

The draft proposed recommendation and Report on Waivers, Exemptions, and Prosecutorial Discretion contain what I believe is a potential fundamental misclassification (or at least a confusing one) between "waiver" and "exemption." The report and recommendation use the term "waiver" for times where Congress has expressly authorized an agency to engage in prospective nonenforcement and "exemption" where Congress has implicitly authorized prospective nonenforcement. However, this classification does not take into account situations where Congress has explicitly granted authority to agencies to issue "exemptions" (often together with the authority to issue waivers. In these situations, some agencies interpret "waiver" to apply to a particular individual seeking relief and an exemption to mean relief from compliance for an entire class or subclass of regulated individuals that would otherwise be subject to the requirement. The terminology of the report and recommendation should be reconsidered to eliminate possible confusion.