

Federal Deposit Insurance Corporation

Shannon Dahn, Chief, Privacy Program

550 17th Street NW

Washington, DC 20429

12/13/2021

SUBJECT: FORMAL COMMENTS – PRIVACY ACT OF 1974; SYSTEM OF RECORDS

To whom it may concern:

On 11/16/21, the FDIC published the “*FDIC-036 Notice, Ensuring Workplace Health and Safety in Response to a Public Health Emergency*” (Notice), noting a comment period ending 12/16/21. This Notice is to establish a new system to collect information to assist the FDIC with maintaining a safe and healthy workplace and respond to a public health emergency (as defined by the U.S. Department of Health and Human Services and declared by its Secretary), such as a pandemic or epidemic; to require FDIC personnel to provide information before being allowed access to a FDIC facility, medical screening, contact tracing, to provide information before being authorized to travel, and to comply with applicable “mandates” related to a public health emergency.

The record system as reflected in the Notice include the collection of the following: Name; Contact information (e.g., email address, phone number); Recent travel history; Whether they provide dependent care for an individual in a high-risk category; Health information, including: ○ Body temperature, ○ Confirmation of pathogen or communicable disease test, ○ Test results, ○ Dates, symptoms, potential or actual exposure to a pathogen or communicable disease, ○ Immunization or vaccination information, and ○ Information to support a request for exemption from a vaccination (e.g., medical diagnosis or religious beliefs); Contact tracing information, including: ○ Dates when they visited the FDIC facility, ○ Locations that they visited within the facility (e.g., office and cubicle number), ○ Duration of time spent in the facility, and ○ Whether they may have potentially come into contact with a contagious person while visiting the facility.

Per the IV Amendment of Constitution of United States of America 1789 (rev. 1992), provides the right of the people to be secure in their persons, houses, papers, and effects, **against unreasonable searches** and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. In general, this means police/any entity cannot search a person or their property without a warrant or probable cause. The FDIC requiring the disclosure of the items noted in the *FDIC-036* Notice violates this one primary right of privacy, by assuming/implying the employee and/or individual visitor is sick, representing an imminent and significant danger to the health of others (defamation). Implementing an unlawful mechanism for tracking purposes, creating a profile that could be used to marginalized, segregate and discriminate between individuals is unacceptable.

The implementation of such system indicates that the FDIC is making an irrational and unsupported general assumption to obtain excessive information justifying it by noting the Privacy Act. Per the Privacy Act, No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, **except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains**, unless disclosure of the record would be-

- (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
- (2) required under section 552 of this title;
- (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;
- (4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;
- (5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;
- (6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;
- (7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;
- (8) *to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;*
- (9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;
- (10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;
- (11) pursuant to the order of a court of competent jurisdiction; or
- (12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

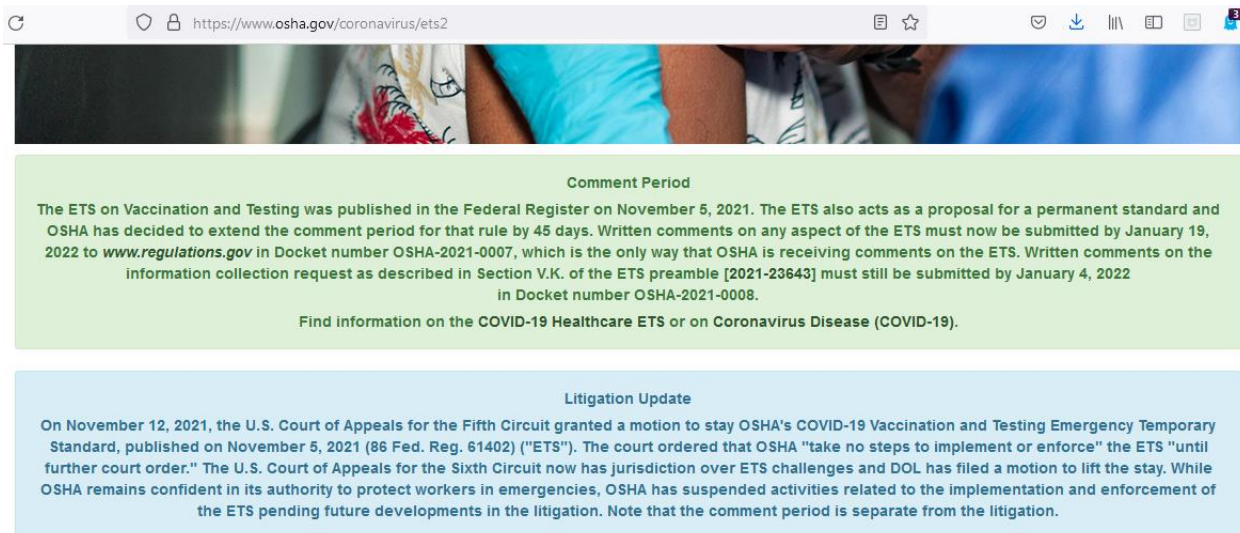
Assuming an employee/visitor gravely danger the health or safety of others (item 8 above), meaning that the FDIC is presuming any individual (employee/visitor) poses a high/significant/material risk to others without proof/cause, thus it could collect **excessive** private information violates many federal laws. What proof the FDIC possesses on each individual, indicating that they've killed anyone because of their health? What proof the FDIC has indicating that each employee has COVID 19? The implementation of such policy reflects that the FDIC is coercing/forcing employees to provide confidential information thus the employee could work or otherwise be dismissed and discriminated against, when there is no true merit or cause for it. Information should be consented and not forced just because. Any inquiry should be reasonable and not excessive.

Per the Fifth Court of Appeal¹, the Mandate in the Executive Order was halted given the grave statutory and implications of violation to the US Constitution, among others. The system that the FDIC is implementing follows an Order that establish a measurement, which is a one-size-fits-all sledgehammer

¹ <https://www.ca5.uscourts.gov/opinions/pub/21/21-60845-CV0.pdf>
<https://fortune.com/2021/12/07/biden-vaccine-mandate-blocked-federal-judge/>
<https://www.littler.com/publication-press/publication/fifth-circuit-enjoins-oshha-enforcing-mandatory-vaccination-or-test>

that makes hardly to account for differences in the workplace and workers, promoting discrimination and harassment practices.

Consequently, the Occupational Safety and Health Administration (OSHA) has been ordered by court to hold on the enforcement of testing and the measurement/mandate as a result of COVID. Please see below.



The screenshot shows a web browser window with the URL <https://www.osha.gov/coronavirus/ets2>. The page features a green banner with the following text:

Comment Period

The ETS on Vaccination and Testing was published in the Federal Register on November 5, 2021. The ETS also acts as a proposal for a permanent standard and OSHA has decided to extend the comment period for that rule by 45 days. Written comments on any aspect of the ETS must now be submitted by January 19, 2022 to www.regulations.gov in Docket number OSHA-2021-0007, which is the only way that OSHA is receiving comments on the ETS. Written comments on the information collection request as described in Section V.K. of the ETS preamble [2021-23643] must still be submitted by January 4, 2022 in Docket number OSHA-2021-0008.

Find information on the COVID-19 Healthcare ETS or on Coronavirus Disease (COVID-19).

Below the green banner is a blue banner with the following text:

Litigation Update

On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard, published on November 5, 2021 (86 Fed. Reg. 61402) ("ETS"). The court ordered that OSHA "take no steps to implement or enforce" the ETS "until further court order." The U.S. Court of Appeals for the Sixth Circuit now has jurisdiction over ETS challenges and DOL has filed a motion to lift the stay. While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation. Note that the comment period is separate from the litigation.

Therefore, the guidance provided by this entity for companies/businesses with over 100 employees is considered unlawful.

Collecting recent travel history; health information; whether the employee/visitor provide dependent care for an individual in a high-risk category; Body temperature; Confirmation of pathogen or communicable disease test; Test results; Dates, symptoms, potential or actual exposure to a pathogen or communicable disease; Immunization or vaccination information, and Information to support a request for exemption from a vaccination (e.g., medical diagnosis or religious beliefs); is an excessive inquiry and unnecessary. Per other existing OSHA guidance, an individual self-assessment or self-screen should be sufficient to monitor symptoms². The FDIC is NOT a Hospital or a Medical facility/provider to collect such information, which is protected by Health and Insurance Portability and Accountability Act (HIPAA). Per HIPAA employers could face large penalties if a HIPAA violation occurs; a HIPAA violation in the workplace refers to a situation where an employee's health information has fallen into the wrong hands, whether willfully or inadvertently, **without his/her consent**.

Additionally, the Americans with Disability Act (ADA) has restrictions on when and how much medical information an employer may obtain from any applicant or employee during a pandemic³. Once an employee begins work, any disability-related inquiries or medical exams must be job related and consistent with business necessity. The ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (i.e. a significant risk of substantial harm even with reasonable accommodation), which must be based on objective evidence obtained, factual information, "**not on subjective perceptions . . . [or] irrational fears**". While ADA notes that COVID 19 per CDC could be considered a direct threat, the direct threat

² <https://www.osha.gov/sites/default/files/publications/OSHA3990.pdf>

³ https://www.eeoc.gov/sites/default/files/2020-04/pandemic_flu.pdf

aspect has been contested in courts; nonetheless, the employer should provide options for employees who may need a reasonable accommodation. Per ADA guidance, Telework is an effective infection-control strategy that is also familiar to ADA-covered employers as a reasonable accommodation.

As noted previously, the contact tracing information including: Dates when they visited the FDIC facility, Locations that they visited within the facility (e.g., office and cubicle number), and Duration of time spent in the facility, while it could be considered information regularly or normally requested, in this situation would be considered profiling individuals, which could be used for discriminatory practices violating Title VII. Furthermore, this Notice does not seem to establish a timeframe to maintain the records, implying that the records will be maintained for an unlimited time. This practice is unacceptable and unreasonable as security and technology risks will increase throughout time.

[REDACTED]

[REDACTED]. If an employee or visitor needs to be transported to a Hospital/Medical facility, the Hospital will take pertinent measurements to reach to emergency contacts. Current or existing systems should allow the FDIC to complete its mission without exceeding its powers over the workforce.

In conclusion, the collection of the information reflected in FDIC-036 Notice is in violation of the Civil Rights Act; Title VII; Privacy Act; and HIPAA. This Notice requiring the collection of health information is an invasion of privacy and inappropriate; resulting in the profiling individuals given an irrational fear; treating individuals as if they are convicted/inmates; and creating in a subtle manner discriminatory practices, in violation of Title VII.

The FDIC should evaluate the real purpose of the record system in this Notice, and how the system will “protect” others, if there are already systems to handle an emergency. [REDACTED]

[REDACTED]. The FDIC is responsible for the stability and monetary policy for community banks. A diverse workforce has contributed to the continuation of its legacy and mission as a governmental and public entity. The FDIC as one major governmental employer should serve as an example to do the right thing, supporting a diverse workforce and promoting inclusion. Implementing a system record as the one proposed in this Notice means that the FDIC will contribute willfully to discriminate against individuals because of the health status/medical condition. Please consider to enforce the FDIC independence, making a difference by truly fostering inclusion within the workforce instead of just following orders that do not serve to a greater good.

Sincerely,

[REDACTED]

Adaiz Santiago-Pabon