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.\(^1\) The authority to waive or exempt regulated parties from specific legal requirements affords agencies much-needed flexibility to respond to situations where generally applicable laws are a poor fit for a given situation.\(^2\) Emergencies or other unforeseen circumstances may also render compliance with a statutory or regulatory requirement impossible or impracticable. In such instances, requiring strict adherence to legal requirements may not be desirable. This is particularly true where the recipient of a waiver or exemption demonstrates that it intends to engage in conduct that will otherwise further the agency’s legitimate goals.

Yet, waiving or exempting a regulated party from a statutory or regulatory requirement also raises important questions about predictability and fairness. For instance, when an agency 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.
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.\(^3\) Such revisions can enhance efficiency and transparency. The requisite notice-and-comment procedures can also foster public participation and informed decision-making.

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. To the extent 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.

2. When an agency has granted a large number of waivers or exemptions, the agency should consider revising the regulation’s scope accordingly.\(^4\) If eliminating the need for waivers

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\(^4\) 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).
or exemptions requires statutory reform, the agency should consider recommending appropriate revisions to the relevant committee in Congress.

**Exercising Waiver or Exemption Authority**

3. Agencies should apply the same treatment to similarly situated parties when granting waivers and exemptions, absent extenuating circumstances.

4. Agencies should clearly announce the duration, even if indefinite, over which a waiver or exemption extends.

**Transparency and Public Input in Granting Waivers and Exemptions**

5. Agencies should endeavor, to the extent practicable, to provide public documents regarding the procedures for granting waivers and exemptions.

6. Agencies should consider soliciting comments from stakeholder groups likely to be affected by a waiver or exemption.

7. Agencies should provide written explanations for individual waiver or exemption decisions to the extent practicable and consistent with privacy concerns. Otherwise, agencies should consider written explanations of representative instances to help illustrate types of activities likely to qualify for a waiver or exemption.