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FEATURE COMMENT: A Federal Contractors' Guide To The Evolving COVID-19 Safeguard Requirements

On Sept. 24, 2021, the White House "Safer Federal Workforce Task Force" (Task Force) issued COVID-19 "Guidance for Federal Contractors and Subcontractors" (Federal Contractor Guidance or FCG, available at *www.saferfederalworkforce.gov/downloads/Draft contractor guidance doc_20210922.pdf*). This Federal Contractor Guidance represents one of the more recent and important actions taken by the Biden administration to implement its six-pronged "Path Out of the Pandemic" national strategy to combat COVID-19. The Federal Contractor Guidance provides various definitions and critical information for federal contractors seeking to ensure compliance with the continually evolving COVID-19 safeguard requirements. This Feature Comment provides a summary and guide to the key provisions of the Executive Order, the Federal Contractor Guidance, and other more recent agency-specific guidance, deviations and authority applicable to federal contractors.

The White House COVID-19 Action Plan: Path Out of the Pandemic—On Sept. 9, 2021, the Biden administration announced its science-based COVID-19 Action Plan, entitled the "Path Out of the Pandemic" (the Plan). The Plan's six prongs are: (1) Vaccinating the Unvaccinated; (2) Further Protecting the Vaccinated; (3) Keeping Schools Safely Open; (4) Increasing Testing & Requiring Masking; (5) Protecting Our Economic Recovery; and (6) Improving Care for those with COVID-19. On the same day, the Biden administration issued a pair of Executive Orders focused on vaccinating the unvaccinated, and announced that the Occupational Safety and Health Administration (OSHA) would be issuing a new Emergency Temporary Standard (ETS) regarding vaccinations and/or routine testing for all employers with 100 or more employees. Although no draft regulations were made available to the public, OSHA submitted the revised ETS text (last adopted as 29 CFR pt. 1910, subpt. U, 86 Fed. Reg. 32376 (June 21, 2021)) to the Office of Management and Budget (OMB) for expedited analysis and review on Oct. 12, 2021. See *www.jdsupra.com/legalnews/osha-sends-covid-19-vaccine-mandate-5387441/*; *www.osha.gov/laws-regs/regulations/standardnumber/2200/2200.103*. The new standard will require employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis. See *www.whitehouse.gov/covidplan/#vaccinate*.

Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors—On September 9, President Biden signed Executive Order 14042, "Ensuring Adequate COVID Safety Protocols for Federal Contractors" (E.O. 14042 or the E.O.; see 86 Fed. Reg. 50985 (Sept. 14, 2021)). Its stated policy and goal are to ensure that parties contracting 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. In furtherance of this goal, § 2 of E.O. 14042 requires executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, see 40 USCA § 102(4)(A), to include a contract clause in the specified contracts and contract-like instruments requiring contractors and subcontractors at any tier to comply with the guidelines published by the Task Force and approved by the director of OMB.

On September 24, the Task Force issued the Federal Contractor Guidance that was approved by the OMB director. The Federal Contractor Guidance

provides various definitions and other information critical for federal contractors seeking to comply with E.O. 14042, which is very broad in scope, particularly as interpreted by that Guidance (and other subsequent authority).

Covered Contracts and Agreements: E.O. 14042 § 2(e) states that it applies to "contracts and contract-like instruments" as those terms are defined in the Department of Labor's proposed regulations on "Increasing the Minimum Wage for Federal Contractors." See 86 Fed. Reg. 38816, 38887 (July 22, 2021). The Federal Contractor Guidance notes that DOL's proposed rule broadly defines a contract or contract-like instrument as including, but

> 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.

(FCG *Definitions*). Although this definition encompasses a very broad group of contracts, subcontracts, agreements and arrangements, E.O. 14042 and the Federal Contractor Guidance also include potentially significant limitations on the mandatory application of the requirements. First, the E.O. states that the requirements do not cover:

(i) grants;
(ii) contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (P.L. 93-638), as amended;
(iii) contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold (i.e., generally, $250,000);
(iv) employees who perform work outside the United States or its outlying areas; or
(v) subcontracts solely for the provision of products.

(E.O. § 5(b)). In addition, the E.O. and the Federal Contractor Guidance specifically note that the requirements discussed therein are mandatory only for:

(i) Procurement contracts or contract-like instruments for services, construction, or a leasehold interest in real property;
(ii) Contracts or contract-like instruments for services covered by the Service Contract Act;
(iii) Contracts or contract-like instruments for concessions, including any concessions contracts excluded by DOL regulations at 29 CFR § 4.133(b); or
(iv) Contracts or contract-like instruments 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.

(E.O. § 5(a); FCG *Definitions*). Although these limitations could exempt a significant number of contracts and contract-like instruments, the Federal Contractor Guidance states that agencies are nonetheless "strongly encouraged" to incorporate a clause requiring compliance with the Federal Contractor Guidance into contracts that are not covered because the contract is under the simplified acquisition threshold or is a contract or subcontract for the manufacturing of products (FCG Guidance). Agency-specific guidance and other authority, which is discussed further below, are often expansive and indicate that even supply subcontractors that are outside the reach of the E.O.'s and the Federal Contractor Guidance's plain language could find themselves subject to these requirements.

Effective Dates: The E.O. and FCG Guidance. The E.O. and the Federal Contractor Guidance set out several important dates with respect to when the COVID-19 safety protocol requirements become effective for contractors. However, additional implementing guidance recently issued by several federal agencies departs from those requirements and underscores the importance of consulting the agency-specific guidance applicable to each potentially impacted contract.

First, the E.O. requires the inclusion of a clause requiring compliance with the FCG in all extensions, renewals or exercises of options for existing specified contracts or contract-like instruments occurring on or after Oct. 15, 2021. (E.O. 14042 § 6(a); FCG FAQ #12). Second, the E.O. requires the inclusion of a clause requiring compliance with the FCG in all new covered contracts and agreements awarded on or after Nov. 14, 2021, and in all new solicitations for covered contracts or agreements issued on or after Oct. 15, 2021. (E.O. 14042 § 6(a)(i)). FAQ #12 of the Federal Contractor Guidance further states that "[b]etween 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." The FCG also states that a clause requiring compliance must be incorporated into all specified contracts awarded on or after Nov. 14, 2021. (FCG, FAQ #12).

At best, the E.O. and the FCG include some ambiguities with respect to the effective date of the new clause and, as a result, there are some significant differing requirements among federal agencies as to when the clause must be included in applicable contracts, solicitations, and other instruments. Since the issuance of the FCG, on September 30: (a) the Federal Acquisition Regulatory Council released its "Issuance of Agency Deviations to Implement Executive Order 14042," see *www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf*, which includes new FAR Deviation Clause 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors; and (b) the Civilian Agency Acquisition Council (CAAC) issued "Class Deviation From the Federal Acquisition Regulation Regarding Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors," see *www.acquisition.gov/sites/default/files/page_file_uploads/CAAC Letter 2021-03 Ensuring Adequate COVID Safety Protocols for Federal Contractors (EO 14042) 09.30.2021.pdf*, which also includes new FAR Deviation Clause 52.223-99. However, instead of issuing a Government-wide deviation (or interim rule) directing when the deviation clause is to be inserted into covered federal contracts, the FAR Council (and the CAAC) delegated this responsibility to covered federal agencies by providing in their respective guidance that "Contracting officers should follow the direction for use of the clause set forth in the deviations issued by their respective agencies." (Emphasis added.) Both the FAR Council and the CAAC Guidance further state that if a civilian agency "intends to use clause text different than the deviated clause text provided," the agency "must consult with the CAAC Chair, … , who will consult with OMB and the Task Force to ensure consistency with Administration policy." With the exception of the Department of Commerce (discussed below), most agencies are using the FAR Council/CAAC clause text; however, several agencies have identified different standards for determining the applicability of the clause including as to the relevant effective dates.

Agency Deviations/Guidance. On Oct. 1, 2021: (i) the Department of Defense published "Class Deviation—Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors," see *www.acq.osd.mil/dpap/policy/policyvault/USA001998-21-DPC.pdf*, which incorporates new Defense FAR Supplement Deviation Clause 252.223-7999, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Deviation 2021-O0009), the text of which is identical to FAR 52.223-99; (ii) NASA published "Class Deviation From The Federal Acquisition Regulation (FAR) For Executive Order 14042, Ensuring Adequate COVID Safety Protocols For Federal Contractors," see *www.hq.nasa.gov/office/procurement/regs/pcd/pcd21-03.pdf*, which includes FAR 52.223-99; and (iii) the Department of Homeland Security and the Department of Veterans Affairs issued their respective guidance, see *www.acquisition.gov/sites/default/files/page_file_uploads/DHS FAR Class Deviation 22-01 EO 14042 Ensuring Adequate COVID Safety Protocols for Federal Contractors.pdf*; *www.va.gov/oal/docs/business/pps/deviation Far20211001.pdf*. Other agencies (e.g., Department of Justice, DOC, Department of the Treasury, Department of Agriculture and Department of the Interior) have subsequently issued guidance. Additional agencies have published their FAR Deviations on *www.acquisition.gov/content/caac-letters*, and more will likely continue to do so.

All of these documents provide guidance as to the effective date of the respective clauses, as well as varying guidance regarding which contracts and agreements must include the clause. Because guidance regarding effective dates and covered contracts, subcontracts and agreements can and does vary from agency to agency, contractors must review the individual guidance released by the specific agency or agencies with which they are or will be contracting.

DOD's Guidance requires that DFARS 252.223-7999 be inserted into applicable: (i) "Solicitations issued on or after October 15, 2021, and contracts, task orders, and delivery orders awarded pursuant to those solicitations"; (ii) "Contracts, task orders, and delivery orders, awarded on or after November 14, 2021, from solicitations issued before October 15, 2021"; (iii) All extensions or renewals issued, or options exercised, "on or after October 15, 2021, of contracts, task orders, and delivery orders"; and (iv) "Existing indefinite-delivery, indefinite-quantity contracts that

are anticipated to have orders that exceed the [simplified acquisition threshold] and that have an ordering period that extends beyond October 15, 2021." This part of the DOD Guidance is fairly consistent with the FAR Council Guidance as is the Guidance issued by DHS, DOJ, and VA as to effective dates.

On Sept. 30, 2021, the General Services Administration released "FAR Class Deviation-Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors," see *www.gsa.gov/cdnstatic/Class Deviation CD-2021-13_0.pdf*, which includes FAR 52.223-99. While somewhat similar, GSA's Guidance differs from DOD's (and the FAR Council's) in several respects. For example, GSA's Guidance provides that "Contracting officers shall include the clause at FAR 52.223-99 in new applicable contracts, lease acquisitions, and 'contract-like instruments' awarded on or after October 15, 2021." In contrast, as noted above, for many applicable, newly awarded contracts, DOD (and the FAR Council, the CAAC, and certain other agencies) makes the clause mandatory starting on November 14 (for solicitations that predate October 15). Notably, in implementing the requirements for the E.O., GSA sent requests for bilateral modifications, including through its automated system, strongly encouraging all GSA contractors to agree to the bilateral modification, even if they are not a covered contractor, ahead of the Oct. 15, 2021 date. While it is in the business judgment of the contractor to accept such a modification, opting not to do so will be noted on GSA's e-tools and website. Thus, contractors are instructed to accept the modification by Nov. 14, 2021, or risk denial of contract extensions, denial of the exercise of an option, or non-renewal of the requirement until the modification is finalized. There is also the possibility of termination, exclusion from new competition for a requirement, "[t]emporarily hiding contractor information on GSA websites and/or e-tools," and "[f]lagging contractors" if a contractor does not comply with the modification request. While some other agencies have also indicated that they may or will seek to modify contracts sooner (as opposed to waiting until a specific contract is up for renewal or extension), this decision is made by each individual agency. In some instances, it could be as late as September 2022 before clauses addressing the E.O. appear in some contracts with a federal agency.

NASA's Guidance is considerably different than GSA's and DOD's Guidance. See *www.hq.nasa.gov/office/procurement/regs/pcd/pcd21-03.pdf*. NASA's Guidance provides that it "has decided to incorporate the clause [FAR 52.223-99] requiring compliance with this Task Force Guidance into acquisitions that are not covered or directly addressed by this E.O. in order to maximize the goal of getting more people vaccinated and decrease the spread of COVID-19." (Emphasis added.) More specifically, NASA requires the insertion of FAR 52.223-99 "[e]ffective immediately and no later than October 15, 2021, for commercial and non-commercial acquisitions that include requirements for services, supplies, research and development, construction, and end-items" (emphasis added) into:

(i) All new solicitations and resulting contracts, orders, blanket purchase agreements (BPAs), and cooperative agreement notices and resulting cooperative agreements above the micro-purchase threshold (MPT) issued on or after the effective date of this [Procurement Class Deviation];

(ii) All existing contracts, orders, BPAs, and cooperative agreements, above the simplified acquisition threshold (SAT) via a bilateral modification; and

(iii) All solicitations above the MPT issued prior to the [Oct. 1, 2021] effective date of [this NASA Procurement Class Deviation].

NASA's guidance does not reference or include a November 14 deadline and requires the clause to be included in most non-services and commercial products contracts.

DOC's Guidance is also considerably different than certain other agencies and that of the FAR Council/CAAC Guidance. See *www.acquisition.gov/sites/default/files/page_file_uploads/Commerce_PM-2022-01_FAR_Class_Deviation_Vaccine_vF.pdf*. For example, DOC requires the inclusion of the new clause in contracts and subcontracts at any tier that exceed the micro-purchase threshold (generally, $10,000) instead of the simplified acquisition threshold, see also HHS Deviation for FAR 52.223-99 and HUD Deviation for FAR 52.223-99 (each similarly applying the micro-purchase threshold to their respective prime contracts), the latter threshold being the ceiling called for by the new clause for other agencies (and by the FAR Council/CAAC) for inclusion in subcontracts. As a result, DOC has issued its own clause, Commerce Acquisition Regulation 1352.223-99, "Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Oct 2021)

(DEVIATION)." See *www.commerce.gov/sites/default/files/2021-10/PM 2022-01 Attachment A.pdf*. The DOC Guidance further provides that its clause "is effective immediately for the following:

(i) new contracts;
(ii) solicitations for a contract;
(iii) extensions or renewals of existing contracts awarded on or after October 15, 2021; and
(iv) options on existing contracts exercised on or after October 15, 2021."

Unlike most other agencies, DOC also sets a firm date of Jan. 1, 2022, for the clause to be effective for "existing contracts." Clearly, some of these requirements are substantially different than those of other agencies.

Because of the differing effective dates, contractors doing business with several agencies should carefully evaluate the guidance from each agency and determine the earliest effective date to which they may be subjected to ensure compliance. In addition, contractors should monitor any challenges to the E.O., as well as challenges to agency-specific and other guidance that differs from the E.O. and FCG. It is possible that disputes and challenges may arise because some of the implementing guidance, as to effective dates and covered contracts/subcontracts and agreements, is not consistent with (i.e., is more expansive than) the E.O. and/or the FCG (and, possibly, the FAR Council or CAAC Guidance). If such challenges or disputes arise, the Biden administration could decide to amend or modify the E.O. to harmonize or reconcile certain language and to avoid or moot a lawsuit.

Employees Subject to Requirements: "Covered Contractor Employees." The COVID-19 safety protocols detailed in the Federal Contractor Guidance are applicable to a contractor's "covered employees" and to "covered contractor workplaces." "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." (Emphasis added.) (FCG *Definitions*).

Employees working "in connection with a covered contract" is rather broadly defined by the FCG as including 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." (FCG *Definitions*; FAQ #17).

"Covered Contractor Workplace." "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." (Emphasis added.) (FCG *Definitions*).

The FAQs included in the Federal Contractor Guidance help illustrate the very substantial reach of these broad definitions. For example, the FAQs explain that employees working on a covered contract from their residence are "covered contractor employees," and must comply with the vaccination requirement (but not mask and social distancing requirements) 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. (FCG FAQ #11). In addition, the FAQs explain that "covered contractor workplaces" include workplace locations that are outdoors (FCG FAQ #7), and clarify that an entire building, site, facility, and campus where a covered contractor employee performs their duties is considered a "covered contractor workplace," which can implicate all other employees at such location (even those having nothing to do with the covered contract or federal contracts), 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, including interactions through the use of common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages. (FCG FAQ #8; FAQ #9). FCG FAQ #18 notes that the guidance does not apply to employees who only perform work outside of the United States, consistent with the definitions at FAR 2.101.

As these broad definitions demonstrate, the requirements of the E.O. and FCG have an expansive reach that likely applies to many employees who may not or do not work directly on or in connection with covered contracts. Contractors should carefully map all employees working on or in connection with covered contracts and agreements, and all resulting "covered contractor workplaces," to identify all "covered employees" subject to the requirements.

Vaccine Requirements: "Full Vaccination." The

E.O. and FCG provide that all "covered contractor employees" must be "fully vaccinated" no later than Dec. 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.

The FCG explains that employees 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. In addition, 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 on the Centers for Disease Control and Prevention website. (FCG *Definitions*). There is currently no post-vaccination time limit on "fully vaccinated" status, but the Task Force may update its guidance based on determinations of the CDC. In light of recent announcements regarding eligibility for COVID-19 vaccine booster shots, which are not currently required by the E.O. or FCG, covered contractors should carefully monitor any updates to the FCG regarding the requirements for "full vaccination."

Accommodations. The FCG notes that a covered contractor may be required, in "limited circumstances," to provide an accommodation to employees who communicate 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. Contractors are directed to review and consider what, if any, accommodation they must offer, and treat requests for "medical accommodation" or "medical exceptions" as requests for a disability accommodation. The contractor is responsible for considering, and dispositioning, such requests for accommodations regardless of the covered contractor employee's place of performance. Such accommodation requests may require consideration of the Americans with Disabilities Act, Title VII of the Civil Rights Act, the Religious Freedom Restoration Act of 1993, and other authority. In addition, 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." (FCG FAQ #4). However, it is unclear from the FCG whether employees that the contractor determines are entitled to an accommodation can remain working on or in connection with covered contracts and, if they are, whether testing requirements might be applicable to employees entitled to an accommodation.

Additionally, the FCG allows agency heads to approve an exception if the agency has an urgent, mission-critical need for a covered contractor employee to begin work on a covered contract or at a covered workplace before becoming fully vaccinated. However, contractors must ensure that employees subject to such an exception are fully vaccinated within 60 days of beginning work on a covered contract or at a covered workplace, and the employees must comply with masking and physical distancing requirements for not fully vaccinated individuals in covered workplaces prior to being fully vaccinated. (FCG Guidance 1). While this temporary exception addresses an agency need for particular covered contractor employees, it is unclear whether this temporary exception could be properly applied to an entire contractor that, for whatever reason(s), would not otherwise be compliant in accordance with the general effective dates detailed in the E.O.

Vaccination Verification. Covered contractors are obligated to require covered employees to show or provide their employer with one of the following documents to verify vaccination status:

i. a copy of the record of immunization from a health care provider or pharmacy,
ii. a copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813__r, published on September 3, 2020),
iii. a copy of medical records documenting the vaccination, a copy of immunization records from a public health or State immunization information system, or
iv. 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.

Contractors may allow employees to show or

provide a digital copy of such records, including, for example, a digital photograph, scanned image, or PDF of such a record. An attestation of vaccination by the covered contractor employee alone is not an acceptable substitute for documentation of proof of vaccination. (FCG Guidance 1).

Masking and Social Distancing Requirements: 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. Contractors must also comply with any additional CDC guidance for specific settings, including healthcare, transportation, correctional and detention facilities, and schools, as applicable. (FCG Guidance 2).

Fully vaccinated individuals must wear a mask in indoor settings in areas of high or substantial community transmission. In areas of low or moderate community transmission, fully vaccinated individuals do not need to wear a mask, and fully vaccinated individuals do not need to physically distance themselves regardless of the level of transmission in the area. (FCG Guidance 2).

Individuals who are not fully vaccinated must wear a mask indoors and in crowded outdoor settings or during outdoor activities that involve sustained close contact with other people who are not fully vaccinated, regardless of the level of community transmission in the area. The FCG also indicates that "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 spaces and workspaces. (FCG Guidance 2). It is unclear under what circumstances compliance with this distancing requirement is considered not "practicable." However, the FCG clearly states that covered contractor employees working from their residence must be vaccinated, although they do not need to comply with requirements for covered contractor workplaces, including those related to masking and physical distancing. (FCG FAQ #11).

The FCG notes that contractors bear certain responsibilities to monitor compliance with masking and distancing requirements and adjust masking and distancing requirements based on CDC data. For example, contractors must check the CDC COVID-19 Data Tracker County View website at *covid.cdc.gov/covid-data-tracker/#datatracker-home* 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 must put in place more protective workplace safety protocols consistent with published guidelines. (FCG Guidance 2).

The FCG also provides that a covered contractor may be required to provide an accommodation to employees who communicate 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. In addition, contractors may provide for exceptions to mask-wearing and/or physical distancing requirements consistent with CDC guidelines including, 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.

Employer COVID-19 Coordinator Requirement: The FCG requires covered contractors to designate a person or persons to coordinate the implementation of and compliance with the Guidance and the workplace safety protocols at covered contractor workplaces. (FCG Guidance 3).

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 the Guidance in a readily understandable manner. Finally, the designated individual (or individuals) must also ensure that covered contractor employees comply with the requirements in the Guidance related to the showing or provision of proper vaccination documentation.

Implementing Contract Clauses: As noted above, FAR 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, was released by the FAR Council on Sept. 30, 2021. The standard clause reads as follows:

> Subpart 52.2—Text of Provisions and Clauses
> ***** [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 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.

See "Memorandum for Civilian Agencies, Class Deviation from the Federal Acquisition Regulation Regarding Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors," CAAC Letter 2021-03, Sept. 30, 2021.

Most agencies that have released implementing guidance (including DOD's separate implementation in the DFARS) utilize the standard FAR clause language in their implementing deviations. However, DOC included clause 1252.223-99 in its deviation for all new contracts and solicitations, applying the same compliance requirements under the Federal Contractor Guidance, but expanding the applicability to all contracts and subcontracts above the micro-purchase threshold. Accordingly, contractors should carefully review implementing guidance and the particular language in any applicable agency clause to confirm the scope of application.

Key Considerations and Questions—*Varying Agency-Specific Application and Timelines*: While the E.O. and FCG provide guidance and directions to agencies regarding the scope of application and deadlines for agency implementation, subsequent implementing guidance and clauses issued by federal agencies to date include varying scopes of application and effective dates. As a result, the contracts impacted and compliance deadlines a contractor may face could vary (including significantly) by agency. Contractors should identify and carefully examine the guidance issued by each agency with which they contract in order to identify the specific scope of application and timelines for implementation.

The potential repercussions for non-compliance range from default termination of contracts, the Government's decision not to exercise an option or renew/extend a contract, breach of contract damages, offsets, withholding of payments, poor past performance evaluations, and possibly civil or criminal False Claims Act liability for falsifying employee data or otherwise erroneously indicating compliance with the E.O., the FCG and/or the implementing contract (e.g., FAR 52.223-99) clause. Suspension or debarment is also a possibility in egregious cases. Covered contractors should ensure that their employees are aware of convenient opportunities for vaccination and establish a compliance plan to timely meet any modifications to their existing contracts, or amendments to any solicitations, for which they seek an award. It

is recommended that contractors and subcontractors review each proposed bilateral modification to assess whether to execute it (and consider whether to specifically reserve their rights to equitable adjustments, and claims, for additional costs or schedule adjustments caused by the modification), confirm the applicability and requirements of the clause, and make appropriate plans to ensure compliance.

Uncertainties Associated with Legal Challenges / Conflict of Laws: Challenges to the E.O. and associated agency deviations/guidance related to the implementation of the E.O. are expected. For example, the attorneys general of 24 states issued a letter in opposition to OSHA's pending rule requiring private-sector companies with more than 100 employees to ensure workers get vaccinated or face weekly testing. See *ago.wv.gov / Documents / AGs' letter to Pres. Biden on vaccine mandate (FINAL) (02715056xD2C78).PDF*. While this challenge is not a direct response to the E.O. as applied to contractors, it may be indicative of the types of challenges to the implementation of the E.O. that may arise.

In addition, challenges may be brought against the rushed process and procedures used to issue new class deviations in less than a month from the E.O.'s release—an unprecedented period. While the Office of Federal Procurement Policy (OFPP) Act at § 22 (41 USCA § 1707) does not specifically address class deviations, class deviations may fall within any of the various categories of procurement changes identified in the OFPP Act—in particular, changes in procurement policy, regulation, procedure or form that require publication in the Federal Register. 41 USCA § 1707. The E.O., here, does not direct the FAR Council to go through its usual process of proposing and finalizing a change to the FAR. Instead, it commanded the FAR Council to, by Oct. 8, 2021, provide "policy direction to acquisition offices" which procuring agencies will use to implement FAR deviations (under FAR subpt. 1.4).

FAR 1.501-2(b) provides that when a possible FAR deviation will have a significant cost and/or administrative impact on a contractor, "[t]he opportunity to submit written comments on proposed significant revisions shall be provided by placing a notice in the Federal Register." See FAR 1.501-2(b); see also *Navajo Refining Co., L.P. v. U.S.*, 58 Fed. Cl. 200, 207–08 (2003) ("The FAR does not specifically address publication requirements for class deviations. However, the FAR does require that for 'significant *revisions*' to FAR provisions, '[t]he opportunity to submit written comments on proposed significant *revisions* shall be provided by placing a notice in the Federal Register.' FAR § 1.501-2(b) (2002). A significant revision 'alter[s] the substantive meaning of any coverage in the FAR System having a significant cost or administrative impact on contractors [or having] a significant effect beyond the internal operating procedures of the issuing agency.' FAR § 1.501-1 (2002).."). Here, it seems likely that the E.O. and implementing agency deviations will have a significant cost and administrative impact on covered contractors. As a result, challenges to specific implementation requirements are possible. Such challenges are likely to add to already existing uncertainties regarding the implementation of the E.O. and the FCG.

Additionally, contractors with employees in certain states may be faced with state laws that appear to or do conflict with the requirements of the E.O. and the FCG. For example, Montana Law House Bill 702, passed on May 7, 2021 and signed by the governor in July, generally prohibits employers from requiring COVID-19 vaccination or from conditioning employment based on vaccine status. Last week, Texas' governor signed an Executive Order to that same effect. While the FCG allows states to employ more protective safety protocols, it specifically provides that "[t]hese requirements are promulgated pursuant to Federal law and supersede any contrary State or local law or ordinance." (FCG FAQ #19). In instances where a state attempts to enforce laws that conflict with federal COVID-19 safeguard requirements, contractor defenses to enforcement based on conflict pre-emption, derivative sovereign immunity, and intergovernmental immunity may provide relief.

Recovery of Compliance Costs: Federal contractors must prepare for the incorporation of a federal COVID-19 safeguard requirements contract clause into new contracts/subcontracts, solicitations, and existing contracts via bilateral modifications, through the exercise of options, extensions or renewals, or possibly through unilateral modifications. Contractors will be required to incur a variety of costs associated with ensuring compliance with the new contract clauses, and the likely evolving FCG. However, agencies have yet to provide any clear guidance regarding what compliance costs may be allowable or otherwise compensable. In fact, it appears that only the U.S. Department of Agriculture's Guidance specifically recognizes the possibility of an equitable adjustment.

Contractors are advised to identify any costs associated with compliance and carefully document those costs to support any requests for equitable adjustment, claims or other requests for relief. Further, if covered contractors are asked to implement the new clause through a bilateral modification, contractors will need to ensure that the modification allows for the recovery of compliance costs or, at a minimum, reserves and does not waive or release any rights the contractor may have to recover for increased costs, negative impact to schedule and the like. Before signing, contractors should also consider whether a modification constitutes an improper out-of-scope or cardinal change to the contract, which could allow a contractor to stop work and seek breach of contract damages.

It appears unlikely that the Government can avoid paying for this new contract safety requirement based on the Sovereign Acts Doctrine. For this doctrine to apply, the new law must be "public and general, [and] cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons." *Horowitz v. U.S.*, 267 U.S. 458, 461 (1925). The E.O. was created to apply to contractors and, consequently, should not qualify as a public and general act. President Biden arguably confirmed that the E.O. was specially designed to apply to contractors on September 9, when he stated that "[i]f you want to work with the federal government and do business with us, get vaccinated. If you want to do business with the federal government, vaccinate your workforce." See *www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/*.

Conclusion—E.O. 14042 and the FCG mandate the broad application of the COVID-19 safety protocols to a large percentage of contractors and subcontractors doing business with the Federal Government, as do most implementing agency guidance documents. In addition, the E.O. and FCG "strongly encourage" agencies to incorporate a clause requiring compliance with the COVID-19 safety protocols into contracts, subcontracts and agreements even when not mandatory. While it seems likely that aspects of the E.O., FCG, and/or agency implementation of the same will be challenged, contractors potentially subject to these requirements should take immediate steps to identify relevant agency guidance and clauses, plan for likely compliance with these requirements but (at a minimum) reserve the right to pursue equitable adjustments (or other relief) in bilateral modifications.

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