



Regulatory Waivers and Exemptions

Committee on Administration and Management

Proposed Recommendation for Committee | September 27, 2017

1 Federal agencies often enforce statutes or regulations. Sometimes, however, agencies
2 decline to do so—either prospectively or retrospectively—through means such as waivers,
3 exemptions, or the exercise of prosecutorial discretion. For purposes here, use of waivers,
4 exemptions, or prosecutorial discretion is called “nonenforcement.” The authority to engage in
5 such nonenforcement may arise from either express or implicit congressional directive. While
6 some agencies forego enforcement sua sponte, most do so only at the request of a regulated
7 party.

8 There is no universally-accepted typology of agency nonenforcement practices used by
9 the courts, agencies, Congress, or scholars. For the purposes of this recommendation, an agency
10 may be considered to exercise prosecutorial discretion when it decides to forego enforcement of
11 a legal violation that has already occurred. If the law has not yet been violated, an agency may
12 engage in nonenforcement by either waiving or exempting an individual or entity from a
13 statutory or regulatory requirement. Where Congress has expressly authorized an agency to
14 engage in prospective nonenforcement, the term “waiver” is used. Where Congress has
15 implicitly authorized prospective nonenforcement, the term “exemption” is used.¹

¹ Generally, there is no bright dividing line between “waivers” and “exemptions,” and the terms may carry various meanings in agency practice. The definitions above 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>.



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16 A key feature of the Administrative Procedure Act is the presumption that final agency
17 action is subject to judicial review.² Since the Supreme Court’s decision in *Heckler v. Chaney*,³
18 however, an agency’s decision to decline to bring an enforcement action has been presumptively
19 *unreviewable*.⁴ And, while federal courts are more willing to review certain types of
20 nonenforcement—such as an agency’s decision to waive one of its own requirements as *part* of a
21 decision-making process that results in a reviewable decision⁵ or statement of a general
22 nonenforcement policy⁶—the federal courts have not had frequent occasion to address the issue.

23 Nonenforcement is often appropriate and advantageous for agencies and regulated
24 entities. Because resources are finite, it is impossible for agencies to investigate every violation
25 of statutory or regulatory law. Even if a violation is known, it may not be cost-effective to
26 pursue it, especially if an agency would then be unable to pursue other violations it deems more
27 important. Nor would inflexible enforcement always be desirable; sometimes generally
28 applicable laws are a poor fit for a particular situation.

29 Yet, the exercise of nonenforcement also raises important questions about predictability
30 and fairness. For instance, when an agency decides to waive legal requirements for some but not
31 all regulated parties, or a potential or intended beneficiary of a regulatory scheme is harmed by
32 nonenforcement, the decision to not enforce the law may create the appearance or perhaps even
33 reality of irregularity, bias, or unfairness. Nonenforcement, therefore, compels agencies to
34 balance regulatory flexibility and cost-effectiveness against evenhanded, non-arbitrary
35 administration of the law.

² See, e.g., 5 U.S.C. § 551(13) (2016) (defining “agency action” as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*”) (emphasis added); *id.* § 704 (providing that “final agency action” is “subject to judicial review” so long as there is “no other adequate remedy in a court”); see also *id.* § 706(1) (instructing the reviewing court to “compel agency action unlawfully withheld”).

³ 470 U.S. 821 (1985).

⁴ The presumption is rebuttable “where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.” *Id.* at 833.

⁵ See *NetworkIP, LLC v. FCC*, 548 F.3d 116 (D.C. Cir. 2008).

⁶ See *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671 (D.C. Cir. 1994).



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36 Agencies' exercise of nonenforcement may intersect with other principles of
37 administrative law. For example, agencies often decline to enforce a regulation because it is
38 outdated or ineffective. Rather than engage in nonenforcement in such circumstances, efficiency
39 and transparency values may militate in favor of retrospectively reviewing outdated or
40 ineffective regulations.⁷ While there are costs associated with revising regulations (not the least
41 which is engaging in notice-and-comment rulemaking), revising regulations that agencies
42 frequently decline to enforce may enhance perceptions of fairness and predictability.

43 The following recommendations offer factors and best practices for agencies to consider
44 as they seek to increase the transparency, consistency, and fairness of their nonenforcement
45 practices. They are not intended to disturb or otherwise limit agencies' broad discretion to elect
46 how to best utilize their often-limited resources. The recommendations begin with
47 considerations for limiting the scope of nonenforcement before turning to best practices for
48 exercising nonenforcement discretion and increasing transparency and public input in
49 nonenforcement decisionmaking.

RECOMMENDATION

Scope of Nonenforcement

- 50 1. Agencies should strive to limit nonenforcement to those instances in which they cannot,
51 as an a priori matter, articulate objective criteria for identifying conduct that falls outside
52 the scope of a given regulatory program. To the extent that the agency can articulate
53 such criteria, it should consider altering the relevant rule or recommending that Congress
54 amend the relevant statute.
- 55 2. In those instances in which an agency has granted a large number of exemptions or
56 exercised its prosecutorial discretion to decide against sanctioning certain conduct, the
57 agency should consider revising its regulations in order to tailor the scope of the rule to

⁷ See Administrative Conference of the United States, Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,116 (Dec. 17, 2014).



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- 58 eliminate the need for extensive nonenforcement.⁸ To the extent that remedying the
59 situation would require statutory reform, the agency should consider recommending
60 appropriate revisions to the relevant committee in Congress.
- 61 3. Agencies should consider creating programs that would allow regulated entities to apply
62 for waivers or exemptions by demonstrating that they intend to engage in conduct that
63 will achieve the same policy goals as fully complying with the relevant statutory or
64 regulatory requirements.

Exercise of Nonenforcement Discretion

- 65 4. Agencies should apply the same treatment to similarly situated parties when engaging in
66 nonenforcement. As developed more fully below, agencies should strive when
67 reasonably possible to provide objective, generally applicable reasons for all
68 nonenforcement decisions and to announce those reasons in a publicly available
69 document.
- 70 5. As a general matter, waivers and exemptions should extend only for a limited period of
71 time. When issuing a waiver or exemption, agencies should clearly announce the period
72 of time over which it extends.

Transparency and Public Input in Nonenforcement Decisionmaking

- 73 6. To the extent possible, agencies should provide public-facing documents that announce in
74 advance the general policies to be applied when making nonenforcement decisions.
75 These documents should describe the procedures for seeking a nonenforcement decision;
76 the criteria the agency will apply in deciding each case; and the opportunities, if any, for
77 other parties to file comments supporting or opposing the request for nonenforcement.
- 78 7. To the extent practicable and consistent with privacy concerns, agencies should provide
79 written explanations for individual nonenforcement decisions. If this cannot practically
80 be accomplished for all nonenforcement decisions, agencies should consider issuing

⁸ See *id.* ¶ 5 (identifying petitions for nonenforcement and poor compliance rates as factors to consider in identifying regulations that may benefit from amendment or rescission).



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81 written explanations in representative cases that help illustrate the type of activity that is
82 likely to qualify for nonenforcement.

83 8. In cases in which the agency believes that the decision of whether to engage in
84 nonenforcement would benefit from broader input, it should consider seeking comments
85 from stakeholder groups likely to be affected by the decision. This may include
86 competitors of the party seeking nonenforcement, regulatory beneficiaries, or other
87 entities with an interest in the agency's decision.