA*,[71] however, the Court read *Heckler* narrowly—at least in one context. The question in *Massachusetts* addressed the agency must regulate greenhouse gas emissions under the Clean Air act. The Court largely concluded yes, and in so doing devoted much of its analysis to its substantive interpretation of the statute. The Court, however, also had to address a nonenforcement question. Certain entities petitioned the EPA to regulate such emissions; the EPA concluded, however, that it lacked statutory authority to do so and, in any event, that even if it did have such authority, it would not exercise it.[72] The Court thus had to address whether a denial of a petition for rulemaking (which also is a decision to not act) should be treated the same as a decision to not bring an enforcement action.

The Court concluded that the two situations are not comparable, even though they both, in a sense, involve agency inaction. Although noting that the Court had "repeated time and again" that "an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities," and, indeed, that such "discretion is at its height when the agency decides not to bring an enforcement action," the Court refused to apply the *Heckler* presumption:

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[68] *See, e.g.*, Lincoln v. Vigil, 508 U.S. 182, 191 (1993) (reiterating *Heckler*); Webster v. Doe, 486 U.S. 592, 599–600 (1988) (same); Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 157–58 (2012) (similar). The Court has made very statements along these lines in the context of immigration. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 396–97 (2012); Reno v. Am.-Arab Anti-Discrim. Comm., 525 U.S. 471, 484–85 (1999).

[69] 524 U.S. 11 (1998).

[70] *Id.* at 26. Justice Scalia, joined by Justices O'Connor and Thomas, disagreed: "The provision of law at issue in this case is an extraordinary one, conferring upon a private person the ability to bring an Executive agency into court to compel its enforcement of the law against a third party. Despite its liberality, the Administrative Procedure Act does not allow such suits . . . ." *Id.* at 29–30 (Scalia, J., dissenting).

[71] 549 U.S. 497 (2007).

[72] *See id.* at 513 ("Even assuming that it had authority over greenhouse gases, EPA explained in detail why it would refuse to exercise that authority.").

> There are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action. In contrast to nonenforcement decisions, agency refusals to initiate rulemaking "are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation." They moreover arise out of denials of petitions for rulemaking which (at least in the circumstances here) the affected party had an undoubted procedural right to file in the first instance. Refusals to promulgate rules are thus susceptible to judicial review, though such review is "extremely limited" and "highly deferential."[73]

Although four justices dissented on other grounds, this analysis went without rebuttal. Hence, a denial for a petition of rulemaking, although potentially conceptualized as nonenforcement, falls outside *Heckler*.

(iv) Recent Supreme Court Non-Answers

Recently, the Supreme Court was asked to address nonenforcement in litigation challenging the Obama Administration's nonenforcement of certain immigration laws. President Obama, in particular, announced that a subset of otherwise deportable immigrants would not be deported so long as they could satisfy certain conditions.[74] In a preliminary injunction posture, the Fifth Circuit rejected that decision as unlawful.[75] The Supreme Court granted certiorari and, interestingly, in doing so directed the parties to brief "Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3."[76]

In its brief to the Supreme Court, the United States repeatedly invoked *Heckler*—arguing that "*Heckler*'s presumption of non-reviewability applies to decisions to defer immigration enforcement action" and that "discretion to permit an alien to be 'lawfully

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[73] *Id.* at 527–28 (quoting Am. Horse Protection Ass'n v. Lyng, 812 F.2d 1, 3–4 (D.C. Cir. 1987) and Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989)).

[74] *See, e.g.*, *Fact Sheet: Immigration Accountability Executive Action*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Nov. 20, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action ("These executive actions . . . prioritize deporting felons not families, and require certain undocumented immigrants to pass a criminal background check and pay their fair share of taxes as they register to temporarily stay in the U.S. without fear of deportation.").

[75] *See* Texas v. United States, 809 F.3d 134 (5th Cir. 2015).

[76] United States v. Texas, 136 S. Ct. 906, 906 (2016) (mem.).

present' . . . is thus precisely the kind of agency judgment that is committed to DHS's discretion under *Heckler*."[77] Texas, joined by numerous other States, rejected this argument: The new policy is "affirmative governmental action" rather than nonaction because "it creates a massive bureaucracy to grant applicants lawful presence, related benefits eligibility, and work authorization."[78] The Court, however, did not decide which side had the better of the fight. Instead, it divided four to four and affirmed the lower court decision while issuing no opinion.[79]

In a similar vein, the Supreme Court recently denied leave to file a bill of complaint in an original case brought by Nebraska and Oklahoma against Colorado challenging Colorado's marijuana laws.[80] This complaint also raised, indirectly, questions about federal nonenforcement because activities authorized by Colorado violate federal law. The U.S. Department of Justice, however, has determined that, as a matter of "prosecutorial discretion," it generally would not enforce federal law so long as certain conditions (i.e., "both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system") are satisfied.[81] The Supreme Court did not address the validity of this nonenforcement.

(v) Lower Court Litigation

Following *Heckler* and these cases, one may suppose that federal courts would only rarely review nonenforcement decisions, if at all. And that is generally true.[82]

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[77] Brief for the Petitioners at 36–37, United States v. Texas, 136 S. Ct. 2271 (2016) (mem.) (*per curiam*) (No. 15-674), 2016 WL 836758; *see also id.* at 39 ("A ruling that the Guidance is reviewable because of long-established consequences that it does not alter would eviscerate *Heckler*'s protection under [immigration law], because the same consequences flow from countless discretionary decisions in immigration enforcement.").

[78] Brief for the State Respondents at 39, United States v. Texas, 136 S. Ct. 2271 (2016) (mem.) (*per curiam*) (No. 15-674), 2016 WL 1213267.

[79] *See* United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (mem.) (*per curiam*).

[80] *See* Nebraska v. Colorado, 136 S. Ct. 1034, 1034 (2016) (mem.) (denying the Motion for Leave to File a Bill of Complaint).

[81] *See* Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, Guidance Regarding Marijuana Enforcement 3 (Aug. 29, 2013), http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

[82] *See, e.g.*, Baltimore Gas & Elec. Co. v. FERC, 252 F.3d 456, 458–59 (D.C. Cir. 2001) ("*Chaney* sets forth the general rule that an agency's decision not to exercise its enforcement authority, or to exercise it in a particular way, is committed to its absolute discretion."); Am. Gas Ass'n v. FERC, 912 F.2d 1496, 1505 (D.C. Cir. 1990) (broadly stating that "nonenforcement decisions are ordinarily unreviewable").

Certain types of nonenforcement, however, are reviewed. Although courts, for instance, rarely review an agency's decision to not bring an enforcement action, they are more willing to review an agency's decision to waive one of its own rules or requirements *within* a proceeding that has already begun. Likewise, courts may review an agency's decision to *not* exercise its nonenforcement power. And, of course, sometimes courts conclude that *Heckler*'s presumption is rebutted. Finally, at least in some courts, a general policy of nonenforcement may be reviewable even if an individualized instance of nonenforcement is not.

The D.C. Circuit's decision in *NetworkIP, LLC v. FCC*[83] is a good example of an agency's decision to not enforce a regulation within a proceeding. There, APCC Services, Inc. ("APCC") filed an informal complaint against NetworkIP, LLC and Network Enhanced Telecom, LLP (which the D.C. Circuit collectively referred to as "NET"). Unfortunately, "[o]n the absolutely last day it could be timely, . . . APCC unsuccessfully attempted to file a formal complaint."[84] There were two problems with APCC's formal complaint. First, APCC was required to submit two checks, not just one, because there were two carriers at issue. And second, "the filing fee proffered for each defendant was $5.00 short" because APCC did not read the latest version of the Code of Federal Regulations before trying to file.[85] About two weeks later, APCC filed a correct formal complaint, which the FCC accepted.[86] The agency did so by invoking its waiver authority: "Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."[87] The result of the agency's exercise of its waiver authority was that NET—deemed liable on the merits by the Commission—was subject to an increase in liability.

NET challenged the FCC's nonenforcement of the agency's procedural rules.[88] The D.C. Circuit "reluctantly" agreed with NET, despite "the deference we afford to an agency's decision whether to waive one of its own procedural rules."[89] In particular,

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[83] 548 F.3d 116 (D.C. Cir. 2008).

[84] NetworkIP, LLC v. FCC, 548 F.3d 116, 125 (D.C. Cir. 2008).

[85] *Id.* at 125–26.

[86] *Id.* at 126.

[87] 47 C.F.R. § 1.3.

[88] *NetworkIP*, 548 F.3d at 126.

[89] *Id.* at 127.

the court explained that "before the FCC can invoke its good cause exception, it both 'must explain why deviation better serves the public interest, and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.'"[90] Because the power to waive procedural rules is so important, the court demanded clear criteria to prevent "the danger of arbitrariness (or worse)."[91] After all, if the test is too ill-defined, "[c]omplainants the agency 'likes' can be excused, while 'difficult' defendants can find themselves drawing the short straw."[92] The court concluded that there were no special circumstances as to APCC; waiting until the last minute and then having something go wrong is too ordinary a situation to merit a waiver of the rules.[93]

Another example of judicial review occurring in the context of nonenforcement occurs when an agency declines to exercise its nonenforcement authority. An excellent example of this is found in *Blanca Telephone Co. v. FCC*,[94] also decided by the D.C. Circuit. In this case, the FCC required digital wireless service providers to offer handsets that could be used by those with hearing aids by a certain date. Over one hundred of these providers petitioned the FCC to "waive the deadline."[95] Exercising its waiver authority,[96] the agency did so for a great many of those providers but not for three of them. It concluded that those three had not exercised enough diligence prior to the deadline to justify waiver. The three providers then sought review on the ground that this "differential treatment" was not justified.[97] The D.C. Circuit sided with the agency, explaining that its review of a denial of a waiver is "'extremely limited'"[98] and

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[90] *Id.* (quoting N.E. Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).

[91] *Id.*

[92] *Id.*

[93] *See id.*

[94] 743 F.3d 860 (D.C. Cir. 2014).

[95] *Id.* at 861.

[96] *See* 47 C.F.R. § 1.925(a) ("The Commission may waive specific requirements of the rules on its own motion or upon request."); *see also id.* § 1.925(b)(3) ("The Commission may grant a request for waiver if it is shown that: (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.").

[97] *Blanca Tel.*, 743 F.3d at 862.

[98] *Id.* at 864 (quoting BDPCS, Inc. v. FCC, 351 F.3d 1177, 1181 (D.C. Cir. 2003)).

that it will vacate a denial only if, for instance, the agency altogether "'fails to provide adequate explanation before it treats similarly situated parties differently.'"[99] The court concluded that the agency's decision satisfied that standard.[100] The D.C. Circuit has applied a similar sort of analysis in other cases.[101]

There are also instances in which the *Heckler* presumption is rebutted. Consider *Cook v. FDA*.[102] Like *Heckler* itself, this case involved a lawsuit by "prisoners on death row."[103] In particular, prisoners sued the agency "for allowing state correctional departments to import sodium thiopental (thiopental), a misbranded and unapproved new drug used in lethal injection protocols . . . ."[104] The agency eventually issued a statement that "in 'defer[ence] to law enforcement' agencies, henceforth it would exercise its 'enforcement discretion not to review these shipments and allow processing through [Customs'] automated system for importation.'"[105] The prisoners thereafter sought judicial review of the new policy. The D.C. Circuit distinguished *Heckler*, because "even assuming the presumption against judicial review . . . does apply to the FDA's refusal to enforce [the statute], that presumption is rebutted by the specific 'legislative direction in the statutory scheme.'"[106] The statute "sets forth precisely when the agency must determine whether a drug offered for import appears to violate the [Food, Drug, and Cosmetic Act], and what the agency must do with such a drug."[107] Courts have applied this sort of analysis in other cases as well.[108]

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[99] *Id.* (quoting Morris Commc'ns, Inc. v. FCC, 566 F.3d 184, 188 (D.C. Cir. 2009)).

[100] *See id.* at 865-66.

[101] *See, e.g.*, Delta Radio, Inc. v. FCC, 387 F.3d 897, 901 (D.C. Cir. 2004) ("Given this limited review, we hold that the FCC did not abuse its discretion in failing to grant Delta a waiver of its payment obligations or in assessing the statutory default penalty when Delta failed to meet payment deadlines.").

[102] 733 F.3d 1 (D.C. Cir. 2013).

[103] *Id.* at 3.

[104] *Id.*

[105] *Id.* (alterations in original) (no citation in original).

[106] *Id.* at 7 (quoting Heckler v. Chaney, 470 U.S. 821, 833 (1985)).

[107] *Id.*

[108] *See, e.g.*, Nat'l Wildlife Fed'n v. EPA, 980 F.2d 765, 773–74 (D.C. Cir. 1992); Ctr. for Auto Safety v. Dole, 828 F.2d 799, 803 (D.C. Cir. 1987) ("The *Chaney* Court said it was 'leaving to one side the problem of whether an agency's rules might under certain circumstances provide courts with adequate guidelines for informed judicial review of decisions not to enforce.' This case, however, squarely presents that situation

Finally, some lower courts have held that there is a difference between nonenforcement in an individual case and a policy of nonenforcement. For instance, in the D.C. Circuit, "an agency's statement of a *general enforcement policy* may be reviewable for legal sufficiency where the agency has expressed the policy as a formal regulation after the full rulemaking process . . . or has otherwise articulated it in some form of universal policy statement . . . ."[109] Hence, for example, in *Edison Electric Institute v. EPA*, the court conclude that an EPA "Enforcement Policy Statement" can be reviewed because the "[p]etitioners [were] not challenging the manner in which the EPA has chosen to exercise its enforcement discretion," but instead were attacking the agency's statutory interpretation.[110]

C. Academic Consideration of Nonenforcement

Although the academy has not devoted as much attention to nonenforcement as it has to other aspects of administrative law, the subject has not gone unnoticed.[111] This Report is not the place for an exhaustive review of the literature, especially because the Report does not address the constitutional questions surrounding nonenforcement—questions which, at least of late, have dominated the academic discussion. That said, it is useful to examine some of the key insights from scholarship.

Unsurprisingly, the academic discourse focuses on many of the same questions that have occupied the judiciary. Some appear to have advanced arguments that would support robust discretion when it comes to nonenforcement, including notably Kenneth Culp Davis, who observed that "[r]ules without discretion cannot fully take into

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in which an agency's own regulations do contain a 'judicially manageable' standard for making nonenforcement decisions.") (citation omitted).

[109] Crowley Caribbean Transp., Inc. v. Peña, 37 F.3d 671, 676 (D.C. Cir. 1994) (emphasis in original) (citations omitted); *see also* People for the Ethical Treatment of Animals, Inc. v. U.S. Dep't of Agric., 7 F. Supp. 3d 1, 10 (D.D.C. 2013) (explaining the exception).

[110] 996 F.2d 326, 333 (D.C. Cir. 1993).

[111] *See, e.g.*, Barron & Rakoff, *supra* note 6, at 276 (discussing waiver in some detail); Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1818 (2015) (briefly discussing waiver); Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501, 535 (2015) (same). Prosecutorial discretion—including the context of regulatory duties administered by federal agencies—has also received scholarly attention in recent years. *See, e.g.*, Peter L. Markowitz, *Prosecutorial Discretion Power at its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489 (2017) (urging that discretion makes the most sense when it protects liberty); Daniel Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENVTL. L. REV. 159 (2014) (examining such discretion empirically in environmental context).

account the need for tailoring results to unique facts and circumstances of particular cases. The justification for discretion is often the need for individualized justice."[112] That analysis, although written about discretion generally, seems to capture one of the key underpinnings of nonenforcement discretion. Some amount of nonenforcement is inevitable because of resource constraints.[113] Looking for evidence of a violation when that violation may or may not have occurred could, in theory, soak up infinite resources since it is impossible to prove a negative, i.e., to be certain that no violation occurred. And even if a violation is known, it may not be cost-effective to pursue it, especially if it means that other, more important, violations could not also be pursued.

More provocatively, David Barron and Todd Rakoff have written in defense of so-called "big waiver," a concept that includes the idea that agencies should be able to waive not just regulatory requirements of their own making but also statutory requirements of Congress's making.[114] They argue that "big waivers" are constitutional and sometimes good policy: "Big waiver offers a salutary means of managing the practical governance concerns that make traditional delegation unavoidable."[115] Similarly, Leigh Osofsky—in the context of tax—has advanced the case for "categorical nonenforcement," i.e., "complete, prospective nonenforcement of some aspect of the law."[116] Simply stated, she argues that if nonenforcement is going to happen anyway, there sometimes is value in doing so categorically.[117] And in the context of immigration

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[112] KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 17 (1969); *see also id.* at 43–44 (arguing that eliminating "all discretion on all subjects would be utter insanity"). That said, it is important to note that Professor Davis was skeptical of an absolutist position; for instance, he disagreed with the Supreme Court's decision in *Heckler*. *See* Davis, *supra* note 45, at 9 ("In light of the long history, one may be reasonably sure that the Court's preference for the extreme *Chaney* view will not long endure.").

[113] *See, e.g.*, Michael Sant'Ambrogio, *The Extra-legislative Veto*, 102 GEO. L.J. 351, 381 (2014) (explaining that some "laws that cannot achieve all their goals with the resources available"); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1846 (2015) (listing "resource allocation" as a "[k]ey component[] of administration").

[114] *See* Barron & Rakoff, *supra* note 6, at 267.

[115] *See id.* at 270; *see also id.* ("Through big waiver, Congress takes ownership of the first draft of a regulatory framework, confident that its handiwork will not prove to be rigid and irreversible.").

[116] Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 TAX L. REV. 73, 73 (2015).

[117] *See id.* at 75–76 ("[I]n some circumstances categorical nonenforcement may actually increase the legitimacy of the IRS's nonenforcement.").

in particular, many scholars have accepted that policy concerns should be allowed to influence nonenforcement decisions.[118]

At the same time, others have criticized nonenforcement, especially some applications of it. Zach Price, among others, has expressed concern about policy-driven nonenforcement, both as a constitutional matter and also for its normative implications.[119] If nonenforcement is accepted and applied too broadly, the Executive Branch could essentially nullify a valid act of Congress. Building on that insight, others have expressed concern about systemic implications. After all, presidential elections and the regulatory process have already become heated.[120] One does not need to be a political theorist to recognize that the more issues at stake when selecting a president, the more energy, across ideological issues, will be exerted.[121]

Another concern, expressed by some, is that there are few "laws, procedures, or assurances of transparency" for nonenforcement.[122] This lack of transparency can be problematic. Similarly, an agency may also use its nonenforcement power to achieve ends not allowed by the statute; if the agency could pursue an enforcement action, it may be able to leverage that power to force a regulated party to do something else the agency wants, in hopes of avoiding an enforcement action.[123]

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[118] *See, e.g.*, Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010) ("This article argues that prosecutorial discretion is both a welcome and a necessary component of immigration law."). *But see* Delahunty & Yoo, *supra* note 10, at 781 (challenging whether broad nonenforcement is always permissible).

[119] *See, e.g.*, Price, *supra* note 7, at 671 (arguing that "the President's nonenforcement authority extends neither to prospective licensing of prohibited conduct nor to policy-based nonenforcement of federal laws for entire categories of offenders"); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1124–25 (2013) ("Though he has great latitude to influence enforcement policy, the President also has an obligation to use his enforcement authority in a way that he can defend as consistent with the law.").

[120] *See, e.g.*, Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1682–1703 (2012) (noting increased tension in regulatory matters).

[121] *See, e.g.*, Aaron Nielson, *An Indirect Argument for Limiting Presidential Power*, 30 HARV. J.L. & PUB. POL'Y 727, 740, 743 (2007) (noting the risk).

[122] Gluck et al., *supra* note 111, at 1818.

[123] *See, e.g.*, Barron & Rakoff, *supra* note 6, at 277–78 (explaining that agencies "can condition its grant of a waiver on an applicant's satisfying requirements not otherwise required by statute"); Epstein, *supra* note 8 (vigorously criticizing this danger as fundamentally contrary to rule-of-law values).

Academics have also recognized that the whole idea of agency inaction versus agency action may be problematic because it can be difficult to draw a line between the two.[124] At the same time, judicial review of nonenforcement can be institutionally challenging for courts, although Daniel Walters has recently suggested that perhaps an APA "arbitrary and capricious" approach would be desirable.[125]

To be clear, the academic discussion of nonenforcement goes beyond these issues, especially to the extent that nonenforcement discretion is part of the larger question of how to manage discretion.[126] For purposes of this Report, however, this discussion, through truncated, should suffice.

II. A TAXONOMY OF NONENFORCEMENT

As explained above, nonenforcement has not received a great deal of attention from courts and academics. And when it is mentioned, all too often, it is treated as a unitary concept. In fact, however, there is a wide variety of nonenforcement. And different types of nonenforcement present different considerations. For instance, a public decision to forego an enforcement action against an already complete violation of the law following a formal request by the lawbreaker is different in many respects from a *sua sponte* decision by the agency to prospectively waive a procedural requirement for a party that has not yet violated the law. This is not to say that nonenforcement is more or less appropriate in one of these contexts than the other. Indeed, both present different sorts of advantages and disadvantages. Rather, it is enough to observe that the two contexts are different and how one thinks about nonenforcement—and how to safeguard it—might also be different in each.

To be sure, some have recognized that there are different types of nonenforcement. For instance, Leigh Osofsky has observed that how one views nonenforcement may change depending on whether the decision is "technical" or

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[124] Jim Rossi, *Waivers, Flexibility, and Reviewability*, 72 CHI.-KENT L. REV. 1359, 1369–70 (1997).

[125] *See, e.g.*, Daniel E. Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911 (2016) (identifying the difficulties with judicial review of nonenforcement and urging a middle ground).

[126] The "discretion question" may be the largest question of all in administrative law. *See, e.g.*, Geoffrey C. Shaw, *H. L. A. Hart's Lost Essay:* Discretion *and the Legal Process School*, 127 HARV. L. REV. 666, 668 (2013).

"policy-laden."[127] She also has focused on the differences between an agency decision to engage in "categorical, or complete, prospective nonenforcement of some aspect of the law" versus merely "setting low enforcement priorities."[128] Similarly, Kate Bowers has differentiated "project-specific" waivers that are based on "individual circumstances" from "[c]ategory-specific waiver[s]" that apply to a "designated category" or even "a single law, such as the Energy Policy Act of 2005."[129] She also has recognized "[n]onspecific" waivers that give "general principles to guide" the agency.[130] The distinction between "big" and "little" waiver is similar.[131] Likewise, Michael Kagan has organized nonenforcement along a spectrum in the context of immigration, concluding that "[c]ongressionally authorized discretion" and "[d]iscretion to not enforce the statute in every case" have the most legal support while "[e]stablishing categorical criteria" may be most vulnerable to legal challenge.[132]

This instinct to disaggregate nonenforcement is right. Such analysis, however, can and should be expanded. To begin, it is important to evaluate nonenforcement depending on *timing*, i.e., whether the unlawful conduct has occurred. An agency's decision to excuse a violation that has not occurred yet is different in kind[133] from an agency's decision to not enforce the law against a violation that has already happened. Likewise, apart from timing, there are a wide range of *situational* considerations that

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[127] Osofsky, *supra* note 116, at 112. *See also id.* ("A comprehensive evaluation of executive nonenforcement should take into account the different types of decisions that agencies make.").

[128] *Id.* at 73.

[129] Kate R. Bowers, *Saying What The Law Isn't: Legislative Delegations Of Waiver Authority In Environmental Laws*, 34 HARV. ENVTL. L. REV. 257, 261–62 (2010).

[130] *Id.* at 262.

[131] Barron & Rakoff, *supra* note 6, at 277–78 (explaining that "little waiver" is "a limited power to handle the exceptional case" while "big waiver" is authority to "substantially revise and not modestly tweak"); *see also id.* (listing a number of types of considerations that may constitute "big waiver," including the Agency's "authority to waive otherwise applicable statutory requirements, even absent an application for a waiver," its "authority to waive" without first "ascertaining the existence of specified factual predicates," its authority to "waive any part of the statute at issue" rather than just a set of specific requirements, and whether its "authority to waive pertains to a substantial group of outside parties").

[132] *See* Michael Kagan, *A Taxonomy of Discretion: Refining the Legality Debate About Obama's Executive Actions on Immigration*, 92 WASH. U. L. REV. 1083, 1085–87 (2015).

[133] The law often distinguishes between acts that have occurred and those that have not. One does not go to jail for something that has not happened. Likewise, procedural options may change depending on whether the action has occurred. *See, e.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922, 929 (1975) ("Having violated the ordinance, rather than awaiting the normal development of its federal lawsuit, M & L cannot now be heard to complain that its constitutional contentions are being resolved in a state court.").

may go into evaluating a nonenforcement decision, including but not limited to those identified above. Hence, the purpose of this section is to create a taxonomy of nonenforcement. This will enable a more meaningful understanding and evaluation of the day-to-day reality of nonenforcement.

A. Temporality and Nonenforcement

One of the key distinctions that must be drawn is between nonenforcement when the entity at issue has already violated a legal duty and when it has not. If the law has already been violated, nonenforcement comes via prosecutorial discretion. If the law has not been violated, either waiver or exemption may apply.

At this point is it useful to define some terms, at least for purposes of this Report. There is an obvious difference between not enforcing the law against an already complete violation and pledging to not enforce the law against a violation that has not yet occurred. The former is an act of prosecutorial discretion; the latter is an act of prospective authorization. Yet not all acts of prospective authorization are the same. For instance, sometimes Congress has itself explicitly created a system that allows the agency to give such prospective authorization. Other times, Congress has authorized, perhaps implicitly, the agency to create its own procedures and internal rules, and from that authorization the agency has created its own system to provide prospective authorization. Of course, in a sense, these two situations are not categorically distinct because an agency cannot do what Congress has not allowed; agencies (as a rule) do not have inherent authority to act beyond what Congress has permitted.[134]

Yet it is useful to distinguish between the two situations. For purposes of this Report, where Congress has expressly authorized the agency to permit prospective nonenforcement, the term "waiver" is used; by contrast, where the agency has acted without an express grant of authority from Congress, the term "exemption" is used. As it is now, the terms are often used fairly interchangeably or in ways that draw distinctions that are not conceptual in character.[135] That said, for reasons explained

[134] *See* HTH Corp. v. NLRB, 823 F.3d 668, 679 (D.C. Cir. 2016) ("[W]e have recognized that agencies enjoy some powers that were not expressly enumerated by Congress. Although we have often described these powers as 'inherent,' the more accurate label is 'statutorily implicit.'") (citations omitted).

[135] *See, e.g.*, *What is a waiver? An exemption?*, FED. MOTOR CARRIER SAFETY ADMIN., https://www.fmcsa.dot.gov/faq/what-waiver-exemption (last visited July 22, 2017) (distinguishing the two because a "waiver provides the person with relief from the regulation for up to three months" while

below, although it is possible to draw such a conceptual distinction between "waivers" and "exemptions," it may not be worthwhile to do so. These types of nonenforcement are sufficiently similar (and appear to be treated by agency officials as virtually interchangeable) that distinguishing between them may not be worth the candle. Another possible way to try to distinguish between waivers and exemptions is to say that waivers apply to statutory requirements while exemptions apply to regulatory requirements; that distinction also does not seem to be universally accepted, however. Thus, for purposes of this Report, an agency can waiver or exempt either a statutory or regulatory requirement; the distinction is not the type of duty at issue but the clarity of the agency's grant of nonenforcement authority from Congress.

B. Non-Temporal Nonenforcement Factors

Apart from time, there are many other factors to consider when evaluating nonenforcement. Nonenforcement may warrant greater caution in its exercise depending on the circumstances. The following ten factors are worth considering:

(i) Who Makes the Decision?

To begin, it is useful to know who makes nonenforcement decisions. Specifically, can the agency's decision to engage in nonenforcement be made by agency staff, or must a political appointee do so? And if the decision is left to staff, is there a meaningful right of appeal to the political appointee? Relatedly, it is useful to know who has a part in the decision-making process, even if they are not the ultimate deciders. For instance, if someone from outside of the agency plays a role, that may be useful information. To the extent that nonenforcement decisions are controversial, one might think that they are important matters meriting the greater political accountability. At the same time, to the extent that one is concerned that the administrative process takes too long, one might worry about appellate rights.

(ii) The Nature of the Agency Judgment

One of the most important factors is whether the agency's waiver decision is merely technical or whether it is driven by policy.[136] As Professor Osofsky explains, an agency "may make policy-laden decisions about whether to pursue business taxes aggressively or not, as well as expertise-laden decisions about whether administrative

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an "exemption provides the person or class of persons with relief from the regulations for up to two years, but may be renewed").

[136] *See, e.g.*, Osofsky, *supra* note 116, at 112 (distinguishing "technical" and "policy-laden" waivers).

concerns preclude enforcement of a very technical tax provision."[137] The public may perceive nonenforcement differently in those two circumstances. This is not to say that nonenforcement is necessarily more or less appropriate in one type of situation than another; the answer to that question depends on one's theory of how governmental authority should be distributed. Some might argue, for instance, that policy-driven nonenforcement is more dangerous, perhaps for constitutional reasons.[138] Others, by contrast, may think that nonenforcement can act as a liberty-enhancing check on bright-line laws, which may require some policy consideration.[139] (This Report is not directed at those higher-level questions; it is enough to observe that they exist.) Of course, separating decisions between "policy-laden" and "technical" is not a simple line to draw; there is a spectrum. Indeed, it is difficult to imagine a purely "technical" decision that does not have some policy implications. After all, "[a] certain degree of discretion, and thus of *lawmaking*, inheres in most executive . . . action."[140] Even so, although it may not always be possible to paint a clean line, the distinction itself is not worthless.

(iii) The Source of the Legal Duty

Another important factor is the nature of the legal duty that the agency is choosing not to enforce. More specifically, is the agency choosing not to enforce a legal duty created by Congress in a statute, or does the duty come from the agency itself in a regulation. (As noted, this one of the key demarcations between "big" and "little" waivers.[141]) This distinction too, of course, is not always black-and-white. After all, agencies cannot act without congressional authorization, and sometimes Congress specifically commands the agency to issue a regulation, so the distinction between congressional and administrative action may be quite thin.

(iv) The Instigation of Nonenforcement

Another factor is whether the agency has authority to engage in nonenforcement *sua sponte*, i.e., on its own volition, or whether it must be made following the receipt of a petition or other such device. Barron and Rakoff consider authority to waive legal duties *sua sponte* to be a "bigger" power.[142] Prosecutorial discretion generally is

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[137] *Id.*

[138] *See, e.g.*, Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1216–17 (2014) (expressing concern about nonenforcement when used for policy reasons).

[139] *See, e.g.*, Michael Sant'Ambrogio, *The Extra-legislative Veto*, 102 GEO. L.J. 351, 361 (2014) (explaining that there may be some advantages, but also dangers, of presidential nonenforcement for policy reasons).

[140] Whitman v. Am. Trucking Assns., Inc., 531 U.S. 457, 475 (2001) (internal citations and punctuation omitted) (emphasis added).

[141] *See* Barron & Rakoff, *supra* note 6, at 267.

[142] *Id.* at 277–78.

something that the agency can choose to do on a *sua sponte* basis. (Indeed, if the agency simply chooses not to investigate, it may not even know that a violation has occurred.) But when it comes to prospective nonenforcement, an agency with power to waive or exempt noncompliance without a petition presumably has more discretion.

(v) The Criteria to Evaluate Potential Nonenforcement

The clarity of the criteria used by the agency in making a nonenforcement decision is also important. Certain agencies, for instance, may have specific requirements that must be met before the agency can engage in nonenforcement (e.g., as discussed below, at some agencies a waiver or exemption can only be given if the regulated party has proposed an alternative that is equally safe). By contrast, other agencies may have broad discretion; indeed some agencies have authority to issue waivers based on "the public interest."[143] In terms of authority, the more flexible the standard, the more powerful the agency. Discretion, of course, enables the agency to target nonenforcement with greater precision, but also increases the risk of bias or at least the appearance of bias. And this too is a spectrum.[144]

(vi) The Breadth of Nonenforcement Across Entities

At the same time, it is also important to observe how many entities are benefited by the agency's nonenforcement decision. An agency may decide to waive a requirement for a single entity, or it may do for an entire category of entities. Both of these approaches have pluses and minuses. When nonenforcement is limited to a single entity, for instance, the aggregate amount of nonenforcement is less than when it applies to a great number of entities. To the extent that compliance with the law is valuable, this is a good thing. Yet if one worries about evenhandedness, categorical nonenforcement may be superior, for instance because it requires drawing fewer nuanced lines.[145]. For purposes here, it is enough to observe that the two are distinct.

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[143] *See, e.g.*, Sergio J. Galvis & Angel L. Saad, *Collective Action Clauses: Recent Progress and Challenges Ahead*, 35 GEO. J. INT'L L. 713, 728 (2004) (explaining that "the SEC has authority to waive any provision of the Trust Indenture Act for reasons of public interest"); 49 U.S.C. § 31315 (1998) ("The Secretary may grant a waiver that relieves a person from compliance in whole or in part with a regulation issued under this chapter . . . if the Secretary determines that it is in the public interest to grant the waiver and that the waiver is likely to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver . . . .").

[144] *See, e.g.*, Aaron L. Nielson, *Beyond* Seminole Rock, 105 GEO. L.J. 943, 968 (2017) (explaining that "the line between clear and ambiguous is a question of degree more than kind").

[145] *See, e.g.*, Osofsky, *supra* note 116.

(vii) The Breadth of Nonenforcement for a Particular Entity

The breadth of nonenforcement for a particular entity also matters. For example, with regards to an entity, an agency may choose to enforce parts of the law while leaving other parts of the law unenforced, or it may choose not to enforce the law at all against that entity. Partial nonenforcement raises different sorts of considerations than complete nonenforcement. On one hand, it may be less objectionable because the violator is not wholly off the hook. On the other hand, it may be more objectionable if it minimizes public scrutiny or allows the agency to pick winners in disputes before it in a potentially biased way.

(viii) Whether Nonenforcement Is Publicly Disclosed

Another key factor is whether the agency's nonenforcement programs, procedures, and decisions are available to the public. Public scrutiny may not be as powerful a check as judicial review, but it is not nothing.[146] Publicity, however, may also create incentives for agencies to enforce the law even in situations in which nonenforcement makes sense, if, for example, the explanation for nonenforcement may be misunderstood or require disclosing sensitive information. Few argue for complete transparency.[147] Publicity, of course, is also not a binary concept. An agency could make sure that its procedures for requesting and obtaining nonenforcement decisions are public. It could also provide that all requests for nonenforcement are public—either before the decision is made (thus potentially allowing others to comment) or after the decision is made. Similarly, an agency could generally make information about its nonenforcement decisions available, subject to exceptions (for instance, if privacy is implicated).

(ix) Benefit to Agency

Another consideration is the question of what the agency "gets," if anything, for allowing nonenforcement. For instance, what must a regulated party do for the agency to obtain a waiver? Is a waiver given as of right, or must a regulated party in a sense "trade" for it by agreeing to do something else that the agency wants, perhaps something not squarely related to the particular issue at hand (i.e., something "outside of the program")? One problem with nonenforcement is that an agency might leverage its power to obtain ends that it may not be able to obtain otherwise within the law. To the extent that the criteria are objective, an agency's ability to leverage authority in this

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[146] *See, e.g.*, T. Alex Aleinikoff, *Non-Judicial Checks on Agency Action*, 49 ADMIN. L. REV. 193, 195–96 (1997) ("Old-fashioned publicity is another significant check on agency action.").

[147] *See generally* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 902–903 (2006) (setting forth some of "transparency's limits").

way would be reduced (though of course not eliminated). This is especially true to the extent that an agency's use of leverage is not in the open.

(x) Whether There Is Judicial Review

Finally, it also is useful to know whether the nonenforcement at issue is subject to judicial review, for instance because the *Heckler* presumption has been rebutted. If the decision is subject to judicial review, perhaps there is more reason to be confident that agency discretion has not been abused because judicial review may serve a disciplining role.[148] Of course, this is not to say that a nonenforcement regime without judicial review is always necessarily a worse one; judicial review has costs of its own.[149] Yet in evaluating whether a nonenforcement scheme is susceptible to abuse, judicial review surely matters.[150]

C. A Visual Taxonomy of Nonenforcement

When all of these factors are considered, a visual taxonomy of nonenforcement is possible. To be sure, this chart is imperfect, especially because many of these factors are best understood as a spectrum. Similarly, one can imagine other visual representations, for instance by placing other considerations on the X-axis. That said, this is a useful way to visualize nonenforcement. For instance, one agency may waive a statutory duty upon written request for a specific entity using specific standards while providing notice to the public of its nonenforcement decision. Another agency, by contrast, may exercise prosecutorial discretion *sua sponte* for a category of entities by applying an open-ended standard, without providing any notice to the public. Those two situations are distinct and should not be conflated.[151]

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[148] *See, e.g.*, Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 529 ("[A] world without aggressive judicial review might well suffer from increases in lawlessness, carelessness, overzealous regulatory controls, and inadequate regulatory protection.").

[149] *See, e.g.*, Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U.L. REV. 673 (2015) (arguing that some checks on discretion are not cost-justified).

[150] *Cf.* William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 59–60 (1975) (explaining the disciplining effect of judicial review).

[151] To be clear, that conclusion is not the only one that can be drawn. For instance, categorical nonenforcement may be less biased. *See, e.g.*, Osofsky, *supra* note 116, at 73–75.

Taxonomy of Nonenforcement				
		Pre-Violation		Post-Violation
		Waiver	Exemption	Prosecutorial Discretion
Who Decides	Agency Principals			
	Agency Staff			
Policy Nature	Policy-Driven			
	Technocratic			
Legal Duty	Statutory Duty			
	Regulatory Duty			
Instigate	Sua Sponte			
	Upon Request			
Criteria	Open-Ended			
	Specific			
Breadth Across Entities	Categorical			
	Individualized			
Breadth for Entity	Complete			
	Partial			
Public Notice	No Public Notice			
	Public Notice			
Agency Benefit	Within Program			
	Outside of Program			
Judicial Review	Unreviewable			
	Reviewable			

III. STUDY FINDINGS

With this conceptual understanding of the different types of agency nonenforcement in mind, we can begin assessing how agencies behave in the real world. How often do they engage in nonenforcement, and is the rate comparable across agencies? What specifically drives nonenforcement decisions, and are those factors consistent across agencies? Which agencies publicize their procedures and decisions?

One of the purposes of this Report is to fill this knowledge gap. By examining certain agencies, complete with survey information and interviews with agency officials, it is possible to gain a better understanding of the nitty-gritty world of nonenforcement. To be clear, this Report does not analyze every federal agency and even within the agencies covered, it is possible that there may be additional types of nonenforcement. Yet despite these limitations, this Report provides significant new insights, and it also highlights areas where additional research would be quite valuable

A. Study Methodology

This study was conducted in three parts. First, in consultation with research assistants and through conversations with others, the author conducted a preliminary investigation of nonenforcement powers and procedures at a large number of agencies. This was done by reviewing the U.S. Code, the Code of Federal Regulations, law review articles, and agency websites. The purpose of this initial step was to identify agencies meriting additional research, for instance because they appear to have especially robust nonenforcement powers or because they seem representative of other sorts of agencies.

Following that initial step, the author, working with an ACUS staff member, approached various agencies identified as potentially useful subjects. In particular, to gain a better appreciation of the reality "on the ground," the author prepared a survey (included as the Appendix to this Report) that was sent to agencies that had indicated a willingness to participate in the study. This survey poses specific questions about how the agency at issue evaluates nonenforcement, and the various types of nonenforcement powers it has. The survey is divided into five parts. First, it asks about the agency's statutory power to "waive" legal duties of private parties. Second, it asks about the agency's power to "waive" legal duties for States, i.e., so-called "federalism waivers."[152]

[152] Unfortunately, the agencies that participated in the survey do not report robust use of this type of waiver. Hence, it is not addressed in this Report.

Third, it asks about the agency's practices regarding equitable "exemptions" from regulatory schemes. Fourth, it asks about the agency's practices regarding prosecutorial discretion, i.e., decisions to not enforce the law against violations that have already occurred. And fifth, it asks whether there are other sorts of nonenforcement worth considering, plus whether those outside of the agency participate in the process, whether the agency has best practices to recommend, and whether the agency has a response to the analysis set out in the D.C. Circuit's *NetworkIP* decision.[153]

Again working through ACUS, several follow-up messages were sent to agencies in an effort to ensure robust participation in the survey. Following this effort, nine agencies submitted a survey response.[154] Unsurprisingly, not all agencies agreed to answer every question posed in the survey. Even so, officials graciously answered most of the questions and, importantly, often compiled and provided agency-specific data.

Following receipt of the completed surveys, the author—again in consultation with an ACUS staff member—approached the agencies that participated in the survey to ask whether they would be willing to participate in interviews, either in person or on the telephone. Representatives of four agencies agreed: the CFPB, FAA, MSHA, and TTB. To encourage a candid conversation, those interviews were not recorded. For these interviews, however, the author was accompanied by either one of two ACUS interns. These interns took detailed notes (which are on file with the author). The purpose of this step was to generate several case studies of how specific agencies make nonenforcement decisions.

B. General Survey Findings

One of the most important findings from the survey is that agency practices regarding nonenforcement vary widely. Some agencies engage in robust nonenforcement; others essentially never do. All the while, some agencies grant quite often while others do so less frequently. Some agencies make their decisions public; others do not. In short, because the administrative state is not monolithic, with

[153] This question was included in the survey because the D.C. Circuit's analysis is especially stark and because, as noted above, there is little precedent involving nonenforcement.

[154] As noted in the introduction, these agencies are: the TTB, CDFI, CFPB, EBSA, FAA, FMCSA, FTA, MSHA, and PHMSA. Two of these agencies are within the Department of Treasury (TTB and CDFI), two are within the Department of Labor (EBSA and MSHA), and four are within the Department of Transportation (FAA, FMCSA, FTA, and PHMSA). The CFPB is is "an independent bureau" that is "established in the Federal Reserve System." 12 U.S.C. § 5491(a).

different agencies having different missions and histories, it is hardly surprising that agency nonenforcement is also not monolithic. The survey, however, illustrates just how diverse all of this really is.

Before addressing the *substantive* variety, however, it is important to recognize another result that comes from the survey: agencies use very different vocabularies. As explained above, for purposes of this Report, the terms "waiver" and "exemption" are assigned specific definitions. Waiver authority is power explicitly granted to an agency by Congress to prospectively not enforce either statutory or regulatory duties. Exemption authority, by contrast, is implicit power to prospectively not enforce statutory or regulatory duties because the agency has concluded (often by applying equity-like principles) that such nonenforcement is necessary to effectuate its other duties.[155]

Yet after even a few moments in the real world, it is obvious that these terms have no fixed definitions. In fact, there is a good chance that every agency understands these terms at least somewhat differently, and it is possible that officials even within the same agency understand the terms differently.[156] Indeed, before the FAA could begin to fill out the survey, it required clarification regarding these terms. That said, although there is no well-defined line between waiver and exemption that commands universal approval, it appears that agencies generally appreciate the distinction between prospective nonenforcement (whether called waiver or exemption) and retrospective nonenforcement (prosecutorial discretion). As alluded to above, one takeaway from this Report, therefore, may be that a distinction between waiver and exemption is not worth preserving, and certainly not worth fighting about.[157]

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[155] As explained above, the author recognizes that this distinction is not always easy to draw. By definition, an agency cannot act without congressional authorization. The level of abstraction, however, varies. There was some confusion about the distinction in the surveys. The EBSA, for instance, appears to have used "waiver" and "exemption" interchangeably in its survey response.

[156] Congress also appears to use these terms in ways that do not suggest a sharp conceptual division. *See, e.g.*, 49 U.S.C. § 31315 (distinguishing between "waivers" and "exemptions" by suggesting that waivers are narrower than exemptions, e.g., of a shorter duration and requiring "unique events").

[157] Given the taxonomy of nonenforcement set out above, it would be helpful to be able to map these agency practices onto the taxonomy. Unfortunately, instances of nonenforcement can be *sui generis* and the survey instrument was not detailed enough to capture the nuance. For the agencies that agreed to be interviewed (discussed in Part III.A), the author was able to delve more deeply into some of the issues set out in the taxonomy but even then, not at the detail necessary to map practices onto the taxonomy.

(i) Findings Regarding Waiver

To begin, a majority of the agencies that participated in the survey identified authority to waive some statutory or regulatory requirements. In fact, FAA has so many potential authorizations of waiver that it was unable to catalog them all; it explained that "[t]he specific instances of statutory waiver authority are as varied as the agency's authority is broad, encompassing Title 49 of the United States Code Subtitle VII and significant otherwise uncodified Public Laws."[158] (The FAA did identify eight distinct grants of waiver authority, seven from the same title of the U.S. Code, which are discussed in more detail below.[159]) The PHMSA can waive both statutory and regulatory duties under the Hazardous Materials Safety Program[160] and the Pipeline Safety Program,[161] while the FMCSA has authority to not enforce motor carrier safety regulations[162] and the FTA may waive requirements for certain grants and "Buy

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Similarly, it is difficult to make apples-to-apples comparisons across agencies. Hence, the Report does not create charts to compare them; such charts may cloud more than illuminate.

[158] FAA Survey Response (on file with author).

[159] *See infra*, Part III.C(ii).

[160] *See* 49 U.S.C. § 5117(a)(1) ("As provided under procedures prescribed by regulation, the Secretary may issue, modify, or terminate a special permit authorizing a variance from this chapter or a regulation prescribed under section 5103(b), 5104, 5110, or 5112 of this title to a person performing a function regulated by the Secretary under section 5103(b)(1) in a way that achieves a safety level—(A) at least equal to the safety level required under this chapter; or (B) consistent with the public interest and this chapter, if a required safety level does not exist.").

[161] *See id.* § 60118(c)(1)(A) ("On application of an owner or operator of a pipeline facility, the Secretary by order may waive compliance with any part of an applicable standard prescribed under this chapter with respect to such facility on terms the Secretary considers appropriate if the Secretary determines that the waiver is not inconsistent with pipeline safety."); *id.* § 60118(c)(2)(A) ("The Secretary by order may waive compliance with any part of an applicable standard prescribed under this chapter on terms the Secretary considers appropriate without prior notice and comment if the Secretary determines that—(i) it is in the public interest to grant the waiver; (ii) the waiver is not inconsistent with pipeline safety; and (iii) the waiver is necessary to address an actual or impending emergency involving pipeline transportation, including an emergency caused by a natural or manmade disaster.").

[162] *See id.* § 31315(a) ("The Secretary may grant a waiver that relieves a person from compliance in whole or in part with a regulation issued under this chapter or section 31136 if the Secretary determines that it is in the public interest to grant the waiver and that the waiver is likely to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver—(1) for a period not in excess of 3 months; (2) limited in scope and circumstances; (3) for nonemergency and unique events; and (4) subject to such conditions as the Secretary may impose."); *id.* § 31136(e) ("The Secretary may grant in accordance with section 31315 waivers and exemptions from, or conduct pilot programs with respect to, any regulations prescribed under this section.").

America" requirements.[163] The MSHA has authority to grant modifications of mine safety requirements under a process it calls "petitions for modification," which is discussed in greater detail below.[164] Likewise, the TTB responded to the survey by listing eight grants of statutory authority.[165] (Those statutes will also be addressed in greater detail below.) Several of the laws administered by the CFPB grant authority akin to what this Report refers to as "waivers," but the Bureau has not granted such waivers in its ordinary practice. The CDFI reports that it does not have waiver authority, and the EBSA classifies its nonenforcement authority as exemption authority rather than waiver authority.[166] Nevertheless, it is safe to say, at least *de jure*, that waiver authority is quite common.

De facto, the exercise of waiver authority differs a great deal. Indeed, the number of requests for waiver reported by these agencies varied markedly—no doubt because the nature of the regulatory missions of the relevant agencies also differ markedly, The TTB, for instance, reports that it receives "[l]ess than 25" requests for a waiver in any typical year, despite having eight potentially applicable statutes.[167] The PHMSA, by contrast, receives over 1,800 requests relating to hazardous materials alone. [168] The FMCSA lists eight requests for waivers in a single year, and the MSHA receives approximately 50 per year (it reported 42 in one year and 64 in another). The FAA does

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[163] *See id.* § 5324(e) ("The Secretary may waive, in whole or part, the non-Federal share required [under various provisions of federal law]."); *id.* § 5323(j)(2) ("The Secretary may waive paragraph (1) of this subsection if the Secretary finds that—(A) applying paragraph (1) would be inconsistent with the public interest; (B) the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality; (C) [complex formula for rolling stock procurement]; (D) including domestic material will increase the cost of the overall project by more than 25 percent."). The FTA also has nonenforcement authority regarding emergencies; it is unclear whether that authority should be deemed waiver authority or exemption authority. See *id.* § 5324(d).

[164] *See infra*, Part III.C(ii).

[165] *See* 26 U.S.C. §§ 5181(b), 5201(b), 5312, 5417, 5554, 5556, 5561, 5162.

[166] EBSA Survey Response (on file with author). For what it is worth, the author of this Report would classify at least some of the EBSA's authority as "waiver" rather than "exemption" authority because Congress expressly allows the agency to not enforce the law. *See* 5 U.S.C. § 8477(c)(3) ("The Secretary of Labor may, in accordance with procedures which the Secretary shall by regulation prescribe, grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by paragraph (2)."). That said, because Congress called it an "exemption," and the agency did too, this Report will discuss such power in the next section.

[167] TTB Survey Response (on file with author).

[168] PHMSA Survey Response (on file with author). Almost half of these, however, were request for renewals. The agency typically receives less than ten special permit requests for pipelines.

not record the number of waiver requests that it receives (as explained below, however, the FAA does record the number of exemption requests that it receives, and the number is in the thousands).

That said, agencies vary in the percentage of requests that they grant. The FMCSA says it grants virtually all requests ("99 percent"),[169] as does the FTA for its two express statutory bases for nonenforcement.[170] By contrast, the MSHA grants a much smaller percentage—somewhere in the range of 36%.[171] (As explained in greater detail below, sometimes a request is neither granted nor denied. Instead, it the request is withdrawn because the mine is able to find another approach to the problem that does not require a waiver.[172]) The PHMSA simply says the grant rate "[v]aries,"[173] and the FAA has only recently "begun tracking waiver requests, but does not currently have enough data to reflect a typical year."[174] The TTB grants "[a]pproximately 85%" of requests made to it.[175]

Similarly, of the agencies that report having waiver authority, *sua sponte* waiver of statutory or regulatory duties appears to be, in the FAA's words, "rare."[176] Indeed, the PHMSA, MSHA, and TTB say they never exercise waiver authority without a request. The FMCSA says it has only does so "once to date," and that was only a

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[169] FMCSA Survey Response (on file with author).

[170] *See* FTA Survey Response (on file with author) (reporting "[c]lose to 100%" under one and that it "has not denied any waive requests since passage of the FAST Act").

[171] MSHA Survey Response (on file with author).

[172] It is interesting that some agencies essentially always grant waivers when requested and some do not. It is hard to draw any real conclusions from this, however, at least based on the raw data alone. Much, no doubt, depends on the nature of the regulatory duty being waived. Some waivers may be less significant than others; if so, it may make sense that waivers of that sort are granted more often. Similarly, it is possible that regulated parties might learn over time what types of requests are granted and which types are not, and so engage in "self-sorting" before filing. Likewise, some regulated parties may engage in informal discussion with the agency that lets them know whether a waiver would likely be granted; if that happens with some agencies more than others, a cross-agency comparison may be misleading. These sorts of questions perhaps should be the focus of additional research.

[173] PHMSA Survey Response, *supra* note 167.

[174] FAA Survey Response, *supra* note 158.

[175] TTB Survey Response, *supra* note 166.

[176] *See* FAA Survey Response, *supra* note 158 ("The FAA has granted waivers under Title 51 without a request but they are rare.") (minor typographical error omitted).

"limited 90-day waiver" of certain "hours-of-service regulations."[177] The FTA too only reports one such *sua sponte* waiver: "Subsequent to Hurricane Sandy, FTA issued blanket waivers for several statutory and regulatory provisions."[178] To the extent that these agencies are representative of agencies generally, it thus appears uncommon for an agency to prospectively forego enforcement without a request from a regulated party for it to do so.

Agency procedures also vary. For instance, Congress set forth specific requirements for the PHMSA (including both procedural and substantive requirements),[179] and, interestingly, has also ordered the agency to deal with applications "promptly."[180] Congress also specified how long such nonenforcement can continue.[181] And as to pipelines, Congress specifically requires the PHMSA to give a reason for granting a waiver.[182] The FMCSA, also part of the Department of

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[177] FMCSA Survey Response, *supra* note 169.

[178] FTA Survey Response, *supra* note 170.

[179] *See* 49 U.S.C. § 5117(b) ("When applying for a special permit or renewal of a special permit under this section, the person must provide a safety analysis prescribed by the Secretary that justifies the special permit. The Secretary shall publish in the Federal Register notice that an application for a new special permit or a modification to an existing special permit has been filed and shall give the public an opportunity to inspect the safety analysis and comment on the application. The Secretary shall make available to the public on the Department of Transportation's Internet Web site any special permit other than a new special permit or a modification to an existing special permit and shall give the public an opportunity to inspect the safety analysis and comment on the application for a period of not more than 15 days.").

[180] *See id.* § 5117(c) ("The Secretary shall issue or renew a special permit or approval for which an application was filed or deny such issuance or renewal within 120 days after the first day of the month following the date of the filing of such application, or the Secretary shall make available to the public a statement of the reason why the Secretary's decision on a special permit or approval is delayed, along with an estimate of the additional time necessary before the decision is made.").

[181] *See id.* § 5117(a)(2) ("A special permit issued under this section shall be effective for an initial period of not more than 2 years and may be renewed by the Secretary upon application for successive periods of not more than 4 years each [subject to certain exceptions].").

[182] *See id.* § 60118(c)(3). As to pipelines, Congress also set out both substantive and procedural requirements; the agency, for instance, must show that waiver "is not inconsistent with pipeline safety" and can only act "after notice and an opportunity for a hearing," unless there is an emergency, in which case the agency can act without a hearing but must show "the waiver is necessary to address an actual or impending emergency involving pipeline transportation, including an emergency caused by a natural or manmade disaster." *Id.* § 60118(c). Such emergency waivers "may be issued for a period of not more than 60 days and may be renewed . . . only after notice and an opportunity for a hearing on the waiver," and the agency "shall immediately revoke the waiver if continuation of the waiver would not be consistent with the goals and objectives of this chapter." *Id.* § 60118(c)(2)(B).

Transportation, requires a showing of equivalent safety, but has different limits; a waiver cannot exceed three months, must be "limited in scope and circumstances," must be "for nonemergency and unique events," and will be "subject to such conditions as the Secretary may impose."[183] The FTA for its part will seek public comment and "will issue a formal determination, which also is published in the *Federal Register*."[184] (The process used by the FAA, MSHA, and TTB is explained below.)

Finally, some but not all of these agencies make their waiver decisions public. The TTB, for instance, does not because "the decisions are fact-specific, and disclosure rules under the Internal Revenue Code generally prevent the agency from publicizing the decisions."[185] Similarly, the FMCSA reports that it has authority "to grant short-term waivers for special situations without providing public notice."[186] The MSHA, by contrast, "publishes all petitions for modification, as well as all granted modifications, in the Federal Register," and "publishes all decisions (or dispositions of any type) on its website."[187] The FTA also "publishes requests for waivers and responses in the emergency relief docket on www.regulations.gov," and publishes other types of decisions on its own webpage or in the Federal Register.[188] The PHMSA also makes its decisions publicly available—indeed, Congress requires it.[189] And as explained in greater detail in subsection (ii), "the FAA publishes those decisions in the Federal Register that are novel, significant, or are of first impression to alert the public to such determinations."[190]

(ii) Findings Regarding Exemptions

There also is a healthy exemption practice across agencies.

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[183] 49 U.S.C. § 31315(a). The agency has supplemented the statute with more detailed regulations. See 49 C.F.R. § 381.210. The FMCSA then endeavors to provide an answer within 120 days.

[184] FTA Survey Response, *supra* note 170 (discussing 49 U.S.C. § 5323(m)(3) and 49 C.F.R. § 661.7).

[185] TTB Survey Response, *supra* note 166.

[186] MSHA Survey Response, *supra* note 171.

[187] FMCSA Survey Response, *supra* note 169.

[188] FTA Survey Response, *supra* note 170.

[189] PHMSA Survey Response, *supra* note 168. *See also* 49 U.S.C. § 5117(b).

[190] FAA Survey Response, *supra* note 158.

For instance, the PHMSA responded that its "hazardous materials approvals program could potentially be considered to fall under the category of 'equitable exemptions,' insofar as it is not specifically listed in Chapter 51 of Title 49 of the U.S. Code."[191] This involves "written consent, including a competent authority approval, from the Associate Administrator or other designated Department official, to perform a function that requires prior consent under the Hazardous Materials Regulations," and can apply to "a wide array of activities in the hazardous materials industry."[192] The FAA, in turn, reports that it "a robust practice," especially because the agency included its treatment of "small unmanned aircraft systems"—often referred to as drones—as part of its exemption regime.[193] The TTB, FTA, CFPB and CDFI report that they do not have agency-created procedures to permit non-compliance that do not have a statutory basis.

The number of exemption requests, moreover, can be astounding. The PHMSA, for instance, reports that it receives "[a]pproximately 16,000" requests per year, of which it grants between 70% to 85% depending on the type.[194] Since August 2016, when "the FAA published a final rule allowing civil operation" of unmanned aircraft systems under a set weight, it has received over 16,000 requests; of those, it has denied over 7,500 and granted about 4,000, and the rest remain pending.[195] Under other programs, it "receives approximately 400-500 requests for exemption per year," of which it grants 73%.[196] The FMCSA receives about 1,100 requests per year, and grants about 58%.[197] The EBSA noted that it has not granted any exemptions in 2017 (at least as of July 31, 2017), but that it typically receives less than 100 requests per year, which are spread across different programs.[198] However, for some types of exemptions, it

[191] PHMSA Survey Response, *supra* note 168.

[192] *Id.*

[193] FAA Survey Response, *supra* note 158.

[194] PHMSA Survey Response, *supra* note 168. Requests involving explosives do better than those involving fireworks. *See id.*

[195] FAA Survey Response, *supra* note 158.

[196] *Id.*

[197] FMCSA Survey Response, *supra* note 169.

[198] EBSA Survey Response, *supra* note 166.

grants about half of applications, whereas for applications that seek a reduction in civil penalties it grants less than 5%.[199]

As with waivers, it appears that agencies do not often grant exemptions without a petition or application. The PHMSA, for instance, says it never does so;[200] the FAA says it generally does not, but that sometimes it will.[201] The EBSA reports that between 2012 and 2016, the agency "granted an exemption without a formal applicant approximately 9 times (2 new exemptions and 7 amendments to existing exemptions)," but also stressed that "[i]t is unlikely that EBSA would propose an individual exemption on its own motion.[202] The FMCSA has only done so "once to date."[203]

The requirements for exemptions, like waivers, also vary. The PHMSA, for example, has a "desk guide," among other resources, dedicated to the question.[204] The FAA requires that requests be submitted on a public docket, and "[m]ost requests are reviewed by an attorney in the Regulations Division of the FAA's Office of the Chief Counsel."[205] The FMCSA's procedures are similar; it also has an office that is "responsible for reviewing exemption requests and making recommendations to the

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[199] *See id.* (explaining that the EBSA may approve three types of exemptions: exemptions allowed by § 408(a) of the Employee Retirement Income Security Act of 1977 and § 4975(c)(2) of the Internal Revenue Code or traditional exemptions, expedited exemptions, and 502(l) petitions; the agency estimates that it granted about 59 traditional exemptions, 29 expedited exemptions, and ten 501(l) petitions between 2007 and 2011, and that it granted about 54% of traditional exemption requests, 46% of the expedited requests, and about 5% of the 501(l) petitions, at least partially).

[200] PHMSA Survey Response, *supra* note 168.

[201] *See* FAA Survey Response, *supra* note 158 ("Our exemption process, outlined in 14 CFR part 11, is well known in the industry. Typically, a petitioner requests exemption from a specific regulation (by section) for a limited period of time. The request must include what actions the petitioner plans to take to maintain a level of safety equivalent to that provided by the regulation, and why a grant would be in the public interest. In some instances, a petitioner will err in its assessment of what regulation applies to its situation or what relief it requires. In those instances, the FAA may grant relief from the necessary sections, explaining the issue in its disposition. Field personnel of the FAA may direct noncompliant operators to apply for an exemption when discrepancies are found.").

[202] EBSA Survey Response, *supra* note 166.

[203] FMCSA Survey Response, *supra* note 169.

[204] PHMSA Survey Response, *supra* note 168; *see also* DEP'T OF TRANSP., PHMSA APPROVALS PROGRAM DESK GUIDE (2016), https://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Approvals_Program_Desk_Guide.pdf.

[205] FAA Survey Response, *supra* note 158.

Administrator."[206] The EBSA's procedures vary, depending on the type of exemption at issue.[207] Each of these agencies generally makes its decisions publicly available.

(iii) Findings Regarding Prosecutorial Discretion

Agencies were reticent to share too much information about their exercises of prosecutorial discretion. This is not altogether surprising. An agency's decision to not enforce the law where violations have occurred can be sensitive.[208] Agencies may not

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[206] FMCSA Survey Response, *supra* note 169.

[207] EBSA Survey Response, *supra* note 166. According to the agency's survey response, it reviews written requests that comply with the regulations in 29 C.F.R. § 2570, and asks questions or requests further information "to the extent the application is deficient or raises additional questions." *Id.* at 3. Generally, an application for a traditional exemption should include "[a] detailed discussion of the exemption transaction and relevant background facts," the reasons why a plan would enter into the exemption transaction, complete descriptions of the prohibited transactions involved, and any other requested evidence. *Id.* This will all become part of the administrative record. *Id.* Applications are granted when, after careful evaluation, the exception "would be administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of the participants and beneficiaries . . . ." *Id.* at 4. A notice of final exemption is then published in the Federal Register. *Id.* And if the agency cannot make its required findings, applicants are notified in writing of tentative determinations as well as the reasoning behind the decision. *Id.* at 3.

The main difference with an expedited application, or EXPRO, is that the applicant may receive a "final authorization to engage in a transaction on a prospective basis" as little as seventy-eight days after the application is received and acknowledged by the agency. *Id.* at 4. However, the applicant must also show that the proposed transaction is substantially similar with either two exemptions that were granted within the last five years, or one exemption that was granted within the last ten years and a final authorization received in the last five years. *Id.* If the applicant is unable to do so, the agency offers the applicant the ability to convert the application into a traditional application. *Id.* However, if the agency grants tentative authorization, the applicant is required to deliver notice to all interested parties, informing them of their right to submit comments or to request a hearing. *Id.* Then, after considering the commenters' input, EBSA may grant an exemption. *Id.* No notice is published in the Federal Register. *Id.*

502(I) petitions are governed by 29 C.F.R. § 2570.85 and EBSA generally relies on the guidelines from Technical Release 85-1 (Jan. 22, 1985) as to what constitutes good faith by a fiduciary when a fiduciary has engaged in a prohibited transaction. *Id.* at 4. "All petitions must be in writing and contain the petitioner's name, a detailed description of the breach or violation, a recitation of the facts which support the basis for waiver or reduction accompanied by supporting documentation, and a declaration under penalty of perjury as to the veracity of the information of the petition." *Id.* EBSA does not publish copies of grants or denials of 502(I) petitions in the Federal Register. *Id.* at 5.

[208] *See, e.g.*, Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 GEO. IMMIGR. L.J. 345 (2013) (using Freedom of Information Act ("FOIA") to try to investigate prosecutorial discretion in the context of immigration).

want regulated parties to know exactly where the line is; if an agency's enforcement priorities are cloaked in mystery, more entities will comply with the law.[209]

The PHMSA, EBSA, MSHA, and CDFI did not respond to this section of the survey, and the FTA said that it does not engage in prosecutorial discretion, because "[t]o the extent possible violations are discovered, FTA requires grantees to take corrective action."[210] The TTB simply gave a one-word answer when asked whether it ever "choose[s] not to enforce the law against known violations": "No."[211]

Some of the survey responses were lengthier. The FAA, in particular, explained its approach to prosecutorial discretion in some detail:

> [T]he FAA does not exempt persons who have violated FAA statutes or regulations from the requirements of those provisions. Rather, when an FAA inspection produces sufficient evidence to conclude that a regulated person has violated a statute or regulation, the FAA takes action appropriate to address the noncompliance. The types of actions the FAA takes, and the bases for selecting such actions, are detailed in FAA Order 2150.3B, chap. 5, at 5-1 to 5-9, which guides FAA personnel in the exercise of prosecutorial discretion (available online). Pursuant to this policy, the FAA may take compliance action, administrative action, or legal enforcement action.
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> The FAA generally uses compliance and administrative actions (which do not result in remedial or punitive FAA enforcement) to ensure that regulated persons return to full compliance and take measures to prevent recurrence. It is appropriate for FAA personnel to take legal enforcement action (for remedial or punitive proposes) against a regulated person for noncompliances resulting from: intentional conduct, reckless conduct, failure to complete corrective action, conduct creating or threatening to create an unacceptable risk to safety, conduct where legal enforcement action is required by law, repeated noncompliance, the provision of inaccurate data to the FAA, actions pertaining to competency or

[209] *See, e.g.*, Mayer Brown LLP v. IRS, 562 F.3d 1190, 1192-93 (D.C. Cir. 2009) ("[Freedom of Information Act ('FOIA')] Exemption 7(E) shields information if 'disclosure could reasonably be expected to risk circumvention of the law.' If the FOIA request here sought a checklist used by agents to detect fraudulent tax schemes or the words most likely to trigger increased surveillance during a wiretap, the applicability of the exemption would be obvious.") (quoting 5 U.S.C. § 552(b)(7)(E)).

[210] FTA Survey Response, *supra* note 170.

[211] TTB Survey Response, *supra* note 167.

> qualification, and law enforcement-related activities. Regardless of how a noncompliance is addressed, the regulated person must return to compliance, now and for the future, or legal enforcement action may be taken.[212]

The FMCSA, after explaining its exemption procedure, also shared some thoughts on prosecutorial discretion that bear quoting:

> In addition, FMCSA conducted almost 8,000 investigations in FY2016. Regulatory violations of varying severity are found in almost every investigation. The investigations resulted in the issuance of approximately 4,400 Notices of Claim alleging one or more violations of the safety, commercial, or hazardous materials regulations. As more fully described below, FMCSA regularly discovers violations for which it chooses not to take enforcement action. FMCSA's overarching goal is safety, so before it initiates an enforcement action, it considers whether that enforcement action is the best method for achieving compliance. . . . Because it is likely that regulatory violations were found in almost all of the investigations, FMCSA's decision to not issue Notices of Claim in the other 3,000+ investigations could be described as an exercise of prosecutorial discretion. [213]

Ultimately, prosecutorial discretion is an area of administrative law that still in many respects is an empirical mystery. Exactly how agencies choose to exercise this power, the process they use, how often they do so, and the internal checks they employ, are all issues that merit additional study. Unfortunately, finding such answers will be difficult because agencies are understandably hesitant to provide detailed information. These extended remarks from the FAA and the FMCSA are greatly appreciated.

(iv) Catch-All Findings

One of the questions posed to the agencies addressed the role those outside the agency play in nonenforcement decisions. As explained in Part II, whether nonenforcement is driven by "political" or "technocratic" concerns may be relevant to one's view of its propriety (recognizing, of course, that there is rarely a bright line

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[212] FAA Survey Response, *supra* note 158; *see also* DEP'T OF TRANSP., GUIDANCE FOR IMPLEMENTING THE FAA COMPLIANCE PHILOSOPHY (2015), https://www.faa.gov/documentLibrary/media/Order/2150.3B_Chg_9.pdf.

[213] FMCSA Survey Response, *supra* note 169.

separating the two). Presumably if officials outside of the agency participate in nonenforcement decisions, the potential for "political" influence increases. Here, each of the agencies that participated in the survey and that answered this question specifically stated that those outside of the agency did not participate in nonenforcement decisions—at least not "generally."[214] Of course, this point does not necessarily extend to all agencies. Even so, it is noteworthy that at least in this cross-section of agencies, involvement by agency outsiders is not a regular occurrence.

Finally, most agencies, understandably, did not share their views of the D.C. Circuit's analysis in *NetworkIP*. (Candidly, the author did not expect many responses, especially because so many agencies litigate before the D.C. Circuit.) Hence, most of the participating agencies understandably ignored this question or said they had no opinion. Similarly, one simply said it agreed with the analysis with little explanation,[215] while another largely said the same.[216] None of this is surprising. That said, two agencies did share some interesting thoughts, both of which merit being quoted in full because they are thoughtful and address the inherent tensions at issue.

The FMCSA addressed *NetworkIP* at some length, and agreed that a public interest standard may be susceptible to abuse. Specifically, the agency explained that:

> FMCSA generally agrees with the court's view in *NetworkIP, LLC v. FCC*, 548 F.3d 116 (D.C. Cir. 2008). Criteria that set forth the special circumstances where waiver of or exemption from a rule is appropriate increase the likelihood of consistent and predictable outcomes. Nonetheless, the purpose of waivers and exemptions is to give an agency the flexibility to reach an equitable result in a particular situation. It is not feasible or efficient for an agency to contemplate the multitude of circumstances that would warrant waivers and exemptions across the

[214] FAA Survey Response, *supra* note 158; *see also* FMCSA Survey Response, *supra* note 169 ("In some instances, the agency may consult with other federal entities if their interests warrant consideration, such as aircraft operations over national parks."); EBSA Survey Response, *supra* note 166 ("With EBSA's decisions to grant statutory waivers, administrative exemptions that are processed on a class rather than individual basis are processed much like regulatory initiatives and will undergo a Departmental Clearance process prior to submission to the Office of Management and Budget.").

[215] TTB Survey Response, *supra* note 167.

[216] *See* CDFI Survey Response (one file with author) (agreeing that "grants of waivers should be determined in a fair and equitable manner"); TTB Survey Response, *supra* note 167 ("Yes. Because TTB's waiver decisions are frequently fact-specific and generally subject to disclosure restrictions, criteria used to evaluate waiver requests should be clear and applied consistently to regulated parties.").

> broad spectrum of rules it administers. While more specific waiver and exemption criteria may be feasible in limited circumstances, such as in the case of the filing deadline considered by the court in *NetworkIP*, in many instances the decision regarding whether to grant a waiver or exemption is more appropriately based on the totality of the circumstances, particularly when significant policy considerations are present. As long as an agency adequately articulates the special circumstances that warrant deviation from the rule at issue, future parties are on notice as to how the agency will interpret its rule and judicial review is not frustrated. Moreover, such a view is consistent with the court's position in *NetworkIP* that an agency is afforded deference regarding its decision whether to waive one of its own rules.
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> As specifically concerns FMCSA's waiver and exemption authority and regulatory standards for exercising that authority, we would note incidentally that the Agency's exercise of discretion is defined by the requirement that relief from regulatory obligations in such circumstances would likely achieve a level of safety equivalent to or greater than the level that would be achieved absent the involved waiver or exemption. Accordingly, FMCSA's waiver and exemption statutory framework and regulatory structure is constrained by a safety-related standard that is inherently more stringent than "whatever is consistent with the public interest" as referenced by the D.C. Circuit's *NetworkIP* ruling.[217]

The EBSA also addressed this question—and identified the downside of overly "rigid" requirements.

> Greater clarity on the criteria used to make waiver determinations will instill the public's trust that its government institutions are not making decisions in an arbitrary manner. However, agencies need flexibility in applying criteria used to grant waivers in order to avoid treating all applications the same. Exemption applications submitted to EBSA are very fact-specific, and a decision whether or not to grant an exemption may turn on one small detail. A more rigid set of criteria that focuses less on the individual facts of an application may either cause EBSA to grant exemptions that it would not currently grant, or to deny applications otherwise deserving of exemptive relief. [218]

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[217] FMCSA Survey Response, *supra* note 169.

[218] EBSA Survey Response, *supra* note 166.

C. Case Studies

In addition to the general findings discussed above, this study produced several case studies about how particular agencies—specifically, the CFPB, FAA, MSHA, and TTB—go about their business. These studies are based on the agency's response to the survey, the author's interview with agency officials, and other background research. Note that although this analysis goes into some detail, the Report does not claim to have a comprehensive take on these agencies. Agencies are large and complex. There is no guarantee that the agency officials interviewed have perfect information (indeed, some the agency officials themselves often cautioned that they do not), and, even if they did, inevitably some nuance is lost in the communication process. Likewise, agency practices evolve; what was true when the surveys were completed may not remain true at later dates. Despite these limitations, however, a close analysis of the behavior of specific agencies is still useful.

(i) The CFPB

The first case study addresses the CFPB, a relatively new agency that, generally, has not engaged in nonenforcement, at least through a formal program. The CFPB was created in 2010 by the Dodd-Frank Wall Street Reform and Consumer Protection Act and is tasked with protecting American consumers who are in the market for consumer focused financial products and services.[219] It has robust regulatory powers, including authority to engage in rulemaking and to bring enforcement actions.

When it comes to the subject of this Report, the CFPB is interesting because, although several of the laws administered by the Bureau grant authority akin to what this Report refers to as "waivers,"[220] the Bureau does not engage in much nonenforcement, at least prospectively on an individualized basis, although it may do so through notice-and-comment rulemaking for a category of parties. When implementing the statute through rulemaking, the CFPB may identify requirements that do not make sense as applied to certain types of circumstances, and thus, modify them. To the extent that this sort of decision is a form of nonenforcement, the agency routinely goes through the ordinary notice-and-comment process to do it.

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[219] CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/the-bureau/creatingthebureau/ (last visited July 20, 2017).

[220] *See, e.g.*, 12 U.S.C. § 5532; *id.* § 1831t; 15 U.S.C. § 1639; *id.* § 1691c-2.

Maybe more interesting, the agency also has authority to not enforce the law for individual entities (by order) but it has not exercised that authority to date. Perhaps the best example of this is the agency's Trial Disclosure Program, which is described in some detail in the Federal Register.[221] In short, this program allows regulated parties to propose a new form of disclosure that currently conflicts with the agency's regulations. Congress explicitly gave the agency this power.[222] The idea is that perhaps a regulated party can produce a better disclosure than what the regulations currently require. In designing the program, the CFPB solicited public comments and responded to them. An applicant must submit a proposal that "[d]escribes how these changes are expected to improve upon existing disclosures, particularly with respect to consumer use, consumer understanding, and/or cost-effectiveness," and "[p]rovide a reasonable basis for expecting these improvements, and metrics for testing whether such improvements are realized."[223] Thereafter, the Bureau evaluates the proposal according to a non-exhaustive set of factors, including "[t]he extent to which the program anticipates, controls for, and mitigates risks to consumers."[224] If the proposal is accepted, the agency will publicize that fact.[225] Despite being on the books for almost four years, however, the Trial Disclosure Program to date has not resulted in a single approved proposal. Nor does it appear that the agency has denied any requests.

It is hard to say for certain why the program has not been used more. It could be because the current regulations are so well understood and institutionalized that regulated parties are reluctant to spend the resources necessary to prepare a proposal. It also is possible that regulated parties would like to see someone else do one first to

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[221] *See* Policy To Encourage Trial Disclosure Programs; Information Collection, 78 Fed. Reg. 64,389 (Oct. 29, 2013).

[222] *See* 12 U.S.C. § 5532(e) (stating that the agency, through a public process, "may permit a covered person to conduct a trial program that is limited in time and scope, subject to specified standards and procedures, for the purpose of providing trial disclosures to consumers[,]" and that such a person "shall be deemed to be in compliance with, or may be exempted from, a requirement of a rule or an enumerated consumer law").

[223] Policy To Encourage Trial Disclosure Programs; Information Collection, 78 Fed. Reg. at 64,393.

[224] *Id.*

[225] *See id.* ("The Bureau will publish notice on its Web site of any trial disclosure program that it approves for a waiver. The notice will: (i) Identify the company or companies conducting the trial disclosure program; (ii) summarize the changed disclosures to be used, their intended purpose, and the duration of their intended use; (iii) summarize the scope of the waiver and the Bureau's reasons for granting it; and (iv) state that the waiver only applies to the testing company or companies in accordance with the approved terms of use.").

see how the well the program works. Similarly, regulated parties may be wary of a public process. It is unlikely, however, that the lack of proposals is due to ignorance of the program; indeed, the program is featured prominently on the agency's webpage.[226]

A similar story could be told about the Bureau's "no action" letters. If the agency gives one of these letters, it means that agency staff has no intention of recommending initiation of an enforcement or supervisory action. Although non-binding, such a letter should be of value to a regulated party. The Bureau, moreover, has established a program for granting such letters, again after soliciting comments from the public about how the program should work.[227] Like the Trial Disclosure Program, agency staff is authorized to issue such letters "involving innovative financial products or services that promise substantial consumer benefit where there is substantial uncertainty whether or how specific provisions of statutes implemented or regulations issued by the Bureau would be applied . . . ."[228] These letters, moreover, "may be conditioned on particular undertakings by the applicant with respect to product or service usage and data-sharing with the Bureau."[229] Such letters "generally would be publicly disclosed."[230] As with the Trial Disclosure Program, however, to date no such letters have been granted or denied.

The Bureau also has systems in place to guide prosecutorial discretion. When it comes to supervising financial institutions (of which the nation has many), discretion is used to determine who is higher risk and needs to be supervised more closely versus an entity that is low risk and does not need the same level of supervision. The CFPB uses an examination manual (which is publicly available) to help direct this process.[231] There also can be some enforcement discretion in the CFPB's public enforcement

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[226] CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/the-bureau/creatingthebureau/ (last visited July 20, 2017).

[227] CONSUMER FIN. PROT. BUREAU, Policy on No-Action Letters; information collection 1 (2016), http://files.consumerfinance.gov/f/201602_cfpb_no-action-letter-policy.pdf. Like the Trial Disclosure Program, this No Action Letter policy was also published in the Federal Register. *See* 81 Fed. Reg. 8686 (Feb. 22, 2016).

[228] *Id.* at 1–2.

[229] *Id.* at 2.

[230] *Id.*

[231] *See* CFPB Supervision and Examination Manual (June 2017), https://www.consumerfinance.gov/f/documents/201706_cfpb_supervision-and-examination-manual.pdf.

processes. Given the breadth of the agency's mission and the number of entities under its jurisdiction, there inevitably will be some prosecutorial discretion.

After speaking with CFPB officials, one gets the sense that the agency hopes to use nonenforcement to encourage more efficient use of regulatory power. Presumably that is the reason why Congress gave the agency authority to encourage experimentation regarding disclosures.[232] The efforts the agency has undertaken to date to create the Trial Disclosure Program or a way to provide no action letters suggests that the agency recognizes that sometimes generalized requirements are a poor fit for individual entities. The fact that regulated parties have not availed themselves of these opportunities is noteworthy and merits further study.

(ii) The FAA

The second case study addresses the FAA, one of the nation's most established agencies. This is true both as a matter of history (the agency was created in 1958), size (the agency has over 14,000 employees)[233] and, for purposes here, nonenforcement. Indeed, the FAA engages in vast amounts of nonenforcement, and, importantly, has a highly regularized process to do so.

As explained above, the FAA identified eight sources of waiver authority; it also "has a robust practice in considering regulatory exemptions in general, as well as specific waiver programs that may be built into those regulations."[234] And although the agency has only recently begun tracking the number of waivers granted, its exemption practice is vigorous; indeed, it has received over 16,000 requests for nonenforcement regarding drones since August 2016 alone.[235] Even apart from drones, it "receives

[232] Regulatory experimentation is currently the focus on a separate study. *See* REGULATORY EXPERIMENTATION, https://www.acus.gov/research-projects/regulatory-experimentation.

[233] FED. AVIATION ADMIN., https://www.faa.gov/about/history/brief_history/ (last visited July 20, 2017); FED. AVIATION ADMIN., https://www.faa.gov/air_traffic/by_the_numbers/ (last visited July 20, 2017).

[234] FAA Survey Response, *supra* note 158.

[235] *See id.*

approximately 400-500 requests for exemptions per year."[236] No doubt driven by this volume, the agency has developed a standardized approach to nonenforcement.[237]

The process begins with a formal request which is submitted to a public docket on Regulations.gov. The FAA's Office of Rulemaking then handles the logistics of responding to the request. "They are assigned for review and disposition to the program office . . . that covers the particular regulations from which relief is requested."[238] Importantly, "[m]ost requests are reviewed by an attorney in the Regulations Division of the FAA's Office of the Chief Counsel."[239] Afterwards, the agency gives its answer, whether "grant or denial," on the public docket. The agency also allows for reconsideration, and "[s]uch requests are ultimately reviewed by the Administrator to be considered final agency action."[240] Importantly, the public can comment on requests for nonenforcement, and the agency "regularly publishes a summary of requests for exemption in the Federal Register for requests that are novel, significant, or are of first impression to alert the public to such requests."[241]

The agency also has a guide for "FAA personnel in the exercise of prosecutorial discretion," and the agency "may take compliance action, administrative action, or legal enforcement action."[242] The agency, unsurprisingly, is more likely to pursue punitive action against more serious violations.[243] But the FAA reports that it "does not exempt persons who have violated FAA statutes or regulations from the requirements of those provisions."[244] Instead, if the agency determines that punitive measures are not

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[236] *Id.* (emphasis omitted).

[237] *Id.*

[238] *Id.*

[239] FAA Survey Response, *supra* note 158.

[240] *Id.* (citing 14 C.F.R. § 11.101).

[241] *Id.*

[242] *Id.*; *see also* DEP'T OF TRANSP., GUIDANCE FOR IMPLEMENTING THE FAA COMPLIANCE PHILOSOPHY (2015), https://www.faa.gov/documentLibrary/media/Order/2150.3B_Chg_9.pdf.

[243] *Id.* ("It is appropriate for FAA personnel to take legal enforcement action (for remedial or punitive purposes) against a regulated person for noncompliances resulting from: intentional conduct, reckless conduct, failure to complete corrective action, conduct creating or threatening to create an unacceptable risk to safety, conduct where legal enforcement action is required by law, repeated noncompliance, the provision of inaccurate data to the FAA, actions pertaining to competency or qualification, and law enforcement-related activities.").

[244] FAA Survey Response, *supra* note 158.

necessary, it "generally uses compliance and administrative actions (which do not result in remedial or punitive FAA enforcement) to ensure that regulated persons return to full compliance and take measures to prevent recurrence."[245]

During the interview, agency officials gave further details about this process. The agency stressed that safety is paramount. Hence, although regulated parties sometimes try to argue that compliance with a regulation is too costly, such an argument is unlikely to succeed. By contrast, the most typical successful petitions for nonenforcement are those where the regulated party shows that there will be no adverse harm to safety. Similarly, the agency generally gives exemptions on a plane-by-plane basis, but if an exemption is requested for something that is affecting an entire fleet of planes, a fleet-wide exemption is possible. Similarly, the FAA stressed that it is tries to be accessible to the public. For example, it will fix an exemption request if the regulated party cites to the wrong authority or something like that.

It is noteworthy, moreover, that if a request for exemption is denied, it is quite unlikely that the petitioner will seek judicial review. Indeed, it is almost unheard of; those interviewed could only remember a single instance of a disappointed party going to court, and that suit was dropped once it was clear that the agency would not settle. It also appears to be the case that although the largest players in the industry are most aware of the agency's nonenforcement process, even smaller regulated companies often know a great deal about it. Seeking exceptions or exemptions tends to be most challenging for individuals (i.e., passengers), however. For example, if a disabled child needs to use a different type of restraint system, special permission must be sought from the FAA. Often the airline will handle the process for its passengers.

The impression one takes away from the FAA is that they have regularized the process. The agency attempts to put almost everything in the open and has standardized its channels for resolving nonenforcement requests. The agency does not place summaries of all decisions in the Federal Register, but it tries to do so for the ones that break new ground.[246] It also is open to receiving comments from the public.

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[245] *Id.*

[246] Of course, what is "novel" may be in the eye of the beholder. That said, the agency emphasized that it tries to be transparent in its nonenforcement decisions.

(iii) The MSHA

The third case study addresses the MSHA, an important agency within the Department of Labor that oversees mine safety. Congress created the MSHA in 1977 and tasked it with overseeing the health and safety of those working in the mining industry.[247] The MSHA does not address nearly as many requests for nonenforcement as the FAA, but it nonetheless addresses a fair number of such requests. Similar to the FAA, the agency's method of analysis is driven by safety.

The MSHA has defined procedures for modifying future enforcement of a particular standard (often adding replacement requirements at the same time), which the agency dubs "petitions for modification." Indeed, the agency has an entire handbook, publicly accessible, that details how the agency processes such requests.[248] A mine must formally request a modification, at which point the agency posts the request in the Federal Register.[249] Interested parties thereafter can file comments. Ordinarily, not many comments are filed, but the agency stressed that union representatives frequently file comments. The agency then conducts a field investigation, which examines the facts on the ground but does not make a recommendation. Higher level officials thereafter examine the request, any comments, and the field report to make a decision called a Proposed Decision and Order. That decision can be appealed to an administrative law judge, whose decision in turn can be appealed to the agency's assistant secretary.[250] Following that, it is possible to seek review in district court, but that is very rare.

By statute, mines must raise one of two arguments in support of a modification to a safety standard.[251] First, that the mine will engage in another practice that is at least

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[247] DEPT. OF LABOR MINE HEALTH & SAFETY ADMIN., https://www.msha.gov/about/history (last visited July 20, 2017).

[248] *See* PETITIONS FOR MODIFICATION, COAL MINE SAFETY AND HEALTH AND METAL AND NONMETAL MINE SAFETY AND HEALTH, MSHA HANDBOOK SERIES, https://arlweb.msha.gov/READROOM/HANDBOOK/PH08-I-2.pdf (July 2008).

[249] *See* PETITIONS FOR MODIFICATION, COAL MINE SAFETY AND HEALTH AND METAL AND NONMETAL MINE SAFETY AND HEALTH, MSHA HANDBOOK SERIES, https://arlweb.msha.gov/READROOM/HANDBOOK/PH08-I-2.pdf (July 2008). The agency also "organizes them by year on its website." MSHA Survey Response, *supra* note 171.

[250] *See* 30 C.F.R. § 44.35 (2017).

[251] *See* 30 U.S.C. § 811(c).

as safe as what the regulation hopes to achieve. Or second, that if the regulation is followed as written, it will result in a diminution of safety, at least for the specific location. The MSHA will not grant a modification if the result would be a less safe working environment for miners. For example, MSHA regulations require that coal mines maintain a 300 feet diameter around oil and gas wells.[252] (Coal mining could cause sparks, which would be very dangerous around an active or inactive gas or oil well.) If a mine wants to move closer to the well, it can request a modification. The MSHA will then consider granting such a modification if the mine can show that the proposal is as safe as the standard.[253] Outside of coal, a typical situation involves use of pressurized air to dust off miners. Ordinarily, that is not permitted, but when an outside company constructed a safe machine to do it, the agency began readily authorizing such modifications.[254]

The process, on average, takes approximately nine months. That said, there are means for expedited consideration.[255] Once granted, the permission is generally permanent; they usually do not have time restrictions.

As noted above, many requests, but not all, are granted. And, indeed, it is not especially difficult to make a request. Because the agency recognizes that mining conditions and technology change, it is willing to work with mines to find practical solutions. At the same time, the agency stressed that safety is paramount.

According to the agency's numbers, it received 64 petitions for modification in 2014, and granted 23 of them "at least to some extent."[256] To be clear, however, that does not mean that all of the other petitions were denied. Sometimes they are withdrawn because the mine can find another way to accomplish its goal. Similarly, MSHA officials during the interview made an interesting observation. They explained that one reason that there are fewer requests for modifications of standards is that the mining industry is an established one; technological changes occur sometimes, but often

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[252] 30 C.F.R. § 75.1700.

[253] *See* 30 C.F.R. § 44.16(e).

[254] *See, e.g.*, Annapolis Mine, 81 Fed. Reg. 8996 (Mine Safety & Health Admin. Feb. 23, 2016) (final admin. review). Sometimes the MSHA has modified the underlying regulations themselves after many in the industry requested waivers.

[255] 30 C.F.R. § 34.16.

[256] MSHA Survey Response, *supra* note 171.

not especially quickly. Thus, mines generally do not need regulatory modifications. Likewise, the agency's substantive standards themselves are often performance based (i.e., they are based on outcomes, not necessarily specific means), so it is fairly feasible and reasonable for mines to comply with them.

This agency stressed that it does not engage in prosecutorial discretion—inspectors must cite a violation if they see one. That said, the agency recognizes that infeasibility can be a defense and may delay enforcement in narrow instances to allow an industry or an operator to come into compliance. For instance, soon after a new standard is promulgated, the agency may not require immediate implementation so long as the regulated mine is making a good faith effort to comply. This sort of analysis is generally mine-specific. Sometimes, moreover, the agency uses infeasibility in a categorical way. One example involved self-contained self-rescuers (SCSRs), which are devices that provide breathable air to miners during emergencies. During the interview, it was recounted that once the agency required a certain type of SCSRs for coal miners, but that the SCSRs, although ordered, were not arriving in time for mines to comply with the new standard. The agency accordingly informed mines across the board that they would not be cited as long as they could show that they had ordered the required SCSRs.

The MSHA's approach shares many of the characteristics as the FAA's. It also uses a public process and evaluates modifications to standards based on safety. Unlike the FAA, however, this agency engages in much less nonenforcement or modification activity, at least judged by the number of requests. The thoughtful explanations given by the agency for the relatively small number of requests certainly has a ring of truth to it, and may have wider applicability than just the MSHA context.[257]

(iv) The TTB

Finally, the fourth case study is the TTB. The TTB is an interesting agency; it operates both as a taxing agency and as a consumer protection agency. Housed within the Treasury Department, it is tasked with "enforcing the provisions of the Federal Alcohol Administration Act . . . to ensure that only qualified persons engage in the

[257] Of course, another possibility is that, since decisions granting modifications are published, some regulated parties may be aware of the agency's willingness (or lack thereof) to grant particular types of modifications and under what conditions. Or perhaps smaller operations have less need for a modification or less ability to establish the requirements for one.

alcohol beverage industry" by regulating alcohol and tobacco production, with a focus on taxation but also on product labeling.[258] The TTB boasts 470 employees across the country; it regulates ammunition and firearms in addition to alcohol and tobacco.[259]

In some respects, the TTB is closer to the MSHA than it is to the FAA. Like the MSHA, the amount of nonenforcement is fairly limited; whereas the FAA may consider hundreds or even thousands of requests for waivers or exemptions in a single year, the TTB will often receive less than fifty. In other respects, however, the TTB is similar to both the FAA and the MSHA. Most obviously, the agency requires an application before it engages in nonenforcement and the agency does not grant all requests. It denies approximately 15% of them.

In many ways, however, the TTB is different from both the FAA and the MSHA. Most obviously, whereas both the MSHA and the FAA make nonenforcement decisions public, including through use of notice-and-comment procedures, the TTB typically does not place information about its nonenforcement decisions in the Federal Register or otherwise make them available.[260] The primary reason for this, according to the agency, is that confidentiality is especially important when it comes to taxes. Thus, the agency is reluctant to share too much information. That said, the agency emphasized that if there is an issue of widespread applicability, the agency is willing to issue guidance documents to the regulated community.[261] But the process under the TTB is different because, as a rule, it is not public.

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[258] ALCOHOL TAX AND TRADE BUREAU, https://ttb.gov/consumer/responsibilities.shtml (last visited July 24, 2017); *see, e.g.*, TTB Ruling 2016-2 (Sept. 29, 2016) ("As part of its ongoing efforts to reduce for industry members the regulatory burdens associated with formula approval and to increase administrative efficiencies for the Bureau, consistent with its mission to protect the public and collect the revenue, TTB has reviewed the formula requirements for certain agricultural wines to determine where its formula review process could be streamlined and modernized. As a result of this review, TTB has determined that its formula review process for certain standard agricultural wine products can be accomplished in a more efficient manner while still being consistent with TTB's mission."); TTB, Industry Circular, No. 2004-3 (Aug. 31, 2004) ("We are issuing this circular to announce an alternative procedure to allow you to request approval to retain export documentation at your premises.").

[259] ALCOHOL TAX AND TRADE BUREAU, https://ttb.gov/about/index.shtml (last visited July 24, 2017).

[260] TTB Survey Response, *supra* note 167.

[261] *See, e.g.*, TTB Industry Circular 2017-3 (May 19, 2017). For more information on agency uses of guidance, *see* AGENCY GUIDANCE, https://www.acus.gov/research-projects/agency-guidance.

The TTB has specific statutory grants to engage in nonenforcement; it also does so through what it calls "Alternate Methods or Procedure."[262] Through these the agency allows regulated parties to use other methods to achieve legal compliance. This device is used for prospective nonenforcement. By contrast, the agency typically pursues known violations, thus exercising prosecutorial discretion somewhat rarely. Typically, this occurs at the investigator-level. (Judicial review of any aspect of the agency's nonenforcement is very unusual.)

In the TTB's experience, more often it is the larger manufacturers that seek prospective nonenforcement. One potential explanation for this is that smaller players do not need exceptions as often as larger ones. Lack of knowledge certainly is possible, but given the amount of contact between the agency and those it regulates (e.g., licenses and inspections), this explanation may be less likely.

Finally, TTB offered wise counsel regarding how to think about nonenforcement. The agency considers the motivation behind the rule and judges the request against that motivation. The agency also explained that sometimes the better course is simply to amend the regulation itself, especially if it becomes clear that the regulation is no longer accomplishing the objective for which it was created. Amending the regulation can be difficult, of course, but sometimes that approach makes the most sense.

IV. RECOMMENDED BEST PRACTICES

Nonenforcement, for all the reasons explained thus far, is an important tool for agencies, but one that carries with it risks. The nature of those risks change depending on the type of nonenforcement at issue, and the checks that exist to mitigate those risks. Accordingly, it is difficult to make any hard-and-fast rules about how nonenforcement should be implemented in specific cases or even specific types of cases. Sometimes the world is too complicated for across-the-board answers. That said, it is possible to at least identify considerations that should inform nonenforcement, even if those considerations do not always lead to the same prescriptions in all circumstances. The purpose of this section therefore is to recommend best practices that agencies should consider when evaluating their nonenforcement practices.

To be clear, the primary focus of these recommendations concerns agency decisions to not bring enforcement actions, either prospectively or retrospectively.

[262] *See, e.g.*, 27 C.F.R. §§ 19.26, 19.27.

Even so, they should also be relevant to other forms of nonenforcement. For instance, just as regularized and public procedures are useful when an agency decides whether to bring an enforcement action, such procedures are also useful when an agency decides whether to excuse a procedural failing in an administrative adjudication. Of course, there are limits to this comparison; it may be less realistic to open up a decision whether to waive a procedural failing to full public notice and comment. But principles developed in one context can still have some force in other contexts.

Accordingly, based on interviews with agency officials, a review of the nonenforcement literature, and background insights into administrative law more generally, the Report urges that the following five best practices merit agency consideration.

A. If Possible, Save Nonenforcement for "Special" Cases

When reasonably possible, nonenforcement should be saved for "special" cases. This is so because if an agency too readily resorts to nonenforcement, the exception may become the rule, resulting in a world in which the law on the books does not reflect the law on the ground. This should be avoided. In such a world, "insiders" may have an unfair advantage and the public may lose confidence in the fairness of the system. To be sure, discretion is important because it is impossible to identify up front every possible scenario that might arise.[263] Indeed, the impossibility of anticipating when application of a rule may be unjust or imprudent is one of the drivers behind nonenforcement.[264] Yet the more unbridled the discretion, the greater risk of bias, or at least the perception of bias.[265] Agencies need to strike a balance. Just because nonenforcement is useful, however, does not mean it should be commonplace.

The D.C. Circuit's analysis in *NetworkIP* is instructive. The court explained that an agency must be able to "articulate the nature of the special circumstances to prevent

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[263] *See, e.g.*, Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1064 n.98 (1990).

[264] *Id.*

[265] *See, e.g.*, Clifford Rechtschaffen, *Promoting Pragmatic Risk Regulation: Is Enforcement Discretion the Answer?*, 52 U. KAN. L. REV. 1327, 1354 (2004) ("As the discretion afforded to regulators increases, so does the potential for biased or inconsistent enforcement. There is considerable evidence showing that enforcement personnel exhibit systematic biases when they make discretionary decisions.").

discriminatory application and to put future parties on notice as to its operation."[266] The reason the D.C. Circuit did this was because it wanted to prevent nonenforcement from becoming too common. The interviews revealed that agencies are aware of this danger. This is one reason, for instance, that the agencies require a strict showing that nonenforcement will not undermine the purposes of the relevant prohibition. Both the MSHA and the FAA stressed that safety is key and the burden is on the applicant to show that there will be no loss of safety. This point was echoed in each of the interviews.

Related to the idea that nonenforcement should be the exception rather than the rule is the notion that nonenforcement should also have objective criteria and a clear temporal dimension. Again, the D.C. Circuit's approach bears consideration. The agency needs to explain why it is objectively reasonable to grant a waiver; if the agency cannot do so, there is a danger that it is behaving in an arbitrary manner. Similarly, nonenforcement may be more appropriate if its duration is shorter. As the FAA explained, "most of our exemptions are granted only for the length of time needed, and generally not more than two years. Exemptions expire by their own terms unless renewal is requested and justified."[267] The common denominator is nonenforcement should be recognized as a significant power that is to be used sparingly and carefully.

B. Greater Use of Retrospective Review

Agencies should also focus on amending outdated or ineffective rules, which may be helpfully identified by the agency's willingness to grant requests for nonenforcement. Agencies often fall back on nonenforcement because the regulation in question no longer makes sense, sometimes in individual circumstances but often across the board. Rather than engage in nonenforcement in such circumstances, the better path may be to change the underlying rule.

This point came up during several of the interviews. Officials explained that sometimes rather than engage in nonenforcement, the better course is to promulgate a rule. The MSHA, for instance, explained that it has done this before. And the CFPB

[266] NetworkIP, LLC v. FCC, 548 F.3d 116, 127 (D.C. Cir. 2008) (quoting N.E. Cellular Tel. Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990)).

[267] FAA Survey Response, *supra* note 158. Of course, a deadline may not always make sense, for instance in situations in which an exemption requires a substantial capital investment or operational change that should have some permanence. In such situations, a longer period may be appropriate.

reasoned that using notice-and-comment rulemaking often makes sense; it can be more efficient (because it applies across the board) and transparent. The TTB also recognizes that nonenforcement should be not treated as a substitute for updating the rules.

In the past, ACUS has urged retrospective review of regulations to ensure that rules which are no longer serving their purpose, or are doing so in a suboptimal way, are eliminated.[268] One of the insights of this Report is that retrospective review is not always conceptually distinct from nonenforcement. Rather, nonenforcement is a signal to agencies that it may be time to engage in retrospective review.

To be clear, there are costs associated with revising regulations. Generally, an agency will have to engage in notice-and-comment rulemaking to do so, which will require dedicated work by agency officials. No doubt that for some regulatory schemes, revision would be quite labor intensive. But particularly if an agency already opens up its nonenforcement decisions to notice and comment, and has been doing so for a long time, formally amending the rules may not be especially onerous.

C. Publicize Nonenforcement Programs, Policies, and Procedures

The next recommendation is for agencies to inform the public regarding their nonenforcement programs and policies, and the procedures for each. One of the potential problems with nonenforcement is the risk of unequal treatment and arbitrariness. To the extent that not everyone has equal access to information about when and how agencies opt for nonenforcement, the risk of inequality or perceived inequality increases—especially when the agency in question will not engage in nonenforcement, either *de jure* or de facto, without a request. If that is the case (and it often is), agencies should ensure that everyone has equal access to the required information to make such a request.

This is why transparency is valuable. Relatedly, the costs of transparency are less now than they have been in the past.[269] Agencies, for instance, have access to the internet. If agencies have programs, policies, and procedures in place to guide

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[268] *See generally* Retrospective Review of Agency Rules, https://www.acus.gov/research-projects/retrospective-review-agency-rules.

[269] *See generally* Adjudication Materials on Agency Websites, https://www.acus.gov/recommendation/adjudication-materials-agency-websites-0.

nonenforcement, it should be relatively straightforward for agency officials to make information about those programs, policies, and procedures available to the public.

Granted, there may be downsides to publicizing an agency's programs, policies, and procedures. For instance, if information about nonenforcement becomes more generally known, there may be more requests for nonenforcement. This may require more time and effort be shifted towards evaluating nonenforcement. Even so, that may be a virtue. If agencies are going to engage in nonenforcement, the public presumptively should have access to that information.

More significantly, disclosure may encourage illegality. If regulated parties do not know the contours of an agency's nonenforcement policy, there will be more law observance because such parties will not know the tripwires, thus causing them to be more cautious altogether.[270] Yet if there is no transparency, and no judicial review, how can the public be confident that agencies are properly using their nonenforcement authority? Although this obviously is not a perfect answer, the most optimal approach is to disclose nonenforcement policies, practices, and procedures, unless doing so would have a significant effect on legal compliance.

The agency officials interviewed for this Report almost uniformly stated that transparency is important. The CFPB, for instance, used a notice-and-comment process for its two nonenforcement programs. Agencies that regulate entities of varying degrees of legal sophistication might also consider actively informing some of the smaller entities about the nonenforcement options. And agencies that regulate a large number of entities should also consider actively trying to inform the public about nonenforcement, perhaps by preparing simplified introductory materials that can be found via internet search engines. Agencies that regulate a smaller number of entities may want to distribute information through personal contacts.

D. Publicize Nonenforcement Decisions and Encourage Comments

Just as agencies can publicize their nonenforcement programs, policies, and procedures, they also can publicize their decisions whether to grant or deny requests for nonenforcement, including potentially doing so before making a final decision so interested parties can submit comments. The EBSA is a good example. In response to

[270] As explained above, there may be good reasons not to publicly disclose an agency's approach. *See supra*, Part III.B(iii).

the survey, the agency offered a recommended best practice that included the following:

> Applicants must disclose, under penalty of perjury, all relevant factual information that may be used by EBSA to make its findings whether to grant an exemption. EBSA will only grant an exemption based on a fully developed record that is open to the public. Before granting an exemption, EBSA must publish a proposed exemption on the Federal Register and give interested persons the ability to comment and request a hearing. Only after considering commenters' input may EBSA then grant an exemption.[271]

Some agencies may be reluctant to do this, of course, because they are wary of sharing sensitive information about an application with the public. The TTB, for instance, expressed this concern; when dealing with tax information, it may not be possible to present all of the relevant materials to the public. Even if the agency does not wish to disclose individual nonenforcement decisions, however, it can present general statistics and trends. If a large number of entities are receiving a similar exemption, the agency may consider sharing that information with the public, even if it does not provide individualized information. Similarly, agencies in such situations may consider redacting confidential information while presenting the general decisions. (To the extent that agencies worry about costs or resources, it is worth nothing that this information can be disclosed in any number of ways and need not appear in a Federal Register notice.)

A good analogy is the judicial process. Courts generally make their decisions public because they recognize the public interest in transparency.[272] Even though most cases are not important to the public in general (sometimes no one but the parties involved care about a specific contract dispute or the like), the judiciary still recognizes the importance of disclosure. And, in any event, courts do not want to be in the business of deciding whether a particular case is important or not, especially because it can be difficult to know what may become important.

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[271] EBSA Survey Response, *supra* note 166.

[272] *See, e.g.*, LIBRARY OF CONG., https://www.loc.gov/law/help/judicial-decisions.php (last visited July 24, 2017).

Agencies could adopt the same attitude. Of course, there are downsides with this recommendation as well. For one thing, publicizing this information may result in increased scrutiny of agency decisions—which may include unfair characterizations of agency behavior. The public may not understand all of the factors that go into a nonenforcement decision. To avoid being misunderstood, agency officials may find themselves spending more time giving reasons for their decisions. At the same time, however, doing so may increase the public's confidence in the agency decision.

Similarly, agencies should, to the extent possible, encourage affected entities to comment about the desirability and appropriateness of nonenforcement. Particularly where other entities may be affected, the agency may be well served by enabling public comment, rather than the agency itself making the decision or basing the decision solely on interactions with the entity or entities that stand to benefit from nonenforcement. Both the MSHA and the FAA stressed that using notice-and-comment procedures allows other affected parties to comment on the proposal, and the MSHA observed that union representatives sometimes do so. It is easy to see how additional information can help an agency make a sound nonenforcement decision.

Indeed, the reason for this recommendation is also straightforward. First, unless agencies obtain information from other entities, they may not be getting the full story. It is easy to imagine, for instance, a party requesting nonenforcement to color the facts in a way that benefits its position. Without an adversarial process, factual assertions may go unchecked. Agency officials, like anyone else, sometimes do not know what they do not know. And second, the process will be perceived as more fair if affected parties have a chance to make their case. Therefore, even if an agency is reluctant to publicly reveal all aspects of the nonenforcement process, it still would be well advised to solicit information from specific other parties that may be affected. No doubt, there are downsides to this as well. For one, it would more than likely delay the decision process. Similarly, it sometimes may be difficult to know who will be affected. On net, however, this process should generate worthwhile results.

E. Use a Consistent Methodology, Including Written Justifications

Finally, agencies should also use a consistent methodology when evaluating nonenforcement, and part of that methodology should include giving reasons for their nonenforcement decisions (even if those decisions are not public). A consistent methodology should help agencies treat like cases alike. And the use of written

explanation should do the same. Indeed, "[a]dministrative-law doctrine places reason giving at the center of agency policymaking"[273] because, in part, doing so can encourage sound decision-making.[274] If officials use a consistency methodology and to explain in writing why nonenforcement makes sense in any particular case, there is a better chance that the ultimate decision will be, and will be perceived as being, evenhanded.

The EBSA process for nonenforcement illustrates the benefits of consistent procedures and written justifications. As a rule, the agency prepares "a published proposed exemption" that "contains an analysis of how the record supports the regulatory finding," and a "published grant of an exemption contains a discussion of any comments received in respect of a proposed exemption, an applicant's response to such comments, and the EBSA's consideration of such comments and responses."[275] Doing so forces the agency to carefully consider what it is doing and why and to ensure uniformity with other decisions.

Written reasons may be especially valuable if the agency prepares them with a goal of achieving consistency across cases. In agencies that must decide whether to engage in nonenforcement in a great many instances, with the decisions being made by different individuals, a written explanation may be essential to maintain uniformity. To be sure, a thorough written explanation of all nonenforcement may not be realistic, especially in agencies that address hundreds or even thousands of waiver or exemption requests every year. The FAA has attempted to address this point by providing detailed explanations for decisions that address novel issues. That approach makes sense. Depending on the nature of an agency's authority, other possible ways to determine whether a detailed explanation should be given may involve focusing on the number of people affected or the dollar amounts involved. These considerations are not meant to be exhaustive, but rather illustrative; the idea is to identify the most important nonenforcement decisions. Some agencies, by contrast, do not confront that many

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[273] Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1887 (2012).

[274] *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 56 (2015) ("Perhaps the primary objective of a reason-giving requirement is to encourage the decisionmaker to make rational, consistent decisions, considering all of the relevant factors. The idea is that a procedural requirement, by focusing attention on a particular danger, should foster better substantive outcomes. The practice of giving reasons, in other words, should improve the quality of decision making.").

[275] EBSA Survey Response, *supra* note 166.

waiver or exemption requests. For them, it may make sense to prepare a detailed written explanation of the agency's decision, with reasons, for each one.

Giving reasons certainly makes sense if nonenforcement decisions are public. If agencies explain why they act, the public can have greater confidence that the agency's decisions are coherent and proper. Well-articulated consistency thus can enhance public confidence in the regulatory process. Yet even if an agency determines that it does not wish to make its nonenforcement decisions public, it still may be benefited by articulating in writing the reasons for them. This is true because even apart from the public benefits of a written explanation, the very act of preparing that explanation should help the agency identify when nonenforcement does and does not make sense.

CONCLUSION

Nonenforcement of the law raises important questions. There are good reasons for it, but it also brings with it dangers. Like much in administrative law, the value of discretion must be balanced against the danger of its abuse. Just because there is tension, however, does not mean that nonenforcement should be rejected. Even if it were possible to eliminate nonenforcement altogether (and often it is not possible because of resource constraints), it would not be desirable. Nonenforcement has a place in administrative law. Even so, awareness of the tension—especially coupled with a more complete conceptual understanding, greater empirical information, and specific recommendations—will benefit the regulatory process.

APPENDIX: SURVEY INSTRUMENT

This appendix contains the list of questions—divided into five Parts—that was sent to agency officials. It also contains an aggregation of the answers received. Note that at the end of Parts I to IV, the official was asked whether the agency would be willing to discuss its standing policy, either on or off the record, with an ACUS consultant.

Part I: Statutory or Regulatory Waivers

Question 1: Does [Agency] have specific statutory authority to waive statutory or regulatory requirements for parties that would otherwise be subject to them?

If yes, please list such statutory sources of authority and proceed to questions a) through f) below. If no, please skip to Part II.

[Clarification included as a footnote]: Please do not include statutory provisions that authorize waivers to States as cooperative regulators but do include statutory provisions that authorize waivers to States as regulated entities.]

Question 1(a). Approximately how many requests for such waivers does [Agency] receive in a typical year?

Question 1(b). Approximately what percentage of such waiver requests does [Agency] grant?

Question 1(c). Does the agency ever grant such a waiver without a request? If so, how often?

Question 1(d). Please briefly describe the procedures [Agency] uses to review potential waivers.

Question 1(e). Does [Agency] publish its decisions regarding such waivers in the Federal Register or otherwise make them publicly available?

Question 1(f). Does [Agency] have any standing policy, whether internal or published, to guide its decisions regarding such waivers?

Part II: Waivers to States

Question 2. Some agencies grant "cooperative federalism" waivers to states, for instance where the state seeks authority to supplement or amend a federal program or where states are preempted from acting in a particular field but may seek a waiver from preemption to act. Does [Agency] oversee any programs in which states are statutorily eligible for waivers from otherwise-applicable statutory or regulatory requirements?

If yes, please list such "cooperative federalism" programs and proceed to questions a) through f) below. If no, please skip to Part III.

Question 2(a). Approximately how many requests for such "cooperative federalism" waivers does [Agency] receive in a typical year?

Question 2(b). Approximately what percentage of such waiver requests does [Agency] grant?

Question 2(c). Does the agency ever grant such a waiver to a State without a request? If so, how often?

Question 2(d). Please briefly describe the procedures [Agency] uses to review such waiver requests.

Question 2(e). Does [Agency] publish its decisions on such waiver requests in the Federal Register or otherwise make them publicly available?

Question 2(f). Does [Agency] have any standing policy, whether internal or published, to guide its decisions regarding "cooperative federalism" waivers to States?

Part III: Equitable Exemptions

Question 3. Does [Agency] ever exercise its equitable power to exempt from regulatory requirements any entity that would otherwise be subject to them?

If yes, please proceed to questions a) through f) below. If no, please skip to Part IV.

[Clarification included as a footnote: Please do not include exercises of prosecutorial discretion, which will be addressed in Part IV. Instead, please limit your answer to written exemptions that are granted before any known violation has occurred. Likewise, the focus of this Part is also distinct from Part I. Part I addresses specific statutory authority to waive regulatory requirements while Part III is concerned with exemptions without such specific statutory authority.]

Question 3(a). Approximately how many requests for such exemptions does [Agency] receive in a typical year?

Question 3(b). Approximately what percentage of such requests does [Agency] grant?

Question 3(c). Does the agency ever grant such an equitable exemption without a request? If so, how often?

Question 3(d). Please briefly describe the procedures [Agency] uses to review such exemption requests.

Question 3(e). Does [Agency] publish its decisions on such exemption requests in the Federal Register or otherwise make them publicly available?

Question 3(f). Does [Agency] have any standing policy, whether internal or published, to guide its decisions regarding such exemptions?

Part IV: Prosecutorial Discretion

Question 4. Does [Agency] ever exercise its prosecutorial discretion (*i.e.*, choose not to enforce the law against known violations of statutory or regulatory requirements under [Agency]'s jurisdiction) to essentially exempt from statutory or regulatory requirements any entity that would otherwise be subject to them?

If yes, please proceed to questions a) through f) below. If no, please skip to Part V.

Question 4(a). Does an entity subject to statutory or regulatory requirements ever request [Agency] to exercise prosecutorial discretion? If so, approximately how often?

Question 4(b). Approximately how many times in a typical year does [Agency] exercise its prosecutorial discretion?

Question 4(c). Does [Agency] ever notify violators, complainants, or the public that it is choosing not to pursue a particular enforcement action because of prosecutorial discretion? If yes, are those notifications published in the Federal Register or otherwise publicly available?

Question 4(d). Does [Agency] have any standing policy, whether internal or published, to guide its exercises of prosecutorial discretion?

Part V: Miscellaneous

Question 5. Does [Agency] have practices or procedures akin to those mentioned above (i.e., ways to essentially exempt someone from complying with a statutory or regulatory requirement or to excuse a violation of a statutory or regulatory requirement) that has not yet been discussed? If yes, what are those practices and procedures and how do they work?

Question 6. Do government officials outside of [Agency] ever participate in decisions of [Agency] to grant a statutory waiver, a waiver to a State, an equitable exemption, an exercise of prosecutorial discretion, or the like? If yes, would [Agency] be willing to discuss such participation, either on or off the record, with an ACUS consultant?

Question 7. Can you think of "best practices" that would help agencies to evaluate whether to grant waivers or exemptions? If so, what are they and why do you think they would help?

Question 8. The U.S. Court of Appeals for the D.C. Circuit has emphasized the need for greater clarity on the criteria used to make waiver determinations to ensure fairness to all parties. Specifically, the court warned that: "If discretion is not restrained by a test more stringent than 'whatever is consistent with the public interest (by the way, as best determined by the agency),' then how to effectively ensure power is not abused?" Do you agree with this view? Why or why not?