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NCLA Comment Objects to Proposed HHS Rule Repealing Regulated Parties' Due Process Rights

Dept. of Health and Human Services Proposes Repeal of Guidance, Enforcement, and Adjudication Procedures

Washington, DC (November 22, 2021) - The Department of Health and Human Services (HHS) is attempting to [rescind](#) a [Final Rule](#) meant to protect due process rights of regulated persons by restricting HHS's ability to use non-public and non-binding standards to violate fair notice and cause unfair surprise in enforcement actions. The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed a [comment](#) objecting to HHS's proposed repeal because HHS neither provided a reasoned explanation for rescinding the [fair notice regulations](#) nor accounted for regulated persons' legitimate reliance interests in the rule.

HHS cites several [Executive Orders](#) issued by President Biden to justify rescinding the Final Rule. One such executive order directs agencies to rescind regulations that "threaten to frustrate the Federal Government's ability to confront urgent challenges facing the Nation, including the coronavirus disease 2019 pandemic, economic recovery, racial justice, and climate change." But NCLA argues that HHS failed to adequately explain its sudden change in position regarding the need for regulations to ensure fair notice and to prevent unfair surprise in enforcement actions. None of HHS's offered explanations suffice under the Administrative Procedure Act (APA).

Further, HHS failed to account for the fact that regulated persons have relied on the protections promised by the fair notice regulations being rescinded. Under the rule set out in *Dep't of Homeland Security v. Regents of the Univ. of California*, when an agency changes course, it is "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."

A change in administration cannot extinguish the reliance interests of people who were protected under the fair notice regulations. Executive Orders disfavoring due process and fair notice in administration proceedings do not eliminate the requirement for HHS to assess and consider these reliance interests. Consistent with the APA's rulemaking requirements, NCLA argues that HHS must withdraw the proposal to rescind the fair notice regulations.

NCLA released the following statement:

"Those in charge of enforcing the law have a natural aversion to providing due process rights to those whom they accuse and prosecute. That is why we don't trust police and prosecutors to enforce the due process rights of criminal defendants, and we instead entrust that duty to an independent judiciary. Unfortunately, such separation does not exist in administrative enforcement actions, where the agency acts as both prosecutor and judge. As a result, the public and courts should be very skeptical of any agency's claim that due process rights in enforcement investigations and proceedings somehow impose an unnecessary hurdle to the agency's mission."

— **Sheng Li, Litigation Counsel, NCLA**

For more information about this issue visit [here](#).

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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