ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Request for Proposals—March 24, 2015
Agency Procedures for Regulatory Waivers and Exemptions

The Administrative Conference is seeking a consultant to undertake a research project that will study agency procedures for granting to regulated parties waivers or exemptions from otherwise applicable regulatory requirements.

Proposals are due by 6:00 p.m. Eastern Time on April 27, 2015.

Background.

Federal agencies sometimes grant to regulated parties temporary or permanent "waivers" or "exemptions" (also sometimes referred to as "exceptions") from regulatory requirements.[1] An agency's authority to grant waivers or exemptions, as well as the criteria under which that authority may be exercised, may be established either by statute or regulation.[2] The D.C. Circuit has suggested that a mandate to regulate in the "public interest" may require an agency to give a "hard look" to the possibility that there may be special circumstances in which a generally sound rule should not be enforced.[3] There are a variety of procedures and practices that agencies use to evaluate applications for waivers and exemptions. For example, some agencies have an independent office that considers these applications, and others offer hearings to allow applicants to present their case for why they should not have to comply with certain regulations.

Although waivers and exemptions may be a useful tool for agencies and offer benefits to regulated parties, they may also carry costs in terms of fairness, predictability, accountability, and other administrative values. Some scholars have argued that waivers are an essential part of the regulatory process because they give agencies the flexibility to ensure that the administrative process works efficiently and effectively.[4] Others have argued that too much flexibility can make

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[1] *See* Jim Rossi, *Making Policy Through the Waiver of Regulations at the Federal Energy Regulatory Commission*, 47 ADMIN. L. REV. 255, 277-78 (1995) (recognizing that "[a]dministrative equity in the form of waivers or exceptions has become a fairly commonplace regulatory mechanism in federal agencies").

[2] *See* David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013); *see also* 7 U.S.C. § 77 (authorizing the Department of Agriculture to "waive the [inspection requirements for grain exports] in emergency or other circumstances which would not impair the objectives of this chapter"); 47 C.F.R. § 1.3 ("Any provision of the rules may be waived by the [Federal Communications] Commission on its own motion or on petition if good cause therefor is shown.").

[3] *See* WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert denied*, 409 U.S. 1027 (1972).

[4] *See* Alfred C. Aman Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277; Comment, *The Exceptions Process: The Administrative Counterpart to a Court of Equity and the Dangers it Presents to the Rulemaking Process*, 30 EMORY L.J. 1135 (1981).

the regulatory process less transparent and politically accountable.[5] Finally, some scholars have noted that while too many exemptions may undermine regulatory goals, additional oversight could curtail that possibility.[6]

Although the Conference has previously studied and adopted a statement on exception processes at the Department of Energy,[7] it has not addressed the cross-cutting issues raised by the use of regulatory waivers and exceptions. The Conference now seeks to conduct a study aimed at providing much needed guidance to agencies regarding procedures and best practices for considering requests for regulatory waivers and exemptions. Additionally, recent news accounts about agency use of waivers suggest that such a study may be timely.[8]

Project Description.

The Conference seeks proposals for a comprehensive study of agency procedures for considering requests for regulatory waivers and exemptions. The goal of this study is to identify and evaluate the waiver and exemption procedures used by agencies and share best practices that could improve fairness, predictability, accountability, and other administrative values. A detailed scope of work follows, but the Conference encourages prospective consultants to comment on the scope of work in their project proposals, and identify/include any additional research subjects related to this topic that the Conference may wish to consider.

Scope of Work

The study should include consideration of the following:

- An evaluation of various waiver and exemption procedures currently used by federal regulatory agencies.
- An identification of best practices that could help:
  - Improve transparency, public participation, fairness, and efficiency in exceptions processes;
  - Ensure adequate consideration of situation-specific requests for exceptions, as well as requests that have broader implications for an agency's regulatory regime;

[5] *See* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429 (1999).

[6] *See* Peter H. Shuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163.

[7] *See* Statement 10, *Agency Use of Exceptions Process to Formulate Policy*, 48 Fed. Reg. 57,464 (Dec. 30, 1983).

[8] *See* Brook Barnes, *Drone Exemptions for Hollywood Pave the Way for Widespread Use*, N.Y. TIMES, Sept. 25, 2014, at B1, *available at* http://www.nytimes.com/2014/09/26/business/media/drone-exemptions-for-hollywood-pave-the-way-for-widespread-use.html.

    - Enable agencies to use the information gleaned from exception processes to inform and improve rulemaking and enforcement activities;
- An examination of the role of Congress, the courts, other agencies, and private groups in structuring or influencing how agencies use regulatory waivers and exemptions.

The study should exclude consideration of exemptions that are available to agencies, such as the good cause exception to notice-and-comment rulemaking, pursuant to 5 U.S.C. § 553(b)(3)(B), because they are beyond the scope of this study.

How to Submit a Proposal.

Proposals are invited from qualified persons who would like to serve as a research consultant on this project. All responses will be considered by the Conference staff and the Chairman.

A consultant's study should result in a report that is delivered first for review by the Conference staff and Chairman and then forwarded to a committee of the Conference membership for consideration. The report should provide proposed recommendations. The consultant works with Conference staff and the committee to refine and further shape the report and may work with Conference staff to revise the recommendations. Recommendations approved by the committee are then forwarded to the Council of the Conference for consideration, and the Council forwards the recommendations (with its views) to the full Conference membership meeting in plenary session. If approved at the plenary session, a recommendation becomes an official recommendation of the Administrative Conference. (For a general understanding of how the Conference is organized and operates, see 5 U.S.C. §§ 591-596, and http://www.acus.gov.)

The Conference will provide a consulting fee for this study plus a budget for related expenses. The Conference also typically encourages its consultants to publish the results of their studies in journals or other publications. Thus, working as a Conference consultant provides some compensation, a publication opportunity, and the opportunity to work with Conference members from federal agencies, academia, the private sector, and public interest organizations to help shape and improve administrative law, procedure, and practice. Those submitting proposals should understand that, in addition to the work involved in researching and writing the consultant's report, the consultant will (in most cases) need to work with Conference staff and committees as the Conference develops a recommendation based on the report. The consulting fee is not designed to match a consultant's normal consulting rates. It is a significant public service to serve as a consultant to the Conference.

To submit a proposal to serve as the Conference's consultant on this project, you must:

- Send an e-mail to Attorney Advisor Funmi E. Olorunnipa, at folorunnipa@acus.gov. Proposals must be submitted by e-mail.
- Include the phrase "ACUS Project Proposal" in the subject line of your e-mail.

In the body of your e-mail or in an attachment, please:

- State the name of the project for which you are submitting a proposal: "Agency Procedures for Regulatory Waivers and Exemptions."
- Explain why you would be well qualified to work on the project. Include your *curriculum vitae* or other summary of relevant experience.
- Explain your research methodology and how you would develop recommendations based on the research. There is no required format, and 2-4 pages should probably be sufficient.
- State how much funding you would need for the project, keeping in mind that a typical Conference research contract includes a consulting fee of $12,000 - $15,000 plus travel expenses of $1,000, and research assistance expenses of $1,000. There may be some flexibility in the budget based on factors relating to the proposal (e.g., the consultant's location relative to Washington, DC, and the need for research assistance and empirical or interviewing work), so your proposal should suggest any special needs in this regard. The amount of the consulting fee and expenses will not be a critical factor in the award of the contract; the quality of the proposal and of the consultant's ability to carry out the study will be the most important factors.
- Propose a schedule for the project deliverables. This project requires submission of a draft outline, a final outline, a draft report, and a final report. Multiple draft reports may be necessary based on input from the Chairman, staff, or committee; nonetheless, the draft report should be substantially complete. The timeline for deliverables should substantially adhere to the schedule below, but high quality research leading to a well-written report will be the prime consideration.

Deliverable	**Due Date**
Draft Project Outline	Contract award date + 30 Days
Final Project Outline	Draft Project Outline + 15 Days
Draft Report	Final Project Outline + 180 Days
Final Report	Draft Final Report + 45 days

A December 2015 submission date for the draft report is preferred, so that a committee recommendation, if any, can be targeted for completion at a plenary session of the Conference held in June 2016.

Submit your proposal by 6:00 p.m. Eastern Time on April 27, 2015. Only proposals submitted by the stated deadline are guaranteed to receive consideration. Proposals may also be submitted or amended at any time until the award of the contract, and the Conference may

consider any proposals or amended proposals received at any time before the award of the contract.

Proposals will be evaluated based on:

- The qualifications and experience of the researcher(s) and knowledge of literature in the field (if applicable);
- The quality and clarity of the proposal;
- The timeline of the proposal and the ability of the researcher(s) to perform the research in a timely manner;
- The likelihood that the research will contribute to greater understanding of the subject matter studied and lead to an Administrative Conference recommendation that will improve administrative procedures in the federal government; and
- The cost of the proposal (although the other factors are more important).

Failure to follow the above instructions may result in your proposal not being considered. Including the phrase "ACUS Project Proposal" in the subject line of your e-mail is important so that your proposal can be easily identified.