



USET

SOVEREIGNTY PROTECTION FUND

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*Transmitted Electronically
To Regulations.gov*

January 4, 2022

The Honorable Chiquita Brooks-LaSure,
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-3415-IFC
P.O. Box 8013
Baltimore, MD 21244-1850

Dear Administrator Brooks-LaSure,

On behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to provide comment to the Centers for Medicare and Medicaid Services (CMS) regarding its *Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule (IFR)*. Under revised deadlines, the IFR would require that covered facilities develop a policy ensuring all eligible staff have received the first dose of a two-dose COVID-19 vaccine or a one-dose COVID-19 vaccine prior to providing any care, treatment, or other services by January 27, 2022. All eligible staff must have received the necessary shots to be fully vaccinated – either two doses of Pfizer or Moderna or one dose of Johnson & Johnson – by February 28, 2022. As we continue to contend with COVID-19, the mandate imposed by the IFR may be appropriate for CMS-regulated facilities that aren't operated by Tribal Nations. However, as an agency of the federal government, CMS has an obligation to honor and uphold Tribal sovereignty and self-determination—an obligation which supersedes other interests. As such, any decisions to mandate vaccinations at Tribally operated facilities must rest solely with Tribal governments. Furthermore, CMS has failed to properly consult with Tribal Nations on the IFR, in addition to failing to provide sufficient clarity on its application to Tribally operated facilities.

USET SPF is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.¹ USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe—Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Because there is Strength in Unity

The IFR Violates Tribal Sovereignty and Self-Determination

As CMS' own Tribal consultation policy states, the "government-to-government relationship [between Tribal Nations and the United States] recognizes the right of tribes to tribal sovereignty, self-government and self-determination." The IFR as currently applied and interpreted, fails to recognize this central tenet. Instead, the Tribally operated health facilities, which are an essential function of Tribal governments, to which the IFR applies are being forced to implement this mandate without regard for our sovereign right to make the best decisions for our citizens and communities. This imposition runs counter to all that this Administration espouses regarding its diplomatic relationship with Tribal Nations. USET SPF strongly urges CMS to reconsider the mandate's application to Tribally operated facilities. Although many Tribal Nations have and may impose similar mandates for employees, we must have the exclusive authority to determine such action.

Lack of Tribal Consultation

In violation of its own Tribal Consultation Policy, CMS has not conducted meaningful consultation on the IFR. Within CMS' policy, the agency promises that it will not promulgate any regulation with Tribal implications unless, "CMS, prior to the formal promulgation of the regulation, consulted with Indian tribes throughout all stages of the process of developing the proposed regulation." While we recognize the emergency nature of the IFR, CMS has continued to fail to properly consult with Tribal Nations since the IFR was issued on November 5, 2021. In response to calls for Tribal consultation, CMS held a single "All Tribes Webinar" providing an overview of the IFR—the same overview that was provided to the general public on November 4, 2021. During the webinar, CMS officials were unable to provide answers to many questions asked by Tribal Nations and organizations. The webinar does not constitute consultation, nor does the public comment period. USET SPF calls upon CMS to immediately initiate Tribal consultation on the IFR and to join its federal partners in suspending implementation and enforcement of the IFR until consultation has taken place.

Application of IFR Remains Unclear

While the rule clearly applies to IHS facilities, its application to the diverse array of Tribal facilities is less clear. After several discussions between Tribal leaders, organizations, and advocates, CMS updated its FAQ document to include the following information:

"Q: Does this requirement apply to Indian Health Service (IHS) facilities?"

A: Generally, yes. Indian Health Service facilities are regulated under the CoPs, therefore the staff vaccination requirement outlined within this regulation applies. **Certain Tribal FQHCs that do not participate in Medicare but only in Medicaid may not be subject to these requirements."**

This FAQ, the only one that pertains to Indian Country, provides zero clarity or certainty to Tribal Nations in determining whether we must comply with the mandate. This, combined with CMS' failure to properly consult, has caused widespread confusion among Tribal Nations. It is impossible to comply with the IFR if you cannot easily determine whether it applies to your facility. While we continue to urge CMS to clarify that the IFR does not apply to Tribal Nations, at the very least, it must work to provide us more clear, robust guidance.

Concerns with Staffing Shortages

As USET SPF member Tribal Nations consider the ramifications of a vaccine mandate at our health care facilities, some have major concerns related to staff retention. As with other many health care facilities throughout the country, there are those personnel who continue refuse to be vaccinated and will likely leave their positions if a mandate is imposed. It is well known that Tribal Nations and the Indian Health Service have difficulty attracting and retaining qualified health care professionals, with many located in Health

Professional Shortage Areas. Indeed, this was a contributing factor to the devastation visited upon Indian Country during the early days of the pandemic. To risk the loss of critical Indian Healthcare System personnel at a time when the nation continues to battle the COVID-19 virus runs counter to CMS' goals of maximizing access to critical health services for American Indians and Alaska Natives, as well as advancing health equity.

Conclusion

USET SPF calls upon CMS to confirm that the IFR does not apply to Tribally operated facilities in recognition of Tribal sovereignty and its diplomatic relationship with Tribal Nations. Instead, CMS should focus on supporting Tribal Nations in taking whatever steps we deem appropriate to fight COVID-19, including the sovereign choice to impose a vaccine mandate within our health facilities. We further urge CMS to work to improve its consultative relationship with Tribal Nations, as well as prioritize the enactment of policies that uphold our status as sovereign governments, our right to self-determination and self-governance, and honor the federal trust obligation in full. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director