New Civil Liberties Alliance

October 28, 2020

VIA REGULATIONS.GOV

Ms. Xenia Kler
Office of the Assistant General Counsel for Litigation
U.S. Department of Commerce
1401 Constitution Ave, NW
Washington, DC 20230

Re: Department of Commerce Promoting the Rule of Law Through Improved Agency Guidance Documents, Docket Number DOC-2020-0004

Dear Ms. Kler,

The New Civil Liberties Alliance (NCLA) submits the following comment in response to the Department Commerce's (Commerce) request for comment on its September 28, 2020 interim final rule. *See* Department of Commerce Promoting the Rule of Law Through Improved Agency Guidance Documents, 85 Fed. Reg. 60694 (Sept. 28, 2020) (to be codified at 15 C.F.R. pt. 29) (Commerce Interim Final Rule). NCLA appreciates the agency's invitation to comment on the Commerce Interim Final Rule.

Since 2018, NCLA has submitted petitions for rulemaking to numerous agencies seeking changes to procedures for agency guidance use and issuance.[1] Last year, President Trump issued Executive Order No. 13891 requiring agencies to curb 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) (Executive Order 13891).

[1] *See, e.g.*, Regulations Prohibiting Issuance, Reliance, or Defense of Improper Agency Guidance, Notice of Petition for Rulemaking, 84 Fed. Reg. 50791 (Sept. 26, 2019) (DOE Notice of Petition and Request for Comment); *see also id.* at 50793-800 (DOE Petition for Rulemaking); *Id.* at 50798-99 (DOE Proposed Rule).

Executive Order 13891 and the Commerce Interim Final Rule partially incorporate several of the procedures outlined in NCLA's rulemaking petitions, signaling that the Commerce Dept. is invested in meaningful regulatory reform that curbs abuses of administrative power—an issue central to NCLA's mission.

I. Statement of Interest

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 made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies, and sometimes even the courts have trampled them for so long.

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 Americans. 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.[2] 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 agencies themselves to curb the unlawful exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. 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 Agency Should Amend the Interim Final Rule to Provide for Availability of Judicial Review After the Final Disposition of a Public Petition for Withdrawal or Modification of Guidance Documents

[2] *See generally* Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

Finality and meaningful judicial review are recurring problems with respect to agency guidance documents.[3] In conformity with the requirements of Executive Order 13891, § 4, the Commerce Interim Final Rule addresses some of these problems by making it clear that guidance documents are non-binding and providing procedures to petition for withdrawal or modification of guidance documents. However, even with additional procedures in place, regulated entities may still fall victim to improper guidance absent the availability of judicial review of the agency's response to a petition for withdrawal or modification of guidance documents.

The judiciary has historically lacked the ability to review improper agency guidance.[4] This occurs even when the improper guidance is binding because the APA typically only permits review of "final agency action."[5] An agency action is final when the action "mark[s] the consummation of the agency's decision-making process" and the action is "one by which rights or obligations have been determined, or from which legal consequences will flow."[6] The binding nature of an agency action does not necessarily make the action final.[7] Consequently, "[a]n initial or interim ruling, even one that binds, 'does not mark the consummation of agency decision-making' and thus might not constitute final agency action."[8] The failure to achieve finality under the APA has resulted in courts' inability to consider the coercive effects of binding guidance documents.[9]

In conformity with the requirements of Executive Order 13891, § 4, the Commerce Interim Final Rule provides a mechanism for challenging improper agency guidance, which is beneficial. However, the Interim Final Rule does not provide a clear method for aggrieved parties to challenge the agency's determination regarding a petition for review or modification. NCLA urges Commerce to include an explicit judicial review provision in its final rule. If the agency's guidance review process falls short, clear procedures identifying when that action is final and what review is available allow an interested party to seek meaningful redress from the courts.

NCLA recommends that Commerce include an explicit judicial review provision in its final rule by adding the following language to section 29.3 of the interim final rule:

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[3] *See, e.g.*, DOE Petition for Rulemaking, 84 Fed. Reg. at 50795.
[4] *Id.* at 50791, 50795.
[5] *Id.* (quoting 5 U.S.C. § 704).
[6] *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations and quotation marks omitted).
[7] *Appalachian Power Co. v. Envtl. Prot. Agency*, 208 F.3d 1015, 1022 (D.C. Cir. 2000).
[8] *See, e.g.*, DOE Petition for Rulemaking, 84 Fed. Reg. at 50795 (quoting *Soundboard Ass'n v. Fed. Trade Comm'n*, 888 F.3d 1261, 1271 (D.C. Cir. 2018)).
[9] *Id.* (discussing cases).

(c) Any agency pronouncement, response, or failure to respond pursuant to subsections (a) and (b) of this section shall constitute final agency action under 5 U.S.C. § 704 and shall be subject to review pursuant to 5 U.S.C. § 702.

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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