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49 CFR Part 26
Disadvantaged Business Enterprise: Program Implementation Modifications; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 26

[Docket No. OST–2012–0147]

RIN 2105–AE08

Disadvantaged Business Enterprise: Program Implementation Modifications

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

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice of proposed rulemaking (NPRM) proposes three categories of changes to improve implementation of the Department of Transportation's disadvantaged business enterprise (DBE) rule. First, the NPRM proposes revisions to personal net worth, application, and reporting forms. Second, the NPRM proposes modifications to certification-related provisions of the rule. Third, the NPRM would modify several other provisions of the rule, concerning such subjects as good faith efforts, transit vehicle manufacturers and counting of trucking companies.

DATES: Comments on this proposed rule must be received by November 5, 2012.

ADDRESSES: You may submit comments (identified by the agency name and DOT Docket ID Number OST–2012–0147) by any of the following methods:

- *Federal Rulemaking Portal:* Go to *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.

Note that all comments received will become part of the docket and will be posted without change to *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://www.gpo.gov/fdsys/pkg/FR2010-29/pdf/2010-32876.pdfDocket.* For internet access to the docket to read background documents and comments received, go to *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: Jo Anne Robinson, Office of General Law, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590, 202–366–9154, *joanne.robinson@dot.gov*.

SUPPLEMENTARY INFORMATION: In January 2011, the Department published a final rule making a number of important policy changes to the DBE program. These included requiring greater accountability for recipients with respect to meeting overall goals, adjusting the Part 26 personal net worth cap applicable to owners of DBE firms for inflation to $1.32 million, requiring greater monitoring of contracts by recipients, adding a small business element to recipients' DBE programs, and facilitating interstate certification. In order not to delay these policy initiatives, the rulemaking did not include other, more technical, program improvements. These include modifications to the forms involved with the program, changes to certification-related provisions in response to eligibility concerns that have come to the Department's attention, and modifications to a variety of other program provisions. This NPRM addresses this series of issues. The Department notes that the DBE program was recently reauthorized in the Moving Ahead for Progress in the 21st Century Act ('MAP–21'), Public Law 112–141 (enacted July 6, 2012). The Department believes that this reauthorization is intended to maintain the status quo of the DBE program and does not include any significant substantive changes to the program.

Forms

Personal Net Worth (PNW) Form and Related Requirements of 49 CFR 26.67

In an advance notice of proposed rulemaking (74 FR 15904; April 8, 2009), the Department asked for comments on potential improvements to the rule's PNW form. Some comments sought to simplify the forms, and other comments recommended additions. A number of commenters provided detailed suggestions about how the form should be configured. Based on the comments, as well as on the Department's experience with reviewing certification appeals and other issues that have come to the Department's attention, the Department is proposing a revised PNW form.

With respect to the PNW form, we mentioned in a June 2003 revision to Part 26 that we had not found anything more appropriate to capture a snapshot of a person's net worth than a Small Business administration (SBA) Form 413, and we included it in the Appendix. Some commenters recommended use of this form, with some modifications.

We have learned of several concerns regarding SBA Form 413. First, the instructions require each partner or stockholder with 20% ownership or more of voting stock to complete the form. This is not required by Part 26 and has caused some confusion. Second, in order to determine whether an applicant's net worth is below the threshold, more detailed information is needed by recipients than the SBA form provides. Third, an applicant has limited space for entering information, and it appears they are often supplementing their entries with separate documents. To correct these problems and help alleviate these concerns, the Department is proposing, in section 26.67 (a)(2)(i), the use of a newly designed PNW statement along with the accompanying instruction sheet (see the proposed Appendix B of the regulation) for use by all applicants to the program and those submitting annual affidavits. The Department would encourage recipients to post the new form electronically in a screen-fillable format on their Web site to allow users to complete and print the form on-line.

One commenter suggested that the Department mandate that the form be used without modification and that regulatory provisions be added to address violations by Uniform Certification Programs (UCPs) that modify the forms. We agree that the standard personal net worth form contained in Appendix G should be used in all cases and have stated so in this proposed revision. We understand, however, that individual situations and unique financial arrangements within certain industries may make it necessary for recipients to seek additional information beyond what is provided on the form.

For instance, if an applicant reports other business interests in section 5 of the new form, recipients should ascertain the value of these entities by obtaining financial statements, balance sheets, and federal/state tax returns. With this information, recipients will be able to verify the applicant's valuation of their ownership interests in these other firms. Similarly, an applicant

reporting stock and bond holdings should be asked to provide quarterly account statements. Also, directly written on the form in section 2 (Real Estate Owner) is the requirement that applicants submit copies of real estate deeds, mortgage notes, and instruments of conveyance. In short, recipients are encouraged, during their review of the firm's eligibility, to look behind the statement and these submissions, and request additional information if necessary. Firms must cooperate with these requests pursuant to § 26.73(c) and § 26.109(c), and a failure or refusal to provide such information is a ground for a denial or removal of certification.

We propose to amend paragraphs (a)(2)(ii) and (iii) to stress that the PNW statement must include all assets owned by the individual, including any ownership interests in the applicant firm, personal assets, and the value of his or her personal residence excluding the equity. Item iii(B) clarifies that the equity in an owner's primary residence is the market value of the residence less any mortgages and home equity loan balances. It also states the basic consideration that recipients are to ensure that home equity loan balances are included in the equity calculation and not as a separate liability on the individual's personal net worth form.

Paragraph (b) of § 26.67 currently states that if an individual's statement of personal net worth shows that he or she exceeds the limitation of $1.32 million the individual's presumption of disadvantage is rebutted.

We propose adding a second component to this statement taken from the Department's long-standing guidance on personal net worth—if the person demonstrates an ability to accumulate substantial wealth, has unlimited growth potential, or has not experienced or has not had to overcome impediments to obtaining access to financing, markets, and resources, the individual's presumption of economic disadvantage is rebutted, even if the individual's PNW is less than $1.32 million. As stated in this new section and demonstrated in an example contained in the regulation text, it is appropriate for recipients to review the total fair market value of the individual's assets and determine if that level appears to be substantial and indicates an ability to accumulate substantial wealth. If a recipient makes this determination this may lead to a conclusion that the individual is not economically disadvantaged. The purpose of this proposed amendment is to give recipients a tool to exclude from the program someone who, in overall assets terms, is what a reasonable person would consider to be a wealthy individual, even if one with liabilities sufficient to bring his or her PNW under $1.32 million. The Department also seeks comment on whether a more bright-line approach would be preferable, such as saying that someone whose Adjusted Gross Income on his or her Federal income tax return was over $1 million for two or three years in a row would lose the presumption of economic disadvantage, regardless of PNW.

In certain instances, assets that individuals have transferred two years prior to filing their certification application may be counted when calculating their PNW. These circumstances are currently described in Appendix E, which attributes to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the DBE program or within two years of a participant's annual program review. The Department proposes to add this same language directly to the regulation text at § 26.67 in a new paragraph (e).

We are also proposing to add a provision concerning transfers from the DBE owner to the applicant firm. This is necessary for two reasons. First, the placement of the added language within the current section better emphasizes the importance of considering transfers of funds from the DBE owner to the applicant firm when assessing a person's economic disadvantage. Second, we have learned of situations in which DBE owner/applicants are shielding a portion of their personal assets by transferring them to the applicant firm that he/she owns and controls. The Department recognizes that such financial transactions may be an acceptable business practice; however, we also recognize that asset transfers can be used to artificially depress their PNW in order to qualify for the program. Because the regulation excludes the ownership interest in the applicant firm in calculating its owner's PNW, the ability to transfer one's personal assets to this entity would defeat the purpose of ensuring that only economically disadvantaged individuals participate in the DBE program.

Additional portions of this section taken from Appendix E would be retained. These provisions state that transfers will be included in a person's net worth unless the individual claiming disadvantaged status can demonstrate that the transfer is to, or on behalf of, an immediate family member for that individual's education, medical expenses, or some other form of essential support. In addition, recipients are not to attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements. The Department seeks comment on whether these exceptions to the inclusions of transfers in someone's PNW would open an overly wide opportunity for people to artificially understate their assets. If so, how should such transfers be handled?

The Department also seeks comment on whether the spouse of an applicant owner should have to file a PNW statement, even if the spouse is not involved in the business in question. In this connection, we note that SBA requires the submission of a separate form from a non-applicant spouse if the applicant is married and not legally separated. Currently, recipients in the DOT program can request relevant information from spouses on a case-by-case basis. The complexities of jointly owned assets and liabilities and the ability of married couples to transfer assets in order to participate in the program could make it useful to certifying agencies to have PNW information about spouses. Recipients could use the net worth statement submitted by a non-applicant spouse as a way check to see whether applicants have transferred assets and as a basis to inquire further as to the circumstances. While this information could improve recipients' ability to protect the integrity of the program, requiring detailed information from spouses not involved with a company could also prove intrusive and add considerably to the information burden of the program for applicants and the volume of materials that recipients would have to review and evaluate. We also seek comment on whether the treatment of assets held by married couples should extend to couples who are part of domestic partnerships or civil unions where these relationships are formally recognized under state law.

In addition, we seek comment on whether the Department should adopt a provision similar to SBA language which considers a spouse's financial situation in determining an individual's access to credit and capital where the spouse has a role in the business (e.g. an officer, employee, director) or has lent money to, provided credit support to, or guaranteed a loan of the business. Although the Department does not use

''access to credit and capital'' as criteria for certification, should the involvement of a spouse in the firm trigger further consideration of their net worth and should the recipient collect the personal financial statement from this person? Are there other circumstances that would warrant this?

Application Form

Under the current DBE rule, certification occurs on a statewide basis through the Unified Certification Program (UCP) in each state. The ''one-stop shopping'' for DBE applicants within a state has simplified certification by making it unnecessary for recipients to apply multiple times for certification by various transit authorities, airports, and highway departments.

In the May 10, 2010 NPRM, we proposed several enhancements to the program to facilitate interstate certification and interstate reciprocity, many of which appear in the revised rule issued by the Department on January 27, 2011. In order to reach the goal of a simplified administrative process for certification, it is necessary to revisit the DBE/ACDBE Certification Application form used by firms applying for certification. The current form, adopted in the June 16, 2003, regulation revision (68 FR 35542), was designed to be more streamlined and user-friendly, yet comprehensive enough to supply recipients with the necessary information to form their initial line of questioning prior to and during an on-site visit and to further assist them in making determinations as to applicants' qualifications for the DBE Program. At the time, the Department sought to keep the form manageable, easy to read, and easy to follow for applicants who must fill out the form, while simultaneously being accessible and practical for many recipients that distribute the form.

It is important to bear 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, particularly when information collection can be viewed as burdensome to applicants but also viewed as necessary to recipients' efforts to maintain program integrity.

Certainly, an application form that remains accessible and usable by firms is a priority, and the Department encourages the continued efforts by recipients to post the form on the Internet in a screen-fillable format. Some commenters on the ANPRM sought ways to simplify the forms, while others recommended additions. A number of commenters provided detailed suggestions about how the forms should be configured. Based on the comments, as well as on the Department's experience with reviewing certification appeals and other issues that have come to the Department's attention, the Department is proposing a revised application form.

The proposed DBE/ACDBE Certification Application form and accompanying instructions would be used for both the DBE and ACDBE programs. Applicants will be requested to provide such items as: (1) A list of dates of any site visits conducted by the firm's home state and any other UCP members; (2) details concerning denial or decertification, withdrawals, suspension/debarment actions; (3) a business profile seeking a concise description of the firm's primary activities, products, or services the company provides; (4) a written description of the applicant's relationships and dealings with other businesses, including the sharing of equipment, storage space, inventory, and staff; (5) an assessment of the amount of time the majority owner and key officers, directors, managers, and key personnel devote to firm activities such as bidding and estimating, supervising field operations, and managing staff or crew, and (6) résumés and salaries of owners, directors, managers and key personnel. The proposed form would also remove obsolete material (e.g., relating to a now-expired SBA–DOT memorandum of understanding). The proposed form revisions include commonly requested items as well as items already mentioned in the existing regulation at § 26.83. ACDBE applications would be requested to provide details concerning their concession leases at airports.

DBE Commitments/Awards and Payment Reporting Form

The Department has identified several concerns regarding the format of Uniform Report of DBE Commitments/Awards and Payments form found in Appendix B of 49 CFR part 26. These include the inability to break out woman-owned DBE participation by race; inadequate, confusing or unclear instructions; inability of the form to meet differing needs of the various types of organizations/businesses participating in the DBE program; and difficulties in collecting information regarding payments to DBE on an ongoing/''real time'' basis. The Department believes the proposed form responds to these concerns by: Creating separate forms for routine DBE reporting and for transit vehicle manufacturers (TVMs) and mega projects; amending and clarifying the report's instructions to better explain how to fill out the forms; and changing the forms to better capture the desired DBE data on a more continuous basis, which should also assist with recipients' post-award oversight responsibilities.

A 2011 Government Accountability Office (GAO) report criticized the existing form because it did not permit DOT to match recipients' DBE commitments in a given year with actual payments made to DBEs on the contracts to which the commitments pertained. The form provides information on the funds that are committed to DBEs in contracts let each year. However, the ''achievements'' block on the form refers to DBE payments that took place during the current year, including payments relating to contracts let in previous years, but could not include payments relating to contracts let in the current year that will not be made until future years.

The form in the NPRM, while attempting to clarify various parts of the reporting process, does not directly address this issue. However, it would be possible for the Department, by looking at data in 3–5 year groupings, to assemble a surrogate for the comparison that GAO recommended. For example, if the Department looked at data from 2009–2011, we could calculate an average annual amount of commitments over that period and an average amount of DBE payments over that period. While there would still not be a year-to-year correspondence between commitments and payments, this approach could smooth out statistical anomalies (e.g., years with unusually high or unusually low commitments or payments), providing a reasonable approximation of the success of recipients in ensuring that commitments are realized in terms of actual payments.

The Department could also modify the form to reach more directly the result that GAO recommended. The modification of the achievements portion of the form could look something like this:

ACTUAL PAYMENTS TO DBEs FOR COMPLETED CONTRACTS

Year contract awarded	Number of contracts completed that were let in each year	Total $ value of contracts completed	DBE participation needed to meet $ committed	Total $ paid to DBEs	Total % of $ committed paid to DBEs
2012					
2011					
2010	4	$10m	$1m	$900k	90%
2009					
2008					
2007					

In each row, data would be entered pertaining to payments from contracts let in a given year that were completed during the reporting year. By the time all contracts let in that year had been completed, DOT could compile the data to compare the recipient's payments to DBEs for payments in a given year to commitments and to goals.

In the example above, a recipient sends in the form in 2012. It shows four contracts let in 2010 were completed in 2012, with a total value of $10 million. The commitments on those contracts, made in 2010, were $1 million. However, actual payments were $900,000, meaning that the DBEs realized only 90 percent of the dollars committed to them in 2010 on commitments made during 2010. Of course, it would be necessary to accumulate these forms for another few years to account for contracts that were not completed until 2013, 2014, etc. Consequently, while use of this form would allow the calculation of more precise data on how well a recipient had performed in terms of ensuring that commitments resulted in payments (and consequently how it had performed in terms of meeting its goals in payment as well as in commitment terms), this calculation would take several years to accomplish and would involve greater use of resources by recipients and the Department. It may also be questioned whether getting this information 3–5 years after the year in which contracts are let would limit too greatly the use of the resulting numbers for program administration and oversight purposes.

The Department seeks comment on how this latter alternative might be improved, and also on which of the alternatives discussed here, or other ideas, would best serve the accountability and program administration objectives of the Department.

Certification Provisions

§ 26.65 What rules govern business size determinations?

In this NPRM, the Department proposes to adjust the statutory gross receipts cap for inflation to $23.98 million. The inflation rate on purchases by state and local governments for the current year is calculated by dividing the price deflator for the first quarter of 2012 (124.668) by 2008's fourth quarter price deflator (116.524). The result of the calculation is 1.0699, which represents an inflation rate of 1.070% from the fourth quarter of 2008. Multiplying the $22,410,000 figure for disadvantaged business enterprises in Department of Transportation financial assistance programs by 1.0699 equals $23,976,459, which will be rounded off to the nearest $10,000, or $23,980,000.

In addition, we propose to add language to the section clarifying that the size standard that applies to a particular firm is the one appropriate to its primary industry classification.

§ 26.69 What rules govern determinations of ownership?

Most firms, particularly those owned and controlled by socially and economically disadvantaged individuals, begin as small operations. Their owners often contribute their own funds or assets to equip the firm (referred to as equity financing) and/or borrow or pledge their own assets as collateral in order to receive needed funds from lending institutions or venture capitalists, friends, relatives, or industry colleagues (referred as debt financing). While each financing transaction has its own unique set of circumstances and requirements, it is fair to say that lenders often require some form of the borrower's personal guarantee.

The DBE rule reflects this reality in two of its stated objectives: (1) Create a level playing field for firms to compete for DOT-assisted contracts, and (2) assist the development of firms that can compete successfully outside the program. To achieve these objectives, it is necessary to ensure that firms are truly owned and controlled by persons who are socially and economically disadvantaged. The Department incorporated the concept of ''ownership'' in the regulation by requiring the socially and economically disadvantaged owner to demonstrate his or her personal stake in their firm. Specifically, under § 26.61 and § 26.69, socially and economically disadvantaged individuals who seek to participate in the program bear the burden of demonstrating that it is they who have made a contribution of capital to acquire their ownership in the firm. This contribution must be ''real, substantial, and continuing, going beyond pro forma ownership of the firm.'' The regulation does not define these terms, but § 26.69(e) does provide some examples of what the Department considers to be an insufficient contribution, including a promise to contribute capital, and an unsecured note payable to the firm or an owner who is not a disadvantaged individual.

Throughout the course of the program, Unified Certification Programs (UCPs) evaluating a firm's eligibility have properly denied certification to DBE and ACDBE applicants when an owner's contribution was either not real (suggesting the owner did not actually make the contribution), insubstantial (not enough of a contribution was provided for what was received), not continuing (no subsequent contribution to the firm or rapid withdrawal of a contribution that was made), or simply a pro forma arrangement (conveying the concept of a firm created on paper but without actual evidence of a personal contribution). For example:

- A capital contribution by the disadvantaged owner of $100 is not considered substantial to acquire a majority interest in a firm worth $1 million.
- A situation in which 51% disadvantaged owner and a 49% non-disadvantaged owner who contribute $100 and $10,000, respectively, to

acquire a firm grossing $1 million, may be indicative of a pro forma arrangement.

• A recipient can properly question the continuing nature of an owner's contribution when it finds that the sole owner of a DBE applicant firm spends $250 to file articles of incorporation and obtains a $100,000 loan, making only nominal or sporadic payments to repay the loan.

In each of these examples, the DBE firm is could appropriately be denied certification on the grounds that the owner's contribution of capital does not meet the requirements of § 26.69. In other arrangements, non-disadvantaged individuals and non-disadvantaged firms may have contributed or loaned funds to the disadvantaged owners at the inception of the firm and/or provided ongoing monetary support to the business. These arrangements and the source of the funds are appropriately questioned by recipients, based on provisions contained in the existing § 26.69(h). This section currently prescribes a higher ''clear and convincing'' standard in situations where non-disadvantaged individuals or non-DBE firms that remain involved in the firm provide interests in a business or gift other assets to the disadvantaged owner applying for DBE certification. It requires the disadvantaged owner to demonstrate that the gift or transfer they received was made for reasons other than obtaining DBE certification and that the disadvantaged owner(s) actually control the management, policy, and operations of the firm, notwithstanding the continuing participation of the non-disadvantaged individual providing the gift or transfer. This safeguard is necessary to reduce the potential for front companies and fraud. We stated that as long as there are safeguards such as § 26.69(h) in place to protect against fronts, the origin of the assets, whether from one's own contribution, a bank loan, gift, inheritance, or other means, is unimportant.

In proposed section 26.69(c)(2), we propose to add language prohibiting situations in which a non-disadvantaged party (e.g., an individual, a company) has a prior or superior right to a DBE firm's profits, compared to that of disadvantaged owners of the DBE. Arrangements in which non-disadvantaged owners get paid a percentage the firm's net profits, before any calculation of residual profit available for other firm purposes, defeats ''ownership'' by the disadvantaged owners. For example, in the context of certification appeals, the Departmental Office of Civil Rights (DOCR) has seen profit sharing and other arrangements through which the disadvantaged owner is paid after another owner holding less of an interest. This is particularly prevalent in ACDBE situations in which the prime is paid first from firm profits despite the fact that the socially/economically disadvantaged owner holds the majority interest on paper.

When a non-disadvantaged individual remains involved in a firm, § 26.69(h) adequately provides recipients with the tools to make an appropriate evaluation of the applicant firm's eligibility. We are learning, however, that recipients are encountering cases in which a non-disadvantaged individual or non-DBE firm provided some form of financing at the firm's inception, enabling a disadvantaged owner to acquire an interest in the firm, in exchange for an ownership interest. These types of arrangements call into question whether a disadvantaged owner's ownership is ''real, substantial, and continuing'' and what considerations should be used in evaluating the timing of transactions.

While the Department remains committed to the principle that firms are evaluated based on present circumstances (see section 26.73(b)(1)), it is also important to pay attention to the commercial and arms-length practices involving collateral, as well as the nature, origination, and timing of firm acquisition or establishment (i.e., the real and continuing requirement). This concern applies to situations in which non-disadvantaged individuals and firms remain involved in the firm and in situations where they do not. We are also concerned that the substantiality of ownership interests be considered in the entire context of the arrangement and in comparison to the overall value of the firm. We believe that greater clarity and specificity in DOT rules would be useful in helping recipients deal with situations of this kind.

This was most evident in *The Grove, Inc.* v. *U.S. Department of Transportation,* (578 F.Supp. 2d 37, D.D.C., 2008), a case that upheld the DOCR certification appeal decision that The Grove, Inc., an ACDBE, lacked independence from a non-DBE entity that was intertwined in The Grove's finances. However, the Court overturned a portion of the DOCR's determination that the disadvantaged owner failed to make a real and substantial contribution of capital to acquire her ownership interest in the firm. At issue in the case were the current provisions in § 26.69 regarding the use of unsecured loans from non-disadvantaged individuals and how to treat personal and marital assets used as collateral to acquire an ownership interest asserted by one spouse. The case also presented issues relating to the timing of a transfer of funds from a non-disadvantaged individual and the disadvantaged owner's subsequent deposit of these funds into a joint/marital account. The Court ruled that that regulation clearly contemplates the use of funds derived from a non-disadvantaged individual or entity as a means to acquire an ownership interest. It also addressed what would be considered a reasonable amount of contribution given the size of the firm at the time the disadvantaged owner acquired her majority interest. It ruled that the Department did not provide a rationale why a gross profit measure is the appropriate measure to value a company as opposed to another method, such as operating margin or net income when making this determination.

To avoid problems of this kind, the Department believes it necessary for applicants to submit additional proof to substantiate both the sufficiency of their contribution and the circumstances of any funding streams to the firm since its inception. This includes documentation of how items used as collateral (whether jointly held or otherwise) are valued, and proof of ownership in these items (particularly high valued assets), and more stringent guidelines for deposits of funds used to acquire the ownership interest in a firm. These additions are reflected in proposed revisions to § 26.69(a) and (c)(1). The revision to (c)(3) concerning dividends and distributions proposes to mandate that one or more disadvantaged owners must be entitled to receive at least 51% of the annual distributions of dividends paid on the stock of a corporate concern; 100% of the value of each share of stock owned by them in the event that the stock is sold; and at least 51% of the retained earnings of the concern and 100% of the unencumbered value of each share of stock owned in the event of dissolution of the corporation. Of course, consistent with section 26.71(i)(1), recipients should also be aware of issues concerning differences in remuneration that could affect the disadvantaged owner's control of a firm.

A revision to § 26.69(i) would add a new requirement concerning marital assets that form the basis for ownership in the firm. Under this proposed provision, recipients would have discretion in cases where marital assets are used to require information concerning the spouse's assets and liabilities. The recipient would then make a case-by-case determination of whether the asset transfer was made for

reasons other than obtaining certification as a DBE.

In paragraph (i), concerning joint or community property, we seek comment on whether greater protections are needed to prevent what are effectively a non-disadvantaged husband's assets from being treated as the capital contribution made by his wife. At present, the wife's share or joint or community property is countable toward ownership requirements if the husband renounces his ownership interest in the property. We propose to strengthen this provision by adding a sentence to paragraph (i)(2) saying that such a renunciation must be contemporaneous with the transfer itself, to avoid after-the-fact gamesmanship.

A new paragraph (k) would incorporate language similar to § 26.69(j)(3), which requires recipients to give ''particularly close and careful scrutiny to the ownership of the firm to ensure that it is owned and controlled in substance as well as in form, by a socially and economically disadvantaged individual.'' The wording of this section is one way to guard against an artificial arrangement or accounting mechanism that gives the appearance that a firm was derived from the disadvantaged owners' own assets, when in reality it was not. In the ANPRM, we invited comments on what additional safeguards could be incorporated to meet this goal without placing undue burden on the applicant firm. The NPRM's draft paragraph (k) answers this question by telling recipients to give ''particularly close and careful scrutiny to all interests in a business or other assets obtained by a socially and economically disadvantaged owner that resulted from a seller-financed sale of the firm or in cases where a loan or proceeds from a non-financial institution were used by the owner to purchase the interest.''

The following proposed conditions would apply to such a transaction: (1) Terms and conditions must be comparable to prevailing market conditions offered by commercial lenders for similar type of projects (e.g., in terms of such factors as duration, rate, and fees); (2) there must be evidence provided by the applicant firm and disadvantaged business owner of the promissory note or loan agreement clearly stating the terms and conditions of the loan, including due date and payment method, interest rate, prepayment, defaults, and collateral; (3) the note would be a full-recourse note and be personally guaranteed by the socially and economically disadvantaged owner and/or secured by assets outside of the ownership interest or future profits of the applicant firm; (4) the contributions of capital by the socially and economically disadvantaged owner and any use of collateral by the disadvantaged owner must be clearly evident from the firm's and/or individual's records and supported by appropriate documentation and appraisals; and (5) other than normal loan provisions designed to preserve property pledged as collateral, there are no conditions, provisions, or practices that have the effect of limiting the socially and economically disadvantaged owner's ability to control the applicant firm. As in all certification matters, the applicant would bear the burden of proving that the transaction meets these criteria.

§ 26.71 What rules govern determinations concerning control?

This section is intended to ensure that recipients analyze the extent to which socially and economically disadvantaged individuals control their firm in both substance and form. Along with ownership, control of an applicant or participating firm is a central concept to the DBE and ACDBE programs and the Department seeks to guard against control of the firm's ownership structure, its operations, and policy decisions by non-disadvantaged individuals. Currently, the involvement of non-disadvantaged individuals in the firm's affairs is addressed in several parts of this section, including 26.71(e), (f), and (l). In the Department's view, the disadvantaged owners' talent and expertise and that of non-disadvantaged participants must be judged concurrently. In situations where the disadvantaged owner of an applicant or participating DBE firm meets the requirements of 26.71(g), the involvement of non-disadvantaged individuals is one of support rather than control, with a clear line of authority and decision making ability passed from the owner to the non-disadvantaged employee. Alternatively, where the disadvantaged owner possesses little or no experience or expertise, non-disadvantaged individuals can be seen as more involved in the firm's affairs such as controlling field operations, making major firm decisions, or supervising other employees in the critical areas of the firm's work. They are frequently compensated at a higher rate, and all indications point to their disproportionate role at the firm above and beyond that deemed acceptable in the DBE program. To explicitly address these scenarios, the Department is placing more stringent control requirements in paragraph (e). We are proposing to add a new section regarding non-disadvantaged individuals who once served as an employer or a principal of a former employer of any disadvantaged owner of the applicant or DBE firm. Under the proposal, this would form a basis for denying certification unless it is determined by the recipient that the relationship between the former employer or principal and the disadvantaged individual or applicant concern does not give the former employer actual control or the potential to control the applicant or DBE firm. To illustrate the potential scenarios wherein non-disadvantaged individuals may be found to control the firm, the proposed paragraph (e)(2) provides examples of unacceptable arrangements that negatively affect a disadvantaged owners' control of the firm.

The current § 26.71(l) requires a higher evidentiary standard to be met in situations where a firm was formerly owned and/or controlled by a non-disadvantaged individual and such ownership and/or control is transferred to a socially and economically disadvantaged individual, where the non-disadvantaged individual remains involved in the firm. In such a situation, § 26.71(l) requires that the disadvantaged individual now owning the firm demonstrate by ''clear and convincing evidence'' that: (1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and (2) the disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm. The Department seeks comment on whether this provision should be strengthened by presuming, that non-disadvantaged individuals who make such transfers and remain involved in the firm continue to control the business, rather than the disadvantaged transferee.

§ 26.73 What are other rules affecting certification?

Under the current 26.73(g), a recipient must not require an applicant firm to be prequalified as a condition for certification ''unless the recipient requires all firms that participate in its contracts and subcontracts to be prequalified.'' We propose to delete this part of this statement, with the result that prequalification could no longer be used as a criterion for certification in any case. While the Department believes that prequalification requirements may be an unnecessary barrier to DBE

participation, this provision would not prohibit prequalification as a condition for receiving certain sorts of contracts. However, whether a firm is prequalified is irrelevant to certification concerns such as size, disadvantage, ownership and control. It is important for certifiers to analyze only the factors relevant to DBE eligibility and not incorporate other recipient business requirements in decisions pertaining to an applicant's qualification for the program. Further, while prequalification may be a requirement for doing business in one mode (e.g., highway) it may not be a requirement for doing business in other modes (e.g., transit).

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

Under the current rule, recipients must take several steps in determining whether a firm meets all eligibility criteria for participation in the DBE program. The on-site visit to the firm's place of business and job sites is a crucial component of this review and the Department seeks to strengthen the information collection process. Since the issuance of the 1999 rule, the Department has received numerous appeals filed by firms denied certification on the basis of control, specifically the involvement of non-disadvantaged individuals in the firm's critical activities. Recipients base their decision after performing an on-site review of the firm and the responses owners give to their questions during the visit.

Interviewing the principal officers of the firm is required under § 26.83(c). Some recipients, however, also interview key personnel of the firm as a means to verify or cross-check the answers they receive from the owners. We believe this is an important practice recipients should perform before determining the firm's eligibility. In addition, interviewing employees reveal how they fit in the firm's overall daily operations and management vis-à-vis the owners. By speaking with these individuals as well, recipients gain a clearer view of how owners oversee a project, whether from behind a desk or at the field. An owner who is primarily in the office handling paperwork may have delegated too much authority to employees in the field, a factor that negatively affects their control of the firm. Therefore, the Department proposes adding a requirement that recipients interview the key personnel of the firm. In addition, the on-site visit should be performed at the firm's principal place of business, which may or may not be the same as the firm's offices. Both revisions appear in the first two sentences of § 26.83(c)(1).

Paragraph (c)(2) requires a recipient to analyze the stock ownership in a firm. Here, the Department proposes adding clarifying language that would require an analysis of documentation related to the legal structure, ownership, and control of the applicant firm. This includes, but is not limited to Articles of Incorporation/Organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; and stock ledgers and certificates. Similarly, a revised section (c)(3) and (c)(4) would add the requirement that recipients also analyze any lease and loan agreements, bank signature cards, and payroll records.

Where a firm is applying to be certified in more than one North American Industrial Classification System (NAICS) code, the NPRM (§ 26.83(c)(5)) would call on recipients to obtain information about the amount of work the firm has performed in the various NAICS codes involved. This will help recipients determine the socially and economically disadvantaged owners' level of knowledge in each category of work and whether they can control the firm's operations in these areas in accordance with § 26.71. The proposed Uniform Certification Application contains added space for firms to enter their NAICS Codes directly on the form, which in turn will help recipients with this determination. Particularly for start-up firms or for firms moving into new areas of work, we do not intend that recipients establish any sort of minimum ''track record'' as a prerequisite to certification. This proposed amendment is simply intended to provide what can be additional useful information in some cases.

Recipients also determine whether a firm meets the applicable size standards and if the applicant owner is economically disadvantaged. Tax returns are important information for this task. The proposed (c)(7) clarifies that applicants need to provide completed income tax returns or requests for extensions filed by the firm, its affiliates, and the socially and economically disadvantaged owners for the last three years. (We recognize that, for start-up or other new firms, three years' worth of tax returns may not yet exist.) As stated in the new paragraph, a complete return is one that includes all forms, schedules, and statements filed with the Internal Revenue Service, and state taxing authority. The proposed DBE/ACDBE application form has been amended to specifically require this information.

At various times during the application review process, recipients may seek more information from an applicant. In (c)(8)(iii), we propose to add language making explicit the discretion of certifying agencies to request clarification of information contained in the application, or to request additional information, at any time in the application process. This will help alleviate confusion by firms that believe their application is complete once it is submitted and that the UCP must make a decision solely on the information the firm has initially provided. At the same time, we caution certifying agencies against prolonging the certification process unnecessarily through repeated requests for additional information, once enough data to make an informed decision possible has been submitted.

§ 26.83(h) and (j)

Paragraph (h) emphasizes that once a firm is certified, it remains certified unless and until it voluntarily withdraws from the program or is decertified (with the exception of circumstances spelled out in section 27.67, when an owner's PNW statement shows that the owner is no longer a disadvantaged individual). There can be partial as well as total decertifications (i.e., when a NAICS code in which a firm is currently certified is taken away). Partial and total decertifications both require use of the section 26.87 process. Recipients are reminded that certifications do not lapse; they are not like driving licenses, which expire after a given number of years if not renewed. There is no such thing as a ''recertification'' process, after three years or any other period, and recipients cannot require currently certified firms to reapply for certification. Any recipient who does so is acting contrary to the express requirements of this rule. However, if, at any time, information comes to a recipient's attention that would cause it to question a firm's continued eligibility, the recipient can, and should, review the firm's certification status, in the course of which it can conduct a new on-site review, announced or unannounced. Because firms' circumstances can change over time, we urge recipients, as a matter of good practice, to conduct reviews of firms' eligibility, including updated on-site reviews, from time to time.

The Department is not changing the long-standing practice of annual affidavits of no change, and we believe that this requirement is crucial to keep

recipients current on the status of certified firms. The NPRM would strengthen this process by directing certified firms to submit additional items with their affidavits. The additional information would include updated PNW statements and a record from each individual claiming disadvantaged status regarding the transfer of assets for less than fair market value to any immediate family member, or to a trust any beneficiary of which is an immediate family member, within two years of the date of the annual review. In addition, the firm would have to submit a record of all payments, compensation, and distributions (including loans, advances, salaries and dividends) made by the DBE firm to each of its owners, officers or directors, as well as the firm's (and its affiliates') and owners' most recent completed IRS tax returns, IRS Form 4506 (Request for Copy or Transcript of Tax Return). Recipients would also have the discretion, on a case-by-case basis, to obtain other information relevant to determinations about the firm's size and its ownership and control by disadvantaged individuals.

§ 26.86 What rules govern recipients' denials of initial requests for certification?

Under paragraph (c) of this section, when a firm is denied certification, the recipient must establish a time period of no more than twelve months that must elapse before the firm may reapply for certification. This waiting period can be shorter, but, as stated in the rule, the time period for reapplication begins to run on the date the recipient's action is received by the firm. The NPRM would add a sentence clarifying that an applicant's appeal of a recipient's decision to the Department pursuant to § 26.89 does not extend this period. For example, suppose a firm is denied certification on September 1, 2012. If the recipient has six-month waiting period, the firm could reapply on March 1, 2013. If, in the meantime, the firm appealed the decision to the Department, it could still reapply on March 1, 2013, even if its appeal to the Department was still pending on that date.

§ 26.87 What procedures does a recipient use to remove a DBE's eligibility?

The Department is proposing to revise and expand the grounds on which recipients can, in the interest of program integrity, decertify DBE firms. First, the Department would delete the first sentence of 26.87(f), which says that a recipient cannot remove a DBE's eligibility on the basis of a reinterpretation or changed opinion of information available to the recipient at the time of the firm's certification. This language was intended to create a degree of finality in certifications. There can be certification decisions about which reasonable people can differ, and we believe, as a matter of policy, that it is useful to limit situations in which, for example, a new certification official reviews the same facts that his or her predecessor reviewed but simply forms a different opinion. That said, certifying agencies have expressed concerns that this language is too limiting, particularly for situations in which it appears that a bad mistake led to a firm's certification.

In an attempt to better accommodate both objectives, we are proposing a revised paragraph (f)(5) that would permit a recipient to decertify a firm on the basis that its certification was clearly erroneous. This standard means that the basis for the decertification would be a definite and firm conviction on the recipient's part that a mistake was committed, in the absence of which the firm would not have been certified. This is more than a simple difference of opinion or different judgment call about the evidence in the matter. To decertify a firm based on this paragraph, the recipient would have to show, by the usual preponderance of the evidence standard it must meet in decertification cases, that the original certification was clearly wrong.

We also propose to add two additional grounds for decertification, both of which refer to other provisions in the regulations. Consistent with section 26.73(a)(2), a firm can be decertified for exhibiting a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program by, for example, repeatedly seeking DBE credit for activities that fail to involve a commercially useful function and thereby raise questions about the firm's eligibility. Likewise, a firm can be decertified for a failure to cooperate, under 26.109(c). A failure to cooperate can include such things as failure to timely file affidavits of no change or notices of change, PNW statements, and various required supporting documents.

We also note that the current provisions of paragraph (f) cover a number of situations that can arise. For example, paragraph (f)(3), concerning concealed or misrepresented information, covers submission of false information in applications, PNW statements, affidavits of no change, etc. Paragraph (f)(1) covers situations where changes in ownership, death or incarceration of a disadvantaged owner, changes in the disadvantaged owner's involvement with management of the firm, changes in the firm's relationship with other firms, etc. may make a previously eligible firm no longer eligible. The provisions relating to failure to cooperate covers such things as failing to send in affidavits of no change or notices of change, and accompanying documents, when needed.

We also seek comment on the relationship between decertification and suspension and debarment proceedings. If a firm is suspended or debarred (e.g., as the result of a criminal indictment or conviction), either as a matter of state or Federal action, should the firm also be decertified? On one hand, since the firm is suspended or debarred, it will not be performing any contracts, so its being or not being on a state's certified list seems somewhat moot. Moreover, certification concerns size, disadvantage, ownership and control, and the misconduct of the firm may not relate to these criteria. On the other hand, especially if the misconduct that led to the suspension and debarment concerned participation in the DBE program, the firm's conduct may constitute a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program. Should suspension and debarment result in an automatic decertification, should it be a trigger causing recipients to evaluate the firm for decertification, or is there another approach that would make more sense?

In paragraph (g), we would add a sentence clarifying that when a notice concerning a recipient's response to an ineligibility complaint is sent to the complainant (other than to a DOT operating administration), confidential business information concerning the DBE in question would be redacted, absent written consent from the DBE firm. This is consistent with the existing confidentiality provisions of section 26.109.

§ 26.88 Summary Suspension of Certification

As noted above, a certified firm remains certified until and unless it is decertified. But what happens if there is a significant change in the business, such as the death of its owner or the sale of the firm? Current guidance properly tells recipients to look at the changed firm and determine whether the firm should be decertified and initiate a section 26.87 proceeding if appropriate. In this situation, the recipient has the burden of proof to demonstrate that the firm should lose its eligibility.

Meanwhile, the firm continues to be certified and can obtain new contracts as a DBE. Many people in the certification community have urged, to the contrary, that the firm should lose its eligibility when a dramatic change of this kind occurs, and should have to reapply for certification as if it were a new firm. Meanwhile, it would not be eligible for new contracts as a DBE.

The proposed section 26.88 seeks a middle ground between these approaches, providing that a firm's certification would be suspended in some situations (i.e., death or incarceration of an owner whose participation is needed to meet ownership and control requirements) and could be suspended in other situations (e.g., sale of the firm to a new owner), while a recipient determines whether the firm's certification should be continued. When a firm's certification is suspended, it cannot receive new contracts as a DBE. However, its participation on a contract it has already received would continue to count toward DBE goals.

Under the proposal, if an owner necessary to the firm's eligibility dies or is incarcerated, the recipient must suspend the firm's eligibility. By necessary to the firm's eligibility, we mean that without that owner's participation, the firm would not meet the requirement of 51 percent ownership by disadvantaged individuals or the requirement that disadvantaged owners control the firm. If a single disadvantaged individual is the 51 percent owner, then it is obvious that the suspension would take effect. However, if there were three disadvantaged owners who each owned 30 percent of the business, and one of them died, then the other two, between them, would still own more than 51 percent of the business, and the recipient would not be required to suspend the firm's certification. Of course, if the owner who died was essential to control of the business by disadvantaged individuals, it would be appropriate to suspend the firm.

In other situations, recipients would have the discretion to suspend a firm's eligibility. For example, if a firm was sold, and there was a significant question about whether the new disadvantaged owners controlled the firm, or if the firm failed to file the required notice following a material change in its circumstances, or an affidavit of no change, the recipient could choose to suspend the firm's eligibility. (This could prove a useful incentive for firms to file these documents in a timely fashion). After a suspension, the firm would provide information relevant to its eligibility to the recipient. Within 30 days of getting that information, the recipient would have to lift the suspension or commence a decertification proceeding under section 26.87. The suspension would continue in effect during the proceeding. If the firm is not decertified as the result of the proceeding, the suspension is lifted and the firm returned to active status as a DBE.

§ 26.89 What is the process for certification appeals to the Department of Transportation?

The Department is not proposing to change the process for firms wishing to appeal a recipient's determination concerning its eligibility. However, we propose amending this section to clarify what type of information should be contained in the appeal filed with DOCR. Specifically, we propose in § 26.89(c) that the appellant provide a ''full and specific statement as to why the decision is erroneous, what significant fact that the recipient failed to consider, or what provisions of this part the recipient did not properly apply.'' This addition will aid the Department in reviewing the recipient's actions. Another change we propose that will also aid both recipients and the Department in the appeal process is clarification of how the regulation defines ''days.'' Under the proposed definition in section 26.5, days would mean calendar days; and in computing any period of time described in the regulation, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal Holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal Holiday.

Other Provisions

§ 26.1 What are the objectives of this part?

The NPRM would add a new paragraph to this section, saying that a purpose of the rule is to promote the use of all types of DBEs. This language is intended to emphasize that the DBE program is not just about construction. Other types of work, including, but not limited to, professional services, supplies etc., are also appropriate for DBE participation.

§ 26.5 Definitions

In the Department's experience, recipients need clarity on terms already used in this provision, and we propose adding eight new definitions in this section for the following words or phrases: ''Assets;'' ''business, business concern, or business enterprise;'' ''contingent liability;'' ''days;'' ''immediate family member;'' ''liabilities;'' ''non-disadvantaged individual;'' ''principal place of business;'' and ''transit vehicle manufacturer (TVM).'' With respect to the TVM definition, the Department seeks comment on whether producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes (e.g., so-called ''cutaway'' vehicles, vans customized for service to people with disabilities) should be defined as TVMs for DBE program purposes.

Additionally, we propose to modify the existing definition of a ''socially and economically disadvantaged individual'' to align with SBA principles. Most importantly, the definition specifically states that being born in a country does not, by itself, suffice to make the birth country and individual's country of origin for purposes of being included within a designated group. For example, a child born of Norwegian parents in Chile would not, based on that fact alone, be regarded as ''Hispanic'' under the definition. Minor technical changes to references within the existing definitions are also proposed.

We also note that the proposed definition of ''immediate family member'' would include a wider group of relatives, and we seek comment on the scope of that proposed change (e.g., Is it appropriate to include grandparents? Should grandchildren also be included?). The effect of the change is to broaden the impact of provisions of the rule that call for a higher burden of proof concerning ownership and control when transfers of interests in a company are made to family members.

The NPRM would amend the definition of ''Native Americans'' to be consistent with a February 2011 change in SBA's definition of the term. The term ''Alaska native'' would replace ''Eskimos and Aleuts,'' and the phrase ''enrolled members of a federally or state-recognized Indian tribe'' would replace ''American Indians.''

§ 26.11 What records do recipients keep and report?

The NPRM proposes two new provisions, both related to certification. The first is a record retention requirement for certification-related records. These are the kind of records that recipients and UCPs normally keep, but we have heard concerns that some recipients may be discarding records that may still be relevant for certification review purposes.

Second, to implement a longstanding provision in the DBE authorization legislation, the Department proposes adding a new reporting requirement. Under section 1101(b)(4)9B) of MAP–21, states are required to notify the Secretary, in writing, of the percentage of the small business concerns that are controlled by (i) Women; (ii) socially and economically disadvantaged individuals (other than women); and (iii) individuals who are women and are otherwise socially and economically disadvantaged individuals. To carry out this requirement, UCPs would go through their statewide Directories and count the number of firms controlled, respectively, by white women, minority or other men, and minority women. They would then convert the numbers to percentages and send the result to the Departmental Office of Civil Rights, with which they already have a working relationship in certification appeals matters. We realize that some firms may be controlled by persons in more than one of these three categories. In this case, we propose that UCPs include a firm in the category applicable to the owner with the largest stake in the firm who is also involved in controlling the firm.

We note that the commitments and achievements reporting form already captures information broken down by gender and ethnicity concerning contracts and contracting dollars going to DBEs. This is not the same thing as the report on the percentages of certified firms, but we seek comment on whether it would be easier to include the percentage information on this reporting form in some fashion rather than having a separate report submitted.

§ 26.21 Who must have a DBE program?

It appears that there is some confusion in the recipient community as to precisely who must have a DBE program with the FTA and FAA. For example, section 26.21 requires all entities that receive FTA federally assisted funds over $250,000 used in contracts (except for transit vehicle purchases) in a federal fiscal year for planning, capital, and/or operating assistance purposes to have a DBE program. However, despite this clear mandate, many of FTA's recipients still mistakenly believe only individual prime contracts valued above $250,000 are eligible for the DBE program, and thus improperly exclude prime contracts valued below $250,000 from both their determination as to whether they are required to submit a goal and from actual goals submitted to FTA. The Department has long maintained the $250,000 threshold applies to contracts in the aggregate, meaning all DBE program-eligible contracts, regardless of value, must be considered for both threshold and goal setting purposes. For example, if a recipient were to receive several small grants within a fiscal year (e.g. $1000 to $200,000) for planning, capital, or operating assistance) their combined value, if over $250,000, would trigger the requirement that the entity have a DBE program. The same point applies with respect to FAA-assisted contracts. The proposed amendment modifies the language to reflect this long held position, and should resolve any lingering misconceptions with regard to the issue.

Section 26.21(a)(1), as currently written, requires all FHWA recipients receiving funds authorized by a statute to which this part applies to have a DBE program. ''Recipient,'' as defined in section 26.5, is ''any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient. * * *'' FHWA, however, expects that each subrecipient will operate under its direct recipient's approved DBE program. Therefore, FHWA will not allow subrecipients to operate under their own DBE programs, separate from the program of the direct recipient. If an entity that is an FHWA subrecipient is also a direct recipient of FAA or FTA funds, then the entity would have its own DBE program and goal for its FAA- or FTA-assisted contracts, while operating under the State DOT's goal for FHWA-assisted contracts. Where funds are comingled, recipients should consult with the DOT agencies involved to determine how to proceed.

§ 26.45 How do recipients set overall goals?

Establishing the overall goal is a critical component of administering the DBE program. We propose several changes to the rules governing overall goal setting to ensure that recipients employ sound goal setting practices consistent with the remedial purpose of the program.

There are two analytical steps to establishing an overall goal. The first step is to determine the relative availability of DBEs in the recipient's transportation contracting market. We propose to codify the elements of a bidders list that must be documented and supported when this approach is used to establish DBE availability. Those elements include capturing data on successful and unsuccessful firms (DBEs and non-DBEs, prime contractors and subcontractors) that have bid on federally assisted contracts during the past three-year period. We also propose to disallow the use of prequalified contractors lists to establish availability and seek your views on whether this prohibition should be extended to the use of bidders list and other such lists (registered subcontractors lists, plan holders list, etc.) relied upon exclusively as a source to identify ready, willing, and able firms.

We know from numerous disparity studies that have been conducted across the nation that discriminatory practices affecting minority and women owned small businesses continue to create barriers to accessing capital and bonding that in turn affect their ability to form, grow, and compete with other firms for contracting opportunities. Looking only to bidders lists, lists of prequalified contractors, or similar lists to determine availability may serve only to perpetuate the effects of discrimination rather than attempt to remedy those effects. Given this concern about the use of bidders lists in goal-setting, and what we understand to be difficulties that recipients have had in collecting all the bidders list information called for in section 26.11, we also seek comment on whether the bidders list approach to goal-setting should be deleted from the rule.

The focus of the second step in the overall goal setting process is to consider other available evidence of discrimination or its effects that may impact availability, and based on that evidence consider making an appropriate adjustment to set an overall goal that reflects the level of participation one would expect in the absence of discrimination. We have seen many recipients routinely adjust downward the step one availability figure based on past DBE utilization, without regard to whether an adjustment is warranted by the evidence. Under the rules, past DBE utilization is defined as a proxy for DBE capacity. However, we know that in many instances, low levels of past DBE utilization does not represent DBE capacity in a given contracting market and may simply reflect the continuing effects of discrimination, the failure of a recipient to implement a robust program, or the existence of circumstances similar to those mentioned in Departmental guidance (e.g., the effect of past or current noncompliance with DBE program requirements). Adjusting availability downward under these or similar circumstances would not be appropriate or required. Consequently, we propose to expressly state in the rule that step two adjustments are not appropriate

unless clearly warranted by the evidence.

In reviewing overall goal submissions made by recipients, operating administrations currently are authorized to adjust the overall goal or require the recipient to do so if in the opinion of the operating administration the overall goal has not been correctly calculated or the method for calculating the goal is inadequate. In making that assessment, we propose to clarify that the operating administrations are to be guided by the goal setting principles and best practices announced by the Department pursuant to section 26.9. While the ''Tips on Goal Setting'' posted on the OSDBU Web site offer recipients a lot of flexibility in developing a methodology, the Tips also represent the Department's view of practices recipients should follow to produce a sound methodology that in turn will likely produce a sound overall goal that is required by the rules. Recipients are not at liberty to employ practices that serve no purpose other than to drive down the overall goal without risking disapproval by the appropriate operating administration.

We are also proposing a clarifying change to 26.45(e)(3) concerning project goals. The language would note that a project goal may be a percentage of the value of the entire project as determined by the recipient or a percentage of the federal share.

We propose to modify the public participation requirements for goal setting to strengthen the consultation component, to eliminate the public comment period associated with publication of the proposed goal, and to require posting proposed goals on recipient Web sites—a less costly alternative to the current requirement for publication in general circulation and other media. These changes are designed to reduce the administrative burden and expense associated with requirements that have added little, if any, value to the goal setting process. We recognize the importance of affording those who are likely to be affected by the proposed goal (i.e., stakeholders) an opportunity to present their views, data, or analysis to recipients in the development of an appropriate goal setting methodology. For that reason, we believe consultation, to be meaningful, should involve a dialogue between a recipient and stakeholders in its contracting market. Based on our experience, the most meaningful participation by the public in goal setting occurs during the consultation phase when genuine efforts are made to engage interested individuals or groups in the process. Few comments are received from the public during the 45 day comment periods that have not been provided during consultation. This change also would be consistent with the requirement for stakeholder involvement currently applicable to the DBE concessions program in Part 23.

§ 26.49 How are overall goals established for transit vehicle manufacturers?

The Department has been concerned for some time about confusion among program participants concerning the implementation of the transit vehicle manufacturer (TVM) provisions of Part 26. Because a large portion of FTA's federal financial assistance is used by its recipients for transit vehicle purchases, the Department's intent was to require similar DBE goal setting provisions to their operations, and under the current rule, such entities were required to submit their goal setting methodologies to FTA and report to FTA their awards to women and minority owned firms. In practice, however, the Department has seen irregularities in how TVMs perform in submitting goal setting methodologies, and how TVMs report DBE awards and achievements. As a result, the Department believes additional clarification is needed to ensure meaningful application of the DBE rule's requirements within the transit vehicle manufacturing industry. The proposed rule changes are intended to clarify TVM requirements by providing additional information as to how the Department expects TVMs to determine their DBE goals, when and in what instances TVMs must report DBE awards and achievements data, and by specifying which portions of the DBE regulations apply to TVMs.

With respect to goal setting, the proposed rule seeks to clarify what must—and what must not—be included in a transit vehicle manufacturer's goal methodology submission. Specifically, it codifies the Department's long-held position that for goal setting purposes, transit vehicle manufacturers may not selectively choose which contracting opportunities will and will not be included. Rather, when setting a DBE goal, all contracting opportunities made available to non-DBEs must also be made available to DBEs, and thus must be included in the submitted methodology. It is important to note that this requirement is not intended to ''solicit'' DBE participation for any specific contracting opportunity or task, nor is it intended to dictate contractual relationships between transit vehicle manufacturers and any specific type of firm. Instead, the sole purpose is to ''level the playing field'' and ensure DBE firms have the opportunity to fairly compete for all contracts non-DBEs have access to. To provide appropriate flexibility in the implementation of this provision, we believe that this clarification must also be accompanied by a strong statement, to FTA recipients in particular, that overly prescriptive contract specifications on transit vehicle procurements that in effect eliminate opportunities for DBEs in the manufacture of transit vehicles is counter to the intent of the DBE Program and unduly restricts competition which is prohibited by 49 U.S.C. 5325(h). Violation of rules that support competition in the marketplace may result in the loss of FTA financial assistance.

In addition to clarifying which opportunities must be included, the proposed rule also contemplates which opportunities must not be included in the goal setting methodology. While the provision pertaining to work and materials performed outside the jurisdiction of the United States remains intact, the Department proposes the current practice of including the entire Federal share of any given vehicle procurement be amended to include only the portion of the Federal share available via contracts to outside firms. Because such a large portion of work required when manufacturing and assembling a transit vehicle is performed ''in house,'' the Department does not believe it is appropriate to use the entire Federal share of a transit vehicle contract as the base figure for the DBE goal, as it skews the final goal relative to the contracting opportunities actually available. Instead, the Department proposes that the base figure be derived from the total value of contracts available to firms outside of the manufacturer itself. For example, if a particular transit vehicle manufacturer is awarded a $10 million contract to manufacture buses, and the transit vehicle manufacturer performs 70% of the work with its own forces while contracting out the remaining 30%, then the amount from which the base figure and goal should be derived would be $3 million. Since work performed ''in house'' is not truly a contracting opportunity available to either DBEs or non-DBEs, the Department believes this approach will lead to more accurate and responsible overall DBE goals, improved overall implementation of the DBE program by transit vehicle manufacturers and simpler, better targeted oversight by FTA. While proposing this approach, however, the Department also seeks comment on whether there should be regulatory

provisions designed to encourage TVMs to make more parts of their manufacturing processes available to DBEs and other small businesses. If so, what should they be?

The proposed rule also clarifies the Department's stance on when transit vehicle manufacturers must report DBE information to FTA. Because submission of a DBE goal to FTA does not guarantee a transit vehicle manufacturer will be awarded a contract, confusion exists as to when DBE reports should be submitted. The Department believes the best approach is to require transit vehicle manufacturers to continuously report their contracting activity in the Uniform Report of DBE Awards/Commitments and Payments, since the administrative burden to submit reports with no activity is negligible in comparison to making a yearly assessment of those transit vehicle manufacturers who are still performing on contracts underway.

Finally, the proposed rule seeks to reiterate and clarify the existing requirement that TVMs are subject to all of the applicable provisions of the DBE regulation and responsible for their implementation. It has been the Department's experience that in many cases, compliance with the DBE regulation has been reduced to the submission of a DBE goal and both of the semi-annual DBE reports each year. This was never the Department's intention, and the proposed rule seeks to correct this issue by reaffirming that transit vehicle manufacturers are equally as responsible for implementing the other areas of the regulation as other DOT recipients. However, recognizing that transit vehicle manufacturers do not participate in the DBE certification process, the Department has exempted them from those portions of the rule, with one notable exception: In order to obtain credit for DBE participation, the manufacturer must still ensure that the DBE firm is certified in the state where it performs the work. In addition the Department also proposes that the other post-award requirements of the DBE regulation need not be followed or reported on in those years where a transit vehicle manufacturer is not either awarded or performing on a transit vehicle procurement. The Department believes these proposed changes will both strengthen the oversight functions for those portions of the rule applicable to transit vehicle manufacturers, while exempting manufacturers from those portions of the regulation that do not specifically apply to their businesses.

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

The current regulation 26.51(a) states that race-neutral DBE participation can include when a DBE wins a subcontract from a prime contractor that did not consider DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award sub-contracts). We propose removing this as an example of race-neutral DBE participation since it is impossible for recipients to determine if a prime uses a strict low bid system, and, more importantly, it conflicts with Appendix A, which states prime should not reject a DBE quote over a non-DBE quote if the price difference is not unreasonable.

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

When a recipient sets a goal for DBE participation on a DOT-assisted contract, it must award the contract only to a bidder/offeror that makes good faith efforts to meet it. Bidders can meet the goal in one of two ways. They can obtain commitments for enough DBE participation to meet the goal. If they do not meet the goal, they can also document that they have made good faith efforts to do so. The existing provisions of § 26.53 and Appendix A discuss the kinds of good faith efforts bidders are expected to make, with the Department taking the approach that a showing of adequate good faith efforts in a particular procurement is necessarily a fact-specific judgment recipients must make. The unique circumstances of procurements vary widely and the Appendix spells out factors recipients should take into account when assessing the behavior of bidders in making a good faith effort showing. We do not believe that a template or checklist approach, or some quantitative formula, could ever adequately respond to the circumstances that recipients have to evaluate in determining whether a bidder has made good faith efforts to meet a goal.

The current rule requires bidders/offerors to submit: The names and addresses of DBE firms that will participate on the contract; a description of the work that each DBE will perform; the proposed dollar amount for each DBE firm; written documentation of the bidder's commitment to use the DBE; and the DBE's confirmation that it is participating. We believe the information reporting requirements can be strengthened by requiring that bidders, in addition to these submissions, provide the recipient with information showing that each DBE signed up by the bidder is certified in the NAICS code(s) for the work it will be performing. This provision will help to reduce the possibility that bidders, in trying to obtain a contract, could list firms that cannot qualify for DBE credit in the work area involved in the contract. This information would have to be submitted with the bidder's initial good faith effort submission. To help implement the NAICS code provision, we recommend that recipients make available (e.g., on their Web sites) the most important and frequently-used NAICS codes relevant to the recipients' operations.

The current rule distinguishes between situations in which contracts are let on the basis of ''responsiveness'' or ''responsibility.'' In the former case, all DBE participation information must be submitted at the time of bid submission. In the latter case, as long as a bidder promised to meet the goal, the bidder could identify DBEs after the bid submission but before the recipient commits itself to using a particular contractor. The Department has noticed an unfortunate trend in which, in procurements that otherwise use a traditional low-bid procurement mechanism, recipients sometimes give the apparent successful bidder a period of several days or weeks after bid opening to submit DBE information, sometimes justifying the practice by labeling the action as a ''responsibility'' procurement. This has the potential to facilitate bid-shopping or other questionable activities by prime contractors. The section's ''responsibility/responsiveness'' terminology has also caused some degree of confusion.

To clarify this situation, the NPRM proposes eliminating the ''responsiveness/responsibility'' distinction. The proposed language would simply say that, with one exception, competitors for a contract having a DBE contract goal would have to submit all information about DBEs that have been engaged for the project with their original submission. There could be no additional grace period after this point during which competitors could subsequently submit this information. The exception to this requirement would be in a negotiated procurement, where the initial submission would contain a binding commitment to meet the goal or document good faith efforts, and specific DBE information could be submitted in the same time frame as price and other terms of the negotiated contract were made final.

If a bidder/offeror does not meet the contract goal on a contract, it must, in order to remain eligible for contract award, submit documentation showing that it made sufficient good faith efforts to meet the contract goal. As noted above, Appendix A describes the kind of information that recipients would use to determine whether a bidder/offeror has made sufficient good faith efforts. In addition, this NPRM proposes that, as part of a good faith efforts showing, a bidder/offeror would have to provide copies of each DBE and non-DBE subcontractor quote it had received, in situations where it picked a non-DBE firm to do work that a DBE had sought. This information will help the recipient determine whether there is validity to any claims by a bidder/offer that a DBE was rejected because its quote was unreasonably high.

The NPRM would give recipients two options with respect to the timing of the provision of good faith efforts documentation from bidders/offers who do not meet the contract goal. First, recipients could require that all bidders/offerors who do not meet the contract goal submit good faith efforts documentation with their original bids/offers. Bidders/offerors have to amass a great deal of information to compete for a contract (e.g., with respect to price, materials, schedules, etc.). DBE-related information is no different and no less an integral part of the bidding process. DBE information is not some separate, foreign intrusion into the procurement process that needs to be handled at a different time from anything else that determines who wins a contract. Consequently, we believe that recipients can justifiably seek good faith efforts information at the same time they receive everything else concerning the competition for a contract.

However, we recognize that some recipients may wish to reduce administrative burdens on unsuccessful bidders/offerors. Consequently, the second option the proposed rule offers is for recipients to require good faith efforts documentation only from an apparent successful bidder/offeror that does not meet the contract goal. In this option, no one would be required to submit good faith efforts documentation with their original submissions. The apparent successful bidder/offer would have one day after the recipient notified it to submit the documentation. The documentation would have to relate to pre-bid/offer submission efforts; no post-bid/offer submission efforts would be acceptable. The Department seeks comment on whether, in this option, one day is an appropriate time frame, or whether a longer period (e.g., three days) would be acceptable.

A related provision, added to Appendix A, seeks to remedy a practice involving the awarding of contracts to offerors who pledge to name DBEs after they are awarded the contract, but do not actually provide specific DBE information at the time required. This language explicitly states that a promise by the prime contractor bidder to include DBEs after the award is not to be considered as part of a good faith efforts evaluation.

We also propose to add a new paragraph (f)(1)(ii) that would create additional safeguards for DBEs. It requires a recipient to include in each prime contract a provision stating that, as a condition of the award, the contractor must use those DBEs listed to perform the specific work items or supply the materials as committed and that the contractor is not entitled to any payment for work or materials performed by its own or any other forces if the work or supplies were committed to a DBE, unless it receives prior written consent of the recipient for a replacement of the DBE for good cause.

In the event that it is necessary to replace a listed DBE, proposed paragraph (g) specifies good faith efforts that a prime contractor would have to make to find DBE participation in place of the original DBE. These include such things as (1) A statement of efforts made to negotiate with DBEs for specific work or supplies, including the names, addresses, telephone numbers, and emails of those DBEs that were contacted; (2) the time and date each DBE was contacted; (3) a description of the information provided to DBEs regarding the plans and specifications for portions of the work to be performed or the materials supplied; and (4) an explanation of why an agreement between the prime contractor and a DBE was not reached. The Department would expect prime contractors to look throughout the contract or project to find opportunities for DBE participation in this situation. This effort would not be limited to the same type of work the original DBE would have performed, but would extend to other types of work as well, including work the prime contractor may originally have planned to self-perform. The prime contractor would have to submit the documentation within 7 days of the recipient's agreement to permit the original DBE to be replaced, and the recipient would provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated.

Under a new paragraph (h), recipients would be required to include in each prime contract a provision stating that failure by the contractor to carry out the requirements of this regulation, or meet its corrective plan as described above, is a material breach of the contract, and may result in the termination of the contract, use of the remedies set forth in proposed paragraph (i), and other remedies available to the recipient under law. The proposed remedies include provisions regarding (i) The withholding of monthly progress payments; (ii) declaring the contractor in default and terminating the contract; (iii) assessing sanctions in the amount of the difference in the DBE contract committal and the actual payments made to each certified DBEs; (iv) liquidated damages; and/or (v) disqualifying the contractor from future bidding as non-responsible.

In an effort to enhance the recipient's ability to review prime and subcontractor participation on DOT-assisted contracts, we are proposing in a new paragraph (k) to require the prime contractor to provide all subcontracts for all DBEs participating on a contract (including first and lower tier subcontractors). Lastly, the good faith efforts provisions of the current rule apply when a procurement involves a race-conscious DBE contract goal. However, DBEs also participate, as a race-neutral matter, on contracts that do not have DBE contract goals. The Department seeks comment on whether some of the provisions of this rule (e.g., concerning termination of DBEs and good faith efforts to replace DBEs that are dropped from a project) should apply to DBEs on contracts that did not have a contract goal.

§ 26.55 How is DBE participation counted toward goals?

We propose to modify the factors in determining whether a DBE trucking company is performing a commercially useful function to include the ability to count 100% of a DBE's trucking services when it uses its own employees as drivers, but leases trucks from a non-DBE truck leasing company. This change would allow DBE haulers to lease trucks from non-DBE leasing companies in instances in which they employ sufficient drivers yet lack sufficient trucks to fulfill their contractual obligations. This change is designed to allow DBEs the same ability as non-DBEs to use their own drivers and supplement their fleets with leased trucks without sacrificing any loss of DBE credit due to the fact that the trucks may be leased from a non-DBE leasing company. Credit would not be given,

however, in instances in which the DBE leases trucks from the prime contractor. The regulations pertaining to counting DBE trucking in which a DBE subcontracts with a non-DBE owner-operator or leases trucks *and* drivers from a non-DBE would remain unchanged. We also note that there could be situations in which close relationships between DBEs and non-DBE companies from which they lease trucks (e.g., a non-DBE mentor company) or difficulties in documentation of arms-length lease relationships (e.g., no proof of payment, assertions of payment in kind) could raise certification or fraud issues. The proposed amendment would change only counting rules; it would not immunize companies involved from scrutiny of potentially improper relationships.

The NPRM would also add language emphasizing that counting decisions concerning whether a firm's participation is best understood as a regular dealer or as a transaction expediter must be made on a contract-by-contract basis, not on a generic basis.

On December 9, 2011, the Department issued a new guidance Question and Answer (Q&A) to clarify the counting rules with respect to credit for suppliers, discussing the application of the ''regular dealer'' and ''transaction expediter/broker'' concepts. The Department seeks comment on whether any provisions of the Q&A should be made part of the rule itself. More broadly, the Department wants to open a discussion of the regular dealer concept itself. As defined in the rule, a ''regular dealer'' occupies something like the traditional ''middleman'' role in commerce. Conversations with a variety of firms and state and local agencies have raised the question of whether changes in the way business is conducted has made the middleman role itself somewhat obsolete in the kinds of work (e.g., construction, professional services) most frequently involved in the DBE program. We seek comment on this question and on how, if at all, changes in the way business is conducted should result in changes in the way DBE credit is counted in supply situations.

The Department's key principle in counting DBE participation in any situation is to ensure that only work the DBE does itself, only the value that the DBE adds to the transaction, should count. When a DBE is involved in supplying goods manufactured by a non-DBE, and the DBE does not play a traditional regular dealer/middleman role, what is the appropriate measure of the value it adds to the transaction? Is it ever more than the fees or commissions the DBE gets? If so, what is the rationale for counting more than this (e.g., some percentage of the product that is provided to the ultimate user)?

One policy consideration that has influenced the Department's thinking over the years is that allowing too-generous credit for supplies provided by a DBE middleman or transaction expediter would work to the disadvantage of DBEs who are contractors in construction or other fields. That is, if a prime contractor can get all or most of the DBE credit it needs to meet a goal from buying steel or petroleum products or other items through a DBE middleman, then the prime contractor's incentive to use other DBE contractors on a project is diminished. The Department seeks comment on how this policy consideration interacts with the way the counting provisions of the rule work in practice.

§ 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

One of the concerns the Department has with the implementation of the program is that certifiers and other state and local program officials can be subject to pressures to take actions inconsistent with the intent and language of the Department's rules. It is crucial that recipients' personnel objectively discharge their professional responsibilities under this part. Objectivity includes being independent in fact and appearance when making certification decisions, maintaining an attitude of impartiality, and being free of conflicts of interest. We believe that the ethical administration of the program means that no public official at any level of state or local government should make, participate in making or in any way attempt to use their official position to influence a certification or other program decision. No employee, officer or agent of the recipient should participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved.

Recipients and their staffs are, of course, obligated to follow their jurisdiction's written codes of ethics. Beyond that, the Department seeks comment on whether Part 26 should be amended (or guidance issued) to add provisions concerning ethics and conflicts of interest that could perhaps play a constructive role in empowering DBE officials to resist inappropriate pressures. Would such provisions be effectual? Could the Department effectively develop provisions that provided appropriate guidance but did not become overly detailed? The Department welcomes suggestions about this subject.

Appendix A—Good Faith Efforts

Appendix A provides guidance for recipients that establish a contract goal for DBE participation on a DOT-assisted contract. The Appendix is mentioned in the regulation text § 26.53, which the Department is proposing (as described above) to revise. The Appendix lists the specific types of actions recipients should consider as part of bidders' good faith efforts to obtain DBE participation. This list was never intended to be a mandatory checklist nor to be exclusive or exhaustive. We clearly indicate that other factors or types of efforts may be relevant in appropriate cases. There has been no revision to the stated good faith efforts examples specified in the Appendix since the original issuance of the rule, but over time we have learned of several possible improvements that we hope to make now. These significant examples we propose to add are in the areas of market research (item A) and establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates DBE participation (item B). We further propose adding language specifying that the rejection of the DBE simply because its quotation for the work was not the lowest received is not a practice considered to be good faith effort. We propose to add language saying that ''determinations should not be made using quantitative formulas.'' There is an understandable desire to permit good faith efforts decisions to be made on a neat, bright-line basis (e.g., if a prime contractor has contacted a given number or given percentage of DBEs, it has made sufficient good faith efforts). To accomplish their purpose, however, good faith efforts decisions must be a judgment based on the entire set of factors concerning a particular contracting action, and cannot be reduced to a formula or checklist without distorting the process.

When a DBE must be replaced on a contract, the prime contractor's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the bidder has the ability and/or desire to perform the contract work with its own forces is not a sound basis for rejecting a prospective replacement DBE's reasonable quote. Section V of the Appendix addresses

various techniques recipients employ in determining whether a bidder has made good faith efforts. We propose adding language that recommends that recipients scrutinize the documented efforts and at a minimum, review the performance of other bidders in meeting the contract goal (e.g., to see if the success of other bidders in meeting a goal suggests that good faith efforts could have resulted in the bidder meeting the goal). We propose mirroring language we have added in § 26.53 revisions that recipients require contractors to submit all subcontractor quotes in order to review whether DBE prices were substantially higher. Recipients would also contact the DBEs listed on a contractor's solicitation to inquire as to whether they were, in fact, contacted by the prime. The added language also states that pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule.

Regulatory Analyses and Notices

Executive Orders 12866 and 13563 (Regulatory Planning and Review)

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of the Order. It does not create significant cost burdens, does not affect the economy adversely, does not interfere or cause a serious inconsistency with any action or plan of another agency, does not materially alter the impact of entitlements, grants, user fees or loan programs; and does not raise novel legal or policy issues. The rule is essentially a streamlining of the provisions for implementing an existing program, clarifying existing provisions and improving existing forms. To the extent that clearer certification requirements and improved documentation can forestall DBE fraud, the rule will result in significant savings to state and local governments. This NPRM does not contain significant policy-level initiatives, but rather focuses on administrative changes to improve program implementation.

Executive Order 12372 (Intergovernmental Review)

The NPRM is a product of a process, going back to 2007, of stakeholder meetings and written comment that generated significant input from state and local officials and agencies involved with the DBE program in transit, highway, and airport programs.

Regulatory Flexibility Act

The underlying DBE rule does deal with small entities: all DBEs are, by definition, small businesses. Also, some FAA and FTA recipients that implement the program are small entities. However, the changes proposed to the rule are primarily technical modifications to existing requirements (e.g., improved forms, refinements of certification provisions) that will have little to no economic impact on program participants. Therefore, the proposed changes will not create significant economic effects on anyone. In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), I certify that this rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132 (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. As noted above, there is no substantial compliance cost imposed on state and local agencies, who will continue to implement the underlying program with administrative improvements proposed in the rule. The proposed rule does not involve preemption of state law. Consequently, we have analyzed this proposed rule under the Order and have determined that it does not have implications for federalism.

Paperwork Reduction Act

As required by the Paperwork Reduction Act of 1995, DOT is submitting 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 an opportunity 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, and should also send a copy their comments to the docket for this rulemaking at regulations.gov. Given the time frames for DOT and OMB consideration of comments, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

We will respond to any OMB or public comments on the information collection requirements contained in this rule. OST may not impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. OST intends to obtain current OMB control numbers for the new information collection requirements resulting from this rulemaking action. The OMB control number, when assigned, will be announced either in the final rule or by separate notice in the **Federal Register**.

The Department invited interested persons to submit comments on any aspect of these ICRs, including: (1) Whether the proposed collection is necessary for OST's performance; (2) the accuracy of the estimated burdens; (3) ways for OST to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

For each of these information collections, the title, a description of the entity to which it applies, and an estimate of the annual recordkeeping and periodic reporting burden are set forth below.

1. Application Form

Based on discussions with DBEs, it is estimated that the total burden hours per applicant to complete its DBE or ACDBE certification application with supporting documentation to be approximately 8 hours. In addition, new applicants will have to submit a personal net worth (PNW) statement (see below).

The number of new applications received each year by Unified Certification Program members is difficult to estimate. There is no central repository for DBE certification applications and we predict that the frequency of submissions at times vary according to construction season (high applications when the season is over), the contracting opportunities available in the marketplace, and the number of new transportation related business formations or expansions. To get some estimate however, the Department contacted recipients in during the process of this NPRM. The agencies we contacted reported receiving between 1–2 per month, 5–10 per month, or on the high end 80–100. There are likely several reasons for the variance. Jurisdictions that are geographically contiguous to other states (such as Maryland) and/or have a high DBE applicant pool may receive a higher number whereas jurisdictions in remote areas of the country with smaller numbers of firms may have lower

applicant requests for DBE certification. These rough numbers likely do not include requests for expansion of work categories from existing firms that are already certified.

Frequency: Once during initial DBE or ACDBE certification.

Estimated Average Burden per Response: 8 hours.

Estimated Total Annual Burden Hours: 72–76 thousand hours per year.

2. PNW Form

A small business seeking to participate in the DBE and ACDBE programs must be owned and controlled by a socially and economically disadvantaged individual. When a recipient determines that an individual's net worth exceeds $1.32 million, the individual's presumption of economic disadvantage is said to have been conclusively rebutted. In order to make this determination, the current rule requires recipients to obtain a signed and notarized statement of personal net worth from all persons who claim to own and control a firm applying for DBE or ACDBE certification and whose ownership and control are relied upon for the certification. These personal net worth statements must be accompanied by appropriate supporting documentation (e.g., tax returns). The form proposed in this rule would replace use of an SBA form suggested in current regulations.

Based on discussion with DBE firms, we estimate that compiling information for and filling out this form would take approximately 10 hours.

The number of respondents is significantly higher than the number of applications received due to annual submissions of the form by owners of DBE or ACDBE certified firms.

Frequency: Once during initial DBE certification and each year thereafter during annual update process. For the DBE/ACDBE programs, information regarding the assets and liabilities of individual owners is necessary for recipients of Federal Transit Administration, Federal Aviation Administration, and Federal Highway Administration, to make responsible decisions concerning an applicant's economic disadvantage under the rule. All persons who claim to own and control a firm applying for DBE or ACDBE certification and whose ownership and control are relied upon for the certification will complete the form. Once a firm is certified as a DBE or ACDBE, these same owners will complete the form each year.

Estimated Average Burden per Response: 8 hours for the initial statement; 4 hours for future updates.

Number of Respondents: 9000–9500 applicants each year. Assuming approximately 30,000 certified firms nationally, there would be that number of updates annually.

Estimated Burden: 72–76 thousand hours per year for applications; 120,000 hours for annual updates. Total estimated burden would be 192–196 thousand hours per year.

3. Material With Annual Affidavits of No Change

Each year, a certified firm must submit an affidavit of no change. In addition to an updated PNW statement (see above), the affidavit must be accompanied by (1) A record from each individual claiming disadvantaged status regarding the transfer of assets for less than fair market value to any immediate family member, or to a trust any beneficiary of which is an immediate family member, within two years of the date of the annual review; (2) a record of all payments, compensation, and distributions (including loans, advances, salaries and dividends) made by the DBE firm to each of its owners, officers or directors, or to any person or entity affiliated with such individuals; and (3) the owner and the firm's (including affiliates) most recent completed IRS tax return, IRS Form 4506 (Request for Copy or Transcript of Tax Return). Collection and submission of these items during the annual affidavit is estimated to take approximately 1.5 hours (realizing that not all firms will have to submit items (1) and (2), and that item 3 will already have been prepared for IRS purposes.

Respondents: The approximately 30,000 certified DBE firms.

Burden: Approximately 45, 000 hours per year.

4. Reporting Requirement for Percentages of DBEs in Various Categories

The NPRM would implement a statutory requirement calling on UCPs to report the percentages of white women, minority men, and minority women who control DBE firms. To carry out this requirement, the 52 UCPs would read their existing Directories, noting which firms fell into each of these three categories. The UCPs would then calculate the percentages and email the results off to the Departmental Office of Civil Rights. It would take each UCP an estimated three hours to comb through their Directories, and another three minutes to operate their calculators to do the percentages and send an email.

Respondents: 52.

Burden: Approximately 158.5 hours.

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 22nd day of August 2012, at Washington, DC.

Robert S. Rivkin,

General Counsel.

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

PART 26—[AMENDED]

1. The authority citation for 49 CFR part 26 continues to read as follows:

Authority: 23 U.S.C. 304 and 324; 42 U.S.C. 2000d, *et seq.* ; 49 U.S.C. 47107, 47113, 47123; Sec. 1101(b), Pub. L. 105–178, 112 Stat. 107, 113.

2. In § 26.1, redesignate paragraphs (f) and (g) as paragraphs (g) and (h), and add new paragraph (f),to read as follows:

§ 26.1 What are the objectives of this part?

* * * * *

(f) To promote the use of DBEs in all types of Federally-assisted contracts and procurement activities conducted by recipients.

* * * * *

3. Amend § 26.5 by removing the definition ''DOT/SBA Memorandum of Understanding or MOU'' and by adding the following definitions ''Assets'', ''Business, business concern or business enterprise'', ''Contingent Liability'', ''Days'', ''Immediate family member'', ''Liabilities'', ''Principal place of business'', ''Transit vehicle manufacturer (TVM)'', in the proper alphabetical order to read as follows:

§ 26.5 What do the terms used in this part mean?

Assets mean all the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

Business, business concern or business enterprise means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of

taxes or use of American products, materials, or labor.

Contingent Liability means a liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.

Days mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, and mother-in-law.

Liabilities mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

Principal place of business means the business location where the individuals who manage the applicant's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business.

Transit vehicle manufacturer (TVM) means any manufacturer whose primary business purpose is to manufacture vehicles specifically built for public mass transportation. Such vehicles include, but are not limited to: buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Businesses that manufacture, mass-produce, or distribute vehicles solely for personal use and for sale ''off the lot'' are not considered transit vehicle manufacturers.

4. In § 26.5, revise the definitions of ''Primary industry classification'' and ''Socially and economically disadvantaged individual'' to read as follows:

§ 26.5 What do the terms used in this part mean?

* * * * *

Primary industry classification means the most current North American Industrial Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available from the National Technical Information Service, 5301 Shawnee Road, Alexandria, VA, 22312 by calling 1–800–553–6847; TDD: (703) 487–4639, on the Internet at: *http://www.ntis.gov/products/naics.aspx.* or through the U.S. Census Bureau *http://www.census.gov/eos/www/naics/*.

* * * * *

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) ''Black Americans,'' which includes persons having origins in any of the Black racial groups of Africa;

(ii) ''Hispanic Americans,'' which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) ''Native Americans,'' which includes persons who are enrolled members of a federally or state recognized Indian tribe, Alaska Natives, or Native Hawaiians;

(iv) ''Asian-Pacific Americans,'' which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kirbati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) ''Subcontinent Asian Americans,'' which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.

* * * * *

5. In § 26.11, add new paragraphs (d) and (e), to read as follows:

§ 26.11 What records do recipients keep and report?

* * * * *

(d) You must maintain all records documenting a firm's compliance with the requirements of this part. At a minimum, you should keep a complete application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews. Such records must be retained in accordance with applicable record retention requirements for the recipient's financial assistance agreement.

(e) Each UCP established pursuant to section 26.81 of this Part must report to the Department of Transportation's Departmental Office of Civil Rights, by May 31 of each year, the percentage of certified DBE firms in its Directory controlled by the following:

(1) women;

(2) socially and economically disadvantaged individuals (other than women); and

(3) individuals who are women and are otherwise socially and economically disadvantaged individuals

§ 26.21 [Amended]

6. In § 26.21 paragraph (a)(1) add the word ''primary'' before FHWA, in paragraph (a)(2) and (a)(3) remove the word ''exceeding'' and add in its place the words ''the cumulative total value of which exceeds.''

7. In § 26.45 revise paragraphs (c) (2), (c) (5); (d)(introductory paragraph), (e)(3), (f)(4) and (g) to read as follows:

§ 26.45. How Do Recipients Set Overall Goals?

* * * * *

(c) * * *

(2) *Use a bidders list.* Determine the number of DBEs that have bid or quoted on your DOT-assisted prime contracts or subcontracts in the past three years. Determine the number of all businesses (successful and unsuccessful) that have bid or quoted on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number of all businesses to derive

a base figure for the relative availability of DBEs in your market. When using this approach, you must establish a mechanism to directly capture data on DBE and non-DBE subcontractors that submitted bids or quotes on your DOT-assisted contracts. * * *

(5) *Alternative methods.* Except as otherwise provided in this paragraph, you may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market. Use of a list of prequalified contractors or plan holders is not an acceptable alternative means of determining the availability of DBEs.

(d) *Step 2.* Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure to arrive at your overall goal. If the evidence does not suggest an adjustment is necessary, then no adjustment shall be made.

* * * * *

(e) * * *

(3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit or require you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects, including entire 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) * * *

(4) You are not required to obtain prior operating administration concurrence with your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated or that your method for calculating goals is inadequate, the operating administration may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you. In evaluating the adequacy or soundness of the methodology used to derive the overall goal, the operating administration will be guided by goal setting principles and best practices identified by the Department in guidance issued pursuant to section 26.9.

* * * * *

(g) In establishing an overall goal, you must provide for consultation and publication. This includes:

(1) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs. The consultation must include a scheduled, direct, interactive exchange (e.g., a face-to-face meeting, video conference, teleconference) with as many interested stakeholders as possible focused on obtaining information relevant to the goal setting process, and it must occur before you are required to submit your methodology to the operating administration for review pursuant to section 26.45(f). You must document in your goal submission the consultation process you engaged in. Notwithstanding section 25.45 (f)(4), you may not implement your proposed goal until you have complied with this requirement.

(2) A published notice announcing your proposed overall goal before submission to the operating administration on August 1st. The notice must be posted on your Internet Web site any other sources (e.g., minority-focused media, trade association publications). If the proposed goal changes following review by the operating administration, the revised goal must be posted on your Internet Web site.

* * * * *

8. Revise § 26.49 to read as follows:

§ 26.49 How are overall goals established for vehicle manufacturers?

(a) If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.

(1) Only those transit vehicle manufacturers listed on FTA's certified list of Transit Vehicle Manufacturers at the time of solicitation are eligible to bid.

(2) Failure to implement the DBE Program in the manner as prescribed in this section and throughout 49 CFR Part 26 will be deemed as non-compliance, which will result in removal from FTA's certified TVMs list, resulting in that manufacturer becoming ineligible to bid.

(3) FTA recipients must have a mechanism in place to document that only certified manufacturers were allowed to bid.

(4) FTA recipients are required to submit within 30 days of making an award, the name of the successful bidder, and the total dollar value of the contract in the manner prescribed in the grant agreement.

(b) If you are a transit vehicle manufacturer, you must establish and submit for FTA's approval an annual overall percentage goal.

(1) In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying § 26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts you will bid on during the fiscal year in question, less the portion(s) attributable to the manufacturing process performed entirely by the transit vehicle manufacturer's own forces.

(i) You must consider and include in your base figure all contracting opportunities made available to non-DBE firms; and

(ii) You must exclude from this base figure funds attributable to work performed outside the United States and its territories, possessions, and commonwealths.

(iii) In establishing an overall goal, the transit vehicle manufacturer must provide for public participation. This includes consultation with interested parties consistent with § 26.45(g) as well as publication of contracting opportunities within a Central Repository of Contracting Opportunities.

(2) The requirements of this part with respect to submission and approval of overall goals apply to you as they do to recipients.

(c) Transit vehicle manufacturers awarded must comply with the reporting requirements of § 26.11 of this part including the requirement to submit the Uniform Report of Awards/

Commitments and Payments, in order to remain eligible to bid on FTA assisted transit vehicle procurements

(d) Transit vehicle manufacturers must implement all other applicable requirements of this part, except those relating to UCPs and DBE certification procedures.

(e) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, use the procedures of this section with respect to procurements of vehicles or specialized equipment. If you choose to do so, then the manufacturers of this equipment must meet the same requirements (including goal approval by FHWA or FAA) as transit vehicle manufacturers must meet in FTA-assisted procurements.

(f) As a recipient you may, with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying through the procedures of this section.

9. Revise § 26.51 paragraph (a) to read as follows:

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

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating race-neutral DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.

* * * * *

10. In § 26.53, revise paragraph (b), redesignate paragraph (f)(1) as (f)(1)(i), and add a new paragraph (f)(1)(ii) to read as follows:

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

* * * * *

(b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:

(1) Award of the contract will be conditioned on meeting the requirements of this section;

(2) All bidders/offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

(i) The names and addresses of DBE firms that will participate in the contract;

(ii) A description of the work that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;

(iii) The dollar amount of the participation of each DBE firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal; and

(v) Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment.

(3) You must require that the each bidder/offeror present all information required by paragraph (b)(2) of this section at the time its bid/offer is presented (e.g., the time of bid opening, the time of presentation of initial proposals). Provided that, in a negotiated procurement, the offeror may make a contractually binding commitment to meet the goal at the time of the presentation of initial proposals but provide the information required by paragraph (b)(2) of this section before the final selection for the contract is made by the recipient.

(4) If the apparent successful bidder/offeror has not met the contract goal, it must submit documentation of the good faith efforts it made to meet the goal in order to be eligible for contract award. The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract.

(i) You may require all bidders/offerors who do not meet the contract goal to submit this documentation with their original submission; or

(ii) You may allow an apparent successful bidder/offeror who does not meet the contract goal to submit this documentation within one day of your notification that it is the apparent successful bidder/offeror. If you use this approach, you must require that the apparent successful bidder/offeror certify that all evidence of good faith efforts was created or generated before the time of the original bid/offer submission. Efforts to obtain additional DBE participation made after the time of the original submission will not be accepted as evidence of good faith efforts.

* * * * *

(f)(1)(i) * * *

(ii) You must include in each prime contract a provision stating (A) that the contractor shall utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the contractor obtains your written consent as provided in this paragraph (f); and (B) that, unless your consent is provided under this paragraph (f), the contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.

* * * * *

11. In § 26.53, revise paragraphs (g) and (h), resdesignate paragraph (i) as paragraph (j), and add new paragraphs (i), and (k) to read as follows:

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

* * * * *

(g) When a DBE subcontractor is terminated as provided in paragraph (f) of this section, or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement. These good faith efforts shall be documented by the contractor and at your discretion, you must direct the contractor to provide—

(i) written notification to certified DBEs that their interest is solicited in subcontracting work defaulted by the previous DBE or in subcontracting other items of work in the contract;

(ii) a statement of efforts to negotiate with certified DBEs for specific sub-bids including the names, addresses, and telephone numbers of certified DBEs who were contacted; a description of the information provided to certified DBEs regarding the plans and specifications for portions of the work to be performed; and a statement of why additional agreements with certified DBEs were not reached; and

(iii) documentation demonstrating its attempts to contact the recipient for assistance in locating certified DBEs willing to assume the portion of work or do other work on the contract. If the recipient requests documentation under this provision, the contractor shall submit the documentation within 7 days and the recipient shall provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated.

(h) You must include in each prime contract a provision stating that failure by the contractor to carry out the requirements of this Part is a material breach of the contract, and may result in the termination of the contract, the remedies set forth in paragraph (i) of

this section, or other remedies you deem appropriate.

(i) You must include in each prime contract a provision for appropriate administrative remedies that you will invoke if the prime contractor fails to comply with the requirements of this section in making good faith efforts to meet DBE contract goals and commitments. The remedies shall include provisions regarding (i) the withholding of monthly progress payments; (ii) declaring the contractor in default and terminating the contract; (iii) assessing sanctions in the amount of the difference in the DBE contract committal and the actual payments made to each certified DBEs; (iv) liquidated damages; and/or (v) disqualifying the contractor from future bidding as non-responsible.

(j) You must apply the requirements of this section to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

(k) You must require the contractor to provide a copy of all DBE subcontracts. The subcontractor shall ensure that all subcontracts or an agreement with DBEs to supply labor or materials require that the subcontract and all lower tier subcontractors be performed in accordance with this part's provisions.

12. In § 26.55, revise paragraph (d)(5) and the example to paragraph (d)(5); redesignate paragraph (d)(6) as (d)(7); and add new paragraph (d)(6) and example to paragraph (d)(6); and add a new paragraph (e)(4) to read as follows:

§ 26.55 How is DBE participation counted toward goals?

* * * * *

(d) * * *

(5) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE that leases trucks equipped with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by DBE-owned trucks or leased trucks with DBE employee drivers. Additional participation by non-DBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate DOT Operating Administration.

Example to this paragraph (d)(5): DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks equipped with drivers from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. DBE credit could be awarded only for the fees or commissions pertaining to the remaining trucks Firm X receives as a result of the lease with Firm Z.

(6) The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.

Example to paragraph (d)(6): DBE Firm X uses two of its own trucks on a contract. It leases two additional trucks from non-DBE Firm Z. Firm X uses its own employees to drive the trucks leased from Firm Z. DBE credit would be awarded for the total value of the transportation services provided by all four trucks.

* * * * *

(e) * * *

(4) You must determine the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer or a transaction expediter) on a contract-by-contract basis.

* * * * *

13. In § 26.65, revise paragraph (a), and in paragraph (b), remove ''in excess of $22.41 million'' and add in its place ''in excess of ''$23.98 million'' to read as follows:

§ 26.65 What rules govern business size determinations?

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. As a recipient, you must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to primary industry classification of the applicant.

* * * * *

14. Revise § 26.67 to read as follows:

§ 26.67 What rules determine social and economic disadvantage?

(a) *Presumption of disadvantage.* (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

(2)(i) You must require each individual owner of a firm applying to participate as a DBE, 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 $1.32 million.

(ii) You must require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation. To meet this requirement, you must use the application form provided in Appendix G to this part without change or revision. Where necessary to accurately determine an individual's PNW, you may, on a case-by-case basis, require additional financial information from the owner of an applicant firm (e.g., information concerning the assets of the owner's spouse, where needed to clarify whether assets have been transferred to the spouse).

(iii) The PNW statement must include all assets owned by the individual, including any ownership interests in the applicant firm, personal assets, and the value of his or her personal residence. However, when computing an individual's net worth to determine economic disadvantage, you must make the adjustments in paragraph (iv) of this paragraph.

(iv) In determining an individual's net worth, you must observe the following requirements:

(A) Exclude an individual's ownership interest in the applicant firm;

(B) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). The equity is the market value of the residence less any mortgages and home equity loan balances. Recipients must ensure that home equity loan balances are included in the equity calculation and not as a separate liability on the individual's personal net worth form. Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.

(C) Do not use a contingent liability to reduce an individual's net worth.

(D) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the

individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

(v) Notwithstanding any provision of Federal or state law, you must not release an individual's personal net worth statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under section 26.89 of this part or to any other state to which the individual's firm has applied for certification under § 26.85 of this part.

(b) Rebuttal of presumption of disadvantage. (1) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds $1.32 million or demonstrates that the individual is (i) able to accumulate substantial wealth; (ii) has unlimited growth potential; or (iii) has not experienced or had to overcome impediments to obtaining access to financing, markets, and resources, the individual's presumption of economic disadvantage is rebutted. As a certifying agency, you should review the total fair market value of the individual's assets and determine if that level appears to be substantial and indicates an ability to accumulate substantial wealth.

Example to paragraph (b)(1): An individual with very high assets and significant liabilities may, in accounting terms, have a PNW of less than $1.32 million. However, the person's assets (e.g., a very expensive house, a yacht, extensive real or personal property holdings) may lead to a conclusion that he or she is not economically disadvantaged. The recipient can rebut the individual's presumption of economic disadvantage under these circumstances, as provided in this section, even though the individual's PNW is less than $1.32 million.

(2) In the case of an individual whose economic disadvantage is rebutted because his or her PNW shows a PNW exceeding $1.32 million, you are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(3) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of Sec. 26.87.

(4) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(5) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds $1.32 million, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage, so long as his or her PNW remains above that amount.

(c) *Transfers within two years.*

(1) Except as set forth in paragraph (e)(2) of this section, recipients must attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, to a trust a beneficiary of which is an immediate family member, or to the applicant firm for less than fair market value, within two years prior to a concern's application for participation in the DBE program or within two years of recipient's review of the firm's eligibility, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients must not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(d) Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of Appendix E of this part.

15. In § 26.69, revise paragraphs (a), (c)(1), and (i), add new paragraph (k), to read as follows:

§ 26.69 What rules govern determinations of ownership?

(a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices.

* * * * *

(c)(1) The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

(2) Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm.

Examples to paragraph (c):

1. An individual pays $100 to acquire a majority interest in a firm worth $1 million. The individual's contribution to capital would not be viewed as substantial.

2. A 51% disadvantaged owner and a non-disadvantaged 49% owner contribute $100 and $10,000, respectively, to acquire a firm grossing $1 million. This may be indicative of a pro forma arrangement that does not meet the requirements of (c)(1).

3. The disadvantaged owner of a DBE applicant firm spends $250 to file articles of incorporation and obtains a $100,000 loan, but makes only nominal or sporadic payments to repay the loan. This type of contribution is not of a continuing nature.

(3) The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Risks include financial,

legal, and operational obligations. Any terms or practices which give a non-disadvantaged individual or firm a priority or superior right a firm's profits, compared to the disadvantaged owner(s),

(4) Dividends and distributions. The disadvantaged owners must be entitled to receive:

(i) At least 51 percent of the annual distribution of dividends paid on the stock of a corporate applicant concern;

(ii) 100 percent of the value of each share of stock owned by them in the event that the stock is sold; and

(iii) At least 51 percent of the retained earnings of the concern and 100 percent of the unencumbered value of each share of stock they own in the event of dissolution of the corporation.

(5) Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

* * * * *

(i) You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification. The document must have been signed contemporaneously with the transfer.

(3) You have discretion in cases where marital assets are used to require information concerning the spouse's assets and liabilities. You must make a case-by-case determination of whether the asset transfer was made for reasons other than obtaining certification as a DBE.

* * * * *

(k) You must give particularly close and careful scrutiny to all interests in a business or other assets obtained by a socially and economically disadvantaged owner that resulted from a seller-financed sale of the firm or in cases where a loan or proceeds from a non-financial institution were used by the owner to purchase the interest. The following conditions apply to such a transaction:

(1) Terms and conditions must be comparable to prevailing market conditions offered by commercial lenders for similar type of projects (e.g., in terms of such factors as duration, rate, and fees);

(2) The applicant firm and disadvantaged business owner of the promissory note or loan agreement must provide evidence clearly stating the terms and conditions of the loan, including due date and payment method, interest rate, prepayment, defaults, and collateral;

(3) The note must be a full-recourse note and be personally guaranteed by the socially and economically disadvantaged owner and/or secured by assets outside of the ownership interest or future profits of the applicant firm;

(4) The contributions of capital by the socially and economically disadvantaged owner and any use of collateral by them must be clearly evident from the firm's records and supported by adequate documentation; and

(5) Other than normal loan provisions designed to preserve property pledged as collateral, there must be no conditions, provisions, or practices that have the effect of limiting the socially and economically disadvantaged owner's ability to control the applicant firm.

The firm bears the burden of proving by clear and convincing evidence the transaction meets these criteria.

16. Revise § 26.71 paragraph (e) to read as follows:

§ 26.71 What rules govern determinations concerning control?

* * * * *

(e)(1) Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however:

(i) Possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm; or

(ii) Be a former employer or a principal of a former employer of any disadvantaged owner of the applicant or DBE firm, unless it is determined by the recipient that the relationship between the former employer or principal and the disadvantaged individual or applicant concern does not give the former employer actual control or the potential to control the applicant or DBE firm.

(2) The following are examples of situations in which non-disadvantaged individuals or entities may be found to control or have the power to control the applicant or participant firm:

(i) Non-disadvantaged individuals control the Board of Directors of the applicant or Participant, either directly through majority voting membership, or indirectly, where the by-laws allow non-disadvantaged individuals effectively to prevent a quorum or block actions proposed by the disadvantaged individuals.

(ii) A non-disadvantaged individual or entity, having an equity interest in the applicant or participant, provides critical financial or bonding support or a critical license to the applicant or DBE firm which directly or indirectly allows the non-disadvantaged individual significantly to influence business decisions of the DBE firm.

(iii) A non-disadvantaged individual or entity controls the applicant or DBE firm or an individual disadvantaged owner through loan arrangements. Providing a loan guaranty on commercially reasonable terms does not, by itself, give a non-disadvantaged individual or entity the power to control a firm.

(iv) Business relationships exist with non-disadvantaged individuals or entities that cause such dependence that the applicant or DBE firm cannot exercise independent business judgment without great economic risk.

* * * * *

§ 26.73 [Amended]

17. In § 26.73 paragraph (g), remove the words ''unless the recipient requires all firms that participate in its contracts and subcontracts to be prequalified.''

18. In § 26.73 paragraph (h), delete ''26.35'' and add in its place ''26.65.''

19. In § 26.83, revise paragraphs (c), (h), and (j), to read as follows:

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

* * * * *

(c)(1) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:

(i) Perform an on-site visit to the firm's principal place of business. You must interview the principal officers and key personnel of the firm and review their résumés and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may

rely upon the site visit report of any other recipient with respect to a firm applying for certification;

(ii) Analyze documentation related to the legal structure, ownership, and control of the applicant firm. This includes, but is not limited to, Articles of Incorporation/Organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; and State-issued Certificates of Good Standing

(iii) Analyze the bonding and financial capacity of the firm; lease and loan agreements; bank account signature cards;

(iv) Determine the work history of the firm, including contracts it has received, work it has completed; and payroll records;

(v) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any. Where a firm is applying to be certified in more than one NAICS code, obtain information about the amount of work the firm has performed in the various NAICS codes requested by the firm.

(vi) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;

(vii) Obtain complete Federal and State income tax returns (or requests for extensions) filed by the firm, its affiliates, and the socially and economically disadvantaged owners for the last 3 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service and the applicable state taxing authority.

(viii) Require potential DBEs to complete and submit an appropriate application form, except as otherwise provided in sections 26.84 and 26.85 of this part.

(2) You must use the application form provided in Appendix F to this part without change or revision. However, you may provide in your DBE program, with the written approval of the concerned operating administration, for supplementing the form by requesting specified additional information not inconsistent with this part.

(3) You must make sure that the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

(4) You must review all information on the form prior to making a decision about the eligibility of the firm. You have the discretion to request clarification of information contained in the application at any time in the application process.

* * * * *

(h)(1) 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 section 26.87. Provided that, this requirement does not apply to decertification under the circumstances specified in section 26.67(b)(1) of this Part.

(2) You may not require DBEs to reapply for certification or undergo a recertification process. However, you may conduct a certification review of a certified DBE firm, including a new on-site review, if appropriate in light of changed circumstances (e.g., of the kind requiring notice under paragraph (i) of this section or relating to suspension of certification under section 26.88), 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 job sites.

* * * * *

(j) Submissions supporting continued eligibility. If you are a DBE, you must provide to the recipient annually the following items. If you fail to provide this information in a timely manner, you will be deemed to have failed to cooperate under § 26.109(c).

(1) 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 there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts.

(2) A current personal net worth statement for each disadvantaged owner;

(3) A record from each individual claiming disadvantaged status regarding the transfer of assets for less than fair market value to any immediate family member, or to a trust any beneficiary of which is an immediate family member, within two years of the application or a subsequent certification review by the recipient. The record must provide the name of the recipient(s) and family relationship, and the difference between the fair market value of the asset transferred and the value received by the disadvantaged individual.

(4) A record of all payments, compensation, and distributions (including loans, advances, salaries and dividends) made by the DBE firm to each of its owners, officers or directors; and

(5) The firm's most recent completed IRS tax return, IRS Form 4506, Request for Copy or Transcript of Tax Form.

* * * * *

§ 26.86 [Amended]

20. In § 26.86, remove and reserve paragraph (b) and add the following sentence to the end of paragraph (c): ''An applicant's appeal of your decision to the Department pursuant to § 26.89 does not extend this period.''

21. Revise § 26.87 paragraphs (f) and (g) to read as follows:

§ 26.87 What procedures does a recipient use to remove a DBE's eligibility?

* * * * *

(f) *Grounds for decision.* You may base a decision to remove a firm's eligibility only on one or more of the following grounds:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information relevant to eligibility that has been concealed or misrepresented by the firm;

(4) A change in the certification standards or requirements of the Department since you certified the firm;

(5) Your decision to certify the firm was clearly erroneous;

(6) The firm has failed to cooperate with you (see section 26.109(c)); or

(7) The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program (see section 26.73(a)(2)).

(g) *Notice of decision.* Following your decision, you must provide the firm

written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under § 26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding. Provided that, when sending such a notice to a complainant other than a DOT operating administration, you must not include information reasonably construed as confidential business information without the written consent of the firm that submitted the information.

* * * * *

22. Add a new § 26.88 to read as follows:

§ 26.88 Summary Suspension of Certification.

(a) A recipient shall immediately suspend a DBE's certification without adhering to the requirements in section 26.87(d) when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated.

(b)(1) A recipient may immediately suspend a DBE's certification without adhering to the requirements in section 26.87(d) when (i) there is adequate evidence to believe that there has been a material change in circumstances that may affect the eligibility of the DBE firm to remain certified, or (ii) when the DBE fails to notify the recipient or UCP in writing of any material change in circumstances as required by section 26.83(i) or fails to timely file an affidavit of no change under section 26.83(j).

(2) In determining the adequacy of the evidence to issue a suspension under paragraph (b)(1) of this paragraph, the recipient shall consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result.

(c) The concerned operating administration may direct the recipient to take action pursuant to paragraph (a) or (b) this section if it determines that information available to it is sufficient to warrant immediate suspension.

(d) When a firm is suspended pursuant to paragraph (a) or (b) of this section, the recipient shall immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.

(e) Suspension is a temporary status of ineligibility pending an expedited show cause hearing/proceeding under section 26.87 to determine whether the DBE is eligible to participate in the program and consequently should be removed. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.

(f) While suspended, the DBE may not be considered to meet a contract goal on a new contract, and any work it does on a contract received during the suspension shall not be counted toward a recipient's overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long as the DBE is performing a commercially useful function under the existing contract.

(g) Following receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes that its eligibility should be reinstated, it must provide to the recipient information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, the recipient must either lift the suspension and reinstate the firm's certification or commence a decertification action under section 26.87. If the recipient commences a decertification proceeding, the suspension remains in effect during the proceeding.

(h) The decision to immediately suspend a DBE under paragraph (a)(or (b) of this section is not appealable to the US Department of Transportation. The failure of a recipient to either lift the suspension and reinstate the firm or commence a decertification proceeding, as required by paragraph (g) of this section, is appealable to the U.S. Department of Transportation under section 26.89 of this Part, as a constructive decertification.

23. In § 26.89, revise paragraphs (a)(3), (c), and (e) to read as follows:

§ 26.89 What is the process for certification appeals to the Department of Transportation?

(a) * * *

(1) * * *

(3) Send appeals to the following address: Department of Transportation, Departmental Office of Civil Rights, 1200 New Jersey Avenue SE., Washington, DC 20590.

* * * * *

(c) If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, including information and setting forth a full and specific statement as to why the decision is erroneous, what significant fact that the recipient failed to consider, or what provisions of this Part the recipient did not properly apply. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late filing of the appeal or in the interest of justice.

* * *

(e) The Department makes its decision based solely on the entire administrative record as supplemented by the appeal. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may also supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, state, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

* * * * *

24. Revise Appendix A to 49 CFR part 26 to read as follows:

Appendix A to Part 26—Guidance Concerning Good Faith Efforts

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract for procuring construction, equipment, services, or any other purpose, a bidder must, in order to be responsible and/or responsive, make sufficient good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

II. In any situation in which you have established a contract goal, Part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, you have the responsibility to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts, subject to this rule and DOT guidance implementing it. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made, based on the regulations and the guidance in this Appendix. DOT

Operating Administrations have the discretion to and, if necessary, change recipients' good faith efforts decisions.

The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call. Determinations should not be made using quantitative formulas.

III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (i.e., obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring bona fide good faith efforts.

IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A. Conducing market research to identify small business contractors and suppliers and soliciting through all reasonable and available means the interest of all certified DBEs that have the capability to perform the work of the contract. This may include attendance at pre-bid and business matchmaking meetings and events, advertising and/or written notices, posting of Notices of Sources Sought and/or Requests for Proposals, written notices or emails to all DBEs listed in the state's directory of transportation firms that specialize in the areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project.

The bidder must solicit this interest as early in the acquisition process as practicable to allow the DBEs to respond to the solicitation and submit a timely offer for the subcontract. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units (for example, smaller tasks or quantities) to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces. This may include, where possible, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates DBE participation.

C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation with their offer for the subcontract.

D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional Agreements could not be reached for DBEs to perform the work.

(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal. Another practice considered an insufficient good faith effort is the rejection of the DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy contract goals.

A prime contractor's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the bidder has the ability and/or desire to perform the contract work with its own forces is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.

F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

V. In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, you must review the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts. As provided in section 26.53(b)(2)((vi), you must also require the contractor to submit all subcontractor quotes (from DBEs and non-DBEs, successful and unsuccessful quotes) in order to review whether DBE prices were substantially higher; and contact the DBEs listed on a contractor's solicitation to inquire as to whether they were contacted by the prime. Pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule.

VI. A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts.

25. Revise Appendix B to Part 26 to read as follows:

Appendix B to 49 CFR Part 26: Uniform Report of DBE Awards and Commitments/Payments Form

INSTRUCTIONS FOR COMPLETING THE UNIFORM REPORT OF DBE AWARDS/COMMITMENTS AND PAYMENTS

Recipients of Department of Transportation (DOT) funds are expected to keep accurate data regarding the contracting opportunities available to firms paid for with DOT dollars. Failure to submit contracting data relative to the DBE program will result in noncompliance with Part 26.

1. Indicate the DOT Operating Administration (OA) that provides your Federal financial assistance. If assistance comes from more than one OA, use separate reporting forms for each OA. If you are an FTA recipient, indicate your Vendor Number in the space provided.

2. If you are an FAA recipient, indicate the relevant AIP Numbers covered by this report. If you are an FTA recipient, indicate the Grant/Project numbers covered by this report. If more than ten attach a separate sheet.

3. Specify the Federal fiscal year (i.e., October 1–September 30) in which the covered reporting period falls.

4. State the date of submission of this report.

5. Check the appropriate box that indicates the reporting period that the data provided in this report covers. If this report is due June 1, data should cover October 1–March 31. If this report is due December 1, data should cover April 1–September 30.

6. Provide the name and address of the recipient.

7. State your overall DBE goal(s) established for the Federal fiscal year of the report. Your Overall Goal is to be reported as

well as the breakdown for specific Race Conscious and Race Neutral projections. The Race Conscious portion of the overall goal should be based on programs that focus on and provide benefits only for DBEs. The use of contract goals is a primary example of a race conscious measure. The Race Neutral Goal portion should include programs that, while benefiting DBEs, are not solely focused on DBE firms. For example, a small business outreach program, technical assistance, and prompt payment clauses can assist a wide variety of businesses in addition to helping DBE firms.

Section A: Awards and Commitments Made During This Period

The amounts in items 8(A)–10(I) should include all types of prime contracts awarded and all types of subcontracts awarded, including: professional or consultant services, construction, purchase of materials or supplies, lease or purchase of equipment and any other types of services. All dollar amounts are to reflect only the Federal share of such contracts, and should be rounded to the nearest dollar.

Line 8: Prime contracts awarded this period: The items on this line should correspond to the contracts directly between the reporting agency and a supply or service contractor, with no intermediaries between the two.

8(A). Provide the *total dollar amount* for all prime contracts assisted with DOT funds and awarded during this reporting period. This value should include the entire Federal share of the contracts.

8(B). Provide the *total number* of all prime contracts assisted with DOT funds and awarded during this reporting period.

8(C). From the total dollar amount awarded in item 8(A), provide the *dollar amount* awarded in prime contracts to certified DBE firms during this reporting period. This amount should not include the amounts subcontracted to other firms.

8(D). From the total number of prime contracts awarded in item 8(B), specify the *number* of prime contracts awarded to certified DBE firms during this reporting period.

8(E&F). This field is closed for date entry. Except for the very rare case of DBE-set asides permitted under 49 CFR part 26, all prime contracts are regarded as race-neutral.

8(G). From the total dollar amount awarded in item 8(C), provide the *dollar amount* awarded to certified DBEs through the use of Race Neutral methods. See the definition of Race Neutral Goal in item 7 and the explanation in item 8 of project types to include.

8(H). From the total number of prime contracts awarded in 8(D), specify the *number* awarded to DBEs through Race Neutral methods.

8(I). Of all prime contracts awarded this reporting period, calculate the *percentage* going to DBEs. Divide the dollar amount in item 8(C) by the dollar amount in item 8(A) to derive this percentage. Round this percentage to the nearest tenth.

Line 9: Subcontracts awarded/committed this period: Items 9(A)–9(I) are derived in the same way as items 8(A)–8(I), except that these calculations should be based on subcontracts rather than prime contracts. Unlike prime contracts, which may only be awarded, subcontracts may be either awarded or committed.

9(A): If filling out the General Reporting form, provide the total dollar amount of subcontracts assisted with DOT funds awarded during this period. This value should be a subset of the total dollars awarded in prime contracts in 8(A), and therefore should never be greater than the amount awarded in prime contracts. If filling out the Project Reporting form, provide the total dollar amount of subcontracts assisted with DOT funds awarded during this period. This value should be a subset of the total dollars awarded previously in prime contracts in 8(A). The sum of all subcontract amounts in consecutive periods should never exceed the sum of all prime contract amounts awarded in those periods.

9(B). Provide the total number of all subcontracts assisted with DOT funds that were awarded during this reporting period.

9(C). From the total dollar amount of subcontracts awarded/committed this period, provide the total dollar amount awarded in subcontracts to DBEs.

9(D). From the total dollar amount of subcontracts awarded/committed in item 8(B), specify the number of subcontracts awarded.

9(E).From the total dollar amount of subcontracts awarded/committed to DBEs this period, provide the amount in dollars to DBEs using Race Conscious measures.

9(F). From the total number of subcontracts awarded/committed to DBEs this period, provide the number of subcontracts awarded to DBEs using Race Conscious measures.

9(G). From the total dollar amount of subcontracts awarded/committed to DBEs this period, provide the amount in dollars to DBEs using Race Neutral measures.

9(H). From the total number of subcontracts awarded/committed to DBEs this period, provide the number of subcontracts awarded to DBEs using Race Neutral measures.

9(I). Of all subcontracts awarded this reporting period, calculate the *percentage* going to DBEs. Divide the dollar amount in item 9(C) by the dollar amount in item 9(A) to derive this percentage. Round this percentage to the nearest tenth.

10(A)–10(B). These fields are unavailable for data entry.

10(A)–11(I). 10(C). Combine the total dollars awarded to DBEs on prime contracts in 8(C) with the total dollars awarded to DBEs on subcontracts in 9(C). The amount listed here should be equal to the sum of the total dollars awarded to DBEs through Race Conscious measures 10(E) and the total dollars awarded to DBEs through Race Neutral measures 10(G).

10(D). Combine the total number of prime contracts awarded to DBEs in 8(D) with the total number of subcontracts awarded to DBEs in 9(D). The amount listed here should be equal to the sum of the total number of contracts awarded to DBEs through Race Conscious measures 10(F) and the total number of contracts awarded to DBEs through Race Neutral measures 10(H).

10(E). Combine the total dollar of prime contracts awarded to DBEs Race Conscious 8(E) with total dollar of subcontracts awarded to DBEs Race Conscious 9(E).

10(F). Combine the total number of prime contracts awarded to DBEs Race Conscious 8(F) with total number of subcontracts awarded to DBEs Race Conscious 9(F).

10(G). Combine the total dollar of prime contracts awarded to DBEs Race Neutral 8(G) with total dollar of subcontracts awarded to DBEs Race Neutral 9(G).

10(H). Combine the total number of prime contracts awarded to DBEs Race Neutral 8(H) with total number of subcontracts awarded to DBEs Race Neutral 9(H).

10(I). If filling out the General Reporting form, of all contracts awarded this reporting period, calculate the *percentage* going to DBEs. Divide the total dollars awarded to DBEs in item 10(C) by the dollar amount in item 8(A) to derive this percentage. Round percentage to the nearest tenth. In the Project Reporting form, this field is closed for data entry, since overall percentage of DBE participation is not a value that can be accurately reflected on a period by period basis, and must instead derive from looking at the project as a whole over the course of time.

Section B: Breakdown by Ethnicity & Gender of Contracts Awarded to DBEs This period

11–18. Further breakdown the contracting activity with DBE involvement. The Total Dollar Amount to DBEs in 18(C) should equal the Total Dollar Amount to DBEs in 10(C). Likewise the total number of contracts to DBEs in 18(F) should equal the Total Number of Contracts to DBEs in 10(D). Column E should only be filled out if this report is due on December 1 by recipients required to make semiannual submissions.

Line 17: The ''Other'' category is reserved for any firms whose owners are not members of the presumptively disadvantaged groups already listed, but who are eligible for the DBE program on an individual basis. All DBE firms must be certified by the Unified Certification Program to be counted in this report. ''Other'' should not be used for ''Unknown.''

Section C: Payments on Ongoing Contracts

Line 19(A–E). Submit information on contracts that are currently being performed. All dollar amounts are to reflect only the Federal share of such contracts, and should be rounded to the nearest dollar.

19(A). Provide the total dollar amount paid to all firms performing work on contracts.

19(B). Provide the total number of contracts that are currently being performed.

19(C). Provide the total number of DBE firms providing work on contracts assisted with federal funds.

19(D). Provide the total dollar value paid to DBE firms currently performing work during this period.

19(E) Of all payments made during this period, calculate the percentage going to DBEs. Divide the total dollar value to DBEs in item 19(C) by the total dollars of all payments in 19(A). Round percentage to the nearest tenth.

Section D: Actual Payments on Contracts Completed This Reporting Period

This section should provide information only on contracts that are closed during this period. All dollar amounts are to reflect the entire Federal share of such contracts, and should be rounded to the nearest dollar.

20(A). Provide the total number of contracts completed during this reporting period that used Race Conscious methods. Race Conscious contracts are those with contract goals or another race conscious measure.

20(B). Provide the total dollar value of prime contracts completed this reporting period that had race conscious goals.

20(C). Provide the total dollar amount of DBE participation on all Race Conscious contracts completed this reporting period that was necessary to meet the contract goals on them. This applies only to Race Conscious contracts.

20(D). Provide the actual total DBE participation in dollars on the race conscious contracts completed this reporting period.

20(E). Of all the contracts completed this reporting period using Race Conscious measures, calculate the percentage of DBE participation. Divide the total dollar amount to DBEs in item 20(D) by the total dollar value provided in 20(B) to derive this percentage. Round to the nearest tenth.

21(A)–21(E). Items 21(A)–21(E) are derived in the same manner as items 20(A)–20(E), except these figures should be based on contracts completed using Race Neutral measures.

21(C). This field is closed.

22(A)–22(D). Calculate the totals for each column by adding the race conscious and neutral figures provided in each row above.

22(C). This field is closed.

22(E). Calculate the overall percentage of dollars to DBEs on completed contracts. Divide the Total DBE participation dollar value in 22(D) by the Total Dollar Value of Contracts Completed in 22(B) to derive this percentage. Round to the nearest tenth.

23. Name of the Authorized Representative preparing this form.

24. Signature of the Authorized Representative.

25. Phone number of the Authorized Representative.

** Submit your completed report to your Regional or Division Office.

BILLING CODE 4910–9X–P

General Reporting

	UNIFORM REPORT OF DBE COMMITMENTS/AWARDS AND PAYMENTS							
	Please refer to the Instructions sheet for directions on filling out this form							
1	Submitted to (check only one):	[ ] FHWA	[ ] FAA	[ ] FTA–Recipient ID Number				
2	AIP Numbers (FAA Recipients); Grant Number (FTA Recipients):							
3	Federal fiscal year in which reporting period falls:			4. Date This Report Submitted:				
5	Reporting Period	[ ] Report due June 1 (for period Oct. 1-Mar. 31)		[ ] Report due Dec. 1 (for period April 1-Sept. 30)		[ ] FAA annual report due Dec. 1		
6	Name and address of Recipient:							
7	Annual DBE Goal(s):	Race Conscious Projection		Race Neutral Projection		OVERALL Goal		

Awards/Commitments this Reporting Period

		A	B	C	D	E	F	G	H	I
A	AWARDS/COMMITMENTS MADE DURING THIS REPORTING PERIOD (total contracts and subcontracts committed during this reporting period)	Total Dollars	Total Number	Total to DBEs (dollars)	Total to DBEs (number)	Total to DBEs /Race Conscious (dollars)	Total to DBEs/Race Conscious (number)	Total to DBEs/Race Neutral (dollars)	Total to DBEs/Race Neutral (number)	Percentage of total dollars to DBEs
8	Prime contracts awarded this period									
9	Subcontracts awarded/committed this period									
10	TOTAL									

B	BREAKDOWN BY ETHNICITY & GENDER	Contracts Awarded to DBEs this Period					
		A	B	C	D	E	F
		Total to DBE (dollar amount)			Total to DBE (number)		
		Women	Men	Total	Women	Men	Total
11	Black American						
12	Hispanic American						
13	Native American						
14	Asian-Pacific American						
15	Subcontinent Asian Americans						
16	Non-Minority						
17	Other						
18	TOTAL						

Payments Made this Period

		A	B	C	D	E	F
C	PAYMENTS ON ONGOING CONTRACTS (report activity of ongoing contracts)	Number of Ongoing Contracts	Total Payments Made	Total Number of Contracts with DBEs	Total Number of DBE firms working	Total Payments to DBE firms	Percent to DBEs
19	Prime and sub contracts currently in progress						

		A	B	C	D	
D	TOTAL PAYMENTS ON CONTRACTS COMPLETED THIS REPORTING PERIOD	Number of Contracts Completed	Total Dollar Value of Contracts Completed	DBE Participation Needed to Meet Goal (Dollars)	Total DBE Participation (Dollars)	Percent to DBEs
20	Race Conscious					
21	Race Neutral					
22	Totals					

23	Submitted By:	24. Signature:	25. Phone Number:

49 CFR Part 26 Appendix B: Version 6(a)

26. Revise Appendix F to Part 26 to read as follows:

Project1 Reporting

UNIFORM REPORT OF DBE COMMITMENTS/AWARDS AND PAYMENTS

****Please refer to the Instructions sheet for directions on filling out this form****

1	Submitted to (check only one):	[ ] FHWA	[ ] FAA	[ ] FTA--Recipient ID Number			
2	AIP Numbers (FAA Recipients); Grant Number (FTA Recipients):						
3	Federal fiscal year in which reporting period falls:			4. Date This Report Submitted:			
5	Reporting Period	[ ] Report due June 1 (for period Oct. 1-Mar. 31)		[ ] Report due Dec. 1 (for period April 1-Sept. 30)		[ ] FAA annual report due Dec. 1.	
6	Name and address of Recipient:						
7	Annual DBE Goal(s):	Race Conscious Projection		Race Neutral Projection		OVERALL Goal	

Awards/Commitments this Reporting Period

		A	B	C	D	E	F	G	H	I
A	**AWARDS/COMMITMENTS MADE DURING THIS REPORTING PERIOD** (total contracts and subcontracts committed during this reporting period)	Total Dollars	Total Number	Total to DBEs (dollars)	Total to DBEs (number)	Total to DBEs /Race Conscious (dollars)	Total to DBEs/Race Conscious (number)	Total to DBEs/Race Neutral (dollars)	Total to DBEs/Race Neutral (number)	Percentage of total dollars to DBEs
8	Prime contracts awarded this period									
9	Subcontracts awarded/committed this period									
10	TOTAL									

B	**BREAKDOWN BY ETHNICITY & GENDER**	Contracts Awarded to DBEs this Period					
		A	B	C	D	E	F
		Total to DBE (dollar amount)			Total to DBE (number)		
		Women	Men	Total	Women	Men	Total
11	Black American						
12	Hispanic American						
13	Native American						
14	Asian-Pacific American						
15	Subcontinent Asian Americans						
16	Non-Minority						
17	Other						
18	TOTAL						

Payments Made this Period

		A	B	C	D	E	F
C	**PAYMENTS ON ONGOING CONTRACTS** (report activity of ongoing contracts)	Number of Ongoing Contracts	Total Payments Made	Total Number of Contracts with DBEs	Total Number of DBE firms working	Total Payments to DBE firms	Percent to DBEs
19	Prime and sub contracts currently in progress						

		A	B	C	D	
D	**TOTAL PAYMENTS ON CONTRACTS COMPLETED THIS REPORTING PERIOD**	Number of Contracts Completed	Total Dollar Value of Contracts Completed	DBE Participation Needed to Meet Goal (Dollars)	Total DBE Participation (Dollars)	Percent to DBEs
20	Race Conscious					
21	Race Neutral					
22	Totals					

23	Submitted By:	24. Signature:	25. Phone Number:

49 CFR Part 26 Appendix B: Version 6(b)

Appendix F to 49 CFR Part 26: Uniform Certification Application Form

U.S. DEPARTMENT OF TRANSPORTATION

UNIFORM CERTIFICATION APPLICATION

DISADVANTAGED BUSINESS ENTERPRISE / AIRPORT CONCESSION DISADVANTAGED BUSINESS ENTERPRISE

49 CFR PARTS 23 and 26

Send Application To:

[UCP PARTICIPATING MEMBER]

[Address]

[Phone:] [Fax]

A MATERIAL OR FALSE STATEMENT OR OMISSION MADE IN CONNECTION WITH THIS APPLICATION IS SUFFICIENT CAUSE FOR DENIAL OF CERTIFICATION, REVOCATION OF A PRIOR APPROVAL, INITIATION OF SUSPENSION OR DEBARMENT PROCEEDINGS, AND MAY SUBJECT THE PERSON AND/OR ENTITY MAKING THE FALSE STATEMENT TO ANY AND ALL CIVIL AND CRIMINAL PENALTIES AVAILABLE PURSUANT TO APPLICABLE FEDERAL AND STATE LAW.

In collecting the information requested by this form, the Department of Transportation (Department) complies with the provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). The Privacy Act provides comprehensive protections for your personal information. This includes how information is collected, used, disclosed, stored, and discarded. Your information will not be disclosed to third parties without your consent. The information collected will be used solely to determine your firm's eligibility to participate in the Department's Disadvantaged Business Enterprise Program as defined in 49 CFR section 26.5 and the Airport Concession Disadvantaged Business Enterprise Program as defined in 49 CFR section 23.3. You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477).

Roadmap for Applicants

1. Should I apply?

You may be eligible to participate in the DBE/ACDBE program if you answer "Yes" to the following:

• Is your firm organized as a for-profit business that performs or seeks to perform transportation related work for a recipient of Federal Transit Administration, Federal Highway Administration, or Federal Aviation Administration funds?

• Is your firm at least 51% owned by a socially and economically disadvantaged individual(s) who also controls the firm?

• Is the disadvantaged owner a U.S. citizen or lawfully admitted permanent resident of the U.S.?

• Is your firm a small business that meets the Small Business Administration's (SBA's) size standard and does not exceed $22.41 million in gross annual receipts for DBE ($52.47 million for ACDBEs)? (Note, other size standards apply ACDBE applications from banks/financial institutions, car rental companies, pay telephone firms, and automobile dealers.)

2. How do I apply?

You must complete and submit this certification application and related material to an agency in your home state; and second participate in an on-site interview conducted by that agency. The attached document checklist can help you locate the items you need to submit to the agency with your completed application. If you fail to submit the required documents, your application may be delayed and/or denied.

3. Who will contact me about my application and what are the eligibility standards?

The DBE and ACDBE Programs require that all U.S. DOT recipients of federal assistance must participate in a statewide Unified Certification Program (UCP). The UCP is a one-stop certification procedure that eliminates the need for your firm to obtain certification from multiple agencies within the state. The UCP is responsible for certifying firms and maintaining a database of certified DBEs and ACDBEs for DOT grantees, pursuant to the eligibility standards found in 49 CFR Parts 23 and 26.

4. Where can I find more information?

U.S. DOT—http://www.osdbu.dot.gov/DBEProgram/index.cfm (This site provides useful links to the rules and regulations governing the DBE/ACDBE programs, questions and answers, and other pertinent information)

http://www.census.gov/eos/www/naics/ (provides a listing of NAICS codes) and

http://www.sba.gov/content/table-small-business-size-standards (SBA has established a Table of Small Business Size Standards that is matched to the North American Industry Classification System (NAICS) for industriesprovides a listing of NAICS codes and size standards)

Under 49 CFR §26.107, dated February 2, 1999, if at any time, the Department or a recipient has reason to believe that any person or firm has willfully and knowingly provided incorrect information or made false statements, the Department may initiate suspension or debarment proceedings against the person or firm under 49 CFR Part 29, Governmentwide Debarment and Suspension (nonprocurement) and Governmentwide Requirements for Drug-free Workplace (grants), take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, and/or refer the matter to the Department of Justice for criminal prosecution under 18 U.S.C. 1001, which prohibits false statements in Federal programs.

INSTRUCTIONS FOR COMPLETING THE

DISADVANTAGED BUSINESS ENTERPRISE

AIRPORT CONCESSIONS DISADVANTAGED BUSINESS ENTERPRISE

UNIFORM CERTIFICATION APPLICATION

NOTE: If you require additional space for any question in this application, please attach additional sheets or copies as needed, taking care to indicate on each attached sheet/copy the section and number of this application to which it refers.

Section 1: CERTIFICATION INFORMATION

A. Basic Contact Information

(1) State the contact person and title of the person completing this application and the person who will serve as your firm's primary contact for this application.
(2) State the legal name of your firm, as indicated in your firm's Articles of Incorporation or charter.
(3) State the primary phone number of your firm.
(4) State a secondary phone number, if any.
(5) State your firm's fax number, if any.
(6) State the contact person's email address.
(7) State your firm's website address, if any.
(8) State the street address of your firm (i.e. the physical location of its offices—not a post office box address).
(9) State the mailing address of your firm, if it is different from your firm's street address. Check the box if this is homes based business and identify who holds title to the property.

B. Prior/Other Certifications and Applications

(10) Check the appropriate box indicating for which program your firm is currently certified. If you are already certified as a DBE/ACDBE, indicate in the appropriate box the name of the certifying agency that certified your firm, and also indicate whether your firm has undergone an onsite visit. If your firm has already undergone an onsite visit/review, indicate the dates of the review(s) and the state UCP(s) that conducted the review.

(11) Indicate whether your firm or any of the persons listed has ever been denied certification as a DBE, 8(a), or SDB firm, or state and local MBE/WBE firm. Indicate if the firm has ever been decertified from one of these programs. Indicate if the application was withdrawn or whether the firm was debarred, suspended, or otherwise had its bidding privileges denied or restricted by any state or local agency, or Federal entity. If your answer is yes, identify the name of the agency, and explain fully the nature of the action in the space provided. Indicate if you have *ever appealed this decision to the Department and if so, attach a copy of USDOT's final agency decision(s).*

Section 2: GENERAL INFORMATION

A. Business profile:

(1) Give a concise description of the firm's primary activities, the product(s) or services the company provides, or type of construction. If your company offers more than one product/service, list primary product or service first. Use additional paper if necessary. This description may be used in our database and the UCP online directory if you are certified as a DBE.
(2) Identify the appropriate NAICS Code for the line(s) of work you identified in your business profile.
(3) State the date on which your firm was officially established as stated in your firm's Articles of Incorporation or charter.
(4) State the date on which you and/or each other owner took ownership of the firm.
(5) Check the appropriate box that describes the manner in which you and each other owner acquired ownership of your firm. If you checked "Other," explain in the space provided.
(6) Check the appropriate box that indicates whether your firm is "for profit." **NOTE:** If you checked "No," then you do NOT qualify for the DBE/ACDBE program and should not complete the rest of this application. All participating firms must be for-profit enterprises. If the firm is a for profit enterprise, provide the Federal Tax ID number as stated on your firm's filed tax returns, if you have one. This could also be the Social Security number of the owner of your firm.
(7) Check the appropriate box that describes the legal form of ownership of your firm, as indicated in your firm's Articles of Incorporation or similar document. If you checked "Other," briefly explain in the space provided.
(8) Check the appropriate box that indicates whether your firm has ever existed under different ownership, a different type of ownership, or a different name. If you checked "Yes," explain the circumstances in the space provided.
(9) Indicate in the spaces provided how many employees your firm has, specifying the number of employees who work on a full-time, part-time, and seasonal basis. Attach a list of employees, their job titles, and dates of employment, to your application.
(10) Specify the total gross receipts of your firm for each of the past three years, as declared in your firm's filed tax returns. You must submit complete copies of the firm's State and Federal tax returns for each year and audited financial statements (if available). If there are any affiliates or subsidiaries of the applicant firm or owners, you must submit complete copies of these firm(s) state and federal tax returns. Affiliation is defined in 49 CFR §26.5 and 13 CFR part 121.

B. Relationships and Dealings with Other Businesses

(1) Check the appropriate box that indicates whether your firm is co-located at any of its business locations, or whether your firm shares a telephone number(s), a post office box, any office space, a yard, warehouse, other facilities, any equipment, financing, or any office staff and/or employees with any other business, organization or entity of any kind. If you answered "Yes," then specify the name of the other firm(s) and fully explain the nature of your relationship with these other businesses by identifying the business or person with whom you have any formal, informal, written, or oral agreement. Provide an explanation of any items shared with other firms in the space provided.
(2) Check the appropriate box indicating whether any other firm currently has or had an ownership interest in your firm at present or at any time in the past.
(3) Check the appropriate box that indicates whether at present or at any time in the past your firm:
(a) has been a subsidiary of any other firm;
(b) existed as a partnership in which one or more of the partners are/were other firms;
(c) has owned any percentage of any other firm; and
(d) has had any subsidiaries of its own.
(e) has served as a subcontractor with another firm constituting more than 25% of your firm's receipts?

If you answered "Yes" to any of the questions in (3)(a-e), describe the subsidiaries, partnership interests or other arrangements. In addition, explain whether these relationships are continuing today, or if not, when they ended.

C. Immediate Family Member, Manager, or Employee Businesses

Check the appropriate to indicate whether any of your immediate family members, managers, or employees, own, manage, or are associated with another company. An "immediate family member" is any person who is your father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law. If you answered "Yes," provide the name of each person, your relationship to them, the name of the company they own or manage the

type of business, and whether they own or manage the company.

Section 3: OWNER INFORMATION

Identify all individuals or holding companies with any ownership interest in your firm, providing the information requested below (if your firm has more than one owner, provide completed copies of this section for each additional owner):

A. Background Information

(1) Give the name of the owner.
(2) State his/her title or position within your firm.
(3) Give his/her home phone number.
(4) State his/her home (street) address.
(5) Indicate this owner's gender.
(6) Identify the owner's ethnic group membership. If you checked "Other," specify this owner's ethnic group/identity not otherwise listed.
(7) Check the appropriate box to indicate whether this owner is a U.S. citizen. If this owner is not a U.S. citizen, check the appropriate box that indicates whether this owner is a lawfully admitted permanent resident. If this owner is neither a U.S. citizen nor a lawfully admitted permanent resident of the U.S., then this owner is NOT eligible for certification as a DBE owner. This, however, does not necessarily disqualify your firm altogether from the DBE program if another owner is a U.S. citizen or lawfully admitted permanent resident and meets the program's other qualifying requirements.
(8) (a)(i) State the personal net worth of each owner claiming to be socially and economically disadvantaged applying for DBE qualification. (Each owner claiming disadvantaged status must submit a separate statement. (ii) State whether a trust has been created for the benefit of this owner. If you answered "Yes," briefly explain the nature, history, purpose, and current value of the trust(s). **NOTE: You only need to complete this section for each owner that is applying for DBE qualification (i.e., for each owner who is claiming to be "socially and economically disadvantaged" and whose ownership interest is to be counted toward the control and 51% ownership requirements of the DBE program)** Use the PNW form at the end of this application to compute each disadvantaged owner's PNW.

B. Ownership Interest

(1) State the number of years during which this owner has been an owner of your firm.
(2) Indicate the dollar value of this owner's initial investment to acquire an ownership interest in your firm, broken down by cash, real estate, equipment, and/or other investment. Describe how you acquired the shares. Attach documentation substantiating this investment.
(3) Indicate the number, percentage of the total, class, date acquired, of stock acquired by the owner.
(4) Describe the familial relationship of this owner to each other owner of your firm and employees.
(5) Check the appropriate box that indicates whether this owner performs a management or supervisory function for any other business. If you checked "Yes," state the name of the other business and this owner's title or function held in that business.
(6) (a) Check the appropriate box that indicates whether this owner owns or works for any other firm(s) that has any relationship with your firm. If you checked "Yes," identify the name of the other business, the nature of the business relationship, and the function at the firm.
(b) If the owner works for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week, please identify this activity.

Section 4: CONTROL

A. Identify the firm's Officers and Board of Directors

(1) In the space provided, state the name, title, date of appointment, ethnicity, and gender of each officer of your firm.
(2) In the space provided, state the name, title, date of appointment, ethnicity, and gender of each individual serving on your firm's Board of Directors.
(3) Check the appropriate box to indicate whether any of your firm's officers and/or directors listed above performs a management or supervisory function for any other business. If you answered "Yes," identify each person by name, his/her title, the name of the other business in which s/he is involved, and his/her function performed in that other business.
(4) Check the appropriate box that indicates whether any of your firm's officers and/or directors listed above own or work for any other firm(s) that has a relationship with your firm. If you answered "Yes," identify the name of the firm, the individual's name, and the nature of his/her business relationship with that other firm.

(5) Check the appropriate box to that indicates whether the applicant business and/or owner is involved in any present or pending litigation or administrative proceedings. If you answered "Yes," provide details of the litigation or administrative proceedings.

B. Duties of Owners, Officers, Directors, Managers, and Key Personnel

In the chart provided, specify the roles of the majority and minority owners, directors, officers, and managers, and key personnel who perform significant functions for the business. Make enough copies of this form to provide information on each and every person. Submit résumés for each owner and non-owner identified below. State the name of the individual, title, race, percentage of the firm that they own, gender, salary and benefits.

Circle the frequency of each person's involvement as follows: "always, frequently, seldom, or never"

(1) Setting policy for company direction/scope, or financial decisions.
(2) Bidding and estimating including calculation of cost estimates, bid preparation and submission;
(3) Making purchasing decisions
(4) Marketing and sales
(5) Supervising field operations
(6) Attending bid openings and lettings
(7) Perform office management, such as billing, accounts receivable, and accounts payable
(8) Hires and fires management staff
(9) Hire and fire field staff or crew
(10) Designates profit spending or investment
(11) Obligates the business by contract/credit/bond/insurance
(12) Purchase equipment
(13) Signs business checks

Check the appropriate box that indicates whether any of the persons listed in (1) through (13) above perform a management or supervisory function for any other business. If yes identify the person, business, and their title/function. Identify if any of the persons listed above own or work for any other firm(s) that has a relationship with this firm (e.g. ownership interest, shared office space, financial investment, equipment, leases, personnel sharing, etc.) If you answered "Yes," describe the nature of his/her business relationship with that other firm.

C. Indicate firm inventory in the following categories:

(1) Equipment and Vehicles
State the type, make and model, and current dollar value of each piece of equipment and motor vehicle held and/or used by your firm. Indicate whether each piece is either owned or leased by your firm and where this item is stored.

(2) Office Space
State the street address of each office space held and/or used by your firm. Indicate whether your firm or owner owns or leases the office space and the current dollar value of that property or its lease.

(3) Storage Space
State the street address of each storage space held and/or used by your firm. Indicate whether your firm or owner owns or leases the storage space and the current dollar value of that property or its lease.

D. Does your firm rely on any other firm for management functions or employee payroll?

Check the appropriate box that indicates whether your firm relies on any other firm for management functions or for employee payroll. If you answered "Yes," briefly explain the nature of that reliance and the extent to which the other firm carries out such functions.

E. Financial / Banking Information

Banking Information. State the name and address of your firm's bank. In the space provided, identify the individuals able to sign checks on this account.

Bonding Information. State your firm's Binder Number. State the name of your firm's bond agent and/or broker. Give your agent's/broker's phone number. Give your agent's/broker's address. State your firm's bonding limits (in dollars), specifying both the aggregate and project limits.

F. Identify all sources, amounts, and purposes of money loaned to your firm, including the names of persons or firms securing the loan.

State the name and address of each source, the name of person securing the loan, original dollar amount

and the current balance of each loan, and the purpose for which each loan was made to your firm.

G. List all contributions or transfers of assets to/from your firm and to/from any of its owners or another individual over the past two years:

Indicate in the spaces provided, the type of contribution or asset that was transferred, its current dollar value, the person or firm from whom it was transferred, the person or firm to whom it was transferred, the relationship between the two persons and/or firms, and the date of the transfer.

H. List current licenses/permits held by any owner or employee of your firm.

List the name of each person in your firm who holds a professional license or permit, the type of permit or license, the expiration date of the permit or license, and the license/permit number and issuing State of the license or permit.

I. List the three largest contracts completed by your firm in the past three years, if any.
List the name of each owner or contractor for each contract, the name and location of the projects under each contract, the type of work performed on each contract, and the dollar value of each contract.

J. List the three largest active jobs on which your firm is currently working.
For each active job listed, state the name of the prime contractor and the project number, the location, the type of work performed, the project start date, the anticipated completion date, and the dollar value of the contract.

AIRPORT CONCESSION (ACDBE) APPLICANTS

Identify the concession space, address and location at the airport, the value of the property or lease, and fees/lease payments paid to the airport. Provide information concerning any other airport concession businesses the applicant firm or any affiliate owns and/or operates, including name, location, type of concession, and start date of the concession enterprise.

AFFIDAVIT & SIGNATURE

The Affidavit of Certification must accompany your application for DBE/ACDBE certification. Carefully read the attached affidavit in its entirety. Fill in the required information for each blank space, and sign and date the affidavit in the presence of a Notary Public, who must then notarize the form.

UNIFORM DBE/ACDBE CERTIFICATION APPLICATION **Date_____**

Section 1: CERTIFICATION INFORMATION

A. Basic Contact Information

(1) Contact person and Title: _____ **(2) Legal name of firm:** _____

_____ _____

(3) Phone #: (___) _____ - _____ **(4) Other Phone #:** (____) _____ - _____ **(5) Fax #:** (____) _____ - _____

(6) E-mail: _____ **(7) Firm Websites:** _____

(8) Street address of firm *(No P.O. Box)*: **City:** **County/Parish:** **State:** **Zip**:

_____ _____ _____ _____ _____ - ____

(9) Mailing address of firm (*if different*): **City:** **County/Parish:** **State:** **Zip:**

_____ _____ _____ _____ _____ - ____

Home Based Business? ❑ Yes ❑No **If Yes, who holds the title to the property?** _____

B. Prior/Other Certifications and Applications

(10) Is your firm currently certified for any of the following programs? *(If Yes, check appropriate box(es))*

❑ DBE ❑ ACDBE Names of certifying agencies:

_____

List the dates of any site visits conducted by your home state and any other states or UCP members:

Date ____/ ____/____ State/UCP Member: _____

Date ____/ ____/____ State/UCP Member: _____

Date ____/ ____/____ State/UCP Member: _____

You will be required to provide a copy of the above on-site reports as part of this application process.

❑**Already certified in your home state?** ⊗ STOP! You may not have to complete this application. Ask your state UCP about the streamlined application process.

(11) Has your firm (under any name) or any firm owned or controlled by your firm's owners, Board of Directors, officers or management personnel, ever been:

(a) Denied certification as a DBE, ACDBE, 8(a), SDB, MBE/WBE firm? ❑ Yes ❑No

(b) Decertified from these programs? ❑ Yes ❑No

(c) Withdrawn an application for these programs, or debarred or suspended or otherwise had bidding privileges denied or restricted by any state or local agency, or Federal entity? ❑ Yes ❑No

If yes to any of the above, identify all state, local, or Federal agencies and explain the nature of the action(s):

_____

If you appealed this decision to USDOT, what was the result? Please attach a copy of USDOT's decision(s).

_____

_____

Section 2: GENERAL INFORMATION

A. Business Profile: (1) Give a concise description of the firm's primary activities, the product(s) or services the company provides, or type of construction. If your company offers more than one product/service, list the primary product or service first. Please use additional paper if necessary. This description may be used in our database and the UCP online directory if you are certified as a DBE or ACDBE.

_____

_____

_____

_____

_____

_____

_____

(2) Applicable NAICS Codes for this line of work include: _____ _____ _____ _____ _____ _____

(3) This firm was established on ____/____/____

(4) I/We have owned this firm since: ____/____/____

(5) Method of acquisition *(Check all that apply)*:

❑ Started new business ❑ Bought existing business ❑ Inherited business ❑ Secured concession

❑ Merger or consolidation ❑ Other *(explain)* _____

(6) Is your firm "for profit"? ❑ Yes ❑No→ ⊗ **STOP!** If your firm is NOT for-profit, then you do NOT qualify for this program and should not fill out this application.

Employer's ID # _____

Federal Tax ID# _____

(7) Type of Legal Business Structure: *(check all that apply)*:

❑ Sole Proprietorship ❑ Limited Liability Partnership
❑ Partnership ❑Corporation
❑ Limited Liability Corporation ❑ Joint Venture (Identify all JV partners _____)
❑ Applying as an ACDBE
❑ Other, Describe: _____

(8) Has your firm ever existed under different ownership, a different type of ownership, or a different name?

❑ Yes ❑ No If Yes, explain: _____

_____

_____

(9) Number of employees: Full-time _____ Part-time _____ Seasonal _____Total _____

(Please attach a list of employees, their job titles, and dates of employment, to your application).

(10) Specify the firm's gross receipts for the last 3 years. You must submit complete copies of the firm's State and Federal tax returns for each year, and audited financial statements (if available). If there are any affiliates or subsidiaries of the applicant firm or owners, you must submit complete copies of these firms' State and Federal tax returns.

Year _____ Total receipts $ _____

Year _____ Total receipts $ _____

Year _____ Total receipts $ _____

B. Relationships and Dealings with Other Businesses

(1) Is your firm co-located at any of its business locations, or does it share a telephone number, P.O. Box, office or storage space, yard, warehouse, facilities, equipment, inventory, financing, office staff, and/or employees with any other business, organization, or entity? ❑ Yes ❑ No If Yes, explain fully the nature of your relationship with these other businesses by identifying the business or person with whom you have any formal, informal, written, or oral agreement. Also detail the items shared.

_____

_____

_____

_____

_____

_____

_____

_____

_____

(2) Has any other firm had an ownership interest in your firm at present or at any time in the past?

❑ Yes ❑ No If Yes, explain_____

(3) At present, or at any time in the past, has your firm:

(a) been a subsidiary of any other firm? ❑ Yes ❑ No
(b) existed as a partnership in which one or more of the partners are/were other firms? ❑ Yes ❑ No
(c) owned any percentage of any other firm? ❑ Yes ❑ No
(d) had any subsidiaries? ❑ Yes ❑ No
(e) been a subcontractor with another firm constituting more than 25% of your firm's receipts? ❑ Yes ❑ No

If you answered "Yes" to any of the questions in (2) and/or (3)(a)-(e), describe the subsidiaries, partnership interests, or other arrangements and whether this continues. Please attach a separate sheet if necessary.

_____
_____
_____
_____
_____

C. Immediate Family Member, Manager, or Employee Businesses

Do any of your immediate family members, managers, or employees own, manage, or are associated with another company? ❑ Yes ❑ No If Yes, then list: *(Please attach extra sheets, if needed)*:

Name	Relationship	Company	Type of Business	Own/Manage/Associated with
1.				
2.				
3.				

Section 3: MAJORIY OWNER INFORMATION

A. In this section, specify the majority owner of the firm holding 51% or more ownership interest.

(1) Full Name:	(2) Title:	(3) Home Phone #:
_____	_____	( ) _____ - _____

(4) Home Address (*Street and Number*):	City:	State:	Zip:

_____	_____	_____	_____ - _____

(5) Gender: ❑ Male ❑ Female

(6) Ethnic group membership

(Check all that apply):

❑ Black ❑ Hispanic

❑ Asian Pacific ❑ Native American

❑ Subcontinent Asian

❑ Other (*specify*) _____

(7) U.S. Citizenship:

❑Birth ❑Naturalized

❑Lawfully Admitted Permanent Resident

(8)(a) Economic Disadvantaged Status: Complete this section only for each owner claiming to be socially and economically disadvantaged applying for DBE qualification.

(i) What is the Personal Net Worth of the owner applying for DBE/ACDBE qualification? $_____

(Use and attach the Personal Financial Statement form attached to this application. Each owner must submit a separate statement).

(ii) Has any trust been created for the benefit of this disadvantaged owner(s)? ❑ Yes ❑ No

If Yes, provide a copy (A*ttach additional sheets if needed*):

B. Ownership Interest

(1) Number of years as owner: _____

(3) Percentage owned: _____ %

Class of stock owned: _____

Date acquired _____

(2) **Initial investment to acquire ownership interest in firm**:

Type	Dollar Value
Cash	$
Real Estate	$
Equipment	$
Other	$

(4) Describe familial relationship to other owners and employees:_____
_____
_____
_____
_____
_____

Describe how you acquired your business

- ❑ Started business myself
- ❑ It was a gift from: _____
- ❑ I bought it from: _____
- ❑ I inherited it from: _____
- ❑ Other

(Attach documentation substantiating your investment)

(5) Does this owner perform a management or supervisory function for any other business? ❑ Yes ❑ No
If Yes, identify: Name of Business: _____ Function/Title: _____

(6)(a) Does this owner own or work for any other firm(s) that has a relationship with this firm? (*e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.*) ❑ Yes ❑ No
Identify than name of the business, and the nature of the relationship, and the owner's function at the firm:
_____

(b) Does this owner work for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week? If yes, identify this activity: _____
_____

Section 3: OWNER INFORMATION, Cont'd.

A. Identify all individuals, firms, or holding companies that hold <u>LESS THAN 51% ownership interest</u> in your firm (*If more than one owner holding less than 51%, attach separate sheets for each additional owner)*

(1) Full Name:	**(2) Title:**	**(3) Home Phone #:**
_____	_____	( ) _____ - _____

(4) Home Address (*street and number*):	**City:**	**State:**	**Zip:**
_____	_____	_____	_____ - _____

(5) Gender: ❑ Male ❑ Female

(6) Ethnic group membership

(Check all that apply):

❑ Black ❑ Hispanic

❑ Asian Pacific ❑ Native American

❑ Subcontinent Asian

❑ Other (*specify*) _____

(7) U.S. Citizenship:

❑Birth ❑Naturalized

❑Lawfully Admitted Permanent Resident:

(8)(a) Economic Disadvantaged Status: Complete this section only for each owner claiming to be socially and economically disadvantaged applying for DBE qualification

(i) What is the Personal Net Worth of the owner applying for DBE/ACDBE qualification? $_____

(Use and attach the Personal Financial Statement form attached to this application. Each owner must submit a separate statement).

(ii) Has any trust been created for the benefit of this disadvantaged owner(s)? ❑ Yes ❑ No

If Yes, please explain (*attach additional sheets if needed*):

B. Ownership Interest

(1) Number of years as owner: _____

(3) Percentage owned: _____ %

Class of stock owned: _____

Date acquired _____

(2) **Initial investment to acquire ownership interest in firm**:

Type	Dollar Value
Cash	$
Real Estate	$
Equipment	$
Other	$

(4) Describe familial relationship to other owners and employees:_____
_____
_____
_____
_____
_____
_____

Describe how you acquired your business

- ❑ Started business myself
- ❑ It was a gift from: _____
- ❑ I bought it from: _____
- ❑ I inherited it from: _____
- ❑ Other

Attach documentation substantiating your investment

(5) Does this owner perform a management or supervisory function for any other business? ❑ Yes ❑ No

If Yes, identify: Name of Business: _____ Function/Title: _____

(6)(a) Does this owner own or work for any other firm(s) that has a relationship with this firm? (*e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.*) ❑ Yes ❑ No
Identify than name of the business, and the nature of the relationship, and the owner's function at the firm:
_____

(b) Does this owner work for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week? If yes, identify this activity: _____
_____

Section 4: CONTROL

A. Identify your firm's Officers and Board of Directors

(If additional space is required, attach a separate sheet):

		Name	Title	Date Appointed	Ethnicity	Gender
(1) Officers of the	(a)					
	(b)					
	(c)					

Company (d) _____

(e) _____

(2) Board of Directors (a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(3) Do any of the persons listed above perform a management or supervisory function for any other business? ❑ Yes ❑ No If Yes, identify for each:

Person: _____ Title: _____

Business: _____ Function: _____

Person: _____ Title: _____

Business: _____ Function: _____

(4) Do any of the persons listed (1) and/or (2) above own or work for any other firm(s) that has a relationship with this firm (*e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.*)?
❑ Yes ❑ No If Yes, identify for each:

Firm Name: _____ Person: _____

Nature of Business Relationship: _____

(5) Is the applicant business and/or owner involved in any present or pending lawsuits?

❑ Yes ❑ No If Yes, provide details:

_____

_____

_____

B. Duties of Owners, Officers, Directors, Managers, and Key Personnel

Complete for all owners and non-owners who perform significant functions for the business. Make enough copies of this form to provide information on each and every person. ***Submit résumés for each person identified below.*** Circle the frequency of each person's involvement as follows:

	Majority Owner (51% or more)				Minority Owner (49% or less)			
A= Always **F = Frequently** **S = Seldom** **N = Never**	Name: _____ Title: _____ Race:_____ Percent Owned:_____ Gender: _____Male _____Female Salary: $_____ Other Benefits $_____				Name: _____ Title: _____ Race:_____ Percent Owned:_____ Gender: _____Male _____Female Salary: $_____ Other Benefits $_____			
Sets policy for company direction/scope/ of operations	A	F	S	N	A	F	S	N
Bidding and estimating	A	F	S	N	A	F	S	N
Major purchasing decisions	A	F	S	N	A	F	S	N
Marketing and sales	A	F	S	N	A	F	S	N
Supervises field operations	A	F	S	N	A	F	S	N
Attend bid opening and lettings	A	F	S	N	A	F	S	N
Perform office management, such as billing, accounts receivable and accounts payable, etc.	A	F	S	N	A	F	S	N
Hires and fires management staff	A	F	S	N	A	F	S	N
Hire and fire field staff or crew	A	F	S	N	A	F	S	N
Designates profits spending or investment	A	F	S	N	A	F	S	N
Obligates business by contract/credit/bond/insurance	A	F	S	N	A	F	S	N
Purchase equipment	A	F	S	N	A	F	S	N
Signs business checks	A	F	S	N	A	F	S	N

Do any of the persons listed above perform a management or supervisory function for any other business? If Yes, identify the person, the business, and their title/function:

_____
_____
_____
_____
_____
_____

Do any of the persons listed above own or work for any other firm(s) that has a relationship with this firm? (*e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.*) ❑ Yes ❑ No

If Yes, describe the nature of the business relationship: _____

B. Duties of Owners, Officers, Directors, Managers, and Key Personnel, continued.

Complete for all owners and non-owners who do anything listed below for the business. Make enough copies of this form to provide information on each and every person. ***Submit résumés for each person identified below.*** Circle the frequency of each person's involvement as follows:

	Person 3				Person 4			
A= Always **F = Frequently** **S = Seldom** **N = Never**	Name: _____ Title: _____ Race:_____ Percent Owned:_____ Gender: _____Male ____Female Salary: $_____ Other Benefits $_____				Name: _____ Title: _____ Race:_____ Percent Owned:_____ Gender: _____Male ____Female Salary: $_____ Other Benefits $_____			
Sets policy for company direction/scope/ of operations	A	F	S	N	A	F	S	N
Bidding and estimating	A	F	S	N	A	F	S	N
Major purchasing decisions	A	F	S	N	A	F	S	N
Marketing and sales	A	F	S	N	A	F	S	N
Supervises field operations	A	F	S	N	A	F	S	N
Attend bid opening and lettings	A	F	S	N	A	F	S	N
Perform office management, such as billing, accounts receivable and accounts payable, etc.	A	F	S	N	A	F	S	N

Hires and fires management staff	A	F	S	N	A	F	S	N
Hire and fire field staff or crew	A	F	S	N	A	F	S	N
Designates profits spending or investment	A	F	S	N	A	F	S	N
Obligates business by contract/credit/bond/insurance	A	F	S	N	A	F	S	N
Purchase equipment	A	F	S	N	A	F	S	N
Signs business checks	A	F	S	N	A	F	S	N

Do any of the persons listed above perform a management or supervisory function for any other business? If Yes, identify the person, the business, and their title/function:

_____

_____

_____

Do any of the persons listed above own or work for any other firm(s) that has a relationship with this firm? (*e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.*) ❑ Yes ❑ No

If Yes, describe the nature of the business relationship:

_____

C. Inventory:

Indicate your firm's inventory in the following categories *(Please attach additional sheets if needed):*

Equipment and Vehicles *(Provide titles, proof of ownership, or signed lease agreements for the items listed)*

Type of Equipment or Vehicle (Make and Model)	Current Value	Owned or Leased by Firm or Owner?	Where is this item stored?
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			
11.			
12.			
13.			
14.			
15.			
16.			

Office Space *(Provide signed lease agreements for the properties listed)*

Street Address	Owned or Leased by Firm or Owner?	Current Value of Property or Lease
1.		
2.		

Storage Space *(Provide signed lease agreements for the properties listed)*

Street Address	Owned or Leased by Firm or Owner?	Current Value of Property or Lease
1.		
2.		

D. Does your firm rely on any other firm for management functions or employee payroll? ❑ **Yes** ❑ **No**

If Yes, explain:

_____

_____

_____

E. Financial / Banking Information *(Provide bank authorization and signature cards)*

Name of bank: _____

Address of bank: _____ City: _____ State: _____ Zip: _____

The following individuals are able to sign checks on this account: _____

Name of bank: _____

Address of bank: _____ City: _____ State: _____ Zip: _____

The following individuals are able to sign checks on this account: _____

Bonding Information: If you have bonding capacity, identify: (a) Binder No: _____

(b) Name of agent/broker _____ (c) Phone No: ( ) _____

(d) Address of agent/broker: _____ _____

(e) Bonding limit: Aggregate limit $ _____ Project limit $ _____

F. Identify all sources, amounts, and purposes of money loaned to your firm including from financial institutions. Identify whether you the owner and any other person or firm loaned money to the applicant DBE/ACDBE. Include the names of any persons or firms securing the loan, if other than the listed owner. (*Provide copies of signed loan agreements and security agreements).*

Name of Source	*Address of Source*	Name of Person Securing the Loan	Original Amount	Current Balance	Purpose of Loan
1.					
2.					
3.					

G. List all contributions or transfers of assets to/from your firm and to/from any of its owners or another individual over the past two years (*attach additional sheets if needed*)**:**

Contribution/Asset	Dollar Value	*From Whom Transferred*	*To Whom Transferred*	Relationship	Date of Transfer
1.					
2.					
3.					

H. List current licenses/permits held by any owner and/or employee of your firm

(*e.g. contractor, engineer, architect, etc.)(Provide copies of the licenses and attach additional sheets if needed)*:

Name of License/Permit Holder	Type of License/Permit	Expiration Date	License Number and State
1.			
2.			

I. List the three largest contracts completed by your firm in the past three years, if any:

Name of Owner/Contractor	Name/Location of Project	Type of Work Performed	Dollar Value of Contract
1.			
2.			
3.			

J. List the three largest active jobs on which your firm is currently working:

Name of Prime Contractor and Project Number	Location of Project	Type of Work	Project Start Date	Anticipated Completion Date	Dollar Value of Contract
1.					
2.					
3.					

AIRPORT CONCESSION (ACDBE) APPLICANTS MUST COMPLETE THIS PAGE

Concession Space	Address / Location at Airport	Value of Property or Lease	Fees/Lease Payments Paid to the Airport

Provide information concerning any other airport concession businesses the applicant firm or any affiliate owns and/or operates, including name, location, type of concession, and start date of concession

Name of Concession	Location	Type of Concession	Start Date of Concession

AFFIDAVIT OF CERTIFICATION

This form must be signed and notarized for each owner upon which disadvantaged status is relied.

A MATERIAL OR FALSE STATEMENT OR OMISSION MADE IN CONNECTION WITH THIS APPLICATION IS SUFFICIENT CAUSE FOR DENIAL OF CERTIFICATION, REVOCATION OF A PRIOR APPROVAL, INITIATION OF SUSPENSION OR DEBARMENT PROCEEDINGS, AND MAY SUBJECT THE PERSON AND/OR ENTITY MAKING THE FALSE STATEMENT TO ANY AND ALL CIVIL AND CRIMINAL PENALTIES AVAILABLE PURSUANT TO APPLICABLE FEDERAL AND STATE LAW.

I _____ (full name printed), swear or affirm under penalty of law that I am _____ _____(title) of the applicant firm _____ (firm name) and that I have read and understood all of the questions in this application and that all of the foregoing information and statements submitted in this application and its attachments and supporting documents are true and correct to the best of my knowledge, and that all responses to the questions are full and complete, omitting no material information. The responses include all material information necessary to fully and accurately identify and explain the operations, capabilities and pertinent history of the named firm as well as the ownership, control, and affiliations thereof.

I recognize that the information submitted in this application is for the purpose of inducing certification approval by a government agency. I understand that a government agency may, by means it deems appropriate, determine the accuracy and truth of the statements in the application, and I authorize such agency to contact any entity named in the application, and the named firm's bonding companies, banking institutions, credit agencies, contractors, clients, and other certifying agencies for the purpose of verifying the information supplied and determining the named firm's eligibility.

I agree to submit to government audit, examination and review of books, records, documents and files, in whatever form they exist, of the named firm and its affiliates, inspection of its places(s) of business and equipment, and to permit interviews of its principals, agents, and employees. I understand that refusal to permit such inquiries shall be grounds for denial of certification.

If awarded a contract, subcontract, concession lease or sublease, I agree to promptly and directly provide the prime contractor, if any, and the Department, recipient agency, or federal funding agency on an ongoing basis, current, complete and accurate information regarding (1) work performed on the project; (2) payments; and (3) proposed changes, if any, to the foregoing arrangements.

I agree to provide written notice to the recipient agency or Unified Certification Program (UCP) of any material change in the information contained in the original application within 30 calendar days of such change (e.g., ownership, address, telephone number, etc.).

I acknowledge and agree that any misrepresentations in this application or in records pertaining to a contract or subcontract will be grounds for terminating any contract or subcontract which may be awarded; denial or revocation of certification; suspension and debarment; and for initiating action under federal and/or state law concerning false statement, fraud or other applicable offenses.

I certify that I am a socially and economically disadvantaged individual who is an owner of the above-referenced firm seeking certification as a Disadvantaged Business Enterprise (DBE) or Airport Concession Disadvantaged Business Enterprise (ACDBE). In support of my application, I certify that I am a member of one or more of the following groups, and that I have held myself out as a member of the group(s): (Check all that apply):

❑ Female ❑ Black American ❑ Hispanic American ❑ Native American ❑ Asian- Pacific American

❑ Subcontinent Asian American ❑Other (specify)

_____

I certify that I am socially disadvantaged because I have been subjected to racial or ethnic prejudice or cultural bias, or have suffered the effects of discrimination, because of my identity as a member of one or more of the groups identified above, without regard to my individual qualities.

I further certify that my personal net worth does not exceed $1.32 million, and that I am economically disadvantaged because my ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially and economically disadvantaged.

I declare under penalty of perjury that the information provided in this application and supporting documents is true and correct.

Signature _____ Executed on _____(Date)

(DBE/ACDBE Applicant)

NOTARY CERTIFICATE

Subscribed and sworn to before me this ___day of _____, 20___.

_____

Notary Public in and for the State of:

Residing at:_____

_____

My Commission Expires:_____

UNIFORM CERTIFICATION APPLICATION

SUPPORTING DOCUMENTS CHECKLIST

In order to complete your application for DBE or ACDBE certification, you must attach copies of all of the following documents. The UCP to which you are applying may have additional required documents that you must also supply with your application. Contact the appropriate certifying agency to which you are applying to find out if more is required. A failure to supply any information requested by the UCP may result in a determination that you failed to cooperate.

All Applicants

- Résumés (that include places of ownership/employment with corresponding dates), for all owners, officers, and key personnel of the applicant firm
- Personal Net Worth Statement for socially and economically disadvantaged owners (form available with this application)
- Personal Federal and State tax returns for the past 3 years, if applicable, for each disadvantaged owner
- Federal and state tax returns (and requests for extensions) filed by the firm and its affiliates including all related schedules, and firm audited financial statements (if available) for the past 3 years.

- Documented proof of contributions used to acquire ownership for each owner (*e.g. both sides of cancelled checks*)
- Your firm's signed loan agreements, security agreements, and bonding forms
- Descriptions of all real estate (including office/storage space, etc.) owned/leased by your firm and documented proof of ownership/signed leases
- List of equipment and/or vehicles owned and leased. Signed lease agreements and titles/proof of ownership
- Property leases
- Documented proof of any transfers of assets to/from your firm and/or to/from any of its owners over the past 2 years
- Year-end balance sheets and income statements for the past three years (*or life of firm, if less than three years*); a new business must provide a current balance sheet
- All relevant licenses, license renewal forms, permits, and haul authority forms
- DBE, ACDBE and SBA 8(a), SDB, MBE/WBE certifications, denials, and/or decertifications, if applicable; and U.S. DOT appeal decisions (if any) on these actions.
- Bank authorization and signatory cards
- Schedule of salaries (or other remuneration) paid to all officers, managers, owners, and/or directors of the firm
- List of all employees, job titles, and dates of employment.
- Trust agreements held by any owner claiming disadvantaged status, if any

Partnership or Joint Venture

- Original and any amended Partnership or Joint Venture Agreements

Corporation or LLC

- Official Articles of Incorporation (*signed by the state official*)
- Both sides of all corporate stock certificates and your firm's stock transfer ledger
- Shareholders' Agreement

☐ Minutes of all stockholders and board of directors meetings

☐ Corporate by-laws and any amendments

☐ Corporate bank resolution and bank signature cards

☐ Official Certificate of Formation and Operating Agreement with any amendments (for LLCs)

Trucking Company

☐ Documented proof of ownership of the company

☐ Insurance agreements for each truck owned or operated by your firm

☐ Title(s), registration certificate(s), and U.S. DOT numbers for each truck owned or operated by your firm

Suppliers

☐ Proof of warehouse/storage facility ownership or lease arrangements

☐ List of product lines carried and list of distribution equipment owned and/or leased

27. Add a new Appendix G to Part 26, to read as follows:

APPENDIX G to 49 CFR Part 26: Personal Net Worth Statement

U.S. Department of Transportation

Appendix G

Personal Net Worth Statement
For DBE/ACDBE Program Eligibility

OMB APPROVAL NO:
EXPIRATION DATE:

As of _____

This form is used by all participants in the U.S. Department of Transportation's Disadvantaged Business Enterprise Programs as set forth in 49 CFR Parts 23 and 26 and must be submitted to determine whether an owner is economically disadvantaged. Complete this form separately for: (1) each disadvantaged proprietor, (2) each limited partner who owns 51% or more interest and each general partner, and (3) each stockholder owning 51% or more of voting stock.

Do not make adjustments to your figures pursuant to the DBE Program Regulation. The agency you apply to will use the information provided on this statement to determine your personal net worth. Please send form to appropriate Unified Certification Program member, not U.S. DOT.

Full Name		**Business Name of Applicant Firm**	
Residence Address (As reported to the IRS)		**Business Address**	
City, State and Zip Code		**City, State and Zip Code**	
Residence Phone		**Business Phone**	
Marital Status: Married, Divorced, Never Married, Widowed		**Spouse's Full Name**	

ASSETS	(Omit Cents)		**LIABILITIES**	(Omit Cents)
		Joint Asset?		
Cash and Cash Equivalents (Complete Section 1A)	$		**Mortgages on Real Estate Excluding Primary Residence (Complete Section 2**	$
Retirement Accounts (IRA, 401Ks, 403Bs, Pensions, etc) (Report Full Value and Complete Section 1B)	$		**Loan on Life Insurance (Complete Section 3)**	$
Brokerage, Investment Accounts (Complete Section 1C)	$		**Notes, Obligations on Personal Property (Complete Section 4)**	$
Assets Held in Trust (Complete Section 1D)	$		**Notes & Accounts Payable to Banks and Others (Complete Section 6)**	$
Shareholder Loans & Other Receivables (Complete section 1E)	$		**Other Liabilities (Complete Section 7)**	$
Real Estate Excluding Primary Residence (Complete Section 2)	$		**Unpaid Taxes (Complete Section 8)**	$
Life Insurance (Cash Surrender Value Only) (Complete Section 3)	$			
Other Personal Property and Assets (Complete Section 4)	$			
Other Business Interests (Complete Section 5)	$			
Total Assets	$		**Total Liabilities**	$

ASSETS (Provide Current Account Statements)

SECTION 1A: Cash on Hand, Checking, Savings, Money Market, Certificates of Deposit

Name on Account (including co-owners)	Type of Account (checking, savings, revolving credit, IRA, other, (explain)	Bank Name and Address	Account number	Account Status (joint, single, trust)	Current Balance
				Total	

Section 1B: Retirement Accounts, IRA, 401Ks, 403Bs, Pensions

Name on Account (including co-owners)	Type of Account	Bank Name and Address	Account number	Current Balance
			Total	

SECTION 1C: Brokerage/Investment Accounts

Name of Brokerage Firm And account number)	Type of Account	Market value as of date of form
	Total	

SECTION 1D: Assets Held in Trust: (Submit trust agreements and amendments, and document the valuation of assets)

Name of Settlor	Type of trust (revocable, irrevocable, etc.)	Date Trust established	Specific Assets held and Value	Date and Method of Valuation	Trustee	Names of Beneficiaries

Section 1E: Securities Not reported in Section 1C and Shareholder Loans, Promissory Notes and Other Receivables Not Listed Above: Provide amount and describe:

_____

_____

_____

SECTION 2: Real Estate Owned (Including Personal Residence, Investment Properties, Personal Property Leased or Rented for Business Purposes, Farm Properties, or any Other Income Producing property.

(List each parcel separately. Submit copies of deeds for each parcel, mortgage note, instrument of conveyance) Add additional sheets if necessary.

	Primary Residence	**Property B**	**Property C**
Type of Property			
Address			
Date Acquired and Method of Acquisition (purchase, inherit, divorce, gift, etc.)			
Names on Deed			
Purchase Price			
Present Market Value			
Source of Market Valuation			
Name & Address of all Mortgage Holders, including			
Mortgage Account Number			
Mortgage Balance As of Date of Form:			
Equity line of credit Balance			
Amount of Payment Per Month/Year (Specify)			

SECTION 3: Life Insurance Held

(Submit policies and most recent statement)

(Give face amount and cash surrender value of policies, name of insurance company and beneficiaries).

Insurance Company	Face Value Amount	Cash Surrender Amount	Beneficiaries	Loan on Policy Information

SECTION 4: Other Personal Property and Assets

(Other documentation may be required upon request, such as invoices, bill of sale, valuation documents, insurance policies)

Type of Property or Asset	Total Present Value	Amount of Liability (Balance)	Is this asset insured? (If so, attach a copy of the policy)	Lien or Note amount and Terms of Payment (Attach a copy of the instrument)
Automobiles and Vehicles (including recreation vehicles, motorcycles, boats, etc.) Include personally owned vehicles that are leased or rented to businesses or other individuals.				
Household Goods				
Jewelry				
Other (List)				

Accounts and Notes Receivables				

Total Present Value: $ _____

Total Liability: $ _____

Total Personal Property $ _____

SECTION 5: Other Business Investments, Other Businesses Owned (excluding applicant firm)
Sole Proprietorships, General Partners, Joint Ventures, Limited Liability Companies, Closely-held and Public Traded Corporations (Provide the information below and submit business financial statements, balance sheets including net worth, Federal tax returns)

Name of Sole Proprietorship, partnership, Joint Venture (Indicate % of ownership)	Address	Business Value in $	Date Acquired	Names of Partners, Unit holders, % of Ownership, and Date Acquired	Primary scope of Operations
Name of Corporation or LLC	Address	Business Value in $	Date Acquired	Name of Stockholders on Certificates, Date Stock Acquired, Total Outstanding Shares of Stock or Units, Market Value and Date of Quotation/Exchange,	Primary scope of Operations

LIABILITIES

SECTION 6: Notes and Accounts Payable to Bank and Others (Including Installment accounts)

(Submit copy of note/security agreement, and most recent account statement)

Name of Borrower(s)	Name of Noteholder(s)	Date of Instrument	Original Balance	Current Balance	Payment Amount and Terms	How Secure/By Whom Guaranteed, Collateral

SECTION 7: Other Liabilities

(Submit copy of most recent statement, or any other debt instrument)

Name of Individual Obligated	Name of Co-signer(s)	Description	Name and Address of Entity Owed	Date of Obligation	Amount	Payment Amount and Terms (frequency)

SECTION 8: Unpaid Taxes

(Describe in detail, as to type, to whom payable, when due, amount, and to what property, if any, a tax lien attaches).

Name of Individual Obligated	Name of Co-signer(s)	Type of Unpaid Tax	Payable to Whom	Date Due	Amount	Property Attached with Tax Lien (if any)

SECTION 9: Transfer of Assets: Have you transferred, within 2 years of this personal net worth statement, transferred assets to a spouse, domestic partner, relative, or entity in which you have an ownership or beneficial interest including a trust? Yes □ No □

(Provide a brief description of all transfers of assets within 2 years from date of application. List the names of individuals on deed, title, note or other instrument receiving assets and relation to transferor.(Submit Bill of Sale or Invoice, transfer document (title, deed, etc., date of transfer, estimate or valuation of the consideration received))

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AFFIDAVIT

I declare under penalty of perjury that the information provided in this application and supporting documents is complete, true and correct. I certify that no assets have been transferred to any beneficiary for less than fair market value in the last two years. I recognize that the information submitted in this application is for the purpose of inducing certification approval by a government agency. I understand that a government agency may, by means it deems appropriate, determine the accuracy and truth of the statements in the application, and I authorize such agency to contact any entity named in the application or this personal financial statement, including the names banking institutions, credit agencies, contractors, clients, and other certifying agencies for the purpose of verifying the information supplied and determining the named firm's eligibility. I acknowledge and agree that any misrepresentations in this application or in records pertaining to a contract or subcontract will be grounds for terminating any contract or subcontract which may be awarded; denial or revocation of certification; suspension and debarment; and for initiating action under federal and/or state law concerning false statement, fraud or other applicable offenses.

Signature (DBE/ACDBE Applicant) Date

NOTARY CERTIFICATE: (Insert applicable state acknowledgment, affirmation, or oath)

In collecting the information requested by this form, the Department of Transportation (Department) complies with the provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). The Privacy Act provides comprehensive protections for your personal information. This includes how information is collected, used, disclosed, stored, and discarded. Your information will not be disclosed to third parties without your consent. The information collected will be used solely to determine your firm's eligibility to participate in the Department's Disadvantaged Business Enterprise Program as defined in 49 CFR section 26.5 and the Airport Concession Disadvantaged Business Enterprise Program as defined in 49 CFR section 23.3. You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477).

General Instructions for Completing the Personal Net Worth Statement for DBE/ACDBE Program Eligibility

Please do not make adjustments to your figures pursuant to U.S. DOT regulations 49 CFR Parts 23 and 26. The agency that you apply to will use the information provided on your completed Personal Net Worth Statement to determine whether you meet the economic disadvantage requirements of 49 CFR Part 26. If there are discrepancies or questions regarding your form, it may be returned to you to correct and complete again.

An individual's Personal Net Worth according to 49 CFR Part 26 includes only his or her own share of assets held separately, jointly, or as community property with the individual's spouse and excludes the following:

- Individual's ownership interest in the applicant firm;
- Individual's equity in his or her primary residence;
- Tax and interest penalties that would accrue if retirement savings or investments (e.g., pension plans, Individual Retirement Accounts, 401(k) accounts, etc.) were distributed at the present time.

Be sure to indicate whether the figures reported are jointly held.

If your personal net worth according to 49 CFR Parts 23 and 26 exceeds the $1.32 million cap and you, individually, or you and other individuals are the majority owners of an applicant firm, the firm is not eligible for DBE or ACDBE certification. If the personal net worth of the majority owner(s) exceeds the $1.32 million cap at any time after your firm is certified, the firm is no longer eligible for certification. Should that occur, it is your responsibility to contact your certifying agency in writing to advise that your firm no longer qualifies as a DBE or ACDBE. You must fill out all line items on the Personal Net Worth Statement. If necessary, use additional sheets of paper to report all information and details. If you have any questions about completing this form, please contact one of the UCP certifying agencies.

Assets

All assets must be reported at their current fair market values as of the date of your statement. ***Assessor's assessed value for real estate, for***

example, is not acceptable. Assets held in a trust generally should be included.

Cash and Cash Equivalents: In Section 1A Enter the total amount of cash or cash equivalents in bank accounts, including checking, savings, money market, certificates of deposit held domestic or foreign. Provide copies of the bank statement.

Retirement Accounts, IRA, 401Ks, 403Bs, Pensions: Enter the total present value of all accounts (including Roth IRAs) and other retirement accounts, including any deferred compensation and pension plans in Section 1B.

Brokerage/Investment Accounts: Enter the name of brokerage firm and account number; type of account and current market value of the account as of the date of the PNW statement.

Assets Held in Trust: Enter the specific assets held in trust, the names of beneficiaries and trustees, and other information. Complete Section 1D.

Securities Not Reported Above, including Shareholder Loans, Promissory Notes, and Other Receivables not listed: Enter amounts loaned to you from your firm, from or any other business entity in which you hold an ownership interest, and other receivables not listed above . Complete Section 1E.

Real Estate: Complete Section 2, beginning with your primary residence (be sure to identify it as your primary residence); enter the type of property, address, method of acquisition, date of acquired, names of deed, purchase price, present fair market value, source of market valuation, name and address of all mortgage holders, mortgage account number, mortgage balance, equity line of credit balance, and amount of payment, for all real estate held. Please ensure that this section contains all real estate owned, including rental properties, vacation properties, commercial properties, personal property leased or rented for business purposes, farm properties and any other income producing properties, etc. Attach additional sheets if needed.

Life Insurance: Enter the name of the insurance company, the face value of the policy, cash surrender value, beneficiary names, and any loans on the policy in Section 3.

Other Personal Property and Assets: Enter personal property and other assets owned in Section 4. Personal property includes motor vehicles, boats, trailers, jewelry, furniture, household goods, collectibles, clothing, and personally owned vehicles that are leased or rented to businesses or other individuals. Enter the present value of the personal property owned, amount of liabilities, and whether the asset is insured. For accounts and notes receivable, enter the total value of all monies owed to you personally, if any. This should include shareholder loans to the applicant firm, if any. If the asset is insured, please attach a copy of the policy. Also attach a copy of any liens or notes on the property and indicate in the space provided the terms of payment. Total the present value and liabilities at the bottom of the form.

Other Business Investments/Other Businesses Owned Interests: Enter information concerning any businesses you hold an ownership interest in, such as sole proprietorships, partnerships, joint ventures, corporations, or limited liability corporations (other than the applicant firm) in Section 5. Do not reduce the value of these entries by any loans from the outside firm to the DBE/ACDBE applicant business.

Liabilities

Mortgages on Real Estate: Enter the total balance on all mortgages payable on real estate in section 2.

Loans on Life Insurance: Enter the total value of all loans due on life insurance policies in Section 3.

Notes & Accounts Payable to Bank and Others: Enter the name of borrowers, noteholders, date of note, original and current balances, payment terms, and security/collateral information in Section 6. The entries should include automobile installment accounts. This should not, however, include any mortgage balances as this information is captured in section 2. Do not include loans for your business or mortgages for your properties in Section 6. Submit copy of note/security agreement, and the most recent account statement)

Other Liabilities: Enter the total value due on all other liabilities not classified in the previous entries. Report the name of the individual obligated, names of co-signers, a description of the liability, the name and address of the entity owed, the date of the obligation, payment amounts and terms. Note: Do not include contingent liabilities in this section. Contingent liabilities are liabilities that belong to you only if an event(s) should occur. For example, if you have co-signed on a relative's loan, but you are not responsible for the debt until your relative defaults, that is a contingent liability. Contingent liabilities do

not count toward your net worth until they become actual liabilities.

Unpaid Taxes: Enter the total amount of all taxes that are currently due, but are unpaid in Section 8. Contingent tax liabilities or anticipated taxes for current year should not be included. Describe in detail the name of the individual obligated, names of co-signers, the type of unpaid tax, to whom the tax is payable, due date, amount, and to what property, if any, the tax lien attaches. If none, state "NONE." You must include documentation, such as tax liens, to support the amounts.

Transfers of Assets:

Transfers of Assets: Detail all asset transfers (within 2 years of the date of this personal net worth statement) to a spouse, domestic partner, relative, or entity in which you have an ownership or beneficial interest including a trust. Include a description of the asset; names of individuals on the deed, title, note or other instrument indicating ownership rights; the names of individuals receiving the assets and their relation to the transferor; the date of the transfer; and the value or consideration received. Submit documentation requested on the form related to the transfer.

Affidavit

Be sure to sign and date at the statement. The Personal Net Worth Statement must be notarized

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