

## SUBSTITUTES THAT ARE ACCEPTABLE SUBJECT TO USE CONDITIONS—Continued

End use	Substitute	Decision	Use conditions	Further information
Retail Food Refrigeration (stand-alone only) New Only.	Propane, R-290, as a substitute for CFC-12 and HCFC-22.	Acceptable subject to use conditions.	<p>(c) "CAUTION—Risk of Fire or Explosion. Flammable Refrigerant Used. Consult Repair Manual/Owner's Guide Before Attempting To Service This Product. All Safety Precautions Must be Followed."</p> <p>(d) "CAUTION—Risk of Fire or Explosion. Dispose of Properly In Accordance With Federal Or Local Regulations. Flammable Refrigerant Used."</p> <p>(e) "CAUTION—Risk of Fire or Explosion Due To Puncture Of Refrigerant Tubing; Follow Handling Instructions Carefully. Flammable Refrigerant Used." This marking shall be provided near all exposed refrigerant tubing.</p> <p>The marking described in clause (a) above shall be permanently attached on or near any evaporators that can be contacted by the consumer. The markings described in clauses (b) and (c) above shall be located near the machine compartment. The marking described in clause (d) above shall be permanently attached on the exterior of the refrigerator. The marking described in clause (e) above shall be permanently attached near any and all exposed refrigerant tubing. All of these markings shall be in letters no less than 6.4 mm (¼ inch) high.</p> <p>7. Retail food refrigeration using R-290 must have fittings colored red as described above in use condition number four and which differ from fittings used in equipment or containers using non-flammable refrigerant. "Differ" means that either the diameter must differ by at least 1/16 inch or the thread direction must be reversed (<i>i.e.</i>, right handed vs. left handed). The unique fittings must be permanently affixed to the unit, and may not be accessed with an adaptor, until the end-of-life of the unit;</p> <p>8. R-290 may not be sold as a refrigerant in containers containing less than five pounds (2.8 kg) of refrigerant.</p>	

**Note:** In accordance with the limitations provided in Section 310(a) of the Clean Air Act (42 U.S.C. 7610(a)), nothing in this table shall affect the Occupational Safety and Health Administrations' authority to promulgate and enforce standards and other requirements under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*)

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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### 49 CFR Part 26

[Docket No. OST-2010-0118]

RIN 2105-AD75

#### Disadvantaged Business Enterprise: Program Improvements

**AGENCY:** Office of the Secretary (OST), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This notice of proposed rulemaking (NPRM) would propose to improve the administration of the Disadvantaged Business Enterprise

(DBE) program by increasing accountability for recipients with respect to good faith efforts to meet overall goals, modifying and updating certification requirements, adjusting the personal net worth (PNW) threshold for inflation, providing for expedited interstate certification, adding provisions to foster small business participation and improve post-award oversight, and addressing other issues.

**DATES:** Comments on this proposed rule must be received by July 9, 2010.

**ADDRESSES:** You may submit comments (identified by the agency name and DOT Docket ID Number OST-2010-0118) by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.

- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building

Ground Floor, Room W12-140, Washington, DC 20590-0001

- *Hand Delivery or Courier:* West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

- *Fax:* 202-493-2251

**Instructions:** You must include the agency name (Office of the Secretary, DOT) and Docket number (OST-2010-0118) for this notice at the beginning of your comments. You should submit two copies of your comments if you submit them by mail or courier. Note that all comments received will be posted without change to <http://www.regulations.gov> including any personal information provided and will be available to internet users. You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR

19477) or you may visit <http://DocketsInfo.dot.gov>.

*Docket:* For internet access to the docket to read background documents and comments received, go to <http://www.regulations.gov>. Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Ave, SE., Docket Operations, M-30, West Building Ground Floor, Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:**

Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC, 20590, Room W94-302, 202-366-9310, [bob.ashby@dot.gov](mailto:bob.ashby@dot.gov).

**SUPPLEMENTARY INFORMATION:** The Department of Transportation issued an advance notice of proposed rulemaking (ANPRM) on April 8, 2009, concerning several DBE program issues (74 FR 15904). The first concerned counting of items obtained by a DBE subcontractor from its prime contractor. The second concerned ways of encouraging the “unbundling” of contracts to facilitate participation by small businesses, including DBEs. The third was a request for comments on potential improvements to the DBE application form and personal net worth (PNW), and the fourth asked for suggestions related to program oversight. The fifth concerned potential regulatory action to facilitate certification for firms seeking to work as DBEs in more than one state. The sixth concerned additional limitations on the discretion of prime contractors to terminate DBEs for convenience, once the prime contractor had committed to using the DBE as part of its showing of good faith efforts. The Department received approximately 30 comment letters concerning these issues. This NPRM makes regulatory proposals concerning many of these issues.

In addition, since the ANPRM was published, both the House of Representatives and the Senate have passed their versions of a Federal Aviation Administration (FAA) reauthorization bill. These bills include a provision requiring an inflationary adjustment to the current \$750,000 personal net worth (PNW) cap. Because the timing of the enactment of an FAA reauthorization bill is not yet clear, and the provisions of the bill do not apply to the Department’s highway and transit programs in any case, the Department has decided to propose an inflationary

adjustment of the PNW cap to \$1.3 million, the figure that would result from the House and Senate bills.

Finally, the Department is proposing amendments to the certification-related provisions of the DBE regulation. These proposals result from the Department’s experience in dealing with certification issues and certification appeal cases during the years since the last major revision of the DBE rule in 1999. The amendments are intended to clarify issues that have arisen and avoid problems with which recipients (i.e., state highway agencies, transit authorities, and airport sponsors who receive DOT grant financial assistance) and the Department have had to grapple over the last 11 years.

**Accountability for Recipients With Respect to Overall Goals**

Section 26.47 of the rule states that a recipient cannot be penalized for failing to meet overall goals. To penalize a recipient simply for failing to “hit a number” could create an impermissible quota system. Nonetheless, recipients are required to implement their DBE programs in good faith in order to remain in compliance with Part 26.

The Department takes this “good faith implementation” requirement very seriously. Accountability is the key to ensuring effective program implementation, and the Department believes that it is useful to add a new provision to increase the accountability of recipients with respect to overall goals and their attainment.

An overall goal is the recipient’s estimate of the “level playing field” amount of DBE participation that it would expect to achieve in the absence of discrimination or its effects. Failing to meet the overall goal means that the measures the recipient has employed in carrying out its DBE program have not fully created that level playing field, and that discrimination or its effects have not fully been remedied. In order to implement its program in good faith, a recipient should make strong efforts to understand the reasons why it has not met its overall goal and to figure out what it can do to correct the situation.

For this reason, the Department is proposing to add a new paragraph (c) to § 26.47. If at the end of a fiscal year (FY) 1, (e.g., September 30), a recipient has failed to meet its overall goal for that FY, the recipient must do two things: (1) Thoroughly analyze why it fell short of meeting its overall goal for FY1 and (2) establish specific steps and milestones for correcting identified problems so that the recipient will meet its overall goal in FY2 and subsequent years. State highway agencies, the largest 50 transit

authorities as designated by FTA, and Operational Evaluation Airports and other airports designated by FAA would have to submit this material to FHWA, FTA, or FAA, as applicable. The NPRM proposes a period of 60 days to submit this material. The Department seeks comment on this process. Other FTA and FAA recipients would retain the information, so that DOT officials conducting program or compliance reviews could review it.

This section also proposes that, if a recipient fails to take actions required under the new provisions, the recipient could be regarded as in noncompliance with § 26.47 and hence subject to the remedies stated in §§ 26.101 through 26.105 or other applicable regulations. These remedies include suspension or termination of Federal assistance, refusal to approve projects, payments, grants, or contracts, or other action at the discretion of the operating administration involved.

**Goal Submission**

On February 2010, the Department amended § 26.45 to allow recipients to submit overall goals every three years, rather than annually (75 FR 5535). This change was intended to reduce administrative burdens for recipients, as well as to permit DOT staff to give greater scrutiny to recipients’ submissions. In this NPRM, we propose a clarification of this amendment. While the recipient need only submit a new goal every three years, it is still responsible for good faith implementation of that goal in each year.

In carrying out the accountability provision discussed above, the Department would hold recipients responsible for each year’s implementation activity. For example, suppose that a recipient has a 12 percent goal for FY 1–3. If the recipient fell short of 12 percent in FY 1, the § 26.47 requirements for analysis of the shortfall and steps to remedy the problems in FY 2 would apply. The recipient would not be able to say, in effect, “We don’t need to worry about our FY 1 shortfall because we’ll catch up in FY 3.”

It is possible, however, that a recipient might anticipate a funding stream for projects that would in fact differ from one year to the next. For example, an airport with a 12 percent goal might expect, given the projects, FAA assistance, and DBE availability that it anticipates, that it would have 6 percent DBE participation in FY 1, 18 percent in FY 2, and 12 percent in FY 3. The Department seeks comment on whether a recipient could, if it wished,

provide a year-to-year projection of its likely DBE participation within the framework of a goal and methodology submitted only every three years, with the result that in applying the accountability provision of proposed § 26.47, those year-to-year projections, rather than the three-year overall goal number, would be the benchmark for determining whether the analysis/corrective action requirements would be triggered. This could increase flexibility, but could undercut, to an extent, the purpose of the three-year goal submission interval. We anticipate that this approach would be relevant primarily, or perhaps only, in FAA programs, where Federal funding is more likely to change from year to year than in the FHWA and FTA programs.

### Improving Oversight

The ANPRM asked for suggestions on how to improve program oversight. The Department received 17 comments. Several recipients commented to the effect that additional resources, including Federal assistance, would be necessary if they were to conduct additional oversight. Other commenters suggested that additional training and information in areas like contract compliance and close-out enforcement could be useful. A DBE organization noted that training for recipient executive-level officials, as well as operating-level staff, would be helpful. This commenter also wanted to emphasize the need for a direct DBE Liaison Officer connection to the top official of the organization. Other comments simply supported the concept of better oversight, without specifying how this could best be accomplished.

Program oversight is not a new concept in the DBE program. Existing § 26.37 requires monitoring and enforcement mechanisms. To strengthen these existing provisions, the Department is proposing to add a sentence to § 26.37(b), calling on recipients to make a written certification that they have reviewed contracting records and monitored the work on-site to ensure that DBEs have actually performed the work in question on each contract involving DBE participation counted toward contract or overall goals. To comply with this requirement, the recipient would have to make one such certification for every contract on any contract with DBE participation. This sentence would simply make more explicit a requirement that the Department believes is implicit in the existing regulatory language.

Existing § 26.25 already requires that the DBE liaison officer (DBELO) must

have direct, independent access to the Chief Executive Officer (CEO) of the recipient's organization concerning DBE program matters. This means that the DEBLO must not be required to get anyone's consent or sign-off, or "go through channels," to talk and write personally to the CEO about DBE program matters. The Department does not believe that additional regulatory language is needed on this point: the existing provision is already explicit.

We also call attention to the last section of § 26.25, which requires that the recipient have adequate staff to administer the DBE program. In times of budget stringency, it may be tempting to cut back on staff and other resources needed for certification, program oversight, and other key DBE program functions. This sentence emphasizes that it is a requirement of Federal law that the DBE program be adequately staffed to ensure compliance with Part 26.

### Personal Net Worth

The personal net worth (PNW) criterion has been a perennially controversial subject in the DBE rule. It is intended to ensure that only economically disadvantaged individuals participate in the DBE program, lest the program become overinclusive. The \$750,000 PNW "cap," taken from SBA materials dating to 1989 or earlier, has been criticized by DBEs as penalizing success and imposing a glass ceiling on the growth and competitiveness of DBE firms. At the same time, the PNW cap has been a part of the package of narrow tailoring features that has helped the Department to defend the DBE program successfully against court challenges.

As noted above, the House and Senate versions of the currently pending FAA reauthorization bills both call for an inflationary adjustment in the PNW cap, relating back to 1989. Based on these provisions, the Department did a straight-line inflationary adjustment using the Consumer Price Index (CPI), which suggests a 73 percent inflation since 1989. This results in an adjusted PNW cap of \$1.31 million. It is very important to understand that this does not represent an increase in the actual personal net worth which DBE owners may have, viewed in real dollar terms. Rather, \$1.31 million today has the same value, in real dollar terms, as \$750,000 in 1989. The inflationary adjustment simply maintains the economic status quo.

The Department is aware that there are a number of methodologies and approaches to making inflationary adjustments. The Department seeks comment on whether the straight-line

CPI approach used in the NPRM is appropriate, or whether there are other approaches or techniques that would be better or more accurate. Also, it would not make sense for the Department to have one PNW number for FAA programs and another for FTA and FHWA programs. Therefore, the Department's proposal would apply the \$1.31 million PNW cap to all programs covered by Part 26.

The pending FAA bills address another issue related to PNW, concerning the handling of retirement savings. Under the Department's current regulation, assets in retirement savings plans are regarded as part of an individual's wealth, and hence are counted as assets for PNW purposes. Some DBEs have long objected to this approach, saying that it is inappropriate to count these assets, which are not liquid and therefore not readily available for purposes of an owner's business. While giving the Department a degree of regulatory discretion, the pending FAA reauthorization bills direct the Department not to count such assets toward the PNW cap.

If these provisions are enacted, the Department will need to devise implementing rules. We seek comment on how best to do so. What sort of retirement savings should be covered by a new provision (*e.g.*, 401(k)s, IRAs, Roth IRAs, Keough Plans, stocks and bonds, certificates of deposit or savings plans, life insurance, etc.)? Should there be any limitation on the amount of money that could be eliminated from counting toward the PNW cap by being in a retirement savings product? Is there a potential problem of abuse, in which DBE owners could shelter assets from PNW consideration in inappropriate ways? If so, how would the Department attempt to deal with such a problem? Would the eliminating consideration of these assets have unintended distributive consequences across the breadth of the DBE program (*e.g.*, helping more affluent firms at the expense of smaller DBEs without such assets, having a racially disparate impact)? We seek comment on how we should shape the details of a future rule implementing the pending statutory provisions.

### Interstate Certification and Related Issues

Under the current DBE rule, certification occurs on a statewide basis. The Unified Certification Program (UCP) in each state ensures "one-stop shopping" for DBE applicants within that state. The UCP requirement, which came into effect in 1999, has simplified certification by making it unnecessary

for recipients to apply multiple times for certification by various transit authorities, airports, and highway departments within a given state.

The present structure, however, does not address problems that occur when DBEs certified in their home state attempt to become certified in other states. As we mentioned in the ANPRM, DBEs and prime contractors have frequently expressed frustration at what they view as unnecessary obstacles to certification by one state of firms located in other states. They complain of unnecessarily repetitive, duplicative, and burdensome administrative processes and what they see as the inconsistent interpretation of the DOT rules by various UCPs. There have been a number of requests for nationwide reciprocity or some other system in which one certification was sufficient throughout the country.

The Department believes that more should be done to facilitate interstate certification. Interstate reciprocity has always been authorized under Part 26 (see § 26.81 (e) and (f)), and in 1999 we issued a Q&A encouraging this approach. To further encourage such efforts, the Department issued another Q&A in 2008, suggesting an approach to facilitating interstate certifications. In the ANPRM, we asked for comment on proposing a regulatory provision based on this guidance, or, in the alternative, whether some version of the nationwide certification reciprocity or Federalizing the certification process would be desirable. We pointed out that nationwide reciprocity could raise concerns about firms engaging in forum shopping to find the “easy graders” among certifying agencies. Federalizing certification, such as having a unitary certification system operated by DOT, would likely raise significant resource issues. Such an approach could also result in less local “on the ground” knowledge of the circumstances of applicant firms, which can be a valuable part of the certification process. The Department asked for comment on how, if at all, these issues could be addressed, and whether there is merit in one or another nationwide approach to certification.

There were about 30 comments on this subject. Most of them favored taking steps to make interstate certification easier. Thirteen commenters favored one variety or another of national reciprocity, with eight of these suggesting that, where a UCP had qualms about an out-of-state firm’s bona fides, the UCP could remove the firm’s certification after the fact. That is, a firm certified in its home state, State A, would send its certification to State B.

State B would immediately put the firm on its list of certified firms, and the firm would become eligible immediately to participate as a DBE. However, State B could subsequently decertify the firm if it appeared that the certification in State A was obtained by fraud or was otherwise invalid. One comment endorsed the rebuttable presumption approach suggested in the Department’s Q&A. Three favored one version or another of Federalizing certification, either by having the Department maintain a centralized certification database or having the Department make certification decisions other than, perhaps, the initial decision in each case.

Other commenters expressed some concerns about reciprocity. Three commenters favored using paperwork submitted to other states to reduce administrative burdens, but reserving to each state the right to make its own decision. Another four commenters opposed or had serious doubts about reciprocity, expressing concerns such as the possibility of forum shopping or variations in state laws that might affect the validity of State A’s certification in State B. Three commenters emphasized the necessity for better and more uniform training, without which, some thought, reciprocity would be unlikely to work.

As the Department stated in the ANPRM, we favor making interstate certification easier and reducing burdens on small businesses seeking to work in more than one state. Before 1999, businesses had to make multiple applications in each state if they wanted to work as a DBE for more than one DOT recipient. The Department dealt successfully with that problem by creating the UCP system in the 1999 revision to the DBE regulation. National reciprocity or one-stop shopping for a single nationwide certification system are worthwhile goals to discuss, but the Department believes that an incremental approach is more likely to be practicable.

It is important to keep in mind that certification has two purposes. One is to foster and facilitate DBE participation by as many firms as can be determined to be eligible. The other is to preserve the integrity of the program, a strong certification system being the first line of defense against program fraud. To some extent, these goals can be in tension with one another. We believe that the concerns expressed by commenters about issues like forum shopping, training, and variations in state laws have validity. Recipients’ concerns about having the integrity of their programs damaged by having to

accept what they view as poorly-considered certification decisions made elsewhere are also important. The Department’s task is to balance, as best we can, the desire to make interstate certification less onerous for small businesses with the imperative of maintaining the integrity of the program.

A seamless, nationwide, one-stop-shopping eligibility process for all firms is, in a sense, the “holy grail” of certification. The Department does not believe we are currently in a position to make this objective a reality. As commenters pointed out, better nationwide uniform training (which has been proposed in Congress as a requirement in pending FAA reauthorization legislation) and considerable additional resources at the Federal level (e.g., for the database and staff that would likely be necessary to make a more centralized certification system practical) are not yet in place. Given what the Department views as the very real concerns about forum shopping and variations in the quality of certifications that commenters and participants in DOT stakeholder meetings have expressed, we believe that moving at this time to a nationwide reciprocity approach would be premature and could endanger the integrity of the program.

As noted above, several commenters favored a slightly modified national reciprocity approach in which a firm certified in its home state would automatically be certified in “State B,” immediately eligible to participate as a DBE in State B’s contracts. However, if State B determined that the firm had obtained its home state certification by fraud, or other information questioning its eligibility came to State B’s attention, State B could remove the firm’s certification. In our view, this approach does not differ significantly from a straight national reciprocity approach, in that the ability to decertify a certified firm already exists. Moreover, the “certify first and ask questions later” tenor of this approach does not inspire confidence: by the time the questions got asked, and a dubious firm removed from the eligible list, it could have received contracts in place of genuinely eligible firms. As a practical matter, it is hard to imagine how a certification agency in, say, Utah, would learn in a timely fashion about fraud or other problems with a firm originally certified in, for example, Florida.

Having considered the comments, the Department believes the best course is to propose a “rebuttable presumption” approach akin to the Department’s recent guidance Q&A. Proposed

regulatory language to carry out this approach is found in §§ 26.84 through 26.85 of the NPRM. Under this approach, a firm certified in its home state would not have to create a second application package. It would send its home state application package, together with other existing documentation (e.g., its affidavits of no change submitted to the home state since the time of the firm's original certification), to State B. State B would obtain a copy of the on-site review report from the home state. State B would be required to certify the firm within 30 days from the date it received this information unless State B had good cause to object to the home state's certification. If it objected, State B would hold a proceeding similar to a decertification proceeding in this case, in which State B would bear the burden of proof to show that the firm should not be certified in State B, notwithstanding its certification in State A. The Department seeks comment on the burden of proof in such a proceeding: Should the firm, rather than State B, bear this burden? This latter approach would be more consistent with the usual rule that the applicant carries the burden of proof with respect to eligibility matters, but it could limit the extent to which the new procedures would actually facilitate interstate certification.

This approach is a significant incremental step toward nationwide reciprocity, which would significantly reduce burdens and obstacles in the path of firms seeking certification outside their home states. Within 30 days of providing copies of existing documentation to State B and receiving a copy of State A's on-site review report, the firm would either be certified in State B or be on notice of specific problems with its eligibility that State B had found. The opportunity for a hearing would have to take place within the next 30 days, with a decision issued 30 days after that. The Department expects that, because providing notice and a hearing and issuing a decision on this "fast track" basis is not something that UCPs would do lightly, UCPs would not overuse their authority to delay certification pending this process. Of course, as is now the case, UCPs could accept the home state's certification without further review.

The Department seeks comment on whether the 30-day period for initial review of an out-of-state certification, and a decision on whether to accept it, is an appropriate time period. Would this period place unwarranted pressure on State B to accept State A's certification, even if it were not warranted? On the other hand, would a

longer period defeat the purpose of the proposed interstate certification process? Again, the question goes to achieving the best balance between the two purposes of the proposed process.

The Department seeks comment on one potential technical problem in this proposed system. When it is asked by State B to send an on-site review of a firm certified in State A, State A is supposed to send a copy of the report to State B within seven days. In this era of e-mail and pdf documents, doing so should be quick and easy. However, what happens if State A does not provide a timely response? Proposed § 26.84(e) would say that if State B has not received the report by 14 days after State B's request, State B may hold action on the firm's application in abeyance pending receipt of State A's report. State B would need to inform the firm of the situation. The Department seeks comment on what, if anything, the Department should do in a final rule to address situations in which a State A's response to a request for an on-site report is delayed.

In proposing these new provisions to the DBE rule, the Department is also proposing to make certain changes to existing rules. We would remove § 26.83(e), which is no longer needed in light of the proposed new § 26.84 interstate certification procedures. We would also amend § 26.83(h) to put to rest a misunderstanding that has continued to exist, despite the Department's efforts to clarify it. Once a firm is certified as a DBE, it stays certified unless and until it is decertified using the procedures of § 26.87, the rule's decertification procedure. There is no periodic "recertification" or "reapplication" procedure required or even authorized. Certifications do not lapse after a given number of years. However, UCPs can, and, in our view, should, review each existing certified firm's eligibility, including a new on-site review, from time to time. The Department seeks comment on the most appropriate interval for such reviews (comments to the ANPRM suggested periods of between three and six years).

One phenomenon the Department's staff has noticed in recent years is the withdrawal by applicants of their applications before a UCP has made a decision in the matter. In some cases, this may reflect "games-playing" by applicants of dubious merit, as they seek repeatedly to revise their organizations to avoid problems that come up in the UCP's review of the application, without triggering the waiting period for reapplication that follows a denial of the application.

However, in other cases, there can be innocent explanations for a withdrawal. The Department seeks comment on whether the rule should be amended to authorize recipients to apply to firms withdrawing an application the same reapplication waiting period that they can apply after a denial. This would reduce administrative burdens on certifying agencies. However, doing so might also penalize firms with legitimate reasons for withdrawing and resubmitting an application or create the perception or reality that recipients might act inconsistently, seeming to favor some firms over others with respect to applying the reapplication period.

Current §§ 26.84 and 26.85 relate to a 1999 memorandum of understanding (MOU) between DOT and SBA concerning DBE certification of SBA 8(a) and 8(d) firms and 8(a) and 8(d) certifications of certified DBEs. This MOU lapsed in 2004 and has not been renewed. Consequently, much of the existing material in these sections has become outdated. Proposed § 26.85 would continue a portion of the current provisions. If an 8(a) firm applies to a DOT UCP, the 8(a) firm could submit its SBA application package in lieu of a new DBE application package. The UCP would have to do the statutorily-mandated on-site review of the firm, since on-site reviews are not normally part of the 8(a) application process. The UCP could also request additional information from the applicant to ensure that all Part 26 requirements are met and that all information has been updated. The UCP would have to certify the firm unless information from the on-site review and other information received by the UCP demonstrates that the firm does not meet Part 26 eligibility criteria. If the 8(a) firm is not from the UCP's state, the UCP would not have to process the application in the absence of the home state's on-site review report, which it would obtain in the same way as it obtains such reports under the "rebuttable presumption" system of proposed § 26.84(d)(1).

The proposed § 26.84 contains the proposed rebuttable presumption reciprocity system. When this section refers to State A (a firm's home state) or State B, it means the UCP of that state. As under the current rule, a UCP always has the option of accepting, without further ado, a certification by another state's UCP. The only new element this provision would add is a basic requirement for the UCP to verify that the out-of-state certification presented by the applicant is genuine.

The main obligation of a firm seeking to get certified outside its home state is

to provide “State B” with a full package of all relevant existing documentation, including its home state application, affidavits of no change, reports of changes, decisions or correspondence relating to certification matters from other states, certification appeal decisions, etc. Any prudent company would keep photocopies or electronic versions of all this documentation, and firms would send in copies of this documentation, rather than generating new documents. There would have to be an affidavit, under penalty of perjury, that the documents were full, complete, and unaltered.

When State B receives this full package of information, it contacts the home state and requests the on-site review report. It is crucial to the operation of this system that the home state respond promptly; otherwise, the certification of the firm can be delayed (see proposed paragraph 26.84(e)). State B must certify the firm within 30 days, unless it finds good cause to believe that the firm should not be certified. If State B fails to respond within 30 days, the Department would regard the firm as having been certified.

Good cause to object to a reciprocal certification could arise from a number of sources: evidence that the home state certification had been obtained fraudulently or if there was new evidence not available to the home state; differences in state law (*e.g.*, home state does not require a professional license for the person controlling a given type of company; State B law does impose such a requirement); or the information the applicant provided was inadequate or insufficient or otherwise not meet the rule’s requirements (*e.g.*, the applicant failed to disclose a denial or decertification in another state).

One of the proposed bases to find good cause bears a bit more discussion. The proposed language would permit State B to find good cause if the home state’s certification was factually erroneous or inconsistent with Part 26. For example, suppose State B reviews the documentation used by the home state to certify Firm Y and finds an outcome-determinative fact about Firm Y that the home state overlooked, or State B notices that the home state had based its decision on what is clearly a misreading or misinterpretation by the home state of Part 26 or DOT guidance. In these cases, under the proposal, State B could find good cause to begin a proceeding to deny reciprocal certification. On the other hand, it is often the case that reasonable people can differ in their conclusions about whether the facts surrounding a firm’s application demonstrate that the firm

meets Part 26 criteria. We would not want this provision simply to become a way for what amounts to no more than differences of opinion to obstruct interstate certification. We seek comment on how, if at all, the language of this provision should be refined to avoid that result.

Where the UCP finds good cause, it must so notify the firm, and provide the reasons for its finding. The firm must have the opportunity, within 30 days, for a proceeding—including a hearing, if the firm wants it—that is essentially the same as a decertification hearing. Importantly, as in a decertification proceeding, the burden of proof is on the UCP to demonstrate that the firm is ineligible. The UCP must render its decision within another 30 days. The Department proposes these short time frames in the belief that reciprocal certification actions should be on a fast track, lest the ability of a firm to become certified outside its home state becomes overly subject to bureaucratic delay.

One of the issues that arises in discussions of reciprocity of certifications is how to handle denials of certification and decertifications. If firm X is certified in its home state, reciprocally certified in State B, and then decertified in his home state, what is State B supposed to do? If, in the “rebuttable presumption” process described above, the home state certifies Firm X, but State B rejects the firm’s certification after the hearing process, what is State C supposed to do when Firm X applies for certification there?

In this NPRM, we are proposing to have UCPs send to the Departmental Office of Civil Rights (DOCR) online database information about firms whose applications have been denied, which have been decertified, or which have been rejected for reciprocal certification after the rebuttable presumption process described above, as well as the date of the action and a very brief summary of the reason for the action. UCPs would be responsible for checking the DOCR Web site to see if any applicant for certification or currently certified firm appears on the list. For example, if State D’s UCP saw Firm X (which State D had certified) on the list as having been decertified by State F’s UCP, State D’s UCP would request from the State F’s UCP a copy of State F’s decertification decision. State F’s UCP would promptly provide the copy. State D’s UCP would take the information in State F’s decision into account in determining what action, if any, to take with respect to Firm X. The Department seeks comment not only on the merits of this proposal but also on any other measures that would address this overall issue.

The Department intends that this interstate certification process apply to airport concessions DBEs as well as those DBEs who seek work on Federally-assisted contracts. Consequently, we will subsequently propose a conforming amendment to 49 CFR Part 23.

### Fostering Small Business Participation

One of the matters discussed in the ANPRM was the issue of “unbundling,” as well as other ways of reducing barriers to the participation of small businesses, including DBEs, on DOT-assisted contracts. The relatively small number of comments on this subject generally suggested that while unbundling was a good thing, it was difficult to achieve, and recipients should have discretion concerning whether and how to implement initiatives in this area.

The Department believes that fostering small business participation in a race-neutral way is an important component of a successful DBE program. For that reason, we are proposing to require recipients to create a small business element of their DBE programs, that could include a number of different approaches. The NPRM, in § 26.39, proposes a menu of strategies that are neither exhaustive nor mandatory to include in this program element. The Department seeks comment on this overall approach, as well as on the individual menu items proposed. Are there additional strategies that should be considered? How much time should recipients be given to amend their DBE program plans to include a small business element?

As noted in a March 2010 DBE conference held by the Department’s Office of Small and Disadvantaged Business Utilization, some states (*e.g.*, Missouri, Wisconsin) have devised innovative approaches to increasing small business and DBE participation. The Department seeks comment on the extent to which this experience can be generalized and on whether any elements of these approaches should be included as recommended or required practices in the DBE regulation.

The pending FAA reauthorization legislation mentioned above would direct the Department to issue rules to prohibit discriminatory or excessive bonding practices. The Department seeks comment on whether there are such practices, what they are, and how DOT rules could best be crafted to implement such a statutory requirement, if it is enacted. For example, we have heard in stakeholder meetings that prime contractors sometimes require subcontractors to be

bonded at a level well above the amount of the subcontract or in a way that duplicates bonding that has already been provided to the project owner. Do such practices exist, and, if so, are they common?

### Terminations and Substitutions of DBE Subcontractors

The Department had noted some concerns about termination and substitution practices by prime contractors that negatively impacted DBE subcontractors committed during the contract award process and sought comment on whether § 26.53(f)(1) should be modified. There was overwhelming support to revise the section by recipients and DBE trade groups in their response to this inquiry. They supported requiring recipients to concur in terminations and substitutions of DBE subcontractors who are being used for DBE credit on a contract, with concurrence to be provided only if the action was for good cause. Prime contractors and their respective trade groups took a contrary view and wanted to retain their independent authority. These commenters suggested that recipients should have no say regarding a change or termination of a DBE subcontractor in instances where the change does not impact DBE goal achievement.

Many recipients commented that they currently do require prime contractors to receive written approval from the recipient prior to the prime substituting DBE subcontractors. In addition, some comments recommended that the Department adopt a regulation containing a standard similar to that required under California Law PCC 4107, which requires notice prior to termination.

The Department is cognizant of the prime contractors' position that primes should have the ability to remove a nonperforming or poorly performing subcontractor. However, the Department does not believe a revision to this section of the rule requiring a recipient's approval prior to termination of a DBE subcontractor for other than good cause would undermine this authority or insert an onerous burden on prime contractors. Moreover, based on the comments from recipients, this change would formalize a practice already undertaken by many recipients. Accordingly, the Department is proceeding with the proposed revision, proposed to be located in § 26.53(f), in order to maintain program integrity and ensure a more meaningful commitment to a particular DBE firm that the prime contractor listed as part of the contract award process. The proposed section

includes a list of actions that would constitute good cause for this purpose. We seek comment on whether there should be any additions or changes to this list.

### Counting Issue

The ANPRM discussed the background of this issue in some detail (*see* 74 FR 15905). For convenience of readers, we are summarizing that discussion here. Section 26.55(a)(1) of the Department's DBE rule provides as follows:

(a) When a DBE participates in a contract, you count only the value of the work actually performed by the DBE toward DBE goals.

(a)(1) *Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(2) of this section) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate.*

The preamble discussion of this provision said the following:

*The value of work performed by DBEs themselves is deemed to include the cost of materials and supplies purchased, and equipment leased, by the DBE from non-DBE sources. For example, if a DBE steel erection firm buys steel from a non-DBE manufacturer, or leases a crane from a non-DBE construction firm, these costs count toward DBE goals. There is one exception: if a DBE buys supplies or leases equipment from the prime contractor on its contract, these costs do not count toward DBE goals. Several comments from prime contractors suggested these costs should count, but this situation is too problematic, in our view, from an independence and commercially useful function (CUF) point of view to permit DBE credit. 64 FR 5115-16, February 2, 1999.*

This provision creates an intentional inconsistency between the treatment of purchases or leases of items by DBEs from non-DBE sources. If a DBE contractor buys or rents items from a non-DBE source other than the prime contractor, the recipient counts those items for DBE credit on the contract. If a DBE subcontractor buys or rents the same items from the prime contractor for the DBE's subcontract, the recipient does not award DBE credit for the items.

The policy rationale for this provision, as the preamble quotation notes, is that permitting the prime contractor to provide an item to its own

DBE subcontractor, and then claim DBE credit for the value of that item, raises issues concerning whether the DBE is actually independent and performing a CUF. The rule regards the item as having been provided by the prime contractor to the project and, consequently, not as part of the "work actually performed by the DBE." Therefore, the rule does not permit it to be counted for DBE credit.

Some prime contractors and DBE contractors have objected to this provision, both in correspondence with the Department and in stakeholder meeting discussions. They assert that 26.55(a)(1) prevents DBE firms from successfully competing for projects involving the purchase of commodities like asphalt, concrete, or quarried rock, since the DBE credit they could bring to the project would be limited to the installation and labor costs of the job (likely a relatively small percentage of the overall contract). This is particularly true, they say, when there are only one or two suppliers of the commodity within a reasonable distance of the DBE, and those suppliers are owned by or affiliated with a prime contractor.

Participants in the stakeholder meeting discussions also suggested that the current rule could lead to competitive inequities between prime contractors. For example, suppose Prime Contractor A has an asphalt plant—the only one in the area—and Prime Contractor B does not. Both are bidding on a highway construction contract on which there is a DBE goal. Prime Contractor A cannot count for DBE credit the asphalt that a DBE paving contractor buys, while Prime Contractor B can. This makes it easier for B to meet the DBE goal on the contract.

The ANPRM asked for comments on four alternatives: (1) No change; (2) keep current rule in place, but allow recipients to make exceptions in limited circumstances; (3) permit items obtained by DBEs for a contract to be counted for DBE credit regardless of their non-DBE source; or (4) prohibit items obtained by a DBE from any non-DBE source to be counted for DBE credit. Twenty-eight comments addressed this issue, and each of the options attracted support (11 favored option 1, 6 favored option 2, 7 favored option 3, and 4 favored option 4).

The Department believes that the basic policy objective of the current regulation—preventing items actually supplied by prime contractors from counting for DBE credit by being passed through their DBE subcontractors—is a sound one. Simply allowing such items to count toward DBE goals in all

situations, as option 3 would provide, is too contrary to this objective for the Department to consider further. Option 2's authorization of exceptions to this general rule could lead to very inconsistent, and arguably arbitrary, results within and among states. Option 4 establishes consistency in how items obtained by DBEs are treated, but would likely result in reduced dollar amounts overall DBE participation. Option 1, which received at least plurality support among commenters and prevents prime contractors from counting as DBE participation items that they themselves contribute to a project, appears the best approach. Consequently, the Department is not proposing to change this section. We will continue to consider comments on the issue, however.

#### **Application and PNW Forms**

The ANPRM asked for comments on potential improvements to the rule's application and personal net worth (PNW) forms. This is an important matter, and one requiring detailed attention as well as thorough analysis of the information collection burdens involved. For this reason, while the Department is currently working on revised forms, we are deferring proposing new forms to a subsequent NPRM.

#### **Certification-Related Provisions**

This NPRM also proposes a number of modifications to the certification provisions of the rule, based primarily on the Department's experience in certification appeals cases and other issues that have come to the Department's attention. The Department is continuing to review and update certification provisions, and we anticipate proposing several additional modifications in the subsequent NPRM that will also propose revised PNW and application forms. Minor technical changes to references within the existing definitions are also proposed.

##### *Section 26.71 What rules govern determinations concerning control?*

"Generic" certification of a firm as a DBE is not proper in the program. Under § 26.71(n), DBEs are certified by recipients and UCPs only with respect to specific types of work in which the certifying agency has determined that the socially and economically disadvantaged owners control. When applying for certification, an applicant is asked to describe the "primary business and professional activities the firm is engaged in." The types of work a firm can perform (whether on initial certification or when a new type of work

is added) should be described in terms of six-digit North American Industry Classification System (NAICS) codes, or another classification scheme of equivalent detail and specificity. In order to meet its burden of proof, a firm must provide detailed information the certifying agency needs and/or requests so that the certifying agency may make an appropriate NAICS code designation. Firms are also responsible for ensuring that the NAICS codes cited in a certification are up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. To assist recipients and firms address these issues, the Department is proposing an amendment to § 26.71(n), which would codify the substance of a guidance Q & A the Department issued in 2009.

##### *Section 26.73 What are other rules affecting certification?*

The Department has learned, through the Department's certification appeal process and from oversight of recipients' DBE programs, that some recipients may deny certification to firms on the basis that they do not appear prepared to perform a particular project, are newly formed, or lack employees or specific pieces of equipment. We have learned that recipients are taking this action after perceiving the firm incapable of success later down the road. This is somewhat of a premature determination and akin to a finding that a firm's work would not be counted for DBE credit sometime in the future. We have consistently held that counting issues are separate from certification; and we continue to hold that firms should be evaluated based on their present circumstances. The Department therefore, is restating § 26.73(b), which prohibits a recipient from refusing to certify a firm solely on the basis that it is a newly formed firm; and adding a section (b)(2) to emphasize also that recipients should not refuse to certify a firm that has not completed contracts or projects at the time of its application, has not yet realized profits from its activities, or has not demonstrated a potential for success. We stress that if the firm meets the size, ownership, and control requirements of this part, the firm is eligible for certification.

A firm must be a going concern in order to be certified. It is not realistic to expect a recipient, for example, to conduct an on-site review of a business plan that exists only on paper. Nevertheless, given that one of the primary purposes of the DBE program is to serve as an incubator for start-up businesses, recipients should not create unauthorized or unnecessary barriers to

the participation of newer firms. For example, it would be contrary to this section for a certifying agency to insist on two years of business tax returns from a firm that had only been in business six months.

##### *Section 26.83 What procedures do recipients follow in making certification decisions?*

The Department wants to reemphasize, in § 26.83(h), that once a firm is certified, it stays certified unless and until its certification is removed under § 26.87. Certifications do not expire or lapse, whether after three years or any particular number of years. Firms cannot be required to reapply for certification. However, recipients may properly conduct certification reviews of certified firms, including a new on-site review, three years from the date of the most recent certification of the firm or sooner if changed circumstances relating to the firm's ownership, control, size or disadvantaged status warrant. In addition, recipients may conduct on-site visits on an unannounced basis at the firm's offices and job sites if information comes to a recipients' attention regarding the firm's eligibility. The Department seeks comment on whether periodic new on-site reviews should be conducted (e.g., every three or five years) to ensure that information about certified firms is up-to-date and that firms have not changed in ways that adversely impact their eligibility? Would such a requirement make the interstate certification process work better? What would the resource implications be?

One of the problems that the Department has seen is that on-site reviews, once conducted, are not periodically updated by some certifying agencies. The result may be that the information in an on-site review report may be stale. This is a particular concern given the interstate certification provisions of proposed § 26.84, in which a "State B" must rely on the on-site report of the applicant firm's home state. If the on-site report is 5 or 10 years old, can other states safely rely on the information? If not, should we require updated on-site reviews to be conducted by firms' home states at a given interval (e.g., every three years)? Should states be permitted to charge user fees to firms for updated on-site reviews? Are there ways of reducing burdens of on-site reviews (e.g., by use of videoconferencing or other technologies)? Could the need for updated on-site reviews be mitigated if firms had to submit additional annual update information (e.g., PNW statements, tax returns, data about the

firm's finances and transactions)? The Department seeks comment on this topic.

The Department has learned, through the Department's certification appeal process and oversight of recipients' DBE programs, of instances in which applicants may have been unaware that their application lacked the necessary information, through either a misunderstanding of the process and/or submitting some, but not all, of the information a recipient needs to make a decision. It is therefore useful for recipients to inform each applicant within 20 business days after receiving an application, whether the application is complete and ready for evaluation, and if not, what additional information or action is required. Many recipients engage in this practice and promptly notify firms, either by e-mail or certified mail of their need for additional information. The addition of a requirement to this effect, therefore, does not seem onerous and we added a new lead sentence in paragraph (l) to reflect this addition.

#### Other Provisions

The Uniform Report of DBE Awards or Commitments and Payments, found in Appendix B of Part 26, has long been required to be submitted by DOT recipients. The form itself states that FHWA and FTA recipients submit the form twice a year, while FAA recipients submit it annually. It was called to our attention, however, that body of the regulation does not specifically reference the form. To remedy this situation, we propose adding such a reference to § 26.11. There is no change to the existing requirement for submission of the form and no additional information collection burden involved.

In § 26.45, the NPRM would clarify requirements concerning project overall goals and the implementation of the recent amendment calling for submission of overall goals on a triennial, rather than annual, basis. In § 26.51, the NPRM would clarify that, if a recipient had an all race-neutral overall goal, it nevertheless would use race-conscious contract goals if, part way through the year, it became necessary to do so in order to have a reasonable opportunity to meet the overall goal. This proposed amendment is related to the proposed "accountability" mechanism in proposed § 26.47. Finally, an obsolete citation to suspension and debarment rules would be replaced by the current citation in § 26.107.

#### Regulatory Analyses and Notices

##### *Executive Order 12866 and DOT Regulatory Policies and Procedures*

This is a nonsignificant regulation for purposes of Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. The proposals involve administrative modifications to several provisions of a long-existing and well-established program, designed to improve the program's implementation. The proposals, if made final, would not alter the direction of the program, make major policy changes, or impose significant new costs or burdens.

##### *Regulatory Flexibility Act*

A number of provisions of the NPRM would reduce small business burdens or increase opportunities for small business, notably the interstate certification process and the small business DBE program element proposals. Small recipients would not be required to prepare or transmit reports concerning the reasons for overall goal shortfalls and corrective action steps to be taken. Only State DOTs, the 50 largest transit authorities, and the 30–50 airports receiving the greatest amount of FAA financial assistance would have to file these reports. The task of sending copies of on-site review reports to other certification entities fall on UCPS, which are not small entities, and in any case can be handled electronically by e-mailing PDF copies of the documents. While all recipients would have to input information about decertifications and denials into a DOT database, this would be a quick electronic process that would not be costly or burdensome. The NPRM would not make major policy changes that would cause recipients to expend significant resources on program modifications. For these reasons, the Department certifies that the NPRM, if made final, would not have a significant economic effect on a substantial number of small entities.

##### *Federalism*

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under the Order and have determined that it does not have implications for federalism, since it merely makes administrative modifications to an existing program. It does not change the relationship between the Department and State or

local governments, pre-empt State law, or impose substantial direct compliance costs on those governments.

##### *Paperwork Reduction Act*

As required by the Paperwork Reduction Act of 1995, DOT will submit Information Collection Requests (ICRs) to the Office of Management and Budget (OMB). Before OMB decides whether to approve these proposed collections of information and issue a control number, the public must be provided 30 days to comment. Organizations and individuals desiring to submit comments on the collection of information should direct them to the Office of Management and Budget, Attention: Desk Officer for the Office of the Secretary of Transportation, Office of Information and Regulatory Affairs, Washington, DC 20503. We also request that a copy of such comments be sent to the docket for this NPRM. OMB is required to make a decision concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

The items in this NPRM for which DOT intends to seek Paperwork Reduction Act approvals are the following:

- Proposed § 23.39(b): Submission of small business program element.
- Proposed § 26.47 (c): Submission of analysis of reasons for falling short of overall goal corrective actions.
- Proposed § 26.84(c)(4): Affidavit concerning information of certification information.
- Proposed § 26.84(f): Submission of certification information to DOT database.

#### List of Subjects in 49 CFR Part 26

Administrative practice and procedure, Airports, Civil rights, Government contracts, Grant-programs—transportation, Mass transportation, Minority businesses, Reporting and record keeping requirements.

Issued This Day of May, 2010, at Washington DC.

**Ray Lahood,**  
*Secretary of Transportation.*

For the reasons set forth in the preamble, the Department of Transportation proposes to amend 49 CFR part 26 as follows:

**PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS**

1. The authority citation for part 26 continues to read as follows:

**Authority:** 23 U.S.C. 324; 42 U.S.C. 2000d, *et seq.*; 49 U.S.C 1615, 47107, 47113, 47123; Sec. 1101(b), Pub. L. 105–178, 112 Stat. 107, 113.

2. Add § 26.11(a) to read as follows:

**§ 26.11 What records do recipients keep and report?**

(a) You must transmit the Uniform Report of DBE Awards or Commitments and Payments, found in Appendix B to this part, at the intervals stated on the form.

\* \* \* \* \*

3. Revise § 26.31 to read as follows:

**§ 26.31 What information must you include in your DBE directory?**

You must maintain and make available to interested persons a directory identifying all firms eligible to participate as DBEs in your program. In the listing for each firm, you must include its address, phone number, and the types of work the firm has been certified to perform as a DBE.

4. Revise § 26.37 (b) to read as follows:

**§ 26.37 What are a recipient's responsibilities for monitoring the performance of other program participants?**

\* \* \* \* \*

(b) Your DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently (*e.g.*, as the result of modification to the contract) is actually performed by the DBEs to which the work was committed, where the DBEs' work is intended to count toward DBE goals. This mechanism must include a written certification for each such contract that you have reviewed contracting records for and monitored the work on-site for the contract to ensure that DBEs have actually performed the work in question.

\* \* \* \* \*

5. Add a new § 26.39 to subpart B, to read as follows:

**§ 26.39 Fostering small business participation.**

(a) Your DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including

unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors.

(b) This element must be submitted to the appropriate DOT operating administration for approval as a part of your DBE program. As part of this program element you may include, but are not limited to, the following strategies:

(1) Establishing a race-neutral small business set-aside for prime contracts under a stated amount (*e.g.*, \$1 million).

(2) In multi-year design-build contracts or other large contracts (*e.g.*, for "meagprojects") requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.

(3) On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.

(4) Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.

(5) If you are implementing your overall goal wholly through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.

6. Revise § 26.45(e)(2), (e)(3), (f)(1), and (f)(2) to read as follows:

**§ 26.45 How do recipients set overall goals?**

\* \* \* \* \*

(e) \* \* \*

(2) If you are an FTA or FAA recipient, as a percentage of all FTA or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA or FAA-assisted contracts in the three forthcoming fiscal years.

(3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects. Like other overall goals, a project goal may be adjusted to reflect changed circumstances, with the concurrence of the appropriate operating administration.

(i) A project goal is an overall goal, and must meet all the substantive and procedural requirements of this section pertaining to overall goals.

(ii) A project goal covers the entire length of the project to which it applies.

(iii) The project goal should include a projection of the DBE participation anticipated to be obtained during each fiscal year covered by the project goal.

(iv) The funds for the project to which the project goal pertains are separated from the base from which your regular overall goal, applicable to contracts not part of the project covered by a project goal, is calculated.

(f)(1)(i) If you set your overall goal on a fiscal year basis, you must submit it to the applicable DOT operating administration by August 1 at three-year intervals, based on a schedule established by the FHWA, FTA, or FAA, as applicable, and posted on that agency's Web site.

(ii) You must submit to the operating administration for approval any significant adjustment you make to your goal during the three-year period based on changed circumstances. The operating administration may direct you to undertake a review of your goal if necessary to ensure that the goal continues to fit your circumstances appropriately.

(iii) While you are required to submit an overall goal to FHWA, FTA, or FAA only every three years, the overall goal and the provisions of § 26.47(c) apply to each year during that three-year period.

(2) If you are a recipient and set your overall goal on a project or grant basis as provided in paragraph (e)(3) of this section, you must submit the goal for review at a time determined by the FHWA, FTA or FAA Administrator, as applicable.

\* \* \* \* \*

7. Add new paragraph (c) and (d) to § 26.47, to read as follows:

**§ 26.47 Can recipients be penalized for failing to meet overall goals?**

\* \* \* \* \*

(c) If the awards and commitments shown on your Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must do the following in order to be regarded by the Department as implementing your DBE program in good faith:

(1) Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year;

(2) Establish specific steps and milestones to correct the problems you have identified in your analysis and to enable you to meet fully your goal for the new fiscal year;

(3) (i) If you are a State highway agency; one of the 50 largest transit

authorities as determined by the FTA; or an Operational Evolution Partnership Plan airport or other airport designated by the FAA, you must submit, within 60 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (c)(1) and (2) of this section to the appropriate operating administration for approval. If the operating administration approves the report, you will be regarded as complying with the requirements of this section for the remainder of the fiscal year.

(ii) As a transit authority or airport not meeting the criteria of paragraph (c)(3)(i) of this section, you must retain analysis and corrective actions in your records for three years and make it available to FTA or FAA on request for their review.

(4) FHWA, FTA, or FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your race-conscious/race neutral split, or the introduction of additional race-neutral or race-conscious measures.

(5) You may be regarded as being in noncompliance with this Part, and therefore subject to the remedies in §§ 26.103 or 26.105 of this part and other applicable regulations, for failing to implement your DBE program in good faith if any of the following things occur:

(i) You do not submit your analysis and corrective actions to FHWA, FTA, or FAA in a timely manner as required under paragraph (c)(3) of this section;

(ii) FHWA, FTA, or FAA disapproves your analysis or corrective actions; or

(iii) You do not fully implement the corrective actions to which you have committed or conditions that FHWA, FTA, or FAA has imposed following review of your analysis and corrective actions.

(d) If, as recipient, your 6-month Uniform Report of DBE Awards or Commitments and Payments (for FHWA and FTA recipients) or other information coming to the attention of FTA, FHWA, or FAA, demonstrates that you are falling short of the DBE awards and commitments that would be necessary to allow you to meet your overall goal at the end of the fiscal year, FHWA, FTA, or FAA, as applicable, may require you to make further good faith efforts, such as by modifying your race-conscious/race neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

8. Revise § 26.51(b)(1), (f)(1), and the example to paragraph (f)(1), to read as follows:

**§ 26.51 What means do recipients use to meet overall goals?**

\* \* \* \* \*

(b) Race-neutral means include, but are not limited to, the following:

(1) Arranging solicitations; times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under § 26.39 of this part.

\* \* \* \* \*

(f) \* \* \*

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year, unless it becomes necessary to do so to avoid falling short of our overall goal.

*Example to Paragraph (f)(1):* Your overall goal for Year 1 is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year 1. However, if part way through Year 1, your DBE awards or commitments are not at a level that would permit you to achieve your overall goal for Year 1, you would begin setting race-conscious DBE contract goals during the remainder of the year as part of your obligation to implement your program in good faith.

\* \* \* \* \*

9. In § 26.53, redesignate paragraph (g) as paragraph (i), redesignate paragraphs (f)(2) and (3) as paragraphs (g) and (h) respectively, revise paragraph (f)(1), and add new paragraphs (f)(2) through (5) to read as follows:

**§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?**

\* \* \* \* \*

(f)(1) You must require that a prime contractor not terminate a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) without your written concurrence. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with a substitute DBE firm.

(2) You may provide such written consent only if you agree, for reasons

stated in your concurrence document, that the prime contractor has good cause to terminate the DBE firm.

(3) For purposes of this paragraph, good cause includes the following circumstances:

(i) The listed DBE subcontractor fails or refuses to execute a written contract;

(iii) The listed DBE subcontractor fails or refuses to perform its subcontract;

(iv) The listed DBE subcontractor fails to perform its work on the subcontract in a way that is acceptable to you;

(v) The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable bond requirements;

(vi) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;

(vii) The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1200 or applicable state law;

(viii) You have determined that the listed DBE subcontractor is not a responsible contractor;

(ix) The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;

(x) The listed DBE is ineligible to receive DBE credit for the type of work required;

(xi) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract.

(xii) Other good cause that you determine compels the termination of the DBE subcontractor, with the concurrence of FHWA, FTA, or FAA, as applicable.

(3) Before transmitting to you its request to terminate and/or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to you, of its intent to request to terminate and/or substitute, and the reason for the request.

(4) The prime contractor must give the DBE 5 days to respond to the prime contractor's notice and advise you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why you should not approve the prime contractor's action.

(5) In addition to post-award terminations, the provisions of this section apply to preaward deletions of or substitutions for DBE firms put forward by offerors in negotiated procurements.

\* \* \* \* \*

10. Revise § 26.67 (a)(2)(i) to read as follows:

**§ 26.67 What rules determine social and economic disadvantage?**

(a) \* \* \*  
(2)(i) You must require each individual owner of a firm applying to participate as a DBE (except a firm applying to participate as a DBE airport concessionaire under 49 CFR part 23) whose ownership and control are relied upon for DBE certification to certify that he or she has a personal net worth that does not exceed \$1.3 million.

\* \* \* \* \*  
11. Revise § 26.71(n) to read as follows:

**§ 26.71 What rules govern determinations concerning control?**

\* \* \* \* \*  
(n) You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You may not, in this situation, require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

(1) The types of work a firm can perform (whether on initial certification or when a new type of work is added) must be described in terms of NAICS codes or a classification scheme of equivalent detail and specificity. A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes may be assigned, where appropriate. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification.

(2) Firms and recipients must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. The firm bears the burden of providing detailed company information the certifying agency needs to make an appropriate NAICS code designation.

(3) If a firm believes that there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified as a DBE, the firm may request that the certifying agency, in its certification documentation, supplement the assigned NAICS code(s) with a clear,

specific, and detailed narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is not sufficient for this purpose, and recipients should not rely on such a description in determining whether a firm's participation can be counted toward DBE goals.

(4) A certifier is not precluded from changing a certification classification or description if there is a factual basis in the record. However, certifiers should not make after-the-fact statements about the scope of a certification, not supported by evidence in the record of the certification action.

\* \* \* \* \*  
12. Revise § 26.73(b) to read as follows:

**§ 26.73 What are other rules affecting certification?**

\* \* \* \* \*  
(b)(1) You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part.

(2) You must not refuse to certify a firm solely on the basis that it is a newly formed firm, has not completed projects or contracts at the time of its application, has not yet realized profits from its activities, or has not demonstrated a potential for success. If the firm meets disadvantaged, size, ownership, and control requirements of this Part, the firm is eligible for certification.

\* \* \* \* \*  
**§ 26.81 [Amended]**

13. Amend § 26.81(g) by removing the period at the end of the last sentence and adding the words "and shall revise the print version of the Directory at least once a year."

14. In § 26.83, remove and reserve paragraph (e), revise paragraph (h), and add a new paragraph (l) to read as follows:

**§ 26.83 What procedures do recipients follow in making certification decisions?**

\* \* \* \* \*  
(h) Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of § 26.87. You may not require DBEs to reapply for certification. However, you may conduct a certification review of a

certified DBE firm, including a new on-site review, three years from the date of the firm's most recent certification, or sooner if appropriate in light of changed circumstances (e.g., of the kind requiring notice under paragraph (i) of this section), a complaint, or other information concerning the firm's eligibility. If information comes to your attention that leads you to question the firm's eligibility, you may conduct an on-site review on an unannounced basis, at the firm's offices and jobsites.

\* \* \* \* \*  
(l) As a recipient or UCP, you must advise each applicant within 20 business days from your receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.

15. Revise § 26.84 to read as follows

**§ 26.84 Interstate certification.**

(a) This section applies with respect to any firm that is currently certified in its home State.

(b) When a firm currently certified in its home State ("State A") applies to another State ("State B") for DBE certification, State B may, at its discretion, accept State A's certification and certify the firm, without further procedures.

(1) To obtain certification in this manner, the firm must provide to State B a copy of its certification notice from State A.

(2) Before certifying the firm, State B must confirm that the firm has a current valid certification from State A. State B can do so by reviewing State A's electronic directory or getting written confirmation from the home State.

(c) In any situation in which State B chooses not to accept State A's certification of a firm as provided in paragraph (b) of this section, as the applicant firm you must provide the following information in paragraphs (c)(1) through (4) of this section to State B.

(1) You must provide to State B a complete copy of the application form, all supporting documents, and any other information you have submitted to State A related to your firm's certification. This includes affidavits of no change (see § 26.83(j) and any notices of changes (see § 26.83(i) that you have submitted to State A, as well as any correspondence you have had with State A's UCP or any recipient concerning your application or status as a DBE firm.

(2) You must also provide to State B any notices or correspondence from states other than State A relating to your status as an applicant or certified DBE

in those states. For example, if you have been denied certification or decertified in State C, or subject to a decertification action there, you must inform State B of this fact and provide all documentation concerning this action to State B.

(3) If you have filed a certification appeal with DOT (*see* § 26.89), you must inform State B of the fact and provide your letter of appeal and DOT's response to State B.

(4) You must submit an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that you have submitted all the information required by 49 CFR 26.84(c) and the information is complete and, in the case of the information required by § 26.84(c)(1), an identical copy of the information submitted to State A.

(d) As State B, when you receive from an applicant firm all the information required by paragraph (c) of this section, you must take the following actions:

(1) Immediately contact State A and request a copy of the site visit review report for the firm (*see* § 26.83(c)(1)), any updates to the site visit review, and any evaluation of the firm based on the site visit. As State A, you must transmit this information to State B within seven days of receiving the request.

(2) Determine, within 30 days, whether there is good cause to believe that State A's certification of the firm is erroneous or should not apply in your State. Reasons for making such a determination may include, but are not limited to, the following:

(i) Evidence that State A's certification was obtained by fraud;

(ii) New information, not available to State A at the time of its certification, indicating that the firm does not meet all eligibility criteria;

(iii) State A's certification was factually erroneous or was inconsistent with the requirements of this part;

(iv) The State law of State B leads to a result different from that of the State law of State A.

(v) The information provided by the applicant firm did not meet the requirements of paragraph (c) of this section.

(3) If, as State B, unless you have determined that there is good cause to believe that State A's certification is erroneous or should not apply in your State, you must, no later than 30 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm

a notice that it is certified and place the firm on your directory of certified firms.

(4) If, as State B, you have determined that there is good cause to believe that State A's certification is erroneous or should not apply in your State, you must, no later than 30 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice stating the reasons for your determination.

(i) This notice must meet the requirements of § 26.87(b) of this part and offer the firm the opportunity for a hearing meeting the requirements of § 26.87(d), (e)(2), and (g) of this part.

(ii) If the firm elects to have a hearing, you must ensure that it takes place within 30 days, and your decision must be issued within 30 days after the date of the hearing.

(iii) Consistent with the provisions of § 26.87(d)(1) and (3) of this part, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(iv) The firm's application for certification is stayed pending the outcome of this proceeding.

(v) The firm may appeal the outcome of this proceeding to DOT as provided in § 26.89 of this part.

(e) As State B, if you have not received from State A a copy of the site visit review report by a date 14 days after you have made a timely request for it, you may hold action required by paragraphs (d)(2) through (4) of this section in abeyance pending receipt of the site visit review report. In this event, you must, no later than 30 days from the date on which you received from an applicant firm all the information required by paragraph (c) of this section, notify the firm in writing of the delay in the process and the reason for it.

(f)(1) As a UCP, when you deny a firm's application, reject the application of a firm certified in State A or any other State in which the firm is certified, through the procedures of paragraph (d)(4) of this section, or decertify a firm, in whole or in part, you must make an entry to the Department of Transportation Office of Civil Rights' (DOCR's) Ineligibility Determination online database. You must enter the following information:

(i) The name of the firm;

(ii) The name(s) of the firm's owner(s);

(iii) The type and date of the action;

(iv) The reason for the action.

(2) As a UCP, you must check the DOCR Web site at least once every month to determine whether any firm that is applying to you for certification

or that you have already certified is on the list.

(3) For any such firm that is on the list, you must promptly request a copy of the listed decision from the UCP that made it. As the UCP receiving such a request, you must provide a copy of the decision to the requesting UCP within 7 days of receiving the request. As the UCP receiving the decision, you must then consider the information in the decision in determining what, if any, action to take with respect to the certified DBE firm or applicant.

16. Revise § 26.85 to read as follows:

**§ 26.85 Certification of SBA 8(a)-certified firms.**

(a) As a recipient or UCP, if a firm certified by SBA under its 8(a) program applies to you for certification as a DBE, you must follow the procedures of this section.

(b) When an SBA 8(a)-certified firm applies for certification, you must accept the certification applications, forms and packages submitted by a firm to the SBA for 8(a) program certification, in lieu of requiring the applicant firm to complete your own application forms and packages. The applicant may submit the package directly, or may request that the SBA forward the package to you.

(c) Before certifying a firm based on its SBA 8(a) certification, you must conduct an on-site review of the firm (*see* § 26.83(c)(1)). You may also request additional relevant information from the firm to ensure that the requirements of this Part for DBE certification have been met. If the SBA application package presented by the firm is more than two years old, you must obtain updated information from the applicant.

(d) Unless you determine, based on the on-site review and other information obtained in connection with the firm's application that the firm does not meet the eligibility requirements of subpart D of this part, you must certify the firm.

(e) For an SBA 8(a) firm that you certify under this section, you must determine, based on the on-site and other information you have gathered, the NAICS codes in which the firm may participate in your contracts as a DBE.

(f) You are not required to process an application for certification from an SBA-certified firm having its principal place of business outside the State(s) in which you operate unless there is a report of a "home State" on-site review on which you may rely.

(g) If the SBA 8(a) firm applying to you is already certified as a DBE by another State's UCP, you must use the procedures of § 26.84 of this part, rather

than those of this section, for considering its eligibility.

**§ 26.81 [Amended]**

17. In § 26.107 (a) and (b), remove “49 CFR part 29” and add in its place, “2 CFR parts 180 and 1200.”

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