



Regulatory Waivers and Exemptions

Committee on Administration and Management

Proposed Recommendation for Committee | October 18, 2017

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

11 Yet, waiving or exempting a regulated party from a statutory or regulatory requirement
12 also raises important questions about predictability and fairness. For instance, when an agency
13 decides to waive legal requirements for some but not all regulated parties, the decision to grant a

¹ Agencies may also *retrospectively* excuse regulated parties from complying with the law by refusing 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.

² The terms “waiver” and “exemption” carry various meanings in agency practice. For the purposes of this recommendation, where Congress has expressly authorized an agency to excuse a regulated party from a legal requirement, the term “waiver” is used. Where 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* (Sept. 11, 2017) (draft report to the Admin. Conf. of the U.S.), *available at* <https://www.acus.gov/report/regulatory-waivers-and-exemptions-draft-report>. Some agencies may also derive authority to grant waivers or exemptions from Article II of the Constitution. That category of waivers and exemptions is outside the scope of this recommendation.



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14 waiver or exemption may create the appearance—or perhaps even reality—of irregularity, bias,
15 or unfairness. Waiving or exempting a regulated party from a legal requirement, therefore,
16 demands that agencies simultaneously consider regulatory flexibility on the one hand and
17 consistent, non-arbitrary administration of the law on the other.

18 Agencies' authority to waive or exempt regulated parties from legal requirements may
19 also intersect with other principles of administrative law. When agencies frequently issue
20 waivers or exemptions because a regulation is outdated or ineffective, for example, amending or
21 rescinding the regulation may be more appropriate in some circumstances despite the necessary
22 resource costs.³ Such revisions can enhance efficiency and transparency. The requisite notice-
23 and-comment procedures can also foster public participation and informed decision-making.

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

RECOMMENDATION

Scope of Waiver and Exemption Authority

- 27 1. To the extent permitted by law, agencies should consider creating programs that would
28 allow regulated parties to apply for waivers or exemptions by demonstrating conduct that
29 will achieve the same purpose as full compliance with the relevant statutory or regulatory
30 requirement.
- 31 2. When an agency has granted a large number of waivers or exemptions, the agency should
32 consider revising the regulation's scope accordingly.⁴ If eliminating the need for waivers

³ See Administrative Conference of the United States, Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,116 (Dec. 17, 2014).

⁴ See *id.* ¶ 5 (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).



33 or exemptions requires statutory reform, the agency should consider recommending
34 appropriate revisions to the relevant committee in Congress.

Exercising Waiver or Exemption Authority

- 35 3. Agencies should apply the same treatment to similarly situated parties when granting
36 waivers and exemptions, absent extenuating circumstances.
- 37 4. Agencies should clearly announce the duration, even if indefinite, over which a waiver or
38 exemption extends.

Transparency and Public Input in Granting Waivers and Exemptions

- 39 5. Agencies should endeavor, to the extent practicable, to provide public documents
40 regarding the procedures for granting waivers and exemptions.
- 41 6. Agencies should consider soliciting comments from stakeholder groups likely to be
42 affected by a waiver or exemption.
- 43 7. Agencies should provide written explanations for individual waiver or exemption
44 decisions to the extent practicable and consistent with privacy concerns. Otherwise,
45 agencies should consider written explanations of representative instances to help illustrate
46 types of activities likely to qualify for a waiver or exemption.