

 New Civil Liberties Alliance

September 17, 2020

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Robert Hinchman,
Senior Counsel, Office of Legal Policy
U.S. Department of Justice
Room 4252 RFK Building
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: Prohibition on the Issuance of Improper Guidance Documents Within the Justice Department, Docket Number OAG 165

Dear Mr. Hinchman,

The New Civil Liberties Alliance (NCLA) submits the following comment in response to the Department Justice's (DOJ) request for comment on its August 19, 2020 interim final rule. *See* Department of Justice Prohibition on the Issuance of Improper Guidance Documents Within the Justice Department, 85 Fed. Reg. 50951 (Aug. 19, 2020) (to be codified at 28 C.F.R. Part 50) (Improper Guidance Prohibition Rule).

Under its Improper Guidance Prohibition Rule, DOJ is codifying the Statements of Policy portion of its Prohibition on Improper Guidance Documents Memorandum and section 1-19.000 of the Justice Manual in conformity with Executive Order 13891's requirements.¹ *Id.* at 50952; *see also*

¹ On July 18, 2018, NCLA submitted a petition for rulemaking and proposed rule to DOJ, urging the department to promulgate formal guidance procedures in view of frequent misuse of agency guidance. *See* NCLA, Petition for Rulemaking to Promulgate Regulations Prohibiting the Issuance, Reliance on or Defense of Improper Agency Guidance (July 18, 2018), *available at* <https://nclalegal.org/wp-content/uploads/2018/11/PetitionforGuidanceRulemaking-DOJ1.pdf> (NCLA July 2018 Petition). The following year, President Trump issued Executive Order No. 13891, requiring agencies to curb such improper agency guidance practices and promulgate procedural rules to that end. *See* Promoting the Rule of Law Through Improved Agency Guidance Documents, Exec. Order No. 13891, 84 Fed. Reg. 55235 (Oct. 9, 2019). NCLA submitted an auxiliary letter in support of its July 2018 Petition to DOJ on August 6, 2020, at which time the agency had yet to respond to NCLA's petition or comply with the Executive Order's directives (August 2020 Letter). Subsequently

Prohibition on Improper Guidance Documents Memorandum (Nov. 16, 2017) *available at* <https://www.justice.gov/opa/press-release/file/1012271/download> (Sessions Memo). NCLA commends DOJ for issuing a binding final rule—a protection that is vital to stopping regulated parties from being subject to unlawful enforcement actions based on alleged violations of guidance. NCLA also appreciates the agency’s invitation to comment on its Improper Guidance Prohibition Rule, which partly adopts suggestions made in NCLA’s [July 2018 Petition for Rulemaking](#).² DOJ’s partial incorporation of the procedures outlined in NCLA’s proposed rule signals that it is invested in meaningful regulatory reform that curbs abuses of administrative power—an issue central to NCLA’s mission.

NCLA incorporates and re-adopts the facts and reasoning set forth in both its July 2018 Petition and August 2020 Letter.

I. Statement of Interest

Having petitioned DOJ for adoption of adequate agency guidance procedures, NCLA has a continuing interest in the adoption of aspects of DOJ’s Improper Guidance Prohibition Rule. NCLA is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms. The “civil liberties” of the organization’s name include rights at least as old as the U.S. Constitution itself, such as a jury trial, due process of law (which includes fair notice of legal obligations), the right to be tried in front of an impartial and independent judge, and the right to live under laws passed by Congress. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies and department heads, and sometimes even the courts have trampled them for so long.

on August 19, 2020, DOJ issued its Improper Guidance Prohibition Rule and invited comment, to which NCLA now responds.

² NCLA’s July 2018 Petition for Rulemaking also includes provisions for petition for agency review of guidance, with the right to judicial review of the agency’s decision. *See* July 2018 Petition for Rulemaking at 21-22, 23-24. As indicated in the interim final rule, DOJ announced on August 26, 2020 that it will promulgate a second rule that will include provisions for the withdrawal or modification of existing guidance. Press Release, Dept. of Justice, Department of Justice Announces Rules Furthering Lawfulness and Transparency in the Regulatory Process, (Aug. 26, 2020) *available at* <https://www.justice.gov/opa/pr/department-justice-announces-rules-furthering-lawfulness-and-transparency-regulatory-process>. As of this date, that rule has not been published in the Federal Register. But a draft of the rule has been made available. *See* Processes and Procedures for Issuance and Use of Guidance Documents (Aug. 21, 2020) (to be codified at 28 C.F.R. Part 50) (Guidance Processes and Procedures Rule) *available at* <https://www.justice.gov/file/1308736/download>. A review of the draft rule indicates that unlike the review provisions in NCLA’s July 2018 Petition for Rulemaking, the Guidance Processes and Procedures Rule does not state that DOJ’s review and determination regarding a withdrawal petition is final agency action that is subject to judicial review. While NCLA intends to comment on the Guidance Processes and Procedures Rule when it is published, we highlight the deficiency now because including an explicit judicial review provision is useful to both the public and the courts and furthers the spirit and requirements of Executive Order 13891.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more people on a daily basis. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent.³ This unconstitutional administrative state within the Constitution’s United States is the focus of NCLA’s attention.

Even where NCLA has not yet brought a suit to challenge an agency’s unconstitutional exercise of administrative power, it encourages government officials themselves to curb the unlawful administrative power by establishing meaningful limitations on their exercise of authority. The courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads have a duty to follow the law, not least by avoiding unlawful modes of governance. NCLA therefore advises that all agencies and agency heads must examine whether their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act (APA) and with the Constitution.

II. The Improper Guidance Prohibition Rule Corrects Issues with Meta-Guidance by Creating a Binding and Final Rule

While the Sessions Memo represented a watershed moment in agency policy regarding the use of guidance, in effect it was little more than guidance on guidance because it lacked any permanent or binding effect. To be sure, the policies and principles outlined in the Sessions Memo are important to guarantee DOJ enforcement actions that are fair, grounded in the law, and not subject to unfair surprise regarding regulated parties’ obligations. But the Sessions Memo explicitly stated that it was only “an internal Department of Justice *policy* directed at Department components and employees” and that “it is not intended to, does not, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.” Sessions Memo at 3 (emphasis added). Because the Sessions Memo was only an internal policy, its noble goals could be rescinded at any time, without input from affected individuals and entities. *See* July 2018 Petition for Rulemaking at 18-19.

As NCLA discussed in its July 2018 Petition for Rulemaking, absent the inclusion of these policies and principles in a final and binding rule, the ephemeral nature of agency policies threatened the continuing existence of these protections. *See id.* at 17-19. The Improper Guidance Prohibition

³ *See generally* Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

Rule corrects this deficiency by codifying these important policies and principles. NCLA commends DOJ for taking this vital action.

III. Conclusion

Thank you again for this opportunity to provide NCLA's view on this important rulemaking proposal. Should you have any questions, please contact Kara Rollins, Litigation Counsel, at kara.rollins@ncla.legal.

Kind regards,



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