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Media Inquiries: [Judy Pino](#), 202-869-5218

NCLA Comments on Department of Energy Rulemaking It Prompted on Use of Guidance
Proposed Agency Guidance Rulemaking (Docket Number DOE_FRDOC_0001-3856)

Washington, DC (December 23, 2019) – The New Civil Liberties Alliance submitted **comments** due this week in response to a Department of Energy (DOE) notice of [proposed rulemaking](#) on the use of guidance. NCLA first [proposed](#) the idea to the agency on August 2, 2019. We commend DOE for acknowledging and acting quickly on this petition, signaling that it is invested in meaningful regulatory reform that curbs abuses of administrative power—an issue absolutely central to NCLA’s mission.

DOE’s Proposed Rule is compatible with Executive Orders signed by President Trump in October aimed at reining in guidance and other unlawful administrative state action, and it would provide regulated parties with additional protections.

At least three of the Guidance Executive Orders’ requirements are achieved by DOE’s Proposed Rule. First, the order requires that guidance documents clearly state that they have no binding effect on the public. Second, the order requires agencies to implement “procedures for the public to petition for withdrawal or modification of a particular guidance document.” Finally, the Guidance EOs require additional review of “significant guidance document[s]” by the Office of Management and Budget’s Office of Information and Regulatory Affairs.

NCLA has [filed](#) 21 similar Petitions for Rulemaking since mid-2018 across the government, and agencies are responding. On December 3, 2019, the Department of Transportation (DOT) issued its Administrative Rulemaking, Guidance, and Enforcement Procedures final rule. In part, the DOT Final Rule responds to NCLA’s Dec. 2018 petition for rulemaking and included several of its proposed provisions. DOT’s willingness to adopt the provisions included in [NCLA’s petition](#) weighs in favor of DOE’s likewise adopting NCLA’s Proposed Rule.

For example, both DOT’s Final Rule and DOE’s Proposed Rule require any guidance document, or non-legislative rule, to identify itself as “‘guidance’ or its functional equivalent.” Additionally, both also require that guidance documents disclaim that they have legal force or effect and/or provide a prominent statement that the guidance document is not legally binding.

However, NCLA believes DOE should also consider including several provisions from DOT’s Final Rule that are not in DOE’s proposed rule. First, the DOT Final Rule mandates affirmative disclosure of exculpatory evidence in all civil enforcement actions akin to the “*Brady Rule*” available in criminal cases. Second, DOT’s Rule codifies that settlement agreements cannot bind parties outside those agreements. To avoid

potential misapplication of consent orders and settlement agreements in DOE enforcement actions, NCLA urges DOE to adopt a rule stating that “No DOE settlement agreement or consent order should be used to adopt or impose new regulatory obligations on entities that are not parties to the settlement.” Furthermore, this statement should be prominently displayed on the page(s) of the website displaying consent orders and settlement agreements.

NCLA released the following statements:

“NCLA appreciates the Department of Energy’s willingness to consider our Petition for Rulemaking and Proposed Rule. DOE’s action on this petition signals that it is invested in purposeful regulatory reform that curbs abuses of administrative power.”

—**Kara Rollins, NCLA Litigation Counsel**

“DOE’s Proposed Rule provides a means to achieve key goals set forth in President Trump’s October 9, 2019 executive orders. In particular, the judicial review provisions NCLA has proposed provide an elegant and effective mechanism to enable judicial review of unlawful guidance, and DOE should adopt these provisions.”

—**Mark Chenoweth, NCLA General Counsel**

ABOUT NCLA

NCLA is a nonprofit civil rights organization founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other *pro bono* advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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