

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF GEORGIA  
AUGUSTA DIVISION**

The States of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, West Virginia; Brian P. Kemp in his official capacity as Governor of the State of Georgia; Kay Ivey in her official capacity as Governor of the State of Alabama; Brad Little in his official capacity as Governor of the State of Idaho; Henry McMaster in his official capacity as Governor of the State of South Carolina; the Board of Regents of the University System of Georgia; Gary W. Black in his official capacity as Commissioner of the Georgia Department of Agriculture; Alabama Department of Agriculture and Industries; Alabama Department of Public Health; Alabama Department of Rehabilitation Services; Idaho State Board of Education,

Plaintiffs,

v.

Joseph R. Biden in his official capacity as President of the United States; Safer Federal Workforce Task Force; United States Office of Personnel Management; Kiran Ahuja in her official capacity as director of the Office of Personnel Management and as co-chair of the Safer Federal Workforce Task Force; Office of Management and Budget; Shalanda Young in her official capacity as Acting Director of the Office of Management and Budget and as a member of the Safer Federal Workforce Task Force; General Services Administration; Robin Carnahan in her official capacity as

Civil Action No. 1:21-cv-163-RSB-BKE

Administrator of the General Services Administration and as co-chair of the Safer Federal Workforce Task Force; Jeffrey Zients in his official capacity as co-chair of the Safer Federal Workforce Task Force and COVID-19 Response Coordinator; L. Eric Patterson in his official capacity as Director of the Federal Protective Service; James M. Murray in his capacity as Director of the United States Secret Service; Administrator Deanne Criswell in her official capacity as Administrator of Federal Emergency Management Agency; Rochelle Walensky in her official capacity as Director of the Center for Disease Control; United States Department of Defense; Lloyd Austin in his official capacity as the United States Secretary of Defense; United States Department of Health and Human Services; Xavier Becerra in his official capacity as the United States Secretary of Health and Human Services; National Institutes of Health; Francis S. Collins in his official capacity as Director of the National Institutes of Health; United States Department of Veterans Affairs; Denis McDonough in his official capacity as United States Secretary of Veterans Affairs; National Science Foundation; Sethuraman Panchanathan in his official capacity as Director of the National Science Foundation; United States Department of Commerce; Gina Raimondo in her official capacity as United States Secretary of Commerce; National Aeronautics and Space Administration; Bill Nelson in his official capacity as Administrator of the National Aeronautics and Space Administration; United States Department of Transportation; Richard Chávez, in his official capacity as the Director of the Department of Transportation; the

United States Department of Energy;  
and Jennifer Granholm in her official  
capacity as United States Secretary of  
Energy,

Defendants.

**FIRST AMENDED COMPLAINT FOR DECLARATORY AND  
PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF**

1. On September 9, 2021, President Biden announced that his patience was “wearing thin” with unvaccinated Americans,<sup>1</sup> and he issued an executive order that required federal departments and agencies to mandate that all of their federal contractors fully vaccinate their workforce. Executive Order 14042 is astonishing—not only for its tremendous breadth and unworkably short deadline, but also because so little care has been given to how it will work in the real world. The mandate, as the federal government has conceived, and thus far implemented, applies not only to contractor employees working on federal contracts, but also *any* employee that *may* have contact with someone working on a federal contract (even if that contact is nothing more than walking past them outside, in a parking lot). There are no exceptions for employees that work alone, outside, or even exclusively remotely. And the federal government is insisting that every federal contractor fully comply by January 18, 2022, which means employees have until December 7, 2021 to begin their two-shot vaccine regimen. The contractual language in question even, remarkably,

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<sup>1</sup> Office of Public Engagement, Transcript, Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>.

commits federal contractors to comply with any amendments to the administrative guidance that may be issued in the future.

2. For state agencies that work on federal contracts, this situation is untenable. This mandate puts billions of contracting dollars in peril, including huge portions of some state agencies' budgets. Some agencies have received notice of their need to comply with this mandate (or lose all their funding) within the past few days, leaving compliance all but impossible. At its core, the mandate forces contractors to make an impossible choice: either (1) take enforcement action that may include termination of all unvaccinated employees, or (2) face losing billions of dollars in federal funding. And because the administration has already amended the guidance multiple times, there is no telling what other onerous obligations may put state agencies in breach at a moment's notice.

3. The States of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, West Virginia, Georgia Governor Brian Kemp, Alabama Governor Kay Ivey, Idaho Governor Brad Little, South Carolina Governor Henry McMaster, the Board of Regents of the University System of Georgia, Commissioner Gary W. Black of the Georgia Department of Agriculture, the Alabama Department of Agriculture and Industries, the Alabama Department of Public Health, the Alabama Department of Rehabilitation Services, and the Idaho State Board of Education bring this action to stop this unprecedented and unconstitutional use of power by the federal government, and to end the nationwide confusion and disruption that the mandate has caused.

## **PARTIES**

4. Plaintiff State of Georgia is a sovereign state with many agencies that are federal contractors.

5. Plaintiff State of Alabama is a sovereign state with many agencies that are federal contractors.

6. Plaintiff State of Idaho is a sovereign state possessing all of the powers reserved to it under the 10th Amendment to the United States Constitution with many agencies that contract directly and administer contracts with the federal government.

7. Plaintiff State of Kansas is a sovereign state of the United States of America. Several of its agencies are federal contractors, and some of these agencies, including multiple state universities, have already been presented with contract amendments incorporating the Contractor Mandate.<sup>2</sup> The State of Kansas employs “covered contractor employees” at “covered contractor workplaces” as defined by the Task Force Guidance.

8. Plaintiff State of South Carolina is a sovereign state of the United States of America. South Carolina citizens and entities, who are federal contractors and subcontractors, have been and will be forced to comply with the unlawful COVID-19 vaccine mandate. Because of that unlawful action as to the State’s citizens and

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<sup>2</sup> As used throughout, Contractor Mandate includes, individually and collectively, Executive Order 14042, the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, the FAR Council’s Class Deviation Clause 252.223-7999, and the Office of Management and Budget’s *Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042*.

entities, Attorney General Alan Wilson brings this action on behalf of the State pursuant to his *parens patriae*, constitutional, and common law authority.

9. Plaintiff State of Utah is a sovereign State and has the authority and responsibility to protect its sovereign interests, public fisc, and the health, safety, and welfare of its citizens. Utah has many state entities that are federal contractors and thus Utah employs “covered contractor employees” and maintains “covered contractor workplaces” as defined by the Contractor Mandate. These contracts are worth millions of dollars, if not more. Utah expects to continue pursuing government contracts in the future. Utah also has current contracts subject to renewal or the exercise of options. The federal government has presented Utah with contract modifications that incorporate the Contractor Mandate. Utah will face irreparable harm if forced to comply.

10. Plaintiff State of West Virginia is a sovereign State and has the authority and responsibility to protect its sovereign interests, public fisc, and the health, safety, and welfare of its citizens. West Virginia has state entities that are signatories to “contract-like instruments” that may render affected employees and workplaces “covered contractor employees” and “covered contractor workplaces” as defined by the Contractor Mandate. These instruments are worth significant sums. West Virginia expects to continue pursuing government contracts in the future. West Virginia also has current agreements subject to renewal or the exercise of options. West Virginia will face irreparable harm if it is forced to comply with requirements imposed by the Contractor Mandate.

11. Plaintiff Brian P. Kemp is named in his official capacity as Governor of the State of Georgia and appears on behalf of the State of Georgia.

12. Plaintiff Kay Ivey is named in her official capacity as Governor of the State of Alabama and appears on behalf of the State of Alabama.

13. Plaintiff Brad Little, in his official capacity as Governor of the State of Idaho, has an interest in preventing the loss of federal funding that will result as a direct consequence of the Contractor Mandate. Additionally, the Governor has an interest in ensuring that all State laws, including the Idaho Constitution and Idaho Statutes, are executed, rather than subverted through federal overreach.

14. Plaintiff Henry McMaster is named in his official capacity as Governor of the State of South Carolina and appears on behalf of the State of South Carolina.

15. Plaintiff Board of Regents of the University System of Georgia was established in 1931 as a part of a reorganization of Georgia's state government. The Georgia Constitution grants to the Board of Regents the exclusive right to govern, control, and manage the University System of Georgia, an educational system comprised of twenty-six institutions of higher learning including universities with extensive research institutions such as Augusta University, the Georgia Institute of Technology, Georgia State University, and the University of Georgia.

16. Plaintiff Gary W. Black is named in his official capacity as Commissioner of the Georgia Department of Agriculture.

17. Plaintiff Alabama Department of Agriculture and Industries is a state agency responsible for serving farmers and consumers of agricultural projects.

18. Plaintiff Alabama Department of Rehabilitation Services is the state agency primarily responsible for serving Alabamians with disabilities.

19. Plaintiff Alabama Department of Public Health is the state agency primarily responsible for serving Alabamians' public health needs.

20. Plaintiff Idaho State Board of Education appears in its capacity as Regents of the University of Idaho, Board of Trustees of Boise State University, Board of Trustees of Idaho State University, and Board of Trustees of Lewis-Clark State College.

21. Defendant Joseph R. Biden is the 46<sup>th</sup> President of the United States who, on September 9, 2021, signed Executive Order 14042, titled *Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors* ("EO 14042").

22. Defendant Safer Federal Workforce Task Force (the "Task Force") was established pursuant to President Biden's Executive Order 13991 (86 Fed. Reg. 7045 (Jan. 25, 2021)). Three co-chairs oversee the Task Force, including: (1) the Director of the Office of Personnel Management ("OPM"); (2) the Administrator of the General Services Administration ("GSA"); and (3) the COVID-19 Response Coordinator. The Director of OPM is also a member of the Task Force.

23. Defendant Office of Personnel Management Director, Kiran Ahuja ("Director Ahuja"), is a co-chair and member of the Task Force and represents the federal agency responsible for managing human resources for civil service of the federal government.



24. Defendant Administrator of General Services, Robin Carnahan (the “GSA Administrator”), is a co-chair and member of the Task Force and represents the federal agency responsible for managing and supporting the basic functioning of federal agencies.

25. Defendant COVID–19 Response Coordinator, Jeffrey Zients (the “COVID-19 Response Coordinator”), is a co-chair and member of the Task Force.

26. Defendant Office of Management and Budget Director, Shalanda Young (the “OMB Director”), is a member of the Task Force and represents the federal agency with delegated authority, by President Biden, to publish determinations relevant to EO 14042 and the Task Force Guidance to the Federal Register.

27. Defendant Director of the Federal Protective Service, L. Eric Patterson (the “FPS Director”), is a member of the Task Force.

28. Defendant Director of the United States Secret Service, James M. Murray (the “Secret Service Director”), is a member of the Task Force.

29. Defendant Director of the Federal Emergency Management Agency, Deanne Criswell (the “FEMA Director”), is a member of the Task Force.

30. Defendant Director of the Center for Disease Control, Rochelle Walensky (the “CDC Director”), is a member of the Task Force.

31. Defendant Office of Management and Budget (“OMB”) is an agency of the United States government.

32. Defendant Office of Personnel Management (“OPM”) is an agency of the United States government.

33. Defendant General Services Administration (“GSA”) is an agency of the United States government, located within HHS.

34. Defendant United States Department of Defense (“DOD”) is an agency of the United States government.

35. Defendant United States Secretary of Defense, Lloyd Austin, is named in his official capacity as the United States Secretary of Defense.

36. Defendant United States Department of Health and Human Services (“DHHS”) is an agency of the United States government.

37. Defendant United States Secretary of Health and Human Services, Xavier Becerra, is named in his official capacity as the United States Secretary of Health and Human Services.

38. Defendant National Institutes of Health (“NIH”) is an agency of the United States government, located within DHHS.

39. Defendant NIH Director, Francis S. Collins, is named in his official capacity as the Director of the NIH.

40. Defendant United States Department of Veterans Affairs (“DVA”) is an agency of the United States government.

41. Defendant United States Secretary of Veterans Affairs, Denis McDonough, is named in his official capacity as the United States Secretary of Veterans Affairs.

42. Defendant National Science Foundation (“NSF”) is an agency of the United States government.

43. Defendant Director of the NSF, Sethuraman Panchanathan, is named in his official capacity as the Director of the NSF.

44. Defendant United States Department of Commerce (“DOC”) is an agency of the United States government.

45. Defendant United States Secretary of Commerce, Gina Raimondo, is named in her official capacity as the United States Secretary of Commerce.

46. Defendant National Aeronautics and Space Administration (“NASA”) is an agency of the United States government.

47. Defendant Administrator of the NASA, Bill Nelson, is named in his official capacity as the Director of the NASA.

48. Defendant United States Department of Transportation (“DOT”) is an agency of the United States government.

49. Defendant Director of the DOT, Richard Chávez, is named in his official capacity as the Director of the DOT.

50. Defendant United States Department of Energy (“DOE”) is an agency of the United States government.

51. Defendant United States Secretary of Energy, Jennifer Granholm, is named in her official capacity as the United States Secretary of Energy.

#### **STATEMENT OF JURISDICTION AND VENUE**

52. This Court has exclusive jurisdiction over this case under 28 U.S.C. §§ 1331 and 1346 because Plaintiffs’ claims arise under the Administrative Procedure Act, 5 U.S.C. §§ 702–703, and the United States Constitution, U.S. Const. art. III, § 2.

53. This Court is authorized to grant the requested declaratory and injunctive relief under 5 U.S.C. §§ 702 and 706, and 28 U.S.C. §§ 2201–02.

54. Venue is proper within this District pursuant to 28 U.S.C. § 1391(e) because (1) certain Plaintiffs reside in Georgia and no real property is involved, and (2) “a substantial part of the events or omissions giving rise to the claim occurred” in this District.

55. Venue further lies in this District pursuant to 28 U.S.C. § 1391(e)(1) because the State of Georgia is a resident of every judicial district in its sovereign territory including this judicial District (and Division). *See California v. Azar*, 911 F.3d 558, 570 (9th Cir. 2018).

### **FACTUAL ALLEGATIONS**

#### **Executive Order 14042 and the Safer Federal Workforce Task Force Guidelines**

56. On September 9, 2021, President Biden signed Executive Order 14042, titled *Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors* (“EO 14042”), a true and accurate copy of which is attached as **Exhibit A**.

57. EO 14042 purports to “promote[] economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument . . . .” **Ex. A** at 1.

58. EO 14042 claims that “ensuring that Federal contractors and subcontractors are adequately protected from COVID-19 will bolster economy and efficiency in Federal procurement.” **Ex. A** at 1.

59. EO 14042 directs executive agencies subject to the Federal Property and Administrative Services Act (the “Procurement Act”) to include in *all* federal contracts and “contract-like instruments” a clause that contractors and subcontractors will comply with all future guidance issued by the Task Force.

60. EO 14042 requires that the Task Force issue specific COVID safety protocols by September 24, 2021.

61. On September 24, 2021 the Task Force released its first *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (the “First Task Force Guidance”) to federal agencies, imposing a vaccine mandate on federal contractors and subcontractors, a true and accurate copy of which is attached as **Exhibit B**.

62. The First Task Force Guidance has been amended on several occasions, with the most recent amendment having occurred on November 10, 2021 (specifically referred to as the “Current Task Force Guidance” and generally referred to as the “Task Force Guidance”), a true and accurate copy of which is attached as **Exhibit C**.

63. EO 14042 further required that the Director of OMB publish a determination in the Federal Register as to “whether such Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors.” **Ex. A** at 2.

64. On September 28, 2021, Director Young published the OMB's *Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042* (the "First OMB Determination") stating in conclusory fashion "I have determined that compliance by Federal contractors and subcontractors with the COVID-19-workplace safety protocols detailed in that guidance will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract." 86 Fed. Reg. 53,691 (Sept. 28, 2021), a true and correct copy of which is attached as **Exhibit D**.

65. The First OMB Determination contained no research or data in support of its claims. Moreover, the First OMB Determination underwent no notice-and-comment period.

66. On November 16, 2021, Director Young issued a second OMB determination, *Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis* (the "Revised OMB Determination"). 86 Fed. Reg. 63,418 (Nov. 16, 2021), a true and correct copy of which is attached as **Exhibit E**.

67. The Revised OMB Determination purports to be immediately effective and provides only a thirty-day notice and comment period through December 16, 2021. The putative immediate effectiveness of the Revised OMB Determination is based on a waiver of the ordinary sixty-day notice and comment period before the Revised OMB Determination would otherwise become effective. *Id.*

68. Through EO 14042 and without legislative intervention, the President purported to give the Task Force, the OMB Director, and various federal agencies broad authority to impose vaccine mandates on federal contractors.

69. While EO 14042 did not specifically call for a vaccine mandate, it did purport to delegate rulemaking authority to the Task Force, OMB, and the Federal Acquisition and Regulatory Council (the “FAR Council”).

70. On September 30, 2021, the FAR Council issued Class Deviation Clause 52.223-99 (the “FAR Deviation Clause”) with accompanying guidance, a true and correct copy of which is attached as **Exhibit F**.

71. The FAR Deviation Clause requires federal contractors to follow the Task Force Guidance and any *future* amendments to the Guidance. **Ex. F**.

72. EO 14042, the Task Force Guidance, the FAR Deviation Clause, and the First and Revised OMB Determinations are hereinafter collectively referred to as the “Contractor Mandate.”

73. Ultimately, prior to implementing the FAR Deviation Clause, the Task Force Guidance was never published to the Federal Register for the purpose of receiving public comment.

74. Pursuant to the Current Task Force Guidance, “[p]eople are considered fully vaccinated for COVID-19 two weeks after they have received the second dose in a two-dose series, or two weeks after they have received a single-dose vaccine.” **Ex. C** at 4.

75. The First Task Force Guidance established that “covered contractor employees” are to be “fully vaccinated” by December 8, 2021.<sup>3</sup>

76. The Current Task Force Guidance requires that covered contractor employees be fully vaccinated by January 18, 2022—meaning said employees must obtain the final dose of their vaccine of choice no later than January 4, 2022.

77. Accordingly, any covered contractor employee inclined to take the Moderna vaccine would have had to receive their first dose by December 7, 2021 in order to comply with the January 18, 2022 deadline.<sup>4</sup>

78. Covered contractor employees must obtain a Pfizer vaccine by December 14, 2021<sup>5</sup> or a Johnson & Johnson vaccine by January 4, 2022.<sup>6</sup>

79. Pursuant to the Current Task Force Guidance, “covered contractor employees” refers to “any full-time or part-time employee of a covered contractor working on or *in connection with* a covered contract or working at a covered contractor workplace. *This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.*” **Ex. C** at 3 (emphasis added).

80. For the same reason, the Guidance also specifies that subcontractors working in a covered workplace must also be fully vaccinated. **Ex. C.** at 1.

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<sup>3</sup> This deadline was first amended on November 4, 2021 by way of a White House press release. Office of Public Engagement, Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies (Nov. 4, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/>.

<sup>4</sup> Center for Disease Control, Different COVID-19 Vaccines, (Oct. 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*



81. Pursuant to the Current Task Force Guidance, a covered contractor workplace “means a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract.” **Ex. C** at 4.

82. Pursuant to the First Task Force Guidance and the updated Frequently Asked Questions on the Task Force website, “unless a covered contractor can affirmatively determine that none of its employees on another floor or in separate areas of the building will come into contact with a covered contractor employee during the period of performance,” employees in other areas of the building site or facility are also a part of the covered contractor workplace. **Ex. B** at 11, Q9.<sup>7</sup>

83. Accordingly, the Contractor Mandate mandates vaccination for those who work both directly and indirectly with federal contracts.

84. For example, pursuant to the Task Force Guidance, if a covered contractor employee is working on a contract for the Department of Defense in a remote office facility and that person merely shares a parking garage with non-contracted employees once a week, those non-contracted employees are subject to the Contractor Mandate.

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<sup>7</sup> See Safer Federal Workforce Task Force, FAQs: Federal Contractors (last visited Nov. 18, 2021), <https://www.saferfederalworkforce.gov/faq/contractors/>. The Frequently Asked Questions were previously within the First Task Force Guidance; however, they were removed from the Current Task Force Guidance and are instead located on the Task Force website. The content published in response to each question remains the same.

85. In another example, pursuant to the Task Force Guidance, if a covered contractor employee is working on a contract for NASA in a remote office facility and that person merely shares an elevator with non-contracted employees every other Friday, those non-contracted employees are subject to the Contractor Mandate.

86. The First Task Force Guidance imposed a deadline of October 15, 2021 for federal agencies to include a vaccination mandate clause in new contracts.

87. EO 14042, in general terms, and the Task Force Guidance, in specific terms, further required that the Federal Acquisition Regulatory Council (“FAR Council”) “conduct a rulemaking to amend the [Federal Acquisition Regulation (“FAR”)] to include the [Contractor Mandate].” **Ex. B** at 12.

88. Pursuant to the First Task Force Guidance, by October 8, 2021 and prior to any rulemaking, the FAR Council was required to develop a recommended contract clause to impose the Contractor Mandate for federal agencies to include in their subsequent contracts. **Ex. B** at 12.

89. The First Task Force Guidance instructed the FAR Council to “recommend that agencies exercise their authority to deviate from the FAR” by using a vaccination mandate clause in contracts prior to the FAR Council actually amending the FAR. **Ex. B** at 12.

#### **Development and Implementation of the FAR Deviation Clause**

90. Before the FAR Deviation Clause was even published on September 30, 2021, the Defense Acquisition Regulations System and the Department of Defense published their intent to comply with EO 14042 via a Notice to the Federal Register

on September 17, 2021 (the “DOD Notice”). A true and correct copy of the DOD Notice is attached as **Exhibit G**.

91. In response, there were seventeen letter comments from members of the public, raising hundreds of key concerns that have yet to be addressed by OMB or the Task Force.

92. A few of the DOD Notice comments included concerns such as:

a. “Are contractors or the government [*sic*] be liable for employee disability or damage claims (side effects, etc.)?”<sup>8</sup>

b. “How will DOD monitor and measure any productivity disruptions?”<sup>9</sup>

c. “Are contractors expected to violate or undermine collective bargaining agreements as they comply with these requirements?”<sup>10</sup>

d. “Implementing a flow down vaccine mandate and/or testing will likely cause our subcontractors to experience significant employee attrition and financial hardship, potentially leaving them unable to fulfill their role in the distribution network.”<sup>11</sup>

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<sup>8</sup> Aerospace Industries Association (AIA), Comment Letter on DOD Implementation Planning for Executive Order 14042 (Sept. 23, 2021), [https://www.acq.osd.mil/dpap/dars/docs/early\\_engagement\\_opportunity/executive\\_order\\_14042/AIA%20Comments%20-%20EO%2040142%20DARS%20EEO.9-23-21.pdf](https://www.acq.osd.mil/dpap/dars/docs/early_engagement_opportunity/executive_order_14042/AIA%20Comments%20-%20EO%2040142%20DARS%20EEO.9-23-21.pdf).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> AmerisourceBergen, Comment Letter on DOD Implementation Planning for Executive Order 14042 (Sept. 23, 2021), [https://www.acq.osd.mil/dpap/dars/docs/early\\_engagement\\_opportunity/executive\\_order\\_14042/Amerisource%20Bergen%20Comments%20to%20DOD%20Early%20Eng](https://www.acq.osd.mil/dpap/dars/docs/early_engagement_opportunity/executive_order_14042/Amerisource%20Bergen%20Comments%20to%20DOD%20Early%20Eng)

93. The DOD Notice comments were never considered prior to issuing the Task Force Guidance. Indeed, the DOD ultimately published the DOD FAR Deviation Memo just one day after the FAR Deviation Clause, with no alterations.

94. Upon information and belief, even some federal agencies were unable to implement the Task Force Guidance due to the quick turnaround time of just 21 days from the date the Guidance was issued to the October 15, 2021 deadline.

**Many Employees Are Likely to Quit Rather Than Submit to Mandatory Vaccination**

95. From an employer's perspective, 9 in 10 employers fear significant reductions in their workforce if they had to implement vaccine mandates.<sup>12</sup>

96. In a recent survey, approximately 70% of unvaccinated workers said they would leave their job before complying with an employer-issued vaccine mandate.<sup>13</sup>

97. "Just under one in five U.S. adults, 18%, can be described as vaccine-resistant. These Americans say they would not agree to be vaccinated if a COVID-19 vaccine were available to them right now at no cost and that they are unlikely to

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agement%20Opportunity%20Ensuring%20Adequate%20COVID%20Safety%20Protocols%20for%20Federal%20Contractors%20EO%2014042%20final.pdf.

<sup>12</sup> Karl Evers-Hillstrom, *9 in 10 Employers Say They Fear They'll Lose Unvaccinated Workers Over Mandate: Survey*, The Hill (Oct. 18, 2021), <https://thehill.com/business-a-lobbying/business-a-lobbying/577201-9-in-10-employers-say-they-will-lose-unvaccinated>.

<sup>13</sup> Liz Hamel et al., Kaiser Family Found., KFF COVID-19 Vaccine Monitor: October 2021 (Oct. 28, 2021), <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-october-2021/>.

change their mind about it. The percentage holding these views has been stable in recent months.”<sup>14</sup>

### **The Georgia Board of Regents and University System of Georgia**

98. The Board of Regents (the “Board”) of the University System of Georgia (the “University System”) is composed of 19 members, five of whom are appointed from the state-at-large, and one from each of the state’s 14 congressional districts.

99. The Board oversees the 26 higher education institutions that comprise the University System including four research universities, four comprehensive universities, nine state universities and nine state colleges. It also includes the Georgia Public Library Service, which encompasses approximately 389 facilities within the 61 library systems throughout the State of Georgia. The University System also includes the Georgia Archives which identifies, collects, manages, preserves and provides access to records and information about Georgia.

100. Every employee of the 26 higher education institutions within the University System is an employee of the Board.

101. The University System has an annual budget of more than \$8.1 billion for fiscal year 2021.

102. The University System’s economic impact on the state was \$18.5 billion in fiscal year 2019, according to the most recent study conducted by the Selig Center for Economic Growth.

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<sup>14</sup> Jeffrey M. Jones, *About One in Five Americans Remain Vaccine Resistant*, Gallup (Aug. 6, 2021), <https://news.gallup.com/poll/353081/one-five-americans-remain-vaccine-resistant.aspx> (last visited Oct. 26, 2021).

103. Of the 157,770 jobs noted in a Selig Center for Economic Growth report, 33% are on the campuses while 67% are off campuses.

104. For every person employed at the University System or a member institution, two people have jobs in the local community that support the presence of the institution.

### **The Board and University System's Response to COVID-19**

105. The University System has provided students with access to COVID-19 vaccination sites on 15 campuses statewide.

106. Students can schedule their first or second dose at the University System campus closest to them, regardless of whether they are enrolled at that institution.

107. Since the beginning of the pandemic, the University System has worked closely with the Georgia Department of Public Health and the Governor's Office and Task Force to make sure their students keep learning and stay healthy.

108. While the University System strongly encourages that all faculty, staff, students, and visitors get vaccinated, it has not mandated vaccination.

109. The University System has stated publicly that "getting vaccinated is an individual decision and not required to be a part of the USG campuses."<sup>15</sup>

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<sup>15</sup> *USG Vaccination Locator*, U. Sys. Ga., <https://www.usg.edu/vaccination/> (last visited Oct. 26, 2021).

**Impact of the Contractor Mandate on the University System and Other Georgia State Agencies**

110. Universities and research institutions within the University System maintain hundreds of contracts with various federal agencies.

111. The University System employees who work on these federal agency contracts work throughout the University System campuses and in remote locations.

112. Relevant to the University System, a “covered contractor employee” goes beyond the individuals specifically assigned to a contract. Instead, “covered contractor employees” include “any full-time or part-time employee of a covered contractor working on or *in connection with* a covered contract or working at a covered contractor workplace.” **Ex. C** at 3–4 (emphasis added).

113. Moreover, “covered contractor employees,” specifically include other employees that come into *minimal* contact directly with contractor employees “unless a covered contractor can affirmatively determine that none of its employees on another floor or in separate areas of the building will come into contact with a covered contractor employee during the period of performance of a covered contract.” **Ex. B** at 11, Q9.

114. The “covered contractor workplace” broadly includes “a location controlled by a covered contractor at which *any employee* of a covered contractor working on or in connection with a covered contract is *likely to be present* during the period of performance for a covered contract.” **Ex. C** at 4 (emphasis added).

115. While a “covered contractor workplace” does not include a covered contractor employee’s residence, covered contractors working exclusively from their residence are required to be vaccinated. Ex. B at 10, Q8.

116. Ultimately, the Contractor Mandate extends to all employees that share “common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages.” Ex. B at 10.

117. Augusta University has a portfolio of at least 45 federal government agreements and contracts, many concerning the university’s healthcare research for the Department of Veterans Affairs and Department of Health and Human Services. Augusta University’s health and research arm—Augusta University Health—is Georgia’s only public academic health center, where world-class clinicians daily perform lifesaving research and development work under federally funded agreements and contracts.

118. Many, if not all, of the federal agencies associated Augusta University’s contracts have already issued memorandums requiring compliance with the Contractor Mandate.

119. Over 200 employees of Augusta University work on the approximately 45 government contracts. University employees who are not themselves working on or in connection with these contracts must also abide by the Contractor Mandate if they share elevators, lobbies, and even parking garages with the employees who do work on government contracts.



120. In practice, if Augusta University cannot “affirmatively determine” that employees working on federal contracts will be completely separated from the rest of the university, every employee must be fully vaccinated by January 18, 2022.

121. The total budget for federal contracts at Augusta University is \$17.1 million for fiscal year 2021.

122. In the event Augusta University cannot comply with the Contractor Mandate—i.e., if they cannot obtain 100% on-campus employee vaccination—their \$17.1 million budget for federal contracts is in jeopardy.

123. Similarly, Georgia Institute of Technology (Georgia Tech) is one of the many University System institutions that will suffer significant harm as a result of the Contractor Mandate.

124. Since the 1940s, Georgia Tech has performed research under federal contracts. Federal funding has been crucial to the development of its applied and fundamental research programs, which have been pivotal to addressing the United States’ security and other national priorities.

125. Georgia Tech and its research entities maintain multiple contracts with the Department of Defense, the National Science Foundation, the Department of Health and Human Services, the Department of Energy, NASA, the Department of Commerce, the Department of Transportation, the Center for Disease Control, the General Services Administration, and others, all of which are impacted by the Contractor Mandate. Many, if not all, of these federal agencies have already issued memorandums to Georgia Tech requiring compliance with the Contractor Mandate.

126. Georgia Tech relies on federal resources and personnel to help define and direct its research activities.

127. Indeed, for fiscal year 2021, Georgia Tech received \$663,868,899.00 in annual revenue from federal contracts. This accounts for 33% of Georgia Tech's annual revenue for fiscal year 2021.

128. Georgia Tech maintains approximately 1,781 active covered federal contracts with approximately 4,079 employees who work on those contracts. This accounts for almost 20% of all Georgia Tech employees. Another approximately 2,374 employees work in connection with federal contracts and a total of approximately 8,949 employees work in "covered contractor workplaces" as defined by the Task Force Guidance—including some students.

129. Accordingly, based upon the plain language of the EO 14042 and the Task Force Guidance, nearly 32% of all Georgia Tech employees are directly implicated by the Contractor Mandate. Moreover, if Georgia Tech is unable to "affirmatively determine" that its employees working on government contracts will share no common areas with its remaining employees, nearly all of Georgia Tech's on-campus employees are subject to the Contractor Mandate.

130. The University of Georgia ("UGA") has approximately 300 federal contracts, subcontracts, and cooperative agreements with federal agencies such as the CDC, NSF, NIH, the FBI, and the Civilian Agency Administration Council.

131. Work performed under these contracts includes the development of a new, more advanced influenza vaccine designed to protect against multiple strains of

influenza virus in a single dose; the study of influenza virus emergence and infection in humans and animals while also making preparations to combat future outbreaks or pandemics; and sample collection from a variety of avian and mammalian species internationally for the identification and characterization of emerging influenza viruses and to develop predictive models describing the epidemiology of influenza in wild avian species.

132. In fiscal year 2021, UGA received at least \$56 million from federal agency contracts.

133. Many, if not all, of the federal agencies with which UGA contracts have already issued memorandums to UGA in connection with contracts between such federal agencies and UGA in its role as either a prime or sub-contractor, requiring UGA to accept the FAR Deviation Clause, or a variant of it, and thus comply with the Contractor Mandate.

134. If UGA is unable to “affirmatively determine” that its contractor employees will share no common areas with its remaining employees, nearly all of UGA’s on-campus employees are subject to the Contractor Mandate.

135. As a direct result of the Contractor Mandate, the impacted University System institutions face loss of funding, increased costs to ensure compliance, and potential employee shortages from resignations, terminations, or unspecified leave.

136. On information and belief, other University System universities will be similarly impacted by the Contractor Mandate.

137. Plaintiff, Gary W. Black, in his official capacity as Commissioner of the Georgia Department of Agriculture, oversees personnel on one or more campuses of the University of Georgia who will be directly impacted by the Contractor Mandate and may have other Department personnel and operations impacted by the mandate.

138. Moreover, within the last few days, other Georgia agencies have been informed by federal agencies that they must also sign new contracts containing the Contractor Mandate.

**Impact of the Contractor Mandate on the State of Alabama and Its Agencies**

139. The Contractor Mandate will harm the State of Alabama's sovereign and proprietary interests.

140. On May 24, 2021, Alabama enacted Senate Bill 267 (now Alabama Act 2021-493). The Act prohibits Alabama state entities, their officers, and their agents from "requir[ing] the publication or sharing of immunization records or similar health information for an individual." Ala. Act. 2021-493 § 1(a).

141. To comply with the federal government's Contractor Mandate, state entities, their officers, and their agents would need to "require the publication or sharing of immunization records or similar health information for an individual" by certifying to the federal government that employees have received the COVID-19 vaccine. Thus, to comply with the Contractor Mandate, state entities, their officers, and their agents will need to violate Alabama law.

142. If a federal contractor does not or cannot comply with these requirements, the government-contracting funds on which the contractor relies will be jeopardized.

143. The sums of money Alabama would lose if it were not to comply with the Contractor Mandate are staggering. And the coercive nature of potentially losing these sums is magnified by the fact that the federal government's demands arose only recently and leave almost no time for the state to come into compliance or line up substitute funding.

144. For example, Alabama public universities stand to lose hundreds of millions of dollars in federal contracts if they do not comply with the Contractor Mandate.

145. Less than half of Alabamians ages 18 and up are fully vaccinated.

146. Many employees of Alabama's public universities are unvaccinated and would likely quit their jobs rather than receive the COVID-19 vaccine as a condition of further employment.

147. Alabama and its public universities will be harmed if the universities lose these federal contract funds, particularly on such short notice. Conversely, Alabama and its public universities will be harmed if the universities lose employees.

148. Plaintiff Alabama Department of Public Health ("ADPH") is the state agency primarily responsible for serving Alabamians' public health needs. ADPH too stands to lose funds if it does not comply with the Contractor Mandate. ADPH has received conflicting guidance from federal agencies as to whether its contracts are subject to the Contractor Mandate.

149. ADPH has over 2,600 employees. Many of these employees are unvaccinated, and many are likely to quit their jobs if forced to receive the COVID-19 vaccination as a condition of further employment.

150. Alabama and ADPH would be harmed if ADPH loses federal contract funds it would have otherwise received were it to comply with the Contractor Mandate. Conversely, Alabama and ADPH would be harmed if ADPH employees quit, particularly because ADPH is already struggling to fill empty positions even before the Contractor Mandate was issued.

151. Plaintiff Alabama Department of Agriculture and Industries (“ADAI”) is a state agency responsible for serving farmers and consumers of agricultural projects. ADAI employs several hundred people. ADAI provides expert regulatory control over products and services and promotes national and international consumption of Alabama products.

152. ADAI has leased property to the United States Department of Agriculture (“USDA”) continuously for the past 26 years. On October 20, 2021, a USDA officer sent ADAI a lease amendment incorporating “the mandatory Executive Order 14042 . . . which needs to be part of every Federal contract now.” ADAI requested clarification on October 22, 2021, to which USDA sent the following response:

[I]t’s “encouraged” for the Lessors to sign, BUT if you don’t, then [USDA] won’t be able to do any future lease actions with you if you don’t, as well as anything regarding the current lease, such as an extensions or expansions if needed. So we’d have to move out when the lease expires.

153. As the federal government's correspondence unequivocally demonstrates—indeed, the scare quotes around “encourage” remove any doubt—if ADAI does not comply with the Contractor Mandate, the federal government will cancel its lease and will refuse to “do any future lease actions” with ADAI going forward, depriving ADAI of the revenues it had relied on for its quarter-century contracting relationship with the federal government.

154. Plaintiff Alabama Department of Rehabilitation Services (“ADRS”) is the state agency primarily responsible for serving Alabamians with disabilities. Through ADRS, Alabama offers these Alabamians state-funded services from birth through every stage their lives.

155. ADRS seeks to aid legally blind vendors by administering a program through which ADRS matches these vendors with government entities whose buildings have vending machines. These vending agreements ensure economic opportunities for Alabama's blind vendors.

156. To facilitate its blind-vendor program, Alabama has contracted with the federal government since 1946, when ADRS established the Alabama Business Enterprise Program for the Blind and Visually Impaired (“BEP”) with the mission to enable qualified blind individuals to achieve independence through self-employment. Since that time, the BEP program has had contracts with the federal government regarding services on federal properties.

157. The Department of Homeland Security issued a contract modification for the ADRS contract with FEMA on October 14, 2021.

**Impact of the Contractor Mandate on the State of Idaho and Its Agencies**

158. The State of Idaho includes agencies and entities affected by the Contractor Mandate.

159. Idaho's institutions of higher learning maintain covered contracts with numerous federal agencies, including, but not limited to, NSF, NASA, HHS, DOE, and DOD sub-entities.

160. Additionally, other Idaho agencies maintain contracts with the federal government and will be impacted by the Contractor Mandate. Federal officials are beginning to pressure these Idaho agencies to adopt the Contractor Mandate not only for future contracts, but for existing contracts. For example, on October 22, 2021, CDC sent an email to the Idaho Department of Health and Welfare instructing it to execute a mandatory contract modification for the purpose of adding language implementing the Contractor Mandate in an existing contract. The email stated: "Contractors will sign and return the modification via email to the Contracting Officer of record by November 9, 2021."

161. Thousands of Idaho employees will be affected by the Contractor Mandate.

162. The agencies and institutions have worked throughout the pandemic, in consultation and collaboration with other government entities and officials, to develop plans to stop the spread of COVID-19.

163. On information and belief, there are Idaho employees that have indicated that they will not be vaccinated. Due to policies regarding termination of some employees, if termination is necessary to comply with the Contractor Mandate,



the termination process will take months to complete, and some employees will draw a salary during a portion of the process

**Impact of the Contractor Mandate on the State of Kansas and Its Agencies**

164. The State of Kansas has multiple contracts with various federal agencies. These contracts are “covered contracts” under the Contractor Mandate.

165. Kansas’s budget is highly dependent upon federal dollars it receives under its federal contracts.

166. Kansas employs hundreds of “covered contractor employees” and multiple “contractor or subcontractor workplace locations” as those terms are used in the Contractor Mandate

167. The Contractor Mandate requires hundreds of Kansas employees to get vaccinated. For the same and similar reasons articulated throughout this Complaint, imposing the Contractor Mandate against Kansas will result in significant and irreparable harm to Kansas.

168. In addition, the State of Kansas will suffer irreparable harm in its *parens patriae* capacity based on application of the Contractor Mandate to private citizens employed by federal contractors who stand to lose their jobs if they choose not to receive the vaccine.

**Impact of the Contractor Mandate on the State of South Carolina and Its Agencies**

169. The State of South Carolina has multiple contracts with various federal agencies. These contracts are “covered contracts” under the Contractor Mandate.

170. South Carolina's budget relies on the federal dollars it receives under its federal contracts.

171. South Carolina employs hundreds of "covered contractor employees" and multiple "contractor or subcontractor workplace locations" as those terms are used in the Contractor Mandate

172. The Contractor Mandate will require hundreds of South Carolina employees to get vaccinated. For the same and similar reasons articulated throughout this Complaint, imposing the Contractor Mandate against South Carolina will result in significant and irreparable harm to South Carolina.

**Impact of the Contractor Mandate on the State of Utah and Its Agencies**

173. Plaintiff State of Utah is a sovereign State that has many state entities that are federal contractors. Utah employs "covered contractor employees" and maintains "covered contractor workplaces" as defined by the Contractor Mandate.

174. The contracts that Utah's agencies have with federal agencies are worth millions of dollars, if not more. Many of Utah's current contracts are subject to renewal or the exercise of options. The federal government has presented Utah with contract modifications that incorporate the Contractor Mandate. Utah will face substantial and irreparable harm if forced to comply.

175. Because Utah's employees are generally not required to be vaccinated, the Contractor Mandate places undue pressure on Utah to create new policies and change existing ones, which threatens Utah with imminent irreparable harm.

176. The Contractor Mandate will likely cause many Utah employees to resign, causing significant loss to Utah's operations by decreasing institutional

knowledge and human capital. As a result, Utah will incur significant recruitment, on-boarding, and training costs to replace lost employees.

**Impact of the Contractor Mandate on the State of West Virginia and Its Agencies**

177. The State of West Virginia has multiple contracts with various federal agencies. These contracts are “covered contracts” under the Contractor Mandate.

178. West Virginia’s budget relies on the federal dollars it receives under its federal contracts.

179. West Virginia employs hundreds of “covered contractor employees” and multiple “contractor or subcontractor workplace locations” as those terms are used in the Contractor Mandate.

180. The Contractor Mandate will require hundreds of West Virginia employees to get vaccinated. For the same and similar reasons articulated throughout this Complaint, imposing the Contractor Mandate against West Virginia will result in significant and irreparable harm to West Virginia.

**The Contractor Mandate Creates Confusion and Uncertainty**

181. In response to the Contractor Mandate, Plaintiffs have scrambled to comply with the ever-changing Guidelines and amended implementation logistics.

182. In particular, the Georgia Tech has already expended a vast amount of time and financial resources to create a portal for its employees to submit their vaccination status.

183. In addition to their specific challenges, all impacted units of the University System will have to overcome the following hurdles in order to comply:

- a. Track employee vaccination statuses;
- b. Develop a robust process to review requests for accommodation;
- c. Identify impacted employees and locations;
- d. Spend an undetermined amount of money to fund its compliance program; and
- e. Track data from subcontractors to ensure that they are likewise performing (a), (b), (c), and (d) above.

184. Upon information and belief, some covered contractor employees will not obtain the vaccine and will not seek an exemption, despite the Contractor Mandate and its allowance for narrowly prescribed exemptions for medical reasons or strongly held religious beliefs.

185. For context, nearly 50% of Georgians are fully vaccinated while the remaining 50% have yet to obtain one or oppose the vaccine altogether.<sup>16</sup>

186. With respect to employees who refuse vaccination, the Georgia universities will have no choice but to consider enforcement action up to and including potential termination, lest they lose billions in federal funding.

187. With national labor shortages crippling the current labor market, losing employees because of the Contractor Mandate will cause significant harm to the University System.

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<sup>16</sup> Georgia Department of Public Health, Press Release, 50% of Georgians Fully Vaccinated Against COVID-19 (Oct. 25, 2021), <https://dph.georgia.gov/press-releases/2021-10-25/50-georgians-fully-vaccinated-against-covid-19>.

188. Equally important, the loss of employees will jeopardize the universities' ability to complete the contracted for work in the contracted for time, thereby materially undermining the very efficiency and economy in contracting that purportedly is the core rationale for implementing the Contractor Mandate in the first place.

189. The broad application of the Contractor Mandate is expected to substantially impact each Plaintiff in that any of their unvaccinated employees must be terminated or reallocated to uncovered workplaces lest they risk breaching their federal contracts by failing to fully comply with the Contractor Mandate.

190. The Contractor Mandate, therefore, forces Plaintiffs to choose between two equally problematic outcomes: (1) maintain a fully vaccinated (but reduced) workforce of covered employees by firing those who are unvaccinated and risk breaching the contracts by not satisfactorily performing due to lack of qualified workers; or (2) breach the contract by continuing to employ unvaccinated, covered employees so that they can timely perform and complete the contract requirements. Either way, Plaintiffs face a risk of breach and material noncompliance for reasons totally beyond their control.

**COUNT I – Violation of the Procurement Act**

**(Under 40 U.S.C. §§ 101 and 121)**

191. Plaintiffs incorporate each of the Complaint allegations stated above herein.

192. The purpose of the Procurement Act is to provide the Federal Government with an “economical and efficient system” for, among other things,

procuring and supplying property and nonpersonal services. 40 U.S.C. § 101. The Contractor Mandate, however, will actually and materially undermine the efficient and economical delivery of property and services by disrupting the continuity of the contractor workforce.

193. The purpose of the Procurement Act is *not* to impose a sweeping vaccination mandate on broad swaths of the American people or to use the federal procurement system as a proxy for implementing a nationwide public health mandate.

194. The Procurement Act empowers the President to “prescribe policies and directives that [he] considers necessary to carry out [the Procurement Act.]” 40 U.S.C. § 121(a). Those policies “*must* be consistent with” the Procurement Act’s purpose, i.e., promoting economy and efficiency in federal contracting. *Id.* § 121(a) (emphasis added).

195. Defendants have failed to demonstrate a “nexus” between the Contractor Mandate (EO 14042, the Initial and Revised OMB Determinations, the Task Force Guidance, and the FAR Deviation Clause) and the Procurement Act’s purpose of promoting an “economical and efficient system” for federal contracting. 40 U.S.C. § 101; *see Am. Fed’n of Lab. & Cong. of Indus. Organizations v. Kahn*, 618 F.2d 784, 793 (D.C. Cir. 1979) (explaining that the Procurement Act is violated when the President does not demonstrate a “nexus” between executive action and the Procurement Act’s policy). The Procurement Act’s text obligates the President to

exercise his statutory authority “consistently with [the Act’s] structure and purposes.” *Id.*

196. Instead, EO 14042 exceeds the President’s Procurement Act authority by directing the Task Force, without a demonstrable nexus to the Procurement Act’s purpose, to prescribe a sweeping public health scheme.

197. Here, the text of the Procurement Act clearly demonstrates that Congress has not authorized the Contractor Mandate, and thus, EO 14042 violates the Procurement Act.

198. Further, before the executive branch may regulate a major policy question of “great and economic and political significance”—such as mandating vaccination for every employee of every federal contractor in the country—Congress must “speak clearly” to assign the authority to implement such a policy. *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (citing *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014)).

199. When the federal government intrudes on a traditional state function, it must clearly articulate the scope of the intrusion and the rationale behind its unprecedented action, which it has not done here. *Gregory v. Ashcroft*, 501 U.S. 452, 463–64 (1991).

200. The Contractor Mandate implicates critical issues of federalism as public health and the regulation of inoculation regimes are traditional state functions.

201. Because the statutory language that the President relies on to issue EO 14042 does not contain a clear statement affirmatively sanctioning the broad scope of the Contractor Mandate, EO 14042 violates the Procurement Act.

202. Therefore, under both the plain text of the Procurement Act and the clear statement principle, EO 14042 is unlawful, and thus the Contractor Mandate is unenforceable.

**COUNT II – Violation of Federal Procurement Policy**

**(Under 41 U.S.C. § 1707(a))**

203. Plaintiffs incorporate each of the Complaint allegations stated above herein.

204. Pursuant to 41 U.S.C. § 1707(a)(1), a procurement policy may not take effect until 60 days after it is published for public comment in the Federal Register if it relates to the expenditure of appropriated funds; and has a significant effect beyond the internal operating procedures of the issuing agency; or has a significant cost or administrative impact on contractors or offerors.

205. The Contractor Mandate will require contractors to develop, implement, and monitor a host of new policies and procedures impacting, for some contractors, their entire workforce. In order to fully comply with the Contractor Mandate, contractors will have to fire any covered employee who refuses to be vaccinated and has not asserted an exemption.

206. Federal agencies will have to budget for and expend appropriated funds to administratively implement the Contractor Mandate and, thereafter, compensate contractors for their increased cost of compliance in violation of § 1707(a).



207. Because the Contractor Mandate requires vaccination of hundreds of thousands of Americans, it certainly has “a significant effect beyond internal operating procedures” in violation of § 1707(a).

208. The Contractor Mandate also has a significant cost or administrative impact on current contractors, future contractors, and offerors in violation of § 1707(a).

209. In a tacit admission that the First OMB Determination violated the Procurement Policy Act, the Office of Management and Budget issued a Revised OMB Determination on November 16, 2021. The Revised OMB Determination purports to invoke the waiver provisions of the Procurement Policy Act and again fails to provide for notice and comment prior to the effectiveness of the Updated OMB Determination.

210. The Procurement Policy Act permits public notice and comment to happen *after* publication only when the procurement policy, regulation, or procedure is effective “on a temporary basis” and “urgent and compelling circumstances make compliance with the [pre-publication notice and comment] requirements impracticable.” 41 U.S.C. § 1707 (d).

211. OMB’s statement of purported urgency and compelling circumstances does not satisfy either requirement. Nothing about the Contractor Mandate is temporary. And, as shown by OMB’s decision to push back the deadline for compliance, there are no urgent and compelling circumstances that warrant a departure from normal requirements.

212. Moreover, Defendants failed to provide the required 60-day comment period before the Task Force Guidance and Contractor Mandate became effective.

213. Accordingly, Defendants failed to comply with 41 U.S.C. § 1707(a) when issuing the Updated OMB Determination and the Task Force Guidance, making the Contractor Mandate invalid as a matter of law.

### **COUNT III – Nondelegation Claim**

#### **(Under Article I, Section 1 of the United States Constitution)**

214. Plaintiffs incorporate each of the Complaint allegations stated above herein.

215. Pursuant to Article I, Section 1 of the United States Constitution, Congress is vested with all legislative powers.

216. “Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.” *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–30 (1935).

217. The executive branch can only exercise its own discrete powers reserved by Article II of the United States Constitution and such power that Congress clearly authorizes through statutory command.

218. Congress gives such authorization when it articulates an intelligible principle to guide the Executive that not only sanctions but also defines and cabins the delegated legislative power.

219. Under the nondelegation doctrine, Congress cannot simply offer a general policy that is untethered to a delegation of legislative power. For a delegation to be proper, Congress must articulate a clear principle or directive of its

congressional will within the legislative act. *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). The principle must be binding, and the delegate must be “directed to conform” to it. *Id.*

220. The nondelegation doctrine preserves and protects important tenets of our democracy, including individual liberties and states’ rights.

221. The President’s direct delegation of authority to the OMB Director and the Task Force gives them unconstitutional and unconstrained rulemaking authority without a statutory directive.

222. Separately, the President’s indirect delegation to the federal agencies of broad authority and discretion to enforce the already unconstitutional Contractor Mandate is unsupported by an explicit statutory directive within the Procurement Act or any other federal law.

223. Thus, the President’s actions lack the requisite congressional direction in two regards:

a. First, Congress did not articulate clear or sufficient instructions in the Procurement Act directing the President to implement this public health policy scheme by executive order.

b. Second, even if Congress did clearly authorize a national vaccination schedule for federal contractors, it did not give sufficiently clear instructions to permit the President to delegate legislative judgment to the Task Force or the OMB Director.

224. EO 14042's reliance on the precatory statement of purpose in the Procurement Act is not a clear directive, and neither the President nor the federal agencies can rely on it to impose an intrusive and sweeping vaccine mandate.

225. Further, any delegation sanctioning broad and intrusive executive action cannot be sustained without clear and meaningful legislative guidance, especially given the important separation-of-powers and federalism concerns implicated. Under the nondelegation doctrine, the Contractor Mandate is unconstitutional because Congress did not articulate a clear principle by legislative act that directs the Executive to take sweeping action that infringes on state and individual rights.

226. Here, the Executive Order cuts deeply into the state's sphere of power without articulating the underlying reasons or providing a justification beyond a superficial, unsupported, and pretextual reference to efficiency and economy in federal contracts.

227. Without *explicit* congressional authorization, the President's delegation of power in EO 14042 through the OMB Determination, the Task Force, and the various executive agencies acting to implement the Contractor Mandate cannot survive constitutional scrutiny.

#### **COUNT IV – Violation of Separation of Powers and Federalism**

##### **(Under Article I, Section 8 of and Amendment X to the United States Constitution)**

228. Plaintiffs incorporate each of the Complaint allegations stated above herein.

229. To the extent Defendants argue that the Contractor Mandate is authorized, such authorization would violate the Constitution's nondelegation principles.

230. The Contractor Mandate exceeds congressional authority.

231. Pursuant to Article I, Section 1 of the United States Constitution, Congress is vested with all legislative powers, but Congress must act pursuant to the enumerated powers granted to it by Article I.

232. Pursuant to Article I, Section 8 of the United States Constitution, Congress has authority "to make all Laws which shall be necessary and proper for carrying into Execution" its general powers ("the Necessary and Proper Clause"). The Necessary and Proper Clause does not "license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559 (2012) (citation omitted).

233. Pursuant to the Tenth Amendment of the United States Constitution, "the powers not delegated by the Constitution to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

234. Nothing in the Constitution authorizes the federal agencies of the executive branch to impose the Contractor Mandate on states because requiring vaccinations for state employees is an exercise of the police power left to the states under the Tenth Amendment.

235. The Constitution does not empower Congress to require anyone who deals with the federal government to get vaccinated. It is not a “proper” exercise of Congress’s authority to mandate that every employee who touches a federal contract or comes in contact with another employee who touches such a contract, has to be vaccinated because the action here falls outside the scope of an Article I enumerated power.

236. Further, the Commerce Clause does not empower Congress to regulate purely noneconomic inactivity, such as an individual’s choice not to receive a vaccination. *BST Holdings*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at \*21 (5th Cir. Nov. 12, 2021).

237. Defendants, through the Contractor Mandate, have exercised power that Congress does not possess under the Constitution and, therefore, cannot delegate to other branches of the federal government.

238. If Congress intended the Procurement Act to authorize the Contractor Mandate, the Act exceeds Congress’s authority, and thus Defendants must be enjoined from taking any action under the Act.

#### **COUNT V – Violation of the Tenth Amendment**

##### **(Under Amendment X to the United States Constitution)**

239. Plaintiffs incorporate each of the Complaint allegations stated above herein.

240. Pursuant to the Tenth Amendment of the United States Constitution, “the powers not delegated by the Constitution to the United States, nor prohibited by

it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X.

241. Defendants, through the Contractor Mandate, have exercised power far beyond what was delegated to the federal government by Constitutional mandate or congressional action.

242. Neither Article II of the U.S. Constitution nor any act of Congress authorizes the federal agencies of the executive branch to implement the Contractor Mandate, which traditionally falls under the police power left to the states under the Tenth Amendment.

243. The Tenth Amendment explicitly preserves the “residuary and inviolable sovereignty,” of the states. *Printz v. United States*, 521 U.S. 898, 918–19 (1997) (quoting *The Federalist* No. 39, at 245 (J. Madison)).

244. By interfering with the traditional balance of power between the states and the federal government and by acting pursuant to ultra vires federal action, Defendants violated this “inviolable sovereignty,” and thus, the Tenth Amendment.

245. Therefore, the Contractor Mandate was adopted pursuant to an unconstitutional exercise of authority by Defendants and must be invalidated.

#### **COUNT VI – Unconstitutional Exercise of the Spending Clause**

##### **(Under Article I, Section 8, Clause 1 of the United States Constitution)**

246. Plaintiffs incorporate each of the Complaint allegations stated above herein.

247. The challenged actions are unconstitutional conditions on the states’ receipt of federal funds.

248. Article I, Section 8, Clause 1 of the United States Constitution gives Congress the power to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and the general Welfare of the United States.”

249. While “Congress may attach appropriate conditions to . . . spending programs to preserve its control over the use of federal funds,” it cannot wield federal funding to unreasonably constrain state autonomy. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579 (2012). “[I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’” *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

250. Federal contracts are an exercise of the Spending Clause, yet the challenged actions ask Plaintiffs to agree to a coercive contract term.

251. The federal contracts at issue here account for considerable portions of Plaintiffs’ budgets for essential research, education, and other necessary programs. The pressure on Plaintiffs to comply with the Contractor Mandate rises to the level of coercion. The challenged actions are invalid for that reason alone.

**COUNT VII – Violation of FAR and Procurement Policy Act’s  
Notice and Comment Requirements**

**(Under 41 U.S.C. § 1707 and 48 CFR § 1.105-1, et seq.)**

252. Plaintiffs incorporate each of the Complaint allegations stated above herein.

253. Pursuant to 5 U.S.C. § 553, agencies must publish “a notice of proposed rulemaking in the Federal Register before promulgating a rule that has legal force.”



*Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S.Ct. 2367, 2384 (2020); 5 U.S.C. § 553(b).

254. Pursuant to 48 C.F.R. 1.501, “significant revisions” to the FAR must be made through notice-and-comment procedures. DOD, NASA, and the General Services Administration must jointly conduct the notice-and-comment process. *Id.*

255. Instead of amending the FAR to implement this significant revision, the FAR Council issued a purported “class deviation” without engaging in the notice-and-comment process. *See* 5 U.S.C. § 553.

256. Proper “class deviations” must fit within one of the discrete definitions set forth in 48 C.F.R. 1.401.

257. Here, however, the FAR Deviation Clause fits none of the definitions.

258. Instead, the FAR Deviation Clause is in the nature of a rule within the meaning of the APA because it is “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4).

259. The FAR Council violated the APA by failing to comply with the notice-and-comment requirements for rulemaking.

260. Good cause does not excuse the FAR Council’s failure to comply with the notice-and-comment process. *See* 5 U.S.C. § 553(b)(3)(B).

### **COUNT VIII – Violation of the APA**

#### **(Under 5 U.S.C. § 706)**

261. Plaintiffs incorporate each of the Complaint allegations stated above herein.

262. Under the APA, a court must “hold unlawful and set aside agency action” that is “not in accordance with law” or “in excess of statutory . . . authority, or limitations, or short of statutory right.” *See* 5 U.S.C. § 706(2)(A), (C).

263. Both OMB Determinations adopting the Task Force guidance are contrary to law for at least four reasons.

264. First, both OMB Determinations violate 41 U.S.C. § 1303(a) because it is a government-wide procurement regulation, which only the FAR Council may issue.

265. EO 14042 apparently seeks to circumvent § 1303 by delegating the President’s Procurement Act power to the OMB Director.

266. That attempt is unlawful because the President has no authority to issue regulations under § 1303—only the FAR Council may issue government-wide procurement regulations. *See* Centralizing Border Control Policy Under the Supervision of the Attorney General, 26 Op. OLC 22, 23 (2002) (“Congress may prescribe that a particular executive function may be performed only by a designated official within the Executive Branch, and not by the President.”).

267. Second, and relatedly, the OMB determinations are contrary to law because the Procurement Act does not grant the President the power to issue orders with the force or effect of law. Congress authorized the President to “prescribe policies and directives that the President considers necessary to carry out.” 40 U.S.C. § 121(a).

268. “[P]olicies and directives” describe the President’s power to direct the exercise of procurement authority throughout the government. It does not authorize the President to issue regulations himself.

269. Congress knows how to confer that power, as it authorized the GSA Administrator, in the same section of the statute, to “prescribe regulations.” *Id.* § 121(c); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (“[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.”).

270. And Congress has given the President the power to “prescribe regulations” in other contexts, typically in the realm of foreign affairs and national defense. *See, e.g.*, 18 U.S.C. § 3496 (“The President is authorized to prescribe regulations governing the manner of executing and returning commissions by consular officers.”); 32 U.S.C. § 110 (“The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.”).

271. Third, even if the Procurement Act authorized the President to issue orders with the force or effect of law, it would not authorize approval of the Task Force guidance. The President appears to assume that the Procurement Act’s prefatory statement of purpose authorizes him to issue any order that he believes promotes “an economical and efficient” procurement system. 40 U.S.C. § 101; *see Ex. A* at 1 (“This order promotes economy and efficiency in [f]ederal procurement.”). In doing so, the President mistakenly construes the prefatory purpose statement for a grant of authority. *D.C. v. Heller*, 554 U.S. 570, 578 (2008) (“[A]part from [a] clarifying

function, a prefatory clause does not limit or expand the scope of the operative clause.”).

272. And even if the Procurement Act did authorize the President to issue binding procurement orders solely because they may promote economy and efficiency, the OMB Determination does not adequately do so. Providing the federal government with an “economical and efficient system for” procurement is not a broad enough delegation to impose a national-scale vaccine mandate that Congress has not separately authorized.

273. Further, the executive order is divorced from the practical needs of procurement. In order to maintain a steady and predictable flow of goods and services—and the advancement of science and technology through research and development—the federal procurement system requires a stable and reliable workforce to timely perform work required under tens of thousands of federal contracts and funding agreements. The Contractor Mandate disrupts the stability and reliability of the contractor workforce by forcing contractors to potentially fire unvaccinated and non-exempt covered employees, many of whom are highly skilled and essential to the work.

274. Because the OMB Determination violates § 1303(a), seeks to exercise a delegated power the President does not possess, and relies on a misreading of the Procurement Act, it is contrary to law.

**COUNT IX – Violation of the APA**

**(Under 5 U.S.C. § 706)**

275. Plaintiffs incorporate each of the Complaint allegations stated above herein.

276. Pursuant to the Administrative Procedure Act, agency action that is “arbitrary [or] capricious” is unlawful and must be set aside by a court of competent jurisdiction. 5 U.S.C. § 706(2)(A).

277. Pursuant to 48 C.F.R. 1.402, “[u]nless precluded by law, executive order, or regulation, deviations from the FAR may be granted [] when necessary to meet the specific needs and requirements of each agency.”

278. The Contractor Mandate and the OMB Determinations impose universal and uniform requirements without regard to the particularized needs and circumstances of each federal agency and are therefore arbitrary and capricious in violation of the APA.

**COUNT X - Declaratory Judgment**

**(Under 28 U.S.C. § 2201(a))**

279. Plaintiffs incorporate each of the Complaint allegations stated above herein.

280. For all the forgoing reasons, Plaintiffs request that the Court declare the Contractor Mandate unlawful, unconstitutional, and unenforceable.

**COUNT XI –Injunctive Relief**

281. Plaintiffs incorporate each of the Complaint allegations stated above herein.

282. The Contractor Mandate threatens immediate and irreparable harm to Plaintiffs, including a loss of highly trained employees, difficulty in completing existing contracts, and significant expenditure of time and resources in ensuring compliance.

283. Monetary damages or other remedies at law cannot adequately address the injury caused by the Contractor Mandate.

284. The deadlines imposed in the Contractor Mandate will have widespread and permanent effects that no legal remedy can reverse, such that the only available remedy to redress the harms is injunctive relief.

285. Balancing the hardships to Plaintiffs relative to the hardships to Defendants, extraordinary equitable relief is warranted.

286. Specifically, absent an injunction, Plaintiffs' operations will be jeopardized as a result of Defendants' adoption and implementation of the unconstitutional, illegal, and logistically unworkable Contractor Mandate.

287. On the other hand, the hardship of an injunction to Defendants is minimal; they simply must abide by the Constitution and the laws of the United States.

288. Permanent injunctive relief would not disserve the public interest, because it would enjoin unconstitutional and illegal executive action.

### **Prayer for Relief**

Wherefore, Plaintiffs respectfully request that this Court:

1. Enter judgment in favor of Plaintiffs and against Defendants on all

Counts asserted herein.

2. Enter a declaratory judgment that Defendants, individually and collectively, have acted to impose a broad-sweeping, unlawful, and unconstitutional COVID-19 vaccine mandate, and that such COVID-19 vaccine mandate is unlawful and unenforceable.

3. Grant a preliminary and permanent injunction prohibiting Defendants and those acting in concert with them from enforcing this broad-sweeping, unlawful, and unconstitutional mandate.

4. Grant any additional and different relief to which Plaintiffs may be entitled.

5. Award Plaintiffs costs of litigation, including reasonable attorneys fees, as allowable by law.

Respectfully submitted this 19th day of November, 2021.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 19, 2021, I caused to be electronically filed a true and correct copy of the foregoing with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to all counsel of record

This 19th day of November, 2021.

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# **EXHIBIT A**

## BRIEFING ROOM

# Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors

SEPTEMBER 09, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and section 301 of title 3, United States Code, and in order to promote economy and efficiency in procurement by contracting with sources that provide adequate COVID-19 safeguards for their workforce, it is hereby ordered as follows:

Section 1. Policy. This order promotes economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument as described in section 5(a) of this order. These safeguards will decrease the spread of COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government. Accordingly, ensuring that Federal contractors and subcontractors are adequately protected from COVID-19 will bolster economy and efficiency in Federal procurement.

Sec. 2. Providing for Adequate COVID-19 Safety Protocols for Federal Contractors and Subcontractors. (a) Executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A) (agencies), shall, to the extent permitted by law, ensure that contracts and contract-like instruments (as described in section 5(a) of this order) include a clause that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts. This clause shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance or Guidance), provided that the Director of the Office of Management and Budget (Director) approves the Task Force Guidance and determines that the Guidance, if adhered to by contractors or subcontractors, will promote economy and efficiency in Federal contracting. This clause shall apply to any workplace locations (as specified by the Task Force Guidance) in which an individual is working on or in

connection with a Federal Government contract or contract-like instrument (as described in section 5(a) of this order).

(b) By September 24, 2021, the Safer Federal Workforce Task Force (Task Force) shall, as part of its issuance of Task Force Guidance, provide definitions of relevant terms for contractors and subcontractors, explanations of protocols required of contractors and subcontractors to comply with workplace safety guidance, and any exceptions to Task Force Guidance that apply to contractor and subcontractor workplace locations and individuals in those locations working on or in connection with a Federal Government contract or contract-like instrument (as described in section 5(a) of this order).

(c) Prior to the Task Force publishing new Guidance related to COVID-19 for contractor or subcontractor workplace locations, including the Guidance developed pursuant to subsection (b) of this section, the Director shall, as an exercise of the delegation of my authority under the Federal Property and Administrative Services Act, *see* 3 U.S.C. 301, determine whether such Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors. Upon an affirmative determination by the Director, the Director's approval of the Guidance, and subsequent issuance of such Guidance by the Task Force, contractors and subcontractors working on or in connection with a Federal Government contract or contract-like instrument (as described in section 5(a) of this order), shall adhere to the requirements of the newly published Guidance, in accordance with the clause described in subsection (a) of this section. The Director shall publish such determination in the *Federal Register*.

(d) Nothing in this order shall excuse noncompliance with any applicable State law or municipal ordinance establishing more protective safety protocols than those established under this order or with any more protective Federal law, regulation, or agency instructions for contractor or subcontractor employees working at a Federal building or a federally controlled workplace.

(e) For purposes of this order, the term "contract or contract-like instrument" shall have the meaning set forth in the Department of Labor's proposed rule, "Increasing the Minimum Wage for Federal Contractors," 86 Fed. Reg. 38816, 38887 (July 22, 2021). If the Department of Labor issues a final rule relating to that proposed rule, that term shall have the meaning set forth in that final rule.

**Sec. 3. Regulations and Implementation.** (a) The Federal Acquisition Regulatory Council, to the extent permitted by law, shall amend the Federal Acquisition Regulation to provide for inclusion in Federal procurement solicitations and contracts subject to this order the clause described in section 2(a) of this order, and shall, by October 8, 2021, take initial steps to implement appropriate policy direction to acquisition offices for use of the clause by recommending that agencies exercise their authority under subpart 1.4 of the Federal Acquisition Regulation.

(b) By October 8, 2021, agencies shall take steps, to the extent permitted by law, to exercise any applicable authority to ensure that contracts and contract-like instruments as described in section 5(a) of this order that are not subject to the Federal Acquisition Regulation and that are entered into on or after October 15, 2021, consistent with the effective date of such agency action, include the clause described in section 2(a) of this order.

Sec. 4. Severability. If any provision of this order, or the application of any provision of this order to any person or circumstance, is held to be invalid, the remainder of this order and its application to any other person or circumstance shall not be affected thereby.

Sec. 5. Applicability. (a) This order shall apply to any new contract; new contract-like instrument; new solicitation for a contract or contract-like instrument; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument, if:

(i) it is a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property;

(ii) it is a contract or contract-like instrument for services covered by the Service Contract Act, 41 U.S.C. 6701 *et seq.*;

(iii) it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. 4.133(b); or

(iv) it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public;

(b) This order shall not apply to:

(i) grants;

(ii) contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638), as amended;

(iii) contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold, as that term is defined in section 2.101 of the Federal Acquisition Regulation;

(iv) employees who perform work outside the United States or its outlying areas, as those terms are defined in section 2.101 of the Federal Acquisition Regulation; or

(v) subcontracts solely for the provision of products.

Sec. 6. Effective Date. (a) Except as provided in subsection (b) of this section, this order is effective immediately and shall apply to new contracts; new contract-like instruments; new solicitations for contracts or contract-like instruments; extensions or renewals of existing contracts or contract-like instruments; and exercises of options on existing contracts or contract-like instruments, as described in section 5(a) of this order, where the relevant

contract or contract-like instrument will be entered into, the relevant contract or contract-like instrument will be extended or renewed, or the relevant option will be exercised, on or after:

(i) October 15, 2021, consistent with the effective date for the action taken by the Federal Acquisition Regulatory Council pursuant to section 3(a) of this order; or

(ii) for contracts and contract-like instruments that are not subject to the Federal Acquisition Regulation and where an agency action is taken pursuant to section 3(b) of this order, October 15, 2021, consistent with the effective date for such action.

(b) As an exception to subsection (a) of this section, where agencies have issued a solicitation before the effective date for the relevant action taken pursuant to section 3 of this order and entered into a new contract or contract-like instrument resulting from such solicitation within 30 days of such effective date, such agencies are strongly encouraged to ensure that the safety protocols specified in section 2 of this order are applied in the new contract or contract-like instrument. But if that contract or contract-like instrument term is subsequently extended or renewed, or an option is subsequently exercised under that contract or contract-like instrument, the safety protocols specified in section 2 of this order shall apply to that extension, renewal, or option.

(c) For all existing contracts and contract-like instruments, solicitations issued between the date of this order and the effective dates set forth in this section, and contracts and contract-like instruments entered into between the date of this order and the effective dates set forth in this section, agencies are strongly encouraged, to the extent permitted by law, to ensure that the safety protocols required under those contracts and contract-like instruments are consistent with the requirements specified in section 2 of this order.

**Sec. 7. General Provisions.** (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

JOSEPH R. BIDEN JR.



THE WHITE HOUSE,

September 9, 2021.

# **EXHIBIT B**

**Safer Federal Workforce Task Force**  
**COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors**  
Issued September 24, 2021

**Introduction**

On September 9, President Biden announced his [Path Out of the Pandemic: COVID-19 Action Plan](#). One of the main goals of this science-based plan is to get more people vaccinated. As part of that plan, the President signed Executive Order 14042, [Ensuring Adequate COVID Safety Protocols for Federal Contractors](#), (“the order”) which directs executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. § 102(4)(A), to ensure that covered contracts and contract-like instruments include a clause (“the clause”) that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts. This clause shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (“Task Force”), provided that the Director of the Office of Management and Budget (“OMB”) approves the Task Force Guidance (the or this “Guidance”) and determines that the Guidance, if adhered to by covered contractors, will promote economy and efficiency in Federal contracting.

The actions directed by the order will ensure that parties who contract with the Federal Government provide COVID-19 safeguards in workplaces with individuals working on or in connection with a Federal Government contract or contract-like instrument. These workplace safety protocols will apply to all covered contractor employees, including contractor or subcontractor employees in covered contractor workplaces who are not working on a Federal Government contract or contract-like instrument. These safeguards will decrease the spread of SARS-CoV-2, the virus that causes COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors performing work for the Federal Government.

Pursuant to this Guidance, and in addition to any requirements or workplace safety protocols that are applicable because a contractor or subcontractor employee is present at a Federal workplace, Federal contractors and subcontractors with a covered contract will be required to conform to the following workplace safety protocols:

1. COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
2. Compliance by individuals, including covered contractor employees and visitors, with the Guidance related to masking and physical distancing while in covered contractor workplaces; and
3. Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

The order also sets out a process for OMB and the Safer Federal Workforce Task Force to update the Guidance for covered contractors, which the Task Force will consider doing based on future changes to Centers for Disease Control and Prevention (“CDC”) COVID-19 guidance and as warranted by the circumstances of the pandemic and public health conditions. It also sets out a process for the Federal Acquisition Regulatory Council (“FAR Council”) to implement such protocols and guidance for covered Federal procurement solicitations and contracts subject to the Federal Acquisition Regulation (“FAR”) and for agencies that are responsible for covered contracts and contract-like instruments not subject to the FAR to take prompt action to ensure that those covered contracts and contract-like instruments include the clause, consistent with the order.

Covered contractors shall adhere to the requirements of this Guidance. The Director of OMB has, as authorized by Executive Order 14042, approved this Guidance and has, an exercise of the delegation of authority (see 3 U.S.C. § 301) under the Federal Property and Administrative Services Act determined that this Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors. The Director has published such determination in the Federal Register.

## Definitions

*Community transmission* – means the level of community transmission as set forth in the [CDC COVID-19 Data Tracker County View](#).

*Contract and contract-like instrument* – has the meaning set forth in the Department of Labor’s proposed rule, “Increasing the Minimum Wage for Federal Contractors,” [86 Fed. Reg. 38,816, 38,887](#) (July 22, 2021). If the Department of Labor issues a final rule relating to that proposed rule, this term shall have the meaning set forth in that final rule.

That proposed rule defines a contract or contract-like instrument as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The term contract includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. The term contract shall be interpreted broadly as to include, but not be limited to, any contract within the definition provided in the FAR at 48 CFR chapter 1 or applicable Federal statutes. This definition includes, but is not limited to, any contract that may be covered under any Federal procurement statute. Contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. In addition to bilateral instruments, contracts include, but are not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; exercised contract options; and bilateral contract modifications. The term contract includes contracts covered by the Service Contract Act, contracts covered by the Davis-Bacon Act, concessions contracts not otherwise subject to the Service Contract Act, and contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public.

*Contractor or subcontractor workplace location* – means a location where covered contract employees work, including a covered contractor workplace or Federal workplace.

*Covered contract* – means any contract or contract-like instrument that includes the clause described in Section 2(a) of the order.

*Covered contractor* – means a prime contractor or subcontractor at any tier who is party to a covered contract.

*Covered contractor employee* – means any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered

contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.

*Covered contractor workplace* – means a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract. A covered contractor workplace does not include a covered contractor employee’s residence.

*Federal workplace* – means any place, site, installation, building, room, or facility in which any Federal executive department or agency conducts official business, or is within an executive department or agency’s jurisdiction, custody, or control.

*Fully vaccinated* – People are considered [fully vaccinated](#) for COVID-19 two weeks after they have received the second dose in a two-dose series, or two weeks after they have received a single-dose vaccine. There is currently no post-vaccination time limit on fully vaccinated status; should such a limit be determined by the Centers for Disease Control and Prevention, that limit will be considered by the Task Force and OMB for possible updating of this Guidance.

For purposes of this Guidance, people are considered fully vaccinated if they have received COVID-19 vaccines currently approved or authorized for emergency use by the U.S. Food and Drug Administration (Pfizer-BioNTech, Moderna, and Johnson & Johnson [J&J]/Janssen COVID-19 vaccines) or COVID-19 vaccines that have been listed for emergency use by the World Health Organization (e.g., AstraZeneca/Oxford). More information is available at [Interim Clinical Considerations for Use of COVID-19 Vaccines | CDC](#).

Clinical trial participants from a U.S. site who are documented to have received the full series of an “active” (not placebo) COVID-19 vaccine candidate, for which vaccine efficacy has been independently confirmed (e.g., by a data and safety monitoring board), can be considered fully vaccinated two weeks after they have completed the vaccine series. Currently, the Novavax COVID-19 vaccine meets these criteria. More information is available at the CDC website [here](#).

*Mask* – means any mask that is consistent with CDC recommendations as set forth in [Types of Masks and Respirators | CDC](#). This may include the following: disposable masks, masks that fit properly (snugly around the nose and chin with no large gaps around the sides of the face), masks made with breathable fabric (such as cotton), masks made with tightly woven fabric (i.e., fabrics that do not let light pass through when held up to a light source), masks with two or three layers, masks with inner filter pockets, and filtering facepiece respirators that are approved by the National Institute for Occupational Safety and Health or consistent with international standards. The following do not constitute masks for purposes of this Guidance: masks with exhalation valves, vents, or other openings; face shields only (without mask); or masks with single-layer fabric or thin fabric that does not block light.

## Guidance

Covered contractors are responsible for ensuring that covered contractor employees comply with the workplace safety protocols detailed below. Covered contractor employees must also comply with agency COVID-19 workplace safety requirements while in Federal workplaces.

Consistent with applicable law, agencies are strongly encouraged to incorporate a clause requiring compliance with this Guidance into contracts that are not covered or directly addressed by the order because the contract is under the Simplified Acquisition Threshold as defined in section 2.101 of the FAR or is a contract or subcontract for the manufacturing of products. Agencies are also strongly encouraged to incorporate a clause requiring compliance with this Guidance into existing contracts and contract-like instruments prior to the date upon which the order requires inclusion of the clause.

### *1. Vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation*

Covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation. Covered contractor employees must be fully vaccinated no later than December 8, 2021. After that date, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and by the first day of the period of performance on an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract.

A covered contractor may be required to provide an accommodation to covered contractor employees who communicate to the covered contractor that they are not vaccinated against COVID-19 because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance. A covered contractor should review and consider what, if any, accommodation it must offer. Requests for “medical accommodation” or “medical exceptions” should be treated as requests for a disability accommodation.

Should a Federal agency have an urgent, mission-critical need for a covered contractor to have covered contractor employees begin work on a covered contract or at a covered workplace before becoming fully vaccinated, the agency head may approve an exception for the covered contractor—in the case of such limited exceptions, the covered contractor must ensure these covered contractor employees are fully vaccinated within 60 days of beginning work on a covered contract or at a covered workplace. The covered contractor must further ensure that such employees comply with masking and physical distancing requirements for not fully vaccinated individuals in covered workplaces prior to being fully vaccinated.

The covered contractor must review its covered employees’ documentation to prove vaccination status. Covered contractors must require covered contractor employees to show or provide their

employer with one of the following documents: a copy of the record of immunization from a health care provider or pharmacy, a copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813\_r, published on September 3, 2020), a copy of medical records documenting the vaccination, a copy of immunization records from a public health or State immunization information system, or a copy of any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of health care professional or clinic site administering vaccine. Covered contractors may allow covered contractor employees to show or provide to their employer a digital copy of such records, including, for example, a digital photograph, scanned image, or PDF of such a record.

The covered contractor shall ensure compliance with the requirements in this Guidance related to the showing or provision of proper vaccination documentation.

Covered contractors are strongly encouraged to incorporate similar vaccination requirements into their non-covered contracts and agreements with non-covered contractors whose employees perform work at covered contractor workplaces but who do not work on or in connection with a Federal contract, such as those contracts and agreements related to the provision of food services, onsite security, or groundskeeping services at covered contractor workplaces.

*2. Requirements related to masking and physical distancing while in covered contractor workplaces*

Covered contractors must ensure that all individuals, including covered contractor employees and visitors, comply with published CDC guidance for masking and physical distancing at a covered contractor workplace, as discussed further in this Guidance.

In addition to the guidance set forth below, CDC's guidance for mask wearing and physical distancing in specific settings, including healthcare, transportation, correctional and detention facilities, and schools, must be followed, as applicable.

In areas of high or substantial community transmission, fully vaccinated people must wear a mask in indoor settings, except for limited exceptions discussed in this Guidance. In areas of low or moderate community transmission, fully vaccinated people do not need to wear a mask. Fully vaccinated individuals do not need to physically distance regardless of the level of transmission in the area.

Individuals who are not fully vaccinated must wear a mask indoors and in certain outdoor settings (see below) regardless of the level of community transmission in the area. To the extent practicable, individuals who are not fully vaccinated should maintain a distance of at least six feet from others at all times, including in offices, conference rooms, and all other communal and work spaces.



Covered contractors must require individuals in covered contractor workplaces who are required to wear a mask to:

- Wear appropriate masks consistently and correctly (over mouth and nose).
- Wear appropriate masks in any common areas or shared workspaces (including open floorplan office space, cubicle embankments, and conference rooms).
- For individuals who are not fully vaccinated, wear a mask in crowded outdoor settings or during outdoor activities that involve sustained close contact with other people who are not fully vaccinated, consistent with CDC guidance.

A covered contractor may be required to provide an accommodation to covered contractor employees who communicate to the covered contractor that they cannot wear a mask because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance. A covered contractor should review and consider what, if any, accommodation it must offer.

Covered contractors may provide for exceptions to mask wearing and/or physical distancing requirements consistent with CDC guidelines, for example, when an individual is alone in an office with floor to ceiling walls and a closed door, or for a limited time when eating or drinking and maintaining appropriate distancing. Covered contractors may also provide exceptions for covered contractor employees engaging in activities in which a mask may get wet; high intensity activities where covered contractor employees are unable to wear a mask because of difficulty breathing; or activities for which wearing a mask would create a risk to workplace health, safety, or job duty as determined by a [workplace risk assessment](#). Any such exceptions must be approved in writing by a duly authorized representative of the covered contractor to ensure compliance with this Guidance at covered contractor workplaces, as discussed further below.

Masked individuals may be asked to lower their masks briefly for identification purposes in compliance with safety and security requirements.

Covered contractors must check the [CDC COVID-19 Data Tracker County View website](#) for community transmission information in all areas where they have a covered contractor workplace at least weekly to determine proper workplace safety protocols. When the level of community transmission in the area of a covered contractor workplace increases from low or moderate to substantial or high, contractors and subcontractors should put in place more protective workplace safety protocols consistent with published guidelines. However, when the level of community transmission in the area of a covered contractor workplace is reduced from high or substantial to moderate or low, the level of community transmission must remain at that lower level for at least two consecutive weeks before the covered contractor utilizes those protocols recommended for areas of moderate or low community transmission.

3. *Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.*

Covered contractors shall designate a person or persons to coordinate implementation of and compliance with this Guidance and the workplace safety protocols detailed herein at covered contractor workplaces. The designated person or persons may be the same individual(s) responsible for implementing any additional COVID-19 workplace safety protocols required by local, State, or Federal law, and their responsibilities to coordinate COVID-19 workplace safety protocols may comprise some or all of their regular duties.

The designated individual (or individuals) must ensure that information on required COVID-19 workplace safety protocols is provided to covered contractor employees and all other individuals likely to be present at covered contractor workplaces, including by communicating the required workplace safety protocols and related policies by email, websites, memoranda, flyers, or other means and posting signage at covered contractor workplaces that sets forth the requirements and workplace safety protocols in this Guidance in a readily understandable manner. This includes communicating the COVID-19 workplace safety protocols and requirements related to masking and physical distancing to visitors and all other individuals present at covered contractor workplaces. The designated individual (or individuals) must also ensure that covered contractor employees comply with the requirements in this guidance related to the showing or provision of proper vaccination documentation.

## Frequently Asked Questions

### *Vaccination and Safety Protocols*

#### **Q1: How do covered contractors determine vaccination status of visitors to covered contractor workplaces?**

A: Covered contractors should post signage at entrances to covered contractor workplaces providing information on safety protocols for fully vaccinated and not fully vaccinated individuals, including the protocols defined in the masking and physical distancing section above, and instruct individuals to follow the appropriate workplace safety protocols while at the covered contractor workplace. Covered contractors may take other reasonable steps, such as by communicating workplace safety protocols to visitors prior to their arrival at a covered contractor workplace or requiring all visitors to follow masking and physical distancing protocols for not fully vaccinated individuals.

#### **Q2: Do covered contractors need to provide onsite vaccinations to their employees?**

A: Covered contractors should ensure their employees are aware of [convenient opportunities to be vaccinated](#). Although covered contractors may choose to provide vaccinations at their facilities or workplaces, given the widespread availability of vaccinations, covered contractors are not required to do so.

#### **Q3: What should a contractor employee do if a covered contractor employee has lost or does not have a copy of required vaccination documentation?**

A: If covered contractor employees need new vaccination cards or copies of other documentation proof of vaccination, they should contact the vaccination provider site where they received their vaccine. Their provider should be able to provide them with new cards or documentation with up-to-date information about the vaccinations they have received. If the location where the covered contractor employees received their COVID-19 vaccine is no longer operating, the covered contractor employees should contact their State or local health department's [immunization information system \(IIS\)](#) for assistance. Covered contractor employees should [contact their State or local health department](#) if they have additional questions about vaccination cards or vaccination records.

An attestation of vaccination by the covered contractor employee is not an acceptable substitute for documentation of proof of vaccination.

#### **Q4: Who is responsible for determining if a covered contractor employee must be provided an accommodation because of a disability or because of a sincerely held religious belief, practice, or observance?**

A: A covered contractor may be required to provide an accommodation to contractor employees who communicate to the covered contractor that they are not vaccinated for COVID-19, or that they cannot wear a mask, because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance. A covered contractor should review and consider what, if any, accommodation it must offer. The contractor is responsible for considering, and dispositioning, such requests for accommodations regardless of the covered contractor employee's place of performance. If the agency that is the party to the covered contract is a "joint employer" for purposes of compliance with the Rehabilitation Act and Title VII of the Civil Rights Act, both the agency and the covered contractor should review and consider what, if any, accommodation they must offer.

**Q5: Are covered contractor employees who have a prior COVID-19 infection required to be vaccinated?**

A: Yes, covered contractor employees who have had a prior COVID-19 infection are required to be vaccinated. More information from CDC can be found [here](#).

**Q6: Can a covered contractor accept a recent antibody test from a covered contractor employee to prove vaccination status?**

A: No. A covered contractor cannot accept a recent antibody test from a covered contractor employee to prove vaccination status.

*Workplaces*

**Q7: Does this Guidance apply to outdoor contractor or subcontractor workplace locations?**

A: Yes, this Guidance applies to contractor or subcontractor workplace locations that are outdoors.

**Q8: If a covered contractor employee is likely to be present during the period of performance for a covered contract on only one floor or a separate area of a building, site, or facility controlled by a covered contractor, do other areas of the building, site, or facility controlled by a covered contractor constitute a covered contractor workplace?**

A: Yes, unless a covered contractor can affirmatively determine that none of its employees on another floor or in separate areas of the building will come into contact with a covered contractor employee during the period of performance of a covered contract. This would include affirmatively determining that there will be no interactions between covered contractor employees and non-covered contractor employees in those locations during the period of performance on a covered contract, including interactions through use of common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages.

**Q9: If a covered contractor employee performs their duties in or at only one building, site, or facility on a campus controlled by a covered contractor with multiple buildings, sites, or facilities, are the other buildings, sites, or facility controlled by a covered contractor considered a covered contractor workplace?**

A: Yes, unless a covered contractor can affirmatively determine that none of its employees in or at one building, site, or facility will come into contact with a covered contractor employee during the period of performance of a covered contract. This would include affirmatively determining that there will be no interactions between covered contractor employees and non-covered contractor employees in those locations during the period of performance on a covered contract, including interactions through use of common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages.

**Q10: Are the workplace safety protocols enumerated above the same irrespective of whether the work is performed at a covered contractor workplace or at a Federal workplace?**

A: Yes. The Guidance applies to all covered contractor employees and to all contractor or subcontractor workplace locations. While at a Federal workplace, covered contractor employees must also comply with any additional agency workplace safety requirements for that workplace. Because covered contractor employees working on a covered contract need to be fully vaccinated after December 8, 2021, covered contractor employees who work only at a Federal workplace need to be fully vaccinated by that date as well, unless legally entitled to an accommodation.

**Q11: How does this Guidance apply to covered contractor employees who are authorized under the covered contract to perform work remotely from their residence?**

A: An individual working on a covered contract from their residence is a covered contractor employee, and must comply with the vaccination requirement for covered contractor employees, even if the employee never works at either a covered contractor workplace or Federal workplace during the performance of the contract. A covered contractor employee's residence is not a covered contractor workplace, so while in the residence the individual need not comply with requirements for covered contractor workplaces, including those related to masking and physical distancing, even while working on a covered contract.

#### *Scope and Applicability*

**Q12: By when must the requirements of the order be reflected in contracts?**

A: Section 6 of the order lays out a phase-in of the requirements for covered contracts as follows:

- *Contracts awarded prior to October 15 where performance is ongoing* – the requirements must be incorporated at the point at which an option is exercised or an extension is made.
- *New contracts* – the requirements must be incorporated into contracts awarded on or after November 14. Between October 15 and November 14, agencies must include the clause in the solicitation and are encouraged to include the clause in contracts awarded during this time period but are not required to do so unless the solicitation for such contract was issued on or after October 15.

**Q13: Must the order’s requirements be flowed down to all lower-tier subcontractors and, if so, who is responsible for flowing the clause down?**

A: Yes. The requirements in the order apply to subcontractors at all tiers, except for subcontracts solely for the provision of products. The prime contractor must flow the clause down to first-tier subcontractors; higher-tier subcontractors must flow the clause down to the next lower-tier subcontractor, to the point at which subcontract requirements are solely for the provision of products.

**Q14: Does the Guidance apply to small businesses?**

A: Yes, the requirement to comply with this Guidance applies equally to covered contractors regardless of whether they are a small business. This broad application of COVID-19 guidance will more effectively decrease the spread of COVID-19, which, in turn, will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at workplaces where they are performing work for the Federal Government.

**Q15: What steps are being taken to promote consistent application of the order’s requirements across agencies?**

A: The FAR Council will conduct a rulemaking to amend the FAR to include a clause that requires covered contractors performing under FAR-based contracts to comply with this Guidance for contractor and subcontractor workplace locations. Prior to rulemaking, by October 8, 2021, the FAR Council will develop a clause and recommend that agencies exercise their authority to deviate from the FAR using the procedures set forth in subpart 1.4. Agencies responsible for contracts and contract-like instruments that are not subject to the FAR, such as concession contracts, will be responsible for developing appropriate guidance by October 8, 2021 to incorporate requirements into their covered instruments entered into on or after October 15, 2021.

**Q16: If the Safer Federal Workforce Task Force updates this Guidance to add new requirements, do those requirements apply to existing contracts?**

A: Yes. Covered contractors are required to, for the duration of the contract, comply with all Task Force Guidance for contractor or subcontractor workplace locations, including any new

Guidance where the OMB Director approves the Guidance and determines that adherence to the Guidance will promote economy and efficiency in Federal contracting. The Task Force and OMB plan to ensure any workplace safety protocols reflect what is necessary to decrease the spread of COVID-19.

**Q17: What constitutes work performed “in connection with” a covered contract?**

A: Employees who perform duties necessary to the performance of the covered contract, but who are not directly engaged in performing the specific work called for by the covered contract, such as human resources, billing, and legal review, perform work in connection with a Federal Government contract.

**Q18: Do the workplace safety protocols in the Guidance apply to covered contractor employees who perform work outside the United States?**

A: No. The workplace safety protocols in the Guidance do not apply to covered contractor employees who only perform work outside the United States or its outlying areas, as those terms are defined in section 2.101 of the FAR.

*Compliance*

**Q19: Does this clause apply in States or localities that seek to prohibit compliance with any of the workplace safety protocols set forth in this Guidance?**

A: Yes. These requirements are promulgated pursuant to Federal law and supersede any contrary State or local law or ordinance. Additionally, nothing in this Guidance shall excuse noncompliance with any applicable State law or municipal ordinance establishing more protective workplace safety protocols than those established under this Guidance.

**Q20: Can a covered contractor comply with workplace safety requirements from the Occupational Safety and Health Administration, including pursuant to any current or forthcoming Emergency Temporary Standard related to COVID-19, instead of the requirements of this Guidance?**

A: No. Covered contractors must comply with the requirements set forth in this Guidance regardless of whether they are subject to other workplace safety standards.

**Q21: What is the prime contractor’s responsibility for verifying that subcontractors are adhering to the mandate?**

A: The prime contractor is responsible for ensuring that the required clause is incorporated into its first-tier subcontracts in accordance with the implementation schedule set forth in section 6 of the order. When the clause is incorporated into a subcontract, a subcontractor is required to

comply with this Guidance and the workplace safety protocols detailed herein. Additionally, first-tier subcontractors are expected to flow the clause down to their lower-tier subcontractors in similar fashion so that accountability for compliance is fully established throughout the Federal contract supply chain for covered subcontractor employees and workplaces at all tiers through application of the clause.



# EXHIBIT C

**Safer Federal Workforce Task Force**  
**COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors**  
Updated November 10, 2021

## **Introduction**

On September 9, President Biden announced his [Path Out of the Pandemic: COVID-19 Action Plan](#). One of the main goals of this science-based plan is to get more people vaccinated. As part of that plan, the President signed Executive Order 14042, [Ensuring Adequate COVID Safety Protocols for Federal Contractors](#), (“the order”) which directs executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. § 102(4)(A), to ensure that covered contracts and contract-like instruments include a clause (“the clause”) that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts. This clause shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (“Task Force”), provided that the Director of the Office of Management and Budget (“OMB”) approves the Task Force Guidance (the or this “Guidance”) and determines that the Guidance, if adhered to by covered contractors, will promote economy and efficiency in Federal contracting.

The actions directed by the order will ensure that parties who contract with the Federal Government provide COVID-19 safeguards in workplaces with individuals working on or in connection with a Federal Government contract or contract-like instrument. These workplace safety protocols will apply to all covered contractor employees, including contractor or subcontractor employees in covered contractor workplaces who are not working on a Federal Government contract or contract-like instrument. These safeguards will decrease the spread of SARS-CoV-2, the virus that causes COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors performing work for the Federal Government.

Pursuant to this Guidance, and in addition to any requirements or workplace safety protocols that are applicable because a contractor or subcontractor employee is present at a Federal workplace, Federal contractors and subcontractors with a covered contract will be required to conform to the following workplace safety protocols:

1. COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
2. Compliance by individuals, including covered contractor employees and visitors, with the Guidance related to masking and physical distancing while in covered contractor workplaces; and
3. Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

The order also sets out a process for OMB and the Safer Federal Workforce Task Force to update the Guidance for covered contractors, which the Task Force will consider doing based on future changes to Centers for Disease Control and Prevention (“CDC”) COVID-19 guidance and as warranted by the circumstances of the pandemic and public health conditions. It also sets out a process for the Federal Acquisition Regulatory Council (“FAR Council”) to implement such protocols and guidance for covered Federal procurement solicitations and contracts subject to the Federal Acquisition Regulation (“FAR”) and for agencies that are responsible for covered contracts and contract-like instruments not subject to the FAR to take prompt action to ensure that those covered contracts and contract-like instruments include the clause, consistent with the order.

Covered contractors shall adhere to the requirements of this Guidance. The Director of OMB has, as authorized by Executive Order 14042, approved this Guidance and has, an exercise of the delegation of authority (see 3 U.S.C. § 301) under the Federal Property and Administrative Services Act determined that this Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors. The Director has published such determination in the Federal Register.

## Definitions

*Community transmission* – means the level of community transmission as set forth in the [CDC COVID-19 Data Tracker County View](#).

*Contract and contract-like instrument* – has the meaning set forth in the Department of Labor’s proposed rule, “Increasing the Minimum Wage for Federal Contractors,” [86 Fed. Reg. 38,816](#), 38,887 (July 22, 2021). If the Department of Labor issues a final rule relating to that proposed rule, this term shall have the meaning set forth in that final rule.

That proposed rule defines a contract or contract-like instrument as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The term contract includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. The term contract shall be interpreted broadly as to include, but not be limited to, any contract within the definition provided in the FAR at 48 CFR chapter 1 or applicable Federal statutes. This definition includes, but is not limited to, any contract that may be covered under any Federal procurement statute. Contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. In addition to bilateral instruments, contracts include, but are not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; exercised contract options; and bilateral contract modifications. The term contract includes contracts covered by the Service Contract Act, contracts covered by the Davis-Bacon Act, concessions contracts not otherwise subject to the Service Contract Act, and contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public.

*Contractor or subcontractor workplace location* – means a location where covered contract employees work, including a covered contractor workplace or Federal workplace.

*Covered contract* – means any contract or contract-like instrument that includes the clause described in Section 2(a) of the order.

*Covered contractor* – means a prime contractor or subcontractor at any tier who is party to a covered contract.

*Covered contractor employee* – means any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.

*Covered contractor workplace* – means a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract. A covered contractor workplace does not include a covered contractor employee’s residence.

*Federal workplace* – means any place, site, installation, building, room, or facility in which any Federal executive department or agency conducts official business, or is within an executive department or agency’s jurisdiction, custody, or control.

*Fully vaccinated* – People are considered [fully vaccinated](#) for COVID-19 two weeks after they have received the second dose in a two-dose series, or two weeks after they have received a single-dose vaccine. There is currently no post-vaccination time limit on fully vaccinated status; should such a limit be determined by the Centers for Disease Control and Prevention, that limit will be considered by the Task Force and OMB for possible updating of this Guidance.

For purposes of this Guidance, people are considered fully vaccinated if they have received COVID-19 vaccines currently approved or authorized for emergency use by the U.S. Food and Drug Administration (Pfizer-BioNTech, Moderna, and Johnson & Johnson [J&J]/Janssen COVID-19 vaccines) or COVID-19 vaccines that have been listed for emergency use by the World Health Organization (e.g., AstraZeneca/Oxford). More information is available at [Interim Clinical Considerations for Use of COVID-19 Vaccines | CDC](#).

Clinical trial participants from a U.S. site who are documented to have received the full series of an “active” (not placebo) COVID-19 vaccine candidate, for which vaccine efficacy has been independently confirmed (e.g., by a data and safety monitoring board), can be considered fully vaccinated two weeks after they have completed the vaccine series. Currently, the Novavax COVID-19 vaccine meets these criteria. More information is available at the CDC website [here](#).

*Mask* – means any mask that is consistent with CDC recommendations as set forth in [Types of Masks and Respirators | CDC](#). This may include the following: disposable masks, masks that fit properly (snugly around the nose and chin with no large gaps around the sides of the face), masks made with breathable fabric (such as cotton), masks made with tightly woven fabric (i.e., fabrics that do not let light pass through when held up to a light source), masks with two or three layers, masks with inner filter pockets, and filtering facepiece respirators that are approved by the National Institute for Occupational Safety and Health or consistent with international standards. The following do not constitute masks for purposes of this Guidance: masks with exhalation valves, vents, or other openings; face shields only (without mask); or masks with single-layer fabric or thin fabric that does not block light.

## Guidance

Covered contractors are responsible for ensuring that covered contractor employees comply with the workplace safety protocols detailed below. Covered contractor employees must also comply with agency COVID-19 workplace safety requirements while in Federal workplaces.

Consistent with applicable law, agencies are strongly encouraged to incorporate a clause requiring compliance with this Guidance into contracts that are not covered or directly addressed by the order because the contract is under the Simplified Acquisition Threshold as defined in section 2.101 of the FAR or is a contract or subcontract for the manufacturing of products. Agencies are also strongly encouraged to incorporate a clause requiring compliance with this Guidance into existing contracts and contract-like instruments prior to the date upon which the order requires inclusion of the clause.

### *1. Vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation*

Covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation. Covered contractor employees must be fully vaccinated no later than January 18, 2022. After that date, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and by the first day of the period of performance on an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract.

A covered contractor may be required to provide an accommodation to covered contractor employees who communicate to the covered contractor that they are not vaccinated against COVID-19 because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance. A covered contractor should review and consider what, if any, accommodation it must offer. Requests for “medical accommodation” or “medical exceptions” should be treated as requests for a disability accommodation.

Should a Federal agency have an urgent, mission-critical need for a covered contractor to have covered contractor employees begin work on a covered contract or at a covered workplace before becoming fully vaccinated, the agency head may approve an exception for the covered contractor—in the case of such limited exceptions, the covered contractor must ensure these covered contractor employees are fully vaccinated within 60 days of beginning work on a covered contract or at a covered workplace. The covered contractor must further ensure that such employees comply with masking and physical distancing requirements for not fully vaccinated individuals in covered workplaces prior to being fully vaccinated.

The covered contractor must review its covered employees’ documentation to prove vaccination status. Covered contractors must require covered contractor employees to show or provide their employer with one of the following documents: a copy of the record of immunization from a health care provider or pharmacy, a copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813\_r, published on September 3, 2020), a copy of medical records documenting

the vaccination, a copy of immunization records from a public health or State immunization information system, or a copy of any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of health care professional or clinic site administering vaccine. Covered contractors may allow covered contractor employees to show or provide to their employer a digital copy of such records, including, for example, a digital photograph, scanned image, or PDF of such a record.

The covered contractor shall ensure compliance with the requirements in this Guidance related to the showing or provision of proper vaccination documentation.

Covered contractors are strongly encouraged to incorporate similar vaccination requirements into their non-covered contracts and agreements with non-covered contractors whose employees perform work at covered contractor workplaces but who do not work on or in connection with a Federal contract, such as those contracts and agreements related to the provision of food services, onsite security, or groundskeeping services at covered contractor workplaces.

*2. Requirements related to masking and physical distancing while in covered contractor workplaces*

Covered contractors must ensure that all individuals, including covered contractor employees and visitors, comply with published CDC guidance for masking and physical distancing at a covered contractor workplace, as discussed further in this Guidance.

In addition to the guidance set forth below, CDC's guidance for mask wearing and physical distancing in specific settings, including healthcare, transportation, correctional and detention facilities, and schools, must be followed, as applicable.

In areas of high or substantial community transmission, fully vaccinated people must wear a mask in indoor settings, except for limited exceptions discussed in this Guidance. In areas of low or moderate community transmission, fully vaccinated people do not need to wear a mask. Fully vaccinated individuals do not need to physically distance regardless of the level of transmission in the area.

Individuals who are not fully vaccinated must wear a mask indoors and in certain outdoor settings (see below) regardless of the level of community transmission in the area. To the extent practicable, individuals who are not fully vaccinated should maintain a distance of at least six feet from others at all times, including in offices, conference rooms, and all other communal and work spaces.

Covered contractors must require individuals in covered contractor workplaces who are required to wear a mask to:

- Wear appropriate masks consistently and correctly (over mouth and nose).
- Wear appropriate masks in any common areas or shared workspaces (including open floorplan office space, cubicle embankments, and conference rooms).

- For individuals who are not fully vaccinated, wear a mask in crowded outdoor settings or during outdoor activities that involve sustained close contact with other people who are not fully vaccinated, consistent with CDC guidance.

A covered contractor may be required to provide an accommodation to covered contractor employees who communicate to the covered contractor that they cannot wear a mask because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance. A covered contractor should review and consider what, if any, accommodation it must offer.

Covered contractors may provide for exceptions to mask wearing and/or physical distancing requirements consistent with CDC guidelines, for example, when an individual is alone in an office with floor to ceiling walls and a closed door, or for a limited time when eating or drinking and maintaining appropriate distancing. Covered contractors may also provide exceptions for covered contractor employees engaging in activities in which a mask may get wet; high intensity activities where covered contractor employees are unable to wear a mask because of difficulty breathing; or activities for which wearing a mask would create a risk to workplace health, safety, or job duty as determined by a [workplace risk assessment](#). Any such exceptions must be approved in writing by a duly authorized representative of the covered contractor to ensure compliance with this Guidance at covered contractor workplaces, as discussed further below.

Masked individuals may be asked to lower their masks briefly for identification purposes in compliance with safety and security requirements.

Covered contractors must check the [CDC COVID-19 Data Tracker County View website](#) for community transmission information in all areas where they have a covered contractor workplace at least weekly to determine proper workplace safety protocols. When the level of community transmission in the area of a covered contractor workplace increases from low or moderate to substantial or high, contractors and subcontractors should put in place more protective workplace safety protocols consistent with published guidelines. However, when the level of community transmission in the area of a covered contractor workplace is reduced from high or substantial to moderate or low, the level of community transmission must remain at that lower level for at least two consecutive weeks before the covered contractor utilizes those protocols recommended for areas of moderate or low community transmission.

### *3. Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.*

Covered contractors shall designate a person or persons to coordinate implementation of and compliance with this Guidance and the workplace safety protocols detailed herein at covered contractor workplaces. The designated person or persons may be the same individual(s) responsible for implementing any additional COVID-19 workplace safety protocols required by local, State, or Federal law, and their responsibilities to coordinate COVID-19 workplace safety protocols may comprise some or all of their regular duties.



The designated individual (or individuals) must ensure that information on required COVID-19 workplace safety protocols is provided to covered contractor employees and all other individuals likely to be present at covered contractor workplaces, including by communicating the required workplace safety protocols and related policies by email, websites, memoranda, flyers, or other means and posting signage at covered contractor workplaces that sets forth the requirements and workplace safety protocols in this Guidance in a readily understandable manner. This includes communicating the COVID-19 workplace safety protocols and requirements related to masking and physical distancing to visitors and all other individuals present at covered contractor workplaces. The designated individual (or individuals) must also ensure that covered contractor employees comply with the requirements in this guidance related to the showing or provision of proper vaccination documentation.

## **Frequently Asked Questions**

Frequently Asked Questions regarding this Guidance can be found here:

<https://www.saferfederalworkforce.gov/faq/contractors/>

All Task Force Guidance, FAQs, and additional information for Federal contractors and subcontractors can be found here:

<https://www.saferfederalworkforce.gov/contractors/>

# **EXHIBIT D**

proposed information request may be obtained by contacting the office listed below in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before November 29, 2021.

**ADDRESSES:** You may submit comments identified by Control Number 1235–0024, by either one of the following methods: *Email: WHDPRAComments@dol.gov; Mail, Hand Delivery, Courier:* Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210.

**Instructions:** Please submit one copy of your comments by only one method. All submissions received must include the agency name and Control Number identified above for this information collection. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via email or to submit them by mail early. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for Office of Management and Budget (OMB) approval of the information collection request.

**FOR FURTHER INFORMATION CONTACT:** Robert Waterman, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this notice may be obtained in alternative formats (Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, large print, braille, audiotape, compact disc, or other accessible format), upon request, by calling (202) 693–0023 (not a toll-free number). TTY/TTD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

**SUPPLEMENTARY INFORMATION:**

**I. Background:** The Wage and Hour Division (WHD) of the Department of Labor administers the Fair Labor Standards Act (FLSA), 29 U.S.C. 201, *et seq.* Section 3(l) of the Act establishes a minimum age of 16 years for most non-agricultural employment, but allows the employment of 14- and 15-year olds in occupations other than manufacturing and mining if the Secretary of Labor determines such employment is confined to: (1) Periods

that will not interfere with the minor's schooling; and (2) conditions that will not interfere with the minor's health and well-being. FLSA section 11(c) requires all covered employers to make, keep, and preserve records of their employees' wages, hours, and other conditions of employment. Section 11(c) authorizes the Secretary of Labor to prescribe the recordkeeping and reporting requirements for these records. The regulations set forth reporting requirements that include a Work Study Program application and written participation agreement. In order to use the child labor work study provisions, § 570.37(b) requires a local public or private school system to file with the Wage and Hour Division Administrator an application for approval of a Work Study Program as one that does not interfere with the schooling or health and well-being of the minors involved. The regulations also require preparation of a written participation agreement for each student participating in a Work Study Program and that the teacher-coordinator, employer, and student each sign the agreement.

**II. Review Focus:** The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Enhance the quality, utility, and clarity of the information to be collected;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

**III. Current Actions:** The Department of Labor seeks approval for an extension of this information collection in order to ensure effective administration of Work Study programs.

**Type of Review:** Extension.

**Agency:** Wage and Hour Division.

**Title:** Work Study Program of the Child Labor Regulations.

**OMB Control Number:** 1235–0024.

**Affected Public:** Business or other for-profit, Not-for-profit institutions, Farms,

Federal, State, Local, or Tribal Government.

**Total Respondents:** WSP Applications: 10; Written Participation Agreements: 500.

**Total Annual Responses:** WSP Applications: 10.

**Written Participation Agreements:** 1,000.

**Estimated Total Burden Hours:** 1,529.

**Estimated Time per Response:** WSP Application: 121 minutes; Written Participation Agreements: 31 minutes.

**Frequency:** On occasion.

**Total Burden Cost (capital/startup):** \$0.

**Dated:** September 20, 2021.

**Amy DeBisschop,**

*Director, Division of Regulations, Legislation, and Interpretation.*

[FR Doc. 2021–20956 Filed 9–27–21; 8:45 am]

**BILLING CODE 4510–27–P**

## OFFICE OF MANAGEMENT AND BUDGET

### Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042

**AGENCY:** Executive Office of the President, Office of Management and Budget.

**ACTION:** Notice of determination.

**SUMMARY:** The Director of the Office of Management and Budget determines that compliance by Federal contractors and subcontractors with the COVID–19 workplace safety protocols detailed in the Safer Federal Workforce Task Force guidance issued on September 24, 2021 will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract.

**DATES:** September 24, 2021.

**ADDRESSES:** The Safer Federal Workforce Task Force Guidance for Federal Contractors and Subcontractors on COVID–19 Workplace Safety is available at: <https://www.saferfederalworkforce.gov/new/>.

**FOR FURTHER INFORMATION CONTACT:** Cristin Dorgelo, 725 17th Street N, Email address: [Cristin.a.dorgelo@omb.eop.gov](mailto:Cristin.a.dorgelo@omb.eop.gov), telephone number: (202) 456–4066. Because of delays in the receipt of regular mail related to security screening, respondents are encouraged to use electronic communications.

**SUPPLEMENTARY INFORMATION:** As explained in Executive Order No. 14042

on *Ensuring Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors*, compliance with COVID-19-related safety protocols improves economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract. Section 2(c) of E.O. 14042 requires that, before Federal contractors and subcontractors must adhere to any guidance from the Safer Federal Workforce Task Force pursuant to Executive Order No. 14042, the Director of the Office of Management and Budget must determine that such guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors. Based on my review of the Safer Federal Workforce Task Force's COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, scheduled for issuance on September 24, 2021, and exercising the President's authority under the Federal Property and Administrative Services Act (see 3 U.S.C. 3011) delegated to me through Executive Order No. 14042, I have determined that compliance by Federal contractors and subcontractors with the COVID-19-workplace safety protocols detailed in that guidance will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract.

**Shalanda Young,**  
*Acting Director, Office of Management and Budget.*

[FR Doc. 2021-21184 Filed 9-24-21; 4:15 pm]

**BILLING CODE 3110-01-P**

## NATIONAL CAPITAL PLANNING COMMISSION

### Senior Executive Service; Performance Review Board; Members

**AGENCY:** National Capital Planning Commission.

**ACTION:** Notice of members of senior executive service performance review board.

**SUMMARY:** This notice announces the membership of the National Capital Planning Commission Senior Executive Service Performance Review Board in accordance with section 4314(c) of Title 5, U.S.C. and 5 CFR 430.311.

**FOR FURTHER INFORMATION CONTACT:** Debra L. Dickson, Director of Administration, National Capital

Planning Commission, 401 Ninth Street NW, Suite 500, Washington, DC 20004, (202) 482-7229.

**SUPPLEMENTARY INFORMATION:** The following persons have been appointed to serve as members of the Performance Review Board for the National Capital Planning Commission from October 1, 2021, to September 30, 2023: Paige Cottingham-Streater, Executive Director, Japan U.S. Friendship Commission; John Farrell, Executive Director, U.S. Arctic Research Commission; and Christopher J. Roscetti, Technical Director, Defense Nuclear Facilities Safety Board.

Dated: September 22, 2021.

**Debra L. Dickson,**  
*Director of Administration, National Capital Planning Commission.*

[FR Doc. 2021-20961 Filed 9-27-21; 8:45 am]

**BILLING CODE P**

## NATIONAL CREDIT UNION ADMINISTRATION

[NCUA 2021-0102]

RIN 3133-AF39

### Request for Information and Comment on Digital Assets and Related Technologies

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Request for information and comment; extension of comment period.

**SUMMARY:** On July 27, 2021, the NCUA Board (Board) published in the **Federal Register** a document entitled "Request for Information and Comment on Digital Assets and Related Technologies" (RFI) and invited comments from interested parties regarding the current and potential impact of activities connected to digital assets and related technologies on federally insured credit unions (FICUs), related entities, and the NCUA. The Board noted that it was broadly interested in receiving input on commenters' views in this area, including current and potential uses in the credit union system, and the risks associated with them. To allow interested persons more time to consider and submit their comments, the Board has decided to extend the comment period for an additional 30 days.

**DATES:** The comment period for the RFI published July 27, 2021, at 86 FR 40213, is extended. Responses to the RFI must now be received on or before October 27, 2021.

**ADDRESSES:** You may submit comments by any one of the following methods

(Please send comments by one method only):

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments for NCUA Docket 2021-0102.

- **Fax:** (703) 518-6319. Include "[Your name] Comments on 'Request for Information and Comment on Digital Assets and Related Technologies.'"

- **Mail:** Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.

- **Hand Delivery/Courier:** Same as mailing address.

**Public Inspection:** You may view all public comments on the Federal eRulemaking Portal at <http://www.regulations.gov> as submitted, except for those we cannot post for technical reasons. NCUA will not edit or remove any identifying or contact information from the public comments submitted. Due to social distancing measures in effect, the usual opportunity to inspect paper copies of comments in the NCUA's law library is not currently available. After social distancing measures are relaxed, visitors may make an appointment to review paper copies by calling (703) 518-6540 or emailing [OGCMail@ncua.gov](mailto:OGCMail@ncua.gov).

### FOR FURTHER INFORMATION CONTACT:

**Policy and Analysis:** Scott Borger, Senior Financial Modeler and Todd Sims, National Payment Systems Officer, Office of National Examinations and Supervision, (703) 518-6640; **Legal:** Thomas Zells, Senior Staff Attorney, Office of General Counsel, (703) 518-6540; or by mail at National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314.

**SUPPLEMENTARY INFORMATION:** On July 27, 2021, the Board published in the **Federal Register** an RFI inviting comments from interested parties regarding the current and potential impact of activities connected to digital assets and related technologies on FICUs, related entities, and the NCUA.<sup>1</sup> The Board published the RFI with the aim of engaging the broad credit union industry and other stakeholders and learning how emerging DLT and DeFi applications are viewed and used. The RFI emphasized that the NCUA hopes to learn how the credit union community is using these emerging technologies and gain additional feedback as to the role the NCUA can play in safeguarding the financial system and consumers in the context of these emerging technologies. In order to continue to

<sup>1</sup> 86 FR 40213 (July 27, 2021).

# **EXHIBIT E**



Dated: November 11, 2021.

**Jessica L. Wechter,**

*Special Assistant to the President, Legal Services Corporation.*

[FR Doc. 2021-25037 Filed 11-12-21; 11:15 am]

BILLING CODE 7050-01-P

## OFFICE OF MANAGEMENT AND BUDGET

### Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis

**AGENCY:** Executive Office of the President, Office of Management and Budget.

**ACTION:** Notice of determination; request for comments.

**SUMMARY:** The Director of the Office of Management and Budget (“OMB”) determines that compliance by Federal contractors and subcontractors with the COVID-19 workplace safety protocols detailed in the Safer Federal Workforce Task Force (“Safer Federal Workforce Task Force” or the “Task Force”) guidance (the “Guidance”) to be issued on November 10, 2021, will promote economy and efficiency in Federal contracting by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract, and the Director approves the guidance. This notice accordingly rescinds and supersedes the Director’s prior notice issued on September 24, 2021.

**DATES:** To be ensured consideration, comments must be received on or before December 16, 2021.

**ADDRESSES:** You should submit comments via the Federal eRulemaking Portal at <https://www.regulations.gov/>. Follow the instructions for submitting comments.

Please be advised OMB will post all comments received that relate to this notice of determination on <https://www.regulations.gov> without making any change to the comments or redacting any information.

All comments posted are available and accessible to the public. So, do not include any information you would not like to be made publicly available, such as Social Security numbers, personal addresses, telephone numbers, and email addresses. It is the responsibility of the commenter to safeguard personal information.

**FOR FURTHER INFORMATION CONTACT:** Cristin Dorgelo, 725 17th Street NW,

Email address: [cristin.a.dorgelo@omb.eop.gov](mailto:cristin.a.dorgelo@omb.eop.gov), telephone number: (202) 456-4066. Because of delays in the receipt of regular mail related to security screening, respondents are encouraged to use electronic communications.

**SUPPLEMENTARY INFORMATION:** Section 2 of Executive Order 14042 (“Executive Order 14042” or the “order”) requires that, before Federal contractors and subcontractors must adhere to any guidance from the Task Force, the Director of OMB must approve such guidance and determine that such guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors. Based on my review of the Task Force’s COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, scheduled for issuance on November 10, 2021 (reproduced in relevant part in Part I below), as well as the economy-and-efficiency analysis presented in Part II below, and exercising the President’s authority under the Federal Property and Administrative Services Act (see 3 U.S.C. 301) delegated to me through Executive Order 14042, I approve the Guidance and have determined that the COVID-19-workplace safety protocols detailed in that Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors. This notice accordingly rescinds and supersedes my prior notice issued on September 24, 2021. 86 FR 53691.

This notice consists of the following sections. Part I consists of revised Guidance from the Task Force. Part II consists of an economic analysis of the COVID-19-workplace safety protocols detailed in such Guidance and the effect on economy and efficiency in Federal procurement. Part III addresses procedural requirements.

#### Part I. Safer Federal Workforce Task Force Guidance

On September 9, President Biden announced his Path Out of the Pandemic: COVID-19 Action Plan. One of the main goals of this science-based plan is to get more people vaccinated. As part of that plan, the President signed Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, which directs executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A), to ensure that covered contracts and contract-like instruments include a clause (“the clause”) that the

contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts. This clause shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Task Force, provided that the Director of OMB approves the Task Force Guidance and determines that the Guidance, if adhered to by covered contractors, will promote economy and efficiency in Federal contracting.

The actions directed by the order will ensure that parties who contract with the Federal Government provide COVID-19 safeguards in workplaces with individuals working on or in connection with a Federal Government contract or contract-like instrument. These workplace safety protocols will apply to all covered contractor employees, including contractor or subcontractor employees in covered contractor workplaces who are not working on a Federal Government contract or contract-like instrument. These safeguards will decrease the spread of SARS-CoV-2, the virus that causes COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors performing work for the Federal Government.

Pursuant to this Guidance, and in addition to any requirements or workplace safety protocols that are applicable because a contractor or subcontractor employee is present at a Federal workplace, Federal contractors and subcontractors with a covered contract will be required to conform to the following workplace safety protocols:

1. COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
2. Compliance by individuals, including covered contractor employees and visitors, with the Guidance related to masking and physical distancing while in covered contractor workplaces; and
3. Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

The order also sets out a process for OMB and the Safer Federal Workforce Task Force to update the Guidance for covered contractors, which the Task Force will consider doing based on future changes to Centers for Disease Control and Prevention (“CDC”) COVID-19 guidance and as warranted by the circumstances of the pandemic and public health conditions. It also sets out a process for the Federal Acquisition

Regulatory Council (“FAR Council”) to implement such protocols and guidance for covered Federal procurement solicitations and contracts subject to the Federal Acquisition Regulation (“FAR”) and for agencies that are responsible for covered contracts and contract-like instruments not subject to the FAR to take prompt action to ensure that those covered contracts and contract-like instruments include the clause, consistent with the order.

Covered contractors shall adhere to the requirements of this Guidance.

#### A. Definitions

**Community transmission**—means the level of community transmission as set forth in the CDC COVID-19 Data Tracker County View.<sup>1</sup>

**Contract and contract-like instrument**—has the meaning set forth in the Department of Labor’s proposed rule, “Increasing the Minimum Wage for Federal Contractors,” 86 FR 38816, 38887 (July 22, 2021). If the Department of Labor issues a final rule relating to that proposed rule, this term shall have the meaning set forth in that final rule.

That proposed rule defines a contract or contract-like instrument as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The term contract includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. The term contract shall be interpreted broadly as to include, but not be limited to, any contract within the definition provided in the FAR at 48 CFR chapter 1 or applicable Federal statutes. This definition includes, but is not limited to, any contract that may be covered under any Federal procurement statute. Contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. In addition to bilateral instruments, contracts include, but are not limited to, awards and notices of awards; job orders or task letters issued

under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; exercised contract options; and bilateral contract modifications. The term contract includes contracts covered by the Service Contract Act, contracts covered by the Davis-Bacon Act, concessions contracts not otherwise subject to the Service Contract Act, and contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public.

**Contractor or subcontractor workplace location**—means a location where covered contract employees work, including a covered contractor workplace or Federal workplace.

**Covered contract**—means any contract or contract-like instrument that includes the clause described in Section 2(a) of the order.

**Covered contractor**—means a prime contractor or subcontractor at any tier who is party to a covered contract.

**Covered contractor employee**—means any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.

**Covered contractor workplace**—means a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract. A covered contractor workplace does not include a covered contractor employee’s residence.

**Federal workplace**—means any place, site, installation, building, room, or facility in which any Federal executive department or agency conducts official business, or is within an executive department or agency’s jurisdiction, custody, or control.

**Fully vaccinated**—people are considered fully vaccinated for COVID-19 two weeks after they have received the second dose in a two-dose series, or two weeks after they have received a single-dose vaccine.<sup>2</sup> There is currently no post-vaccination time limit on fully vaccinated status; should such a limit be determined by the Centers for Disease Control and Prevention, that limit will

be considered by the Task Force and OMB for possible updating of this Guidance.

For purposes of this Guidance, people are considered fully vaccinated if they have received COVID-19 vaccines currently approved or authorized for emergency use by the U.S. Food and Drug Administration (Pfizer-BioNTech, Moderna, and Johnson & Johnson [J&J]/Janssen COVID-19 vaccines) or COVID-19 vaccines that have been listed for emergency use by the World Health Organization (e.g., AstraZeneca/Oxford). More information is available at Interim Clinical Considerations for Use of COVID-19 Vaccines | CDC.<sup>3</sup>

Clinical trial participants from a U.S. site who are documented to have received the full series of an “active” (not placebo) COVID-19 vaccine candidate, for which vaccine efficacy has been independently confirmed (e.g., by a data and safety monitoring board), can be considered fully vaccinated two weeks after they have completed the vaccine series. Currently, the Novavax COVID-19 vaccine meets these criteria. More information is available at the CDC website.<sup>4</sup>

**Mask**—means any mask that is consistent with CDC recommendations.<sup>5</sup> This may include the following: Disposable masks, masks that fit properly (snugly around the nose and chin with no large gaps around the sides of the face), masks made with breathable fabric (such as cotton), masks made with tightly woven fabric (i.e., fabrics that do not let light pass through when held up to a light source), masks with two or three layers, masks with inner filter pockets, and filtering facepiece respirators that are approved by the National Institute for Occupational Safety and Health or consistent with international standards. The following do not constitute masks for purposes of this Guidance: Masks with exhalation valves, vents, or other openings; face shields only (without mask); or masks with single-layer fabric or thin fabric that does not block light.

#### B. Requirements

Covered contractors are responsible for ensuring that covered contractor employees comply with the workplace

<sup>3</sup> CDC, Interim Clinical Considerations for Use of COVID-19 Vaccines, <https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html>.

<sup>4</sup> CDC, People who received COVID-19 vaccine as part of a clinical trial in the United States, <https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html#vaccinated-part-clinical-trial>.

<sup>5</sup> CDC, Types of Masks and Respirators (Sept. 23, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/types-of-masks.html>.

<sup>1</sup> CDC, COVID-19 Integrated County View, <https://covid.cdc.gov/covid-data-tracker/#county-view>.

<sup>2</sup> CDC, When You’ve Been Fully Vaccinated (last updated Oct. 15, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html>.



safety protocols detailed below. Covered contractor employees must also comply with agency COVID-19 workplace safety requirements while in Federal workplaces.

Consistent with applicable law, agencies are strongly encouraged to incorporate a clause requiring compliance with this Guidance into contracts that are not covered or directly addressed by the order because the contract is under the Simplified Acquisition Threshold as defined in section 2.101 of the FAR or is a contract or subcontract for the manufacturing of products.

Agencies are also strongly encouraged to incorporate a clause requiring compliance with this Guidance into existing contracts and contract-like instruments prior to the date upon which the order requires inclusion of the clause.

#### 1. Vaccination of Covered Contractor Employees, Except in Limited Circumstances Where an Employee Is Legally Entitled to an Accommodation

Covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation. Covered contractor employees must be fully vaccinated no later than January 18, 2022. After that date, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and by the first day of the period of performance on an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract.

A covered contractor may be required to provide an accommodation to covered contractor employees who communicate to the covered contractor that they are not vaccinated against COVID-19 because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance. A covered contractor should review and consider what, if any, accommodation it must offer. Requests for “medical accommodation” or “medical exceptions” should be treated as requests for a disability accommodation.

Should a Federal agency have an urgent, mission-critical need for a covered contractor to have covered contractor employees begin work on a covered contract or at a covered workplace before becoming fully vaccinated, the agency head may approve an exception for the covered contractor—in the case of such limited

exceptions, the covered contractor must ensure these covered contractor employees are fully vaccinated within 60 days of beginning work on a covered contract or at a covered workplace. The covered contractor must further ensure that such employees comply with masking and physical distancing requirements for not fully vaccinated individuals in covered workplaces prior to being fully vaccinated.

The covered contractor must review its covered employees’ documentation to prove vaccination status. Covered contractors must require covered contractor employees to show or provide their employer with one of the following documents: A copy of the record of immunization from a health care provider or pharmacy, a copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813\_r, published on September 3, 2020), a copy of medical records documenting the vaccination, a copy of immunization records from a public health or State immunization information system, or a copy of any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of health care professional or clinic site administering vaccine. Covered contractors may allow covered contractor employees to show or provide to their employer a digital copy of such records, including, for example, a digital photograph, scanned image, or PDF of such a record.

The covered contractor shall ensure compliance with the requirements in this Guidance related to the showing or provision of proper vaccination documentation.

Covered contractors are strongly encouraged to incorporate similar vaccination requirements into their non-covered contracts and agreements with non-covered contractors whose employees perform work at covered contractor workplaces but who do not work on or in connection with a Federal contract, such as those contracts and agreements related to the provision of food services, onsite security, or groundskeeping services at covered contractor workplaces.

#### 2. Requirements Related To Masking and Physical Distancing While in Covered Contractor Workplaces

Covered contractors must ensure that all individuals, including covered contractor employees and visitors, comply with published CDC guidance for masking and physical distancing at a covered contractor workplace, as discussed further in this Guidance.

In addition to the guidance set forth below, CDC’s guidance for mask wearing and physical distancing in specific settings, including healthcare, transportation, correctional and detention facilities, and schools, must be followed, as applicable.

In areas of high or substantial community transmission, fully vaccinated people must wear a mask in indoor settings, except for limited exceptions discussed in this Guidance. In areas of low or moderate community transmission, fully vaccinated people do not need to wear a mask. Fully vaccinated individuals do not need to physically distance regardless of the level of transmission in the area.

Individuals who are not fully vaccinated must wear a mask indoors and in certain outdoor settings (see below) regardless of the level of community transmission in the area. To the extent practicable, individuals who are not fully vaccinated should maintain a distance of at least six feet from others at all times, including in offices, conference rooms, and all other communal and work spaces.

Covered contractors must require individuals in covered contractor workplaces who are required to wear a mask to:

- Wear appropriate masks consistently and correctly (over mouth and nose).
- Wear appropriate masks in any common areas or shared workspaces (including open floorplan office space, cubicle embankments, and conference rooms).
- For individuals who are not fully vaccinated, wear a mask in crowded outdoor settings or during outdoor activities that involve sustained close contact with other people who are not fully vaccinated, consistent with CDC guidance.

A covered contractor may be required to provide an accommodation to covered contractor employees who communicate to the covered contractor that they cannot wear a mask because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance. A covered contractor should review and consider what, if any, accommodation it must offer.

Covered contractors may provide for exceptions to mask wearing and/or physical distancing requirements consistent with CDC guidelines, for example, when an individual is alone in an office with floor to ceiling walls and a closed door, or for a limited time when eating or drinking and maintaining appropriate distancing. Covered contractors may also provide

exceptions for covered contractor employees engaging in activities in which a mask may get wet; high intensity activities where covered contractor employees are unable to wear a mask because of difficulty breathing; or activities for which wearing a mask would create a risk to workplace health, safety, or job duty as determined by a workplace risk assessment.<sup>6</sup> Any such exceptions must be approved in writing by a duly authorized representative of the covered contractor to ensure compliance with this Guidance at covered contractor workplaces, as discussed further below.

Masked individuals may be asked to lower their masks briefly for identification purposes in compliance with safety and security requirements.

Covered contractors must check the CDC COVID-19 Data Tracker County View website for community transmission information in all areas where they have a covered contractor workplace at least weekly to determine proper workplace safety protocols.<sup>7</sup> When the level of community transmission in the area of a covered contractor workplace increases from low or moderate to substantial or high, contractors and subcontractors should put in place more protective workplace safety protocols consistent with published guidelines. However, when the level of community transmission in the area of a covered contractor workplace is reduced from high or substantial to moderate or low, the level of community transmission must remain at that lower level for at least two consecutive weeks before the covered contractor utilizes those protocols recommended for areas of moderate or low community transmission.

### 3. Designation by Covered Contractors of a Person or Persons To Coordinate COVID-19 Workplace Safety Efforts at Covered Contractor Workplaces

Covered contractors shall designate a person or persons to coordinate implementation of and compliance with this Guidance and the workplace safety protocols detailed herein at covered contractor workplaces. The designated person or persons may be the same individual(s) responsible for implementing any additional COVID-19 workplace safety protocols required by local, State, or Federal law, and their responsibilities to coordinate COVID-19 workplace safety protocols may

comprise some or all of their regular duties.

The designated individual (or individuals) must ensure that information on required COVID-19 workplace safety protocols is provided to covered contractor employees and all other individuals likely to be present at covered contractor workplaces, including by communicating the required workplace safety protocols and related policies by email, websites, memoranda, flyers, or other means and posting signage at covered contractor workplaces that sets forth the requirements and workplace safety protocols in this Guidance in a readily understandable manner. This includes communicating the COVID-19 workplace safety protocols and requirements related to masking and physical distancing to visitors and all other individuals present at covered contractor workplaces. The designated individual (or individuals) must also ensure that covered contractor employees comply with the requirements in this Guidance related to the showing or provision of proper vaccination documentation.

### Frequently Asked Questions

Frequently Asked Questions regarding this Guidance can be found here: <https://www.saferfederalworkforce.gov/faq/contractors/>.

All Task Force Guidance, FAQs, and additional information for Federal contractors and subcontractors can be found here: <https://www.saferfederalworkforce.gov/contractors/>.

### Part II. Economy-and-Efficiency Analysis

The following analysis outlines the ways in which the Guidance set forth in Part I will promote economy and efficiency in Federal procurement.

The Guidance requires vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation. It imposes requirements related to masking and physical distancing in covered contractor workplaces. And it requires covered contractors to designate a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

The Guidance is issued pursuant to Executive Order 14042, which the President promulgated, in part, under the Federal Property and Administrative Services Act (FPASA). The FPASA, 40 U.S.C. 101 *et seq.* provides that the President “may prescribe policies and directives that the President considers necessary to carry out” the Act, which

includes a purpose of “provid[ing] the Federal Government with an economical and efficient system for . . . [p]rocuring and supplying property and nonpersonal services.” 40 U.S.C. 101(1), 121(a).

This analysis of the economic impact of the Guidance is based on OMB’s subject matter expertise and OMB’s review and analysis of the academic literature on interventions to prevent the spread of COVID-19.

As explained below, the overall effect of enacting these protocols for Federal contractors and subcontractors will be to decrease the spread of COVID-19, which will in turn decrease worker absence, save labor costs on net, and thereby improve efficiency in Federal contracting. Indeed, numerous private companies have undertaken vaccine mandates that were announced or take effect before the Federal Government’s mandate on Federal contractors takes effect and private companies have also imposed masking and physical distancing requirements at their workplaces. Just as these private businesses have concluded that vaccination, masking, and physical distancing requirements will make their operations more efficient and competitive in the market, we have concluded that the Guidance will realize economy and efficiency in Federal contracting.

### A. COVID-19 Infection Imposes Significant Costs on Contractors and the Federal Government

The primary goal of the safety protocols is to reduce the spread of COVID-19 among contractor employees. COVID-19 is a highly communicable disease that tends to spread between people who are indoors, sharing space, and in close quarters—conditions common in typical workplaces.<sup>8</sup> There is also evidence that COVID-19 can be spread by asymptomatic individuals. One study estimated that more than half of transmissions come from individuals who do not have symptoms (Johansson et al., 2021). Individuals who do not have symptoms are likely to continue to report to work and therefore may spread the disease to their coworkers. As such, safety protocols applied even in the absence of observable illness among employees can meaningfully reduce the spread of COVID-19. Moreover, because employees working at a single workplace will regularly come into contact, safety protocols applied to all

<sup>6</sup> OSHA, Recommended Practices for Safety and Health Programs, <https://www.osha.gov/safety-management>.

<sup>7</sup> CDC, COVID-19 Integrated County View, <https://covid.cdc.gov/covid-data-tracker/#county-view>.

<sup>8</sup> See U.S. Environmental Protection Agency, Indoor Air and Coronavirus (COVID-19), <https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19>.



employees in a workplace can meaningfully reduce the spread of COVID-19.

The CDC recommends that individuals remain isolated for ten days after symptom onset, which would mean workers who catch the virus can miss up to eight days of work.<sup>9</sup> Furthermore, those individuals could infect other workers, who would also miss eight days of work. Additional exposed workers would likely need to quarantine and would also miss work.

Workers unable to work generate substantial costs on employers. An imperfect proxy for the cost to an employer of a foregone hour of work is the worker's hourly pay. We calculate the average hourly wage for a Federal contractor to be approximately \$31.51, making the average pay for eight days \$2,016.<sup>10</sup> Wages are higher in Washington, DC, Maryland and Virginia, where many contractors are located, ranging from \$33.36 in Virginia to \$42.83 in Washington, DC, making the average pay for eight days in those areas \$2,135 and \$2,741, respectively. Such costs are substantial and, if borne by contractors, such costs would be expected to be passed on to the Federal Government, either in direct cost or lower quality, including delays.

Fortunately, vaccines, masks, and physical distancing have all been proven to reduce the prevalence of COVID-19 infection, and vaccines have been shown to greatly reduce the severity of breakthrough infections. And vaccines, masking, and physical distancing are all low-cost interventions.

#### *B. COVID-19 Vaccination Reduces Net Costs*

Requiring any workers who have not yet done so to receive a COVID-19 vaccine would generate meaningful efficiency gains for Federal contractors. COVID-19 vaccines provide strong and persistent protection against infection, illness, and hospitalization (see Tenforde, et al., 2021 and references). Reducing the number of infected people mechanically reduces transmission, and some preliminary evidence also indicates that vaccines also reduce transmission by people who contract "breakthrough" infections (Ke, et al.,

2021). The vaccine requirement in the Guidance buttresses other workplace-specific safety protocols and provides protection against infection outside of the workplace, increasing the likelihood that the full set of protocols will prevent infection and illness and preserve the productivity of people working on or in connection with Federal contracts.<sup>11</sup>

Because vaccines are widely available for free, the cost of implementing a vaccine mandate is largely limited to administrative costs associated with distributing information about the mandate and tracking employees' vaccination status. Such costs are likely to be small.<sup>12</sup> Other costs of vaccination include employees quitting and using sick time when experiencing side effects from vaccination. However, based on experiences shared by private companies detailed below, we expect few employees to quit because of the vaccine mandate, and side effects lead to significantly less sick leave than COVID-19 infection. And unlike COVID-19 infection, side effects are not contagious to other employees.

Consistent with the view that COVID-19 vaccines promote economy and efficiency, numerous private companies have undertaken vaccine mandates that were announced or take effect before the Federal Government's mandate on Federal contractors takes effect. Led originally by companies like United Airlines and Tyson Foods, a wide and growing swath of private companies have determined that vaccine mandates are net beneficial to their companies.<sup>13</sup>

While anecdotal reports suggest that vaccine mandates may lead some workers to quit their jobs rather than comply, which could create some cost associated with replacing them, we know of no systematic evidence that this has been a widespread phenomenon, or that it would be likely

to occur among employees of Federal contractors. In fact, the experience of private companies is to the contrary. For example, United Airlines reported in October 2021 that 99.7 percent of the airline's workforce complied with the vaccination requirements, Tyson Foods reported more than 96 percent of its workforce is now vaccinated, and healthcare providers such as California's Kaiser Permanente reported placing only two percent of employees on administrative leave for failing to comply with vaccine requirements.<sup>14</sup> And finally, even if some non-negligible number of workers were to quit rather than comply with a vaccine mandate, the cost of replacing those workers would be a one-time cost, while the benefits of increased vaccination (including among replacement workers, who would be vaccinated) would be long-lasting.

#### *C. Masking and Physical Distancing Reduces Net Costs*

COVID-19 is generally thought to be spread by respiratory particles and aerosols.<sup>15</sup> Masking and physical distancing have proven effective in reducing the spread of COVID-19. One study found that communities with the greatest physical distancing had a 31 percent lower risk of COVID-19 than communities with poor physical distancing, and that communities where individuals reported always using face masks outside of the home, even with poor physical distancing, had 62 percent reduced risk of COVID-19 compared to communities where face masks were never worn (Kwon et al., 2020). Another study found that full population masking reduces transmission of the virus by 25.8 percent (Leech et al., 2021). Similarly, a study of masking and ventilation improvements in Georgia schools found that COVID-19 incidence was 37 percent lower in schools where masks were required and 39 percent lower in schools with improved ventilation

<sup>11</sup> Note that the other safety protocols discussed above will still be appropriate even after the vaccine requirement is implemented, e.g., to protect against breakthrough infections and emerging variants of the virus, or for the benefit of workers who may be unable to receive a vaccine for medical or religious reasons, until such time as public health conditions improve and CDC guidance related to masking and physical distancing changes.

<sup>12</sup> For example, the Occupational Safety and Health Administration estimated that providing information would take ten minutes per firm (84 FR 61476 cl. 3) and that tracking employees' vaccination status would take five minutes per employee (id. 84 FR 61488 cl. 2).

<sup>13</sup> The Major Companies Requiring Workers to Get COVID Vaccines, *Fortune* (Aug. 23, 2021), <https://fortune.com/2021/08/23/companies-requiring-vaccines-workers-vaccination-mandatory/>. See greater discussion on page 12 of the White House Vaccination Requirements Report (Oct. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/10/Vaccination-Requirements-Report.pdf>.

<sup>14</sup> COVID Vaccine Some 5 Percent of Unvaccinated Adults Have Quit Their Jobs Over a Mandate Survey Shows CNBC (Oct. 28, 2021), <https://www.cnbc.com/2021/10/28/covid-vaccine-some-5percent-of-unvaccinated-adults-have-quit-their-jobs-over-a-mandate-survey-shows.html>; How Tyson Foods Got 60,500 Workers to Get the Coronavirus Vaccine Quickly, *N.Y. Times* (Nov. 4, 2021), <https://www.nytimes.com/2021/11/04/business/tyson-vaccine-mandate.html>; Vaccine mandates stoked fears of labor shortages. But hospitals say they're working, *Washington Post* (Oct. 16, 2021), <https://www.washingtonpost.com/health/2021/10/16/hospital-covid-vaccine-mandate/>.

<sup>15</sup> CDC, Prevent Getting Sick: How COVID Spreads (last updated July 14, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

<sup>9</sup> See Centers for Disease Control and Prevention, Recommendations for Ending Isolation (last updated Sept. 14, 2021), [https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html#anchor\\_1631308518116](https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html#anchor_1631308518116).

<sup>10</sup> This calculation uses the distribution of NAICS codes in the contractor population and average salary of those NAICS codes from the Occupational Employment and Wage Statistics program at the Bureau of Labor Statistics, <https://www.bls.gov/oes/>.

(Gettings et al., 2021). This research shows that masking, physical distancing, and improved ventilation will all reduce the likelihood that COVID-19 spreads among the contractor workforce. These preventative measures will decrease worker absence and allow contract workers to continue their work without the need to take time off to recover from COVID-19. Thus, mask wearing and physical distancing are likely to reduce the spread of COVID-19 within contractor workplaces, reducing worker absence and maintaining productivity.

The costs of masking and physical distancing are minimal. For example, contractors may have to pay for masks for their employees. Masks can cost as little as \$0.13 per mask and would need to be provided only to employees who do not already have their own masks.<sup>16</sup> Physical distancing can often be done without additional costs. Numerous private companies like Walmart require all employees to wear masks and physically distance, embodying a judgment that these mitigation measures promote economy and efficiency in the workplace.<sup>17</sup>

#### D. Conclusion

For these reasons, it is OMB's expert opinion that the Guidance will promote economy and efficiency in Federal Government procurement. All plans for economic recovery and growth are predicated on the need to prevent additional spread of the COVID-19 virus and facilitate vaccinations, and no employer, whether public or private, can expect to see increased productivity or economic efficiency without a healthy workforce. The safety protocols that are set forth by the Safer Federal Workforce Task Force are meant to ensure that COVID-19 does not easily spread within the workplace, so that Federal contractor employees can continue to be productive.

#### E. References

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### Part III. Procedural Requirements

#### A. Public Contract Requirements Under Public Law 111-350

I am making my determination pursuant to a Presidential delegation under 3 U.S.C. 301. That determination is therefore not subject to the procedural requirements of Public Law 111-350, codified at 41 U.S.C. 1707. *See NRDC, Inc. v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 109 & n.5, 111 (D.D.C. 2009) (when an agency acts pursuant to 3 U.S.C. 301, the agency "stands in the President's shoes" and that action is "not reviewable under the APA"); *Detroit Int'l Bridge Co. v. Canada*, 189 F. Supp. 3d 85, 100 (D.D.C. 2016) ("Several cases have concluded that an agency's action on behalf of the President, involving discretionary authority committed to the President, is 'presidential' and unreviewable under the APA."). To the extent that 41 U.S.C. 1707 is applicable to my determination set forth in this document, there are urgent and compelling circumstances that justify departing from the notice-and-comment and delayed-effective-date requirements in 41 U.S.C. 1707.

The notice-and-comment and delayed-effective-date requirements of subsections (a) and (b) of 41 U.S.C. 1707 "may be waived by the officer authorized to issue a procurement policy, regulation, procedure, or form if urgent and compelling circumstances make compliance with the requirements impracticable." 41 U.S.C. 1707(d). This statutory exception is implemented in FAR section 1.501-3, which provides that "[a]dvance comments need not be solicited when urgent and compelling

circumstances make solicitation impracticable prior to the effective date of the coverage, such as when a new statute must be implemented in a relative short period of time."

Urgent and compelling circumstances justify waiving the notice-and-comment requirement for this notice. This is a once in a generation pandemic, which has already resulted in more than 46,405,253 cases of COVID-19, hospitalized more than 3,283,045 Americans, and taken more than 752,196 American lives. The pandemic continues to present an imminent threat to the health and safety of the American people, including due to the emergence of the B.1.617.2 (Delta) variant, which is a variant of concern that spreads more easily than previously discovered variants of SARS-CoV-2. This threat reaches all Americans, including those working for Federal contractors and subcontractors. The Guidance directly addresses this imminent threat by requiring vaccination. The CDC has determined that the best way to slow the spread of COVID-19, including preventing infection by the Delta variant, is for individuals to get vaccinated. According to the CDC, vaccinated individuals are 5 times less likely to be infected and 10 times less likely to experience hospitalization or death due to COVID-19 than unvaccinated individuals. The Guidance thus promotes the most important, urgent public health measure to slow the spread of COVID-19 among Federal contractors and subcontractors—which is critical to avoiding worker absence and unnecessary labor costs that could hinder the efficiency of federal contracting.

The minimum delay required by subsections (a) and (b) of 41 U.S.C. 1707 is also incompatible with a fundamental purpose of issuing this determination. The Guidance set forth in Part I changes the vaccination deadline for Federal contractors from December 8, 2021, to January 18, 2022. If the determination implementing this change were required to comply with subsections (a) and (b) of 41 U.S.C. 1707 (requiring 30 days for comment, and another 30 days to become effective), the earliest possible effective date for this determination would be January 9, 2022. But waiting until January for this determination to become effective would prevent the change in deadlines from having practical effect, as Federal contractors and subcontractors would still be legally obligated to meet the December 8, 2021, vaccination deadline until this determination became effective. That alone establishes urgent and compelling

<sup>16</sup> Mask costs were taken from a search of Amazon and would likely be lower for a contractor who would be able to order in bulk.

<sup>17</sup> The Major Companies Requiring Workers to Get COVID Vaccines, *Fortune* (Aug. 23, 2021), <https://fortune.com/2021/08/23/companies-requiring-vaccines-workers-vaccination-mandatory/>.



circumstances to warrant making this determination immediately effective.

Additionally, even if there were no prior deadline that contractors and subcontractors were obligated to meet, urgent and compelling circumstances would still exist because the broader economy-and-efficiency purpose of this determination would be severely undermined by the minimum delay required under subsections (a) and (b) of 41 U.S.C. 1707. As an initial matter, such a delay would interfere with an important purpose of the Task Force Guidance—aligning the vaccination deadline for Federal contractors with the vaccination deadline for private companies under recent regulatory actions. In particular, the Occupational Safety and Health Administration (OSHA) issued an Emergency Temporary Standard (ETS) requiring employers with 100 or more employees to ensure their workers are fully vaccinated or tested for COVID-19 on at least a weekly basis, and the Centers for Medicare & Medicaid Services (CMS) issued a rule requiring health care workers at facilities participating in Medicare and Medicaid to be fully vaccinated. 86 FR 61402; 86 FR 61555. Those rules set a deadline of January 4, 2022, for employees to receive their final COVID-19 vaccination dose—*i.e.*, January 18, 2022, for a fully vaccinated covered workforce. The Task Force’s decision to set the same deadline for Federal contractors and subcontractors will make it easier for private employers to administer successful vaccination policies across their workforce and will allow Federal contractors and subcontractors to implement their requirements on the same timeline as other employers in their industries.<sup>18</sup> For example, a large employer covered by the ETS may have some but not all of their workplaces covered by the vaccination requirement for Federal contractors and subcontractors. For such an employer, that would mean some workplaces are governed by the ETS and some by the Task Force Guidance. Or, an employer may have some workers covered by the CMS rule, and other workers covered by the vaccination requirement for Federal contractors and subcontractors. For employers in these circumstances, having the same

deadline across all requirements will promote consistency and administrability of public health standards, and eliminate potential confusion and frustration that disparate deadlines could produce. It could also avoid needless costs in having multiple systems of records and internal accountability established for different deadlines. Ensuring that private employers do not need to meet different compliance dates across different Federal vaccination policies is thus important to the success of their vaccination programs and to promoting economy and efficiency in Federal procurement.

Moreover, in order for such alignment to be effective, employers require regulatory certainty in the near-term. An immediately effective notice gives contractors and subcontractors a clear understanding not only of their responsibilities under Federal law but also the deadline for complying with those responsibilities. By contrast, absent an immediately effective determination of that deadline, such employers would have to wait until comments are received and a determination is finalized to know with certainty the deadline for ensuring that their covered employees are fully vaccinated. That would cause much of the administrability problems and frustration that alignment is intended to avoid, undermining the critical efforts to curb the spread of COVID-19 among Federal contractors and subcontractors and preventing alignment of the relevant deadlines.

Compliance with the procedural requirements of 41 U.S.C. 1707(a) and 1707(b) would fundamentally undermine the effort to provide private companies with aligned deadlines and regulatory certainty, as outlined above. As noted above, under those requirements the earliest effective date for this determination would be January 9, 2022. Simply put, that is far too late to provide regulatory certainty for Federal contractors, as that is *past* the date that covered employees of covered Federal contractors must receive their final COVID-19 vaccination dose (January 4, 2022), and it is less than ten days before the deadline for covered contractor employees to be fully vaccinated (January 18, 2022). Thus, compliance with the procedural requirements of 41 U.S.C. 1707(a) and 1707(b) would undermine the success of the Federal Government’s vaccination efforts and economy and efficiency in Federal procurement.

Thus, to the extent that it is found that my determination is subject to the procedural requirements in 41 U.S.C.

1707, I have concluded that urgent and compelling circumstances exist under section 1707(d). The requirements of this notice are accordingly effective immediately upon filing with the **Federal Register**. Additionally, to the extent that it is found that my determination is subject to the procedural requirements in 41 U.S.C. 1707, this determination is temporary, consistent with section 1707(e). And regardless of whether this determination is subject to the procedural requirements in 41 U.S.C. 1707, I am soliciting comment on all subjects of this determination, which would also be consistent with sections 1707(c) and (e), if those provisions applied.

#### B. Administrative Procedure Act

My determination is not subject to the procedural rulemaking requirements of the Administrative Procedure Act (APA).

As noted above, this determination is pursuant to a delegation from the President under 3 U.S.C. 301. When any agency acts pursuant to such a delegation, the agency “stands in the President’s shoes” and its actions “cannot be subject to judicial review under the APA.” *NRDC v. State*, 658 F. Supp. 2d at 109 & n.5, 111.

Even if the APA were applicable, the notice-and-comment requirements of 5 U.S.C. 553 exempt “a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” 5 U.S.C. 553(a)(2). This determination relates to procurement and contractors—*i.e.*, “contracts” under section 553(a)(2)—and is thus exempt from the APA’s notice-and-comment requirements.

Moreover, even if the notice-and-comment requirements of 5 U.S.C. 553 were applicable, the good-cause exception is satisfied here. 5 U.S.C. 553(b)(3)(B) waives notice-and-comment requirements if “the agency for good cause finds” that compliance would be “impracticable, unnecessary, or contrary to the public interest.” Notice and comment is impracticable in situations where delay would result in harm. *See, e.g., Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012). Applicable procedures are “[i]mpracticable” if “the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings” or negotiated rulemaking. *N.J., Dep’t of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980) (quoting S. Doc. No. 248, at 200 (1946)); *see also United States v. Cotton*, 760 F. Supp. 2d 116, 129 (D.D.C. 2011). Such “good cause” would also exempt an agency from the delayed effective

<sup>18</sup> Unlike the vaccination deadline for covered employees of Federal contractors, the vaccination deadline for Federal employees under Executive Order 14043 does not require alignment with private companies, because there is no subset of private companies also subject to Executive Order 14043. Thus, the exigencies of combatting the global pandemic require maintaining the current vaccination deadline for Federal employees of November 22, 2021.

date under 5 U.S.C. 553(d). For the reasons explained above, notice-and-comment rulemaking and a delayed effective date would be impracticable, because the resulting delay in the effective date would not provide Federal contractors and subcontractors sufficient time to ensure compliance in time for the January 18, 2022, vaccination deadline.

\* \* \* \* \*

**Shalanda Young,**  
Acting Director.

[FR Doc. 2021-24949 Filed 11-10-21; 4:15 pm]

BILLING CODE 3110-01-P

## NATIONAL CREDIT UNION ADMINISTRATION

### Sunshine Act Meetings

**TIME AND DATE:** 10:00 a.m., Thursday, November 18, 2021.

**PLACE:** Due to the COVID-19 Pandemic, the meeting will be open to the public via live webcast only. Visit the agency's homepage ([www.ncua.gov](http://www.ncua.gov)) and access the provided webcast link.

**STATUS:** This meeting will be open to the public.

#### MATTERS TO BE CONSIDERED:

1. Board Briefing, Share Insurance Quarterly Report.
2. NCUA's 2022-2026 Strategic Plan.
3. NCUA Rules and Regulations, Service Facilities.
4. Board Briefing, NCUA's Modernized Examination Tools.
5. Board Briefing, Update to NCUA's Response to the COVID-19 Pandemic.

**CONTACT PERSON FOR MORE INFORMATION:** Melane Conyers-Ausbrooks, Secretary of the Board, Telephone: 703-518-6304.

**Melane Conyers-Ausbrooks,**  
Secretary of the Board.

[FR Doc. 2021-25032 Filed 11-12-21; 11:15 am]

BILLING CODE 7535-01-P

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### National Endowment for the Arts

#### Arts Advisory Panel Meetings

**AGENCY:** National Endowment for the Arts.

**ACTION:** Notice of meetings.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, as amended, notice is hereby given that 17 meetings of the Arts Advisory Panel to the National Council on the Arts will be

held by teleconference or videoconference.

**DATES:** See the **SUPPLEMENTARY INFORMATION** section for individual meeting times and dates. All meetings are Eastern time and ending times are approximate:

**ADDRESSES:** National Endowment for the Arts, Constitution Center, 400 7th St. SW, Washington, DC 20506.

**FOR FURTHER INFORMATION CONTACT:** Further information with reference to these meetings can be obtained from Ms. Sherry P. Hale, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC 20506; [haless@arts.gov](mailto:haless@arts.gov), or call 202/682-5696.

**SUPPLEMENTARY INFORMATION:** The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of September 10, 2019, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of title 5, United States Code.

The upcoming meetings are:  
*Our Town* (review of applications): This meeting will be closed.

*Date and time:* December 2, 2021; 11:00 a.m. to 1:00 p.m.

*Our Town* (review of applications): This meeting will be closed.

*Date and time:* December 2, 2021; 2:30 p.m. to 4:30 p.m.

*Arts Education* (review of applications): This meeting will be closed.

*Date and time:* December 3, 2021; 11:30 a.m. to 1:30 p.m.

*Arts Education* (review of applications): This meeting will be closed.

*Date and time:* December 3, 2021; 2:30 p.m. to 4:30 p.m.

*Our Town* (review of applications): This meeting will be closed.

*Date and time:* December 3, 2021; 11:00 a.m. to 1:00 p.m.

*Presenting and Multidisciplinary Works* (review of applications): This meeting will be closed.

*Date and time:* December 6, 2021; 2:00 p.m. to 4:00 p.m.

*Museums* (review of applications): This meeting will be closed.

*Date and time:* December 7, 2021; 11:30 a.m. to 1:30 p.m.

*Museums* (review of applications): This meeting will be closed.

*Date and time:* December 7, 2021; 2:30 p.m. to 4:30 p.m.

*Presenting and Multidisciplinary Works* (review of applications): This meeting will be closed.

*Date and time:* December 7, 2021; 2:00 p.m. to 4:00 p.m.

*Museums* (review of applications): This meeting will be closed.

*Date and time:* December 8, 2021; 11:30 a.m. to 1:30 p.m.

*Presenting and Multidisciplinary Works* (review of applications): This meeting will be closed.

*Date and time:* December 8, 2021; 2:00 p.m. to 4:00 p.m.

*Arts Education* (review of applications): This meeting will be closed.

*Date and time:* December 9, 2021; 1:30 p.m. to 3:30 p.m.

*Local Arts Agencies* (review of applications): This meeting will be closed.

*Date and time:* December 9, 2021; 1:00 p.m. to 3:00 p.m.

*Local Arts Agencies* (review of applications): This meeting will be closed.

*Date and time:* December 9, 2021; 3:30 p.m. to 5:30 p.m.

*Presenting and Multidisciplinary Works* (review of applications): This meeting will be closed.

*Date and time:* December 9, 2021; 2:00 p.m. to 4:00 p.m.

*Folk and Traditional Arts* (review of applications): This meeting will be closed.

*Date and time:* December 14, 2021; 1:00 p.m. to 3:00 p.m.

*Folk and Traditional Arts* (review of applications): This meeting will be closed.

*Date and time:* December 16, 2021; 1:00 p.m. to 3:00 p.m.

Dated: November 10, 2021.

**Sherry P. Hale,**

Staff Assistant, National Endowment for the Arts.

[FR Doc. 2021-24928 Filed 11-15-21; 8:45 am]

BILLING CODE 7537-01-P

## NUCLEAR REGULATORY COMMISSION

[Docket No. 50-201; NRC-2021-0175]

**New York State Energy Research and Development Authority; Irradiated Nuclear Fuel Processing Plant; Western New York Nuclear Service Center**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** License amendment; issuance.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) has issued an

# **EXHIBIT F**

**Attachment**

**FAR Deviation Clause**

**Executive Order 14042, Ensuring Adequate COVID Safety Protocols  
for Federal Contractors**

*September 30, 2021*

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

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**Subpart 52.2—Text of Provisions and Clauses**

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**[52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.**

**ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL  
CONTRACTORS (OCT 2021) (DEVIATION)**

**(a) *Definition.* As used in this clause -**

***United States or its outlying areas means—***

- (1) The fifty States;**
- (2) The District of Columbia;**
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;**
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and**
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.**

**(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).**

**(c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.**

**(d) *Subcontracts.* The Contractor shall include the substance of this clause,**



including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)]

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# **EXHIBIT G**



ACQUISITION  
AND SUSTAINMENT

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

In reply refer to  
DARS Tracking Number: 2021-O0009

MEMORANDUM FOR COMMANDER, UNITED STATES CYBER  
COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES SPECIAL OPERATIONS  
COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES TRANSPORTATION  
COMMAND (ATTN: ACQUISITION EXECUTIVE)  
DEPUTY ASSISTANT SECRETARY OF THE ARMY  
(PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY  
(PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE  
(CONTRACTING)  
DIRECTORS, DEFENSE AGENCIES  
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Class Deviation—Ensuring Adequate COVID-19 Safety Protocols for Federal  
Contractors

Effective immediately, contracting officers shall insert the clause 252.223-7999, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Deviation 2021-O0009), in the following solicitations, contracts, task orders, delivery orders, and modifications thereof that are for services (including construction) performed in whole or in part within the United States or its outlying areas:

- Solicitations issued on or after October 15, 2021, and contracts, task orders, and delivery orders awarded pursuant to those solicitations, that are expected to exceed the simplified acquisition threshold (SAT).
- Contracts, task orders, and delivery orders, awarded on or after November 14, 2021, from solicitations issued before October 15, 2021, that exceed the SAT.
- All extensions or renewals, issued on or after October 15, 2021, of contracts, task orders, and delivery orders that exceed the SAT.
- All options exercised, on or after October 15, 2021, on contracts, task orders, and delivery orders that exceed the SAT.
- Existing indefinite-delivery, indefinite-quantity contracts that are anticipated to have orders that exceed the SAT and that have an ordering period that extends beyond October 15, 2021.

## Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors

The deviation clause is not required in contracts or subcontracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act (the exclusion would not apply to a procurement contract or subcontract under the Federal Acquisition Regulation (FAR) to an Indian-owned or tribally-owned business entity).

In accordance with the Safer Federal Workforce Task Force Guidance and FAR 1.108(d)(2) and (3), contracting officers may insert the deviation clause in—

- Solicitations issued prior to October 15, 2021;
- Contracts, task orders, or delivery orders awarded before November 14, 2021, resulting from solicitations issued before October 15, 2021;
- Solicitations, contracts, task orders, and delivery orders that are valued at or below the SAT and are for services (including construction) performed in whole or in part within the United States and its outlying areas; or
- Solicitations, contracts, task orders, and delivery orders for the manufacturing of products.

When modifying existing contracts, task orders, or delivery orders in accordance with this deviation, contracting officers shall use a bilateral modification to incorporate the deviation clause.

This class deviation implements the requirements of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021, which directs agencies to include a clause in certain contracts to ensure that contractors comply with all guidance for contractor and subcontractor workplace locations published by the Safer Federal Workforce Task Force at: <https://www.saferfederalworkforce.gov/contractors/>.

This class deviation remains in effect until incorporated into the FAR or until otherwise rescinded. Please direct any comments or questions to Defense Pricing and Contracting, Contract Policy, at [osd.pentagon.ousd-a-s.mbx.asda-dp-c-contractpolicy@mail.mil](mailto:osd.pentagon.ousd-a-s.mbx.asda-dp-c-contractpolicy@mail.mil).

TENAGLIA.JOH  
N.M.1154945926

Digitally signed by  
TENAGLIA.JOHN.M.1154945926  
Date: 2021.10.01 11:02:24 -04'00'

John M. Tenaglia  
Principal Director,  
Defense Pricing and Contracting

Attachment  
As stated

Attachment 1  
Class Deviation 2021-O0009

Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors

**252.223-7999 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Deviation 2021-O0009)**

As prescribed in Class Deviation 2021-O0009, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, use the following clause:

ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL  
CONTRACTORS (DEVIATION 2021-O0009) (OCT 2021)

(a) *Definition.* As used in this clause –

*United States or its outlying areas* means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the *Federal Register* on September 14, 2021, 86 FR 50985).

(c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)