



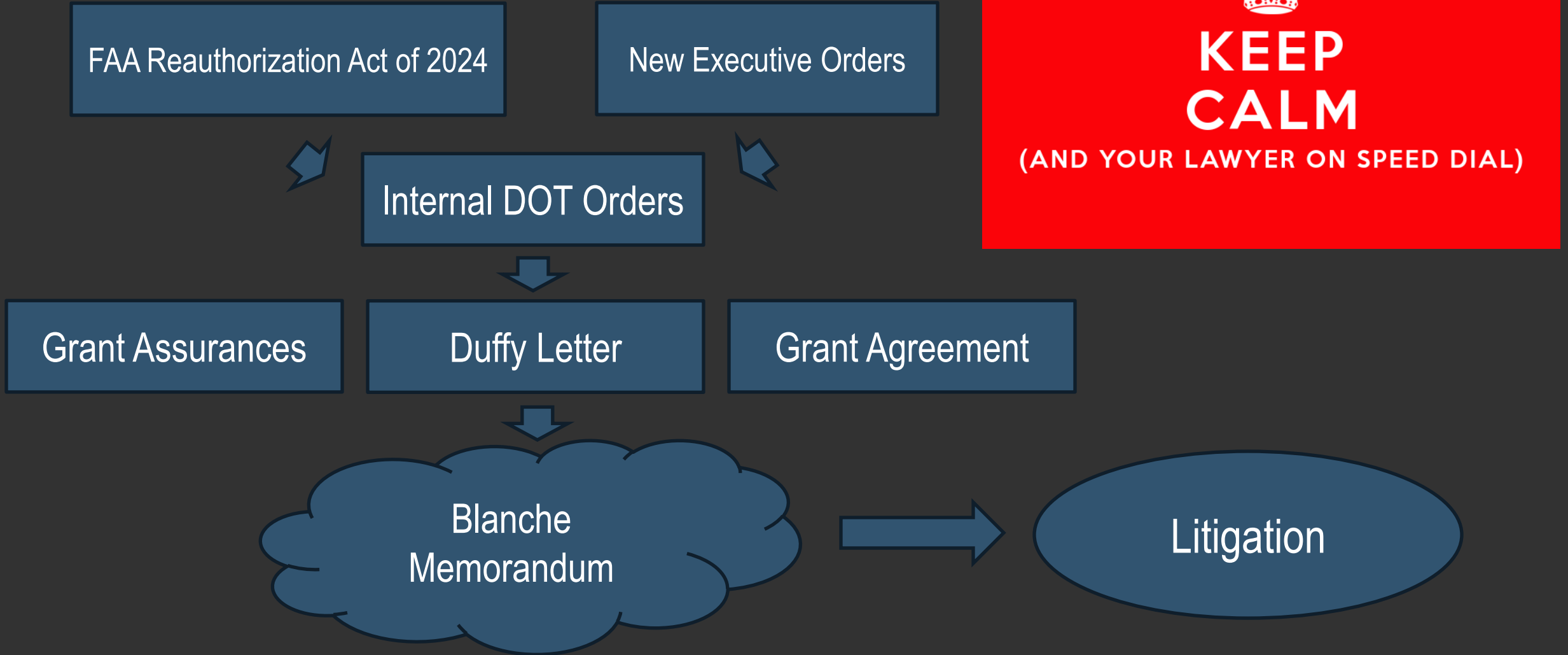
KAPLAN KIRSCH

THE GRANTS THEY ARE A-CHANGIN'

2025 Business of Airport Conference
Financial Regulations and Policy Working Group
June 23, 2025

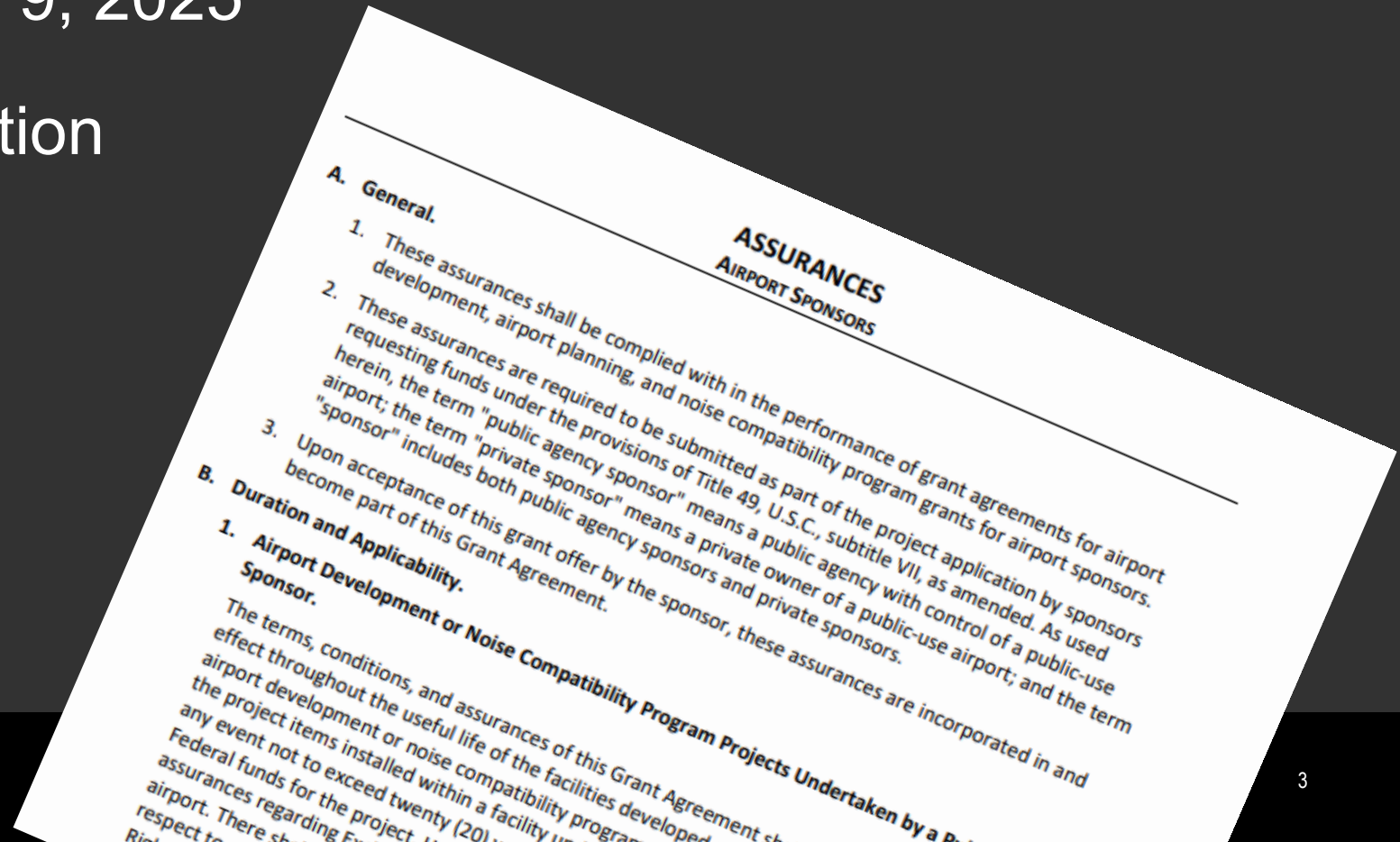
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Where are we (today)?



Overview of Grant Assurance Changes

- Published in Federal Register April 24, 2025
- Comments closed May 9, 2025
- Immediate implementation



Grant Assurance 1

“The Sponsor ~~It~~ will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance, and use of Federal funds for this Grant ~~including~~. Performance under this agreement shall be governed by and in compliance with the following requirements, as applicable, to the type of organization of the Sponsor and any applicable sub-recipients. The applicable provisions to this agreement include, but are not limited to, the following:”



Grant Assurance 1

- **New Executive Orders**
 - 14151 – Ending Radical and Wasteful Government DEI Programs and Preferencing
 - 14154 – Unleashing American Energy
 - 14168 – Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government
 - 14173 – Ending Illegal Discrimination and Restoring Merit-Based Opportunity
- **Repealed Executive Orders**
 - 11246 – Equal Employment Opportunity
 - 13166 – Improving Access to Services for Persons with Limited English Proficiency
 - 13985 – Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government
 - 13988 – Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation
 - 14005 – Ensuring the Future is Made in all of America by All of America's Workers
 - 14008 – Tackling the Climate Crisis at Home and Abroad



Grant Assurance 30

- Removes “gender identity” and “sexual orientation” as enumerated forms of discrimination prohibited under Title VI obligations and required solicitation language.
- Removes references to DBE and ACDBE from required solicitation language.

Grant Assurances 29 and 40

- Changes to Airport Layout Plan approval to incorporate Section 743 of the FAA Reauthorization Act
- Implementation of Section 770 of the FAA Reauthorization Act: no restriction or prohibition of 100LL fuel sales or self-fueling until FAA determines unleaded fuel available
 - Note: Civil penalty of \$5,000/day for noncompliance



Secretary Duffy Letter (Apr. 24, 2025)

“

“[T]o clarify and reaffirm pertinent legal requirements, to outline the Department’s expectations, and to provide a reminder of your responsibilities and the consequences of noncompliance with Federal law and the terms of your financial assistance agreements.”

Secretary Duffy Letter

- Presumption that DEI programs violate federal law, “[w]hether or not described in neutral terms”
- ICE cooperation requirement – “cooperation generally”
- Consequences for failure to comply
- Termination of funding “if DOT determines that continued funding is no longer in the public interest.”

Overview of Grant Agreement Changes

- Posted on FAA's website around April 25
- Newer version posted May 6
- To be used for all FY 2025 grant agreements
- No public notice or comment opportunity for comment



“Cooperation” Condition - #32

“

“[T]he Sponsor will cooperate with Federal officials in the enforcement of Federal law, including cooperating with and not impeding U.S. Immigration and Customs Enforcement (ICE) and other Federal offices and components of the Department of Homeland Security in and the enforcement of Federal immigration law.”

DEI Condition - #31

“

“[T]he sponsor: (a) Agrees that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government’s payment decisions for purposes of 31 U.S.C. 3729(b)(4); and (b) certifies that it does not operate any programs promoting diversity, equity, and inclusion (DEI) initiatives that violate any applicable Federal anti-discrimination laws.”

Additional Grant Conditions

- #2c Grant may be terminated by the FAA at any time for the public interest (and the FAA may consider *only* the FAA's interests.
- #29 Removal of gender for Title VII Civil Rights Act compliance
- #33 Sponsor will cooperate with National Airspace System needs including waiving permitting and other requirements
- #35 Sponsor agrees it is subject to criminal penalties for harboring or assisting certain aliens
- #49 Foreshadowing amendments to DBE and ACDBE programs



The False Claims Act

- The False Claims Act (31 U.S.C. §§ 3729 – 3733) was designed to penalize material false statements made in furtherance of requests for federal assistance.
- Any person who knowingly submits, or causes to submit, false claims to the government is liable for three times the government's damages plus a penalty.
- Authorizes suits by “private attorneys general” (*qui tam*), allowing government to intervene or allow to proceed.



Deputy AG Blanche Memorandum

- “The False Claims Act is . . . 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.”
- “The Department recognizes that it alone cannot identify every instance of civil rights fraud. Congress . . . 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.”



Current litigation

- ***State of California [and 19 states] v. DOT***
(U.S. District Court for the District of Rhode Island)
 - Sanctuary city issues
 - Injunction pleadings pending
- ***King County (WA) [and 29 other plaintiffs] v. Turner***
(U.S. District Court for the Western District of Washington)
 - Preliminary Injunction issued June 3
 - Affects 13 airport sponsors
 - FAA cannot impose or enforce new language
 - FAA cannot rescind, withhold, cancel, pause, block, terminate, delay, or condition grants
 - If already signed agreement, new conditions are null and void



Current litigation

- ***Mid-America Milling Co. v. DOT***
(U.S. District Court for the Eastern District of Kentucky)
 - Parties on 5/28 filed a Motion for Entry of Consent Order :
 - Stipulating that the determination of DBE eligibility using race- and sex-based presumptions “is not supported by the Constitution as currently interpreted under equal protection jurisprudence.”
 - Stipulating “that the [USDOT] 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.”
 - Asking that the court hold “that the use of DBE contract goals . . . based on a race- or sex-based presumption, violates the equal protection component of the Due Process Clause of the Fifth Amendment.”
 - Intervenorors oppose order

What happens next?

- Federal contact provisions are moved to historical status; the FAA is “working on an update.”
- Injunctions are limited in scope but may be expanded.
- Anticipated changes to 49 CFR Part 23 and 26.
- Additional guidance and policy may be forthcoming, including interpretation of Title VI.

Lots of questions remain...

- What does it mean to cooperate with enforcement of federal law?
- What are 'illegal' DEI or DBE programs?
- What if the laws/policies change after signing the grant agreement?
- What if there are conflicts between state/local law and grant agreement/assurance obligations?
- Do existing third-party contracts need to be amended?

Questions?

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