

Proposed amendments to the Recommendation on Regulatory Waivers and Exemptions
From Jeffrey Lubbers

1. Add the following footnote to the 4th sentence of the preamble, dealing with emergencies:

See, for example, the Stafford Act, § 301, 42 U.S.C. § 5141, authorizing any federal agency charged with the administration of a federal assistance program in a presidentially declared major disaster, to modify or waive administrative conditions for assistance if requested to do so by state or local authorities.

2. Recommendation 1 seems overbroad to me. Just as a matter of wording, it not only suggests that regulated parties can apply for waivers where they can demonstrate conduct “that will achieve the same purpose as full compliance with the relevant statutory or regulatory requirement,” but implies that those waivers should be granted.

More fundamentally, the recommendation, perhaps unintentionally, seems to put ACUS’s seal of approval on programs or decisions that allow regulated parties to evade regulatory requirements by demonstrating alternative compliance. Agencies have experimented with collaborative regulation programs such as Project XL, and while I don’t have an opinion on their success, they have been controversial. See, e.g., Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 107-08 (1998). My main concern is that this topic is a lot bigger than agency waiver and exemptions practices, perhaps deserving of ACUS study, but, with respect, I don’t think the four agency case studies in Professor Neilson’s interesting report, which is mostly about non-enforcement a la *Heckler v. Chaney*, provide a basis for suggesting that [all] agencies should “consider creating such [alternative compliance] programs.”

So, if this paragraph is to be kept, I would recommend the following changes:

TO THE EXTENT [Where] permitted by law, agencies should consider creating programs that would allow regulated parties to apply for waivers or exemptions by demonstrating conduct that will achieve the same purpose as full compliance with the relevant statutory or regulatory requirement, AND THAT SUCH WAIVER OR EXEMPTION IS OTHERWISE IN THE PUBLIC INTEREST. SUCH PROGRAMS SHOULD INCORPORATE THE COMMENT SOLICITATION AND WRITTEN EXPLANATION PROCEDURES DESCRIBED IN PARAGRAPHS 8 AND 9 BELOW.

3. Recommendation 9:

Instead of “consider providing” in both instances, substitute “provide”