



November 3, 2025

The Honorable Sean P. Duffy
Secretary of Transportation
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Dear Secretary Duffy:

The American Public Transportation Association (APTA) represents a \$93 billion industry that directly employs more than 430,000 people and supports millions of private-sector jobs. APTA offers comments regarding the Department of Transportation's (DOT) Interim Final Rule (IFR), "Disadvantaged Business Enterprise and Disadvantaged Business Enterprise in Airport Concessions Program Implementation Modifications," published in the Federal Register, at 90 Fed. Reg. 47969, on October 3, 2025. Because APTA's membership is transit-specific, these comments focus on the changes to 49 C.F.R. Part 26.

APTA and its members strongly support the Disadvantaged Business Enterprise (DBE) program and diligently administer the program to promote DBE participation in projects funded by DOT. The DOT DBE program has a long, vital, and successful history. There are nearly 50,000 certified DBEs, and the DBE program is implemented by 53 departments of transportation (DOTs) and more than 500 transit agencies across the United States. Congress first authorized the DBE program for highway and transit projects in 1983.¹ Importantly, Congress has reauthorized the DBE program seven times, most recently in the Infrastructure Investment and Jobs Act (IIJA).²

APTA has long supported the DBE program to foster competition by ensuring transportation entities have a broad base of contractors and subcontractors to choose among and that prime

¹ Highway Improvement Act of 1982, Pub. L. 97-424 § 105(f), 96 Stat. 2097 (1983).

² Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100-17, 101 Stat. 132; Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102-240, 105 Stat. 1914; Transportation Equity Act for the 21st Century of 1998, Pub. L. 105-178, 112 Stat. 107; Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005, Pub. L. 109-59, 119 Stat. 1144; Moving Ahead for Progress in the 21st Century Act, Pub. L. 112-141, 126 Stat. 405 (2012); Fixing America's Surface Transportation Act, Pub. L. 114-94, 129 Stat. 1312 (2015); Infrastructure Investment and Jobs Act, Pub. L. 117-58, 135 Stat. 448 (2021).

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contractors have a variety of potential subcontractors from which to source and scale capacity. The DBE program is a vital pathway for small businesses to support American infrastructure projects and for Federal funding to support broad-based economic growth.

APTA has always valued its open dialogue, strong collaboration, and productive engagement with DOT. APTA is concerned, however, about the use of an interim final rule, as opposed to a notice and comment process, to effectuate this seismic shift in how the DBE program is implemented. The notice-and-comment process is vital because it allows for collaboration; regulated entities are able to pose questions and provide feedback for DOT's consideration before a regulation goes into effect. This process ensures that a regulation is clear and that regulated entities are able to implement the final rule properly after it goes into effect. It is through that collaboration that changes in law and regulation can be implemented in a manner that promotes widespread compliance, furthers competition in the market, and is both workable for our industry and efficient for taxpayers.

By issuing an interim final rule, DOT immediately altered a program that had been in place for decades without input from those most impacted by the changes. The IFR has significantly impacted eligibility and administration across major public transit infrastructure programs nationwide and suspended or reshaped goal-setting and counting in ways that have affected state DOTs, over 150 Unified Certification Program (UCP) certifying agencies, over 500 transit agencies, and tens of thousands of previously certified firms.

Rather than receiving notice of proposed regulatory changes and having the chance to offer feedback on a proposed rule, those entities have been left to interpret a rule with which they must immediately comply. And even as APTA members are working in good faith to comply with the IFR, DOT has threatened to withhold funding if a recipient fails to comply with the qualitative standards in the amended rule. APTA is especially concerned that DOT paused reimbursement on funding obligated to several agencies until *after* completion of a review of those agencies' DBE compliance. APTA strongly urges DOT to provide all recipients with notice and an opportunity to be heard before taking deeply disruptive actions that can destabilize major capital projects and harm transit agencies, workers, contractors, businesses, and entire communities.

APTA has surveyed its members and respectfully submits the comments below. We appreciate that DOT issued answers to Frequently Answered Questions (FAQs) on the DBE interim final rule on October 24, 2025.³ APTA's comments largely focus on questions members have about implementation of the rule. We urge DOT to continue its efforts to provide guidance to ensure

³ U.S. Dep't of Transp., *Official Frequently Asked Questions (FAQs) on the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) Program and Disadvantaged Business Enterprise in Airport Concessions (ACDBE) Program Implementation Modifications, Interim Final Rule* (Oct. 24, 2025), <https://www.transportation.gov/media/1081>.

consistent implementation of the new standards across jurisdictions and to allow transit agencies and contractors, including DBEs, to continue their important and essential work. Highlights of the comments below include requests for additional guidance on:

- Preparing and evaluating personal narratives (Section II);
- Setting standards and timelines for reevaluation, with a focus on reducing burdens on UCPs and ensuring continuity and consistency (Section III); and
- Addressing current procurements and contracts, decertification procedures, and penalty provisions (Section IV).

We look forward to continued collaboration and engagement on these important issues.

I. Removal of Race- and Sex-Based Presumptions of Disadvantage (49 C.F.R. §§ 26.5, 26.61, 26.67)

Under prior versions of the DBE program, women and members of certain racial and ethnic groups were rebuttably presumed to be socially and economically disadvantaged.⁴ Recent judicial developments have called into question the program’s use of race- and gender-based presumptions of disadvantage.⁵ The IFR removes the presumption of social and economic disadvantage based on race or gender, replacing it with a requirement that all applicants “demonstrate social and economic disadvantage (SED) affirmatively based on their own experiences and circumstances within American society, and without regard to race or sex.”⁶

APTA supports DOT’s position that the DBE program remains in effect and is intended to provide opportunities for *socially and economically* disadvantaged businesses. This is consistent with the statute.⁷

⁴ 49 C.F.R. § 26.67(a)(1) (2024) (“Citizens of the United States (or lawfully admitted permanent residents) who are women, Black American, Hispanic American, Native American, Asian Pacific American, Subcontinent Asian American, or other minorities found to be disadvantaged by the Small Business Administration (SBA), are rebuttably presumed to be socially and economically disadvantaged.”).

⁵ On September 23, 2024, the Eastern District of Kentucky issued a preliminary injunction that enjoined DOT from mandating the use of race- and gender-based rebuttable presumptions for DOT contracts impacted by DBE goals upon which the two plaintiffs bid. *Mid-America Milling Co. v. DOT*, No. 3:23cv00072-GFVT (E.D. Ky. Sep. 23, 2024). The two plaintiffs are Mid-America Milling, LLC and Bagshaw Trucking, Inc. The court has not issued a final ruling on the merits of the case, nor has it granted the pending motion for entry of a consent order.

⁶ 90 Fed. Reg. 47969 (updated language in 49 C.F.R. § 26.67(a)).

⁷ IJIA, § 11101(e) (establishing the goal of ten percent of funding to be expended through “small business concerns owned and controlled by socially and economically disadvantaged individuals”).

II. Guidance Regarding Evaluation of Personal Narratives (49 C.F.R. §§ 26.5, 26.61, 26.67, 26.111)

Member UCPs, which include some public transit agencies, and DBEs are moving quickly to comply with the IFR. APTA understands that each UCP must determine whether a currently certified DBE meets the new eligibility standards set forth in the IFR.⁸ As part of this process, each DBE applicant must submit a detailed Personal Narrative. The narrative must establish the existence of disadvantage by a “preponderance of the evidence based on individualized proof regarding specific instances of economic hardship, systemic barriers, and denied opportunities that impeded the owner's progress or success in education, employment, or business” and that “such impediments caused the owner economic harm.”⁹ Further, under the IFR, a determination that an individual is socially and economically disadvantaged must not be based “in whole or in part on race or sex.”¹⁰

This component has caused considerable confusion among our members. To ensure full compliance, APTA urges DOT to provide further clarification, so that UCPs and DBEs have a firm understanding of how to administer their reevaluation responsibilities to avoid inconsistency and compliance issues.

Consistency with *Students for Fair Admissions*: Consistent with *Students for Fair Admissions v. Harvard (SFFA)*¹¹ and the IFR, it is APTA’s understanding that in proving social and economic disadvantage, a DBE applicant *may* provide *individualized* evidence of discrimination, including discrimination suffered on account of the race or sex of the applicant firm’s owner, as a basis for demonstrating disadvantage. As the Supreme Court itself noted in *SFFA*, “nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”¹²

Accordingly, in the context of the DBE program, which focuses on social and economic disadvantage, APTA believes that it is consistent with *SFFA* for UCPs to consider a DBE applicant’s individualized claims of discrimination experienced on account of race or sex as a viable basis for demonstrating disadvantage. If a firm has directly suffered discrimination based on the race or sex of its owner (or on any other demonstrable account) and that discrimination caused social and economic disadvantage to the firm, the DBE applicant may provide an individualized personal narrative demonstrating it. In such a circumstance, the UCP would be making a determination of social and economic disadvantage based on the nature of any

⁸ See 90 Fed. Reg. 47969 (describing new eligibility standards in 49 C.F.R. § 26.111(a)).

⁹ 90 Fed. Reg. 47969 (quoting updates to language in 49 C.F.R. §§ 26.67(a)(1)-(2)).

¹⁰ 90 Fed. Reg. 47969 (quoting updates to language in 49 C.F.R. § 26.67(a)(1)).

¹¹ 600 U.S. 181 (2023).

¹² *Id.* at 230.

discrimination and its impact on the business, not on the racial or sex identity of the individual applicant.

APTA strongly urges DOT to confirm that individualized claims of discrimination experienced on account of race or sex constitute a viable basis for demonstrating disadvantage. Confirmation of this position would allow UCPs to proceed with the reevaluation process in good faith, with a clear “safe harbor” of permitted and prohibited activity, and it will help achieve the goal of ensuring that only those businesses that meet DOT’s new standards for social and economic disadvantage remain in, or are added to, the DBE program.

III. Guidance Regarding Reevaluation Standards and Process (49 C.F.R. § 26.111)

In addition to comments concerning the reevaluation standards, APTA offers several additional comments and seeks further guidance on the following aspects of the reevaluation determination and process:

Burden of Reevaluation on UCPs and DBEs: APTA and its members observe that the immediate effective date of the rule and the rule’s removal of long-standing certification criteria has caused, and will continue to cause, significant disruption to a wide range of projects across markets nationwide, including major public transportation infrastructure projects. APTA’s members will be significantly challenged commercially by the immediate removal of the long-standing presumptions and requirement that each UCP reevaluate all currently certified DBEs under the new standards.¹³ DOT’s own calculations estimate a cost of \$91,922,000 for an estimated 41,000 DBE applicants to submit their reevaluation applications.¹⁴ This cost is substantial, particularly in light of the fact that the impacted firms are small or otherwise economically disadvantaged.

Additionally, DOT’s calculations estimate a cost of \$3,447,280 for UCPs to reevaluate applications for certification based on an individualized showing of social disadvantage.¹⁵ This cost is substantial and likely underestimates the significant amount of time and effort it will take for UCPs to determine how to interpret the requirements of the rule, based on current guidance from DOT. Notably, UCP members are often reliant on advice from outside legal counsel, contractors, and consultants.

Importantly, DBE members have emphasized that the requirement that DBE applicants prove their individualized experience of social and economic disadvantage creates an enormous burden on applicants. APTA and its members urge DOT to clarify elements of the reevaluation requirement and reduce compliance burdens on UCPs and DBEs.

¹³ See 90 Fed. Reg. 47969 (language removed in 49 C.F.R. § 26.111).

¹⁴ Disadvantaged Business Enterprise Program and Disadvantaged Business Enterprise in Airport Concessions Program Implementation Modifications, 90 Fed. Reg. 47969 (Oct. 3, 2025) (to be codified at 49 C.F.R. pts. 23, 26).

¹⁵ *Id.*

Further Guidance on Standards of Proof: APTA requests clarity as to how to determine whether an application sufficiently meets the “preponderance of the evidence” standard necessary to demonstrate individualized disadvantage. Further clarity is important for UCPs, transit agencies, and contractors alike because even though the standard as currently articulated in the IFR is qualitative, DOT reserves the right to review a UCP’s reevaluation process and potentially pursue enforcement actions based on methods or standards that are not articulated in the rule.¹⁶

The previous DBE rule’s presumption of disadvantage meant that UCPs had objective criteria to apply to DBE applications. The lack of clear guidance on the new standard means that individual UCP staff will be tasked with interpreting Personal Narratives and assessing them for sufficiency based on qualitative and indeterminate standards. Certification decisions directly impact the livelihoods of applicants, and APTA members have expressed concern with making such impactful decisions without clear standards. APTA recommends that DOT reincorporate Appendix E to Part 26, with any necessary conforming updates, to provide guidance as to what factors may be appropriately considered under the new certification standards (e.g., area median income, educational background, specific incidents of discrimination), as well as any recommended data sets UCPs may use (e.g., data from the Census Bureau, U.S. Department of the Treasury, or the U.S. Small Business Administration).

Risk of Inconsistent Certification Standards among UCPs: The lack of clear guidance will undoubtedly create inconsistency among UCPs. For example, two similarly situated DBEs certified in different jurisdictions may encounter different practical applications of the DBE certification standards, resulting in potentially divergent certification determinations. In addition, because the IFR preserves the interstate reciprocity provisions in § 26.85(b), DBEs certified in a given jurisdiction may be subjected to different certification standards based on the application of the standards in their jurisdiction of original certification.¹⁷ DOT can mitigate this problem by issuing clear, detailed guidance outlining how UCPs should evaluate certification applications under the new standards. It would also assist UCPs to have additional guidance on the form and content of notification and documentation once a UCP has completed its reevaluation.

Indeterminate Timeline or Deadlines: The IFR does not provide a deadline for completion of the reevaluation process, offering as a timeframe for the process: “as quickly as practicable.”¹⁸ The lack of clear deadlines and the varying number of certifications across jurisdictions mean that the reevaluation timelines are likely to vary significantly between UCPs. Because the establishment

¹⁶ See 90 Fed. Reg. 47969 (updating the reevaluation process through 49 C.F.R. § 26.111(c)).

¹⁷ DOT’s Official Frequently Asked Questions on the IFR state that if “DBEs are recertified by the UCP in their jurisdiction of original certification, they will be required to reapply for interstate certification with the UCPs for the jurisdictions in which they wish to be certified.” *FAQs* at 5. Because the IFR preserved the rule language requiring UCPs to accept a DBE’s certification from its jurisdiction of original certification, that second jurisdiction would be required to grant certification. See 49 C.F.R. § 26.85(b) (2025).

¹⁸ See 90 Fed. Reg. 47969 (updating the language through 49 C.F.R. § 26.111(c)).

and enforcement of DBE goals are paused during the reevaluation process, this will lead to a mosaic of jurisdictions with and without current DBE goals. Additionally, because DOT guidance states UCPs are required to reevaluate only the certifications of DBEs for which they are the jurisdiction of original certification, firms seeking reevaluation will be subjected to different timelines depending on how quickly their jurisdiction of original certification executes the reevaluation process.¹⁹ Given the scope and complexity of this effort, the reevaluation process may take an extended time to complete, and some firms that meet the new DBE standards may miss out on contracts they would otherwise have been awarded because they lack updated certifications and the procuring entity does not have any current DBE goals.

It would also be beneficial for DOT to clarify whether UCPs may impose a deadline on currently certified DBEs for submissions of reevaluation documentation. The FAQ document contains a question and answer related to this issue, but the answer leaves some ambiguity as to whether UCPs *have the option* to impose such a deadline, even though the regulation does not impose one in 49 C.F.R. § 26.111.²⁰

Privacy and Personally Identifiable Information (PII): Reevaluation also means that there will be a significant increase in the number of individuals who are required to provide UCPs with personally identifiable information and documentation, creating the potential for disclosure risks under state and Federal open records and privacy laws. APTA urges DOT to clarify that UCPs and other jurisdictions must continue to take measures to safeguard PII from unauthorized disclosure, in accordance with Federal, state, and local laws.

IV. Current Procurements and Contracts, Decertification Procedural Requirements, Recordkeeping, and Penalty Provisions (49 C.F.R. §§ 26.11, 26.45, 26.47, 26.51, 26.55, 26.111)

Under the IFR, a recipient may not count any DBE participation toward DBE goals until the applicable UCP has completed its reevaluation process.²¹ Additionally, the rule prohibits recipients from setting contract goals until the applicable UCP has completed the newly required reevaluation process.²²

Impact to Current Contracts and Procurements: APTA's members have strongly expressed concern and confusion regarding the IFR's impact on contracts in force and procurements that were ongoing on October 3, 2025. DOT's confirmation in its FAQs that all preexisting contracts and

¹⁹ See FAQs at 4-5.

²⁰ See FAQs at 5.

²¹ See 90 Fed. Reg. 47969 (updating the language in 49 C.F.R. § 26.55(i)).

²² See 90 Fed. Reg. 47969 (updating the language in 49 C.F.R. § 26.51(h)).

subcontracts with DBEs are still valid and that the standard termination processes still apply was helpful to our members.²³

In its FAQs, however, DOT states, “if a DBE performing work on a contract is not recertified during the reevaluation process, the recipient will be required to take appropriate action to discontinue the effect of the unconstitutional certification; if a recipient does not take appropriate action with respect to a contract, DOT will not make any payments with respect to that contract.”²⁴ This determination indicates that after the recertification process is complete, existing contracts with a firm that was not recertified may not be able to proceed without some action being taken, even though that action is not specified in the IFR or the FAQs. APTA seeks confirmation that this rule does not disrupt state and local law with respect to the validity of existing contracts and urges further guidance on what DOT would consider to be “appropriate action” given the range of possible circumstances and impacts on projects.

Decertification Procedural Requirements: APTA notes that DOT’s decision not to apply the procedural requirements of § 26.87 to any decertification determinations made during the reevaluation creates a due process risk that DBEs may lose their certification without explanation or the opportunity to be heard. While APTA appreciates DOT’s clarification that firms decertified through the reevaluation process may appeal to DOT under § 26.89, DOT is not subject to a specific timeline for processing those appeals. The loss of DBE certification directly impacts the livelihoods of a significant number of individuals and their ability to comply with many contractual requirements. DOT may receive a large number of appeals, and it is not clear how long a firm would need to wait for its appeal to be reviewed.

Accordingly, APTA requests that DOT provide a dispute resolution opportunity specific to firms decertified as a result of the reevaluation process, ideally with a specified timeline for DOT’s review (e.g., 60 days). The review of each reevaluation decertification appeal will be less burdensome for DOT than an average appeal because the § 26.87 process does not apply, meaning the record on review will be limited.

Recordkeeping and Reporting Requirements: The IFR has created confusion as to the applicability of the standard recordkeeping and reporting requirements during the reevaluation period. Under § 26.11, recipients “must submit a report on DBE participation to the concerned Operating Administration containing all the information described in the Uniform Report to this part” and “must continue to provide data about [their] DBE program to the Department as directed by DOT Operating Administrations.”²⁵ The IFR amended the required bidders list information to remove race and gender data, but on September 30, 2025, FTA announced that it was delaying the release

²³ See FAQs at 2-3.

²⁴ *Id.*

²⁵ 49 C.F.R. § 26.11(a)-(b) (2025).

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of the DBE Uniform Report that would normally be due December 1.²⁶ Because APTA understands the recordkeeping and reporting requirements of § 26.11 to remain in effect during the reevaluation period, this determination has generated confusion as to what data recipients should be recording and reporting. APTA requests DOT issue guidance regarding the recordkeeping and reporting requirements of the DBE program during the reevaluation process.

Funding Implications of Noncompliance: APTA members are actively working in good faith to comply with the IFR. Several members have expressed concern that withholding funding during the pendency of investigations related to the IFR has significant adverse impacts not only on transit agencies, but also on the many businesses and workers who rely on transit projects or activities for their livelihoods, with substantial economic disruption to businesses and communities. APTA strongly urges DOT to provide ample guidance, notice, and opportunity to be heard on potential violations as transit agencies and UCPs work to implement these significant changes to the DBE program.

Conclusion

APTA appreciates the opportunity to comment on this IFR and requests additional guidance and engagement from DOT regarding the new standards. If there are any questions regarding this letter, please contact APTA's General Counsel, Taria Barron, at tbarron@apta.com. Thank you for your consideration, and we look forward to continuing to work with DOT to improve and invest in public transportation.

Respectfully submitted,



Taria Barron
APTA General Counsel

cc: Docket Clerk, West Building, Ground Floor, Room W12-140

²⁶ U.S. Dep't of Transp. Off. of Civ. Rights, Guidance on DBE and ACDBE Programs (Sep. 30, 2025).