



## **Administrative Conference Recommendation 2017-7**

### **Regulatory Waivers and Exemptions**

**Adopted December 15, 2017**

Individuals and entities regulated by federal agencies must adhere to program-specific requirements prescribed by statute or regulation. Sometimes, however, agencies prospectively excuse individuals or entities from statutory or regulatory requirements through waivers or exemptions.<sup>1</sup> The authority to waive or exempt regulated parties from specific legal requirements affords agencies much-needed flexibility to respond to situations in which generally applicable laws are a poor fit for a given situation.<sup>2</sup> Emergencies or other unforeseen circumstances may also render compliance with statutory or regulatory requirements impossible or impracticable.<sup>3</sup> In such instances, requiring strict adherence to legal requirements may not be desirable.<sup>4</sup> This is particularly true when the recipient of a waiver or exemption demonstrates that it intends to engage in conduct that will otherwise further the agency's legitimate goals.

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<sup>1</sup> Agencies may also *retrospectively* decline to bring an enforcement action once a legal violation has already occurred. This recommendation, however, is confined to the agency practice of prospectively waiving or exempting regulated parties from legal requirements.

<sup>2</sup> The terms “waiver” and “exemption” carry various meanings in agency practice. For the purposes of this recommendation, when Congress has expressly authorized an agency to excuse a regulated party from a legal requirement, the term “waiver” is used. If an agency is implicitly authorized by Congress to excuse a regulated party from a legal requirement, “exemption” is used. These definitions stem from the report underlying this recommendation. See Aaron L. Nielson, *Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices* (Nov. 1, 2017) (report to the Admin. Conf. of the U.S.), <https://acus.gov/report/regulatory-waivers-and-exemptions-final-report>. Some agencies may also derive authority to grant waivers or exemptions from presidential delegations under Article II of the Constitution. That category of waivers and exemptions is outside the scope of this recommendation.

<sup>3</sup> See, for example, the Stafford Act, 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.

<sup>4</sup> Of course, agencies cannot issue waivers or exemptions unless authorized by law, and even when authorized by law, agencies must not issue them in an arbitrary fashion.



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Yet, waiving or exempting a regulated party from a statutory or regulatory requirement also raises important questions about predictability, fairness, and protection of the public. For instance, when an agency decides to waive legal requirements for some but not all regulated parties, the decision to grant a waiver or exemption may create the appearance—or perhaps even reality—of irregularity, bias, or unfairness. Waiving or exempting a regulated party from a legal requirement, therefore, demands that agencies simultaneously consider regulatory flexibility, on the one hand, and consistent, non-arbitrary administration of the law, on the other.

Agencies' authority to waive or exempt regulated parties from legal requirements may also intersect with other principles of administrative law. When agencies frequently issue waivers or exemptions because a regulation is outdated or ineffective, for example, amending or rescinding the regulation may be more appropriate in some circumstances, despite the necessary resource costs.<sup>5</sup> Such revisions can enhance efficiency and transparency. The requisite notice-and-comment procedures can also foster public participation and informed decisionmaking.

The following recommendations offer best practices and factors for agencies to consider regarding their waiver and exemption practices and procedures. They are not intended to disturb or otherwise limit agencies' broad discretion to elect how to best use their limited resources.

### RECOMMENDATION

#### **Scope of Waiver and Exemption Authority**

1. When permitted by law, agencies should consider creating mechanisms 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.
2. When consistent with the statutory scheme, agencies should endeavor to draft regulations so that waivers and exemptions will not be routinely necessary. When an agency has

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<sup>5</sup> See Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, ¶ 5, 79 Fed. Reg. 75,114, 75,116 (Dec. 17, 2014) (identifying petitions from stakeholder groups and members of the public and poor compliance rates as factors to consider in identifying regulations that may benefit from amendment or rescission).



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approved a large number of similar waivers or exemptions, the agency should consider revising the regulation accordingly. If eliminating the need for waivers or exemptions requires statutory reform, Congress should consider appropriate legislation.

### **Exercising Waiver or Exemption Authority**

3. Agencies should endeavor, to the extent practicable, to establish standards and procedures for seeking and approving waivers and exemptions.
4. Agencies should apply the same treatment to similarly situated parties when approving waivers and exemptions, absent extenuating circumstances.
5. Agencies should clearly announce the duration, even if indefinite, over which a waiver or exemption extends.

### **Transparency and Public Input in Seeking and Approving Waivers and Exemptions**

6. Agencies should consider soliciting public comments before establishing standards and procedures for seeking and approving waivers and exemptions.
7. Agencies should endeavor, to the extent practicable, to make standards and procedures for seeking and approving waivers and exemptions available to the public.
8. Agencies should consider soliciting public comments before approving waivers or exemptions.
9. Agencies should provide written explanations for individual waiver or exemption decisions and make them publicly available to the extent practicable and consistent with legal or policy concerns, such as privacy. Further, agencies should consider providing written explanations of representative instances to help illustrate the types of activities likely to qualify for a waiver or exemption.