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DOT Interim Final Rule on DBE Program

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The U.S. Department of Transportation (DOT) issued an Interim Final Rule (IFR) making immediate changes to the Disadvantaged Business Enterprise (DBE) program on October 3, 2025. The DBE program allows states to certify "socially and economically" disadvantaged business owners for transportation project contracting benefits. The IFR follows a recent proposed consent decree DOT submitted to resolve alleged constitutional violations in *Mid-America Milling Company v. United States Department of Transportation*. The IFR removes race- and sex-based presumptions of "social and economic disadvantage" from DBE program eligibility that, according to the agency, violate the Equal Protection Clause of the Fourteenth Amendment. The IFR also requires all firm owners seeking DBE certification to provide "individualized evidence" of both their social and economic disadvantage. Because the DBE program is implemented by state- and local-level DOT grantees, the IFR directs state government entities that certify DBEs to conduct a reevaluation process "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." Although there is no deadline, the IFR requires recertification to be completed "as quickly as practicable."

The IFR acknowledges and follows a proposed consent order DOT and the plaintiffs submitted in *Mid-America*, a suit in the U.S. District Court for the Eastern District of Kentucky. In that case, the plaintiffs challenged DOT's use of race and sex to establish a "rebuttable presumption" of social disadvantage, a status business owners need to participate in DOT's DBE program. Plaintiffs won a preliminary injunction barring use of the presumption for any contract they bid on in a September 2024 ruling. In granting the injunction, the court concluded that the race-based presumption of disadvantage did not survive the strict constitutional scrutiny required of race-based government action. Strict scrutiny requires that DOT show a compelling government interest (such as remedying past, intentional discrimination in government contracting) to justify its use of race, and also that the agency has narrowly tailored its program to address that interest. Here, the court concluded, DOT had not shown a compelling interest in remedying past discrimination. The record did not contain adequate, specific evidence of intentional discrimination against the many ethnic and racial groups granted a presumption of disadvantage. Strict scrutiny, the court stated, required more than a showing of "societal discrimination against minority-owned businesses generally."

In addition, the court stated that even if the DBE program's racial presumption could be justified by evidence of discrimination, the program was not narrowly tailored as strict scrutiny requires. The court

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held the DBE program's racial presumption was overbroad because it lacked a "logical end point"; a closing date or other limit. The court next evaluated the DOT's presumption allowing women-owned businesses to claim presumptive social disadvantage. According to the court, this presumption, too, lacked the supporting evidence of intentional discrimination in DOT contracts needed to justify the preference.

The preliminary injunction remains in place and the parties have proposed a consent order. DOT stipulated that the DBE program's race- and sex-based presumptions violated equal protection principles. If approved by the court, the decree would prohibit DOT from approving DOT-funded projects with DBE contract goals in any jurisdiction where a DBE has been determined to be eligible based on a race- or sex-based presumption. DOT's IFR references the *Mid-America* ruling, stating the DBE program's race- and sex-based presumptions "likely do not comply" with the Equal Protection Clause of the Fourteenth Amendment.

After a program with similar eligibility criteria, SBA's 8(a) Program, faced a court challenge in 2023 related to equal protection issues, it also discontinued the use of race-based presumptions of social disadvantage when admitting applicants to the program. In 2023, program participants who previously relied on the presumption of social disadvantage for eligibility were required to submit a personal narrative to the SBA demonstrating their disadvantage. The number of SBA-certified 8(a) program participants nationwide has recently ranged from 4,000-5,000. In contrast, the DBE program may cover several thousand firms in any individual state. Texas, for example, had more than 7,000 firms in its DBE directory in 2025.

Since issuing the IFR, DOT released and revised a Frequently Asked Questions (FAQs) document "to provide clarity to the public." Topics covered in the FAQ include the status of DBEs currently performing work on federally-funded project contracts and contract amendments that may be required. According to the FAQ, to comply with the IFR, state certifying entities will need to not only adapt their certification applications and procedures for the new program requirements, but also identify each currently certified DBE in their jurisdiction and provide "the opportunity to submit documentation demonstrating its DBE eligibility." DOT's analysis of the IFR's administrative burden describes its "primary quantified costs" as "transitional and one-time, totaling approximately $95 million, with recurring annualized burdens of about $1.8 million." DOT describes the potential benefits of the program changes as including "constitutional compliance and reduce[d] risks associated with constitutional litigation."

Some states are individually responding to the IFR. Colorado has declared next steps toward rule compliance, and Georgia has initiated outreach to stakeholders.

The American Association of State Highway and Transportation Officials (AASHTO) sent a letter of comment to DOT regarding the IFR on November 3, 2025. The letter remarks on the amount of work tasked to state-level transportation departments by the IFR, as they must "review the personal narratives and individually recertify or decertify each DBE, currently estimated at 53,500 DBEs nationally." The American Road and Transportation Builders Association (ARTBA) also submitted a letter to DOT, commenting that DOT's "urgency in implementation" has created "numerous practical questions from those tasked with compliance." ARTBA also highlights potential compliance issues for multiyear projects and warns against potential project delays that increase project costs. Meanwhile, comments submitted to DOT from the Utility and Transportation Contractors Association of NJ welcome the program changes, remarking that DBE goals "have failed to increase DBE participation in construction contracts and have created additional bureaucratic inefficiencies."

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