



## Regulatory Waivers and Exemptions

### Committee on Administration and Management

Proposed Recommendation | December 15, 2017

#### Proposed Amendments

**This document displays manager's amendments (with no marginal notes).**

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.<sup>1</sup> The authority to waive or exempt regulated parties from specific legal  
5 requirements affords agencies much-needed flexibility to respond to situations **where-in which**  
6 generally applicable laws are a poor fit for a given situation.<sup>2</sup> Emergencies or other unforeseen  
7 circumstances may also render compliance with statutory or regulatory requirements impossible  
8 or impracticable. In such instances, requiring strict adherence to legal requirements may not be  
9 desirable.<sup>3</sup> This is particularly true **where-when** the recipient of a waiver or exemption

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<sup>1</sup> 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.

<sup>2</sup> The terms “waiver” and “exemption” carry various meanings in agency practice. For the purposes of this recommendation, **where-when** Congress has expressly authorized an agency to excuse a regulated party from a legal requirement, the term “waiver” is used. **Where-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) (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> Of course, agencies cannot issue waivers or exemptions unless authorized by law, and even **where-when** authorized by law, agencies must not issue them in an arbitrary fashion.



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10 demonstrates that it intends to engage in conduct that will otherwise further the agency's  
11 legitimate goals.

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

19 Agencies' authority to waive or exempt regulated parties from legal requirements may  
20 also intersect with other principles of administrative law. When agencies frequently issue  
21 waivers or exemptions because a regulation is outdated or ineffective, for example, amending or  
22 rescinding the regulation may be more appropriate in some circumstances, despite the necessary  
23 resource costs.<sup>4</sup> Such revisions can enhance efficiency and transparency. The requisite notice-  
24 and-comment procedures can also foster public participation and informed decisionmaking.

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

### RECOMMENDATION

#### Scope of Waiver and Exemption Authority

- 28 1. To the extent permitted by law, agencies should consider creating programs that would  
29 allow regulated parties to apply for waivers or exemptions by demonstrating conduct that

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<sup>4</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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30 will achieve the same purpose as full compliance with the relevant statutory or regulatory  
31 requirement.

32 2. When an agency has approved a large number of similar waivers or exemptions, the  
33 agency should consider revising the regulation's scope accordingly. If eliminating the  
34 need for waivers or exemptions requires statutory reform, Congress should consider  
35 appropriate legislation.

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

36 3. Agencies should endeavor, to the extent practicable, to establish standards and  
37 procedures for seeking and approving waivers and exemptions.

38 4. Agencies should apply the same treatment to similarly situated parties when approving  
39 waivers and exemptions, absent extenuating circumstances.

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

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

42 6. Agencies should consider soliciting comments before prescribing standards and  
43 procedures for approving waivers and exemptions.

44 7. Agencies should endeavor, to the extent practicable, to make standards and procedures  
45 for approving waivers and exemptions available to the public.

46 8. Agencies should consider soliciting comments before approving waivers or exemptions.

47 9. Agencies should consider providing written explanations for individual waiver or  
48 exemption decisions to the extent practicable and consistent with privacy concerns.

49 Otherwise, agencies should consider providing written explanations of representative  
50 instances to help illustrate the types of activities likely to qualify for a waiver or  
51 exemption.