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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 107

[Docket No. FAA–2025–0412]

Accepted Means of Compliance for Small Unmanned (sUA) Aircraft Category 2 and Category 3 Operations Over Human Beings; Aerial Vehicle Safety Solutions Inc. (AVSS)

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notification of availability.

SUMMARY: This document announces the acceptance of a means of compliance with FAA regulations for sUA Category 2 and Category 3 operations over human beings. The Administrator finds that AVSS's "Means of Compliance with §§ 107.120(a) and 107.130(a) for Small Unmanned Aircraft," revision 6, dated January 7, 2025, provides an acceptable means, but not the only means, of showing compliance with FAA regulations.

DATES: The means of compliance is accepted effective October 3, 2025.

FOR FURTHER INFORMATION CONTACT:

FAA Contact: Kimberly Luu, Cabin Safety Section, AIR–624, Technical Policy Branch, Policy and Standards Division, Aircraft Certification Service, Federal Aviation Administration, 2200 South 216th Street, Des Moines, Washington 98198; telephone and fax 206–231–3414; email Kimberly.H.Luu@faa.gov.

AVSS Contact: Josh Ogden, CEO, AVSS, 570 Queen Street, Suite 600, Fredericton, New Brunswick, E3B–6Z6, Canada, +1 (650) 741–1326; Info@avss.co.

SUPPLEMENTARY INFORMATION:

Background

Title 14, Code of Federal Regulations, part 107, subpart D, prescribes the

eligibility and operating requirements for civil sUA to operate over human beings in the United States. To be eligible for use, the sUA must meet the requirements of § 107.120(a) for Category 2 operations or § 107.130(a) for Category 3 operations. These sections require the sUA to be designed, produced, or modified such that it will not cause injury to a human being above a specified severity limit, does not contain any exposed rotating parts that would lacerate human skin, and does not contain any safety defects. Section 107.155 requires that means of compliance with § 107.120(a) or § 107.130(a) be established and FAA-accepted. Section 107.160 requires an applicant to declare that sUA for Category 2 or Category 3 operations meet an FAA-accepted means of compliance.

Means of Compliance Accepted

This notification of availability serves as a formal acceptance by the FAA of the AVSS's "Means of Compliance with §§ 107.120(a) and 107.130(a) for Small Unmanned Aircraft," revision 6, as an acceptable means of compliance, but not the only means of compliance with §§ 107.120(a) and 107.130(a). Applicants may also propose alternative means of compliance for FAA review and possible acceptance.

Revisions

Revisions to AVSS's "Means of Compliance (MOC) with §§ 107.120(a) and 107.130(a) for Small Unmanned Aircraft (sUA)," revision 6, will not be automatically accepted and will require further FAA acceptance for any revisions to be considered an accepted means of compliance.

Issued in Kansas City, Missouri, on September 30, 2025.

Patrick R. Mullen,

Manager, Technical Policy Branch, Policy and Standards Division, Aircraft Certification Service.

[FR Doc. 2025–19435 Filed 10–2–25; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary of Transportation

49 CFR Parts 23 and 26

[Docket No. DOT–OST–2025–0897]

RIN 2105–AF33

Disadvantaged Business Enterprise Program and Disadvantaged Business Enterprise in Airport Concessions Program Implementation Modifications

AGENCY: Office of the Secretary of Transportation (OST), U.S. Department of Transportation (DOT).

ACTION: Interim final rule.

SUMMARY: This interim final rule (IFR) ensures that the U.S. Department of Transportation (DOT or Department) operates its Disadvantaged Business Enterprise (DBE) and Airport Concession Disadvantaged Business Enterprise (ACDBE) Programs (collectively, Programs) in a nondiscriminatory fashion—in line with law and the U.S. Constitution. The IFR removes race- and sex-based presumptions of social and economic disadvantage that violate the U.S. Constitution.

DATES: This IFR is effective October 3, 2025. Comments must be received on or before November 3, 2025. To the extent practicable, DOT will consider late-filed comments.

ADDRESSES: You may submit comments identified by the docket number DOT–OST–2025–0897 by any of the following methods:

- **Federal Rulemaking Portal:** <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- **Mail:** U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- **Hand Delivery:** U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name, docket name, and docket number DOT–OST–2025–0897 or Regulatory Identifier Number

(RIN) 2105–AF33 for this rulemaking. DOT solicits comments from the public to inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at www.dot.gov/privacy.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> at any time or to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20950, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Confidential Business Information: Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA; 5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this IFR contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this IFR, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as “PROPIN.” Submissions containing CBI should be sent to the individual listed in the **FOR FURTHER INFORMATION CONTACT** section below. Any commentary that OST receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Electronic Access and Filing

A copy of the IFR, all comments received, and all background material may be viewed online at <http://www.regulations.gov>. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register’s website at <http://www.ofr.gov> and the Government Publishing Office’s website at <http://www.gpo.gov>.

FOR FURTHER INFORMATION CONTACT: Peter Constantine, Office of the General Counsel, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590 at (202) 658–9670 or peter.constantine@dot.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

Spanning nearly 40 years, the Department’s DBE and ACDBE programs are small business initiatives intended to level the playing field for businesses seeking to participate in federally assisted contracts and in airport concessions. Rooted in a desire to give small businesses a fair shake in the process, the Programs must balance a desire to help the small business community with an overriding government obligation to serve the public. The government must undertake all these efforts consistent with law—including constitutional nondiscrimination requirements that establish the conditions for national harmony and unity. This IFR advances the administration’s goals of nondiscrimination, fairness, and excellence in serving the American public.

Although the Programs aim to assist small businesses owned and controlled by “socially and economically disadvantaged individuals,” Congress has mandated by statute that DOT treat certain individuals—women and members of certain racial and ethnic groups—as “presumed” to be disadvantaged.¹ Other individuals do not benefit from that statutory presumption. This means that two similarly situated small business owners may face different standards for entering the program, based solely on their race, ethnicity, or sex.

On September 23, 2024, the U.S. District Court for the Eastern District of Kentucky determined that the DBE program’s statutory race- and sex-based presumptions likely do not comply with the Constitution’s promise of equal protection under the law.² The Court held that the Government may only use a racial classification to “further a compelling government interest” and may only use race in a “narrowly

¹ Congress has provided that: (1) “women shall be presumed to be socially and economically disadvantaged individuals”; and (2) the term “socially and economically disadvantaged individuals” should otherwise be given the meaning given by section 8(d) of the Small Business Act and its implementing regulations. See Infrastructure Investment and Jobs Act, Public Law 117–58, 11101(e)(2) (B) (2021) (DBE program for highway and transit funding); 49 U.S.C. 47107(e)(1) (ACDBE program); 49 U.S.C. 47113(a)(2) (DBE program for airport funding). Section 8(d) of the Small Business Act and its implementing regulations create a rebuttable presumption that “Black Americans,” “Hispanic Americans,” “Native Americans,” “Asian Pacific Americans,” and “Subcontinent Asian Americans” are disadvantaged. See 15 U.S.C. 637(d)(3); 13 CFR 124.103(b)(1).

² *Mid-America Milling Co. v. U.S. Dep’t of Transp.*, No. 3:23–cv–00072, 2024 WL 4267183 (Sept. 23, 2024).

tailored fashion.” It held that although courts have identified a compelling government interest in “remediating specific, identified instance[s] of past discrimination that violated the constitution or a statute,” the Government did not present evidence of such discrimination by DOT against each of the groups covered by the DBE program’s presumptions. The Court held, moreover, that the presumptions were not narrowly tailored because Congress used an unexplained “scattershot” approach in identifying the covered groups, and because the presumptions had no “logical end point.” The Court also held that the sex-based presumptions failed heightened scrutiny. Accordingly, the Court issued a preliminary injunction that prohibits DOT from mandating the use of presumptions with respect to contracts on which the two plaintiff entities bid. DOT has implemented the injunction by requiring funding recipients to remove DBE contract goals from any contracts on which the plaintiffs intend to bid.

On January 20, 2025, the President issued Executive Order 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*, which affirmed that “Americans deserve a government committed to serving every person with equal dignity and respect” and directed agencies to recommend actions to align their programs and activities with this policy. On January 21, 2025, the President issued Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, which ordered agencies to “terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements.”

On March 21, 2025, the Attorney General issued a memorandum to all Federal agencies on implementing these Executive Orders.³ The Attorney General noted that “federal policies that give preference to job applicants, employees, or contractors based on race or sex trigger heightened scrutiny under the Constitution’s equal protection guarantees and can only survive in rare circumstances.” The Attorney General directed all Federal agencies immediately to “[d]iscontinue any policies that establish numerical goals, targets, or quotas based on race or sex,” and to “[r]emove any contracting or

³ Memorandum from the Attorney General for All Federal Agencies, *Implementation of Executive Orders 14151 and 14173; Eliminating Unlawful DEI Programs in Federal Operations* (March 21, 2025), available at <https://www.justice.gov/ag/media/1409556/dl?inline>.

funding requirement or guidance that induces, requires, or encourages private parties to adopt discriminatory practices.”

On February 19, 2025, the President issued Executive Order 14219, *Ensuring Lawful Governance and Implementing the President’s “Department of Government Efficiency” Deregulatory Initiative*, which directed agencies to identify “unconstitutional regulations and regulations that raise serious constitutional difficulties,” and to target those regulations for repeal. On April 9, 2025, the President issued a memorandum directing that this effort should prioritize regulations that conflict with certain Supreme Court decisions, including *Students for Fair Admissions, Inc. v. Harvard (SFFA)*.⁴

In accordance with the directives of the President and the Attorney General, DOT and the U.S. Department of Justice (“DOJ”) have evaluated the DBE and ACDBE programs. DOT and DOJ, consistent with the ruling of the District Court, have determined that the race- and sex-based presumptions of DOT’s DBE programs are unconstitutional. In *SFFA*, the Supreme Court held that race-based admissions programs at universities violated the Equal Protection Clause of the Fourteenth Amendment—and, by corollary, Title VI of the Civil Rights Act. In light of *SFFA*, multiple Federal courts have held unlawful the use of presumptions similar to those used in the DBE and ACDBE programs. In *Ultima Serv. Corp. v. U.S. Dep’t of Agric.*, the Eastern District of Tennessee held that a Small Business Act program violated the equal protection component of the Fifth Amendment’s Due Process Clause to the extent that it used the exact same type of race-based presumptions used by the DBE and ACDBE programs.⁵ And in *Nuziard v. Minority Business Development Agency*, the Northern District of Texas held that a race-based statutory presumption of disadvantage was unconstitutional and that the U.S. Department of Commerce’s application of this statutory preference violated the equal protection principle of the Fifth Amendment.⁶ As with the presumptions at issue in *Ultima* and *Nuziard*, there is not a strong basis in evidence that the race- and sex-based presumptions used by the DBE and ACDBE programs are necessary to support a compelling governmental interest, and the presumptions are not narrowly tailored.

The government has no compelling justification for engaging in overt race or sex discrimination in the awarding of contracts in the absence of clear and individualized evidence that the award is needed to redress the economic effects of actual previous discrimination suffered by the awardee. For these reasons, the presumptions must be disregarded, and the Department’s DBE and ACDBE programs must be administered in all other respects in accordance with the law and consistent with the U.S. Constitution.

On May 28, 2025, DOT (represented by DOJ), along with the plaintiffs in the litigation in the U.S. District Court for the Eastern District of Kentucky, asked the Court to enter a Consent Order resolving a constitutional challenge to the DBE program.⁷ The motion is currently pending. In the proposed Consent Order, DOT stipulated and agreed that “the DBE program’s use of race- and sex-based presumptions of social and economic disadvantage . . . violates the equal protection component of the Due Process Clause of the Fifth Amendment of the U.S. Constitution.” The parties asked the Court to declare that “the use of DBE contract goals in a jurisdiction, where any DBE in that jurisdiction was determined to be eligible based on a race- or sex-based presumption, violates the equal protection component of the Due Process Clause of the Fifth Amendment,” and to “hold and declare that [DOT] may not approve any Federal, State, or local DOT-funded projects with DBE contract goals where any DBE in that jurisdiction was determined to be eligible based on a race- or sex-based presumption.”

On June 25, 2025, the Solicitor General wrote to the Speaker of the House, consistent with 28 U.S.C. 530D, to advise the Speaker that DOJ had concluded that the DBE program’s presumptions violate the U.S. Constitution, that DOJ would no longer defend the presumptions in court, and that DOJ had taken that position in ongoing litigation.⁸ The Solicitor General noted that DOJ “had previously defended the DBE program’s race- and sex-based presumptions by pointing to societal discrimination against minority-owned businesses generally.” He stated, however, that “[c]onsistent with *SFFA*’s rejection of a similar justification in the university-admissions context, [DOJ] has determined that an interest in

remediating the effects of societal discrimination does not justify the use of race- and sex-based presumptions in the DBE program.” The Solicitor General also reported that DOJ has determined that “like the admissions programs at issue in *SFFA*, the DBE program relies on arbitrary, overbroad, and underinclusive racial categories and lacks any logical end point.” DOT agrees with and adopts the Solicitor General’s analysis.

In light of DOT and DOJ’s determination that the DBE program’s race- and sex-based presumptions are unconstitutional, DOT is issuing this IFR to remove the presumptions from the DBE program regulations set forth in 49 CFR part 26. Because the ACDBE presumptions are functionally identical and suffer the same constitutional infirmity, this IFR also removes the presumptions from the ACDBE regulations set forth in 49 CFR part 23. To ensure a level playing field between existing participants and new applicants, while also eliminating the effects of the unconstitutional presumptions and reliance in whole or in part on claims of disadvantage based on race or sex, this IFR requires each Unified Certification Program (UCP) to reevaluate any currently certified DBE or ACDBE, to recertify any DBE or ACDBE that meets the new certification standards, and to decertify any DBE or ACDBE that does not meet the new certification standards. The IFR includes certain requirements that apply during the pendency of this reevaluation process.

II. Revisions

Part 26

Subpart A—General

1. Objectives (§ 26.1)

The Department amends § 26.1 to clarify the proper objectives of the DBE program. The Department’s amendments replace references to the DBE program being “narrowly tailored” with an objective intended to ensure that the DBE program operates in a nondiscriminatory manner and without regard to race or sex, while maximizing efficiency of service. These amendments center the DBE program’s purpose of leveling the playing field for businesses owned and controlled by socially and economically disadvantaged individuals while providing excellent service to the American people.

2. Definitions (§ 26.5)

The Department changes the definition of “socially and economically disadvantaged individual” in § 26.5 to

⁴ 600 U.S. 181 (2023).

⁵ *Ultima Servs. Corp. v. U.S. Dep’t of Agric.*, 683 F. Supp. 3d 745 (E.D. Tenn. 2023).

⁶ *Nuziard v. Minority Bus. Dev. Agency*, 721 F. Supp. 3d 431 (N.D. Tex. 2024).

⁷ Joint Motion for Entry of Consent Order, *Mid-America Milling Co. v. U.S. Dep’t of Transp.*, No. 3:23-cv-00072 (E.D. Ky. May 28, 2025).

⁸ Letter from Solicitor General D. John Sauer to Hon. Mike Johnson (June 25, 2025), <https://www.justice.gov/oip/media/1404871/dl?inline>.

remove the race- and sex-based presumptions that DOT and DOJ and have found to violate the Fifth Amendment. Under the revised rule, any individual seeking to demonstrate that he or she is a “socially and economically disadvantaged individual” will be required to make the same individualized showing of disadvantage, regardless of the individual’s race or sex.

In furtherance of these legal conclusions, the IFR also replaces the terms “race-neutral” and “race-conscious” in § 26.5 with “DBE-neutral” and “DBE-conscious” and modifies the definitions slightly for the same reasons.

3. Recordkeeping and Reporting (§ 26.11)

Similarly, the IFR eliminates the requirement in § 26.11(c)(2)(iv) for recipients to obtain bidders list information about the majority owner’s race and sex for all DBEs and non-DBEs who bid as prime contractors and subcontractors on each of a recipient’s federally assisted contracts, and then rennumbers the requirements in current §§ 26.11(c)(v) through (c)(vii) as §§ 26.11(c)(iv) through (c)(vi).

The IFR also eliminates the requirement in § 26.11(e)(1) that recipients report and categorize the percentage of in-State and out-of-State DBE certifications by sex and ethnicity. The IFR also eliminates the requirements in §§ 26.11(e)(5) and (6) that recipients report the number of in-State and out-of-State applications for an “individualized” determination of social or economic disadvantage status, and the number of in-State and out-of-State applicants who made an individualized showing of social and economic disadvantaged status. This IFR requires all applicants to demonstrate social and economic disadvantage affirmatively to participate in the DBE program, which renders these reporting requirements unnecessary. The IFR further rennumbers the reporting requirements in current §§ 26.11(e)(2) through (e)(4) as §§ 26.11(e)(1) through (e)(3).

Subpart B—Administrative Requirements for DBE Programs for Federally Assisted Contracting

4. Recipient Monitoring Responsibilities (§ 26.37)

For consistency, the IFR replaces the word “race-neutral” with “DBE-neutral” in § 26.37(b).

5. Fostering Small Business Participation (§ 26.39)

For consistency, the IFR replaces the word “race-neutral” with “DBE-neutral” in §§ 26.39(b)(1) and (5).

Subpart C—Goals, Good Faith Efforts, and Counting

6. Setting Goals (§ 26.45)

For consistency, the IFR replaces the phrase “race-neutral DBE program” with “DBE-neutral program” in § 26.45(a)(2).

For consistency, the IFR amends the second sentence of § 26.45(b) to replace the word “discrimination” with “social and economic disadvantage” so it will read as follows: “The goal must reflect your determination of the level of DBE participation you would expect absent the effects of social and economic disadvantage.”

For consistency and to ensure recipients establish overall goals that include only DBEs who are ready, willing, and able to compete for and participate in DOT-assisted contracts, the Department amends § 26.45(c)(3) to clarify that any disparity studies utilized by recipients in setting their goals must provide a detailed capacity analysis, including the methodology used. The Department makes the same clarification regarding the use of disparity studies in § 26.45(d)(ii).

For consistency, the IFR amends § 26.45(f)(3) to remove references to race-neutral and race-conscious measures.

The IFR amends § 26.45(g)(1) to remove consultation requirements for minority and women’s contractor groups, as well as the language related to posting proposed overall goals in minority-focused media.

The IFR amends § 26.45(h) by removing the existing language, as there will be no opportunity to create group-specific goals now that race and sex have been removed from the regulation. In its place, the IFR adds new language in § 26.45(h) to indicate that a recipient is not required to update its overall goal until its UCP completes the reevaluation process described in § 26.111.

7. Failing To Meet Overall Goals (§ 26.47)

For consistency, the IFR replaces the words “race-conscious” and “race-neutral” with “DBE-conscious” and “DBE-neutral” in § 26.47(c)(4) and § 26.47(d).

The IFR adds § 26.47(e) to provide that until a Unified Certification Program (UCP) completes the reevaluation process described in § 26.111, the compliance provisions of

§ 26.47 will not apply to any recipient covered by that UCP. This requirement ensures fairness to recipients during the transition period.

8. Means Used To Meet Overall Goals (§ 26.51)

For consistency, the IFR replaces the words “race-conscious” and “race-neutral” with “DBE-conscious” and “DBE-neutral” throughout § 26.51 and the corresponding examples.

The IFR adds § 26.51(h) to provide that until a UCP completes the reevaluation process described in § 26.111, a recipient covered by that UCP may not set any contract goals. This provision ensures that existing DBEs do not continue to receive any benefits as a result of their certification under the old standards.

9. Counting DBE Participation Toward Goals (§ 26.55)

The IFR adds § 26.55(i) to provide that until a UCP completes the reevaluation process described in § 26.111, a recipient covered by that UCP may not count any DBE participation toward DBE goals. This provision ensures that existing DBEs do not continue to receive any benefits as a result of their certification under the old standards.

Subpart D—Certification Standards

10. Burden of Proof (§ 26.61)

The IFR eliminates § 26.61(b)(2), which imposed a burden of proof on certifiers with respect to individuals subject to the race- and sex-based presumptions that the IFR eliminates.

11. Social and Economic Disadvantage (§ 26.67)

The IFR revises § 26.67 to implement the removal of unconstitutional race- and sex-based presumptions. The IFR requires all small business concerns to demonstrate social and economic disadvantage based on their own experiences and circumstances without reliance in whole or in part on race or sex.

Subpart F—Compliance and Enforcement

12. Reevaluation Process (§ 26.111)

This IFR adds § 26.111 to require each UCP to reevaluate any currently certified DBE, to recertify any DBE that meets the new certification standards, and to decertify any DBE that does not meet the new certification standards or fails to provide additional information required for submission under the new certification standards. The IFR provides that decertification procedures of 49 CFR 26.87 do not apply to any

decertification decisions under this process. The IFR requires each UCP to complete the reevaluation process as quickly as practicable following issuance of this IFR. The Department will work with each UCP to minimize the practical impact of this rule change during the pendency of the reevaluation process. This reevaluation process will ensure a level playing field between existing participants and new applicants, while also eliminating the effects of the unconstitutional presumptions and reliance on claims of disadvantage based in whole or in part on race or sex. This process does not replace or restrict the Department's ability to conduct a review or take action under Title VI or other applicable law regarding compliance with equal protection principles. A companion provision has been added to part 23 with respect to reevaluation of ACDBEs.

Part 23

Subpart A—General

13. Aligning Part 23 With Part 26 Objectives (§ 23.1)

The IFR amends the program objectives for the ACDBE program in § 23.1 that are similar to the amendments to the DBE program objectives in § 26.1.

14. Definitions (§ 23.3)

The IFR amends the definition of the phrase “socially and economically disadvantaged individual” in § 23.3 to conform to the definition of the phrase in § 26.5. In addition, the IFR replaces the terms “race-conscious” and “race-neutral” with “ACDBE-conscious” and “ACDBE-neutral” in § 23.3.

Subpart B—ACDBE Programs

15. Measures To Ensure Nondiscrimination Participation of ACDBEs (§ 23.25)

For consistency, the IFR replaces the words “race-neutral” and “race-conscious” with “DBE-neutral” and “DBE-conscious” in §§ 23.25(d) and (e).

The IFR adds § 23.25(h) to provide that until a UCP completes the reevaluation process described in § 23.81, a recipient covered by that UCP may not set concession-specific goals or use any of the other methods described in § 23.25(e). This provision ensures that existing ACDBEs do not continue to receive any benefits as a result of their certification under the old standards.

16. Fostering Small Business Participation (§ 23.26)

For consistency, the IFR replaces the words “race-neutral” with “DBE-neutral” in § 23.26(b)(1).

For consistency, the IFR replaces the words “minority and women owned” with “socially and economically disadvantaged” in § 23.26(d)(5).

For consistency, the IFR replaces the word “gender” with “sex” in § 23.26(e).

17. Reporting and Recordkeeping (§ 23.27)

The IFR eliminates the requirement in § 23.27(c)(2)(iv) for recipients to obtain information about the majority owner's race and sex for all ACDBEs and non-ACDBEs who seek to work on each of a recipient's concession opportunities, and then renumbers the requirements in current §§ 23.27(c)(v) through (c)(vii) as §§ 23.27(c)(iv) through (c)(vi). The IFR also eliminates the requirement in § 23.27(d)(1) that recipients report and categorize the percentage of in-State and out-of-State ACDBE certifications by sex and ethnicity. The IFR also eliminates the requirements in §§ 23.27(d)(5) and (6) that recipients report the number of in-State and out-of-State applications for “individualized” determinations of social or economic disadvantage status, and the number of in-State and out-of-State applicants who made an individualized showing of social and economic disadvantaged status. This IFR requires all applicants to demonstrate social and economic disadvantage affirmatively to participate in the ACDBE program, which renders these reporting requirements unnecessary. The IFR further renumbers the reporting requirements in current §§ 23.27(d)(2) through (d)(4) as §§ 23.27(d)(1) through (d)(3).

Subpart D—Goals, Good Faith Efforts, and Counting

18. Goal and Consultation Requirements (§§ 23.41, 23.43)

The IFR amends § 23.41(d) by removing the existing language, as there will be no opportunity to create group-specific goals now that race and sex have been removed from the regulation. In its place, the IFR adds new language to indicate that a recipient is not required to update its overall goal until its UCP completes the reevaluation process described in § 23.81.

The IFR amends § 23.43(b) to remove consultation requirements for minority and women's contractor groups, as well as the language related to posting proposed overall goals in minority-focused media.

19. Setting Goals (§ 23.51)

For consistency, the Department amends § 23.51(a) to replace the words “discrimination and its effects” with “social and economic disadvantage.” For consistency, the IFR replaces the

words “race-neutral” and “race-conscious” with “ACDBE-neutral” and “ACDBE-conscious” in §§ 23.51(f), (g), and (h), and in § 23.51(d)(5).

For consistency and to ensure recipients establish overall goals that include only DBEs who are ready, willing, and able to compete for and participate in DOT-assisted contracts, the Department amends § 23.51(c)(3) to clarify that any disparity studies utilized by recipients in setting their goals must provide a detailed capacity analysis, including the methodology used.

20. Counting ACDBE Participation During Transition Period (§§ 23.53, 23.55)

The IFR adds § 23.53(g) and § 23.55(m) to provide that until a UCP completes the reevaluation process described in § 23.81, recipients covered by that UCP, and car rental companies operating at airports covered by that UCP, may not count any ACDBE participation toward ACDBE goals. These provisions ensure that existing ACDBEs do not continue to receive any benefits as a result of their certification under the old standards.

21. Failing To Meet Overall Goals (§ 23.57)

For consistency, the IFR replaces the words “race-conscious” and “race-neutral” with “DBE-conscious” and “DBE-neutral” in § 23.57(b)(4) and § 23.57(c).

The IFR adds § 23.57(d) to provide that until a UCP completes the reevaluation process described in § 23.81, the compliance provisions of § 23.57 will not apply to any recipient covered by that UCP. This requirement ensures fairness to recipients during the transition period.

22. Reevaluation Process (§ 23.81)

This IFR adds § 23.81 to require each UCP to reevaluate any currently certified ACDBE, to recertify any ACDBE that meets the new certification standards, and to decertify any DBE that does not meet the new certification standards or fails to provide additional information required for submission under the new certification standards. The IFR provides that decertification procedures of 49 CFR 26.87 do not apply to any decertification decisions under this process. The IFR requires each UCP to complete the reevaluation process as quickly as practicable following issuance of this IFR. The Department will work with each UCP to minimize the practical impact of this rule change during the pendency of the reevaluation process. This reevaluation

process will ensure a level playing field between existing participants and new applicants, while also eliminating the effects of the unconstitutional presumptions and reliance on claims of disadvantage based in whole or in part on race or sex. This process does not replace or restrict the Department's ability to conduct a review or take action under Title VI or other applicable law regarding compliance with equal protection principles. A companion provision has been added to part 26 with respect to reevaluation of DBEs.

III. Public Proceedings

The Administrative Procedure Act generally requires agencies to provide the public with notice of proposed rulemaking and an opportunity to comment prior to publication of a substantive rule. However, 5 U.S.C. 553(b)(B) authorizes agencies to publish a final rule without first seeking public comment on a proposed rule "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." DOT finds that providing advance notice and an opportunity to comment on these regulatory changes pertaining to the DBE and ACDBE programs would be impracticable, unnecessary, and contrary to the public interest. Consistent with the letter authored by the Solicitor General and discussed elsewhere in the preamble,⁹ DOT has determined that race- and sex-based presumptions of the DBE and ACDBE programs violate the U.S. Constitution. In the absence of this IFR, however, DOT's own regulations would continue to require funding recipients to apply those very same presumptions. Allowing this confusing and contradictory situation to continue during a notice-and-comment process would be impracticable and contrary to the public interest. Further, notice-and-comment is unnecessary where a regulatory action is required as a matter of law to ensure consistency with rulings of the United States Supreme Court. It is well-established that an agency is not required to continue to enforce a statutory provision that it has found to be unconstitutional.¹⁰ By the

⁹ Letter from Solicitor General D. John Sauer to Hon. Mike Johnson (June 25, 2025), <https://www.justice.gov/oip/media/1404871/dl?inline>.

¹⁰ See *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013) (Kavanaugh, J.) ("If the President has a constitutional objection to a statutory mandate or prohibition, the President may decline to follow the law unless and until a final Court order dictates otherwise. . . . [This] basic constitutional

principle [] applies] to the President and subordinate executive agencies."); Office of Legal Counsel Opinion, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 U.S. Op. Off. Legal Counsel 199 (1994).

same token, an agency is not required to subject the public to unconstitutional requirements. This IFR provides notice of the amendments to the regulations' provisions and invites the public to comment. DOT has determined, however, that it should not delay the effectiveness of the amendments and that it should act immediately to remedy the unconstitutional programs. For the foregoing reasons, the good cause exception in 5 U.S.C. 553(d)(3) also applies to DOT's decision to make this IFR effective upon publication.

IV. Regulatory Analyses and Notices

A. Executive Order: 12866 ("Regulatory Planning and Review"), Executive Order 13563 ("Improving Regulation and Regulatory Review"), and DOT Regulatory Policies and Procedures

The IFR is a significant regulatory action under Executive Order 12866, "Regulatory Planning and Review," as supplemented by Executive Order 13563, "Improving Regulation and Regulatory Review." Accordingly, the Office of Management and Budget (OMB) has reviewed it under that Executive Order.

The IFR amends reporting and eligibility requirements for the Department's Airport Concession Disadvantaged Business Enterprises (ACDBE) program and Disadvantaged Business Enterprise (DBE) program. These programs are implemented and overseen by recipients of certain Department funds. The changes to the requirements would affect businesses participating in the programs, recipients of Department funds who oversee the programs, and the Department.

The IFR replaces the race- and sex-based presumptions previously embedded in these programs with a requirement for individualized demonstrations of social and economic disadvantage. The IFR also modifies terminology and data reporting requirements to align with constitutional principles while maintaining the programs' statutory objectives.

Need for Regulatory Revisions

The IFR is being issued pursuant to legal determinations by DOT and DOJ that the race- and sex-based presumptions previously embedded in these programs are unconstitutional. In addition to legal compliance, this action corrects a regulatory failure—namely,

reliance on presumptions that no longer withstand judicial scrutiny—by shifting to individualized determinations. The IFR aligns the programs with constitutional mandates.

Costs and Benefits

Costs

While DOT is unable to quantify all the economic costs and benefits of the IFR, the Department has identified both qualitative and quantitative impacts. Several provisions may lead to increased or decreased burdens for applicants, certifying agencies, and recipients related to transitional documentation requirements, the degree of technical rigor in disparity studies, and changes in program reporting. The magnitude of these costs and benefits would depend on the scope of the change; the likelihood of behavior adjustment; and potential legal, administrative, or programmatic effects.

Unquantified Costs

Key provisions of the IFR and their related cost impacts include:

- *Removal of race- and sex-based presumptions.* This provision eliminates presumptive eligibility based on race or sex and requires applicants to submit individualized evidence of social disadvantage, alongside the remaining required showing of economic disadvantage. Although the underlying economic disadvantage documentation (e.g., Personal Net Worth, income verification) was already a component of many applications, the shift to a required narrative or case-specific justification for all applications, as opposed to just those that did not meet the presumption of eligibility, may introduce additional procedural burdens and time costs on some applicants. This may increase the complexity of preparing applications and even potentially deter participation among some eligible small businesses, especially those with limited administrative capacity or legal support. This may also implicate reliance interests for businesses that were previously certified based on presumptive eligibility. However, many eligible small businesses will continue efforts at applying for certification and assume the additional burden to apply because of the benefits to being certified and the potential opportunity it brings outweighs the added burden of the application process. All eligible businesses may apply for and potentially obtain certification under the new certification process, which mitigates any impact on reliance interests. In addition, businesses'

reliance interests do not justify continuing to implement presumptions that DOT and DOJ have determined are unconstitutional.

- *Certification burden.* As the burden of production and persuasion shifts away from certifying officials to individual applicants, certifying agencies may experience increased numbers of intake inquiries and clarification requests as applicants navigate the new social disadvantage requirements, or face inconsistent application quality, especially during the transition period. This would require certifying agencies to spend time following up with applicants and guiding them through the application as they go through the re-certification process, which implicates certifying agencies' reliance interests. In the short-term, the increase in workload and support services on certifying agencies may temporarily elevate the demands on the recipients' staff demands or delay determinations, which could at least partially offset any cost savings from shifting this burden to applicants. However, in the long run, it is expected that after the initial review of each applicant, subsequent reviews of applicants will require minimal agency time and will not implicate agencies' reliance interests.

- *Reevaluation of all affected DBEs/ACDBEs.* DBE/ACDBE participants who have previously qualified based in whole or in part on their race or sex will incur additional costs to develop and provide the individualized narrative required by the IFR. In addition, all firms will temporarily lose certifications until the reevaluation process is complete, and some firms may lose the certifications that currently lead to opportunities for them to participate, potentially leading to a loss of business opportunities and implicating firms' reliance interests (though this would be offset by other firms who face increased access to the same opportunities). Additional administrative burdens will also fall on certifiers (UCPs) performing the reevaluations. This could also lead to delays in goal setting and program participation, resulting from the temporary pause in counting DBE participation while the reevaluation process is underway.

- *Clarified disparity study expectations.* The rule requires that disparity studies include detailed capacity analyses, which may necessitate additional economic modeling, data collection, and expert analysis beyond what is standard practice in many jurisdictions. These requirements could increase costs,

particularly for large or multi-jurisdictional studies. While such studies are episodic rather than annual, the enhanced methodology could impose non-trivial compliance costs when undertaken.

- *Elimination of race/sex reporting in bidder lists.* The removal of demographic fields from bidder list reporting will reduce the administrative burden of data entry for participants and recipients, though the cost impact would likely be negligible.

- *Terminology changes and redefinitions.* These changes update program language to reflect constitutional terminology but do not alter administrative procedures or eligibility. The impact is purely semantic and is not expected to have any material cost impacts.

Quantified Costs: Information Collection Burden (Paperwork Reduction Act)

In addition to the above qualitative costs, the Department has quantified a portion of the expected compliance burdens as part of its Paperwork Reduction Act (PRA) package of the rule. These burdens represent the time and resources required to prepare, submit, and review program-related information.

Requirement	Estimated cost burden	Timing
Certification narratives (firms)	\$91.9 million	One-time.
UCP reevaluations	\$3.4 million	One-time.
Interstate certification	\$0.46 million	One-time.
Bidders' list reporting	\$1.24 million	Annual.
ACDBE annual report	\$0.58 million	Annual.
Goal setting (disparity studies)	\$0.46 million (annual cost)	Every three years.

These figures reflect fully loaded labor costs consistent with the Bureau of Labor Statistics data and DOT's standard methodology. One-time burdens primarily reflect transaction costs related to individualized certification requirements, while recurring burdens are associated with ongoing reporting and program administration. Overall, the IFR's primary quantified costs are transitional and one-time, totaling approximately \$95 million, with recurring annualized burdens of about \$1.8 million.

Benefits

With respect to benefits, the IFR will enhance constitutional compliance and reduce risks associated with constitutional litigation. It may also improve public trust by reinforcing fairness in eligibility determinations, which, although not easily quantifiable,

represent important benefits from improved program integrity.

B. Executive Order 14192 ("Unleashing Prosperity Through Deregulation")

This interim final rule is considered an E.O. 14219 deregulatory action because the unquantified cost-savings associated with constitutional compliance outweigh the quantified costs.

C. Executive Order 13132 ("Federalism")

This IFR has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"), and the rule satisfies the requirements of the Executive Order. While the rule may include provisions that impose substantial direct compliance costs on State and local governments, the Department has determined that

consultation with State and local governments prior to promulgation of the rule is not practicable given the urgent need to cure constitutional infirmities with the existing DBE and ACDBE regulations. These changes are required not by statute, but to ensure that the DBE and ACDBE programs do not violate the U.S. Constitution. We seek comment from State and local governments on these burdens during the comment period for this IFR.

D. Executive Order 13175 ("Consultation and Coordination With Indian Tribal Governments")

This rulemaking has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this rulemaking does not significantly or uniquely affect the communities of the Indian Tribal

governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (UMRA) of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of more than \$100 million annually (adjusted annually for inflation with the base year of 1995). This rulemaking would not result in annual State expenditures exceeding the minimum threshold. The Department has determined that the requirements of the Title II of the Unfunded Mandates Reform Act of 1995 therefore do not apply to this rulemaking.

F. National Environmental Policy Act

The Department has analyzed the environmental impacts of this action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1D, available at <https://www.transportation.gov/mission/dots-procedures-considering-environmental-impacts>. Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). The purpose of this rulemaking is to amend the Department's DBE and ACDBE regulations. Section 9(f) of DOT Order 5610.1D states that a DOT Operating Administration can use the categorical exclusions developed by another Operating Administration. This action is covered by the categorical exclusion listed in the Federal Transit Administration's implementing procedures, "[p]lanning and administrative activities that do not involve or lead directly to construction, such as: . . . promulgation of rules, regulations, directives . . ." 23 CFR 771.118(c)(4). In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

G. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601 *et seq.*) requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations, and small governmental jurisdictions. Whenever an agency is required by 5 U.S.C. 553, or any other law, to publish general notice of proposed rulemaking for any proposed rule, the agency must conduct and publish for public comment a regulatory flexibility analysis. Because the Department is not required to publish a proposed rulemaking for this action, an analysis under the RFA is not required.

H. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (Pub. L. 104–13, 49 U.S.C. 3501, 3507) requires Federal agencies to obtain approval from the Office of Management and Budget (OMB) before undertaking a new collection of information imposed on ten or more persons, or continuing a collection previously approved by OMB that is set to expire.

This IFR modifies existing collection instruments in both parts 23 and 26. The following is a description of the sections that contain new and modified information collection requirements, along with the estimated hours and cost to fulfill them.

For purposes of estimating the cost burden on recipients, the State government wage rate was taken from the Bureau of Labor and Statistics (BLS) estimate of median wages for employees in the category of "Eligibility Interviewer in Government Programs" (OEWS Designation 43–4061). For the purpose of calculating loaded wage rates, these burden estimates assume wages represent 61.9 percent of total compensation, which is consistent with similar loaded wage rate estimates identified by BLS and used by DOT for related purposes. Because wages represent 61.9 percent of total compensation, the appropriate cost multiplier is 1.62 (1/0.619). Accordingly, the wage rate (\$25.95) is multiplied by 1.62 to get a fully loaded hourly wage rate of \$42.04 to account for the cost of employer-provided benefits.

For purposes of estimating the cost burden on applicant and certified DBE/ACDBE firms, the wage rate was taken from the BLS estimate of median wages for individuals in the category of "Cross-industry, Private Ownership Only" (OEWS Designation 00–0001). Using the same loaded wage rate identified above, the wage rate for DBE/

ACDBE applicant firms (\$69.20) is multiplied by 1.62 to get a fully loaded hourly wage rate of \$112.10 to account for the cost of employer-provided benefits. The Department emphasizes that many of these hour and cost burdens are one-time burdens as a result of the change in the DBE certification eligibility requirements. After the initial transition to the new requirements, increases in annual burdens will be modest. For DOT recipients, reporting burdens are expected to decrease as a result of reduced DBE/ACDBE reporting requirements.

i. Reapplication Review for DBE/ACDBE Certification Based on Individualized Showing of Social Disadvantage

To satisfy the social and economic disadvantage (SED) requirement and ensure all determinations of disadvantage are not based in whole or in part on race or sex, an owner must provide the certifier a Personal Narrative (PN) that establishes 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, including obtaining financing on terms available to similarly situated persons who did not face barriers in obtaining terms.

The PN must state how and to what extent the impediments caused the owner economic harm, including a full description of type and magnitude, and must establish the owner is economically disadvantaged in fact relative to similarly situated non-disadvantaged individuals.

The owner must attach to the PN a current personal net worth (PNW) statement and any other financial information the owner considers relevant. The total annual burden hours below were calculated based on the average of three stakeholder responses ranging from 240–2,000 hours. The total annual cost burden was calculated based on one stakeholder response of \$80,000.

In preparing this estimate, DOT estimated a 10 percent decrease in the number of currently certified firms who will submit documentation to maintain their DBE/ACDBE decertification status. DOT also assumed a 50 percent reduction in the total burden hours compared to the pre-existing estimated burden for completing the full Uniform Certification Application (UCA), as firms will be able to use many of their other existing certification documents for resubmission.

Respondents: Firms seeking to maintain their DBE/ACDBE certification.

Estimated Number of Respondents: 41,000.

Frequency: One time per respondent.

Total Annual Burden Hours: 820,000 (one-time burden).

Total Annual Cost Burden: \$91,922,000 (one-time burden).

ii. Unified Certification Program (UCP) Reevaluation of Applications for DBE/ACDBE Certification Based on Individualized Showing of Social Disadvantage

UCPs will need to reevaluate DBE/ACDBE applicant firms based on updated submission of application materials, including the PN and PNW statement. This estimate assumes an average burden of two hours to complete a review and make a disposition for each DBE/ACDBE certification application, including notifications to other jurisdictions.

Respondents: UCPs.

Estimated Number of Respondents: 53.

Frequency: One-time reevaluation of 41,000 applicant firms.

Total Annual Burden Hours: 82,000 (one-time burden).

Total Annual Cost Burden: \$3,447,280 (one-time cost).

iii. Maintaining and Updating Bidders' Lists

We estimate that recipients will experience a reduced burden to implement 49 CFR 26.11 as a result of eliminating the race- and sex-based reporting requirements for bidders' lists, in addition to eliminating the requirement to report data related to applications for and determinations of individualized social and economic disadvantage.

Respondents: FAA, FHWA, and FTA funding recipients.

Estimated Number of Respondents: 1,639.

Frequency: 3 times per year.

Total Annual Burden Hours: 29,502.

Total Annual Cost Burden: \$1,240,264.

iv. ACDBE Annual Report of Percentages of ACDBEs in Various Categories

We estimate that FAA airport recipients will experience a reduced burden to implement 49 CFR 26.11 as a result of eliminating the race- and sex-based reporting requirements for bidders' lists, in addition to eliminating the requirement to report data related to applications for and determinations of individualized social and economic disadvantage.

Respondents: State Departments of Transportation, District of Columbia, U.S. Virgin Islands, and Puerto Rico.

Estimated Number of Respondents: 53.

Frequency: Once per year.

Total Annual Burden Hours: 13,780.

Total Annual Cost Burden: \$579,311.

v. Setting Overall Goals for DBE Participation in DOT-Assisted Contracts

The Department estimates a modest increase in burden for setting overall DBE goals as a result of the transition to the new DBE certification requirements and enhanced expectations related to disparity studies used in setting overall goals. These changes may result in increases in the amount of time for recipients to set goals based on the relative availability of certified DBEs.

Respondents: DOT funding recipients.

Estimated Number of Respondents: 1,639.

Frequency: Once every three years.

Total Annual Burden Hours: 10,927.

Total Annual Cost Burden: \$459,371.

vi. Providing Evidence of Certification to an Additional State When a Firm Certified in Its Home State Applies to Another State for Certification (Interstate Certification)

The Department estimates a one-time increase in the burden for firms to provide evidence of certification to an additional State when a firm certified in its home State applies to another State for certification.

Respondents: DBE/ACDBE firms applying for interstate certification.

Estimated Number of Respondents: 4,100.

Frequency: Once.

Total Annual Burden Hours: 4,100.

Total Annual Cost Burden: \$459,610 (one-time cost).

As noted in the Costs and Benefits section of this analysis, these burden hour and cost estimates have been incorporated into the Department's overall assessment of regulatory costs.

Notwithstanding any other provision of law, no person is required to respond to a collection of information unless that collection displays a valid OMB control number.

I. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. DOT will submit a report containing this rule and other required information to the U.S. Senate,

the U.S. House of Representatives, and the Comptroller General of the United States. This rule does not constitute a major rule as defined in 5 U.S.C. 804(2).

List of Subjects in 49 CFR Parts 23 and 26

Administrative practice and procedure, Airports, Civil rights, Government contracts, Grant programs—transportation, Mass transportation, Minority businesses, Reporting and recordkeeping requirements.

Sean P. Duffy,

Secretary of Transportation.

For the reasons stated in the preamble, the Department of Transportation amends 49 CFR parts 23 and 26 as follows:

PART 23—PARTICIPATION OF DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS

■ 1. The authority for part 23 continues to read as follows:

Authority: 49 U.S.C. 47107 and 47113; 42 U.S.C. 2000d; 49 U.S.C. 322; E.O. 12138, 44 FR 29637, 3 CFR, 1979 Comp., p. 393.

■ 2. Amend § 23.1 by revising paragraph (c) to read as follows:

§ 23.1 What are the objectives of this part?

* * * * *

(c) To ensure that the Department's ACDBE program operates in a nondiscriminatory manner and without regard to race or sex, while maximizing efficiency of service;

* * * * *

■ 3. Amend § 23.3 as follows:

■ a. Add definitions for ACDBE-conscious and ACDBE-neutral in alphabetical order;

■ b. Remove the definitions of Race-conscious and Race-neutral; and

■ c. Revise the definition of Socially and economically disadvantaged individual.

The additions and revisions read as follows:

§ 23.3 What do the terms used in this part mean?

ACDBE-conscious measure or program is one that is focused specifically on assisting only ACDBEs.

ACDBE-neutral measure or program is one that is, or can be, used to assist all small business concerns.

* * * * *

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who a certifier finds to be socially and economically

disadvantaged on a case-by-case basis. A determination that an individual is socially and economically disadvantaged must not be based in whole or in part on race or sex. For that reason, applicants may qualify as socially and economically disadvantaged only if they can meet the relevant criteria described in § 26.67.

- 4. Amend § 23.25 as follows:
 - a. Revise the introductory text of paragraphs (d) and (e); and
 - b. Add paragraph (h).

The revisions read as follows:

§ 23.25 What measures must recipients include in their ACDBE programs to ensure nondiscriminatory participation of ACDBEs in concessions?

(d) Your ACDBE program must include ACDBE-neutral measures that you will take. You must maximize the use of ACDBE-neutral measures, obtaining as much as possible of the ACDBE participation needed to meet overall goals through such measures. These are responsibilities that you directly undertake as a recipient, in addition to the efforts that concessionaires make, to obtain ACDBE participation. The following are examples of ACDBE-neutral measures you can implement:

(e) Your ACDBE program must also provide for the use of ACDBE-conscious measures when ACDBE-neutral measures, standing alone, are not projected to be sufficient to meet an overall goal. The following are examples of ACDBE-conscious measures you can implement:

(h) Effective October 3, 2025, you may not use any of the measures described in paragraph (e) of this section until the UCP that covers you has completed the reevaluation process described in § 23.81.

- 5. Amend § 23.26 by revising paragraphs (b) introductory text, (b)(1), (d)(5), and (e) to read as follows:

§ 23.26 Fostering small business participation.

(b) This element must be submitted to the FAA for approval as a part of your ACDBE program. As part of this program element, you may include, but are not limited to including, the following strategies:

(1) Establish an ACDBE-neutral small business set-aside for certain concession opportunities. Such a strategy would include the rationale for selecting small

business set-aside concession opportunities that may include consideration of size and availability of small businesses to operate the concession.

(5) You will take aggressive steps to encourage those socially and economically disadvantaged firms eligible for ACDBE certification to become certified; and

(e) A State, local, or other program, in which eligibility requires satisfaction of race, sex, or other criteria in addition to business size, may not be used to comply with the requirements of this part.

§ 23.27 [Amended]

- 6. Amend § 23.27 as follows:
 - a. Remove paragraph (c)(2)(iv);
 - b. Redesignate paragraphs (c)(2)(v), (c)(2)(vi), and (c)(2)(vii) as paragraphs (c)(2)(iv), (c)(2)(v), and (c)(2)(vi), respectively;
 - c. Remove paragraph (d)(1);
 - d. Redesignate subparagraphs (d)(2), (d)(3), and (d)(4) as paragraphs (d)(1), (d)(2), and (d)(3), respectively; and
 - e. Remove paragraphs (d)(5) and (d)(6).

- 7. Amend § 23.41 by revising paragraph (d) to read as follows:

§ 23.41 What is the basic overall goal requirement for recipients?

(d) Effective October 3, 2025, you are not required to update your overall goals until the UCP that covers you has completed the reevaluation process described in § 23.81.

- 8. Amend § 23.43 by revising paragraph (b) to read as follows:

§ 23.43 What are the consultation requirements in the development of recipients' overall goals?

(b) Stakeholders with whom you must consult include, but are not limited to, business groups, community organizations, trade associations representing concessionaires currently located at the airport, as well as existing concessionaires themselves, and other officials or organizations that could be expected to have information concerning the availability of disadvantaged businesses and the recipient's efforts to increase participation of ACDBEs.

- 9. Amend § 23.45 by revising paragraphs (f), (g), and (h) to read as follows:

§ 23.45 What are the requirements for submitting overall goal information to the FAA?

(f) Your submission must include your projection of the portions of your overall goals you propose to meet through use of ACDBE-neutral and ACDBE-conscious means, respectively, and the basis for making this projection (see § 23.51(d)(5)).

(g) FAA may approve or disapprove the way you calculated your goal, including your ACDBE-neutral/ACDBE-conscious "split," as part of its review of your plan or goal submission. Except as provided in paragraph (h) of this section, the FAA does not approve or disapprove the goal itself (i.e., the number).

(h) If the FAA determines that your goals have not been correctly calculated or the justification is inadequate, the FAA may, after consulting with you, adjust your overall goal or ACDBE-neutral/ACDBE-conscious "split." The adjusted goal represents the FAA's determination of an appropriate overall goal for ACDBE participation in the recipient's concession program, based on relevant data and analysis. The adjusted goal is binding.

- 10. Amend § 23.51 as follows:

- a. Revise the introductory text of paragraph (a);
- b. Revise paragraph (a)(2);
- c. Revise paragraph (c)(3); and
- d. Revise paragraph (d)(5).

The revisions read as follows:

§ 23.51 How are a recipient's overall goals expressed and calculated?

(a) Your objective in setting a goal is to estimate the percentage of the base calculated under §§ 23.47 through 23.49 that would be performed by ACDBEs in the absence of social and economic disadvantage and its effects.

(2) In conducting this goal setting process, you are determining the extent, if any, to which the firms in your market area have been impacted by social and economic disadvantage in connection with concession opportunities or related business opportunities.

(3) Use data from a disparity study. Use a percentage figure derived from data in a valid, applicable disparity study. Any disparity study utilized must

provide a detailed capacity analysis, including the methodology used.

* * * * *

(d) * * *

(5) Among the information you submit with your overall goal (see § 23.45(e)), you must include description of the methodology you used to establish the goal, including your base figure and the evidence with which it was calculated, as well as the adjustments you made to the base figure and the evidence relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and an explanation of how you used that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through ACDBE-neutral and ACDBE-conscious measures, respectively (see §§ 26.51(c) of this chapter).

* * * * *

■ 11. Amend § 23.53 by adding paragraph (g) to read as follows:

§ 23.53 How do car rental companies count ACDBE participation toward their goals?

* * * * *

(g) Effective October 3, 2025, you as a car rental company may not count any ACDBE participation toward the goal that an airport has set for you until the UCP covering that airport has completed the reevaluation process described in part 26, § 23.81

■ 12. Amend § 23.55 by adding paragraph (m) to read as follows:

§ 23.55 How do recipients count ACDBE participation toward goals for items other than car rentals?

* * * * *

(m) Effective October 3, 2025, you may not count any ACDBE participation toward ACDBE goals until the UCP covering you has completed the reevaluation process described in § 23.81.

■ 13. Amend § 23.57 as follows:

- a. Revise paragraphs (b)(4) and (c); and
- b. Add paragraph (d).

The revision and addition read as follows:

§ 23.57 What happens if a recipient falls short of meeting its overall goals?

* * * * *

(b) * * *

(4) The FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your ACDBE-

neutral/ACDBE-conscious split, or the introduction of additional ACDBE-neutral or ACDBE-conscious measures.

* * * * *

(c) If information coming to the attention of FAA demonstrates that current trends make it unlikely that you, as an airport, will achieve ACDBE awards and commitments that would be necessary to allow you to meet your overall goal at the end of the fiscal year, FAA may require you to make further good faith efforts, such as modifying your ACDBE-conscious/ACDBE-neutral split or introducing additional ACDBE-neutral or ACDBE-conscious measures for the remainder of the fiscal year.

(d) Effective October 3, 2025, you are not subject to this section until the UCP that covers you has completed the reevaluation process described in § 23.81.

■ 14. Add § 23.81 to subpart E to read as follows:

§ 23.81 ACDBE reevaluation process.

(a) Effective October 3, 2025, each UCP must:

(1) Identify each currently certified ACDBE;

(2) Provide each firm identified pursuant to paragraph (a)(1) of this section with the opportunity to submit documentation demonstrating its ACDBE eligibility under the standards set forth in this part;

(3) Determine whether each firm identified pursuant to paragraph (a)(1) of this section meets the ACDBE eligibility standards set forth in this part; and

(4) Issue a written decision to each firm reevaluated pursuant to subparagraph (a)(3), indicating that it has either been recertified or is decertified.

(b) The provisions of § 26.87 of this chapter shall not apply to any action taken pursuant to paragraph (a) of this section.

(c) Each UCP must reevaluate each firm identified pursuant to paragraph (a)(1) of this section as quickly as practicable and must promptly notify the Department when it has done so. The Department reserves the right to review a UCP's reevaluation process.

PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

■ 15. The authority for part 26 continues to read as follows:

Authority: 23 U.S.C. 304 and 324; 42 U.S.C. 2000d, *et seq.*; 49 U.S.C. 47113, 47123; Sec. 1101(b), Pub. L. 114–94, 129 Stat. 1312,

1324 (23 U.S.C. 101 note); Sec. 150, Pub. L. 115–254, 132 Stat. 3215 (23 U.S.C. 101 note); Pub. L. 117–58, 135 Stat. 429 (23 U.S.C. 101 note).

■ 16. Amend § 26.1 by revising paragraph (c) to read as follows:

§ 26.1 What are the objectives of this part?

* * * * *

(c) To ensure that the Department's DBE program operates in a nondiscriminatory manner and without regard to race or sex, while maximizing efficiency of service;

* * * * *

■ 17. Amend § 26.5 as follows:

■ a. Add definitions for DBE-conscious and DBE-neutral in alphabetical order;

■ b. Remove the definitions of Race-conscious and Race-neutral; and

■ c. Revise the definition of Socially and economically disadvantaged individual.

The addition and revision read as follows:

§ 26.5 Definitions.

* * * * *

DBE-conscious measure or program is one that is focused specifically on assisting only DBEs.

DBE-neutral measure or program is one that is, or can be, used to assist all small businesses.

* * * * *

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who a certifier finds to be socially and economically disadvantaged on a case-by-case basis. A determination that an individual is socially and economically disadvantaged must not be based in whole or in part on race or sex. For that reason, all applicants shall qualify as socially and economically disadvantaged if they can meet the relevant criteria described in § 26.67. Being born in a particular country does not, standing alone, mean that a person is necessarily socially and economically disadvantaged.

* * * * *

§ 26.11 [Amended]

■ 18. Amend § 26.11 as follows:

■ a. Remove paragraph (c)(2)(iv);

■ b. Redesignate paragraphs (c)(2)(v), (c)(2)(vi), and (c)(2)(vii) as subparagraphs (c)(2)(iv), (c)(2)(v), and (c)(2)(vi), respectively;

■ c. Remove paragraph (e)(1);

■ d. Redesignate paragraphs (e)(2), (e)(3), and (e)(4) as paragraphs (e)(1), (e)(2), and (e)(3), respectively; and

■ e. Remove paragraphs (e)(5) and (e)(6).

■ 19. Amend § 26.37 by revising paragraph (b) to read as follows:

§ 26.37 What are a recipient's responsibilities for monitoring?

(b) A recipient's DBE program must also include a monitoring and enforcement mechanism to ensure that work committed, or in the case of DBE-neutral participation, the work subcontracted, to all DBEs at contract award or subsequently is performed by the DBEs to which the work was committed or subcontracted to, and such work is counted according to the requirements of § 26.55. This mechanism must include a written verification that you have reviewed contracting records and monitored the work site to ensure the counting of each DBE's participation is consistent with its function on the contract. The monitoring to which this paragraph (b) refers may be conducted in conjunction with monitoring of contract performance for other purposes such as a commercially useful function review.

■ 20. Amend § 26.39 by revising paragraphs (b)(1) and (b)(5) to read as follows:

§ 26.39 Fostering small business participation.

(b) (1) Establishing a DBE-neutral small business set-aside for prime contracts under a stated amount (e.g., \$1 million). (5) To meet the portion of your overall goal you project to meet through DBE-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.

- 21. Amend § 26.45 as follows:
■ a. Revise paragraph (a)(2);
■ b. Revise paragraph (b);
■ c. Revise paragraph (c)(3);
■ d. Revise paragraph (d)(1)(ii);
■ e. Revise paragraph (d)(3);
■ f. Revise paragraph (f)(3);
■ g. Revise paragraph (g)(1); and
■ h. Revise paragraph (h);
The revisions read as follows:

§ 26.45 How do recipients set overall goals?

(2) If you are an FTA Tier II recipient who intends to operate a DBE-neutral program, or if you are an FAA recipient who reasonably anticipates awarding \$250,000 or less in FAA prime contract funds in a Federal fiscal year, you are not required to develop overall goals for FTA or FAA, respectively, for that Federal fiscal year.

(b) Your overall goal must be based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate on your DOT-assisted contracts (hereafter, the "relative availability of DBEs"). The goal must reflect your determination of the level of DBE participation you would expect absent the effects of social and economic disadvantage. You cannot simply rely on either the 10 percent national goal, your previous overall goal, or past DBE participation rates in your program without reference to the relative availability of DBEs in your market.

(3) Use data from a disparity study. Use a percentage figure derived from data in a valid, applicable disparity study. Any disparity study utilized must provide a detailed capacity analysis, including the methodology used.

(ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure. To the extent that the disparity study provides a detailed capacity analysis, include the methodology used;

(3) If you attempt to make an adjustment to your base figure to account for the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.

(3) You must include with your overall goal submission a description of the methodology you used to establish the goal, including your base figure and the evidence with which it was calculated, and the adjustments you made to the base figure and the evidence you relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and, where applicable, an explanation of why you did not use that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through DBE-neutral and DBE-conscious measures, respectively (see § 26.51(c)).

(g)(1) In establishing an overall goal, you must provide for consultation and publication. This includes:

(i) Consultation with general contractor groups, community organizations, and other officials or organizations that could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses and your efforts to establish a level playing field for the participation of DBEs. The consultation must include a scheduled, direct, interactive exchange (e.g., a face-to-face meeting, video conference, teleconference) with as many interested stakeholders as possible focused on obtaining information relevant to the goal setting process, and it must occur before you are required to submit your methodology to the operating administration for review pursuant to paragraph (f) of this section. You must document in your goal submission the consultation process you engaged in. Notwithstanding paragraph (f)(4) of this section, you may not implement your proposed goal until you have complied with this requirement.

(ii) A published notice announcing your proposed overall goal before submission to the operating administration on August 1st. The notice must be posted on your official internet website and may be posted in any other sources (e.g., trade association publications). If the proposed goal changes following review by the operating administration, the revised goal must be posted on your official internet website.

(h) Effective October 3, 2025 you are not required to update your overall goals until the UCP that covers you has completed the reevaluation process described in § 26.111.

- 22. Amend § 26.47 as follows:
■ a. Revise paragraph (c)(4);
■ b. Revise paragraph (d); and
■ c. Add paragraph (e).

§ 26.47 Can recipients be penalized for failing to meet overall goals?

(4) FHWA, FTA, or FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your DBE-conscious/DBE-neutral split, or the introduction of additional DBE-neutral or DBE-conscious measures.

(d) If, as recipient, your Uniform Report of DBE Awards or Commitments and Payments or other information coming to the attention of FTA, FHWA, or FAA, demonstrates that current

trends make it unlikely that you will achieve DBE awards and commitments that would be necessary to allow you to meet your overall goal at the end of the fiscal year, FHWA, FTA, or FAA, as applicable, may require you to make further good faith efforts, such as by modifying your DBE-conscious/DBE-neutral or introducing additional DBE-neutral or DBE-conscious measures for the remainder of the fiscal year.

(e) Effective October 3, 2025, you are not subject to this section until the UCP that covers you has completed the reevaluation process described in § 26.111.

- 23. Amend § 26.51 as follows:
- a. Revise paragraph (a);
- b. Revise the introductory text to paragraph (b);
- c. Revise paragraph (c);
- d. Revise paragraph (d);
- e. Revise paragraph (e)(2);
- f. Revise paragraph (f);
- g. Revise paragraph (g); and
- h. Add paragraph (h).

The revisions read as follows:

§ 26.51 What means do recipients use to meet overall goals?

(a) You must meet the maximum feasible portion of your overall goal by using DBE-neutral means of facilitating DBE-neutral participation. DBE-neutral participation includes any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.

(b) DBE-neutral means include, but are not limited to, the following:

* * * * *

(c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through DBE-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.

(d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using DBE-neutral means.

* * * * *

(e) * * *

(2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work

involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of DBE-neutral means.

* * * * *

(f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of social and economic disadvantage, you must adjust your use of contract goals as follows:

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through DBE-neutral means, you must implement your program without setting contract goals during that year, unless it becomes necessary in order meet your overall goal.

Example 1 to paragraph (f)(1): Your overall goal for Year I is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through DBE-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year I. However, if part way through Year I, your DBE awards or commitments are not at a level that would permit you to achieve your overall goal for Year I, you could begin setting DBE-conscious contract goals during the remainder of the year as part of your obligation to implement your program in good faith.

(2) If, during any year in which you are using contract goals, you determine that you will exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of DBE-neutral or DBE-conscious measures to allow you to meet the overall goal.

Example 2 to paragraph (f)(2): In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of DBE-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use of DBE goals. By September, you have already obtained 11 percent DBE participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent DBE participation. However, if you determine in September that your

participation for the year is likely to be only 8 percent total, then you would increase your use of DBE-neutral or DBE-conscious means during the remainder of the year in order to achieve your overall goal.

(3) If the DBE participation you have obtained by DBE-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only DBE-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

Example 3 to paragraph (f)(3): Your overall goal for Years I and Year II is 10 percent. The DBE participation you obtain through DBE-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional DBE participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using DBE-neutral means. You simply use DBE-neutral means to achieve your overall goals. However, if in Year VI your DBE participation falls short of your overall goal, then you must make a paragraph (c) of this section projection for Year VII and, if necessary, resume use of contract goals in that year.

(4) If you obtain DBE participation that exceeds your overall goal in two consecutive years using contract goals (*i.e.*, not through DBE-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

Example 4 to paragraph (f)(4): In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent DBE participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) of this section projection estimates that you will obtain 4 percent DBE participation through DBE-neutral means and 8 percent through contract goals. You then reduce the contract goal projection by 25 percent (*i.e.*, from 8 to 6 percent) and set contract goals accordingly during the year. If in Year III you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two consecutive years of exceeding overall goals.

(g) In any year in which you project meeting part of your goal through DBE-neutral means and the remainder through contract goals, you must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in § 26.11.

(h) Effective October 3, 2025, you may not set any contract goals until the UCP that covers you has completed the reevaluation process described in § 26.111.

■ 24. Amend § 26.55 by adding paragraph (i) to read as follows:

§ 26.55 How is DBE participation counted toward goals?

* * * * *

(i) Effective October 3, 2025, you may not count any DBE participation toward DBE goals until the UCP that covers you has completed the reevaluation process described in § 26.111.

■ 25. Amend § 26.61 by revising paragraph (b) to read as follows:

§ 26.61 Burden of proof.

* * * * *

(b) The firm has the burden of demonstrating, by a preponderance of the evidence, *i.e.*, more likely than not, that it satisfies all of the requirements in this subpart. In determining whether the firm has met its burden, the certifier must consider all the information in the record, viewed as a whole. In a decertification proceeding the certifier bears the burden of proving, by a preponderance of the evidence, that the firm is no longer eligible for certification under the rules of this part.

■ 26. Revise § 26.67 to read as follows:

§ 26.67 Social and economic disadvantage.

(a) Non-presumptive Disadvantage. All applicants must demonstrate social and economic disadvantage (SED) affirmatively based on their own experiences and circumstances within American society, and without regard to race or sex.

(1) To satisfy the SED requirement and ensure all determinations of disadvantage are not based in whole or in part on race or sex, an owner must provide the certifier a Personal Narrative (PN) that establishes 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, including

obtaining financing on terms available to similarly situated, non-disadvantaged persons.

(2) The PN must state how and to what extent the impediments caused the owner economic harm, including a full description of type and magnitude, and must establish the owner is economically disadvantaged in fact relative to similarly situated non-disadvantaged individuals.

(3) The owner must attach to the PN a current PNW statement and any other financial information he considers relevant.

■ 27. Add § 26.111 to subpart F to read as follows:

§ 26.111 DBE Reevaluation Process.

(a) Effective October 3, 2025, each UCP must:

(1) Identify each currently certified DBE;

(2) Provide each firm identified pursuant to subparagraph (a)(1) with the opportunity to submit documentation demonstrating its DBE eligibility under the standards set forth in this part;

(3) Determine whether each firm identified pursuant to subparagraph (a)(1) meets the DBE eligibility standards set forth in this part; and

(4) Issue a written decision to each firm reevaluated pursuant to subparagraph (a)(3), indicating that it has either been recertified or is decertified.

(b) The provisions of § 26.87 of this part shall not apply to any action taken pursuant to paragraph (a).

(c) Each UCP must reevaluate each firm identified pursuant to subparagraph (a)(1) as quickly as practicable and must promptly notify the Department when it has done so. The Department reserves the right to review a UCP's reevaluation process.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 600 and 622

[Docket No. 250915-0853]

RIN 0648-BM94

Fisheries of the Caribbean, Gulf of America, and South Atlantic; Fishery Management Plans of Puerto Rico, St. Croix, and St. Thomas and St. John; Amendment 2

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement management measures described in Amendment 2 to the Fishery Management Plans (FMPs) for Puerto Rico, St. Croix, St. Thomas and St. John FMP (Amendment 2), as prepared by the Caribbean Fishery Management Council (Council). This final rule prohibits and restricts the use of certain net gear in U.S. Caribbean Federal waters and requires a descending device to be available and ready for use on vessels when fishing for federally managed reef fish species in U.S. Caribbean Federal waters. The purpose of this final rule and Amendment 2 is to protect habitats and species from the potential negative impacts associated with the use of certain net gear and to enhance the survival of released reef fish in U.S. Caribbean Federal waters.

DATES: This final rule is effective November 3, 2025, except for the revisions for §§ 622.437(a)(4), 622.477(a)(4), and 622.512(a)(4), which are effective April 1, 2026.

ADDRESSES: Electronic copies of Amendment 2, which includes a fishery impact statement, an environmental assessment, a regulatory impact review, and a Regulatory Flexibility Act (RFA) analysis, may be obtained from the Southeast Regional Office website at <https://www.fisheries.noaa.gov/action/amendment-2-puerto-rico-st-croix-and-st-thomas-and-st-john-fishery-management-plans-trawl>.

FOR FURTHER INFORMATION CONTACT: Maria Lopez-Mercer, NMFS Southeast Regional Office, 727-824-5305, maria.lopez@noaa.gov.

SUPPLEMENTARY INFORMATION: NMFS, with the advice of the Council, manages the Puerto Rico, St. Croix, and St. Thomas and St. John fisheries in U.S. Caribbean Federal waters under the Puerto Rico, St. Croix, and St. Thomas and St. John FMPs. The Council prepared the FMPs, which the Secretary of Commerce approved, and NMFS implements the FMPs through regulations at 50 CFR parts 600 and 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On August 27, 2024, NMFS published a notice of availability for Amendment 2 and requested public comment (89 FR 68572). On September 30, 2024, NMFS published a proposed rule for Amendment 2 and requested public comment (89 FR 79492). NMFS

**Official Frequently Asked Questions (FAQs) on the U.S.
Department of Transportation’s Disadvantaged Business Enterprise
Program and Disadvantaged Business Enterprise in Airport
Concessions Program Implementation Modifications,
October 3, 2025, Interim Final Rule

Updated December 1, 2025**

The General Counsel of the Department of Transportation has reviewed these questions and answers and approved them as consistent with the language and intent of 49 CFR Part 26. The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

A. General

1. When did the Interim Final Rule (IFR) become effective?

The IFR was published in the Federal Register on October 3, 2025 and became effective that day.

2. By when must the recipients update their DBE program plans?

In accordance with § 26.21(b), significant changes to DBE plans must be submitted to DOT for approval. The Department believes the IFR significantly changes the way recipients must implement their DBE plans. Therefore, we expect that recipients will amend their plans as soon as practicable after the Unified Certification Program (UCP) in their jurisdiction completes the reevaluation process described in § 26.111 to reflect the changes in the IFR. Any portion of a DBE program plan that is dependent upon presumptions of disadvantage, DBE goals, or any aspect of the prior DBE rule that has changed based on the IFR is no longer valid.

3. Do these changes apply to the Airport Concession Disadvantaged Business Enterprise (ACDBE) Program?

Yes, the IFR made changes to the ACDBE regulations in 49 CFR part 23 in a substantially similar manner to those changes made in 49 CFR part 26. Accordingly, these FAQs apply to ACDBEs.

4. Can recipients implement their own race- and sex-neutral small business enterprise programs on federally assisted contracts? (added 12/01/2025)

Yes. DOT's DBE regulations at 49 CFR § 26.39 (Fostering Small Business Participation) provide that recipients must include an element in their DBE program plans to facilitate competition by small business concerns. This element must be submitted to the appropriate DOT operating administration for approval as a part of the recipient's DBE program. As part of this type of program's elements, recipients may include, among other practices, establishing a DBE-neutral small business set-aside program. Certification for eligibility in a recipient's small business enterprise program cannot be based in whole or in part on race or sex.

5. Are recipients expected to continue meeting the requirements of a DBE conciliation agreement under 49 CFR § 26.103? (added 12/01/2025)

Yes, but only for compliance measures in a conciliation agreement that relate to compliance with regulations that remain valid under the IFR. Any compliance measures remaining open that relate to the implementation of race- or sex- based preferences removed under the IFR are null and void.

6. After the reevaluation process, 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. What appropriate action must be taken? (added 12/01/2025)

If the reevaluation process results in circumstances that necessitate a recipient to take appropriate action, the recipient must assess its project, including, for example, the contracts and subcontracts, and take all measures to ameliorate prior unconstitutional actions. The appropriate action a recipient must take will depend on individual circumstances and should be tailored on a case-by-case basis.

7. Where the FAQs reference DBE programs and their regulatory provisions, do they apply similarly to ACDBE programs? (added 12/01/2025)

Yes, the FAQs apply to both the DBE and ACDBE programs.

B. Contracting Questions

1. How does the IFR affect projects that are currently authorized/advertised and projects/contracts already awarded that have DBE goals?

Recipients with DBE goals on contracts that have been advertised but not yet let (i.e., bids not yet opened) must issue amendments to the advertisements removing the DBE contract goals. For projects with DBE contract goals that have been let (i.e., bids opened) but contracts not yet awarded (i.e., executed), recipients must take appropriate action to

zero out the DBE goal. Due to the program changes in the IFR, DOT will allow recipients to amend the contracts without readvertising the projects, but each recipient should make its own determination on whether the contract needs to be recompeted under State law. Contracts with a DBE goal that were let and executed prior to October 3, 2025 are not required to be modified, but DBE participation on such contracts cannot be counted toward the DBE contract goal or toward the recipient's overall DBE goal until the UCP in the recipient's jurisdiction completes the reevaluation process described at 49 CFR § 26.111. If, after the reevaluation process, every DBE performing work on a contract is recertified under the new standards, then the contract will not need to be modified. In contrast, 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.

2. Do recipients need to continue to perform commercially useful function (CUF) reviews of DBE work on existing contracts during the reevaluation process described in 49 CFR § 26.111?

No. Because the purpose of CUF reviews is to ensure that DBE participation on a project can be properly counted toward DBE goals (contract goals and overall DBE goals) and the counting of DBE participation is suspended during the reevaluation process, it is unnecessary for recipients to conduct CUF reviews during the reevaluation process. Recipients may determine whether any existing contracts should be modified with respect to ongoing CUF requirements.

3. Do the regulatory DBE termination provisions continue to apply during the reevaluation period described in 49 CFR § 26.111?

Yes. The termination provisions at 49 CFR § 26.53(f) continue to apply to existing contracts. A prime contractor cannot terminate a DBE or any portion of the DBE's work listed in response to the good faith efforts bidding requirements of 49 CFR § 26.53(b) without the recipient's prior written consent upon a showing of good cause, unless the recipient causes the termination or reduction. (49 CFR § 26.53(f)). The regulations provide:

“Good cause does not exist if the prime contractor seeks to terminate a DBE or any portion of its work that it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged, or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award.”

Good cause for termination exists if a DBE loses its DBE certification after the reevaluation process described in § 26.111 is completed because it is ineligible to receive DBE credit for the type of work required. (49 CFR 26.53(viii)).

4. How does the IFR affect DBE open-ended performance plans for design-build projects?

In cases in which a design-build contractor has already signed contracts prior to October 3, 2025 with DBE subcontractors toward meeting an open-ended performance plan, the contractor should proceed with the contract. The DBE subcontractor may not be terminated or have its work reduced without the written consent of the recipient and only for good cause, including a change in eligibility. See 49 CFR 26.53 for additional grounds for good cause. Where a DBE goal has been established for a design-build contract or a separate phase of a design-build contract, but no DBEs have yet been awarded contracts, the recipient should take appropriate action to zero out the DBE goal.

If, after the reevaluation process, every DBE performing work on a design-build contract is recertified under the new standards, then the recipient need not take any further action. In contrast, if a DBE performing work on a design-build 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.

5. How does a recipient remove an advertised DBE contract goal prior to a letting?

Recipients should issue amendments to the project advertisements to remove the DBE goal.

6. Does Section II (Nondiscrimination), Part 10.a, of Federal Highway Administration (FHWA) Form 1273 incorporate by reference the DBE regulations as amended by the IFR?

Yes. For contracts awarded on or after October 3, 2025, the new DBE program regulations apply.

7. What changes should be made to DBE special provisions that recipients use for contract awards?

DBE special provisions based on the DBE regulations in effect before October 3, 2025, should not be included in contracts entered into on or after October 3, 2025. For any contracts entered into on or after October 3, 2025, recipients should review and update any such DBE special provisions to comply with the DBE regulations as amended by the IFR. To the extent that an operating administration approves DBE special provisions, updated DBE special provisions must be approved by that DOT operating administration. Recipients may use their revised and DOT-approved DBE special provisions (when required) on contracts entered into after the recipient's UCP has completed the reevaluation described in 49 CFR § 26.111 and adopted a new overall DBE goal in accordance with 49 CFR § 26.45.

8. Are DOT recipients required to include the contract clauses in 49 CFR §§ 23.9 and 26.13 in contracts awarded on or after October 3, 2025 during the UCP reevaluation period?

Yes, DOT recipients are required to include the contract clauses listed in 49 CFR §§ 23.9 and 26.13(a-b) in all contracts. The IFR did not make changes to this requirement.

9. Are DOT recipients required to comply with the prompt payment requirements in 49 CFR § 26.29 during the UCP reevaluation period?

Yes. DOT recipients are required to implement and document compliance with the prompt payment requirements in 49 CFR § 26.29, including: (1) ensuring prime contractors pay subcontractors for satisfactory performance of their contract no later than 30 days from receipt of each payment made to the prime contractor, and (2) prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractors work is satisfactorily completed. The IFR did not make changes to this requirement.

10. Is a prime contractor that terminates a DBE or a portion of a DBE's work on an existing contract in accordance with the termination provisions in 49 CFR § 26.53(f) during the reevaluation process described in 49 CFR § 26.111 required to use good faith efforts to include additional DBE participation to the extent needed to meet the contract goal in accordance with 49 CFR § 26.53(g)? (added 12/01/2025)

No. During the reevaluation process described in 49 CFR § 26.111, a recipient is prohibited from counting DBE participation toward DBE goals. As a result, a prime contractor who terminates a DBE or a portion of a DBE's work in compliance with the termination procedures in 49 CFR § 26.53(f) is not required to attempt to include additional DBE participation because the DBE goal provisions of the contract cannot be given effect under the IFR.

11. May a recipient issue a change order to zero out a DBE goal on an existing contract executed before October 3, 2025? (added 12/01/2025)

Yes. A recipient may issue a change order to zero out a contract goal on an existing contract executed before October 3, 2025. However, termination of any DBEs in executed contracts prior to October 3, 2025, must be processed in accordance with the termination provisions in 49 CFR § 26.53(f).

12. Should recipients set DBE goals to zero for task orders issued for on-call, Indefinite Delivery Indefinite Quantity (IDIQ), or Job-Order-Contracting (JOC) contracts extending past the IFR issuance? (added 12/01/2025)

Yes. The IFR provides that until a UCP completes the reevaluation process provided in 49 CFR § 26.111, each recipient covered by that UCP may not: (1) include DBE contract goals; or (2) count any participation toward overall DBE goals.

13. Should recipients set concession-specific ACDBE goals to zero on new Requests for Proposals (RFPs), Requests for Qualifications (RFQs), Requests for Letters of Interest (RLIs), or similar concession procurement methods during the IFR transition? (added 12/01/2025)

Yes. According to the IFR, until the UCP completes the reevaluation process provided in 49 CFR § 23.81, each recipient covered by that UCP may not: (1) include concession-specific ACDBE goals; or (2) count any participation toward overall ACDBE goals.

14. For projects with DBE goal shortfalls that were completed prior to October 3, 2025, should a recipient conduct shortfall reviews and carry out the applicable remedies? (added 12/01/2025)

No. Because the IFR requires recipients to stop counting DBE participation toward goals until the recipient's UCP completes the reevaluation process at 49 CFR § 26.111, any project shortfall analysis regarding the prime contractor's good faith efforts to meet a DBE contract goal (49 CFR § 26.53(g)) not completed prior to October 3, 2025, should be terminated and no remedies applied.

C. Certification Reevaluation

1. Does a UCP have to reevaluate all currently certified DBEs in its DBE directory or only those DBEs for which the UCP was the jurisdiction of original certification?

Under the certification reevaluation requirements at 49 CFR § 26.111, UCPs are required to reevaluate the certifications only of those DBEs for which the UCP is the jurisdiction of original certification. UCPs are not required to reevaluate the certifications of DBEs that obtained certification from the UCP through the interstate certification procedures at 49 CFR § 26.85. DBEs that received certification from UCPs through interstate certification will have their certifications reevaluated by the UCPs in their jurisdiction of original certification. If such 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.

2. Is there a date by which a UCP must complete its certification reevaluation process?

No. The regulation at 49 CFR § 26.111 provides that UCPs should complete the reevaluation process “as quickly as practicable.”

3. Can a UCP impose a deadline on currently certified DBEs for submission of the reevaluation documentation required under 49 CFR § 26.111?

No, the regulation at 49 CFR § 26.111 does not provide a deadline for a currently certified DBE to submit documentation demonstrating its DBE eligibility under the new standards provided in the IFR. Firms that do not submit the necessary information, however, will remain ineligible for the DBE program until they submit the required documentation demonstrating DBE eligibility under the new standards.

4. Can a UCP simply decertify all currently certified DBEs without completing the reevaluation process?

No. The IFR requires UCPs to identify each currently certified DBE and provide each identified firm with the opportunity to submit documentation demonstrating its DBE eligibility under the standards described at 49 CFR § 26.67

5. Are recipients required to submit Uniform Reports during the reevaluation process?

Under the IFR, recipients are not required to update their overall DBE goals until the UCP in the recipient’s jurisdiction has completed the reevaluation process described in 49 CFR § 26.111 and notified the Department that the reevaluation process is complete. In addition, recipients may not set any contract goals and may not count any DBE participation toward DBE goals until the UCP in the recipient’s jurisdiction completes the reevaluation process described in 49 CFR § 26.111. As a result of these requirements, recipients are not required to submit Uniform Reports under 49 CFR § 26.21 until the recipient has established a new overall annual DBE goal following completion of the reevaluation process at 49 CFR § 26.111.

6. What is the Department’s role in the reevaluation process?

Each UCP is responsible for carrying out the reevaluation of currently certified DBEs for which the UCP was the jurisdiction of original certification. DOT is available to provide technical assistance as necessary.

7. Can a firm that is decertified through the reevaluation process appeal the decision to DOT?

Yes. A firm that is decertified under the reevaluation procedures described at 49 CFR § 26.111 is entitled to appeal the decertification to DOT under the procedures described at 49 CFR § 26.89.

8. Should recipients take down their DBE directories until their respective UCP completes the reevaluation process (and certifies qualified DBEs)? (added 12/01/2025)

That is a matter of discretion for each recipient. No DBE goals may be set, and no DBE participation may be counted until the UCP in the recipient's jurisdiction completes the reevaluation process described in 49 CFR § 26.111.

9. Does the owner of a DBE firm undergoing reevaluation need to submit a new personal net worth statement along with the personal narrative of social disadvantage? (added 12/01/2025)

Yes. In seeking reevaluation of its certification under 49 CFR § 26.111, the owner of a currently certified DBE needs to submit the personal narrative along with the current personal net worth statement and any other financial information the owner considers relevant, in accordance with 49 CFR § 26.67. Under 49 CFR § 26.83(i), currently certified DBEs continue to be responsible for notifying the UCP in writing of any changes in circumstances affecting the DBE's ability to meet the certification requirements of 49 CFR Part 26, including disadvantaged status (*e.g.*, compliance with the personal net worth threshold of \$2,047,000).

10. To establish social disadvantage through the personal narrative, does a DBE owner have to meet all categories of economic hardship, systemic barriers, and denied opportunities described in 49 CFR § 26.67? (added 12/01/2025)

No. Per 49 CFR § 26.67, a DBE owner must provide the certifier a personal narrative that establishes the existence of disadvantage by a preponderance of the evidence. Certifiers must holistically evaluate all presented evidence before making a determination. Considerations may include:

Education -- factors such as denial of equal access, compared to all similarly situated persons, to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures that discouraged the individual from pursuing a professional or business education.

Employment -- factors such as unequal treatment compared to all similarly situated persons in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory behavior by an employer or labor union; and social patterns or pressures that have channeled the individual into non-professional or non-business fields; or

Business history -- factors such as unequal access, compared to all similarly situated persons, to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts

or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

Other relevant evidence may be considered, but the incidents or experiences discussed in the narrative must not rely, in whole or in part, on race or sex.

11. Should the personal narrative span the full scope of the owner’s life experiences related to economic disadvantage, from childhood through to the present, including both the time before and after starting the business? (added 12/01/2025)

The personal narrative can discuss incidents and experiences of economic hardship, systemic barriers, and denied opportunities from any point in the owner’s life within American society that impeded the owner’s progress or success in education, employment, or business opportunities, including obtaining financing on terms available to similarly situated, non-disadvantaged persons. However, the incidents or experiences discussed in the narrative must not rely, in whole or in part, on race or sex.

12. If a DBE is recertified through the reevaluation process, will its certification anniversary remain the date of its original certification or the date it is recertified under the new IFR certification standards? (added 12/01/2025)

The DBE regulations at 49 CFR § 26.83(j) require a certified DBE to provide its certifiers, every year on the anniversary of its original certification, a new Declaration of Eligibility (DOE) along with the specified documentation in section 26.65(a). The certification anniversary of a DBE recertified under the reevaluation process at 49 CFR § 26.111 will continue to be the date of the DBE’s original certification under the DBE certification standards issued prior to October 3, 2025. This should alleviate the burden on UCPs of reviewing annually submitted DOEs that may otherwise be concentrated around the time the UCPs are completing their reevaluations of existing DBEs.

13. Because a UCP cannot establish a deadline by which currently certified DBEs must submit the reevaluation documentation required under 49 CFR § 26.111 (Q&A C.3), at what point in time can a UCP notify DOT the reevaluation process is complete? (added 12/01/2025)

The reevaluation regulation at 49 CFR § 26.111 provides that each UCP must provide currently certified DBEs with the opportunity to submit documentation demonstrating DBE eligibility under the new standards adopted under the IFR. 49 CFR § 26.111(a)(2). The rule, however, does not establish a deadline by which currently certified DBEs must submit such documentation. See Q&A C.3. This creates a situation where a UCP may be prevented from completing the reevaluation process if a currently certified DBE delays or refrains from submitting the required documentation. To address this situation, a UCP can set a date by which currently certified DBEs should submit the required documentation. A UCP may notify DOT that its reevaluation process is complete after it completes its reevaluation of the firms that submit the necessary information by the UCP’s submission

date. Currently certified DBEs that do not submit the required information by the UCP's submission date may still submit the required documentation at a later time, but such firms will remain ineligible for counting towards DBE participation until they submit the required documentation demonstrating DBE eligibility under the new standards and obtain certification.

14. Does the IFR affect Alaska Native Corporations (ANCs) or require ANCs to seek certification? (added 12/01/2025)

The DBE IFR does not change the DBE certification rules for ANCs. The DBE certification requirements for ANC-owned firms continue to be governed by 49 CFR § 26.63(c)(2), which was not amended by the DBE IFR.

15. Does a UCP have the discretion to complete the reevaluation process for ACDBEs first and get that ACDBE program reinstated to start setting goals and counting participation, and then focus on the reevaluation of the DBEs thereafter? (added 12/01/2025)

UCPs should use their established procedures for determining the order for reevaluations.

D. Goal Setting and Counting

1. What do recipients need to do about their existing overall annual DBE goals?

Recipients are not required to do anything with their DBE goals until their respective UCPs have completed the reevaluation process described in 49 CFR § 26.111. Until the UCP completes the reevaluation process, a recipient is not required to update its DBE goal (§ 26.45(h)) and may not count any DBE participation toward its goal (§ 26.55(i)).

2. What is the role of DOT operating administrations in reviewing the three-year DBE goal setting methodology?

DOT operating administrations will continue to review and approve the DBE goal methodologies of their recipients in accordance with 49 CFR § 26.45. Recipients are not required to update their overall goal methodologies until the UCP in the recipient's jurisdiction has completed the reevaluation process described in 49 CFR § 26.111.

3. Can recipients continue to set DBE contract goals before the recipient's UCP has completed the reevaluation process described in 49 CFR § 26.111?

No. A recipient may not set any DBE contract goals until the UCP in the recipient's jurisdiction has completed the reevaluation process described in 49 CFR § 26.111.

4. Should recipients continue counting DBE participation on existing contracts without DBE goals toward the recipient's overall goal?

No. Starting on October 3, 2025, no DBE participation may be counted toward a recipient's overall goal, including such participation obtained through race and gender-neutral means.

E. New Certification Applications

1. Will new DBE applicants only need to provide a personal narrative statement and personal net worth statement, or will other components of the regulatory application process apply?

New applicants will be required to provide a personal narrative statement in addition to meeting the other certification standards at 49 CFR part 26, Subpart D. Applicants are required to submit the Uniform Application Form found at <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/uniform-certification-application-english>. DOT expects to provide an updated Uniform Application Form on its website.

2. Will DOT update the Declaration of Eligibility (DOE) form on its website to account for the regulatory changes in the IFR? (added 12/01/2025)

Yes. DOT will update the DOE form on its website.

3. Does the IFR affect firms recently denied certification? (added 12/01/2025)

No. The IFR did not make changes to 49 CFR § 26.86. Under that provision, each UCP is authorized to set a waiting period of no more than 12 months before a firm denied certification may reapply for certification. Applicants who reapply after the waiting period expires must comply with the revised certification standards established in the IFR.

F. Transit Vehicle Manufacturers

1. Are transit vehicle manufacturers (TVM) required to set DBE goals and submit Uniform Reports in accordance with 49 CFR § 26.49(b) and (c)?

DOT will treat TVMs similarly to recipients. A TVM will not be required to update its DBE goal or submit Uniform Reports until after the UCP reevaluation of DBEs described in 49 CFR § 26.111. A manufacturer that wants to request eligibility as a TVM before the completion of the UCP reevaluation can submit a request to the Federal Transit Administration (FTA) at ftatvmsubmissions@dot.gov. During this time, FTA will not require the submission of a DBE program or DBE goal to become a TVM.

2. Are FTA recipients required to continue checking the eligible list of TVMs when purchasing vehicles?

Yes. FTA recipients are required to continue checking the eligible list of TVMs to determine if the manufacturer is eligible to bid or propose on an FTA-assisted transit vehicle procurement. FTA is working directly with the manufacturers to ensure that this list is kept up-to-date.

3. Are FTA recipients required to comply with the requirement in 49 CFR § 26.49(a)(4) and report transit vehicle purchases within 30 days of becoming contractually required during the UCP reevaluation period?

No. FTA recipients are not required to submit Transit Vehicle Award Reports during the UCP reevaluation period.

4. How do the changes to the DBE rule affect ferry procurements? (added 12/01/2025)

The DBE rule generally requires FTA recipients to limit solicitations for transit vehicles (including ferries) to vendors that are certified Transit Vehicle Manufacturers (TVM). 49 CFR § 26.49(a). However, as an alternative, a recipient may establish a project-specific DBE goal for a vehicle procurement when a TVM cannot be identified. 49 CFR § 26.49(f). Historically, recipients have relied on this alternative when procuring ferries.

Until the recipient's UCP finishes the reevaluation described in 49 CFR § 26.111, a recipient setting a project-specific goal following the procedures of 49 CFR § 26.49(f) should set a goal of zero.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT**

**MID-AMERICA MILLING COMPANY,
LLC, *et al.*,**

Plaintiffs,

v.

**UNITED STATES DEPARTMENT OF
TRANSPORTATION, *et al.*,**

Defendants.

Case No. 3:23-cv-00072-GFVT-EBA

CONSENT ORDER

This action was brought by Plaintiffs, Mid-America Milling Company, LLC and Bagshaw Trucking Inc., against Defendants the United States Department of Transportation (“USDOT”), Secretary of Transportation Sean Duffy, Administrator of the Federal Highway Administration, and Division Administrator of the Kentucky Division of the Federal Highway Administration Shundreka Givan¹ (“Defendants”), under the Fifth Amendment to the United States Constitution and the Administrative Procedure Act (“APA”). Plaintiffs and Defendants (collectively, “the Parties”) agree to this Order as final and binding between themselves as to the issues raised in Plaintiffs’ Complaint in this action.

NOW, THEREFORE, it is hereby AGREED BY THE PARTIES, through their undersigned counsel, and ORDERED BY THE COURT, that:

¹ Defendants hereby notify the Court of the substitution of Shundreka Givan pursuant to Federal Rule of Civil Procedure 25(d).

I. Statutory Background

1. In 2021, Congress reauthorized the USDOT’s Disadvantaged Business Enterprise (“DBE”) program with respect to federal highway and transit funding, requiring the Secretary of Transportation to continue to expend “not less than 10 percent of” certain federal funding “through small business concerns owned and controlled by socially and economically disadvantaged individuals,” “[e]xcept to the extent that the Secretary determines otherwise.” Infrastructure Investment and Jobs Act (“IIJA”) § 11101(e)(3), Pub. L. No. 117-58 (2021). In 2024, Congress reauthorized a similar requirement with respect to federal airport construction funding. FAA Reauthorization Act of 2024 § 730(a), Pub. L. No. 118-63; *see also* 49 U.S.C. § 47113(b).

2. The statutory provisions governing the DBE program provide that the term “socially and economically disadvantaged individuals” has the meaning given by “section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations issued pursuant to that Act, except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.” IIJA § 11101(e)(2)(B); *see also* 49 U.S.C. § 47113(a)(2).

3. Section 8(d) of the Small Business Act and its implementing regulations create a rebuttable presumption that “Black Americans,” “Hispanic Americans,” “Native Americans,” “Asian Pacific Americans,” and “Subcontinent Asian Americans” are disadvantaged. *See* 15 U.S.C. § 637(d)(3); 13 C.F.R. §§ 124.103(b)(1), 124.104(a).

4. Accordingly, USDOT’s DBE regulations mandate that state and local funding recipients consider members of those groups, as well as women, to be “rebuttably presumed to be socially and economically disadvantaged.” 49 C.F.R. §§ 26.67(a)(1), 26.5.

II. Stipulations

5. Defendants, upon review of the DBE program and their position in this litigation, have determined that the program's use of race- and sex-based presumptions is unconstitutional.

6. The Parties have previously acknowledged, and this Court has found, that the DBE program's race-based presumption is subject to strict scrutiny and that the program's sex-based presumption is subject to intermediate scrutiny. *See* Dkt. No. 32 at 12 n.3, 13; Dkt. No. 40 at 15, n.6; Dkt. No. 44 at 15, 22. Defendants previously defended the presumptions as seeking to remedy past discrimination. *See* Dkt. No. 32 at 13-19. Defendants, however, have reevaluated their position, including in light of the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) ("*SFFA*").

7. Consistent with *SFFA*'s prohibition against the government's use of race as a stereotype and/or a negative and rejection of similarly overbroad or underinclusive racial categories, USDOT has determined that the race- and sex-based presumptions in its DBE program can no longer pass constitutional scrutiny. Race- and sex-based government programs are also constitutionally infirm if indefinite in length and Congress must consider the length of time a race- or sex-based program has been in place and include a time for its conclusion when creating or renewing these programs.

8. Accordingly, Defendants stipulate and agree that the DBE program's use of race- and sex-based presumptions of social and economic disadvantage, as described above, violates the equal protection component of the Due Process Clause of the Fifth Amendment of the U.S. Constitution.

9. Defendants do not admit to liability under the Constitution or laws of the United States and assert that they acted in full compliance with all applicable laws; provided, however,

that Defendants stipulate for the purposes of this Consent Order that the determination of DBE eligibility using race- and sex-based presumptions, as reauthorized by the IIJA, and in the FAA Reauthorization Act of 2024, is not supported by the Constitution as currently interpreted under equal protection jurisprudence.

10. Defendants further stipulate and agree to pay Plaintiffs' reasonable attorneys' fees and costs incurred in the prosecution of their claims in this action up until the filing of the Joint Motion for Entry of Consent Order, as agreed upon by the Parties or, absent agreement, as determined and ordered by the Court. Within 60 days of entry of this Consent Order, the Parties will file a joint status report with the Court informing it whether the Parties have reached an agreement on the amount of attorneys' fees and costs. If the Parties have not reached an agreement at the time they file the joint status report, they will include a proposed briefing schedule for the amount of attorneys' fees and costs. After briefing has concluded, the Court will determine the amount of attorneys' fees and costs.

III. Agreement and Release Declaration and Permanent Injunction

11. Based on the stipulation set forth in Paragraph 9 above and its independent analysis, the Court hereby holds and declares that the use of DBE contract goals in a jurisdiction, where any DBE in that jurisdiction was determined to be eligible based on a race- or sex-based presumption, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

12. Accordingly, the Court hereby holds and declares that Defendants may not approve any federal, state or local DOT-funded projects with DBE contract goals where any DBE in that jurisdiction was determined to be eligible based on a race- or sex-based

presumption. The Court's declarations are binding on the parties, including all Defendants, in a conclusive final judgment.

13. Based on the stipulation set forth in Paragraph 10 above, the Court orders Defendants to pay Plaintiffs' reasonable attorneys' fees and costs, as agreed upon by the Parties or ordered by the Court.

IV. Other Provisions

14. The Consent Order, once finally approved and effective—and following the Parties' or the Court's determination, and Defendants' payment, of Plaintiffs' attorneys' fees and costs— resolves in full all claims, agreements, actions, cases, causes of action, compromises, controversies, costs, damages, debts, demands, disputes, expenses, judgments, liabilities, payments, promises, and suits of any nature whatsoever which are based upon or could be based upon or arise from the facts alleged in Plaintiffs' Complaint, whether or not known, against Defendants or their current and former agents, servants, officers, officials, and/or employees, in their individual and official capacities, by Plaintiffs, their agents, heirs, and assigns, involving violations of law or constitutional rights, including, without limitation, their Fifth Amendment rights or any other federal law, regulation, duty, or obligation, or any other legal theory, action or cause of action. When the Consent Order is final, as of the date the Court enters this Order, Plaintiffs, their agents, heirs, and assigns, waive all rights to any and all claims relating to the allegations in the Complaint under any theory or cause of action whatsoever under federal law. This waiver and release shall include a full release and waiver of unknown rights based on claims (including any individual claims) relating to the allegations in the Complaint. Notwithstanding the foregoing, Plaintiffs reserve their rights to make similar claims under state and federal law, against parties other than Defendants or their officers and/or employees.

It is SO ORDERED, this ____ day of _____, 2025.

GREGORY F. VAN TATENHOVE
United States District Judge
Date:

CONSENTED TO BY:

FOR PLAINTIFFS:

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

/s/ Cara Tolliver

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SBA Guidance

TO: Office of Government Contracting and Business Development and Office of Field Operations

SUBJECT: 8(a) Program Mandate

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (the “8(a) Program”), authorizes a business development program for small businesses owned and controlled by one or more socially and economically disadvantaged individuals. In 2023, a federal court found that the presumption of social disadvantage based on race in the Small Business Administration’s (SBA) regulations implementing the 8(a) Program is unconstitutional. *See Ultima Servs. Corp. v. U.S. Dep’t of Agric.*, 683 F. Supp. 3d 745, 774 (E.D.T.N. 2023). Consistent with this case and other recent Supreme Court caselaw, the Trump Administration has taken a strong stance against unconstitutional discrimination and unlawful diversity, equity, and inclusion (DEI) policies, including through executive orders in the Administration’s first week. *See, e.g.*, E.O. 14151, E.O. 14173.

The Department of Justice’s November 25, 2025, letter to the Speaker of the House of Representatives affirmed these basic Constitutional principles, advising that SBA’s regulations implementing the 8(a) Program are unconstitutional in that they presume an individual is “socially disadvantaged” based solely on his or her membership in certain racial groups. On that basis, the Department of Justice advised that it would not defend the constitutionality of the regulations’ race-based presumption.

SBA fully agrees that the presumption of social disadvantage based on enumerated races in its regulations is unconstitutional. Under SBA’s regulations, large segments of American society were excluded from the presumption and, in practicality, from the program—particularly white Americans. This was and is unlawful. No American, including white Americans, shall be excluded or treated differently with respect to government programs based on race.

SBA is finalizing regulations to eliminate the unconstitutional presumption and related program guides—which SBA has not used since the beginning of the Trump Administration—and ensure the program complies with applicable law. To the extent unclear, this guidance clarifies the following current practices with respect to administration of the 8(a) Program:

1. No applicant to the 8(a) Program shall be denied, nor given any presumptive preference, based solely on his or her race. The 8(a) Program should be administered race neutrally.
2. SBA will not approve admissions to the program based on the Biden-era “social disadvantage narratives”, nor will SBA utilize in any way or refer applicants to the

related "Guide for Demonstrating Social Disadvantage". Consistent with the SBA's practice since January 2025, employees in the Office of Government Contracting and Business Development and the Office of Field Operations should not request or consider such "social disadvantage narratives," nor utilize or encourage applicants to utilize the "Guide for Demonstrating Social Disadvantage."

3. All employees in the office of Government Contracting and Business Development and the Office of Field Operations shall treat all Americans fairly and equally in compliance with President Trump's Executive Orders 14151 and 14173.
4. When considering whether an individual has suffered social disadvantage, the Office of Government Contracting and Business Development and the Office of Field Operations shall consider, for example, such factors as whether such individual has been the victim of illegal or radical DEI policies or illegal affirmative action policies or has otherwise been the victim of discriminatory practices such as race-based quotas, set asides, or hiring targets, in each case, whether by governmental or non-governmental actors. The Office of Government Contracting and Business Development and the Office of Field Operations shall further consider, for example, whether an individual was formally, or in practice, excluded from SBA's 8(a) Program while these unconstitutional laws, practices, and policies were in effect.

Effective Date: January 22, 2026

If you have any questions regarding this guidance, please contact Richard Kingan, Acting Associate Administrator of the Office of Government Contracting and Business Development or Lisa Shimkat, Associate Administrator of the Office of Field Operations.

§ 0.175 Judicial and administrative proceedings.

* * * * *

(b) The Assistant Attorneys General or any Deputy Assistant Attorney General of the Antitrust Division, the Civil Division, the Civil Rights Division, and the Environment and Natural Resources Division are authorized to exercise the power and authority vested in the Attorney General by 18 U.S.C. 6003 to approve the application of a U.S. Attorney to a Federal court for an order compelling testimony or the production of information in any proceeding before or ancillary to a court or grand jury of the United States when the subject matter of the case or proceeding is within the cognizance of their respective Divisions: Provided, however, that no approval shall be granted unless the Criminal Division indicates that it has no objection to the proposed grant of immunity.

* * * * *

Dated: December 5, 2025.

Pamela Bondi,*Attorney General.*

[FR Doc. 2025–22449 Filed 12–9–25; 8:45 am]

BILLING CODE 4410–12–P; 4410–14–P

DEPARTMENT OF JUSTICE**28 CFR Part 42**

[CRT Docket No. 146; AG Order No. 6509–2025]

RIN 1190–AA83

Rescinding Portions of Department of Justice Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14281**AGENCY:** Civil Rights Division, Department of Justice.**ACTION:** Final rule.

SUMMARY: By this rule, the Department of Justice amends its regulations implementing Title VI of the Civil Rights Act of 1964 (“Title VI”) to eliminate disparate-impact liability. These amendments align the conduct prohibited by the Department’s regulations with Title VI’s original public meaning, avoid constitutional concerns, reduce compliance costs, and serve the public interest. In addition, these revisions implement changes directed in Executive Order 14281.

DATES: The rule is effective on December 10, 2025.**FOR FURTHER INFORMATION CONTACT:** R. Jonas Geissler, Deputy Assistant Attorney General, Civil Rights Division, at 202–353–8866.**SUPPLEMENTARY INFORMATION:****I. Executive Summary**

The Department is rescinding portions of its regulations promulgated pursuant to Title VI, 42 U.S.C. 2000d–1, to more closely align its regulations to the language that Congress enacted in Title VI prohibiting intentionally discriminatory conduct, *see* 42 U.S.C. 2000d. There are serious statutory and constitutional concerns with the legality of the Department’s Title VI regulations that go beyond intentional discrimination by prohibiting conduct that has an unintentional disparate impact. This rule accordingly rescinds those portions of the regulations that prohibit conduct having a disparate impact, which are in considerable tension with both the statute and the Constitution and do not sufficiently serve the public interest. First, this rule rescinds the full text of 28 CFR 42.104(b)(2), which currently prohibits the utilization of “criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.” Second, this rule removes the two uses of the phrase “or effect” from 28 CFR 42.104(b)(3). Third, this rule rescinds the full text of 28 CFR 42.104(b)(6). Fourth, this rule rescinds the full text of 28 CFR 42.104(c)(2), which addresses employment practices subject to Federal financial assistance.

The rule’s revisions also conform to Executive Order 14281, *Restoring Equality of Opportunity and Meritocracy*, 90 FR 17537 (Apr. 23, 2025). That Order stated that “[i]t is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals.” *Id.* at 17537. The Order directed the Attorney General to, among other things, review Title VI regulations and “initiate appropriate action to repeal or amend” these regulations “to the extent they contemplate disparate-impact liability.” *Id.* at 17538. Section 3 of the Order specifically revoked the Presidential approvals of certain Justice Department Title VI regulations that address disparate-impact liability promulgated under 42 U.S.C. 2000d–1. *Id.* Though the Department would take this action independent of Executive Order 14281, the Order supports this action.

The practical impact of this rule’s modifications will be to make clear to Department Federal-funding recipients that the Department’s Title VI regulations do not prohibit conduct or activities that have a disparate impact

and prohibit only intentional discrimination, and the Department thus will not pursue Title VI disparate-impact liability against its Federal-funding recipients.

II. Discussion**A. Statutory History of Title VI**

Title VI of the Civil Rights Act of 1964, as amended, provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. 2000d. Title VI also directs Federal departments and agencies that extend Federal financial assistance to “effectuate the provisions of” Title VI “by issuing rules, regulations, or orders of general applicability.” 42 U.S.C. 2000d–1. The section of the Title VI statute that sets forth the prohibited conduct, 42 U.S.C. 2000d, prohibits specifically intentional discrimination and makes no reference to unintentional disparate effects or impact. *See Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (“[I]t is . . . beyond dispute—and no party disagrees—that [Title VI] prohibits only intentional discrimination.”). The statute does not explicitly provide any Federal department or agency with authority to prohibit unintentional disparate impact. And despite ample opportunities, Congress has enacted no subsequent amendments to Title VI to impose disparate-impact liability.

B. Regulatory History of Title VI

Pursuant to Executive Order 12250, “[t]he Attorney General shall coordinate the implementation and enforcement by Executive agencies of . . . Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*)” 45 FR 72995, 72995 (Nov. 2, 1980). Accordingly, the Department of Justice acts as the lead Federal agency responsible for defining the nature and scope of Title VI’s prohibition of discrimination on the basis of race, color, and national origin in programs or activities receiving Federal financial assistance. The Order directs the Department, among other things, to “develop standards and procedures for taking enforcement actions and for conducting investigations and compliance reviews.” *Id.* Further, as part of this responsibility, the Order provides that other agencies’ Federal regulations implementing Title VI are also subject to the Attorney General’s approval. *Id.* at 72996.

The Department’s Title VI implementing regulations are codified at

28 CFR 42.101, 42.112. The initial set of model regulations for Title VI were issued by the then-Department of Health, Education, and Welfare on December 4, 1964, which included only one reference to the “effect of” language in the “discrimination prohibited” provision of the rule. See 29 FR 16298, 16299 (Dec. 4, 1964) (provision found at 45 CFR 80.3(b)(2)). The Department adopted these model regulations in 1966, which likewise contained a single instance of the “or effect” language at 28 CFR 42.104(b)(2). 31 FR 10265, 10266 (July 29, 1966). In 1973, the Department substantively amended its regulatory description of prohibited discrimination. See 38 FR 17955 (July 5, 1973). These substantive changes include, among other things, the addition of 28 CFR 42.104(b)(3) (which added the “or effect” language to an additional provision), 28 CFR 42.104(b)(6) (which introduced the “affirmative action” language to the regulations), and 28 CFR 42.104(c)(2) (which extends the rule to Federal financial assistance whose primary objective is not to provide employment). *Id.* at 17955. In 2003, the Department added language regarding “program or activity” to reflect the amendment of Title VI by the Civil Rights Restoration Act of 1987. See 68 FR 51334, 51364 (Aug. 26, 2003); Public Law 100–259, sec. 6, 102 Stat. 28, 31 (1988). Thus, beyond the required updating of the phrase “program or activity” pursuant to the Civil Rights Restoration Act, the Department has not substantively updated its Title VI regulations since 1973—over 50 years ago.

The Department’s implementing regulation describing the scope of prohibited discriminatory conduct, 28 CFR 42.104, currently includes prohibitions on conduct that has an unintentional disparate impact, discussed more fully below.

C. Relevant Supreme Court Decisions

The Supreme Court has found that Title VI, 42 U.S.C. 2000d, does not prohibit facially neutral policies that result in disparate outcomes when there is no discriminatory intent. Rather, it prohibits only intentional discrimination. In 1978, five years after the Department last substantively amended its Title VI regulations, the Supreme Court found that Congress intended Title VI to prohibit “only those racial classifications that would violate the Equal Protection Clause” if committed by a government actor. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (Powell, J., announcing the judgment of the Court); *id.* at 325, 328, 352–53 (Brennan, White,

Marshall, and Blackmun, JJ., concurring in part and dissenting in part); see also *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 198 n.2 (2023) (“*SFFA*”). Shortly before *Bakke*’s Title VI holding, the Supreme Court held that the Equal Protection Clause requires proof of intentional discrimination and that “a law or other official act” that has a “racially disproportionate impact” alone does not violate that Clause. *Washington v. Davis*, 426 U.S. 229, 239 (1976); see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”). Taken together, these Supreme Court cases establish that Title VI’s statutory prohibition, like the Equal Protection Clause, extends only to intentional discrimination.

In 2001, the Supreme Court, in *Alexander v. Sandoval*, reaffirmed that settled understanding. 532 U.S. at 280 (“[I]t is . . . beyond dispute . . . that [Title VI] prohibits only intentional discrimination.”). In *Sandoval*, the Supreme Court held that private plaintiffs lacked a private right of action to enforce the Department’s “disparate-impact regulations.” *Id.* at 285–87. Though the Supreme Court had previously found a private cause of action to enforce Title VI’s bar on intentional discrimination, *id.* at 279–80, that conclusion did not extend to enforcing the Department’s “disparate-impact regulations.” *Id.* at 285. As the Supreme Court explained, it is “clear” that “the disparate-impact regulations do not simply apply” the statutory prohibition, as the regulations “forbid conduct that [Title VI] permits,” so it is equally “clear that the private right of action to enforce [Title VI] does not include a private right to enforce these regulations.” *Id.* While the Supreme Court in *Sandoval* “assume[d],” without deciding, that the Department’s disparate-impact regulations were valid, the Court explained that the regulations are in “considerable tension” with the Supreme Court’s Title VI precedents. Similarly, the regulations do not “authoritatively” construe Title VI because the regulations “forbid conduct”—namely, policies that unintentionally result in a disparate impact—that Title VI “permits.” *Id.* at 281–82, 284–85; see also *id.* at 286 n.6 (“[Title VI] permits the very behavior that the regulations forbid.”).

Finally, in 2024, the Supreme Court overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *Loper*

Bright Enters. v. Raimondo, 603 U.S. 369, 409–12 (2024). In reaching that result, the Supreme Court made clear that “statutes . . . have a single, best meaning” that is “‘fixed at the time of enactment.’” *Id.* at 400 (quoting *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018)). Thus, Title VI’s bar on discrimination can have only one meaning. And under Supreme Court precedent, the single, best meaning of Title VI is that it “prohibits only intentional discrimination” and “permits” facially neutral policies that result in disparate outcomes when there is no discriminatory intent. *Sandoval*, 532 U.S. at 280, 286 n.6.

D. Executive Order 14281

On April 23, 2025, the President issued Executive Order 14281. This Order restated the “bedrock principle of the United States . . . that all citizens are treated equally under the law.” 90 FR at 17537. The Order explained that this “principle guarantees equality of opportunity, not equal outcomes,” and “promises that people are treated as individuals, not components of a particular race or group.” *Id.*

That Order also explained that disparate-impact liability “endangers this foundational principle.” *Id.* Disparate-impact liability, the Order reasoned, “all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability.” *Id.* As the Order explained, disparate-impact liability “not only undermines our national values, but also runs contrary to equal protection under the law and, therefore, violates our Constitution.” *Id.*

The Order relayed that because of disparate-impact liability’s problems, “[i]t is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals.” *Id.* The Order directed the Attorney General to, among other things, review Title VI regulations and “initiate appropriate action to repeal or amend” them “to the extent they contemplate disparate-impact liability.” *Id.* at 17538.

Section 3 of the Order also specifically revoked prior Presidential approvals of the disparate-impact regulations promulgated under Title VI, including the presidential approval of July 25, 1966, of 28 CFR 42.104(b)(2) and the presidential approval of July 5, 1973, of 28 CFR 42.104(b)(3), (b)(6)(ii) and (c)(2). *Id.* Section 5 of the Order directed the Attorney General to “initiate appropriate action to repeal or

amend the implementing regulations for Title VI of the Civil Rights Act of 1964 for all agencies to the extent they contemplate disparate-impact liability.” *Id.* Accordingly, this rule revises the Department’s currently existing Title VI regulations to effectuate the Order’s policy and purpose.

In any event, the Department would have independently initiated steps toward making these changes regardless of Executive Order 14281. Even if Executive Order 14281 did not exist, in other words, the Department would have taken steps to adopt the policy to eliminate the use of disparate-impact liability under Title VI. The Order states, and the Department firmly agrees, that a “bedrock principle of the United States is that all citizens are treated equally under the law. This principle guarantees equality of opportunity, not equal outcomes. It promises that people are treated as individuals, not components of a particular race or group. It encourages meritocracy and a colorblind society,” not race-, color-, or national-origin-based favoritism. 90 FR at 17537. And adherence to this principle, including in the issuance of grants, “is essential to creating opportunity, encouraging achievement, and sustaining the American Dream.” *Id.* But imposing disparate-impact liability endangers these policy objectives. Disparate-impact liability also raises serious constitutional concerns, is in considerable tension with the original public meaning of Title VI, creates confusion, increases the costs of compliance, and does not serve the public interest. After considering the relevant issues and factors and weighing the relevant considerations, the Department concludes that these reasons together support eliminating disparate-impact liability from the Department’s Title VI regulations. In any event, the Department concludes that each reason is a separate and independent basis for eliminating disparate-impact liability from the Department’s Title VI regulations.

E. Need for Rulemaking

The Department’s regulation at 28 CFR 42.104, entitled “Discrimination prohibited,” contains several provisions that prohibit conduct or activities causing unintentional disparate impact, without a statutory or constitutional basis for doing so, and in some instances, may encourage or even require unlawful discrimination labeled as “affirmative action.” Section 42.104(b)(2) is the current regulation’s general disparate-impact prohibition, which states that a “recipient . . . may

not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.” 28 CFR 42.104(b)(2). Beyond that general prohibition, section 42.104(b)(3) addresses a Federal funding recipient’s selection of the site or location of facilities and includes two references to “effect” that extend the scope of prohibited conduct to include conduct with unintentional disparate impact. *Id.* 42.104(b)(3). Section 42.104(b)(6) concerns the use of “affirmative action,” and provides that funding recipients may (and sometimes must) use race, color, or national origin to overcome unintentional disparate “effects,” but does not expressly specify that the funding recipient must narrowly tailor such use nor that this use must serve a compelling governmental interest, as is required to satisfy strict scrutiny. *Id.* 42.104(b)(6). Finally, section 42.104(c) addresses prohibited discriminatory employment practices and extends beyond intentional discrimination to prohibiting conduct that “tends” to have a discriminatory effect. *Id.* 42.104(c)(2).

There are serious statutory and constitutional concerns with the legality of the Department’s Title VI disparate-impact regulations. The Department also has serious policy concerns with its current disparate-impact regulations because they create confusion, undermine public confidence in the nation’s civil rights laws and the rule of law, and produce burdensome litigation and compliance costs.

1. Serious Legal Concerns

There are serious statutory concerns as to whether the Title VI statute authorizes the disparate-impact provisions of the current regulations. As the Supreme Court has made clear, Title VI prohibits “only intentional discrimination” and “permits” facially neutral policies that result in disparate outcomes when there is no discriminatory intent. *Sandoval*, 532 U.S. at 280, 286 n.6. That is the “single, best meaning” of Title VI. *Loper Bright*, 603 U.S. at 400. As summarized above, *Sandoval* calls into serious doubt the legality of the Department’s “disparate-impact regulations.” *Sandoval*, 532 U.S. at 281–82, 284–85 (noting that the Department’s regulations are in “considerable tension” with the Supreme Court’s Title VI precedents); *see also id.* at 286 n.6 (“[Title VI] permits the very behavior that the regulations forbid.”). Although *Sandoval* resolved only the question of private enforceability, subsequent cases

such as *Loper Bright* have made clear that the Department cannot extend Title VI beyond its original public meaning. *See* 603 U.S. at 412–13 (holding that “courts must . . . ensur[e] that [an] agency acts within” its statutory authority). And even in the absence of Supreme Court precedent, the Department would have concluded that the best reading of Title VI is that it prohibits only intentional discrimination.

Title VI authorizes agencies to promulgate regulations “to effectuate” the statute’s prohibition of intentional discrimination. 42 U.S.C. 2000d–1. The current regulations’ extension of prohibited conduct to include conduct with an unintentional disparate impact reaches a vastly broader scope than the statute itself. This scope is too broad to be considered a simple prophylactic measure aimed at preventing intentional discrimination. *See Sandoval*, 532 U.S. at 286 n.6 (“[Title VI] permits the very behavior that the regulations forbid.”). Thus, the disparate-impact regulations do not “effectuate” Title VI. 42 U.S.C. 2000d–1.

There are also serious concerns about whether the Department’s Title VI regulations pass constitutional muster under the Equal Protection Clause. As the Supreme Court recently held in *SFFA*, “the Equal Protection Clause . . . applies without regard to any differences of race, of color, or of nationality—it is universal in its application” and the “guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.” 600 U.S. at 206 (internal quotation marks omitted) (first quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); and then quoting *Bakke*, 438 U.S. at 289–90 (Powell, J.)). Despite the promises of the Equal Protection Clause, a funding recipient’s risk of disparate-impact liability under the Department’s regulations is triggered by unintentional disparate outcomes, which the recipient may not even know about without investigation. To evaluate and avoid this risk, the funding recipient must incur investigatory costs, such as conducting an impact analysis, and is coerced to proactively consider race, color, and national origin, and potentially use it to change the unintended disparate outcomes. In short, disparate-impact liability encourages and, in some cases, requires covered entities to engage in the intentional use of race and racial balancing to eliminate those disparate outcomes by treating certain racial groups differently from others—the exact conduct the Equal Protection

Clause forbids. *See id.* This serious constitutional concern further confirms that the best reading of Title VI is that it prohibits only intentional discrimination and does not authorize the Department to impose disparate-impact liability. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” (citing *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 499–501, 504 (1979))).

This use of race, color, or national origin violates the Equal Protection Clause unless it survives review under the “daunting” strict-scrutiny standard. *SFFA*, 600 U.S. at 206; *see also Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2310 (2025) (“Strict scrutiny—which requires a restriction to be the least restrictive means of achieving a compelling governmental interest—is ‘the most demanding test known to constitutional law.’” (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997))). The use of race, color, or national origin necessitated by the disparate-impact provisions runs into serious issues with the requirement of narrow tailoring to achieve a compelling interest. *SFFA*, 600 U.S. at 206–07.

Similarly, the “affirmative action” provision authorizes and sometimes requires the intentional use of race without requiring that this intentional use be narrowly tailored to serve a recognized compelling interest. Instead, it encourages intentional racial balancing “to overcome the effects of” unintended racial disparities. 28 CFR 42.104(b)(6). Thus, for substantially the same reasons as above, the “affirmative action” provision raises serious constitutional concerns.

As summarized above, there are serious statutory and constitutional concerns with the Department’s disparate-impact regulations. But even if the regulations were legal, the Department finds that eliminating the potential constitutional concerns addressed above would independently justify the amendment of the regulations. *Cf. U.S. Tel. Ass’n v. FCC*, 188 F.3d 521, 528 (D.C. Cir. 1999) (concluding it was not “arbitrary and capricious” to adopt a certain policy in order to “avoid[] raising a non-trivial constitutional question”). And even if the regulations did not raise serious constitutional concerns, the Department finds that eliminating the costs and confusion caused by the mismatch

between the statute and the disparate-impact regulations would independently justify the repeal of the regulations.

2. Serious Policy Concerns

The Department also has serious policy concerns with the Title VI regulations’ imposition of disparate-impact liability. While the Department expresses its policy concerns with disparate-impact liability independent of Executive Order 14281, that Order sets forth many valid policy concerns with disparate-impact liability. As noted in section 1 of the Order,

On a practical level, disparate-impact liability has hindered businesses from making hiring and other employment decisions based on merit and skill, their needs, or the needs of their customers because of the specter that such a process might lead to disparate outcomes, and thus disparate-impact lawsuits. This has made it difficult, and in some cases impossible, for employers to use bona fide job-oriented evaluations when recruiting, which prevents job seekers from being paired with jobs to which their skills are most suited—in other words, it deprives them of opportunities for success.

90 FR at 17537. Moreover, the legal concerns identified above have caused uncertainty and confusion for Federal funding recipients as to whether and when they need to comply with the disparate-impact regulations and when they can or must consider race, color, and national origin. As explained above, *Sandoval* casts substantial doubt on the validity of the disparate-impact regulations that many Federal departments and agencies have promulgated pursuant to Title VI. 532 U.S. at 280–82.

Additionally in practice, and as explained above, disparate-impact liability leads covered entities to engage in racial balancing even as the underlying Title VI statute forbids intentional racial discrimination. This tension tends to create confusion, undermine public confidence in the nation’s civil rights laws, and undermine public confidence in the rule of law itself, as the law seems to both forbid and require the same conduct.

These problems are amplified by the arbitrary nature of the racial and ethnic categories typically used to measure disparate effects, which, by virtue of their arbitrariness, typically lack a meaningful connection to a compelling interest. *See, e.g., SFFA*, 600 U.S. at 216–17 (explaining that the “[racial] categories” utilized by Harvard and University of North Carolina were “themselves imprecise in many ways” and “the use of these opaque racial

categories undermine[d], instead of promote[d], [their] goals”). This confusion undermines the law’s ability to teach principles of nondiscrimination and is evident in, among other things, many of the grant proposals that the Department awarded funds to in past years. Many of the grant proposals explicitly targeted certain racial groups. *See, e.g., OVC FY 2022 Bridging Inequities—Legal Services and Victims’ Rights Enforcement for Underserved Communities* at 5, Off. of Just. Progs. (Apr. 25, 2022), <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/o-ovc-2022-171291.pdf> (the Department awarding \$5 million FY 2022 to expand access to legal assistance for victims of crime in communities comprised of “Black people, Hispanic and Latino/a/e people, Native American and other Indigenous peoples of North America (including Alaska Natives, Eskimos, and Aleuts), Asian Americans, Native Hawaiians, and Pacific Islanders”). The Department believes that these policy concerns independently justify repealing certain parts of its regulation to cure this confusion, remove the incentive for covered entities to engage in racial balancing, and maintain clarity and public confidence in the nation’s civil rights laws.

The Department has considered the view that looking at disparate effects can sometimes be useful in uncovering or deterring subtle intentional discrimination or intentional indifference to unnecessary and arbitrary barriers. But that view’s alleged benefits are outweighed by the other issues and factors the Department has considered. And in any event, the concern is mitigated by the fact that eliminating disparate-impact liability does not preclude the use of data on disparate outcomes to help prove intentional discrimination. Indeed, under the Department’s Title VI regulations, which the current changes do not alter, “recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of federally assisted programs.” 28 CFR 42.106(b). Both the Department and private litigants rely on such data as a potential indicator of intentional discrimination. This use of statistical disparity to help establish, as an evidentiary matter, liability for *intentional* discrimination materially differs from using it to impose liability for an unintentional disparate impact.

The Department has also considered the alternative of trying to adopt a modified version of disparate-impact liability, for example, by requiring

covered entities to remedy unintentional discrimination for only certain types of cases in education or housing. But any version of imposing liability for unintentional discrimination is inconsistent with Title VI's original public meaning. Regardless, even a modified version of disparate-impact liability would not eliminate the Department's serious legal and policy concerns. The Department determines that any benefits from a regulation adopting alternative versions of disparate-impact liability are outweighed by the Department's legal and policy concerns. And even if possible, developing such a rule would not solve the confusion or rule-of-law concerns expressed above, nor reduce the compliance and litigation costs that covered entities face. The Department believes that the better course is to avoid the complexities, costs, and litigation associated with this alternative, even if eliminating disparate-impact liability ultimately would leave some problems unaddressed and others inadequately addressed.

The Department has additionally considered the potential reliance interests of funding recipients and others on the disparate-impact regulations. The *Sandoval* decision in 2001, however, cast serious doubt on the continuing viability of the

regulations more than 20 years ago. At least since *Sandoval*, the Department's enforcement of its Title VI disparate-impact regulations has been minimal and sporadic. And Executive Order 14281 also directed all agencies to "deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability," including specifically the Department's Title VI disparate-impact regulations. 90 FR at 17538. The Department accordingly believes that any reliance interests should be minimal and do not outweigh the Department's legal and other policy concerns. Further, each of the Department's concerns, whether considered cumulatively or separately, outweighs any reliance interests.

The Department notes that *Sandoval* has also led to a divergence between Title VI enforcement by private plaintiffs and enforcement by Federal departments and agencies. After *Sandoval*, private plaintiffs can enforce only Title VI's statutory prohibition on intentional discrimination, while the Department could continue to pursue disparate-impact liability. Repealing the disparate-impact regulations would eliminate this incongruent enforcement.

Overall, after considering the relevant issues and factors and weighing the relevant considerations, the Department finds that, regardless of the legality of the Department's disparate-impact

regulations, the above summarized policy concerns, when viewed separately or cumulatively, independently justify the repeal of its disparate-impact regulations.

III. Regulatory Amendments

This rule's regulatory changes address the concerns regarding the statutory authority that the Supreme Court questioned in *Sandoval* and the other legal and policy concerns discussed above, harmonize the implementing regulations' scope with the conduct that Congress intended Title VI to prohibit, promote consistent enforcement among private plaintiffs and Federal departments and agencies, and provide much needed clarity to the courts and Federal funding recipients and beneficiaries.

For the reasons summarized above, the Department amends the following provisions in its Title VI implementing regulation that explain the particular types of discrimination prohibited, located at 28 CFR 42.104.

A. Table Summarizing Amendments

The table below indicates the exact wording changes. For each section indicated in the left column, the text shown in the middle column is removed and the text shown in the right column is added:

Section	Remove	Add
42.104(b)(2)	Full text of paragraph: "(2) A recipient . . . or national origin."	"[Removed]".
42.104(b)(3)	"or effect" from both places.	
42.104(b)(6)	Full text of paragraph (6), subparts (i) and (ii).	
42.104(c)(1)	"(1)" from "(c) Employment practice. (1) Whenever a primary objective of the".	
42.104(c)(2)	Full text of paragraph: "(2) In regard to . . . of beneficiaries."	

B. Section-by-Section Analysis

Section 42.104(b)(2)

Section 42.104(b)(2) is the current regulation's general prohibition of conduct with unintentional disparate impact. It expands prohibited conduct from purposeful discrimination to imposed liability on Federal funding recipients who "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination." Because section 42.104(b)(2)'s only purpose is to extend the scope of Title VI to reach unintentional disparate-impact discrimination, this rule deletes this paragraph in its entirety. It thus amends the Department's Title VI implementing regulations to conform to the scope of coverage Congress intended when it enacted Title VI and to address the legal and policy considerations and

determinations described in this document. The rule replaces paragraph (b)(2) with a placeholder to maintain the numbering accuracy of previous citations and other references to parts of this section.

Section 42.104(b)(3)

Section 42.104(b)(3) addresses a Federal funding recipient's or applicant's selection of the site or location of facilities. It provides that a funding recipient may not make selections with the "purpose or effect" of discriminating, or "with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of" Title VI or the Department's implementing regulations. The paragraph's two references to "effect" extend its scope to unintentional disparate impacts. This rule deletes both "or effect" references

to conform paragraph (b)(3) more closely to the scope of coverage Congress intended when it enacted Title VI and to address the legal and policy considerations and determinations described in this document.

Section 42.104(b)(6)

Section 42.104(b)(6) deals with "affirmative action." Paragraph (b)(6)(ii) authorizes affirmative action even in the absence of a finding of prior discrimination in a program "to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." This provision points not to intentional discrimination, but rather to the unintentional "effects of conditions." It consequently encourages intentional racial classifications, racial preferences, and other race-based actions without specifying the

compelling governmental interest and narrow tailoring that the Equal Protection Clause demands. This section has long been unlawful under an Equal Protection Clause analysis.

Paragraph (b)(6)(i) requires that a recipient “must take affirmative action to overcome the effects of prior discrimination” if, in “administering a program,” the funding “recipient has previously discriminated against persons on the ground of race, color, or national origin.” This provision goes beyond the Equal Protection Clause, which permits in limited circumstances, but does not mandate, a government to take narrowly tailored action to remedy the effects of its identified past discrimination. *See, e.g., Bakke*, 438 U.S. at 307 (Powell, J.). Moreover, even putting aside the mandatory language, this provision does not expressly require narrow tailoring to counter particular past discrimination, but rather just “affirmative action to overcome the effects of prior discrimination.” This provision accordingly promotes potentially illegal race, color, and national origin discrimination. Moreover, in some instances, it may even coerce recipients to consider and use race preferences when the recipient does not want to. This is contrary to the Department’s goal of promoting and defending a culture of nondiscrimination and is destructive to the public’s understanding of and faith in the nation’s civil rights laws. This rule, therefore, removes paragraph (b)(6).

Section 42.104(c)

Section 42.104(c) addresses prohibited discriminatory employment practices. Paragraph (c)(1) prohibits intentionally discriminatory employment practices in a program when a primary objective of the Federal financial assistance that program receives is to provide employment. Paragraph (c)(2) extends the prohibition on discrimination to employment practices of the funding recipient even when the financial assistance “does not have providing employment as a primary objective” if discrimination in the non-funded “employment practices tends, on the ground of race, color, or national origin, to exclude persons from participation in, to deny them the benefits of or to subject them to discrimination under the program receiving Federal financial assistance.” This paragraph does not prohibit only intentional discrimination but rather extends the prohibition to conduct that “tends” to have a discriminatory effect.

Moreover, the Department notes that paragraph (c)(2)’s extension to

employment practices where the Federal funding’s primary objective is not to provide employment conflicts with the statutory limitation found in 42 U.S.C. 2000d–3. That section states that “[n]othing contained in [Title VI] shall be construed to authorize action under [Title VI] by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.” 42 U.S.C. 2000d–3; *see also Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 627–28 n.6 (1987) (citing the statutory limitation and noting Congress’s intent that Title VI not “impinge” on Title VII, which prohibits discriminatory employment practices). The rule deletes paragraph (c)(2) to amend the regulation so that it more closely adheres to the scope of conduct Congress prohibited with Title VI and to address the legal and policy considerations and determinations described in this document. This rule makes no change to the current text of paragraph (c)(1) except for a technical edit to reflect the removal of paragraph (c)(2).

IV. Severability

The Department’s position is that each of the amendments serve a vital, related, but distinct purpose. The Department also confirms that each of the amendments is intended to operate independently of each other and that the potential invalidity of one amendment should not affect the other amendments. The Department would adopt any of the amendments independent to, and regardless of, the invalidity of a separate amendment.

V. Regulatory Certifications

Administrative Procedure Act

The Department issues this final rule without prior public notice and comment or a delayed effective date pursuant to the Administrative Procedure Act’s exception for rules “relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” 5 U.S.C. 553(a)(2).

Title VI concerns non-discrimination conditions on the receipt of Federal financial assistance, and more particularly to the receipt of Federal “[g]rants and loans,” “property,” “personnel” and “[a]ny Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.” 28 CFR 42.102(c); *see also* 28 CFR 42.105 (requiring funding recipient sign

contractual assurance of compliance with Title VI); *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 217–18 (2022) (observing that Congress enacted Title VI “[p]ursuant to its authority to ‘fix the terms on which it shall disburse federal money’” (internal citation omitted)). *Cf. Education Programs or Activities Receiving or Benefitting from Federal Financial Assistance*, 82 FR 46655, 46655 (Oct. 6, 2017) (invoking the section 553(a)(2) exception to amend Title IX regulations to “promote consistency in the enforcement of Title IX for [the Department of Agriculture] financial assistance recipients”); *Preserving Community and Neighborhood Choice*, 85 FR 47899 (Aug. 7, 2020) (invoking the exception to repeal Housing and Urban Development rule regarding Federal grantees); *Participation by Minority Business Enterprise in Department of Transportation Programs*, 53 FR 18285 (May 23, 1988) (invoking the exception to expand coverage of Department of Transportation regulation regarding Federal Aviation Administration’s airport financial assistance program); *Nondiscrimination on the Basis of Handicap in Federally Assisted Programs—Suspension of Guidelines with Respect to Mass Transportation*, 46 FR 40687 (Aug. 11, 1981) (invoking the exception to suspend Department of Justice guidelines regarding prohibiting disability discrimination in transportation programs and activities receiving Federal financial assistance).

Indeed, invoking 5 U.S.C. 553(a)(2) is consistent with the U.S. Office for Management and Budget’s (OMB) definition for Federal financial assistance under 2 CFR 200.1, which defines Federal financial assistance with the same categories as the Administrative Procedure Act’s exception for rules “relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” 5 U.S.C. 553(a)(2). With potentially limited exceptions not applicable to the Department, all the forms of Federal financial assistance set forth under 2 CFR 200.1 that the Department administers would fall under the “public property, loans, grants, benefits, or contracts” exception. Thus, the Department issues this final rule without prior public notice and comment or a delayed effective date under 5 U.S.C. 553(a)(2).

Executive Orders 12866 and 13563 (Regulatory Review)

The Department has determined that this rulemaking is a “significant regulatory action” under section 3(f) of

Executive Order 12866, 58 FR 51735, 51738 (Sep. 30, 1993), but it is not an “economically significant” action.

Accordingly, this rule has been submitted to the Office of Management and Budget (“OMB”) for review.

This regulation has been drafted and reviewed in accordance with Executive Order 12866 section 1(b), *id.* at 51735, and in accordance with Executive Order 13563 section 1(b), 76 FR 3821, 3821 (Jan. 18, 2011), which supplements and reaffirms the principles of Executive Order 12866. These Executive Orders direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. 58 FR at 51735; 76 FR at 3821.

Executive Order 13563 also recognizes that some benefits and costs are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify. *Id.*

As explained in the preamble, the regulatory modifications this rule makes are necessary to conform Department regulations to Executive Order 14281, address serious concerns regarding the Department’s Title VI regulation that the Supreme Court raised in *Sandoval*, harmonize the implementing regulation’s scope with the scope of conduct that Congress intended Title VI to prohibit, promote consistency in enforcement among private plaintiffs and Federal departments and agencies, and provide much needed clarity to courts and Federal funding recipients and beneficiaries regarding the scope of the Department’s Title VI regulations. Indeed, with respect to section 42.104(c) of the Department’s Title VI-implementing regulations, the changes this rule makes are clearly necessary to bring the regulations into compliance with 42 U.S.C. 2000d–3. In short, this rule is necessary to conform the Department’s regulation to existing statutory law, as interpreted by the Supreme Court.

Data limitations make the costs and benefits of the rule difficult to quantify. While not representing the monetary impact of the rule, more generally the Department of Justice issued approximately 21,600 separate awards totaling approximately \$19.6 billion over the past four years. In FY2023 alone, the Department issued approximately 5,900 separate awards totaling \$5.7 billion. The Department’s Title VI related, active investigations and compliance reviews regarding these funds and their recipients totaled just over 100 for FY2020 through FY2024.

The Department does not track which of its investigations and compliance reviews involve solely allegations of disparate-impact discrimination. For enforcement actions that relate to both intentional discrimination and conduct having an unintentional disparate impact, the Department does not track and cannot reliably quantify the costs attributable to the varying disparate-impact portions of enforcement actions. That the existence of a disparate impact is sometimes a factor that may be considered in determining whether discrimination was intentional further impedes monetizing costs and benefits. Therefore, the overall cost effect on the Department is difficult to quantify. The deregulatory action should decrease the Department’s enforcement costs, however. It should also have the benefit, also difficult to quantify, of bringing the Department’s conduct in line with the law. Similarly, the Department is unable to quantify how funding recipients will respond to the regulatory changes. But the deregulatory action should result in greater flexibility and lower compliance costs for recipients.

The Department recognizes that a funding recipient may receive Federal funds from sources other than, and in addition to, the Department. Because of the Department’s unique role in the interpretation and enforcement of Title VI, as discussed above, the Department expects that this rule will cause other Federal departments and agencies to consider similarly revising their Title VI regulations. Regardless, the Department does not envision that this rule will appreciably increase administrative costs or compliance costs for funding recipients who must also adhere to the regulations of another department or agency. The deregulatory action the Department takes here does not create any new obligations for funding recipients. On the contrary, by eliminating disparate-impact liability from the regulation, it eliminates a source of regulatory confusion, narrows and makes more specific the conduct prohibited, and thus lessens the costs of compliance and potential liability. Moreover, recipients who receive funds for the same program or activity from more than one Federal entity already enter into separate contractual assurances with each funding entity, *see, e.g.*, 28 CFR 42.105. These contractual assurances already impose varying requirements that each Federal funding source deems necessary. Funding recipients will continue to be held to the most stringent contractual assurance and regulation.

Based on the analysis of the practical qualitative costs and benefits noted

above, the Department believes that this rule is consistent with the principles of Executive Orders 12866 and 13563, including the requirements that, to the extent permitted by law, the Department adopt a regulation only upon a reasoned determination that its benefits justify its costs and choose a regulatory approach that maximizes net benefits. *See* 58 FR at 51735; 76 FR at 3821.

Executive Order 14192 (Unleashing Prosperity Through Deregulation)

Executive Order 14192 requires an agency, unless prohibited by law, to identify at least 10 existing regulations to be repealed when the agency publicly proposes for notice and comment or otherwise promulgates a new regulation. 90 FR 9065, 9065 (Jan. 31, 2025). In furtherance of this requirement, section 3(c) of the Order requires that “any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least 10 prior regulations.” *Id.* By revising the Department’s current Title VI regulations, which extend prohibited conduct to include unintentional disparate impacts and thus expand the scope of those regulations to a vastly broader range of conduct than the statute prohibits, this rule eliminates unnecessary regulation. Accordingly, the Department expects this rule to be a deregulatory action under Executive Order 14192.

Executive Order 14294 (Fighting Overcriminalization in Federal Regulations)

Executive Order 14294 requires agencies promulgating regulations with criminal regulatory offenses potentially subject to criminal enforcement to “explicitly describe the conduct subject to criminal enforcement, the authorizing statutes, and the mens rea standard applicable to” each element of those offenses. 90 FR 20363, 20363 (May 9, 2025). This rule does not impose a criminal regulatory penalty and is thus exempt from Executive Order 14294 requirements.

Executive Order 13132 (Federalism)

This rule will not have a substantial, direct effect on the relationship between the national government and the states, on distribution of power and responsibilities among various levels of government, or on states’ policymaking discretion. States that choose to receive Federal financial assistance from the Department do so voluntarily and agree to comply with relevant statutory requirements as a condition of receiving such funding. This rule does not subject

states or any other funding recipients or beneficiaries to new obligations. This rule amends and clarifies existing regulations that are required by statute. Therefore, in accordance with section 6 of Executive Order 13132, 64 FR 43255, 43257–58 (Aug. 4, 1999), the Department has determined that these amendments do not have sufficient Federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and (b)(2) of Executive Order 12988 to specify provisions in clear language. See 61 FR 4729, 4731–32 (Feb. 5, 1996). Pursuant to section 3(b)(1)(I) of the Executive Order, *id.* at 4731, nothing in this proposed or any previous rule (or in any administrative policy, directive, ruling, notice, guideline, guidance, or writing) directly relating to the Program that is the subject of this proposed rule is intended to create any legal or procedural rights enforceable against the United States.

Regulatory Flexibility Act

This rule does not require a regulatory flexibility analysis under the Regulatory Flexibility Act, 5 U.S.C. 603, 604, because, for the reasons described above, no notice of proposed rulemaking is required under 5 U.S.C. 553. See *Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1123–24 (9th Cir. 2006) (noting that the RFA does not apply when an agency validly invokes an exception to the public comment requirements of 5 U.S.C. 553). Further, the Department, in accordance with 5 U.S.C. 605(b), has reviewed these regulations and certifies that the rule's changes will not have a significant economic impact on a substantial number of small entities, in large part because these regulatory changes do not impose any new substantive obligations on Federal funding recipients. The rule amends and clarifies existing regulations that are required by Title VI. The rule merely brings the Department into compliance with the Equal Protection Clause and harmonizes the scope of its regulations to conform with the scope of Title VI, which does not prohibit unintentional disparate impact. All Federal funding recipients have been bound by the existing standards that will remain in place after this rule since their initial promulgation.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (“UMRA”), 2 U.S.C. 1501 *et seq.*, requires agencies to prepare several analytic statements before proposing any rule that may result in annual expenditures of \$100 million by state, local, or tribal governments, or the private sector. 2 U.S.C. 1532(a). The UMRA also, however, excludes from its coverage any proposed or final Federal regulation that “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” 2 U.S.C. 1503(2). Accordingly, this rulemaking is not subject to the provisions of the UMRA.

Congressional Review Act

This rule is not a “major rule” as defined by the Congressional Review Act, 5 U.S.C. 804(2). This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of companies based in the United States to compete with foreign-based companies in domestic and export markets. The rule merely narrows the scope of the Department’s Title VI regulations to conform them to the scope of Title VI and the Equal Protection Clause. Doing so does not impose any new obligations on any recipients of Federal funding.

Paperwork Reduction Act of 1995

This rule will not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

List of Subjects for 28 CFR Part 42

Administrative practice and procedure, Civil rights, Equal employment opportunity, Grant programs.

Accordingly, for the reasons set forth above, and by the authority vested in me as the Attorney General by law, part 42 of title 28 of the Code of Federal Regulations is amended as follows:

PART 42—NONDISCRIMINATION; EQUAL EMPLOYMENT OPPORTUNITY; POLICIES AND PROCEDURES

Subpart C—Nondiscrimination in Federally Assisted Programs—Implementation of Title VI of the Civil Rights Act of 1964

■ 1. The authority citation for subpart C of part 42 is revised to read as follows:

Authority: 42 U.S.C. 2000d, 2000d–1, 2000d–7; E.O. 12250, 45 FR 72995, 3 CFR, 1980 Comp., p. 298; E.O. 14281, 90 FR 17537.

■ 2. In § 42.104:

- a. Remove and reserve paragraph (b)(2);
- b. Revise paragraph (b)(3);
- c. Remove paragraph (b)(6); and
- d. Revise paragraph (c).

The revisions read as follows:

§ 42.104 Discrimination prohibited.

* * * * *
(b) * * *

(3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this subpart applies, on the ground of race, color, or national origin; or with the purpose of defeating or substantially impairing the accomplishment of the objectives of the Act or this subpart.

* * * * *

(c) *Employment practices.* Whenever a primary objective of the Federal financial assistance to a program to which this subpart applies is to provide employment, a recipient of such assistance may not (directly or through contractual or other arrangements) subject any individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion or transfer, rates of pay or other forms of compensation, and use of facilities). That prohibition also applies to programs as to which a primary objective of the Federal financial assistance is to assist individuals, through employment, to meet expenses incident to the commencement or continuation of their education or training, or to provide work experience which contributes to the education or training of the individuals involved. The requirements applicable to construction employment under any such program shall be those specified in or pursuant to part III of Executive Order 11246 or any Executive order which supersedes it.

Dated: December 5, 2025.

Pamela Bondi,
Attorney General.

[FR Doc. 2025–22448 Filed 12–9–25; 8:45 am]

BILLING CODE 4410–13–P



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

**MEMORANDUM FOR SECRETARIAL OFFICERS AND HEADS OF OPERATING
ADMINISTRATIONS**

From: The Secretary

Subject: Implementation of Executive Orders Addressing Energy, Climate Change, Diversity,
and Gender

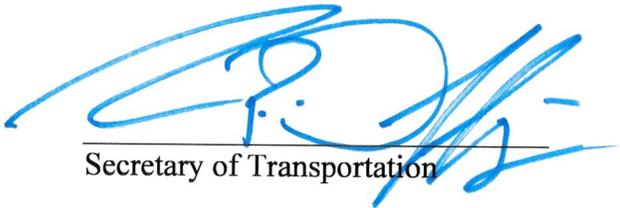
DATE: January 29, 2025

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1. This Memorandum sets forth the initial steps to be taken by the U.S. Department of Transportation (Department or DOT) to implement the provisions of several executive orders including those titled as follows: several executive orders and memoranda issued by the President on January 20, 2025, including: Executive Order 14148, *Initial Rescissions of Harmful Executive Orders and Actions*; Executive Order 14151, *Ending Radical And Wasteful Government DEI Programs And Preferencing*; Executive Order 14154, *Unleashing American Energy*; and an Executive Order of January 20, 2025 titled "*Defending Women From Gender Ideology Extremism And Restoring Biological Truth To The Federal Government*" (collectively referred to herein as "relevant executive orders"), which direct Federal agencies, where and as consistent with law, to identify and eliminate all orders, directives, rules, regulations, notices, guidance documents, funding agreements, programs, and policy statements, or portions thereof, which were authorized, adopted, or approved between noon on January 20, 2021 and noon on January 20, 2025, and which reference or relate in any way to climate change, "greenhouse gas" emissions, racial equity, gender identity, "diversity, equity, and inclusion" goals, environmental justice, or the Justice 40 Initiative.
 2. All DOT Operating Administrations (OAs) and all components of the Office of the Secretary (OST) shall, within 10 days of the date of this Memorandum, identify and list in a written report to the Office of the General Counsel and the Office of the Under Secretary for Policy all DOT orders, directives, rules, regulations, notices, guidance documents, funding agreements, programs, and policy statements, or portions thereof, which are subject to the relevant executive orders.
 3. Within 10 days after submission of the report, all OAs and OST components shall, in coordination and consultation with the Office of the General Counsel and the Office of the Under Secretary for Policy, initiate all lawful actions necessary to rescind, cancel, revoke, and terminate all DOT orders, directives, rules, regulations, notices, guidance documents, funding agreements, programs, policy statements, or portions thereof, which are subject to the relevant executive orders and which are not required by clear and express statutory language.
 4. The Office of the General Counsel and the Office of the Under Secretary for Policy shall be responsible for overseeing compliance with this Memorandum and within 30 days of the date hereof shall

submit a written report to the Secretary regarding the status of compliance by each OA and OST component.

5. Pursuant to the relevant executive orders, the following Departmental Orders are hereby canceled:

DOT 1000.17	Department of Transportation Equity Council	Dec. 19, 2022
DOT 4360	Climate Change Adaptation and Resilience Policy for DOT Operational Assets	Sept. 18, 2023
DOT 5610.2C	U.S. Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-income Populations	May 16, 2021



Secretary of Transportation



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

May 19, 2025

MEMORANDUM FOR OFFICE OF THE ASSOCIATE ATTORNEY GENERAL
CIVIL DIVISION
CIVIL RIGHTS DIVISION
CRIMINAL DIVISION
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
ALL UNITED STATES ATTORNEYS

FROM: THE DEPUTY ATTORNEY GENERAL *Paul Blum*

SUBJECT: Civil Rights Fraud Initiative

Under Attorney General Bondi's leadership, "[t]he Department of Justice is committed to enforcing federal civil rights laws and ensuring equal protection under the law." Attorney General Memorandum, *Ending Illegal DEI and DEIA Discrimination and Preferences* (Feb. 5, 2025). One of the most effective ways to accomplish this objective is through vigorous enforcement of the False Claims Act, 31 U.S.C. § 3729 et seq., against those who defraud the United States by taking its money while knowingly violating civil rights laws.

The False Claims Act is the Justice Department's primary weapon against government fraud, waste, and abuse. Liability results in treble damages and significant penalties. It is implicated when a federal contractor or recipient of federal funds knowingly violates civil rights laws—including but not limited to Title IV, Title VI, and Title IX, of the Civil Rights Act of 1964—and falsely certifies compliance with such laws. Accordingly, a university that accepts federal funds could violate the False Claims Act when it encourages antisemitism, refuses to protect Jewish students, allows men to intrude into women's bathrooms, or requires women to compete against men in athletic competitions. Colleges and universities cannot accept federal funds while discriminating against their students.

The False Claims Act is also implicated whenever federal-funding recipients or contractors certify compliance with civil rights laws while knowingly engaging in racist preferences, mandates, policies, programs, and activities, including through diversity, equity, and inclusion (DEI) programs that assign benefits or burdens on race, ethnicity, or national origin. While racial discrimination has always been illegal, the prohibition on such policies became clear after the Supreme Court stated that "[e]liminating racial discrimination means eliminating all of it." *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 205 (2023).

President Trump reinforced that principle in Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, 90 Fed. Reg. 8633 (Jan. 21, 2025), explaining that racist policies “violate the text and spirit of our long-standing Federal civil-rights laws.” Nevertheless, many corporations and schools continue to adhere to racist policies and preferences—albeit camouflaged with cosmetic changes that disguise their discriminatory nature.

The federal government should not subsidize unlawful discrimination. To that end, I am standing up the Civil Rights Fraud Initiative. This Initiative will utilize the False Claims Act to investigate and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws. This Initiative will be co-led by the Civil Division’s Fraud Section, which enforces the False Claims Act, and the Civil Rights Division, which enforces civil rights laws. Each division will identify a team of attorneys to aggressively pursue this work together. Each of the 93 United States Attorney’s Offices will identify an Assistant United States Attorney to advance these efforts.

To ensure a comprehensive approach, the Civil Fraud Section and the Civil Rights Division will engage in regular coordination meetings and share relevant information about potential violations. The Civil Fraud Section and the Civil Rights Division will also engage with the Criminal Division, as well as with other federal agencies that enforce civil rights requirements for federal funding recipients, including the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development, and the Department of Labor. The Civil Fraud Section and the Civil Rights Division will also establish partnerships with state attorneys general and local law enforcement to share information and coordinate enforcement actions.

The Department recognizes that it alone cannot identify every instance of civil rights fraud. Congress likewise has recognized as much and, as a result, has authorized private parties to protect the public interest by filing lawsuits and litigating claims under the False Claims Act—and, if successful, sharing in any monetary recovery. *See* 31 U.S.C. § 3730. The Department strongly encourages these lawsuits. The Department also encourages anyone with knowledge of discrimination by federal-funding recipients to report that information to the appropriate federal authorities so that the Department may consider the information and take any appropriate action. Please visit <https://www.justice.gov/civil/report-fraud> for more information.