

Prove It: Department of Transportation's DBE Program Ceases Presumption of Disadvantaged Status for Women- and Minority-Owned Businesses

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Firm Alert

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The U.S. Department of Transportation (DOT) issued an Interim Final Rule (IFR) effective October 3, 2025, instituting an immediate and significant change for the qualification of women- and minority-owned businesses in the DOT's Disadvantaged Business Enterprise (DBE) and Airport Concessions Disadvantaged Business Enterprise (ACDBE) Program. For purposes of the DBE/ACDBE program, women- and minority-owned businesses were historically presumed to be disadvantaged, automatically meeting one of the requirements for DBE status; this is no longer the case.

What is the DBE/ACDBE program? The purpose of this longstanding program is to level the playing field for small businesses in the highway construction, transit, and airport industries, owned by socially and economically disadvantaged individuals, seeking to participate in federally funded contracts. Congress enacted the first statutory DBE provision in 1983, setting a goal that at least 10% of project funds be issued to DBEs on highway and transit projects. In 1987, Congress expanded the program for airport projects and concessionaires. This legislatively-mandated program was intended to ensure nondiscrimination and remove barriers in the award of DOT-assisted contracts, and thus the DOT was entrusted with oversight of the program.

Specifically, the program requires state and local transportation agencies that receive DOT grants to develop their own aspirational DBE contracting goals based on the availability of DBEs in their local markets, to meet the program targets. Notably, grantees are generally prohibited from using quotas or set-aside contracts for DBEs. (49 CFR § 26.43). They have been required to use race- and gender-neutral means to meet their goals to the extent possible, without using criteria favoring DBEs over non-DBEs (49 CFR §§ 26.5, 26.51). Examples of such neutral means are unbundling of large contracts, informational programs on contracting opportunities, and offering business support services. Eligibility for DOT financial assistance depends on DOT approval of grantee DBE programs; however, as long as the program is administered in good faith, grantees cannot be penalized for noncompliance or failure to meet their set DBE contracting goals. (49 CFR §§ 26.21(c), 26.47).

To qualify as a DBE, an entity must be a for-profit small business that is at least 51% owned and controlled by socially and economically disadvantaged individuals who do not exceed certain net worth caps. To qualify as socially and economically disadvantaged, the owners must either demonstrate disadvantage by meeting specific conditions or be presumed disadvantaged. Since 1987, the DOT has presumed social and economic disadvantage for women- and minority-owned business owners. As of October 3, 2025, however, this presumption ceased; henceforth, these business owners must "prove it."

What happens now? To remain in the program, all DBE/ACDBE certified businesses owners must be reevaluated for disadvantaged status. The IFR changes the definition of a "socially and economically disadvantaged individual," to one "who a certifier finds to be socially and economically disadvantaged on a case-by-case basis. [This] determination ... must not be based in whole or in part on race or sex."

Business owners must submit both a Personal Narrative (PN) and a Personal Net Worth Statement to demonstrate eligibility. The PN should demonstrate the existence of a disadvantage based on individual proof of specific instances of economic hardship, systemic barriers, and denied opportunities that impeded the owner's progress or success in education, employment, or business. The PN must state how and to what extent these impediments caused the owner economic harm, including a description of the type and magnitude, and must establish the owner is

economically disadvantaged relative to similarly situated individuals. The business owner must also attach and submit a Personal Net Worth Statement, and any other financial information they consider relevant.

Those submitting commercial and financial business information normally considered proprietary or confidential are cautioned to designate those submissions as "PROPIN." If one fails to mark the confidential business information as "PROPIN," under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, the information is placed in the public docket for rulemaking purposes. To avoid public dissemination of confidential businesses information, entities should make sure that employees tasked with the submission of this documentation understand the need for designation.

The existing regulations require states to establish Unified Certification Programs (UCP) to handle state-wide DBE-firm certification, including making certification decisions on behalf of all DOT grant recipients in the state and maintaining a state directory of certified DBE firms. Now, each UCP is required to identify currently certified DBEs, provide them with the opportunity and instructions to submit documentation demonstrating eligibility under the new standards, and then issue a written decision indicating whether each business has been recertified or is decertified "as quickly as practicable." The IFR does not require the UCP's written decision to explain the specific basis for recertification or decertification. Individual UCPs are expected to create their own timelines for firm submissions of new PNs and Personal Net Worth Statements, but the DOT has expressly reserved the right to review a UCP's reevaluation process.

Until the UCP reevaluations are complete, goal setting and other DBE/ACDBE program elements are suspended. The current federal government shutdown of indeterminate duration will likely further slow the reevaluation process.

What prompted this IFR? On February 24, 2025, President Trump issued Executive Order 14219, *Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative*, which ordered agencies to identify "unconstitutional regulations and regulations that raise serious constitutional difficulties" and to target them for repeal. On April 9, 2025, the President issued a presidential memorandum to the heads of all federal agencies, directing that this effort should prioritize regulations that conflict with certain U.S. Supreme Court decisions, including *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023), a landmark 2023 ruling that consideration of race in college admissions violates the Equal Protection Clause of the Fourteenth Amendment, essentially ending affirmative action.

In a pending case in the Eastern District of Kentucky, non-DBE entities who had lost bids on DOT-funded projects filed suit against the DOT, claiming that they cannot compete for DOT contracts on an equal footing with entities owned by women or racial minorities because of their presumptive qualification as DBEs. In September of 2024, the court granted a preliminary injunction, determining that the disadvantage presumption of the DBE program likely violates the Equal Protection Clause. *Mid-America Milling Co. v. U.S. Dep't of Transp.*, No. 3:23-cv-00072, 2024 WL 4267183 (Sept. 23, 2024). The preliminary injunction prohibits the DOT from mandating use of the presumptions with respect to the contracts on which the plaintiff entities had bid.

Shortly following the President's February Executive Order and April memorandum, both the DOT and Department of Justice (DOJ) evaluated the DBE/ACDBE program as directed by the administration.

In May of 2025, the parties asked the court to enter a consent order resolving the constitutional challenge to the DBE program, where the DOT (represented by the DOJ in court) stipulated and agreed that the DBE program's presumptions violate the Equal Protection Clause. The proposed consent order asks the court to declare the use of DBE contract goals to be unconstitutional nationwide and to hold that DOT cannot approve any DOT-funded projects with DBE contract goals where any DBE in the jurisdiction was determined eligible based on race- or sex-based presumptions. Notably, the consent order remains pending.

On June 25, 2025, Solicitor General D. John Sauer of the DOJ advised Speaker of the House Mike Johnson that DOJ concluded the DBE program's race- and sex-based presumptions are unconstitutional, and that DOJ would no longer defend those presumptions in court—consistent with the proposed consent order in the pending *Mid-America Milling* case. Soon thereafter, on October 3, 2025, DOT issued the present IFR.

How can the DOT issue an immediately-effective rule like this IFR? The Administrative Procedures Act (APA), 5 U.S.C. §§ 551-559, mandates that federal administrative agencies follow certain procedural steps before enacting a rule. Typically, an agency must publish notice of the proposed rule in the Federal Register, citing its authority to make the rule and including the proposed terms. Then, the public must be given the opportunity to comment on the proposed rule. After considering comments and making any revisions to the rule based thereon, the agency must provide a general statement of the basis and purpose of the rule and generally must publish the final

rule no less than 30 days prior to the effective date. However, an agency may skip the aforementioned procedure and issue a rule without the notice, comment, and minimum 30-day effectiveness delay if it finds good cause that the process is “impracticable, unnecessary or contrary to public interest.” 5 U.S.C. § 553(b)(B). Here, the DOT determined that the presumption of disadvantage under the DBE/ACDBE program is unconstitutional, so enforcing those presumptions would be contrary to public interest and providing an advance notice-and-comment period would be impracticable and unnecessary. While this IFR is effective immediately, the public can currently comment on the IFR for a 30-day period, and the DOT may amend the rule pursuant to submitted comments.

We will follow further developments concerning this IFR and DBE program requirements and provide updates. For more information about how these requirements affect your business, drafting a PN for certification reevaluation, and how Babst Calland can assist you, please contact Alexandra G. Farone (412) 394-6521 or

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