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## CLIENT ALERT

### DOT Issues Proposed Rules Regarding Modifications to DBE Program

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On September 6, 2012, the Department of Transportation (“DOT”) issued a notice of proposed rulemaking to address modifications to DOT’s Disadvantaged Business Enterprise (“DBE”) Program. The proposed rule is designed to improve the implementation of the DBE Program, which also underwent substantive revisions in 2011, and suggests changes to a range of provisions related to, among other things, personal net worth and ownership of DBE concerns. This Client Alert highlights several of the most important changes encompassed by the proposed rule.

#### *Personal Net Worth*

DOT’s current regulations require a business owner’s net worth to be \$1.32 million or less for the owner to carry a presumption of economic disadvantage for DBE eligibility. While the \$1.32 million threshold will remain, DOT’s proposed rule would increase the number and types of factors that could be considered in rebutting the presumption of economic disadvantage, even when an individual’s net worth is less than \$1.32 million. Such factors that may be considered include a person’s: (1) ability to amass wealth; (2) potential for unlimited financial growth; and (3) access to useful resources, such as markets and financing. DOT’s proposed rule suggests that DOT intends to focus its economic disadvantage analyses on “the whole individual,” as opposed to only the financial numbers that appear in a person’s bank and tax records. DOT’s proposed rule also asks for comments regarding alternative approaches to appraising net worth, such as presuming that a person whose adjusted gross income exceeds \$1 million for two or three years in a row is not disadvantaged.

The proposed rule also includes language dedicated to transfers of assets. Appendix E to the current regulations addresses the fact that transfers for less than fair market value to certain parties within two years of seeking DBE certification or undergoing an annual review may affect calculations of personal net worth. DOT proposes to add the relevant language of Appendix E to the DBE Program regulations, and also seeks to expand regulatory coverage to transfers of assets from owners to their firms. DOT is concerned that some business owners make transfers to their companies in order to superficially reduce the sum values of their assets. Though DOT notes that such practices are neither uncommon nor illegal, DOT feels that shifting personal assets to business entities undercuts the purposes of the DBE Program. However, DOT also recognizes that certain transfers, such as those made to pay for educational costs and those intended as gifts, should not factor into net worth calculations, and the proposed rule accounts for such exceptions.

Accordingly, DOT seeks comments regarding the advisability of such exceptions in light of the potential for abuses.

### ***Ownership and Control***

DOT is actively focused on ensuring that DBE-certified firms are truly owned and controlled by disadvantaged individuals. Thus, DOT proposes to add prohibitions against non-disadvantaged owners' exercise of rights to the profits of DBE Program participants that are superior to the rights of the disadvantaged owners of those participants. Furthermore, DOT believes that applicants to the DBE Program should be required to submit evidence over and above that which is presently required by the regulations to: (1) prove that the contributions of disadvantaged owners' to their companies are real and substantial; and (2) dispel concerns that applicant firms might be funded by, and therefore beholden to, non-disadvantaged interests.

In DOT's estimation, additional protections are also needed where the disadvantaged owner of an applicant or DBE Program participant was previously employed by a non-disadvantaged person who may, in turn, be able to control the applicant or participant. The DOT seeks comments that address whether DOT should presume that non-disadvantaged owners who transfer their interests to disadvantaged persons, but who remain involved with their companies after the transfers take place, retain control of their old companies despite the presence of new, disadvantaged owners.

### ***Program Objectives and Due Date for Comments***

In addition to the substantive provisions described above, DOT is seeking to maximize awareness of the fact that the DBE Program encompasses much more than construction. In fact, DBE participation can entail the performance of professional services, supplies, and other types of contracts. Accordingly, the proposed rule will amend the "objectives" portion of the relevant regulations to highlight that point.

While the SBA's 8(a) Program may be more familiar than the DBE Program to many small businesses, the DBE Program affords opportunities that are well worth investigating. Comments on the DOT's proposed rule will be accepted until November 5, 2012, and we strongly encourage affected and interested firms to submit comments to DOT. If you would like our assistance in preparing comments, or if you have any questions about the DBE Program, the proposed changes, and the comment process, please do not hesitate to contact Jon Williams at either 202-857-1000 or [jwilliams@pilieromazza.com](mailto:jwilliams@pilieromazza.com).