STATE OF INDIANA

Governor Mike Braun

DEPARTMENT OF ADMINISTRATION
Commissioner's Office

Indiana Government Center South
402 West Washington Street, Room W462
Indianapolis, IN 46204

August 26, 2025

The Honorable Todd Rokita
Attorney General of Indiana
302 W. Washington St.
IGCS 5th Floor
Indianapolis, IN 46204-2770

RE: Request for Opinion
Legality of Indiana Code chapter 4-13-16.5

Dear Attorney General Rokita:

In my capacity as the Commissioner of the Indiana Department of Administration (the "IDOA"), I respectfully request your advisory opinion—pursuant to Indiana Code section 4-6-2-5—concerning the legality of: (1) the Governor's Commission on Supplier Diversity (the "Commission"); and (2) the IDOA's continued implementation of the Minority and Women's Business Enterprises Program, as set forth in Indiana Code chapter 4-13-16.5 (the "M/WBE Program"), together with Indiana Code sections 4-13-1-4.3 and 4-30-1-2(5), Indiana Code chapters 4-33-14 and 4-35-11, Indiana Code sections 5-1.2-5-8, 5-16-1-17, 5-32-3-3(b) and 6-3.1-29-1, as well as any other Indiana statute or any Indiana Administrative Rule, to the extent they require compliance with the M/WBE Program (collectively, the "DBE Program").

The Commission and the M/WBE Program are governed by Indiana Code chapter 4-13-16.5. The remainder of the State law that constitutes part of the DBE Program is generally interpreted and implemented in accordance with this chapter.

In particular, Indiana Code section 4-13-16.5-2(g) provides, in part, that the duties of the Commission include the following:

(1) Identify minority business enterprises, women's business enterprises . . . in the state.

(2) Assess the needs of minority business enterprises, women's business enterprises. . . .

(3) Initiate aggressive programs to assist minority business enterprises, women's business enterprises . . . in obtaining state contracts.

(4) . . . .

(5) Include minority business enterprises, women's business enterprises . . . on solicitation mailing lists.

(6) Evaluate the competitive differences between qualified minority or women's nonprofit corporations and other than qualified minority or women's nonprofit corporations . . . that

offer similar services and make recommendation to the department on policy changes necessary to ensure fair competition among minority business enterprises, women's business enterprises . . . .

(7) Define the duties, goals, and objectives of the deputy commissioner of the department as created under this chapter to assure compliance by all state agencies, separate bodies corporate and politic, and state educational institutions with state and federal legislation and policy concerning the awarding of contracts (including, notwithstanding section 1(d) of this chapter or any other law, contracts of state educational institutions) to minority business enterprises, women's business enterprises . . . .

(8) Establish annual goals:

(A) for the use of minority and women's business enterprises; and

(B) derived from a statistical analysis of utilization study of state contracts (including, notwithstanding section 1(d) of this chapter or any other law, contracts of state educational institutions) that are required to be updated every five (5) years.

. . .

(11) Establish annual goals for the use of minority business enterprises, women's business enterprises . . . for any contract that:

(A) will be paid for in whole or in part with state grant funds; and

(B) involves the use of real property of a unit.

In addition, Indiana Code section 4-13-16.5-3 creates a deputy commissioner for supplier diversity development and places, in part, the following responsibilities on the deputy commissioner for the purpose of working with the Commission in the implementation of that chapter:

(1) Identify and certify minority business enterprises, women's business enterprises . . . for state projects.

(2) . . . .

(3) Periodically update the certification status of each minority business enterprise, women's business enterprise. . . .

(4) Monitor the progress in achieving the goals established under section 2(g)(8) and 2(g)(11) of this chapter.

(5) Require all state agencies, separate bodies corporate and politic, and state educational institutions to report on planned and actual participation of minority business enterprises, women's business enterprises . . . in contracts awarded by state agencies. The commissioner

> may exclude from the reports uncertified minority business enterprises, women's business enterprises. . . .

Moreover, Indiana Code section 4-13-16.5-4.5 requires each state educational institution to submit an annual report "regarding the state educational institution's progress in achieving the goals established under section 2 of this chapter for the use of minority business enterprises, women's business enterprises . . . as contractors."

BASIS OF REQUEST

On June 29, 2023, the Supreme Court of the United States decided *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023). In that case, the Court held Harvard's admission program violated the Equal Protection Clause of the Fourteenth Amendment because the program lacked sufficiently focused and measurable objectives warranting the use of race, unavoidably employed race in a negative manner, involved racial stereotyping, and lacked meaningful end points. *Id*. at 230.

On July 29, 2025, the Attorney General of the United States issued a memorandum entitled *Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination*. A copy of this Memorandum is attached to this letter for your convenience. The U.S. Attorney General explained the purpose of the Memorandum.

> One of our Nation's bedrock principles is that all Americans must be treated equally. Not only is discrimination based on protected characteristics illegal under federal law, but it is also dangerous, demeaning, and immoral. Yet in recent years, the federal government has turned a blind eye toward, or even encouraged, various discriminatory practices, seemingly because of their purportedly benign labels, objectives, or intentions. No longer. Going forward, the federal government will not stand by while recipients of federal funds engage in discrimination.
>
> This guidance clarifies the application of federal antidiscrimination laws to programs or initiatives that may involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion ("DEI") programs. Entities receiving federal funds, like all other entities subject to federal antidiscrimination laws, must ensure that their programs and activities comply with federal law and do not discriminate on the basis of race, color, national origin, sex, religion, or other protected characteristics—no matter the program's labels, objectives, or intentions.[1]

The Memorandum contends unlawful use of protected characteristics occurs when a federally funded entity or program considers race, sex, or any other protected trait as a basis for selecting candidates for contracts (e.g., vendor agreements).[2] The Memorandum provides the following as an example of an unlawful practice.

> **Sex-Based Selection for Contracts**: A federally funded state agency implements a DEI policy that prioritizes awarding contracts to women-owned businesses, automatically advancing female vendors or minority-owned businesses over equally or more qualified businesses without preferred group status. This includes any contract selection process that uses sex or race as a tiebreaker or primary criterion,

> such as policies favoring "minority- or women-owned" businesses without satisfying the appropriate level of judicial scrutiny.[3]

Then, the Memorandum provides the following suggested guidance to help entities comply with federal antidiscrimination laws.

> **Eliminate Diversity Quotas**: Focus solely on nondiscriminatory performance metrics, such as program participation rates or academic outcomes, without reference to race, sex, or other protected traits. And discontinue policies that mandate representation of specific racial, sex-based, or other protected groups in candidate pools, hiring panels, or final selections. For example, replace a policy requiring "at least one minority candidate per slate" with a process that evaluates all applicants based on merit.[4]

In early 2023, Mid-America Milling Company, LLC and Bagshaw Trucking Inc. filed suit against the United States Department of Transportation ("USDOT"), and they argued that USDOT's use of race- and sex-based presumptions in its Disadvantaged Business Enterprise program violated the equal protection components of the Fifth Amendment and the Administrative Procedure Act. Following the filing of this suit, in September 2024, the US District Court, Eastern District of Kentucky, granted Mid-America Milling Company's motion for preliminary injunction and enjoined USDOT from mandating the use of the presumptions in the program's contracts. On May 28, 2025, the United States Department of Justice submitted a proposed consent order to resolve the suit, and this proposed order would declare the program's presumptions unconstitutional and enjoin USDOT from approving contract goals or eligibility based on these presumptions.

Additionally, on June 12, 2025, Indiana joined twenty states in an amicus brief for that suit, calling attention to DBE programs across the country costing states millions of dollars by prohibiting states from selecting the lowest bids for a project and requiring states to discriminate unjustly by excluding opportunities to qualified companies or individuals that do not qualify under a DBE program.

QUESTIONS PRESENTED

1. Based on the above legal authority, federal law, and other relevant factors available to your Office, what is the legality of Indiana's DBE Program?

2. Depending on the answer for question 1 above, what is the legal obligation of the IDOA to comply with the requirements set forth in the Indiana Code for the DBE Program, including, for example, the requirement to conduct the 5-year diversity study pursuant to Indiana Code section 4-13-16.5-2(g)(8)?

3. Based on the above legal authority, federal law, and other relevant factors available to your Office, on its face, as described above, would an alternative program that focused on characteristics such as veterans status, small business status, and businesses domiciled in Indiana or with Indiana workers (the "Alternative Program") comply with the requirements set forth in current federal law?

4. Depending on the answers for questions 1, 2, and 3 above, is it permissible under the above legal authority, federal law, and other relevant factors available to your Office:

   (a) for the IDOA to no longer comply with the requirements set forth in the DBE Program, including, for example, the requirement to conduct the 5-year diversity study pursuant to Indiana Code section 4-13-16.5-2(g)(8)?

   (b) for the State to continue to honor contracts for which requests for proposals have been issued prior to the to the date of the answer to these questions?

   (c) for the Alterative Program to apply solely to contracts for which requests for proposals have been issued on or after the date of the answer to these questions, but not to any contracts, for which requests for proposals have been issued before such date?

Sincerely,

Brandon Clifton
Commissioner
Indiana Department of Administration