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NCLA’s Comments on Proposed Rules Prompt HHS and DOJ to Curb Abuses of Administrative Power

Prohibition on the Issuance of Improper Guidance Documents Within the Justice Department, Docket Number OAG 165; Department of Health and Human Services Good Guidance Practices, Docket Number HHS-OS-2020-0008

Washington, DC (September 18, 2020) – The U.S. Department of Health and Human Services (HHS) and the U.S. Department of Justice (DOJ) have adopted recommendations from petitions for rulemaking submitted in 2018 by the New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group. NCLA petitioned federal agencies and departments across the government that too often regulate through “guidance” to follow the process the Administrative Procedure Act (APA) mandates for regulations—specifically notice and comment. This week, at the invitation of both departments, NCLA submitted comments to HHS’s [“Good Guidance Practices”](#) proposed rule and DOJ’s [“Prohibition on the Issuance of Improper Guidance Documents Within the Justice Department”](#) interim final rule.

HHS’s [proposed rule](#) partly adopts suggestions made in NCLA’s [September 2018 petition for rulemaking](#). NCLA’s comments respond specifically to the portion of HHS’s proposed rule that would allow regulated parties to petition for withdrawal or modification of guidance documents. In its response, NCLA commends HHS for including a finality statement, a vital procedural protection that allows regulated parties to vindicate their rights in court. Finality and meaningful judicial review are recurring problems with respect to agency guidance documents. We believe, however, the proposed rule doesn’t go far enough to guarantee the opportunity for judicial review. NCLA urges HHS to specify in the final rule that its decision on a petition is final agency action, subject to judicial review. Further, NCLA recommends that the proposed rule include an additional provision establishing a definite timeline for required agency response under the rule’s suspension provision.

NCLA is also pleased that DOJ issued a binding final rule, a protection which stops regulated parties from being subject to unlawful enforcement actions based on alleged violations of guidance that purport to bind private parties with the force of law. DOJ’s [proposed interim final rule](#) partly adopts suggestions made in NCLA’s [July 2018 petition for rulemaking](#) asking the department to include the policies and principles in the memo drafted by former Attorney General Jeff Sessions. The Sessions memo prohibited improper guidance documents, but NCLA’s petition described the Sessions memo as “little more than guidance on guidance” because it lacked any permanent or binding effect. DOJ’s interim final rule corrects this deficiency by codifying its policies and principles in a final and binding rule.

Since 2018, NCLA has petitioned over twenty federal agencies and departments to adopt formal rules that will last. See the full list of petitions for rulemaking filed by NCLA [here](#).

NCLA released the following statements:

“NCLA’s petitions have languished with the agencies for years. Thankfully, in response to President Trump’s Executive Order prompting agencies to adopt procedures regarding guidance documents, agencies, like HHS and DOJ, have finally taken action to curb the unlawful use of guidance documents. This is a positive first step in making sure that agencies are following the rule of law and the Constitution.”

— **Kara Rollins, Litigation Counsel, NCLA**

“As well-meaning as the Sessions memo may have been, it skipped the rulemaking process just like the guidance documents it targeted. It is refreshing to see those intentions finally codified. These rules are a sign that federal agencies are slowly but surely coming to terms with the idea that they, too, are bound by the Constitution and rule of law.”

— **Jared McClain, Staff Counsel, NCLA**

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group 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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