

**Office of the Secretary****49 CFR Parts 23 and 26****[Docket No. DOT-OST-2022-0051]****RIN 2105–AE98****Disadvantaged Business Enterprise and Airport Concession Disadvantaged Business Enterprise Program Implementation Modifications**

AGENCY: Office of the Secretary (OST), U.S. Department of Transportation (DOT or the Department).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This rulemaking would strengthen implementation of the Department of Transportation's (Department or DOT) Disadvantaged Business Enterprise (DBE) and Airport Concession Disadvantaged Business Enterprise (ACDBE) Program regulations. The NPRM would update personal net worth and program size thresholds for inflation; modernizes rules for counting of material suppliers; incorporate procedural flexibilities enacted during the coronavirus (COVID-19) pandemic; add new program elements to foster greater usage of DBEs and ACDBEs with concurrent, proactive monitoring and oversight; update certification provisions with less prescriptive rules that give certifiers flexibility when determining eligibility; and make technical corrections that have led to substantive misinterpretations of the rules by recipients, program applicants, and participants.

DATES: Comments should be filed by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may submit comments (identified by the agency name and DOT Docket ID Number DOT-OST-2022-0051) by any of the following methods:

- Federal eRulemaking Portal: Go to <https://www.regulations.gov> and follow the online instructions for submitting comments.
- Mail: Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001
- Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE, Washington, DC 20590-0001 between 9 a.m. and 5 p.m. EST, Monday through Friday, except Federal holidays.
- Fax: 202–493–2251

Instructions: You must include the agency name and docket number DOT-OST-2022-0051 or the Regulatory Identification Number (RIN) 2105–AE98 for the rulemaking at the beginning of your comment. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT’s Privacy Act statement in the *Federal Register* published on April 11, 2000 (65 FR 19477-78).

Paperwork Reduction Act: Pursuant to 44 U.S.C 3506(c)(2)(B), DOT solicits comments about the accuracy of the hours and cost burden estimates. Comments should be submitted to Walter Bohorfoush, Supervisory Information Technology Specialist, Office of the Chief Information Officer, U.S. Department of Transportation, at 202-366-0560 / walter.bohorfoush@dot.gov or Joseph Nye, Office of the Secretary Desk Officer, Office of Management and Budget, at Joseph_B_Nye@omb.eop.gov. The Office of Management and Budget (OMB) is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB

receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

Docket: For internet access to the docket to read background documents and comments received, go to <https://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 20590-0001, between 9 a.m. and 5 p.m. EST, Monday through Friday, except Federal holidays.

Electronic Access and Filing: A copy of the Notice of Proposed Rulemaking, all comments, final rule and all background material may be viewed online at <https://www.regulations.gov> using the docket number listed above. A copy of this notice will be placed in the docket. Electronic retrieval help and guidelines are available on the website. An electronic copy of this document may be downloaded from the Office of the Federal Register's website at: <https://www.FederalRegister.gov> and the Government Publishing Office's website at: <https://www.GovInfo.gov>.

FOR FURTHER INFORMATION CONTACT: Questions concerning part 26 amendments should be directed to Marc D. Pentino, Associate Director, Disadvantaged Business Enterprise Programs Division, Departmental Office of Civil Rights, Office of the Secretary, U.S.

Department of Transportation, at 202-366-6968 / marc.pentino@dot.gov. Questions concerning part 23 amendments should be directed to Marcus England, Office of Civil Rights, National Airport Civil Rights Policy and Compliance (ACR-4C), Federal Aviation Administration, 600 Independence Ave. SW, Washington, DC 20591 at 202-267-0487 / marcus.england@faa.gov or Nicholas Giles, Office of Civil Rights, National Airport Civil Rights Policy and Compliance (ACR-4C), Federal Aviation Administration, 600 Independence Ave. SW, Washington, DC 20591, at 202-267-0201 / nicholas.giles@faa.gov.

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Introduction

Spanning nearly 40 years, the DBE and ACDBE Programs are small business initiatives intended to prevent discrimination, and remedy the effects of past discrimination, in federally assisted contracting markets. This proposed rulemaking advances the administration’s goals of advancing equity and expanding opportunities in government programs. We invite comment from Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA) funding recipients and project sponsors, firms participating or seeking to participate in federally assisted contracts and/or in airport concessions, the prime contracting community at large, and the general public about our proposed changes to the DBE and ACDBE Program regulations at 49 CFR parts 26 and 23, respectively.

The Department revised the ACDBE Program regulation in 49 CFR part 23 (part 23) in 2005 to make it parallel, in many important respects, to the DBE regulation in 49 CFR part 26 (part 26). DOT later modified part 23 in June 2012, amending the small business size

standards and personal net worth limit for ACDBE Program participants. In October 2014, the Department published a final rule for part 26, revising the Uniform Certification Application (UCA) and the Uniform Report of DBE Awards or Commitments and Payments (Uniform Report), and adding the Personal Net Worth (PNW) Statement. The rule also strengthened the certification-related provisions, amended provisions addressing good faith efforts, overall goal setting, transit vehicle manufacturers, and counting for trucking companies.

Since 2014, FAA, FHWA, FTA, and the Departmental Office of Civil Rights (DOCR) have held outreach and listening sessions and conducted trainings on a range of critical program topics including certification, counting, goal setting, good faith efforts, joint ventures, long-term exclusive (LTE) agreements at airports, PNW, gross receipts calculation adjustments, and participatory reporting. In Fiscal Year 2019, for example, FAA conducted six listening sessions, each focusing on issues identified within the specific subparts of part 23 with input from airport sponsors, ACDBEs, certifying agencies, consultants, and industry groups. In that same fiscal year, FHWA held stakeholder listening sessions about supply transactions and counting mechanisms for DBEs considered brokers, manufacturers, and regular dealers.

The Department also conducted internal research and analysis of issues raised by stakeholders before and during the COVID-19 pandemic, including those presented by the Transportation Research Board, the Airport Cooperative Research Program, prime contractor associations, and small businesses submitting certification appeals to DOCR. The Department found that many portions of the current rules seem outdated for today's DBE and ACDBE marketplace. They might inhibit firm growth and success, and limit recipient and sponsors' ability to effectively monitor program compliance by all participants in a pandemic and post-pandemic environment. The Department seeks to update several core provisions of the regulation to maintain optimal program performance, improve operational cohesiveness, and provide contemporary solutions for program deficiencies.

The DBE Program was reauthorized in the Bipartisan Infrastructure Law (BIL) (enacted as the Infrastructure Investment and Jobs Act (Nov. 15, 2021) (Pub. L. 117-58)). The ACDBE Program is authorized and mandated by 49 U.S.C. 47107(e), 42 U.S.C. 2000d, 49 U.S.C. 322, and Executive Order 12138.

PART 26

Subpart A—General

1. Bipartisan Infrastructure Law (BIL) and Fixing America’s Surface Transportation Act (FAST Act) (§ 26.3)

The Department is amending § 26.3 to add applicable Titles in the reference to the Department’s surface authorizations, the BIL enacted on November 15, 2021, and the Fixing America’s Surface Transportation Act (FAST Act), enacted on December 4, 2015.

2. Definitions (§ 26.5)

We propose minor technical and spelling corrections for the following terms: “Alaska Native,” “Department or DOT,” “Indian tribe or Native American tribe,” “primary industry classification,” “recipient,” and “Secretary.” We also propose expanding current definitions and adding new definitions, as described below.

Disadvantaged Business Enterprise

We would like to clarify the term “Disadvantaged Business Enterprise” to align it with the definition in the Department’s official guidance regarding the types of firms that should apply for DBE and/or ACDBE certification.¹ The guidance provides that certification in the DBE Program be limited to business concerns engaged in transportation-related industries. We propose adding that language to the definition of Disadvantaged Business Enterprises.

Personal Net Worth

¹ See “USDOT Official Guidance - DBE and ACDBE Certification for Non-Transportation Industry Businesses” at <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/dbe-and-acdbe-certification-non-transportation>.

The Department seeks to modify the definition of “personal net worth” for simplicity and to include a reference to the applicable provision (i.e., proposed § 26.68).

Principal Place of Business

We would like to clarify the definition of “principal place of business” to explain that it does not include construction trailers or other temporary construction sites. This clarification would mirror the Small Business Administration’s (SBA) definition of “bona fide place of business” in 13 CFR 124.3.

Transit Vehicle

The Department recognizes that the term “transit vehicle” is used throughout part 26 yet is not defined; some recipients and TVMs have expressed confusion over whether “transit vehicle” refers to only those vehicles produced by a TVM. The Department believes that defining this term in the regulation is important because whether a vehicle qualifies as a “transit vehicle” under part 26 has a significant impact on a recipient’s goal setting and reporting efforts. For example, pursuant to § 26.45(a)(2), “transit vehicle purchases” are to be excluded from a recipient’s goal calculation. Some recipients have incorrectly interpreted “transit vehicle” to mean “vehicles used by the recipient for transit purposes,” and therefore have excluded from their goal vehicles such as minivans manufactured by major automakers to be used for micro-transit pilots. In practice, funds used to purchase such vehicles must be included in the recipient’s goal calculations because such manufacturers do not qualify as TVMs and therefore do not have their own DBE programs. The Department proposes to alleviate this confusion by adding the following definition of “transit vehicle” to § 26.5: a vehicle manufactured by a TVM. Additionally, the Department proposes to make explicit that a vehicle manufactured by a non-TVM is not considered a transit vehicle for purposes of part 26, notwithstanding the vehicle’s ultimate use. Thus, when a recipient procures vehicles that are not manufactured by a TVM, the FTA funds used in that procurement must be included in either the recipient’s overall triennial goal or in a project goal established pursuant to §

26.45(e)(3) and must not be treated as if the funds were awarded to a TVM. Relatedly, any FTA funds used to procure vehicles that are not manufactured by a TVM must be reported in the recipient's Uniform Report pursuant to § 26.11(a).

Transit Vehicle Dealership

The Department proposes to add a definition of "transit vehicle dealership" to § 26.5. This change, in combination with the proposed edits to § 26.49, will clarify the Department's existing practice regarding transit vehicle dealerships. The Department proposes to define "transit vehicle dealership" as follows: a business that is primarily engaged in selling transit vehicles but that does not manufacture vehicles itself. This addition would facilitate more accurate tracking of FTA funds and DBE participation, thus better serving the program.

Transit Vehicle Manufacturer (TVM)

The Department first added a definition of TVM to § 26.5 on October 2, 2014 (79 FR 59592). Through experience, we have seen that the current definition creates confusion for manufacturers of both public and private mass transportation vehicles. The Department's practice is to require all manufacturers of vehicles intended for public mass transportation to become certified TVMs to bid on FTA-funded contracts for such vehicles, even if they also manufacture vehicles for both public and private transportation and industrial vehicles. However, under the current definition such a manufacturer may question whether its "primary business purpose is to manufacture vehicles specifically built for public mass transportation," especially if the combined sales to private operators and from commercial vehicles exceed the sales of vehicles sold to public transit operators. The Department has found that the current definition of TVM is ambiguous and does not clearly convey which entities qualify as TVMs. Thus, we are proposing several changes to the TVM definition. We wish to remove "specifically" and "public" from the definition. This would clarify that such manufacturers are considered TVMs and are therefore subject to all applicable DBE regulation requirements.

Further, the Department has found that the TVM definition creates ambiguity as to which entities are subject to part 26 when a vehicle receives post-production alterations or is retrofitted for public transportation purposes (e.g., so-called “cutaway” vehicles, vans customized for service to people with disabilities). In practice, the Department has noted that the current definition, which includes “producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes,” has caused some recipients and TVMs to mistakenly believe that any manufacturer of any motor vehicle could become a TVM based on the actions of a third-party modifier. However, as the Department stated in its response to comments on the 2014 final rule, we intended to include only those businesses that *perform* the alterations or retrofitting to vehicles for public transportation purposes. Accordingly, the Department proposes to address this confusion by clarifying that the businesses that perform retrofitting or post-production alterations to vehicles so that such vehicles may be used for public transportation purposes are considered TVMs.

Further, the current TVM definition states that “businesses that manufacture, mass-produce, or distribute vehicles solely for personal use and for sale “off the lot” are not considered transit vehicle manufacturers.” With this language, the Department intended to exclude from the TVM definition entities that mass produce vehicles that are not specifically intended to carry a large number of passengers, which generally lack significant opportunities for recipient-requested specifications at the manufacturing stage. The Department recognizes that some recipients do use such vehicles for transit purposes. For example, a transit agency may use a completely unmodified four-door sedan to provide paratransit services for riders who do not require specialized equipment. In practice, the Department has noted that it is unclear whether any vehicle manufacturer makes vehicles “solely” for personal use. Still, the Department intends to exclude vehicle manufacturers that are primarily engaged in selling vehicles that are ultimately designed to be used by individuals, notwithstanding their actual use. Generally, public transportation does not currently represent a major line of business for

these manufacturers, and their business structures and supply chains do not create the sort of subcontracting opportunities that would allow for meaningful DBE participation. The Department would like to exclude such manufacturers and requests comments on whether such manufacturers should be treated as TVMs when they intend to bid on FTA-assisted contracts, particularly in light of new transit models and emerging vehicle technologies.

Additionally, the Department has found that the “off the lot” condition is unnecessary and results in further confusion. The Department initially included the “off the lot” language to highlight that once a vehicle reaches the lot there are no longer meaningful opportunities for DBEs to participate in the manufacturing process, therefore obviating the rationale for requiring a TVM to operate a DBE Program. However, the language has caused some eligible TVMs to question how they should treat vehicles that they manufacture and sell to recipients from their own lots. The current definition creates some confusion over whether a vehicle must be both for personal use and for sale off the lot to meet the exception, or instead only needs to meet one of those conditions.

The Department proposes to address this ambiguity by replacing “solely” with “primarily,” removing the reference to “off the lot” purchases and, as discussed below and in the discussion of the proposed changes to § 26.49, add a definition and specify the requirements for transit vehicle dealerships. The Department expects that these revisions would clarify to vehicle manufacturers primarily engaged in producing personal use vehicles that they are generally not subject to part 26 and would clarify to eligible TVMs that the point of sale is irrelevant if it is the TVM that bids on the contract from the recipient.

Unsworn Declaration

Parts 26 and 23 contain several sections that require applicants and DBEs to submit documentation by notarized statement, sworn affidavit or unsworn declaration. See e.g., §§ 23.31(c)(2), 23.39(b), 26.61(c), 26.67(a), 26.83(c)(3), (i)(3), and (j), and 26.85(c)(4). The Department recognized (and continues to recognize) that the COVID-19 public health

emergency made it difficult and unsafe to have forms notarized in person. Thus, on April 30, 2020, we issued temporary guidance to address this challenge.² It was extended until June 30, 2022, and permits alternative methods to meet the notary requirements in parts 26 and 23 by:

1. Allowing the use of online notary public services if the recipient's state permits notarized digital signatures validated with an electronic notary seal.
2. Allowing the use of a subscribing witness if the recipient's state permits such use permitting the document to be signed in the presence of a witness; the witness, not the signer, then appears before a notary if doing so does not compromise social distancing.
3. Allowing the filing of unsworn declarations executed under penalty of perjury rather than sworn affidavits, including affidavits of no change.
4. Allowing unsworn declarations as an interim measure and requiring the applicant or certified firm to follow up with a sworn version at a to-be determined later date.

The Department is aware that the remote online notarization process is working effectively, and states are increasingly permitting this process in furtherance of the DBE requirements. The Department understands that in response to the COVID-19 pandemic, some states accelerated the implementation of laws permitting remote notarization or temporarily waived certain provisions of law that would otherwise impede the availability of remote notarization.

Further, the Department believes the use of unsworn declarations executed under penalty of perjury rather than sworn affidavits has been viewed as a positive development. There are compelling reasons to continue allowing declarations under circumstances in the regulation where affidavits or verifications are normally required. The Department

² See "COVID-19 Public Health Emergency: Update and Supplemental Guidance" at https://www.transportation.gov/sites/dot.gov/files/2020-05/DOCR%20Guidance%20April%2030%2C%202020_0.pdf.

underscores that the use of declarations in lieu of sworn affidavits does not diminish the legal sanctions available. Section 26.107(e) acknowledges that the Department may refer false statement claims under 18 U.S.C. 1001 to the U.S. Department of Justice for prosecution. Additionally, misstatements in a declaration are punishable as perjury under 18 U.S.C. 1621. Moreover, 28 U.S.C. 1746 recognizes that a matter required or permitted to be supported, evidenced, or proved by the sworn affidavit, may be supported by an unsworn declaration under penalty of perjury, with like force and effect.

The use of online notarization services and the use of declarations in lieu of sworn affidavits has reduced burdens for small businesses that do not have direct or immediate access to a notary public. The Department, however, believes more benefits with even less burden can be achieved by relying on declarations rather than sworn affidavits; these benefits include convenience, time, and cost savings. Based on the success of the temporary practices and the benefits to small businesses, the Department is proposing to eliminate the requirement for sworn affidavits and notarization and instead require the use of unsworn declarations under penalty of perjury.

3. Reporting Requirements (§ 26.11 and Appendix B)

The Department proposes three changes to reporting requirements: (1) revise the Uniform Report to include additional data fields, (2) direct recipients to obtain a standardized set of bidders list data and enter it into a centralized database specified by DOT, and (3) expand data collection requirements for Moving Ahead for Progress in the 21st Century (MAP-21) data reports.

The proposed revisions to reporting requirements are critical to DOT's efforts to improve data-driven program evaluation and DBE Program decision making going forward. The Department believes the proposed revisions would remedy current reporting deficiencies. They would also be a meaningful step toward a more data-driven and uniform approach to

making future program improvements. An expanded data collection would allow DOT to look at data across several years to get a thorough assessment of the impact of the DBE Program.

Uniform Report

The Department collects much of its DBE utilization data from the Uniform Report. Recipients annually submit it to the OA(s) that provide funding to them. We propose to revise the Uniform Report to include additional data that would assist the OAs and the Department with evaluating whether the DBE Program is making progress toward meeting its stated objectives in § 26.1. The Department proposes to revise the Uniform Report to include the following new data fields:

- Names of the DBEs with contracts that are included in the Uniform Report.
- Zip code of the firm's principal place of business
- Owner(s)' contact information
- Work category/trade firm performed in that contract
- North American Industry Classification System (NAICS) code associated with the type of work performed
- Dollar value of the contract
- Federally assisted contract number
- Ethnic group membership
- DBEs decertified during the reporting period for excess gross receipts beyond the relevant size standard or because the disadvantaged owner exceeded the personal net worth cap.
- Number of DBEs listed at time of commitment that were replaced during the life of the contract.

The Department believes that access to this data would help inform the Department about areas that may need to be addressed through future policy decisions and regulation revisions. For example, the names of DBEs and NAICS codes would allow the Department

to identify the firms working on federally assisted contracts to determine whether the DBE Program is benefiting a large subsection of all DBEs and not only a select few.

Information on firms that have “outgrown” the DBE Program by exceeding the business size or PNW limits, would allow the Department to determine whether firms later reenter the program. This data would help the Department to evaluate progress towards the DBE Program objective: “[t]o assist the development of firms that can compete successfully in the marketplace outside the DBE Program.” § 26.1(g).

The proposed data collection would make it possible for the Department to compare information from 3 datasets: the new MAP-21 report (e.g., the total number of DBEs, delineated by NAICS code and prequalification), bidders list (i.e., those DBEs that are actively bidding on federally assisted contracts), and Uniform Report (i.e., those DBEs that are awarded contracts and subcontracts). The new information would improve the Department’s ability to evaluate program trends and would help establish a national baseline for the status of the DBE Program.

The Department also proposes to revise the method that recipients use to submit the Uniform Report. Section 26.11(a) instructs recipients to transmit the Uniform Report form in appendix B for review by the applicable OA. Recipients currently submit the information electronically and no longer submit printed spreadsheets. For this reason, the Department proposes to amend the rule, instructing recipients to submit this information in a form acceptable to the concerned OA. We also propose to remove the Uniform Report form from appendix B. Official forms are not required to be reproduced in the Code of Federal Regulations (CFR), and the Uniform Report is readily available on the DOT website.³

Removing this form from the CFR is an administrative action and would not impact the ability

³ See “New DBE Uniform Report” at <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/new-dbe-uniform-report>.

of the public to comment on any amendments to the information collections contained in these forms.

The proposal would make a minor change to instruction 5, which specifies the reporting period for FHWA and FTA recipients. The change would clarify that FTA recipients that do not meet the new \$670,000 threshold in § 26.21, are required to report data to the OA that covers the entire year.

The proposal would also make a technical correction to line 18 of the report to conform the form text with the Department's official guidance on reporting payments on ongoing contracts and add an example to explain the number of contracts reported in item 18(C) may differ from the number reported in item 18(A).⁴

Finally, the Department does not currently collect data on the number of DBEs committed in response to a contract goal (prior to contract award) that were terminated during the life of the contract by the prime contractor. Nor do we collect information on the reasons for those terminations. This data would assist the Department with identifying any trends in the number of terminations and the most common reasons for terminations. For example, many terminations may occur in certain parts of the country, or many terminations may occur due to overcommitments by DBEs. With this data available, the Department can provide focused technical assistance and training to reduce the number of DBEs terminated and provide supportive services to DBEs to assist in appropriate bidding practices. The Department seeks comment about how frequent and detailed the collection should be as well as what would be the best and most efficient method to capture data on terminations of committed DBEs.

Bidders Lists

⁴ See "Guidance on Completing Ongoing Payments" at <https://www.transportation.gov/sites/dot.gov/files/2020-01/docr-20180425-001part26qa.pdf>.

Section 26.11(c) instructs recipients to create and maintain a bidders list with certain information about DBE and non-DBE contractors and subcontractors who seek work on federally assisted contracts. Section 26.11(c)(1) states that the purpose of the list is related to determining availability for use in goal-setting. In the 1999 final rule, the Department noted “bidders lists appear to be a promising method for accurately determining the availability of DBE and non-DBE firms” and that “creating and maintaining a bidders list would give recipients another valuable way to measure the relative availability of ready, willing and able DBEs when setting their overall goals.” (64 FR 5096, 5104 (Feb. 2, 1999)) The Department also noted in the 1999 final rule that flexibility was important because of potential burdens related to collecting data about “subcontractors that were unsuccessful in their attempts to obtain contracts.” *Id.* At the time, the Department did not seek to impose procedural requirements for collecting the data, in the interest of reducing burdens. The Department suggested several possible collection methods, including disseminating surveys and aggregating data from multiple sources. These suggestions were incorporated into § 26.11(c)(3). It is not currently known how many recipients engaged or continue to engage in surveys and questionnaires to obtain bidders list information or how many are using this information to set overall goals. In practice, when setting overall goals many—if not most—recipients use DBE directories and U.S. Census Bureau data, a method described in § 26.45(c)(1) or use data from a disparity study as described in § 26.45(c)(3).

Many recipients of DBE Programs specify that bidders list information is collected from all bidders at the time of bid submission, and many recipients rely on electronic systems for capturing and storing this information. Currently, all bidders list information is obtained and maintained locally by each recipient and is not reported to the Department or the concerned OA. As a result, this data is disaggregated among thousands of recipients in a wide variety of formats and may contain a variety of different data points. In a standardized and centralized format, this data could be of great value to the Department in evaluating the extent

to which the program is achieving the objectives of § 26.1(b) and (g). A centralized database, searchable by recipients, could also improve the viability of the bidders list method described in § 26.45(c)(2) as a means for recipients to identify DBE availability at Step 1 of the overall goal setting process.

The Department therefore proposes revising § 26.11(c) to require recipients to obtain and enter bidders list data into a centralized database the Department would specify. The purpose of this proposed change is twofold: first, the revision would build a data source that would allow more accurate and more granular analysis of firms actively seeking to participate in DOT-funded contracts in relation to the DBE Program objectives of § 26.1; secondly, a searchable, centralized database with bidders list information that includes an expanded dataset would aid recipients in evaluating DBE availability for goal setting purposes. We invite comment on estimated costs for developing and maintaining such a database (this is not a request for proposals or offers, and the Department is not seeking or accepting unsolicited proposals).

The Department also proposes to amend § 26.11(c)(2) to require recipients to obtain and report the following additional data sets: race and gender information for the firm's majority owner; and NAICS code applicable to each scope of work the firm sought to perform in its bid. This proposed revision would help ensure that the bidders list information to be collected includes at least the same elements as those being required in the proposed change to the Uniform Report. In conjunction with the proposed changes to the MAP-21 Report in § 26.11(e) and the Uniform Report, the proposed bidders list reporting requirement would provide the Department with data showing how many and what types of DBE firms are certified, how many DBEs are actively bidding as prime or subcontractors, and which of them are actually awarded contracts or subcontracts.

To ensure uniformity of data collection for proper analysis, the Department proposes a change to § 26.11(c)(3) regarding the collection of bidders list information to require a standard practice of requesting the information with bids or initial proposals.

The Department anticipates minimal impact to stakeholders from these changes as recipients already collect most (if not all) of this information when conducting good faith efforts to obtain DBE participation on contracts with DBE goals. Additionally, contrary to the situation in 1999, current internet and data capture technology makes sending out surveys and questionnaires and aggregating that data less burdensome.

MAP-21 Data Reports

In 2014, the Department implemented a longstanding provision in the Department's surface transportation program authorizations, adding a new reporting requirement which we called the MAP-21 data report. Under § 26.11(e), state departments of transportation, on behalf of their UCP members, submit UCP directory information yearly to the Departmental Office of Civil Rights reporting the percentage and location in the state of DBEs controlled by women; socially and economically disadvantaged individuals (other than women); and individuals who are women and are otherwise socially and economically disadvantaged individuals. The Department usually sends a request for this information each Fall with a January due date and we have interpreted the "location in the state" to mean certified in a recipient's home state or certified out-of-state.

The MAP-21 report information is distinct from what is included in the Uniform Report that recipients and sponsors annually submit to the relevant OAs. It provides a yearly snapshot of the number and percentage of DBEs in that state. However, the MAP-21 report is limited in scope and utility largely because the Department is unable to break out the number of firms certified, denied, or decertified by ethnicity. This limitation prevents any comparison to section C of the Uniform Report that could show volume of participation in relation to firm ownership data contained in state directories.

We are mindful that similar concerns were raised in a 2001 Government Accountability Office (GAO) report (“Disadvantaged Business Enterprise: Critical Information is Needed to Understand Program Impact,” GAO-01-586, pp. 18-19 (Jun. 1, 2001)), which criticized elements of the Department’s data collection as not truly reflective of the environment that exists for the small business community of DBEs and DBE applicants. The GAO observed, for example, that a lack of key information prevents anyone from gaining a clear understanding of the firms that participate in the DBE Program and how these firms compare with the rest of the transportation contracting community.

In response to the GAO report and subsequent observations, the Department instituted many changes to the Uniform Report, mandated improvements to state directories, and instituted the current MAP-21 collection. The existing MAP-21 data collected shows the number of DBE certifications steadily increasing (approximately 3.5 percent each year). More can be done now, however, to inform our understanding of the DBE Program’s impact and depth of coverage.

The Department believes the proposed revision remedies the current report deficiencies and is a meaningful first step toward a data-driven and uniform approach to future program improvements and coordination among program actors. The proposed revision does not replace existing data collection requirements under the BIL but expands the collection of data to cover the number of firms denied certification, summarily suspended, or decertified by ethnicity and gender. This expanded data collection would allow the Department to look at data across several years to develop a thorough assessment of the impact of the DBE certification process.

We invite comment on expanding this collection to cover: (1) the number and percentage of in-state and out-of-state DBE certifications for socially and economically disadvantaged owners by gender and ethnicity (Black American, Asian-Pacific American, Native American, Hispanic American, Subcontinent-Asian American, and non-minority); (2)

the number of DBE certification applications received from in-state and out-of-state firms and the number found eligible and ineligible; (3) the number of in-state and out-of-state firms decertified and summarily suspended; (4) the number of in-state and out-of-state applications received for an individualized determination of social and economic disadvantage status; (5) the number of in-state and out-of-state firms certified whose owner(s) made an individualized showing of social and economic disadvantaged status; and (6) the number of DBEs pre-qualified in their work type by the recipient.

The Department proposes to create a similar data reporting requirement for the ACDBE Program (excluding prequalification data). The proposed rule would add a new paragraph to § 23.27 that would require state departments of transportation, on behalf of their UCP members, to include ACDBE data in the yearly report to DOCR. This data collection would provide the Department a yearly snapshot of the number and percentage of ACDBEs. The Department anticipates that expanding the collection to include information on ACDBEs would pose minimal burden on recipients because UCPs are already required to report this data for DBEs. It is highly useful in our view for data on ACDBEs to be reported in order for the Department to gain a deeper understanding of the firms that participate in that program and how these firms compare with the rest of the airport concession community. It is important for the Department to be able to do this in order to enhance the Department's ability to conduct more detailed trend analyses of changes in ACDBE participation levels and assess the program's overall success.

Subpart B—Administrative Requirements for DBE Programs for Federally Assisted Contracting

4. Threshold Program Requirement for FTA Recipients (§ 26.21)

Currently, the rule requires only those FAA and FTA recipients that will award prime contracts with cumulative total value exceeding \$250,000 in a fiscal year to have a DBE Program. The \$250,000 value for the threshold was first introduced in a 1983 final rule, but it

originally meant that FTA and FAA recipients who *received* over \$250,000 in a fiscal year were required to have a DBE Program—in 2000, the \$250,000 threshold was updated to apply to contract awards.

There is little documentation as to the rationale for the threshold when it was originally introduced. However, program experience shows that recipients with lower dollar amounts of total prime contract awards have low levels of DBE participation. Those lower contract amounts necessarily imply low amounts of DBE participation simply because the pool of available contract awards is small. In addition, small prime contract awards have fewer opportunities for unbundling to allow for subcontracting opportunities. It is only with subcontracting opportunities that race-conscious awards can be used. Further, subcontracts of small prime contracts are of low total value and may not attract much interest from DBEs.

The proposed rule makes one adjustment to the rule based on observed changes in the consumer price index (CPI) from 1983 to 2020. The change sets a new threshold level for FTA recipients that would trigger full adherence to those rule requirements FTA deems essential for all recipients. This change amends the rule so that FTA recipients receiving planning, capital and/or operating assistance less than \$670,000 must maintain a program locally that includes the requirements of § 26.11, reporting and record keeping; § 26.13, contract assurances; § 26.23, a policy statement; § 26.39, fostering small business participation; and § 26.49, concerning transit vehicle manufacturers. FTA recipients receiving planning, capital and/or operating assistance that will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which exceeds \$670,000 in FTA funds in a Federal fiscal year must have a DBE Program meeting all the requirements of the rule. The Department will adjust the threshold for inflation in its discretion as the need arises.

The Department conducted an economic analysis of this change, identifying how many FTA recipients would no longer need a full program (approximately 80), and the cost savings to those recipients and the Department. FTA also conducted a public outreach session on

October 14, 2021 and received general comments on changes to the DBE Program, including increasing the threshold and amending the reporting requirements for recipients of that OA. The Department found that raising the threshold is expected to provide administrative cost savings to FTA recipients with reduced reporting requirements and only minor levels of reductions in total program-level DBE participation. The FTA Office of Civil Rights will also experience reduced workload related to monitoring, oversight, and training of these smaller recipients. Further, the FTA Office of Civil Rights staff will be able to direct their resources to recipients in other areas of need. That redeployment of FTA staff resources may produce more DBE participation from other recipients that may offset any losses in DBE participation from recipients who are below the revised threshold.

We anticipate that recipients would experience cost savings resulting from lower administrative burdens if the threshold were raised. The exact impacts of this change would vary from year to year, given that recipients have varying amounts of Federal contract dollars every year, but an average impact can be estimated. The categories of cost savings included in the analysis are:

- Program development and goal setting: These are the administrative costs associated with the development of a recipient's DBE Program and establishing the DBE Program goals every three years. This work involves some amount of effort by recipients. In some cases, recipients may contract this work out to a consultant.
- Monitoring, reporting, and outreach: These are the administrative costs incurred by the recipient related to administering their DBE Program every year. The recipient must monitor their contracts to ensure the work committed to DBEs is actually performed by DBEs, and verify payments made to DBEs. The recipient performs this work by conducting contract reviews and work site visits. Entities must report on their DBE participation twice a year to FTA. They must also conduct regular outreach to DBEs in their community.

- Conferences and trainings: Recipients may send their employees to conferences or trainings related to the DBE Program. The cost to the recipient is incurred through travel expenses and the opportunity cost of the employee's time. Some trainings provided by private companies and organizations include registration fees, but DOT offers training free of charge. This analysis assumes no registration fees for the conferences and trainings.
- DOT technical assistance: FTA provides technical assistance to transit agencies for their DBE Programs. This cost is measured by the typical number of hours spent by FTA staff providing such assistance per recipient.

The Department conducted a Regulatory Impact Analysis (RIA) (available in the docket) of this proposal in connection with this rulemaking; and believes that the revisions proposed reduces the administrative burden of the DBE Program on recipients receiving less funding and would have a minimal impact on race-neutral awards. We are proposing to retain annual reporting requirements, nondiscrimination contract assurances, strategies for expanding contracts with small businesses, and transit vehicle manufacturing requirements.

5. Unified Certification Program (UCP) DBE/ACDBE Directories (§§ 26.31 and 26.81(g))

Under the current DBE and ACDBE rules, each UCP must maintain a directory of all DBE and ACDBE firms, in the state in which the UCP is located. The directories must include each firm's address, phone number, and types of work the firm has been certified to perform.⁵ The directories must be publicly available both electronically and in print. UCPs are to make additions, deletions, and other changes as soon as they learn of them.

The Department enacted this requirement in 1999, noting in its final rule that commenters discussed whether the directories should include information concerning the qualifications of the firm to do various sorts of work. For example, has the firm been pre-

⁵ The UCP directory provisions in §§ 26.31 and 26.81(g) are applicable to the ACDBE program per § 23.23(a).

qualified by the recipient or another state agency? Can it do creditable work? What kinds of work does the firm prefer to do? Some commenters also requested that the directory should list the geographical areas in which the firm is willing to work.

The primary purpose of the directories is to show the results of the certification process, with sufficient identifying information for prime contractors to contact the DBEs or ACDBEs for those areas of work or supply they could perform or provide on a potential project or concession opportunity. Information about firms' qualifications, geographical preferences for work, performance track record, capital, etc., were not required to be part of the directories because, as stated in the 1999 preamble, this would "clutter up the directory and dilute its focus on certification." The Department expected that a prime contractor or prime concessionaire would contact a DBE or ACDBE to discuss its qualifications before hiring it to perform work as a subcontractor, sub-concessionaire, or supplier on a federally assisted contract or concession opportunity. While the Department continues to believe that the directories serve this purpose, the current regulation was written before the widespread adoption of the internet and the availability of online resources.

The proposed rule would direct UCPs to expand their directories of DBE and ACDBE firms, allowing them to display other essential information about DBEs and ACDBEs that attests to the firms' ability, availability, and capacity to perform work. While the UCP would in no way be required to vouch for the quality of the DBE or ACDBE's work, it could expand information regarding a DBE or ACDBE beyond merely its contact information and NAICS code(s). Under the proposal, all UCPs would amend their directories so that firms would have a standard set of options for information they can choose to make public, such as a capability statement, state licenses held, pre-qualifications, personnel and firm qualifications, bonding coverage, recently completed project(s), equipment capability, and a link to the firm's website. Under the proposed rule, UCPs would be required to incorporate these information fields as additional criteria by which the public can search and filter the UCP directory. We invite

comments about the specific categories of information that prime contractors or prime concessionaires and DBEs or ACDBEs would find useful to have publicly available. We anticipate that most DBEs and ACDBEs will avail themselves of this opportunity, recognizing this is a cost-effective and timesaving alternative to market their qualifications while providing a one-stop baseline tool for prime contractors and prime concessionaires as they seek out potential subcontractors and sub-concessionaires. Further, the Department also proposes eliminating the paper requirement for the directory in § 26.81; we see no continued utility for this requirement as all directories are available online.

We invite comments on whether prime contractors and prime concessionaires will see time-and-resource savings with such a change to the directory. There is a clear benefit to prime contractors and prime concessionaires that seek out information regarding a firm's capabilities, experience, and past performance. Given the growing size of DBE/ACDBE directories each year, this may expedite contractor or concessionaire selection and overall bid or solicitation response times. Additional time savings would be realized in "contract or concession specific goal" situations, wherein an award to a prime contractor or prime concessionaire cannot be made unless that prime contractor or prime concessionaire commits to contracting to a sufficient number of DBEs or ACDBEs to meet a contract or concession specific goal or demonstrates good faith efforts if it falls short of the goal through contracting commitments. Also, when a prime contractor complies with the regulatory requirements to terminate and replace a DBE or ACDBE to which it committed at the time of award, it is typically required to make good faith efforts to replace that DBE or ACDBE. A more informative directory could assist prime contractors or prime concessionaires with the replacement process as well and could be used as one element in the good faith efforts analysis, a point referenced by prime contracting organizations in response to the Department's October 2017 request for public input on existing regulatory and agency actions. (82 FR 45750 (Oct. 2, 2017))

We are aware that some UCPs have already expanded the search capabilities of their current directories of DBE and ACDBE firms. We anticipate UCPs being able to implement the requirement by January 1, 2024, or within 180 days of the final rule, but we invite comment on how long UCPs expect the proposed enhancements may take, if enhancements are feasible given existing resources, and whether the benefits we describe above outweigh any upfront costs. We invite comment on whether the directory enhancements should consist of drop-down menus that draw from available data sources, open-ended fields with a word limitation (e.g., 250 words more or less), or some combination thereof. We invite comment on which of these approaches would be most conducive to useful search functionality, feasibility, and resource efficiency. If the proposed change takes effect, the Department anticipates having a phase-in period for the additional requirements described and will not make compliance mandatory until the certification members of UCPs can build the enhancements and make them operational.

6. Monitoring Requirements (§ 26.37)

Since 1999, § 26.37 has set forth a recipient's responsibility for monitoring the performance of other program participants. This regulation in Subpart B, however, focuses on a recipient's responsibility to include in its DBE Program a monitoring and enforcement mechanism to verify that work committed to a DBE at contract award is actually performed by that DBE. In addition, the recipient must keep a running tally of actual DBE payments to ensure that DBE participation is credited toward overall and contract goals only when payments are actually made to DBEs.

The Department has learned that certain language in § 26.55(h) has caused confusion among recipients. The heading of this section is misleading; it suggests that the section is limited to monitoring the performance of other program participants, when it also sets forth significant oversight requirements for recipients, including the requirement to keep a "running tally" of payments toward the achievement of the recipient's overall goal as well as each

contract with a DBE goal. Recipients also questioned how the requirement to certify in writing each DBE was actually performing the work for which it was committed intersected with § 26.55, which requires recipients to count DBE participation toward its annual goal and a contract goal only if the DBE is performing a commercially useful function (CUF).

The Department also learned that the requirement for the recipient to keep a “running tally” was often overlooked or misconstrued. Finally, the Department learned that many recipients were confused by use of the word “certification,” used in this section as it pertains to the requirement that there must be written, signed confirmation that each DBE was monitored. The word “certification” in the DBE Program more often than not refers to the application process a firm undertakes to achieve DBE status or “certification.”

We seek to clarify § 26.37 by changing the title from “What are a recipient’s responsibilities for monitoring the performance of other program participants?” to “What are a recipient’s responsibilities for monitoring?” We believe that this would better describe the substantive content of the regulatory requirements.

The Department also wants to make clear that even DBEs used race-neutrally must be monitored to count toward a recipient’s overall goal. We have learned that some recipients do not monitor DBE participation unless there is a race-conscious contract goal.

We also seek to combine the requirements under this section with the commercially useful function (CUF) requirements in § 26.55. In order for a recipient to verify that a DBE is performing the work it was committed to perform, the recipient would be required to also verify that the DBE is performing in the manner in which it can be counted toward the recipient’s overall goal and a contract goal. This would clarify that while a CUF review can be an additional step in monitoring, a CUF review is necessary for every DBE that performs for credit toward a recipient’s overall goal and a contract goal. A CUF review could be combined

with the § 26.37 requirement for the written verification or performed in a subsequent monitoring. Our official guidance on this section also makes this clear.⁶

The Department seeks to emphasize the importance of the “running tally” requirement. Since 1999, the Department has made it clear that a running tally applies to a recipient’s overall goal and contract goals. Therefore, we want to underscore in this revision that each recipient would be required to keep a running tally, or ongoing accounting, of its attainment of its overall DBE goal (including race-neutral DBE participation) and make adjustments, if necessary, as set forth in § 26.51(d).

The running tally requirement would also require recipients to keep an accounting of each contractor’s progress in attaining a contract goal through progressive payments to the committed DBE. This would be necessary to allow recipients to intervene in real time when and/or if they observe a prime contractor fall short of its contract goal. Keeping an accounting of a prime contractor’s progress toward meeting a contract goal would allow recipients to observe when a prime contractor is not on target toward achieving the goal. This information would allow the recipient to question whether there has been unreported termination of a DBE pursuant to a change order or otherwise; or whether the DBE has withdrawn, and whether the contractor should be using good faith efforts to find additional DBE credit, etc. If a recipient were to wait until the end of the contract to match commitments to actual payments, it would be too late to rectify any shortfalls during contract performance. This is also why the Department is also removing the sentence that indicates the monitoring requirement in this section could be performed during contract close-out reviews. The elimination of this sentence also conforms to the Department’s official guidance on this issue.⁷

⁶ See “Official Questions and Answers (Q&A’s) Disadvantaged Business Enterprise Program Regulation (49 CFR 26) – Commercially Useful Function” at <https://www.transportation.gov/sites/dot.gov/files/2020-01/docr-20180425-001part26qa.pdf>.

⁷ See “Recipient Responsibilities for Oversight and Monitoring of DBE Participation” at <https://www.transportation.gov/sites/dot.gov/files/docs/mission/civil-rights/disadvantaged-business-enterprise/318146/oversight-and-monitoring-dbe-participation.pdf>.

The Department proposes replacing the word “certification” with “verification” to avoid confusion with other parts of the regulation. We also recommend eliminating the last sentence in this section regarding DBE reports because it is misplaced.

Subpart C—Goals, Good Faith Efforts, and Counting

7. Prompt Payment and Retainage (§ 26.29)

In the 1999 preamble to the final rule, we stated that prompt payment mechanisms are an important race-neutral mechanism that can benefit DBEs and other small businesses. Without the protections embedded in the rule, we remain concerned that DBE subcontractors can be significantly—and, to the extent that they tend to be smaller than non-DBEs, disproportionately—affected by late payments from prime contractors. As we said in 1999, lack of prompt payment constitutes a very real barrier to the ability of DBEs to compete in the marketplace; since that time, the Department has required recipients to take reasonable steps to address this barrier.

In the 2021 BIL (section 1101(e)(8)) Congress repeated mandates it made in prior surface authorizations that the Department should take additional steps to ensure that recipients comply with § 26.29. Similarly, the Department’s Office of Inspector General recommended the Department improve oversight of this issue.⁸

In response, the OAs recommended that guidance on this section was necessary to underscore the Department’s intent. Thus, on April 15, 2016, we published official guidance⁹ consisting of 12 questions and answers regarding § 26.29. With respect to prompt payment and return of retainage monitoring, the Department specified the need for recipients to create a

⁸ See “New Disadvantaged Business Enterprise Firms Face Additional Barriers to Obtaining Work at the Nation’s Largest Airports,” USDOT Office of Inspector General, Report ZA-2016-002 (Nov. 3, 2015) at <https://www.oig.dot.gov/sites/default/files/New%20DBE%20Participation%20Is%20Decreasing%20at%20the%20Nation%E2%80%99s%20Largest%20Airports%2C%20and%20Certification%20Barriers%20Exist.pdf>.

⁹ See “USDOT Official Questions and Answers (Q&A’s) Disadvantaged Business Enterprise Program Regulation (49 CFR 26)” at <https://www.transportation.gov/sites/dot.gov/files/docs/Official%20Questions%20and%20Answers%204-15-16.pdf>.

mechanism to affirmatively monitor a contractor's compliance with subcontractor prompt payment and return of retainage requirements, and that a recipient's reliance on complaints or notifications from subcontractors is insufficient. The guidance provides, in relevant part, as follows:

Relying only on complaints or notifications from subcontractors about a contractor's failure to comply with prompt payment and retainage requirements is not a sufficient mechanism to enforce the requirements of section 26.29. . .

While this section does not mandate that a recipient employ a specific type of mechanism for monitoring prompt payment, recipients are expected to take affirmative steps to monitor and enforce prompt payment and retainage requirements.

The guidance continues, providing examples of affirmative monitoring methods.

In 2020, FHWA performed a national review on recipient compliance with prompt payment and return of retainage compliance. Among other things, the review found most recipients are not affirmatively monitoring subcontractor payments on FHWA-assisted projects. Many recipients wait for subcontractor payment complaints or other notification of non-payment before taking any action.

The Department believes including in this regulatory section a specific reference to the need for affirmative monitoring of subcontractor prompt payment and return of retainage by the recipient will reinforce the Department's position on this matter. This revision also makes clear that the requirements within this rule are intended to flow down to all lower tier subcontractors through an addition of a paragraph (f) to § 26.29.

8. Transit Vehicle Manufacturers (TVMs) (§ 26.49)

Section Heading

The current heading of § 26.49 is "How are overall goals established for transit vehicle manufacturers?" The heading of § 26.49 has remained constant since its introduction in 1999, but it no longer accurately describes the section's contents. The Department proposes to revise the heading to "What are the requirements for TVMs and for awarding DOT-assisted

contracts to TVMs?” This heading would describe the contents of the section more accurately, which includes requirements for TVMs that go beyond goal setting and pre- and post-award requirements for recipients.

Terminology and Abbreviations

Section 26.49 in the current rule uses language and terms inconsistently and does not match the language and terms used by the Department in related documents and used by the industry.

The Department proposes to abbreviate “transit vehicle manufacturer” to “TVM” throughout § 26.49 so that the term’s usage is uniform throughout part 26. The Department proposes to revise § 26.49(b) to use “you” and its forms consistently when referring to a party subject to this regulatory provision.

The Department also proposes to change references to “certified” TVMs to “eligible” TVMs in § 26.49(a)(1) and (2) to reduce any confusion as to whether a TVM must first receive a certification from FTA prior to becoming eligible to bid on FTA-assisted transit vehicle procurements. While FTA does evaluate whether a vehicle manufacturer meets the qualifications for a TVM and whether it is eligible to bid, such entities do not receive any sort of formal certification, and their eligibility is always conditioned on whether they are maintaining a DBE Program in compliance with part 26 and in good faith. We expect that this change will reduce the likelihood of a recipient mistakenly determining that a TVM is ineligible to bid because the TVM is unable to produce a certification from FTA.

Post-award Reporting Requirements

Section 26.49(a) details the pre- and post-award requirements for FTA recipients engaged in procuring transit vehicles with FTA assistance.

Section 26.49(a)(4) requires FTA recipients “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.” Since 2016, the Department has maintained an

internet-based reporting form for recipients to fulfill this requirement. The Department has found that as currently written, § 26.49(a)(4) results in inconsistent and inaccurate reporting. These issues are especially prevalent when recipients report contracts with options or schedules.

Recipients occasionally do not know which events trigger the 30-day requirement and from which day they must begin counting. Some of the confusion comes from the use of the word “award.” Generally, FTA defines “award” as the Federal assistance FTA has provided to the recipient to carry out the scope of work that FTA has approved. However, § 26.49(a)(4) uses “award” to refer to the procurement mechanism used by a recipient to procure a transit vehicle from a TVM. Additionally, some recipients are unsure when to report when they exercise an option or receive a delivery from a schedule. One of the most common errors the Department observes related to this requirement is a recipient reporting the date the initial procurement occurred instead of the date the option was exercised. To alleviate this confusion, the Department proposes to replace “making an award” with “becoming contractually required to procure a transit vehicle” in § 26.49(a)(4), and to revise that paragraph for clarity. This clarifies that a recipient needs to reference its contract with the TVM to determine the trigger for the reporting requirements.

Recipients have also expressed confusion about which information is required to be reported. Recipients sometimes do not know what to include and exclude from the report. Section 26.49(a)(4) states that recipients must report the “total dollar value of the contract in the manner prescribed in the grant agreement.” Since the Uniform Report specifies that recipients are only to report the Federal share, some recipients misinterpret the language in § 26.49(a)(4) to mean both the Federal and non-Federal share.

Additionally, when reporting exercised options or scheduled deliveries, some recipients report the value of the entire contract. In practice, they must only report the value of the vehicles received from the option or schedule. For example, if a recipient contracts with a

TVM to purchase 10 buses at a cost of \$100,000 per bus, with the option to purchase up to 10 additional buses at the same price per bus over the next two years, and the Federal share is 50 percent; the recipient is to report only \$500,000 for the initial contract, and only \$50,000 per bus if and only if the recipient exercises the option to procure additional buses.

To alleviate this misunderstanding, the Department proposes to specify in § 26.49(a)(4) that the recipient is to report “the Federal share of the contractual commitment at that time.” This clarifies that only the Federal share is to be reported and only the funds actually required to be paid at that time.

These proposals, if adopted, would result in the Department collecting the information most useful to it, including in situations in which recipients use options and schedules. The Department clarifies that when a recipient uses a schedule in a contract and becomes contractually obligated to pay for the vehicles that will be delivered in the future as of the initial contract signing, the recipient must report once and only once. This is because the entirety of the funds will be expended by the recipient and received by the TVM in a single reporting period.

Awards to Transit Vehicle Dealerships

As currently written, part 26 does not specifically address situations in which an FTA recipient procures transit vehicles through a dealership. Reports received by FTA show that the transit vehicle market includes both direct-from-manufacturer procurements and procurements from dealerships. Previously, the rationale for requiring TVMs to maintain a DBE Program was that TVMs control their subcontracting opportunities and thus are better positioned than recipients to promote a level playing field for DBEs in the transit vehicle manufacturing market. Transit vehicle dealerships, however, are not required to maintain a DBE Program. Consequently, a transit vehicle dealership is generally not eligible to bid on FTA-assisted transit vehicle contracts. Recipients may procure vehicles from these entities but must treat such procurements as any other procurement when calculating their DBE goal.

Thus, recipients may only procure transit vehicles from transit vehicle dealerships by establishing project-specific goals pursuant to § 26.49(f) and must report using the Uniform Report for that project. Further, many FTA recipients currently incorrectly report contracts with dealerships as if they were contracts with TVMs, complicating FTA's oversight efforts and resulting in inaccurate data.

The Department proposes adding new paragraph (a)(5) to § 26.49 to expressly state that a contract with a transit vehicle dealership does not qualify as a contract with a TVM, even if a TVM manufactured the vehicles procured by the recipient from the dealership. Further, as described in the discussion of § 26.5, the Department proposes defining "transit vehicle dealership" and "transit vehicle" to clarify which procurements qualify as transit vehicle procurements. The Department expects that clarifying this aspect of the DBE Program will result in more accurate DBE goals, more accurate reporting, and generally greater compliance.

TVM Goal Setting, Submission, and Review

As currently written, § 26.49(b) states that development, submission, and approval of goals is generally the same for TVMs as it is for recipients. Recipients and TVMs have expressed confusion regarding how frequently TVMs must submit their goal, what period their goal should cover, and whether FTA approval is required prior to the TVM becoming eligible to bid. The Department proposes adding language to expressly state that TVMs' goals are set and submitted annually. Further, the Department proposes eliminating the language related to FTA's approval to harmonize the requirements for TVMs with the requirements for recipients.

The proposed removal of the "approval" language is not intended to have any substantive effect on the conditions necessary for a TVM to be eligible to bid on FTA-assisted transit vehicle procurements, nor any effect on the process by which FTA reviews a TVM's goal and goal methodology. Even though § 26.49(a)(1) expressly states that TVMs that have

submitted goals that have yet to be approved are eligible to bid, recipients and TVMs often express confusion over whether prior approval is required. Further, § 26.45(f)(4), part of the section TVMs are to reference when setting their goals, expressly states that recipients “are not required to obtain prior Operating Administration concurrence with [their] overall goal[s].” Additionally, § 26.49(b)(2) expressly states that the requirements for goal approval apply to TVMs in the same manner that they apply to recipients. Thus, by removing “approval” from § 26.49(b), the Department expects that recipients and TVMs will better understand that FTA need not approve a TVM’s goal prior to the TVM becoming eligible to bid without affecting the eligibility processes and conditions.

TVM Uniform Report

As currently written, § 26.49(c) requires “transit vehicle manufacturers awarded” to submit the Uniform Report in the same manner as recipients to remain eligible to bid on FTA-assisted transit vehicle procurements. Some TVMs have expressed confusion over the word “awarded” and that confusion has resulted in eligible TVMs failing to report properly. These TVMs misinterpret the current text to mean that only TVMs that have actually been awarded contracts by FTA need to submit the Uniform Report. However, TVMs that are eligible to bid on FTA-assisted transit vehicle procurements in a given fiscal year must submit the Uniform Reports for that fiscal year, even if they were not awarded any contracts with FTA assistance. Reporting zero contracts is important for the Department’s oversight efforts because it allows the Department to cross-reference the data provided by TVMs with data provided by recipients.

The Department proposes eliminating the word “awarded” to clarify that an eligible TVM must fulfill the relevant reporting requirements for the years in which it is eligible. This revision should not be construed to mean that an entity that otherwise qualifies as a TVM is required to submit any reports to FTA or the Department if it is not eligible to bid on FTA-assisted transit vehicle procurements.

9. Good Faith Efforts Procedures for Contracts with DBE Goals (§ 26.53)

Considerations for administering the DBE Program in the context of a design-build contract were introduced by the Department in 1999, in § 26.53(e). In this section of the regulation, pertaining to contract goal attainment, the Department recognized that at the time a design-build contract is awarded, the project is minimally designed, and future subcontracting opportunities are unknown. In light of this, the Department acknowledged that specific DBEs that will subsequently be involved in the contract cannot reasonably be identified as required under paragraph (b)(2) of this section.

DBE Performance Plan (DPP)

To address this issue, in 2014, DOT revised § 26.53(b)(3) to provide that bidders in negotiated procurements, such as design-build procurements, may make a commitment to meet the DBE goal at the time of their response to initial proposals but provide the information required by paragraph (b)(2) of this section before the recipient makes its final contractor selection. However, challenges to identifying specific DBEs when the project is minimally designed, and subcontracting opportunities are unknown, remain at the time the recipient makes its final selection and even after contract award. Further, in the event the design builder is unable to meet the goal through committing to enough DBEs before the recipient makes its final selection, the design builder must submit documented good faith efforts. In practice, the Department has noted that by requiring the contractor to identify specific DBEs and document good faith efforts at this early stage of a design-build project, goal achievement is often attained through minimal DBE subcontracting commitments and large submissions of documented good faith efforts. Thus, as currently written, § 26.53(b)(3)(ii) may unnecessarily limit the participation of DBEs in a design-build project that likely includes an abundance of subcontracting opportunities.

Since 1999, design-build contracts have become much more prevalent, and best practices for administering the DBE Program in the context of this contract delivery method

have been identified. The Department proposes to revise § 26.53(e), to align with current best practices which allow for continued DBE participation as the contract proceeds and definitive subcontracting opportunities arise.

The Department proposes to revise § 26.53(e), to direct recipients requesting proposals for a design-build project to require a design builder to submit a DBE Performance Plan (DPP) with its proposal. The DPP replaces the need to commit to specific DBEs or submit good faith efforts at the time of the proposal or prior to final selection. To be considered responsive, a contractor's DPP must include a commitment to meet the goal by providing details of the types of work and projected dollar amounts the contractor will solicit DBEs to perform. The DPP must also include an estimated time frame in which actual DBE subcontracts would be executed. Once the contract is awarded, the recipient must provide ongoing monitoring and oversight of the contractor to evaluate its good faith efforts to comply with the DPP and schedule. The parties may agree to revise the DPP throughout the life of the project, e.g., replacing the type of work items the contractor will solicit DBEs to perform and/or adjusting the proposed schedule as long as the contractor continues to use good faith efforts to meet the goal. The Department believes this method will result in greater opportunities for DBEs to participate in design-build contracts.

In addition, DOT proposes clarifying § 26.53(b)(3)(ii) to address negotiated procurements outside of the context of design-build procurements.

Terminations

Since 1999, § 26.53(f)(1) has prohibited a prime contractor from terminating a DBE used in response to a contract goal without the recipient's prior written consent. The Department implemented protections in these situations to prevent abuse, i.e., that absent a recipient's consent, a prime contractor may not terminate a DBE committed on the contract for convenience and then perform the work with its own forces. Also, since 1999, § 26.53(g) has required a prime contractor that has terminated a DBE to make good faith efforts to

substitute another DBE to perform the same amount of work as the DBE that was terminated.

In 2005, these termination and substitution provisions in § 26.53(f) and (g) were made applicable by § 23.25(e)(1)(iv) to concession specific goals. The Department expanded § 26.53(f)(4) and (5) in 2011 to require recipients to include a provision in its prime contract requiring the prime contractor or prime concessionaire to give written notice to the DBE or ACDBE subcontractor or sub-concessionaire (within five days) of its intention to request termination and/or substitution, and the reasons for the request. The prime contractor or prime concessionaire must also give the DBE or ACDBE five days to respond to the prime contractor's or prime concessionaire's notice and advise the recipient of any reasons the request should not be approved.

The 2014 revisions to § 26.53(g) expanded the good faith efforts requirements a prime contractor or prime concessionaire must follow to replace the terminated DBE or ACDBE. After making this change, the Department has learned that because the section above combines the terms "terminate and/or substitute," some recipients permit a prime contractor or prime concessionaire that wishes to terminate a DBE or ACDBE in response to a contract or concession specific goal to seek written concurrence only for a DBE or ACDBE substitution. This action often omits the procedures a prime contractor or prime concessionaire is required to follow prior to *terminating* a firm. The required actions a prime contractor or prime concessionaire must take prior to terminating a firm provide the DBE or ACDBE with an opportunity to respond in writing to the recipient, indicating the reasons why it objects to the proposed termination. Requiring a prime contractor or prime concessionaire only to seek written concurrence for a proposed substitution deprives the DBE or ACDBE from these due process protections.

To avoid this unintended result, the Department proposes a minor revision to this section to eliminate the pairing of "termination" with "substitution" to clarify that proposed DBE and ACDBE terminations require the prime contractor or prime concessionaire to follow

specific actions and provide a DBE or ACDBE an opportunity to respond before a recipient may provide written concurrence or denial. Under this proposed revision, the prime contractor or prime concessionaire would be permitted to propose a substitution only after a recipient's written concurrence with the proposed termination is received.

The revisions also make clear that a prime contractor's or prime concessionaire's desire to eliminate a portion of the work committed to a DBE or ACDBE as a condition of award would also constitute a "termination" in which the prime contractor or prime concessionaire and recipient must follow the above-referenced procedures.

10. DBE Supplier Credit (§ 26.55(e))

The Department first adopted regulatory provisions related to "regular dealer" suppliers in the 1987 DBE final rule (52 FR 39225 (Oct. 21, 1987)) (revising then-existing § 23.47(e) to § 23.47(e) and (f)). This regulation has gone through several revisions since then, most recently in 2014 (79 FR 59566 (Oct. 2, 2014)), and now appears as § 26.55(e). This section assists recipients in evaluating the appropriate credit to be given toward a contract goal (and a recipient's overall goal) when a DBE provides services as a manufacturer, supplier, or transaction facilitator; the latter is sometimes referred to as packager, broker, manufacturers' representative, or other firm that arranges or expedites transactions.

The Department requested stakeholder feedback on the regular dealer concept in the 2012 Notice of Proposed Rulemaking. See 77 FR 54592 (Sept. 6, 2012), which led to the 2014 final rule. The preamble to the 2014 final rule states: "Specifically, we sought comment on: (1) 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?; (2) what is the appropriate measure of the value added by a DBE that does not play a traditional regular dealer/middleman role in a transaction?; and (3) do the policy considerations for the current 60% regular dealer credit actually influence more use of DBEs as contractors that receive 100% credit?" See 79 FR 59566, 59588 (Oct. 2, 2014).

In response to the 2012 NPRM, the Department received over 50 comments from prime contractors, DBEs, stakeholder associations, and recipients, many of which emphasized the need for additional clarification of, or changes to, the terminology used to describe regular dealers, middlemen, transaction expeditors, and brokers. The Department responded that more analysis and discussion was needed to make informed policy decisions about how best to amend the regulations governing regular dealers and transaction facilitators; it committed to continuing the conversation through future stakeholder meetings.

On September 26 and 27, 2018, the Department held stakeholder meetings on the topic of “regular dealers.” Prime contractors, recipients, stakeholder associations, and DBEs, attended and many shared valuable information from their various perspectives. While the Department often hears that the “regular dealer” concept is outdated, does not reflect current industry practice, and should be eliminated, most meeting contributors did not propose doing away with the regular dealer concept. Most acknowledged that even though the market has changed to allow prime contractors the ability to obtain goods through e-commerce without the need for a “middle-man,” many DBE suppliers reported that they rely upon the DBE Program and contract goals to maintain a viable business. Similarly, prime contractors conveyed their reliance on DBE suppliers to assist in meeting contract goals.

Based on the input from the stakeholder sessions and DOT’s continued analysis of the role of the regular dealer provisions in the success of the DBE Program, DOT proposes several modifications to the regular dealer provisions designed to better align with modern business practices. Modifications to this section also include clarifying the definition of “manufacturer” and “suppliers of specialty items.”

Limiting DBE Supplier Goal Credit

Since the beginning of the DBE Program in 1980, DOT has never placed a cap on the total amount of credit a prime contractor could obtain from supply contracts toward meeting a contract goal. DOT has long had a concern, however, that if prime contractors could

frequently meet contract goals primarily through supply contracts with DBEs, opportunities for DBEs that perform other types of work would be too limited. DOT addressed this concern by allowing prime contractors to only count a certain percentage of the value of individual supply contracts toward contract goals. The Department's initial comprehensive Minority Business Enterprise regulation, issued in 1980, limited goal credit for a contract with a non-manufacturer supplier to 20 percent of the expenditures with the supplier, provided the supplier performed a commercially useful function (CUF).¹⁰ In 1987, based on feedback from stakeholders, DOT adjusted the limit on goal credit to 60 percent of expenditures with a non-manufacturer supplier, determining that the adjusted figure would better balance the considerations that too low of a credit figure would unduly limit participation by MBE suppliers and that too high of a figure would unduly limit participation by other MBE firms (e.g., construction contractors). The 60 percent figure was set in 1987.¹¹

During the 2018 stakeholder meetings, some DBE participants conveyed that although crediting suppliers is limited to 60 percent of the value of the contract, some contractors, are still able to meet all or most of a contract goal through DBE suppliers, especially suppliers that provide high-cost or bulk items such as petroleum or steel, diminishing or even eliminating the need for the prime to employ additional DBE subcontractors on a project.

In consideration of the comments received, the Department proposes to revise this Part by adding a provision at § 26.55(e)(6) to limit the total allowable credit for a prime contractor's expenditures with DBE suppliers (manufacturers, regular dealers, distributors, and transaction facilitators) to no more than 50 percent of the contract goal. This revision would allow exceptions to the crediting limit (50 percent) for DBE material suppliers on

¹⁰ See 45 FR 21172, 21181 (Mar. 31, 1980) available at <https://www.transportation.gov/sites/dot.gov/files/2020-06/1980%20Final%20Rule%2045%20Fed.%20Reg.%2020771%2C%2021172%28Mar.%2031%2C%201980%29.pdf>.

¹¹ See 52 FR 39225, 39227 (Oct. 21, 1987) available at <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/1987-final-rule>).

a contract-by-contract basis (for example, certain contracts may be material-intensive), with the prior approval of the appropriate OA.

The following hypothetical is an example of how DBE credit should be applied under the proposed rule:

A prime contractor seeks to bid on a \$1M contract with a DBE goal of 20%. The prime contractor's total creditable portion of the commitment submitted to meet the contract goal cannot exceed \$100,000 in DBE material supplier participation: ($\$1M \times 0.2 = \$200,000$ (total amount to meet goal)) ($\$200,000 \times 50\% = \$100,000$ (material supplier limit)). For example, the prime will use a DBE manufacturer of bricks for \$50,000 and a regular dealer of steel costing \$100,000. The regular dealer of steel can only count 60% of the cost of steel ($\$100,000 \times 0.6 = \$60,000$). The total amount for DBE supplies is (\$50,000 plus \$60,000=\$110,000). The prime can only count \$100,000.

Evaluating a Supplier's Designation as a Regular Dealer

The Department proposes to continue to credit 60 percent of the cost of supplies toward the contract goal (and recipient's overall goal) should a DBE meet the regular dealer requirements. This determination is made up of two components: (1) whether the DBE is an established business regularly engaged in the sale or lease of a product of the "general character" of that required under the contract; and (2) whether the DBE meets certain performance requirements in supplying the item.

The Department has learned that recipients often find it difficult to determine whether a DBE is "regularly engaged" in a supply activity, versus a firm that occasionally engages in such work or does so on an ad hoc or contract-by-contract basis. Similarly, recipients find it difficult to determine if the DBE regularly sells products of the "general character" of those called for in a specific contract. Moreover, recipients often wait to make these determinations until after the contract is awarded, during a CUF review in the field. While field inspectors performing CUF monitoring can evaluate a DBE supplier's performance, they are unlikely to have a method to determine if the DBE supplier meets the fundamental criteria to be considered a regular dealer.

In a design-bid-build contract, contractors/bidders must submit, either at the time of bid or within 5 days thereafter, information regarding the specific DBE firms to which they have committed to meet a contract goal. To determine if a contractor/bidder is eligible for contract award, recipients must evaluate these commitments to determine if the contractor/bidder met the goal either by sufficient subcontracting to DBEs and/or by demonstrating sufficient good faith efforts. See § 26.53(b). Contractor/bidder commitments often include the use of DBE suppliers and indicate 60 percent credit of the cost of the supplies toward goal achievement.

The Department has learned that many recipients accept the 60 percent commitment at face value without knowing whether the DBE “regularly engages” in the purchase and sale or lease of items, or those of the “general character,” that it is committed to supply for the contract at issue.

This face-value determination could affect whether a contractor/bidder has actually met the contract goal and is eligible for contract award. To avoid overcounting upfront toward contract goal achievement prior to contract award, and potential overcounting of goal credit in the field, the Department proposes to add a requirement in § 26.55(e)(2)(iv) for a recipient to establish a system to determine, prior to award, that the DBE supplier meets the fundamental characteristics of a “regular dealer,” i.e., whether the committed DBE is “regularly engaged” in the purchase or sale of items, or those of the “general character,” called for in the contract. (In the race-neutral context, this information should first be considered prior to entering the DBE’s participation into the recipient’s reporting system, which usually occurs when subcontracts are approved.) To make such a determination, the recipient must evaluate whether the DBE supplier keeps sufficient quantities of the items in question and regularly sells the items to a sector of the public that demands such items.

To address the second component of the determination, the Department proposes under § 26.55(e)(2)(iv)(A) to add a requirement that a recipient establish a system, pre-

award, to determine whether a DBE supplier submitted by the contractor/bidder as a “regular dealer” has demonstrated capacity and intent to perform as a regular dealer to ensure preliminary counting determinations are based on the DBE’s capacity and intent to comply with the CUF requirements. Such procedures would be flexible but should include preliminary questions to identify whether the products sold or leased will be provided from the DBE’s inventory or whether the DBE will have physical possession before they are sold or leased to the prime.

Under this same section, these procedures would also address the supply of bulk items by including questions on the disclosure of information to determine if the DBE will deliver the items using distribution equipment it owns and operates. This system is necessary to provide a sound basis for evaluating goal attainment prior to contract award and is necessary to support the likelihood that the DBE supplier will actually perform as a regular dealer in the field. Should the additional information a recipient receives result in a determination that the committed DBE supplier’s services would not be entitled to the goal credit listed, the recipient would then determine that the contractor/bidder fell short of the goal and would then evaluate the bidder’s good faith efforts to determine eligibility for contract award or subcontractor approval.

Ultimately, goal crediting would be made on a contract-by-contract basis contingent upon the outcome of a recipient’s final CUF and counting determination of the DBE supplier’s performance during the contract.

Drop-Shipping and Delivery from Other Sources

Many DBE suppliers said that the absolute prohibition on drop-shipping materials from the manufacturer to the desired location severely impacts their ability to compete with non-DBE suppliers. On the other hand, it is of concern to the Department and DBE subcontractors that a firm would receive 60 percent credit of the cost of supplies if the DBE’s role is limited to making phone calls or sending emails to manufacturers or suppliers and

asking them to drop-ship the materials to the desired location. The latter role is akin to a broker or transaction facilitator, and credit should be limited to the amount paid by the prime as a commission or fee for these services.

During the 2018 stakeholder meetings, the Department learned that the prohibition of drop-shipping materials is especially of concern to DBEs with distributorship agreements for the supply of bulk items. Those with distributorship agreements conveyed that these agreements with manufacturers are limited in nature, costly, and require them to assume significant risk of loss or damage. They stressed that the requirement that they use and operate their own distribution equipment to deliver the products is a barrier to their ability to compete fairly with other suppliers of bulk items.

Recognizing that a DBE with a distributorship agreement typically has more control regarding the quality of materials and bears significant risk, the Department proposes to add language to § 26.55(e)(3) to allow materials or supplies purchased from a DBE distributor that neither maintains sufficient inventory nor uses its own distribution equipment for the products in question to receive credit for 40 percent of the cost of materials, including transportation costs.

In this section, a DBE distributor is defined as an established business that engages in the regular sale or lease of the general character of items specified by the contract and described under a valid distributorship agreement. This section further explains that a DBE distributor performs a CUF, entitling it to 40 percent credit, when it operates in accordance with the terms of its distributorship agreement; and with respect to shipping, the DBE distributor must assume the risk for lost or damaged goods. The Department proposes that recipients must review the language in distributorship agreements, prior to contract award, to determine their validity relevant to each purchase order/subcontract and the risk assumed by the DBE. Where the DBE distributor drop-ships materials without assuming risk, or

otherwise does not operate in accordance with its distributorship agreement, credit is limited to fees or commissions.

Stakeholders also expressed concern regarding how to credit supplies from a DBE regular dealer that provides the major portion of items under the contract from its inventory, but must provide additional quantities “of the general character” of those kept and regularly sold, from other sources. The Department believes it places an undue burden on recipients to segregate minor quantities of an order delivered by sources other than the DBE, to eliminate them from regular dealer credit (60 percent). The Department proposes to clarify in § 26.55(e)(2)(iv)(A) that 60 percent credit of the cost of materials or supplies (including transportation costs) is appropriate when all, or the major portion, of the supplies under a purchase order or subcontract are provided from the DBE’s inventory, and when necessary, any additional minor quantities, of the “general character” as those kept and regularly sold, are delivered from other sources (e.g., the manufacturer). The Department proposes that the recipient’s system mentioned above should include a means to evaluate at the commitment stage, prior to contract award, the type and quantity of items the DBE intends to have delivered by other sources.

Negotiating the Price of Supplies

The Department made clear that to receive credit for supplying materials, a DBE must demonstrate ownership by negotiating the price of supplies, determining quantity and quality, ordering the materials, and paying for the materials itself. Some DBE suppliers conveyed that they are unable to compete with those prices negotiated by larger companies with established relationships with manufacturers, or who purchase supplies regionally in bulk; and that this scenario is a barrier for DBEs to fairly compete. They asked us to consider eliminating the need to negotiate price for certain bulk items, and still allow 60 percent goal credit. We considered this request but ultimately do not support it. The Department reaffirms the following statement set forth in official guidance posted on May 24, 2012:

The Department understands that there may be some kinds of transactions in which no subcontractor performs all of the four required functions (e.g., a prime contractor decides who will supply a commodity and at what price, with the result that a subcontractor cannot negotiate the price for the item). In such situations, the way the transaction occurs does not lend itself to the performance of a CUF by a DBE subcontractor, and it is not appropriate to award DBE credit for the acquisition of the commodity by the DBE subcontractor. All the DBE has done with respect to acquiring the commodity is to carry out, in a ministerial manner, a decision made by the prime contractor.¹²

DBE Manufacturers

The Department has learned from the OAs that the definition of a DBE manufacturer should be clarified to assist recipients in evaluating whether a DBE is a manufacturer, allowing 100 percent credit of the cost of supplies and materials it manufactures toward a contract goal (and a recipient's overall goal). In response, we propose revising § 26.55(e)(1) to clarify the meaning of the term "manufacturer." A DBE is a manufacturer if it owns or leases and operates a factory or establishment that produces the materials, supplies, articles, or equipment required under the contract. Manufacturing also includes blending or modifying raw materials or assembling components to create the product to meet contract specifications. A DBE does not meet the definition of a manufacturer, however, when it makes minor modifications to the materials, supplies, articles, or equipment.

Suppliers of Specialty Items

The Department proposes a new provision at § 26.55(e)(2)(iv)(C) to address a common scenario in which a DBE supplies items that are not typically stocked due to their unique characteristics (e.g., limited shelf life, or specialty items requested by contractors on an ad hoc basis). We consider a DBE supplier that operates in this manner as a regular dealer of bulk items that can receive 60 percent credit for the items only if it owns and operates its own distribution equipment. We propose that the recipient include in its pre-award system

¹² Official FAQs on DBE Program Regulations – Commercially Useful Function
<https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/dbe-guidance/official-faqs-dbe-program-regulations-49-cfr-26#Commercially>.

procedures to determine whether the DBE supplier of such items will operate its own distribution equipment in order to be entitled to 60 percent credit.

Subpart D—Certification Standards

11. General Certification Rules (§ 26.63)

To begin, we propose changing “recipient” to “certifier” throughout subparts D and E because firms often do not know that “recipient” refers to “certifier.”

Currently, § 26.73 is a catch-all section that mostly provides broad certification requirements. The overall objective of the proposed revisions is to create more succinct and clearer paragraphs for rules. For this reason, we propose changing the title of this section from “What are the other rules affecting certification?” to “General Certification Rules;” and redesignating § 26.73 to § 26.63. These changes provide context to the certification rules that follow and more accurately reflect the section’s purpose.

The proposal would restate and compile the rules discussed in current paragraphs (a) through (d) and (f) through (g) into new paragraph (a). The Department believes that the new paragraph (a) would increase readability, making the rules more accessible to the general public.

The most notable change in proposed § 26.63(b) pertains to firm’s owned and controlled by a parent or holding company. The current § 26.73(e) states that a DBE must be owned by individuals and not another firm. However, § 26.73(e)(1) provides an exception to the general rule and states that “if socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization, or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, you may certify the subsidiary if it otherwise meets all [other certification] requirements.” § 26.73(e)(1).

Because the text of current § 26.73(e) does not clearly define “parent,” “holding company,” or “tax, capitalization or other purposes,” the ambiguity created by these terms

makes the entire provision difficult to apply. The Department interprets the exception to the general rule to allow a DBE to be owned by another firm so long as the parent or holding company is owned and controlled by disadvantaged individuals. The proposal takes this approach. As we acknowledged in the 1999 preamble when we issued the rule, “[t]he purpose of the DBE Program is to help create a level playing field for DBEs. It would be inconsistent with the program’s intent to deny DBEs a financial tool that is generally available to other businesses.” (64 FR 5096, 5120 (Feb. 2, 1999))

Contrary to the goal stated in the preamble, the “general rule” in § 26.73(e) unduly excludes the disadvantaged owner from indirectly owning a firm through another entity—a flexibility that is available to non-DBEs. This restriction arguably puts the DBE at a competitive disadvantage with its non-disadvantaged competitors.

We are aware that the more complex a firm’s ownership structure is, the more difficult it is for the certifier to assess its eligibility. Our proposal would permit only one tier of ownership above the subsidiary DBE. No firm would be certified based on ownership of a business, control on the grandparent level (i.e., a DBE cannot be 51 percent owned by firm B, which is 51 percent owned by firm C, which is owned by the disadvantaged owner).

Also, the firm would still be required to meet all other certification requirements, including the PNW limit and business size standard, which may create eligibility issues related to the outside business interests and affiliation counting rules. The firm’s refusal to provide pertinent information about its parent or holding company would be grounds for denial or decertification for failure to cooperate.

The proposal also makes technical corrections to the portions of the section concerning Indian tribes and Alaska Native Corporations.

Overall, proposed § 26.63 simplifies and removes ambiguous language that exists within the current rule. It preserves common business practices while securing program integrity.

12. Business Size (§§ 26.65, 23.33)

Size standards in the DBE and ACDBE regulation are important for a number of reasons. They implement the statutory requirement that participants be small businesses. They provide a means to ensure that participation in the DBE and ACDBE Programs is not necessarily of indefinite duration: if a firm grows to exceed the applicable size standard, it ceases to be eligible for the applicable Program. The size standards are calibrated to help meet the objectives of the Programs, including permitting ACDBEs to compete in the transportation and airport concessions markets.

To be classified as a small business under the DBE Program, a business's gross receipts (including those of its affiliates) must satisfy two size standards. Per § 26.71(n), DBEs must meet a size limit for each North American Industry Classification System (NAICS) code corresponding to the firm's work. The size standard represents the highest amount of receipts a firm can have to be considered small. For example, an architecture firm, assigned NAICS Code 541310, cannot exceed \$11 million in average annual gross receipts (SBA's size limit for NAICS Code 541310) and still be considered small. DBEs must also meet a secondary size standard prescribed in the Department's surface reauthorization legislation, known as the statutory or secondary gross receipts cap. This provision is currently implemented through § 26.65(b) and (c), and to qualify as a DBE, a firm cannot exceed the size cap prescribed by this regulation. The NAICS code standard cap is expressed in either millions of dollars or number of employees whereas the statutory gross receipts cap is measured in average annual gross receipts.

The Federal Aviation Administration (FAA) Reauthorization Act of 2018 (Pub. L. 115–254) removed the secondary gross receipts cap under § 26.65(b) for purposes of eligibility for FAA-assisted work. Therefore, the revised rule published on December 14, 2020, reflects that

the secondary gross receipts cap of § 26.65(b) and (c) does not apply for purposes of determining a firm's eligibility for FAA-assisted work.¹³

Size limits are similarly placed on ACDBEs and firms applying for ACDBE certification, but under § 23.33, these are not currently aligned with the SBA limits based on individual NAICS codes. Section (a) of the current provision requires recipients to treat a firm as a small business eligible to be certified as an ACDBE if its gross receipts, averaged over the firm's previous 3 fiscal years does not exceed \$56.42 million. Unique types of businesses have size standards that differ—Banks and financial institutions; car rental companies; pay telephone companies; and automobile dealers.

Changing the Measurement for the NAICS Code Size Calculations from 3 to 5 Years

Section 1101(e)(3) of the BIL states that for purposes of the DBE Program's definition of a small business, the term is defined as used in section 3 of the Small Business Act (15 U.S.C. 632). The Small Business Runway Extension Act of 2018 (SBREA) (Public Law 115-324) amended Section 3 of the Small Business Act, which in turn changed the method used by the SBA to calculate business size under 13 CFR part 121. The SBA implemented this change on January 6, 2020, through a final rule.¹⁴ This rule changed the time period for calculating average annual gross receipts under 13 CFR part 121 from 3 years to 5 years but provided firms with the option to use either the 3-year calculation or the 5-year calculation until the 5-year period became mandatory on January 6, 2022.

The SBA final rule applies to FHWA, FTA, and FAA-assisted projects because the DBE regulation requires recipients to use the current SBA business size standard(s) found in the SBA regulation. On October 19, 2020, the Department issued guidance stating that until January 6, 2022, DBEs participating in FHWA, FTA, and FAA-assisted projects may choose

¹³ See 85 FR 80646 (Dec. 14, 2020) available at <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/december-14-2020-final-rule-gross-receipts>.

¹⁴ See 84 FR 66561 (Dec. 5, 2019) available at <https://www.federalregister.gov/documents/2019/12/05/2019-26041/small-business-size-standards-calculation-of-annual-average-receipts>.

between using a 3-year averaging period or a 5-year averaging period for the purposes of meeting the requirements of the DBE Program, as described in § 26.65(a), and after that date, the 5-year averaging period would become mandatory.¹⁵

The Department proposes to incorporate the 5-year calculation changes in § 26.65(a) to meet these statutory requirements. Under the proposed additional language, a firm would be eligible as a DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by the SBA regulation at 13 CFR 121.104, over the firm's previous five fiscal years.

Statutory Gross Receipts Cap

For the statutory DOT size cap found at § 26.65(b), DBEs are still subject to the 3-year averaging period because this 3-year period is specifically prescribed by the BIL. Therefore, while a DBE firm may elect to submit its average annual gross receipts for either the last 3 years or last 5 years to show it meets the size standard for a NAICS code under 13 CFR part 121, only the last 3 years may be considered for determining whether the firm also meets the DOT size standard prescribed by § 26.65(b).

Future Adjustments and Technical Amendments

In December 2020, the Department removed the requirement from part 26 to publish a Federal Register document informing the public of inflationary adjustments. In this proposed rulemaking, the Department will make a similar change to part 23 and will strike this language from paragraph (c) of § 23.33. Like § 26.65(c), the proposed § 23.33(c) language states that the Departmental Office of Civil Rights will publish the annually adjusted number on its webpage.¹⁶

We propose adding the word “passenger” to car rental companies, replacing “automobile dealer” with “new car dealer,” and remove reference to pay telephone operators.

¹⁵ See “DBE/ACDBE Size Standards” at <https://www.transportation.gov/DBEsizestandards>.

¹⁶ See <https://www.transportation.gov/DBEsizestandards>.

The size standards for these types of firms (with the proposed new titles) will remain the same, i.e., \$1 billion in assets for banks and financial institutions; \$75.23 million average annual gross receipts from passenger car rental companies' 5 previous fiscal years; and 350 employees for new car dealers.

We also propose removing the regulatory requirement for the Department to adjust the ACDBE size standards every two years. The Department last adjusted the ACDBE size standards in June 2012. We seek comments on whether any inflationary adjustment to the ACDBE size standards is needed at this time. The standards far exceed the SBA small business size limits placed on these types of businesses, and any adjustment must be made in recognition of the overall intent to narrowly tailor all program requirements. We are contemplating whether there is a need to further raise the current size standards, particularly given that we propose changing the period of measurement under § 23.33 from 3 to 5 years. It is the Department's view that raising the standards too high could result in smaller firms seeking to enter the concession industry having to compete with larger firms for space that is already limited in opportunities because of limited airport opportunities.

The Department seeks data on whether the additional categories with different size standards, like car rental companies, are still needed and if the size standards applicable to these categories require an adjustment. If proponents advise that an adjustment is needed, should the Department again use an inflation rate tied to purchases by state and local governments as it does in part 26 adjustments? We currently use data from the Department of Commerce's Bureau of Economic Analysis (BEA). The BEA measures constant dollar estimates of state and local government purchases of goods and services by deflating current dollar estimates by suitable price indexes. These indexes include purchases of durable and non-durable goods, and other services.

Gross Receipts of ACDBE Affiliates and Joint Venture Partners

The Department is proposing to address how an ACDBE must account for annual gross receipts of affiliates and joint ventures for size purposes, as provided in 13 CFR 121.104(d) and § 121.103(h)(3) of the SBA regulations, respectively. The Department will add a new paragraph (d) to § 23.33, making clear that an ACDBE that is a party to a joint venture must include in its gross receipts its proportionate share of receipts generated by the joint venture.

13. Personal Net Worth (PNW) Adjustment

Section 26.67(a)(1) provides a presumption of social and economic disadvantage for citizens (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. However, individuals who belong to a group(s) whose members are presumed socially and economically disadvantaged (SED) could be too wealthy to be considered economically disadvantaged for purposes of the DBE Program. As a mechanism for excluding those individuals from the DBE Program, in 1999, the Department adopted a PNW cap of \$750,000. A PNW cap means that, regardless of membership in a group whose members are presumed SED, any individual whose PNW exceeds the PNW cap is not considered economically disadvantaged. This helps ensure that the DBE Program is narrowly tailored and that only those individuals who are actually economically disadvantaged are eligible for the DBE Program.

The Department's 2011 final rule raised the PNW limit from \$750,000 to \$1.32 million to keep up with inflation.¹⁷ The Department now proposes raising the limit to \$1,600,000 (\$1.60 million) for the DBE and ACDBE Programs, based on a number of factors. In addition, the Department proposes establishing a method for adjusting the PNW cap in the future that would allow the DBE and ACDBE Programs to adjust the PNW cap in a timely

¹⁷ The \$750,000 PNW cap was adjusted using the CPI from the base year of 1989. As explained in previous rulemakings, 1989 was used as the base year because this was the year the Small Business Administration initially proposed the \$750,000 PNW cap. See January 2011 final rule, available at <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/dbe-laws-policy-and-guidance>.

and responsive manner while avoiding the delay and the administrative burden of a formal rulemaking.

The DBE Program adjusts the traditional definition of total personal net worth by excluding the disadvantaged owner's interest in the firm in question, equity in the owner's primary residence, and 50 percent of any assets held as community property with a spouse or domestic partner. The existence of a PNW cap highlights a tension between the DBE Program's multiple objectives. If the PNW cap is set too high, the program would include business owners who are not in fact economically disadvantaged. If the PNW cap is set too low, the program will exclude some truly disadvantaged business owners who could benefit from participating in the program and whose participation would advance the program's progress towards achieving equity in Federal contracting. A 2007 report commissioned by the Congressional Black Caucus Foundation, "Increasing the Capacity of the Nation's Small Disadvantaged Businesses," points out that businesses need resources to build capacity and be competitive, thus a PNW cap that is too low will limit the success of participating businesses.

In 2019, the Federal Aviation Administration (FAA) conducted listening sessions related to this rulemaking. Commenters noted that the current \$1.32 million PNW cap hinders the success of the ACDBE Program. They noted that restaurants in airports can have very high upfront financing needs related to build-out costs, covering initial operating costs, and the need to refresh their facilities midway through a typical 7 to 10-year lease. In addition, because of the nature of those types of expenses (and possibly the risk inherent with the airport concession industry), banks require a high amount of collateral for loans to finance those upfront expenses.¹⁸ Consequently, a PNW cap that is too low means that the business owners who have the means to provide the collateral for airport concessions with high upfront investment requirements are generally not eligible to participate in the ACDBE Program.

¹⁸ Fed. Aviation Admin., "49 CFR Part 23 Review Virtual Listening Session Subpart C" (Apr. 4, 2019).

Note, however, that the business owner's total household net worth can be used as collateral for a loan, so that while the PNW as defined by the program must be below the rule's cap, the amount available to use as collateral might be higher than the cap due to how PNW is calculated for the DBE and ACDBE Programs.

Rationale for \$1.60 Million Adjustment

As part of this proposed rulemaking, the Department conducted an original analysis to establish an appropriate PNW cap. We recognize that the determination of economic disadvantage is a comparative exercise, not an absolute determination made in isolation.¹⁹ In this analysis, the determination of an economically disadvantaged business is based on comparing the business owner to other business owners, since the wealth of business owners generally is likely higher than the wealth of the general population. Further, this analysis focuses on the wealth of business owners who are not presumed to be socially and economically disadvantaged: White, non-Hispanic men. To make this comparison, this analysis uses data from the 2019 Survey of Consumer Finances (SCF) to analyze the distribution of PNW among business owners to determine where a new PNW cap should be set.²⁰

In the SCF, the race and ethnic group for a household is based on the identification of the original respondent to the survey. The employment status and other demographic descriptors are based on the reference person for the family. The reference person used for the

¹⁹ As explained in the 1983 final rule, “[when] considering the economic disadvantage of firms and owners, it is important for recipients to understand that they are making a comparative judgment about relative disadvantage. Obviously, someone who is destitute is not likely to be in any position to own a business. The test is not absolute deprivation, but rather disadvantage compared to business owners who are not socially disadvantaged individuals and firms owned by such individuals.” 48 FR 33432, 33452 (July 21, 1983) available at <https://www.transportation.gov/sites/dot.gov/files/docs/Final%20Rule%2C%20July%2021%2C%201983.pdf>.

²⁰ The Survey of Consumer Finances (SCF) is a cross-sectional survey of primary economic units (PEU) in the United States conducted every three years from 1983 to 2019. The PEU consists of the economically dominant individual or couple and all individuals in the household that are financially dependent on the individual or couple. The SCF is sponsored by the Federal Reserve Board of Governors and the U.S. Department of the Treasury. The survey includes information on demographics, income, assets, and debts, among other topics. The SCF presents five replicates of each record as a method of approximating missing values in the data. Thus, the number of records in the public dataset is 28,885, five times more than the number of households that responded to the survey (5,777). See <https://www.federalreserve.gov/econres/scfindex.htm>.

household in the SCF data is the male in an opposite-sex couple, the older person in a same-sex couple, or the individual if the household is led by a single person. The SCF data allows for identification of the following race and ethnic group categorizations: White, Non-Hispanic; Black, Non-Hispanic, Hispanic, and Other. “Other” includes individuals who identify as Asian, American Indian, Alaska Native, Native Hawaiian, Pacific Islander, other race, and all respondents reporting more than one racial identification.²¹ Table 1 shows that the mean net worth of White, Non-Hispanic households is roughly 6 to 7 times higher than for Black, Non-Hispanic and Hispanic households. Even at the highest wealth levels, the disparity exists: the wealth of the top 10 percent of White households exceeds the wealth of the top 10 percent of Black, Non-Hispanic, and Hispanic households by a factor of 5.

Table 1. Total Net Worth of the Household by Race and Ethnic Group in 2019 (2019 dollars)

| Race & Ethnicity | Total Number of Households | Mean | Median | 90th Percentile |
|---------------------|----------------------------|-----------|-----------|-----------------|
| <i>ALL</i> | 5,777 | \$746,821 | \$121,774 | \$1,219,499 |
| White, Non-Hispanic | 3,980 | \$980,549 | \$188,985 | \$1,610,000 |
| Black, Non-Hispanic | 679 | \$142,330 | \$24,100 | \$324,901 |
| Hispanic | 490 | \$165,541 | \$36,031 | \$333,500 |
| Other | 627 | \$656,603 | \$74,500 | \$1,164,100 |

Source: 2019 SCF

The current PNW calculation for the DBE and ACDBE Programs allows the firm owner to omit the value of their primary residence and the value of the business for which the owner is applying for certification. In addition, the PNW definition includes only the assets of the firm owner, meaning that only half the value of any assets held jointly by the owner and their spouse (community property) are included in the calculation of PNW. Finally, applicants are instructed only to report the current value of any retirement accounts, after any early withdrawal penalties and applicable taxes are subtracted. During stakeholder engagement events and compliance reviews, the Department received many comments that the calculations

²¹ Codebook for 2019 Survey of Consumer Finances, Board of Governors of the Federal Reserve System, accessed at <https://www.federalreserve.gov/econres/files/codebk2019.txt>.

required to compute the applicable taxes and penalties on retirement accounts is highly burdensome to applicants and certifiers. Those calculations require a great deal of information including what portion of the account is the initial contributions versus subsequent capital gains or interest earned, applicable state and Federal income tax rates, and applicable state and Federal capital gains tax rates. In response to those comments, the Department proposes to exclude the full balance of retirement accounts in calculating PNW.

In addition, the Department proposes to increase the PNW cap to \$1.60 million in order to account for factors such as inflation, since the PNW cap was last updated 10 years ago. The Department's proposal to make future adjustments to the PNW cap is discussed later in this section.

The analysis underlying the proposal to increase the PNW cap constructs a proxy measure for PNW under the proposed definition of PNW for the DBE and ACDBE Programs. Using the 2019 SCF data, the proxy measure, shown in Equation 1, calculates PNW using measures of total household net worth, home equity (value in primary residence minus any home secured debt), active business equity (equity the individual owns in a business they actively manage), and current balance of retirement accounts.²² The calculation is performed separately for single individuals versus couples in order to account for adjustments for community property made in the definition of PNW for the DBE and ACDBE Programs. Only 50 percent of any jointly held assets between a couple (community property) should be accounted for in an individual's PNW according to that definition. Equation 2 shows the calculation for the proxy measure for PNW under an alternative proposal (not being proposed in this NPRM), which would include the full amount of the retirement account balances in the

²² The SCF data does not allow a distinction between all of an applicant's active businesses and the sole business the applicant might choose to certify as a DBE or ACDBE. Therefore, the PNW proxy measure used here removes the total value of all active businesses. As a result, this proxy measure for PNW could be under-estimating an applicant's true PNW.

calculation of PNW. In the SCF, net worth is reported using the current balance of any retirement accounts with no adjustments made for early withdrawal penalties or taxes.

If single, $PNW = \text{Net Worth} - \text{Home Equity} - \text{Active Business Equity} - \text{Retirement Accounts}$
 If married or living with partner, $PNW = (\text{Net Worth} - \text{Home Equity} - \text{Active Business Equity} - \text{Retirement Accounts}) / 2$

Equation 1. Personal Net Worth Calculation Under Proposal

If single, $PNW = \text{Net Worth} - \text{Home Equity} - \text{Active Business Equity}$
 If married or living with partner, $PNW = (\text{Net Worth} - \text{Home Equity} - \text{Active Business Equity}) / 2$

Equation 2. Personal Net Worth Calculation Under Proposal

In addition, the analysis includes only White, Non-Hispanic households with male reference persons identified as owning a business and who indicated they were self-employed or in a partnership as their occupational status. The focus is on self-employed business owners because the intent is to identify a comparison group for business owners who are likely to participate in the DBE and ACDBE Programs.

Table 2 shows the percentile distribution related to the estimated PNW calculation from the 2019 SCF for the proposal.

Table 2. Percentile Distribution of the Personal Net Worth for Male, White, Non-Hispanic, Self-Employed, Business Owners, as Calculated under the Proposal (2019 dollars)

| Percentile | PNW As Calculated Under Proposal |
|------------------|-------------------------------------|
| 10 th | - \$50 |
| 20 th | \$11,610 |
| 30 th | \$24,050 |
| 40 th | \$48,300 |
| 50 th | \$77,875 |
| 60 th | \$157,500 |
| 70 th | \$265,000 |
| 80 th | \$558,950 |
| 90 th | \$1,601,500 |
| 95 th | \$3,757,750 |

Source: 2019 SCF

Under the proposal that the Department is recommending in this NPRM, retirement accounts (along with home and business equity) would be removed from the calculation of PNW. The 90th percentile of PNW for male, White, Non-Hispanic self-employed business

owners is roughly \$1.60 million, which is \$1.04 million higher than the 80th percentile of \$0.56 million, which is in turn just \$0.29 million greater than the 70th percentile. Using the proposed definition of PNW with exclusion of all retirement accounts, the Department proposes to set the PNW cap at the 90th percentile of the group of male, White, Non-Hispanic, self-employed business owners (\$1.60 million). Determining a threshold beyond which an individual is considered to have accumulated wealth too substantial to need the program's assistance, we used the 90th percentile to identify a high level of wealth or income, which is a common convention.²³ Choosing a substantially lower threshold, such as the 80th percentile, would result in a cap that is lower than the current cap and would act to remove eligible businesses that are currently participating in the DBE and ACDBE Programs. Choosing a substantially higher threshold would increase the possibility that the program would no longer be sufficiently narrowly tailored. While the Department proposes to use the 90th percentile, it acknowledges that using a different threshold amount could also meet the goals of the program and requests comment from the public on how an appropriate PNW cap should be set.

Data from the 2019 SCF suggests that between 88.7 and 90.8 percent of self-employed business owners who are presumed to be socially and economically disadvantaged (i.e., individuals who are women, Hispanic, or non-White) have a PNW lower than the current PNW cap as PNW is currently defined.²⁴ Under the proposed cap of \$1.60 million, 92.6 percent of that group would fall under the cap, an increase of 2.0 to 4.4 percent.

²³ See Bricker, Goodman, Moore and Volz. "Wealth and Income Concentration in the SCF: 1989-2019" in "FEDS Notes" (Sept. 28, 2020) available at <https://www.federalreserve.gov/econres/notes/feds-notes/wealth-and-income-concentration-in-the-scf-20200928.htm>; see also Credit Suisse, "World Wealth Report 2020," at p. 29 and available at <https://worldwealthreport.com/resources/world-wealth-report-2020/>; see also Kochar and Cilluffo, "Income Inequality in the U.S. Is Rising Most Rapidly Among Asians," Pew Research Center (July 12, 2018) available at <https://www.pewresearch.org/social-trends/2018/07/12/income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians/>.

²⁴ The range on this estimate is the result of lack of information in the SCF on how to appropriately adjust the current balances of retirement accounts for early withdrawal penalties and taxes. The lower end of the estimated range (88.7 percent) assumes that the entire balance of retirement accounts is counted toward the PNW cap while the upper end (90.8 percent) assumes that no portion of retirement account balances are counted toward the PNW

Table 3. Comparison of Current and Proposed Methods

| <u>Label</u> | <u>Description</u> | <u>Cap Amount</u> |
|-----------------|--|-------------------|
| Current Method | Applicants must calculate current value of retirement accounts by determining any early withdrawal penalties and applicable taxes. | \$1.32 million |
| Proposed Method | Full current retirement account balance excluded from PNW calculation. | \$1.60 million |

Periodic Adjustments to the PNW Cap

The previous adjustment of the PNW cap in January 2011 used the CPI to reflect the increase in prices due to inflation. However, while household net worth is expected to grow in nominal terms over time, simply due to inflation, it is also subject to additional influences. For instance, the 2008 financial crisis significantly reduced household net worth but a CPI adjustment would not account for that change caused by the financial crisis. In consecutive periods of sustained economic growth that raises the net worth of all business owners in real terms (after adjusting for inflation), an adjustment using only the CPI could maintain a PNW cap that remains too low over time.

One alternative to using a CPI adjustment includes using data on the changes in aggregate household net worth data published quarterly by the Federal Reserve.²⁵ Another alternative is to calculate the 90th percentile of PNW for self-employed business owners using future editions of the SCF, which is published every three years. An advantage of using the Federal Reserve data is that the information is readily and frequently available whereas analysis of the SCF requires specialized statistical programming skills and the updates would be limited to a 3-year cycle.

Table 4 compares the nominal growth rates inferred by the CPI, the Federal Reserve measure of total household net worth, and the historic information of the 90th percentile of

cap. The Department believes that the true value is likely closer to 88.7 percent than 90.8 percent because the deduction for early withdrawal penalties and taxes is likely to be less than 50 percent, but a more precise estimate is not possible with the available information.

²⁵ Federal Reserve, "Financial Accounts of the United States: Balance Sheet of Households and Nonprofit Organizations Table Z.1," available at https://www.federalreserve.gov/releases/z1/dataviz/z1/balance_sheet/chart/.

PNW (calculated with exclusion of retirement accounts) for male, White, non-Hispanic, self-employed business owners from previous editions of the SCF. While the SCF data might be considered the most precise in terms of accurately representing the proposed cap based on the 90th percentile of self-employed business owners, the Federal Reserve data historically shows very similar dynamics and is more accessible because it is easily computed and is updated more frequently. The CPI does not adequately reflect the underlying dynamics of household net worth. Using the CPI to adjust the cap going forward would result in a cap that may block participation from a growing number of firms over time. Therefore, the Department proposes to make future adjustments to the PNW cap using growth in Federal Reserve measure of total household net worth from “Financial Accounts of the United States: Balance Sheet of Households and Nonprofit Organizations Table Z.1” using 2019 as the base year.

Table 4. Growth of CPI, Federal Reserve Total Household Net Worth, and Personal Net Worth 90th Percentile of White, Non-Hispanic, Male, Self-Employed Business Owners from the SCF (Indexed to 1992)

| Year | CPI | Federal Reserve Total Household Net Worth | Personal Net Worth 90 th Percentile from SCF |
|------|-------|---|---|
| 1992 | 100.0 | 100.0 | 100.0 |
| 1995 | 108.6 | 118.2 | 105.8 |
| 1998 | 116.2 | 154.1 | 183.0 |
| 2001 | 126.2 | 184.4 | 237.1 |
| 2004 | 134.6 | 228.2 | 327.3 |
| 2007 | 147.8 | 287.7 | 411.5 |
| 2010 | 155.4 | 263.9 | 325.3 |
| 2013 | 166.0 | 319.4 | 535.3 |
| 2016 | 171.1 | 383.5 | 498.0 |
| 2019 | 182.2 | 467.4 | 514.2 |

Based on the above analysis, the proposed rule would simplify the PNW calculation by excluding retirement accounts and changing the PNW cap for the DBE and ACDBE Programs from \$1.32 million to \$1.60 million. The proposed rule would increase that cap every 5 years using growth in the Federal Reserve measure of total household net worth from “Financial Accounts of the United States: Balance Sheet of Households and Nonprofit Organizations Table Z.1,” using 2019 as the base year. If household net worth were ever to

decline by that measure, the Department would not revise the PNW cap and thereby avoid a downward adjustment of the PNW. A downward adjustment of the PNW cap might cause certain firms to be decertified due to circumstances beyond their control and would be an undesirable outcome for the DBE and ACDBE Programs.

Note that the above analysis is broad-based in that it analyzes the distribution of PNW for all self-employed business owners and does not focus on the types of businesses that would be expected to be involved in the DBE and ACDBE Programs. The SCF does not contain sufficient detail on the industry of the business owners to permit a more focused analysis. There may be additional industry-specific factors that warrant consideration, and we invite comment on what factors could be considered for further analysis.

The Department requests comment on the proposed \$1.60 million PNW cap and seeks comment on whether the cap for the ACDBE Program should be different than the cap for the DBE Program. If recommending that the PNW cap be different than \$1.60 million, we request data and information that can be used to support an alternative PNW cap.

Rules for Reporting PNW

The Department proposes revisions for clarity and enhanced specificity. Our goal overall is to remove the ambiguity and confusion that we have seen caused by the current rules for reporting PNW. To start, we would like to remove any consideration of state marital laws or community property rules when calculating the socially and economically disadvantaged owner's (SEDO) equity in the primary residence. It is neither appropriate nor practicable for the Department to interpret state marital laws or community property rules. Every state has its own laws and rules. The DBE Program is a Federal program governed by a Federal regulation.

We are also proposing a detailed explanation of "household contents" in § 26.68(e) because of disputes we have seen between owner-applicants and certifiers. One hundred percent of the contents of the SEDO's primary residence belong to the SEDO. The exception

is if the SEDO's spouse or domestic partner cohabits with the SEDO in the SEDO's primary residence; in that case, fifty percent of the value of all household contents is attributable to the SEDO, regardless of who acquired them and regardless of whether they were acquired before or after cohabitation.

Motor vehicles of any type belong to the individual who holds title to the vehicle. We would like comments on how to treat leased vehicles under the definition of "household contents." Specifically, should a vehicle leased in the SEDO's name be considered an asset or should it be considered a liability?

The general purpose behind the proposed asset transfers rule is to prevent individuals from offloading wealth immediately before or concurrent with applying for DBE certification to stay within the PNW limit. To what extent might there be administrative difficulties in implementing the proposed rule that could outweigh the intended benefits?

In addition, as stated above, we would like to exclude all retirement assets from PNW calculations. Our rationale is twofold. The current rule states that the value of all assets held in vested pension plans, Individual Retirement Accounts, 401(K) accounts, etc. must be included, minus the tax and interest penalties that would accrue if the asset were distributed at the present time. The Department has witnessed multiple conflicts among certifiers, firm owners, accountants, etc. about how to determine the amount of tax and interest penalties. To eliminate this problem, and perhaps more importantly, to avoid the unintended consequence of penalizing individuals from saving for retirement, we propose fully excluding all retirement assets.

14. Social and Economic Disadvantage (§§ 26.5, 26.63, and 26.67)

Section 26.5 currently defines "socially and economically disadvantaged individual" as 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 the individual's identity as a member of a group and without

regard individual qualities. The social disadvantage must stem from circumstances beyond the individual's control. These individuals who are members of one or more of the following groups are rebuttably presumed to be socially and economically disadvantaged (SED): Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, women, and any additional groups whose members are designated as SED by the Small Business Administration (SBA), at such time as the SBA definition becomes effective.

Evidence and Rebuttal of Social Disadvantage

Section 26.61(c) states that certifiers must rebuttably presume that members of the designated groups identified in § 26.67(a) are socially and economically disadvantaged (SED). This means that individuals who are members of the designated groups do not have the burden of proving that they are (SED). In order to obtain the benefit of the rebuttable presumption, individuals must only submit a signed, notarized statement that they are a member of one of the groups in § 26.67(a). Applicants do, however, have the obligation to provide certifiers with information concerning their economic disadvantage. See § 26.67.

Section 26.63(a)(1) provides that if, after reviewing the signed, notarized affidavit of membership in a § 26.5 presumptively disadvantaged group, the certifier has a well-founded reason to question the individual's claim of membership, the certifier must require the individual to present additional evidence of group membership. See §§ 26.61(c) and 26.63(b)(1). The current rule states that in making such a determination, the certifier must consider whether the person has held himself/herself/themselves out to be a member of the group over a "long period of time" prior to applying for certification and whether the person is regarded as a member of the group by the relevant community. The certifier may require the individual to produce additional evidence of group membership. If, after reviewing the evidence, the certifier determines that the individual is not a member of a § 26.5 group, the

individual may elect to apply for certification by demonstrating social and economic disadvantage on an individualized basis.

Current § 26.67(a)(1) states that certifiers 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 individuals, as defined by the SBA, are SED. Each owner claiming the presumption must submit a signed, notarized affidavit as evidence of the claim. Section 26.67(b)(2) provides that if a certifier has 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, the certifier may, at any time, start a proceeding to determine whether the individual's presumption of social and economic disadvantage should be deemed rebutted. Section 26.67(b)(3) explains that the certifier bears the burden of demonstrating, by a preponderance of the evidence, that the individual is not SED. The certifier may, however, require the individual to produce information relevant to the determination of the individual's disadvantage.

The Department acknowledges there has been confusion caused by the definition of SED in § 26.5, the provisions governing group membership determinations, in § 26.63 and the rebuttal of social and economic disadvantage provisions in § 26.67.

To more clearly address group membership, the presumption of social and economic disadvantage that attaches to group membership, and the rebuttal of presumed social and economic disadvantage, we propose several changes. Current § 26.63(b)(1) explains that when questioning an individual's group membership, the certifier "must consider whether the person has held himself out to be a member of the group *over a long period of time* prior to application for certification ..." (italics added). Without that requirement, a White male (for example) could suddenly discover he has Black ancestry and apply for DBE certification based on that recent discovery—even though he has never held himself out as Black, and he

would likely have no evidence that the Black community regards him as a member of the Black community. The Department has not previously defined what constitutes “a long period of time.” Because of confusion expressed by certifiers and applicants alike, the Department now proposes defining “a long period of time” as a period of at least five years. We also propose adding procedural requirements to be followed by the certifier and the owner of the applicant firm claiming group membership in the event that the certifier questions the owner’s claim of group membership.

We also propose folding the requirements of § 26.63 into § 26.67 for clarification and simplicity. Under § 26.67(a)(1), an individual claims the presumption of social disadvantage by filing a signed, notarized Affidavit of Certification. We propose changing the name of this document to Declaration of Eligibility (DOE). Like the Affidavit of Certification, the DOE is found in the Uniform Certification Application (UCA).

In the current rule, the definition of social disadvantage is immediately followed by the definition of economic disadvantage; both definitions precede the provisions regarding rebuttal of each type of disadvantage. We propose that the social disadvantage rebuttal provisions immediately follow the definition of social disadvantage, and likewise for economic disadvantage (i.e., definition immediately followed by rebuttal provisions. It is our view that this reordering will increase efficiency for certifiers and applicants when trying to find the rules for each type of disadvantage.

To claim a presumption of social disadvantage, an owner must only check the box(es) on the DOE for which group(s) the individual is a member, and sign and submit the DOE with the firm’s UCA. To claim the presumption of economic disadvantage, the owner must sign and submit the DOE as well as a PNW statement.

We propose adding a reminder in § 26.67 that the signed DOE is the *only* evidence of group membership an individual must provide with the UCA. We want to add this reminder because we have seen instances in which certifiers burden applicants to provide additional

evidence of group membership as a matter of course without a well-founded reason to question the individual's claim of membership. This NPRM would clarify that certifiers must not request additional evidence as a matter of course. Additional evidence may only be requested if the certifier has a well-founded reason to question the individual's claim of group membership. When group membership is in question, § 26.61(b) states that the firm seeking certification bears the burden of demonstrating, by a preponderance of the evidence, that it meets the regulation's group membership requirements.

In the proposed rule, we are placing timelines/deadlines in § 26.67 to ensure that the process of questioning group membership is not unduly delayed by certifiers or applicants. For example, if a certifier properly asks an owner for additional evidence of group membership, the owner would be required to submit the evidence within 15 days of the certifier's written explanation. If the owner timely submits the evidence requested, the certifier would be required to notify the owner in writing, no later than 30 days after receiving the evidence, of the certifier's determination of group membership.

We emphasize that the presumption of social disadvantage remains rebuttable. If a certifier has a reasonable basis to believe that, despite membership in one of the groups whose members are presumed socially disadvantaged, the individual is not, in fact, socially disadvantaged, the certifier may commence a proceeding to determine whether the presumption of social disadvantage should be regarded as rebutted. When social disadvantage is questioned, § 26.67(b)(3) states that the certifier bears the burden of proof. We point out that current § 26.67(b)(2) states that a certifier *may* (not *must*), at any time start a proceeding under § 26.87 to determine whether an individual's presumption of social disadvantage should be rebutted. We believe that if a certifier has a well-founded basis to question an individual's social disadvantage, it *must* initiate a proceeding under § 26.87, and we have adjusted this language accordingly. We propose allowing the owner of a firm that is denied certification to submit a claim of individual disadvantage at any time, without regard to the waiting period in

§ 26.86(c). A certifier would not be able to require the individual to file a new application; the individual would be permitted to simply amend the original application.

Evidence and Rebuttal of Economic Disadvantage

Under the current rule, an owner claiming a presumption of economic disadvantage must, in addition to submitting a signed DOE, demonstrate that the owner's PNW does not exceed the DBE Program's current \$1.32 million limit. The owner must also submit a signed statement of PNW, with appropriate supporting documentation, using the Department's PNW Statement without change or revision.

As explained in current guidance, the DBE Program "should not include people who can reasonably be regarded as having accumulated wealth too substantial to need the program's assistance."²⁶ For example, there are instances in which an individual's PNW is below the program's cap, yet the individual is not, in fact, economically disadvantaged. Thus, if a certifier has an articulable reason, on a case-by-case basis (and not as a matter of course) to believe that an individual whose PNW does not exceed the cap should not be regarded as economically disadvantaged, the certifier is permitted under § 26.67(b)(1)(ii)(A) to evaluate whether the individual has the ability to accumulate substantial wealth (AASW). Under the current rule, the individual's presumption of economic disadvantage will be rebutted if the certifier finds that the individual does have the AASW. In making its determination under the current rule, a certifier may consider factors such as, but not limited to: (1) whether the average adjusted gross income of the owner over the most recent three year period exceeds \$350,000; (2) whether the income was unusual and not likely to occur in the future; (3) whether the earnings were offset by losses; (4) whether the income was reinvested in the firm

²⁶ See "Official Questions and Answers (Q&A's) Disadvantaged Business Enterprise Program Regulation (49 CFR Part 26)" available at <https://www.transportation.gov/sites/dot.gov/files/docs/mission/civil-rights/disadvantaged-business-enterprise/55851/official-questions-and-answers-disadvantaged-business-enterprise-program-regulation-49-cfr-26-4-25.pdf> and "Official FAQs on DBE Program Regulations (49 CFR 23) - Section 23.31; 27.67(b)(2) - Personal Net Worth" available at <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/official-faqs-dbe-program-49-cfr-23>.

or used to pay taxes arising in the normal course of operations by the firm; (5) other evidence that income is not indicative of lack of economic disadvantage; and (6) whether the total fair market value of the owner's assets exceed \$6 million.

During the last eight years, the Department has seen, on multiple occasions, that certifiers and applicant firms misinterpret the AASW rule. For example, they often treat the six factors as a checklist and unduly focus on the owner's adjusted gross income while ignoring the other five factors, rather than doing a holistic evaluation. In addition, calculating whether an owner's assets exceed \$6 million has resulted in overly complex calculation disputes, while again largely ignoring any other factors that could have indicated an AASW. Thus, the Department proposes eliminating the six factors in favor of a more "big picture" approach. Specifically, the provision would instruct certifiers to evaluate whether a reasonable person would consider the owner economically disadvantaged. Indicators could include (but are not limited to) ready access to wealth, lavish lifestyle, income or assets of a type or magnitude inconsistent with economic disadvantage, or other circumstances that economically disadvantaged people typically do not enjoy. We emphasize that inquiry would have no effect on the PNW asset exclusions or limitations on inclusions. It would entirely disregard liabilities. We welcome comment on whether this proposed replacement swings the pendulum too far in the opposite direction of the current AASW provision. In other words, are the proposed elements too vague in nature and result in just as much confusion and dispute as the current provision? Would the proposal lead to inconsistent application of the regulation? If so, what factors should be considered in making an AASW evaluation?

Individualized Determinations of SED Status

Because the DBE Program is intended to be as inclusive as possible—without compromising the program's integrity and while remaining narrowly tailored—firms whose owners are not presumed socially and economically disadvantaged can still apply for certification. The DBE Program regulation has allowed for this since the program began in

1983. Appendix E of the regulation provides guidance for evaluating disadvantage on an individualized basis under § 26.67(d) (§ 26.67(e) in the proposed rule). The Department regularly receives feedback from certifiers, applicants, and other stakeholders about the excessive burdens related to gathering and submitting evidence under appendix E, particularly the evidence of economic disadvantage. Though not the Department's intention, much of the required evidence of economic disadvantage can be more challenging to obtain than necessary. The list of required evidence also focuses largely on the stature of other firms rather than on the applicant firm. Multiple stakeholders have told us that the standards set forth in appendix E are nearly impossible to meet. The standard is "preponderance of the evidence," but in practice is "clear and convincing." The latter is a much more stringent burden to bear. Thus, we propose replacing appendix E with flexible, less prescriptive rules that will better allow certifiers to make accurate case-by-case determinations using the correct "preponderance of the evidence" standard. Further, we want to reduce the cost and hours burden for applicants to submit evidence of their individual disadvantage.

15. Ownership (§ 26.69)

The Department proposes considerable revisions to § 26.69, which has remained largely unchanged since 1999. The changes are essential because disadvantaged ownership is the foundation of the DBE Program.

Burden Reduction, Simplification, and Consistency

The revisions would preserve the section's programmatic objectives and effect but articulate the operative concepts differently. We believe that the revisions would serve several related goals: burden reduction, simplification, improved understanding and thus compliance, streamlined administration, consistent results, and enhanced program integrity. We also think that revised § 26.69 can drive efficiency gains across the board. The proposed changes would further these goals by stating rules and intent plainly and directly. They would more logically organize the material. Our proposed changes would replace language that has proved

confusing, impractical, awkward, or outdated, with text that we believe corrects or mitigates these shortcomings. Clear rules and consistent results are what stakeholders tell us they value above all. Accordingly, we propose several bright-line rules that we believe will make certification easier to obtain, maintain, and monitor. The overarching objective of subpart D, after all, is to certify eligible firms.

The Department's proposed revisions would describe and prescribe. It is more flexible than the language it replaces. At the same time, the revised rules would provide detail when detail can resolve longstanding misinterpretations. The intent is to confront interpretive challenges directly and unambiguously. A measure of certainty should provide all stakeholders peace of mind. The proposed revision would also make the certification process quicker and less intrusive. To the extent possible, we prefer to leave business decisions to business owners and give certifiers similar latitude to determine how the rules apply to individual applicants and DBEs. They are in the best position to make these judgments. Broad anti-abuse rules, rather than long lists of suspect transactions, safeguard the integrity of the ownership requirements. We consider the revision to be notably more user-friendly than the present § 26.69.

The Department has come to believe that current § 26.69(a) is too complex. It is more a chronology or summary of ownership-related events than a statement of the core requirement for eligibility. It is also out of sync with current business realities. The revised rule reworks and simplifies the essential concepts and moves them to places in § 26.69 that correspond to their role in explaining the general rule. There, we develop and update those concepts and cross-refer to related provisions.

The current § 26.69(b), streamlined and restated as the general rule, would become the new § 26.69(a). The restatement would overtly tie the rules that follow to the general rule that SEDOs must own at least 51 percent of the business. It would explain concisely and precisely the import of the provision and what the firm must prove to be eligible for certification.

Reasonable Economic Sense

The proposed new § 26.69(b) replaces the concepts of “real, substantial, and continuing” (RS&C) capital contributions and ownership, and the binary alternative of “pro forma” ownership, with the broader, more flexible requirement that transactions affecting ownership make reasonable economic sense (RES). The revision would accomplish several objectives, not least of which are objectivity and neutrality. The revision would recast the requirement in terms less awkward and more descriptive. The revision would also address the rigidity of the RS&C, avoiding outcomes (e.g., ineligibility determinations based on a one-dollar deficiency in contributed capital) that can seem capricious.

We propose retiring RS&C in favor of a more workable standard, one that can adapt to unforeseen transactions and business structures. RES is less absolute. It acknowledges that substance trumps form and one size never really fits all. Our objective is to encourage certifiers not just to “consider” all pertinent facts but to *weigh* them in firm-specific context. The current language obscures the fact that certifiers have always had the freedom and discretion to make these judgments. We believe that the proposed revision would make certifiers more confident and business owners less wary. Paragraph (b) of the revised § 26.69 describes the proposed standard’s components and signals that reasonable proportionality, economic effect, and common sense are the new touchstones. We intend, in the “benefits and burdens” clauses, to give certifiers a more useful yardstick for assessing initial and continuing eligibility.

The proposed revisions to § 26.69(c) would define the new term “investments” to include purchase of ownership interests, capital contributions, and certain gifts, *and* additional investments after acquiring the ownership. This would be consistent with the current RS&C standard but more straightforward and less strained. Stakeholders frequently do not understand what the current language means. A purchase, for example, is not a capital contribution, and investments “to acquire” ownership are not the only ones to which the rules

apply. The single-sentence numbered provisions under new paragraph (c) attempt to remedy these deficiencies in the current rule, which too often confuse SEDOs who are not versed in certification nuances.

The paragraphs under § 26.69(c) would also streamline the rule and make it more equitable. The proposed § 26.69(c)(3) would treat all joint owners the same, regardless of marital status or state-specific community property law. We intend for the same rules to apply to all SEDOs and to all cases of joint ownership regardless of jurisdiction. Hence the simple statement that ownership tracks title. Paragraph (c)(4) clarifies which gifts count as investments, simplifies the analysis, and minimizes opportunities for gamesmanship.

These proposed changes would permit us to eliminate the marital property rule in current § 26.69(i) and extend the renunciation and transfer remedy to all joint owners. We would remove as unnecessary the complex machinery of current § 26.69(h), which applies when a non-disadvantaged individual gifts or transfers interest or other assets without adequate consideration. The presumption and two-pronged rebuttal/higher standard of proof is overly complex. The streamlined, modernized proposed rule would work in better coordination with the rest of part 26 and would enable us to simplify or eliminate corresponding rules in other sections, e.g., in §§ 26.67 and 26.71. Revised § 26.69(c), in short, should minimize haggling, save resources, and improve program administration. We expect it to produce speedier, more accurate results that do not vary by state.

The proposed § 26.69(d) explains how the rules for purchases differ from those for capital contributions, and they provide simple but significant backstops. These rules tie into concepts introduced in preceding paragraphs and replace rules that have proved nearly impossible to administer effectively. The revised rule explains the concepts more objectively and more directly than do current § 26.69(c) through (f).

The proposed revisions to § 26.69(e) would provide new, bright-line rules for debt-financed capital contributions and purchases. They would replace disjointed and often

misunderstood provisions. The proposed would substitute an RES analysis for RS&C and go a step further toward clarity and preventing abuse. They give effect to longstanding Departmental and Congressional intent and, we believe, substantially reduce certifier burden. We intend for them to significantly reduce administrative bottlenecks. They should preempt at least some frivolous or premature applications and give certifiers a clear reason for rejecting the ones that get through.

Paragraph (f) revisions bring Department policy into the regulation. We want to make clear that legitimate efforts to correct impediments to certification are not evasive or subversive. The ultimate objective remains certifying eligible small, disadvantaged businesses with as little hindrance as possible.

The three, short anti-abuse rules in proposed paragraph (g) would put firms on notice of particular, and logical, results of the RES requirement and would give certifiers explicit authority to streamline the analysis.

We believe that all of the proposed revisions would save firms and certifiers time and significantly improve program administration. We expect to see results that are more accurate and more equitable.

16. Control (§ 26.71)

Control of DBEs has been part of the certification eligibility criteria since the program began in 1983. Certifiers are required to analyze the extent to which disadvantaged individuals control their business in both substance and form. However, the Department believes that strict requirements about non-disadvantaged participants hinder the certifier from conducting a meaningful analysis of whether the disadvantaged owner controls the firm. As such, we are proposing significant revisions to the control provisions found in § 26.71. The rationale of our revisions is to give certifiers flexibility when determining whether the SEDO controls the firm. Thus, we recommend replacing the current checklist-type requirements with

less prescriptive rules. The proposed revisions would also give applicants more flexibility in demonstrating control.

The proposed revisions would shift the focus from the actions and experience of non-disadvantaged participants in the firm to those of the SEDO. The proper and originally intended inquiry is whether the SEDO controls the firm through managerial oversight, revocable delegation of authority, and critical and independent decision-making. The proposal would also streamline § 26.71 by removing redundancy, and in some instances, excessively burdensome requirements.

The Department proposes to add general rules to § 26.71(a). Proposed § 26.71(a)(1) would state that disadvantaged owners who own at least 51 percent of the firm must also control it. Proposed § 26.71(a)(2) would add a fine point that the certifier must consider all relevant facts together in context.

Because control requires the certifier to make a fact-intensive determination, proposed rule § 26.71(a)(3) would state that a firm must have operations in the type of business that it seeks to perform as a DBE before it applies for certification. We believe there are two benefits to this proposal. First, the proposed rule would allow the certifier to evaluate the disadvantaged owner's control of the firm based on demonstrable actions that the owner takes to run the business. Second, the proposed rule would help certifiers better allocate their resources by relieving them from the burden of evaluating applications from firms that are not conducting business and have no ability to bid on DBE contracts. The proposed rule would exclude firms that are applying for ACDBE certification, since many potential ACDBEs have no operations before obtaining a contract.

SEDO as the Ultimate Decision Maker

The Department proposes § 26.71(b) to clarify that a disadvantaged owner must be the ultimate decision maker. The rule reminds certifiers and firms that the control inquiry requires an analysis that goes beyond formalities shown in business structure, governing documents,

and policies. What the firm must prove under this provision is that the SEDO “runs the show” by having the final say on all matters. This means that the firm’s chain of command must be led by the disadvantaged owner, whether in a small startup business or a large multifaceted corporation. Except under narrow circumstances described in § 26.71(c)(4), other participants at the firm must faithfully carry out every decision that the SEDO makes.

Governance

Proposed rule § 26.71(c) combines the requirements of the current § 26.71(c) and (d) rules and clarifies what a firm must prove to demonstrate control of the firm’s governance.

The proposal simplifies current § 26.71(c) into one general rule that precludes provisions that require non-SEDO concurrence or consent for the SEDO to act. The proposed rule would simplify the introductory language of current § 26.71(d), denoting that the disadvantaged owners must “possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.” This phrase comes from an earlier rule that the Department intended to remove after it issued the more specific provisions of § 26.71(e), (f), and (g). The phrase has caused certifiers to misinterpret this broad, introductory language as the rule itself, independent of the precise paragraphs (d)(1) through (3).²⁷ We have previously opined that the introductory language is merely prefatory and does not constitute an eligibility requirement independent of paragraphs (d)(1) through (3).²⁸

The Department intends the proposed rule to reflect what is described in the current § 26.71(d)(1) through (3)—that the disadvantaged owner must control the firm by holding the

²⁷ See, e.g., 17-0058 ARS Electric, LLC (Oct. 10, 2017) at 2 (omitting any eligibility analysis under paragraphs (d)(1) through (3)). <https://www.transportation.gov/sites/dot.gov/files/data/dbe/appeal-docs/17-0058%20ARS%20Electric%20FINAL-REDACTED.pdf>

²⁸ See, e.g., 13-0073 C2PM, Inc. (Nov. 7, 2013) (certifier disregarded SEDO’s holding of highest officer position and demonstrated control of board of directors; decision reversed) and 16-0017 Tamarac Land Surveying, LLC (Apr. 28, 2016) (certifier cited introductory language of § 26.71(d) to support denial but did not dispute SEDO’s ability to control board of directors; decision reversed).

highest officer position and having voting authority over other directors, partners, or members. We believe the proposal would resolve confusion and clarify that the rule is about the disadvantaged owner's governance of the firm.

We also propose to clarify the requirement that “disadvantaged owners must control the board of directors.” Our proposal outlines voting and quorum provisions that would prevent a disadvantaged owner from controlling the board of directors. The proposal also clarifies that disadvantaged individual(s) must have *present* control of the board of directors, meaning they cannot prove eligibility under § 26.71(c) based on a disadvantaged owner's power as a majority shareholder to later change the composition of the board of directors. See § 26.73(b) (certifier must evaluate eligibility based on present circumstances). The Department affirms many certification denials each year because of disqualifying voting and quorum provisions in the firm's bylaws. We believe that adding more explicit language to the rule would encourage firms to amend bylaw provisions that do not conform with the rule before applying for DBE certification.

The only exception proposed under § 26.71(c) is for extraordinary actions detailed within proposed § 26.71(c)(4). The Department believes that non-SEDOs should have the power to block extraordinary measures that would affect their ownership rights. We believe that protecting minority ownerships through governing provisions is generally permissible and consistent with standard business practices.

Expertise

The Department proposes revisions to § 26.71(d), to incorporate a portion of the current § 26.71(g) with minor adjustments. The proposed rule would clarify that the SEDO must have an overall understanding of the firm's business operations to the extent necessary to make managerial decisions. Administrative decisions made by the disadvantaged owner do not prove control unless the firm primarily performs administrative business services for its customers.

The owner of a DBE does not need to be an expert in every aspect of the firm's operations, as we explained in the 1997 supplemental notice of proposed rulemaking (SNPRM): "with respect to expertise, the disadvantaged owners must, in our view, generally understand and be competent with respect to the substance of the firm's business." (62 FR 29548, 29568 (May 30, 1997))

The understanding that the owner should have varies by the nature and complexity of the firm's operations. For example, a disadvantaged owner of a large electrical firm may not be an electrician but would need to know enough about the firm's electrical work and processes to make managerial decisions. In contrast, an owner of a three-employee firm that provides lawn services may only need general managerial expertise to control the firm.

SEDO Decisions

Proposed rule § 26.71(e) incorporates a portion of the current § 26.71(g) with minor amendments. Based on several appeal decisions, the Department believes that this rule is too subjective, since it requires that the owner must have "the ability to" make decisions. To correct this issue, the proposed rule would direct the inquiry to whether the SEDO makes major decisions that affect the firm's prospects. The proposed rule would have three requirements. First, the firm would be required to show that the SEDO receives pertinent information from subordinates to demonstrate that other participants are not making important decisions without the owner's knowledge. Second, the firm the firm would be required to show that the SEDO critically analyzes the pertinent information, based on the SEDO's knowledge demonstrated in § 26.71(d). Failure to prove this means that the owner simply "rubber-stamps" what another participant has to say about an issue. The proposed rule, however, would not preclude the owner from asking questions and consulting other participants as the owner analyzes the information. Finally, the SEDO would need to make independent decisions after receiving and analyzing the pertinent information.

Delegation

The Department proposes to simplify and restructure the current delegation rule. As we stated in the 1997 SNPRM, “[t]he more successful or complex a firm becomes; the more inevitable delegation becomes. It is fanciful to imagine that one or a few owners can or should do, or be prepared to do, everything that a firm does. As long as the owners can take back authority they have delegated, retain hiring and firing authority, and continue to ‘run the show’ for the company, they control it, notwithstanding delegation of some authority and functions.” (62 FR 29548, 29568 (May 2, 1997))

The proposal makes clear that the disadvantaged owner must have the power to revoke the delegated authority, but also emphasizes that the firm must show that an obvious chain-of-command exists within the company, which is recognized by all employees and associates of the business.

Finally, the proposed paragraphs describe what delegated actions by non-disadvantaged individuals are permissible under § 26.71.

Independent Business

The Department proposes to make minor amendments to current § 26.71(b) and redesignate the provision as § 26.71(g). The proposed rule would clarify that a firm must prove that it is independently viable, notwithstanding a relationship with another firm from which it receives or shares essential resources. A pattern of regular dealings with a single or small number of firms does not necessarily make a firm ineligible for certification so long as it is not acting as a “front” or “pass-through” for another firm or individual. For example, the fact that a trucking firm in a rural part of a state provides services to the only prime contractor in town does not necessarily make the firm ineligible under the proposed rule, unless the certifier determines that the applicant firm is set up as a conduit for another firm or person who is not eligible to participate in the DBE Program. The proposal also clarifies that relationships and transactions between firms of which the SEDO has 51 percent ownership

and control does not violate the rule, although the relationship may raise a business size/affiliation issue.

Franchises

The Department proposes redesignating the current provision § 26.71(o), which is commonly referred to as the franchise rule, to § 26.71(h).

NAICS Codes

The Department proposes redesignating the current provision § 26.71(n), which is commonly referred to as NAICS rule, to § 26.73 with minor technical corrections.

Removed Provisions (§ 26.71 (i), (j), (k), (l), (m), (p), and (q))

The current language of § 26.71(i), (j), (k), (l), (m), (p), and (q) relates to the concept that non-disadvantaged individuals can participate in any DBE firm, as long as disadvantaged individuals control the firm. The Department's proposed rules offer more than adequate means to decide whether an owner controls his or her firm, with or without the involvement of non-disadvantaged participants. The proposal would eliminate redundancy but also remove the tendency of certifiers to rely in accurately on these provision as catch-all grounds for ineligibility whenever a non-disadvantaged participant is involved or present in the firm's operations. The Department has stressed for decades that this is inappropriate, and that the proper inquiry is whether the disadvantaged owner controls the firm notwithstanding the participation of other employees, family members, or non-disadvantaged owners.

For example, the Department proposes to remove § 26.71(k), commonly known as the "family business" provision, to eliminate an eligibility criterion that is often misused by certifiers. Family-owned firms have long been a concern in the program. The December 1992 NPRM proposed that certifiers treat non-disadvantaged family members the same as other non-disadvantaged participants in DBEs. The participation of family members in a firm should not be viewed as meaning that a disadvantaged individual fails to control a firm, as stated in the December 1992 NPRM. The May 1997 SNPRM provided explicitly that if the

threads of control in a family-run business cannot be disentangled, such that the certifier can specifically find that a woman or other disadvantaged individual independently controls the business, the certifier may not certify the firm. The 1999 final rule maintained this line of thinking—a business that is controlled by the family as a group, as distinct from controlled individually by disadvantaged individuals, is ineligible.

The current language of § 26.71(k) stresses that non-disadvantaged individuals can participate in any DBE firm, as long as disadvantaged individuals control the firm. This is duplicative of revisions proposed in this NPRM. The Department believes that the proposed provisions offer more than adequate means to determine whether a SEDO controls his or her firm, with or without the involvement of non-disadvantaged or disadvantaged individuals and relatives.

The Department recommends removing current § 26.71(h), commonly referred to as the “license rule,” to eliminate redundancy with proposed rules § 26.71(d) and (e) and to eliminate state law requirements from the rule as we propose in revisions to the personal net worth and ownership provisions.

The current § 26.71(h) directs the certifier to deny certification if the SEDO does not hold a license or credentials that a state or local law requires to own and control the firm. The Department believes that the UCP is the proper authority on state or local license requirements since it is more familiar with the law within its state, and Departmental personnel are not experts in state and local law. For example, appeal cases often provide two opposing interpretations of a state or local law, with no citation to the law at issue, and fail to explain how the law does, or does not, apply to the SEDO. The Department remands in these circumstances for the certifier to decide and interpret which license state or local law requires the SEDO to hold under the rule.

More often however, a state or local law(s) only require that someone employed at the firm hold a license to perform specific work. In the preamble to the 1999 final rule, the

Department explained that when “State law allows someone to run a certain type of business (e.g., electrical contractors, engineers) without personally having a license in that occupation, then we do not think it is appropriate for the certifier to refuse to consider that someone without a license may be able to control the business.” (64 FR 5096, 5119-20 (Feb. 2, 1999)) The current language of § 26.71(h) adopts the view that the Department expressed in the preamble and allows the certifier to consider the SEDO’s lack of a license as “one factor” in determining control.

The Department reversed many appeal decisions where the “one factor” rule is either misapplied or not considered in context with the firm’s overall operations. For example, the rule does not disqualify trucking firms if the SEDO does not have a commercial driver’s license.²⁹ The Department believes proposed rules § 26.71(d) and (e) better describe the proper control inquiry than the current “one factor” rule, making § 26.71(h) therefore redundant. The pertinent questions, which exist regardless of licensing, are whether the SEDO has enough of an overall understanding of the business to run the firm and whether the SEDO makes independent decisions.³⁰

Subpart E—Certification Procedures

17. Technical Corrections to UCP Requirements (§ 26.81)

The Department would like to make minor technical changes to sections (a) and (g), removing language that is outdated and no longer applicable.

18. Virtual On-site Visits (§ 26.83(c)(1) and (h)(1))

Ensuring that only eligible firms participate in the DBE Program is central to the integrity of the program and critical to recipient compliance activities. The Department

²⁹ See, e.g., 18-0003 Clear Creek of Salisbury, Inc. (May 29, 2018) (owner did not need own commercial driver’s license (CDL) to control hauling firm); see also 18-0007 K-Kap, Inc. (May 15, 2018).

³⁰ See 13-0064 J&L Steel, Inc. (Aug. 23, 2013) (absence of electrician license did not impair owner’s control of large electrical contracting business when she did not perform electrical work); 13-0112 Nancy’s Tree Planting, Inc. (Jan. 10, 2014) (no home improvement contractor license needed to control commercial landscaping business).

believes that regularly updated on-site reviews are an extremely important tool in helping prevent fraudulent firms or firms that no longer meet eligibility requirements from participating in the DBE Program. See 76 FR 5083, 5090 (Jan. 28, 2011). We acknowledged in the 2011 final rule that on-site visits can be time and resource-intensive, but the Department encouraged recipients to conduct updated on-site visits of certified firms on a regular and reasonably frequent basis. The current rule instructs certifiers to perform an on-site visit at the firm's principal place of business to interview firm officers and evaluate their work histories and/or résumés. The rule also requires certifiers to visit job sites the firm is working on at the time of its eligibility review.

The Department proposes amending § 26.83(c)(1) to make permanent the virtual on-site visit flexibilities announced in guidance in response to the COVID-19 pandemic.³¹ This would free up certifier resources to enable them to better administer other aspects of the DBE and ACDBE Programs, e.g., on-site monitoring of contractor compliance. Following the announcement of the Department's flexibilities, we have received feedback from certifiers stating that virtual on-site visits have reduced logistical burdens, time, and expense on certifiers and firms while ensuring the safety of all parties involved in the on-site process.

Even before the COVID-19 pandemic flexibilities were put in place, the Department's past guidance and policy gave certifiers the discretion to conduct virtual on-site interviews. For example, the Department explained in a 2005 Q&A, issued before the current interstate rule, that "the UCP has discretion to require the applicant to appear in person for an interview. Before imposing such a requirement, the UCP should determine if other, less onerous, means can be used to obtain the needed information (e.g., sending documents, participating in a teleconference or videoconference)."³²

³¹ See COVID-19 Guidance (June 29, 2021) (extending virtual on-site flexibilities announced in March 2020) available at <https://www.transportation.gov/mission/civil-rights/covid-19-guidance>.

³² 49 CFR part 26 Q&A, "Is it appropriate for UCP's to require out-of-state applicants to appear in person for an interview?" available at <https://www.transportation.gov/sites/dot.gov/files/2020-01/docr-20180425-001part26qa.pdf>.

The Department believes that virtual on-site visits are less onerous and more efficient, for certifiers and firms alike, for certifiers to obtain information about a firm. It is our view that a virtual on-site visit is equally effective as an in-person visit. It gives the certifier the choice to setup and complete multiple interviews during the day since it eliminates travel time to the firm's principal place of business or job site. For example, one medium-sized certifier reported that conducting virtual on-site visits saved about \$20,000 in travel costs and decreased the time it took to process applications by 10 percent. With the time and resources that a certifier would by not traveling to a firm's principal place of business, the certifier could better prepare for the interview itself, ultimately review more applications, and improve the quality of their on-site review report.

Also, when certifiers or UCPs become aware of a change in circumstances or concerns that a firm may be ineligible or engaging in misconduct (e.g., from notifications of changes by the firm itself, complaints, information in the media, etc.), the certifier or UCP should review the firm's eligibility, including conducting an on-site review. Certifiers can meet this objective more efficiently with a virtual option.

The Department believes the proposal would give the firm a better opportunity to demonstrate eligibility because the SEDO would have more time to fully explain their industry and how the business runs, its relationships with other businesses, and describe how they control their business within the meaning of the rule. The owner can also make more employees available to support the owner's statements or answer questions certifier may have.

Many certifiers report that another benefit of virtual on-site visits is that most communication software allows the reviewer to record the interview, which is another flexibility that the Department proposes in this rulemaking. Recordings allow certifiers to prepare more precise on-site visit reports. The certifier and firm can use the recording as evidence during a decertification hearing, and the independent decisionmaker may find it useful to review the recording before ruling on the proposed decertification. The Department

rarely receives recordings on appeal, but we believe that they may be useful when there is a dispute as to what the parties discussed during an on-site visit.

Virtual on-site visits also have safety and health benefits. Several certifiers used virtual on-site visits during COVID-19 surges to protect the health and safety of employees and firm employees. Certifiers also report that the choice of conducting a virtual on-site visit eases the concerns of employees about traveling to rural areas where there is no mobile phone service or traveling to the homes of business owners.

The Department believes that virtual on-site visits are an easier means for certifiers to conduct on-site reviews after it certifies a DBE that is in another state. As a matter of good auditing practice, certifiers can easily perform virtual on-sites visits of an out-of-state DBE on a regular and frequent basis per the UCP program requirements, or if the certifiers have a reason to question the firm's eligibility. See §§ 26.83(h)(2), 26.87(b).

Although there are many benefits of virtual on-sites, we recognize that some certifiers may prefer to conduct interviews of some firms in person. The proposed rule would retain certifier discretion to still conduct in-person on-site visits.

Finally, the proposal would not otherwise obviate requirements for conducting on-sites during an initial application. The certifier would still interview principal officers at the firm, review résumés with the SEDO, interview the firm's other participants, and visit an active jobsite (virtually or in-person).

19. Timely Processing of In-state Certification Applications (§ 26.83(k))

The Department proposes amending the current § 26.83(k) (redesignated to § 26.83(l) in the proposed rule) to reduce impediments to the certification process. Specifically, we seek to limit a certifier's ability to extend the 90-day timeframe in which a certifier must issue a final eligibility decision for in-state certification applications and to codify existing guidance that gives certifiers discretion to allow firms to fix errors within an application. Under the current rule, the certifier must notify a firm in writing within 30 days from receipt of the

application whether the application is complete and ready for evaluation. The Department clarified in guidance that a “complete” application means that the firm filed a Uniform Certification Application (UCA) and the documents required from the UCA’s checklist. See 49 CFR part 26 Q&A, Compliance with Requirements for Timely Processing of Certification Applications (Apr. 25, 2018, at 1-2 (discussing when the 90-day review period starts and steps UCPS should take to ensure the timely processing of DBE applications)).³³

After the certifier receives all the information required under the rule, the certifier must make a certification decision within 90 days. Current § 26.83(k) states that a certifier may extend the 90-day period up to 60 days “upon written notice to the firm, explaining fully and specifically the reasons for the extension.” Our proposal would reduce the extension period from 60 days to 30 days. A certifier would need OA approval for any extension beyond 30 days. The 1997 NPRM explains our rationale for the current review periods, providing that the Department decided to propose extending the deadline to 90 days, with a possibility of a 60-day extension of this period if the recipient sends a specific written explanation to the applicant. The Department was persuaded that a 60-day deadline was unrealistic in light of the certification workloads facing many recipients. However, the Department determined that a deadline remained necessary to give firms the assurance of reasonably timely handling of their applications. With the approval of the concerned Operating Administration, the recipient could alter the deadline involved, but the appropriate DOT office would be very careful to grant only what relief is necessary to recipients. (62 FR 29548, 29573 (May 30, 1997))

The Department believes that the technological advances that exist today eliminate the need for a 60-day extension. Many certifiers now use software that reduce the time it takes to process an application, and the proposed allowance of virtual on-site visits should also give the certifier enough time to decide applications within the standard 90-day period.

³³ See “Compliance with Requirements for Timely Processing of Certification Applications” available at <https://www.transportation.gov/sites/dot.gov/files/docs/mission/civil-rights/disadvantaged-business-enterprise/308776/dbe-guidance-timely-processing-dbe-certification-applications.pdf>.

We understand, however, that there are some situations where the certifier would need a brief extension. For example, a certifier may extend its review to give the firm time to cure a defect in its application. There may also be extraordinary or unusual instances where the certifier may need more time beyond the proposed 30-day extension period, at which point, the proposal requires that the certifier obtain OA approval for another extension. The Department seeks comment on whether another extension is necessary.

Finally, we remind certifiers that a failure to make an application decision within the § 26.83(l) period is a constructive denial of the firm's application, and that certifier may become subject to penalties for noncompliance under §§ 26.103 and 26.105.

20. Curative Measures

We propose to codify our 2019 memorandum regarding curative measures during the DBE and ACDBE certification application process to streamline and reduce redundancy in the certification process.³⁴ As we explained, the certification process can be a lengthy and intensive undertaking for certifiers and applicant firms. If a certifier finds a firm ineligible, the certifier must expend often limited resources to issue a regulation compliant denial letter. If the denied firm reapplies, the certifier must reprocess a very similar application to what was previously submitted, including conducting another on-site review. That is why our 2019 memorandum reminds applicant firms and certifiers that firms may proactively revise their UCA and/or supporting documents to conform with the regulation's certification requirements before a certifier makes a final eligibility decision. Similarly, a certifier may notify the applicant about any eligibility concerns before making a final decision. We see tremendous benefits to this practice. The Department continues to stress that allowing an applicant to take curative measures is not meant to allow unqualified firms into the program. It would simply give the firm a chance to resolve certification issues during the eligibility evaluation. A firm

³⁴ See "Curative Measures During DBE/ACDBE Certification Application Process" available at <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/curative-measures-during-dbeacdbe-certification>.

contacting a certifier to request permission to cure deficiencies is generally not an attempt to circumvent program requirements.

Proposed rule § 26.83(m) would incorporate what is stated in the 2019 memorandum. A certifier would be required to allow a firm to make any change(s) as long as the changes are made within the § 26.83(l) review period. In addition to essentially mirroring the 2019 memorandum, our proposed change is consistent with policies we discussed in previous preambles. In 1992, the Department proposed an amendment that would allow a firm to correct errors within 30 days of receiving a denial letter to avoid reapplying for certification. In the 1997 SPRM, the Department recognized certifiers' concerns that allowing firms to fix errors and reapply soon after a denial wastes resources. The 1997 NPRM, however, encouraged certifiers to allow applicants to correct minor paperwork errors, non-material mistakes, and omissions in applications before denying an application. (62 FR 29548, 29573 (May 30, 1997)) The 1999 preamble to the final rule reiterated that certifiers may allow firms to correct minor errors without invoking the usual 12-month waiting period, and the Department urged certifiers to follow such a policy. (64 FR 5096, 5123 (Feb. 2, 1999))

21. Interstate Certification (§ 26.85)

The Department proposes changes to the current § 26.85, the interstate certification rule, which would streamline the interstate certification process while preserving the integrity of the DBE Program. First, the proposal would implement reciprocity between Unified Certification Programs (UCP)—achieving a goal that we described in the 2010 NPRM as the “holy grail of certification.” (75 FR 25815, 25818 (May 10, 2010)) Second, after a UCP certifies a DBE that applies for interstate certification, the Department is proposing procedures that would facilitate information sharing amongst UCPs and would establish efficient processes to remove ineligible firms from the program.

We believe the proposal would provide faster and more efficient means to achieve the “fundamental objectives” of interstate certification, which are: (1) facilitating the ability of

DBEs to compete for DOT-assisted contracting; (2) reducing administrative burdens and costs on the small businesses that seek to pursue contracting opportunities in other states; and (3) fostering greater consistency and uniformity in the application of certification requirements while maintaining program integrity.³⁵

Issues with the Current Rule

The Department compiled appeal information for the purpose of this NPRM. We observed that from fiscal years 2011 to 2020, 77 percent of the appeals that involved an interstate certification denial are reversed or remanded, less than 22 percent of cases are affirmed, and 1 percent are dismissed.

Among the cases that are reversed, a plurality (35 percent) are reversed because the UCP required the firm to provide more information than § 26.85(c) requires, and 26 percent of cases are overturned because the certifier denied certification without referencing a good cause reason. The same percentage of cases are reversed because the UCP did not give the DBE an opportunity to respond to the UCP's objection to the DBE's home state certification as the rule requires. Our reversals show a common trend: UCPs generally give little deference to the DBE's existing certification. However, the UCP often chooses to verify, question, and reevaluate all aspects of the DBEs certification, which the interstate rule prohibits.

Relatively few interstate certification denial cases are affirmed on appeal, and even fewer are affirmed because the home state certification is erroneous. Approximately 54 percent of affirmations occur because the DBE did not provide its entire home state (State A) package as § 26.85(c) requires. In these cases, it is not uncommon that the DBE cannot locate material or mistakenly omits a document. Few appeals decisions are affirmed because State A's certification was erroneous. Cases are primarily affirmed because of defects in the certification file that the DBE could have easily corrected (e.g., a disqualifying bylaw

³⁵ See "Interstate Certification 49 CFR § 26.85 Guidance" available at <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/interstate-certification-49-cfr-2685>.

provisions). There has not been a case where the Department affirmed based on an allegation that State A's certification was obtained by fraud.

The Department has observed over the 10 years since we promulgated § 26.85 that the rule has not operated in a way that achieves the rule's objectives. The high reversal rate of interstate certification denials shows that the rule must be revised to reduce unnecessary burden on firms, certifiers, and the Department. We believe national reciprocity would build trust, encourage teamwork, and improve the quality of certifications as contemplated when the Department introduced the UCP system in 1999.

Proposed § 26.85(a) would revise the interstate rule to apply to all DBEs, replacing the restrictive text of the current rule which applies only to DBEs with a home state certification. The Department believes that excluding a subset of DBEs would contradict the rule's objective to *facilitate* certification.

Paragraph (b) would clearly state that a UCP (State B) must accept certifications from a firm that has already been certified as a DBE—directly implementing interstate reciprocity. The proposal would repeal “option 2” under the current rule. The proposal for paragraph (c) would provide a simple and streamlined interstate application process for DBEs. The DBE would apply to State B by submitting a short cover letter, an electronic image, or a photocopy of a UCP directory showing the DBE's certification, and a signed Declaration of Eligibility (DOE) (the same declaration described in proposed §§ 26.67 and 26.83).

The cover letter would inform State B that the DBE is applying for interstate certification and identify the states where the DBE is certified. Since DBEs often do not have a certification notice readily available, the proposal only requires the DBE to provide proof that its name appears on a UCP directory. This would remove the unnecessary burden for a DBE to have to contact a certifier for a copy of its certification notice. Finally, we emphasize that the Declaration of Eligibility represents conclusive evidence that the DBE is eligible when it submits its interstate certification application. The DOE ameliorates the burden of

providing an entire certification package, which State B may require under the current rule; this is the most common issue presented on appeal. Of course, State B may later obtain certification information from other UCPs to carry out its compliance activities under proposed paragraphs (g) and (h) after it certifies the DBE.

After receiving the material from paragraph (c), State B would have 10 business days under proposed paragraphs (d) and (e) to verify that the firm is already certified as a DBE and to approve the DBE's interstate certification application. State B would only contact State A for confirmation in rare cases where the name of the DBE does not appear in State A's UCP directory.

Since interstate certification is an expedited procedure, proposed paragraph (f) warns the certifier that any undue delay by State B in certifying the DBE would be noncompliance with this part.

Overall, proposed paragraphs (a) through (f) would streamline a process that could take more than 140 days under the existing rule and reduce the review period to 10 business days or less. The interstate application would consist of the three documents described above.

Post-interstate Certification Procedures

After certifying the DBE, as with the current rule, State B would treat the DBE as any other DBE within its UCP.

Proposed paragraph (g)(1) describes a discretionary process for any UCP to obtain all or a portion of a DBE's unredacted certification files. The UCP that initially certified the firm would likely have the bulk of the DBE's information, but other UCPs could have additional information that may be helpful to monitor the DBE. The Department seeks comment on whether there should be limits to the information a UCP may request from another state. Should the rule only allow the UCP to request certification information from the previous seven years? Or should a UCP be entitled to only a subset of information in the certification file (e.g., most recent on-site report and the latest Declaration of Eligibility)?

Paragraph (g)(2) would require all UCPs to share certification file information within 10 business days of a request. We believe the proposal would create a minimal burden, as technological advances now allow a certifier to send electronic certification files. The Department stresses that the integrity of the program is the responsibility of all participants, regardless of where the DBE is located. UCPs are required to promptly share information with other states. The proposal simply reinforces the UCP's duty to cooperate, as described in §§ 26.81(d) and 26.109(c).

As in the current rule, a UCP would be required to carry out its own oversight of its out-of-state DBEs. The proposed paragraph (g)(3) clarifies that the UCP must conduct its own certification reviews and investigate complaints regarding out-of-state DBEs, as it would do with in-state DBEs. We believe that the proposal to allow virtual on-site visits makes this process less burdensome.

Paragraph (g)(3) would also clarify that the DBE must submit an annual DOE, with documentation of gross receipts to confirm small business size, to the UCP of each state in which it is certified. The Department seeks comment on whether a centralized portal should be created to reduce the burden on DBEs that must file declarations in multiple states. The DBEs could upload current annual and material change declarations to the system at a specific time during the year where all UCPs could review the information. The Department seeks other ideas on how a centralized portal, which would not be housed at USDOT, would function and what additional capabilities the portal should have.

To address concerns discussed in previous preambles that reciprocity would promote forum shopping by DBEs to apply to UCPs that may be perceived as less stringent in their certification reviews, proposed paragraphs (g)(4) and (6) would provide UCPs tools to remove ineligible firms from the DBE Program. The objective of paragraphs (g)(4) and (6) is to promote uniformity in certification and program integrity.

Proposed paragraph (g)(4) would allow a UCP to take part in a decertification proceeding conducted by another state, if the UCP believes the DBE is ineligible based on the same facts and reasons as the other state. The joint removal procedures would only be a possible if UCPs communicate with each other. We hope that the proposed rule will encourage UCPs to interact more frequently. If the UCP joining the proceeding has additional evidence to support ineligibility, both states could agree to update the notice of reasonable cause to propose decertification. While the UCP joining the proceeding would be permitted to provide additional information to support the initiating UCP's case, the UCP would not be permitted to change the grounds for the proposed removal or unduly delay the informal hearing. The joint decertification proceedings would be a discretionary process and only UCPs that choose to participate would be bound to the decision of the independent decisionmaker. The Department seeks comments about additional, or alternative procedures and due process protections the provision should include.

Proposed paragraph (g)(5) would provide that UCPs should regularly check and update the ineligibility database, which is the same requirement that exists under the current rule.

Finally, to strengthen program integrity, proposed paragraph (g)(6) states that if the Department determines on appeal that substantial evidence supports a UCP's decertification of a firm, that firm would automatically be decertified in all states. The proposal would not provide appeal rights to challenge an automatic decertification because the firm already had the opportunity to challenge its decertification after the UCP's initial determination. This proposal promotes program integrity and uniformity in certifications through a single action.

The proposed paragraph (g)(6) would not apply in instances where the Department affirms a decision because of failure to cooperate, since such cases are limited to a firm's interaction with one UCP.

22. Denials of In-state Certification Applications (§ 26.86)

Under existing paragraph (c) of § 26.86, when a firm is denied certification, the certifier must establish a waiting period of no more than twelve months before the firm may reapply. We propose removing the requirement for the certifier to gain OA approval before adopting a shorter waiting period, as we do not see the necessity for it. In May 2020, DOCR began requiring certifiers to include specific, verbatim appeal instructions in their denial letters.³⁶ We propose adding those instructions to § 26.86(a). Most notable in the instructions is a shorter timeframe for filing an appeal as well as notifying the firm that they have a right to request the documents that the certifier relied on to make its decision.

Under the current rule, the clock for the waiting period for reapplication begins to run on the date the applicant receives the denial letter; we propose that the period begin on the date the certifier sends the denial letter, which in the majority of cases is done by email.

23. Decertification Procedures (§ 26.87)

Strict Compliance

Since the beginning of the DBE Program in 1983, rules have been in place that recipients/certifiers must follow when removing a DBE's certification. These rules are essential for ensuring that only eligible firms participate in the program. We reiterate that these rules exist to give certifiers the tools to take prompt action in a fair manner if a firm's circumstances, ownership, or control changes over time, resulting in once-eligible firms becoming ineligible. Certifiers' strict compliance with the program's decertification rules is critical to keeping intact appropriate due process protections afforded to DBEs and ensuring administrative efficiencies if or when the firm chooses to appeal a decertification decision to the Department. As such, decertification procedures are not to be perfunctorily executed. Given the inconsistent and erroneous manner in which we see certifiers sometimes implementing the procedures, we are proposing to streamline and strengthen the current language in § 26.87. Our goal is to make the procedures easier to understand so that they may

³⁶ Email from Departmental Office of Civil Rights to Recipients.

be more easily followed. Although the substance of § 26.87 remains largely the same, we propose adding some requirements and clarifications.

In too many instances, we have seen certifiers issue pro forma notices of intent to decertify and pro forma final notices of decertification, with scant justifications articulated. Section 26.87 requires both notices to fully explain the reason(s) for moving to decertify a firm with references to specific evidence in the record. Sparse notices and blanket, incomplete, or cryptic references deprive the DBE of the ability to meaningfully respond and provide information that demonstrates its continued eligibility. Further, the certifier bears the burden of proof in decertification proceedings (i.e., the certifier must show that, more likely than not, the DBE is no longer eligible for certification); notices not fulfilling the requirements of § 26.87 do not satisfy that burden. To address these issues, we propose more succinct and pointed language in paragraphs (b) and (g), which are respectively paragraphs (d) and (h) in the proposed rule. We also propose stating the burden of proof information at the very beginning of § 26.87.

Failure to Submit Declaration of Eligibility (DOE)

The Department notes an upward trend in the number of appeals from DBEs that certifiers decertified based on the DBE's failure to cooperate with a request(s) to submit a § 26.83(j) annual no-change affidavit (and now proposed as declaration of eligibility (DOE)). The responsibility of timely filing a DOE squarely falls on the DBE. There is no requirement that a certifier remind a DBE of the annual DOE submission deadline, though we are aware many do send reminders electronically through automated systems. In the preamble to the 2014 final rule we explained that a DBE's failure to provide a DOE after a request or reminder from a certifier is failure to cooperate under § 26.109(c), for which a certifier may initiate decertification proceedings. We also stated in 2014 that a certifier should not commence decertification proceedings simply because the DBE failed to meet the filing deadline; nor should decertification proceedings continue once the DBE submits the requested

information. That statement unintentionally suggested that a DBE can fail to submit a DOE without consequence.

The proposed revision to § 26.87 would clarify that that is not the case. In the requirement for offering the firm an opportunity for an informal hearing, we are proposing an exception: the firm would not be entitled to a hearing if the ground for decertification is the firm's failure to timely submit a § 26.83(j) DOE. If the firm does not provide the DOE within 15 days of the notice of intent to decertify, the certifier *may* issue a final notice of decertification based on § 26.83(j) and/or § 26.109(c) without offering an opportunity for a hearing. The Department recognizes the time and resources a certifier must undertake to convene a decertification hearing, no matter the simplicity or complexity of the issues. The proposed exception to the informal hearing requirement would help certifiers conserve resources that in many instances are already limited.

Decertification Grounds

Section 26.87(e) lists the grounds upon which certifiers may initiate decertification proceedings. One of the grounds (§ 26.87(e)(5)) is if there is a change in DOT's certification standards or requirements after the firm was certified. The Department proposes an amendment to § 26.87(e)(5) stating that in the instance of a change in certification standards or requirements, the certifier must offer the firm, in writing, an opportunity to cure eligibility defects within 30 days. If the firm does not do so, the certifier may proceed with sending the firm a notice of intent to decertify. The Department's rationale is that certified firms should not be penalized for changes to certification standards of which they most likely are unaware and with which they might be able to comply—and thus remain eligible—if given the opportunity to do so.

Virtual Informal Hearings

Section 26.87(d) requires a certifier to offer a firm that it intends to decertify an informal hearing at which the firm may respond in person to the reasons for the intent to decertify. At

the onset of the COVID-19 pandemic in March 2020, the Department issued guidance allowing certifiers to conduct a § 26.87(d) hearing using virtual methods such as (but not limited to) video conferencing.³⁷ We propose making permanent the option to conduct hearings virtually. In addition to reducing the risk of transmitting or contracting COVID-19 or other illness, virtual hearings would be more efficient for all parties because of the reduction in travel time and cost, as well as helping certifiers conserve financial and other resources that in-person hearings require. Moreover, the Department has not heard of any negative repercussions from conducting virtual informal hearings. The requirement for a certifier to maintain a complete, verbatim transcript remains intact.

However, having heard of instances in which a certifier or a DBE requests multiple date changes for the hearing (some we suspect may be attempts to delay an adverse finding), we seek to impose a deadline by which the hearing must occur. If the DBE elects not to have a hearing, we would propose to impose the same deadline by which the DBE would be required to submit written information or arguments regarding its eligibility. The deadline in both instances would be within 45 days of the date of the certifier's notice of intent to decertify (NOI). Otherwise, the *ad infinitum* potential for date changes would become excessively cumbersome for all parties, waste resources, and ultimately create unnecessary delay. Both the hearing and submission of written information would remain optional for the DBE, and we remind certifiers that a firm's decision not to attend a hearing or submit written information does not equate to a failure to cooperate.

Informal Hearing Participation

We also propose that during an informal hearing, only the socially and economically disadvantaged owner (SEDO) be permitted to answer questions related to the SEDO's control of the firm. Often, the purpose of the informal hearing is for the certifier to ascertain whether

³⁷ See "Memorandum - DBE and ACDBE Certification Procedures During COVID-19 Pandemic" available at <https://www.transportation.gov/sites/dot.gov/files/2020-04/DOCR-20200324-001.pdf>.

the SEDO in fact controls the firm. Responses from someone other than the SEDO do not allow a certifier to make an accurate or meaningful determination about the SEDO's role in the firm, such as whether the SEDO makes independent decisions about the firm's daily and long-term operations. Based on the Department's regular review of multiple hearing transcripts when firms appeal decertification decisions, the Department has seen instances of a non-SEDO or other party providing rehearsed and/or falsified responses on behalf of the SEDO regarding the SEDO's control of the firm. Thus, this proposed requirement would further protect the DBE Program's integrity and help prevent fraud. A representative of the SEDO, including an attorney, would still be permitted to attend and participate in the hearing, including answering questions about ownership, business size, the firm's structure, etc. A representative of the SEDO, including an attorney, would be permitted to ask the SEDO follow-up questions about any topic – including control – during the hearing. Other employees of the firm would still be permitted to answer questions about their own roles/experiences as well as other general aspects of the firm. We emphasize that the requirement for the SEDO to directly answer questions *only* applies to questions about control. We welcome comments from certifiers and firms on this proposal.

For similar reasons for proposing informal hearing and written submission deadlines, we propose a 30-day deadline in § 26.87(h) for a certifier to render a final decision following an informal hearing or receiving written information from the DBE.

24. Counting DBE Participation after Decertification (§ 26.87(j))

In response to requests for clarification and various concerns evidenced by recipients and other stakeholders, the Department is proposing the following revisions to § 26.87(j).

The first revision breaks out the current first paragraph into two paragraphs to clarify the effect of removing a DBE's eligibility prior to a prime contractor executing a subcontract with the DBE or prior to the recipient entering into a prime contract with the DBE. The Department believes that addressing each scenario in a separate subheading would not change the

requirements of the rule; it would simply make it easier to understand by separately addressing each scenario in the current rule.

The next proposed revisions concern the effects of decertifying a DBE after it has entered into a subcontract with the prime contractor. The current rule states that the DBE's performance could continue to count toward the contract goal if it received notice of its decertification after the subcontract was executed. However, stakeholders have informed the Department that they have witnessed prime contractors taking advantage of this provision, particularly in the context of a design-build contract. On design-build contracts, prime contractors/developers may submit an open-ended DBE commitment plan, and only commit work to specific DBEs once they have been awarded a subcontract. In such instances, prime contractors have an incentive to add work to an existing contract with the now decertified firm. Prime contractors do this to avoid having to end the subcontract with the formerly certified firm and find another DBE to perform the additional work. This practice deprives other DBEs from being solicited to perform work on new subcontracts. Of course, in other situations, it may make sense to allow minor amendments, or a brief continuation, of a decertified firm's work on a contract to alleviate the burden of ending the subcontract and soliciting a new DBE subcontractor. To balance the two concerns, the Department proposes that prime contractors would only be permitted to add work or extend a completed subcontract with a previously certified firm if it obtains prior, written consent from the applicable recipient.

Further, DBEs have expressed concerns regarding the situation in which a DBE, after a subcontract has been executed between the DBE and the prime, becomes disqualified from the program because it was purchased or merged with a non-DBE firm, perhaps even by the prime contractor on the project. The current rule allows DBEs to continue to count toward contract goal credit, regardless of the reason they become disqualified from the program. The purpose of the current rule is to avoid burdening a prime contractor to find a replacement for a

DBE that becomes ineligible after the subcontract was signed; the prime contractor already made a subcontracting commitment with a DBE that was certified at the time the commitment was made and should not have to repeat the process. The Department proposes an exception to this current rule because the Department has determined that the deprivation of opportunities for DBEs that results from a prime contractor's ability to continue to count work now performed by a non-DBE outweighs the burden for a prime contractor to make good faith efforts to solicit a new DBE, if necessary to meet the contract goal. Thus, the Department proposes to disallow continued credit toward a contract goal if the DBE's ineligibility after the subcontract is signed is the result of a purchase by, or merger with, a non-DBE firm. In that situation, the prime contractor would be required to use good faith efforts to replace the DBE if additional credit is needed to meet the contract goal.

25. Summary Suspension (§ 26.88)

Section 26.88 permits or requires the certifier to suspend a DBE's certification immediately under specified circumstances. In promulgating this rule in 2014, the Department intended for it to apply in extraordinary situations that jeopardize program integrity or when time is otherwise of the essence. We said in the 2012 NPRM that we sought a "middle ground" between not having a suspension rule at all, as was then the case, and, as "many" stakeholders urged, one that is universal and automatic. See 77 FR 54960 (Sept. 6, 2012). The middle ground was a rule requiring suspension upon the incarceration or death of a SEDO necessary to the firm's eligibility and permitting suspension in the event of "[o]ther material changes." Preamble to final rule (79 FR 59577 (Oct. 2, 2014)). We noted the need for "swift action" when a "dramatic change in the operation of the DBE occurs that directly affects the status of the company as a DBE," and our intent that suspensions be short and quickly resolved. *Id.* at 59578. We explained that our overall objective in adopting the current rule was "to preserve the integrity of the program without compromising the procedural

protections afforded DBEs to safeguard against action by certifiers based on ill-founded or mistaken information.” Id.

The Department would like to add language in § 26.88 to permit a certifier to only rely on a *single* reason if the summary suspension is elective; if the suspension is for a mandatory reason, the certifier may rely on more than one reason. As already expressed, it is our view that summary suspension is an extraordinary measure that greatly impacts a firm’s operations. It is a severe remedy that certifiers should not invoke lightly and to which a firm should have adequate opportunity to respond. We believe the latter is critical to preserving a firm’s due process rights. Furthermore, being permitted to only provide a single reason would rightfully narrow the focus of the summary suspension while retaining a certifier’s discretion to decide the basis of the suspension.

We remain committed to the objective. Experience has shown, however, that the rule has not functioned as intended. Too often, the rule has needlessly jeopardized the DBE’s viability, made the certifier’s job harder, or provided unfair and unreasonable outcomes. It has produced divergent results among jurisdictions without much time-to-resolution improvement over standard § 26.87 proceedings. None of these outcomes enhances program integrity, reduces regulatory burden, or streamlines administration.

The proposal states clearer rules and would reduce burdens bilaterally. The language would clarify and simplify procedures, provide bright-line rules, and rebalance rights and responsibilities more equitably. It would specify what needs to happen and when. Individual provisions would spell out what certifiers must do to get a result within 45 days and what protections from arbitrary action DBEs could expect. The revised rule would require both parties to the suspension to act faster, which the Department believes is consistent with the gravity of the action, with procedural protections specified in much greater detail. We believe that both speed and precision bolster the integrity of the program.

We have tried to reduce ambiguity and remove internal inconsistencies. We do not believe, for example, that an “expedited” procedure should in fact delay the “commence[ment]” of an action to decertify. See current paragraphs (e) and (g). Similarly, current paragraphs (b) and (e) seem to take opposite sides on the question of whether § 26.87(d) procedures apply in resolving summary suspensions. The proposal would correct these problems and seize an opportunity. While the current rule requires nothing in the certifier’s notice other than the fact that the DBE is suspended—the reason, the evidence, the DBE’s response options, consequences, etc.—the proposed rule would require notice of the “procedural protections” to which we referred in 2012. We realize now that the current rule can be revised to afford greater fairness to DBEs. For example, under the current rule a DBE cannot meaningfully “show cause” in defense of the unknown, let alone do it quickly. We invite comments on our proposed revisions, which we believe will address the above-described deficiencies.

Proposed § 26.88(a) would consolidate the language in current paragraphs (e) and (f) about the temporary nature and consequences of summary suspension, with an important clarification and an essential simplification. The clarification would resolve the ambiguity in paragraphs (a) and (e) about whether a summary suspension triggers a § 26.87 proceeding and immediately activates all § 26.87 procedures. The Department does not believe it does. Otherwise, there would be no distinction between §§ 26.87 and 26.88 except the immediate penalty on the DBE. The current rule compounds the problem with hybridization: it converts swift suspensions into slower § 26.87 decertifications, which further obscures the rule’s purpose and erodes its utility. Finally, the substantive reach of the current provisions is nearly identical. The proposed revision would eliminate much of the overlap and time lag by deeming a rule-compliant suspension decision to be a final decision appealable to the Department. It recognizes the reality that regular decertification proceedings almost always take more than 30 days, and it removes the additional, unintended burden to the DBEs

of open-ended suspensions. The most obvious results would be time savings, burden reduction, and more business-critical certainty about what a suspension entails and how soon it would be resolved. Reinforcing and conforming changes elsewhere in § 26.88 would close structural gaps, shorten embedded deadline, and strengthen procedural integrity.

The simplification is small but critical to fairness and transparency. The proposed rule would require notice of the suspension by email. The change would eliminate the certified mail requirement, which needlessly burdens both parties. The DBE would receive immediate notice of the suspension, including information critical to its response. Emailing notice to the DBE at an email address provided by the DBE in its initial DBE application or its annual DOE would remove uncertainty about when the suspension is, or is deemed to be, effective. The certifier would save time and resources, both parties would know when the 30-day clock begins to run, and the DBE would have a meaningful opportunity to contest the suspension. We believe the change is essential to producing speedy and principled results. Short, clear rules in subsequent paragraphs would specify the contents of the notice, its effect, and the rights and responsibilities of certifier and firm.

Revised § 26.88(b) would alter the description of events requiring or permitting summary suspension. The most notable revision is also the most obvious. We propose to add as a mandatory suspension condition clear and credible evidence of the DBE's involvement in fraud or other serious criminal activity. This proposed change should be self-explanatory. The proposed provision would omit the two "material change" grounds for elective suspension as too subjective and better resolved by information request or § 26.87(b) notice. We consider the "clear and credible" standard a simplified, plain language encapsulation of the more extensive but less helpful explanation in the current rule.

The proposed rule would change the treatment of death and incarceration as suspension events. Our reasoning is that in a significant number of cases the event itself does not meaningfully affect program integrity. When a SEDO dies, a successor in interest may be able

to demonstrate SED. We also believe that certifiers should be mindful of the effect of instantly removing certification at a time when the company is likely to be particularly vulnerable. Similarly, when a SEDO is incarcerated, the SEDO may be incarcerated for a minor offense of which s/he has not been convicted or on a charge that might not threaten program integrity. The decedent's estate, though not an individual, might reasonably be considered to represent the interests of SED persons. While we generally leave to the certifier's discretion which deaths or incarcerations demand immediate action, the new language in paragraph (b)(2)(i) would raise the bar. In short, deaths and incarcerations could trigger elective suspensions only if they clear that bar.

Finally, proposed § 26.88(b) would resolve the apparent tension between summary suspension's extraordinary nature and the current rule's explicit provision for suspension in the case of a DBE's SEDO's failure to comply with § 26.83(j) requirements. In this case, the rationales are procedural/administrative and substantive. Certifiers rightly point out that the magnitude of noncompliance unreasonably strains resources and hampers enforcement. The number of DBEs that do not comply strains the system in ways that sometimes preclude fair, efficient administration overall. We do not believe that giving every noncompliant firm a full § 26.87 proceeding in each year of noncompliance is tenable, given the likelihood that many offenders once suspended will simply provide the DOE and gross receipts documentation. The current rule diverts resources from more productive uses.

The substantive rationale for retaining the No Change Affidavit (NCA)/Declaration of Eligibility (DOE) trigger for discretionary suspension is more compelling: program integrity depends on the NCA/DOE filing. The NCA/DOE substitutes for the much more burdensome option of periodically requiring DBEs to re-demonstrate that they meet all eligibility requirements. Section 26.83(h) prohibits such recertification requirements as unreasonably burdensome, and § 26.83(j) makes them unnecessary. The annual filing is the price of continued certification and one we consider more than reasonable. Hence our view that

suspension is an appropriate remedy for a DBE's failure to comply with the relatively light burden of submitting a NCA/DOE to demonstrate its continued eligibility for the DBE Program. Notably, the proposal expands the universe of cases that can be resolved without invoking § 26.87, which greatly streamlines program administration.

We base these changes on stakeholder input and our own experience with the rule. In keeping with our oversight role, our primary concern is to maintain the integrity of the entire program. Local certifiers are better equipped than we are to consider issues such as changes in ownership of particular DBEs and whether such changes affect the DBE's eligibility for the program.

Proposed § 26.88(c)(1) specifies what the paragraph (a) notice must contain. The new language clarifies how §§ 26.87 and 26.88 differ and specifies the scope of each in the suspension context. It closes the gap (i.e., the notice's due process role referenced above) between notice and result. The rest of the paragraph fleshes out the necessary particulars and limits potential abuse in equal measure on both sides. The new rules, with their component time limits, explicit burden allocations, waivers, and defaults, are the mechanical core of § 26.88. They will provide a realistic mechanism for achieving full, fair, and final resolutions within 30 days. We anticipate substantial efficiency gains from eliminating redundant processes and the much benefit to DBEs of certainty that any suspension will be fully and finally resolved by a date certain.

Proposed revisions in § 26.88(d) preserve the current rule's articulation of the firm's appeal rights and add a provision for injunctive relief when the certifier does not comply with the new time limitations. The DBE may request injunctive relief when the certifier, contrary to a new curb on its expanded discretion, electively suspends the same firm twice within a rolling one-year period. The DBE may also request injunctive relief when the certifier fails to lift a suspension by the 30th day. These curbs reinforce our intent that a brief discretionary suspension is a remedy to be employed judiciously.

26. Certification Appeals to DOCR (§ 26.89)

The overarching goals of the Department's proposed changes to this section are to increase administrative efficiency and enhance the clarity of existing rules by reordering the paragraphs and introducing a few requirements.

We recommend shortening the timeframe for filing an appeal from 90 to 45 days. The Department set the 90-day deadline prior to applicants commonly having access to email and the internet. The proposed timeframe matches the rule set by the SBA Office of Hearings and Appeals for firms determined ineligible for participation in SBA's 8(a) contracting program. See 13 CFR 134.404. We welcome comment from business owners on the feasibility of appealing within 45 days. We emphasize that we are not proposing any change to a firm's ability to show that there was good cause for a late filing and to explain why it would be in the interest of justice for the Department to accept the late filing.

While the Department will continue to accept appeals sent via mail or hand delivery, we encourage appellants to submit them via email to help decrease administrative costs and increase efficiency for all involved parties.

Next, the requirement in § 26.89(d) that certifiers send the Department administrative records that are well organized, indexed, and paginated has long been in existence. Nonetheless, the vast majority of administrative records we receive are poorly organized and not indexed. Having to weed through these types of records – most of which are many hundreds of pages – wastes time and can prevent the Department from issuing timely decisions. Moving forward, the Department will reject non-indexed or otherwise disorganized records that do not meet this standard and will request certifiers to immediately correct and resubmit them. A certifier's failure to comply with our request within seven days will be regarded as a failure to cooperate under § 26.109(c).

The Department would like to reinsert the language from § 26.89(c)(1) and (2), which were inadvertently omitted from the published rule during the 2014 revision. The first

provision to be reinserted would require appellants to identify in their appeal the other certifiers that have certified the firm, which certifier(s) have rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, and which certifier(s), if any, before which an application for certification or a removal of eligibility is pending. The second reinsertion would notify program recipients that in the event of an appeal, the Department would request the information described above, which the firm in question would be required to promptly provide.

In the interest of administrative efficiency, the Department proposes adding a paragraph that would allow DOCR, at its discretion, to summarily dismiss an appeal. DOCR would dismiss an appeal that does not set forth a full and specific statement under § 26.89(c). It is plausible that there are additional circumstances under which DOCR would decide to summarily dismiss. In every instance of a summary dismissal, DOCR's written notification would include an explanation for the decision and would instruct the parties what action(s) to take.

The proposed language for paragraph (e) restates portions of the current rules found in § 26.89(e) and (f)(1) and (2), in plain language and aggregates them. There is no substantive change.

We are also proposing a paragraph to clarify the parameters within which we give recipients technical advice. At present, we provide technical advice about the overall meaning and general implementation of the provisions of part 26 concerning DBE/ACDBE certification. Recipients sometimes give the Department a description of a specific firm's certification application and ask the Department to opine on the firm's eligibility. When that happens, the Department reminds recipients that determining certification eligibility is not within the Department's purview. If we issued advisory opinions, we would be effectively directing certifier's actions and altering the result. Doing so would violate basic separation of functions principles, as eligibility decisions are squarely the responsibility of the certifier,

while we are responsible for considering appeals of certifiers' decisions. To make the reminder more permanent, we propose adding § 26.89(g) to definitively state that the Department does not issue advisory opinions.

We also wish to remove the references to SBA from § 26.89 because the former memorandum of understanding between SBA and DOT is no longer in effect.

Section 26.89(i) states a Departmental "policy" to make an appeal decision within 180 days of receiving the complete administrative record, that the Department will notify the parties of the reason(s) for a delay beyond this point, and to provide a date by which an appeal decision will be made. Recipients and appellants alike interpret this policy as a requirement that the Department issue decisions in 180 days and to do so by an absolute date. That was never the Department's intent, and we would like to clarify that the Department will issue a decision in 180 days "if practicable," and changing the phrase "date by which" to "approximate date."

27. Updates to Appendices F and G

The Department proposes to remove from part 26 forms in Appendices F (Uniform Certification Application/UCA) and G (Personal Net Worth Statement). Official forms are not required to be reproduced in the Code of Federal Regulations (CFR). Moreover, the UCA and PNW Statement are readily available on DOT's website.³⁸ Removing the forms from the CFR is an administrative action and does not impact the ability of the public to comment on any amendments to the information collections contained in these forms.

The changes we are proposing to the UCA are largely technical in nature. They include updating website addresses, clarifying definitions, minimizing the use of pronouns, and providing more details on how applicants can learn more about the DBE and ACDBE Programs. The only substantive change we recommend is changing the term "Affidavit of Certification" to "Declaration of Eligibility." We propose that change so that the same form

³⁸ See www.transportation.gov/civil-rights/disadvantaged-business-enterprise/ready-apply.

can also be used in lieu of the current annual affidavit of no change that certified firms must annually submit. Using the same form for both purposes will increase efficiency and decrease burden for firms and certifiers alike.

On the PNW Statement, we propose adding a sentence in the introductory paragraph specifying the rule's PNW limit, changing the "Spouse's Full Name" field to "Spouse or Domestic Partner's Full Name," and removing the "Retirement Accounts" field from the Assets column, consistent with our proposal of fully excluding retirement accounts from the personal net worth calculation.

Part 23

Subpart A—General

28. Aligning Part 23 with Part 26 Objectives (§ 23.1)

The program objectives for the DBE Program currently identified in § 26.1 are inconsistent with the program objectives for the ACDBE Program currently identified in § 23.1. Although the objectives are largely identical, a 2014 revision to § 26.1 added the following two objectives that are not included in § 23.1:

- To promote the use of DBEs in all types of federally assisted contracts and procurement activities conducted by recipients ("program objective 1");
and
- To assist the development of firms that can compete successfully in the marketplace outside the DBE Program ("program objective 2").

For consistency with the program objectives in part 26, the proposed rule adds program objectives similar to § 26.1 of the DBE Program to § 23.1 for the ACDBE Program. Importantly, the concepts found in the DBE Program § 26.1 objectives 1 and 2 are already included in the ACDBE Program at § 23.25(c) and (d)(7).

29. Definitions (§ 23.3)

In the Department's experience, recipients need clarity on terms already used in this provision. Discussed below are a few of the definitions we propose adding or amending to clarify existing requirements in part 23 and to make provisions in part 23 consistent with the provisions of 49 CFR part 26.

Affiliation

The definition of "affiliation" under § 23.3 incorrectly references "13 CFR § 121.103(f)," titled "affiliation based on identity of interest." The SBA amended its regulation in 2004 redesignating "(f)" to "(h)." When the part 23 rule was finalized in 2005, the reference to 13 CFR 121.103(f) was inadvertently not updated to reference "(h)." See 58 FR 52050 (Oct. 8, 1993); 62 FR 29548 (May 30, 1997); and 65 FR 54454 (Sept. 8, 2000). Accordingly, the correct reference is to 13 CFR 121.103(h), titled "affiliation based on joint ventures." Therefore, the proposed rule would make a technical correction to address the aforementioned error in the definition of "affiliation" in § 23.3.

Airport Concession Disadvantaged Business Enterprise (ACDBE)

Based on the definitions of "Airport Concession Disadvantaged Business Enterprise" and "concession" under § 23.3, certifying agencies are not clear when providing an ACDBE designation to an applicant if the firm does not currently operate an airport concession.

The current § 23.3 defines "concession" in part as one or more of the types of for-profit businesses in item 1 or 2.

1. A business, located on an airport subject to part 23, *that is engaged in* the sale of consumer goods or services to the public under an agreement with the recipient, another concessionaire, or the owner or lessee of a terminal, if other than the recipient.
2. A business conducting one or more of the following covered activities, even if it does not maintain an office, store, or other business location on an airport subject to part 23, as long as the activities take place on the airport:

Management contracts and subcontracts, a web-based or other electronic business in a terminal or which passengers can access at the terminal, an advertising business that provides advertising displays or messages to the public on the airport, or a business that provides goods and services to concessionaires.

The 2000 supplemental notice of proposed rulemaking (SNPRM) opines that a “small business concern” must be an “existing” business but notes that the firm does not need to be operational or demonstrate that it previously performed contracts at the time of its application for certification. See 65 FR 54454, 54456 (2000). The terms “engaged in” and “conducting” in the current definition of “ACDBE” have led some certifying agencies to believe that they cannot provide an ACDBE designation to an applicant firm unless the firm already is engaged in an operational airport concession activity. Part 23, subpart C, “Certification and Eligibility of ACDBEs”, does not address this. We agree with the perspective described in the 2000 SNPRM and propose amending the definition of “ACDBE” under § 23.3 to clarify that a firm does not need to be operational or demonstrate that it previously performed contracts at the time it applies for certification.

Concession

A “concession” is defined as “[a] business, located on an airport subject to this part, that is engaged in the sale of consumer goods or services to the *public* under an agreement with the recipient, another concessionaire, or the owner or lessee of a terminal, if other than the recipient.” See § 23.3 (emphasis added). Some stakeholders contend that the definition of “concession” should apply only to businesses that serve the “traveling public.” In other words, even though the definition of “concession” in part 23 applies the term “public,” this should be interpreted to mean exclusively to the “traveling public.”

In the past, the Department considered the issue of whether businesses that may occupy a portion of airport property serving the public in general, but that do not focus on

serving passengers who use airport for air transportation, should be deemed “concessions” for purposes of the program. See 65 FR 54455 (2000). The Department determined that businesses on airport property that do not primarily serve the public should not be viewed as concessions. See 70 FR 14496, 14501 (2005). Instead, the term “concession” in part 23 refers only to businesses that serve the traveling public, except as otherwise provided in the definition of “concession” in the rule (e.g., a hotel located anywhere on airport property is considered to be a concession).

The proposed rule revises the definition of “concession” to reflect the Department’s interpretation that concessions are businesses who serve the “traveling public.”

Personal Net Worth

The current definition of “personal net worth” (PNW) in § 23.3 exempts from inclusion in the PNW calculation the values of a maximum of \$3 million dollars in assets, which an owner/applicant could demonstrate were necessary to obtain financing for purposes of entering or expanding a concessions business subject to part 23 at an airport (the “PNW Third exemption”). This exemption was instituted in 2005 when the Department determined that raising the PNW cap for ACDBEs to enter the concessions industry was not the best solution to mitigate the high capital requirements of the industry. Instead, the Department determined that it was more appropriate to adopt exceptions such as the PNW third exemption. This exemption considered an individual’s circumstances in order to avoid a “glass ceiling” effect of an across-the-board PNW standard. When adopting the PNW third exemption in 2005, the Department made clear that it believed the additional burdens of implementing the exemption were justified in the interest of opening business opportunities to ACDBEs. See 70 FR 14496, 14498 (Mar. 22, 2005).

Nonetheless, in the preamble to the 2012 final rule, the Department cited evidence showing that the PNW third exemption was infrequently used. The evidence also showed that when the exemption was applied, it often appeared to be the subject of considerable

uncertainty and confusion on the part of ACDBEs and certifying agencies alike. Therefore, the Department suspended the exemption to consider whether the provision should be retained, modified, or deleted. See 77 FR 36924, 36928 (June 20, 2012).

The Department contemplated whether the inflationary adjustment of the underlying PNW cap to \$1.32 million, which maintained the real dollar value of the previous \$750,000 cap, may have the effect of mitigating what the Department had seen in 2005, as the need for adopting a provision of this kind. This NPRM proposes raising the PNW cap to \$1.60 million, further obviating the need for the PNW third exemption. Also, given the indefinite state of suspension of the exemption with no firm applying it since 2012, the Department is proposing to delete the PNW third exemption from the definition of “personal net worth” in § 23.3.

Instead of removing the above exemption and other proposed changes to § 26.67(a)(2)(i), the Department proposes to simplify the definition of “personal net worth” in § 23.3 by amending the definition to have the same meaning as the term “personal net worth, in part 26. See discussion above.

Socially and Economically Disadvantaged Individual

The term “Native Americans” within the definition of “socially and economically disadvantaged individual” in 49 CFR part 26 was revised in the Department’s 2014 final rule to make it consistent with the SBA’s definition of the term. See 79 FR 59566, 59579 (Oct. 2, 2014). This revision clarified that an individual must be an enrolled member of a federally or state recognized Indian tribe to receive the presumption of social disadvantage as a Native American in the DBE certification process. Consequently, the current definition of “Native Americans” in § 26.5 “includes persons who *are enrolled members of a federally or State recognized Indian tribe, Alaska Natives or Native Hawaiians.*”

In contrast, the term “Native Americans” included within the definition of “socially and economically disadvantaged individual” in § 23.3 for the ACDBE Program fails to incorporate the requirement of Federal or state recognition. It includes “persons who are

American Indians, Eskimos, Aleuts, or Native Hawaiians.” The existing definition of “Native Americans” in § 23.3 has not been updated to mirror its counterpart definition of “Native Americans” in § 26.5. The proposed rule amends the term “Native Americans” included under the definition of “socially and economically disadvantaged individual” in § 23.3 to conform to the wording of the term “Native Americans” included under the definition of “socially and economically disadvantaged individual” in § 26.5.

Sublease

Airports are encountering more complex subtenant arrangements between ACDBEs and primes. For instance, there are a growing number of agreements with primes that include provisions that bind tenants to more than simply the payment of rent. For example, these provisions might include providing services and supplies and profit-sharing. These new types of agreements raise questions of control, ownership, and the manner of counting ACDBE participation. They have given rise to the need for clarification as to what terms and provisions are appropriate in a sublease operation that would allow the ACDBE participation to count as direct ownership toward the ACDBE goal.

The term “sublease” is used in several sections of the regulation but is not defined. This has created uncertainty as to how to determine if the ACDBE participation should be counted as a sublease agreement. Other terms used in the regulation to reference sublease relationships include subconcession (§ 23.55 and the Uniform Report) and subcontract (§§ 23.3, 23.9, 23.47, and 23.55). The term “subconcession” is defined in the Uniform Report as “a firm that has a sublease or other agreement with a prime concessionaire, rather than with the airport itself, to operate a concession at the airport.” The regulation defines the term direct ownership arrangement as “a joint venture, partnership, sublease, licensee, franchise, or other arrangement in which a firm owns and controls a concession.”

In 2011, the Airport Cooperative Research Program (ACRP), “an industry-driven, applied research program that develops near-term, practical solutions to airport challenges”

published a Resource Manual for Airport In-Terminal Concessions intended to provide guidance on the development of airport concessions programs. Under the discussion of subtenant agreements (i.e., subleases), it states that “subtenants are usually responsible for all aspects of their operations. Subtenants may be franchisees or licensees, or they may operate brands and concepts that they developed. Counting concession gross receipts generated by subtenants toward ACDBE goals is, for the most part, straightforward when subtenants use their own capital and workforce and manage the overall and day-to-day operations of their business.”³⁹

Airports are encountering an increasing number of unconventional subtenant arrangements that are termed “subleases” which in many cases contain restrictions that limit the ACDBE’s control of its operations. In order to determine how to count ACDBE participation, a recipient must determine in what capacity the ACDBE is performing and whether the firm owns and controls the concession location.

The proposed rule would add a definition for “sublease” to clarify that the use of the words “sublease, subconcession, or subcontract” in describing the type of agreement is not controlling as to whether the participation should be counted as direct ownership. The proposed rule would also add the definition of the term “subconcession” to § 23.3, which currently only is found in the Uniform Report to part 23.

Subpart B—ACDBE Programs

30. Direct Ownership, Goal Setting, and Good Faith Efforts Requirements (§ 23.25)

By statute (49 U.S.C. 47107(e)(3)), recipients and businesses at the airport must “make good faith efforts to explore all available options to achieve, to the maximum extent practicable, compliance with the goal through direct ownership arrangements, including joint ventures and franchises.” This statutory good faith efforts requirement is addressed in the

³⁹ The National Academy of Sciences, Engineering, & Medicine 2011, “Resource Manual for Airport In-Terminal Concessions,” Washington, D.C.: The National Academies Press., available at <https://doi.org/10.17226/13326>.

regulations at § 23.25(f), which mandates that a recipient include in its ACDBE Program a requirement for businesses subject to ACDBE goals at the airport, other than car rental companies, to make good faith efforts to explore all available options to meet goals, to the maximum extent practicable, through direct ownership arrangements with ACDBEs.

The current § 23.25(e) provides for the “use of race-conscious measures when race-neutral measures, standing alone, are not projected to be sufficient to meet an overall goal.” Establishing concession-specific goals is an example of an acceptable race-conscious measure that can be implemented. In establishing contract goals, § 23.25(e)(1)(i) and (ii) mandates that the goal can be set through direct ownership arrangements or through the purchase and/or leases of good and services. Additionally, § 23.25(e)(1)(iii) addresses the good faith efforts requirement, and states that “to be eligible to be awarded the concession, competitors must make good faith efforts to meet this goal,” referencing the narrowly tailored goal that was set in accordance with 49 CFR part 23, subpart D.

Some airports have interpreted the requirement under § 23.25(e) to mean that they must require competitors to always make good faith efforts to meet the goal through direct ownership arrangement regardless of how the goal was set. Stakeholders have requested clarification on when concessionaires must make good faith efforts to explore participation through direct ownership arrangements when a goal is established based on goods and services provided by ACDBEs as well as when a goods and services goal can or should be used.

It is important to note the parenthetical “except car rental companies” in § 23.25(f) is intended only to implement the statutory limitation in 49 U.S.C. 47107(e)(4)(C) against requiring car rental companies to change their corporate structure to include direct ownership

arrangements as a means of meeting ACDBE goals. Notwithstanding this exception, car rental companies are still obligated to make good faith efforts to meet such goals.⁴⁰

The proposed rule would amend § 23.25(e) and (f) to clarify direct ownership goal setting and good faith efforts requirements.

31. Fostering ACDBE Small Business Participation (§ 23.26)

This NPRM proposes a conforming amendment to add a small business requirement as under part 26 to the DBE Program (49 CFR part 23). The rationale for this proposed change is similar to the corresponding rationale for the requirement under the DBE Program. See 76 FR 5083, 5094 (Jan. 28, 2011).

The Department previously amended the ACDBE part 23 regulation to conform in several respects to the DBE rule via a June 20, 2012, final rule. However, in the preamble for this final part 23 rule, we contemplated but decided not to issue a parallel small business program requirement for the ACDBE Program. We explained that at the time, it was primarily focused on applying this provision to federally assisted contracting and associated issues such as “unbundling.” However, we acknowledged indications of barriers to ACDBEs in the concessions program that a small business element may help to alleviate. See 77 FR 36924, 36926 (June 20, 2012). We further stated that it would consider the comments in deciding whether to proceed with a small business provision for the ACDBE Program in the future, and that it hoped to learn from airport recipients’ implementation of the small business element part 26.

The Department learned about the implementation of a small business element from airport recipients and their success in achieving race-neutral participation from small businesses, including DBEs, through this process. Moreover, we continue to receive feedback from stakeholders stating that there is a lack of concession opportunities of a size and nature

⁴⁰ See “What are the Good Faith Efforts Obligations of Car Rental Companies to Meet ACDBE Goals at an Airport?” available at <https://www.transportation.gov/sites/dot.gov/files/2020-01/docr-20160329-001carrentalcompaniesgoodfaitheffortsguidance.pdf>.

that small businesses, including ACDBEs, can compete for fairly. Given the continued concerns expressed by stakeholders, we believe the inclusion of a small business element focused on concessions is warranted. Therefore, we propose adding a provision in part 23 that would closely mirror the § 26.39 requirement for recipients to create an element for their ACDBE Program specifically designed to foster small business participation. For purposes of monitoring compliance, this element would include a requirement for recipients to periodically report on the implementation of race-neutral strategies under the small business element for their programs.

32. Retaining and Reporting Information about ACDBE Program Implementation (§ 23.27)

Active Participants List

The Department proposes adding a “bidders list” requirement to part 23 like the one in part 26. Section 26.11(c) instructs recipients to create and maintain a bidders list with certain information about DBE and non-DBE contractors and subcontractors who seek work on federally assisted contracts. However, for part 23, this proposed rule would add a requirement for recipients to develop and maintain an “active participants list.” The term “active participants list” is used in place of “bidders list;” “bidding,” is generally not used in the context of concessions. The active participants list would include all firms that have participated or attempted to participate in airport concession programs in previous years. See § 23.51(c)(2).

Similar to § 26.11(c)(1), one of the purposes of the “active participants list” would be to provide recipients with data that is as accurate as possible about the universe of ACDBE and non-ACDBEs who seek concession opportunities for use in helping recipients set overall goals for car rentals and concessions other than car rental. See § 23.41(a). Recipients could also use all the already available data methods of reporting and communication with their concessions community. See 64 FR 5096, 5104 (Feb. 2, 1999). Recipients may obtain

information on firms interested in seeking concession opportunities from a number of sources, such as past experience with firms that have run concessions or sought concession contracts or leases, knowledge about the universe of firms in certain areas of retail and food and beverage service that tend to be interested in participating in airport concessions, and attendance lists from informational and outreach meetings about upcoming concessions opportunities. See 70 FR 14496, 14506 (Mar. 22, 2005).

As with the proposed change to § 26.11(c), the Department proposes to require recipients to enter this active participant list information into a centralized database that the FAA would specify. Requiring recipients to report this information into a centralized database would create a data source that would allow a more accurate analysis of firms actively seeking concession opportunities. In addition, a searchable, centralized database with information about active participants that includes an expanded dataset would aid recipients in evaluating ACDBE availability for goal-setting purposes.

We list in proposed § 23.27(c)(2) the types of data that recipients would be required to obtain and report. Recipients would be required to obtain and report for the active participants list requirement the same data sets under the proposed § 26.11(c)(2). In conjunction with the Department's proposal to add a similar MAP-21 reporting requirement to § 23.27, and its changes to the Uniform Report, the proposed active participants list reporting requirement would provide the Department with data showing how many and what types of ACDBEs are certified, how many ACDBEs are actively seeking concession opportunities as primes, joint venture participants or sub-concessions, and which of them are actually awarded concession opportunities.

To ensure uniformity of data collection for proper analysis, the Department proposes to add § 23.27(c)(3) to require a standard practice of requesting the information with proposals and initial responses to negotiated procurements.

As the Department noted for part 26 with the bidders list, the active participants list is a promising method for accurately determining the availability of ACDBE and non-ACDBEs. We also believe that creating and maintaining an active participants list will give recipients another valuable tool to measure the relative availability of ready, willing, and able ACDBEs when setting their overall goals. See 64 FR 5096, 5104 (Feb. 2, 1999). For this reason, the Department proposes to add a new paragraph (c) to § 23.27 to require recipients to develop and maintain an “active participants list” for their ACDBE programs.

Subpart C—Certification and Eligibility of ACDBEs

33. Size Standards (§ 23.33)

See discussion on § 26.65 above.

34. Certifying Firms that Do Not Perform Work Relevant to the Airport’s Concessions (§ 23.39)

The regulatory definition of “concession” under § 23.3 allows firms that provide goods and services to concessionaires and do not maintain physical locations on airport property to be certified as ACDBEs. Firms that provide construction services for the build-out of concession facilities to concessionaires (e.g., food and beverage, retailers, etc.) at airports satisfy the definition of “concession” under part 23. Hence, suppliers of goods and services (e.g., architects, engineers, etc.) to these construction firms also meet the definition of “concession” and are not excluded from receiving ACDBE certification.

While the firms that perform these construction-related activities for concessions may qualify as ACDBEs, § 23.55(k) prohibits recipients from counting toward ACDBE goals the costs incurred in connection with the “build-out” of a concession facility, such as costs related to renovation, repair or construction. Section 23.55(k) was promulgated to address concerns that primes may use participation from construction firms completing build-out projects to primarily satisfy their goals instead of having ACDBEs meaningfully participate in as many other concession activities outside of construction.

Given that the definition of “concession” under § 23.3 includes suppliers of goods and services to concessionaires without excepting suppliers of goods and services for build-outs, stakeholders report that certifiers continue to provide ACDBE certification to construction firms and firms that supply goods and services to the construction industry. However, these firms often do not realize that their participation as ACDBEs cannot be counted until after they have gone through the certification process. Thus, many are left with having undergone the burden of obtaining certification and not obtaining airport jobs.

Firms seeking their ACDBE designation to perform construction-related activities exclusively in connection with build-out of concession facilities should not be granted certification given that the participation derived from those activities cannot be counted toward goals. Although existing regulations provide certifiers the discretion to withhold certification of firms that are certified as DBEs that seek ACDBE certification if they do not perform work relevant to the Program, the regulations are not explicit regarding whether certifiers possess the same discretion to deny certification to ACDBE applicants that are not certified as DBEs. See § 23.37(b). Therefore, the proposed rule would add a paragraph to § 23.39 explaining that certifiers must not certify applicant firms if they intend to perform activities exclusively related to the renovation, repair, or construction of a concession facility (sometimes referred to as the “build-out”) for which participation cannot be counted toward an ACDBE goal.

Subpart D—Goals, Good Faith Efforts, and Counting

35. Removing Consultation Requirement When No New Concession Opportunities Exist (§ 23.43)

The current § 23.43 requires recipients to consult with stakeholders before submitting overall goals to the FAA. Recipients must submit goals every three years, which may include periods when there are no concession opportunities to evaluate. See § 23.45(b). Examples of stakeholders with whom recipients must consult include, but are not limited to, minority and

women's business groups, community organizations, trade associations representing concessionaires currently located at the airport, as well as existing concessionaires themselves. See § 23.43(b). Meaningful consultation with stakeholders is an important, cost-effective means of obtaining relevant information from the public concerning the methodology, data, and analysis that support the overall ACDBE goal. See 79 FR 59566, 59581 (Oct. 2, 2014). The type of information that might be derived from these consultations includes the availability of disadvantaged businesses, the effects of discrimination on opportunities for ACDBEs, and recipients' efforts to increase participation of ACDBEs. See § 23.43(b).

The Department's guidance, titled "Tips for Goal Setting," discusses the need for consultation as a source in determining an adjustment to the base goal figure. It states, in part: "In determining whether or not your base figure should be adjusted to account for the effects of past discrimination, you should consider consulting with the following organizations and institutions to determine whether they can direct you to information about past discrimination in public contracting; discrimination in private contracting; discrimination in credit, bonding or insurance; data on employment, self-employment, training or union apprenticeship programs; and/or data on firm formation."⁴¹

Stakeholders expressed that the regulatory requirement for recipients to perform consultation when there are no concession opportunities to evaluate or promote is misleading and burdensome. They argue that it would be more meaningful if they only had to conduct stakeholder consultation when their goal methodology would include new concession opportunities.

The Department agrees that consultation work is most appropriate in gathering narrative data to adjust the base goal figure and when there are concession opportunities to

⁴¹ See "Tips for Goal Setting in the Disadvantaged Business Enterprise (DBE) Program" available at <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>.

promote. The consultation requirement becomes unnecessary without relative availability of new concessions opportunities to analyze or a base figure to adjust.

The proposed rule would require consultation only when the ACDBE goal methodology includes opportunities for new concession agreements.

36. Non-car Rental Concession Goal Base (§ 23.47)

Section 23.47 requires recipients to include in the base of the overall goal for concessions other than car rentals the total gross receipts of all concessions at the airport, with the following specific exclusions: (1) the gross receipts of car rental operations; (2) the dollar amount of a management contract or subcontract with a non-ACDBE; (3) the gross receipts of business activities to which a management or subcontract with a non-ACDBE pertains; and (4) any portion of a firm's estimated gross receipts that will not be generated from a concession.

However, § 23.25(e)(1) provides for establishing concession-specific goals for particular concession opportunities. Specifically, it provides that if the objective of the concession-specific goal is to obtain ACDBE participation through a direct ownership arrangement with an ACDBE, recipients must calculate the goal as a percentage of the total estimated annual gross receipts from the concession. See § 23.25(e)(1)(i). It further provides that if the goal applies to purchases and/or leases of goods and services, recipients must calculate the goal by dividing the estimated dollar value of such purchases and/or leases from ACDBEs by the total estimated dollar value of all purchases to be made by the concessionaire. See § 23.25(e)(1)(ii).

Since the overall goal is an analysis of concessions opportunities and concession-specific goals set on those opportunities, recipients have requested clarification on what to use as their base for their overall goal when the concessions opportunities will yield participation through the purchase of goods and services from concessionaires. Recipients report situations

where participation for some non-car rental concessions can only be reasonably expected to be achieved in the form of goods and services purchases.

The Department explained in the 2000 SNPRM for parts 23 and 26 that “[c]onsistent with statutory requirements, management contracts and purchases by concessions from DBE suppliers form part of the goal.” 65 FR 54454, 54457 (Sept. 8, 2000) Where direct ownership arrangements are not practicable, it is permissible to add the potential value of management contracts or subcontracts with ACDBEs and goods and services to be purchased by concessionaires from ACDBEs when calculating overall goals. These amounts are added to the base for the overall goal in both the numerator and denominator.

The proposed rule would amend § 23.47(a) to provide for the goal setting requirements set forth in § 23.25.

37. Counting ACDBE Participation After Decertification (§ 23.55)

Both §§ 23.39(e) and 23.55(j) provide that upon an ACDBE firm losing its ACDBE certification because the firm exceeded the small business size standard or because an owner has exceeded the PNW, the participation of the ACDBE firm may be counted toward ACDBE goals during the remainder of the term of a concession agreement. Specifically, § 23.39(e) also requires that “the firm in all other respects remains an eligible DBE” as a condition to continue counting their participation.

When a firm is certified, it is required to report changes that impact its eligibility by submitting annual affidavits that provide either notice of no changes or notification of changes in accordance with § 26.83(i) and (j), made applicable to part 23 by § 23.31. However, there is currently no provision in the regulation to monitor whether a firm whose ACDBE certification was removed solely for exceeding the size standard or PNW cap, but remains eligible for ACDBE certification in all other respects, remains an eligible ACDBE for the purpose of counting its participation. Of note, once a firm loses its certification as an ACDBE due to

exceeding the business size standard or PNW cap, it is no longer obligated to provide the information or affidavits required by § 26.83.

Section 23.39(e) provides that firms whose ACDBE certification has been removed because of size or PNW must continue to meet the ownership and control eligibility requirements to be counted for the duration of a concession agreement. Stakeholders have highlighted the need to monitor if it is appropriate to continue counting the participation of ACDBEs once they lose their ACDBE certification due to size or personal net worth standards. This type of monitoring is necessary and the proposed rule amends § 23.55(j) to require those firms to continue to report changes by submitting declarations similar to those affidavits required of DBEs by § 26.83(i) and (j). This should be carried out only with respect to their ability to meet ownership and control requirements, as a condition to continue counting their participation.

Under the proposed rule, firms would report changes to recipients rather than UCPs, given that the firms' participation is counted by airports. That is, as a condition to counting a firm's continued participation in the ACDBE Program upon losing certification due to failure to meet size or PNW standards, the firm would be required to submit an annual declaration that provides either notice of no changes or notification of changes similar to those required by § 26.83(i) and (j). More specifically, firms would be required to submit a declaration to report any change in their circumstances affecting their ability to meet ownership and control requirements under part 23. In addition, a "no change declaration," submitted annually to the airport, would affirm that there have been no changes in the firm's circumstances affecting its ability to meet these ownership or control requirements. Should an ACDBE firm fail to provide a no change declaration, the recipient would cease counting the firm's participation toward ACDBE goals.

Firms would need to report a change in ownership through a notice of change declaration because the change might impact the recipient's ability to count the participation

of that firm. For example, if a previously certified ACDBE firm was sold or a controlling interest in the firm was sold to a non-ACDBE, its participation would cease to be counted as of the date of the sale based on § 23.39(e). A sale constitutes a material change that impacts the ownership and control eligibility requirements in part 23. Therefore, the counting of the ACDBE's participation would no longer meet the requirements of § 23.39(e), which states in part that "in all other respects [the firm] remains an eligible [AC]DBE." However, if the sale is made to a ACDBE firm that meets all eligibility criteria under the ACDBE Program, recipients should not disqualify the firm's participation from counting under § 23.55(j).

Upon notice of a sale or change of ownership, recipients should verify via state electronic directories whether the firm or a controlling interest in the firm was sold to a ACDBE. Once the sale or change of ownership is verified, the recipient's monitoring obligation as well as the selling firm's reporting requirements under this recommendation would cease. Therefore, the UCP would be solely responsible for keeping current on the status of the acquiring firm's ACDBE's certification status and the ACDBE would continue to comply with its reporting obligations under § 26.83(i) and (j) as required, prior to acquiring the firm or a controlling interest therein.

The Department proposes to delete § 23.39(e), and redesignate paragraphs (f) and (g) as paragraphs (e), (f), and (g) under § 23.39. Both §§ 23.39(e) and 23.55(j) address the identical issue concerning continued counting, and therefore, there is no valid justification for having these two differently worded sections instituting the same rule.

38. Shortfall Analysis Submission Date (§ 23.57)

Section 23.57(b) requires recipients to conduct a shortfall analysis and establish steps and milestones as corrective actions (collectively, "Shortfall Analysis") if the recipient fails to meet its overall goal for the fiscal year. See § 23.57(b)(1) and (2). The Shortfall Analysis must be submitted to FAA within 90 days of the end of the Federal fiscal year. See § 23.57(b)(3)(i). In contrast, § 23.27(b) requires recipients to submit an annual Uniform Report of ACDBE

Participation (“Uniform Report”) by March 1 of each year. Stakeholders expressed concerns over the due date of the Shortfall Analysis under part 23 as it becomes due before the Uniform Report is due.

Part 26 includes a similar requirement; however, the shortfall analysis is due 30 days after the Uniform Report is due. This affords recipients 30 days after they are required to submit the report to analyze the data in the Uniform Report. See § 26.47(c)(3)(i).

The proposed rule would extend the due date of the part 23 Shortfall Analysis by amending § 23.57(b)(3)(i) to allow recipients to submit the Shortfall Analysis 30 days after they submit their Uniform Report.

Subpart E—Other Provisions

39. Long-term Exclusive Agreements (§ 23.75)

Five-year Term for Long-term Agreements

Section 23.75(a) prohibits recipients from entering into “long-term, exclusive agreements” (LTE) for concessions without prior FAA approval based on very limited conditions that are outlined in the regulation. The reason for this general prohibition is to limit situations where an entire category of business activity is not subject to competition for an extended period through the use of an LTE agreement. See Principles for Evaluating Long-Term, Exclusive Agreements in the ACDBE Program, June 10, 2013 (LTE Guidance).⁴²

Stakeholders suggest that the five-year term in the definition contained in § 23.75(a) is too short. As an alternative, stakeholders suggested that “long-term” should be re-defined to a minimum of ten years given that the term of the typical concession lease agreement is generally ten years or longer, per industry standards.

The Department discussed the definition of “long-term agreement” under § 23.75 in the preamble to the 2005 final rule, which states that “[o]ne airport suggested making 10 years

⁴² See “Principles for Evaluating Long-term, Exclusive Agreements in the ACDBE Program” available at https://www.faa.gov/sites/faa.gov/files/about/office_org/headquarters_offices/acr/LTE_Guidance_Final.pdf.

rather than 5 years the criterion for a long-term exclusive lease subject to this section. We have not adopted this comment because doing so would reduce the degree of oversight FAA can exercise under the rule to make sure that long-term concession agreements include adequate ACDBE participation.” (70 FR 14496, 14507 (March 22, 2005))

The need for oversight remains unchanged. It is worth noting that concession agreements with terms that exceed five years but do not meet the definition of “exclusive” need not be submitted for FAA approval under the rule. The Department seeks comments on keeping the term at 5 years rather than revising it to 10 years. See section 1.2 of LTE Guidance.

Long-term Agreements and Options

Section 23.75(a) does not address whether a concession agreement becomes “long-term” if its duration exceeds the five-year threshold as a result of options. The LTE Guidance explains that a long-term agreement is one that has a term of more than five years, including any combination of base term and options (e.g., options to extend the term of the lease agreement, or to expand the scope of the agreement to a new section or terminal, or to enter into a new contract, etc.) if the effect is a lease period of more than five years. See section 1.3 LTE Guidance. The Department proposes to amend the definition of “long-term agreement” under § 23.75(a) to state that options are subject to the regulation’s requirements if the options result in a lease period of more than five years.

Long-term Agreements and Holdovers

Holdover provisions of an airport lease typically allow the airport sponsor to extend the terms of an existing airport lease without execution of a new lease, which are distinct from options. Options involve an extension of the lease and sometimes an adjustment in rental rates for the extended period set by the option. In contrast, holdover provisions are meant to provide a short-term extension of the protections and terms described within the lease document. Notwithstanding the fact that holdover provisions are designed to bridge gaps to

meet the short-term needs of the parties, holdover tenancies that cause an exclusive agreement to extend the term beyond five years may preclude potential ACDBE competitors from participating in the agreement in the same manner as long-term exclusive agreements requiring approval by the FAA per § 23.75.

The Department seeks public comment on how to address holdovers that would result in short-term exclusive agreements becoming long-term without FAA oversight, leading to the possible circumvention of § 23.75.

Definition of Exclusive Agreement

Section 23.75 prohibits sponsors from entering into long-term exclusive agreements for the operation of concessions except under limited conditions and subject to FAA approval. Section 23.75(a) contains a definition of “long-term agreement” but does not define an “exclusive agreement.” However, the FAA’s LTE Guidance defines the term “exclusive” as follows:

For purposes of this guidance and in accord with 49 CFR Section 23.75, the term “exclusive” is defined as a type of business activity that is conducted solely by a single business entity on the entire airport. In the context of this guidance, the concept of “exclusive” includes the absence of any ACDBE participation. (LTE Guidance, section 1.2)⁴³

The intent of § 23.75 is to provide for the review of LTE agreements to ensure adequate ACDBE participation throughout the term of the agreement, irrespective of whether an ACDBE or a non-ACDBE enterprise is the prime concessionaire being considered for award of an exclusive, long-term agreement. See 57 FR 18400, 18401 (Apr. 30, 1992). Therefore, the Department proposes to add the definition of “exclusive agreement” to § 23.75(a) to be consistent with the LTE guidance’s discussion of the term “exclusive.”

Amending Document Requirements

⁴³ Id.

Section 23.75(c) requires recipients to submit to the FAA various documents and information to obtain approval from the FAA of an exclusive LTE agreement. In Fiscal Year 2020, the FAA held several listening sessions with stakeholders in reference to part 23. Stakeholders shared their concerns regarding LTE requirements for documentation, specifically, that some of the LTE requirements for documentation and information were unclear, not feasible, or pertinent. Moreover, we understand that certain documentation and information required under the existing rule are typically not available before a concession opportunity solicitation is published.

The Department believes these concerns merit addressing and proposes the following changes to § 23.75(c):

- Amend the introductory text in § 23.75(c) to allow for certain documentation and information required for approval of an LTE agreement under this section to be submitted prior to the release of the solicitation or request for proposals and others, prior to award of the contract.
- Delete § 23.75(c)(2)(i) as there may not be opportunities for direct ownership.
- Delete § 23.75 (c)(2)(ii) as the existing rule can be improperly read to permit the prime concessionaire to terminate ACDBEs on an operation, after the ACDBEs made an investment. Relatedly, delete § 23.75(c)(2)(iii), as the termination provision language is inconsistent with the requirements of § 26.53 and the provisions of § 26.53(f). These termination provisions apply to part 23 by reference and address replacement or substitution of ACDBEs.
- Replace the current provision in § 23.75(c)(3) that requires ACDBE participants to be in an acceptable form such as a sublease, joint venture, or partnership, with a requirement for recipients to submit an ACDBE contract goal analysis developed in accordance with part 23.

- Amend § 23.75(c)(4) to specify that documentation that ACDBE participants are certified in the appropriate NAICS code need only be provided before award of the concession contract.
- Amend § 23.75(c)(5) to only require a general description, including location and concept of the ACDBE operation, and require the information to be submitted only prior to final award, i.e., allowing information to be submitted after prime concessionaire selected.
- Lastly, delete the current provisions in § 23.75(c)(7) as actual information on estimated gross receipts and net profits are not available at the solicitation stage. Requesting data on net profit to be earned by the ACDBE is not equitable because the process does not require the same information from the non-ACDBE. Insert in its place, a provision to allow recipients to submit agreements in draft form prior to the release of the solicitation or RFP, and to subsequently provide the final agreements prior to award of the contract.

40. Local Geographic Preferences (§ 23.79)

This NPRM provision proposes to revise § 23.79 to make it clear that local geographic preferences are not permitted regardless of concession certification status. This change is needed to address confusion about whether the local geographic preference limitation under § 23.79 applies only to ACDBEs.

This change would be consistent with the Department's views from 2005 part 23 final rule. The ACDBE Program is a national program, and some concession markets are national markets. Under these conditions, a local preference program is out of place. The disadvantages of local preferences, such as the elimination of benefits of wider competition for business opportunities and the possible loss of opportunities for ACDBEs who are not located in the locality served by an airport, continue to be important to warrant prohibiting

local preferences in the context of the ACDBE Program. (70 FR 14496, 14507 (March 22, 2005))

Revising this section would make clear that a local geographic preference that gives a concession located in a local area an advantage over concessions from other places in obtaining business as, or with, a concession at an airport is prohibited. However, while recipients cannot limit solicitations to local concessionaires or use local geographic preference as a selection criterion, recipients may request concepts that are local to a specific region when soliciting proposals. We understand the objective of local concepts is to create a sense of place for passengers, but this does not extend to local geographic preferences that limit concession awards to local concessionaires.

41. Appendix A to Part 23: Uniform Report of ACDBE Participation Form

The Department proposes removing the Uniform Report of ACDBE Participation from appendix A to part 23. Official forms are not required to be reproduced in the CFR; this report will be posted on the DOT website. Removing this form from the CFR is an administrative action and would not impact the ability of the public to comment on any amendments to the information collections contained in the form.

Section 23.27(b) requires recipients to complete and submit an annual report on ACDBE participation using the Uniform Report found in appendix A. The Department proposes several amendments to the Uniform Report to enhance the accuracy of participation reported and address stakeholder concerns. In lieu of the above proposal to remove appendix A from the CFR, the following amendments would be found in the Uniform Report.

Block #5 Instructions of Appendix A, Definition of Goods and Services

The Uniform Report's block #5 instructions state that "[...] 'Goods/services' refers to those goods and services purchased by the airport itself or by concessionaires and management contractors from DBEs." Block #5 encompasses all non-car rental cumulative ACDBE participation during the reporting period.

There are several participation categories (e.g., prime concessions; subconcession; management contracts; and goods and services) listed in the Uniform Report under which gross revenues, and goods and service expenditures are to be reported. These categories include “prime concession” which is defined as “concessions who have a direct relationship with the airport (e.g., a company who has a lease agreement directly with the airport to operate a concession).” The category “subconcession” is defined as “a firm that has a sublease or other agreement with a prime concessionaire, rather than with the airport itself, to operate a concession at the airport.” Because airport recipients do not meet either the definition of a “concession” or “concessionaire,” it is the Department’s view that goods and services purchased by recipients should not be reported in the Uniform Report.

The proposed rule would amend the definition of “goods/services” in the block #5 instructions to clarify that only participation in the form of goods and services purchased by concessionaires and management contractors from DBEs should be reported. The definition of “subconcession” is currently in the Uniform Report but not in the § 23.3 list of definitions. The Department proposes adding the definition to § 23.3.

Block #5 New Joint Venture Participation Category

Stakeholders expressed that the Uniform Report should be modified to address the reporting of participation of joint venture partnerships as compared to participation from goods/services purchases or sub-concessions. The proposed rule would amend blocks #5, #6, #8, and #9 to incorporate a separate row for reporting joint venture participation. The proposed rule also would amend the instructions in all blocks of the Uniform Report to include the definition of “joint venture” as defined in § 23.3 as a new participation category and provides directions on how to count ACDBE participation derived from joint ventures.

Blocks #10 and #11 Reporting of ACDBEs Owned by Members of Different Socially Disadvantaged Groups

The Uniform Report does not provide for the reporting of ACDBEs owned by multiple partners who are from different groups whose members are presumed socially and economically disadvantaged (SED). Block #10 instructs recipients to break down the cumulative ACDBE participation figures from blocks #5 and #8 by race and gender categories. The data reported under block #10 only permits reporting of firms by race and gender by one group whose members are presumed SED. Block #10 does provide a column for “other,” but this is used to report participation by individuals who are found disadvantaged on an individualized basis.

To enhance the accuracy of participation reported in the Uniform Report, the Department proposes to amend the requirements under block #11 in the Uniform Report to allow for participation to be reported by ACDBEs that are owned by multiple individuals of different races, ethnicities, and/or genders.

42. Technical Corrections

In addition to substantive proposed changes to part 23, the Department is proposing a number of technical amendments. These amendments fall into the following categories: (1) additions and amendments to make provisions in part 23 consistent with the provisions of Part 26; (2) additions or amendments to provisions to clarify existing requirements in part 23; and (3) corrections of typographical errors, and revisions to obsolete and/or duplicative provisions, and cross-references within the regulation. Some of these proposed technical amendments to part 23 are discussed below.

Obsolete Dates in § 23.31

Regulatory changes instituted in 2005 direct airports or UCPs to review the eligibility of ACDBEs to make sure that they met the eligibility standards of part 23. More specifically, § 23.31(c)(1) and (2) direct airports or UCPs to complete these eligibility reviews by no later than April 21, 2006, or three years from the anniversary date of each firm’s recent certification. Additionally, recipients are obligated by these regulations to direct DBEs to

submit by April 21, 2006, a PNW statement, a certification of disadvantage, and a No Change Affidavit.

These deadlines have expired. In addition, the date is confusing, especially to participants new to the ACDBE Program. Section 23.31(c)(1) and (2) was promulgated in 2005 to account for new PNW criteria instituted in 2005, triggering the need to review certified firms to ascertain their PNW. During the 17 years following the adoption of the 2005 regulation, there has been ample time for review of PNW standards. In addition, § 26.83(h) through (j), made applicable by § 23.31(a), provides for certification reviews of DBEs, annual certification of disadvantage, and notification of changes regarding circumstances affecting certification, including size and PNW standards. Hence, § 23.31(c) is unnecessary and the Department recommends deleting it.

Uniform Certification Application (UCA) Inconsistencies

The current § 23.39(g) which would become paragraph (f) under the above proposed redesignation, requires UCPs to use the UCA to certify firms for the ACDBE Program. However, the language of § 23.39(g) is inconsistent with § 26.83(c)(2), made applicable to part 23 by § 23.31. In addition, § 23.39(g) is inconsistent with the revised UCA that the Department published in 2019. The proposed rule would therefore delete § 23.39(g)(1) through (3) and revise § 23.39 to be consistent with § 26.83(c)(2) and the revised UCA.

Enhanced Consistency with Part 26

Sections 23.39(a) and 26.83(c)(1) detail the requirements for determining the eligibility of firms for the ACDBE and DBE programs. The introductory text in paragraph (a) of § 23.39 lists by reference several provisions in § 26.83(c) that are not to be applied to part 23; the provisions that are not specifically excluded remain applicable to part 23 via § 23.31(a).

Notwithstanding slight differences between part 23 and part 26 certification, all of the requirements of § 26.83(c)(1)(i) through (viii) generally apply to part 23 certification, but

various modifications to the cross-references make § 23.39 difficult to follow as written. To address this, the Department proposes to simplify the rule by excluding all of the provisions of § 26.83(c)(1)(i) through (viii) and stating each of those requirements in § 23.39(a) in a manner that is consistent with the ACDBE Program.

REGULATORY ANALYSES AND NOTICES

A. Executive Order: 12866 (“Regulatory Planning and Review”), Executive Order 13563 (“Improving Regulation and Regulatory Review”), and DOT Regulatory Policies and Procedures (49 CFR Parts 23, 26)

The proposed rule is not a significant regulatory action under Executive Order 12866, “Regulatory Planning and Review,” as supplemented by Executive Order 13563, “Improving Regulation and Regulatory Review.” Accordingly, OMB has not reviewed it under that Executive order. It is also not significant under the Department’s regulatory policies and procedures.⁴⁴

The proposed rule would amend reporting and eligibility requirements for the Department’s Airport Concession Disadvantaged Business Enterprises (ACDBE) program and Disadvantaged Business Enterprise (DBE) program. These programs are implemented and overseen by recipients of certain Department funds. The changes to the proposed rule would affect businesses participating in the programs, recipients of Department funds who oversee the programs, and the Department.

The Department conducted a regulatory impact analysis, available in the docket, to assess the effects of the proposed rule. Businesses, recipients, and the Department would incur some costs due to increased reporting requirements. At the same time, they would experience

⁴⁴ See “DOT Order 2100.6A, Rulemaking and Guidance Procedures” available at <https://www.transportation.gov/sites/dot.gov/files/2021-06/DOT-2100.6A-Rulemaking-and-Guidance-%28003%29.pdf>.

cost savings overall because the rule would relax requirements—for example, by allowing recipients to conduct virtual on-site visits—and clarify regulations.

Table 1 summarizes the estimated costs and cost savings of the rule over a ten-year analysis period. The rule has annualized net cost savings of \$6.2 million at a 3 percent discount rate and \$6.1 million at a 7 percent discount rate. DOT requests comment on the assumptions made and conclusions drawn in the regulatory impact analysis.

Table 1: Costs and cost savings of the proposed rule, 10-year period (rounded to thousands)

| | Undiscounted | Present value 3% | Annualized 3% | Present value 7% | Annualized 7% |
|--------------------|--------------|---------------------|------------------|---------------------|------------------|
| Total cost savings | 202,778,000 | 177,991,000 | 20,865,000 | 152,057,000 | 21,649,000 |
| Total cost | 140,623,000 | 125,153,000 | 14,672,000 | 108,953,000 | 15,513,000 |
| Net cost savings | 62,155,000 | 52,838,000 | 6,193,000 | 43,104,000 | 6,136,000 |

B. Executive Order 13132 (“Federalism”)

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13121 (“Federalism”). It would not include any provision that: (1) has substantial direct effects on the states, the relationship between the National Government and the states, or the distribution of power and the responsibilities among the various levels of government; (2) imposes substantial direct compliance costs on state and local governments; or (3) preempts state law. The DBE and ACDBE programs are governed by Federal regulations 49 CFR parts 26 and 23. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

C. Executive Order 13084 (“Tribal Consultation and Coordination”)

This rulemaking has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (“Consultation and Coordination with Indian Tribal Governments”). Because this rulemaking does not significantly or uniquely affect the communities of the Indian Tribal governments or impose substantial direct compliance costs

on them, the funding and consultation requirements of Executive Order 13084 do not apply.

D. Unfunded Mandates Reform Act

The Department has determined that the requirements of the Title II of the unfunded Mandates Reform Act of 1995 do not apply to this rulemaking.

E. National Environmental Policy Act

The Department has analyzed the environmental impacts of this action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C 4321 *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). The purpose of this rulemaking is to amend the Department's DBE and ACDBE regulations. Paragraph 4(c)(5) of DOT Order 5610.1C incorporates by reference the categorical exclusions for all DOT Operating Administrations. This action is covered by the categorical exclusion listed in the Federal Transit Administration's implementing procedures, "[p]lanning and administrative activities that do not involve or lead directly to construction, such as: . . . promulgation of rules, regulations, directives..." 23 CFR 771.118(c)(4). In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

F. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, as amended, (5 U.S.C. 601 *et seq.*) and E.O. 13272 (67 FR 53461, Aug. 16, 2002) requires agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare an Initial Regulatory

Flexibility Analysis (IRFA) unless it determines and certifies that a rule, if issued, would not have a significant economic impact on a substantial number of small entities. DOT has not determined whether the NPRM would have a significant economic impact on a substantial number of small entities.

The Department prepared an IRFA as part of the Department's regulatory impact analysis (appendix C of the regulatory impact analysis), available in the docket. DOT invites all interested parties to submit data and information regarding the potential economic impact on small entities that would come from promulgating the NPRM. DOT will consider all information and comments received in the public comment process when preparing the Final Regulatory Flexibility Analysis.

G. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (Pub. L. 104-13, 49 U.S.C. 3501, 3507) requires Federal agencies to obtain approval from the Office of Management and Budget (OMB) before undertaking a new collection of information imposed on ten or more persons, or continuing a collection previously approved by OMB that is set to expire.⁴⁵ On March 1, 2022, OMB renewed its approval of five information collection instruments that were previously approved in 2018 (OMB Control No. 2105-0510).⁴⁶ Nonetheless, the Department is resubmitting them to OMB because the proposed rule modifies, and in some cases, reduces PRA burdens. On March 10, 2022, OMB took under consideration the Department's request for an OMB Control Number for 17 additional part 26 information collection instruments that had not previously been submitted for approval (ICR Reference No: 202203-2105-001). On

⁴⁵ A "collection of information" is defined as "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to an agency, requiring the disclosure to an agency, third parties or the public of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, ten or more persons." 5 CFR 1320.3(c)(1). The activities that constitute the "burden" associated with a collection are defined in 5 CFR 1320.3(b)(1) as "the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency."

⁴⁶ The instruments are the Uniform Report of DBE Awards or Commitments and Payments, Uniform Certification Application, Annual Affidavit of No Change, Personal Net Worth Statement, and Percentages of DBEs in Various Categories.

April 27, 2022, OMB took under consideration the Department's request for an OMB Control Number for part 23 collection instruments that had not previously been submitted for approval (ICR Reference No: 202204-2120-002).

This proposed rule would add new collection instruments as well as modify existing collection instruments in both parts 23 and 26. The following is a description of the sections that contain new and modified information collection requirements, along with the estimated hours and cost to fulfill them.⁴⁷

1. ACDBE Small Business Element (new requirement)

CFR Section: 49 CFR 23.26

Respondents: Primary airports

Number of respondents: 396

Frequency: Once each year

Number of responses: 396

Hours per response: 5.6 hours

Wage rate: \$72.35/hour

Total annual burden: 14,097.6 hours and \$1,019,961.36

2. ACDBE Active Participants List (new requirement)

CFR Section: 49 CFR 23.27(c)

Respondents: Primary airports and ACDBE and non-ACDBEs that seek to work on concession opportunities

Number of respondents: 396 primary airports; 3,945 ACDBE and non-ACDBEs

⁴⁷ For part 23 recipient wage rates, the Department calculated the total annual cost burden by multiplying the total annual burden hours (56 hours x 396 respondents) against the fully loaded state government wage rate taken from Bureau of Labor and Statistics' (BLS) estimate of median wages for employees in "Management Occupations" (SOC 11-000) working in "State Government, excluding schools and hospitals" (NAICS 999200) at https://www.bls.gov/oes/current/naics4_999200.htm#11-0000. The wage rate (\$44.66/hour) is multiplied by 1.62 to get a fully loaded wage rate (compensation rate) of \$72.35 to account for the cost of employer provided benefits. For part 26, recipient staff hourly wage rate is taken from the BLS estimate of an Eligibility Interviewer in Government Programs (OEWS Designation). The wage rate is multiplied by 1.62 to get a fully loaded hourly wage rate of \$34.77 to account for the cost of employer provided benefits. For state and local government workers, wages represent 61.9% of total compensation in 2020, therefore the multiplier is 1.62 (1/0.619).

Frequency: once each year

Number of responses: 396 primary airports; 3,945 ACDBE and non-ACDBEs

Hours per response: 42 hours per primary airport; .5 hours per ACDBE and non-ACDBE firm

Wage rate: \$72.35/hour

Total annual burden: 16,632 hours and \$1,203,325.20 for primary and non-hub airports; 1,972.5 hours and \$0 for ACDBE and non-ACDBEs

3. ACDBE Annual Report of Percentages of ACDBEs in Various Categories (new requirement)

CFR Section: 49 CFR 23.27(d)

Respondents: 49 state departments of transportation, District of Columbia, and Puerto Rico

Number of respondents: 51

Frequency: once each year

Number of responses: 51

Hours per response: 3.2

Wage rate: \$72.35/hour

Total annual burden: 161.6 hours and \$11,807.52

4. Counting of ACDBE Participation Following Eligibility Removal (§ 23.55) (new requirement)

Respondents: ACDBE firms

Number of respondents: 1,233

Frequency: once each year

Number of responses: 1,233

Total annual burden: 25,276.5 hours and \$1,259,528

5. Long-Term Exclusive Agreements (§ 23.75) (modification of existing requirement)

Proposed modification: Amend and/or remove LTE requirements for documentation and information that are unclear, not feasible, or pertinent.

Respondents: Recipients of FAA airport development grants

Number of respondents: 7

Frequency: once

Number of responses: 7

Total annual burden: 35.09 hours and \$2,130.23

6. Personal Net Worth Statement (modification of existing requirement)

Proposed modification: Remove the requirement for firms to report their retirement assets, thus reducing the hours and cost burden of completing the form.

CFR Section: Appendix G of 49 CFR part 26

Respondents: DBE and ACDBE certification applicants

Number of respondents: 9,500

Frequency: once each year

Number of responses: 9,500

Hours per response: 8

Wage rate: There is no applicable wage rate because there is no standardized way in which firms operate and how they pay their employees and/or contractors. It is not possible for DOT to contact firms for estimates.

Total annual burden: 76,000 hours

7. Uniform Certification Application (UCA) (modification of existing requirement)

Proposed modification: Add clarifying instructions and terminology to assist applicants in filling out the application, thereby reducing the hours and cost burdens of completing it.

CFR Section: Appendix F of 49 CFR part 26

Respondents: DBE and ACDBE certification applicants

Number of respondents: 9,500

Frequency: once

Number of responses: 9,500

Hours per response: 35

Wage rate: There is no applicable wage rate because there is no standardized way in which firms operate and how they pay their employees or contractors It is not possible for DOT to contact firms for estimates.

Total annual burden: 332,500 hours

8. Declaration of Eligibility (currently titled “Annual No Change Affidavit”)

(modification of existing requirement)

Proposed modification: Eliminate the notarization requirement, thus reducing the hours and cost burden of completing and submitting the form.

CFR Section: 49 CFR 26.83(j)

Respondents: DBE and ACDBE firms

Number of respondents: 45,525

Frequency: once each year

Number of responses: 45,525

Hours per response: .5 hour (30 minutes)

Wage rate: There is no applicable wage rate because there is no standardized way in which firms operate and how they pay their employees or contractors It is not possible for DOT to contact firms for estimates.

Total annual burden: 22,762 hours

9. Maintaining bidders lists (modification of existing requirement)

Proposed modification: Recipients would obtain additional data sets and enter all bidders list information into a centralized database.

CFR Section: 49 CFR 26.11(c)

Respondents: DOT funding recipients

Number of respondents: 1,198

Frequency: 3 times per year

Number of responses: 3,594

Hours per response: 8

Wage rate: \$34.77

Total annual burden: 86,256 hours and \$2,999,121.12

10. Reporting Percentages of DBEs in Various Categories (MAP-21 Data Report)

(modification of existing requirement)

Proposed modification: Expand data collection to cover the number of firms denied certification, summarily suspended, or decertified. The data would be disaggregated by ethnicity, gender, and the number of prequalified certified firms in each North American Industry Classification System (NAICS) code.

CFR Section: 49 CFR 26.11(e)

Respondents: state departments of transportation, District of Columbia, and Puerto Rico

Number of respondents: 52

Frequency: once per year

Number of responses: 52

Hours per response: 315

Wage rate: \$34.77

Total annual burden: 16,380 hours and \$569,532.60

11. Updating and maintaining state directories of DBEs and ACDBEs (modification of existing requirement)

Proposed modifications: Eliminate the requirement of publishing printed directories. Add additional information fields to the directories.

CFR Section: 49 CFR 26.31 and 26.81(g)

Respondents: Certifying agencies of DOT funding recipients

Number of respondents: 132

Frequency: Each respondent does this 12 times each year

Number of responses: 1,584

Hours per response: 2

Wage rate: \$34.77

Total annual burden: 38,016 hours and \$1,321,816.32

12. DBE performance plan (new requirement)

CFR Section: 49 CFR 26.53(e)

Respondents: Recipients of FHWA funds that let design-build contracts

Number of respondents: 50

Frequency: 15 times each year

Number of responses: 750

Hours per response: 3

Wage rate: \$34.77

Total annual burden: 33,750 hours and \$1,173,487.50

13. Mailing and maintaining copies of notices of summary suspension (modification of existing requirement)

Proposed modification: Remove the requirement for sending notices of summary suspension by mail and allow respondents to send the notices by email.

CFR Section: 49 CFR 26.88

Respondents: Certifying agencies of DOT funding recipients

Number of respondents: 132

Frequency: 5 times each year

Number of responses: 660

Hours per response: .25 hours (15 minutes)

Wage rate: \$34.77

Total annual burden: 165 hours and \$5,737.05

14. Uniform Report of DBE Awards or Commitments and Payments (modification of existing requirement)

Proposed modification: Recipients would fill out 10 additional data fields.

CFR Section: 49 CFR 26.11(a)

Respondents: DOT funding recipients

Number of respondents: 1,198

Frequency: once each year

Number of responses: 1,198

Hours per response: 317

Wage rate: \$34.77

Total annual burden: 377,370 hours and \$11,022

Pursuant to 44 U.S.C 3506(c)(2)(B), DOT solicits comments about the accuracy of the hours and costs burden estimates. Comments should be submitted to Walter Bohorfoush, Supervisory Information Technology Specialist, Office of the Chief Information Officer, Department of Transportation, at 202-366-0560 or Walter.Bohorfoush@dot.gov or to Joseph Nye, Office of the Secretary Desk Officer, Office of Management and Budget, at Joseph.B.Nye@omb.eop.gov. The Office of Management and Budget (OMB) is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

List of Subjects in 49 CFR Parts 23 and 26

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

Issued on July 5, 2022, in Washington, DC.

Peter Paul Montgomery Buttigieg,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department of Transportation proposes to amend 49 CFR parts 23 and 26 as follows:

PART 23—PARTICIPATION OF DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS

1. Revise the authority citation for part 23 to read as follows:

Authority: 49 U.S.C. 47107; 42 U.S.C. 2000d; 49 U.S.C. 322; E.O. 12138, 44

FR 29637, 3 CFR, 1979 Comp., p. 393.

2. In part 23, remove “a ACDBE” wherever the term appears and add in its place “an ACDBE”.

3. Amend § 23.1 by:

a. In paragraph (e), removing the word “and” at the end of the paragraph.

b. Redesignating paragraph (f) as paragraph (h).

c. Adding new paragraph (f) and paragraph (g).

The additions read as follows:

§ 23.1 What are the objectives of this part?

* * * * *

(f) To promote the use of ACDBEs in all types of concessions activities at airports receiving DOT financial assistance;

(g) To assist the development of firms that can compete successfully in the marketplace outside the ACDBE program; and

* * * * *

4. Amend § 23.3 by:

a. Removing “13 CFR § 121.103(f)” in the definition of *Affiliation* and adding in its place “13 CFR 121.103(h).”

b. Removing the phrase “a concession that” from the introductory text in the definition of *Airport Concession Disadvantaged Business Enterprise (ACDBE)* and adding in its place “a firm seeking to operate as a concession that.”

c. Adding the definitions of *Alaska Native* and *Assets* in alphabetical order.

d. In the definition of *Concession*:

i. In the introductory text, adding the phrase “that serve the traveling public” after “the types of for-profit businesses.”

ii. Adding the phrase “traveling” after “sale of consumer goods or services to the” in paragraph (1).

e. Adding the definitions of *Contingent liability* and *Days* in alphabetical order.

f. Removing the definition *Department (DOT)* and adding the definition *Department* or *DOT* in its place.

g. Adding the definition of *Home State* in alphabetical order.

h. Removing the phrase “or registered domestic partner” from the definition of *Immediate family member* and adding in its place “and domestic partner and civil unions recognized under State law.”

i. Adding the definitions of *Liabilities* and *Operating Administration* or *OA* in alphabetical order.

j. Revising the definitions of *Part 26* and *Personal net worth*.

k. Removing the definition of *Primary recipient*.

l. Moving the definition of *Recipient* into alphabetical order and revising the definition.

- m. Revising the introductory text and paragraphs (1) and (2)(iii) and (iv) in the definition of *Socially and economically disadvantaged individual*.
- n. Adding the definitions of *Subconcession* or *subcontractor* and *Sublease* in alphabetical order.

The revisions and additions read as follows:

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

* * * * *

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

* * * * *

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, individual retirement account (IRA) or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

* * * * *

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 firm, legal claims and judgments, and provisions for Federal income tax.

Days means 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.

Department or *DOT* means the U.S. Department of Transportation, including the Office of the Secretary.

* * * * *

Home State means the state in which an ACDBE firm or applicant for ACDBE certification maintains its principal place of business.

* * * * *

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.

* * * * *

Operating Administration or *OA* means any of the following: Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The “Administrator” of an OA includes his or her designees.

Part 26 means 49 CFR part 26, DOT’s Disadvantaged Business Enterprise Program regulation.

Personal net worth or *PNW* has the same meaning the term has in 49 CFR part 26.

* * * * *

Recipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

* * * * *

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and has been subjected

to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of a certain group and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.

Socially and economically disadvantaged individuals include:

(1) Any individual determined by a recipient 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) * * *

(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), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong.

Subconcession or *subcontractor* means a firm that has a sublease or other agreement with a prime concessionaire, rather than with the airport itself, to operate a concession at the airport.

Sublease means a lease by a lessee (tenant) to a sublessee (subtenant). Sublease is an example of a direct ownership arrangement in which the concessionaire operates a concession location at the airport. Under a sublease arrangement, the subtenant is responsible for the full operation of the concession and all requirements applicable to that concession under the master lease including proportionate share of the rent, and owns and controls the concession.

* * * * *

§ 23.13 [Amended]

5. Amend § 23.13 by:

- a. In paragraph (b), removing “of” that appears after the word “interpretations.”
- b. In paragraph (d) introductory text, removing the phrase “are for the purpose of authorizing” and adding in its place the word “authorize.”

§ 23.21 [Amended]

6. Amend § 23.21 by:

- a. In paragraph (a) introductory text, removing the word “revisesd” and add in its place the word “revised.”
- b. In paragraph (b), removing the term “a DBE concessions” and add in its place “an ACDBE”.
- c. In the second sentence of paragraph (c), removing the phrase “If you do so,” and add in its place the word “However,”.

7. Amend § 23.25 by:

- a. In paragraph (d)(3), removing the words “so as” after the word “activities” and adding a semicolon at the end of the sentence.
- b. Revising paragraphs (e) and (f).

The revisions read as follows:

§ 23.25 What measures must recipients include in their ACDBE programs to ensure nondiscriminatory participation of ACDBEs in concessions?

* * * * *

(e) Your ACDBE program must also provide for the use of race-conscious measures when race-neutral measures, standing alone, are not projected to be sufficient to meet an overall goal. The following are examples of race-conscious measures you can implement:

(1) Establishing concession-specific goals for particular concession opportunities.

(i) In setting concession-specific goals for concession opportunities other than car rental, you are required to explore, to the maximum extent practicable, all available options to set goals that concessionaires can meet through direct ownership arrangements. A concession-

specific goal for any concession other than car rental may be based on purchases or leases of goods and services only when the analysis for the relative availability of ACDBEs and all relevant evidence reasonably supports that proposition.

(ii) In setting car rental concession-specific goals, you cannot require a car rental company to change its corporate structure to provide for participation via direct ownership arrangement. When your overall goal for car rental concessions is based on purchases or leases of goods and services, you are not required to explore options for direct ownership arrangements prior to setting a car rental concession-specific goal based on purchases or leases of goods and services.

(iii) If the objective of the concession-specific goal is to obtain ACDBE participation through a direct ownership arrangement with an ACDBE, calculate the goal as a percentage of the total estimated annual gross receipts from the concession.

(iv) If the goal applies to purchases or leases of goods and services, calculate the goal by dividing the estimated dollar value of such purchases or leases from ACDBEs by the total estimated dollar value of all purchases to be made by the concessionaire.

(v) To be eligible to be awarded the concession, competitors must make good faith efforts to meet this goal. A competitor may do so either by obtaining enough ACDBE participation to meet the goal or by documenting that it made sufficient good faith efforts to do so.

(vi) The administrative procedures applicable to contract goals in part 26, §§ 26.51 through 26.53, apply with respect to concession-specific goals.

(2) Negotiation with a potential concessionaire to include ACDBE participation, through direct ownership arrangements or measures, in the operation of the non-car rental concession.

(3) With the prior approval of FAA, other methods that take a competitor's ability to provide ACDBE participation into account in awarding a concession.

(f) Your ACDBE program must require businesses subject to car rental and non-car rental ACDBE goals at the airport to make good faith efforts to meet goals when set pursuant to paragraph (e) of this section.

* * * * *

8. Add § 23.26 to read as follows:

§ 23.26 Fostering small business participation.

(a) Your ACDBE program must include an element to provide for the structuring of concession opportunities to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of concession opportunities that may preclude small business participation in solicitations.

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

(1) Establish a race-neutral small business set-aside for certain concession opportunities. Such a strategy would include the rationale for selecting small business set-aside concession opportunities which may include consideration of size and availability of small businesses to operate the concession.

(2) Consider the concession opportunities available through all concession models, including but not limited to direct leasing, third party developer, and leasing manager.

(3) On concession opportunities that do not include ACDBE contract goals, require prime concessionaires to provide subleasing opportunities of a size that small businesses, including ACDBEs, can reasonably operate.

(4) Identify alternative concession contracting approaches to facilitate the ability of small businesses, including ACDBEs, to compete for and obtain direct leasing opportunities.

(c) This element should include an objective, definition of small business, verification process, monitoring plan, implementation timeline, and required assurances.

(d) A state, local or other program, in which eligibility requires satisfaction of race/gender or other criteria in addition to business size, may not be used to comply with the requirements of this part.

(e) This element must not include local geographic preferences per § 23.79.

(f) You must submit an annual report on small business participation obtained through the use of your small business element. This report must be submitted in a format acceptable to the FAA based on a schedule established and posted to the agency's website, available at https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program.

(g) You must actively implement your program elements to foster small business participation. Doing so is a requirement of good faith implementation of your ACDBE program.

9. Amend § 23.27 by revising paragraph (b) and adding paragraphs (c) and (d) to read as follows:

§ 23.27 What information does a recipient have to retain and report about implementation of its ACDBE program?

* * * * *

(b) You must submit an annual report on ACDBE participation to the FAA by March 1 following the end of each fiscal year. This report must be submitted in the format acceptable to the FAA and contain all of the information described in the Uniform Report of ACDBE Participation.

(c) You must create and maintain active participants list information as described in paragraph (c)(2) of this section and enter it into a system designated by the FAA.

(1) The purpose of this active participants list is to ensure that you have the most accurate data possible about the universe of ACDBE and non-ACDBEs who seek work in

your airport concessions program as a tool to help you set your overall goals and, to provide the Department with data for evaluating the extent to which the objectives of § 23.1 are being achieved.

(2) You must obtain the following active participant list information about ACDBE and non-ACDBEs who seek to work on each of your concession opportunities.

- (i) Firm name;
- (ii) Firm address including zip code;
- (iii) Firm status as an ACDBE or non-ACDBE;
- (iv) Race and gender information for the firm's majority owner;
- (v) NAICS code applicable to each scope of work the firm sought to perform in its proposal;
- (vi) Age of the firm; and
- (vii) The annual gross receipts of the firm. You may obtain this information by asking each firm to indicate into what gross receipts bracket they fit (e.g., less than \$1 million; \$1-3 million; \$3-6 million; \$6-10 million, etc.) rather than requesting an exact figure from the firm.

(3) You must collect the data from all active participants for your concession opportunities by requiring the information in paragraph (c)(2) of this section to be submitted with their proposals or initial responses to negotiated procurements. You must enter this data in FAA's designated system no later than December 1 following the fiscal year in which the relevant concession opportunity was awarded.

(d) The state department of transportation in each Unified Certification Program (UCP) established pursuant to 49 CFR 26.81 must report to DOT's Departmental Office of Civil Rights, by January 1st each year, the information in the UCP directory:

(1) Number and percentage of in-state and out-of-state ACDBE certifications for socially and economically disadvantaged by gender and ethnicity (Black American, Asian-

Pacific American, Native American, Hispanic American, Subcontinent-Asian Americans, and non-minority);

(2) Number of ACDBE certification applications received from in-state and out-of-state firms and the number found eligible and ineligible;

(3) Number of in-state and out-of-state ACDBEs decertified and/or summarily suspended;

(4) Number of in-state and out-of-state ACDBE applications received for an individualized determination of social and economic disadvantage status; and

(5) Number of in-state and out-of-state ACDBEs whose owner(s) made an individualized showing of social and economic disadvantaged status.

§ 23.31 [Amended]

10. Amend § 23.31 by removing paragraph (c).

11. Revise § 23.33 to read as follows:

§ 23.33 What size standards do recipients use to determine the eligibility of applicants and ACDBEs?

(a) As a recipient, you must, except as provided in paragraph (b) of this section, treat a firm as a small business eligible to be certified as an ACDBE if the gross receipts of the applicant firm and its affiliates, calculated in accordance with 13 CFR 121.104 averaged over the firm's previous five fiscal years, do not exceed \$56.42 million.

(b) The following types of businesses have size standards that differ from the standard set forth in paragraph (a) of this section:

(1) *Banks and financial institutions.* \$1 billion in assets;

(2) *Passenger car rental companies.* \$75.23 million average annual gross receipts over the firm's previous five fiscal years; and

(3) *New car dealers.* 350 employees.

(c) For size purposes, gross receipts (as defined in 13 CFR 121.104(a)), of affiliates should be included in a manner consistent with 13 CFR 121.104(d), except in the context of joint ventures. For gross receipts attributable to joint venture partners, a firm must include in its gross receipts its proportionate share of joint venture receipts, unless the proportionate share already is accounted for in receipts reflecting transactions between the firm and its joint ventures (e.g., subcontracts from a joint venture entity to joint venture partners).

12. Revise § 23.35 to read as follows:

§ 23.35 What is the personal net worth (PNW) limit for disadvantaged owners of ACDBEs?

The PNW limit used in determining eligibility for purposes of this part is \$1.60 million. Any individual who has a PNW exceeding this amount is not a socially and economically disadvantaged individual for purposes of this part, even if the individual is a member of a group otherwise presumed to be disadvantaged.

§ 23.37 [Amended]

13. Amend § 23.37 in the second sentence of paragraph (b) by removing the phrase “does not do work relevant to the airport's concessions program” and adding the phrase “does not perform work or provide services relevant to the airport’s concessions program” in its place.

14. Revise § 23.39 to read as follows:

§ 23.39 What are other ACDBE certification requirements?

(a) The provisions of 49 CFR 26.83(c)(1) do not apply to certifications for purposes of this part. Instead, in determining whether a firm is an eligible ACDBE, you must take the following steps:

(1) Perform an on-site visit, virtually or in person, to the firm’s principal place of business. You must obtain the résumés or work histories of the principal owners of the firm and personally interview these individuals. You must interview the principal officers and review their résumés and/or work histories. You may interview key personnel of the firm if

necessary. 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;

(2) 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;

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

(4) Determine the work history of the firm, including any concession contracts or other contracts it may have received; and payroll records;

(5) Obtain or compile a list of the licenses of the firm and its key personnel to perform the concession contracts or other contracts it wishes to receive;

(6) Obtain a statement from the firm of the type(s) of concession(s) it prefers to operate or the type(s) of other contract(s) it prefers to perform;

(7) Obtain complete Federal income tax returns (or requests for extensions) filed by the firm, its affiliates, and the socially and economically disadvantaged owners for the last 5 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service; and

(8) Require applicants for ACDBE certification to complete and submit an appropriate application form, except as otherwise provided in 49 CFR 26.85.

(b) In reviewing the Declaration of Eligibility required by 49 CFR 26.83(j), you must ensure that the ACDBE applicant provides documentation that it meets the applicable size standard in § 23.33.

(c) For purposes of this part, the term *prime contractor* in 49 CFR 26.87(j) includes a firm holding a prime contract with an airport concessionaire to provide goods or services to the concessionaire or a firm holding a prime concession agreement with a recipient.

(d) With respect to firms owned by Alaska Native Corporations (ANCs), the provisions of 49 CFR 26.63(c)(2) do not apply. The eligibility of ANC-owned firms for purposes of this part is governed by § 26.63(c)(1).

(e) You must use the Uniform Certification Application found in part 26 without change. However, you may provide in your ACDBE program, with the written approval of the concerned Operating Administration, for supplementing the form by requesting specified additional information consistent with this part. In the same space available in section 1(A) of the form, the applicant must state that it is applying for certification as an ACDBE and complete all of section 5.

(f) Car rental companies and private terminal owners or lessees are not authorized to certify firms as ACDBEs. As a car rental company or private terminal owner or lessee, you must obtain ACDBE participation from firms which a recipient or UCPs have certified as ACDBEs.

(g) You are not required to certify an applicant firm if the firm intends to perform activities exclusively related to the renovation, repair, or construction of a concession facility (sometimes referred to as the "build-out") for which participation cannot be counted toward an ACDBE goal.

15. Revise § 23.41 to read as follows:

§ 23.41 What is the basic overall goal requirement for recipients?

(a) If you are a recipient who must implement an ACDBE program, you must establish two separate overall ACDBE goals. The first is for car rentals and the second is for concessions other than car rentals.

(b) If your annual car rental concession revenues, averaged over the three-years preceding the date on which you are required to submit overall goals, do not exceed \$200,000, you are not required to submit a car rental overall goal. If your annual revenues for concessions other than car rentals, averaged over the three years preceding the date on which

you are required to submit overall goals, do not exceed \$200,000, you are not required to submit a non-car rental overall goal.

(c) Each overall goal must cover a three-year period. You must review your goals annually to make sure they continue to fit your circumstances appropriately. You must report to the FAA any significant adjustments that you make to your goal before your next scheduled submission.

(d) Your goals established under this part must provide for participation by all DBEs and may not be subdivided into group-specific goals.

(e) If you fail to establish and implement goals as provided in this section, you are not in compliance with this part. If you establish and implement goals in a way different from that provided in this part, you are not in compliance with this part. If you fail to comply with this requirement, you are not eligible to receive FAA financial assistance.

(f) If you fail to establish and implement goals as provided in this section, you are not in compliance with this part. If you establish and implement goals in a way different from that provided in this part, you are not in compliance with this part. If you fail to comply with this requirement, you are not eligible to receive FAA financial assistance.

16. Amend § 23.43 by adding paragraph (c) as to read follows:

§ 23.43 What are the consultation requirements in the development of recipients' overall goals?

* * * * *

(c) The requirements of this section do not apply if no opportunities for new concession agreements will become available during the goal period. However, recipients must take appropriate outreach steps to encourage available ACDBEs to participate as concessionaires whenever there is a concession opportunity.

17. Amend § 23.45 by:

a. Revising the second sentence of paragraph (a) introductory text.

- b. Removing paragraphs (a)(1) through (3).
- c. Removing the word “new” in paragraph (b).
- d. Removing the words “on you” in paragraph (h) in the last sentence.

The revision reads as follows:

§ 23.45 What are the requirements for submitting overall goal information to the FAA?

(a) * * * Your overall goals meeting the requirements of this subpart are due based on a schedule established by the FAA and posted on the FAA’s website.

* * * * *

18. Amend § 23.47 by revising paragraph (a) to read as follows:

§ 23.47 What is the base for a recipient’s goal for concessions other than car rentals?

(a) When setting your overall goal you must evaluate all available opportunities for participation that can be obtained, to the maximum extent practicable, through direct ownership arrangements. You may use an alternative method as allowed by § 23.51(c)(5) for the portion of your overall goal for circumstances where there is no relative availability for direct ownership participation by ACDBEs in a particular concession opportunity.

* * * * *

§ 23.51 [Amended]

19. Amend § 23.51 in paragraph (c)(1) by removing the hyperlink

“www.census.gov/epcd/cbp/view/cbpview.html” and adding in its place the hyperlink

“<https://www.census.gov/programs-surveys/cbp.html>.”

20. Amend § 23.55 by:

- a. In paragraphs (e) and (h)(1) and (2), removing the phrase “the entire amount” and adding “100 percent” in its place.
- b. Revising paragraph (j).

The revision reads as follows:

§ 23.55 How do recipients count ACDBE participation toward goals for items other than car rentals?

* * * * *

(j) When an ACDBE is decertified because one or more of its disadvantaged owners exceed the PNW cap or the firm exceeds the business size standards of this part during the performance of a contract or other agreement, the firm's participation may continue to be counted toward ACDBE goals for the remainder of the term of the contract or other agreement. However, you must verify that the firm in all other respects remains an eligible ACDBE and you must not count the concessionaire's participation toward ACDBE goals beyond the termination date for the concession agreement in effect at the time of the decertification (e.g., in a case where the agreement is renewed or extended, or an option for continued participation beyond the current term of the agreement is exercised).

(1) The firm must inform the recipient in writing of any change in circumstances affecting its ability to meet ownership or control requirements of subpart C of this part or any material change. Reporting must be made as provided in 49 CFR 26.83(i).

(2) The firm must provide to the recipient, annually on December 1, a Declaration of Eligibility, affirming that there have been no changes in the firm's circumstances affecting its ability to meet ownership or control requirements of subpart C of this part or any other material changes, other than changes regarding the firm's business size or the owner's personal net worth.

* * * * *

21. Amend § 23.57 by revising the first sentence of paragraph (b)(3)(i) to read as follows:

§ 23.57 What happens if a recipient falls short of meeting its overall goals?

* * * * *

(b) ***

(3) ***

(i) If you are a CORE 30 airport or other airport designated by the FAA, you must submit, by April 1, the analysis and corrective actions developed under paragraphs (b)(1) and (2) of this section to the FAA for approval. * * *

* * * * *

§ 23.59 [Amended]

22. Amend § 23.59 in paragraph (b) by removing the word “DBEs” and adding “ACDBEs” in its place.

§ 23.71 [Amended]

23. Amend § 23.71 by removing the first sentence.

24. Revise § 23.75 to read as follows:

§ 23.75 Can recipients enter into long-term, exclusive agreements with concessionaires?

(a) Except as provided in paragraph (b) of this section, you must not enter into long-term, exclusive agreements for concessions.

(1) For purposes of this section, a long-term agreement is one having a term longer than five years including any combination of base term and options to extend the term of the agreement, if the effect is a term of more than five years.

(2) For purposes of this section, an exclusive agreement is one having a type of business activity that is conducted solely by a single business entity on the entire airport, irrespective of ACDBE participation.

(b) You may enter into a long-term, exclusive concession agreement only under the following conditions:

(1) Special local circumstances exist that make it important to enter such agreement; and

(2) The responsible FAA regional office approves your plan for meeting the standards of paragraph (c) of this section.

(c) In order to obtain FAA approval of a long-term-exclusive concession agreement, you must submit the following information to the FAA regional office, the items in paragraphs (c)(1) through (3) of this section must be submitted at least 90 days before the solicitation is released and items in paragraphs (c)(4) through (7) of this section must be submitted at least 45 days before contract award:

(1) A description of the special local circumstances that warrant a long-term, exclusive agreement.

(2) A copy of the solicitation.

(3) ACDBE contract goal analysis developed in accordance with this part.

(4) Documentation that ACDBE participants are certified in the appropriate NAICS code in order for the participation to count towards ACDBE goals.

(5) A general description of the type of business or businesses to be operated by the ACDBE, including location and concept of the ACDBE operation.

(6) Information on the investment required on the part of the ACDBE and any unusual management or financial arrangements between the prime concessionaire and ACDBE.

(7) Final long-term-exclusive concession agreement, subleasing or other agreements.

§ 23.77 [Amended]

25. Amend § 23.77 in paragraph (b) by removing the term “disadvantaged business enterprise” and adding in its place “Disadvantaged Business Enterprise”.

26. Revise § 23.79 to read as follows:

§ 23.79 Does this part permit recipients to use local geographic preferences?

No. As a recipient you must not use a local geographic preference. For purposes of this section, a local geographic preference is any requirement that gives a concessionaire located in one place (e.g., your local area) an advantage over concessionaires from other places in obtaining business as, or with, a concession at your airport.

Appendix A to Part 23 [Removed]

27. Remove appendix A to part 23.

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

28. The authority citation for part 26 is revised to read as follows:

Authority: 23 U.S.C. 304 and 324; 42 U.S.C. 2000d, *et seq.*; 49 U.S.C. 47113, 47123; Sec. 1101(b), Pub. L. 114-94, 129 Stat. 1312, 1324 (23 U.S.C. 101 note); Sec. 150, Pub. L. 115-254, 132 Stat. 3215 (23 U.S.C. 101 note); Pub. L. 117-58, 135 Stat. 429 (23 U.S.C. 101 note).

29. In part 26, remove the word “actually” wherever it appears.

§ 26.1 [Amended]

30. Amend § 26.1 in paragraph (f) by removing “federally-assisted” and add in its place “federally assisted”.

31. Revise § 26.3 to read as follows:

§ 26.3 To whom does this part apply?

(a) If you are a recipient of any of the following types of funds, this part applies to you:

(1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405; Titles I, II, III, and VI of the Fixing America’s Surface Transportation Act (FAST Act) Pub. L. 114-94, 23 U.S.C. 204; section 403 of Title 23, U.S. Code, and Division C of the Bipartisan Infrastructure Law (BIL), Pub. L. 117-58.

(2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21,

Pub. L. 105-178. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405; Titles I, II, III, and VI of the Fixing America's Surface Transportation Act (FAST Act) Pub. L. 114-94, and Division C of the Bipartisan Infrastructure Law (BIL), Pub. L. 117-58.

(3) Airport funds authorized by 49 U.S.C. 47101, *et seq.*

(4) [Reserved]

(b) [Reserved]

(c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Mariana Islands, this part does not apply to the contract.

(d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

32. Amend § 26.5 by:

- a. Revising the definitions of *Alaska Native* and *Department* or *DOT*.
- b. Removing the definition *Disadvantaged business enterprise* or *DBE* and adding the definition *Disadvantaged Business Enterprise* or *DBE* in its place.
- c. Removing the definition *Indian tribe* and adding the definition *Indian tribe* or *Native American tribe* in its place.
- d. Removing the definition *Personal net worth* and adding the definition *Personal net worth* or *PNW* in its place.
- e. Revising the definitions of *Primary industry classification*, *Principal place of business*, *Recipient*, and *Secretary*.
- f. In the definition of *Socially and economically disadvantaged individual*:

- g. In the introductory text, removing the phrase “as a members of groups” and adding in its place the phrase “as a member of a group”.
- ii. In paragraph (2)(iv), removing the locations “Republic of the Northern Marianas Islands” and “Kirbati” and adding in their place the locations “Republic of the Northern Mariana Islands” and “Kiribati”, respectively.
- iii. In paragraph (2)(v), removing the location “the Maldives Islands” and adding in its place the location “Maldives”.
- f. Adding the definitions of *Transit vehicle* and *Transit vehicle dealership* in alphabetical order.
- g. Removing the definition of *Transit vehicle manufacturer* and adding in its place the definition *Transit vehicle manufacturer (TVM)*.
- h. Adding the definition of *Unsworn declaration* in alphabetical order.

The revisions and additions read as follows:

§ 26.5 Definitions

* * * * *

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

* * * * *

Department or *DOT* means the U.S. Department of Transportation, including the Office of the Secretary, the Departmental Office of Civil Rights, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

Disadvantaged Business Enterprise or DBE means a for-profit small business concern engaged in transportation-related industries:

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

* * * * *

Indian tribe or Native American tribe means any federally or state-recognized tribe, band, nation, or other organized group of Indians (Native Americans), or an ANC.

* * * * *

Personal net worth or PNW means the net value of an individual's reportable assets and liabilities, per the calculation rules in § 26.68.

Primary industry classification means the most current North American Industry 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 online on the U.S. Census Bureau website: www.census.gov/naics/.

* * * * *

Principal place of business means the business location where the individuals who manage the firm'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. The term does not include construction trailers or other temporary construction sites.

* * * * *

Recipient means any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or that has applied for such assistance.

Secretary means DOT's Secretary of Transportation or the Secretary's designee.

* * * * *

Transit vehicle means a vehicle manufactured by a TVM. A vehicle manufactured by a non-TVM is not considered a transit vehicle for purposes of this part, notwithstanding the vehicle's ultimate use.

Transit vehicle dealership means a business that is primarily engaged in selling transit vehicles but that does not manufacture vehicles itself.

Transit vehicle manufacturer (TVM) means any manufacturer whose primary business purpose is to manufacture vehicles built for mass transportation. Such vehicles include, but are not limited to buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Businesses that perform retrofitting or post-production alterations to vehicles so that such vehicles may be used for public transportation purposes are also considered TVMs. Businesses that manufacture, mass-produce, or distribute vehicles primarily for personal use are not considered TVMs.

* * * * *

Unsworn declaration means an unsworn statement, dated and in writing, subscribed as true under penalty of perjury.

* * * * *

33. Revise § 26.11 to read as follows:

§ 26.11 What records do recipients keep and report?

(a) You must submit a report on DBE participation to the concerned Operating Administration containing all the information described in the Uniform Report to this part. This report must be submitted at the intervals required by, and in the format acceptable to, the concerned Operating Administration.

(b) You must continue to provide data about your DBE program to the Department as directed by DOT operating administrations.

(c) You must obtain bidders list information as described in paragraph (c)(2) of this section and enter it into a system designated by the Department.

(1) The purposes of this bidders list information is to compile as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on your federally assisted contracts for use in helping you set your overall goals; and, to provide the Department with data for evaluating the extent to which the objectives of § 26.1 are being achieved.

(2) You must obtain the following bidders list information about all DBE and non-DBEs who bid as prime contractors and subcontractors on each of your federally assisted contracts:

- (i) Firm name;
- (ii) Firm address including zip code;
- (iii) Firm's status as a DBE or non-DBE;
- (iv) Race and gender information for the firm's majority owner;
- (v) NAICS code applicable to each scope of work the firm sought to perform in its bid;
- (vi) Age of the firm; and
- (vii) The annual gross receipts of the firm. You may obtain this information by asking

each firm to indicate into what gross receipts bracket they fit (e.g., less than \$1 million; \$1-3 million; \$3-6 million; \$6-10 million; etc.) rather than requesting an exact figure from the firm.

(3) You must collect the data from all bidders for your federally assisted contracts by requiring the information in paragraph (c)(2) of this section to be submitted with their bids or initial responses to negotiated procurements. You must enter this data in the Department's designated system no later than December 1 following the fiscal year in which the relevant contract was awarded. In the case of a "design-build" contracting situation where subcontracts will be solicited throughout the contract period as defined in a DBE Performance Plan

pursuant to § 26.53(e), the data must be entered no later than December 1 following the fiscal year in which the design-build contractor awards the relevant subcontract(s).

(d) You must maintain records documenting a firm's compliance with the requirements of this part. At a minimum, you must keep a complete application package for each certified firm and all Declarations of Eligibility, change notices, and on-site visit reports. These records must be retained in accordance with applicable record retention requirements for the recipient's financial assistance agreement. Other certification or compliance related records must be retained for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the recipient's financial assistance agreement, whichever is longer.

(e) The department of transportation in each Unified Certification Program (UCP) established pursuant to § 26.81 must report to DOT's Departmental Office of Civil Rights each year, the following information in the UCP directory:

(1) The number and percentage of in-state and out-of-state DBE and Airport Concession Disadvantaged Business Enterprise (ACDBE) certifications by gender and ethnicity (Black American, Asian-Pacific American, Native American, Hispanic American, Subcontinent-Asian Americans, and non-minority);

(2) The number of DBE certification applications received from in-state and out-of-state firms and the number found eligible and ineligible;

(3) The number of in-state and out-of-state firms decertified and/or summarily suspended;

(4) The number of in-state and out-of-state applications received for an individualized determination of social and economic disadvantage status;

(5) The number of in-state and out-of-state firms certified whose owner(s) made an individualized showing of social and economic disadvantaged status; and

(6) The number of DBEs pre-qualified in their work type by the recipient.

34. Revise the heading for subpart B to read as follows:

Subpart B - Administrative Requirements for DBE Programs for Federally Assisted Contracting

35. Revise § 26.21 to read as follows:

§ 26.21 Who must have a DBE program?

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:

(1) All FHWA primary recipients receiving funds authorized by a statute to which this part applies;

(2) All FTA recipients receiving planning, capital and/or operating assistance must maintain a program locally that includes the requirements of reporting and recordkeeping under § 26.11; contract assurances under § 26.13; policy statement under § 26.23; fostering small business participation under § 26.39; and transit vehicle manufacturers under § 26.49. FTA recipients receiving planning, capital and/or operating assistance to award prime contracts (excluding transit vehicle purchases) the cumulative total value of which exceeds \$670,000 in FTA funds in a Federal fiscal year must have a DBE program meeting all the requirements of this part; and

(3) FAA recipients receiving grants for airport planning or development that will award prime contracts the cumulative total value of which exceeds \$250,000 in FAA funds in a Federal fiscal year.

(b)(1) You must submit a conforming DBE program to the concerned Operating Administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except goals that are reviewed by the relevant OA).

(2) You do not have to submit regular updates of your DBE program plan if you remain in compliance with this part. However, you must submit significant changes to the relevant OA for approval.

(c) You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part. You must continue to carry out your DBE program until all funds from DOT financial assistance have been expended.

36. Amend § 26.29 by:

- a. Revising paragraph (d).
- b. Redesignating paragraph (e) as paragraph (g).
- c. Adding new paragraph (e) and paragraph (f).

The revision and additions read as follows:

§ 26.29 What prompt payment mechanisms must recipients have?

* * * * *

(d) Your DBE program must include the mechanisms you will use for proactive monitoring and oversight of a prime contractor's compliance with subcontractor prompt payment and return of retainage requirements in this part. Reliance on complaints or notifications from subcontractors about a contractor's failure to comply with prompt payment and retainage requirements is not a sufficient monitoring and oversight mechanism.

(e) Your DBE program must provide appropriate means to enforce the requirements of this section. These means must be described in your DBE program and should include appropriate penalties for failure to comply, the terms and conditions of which you set. Your program may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.

(f) Prompt payment and return of retainage requirements in this part also apply to lower-tier subcontractors.

* * * * *

37. Revise § 26.31 to read as follows:

§ 26.31 What information must a UCP include in its DBE/ACDBE directory?

(a) In the directory required under § 26.81(g), you must list all firms eligible to participate as a DBE and/or ACDBE in your program. In the listing for each firm, you must include its business address, business phone number, the types of work the firm has been certified to perform as a DBE and/or ACDBE, and all the following information that the firm chooses to make public:

- (1) State licenses held;
- (2) Pre-qualifications;
- (3) Bonding capacity;
- (4) Equipment capability;
- (5) Recently completed projects; and
- (6) Website.

(b) You must list each type of work a DBE and/or ACDBE is eligible to perform by using the most specific NAICS code available to describe each type of work. Pursuant to § 26.81(n)(1) and (3), your directory must allow for NAICS codes to be supplemented with specific descriptions of the type(s) of work the firm performs.

(c) Your directory must permit the public to search and/or filter for DBEs and/or using the following criteria:

- (1) Physical location;
- (2) NAICS code(s);
- (3) Keyword search of work descriptions; or
- (4) The information in paragraphs (a)(1) through (6) of this section:
 - (i) State license(s);
 - (ii) Pre-qualifications;
 - (iii) Bonding and maximum bonding capacity;
 - (iv) Equipment type and number of each equipment type;

(v) Dollar value of largest completed project and keyword search of project descriptions; and

(vi) Firms that have websites.

(d) You must make any changes to your current directory entries by January 1, 2024, or within [DATE 180 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE]. The directory should clearly indicate that the information displayed pursuant to paragraphs (a)(1) through (6) of this section was submitted by the DBE and/or ACDBE and has not been reviewed for accuracy by the members of the UCP.

38. Amend § 26.35 by revising paragraph (b)(2) introductory text to read as follows:

§ 26.35 What role do business development and mentor-protégé programs have in the DBE program?

* * * * *

(b) * * *

(2) In the mentor-protégé relationship, you must:

* * * * *

39. Revise § 26.37 to read as follows:

§ 26.37 What are a recipient's responsibilities for monitoring?

(a) You must implement appropriate mechanisms to ensure compliance with the requirements in this part by all program participants (e.g., applying legal and contract remedies available under Federal, state, and local law). You must set forth these mechanisms in your DBE program.

(b) Your DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to all DBEs at contract award or subsequently, including race-neutral participation, is actually performed by the DBEs to which the work was committed, and such work is counted according to the requirements of § 26.55. This mechanism must include a written verification that you have reviewed contracting records and monitored the

work site to ensure the counting of each DBE's participation is consistent with its function on the contract. The monitoring to which this paragraph (b) refers may be conducted in conjunction with monitoring of contract performance for other purposes.

(c) This mechanism must also provide for running tallies of actual DBE attainments toward the overall goal and for each DBE commitment submitted pursuant to meeting a contract goal. Regarding the running tally used to monitor the overall goal, this mechanism must provide a means to compare current DBE attainments to anticipated contract awards for the remainder of the annual reporting period. This mechanism should ensure that contract goals are applied in accordance with § 26.51(d). Regarding the running tally used to monitor the fulfillment of each DBE commitment, this mechanism must provide a means of comparing cumulative payments made to the DBE to the work listed for each. This mechanism should assess whether the commitment will be fulfilled or whether the prime contractor has demonstrated good faith efforts, or should be required to demonstrate good faith efforts, to address any projected shortfall per § 26.53(g).

§ 26.39 [Amended]

40. Amend § 26.39 in paragraph (b) introductory text by removing the phrase "by February 28, 2012".

41. Amend § 26.45 by:

a. Revising paragraph (a).

b. Removing in paragraph (c)(1) the hyperlink

"www.census.gov/epcd/cbp/view/cbpview.html" and adding in its place the hyperlink

"<https://www.census.gov/programs-surveys/cbp.html>".

c. Removing in paragraph (f)(1)(i) the words "Web site" and adding in their place the word "website".

d. Removing in paragraph (f)(3) the text "including", "race-consioous", and "26.51(c)" and adding in their places the text "including", "race-conscious", and "§ 26.51(c)", respectively.

The revision reads as follows:

§ 26.45 How do recipients set overall goals?

(a) *General rule.* (1) Except as provided in paragraph (a)(2) of this section, you must set an overall goal for DBE participation in your DOT-assisted contracts.

(2) If you are an FTA or FAA recipient who reasonably anticipates awarding (excluding transit vehicle purchases) \$670,000 or less in FTA or \$250,000 or less in FAA funds in prime contracts in a Federal fiscal year, you are not required to develop overall goals for FTA or FAA respectively for that fiscal year.

* * * * *

§ 26.47 [Amended]

42. Amend § 26.47 in paragraph (c)(3)(i) by removing the words “Operational Evolution Partnership Plan” and adding in their place the term “CORE 30”.

43. Revise § 26.49 to read as follows:

§ 26.49 What are the requirements for transit vehicle manufactures (TVMs) and for awarding DOT-assisted contracts to TVMs?

(a) If you are an FTA recipient, you must require in your DBE program that each TVM, 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 TVMs listed on FTA’s list of eligible TVMs, or that have submitted a goal methodology to FTA that has been approved or has not been disapproved, at the time of solicitation are eligible to bid.

(2) A TVM’s failure to follow the requirements of this section and throughout this part will be deemed as non-compliant, which will result in removal from FTA’s eligible TVMs list and will become ineligible to bid.

(3) An FTA recipient's failure to comply with the requirements set forth in paragraph (a) of this section may result in formal enforcement action or appropriate sanction as determined by FTA (e.g., FTA declining to participate in the vehicle procurement).

(4) Within 30 days of becoming contractually obligated to procure a transit vehicle, an FTA recipient must report to FTA:

- (i) The name of the TVM that was the successful bidder; and
- (ii) The Federal share of the contractual commitment at that time.

(5) A contract with a transit vehicle dealership to procure vehicles does not qualify as a contract with a TVM, notwithstanding the manufacturer of the vehicles procured.

(b) If you are a TVM, you must establish and submit to FTA an annual overall percentage goal for DBE participation.

(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 on which you will bid during the fiscal year in question, less the portion(s) attributable to the manufacturing process performed entirely by your own forces.

(i) You must consider and include in your base figure all domestic contracting opportunities made available to non-DBEs.

(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, you must provide for public participation. This includes consultation with interested parties consistent with § 26.45(g).

(2) The requirements of this part with respect to submission and approval of overall goals apply to you as they do to recipients, except that TVMs set and submit their goals annually and not on a triennial basis.

(c) TVMs must comply with the reporting requirements of § 26.11, including the requirement to submit the Uniform Report of DBE Awards or Commitments and Payments, in order to remain eligible to bid on FTA-assisted transit vehicle procurements.

(d) TVMs must implement all other 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 the equipment must meet the same requirements (including goal approval by FHWA or FAA) that TVMs 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 with the procedures of this section.

§ 26.51 [Amended]

44. Amend § 26.51 in paragraph (f)(4) by removing the words “through the use of” and adding in their place the word “using.”

45. Amend § 26.53 by revising paragraphs (b)(3)(ii), (e), and (f) to read as follows:

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

* * * * *

(b) * * *

(3) * * *

(ii) Provided that, in a negotiated procurement, such as a procurement for professional services, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or 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. This paragraph (b)(3)(ii) does not apply to a design-build procurement, which must follow the provisions in paragraph (e) of this section.

* * * * *

(e) In a design-build contracting situation, in which the recipient solicits proposals to design and build a project with minimal-project details at time of letting, the recipient may set a DBE goal that proposers must meet by submitting a DBE Performance Plan (DPP) with the proposal. The DPP replaces the requirement to provide the information required in paragraph (b) of this section that applies to design-bid-build contracts. To be considered responsive, the DPP must include a commitment to meet the goal and provide details of the types of subcontracting work or services (with projected dollar amount) that the proposer will solicit DBEs to perform. The DPP must include an estimated time frame in which actual DBE subcontracts would be executed. Once the design-build contract is awarded, the recipient must provide ongoing monitoring and oversight to evaluate whether the design-builder is using good faith efforts to comply with the DPP and schedule. The recipient and the design-builder may agree to make written revisions of the DPP throughout the life of the project, e.g., replacing the type of work items the design builder will solicit DBEs to perform and/or adjusting the proposed schedule, as long as design-builder continues to use good faith efforts to meet the goal.

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

(ii) You must include in each prime contract a provision stating that:

(A) The contractor must 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 paragraph (f) of this section; and

(B) Unless your consent is provided under paragraph (f) of this section, the prime contractor must not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.

(2) You may provide such written consent only if you agree, for reasons stated in your concurrence document, that the prime contractor has good cause to terminate the listed DBE or any portion of its work.

(3) Good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award. For purposes of this paragraph (f)(3), good cause includes the following circumstances:

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

(ii) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;

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

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

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

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

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

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

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

(x) Other documented good cause that you determine compels the termination of the DBE subcontractor.

(4) Before transmitting to you its request to terminate a DBE subcontractor or any portion of its work, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to you sent concurrently, of its intent to request to terminate and the reason for the proposed request.

(5) The prime contractor's written notice must give the DBE five days to respond, advising you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract/or portion thereof and why you should not approve the prime contractor's request. If required in a particular case as a matter of public necessity (e.g., safety), you may provide a response period shorter than five days.

(6) In addition to post-award terminations, the provisions of this section apply to pre-award deletions or changes to DBEs or their listed work put forward by offerors in negotiated procurements.

* * * * *

46. Amend § 26.55 by:

a. In paragraph (c)(2), removing the words "in order".

b. In paragraph (c)(3), removing the words "on the basis of" and adding in their place the word "within".

c. Revising paragraph (e).

d. In paragraph (f), removing the cross-reference “§ 26.87(i)” and adding in its place the cross-reference “§ 26.87(j)”.

e. Revising paragraph (h).

The revisions read as follows:

§ 26.55 How is DBE participation counted toward goals?

* * * * *

(e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1)(i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies.

(ii) For purposes of paragraph (e)(1) of this section, a manufacturer is a firm that owns (or leases) and operates a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications. Manufacturing includes blending or modifying raw materials or assembling components to create the product to meet contract specifications. When a DBE makes minor modifications to the materials, supplies, articles, or equipment, the DBE is not a manufacturer.

(2)(i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies (including transportation costs).

(ii) For purposes of this section, a regular dealer is a firm that owns (or leases) and operates, a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in sufficient quantities, and regularly sold or leased to the public in the usual course of business.

(iii) Items kept and regularly sold by the DBE are of the “general character” when they share the same material characteristics and application as the items specified by the contract.

(iv) You should establish a system to determine that a DBE regular dealer, over time, keeps sufficient quantities and regularly sells the items in question. This system should ensure that each DBE supplier is eligible for 60% credit based on its demonstrated capacity to perform a commercially useful function (CUF) as a regular dealer. This determination is intended to prevent overcounting at the pre-award or subcontract approval stage and is contingent upon the outcome of a final CUF and counting determination.

(A) To be a regular dealer, the firm must be an established business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A DBE supplier performs a CUF as a regular dealer and receives credit for 60% of the cost of materials or supplies (including transportation cost) when all, or the major portion of, the items under a purchase order or subcontract are provided from the DBE’s inventory, and when necessary, any minor quantities delivered from and by other sources are of the general character as those provided from the DBE’s inventory. Recipients should establish procedures to ensure that preliminary counting determinations at the pre-award/subcontract approval stage include an evaluation of the type and quantity of items the DBE intends to have delivered by other sources.

(B) A DBE may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in paragraph (e)(2)(ii) of this section if the person both owns and operates distribution equipment used to deliver the products. Any supplementing of regular dealers’ own distribution equipment must be by a long-term operating lease and not on an ad hoc or contract-by-contract basis. Recipients should establish procedures to make preliminary counting determinations at the pre-award/subcontract approval stage based on the DBE’s capacity and intent to comply with the requirement of this paragraph (e)(2)(iv)(B).

(C) A DBE supplier of items that are not typically stocked due to their unique characteristics (e.g., limited shelf life or specialty items) should be considered in the same manner as a regular dealer of bulk items per paragraph (e)(2)(iv)(B) of this section. If the DBE supplier of these items does not own or lease distribution equipment, as described above, it is not a regular dealer.

(D) Packagers, brokers, manufacturers' representatives, or other persons who arrange, facilitate, or expedite transactions are not regular dealers within the meaning of paragraph (e)(2) of this section.

(3) If the materials or supplies are purchased from a DBE distributor that neither maintains sufficient inventory nor uses its own distribution equipment for the products in question, count 40% of the cost of materials or supplies (including transportation costs). A DBE distributor is an established business that engages in the regular sale or lease of the items specified by the contract and described under a valid distributorship agreement. A DBE distributor performs a CUF when it operates in accordance with the terms of its distributorship agreement; with respect to shipping, the DBE distributor must assume risk for lost or damaged goods. You should review the language in distributorship agreements to determine their validity relevant to each purchase order/subcontract and the risk assumed by the DBE. Where the DBE distributor does not assume risk or, otherwise, does not operate in accordance with its distributorship agreement, counting is limited to fees and commissions.

(4) With respect to materials or supplies purchased from a DBE that is neither a manufacturer, a regular dealer, nor a distributor, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves, however.

(5) 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, distributor, or a transaction facilitator) on a contract-by-contract basis.

(6) The total allowable credit for a prime contractor's expenditures with DBE suppliers (manufacturers, regular dealers, distributors, and transaction facilitators) is limited to 50% of the participation used by a prime contractor to meet a contract goal. Exceptions to this cap for material-intensive projects may be granted on a contract-by-contract basis with prior approval of the appropriate OA.

* * * * *

(h) Do not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the contractor has actually paid the DBE the amount being counted.

47. Revise § 26.61 to read as follows:

§ 26.61 How are burdens of proof allocated in the certification process?

(a) In determining whether to certify a firm as eligible to participate as a DBE, you must apply the standards of this subpart.

(b) The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence (i.e., more likely than not) that it meets all the certification eligibility requirements in this subpart. In determining whether the firm has met its burden, you must consider all the information in the record, viewed as a whole.

(1) *Exception 1.* In proceedings to decertify a firm, you bear the burden of proving, by a preponderance of the evidence, that the firm is no longer eligible for certification under the rules of this part.

(2) *Exception 2.* If you seek to rebut an individual's claim of presumed social and/or economic disadvantage, you bear the burden of proving, by a preponderance of the evidence,

why the individual is not entitled to the presumption of social and economic disadvantage. See § 26.67(c).

48. Revise § 26.63 to read as follows:

§ 26.63 General certification rules.

(a) *General rules.* Except as otherwise provided:

(1) The firm must be for-profit and operational.

(2) Whether a firm performs a commercially useful function is irrelevant to certification eligibility.

(3) Certification cannot be conditioned on state pre-qualification requirements for bidding on contracts.

(4) Entering into a fraudulent transaction is disqualifying per se.

(5) The certifier determines eligibility based on the evidence it has at the time of its decision, not on the basis of historical or outdated information, giving full effect to the “curative measures” provisions of this part.

(b) *Indirect ownership.* A firm (i.e., a subsidiary, denoted S) that socially and economically disadvantaged owners (SEDOs) own and control indirectly is eligible, assuming it satisfies the other requirements of this part, only under the following circumstances.

(1) *Look-through.* SEDOs own at least 51 percent of S cumulatively, as shown in the examples following.

(2) *Control.* The same SEDOs control P, and P controls S.

(3) *One tier only.* The SEDOs indirectly own S through a single P and not through, for example, a parent of P (grandparent).

(4) *Examples.* The following examples assume that S and its SEDOs satisfy all other requirements in this part.

Example 1 to paragraph (b)(4). SEDOs own 100 percent of P, and P owns 100% of S. S is eligible for certification.

Example 2 to paragraph (b)(4). Same facts, except P owns 51 percent of S. S is eligible.

Example 3 to paragraph (b)(4). SEDOs own 80 percent of P, and P owns 70 percent of S. S is eligible because SEDOs indirectly own 56 percent of S. The calculation is 80 percent of 70 percent or $.8 \times .7 = .56$.

Example 4 to paragraph (b)(4). SEDOs own and control P, and they own 52 percent of S by operation of this part. However, a non-SEDO controls S. S is ineligible.

Example 5 to paragraph (b)(4). SEDOs own 60 percent of P, and P owns 51 percent of S. S is ineligible because SEDOs own just 31 percent of S.

Example 6 to paragraph (b)(4). P indirectly owns and controls S and has other affiliates. S is eligible only if its gross receipts plus those of all of its affiliates, including those of P, do not exceed the applicable small business size cap. Note that all of P's affiliates are affiliates of S by virtue of P's ownership and/or control of S.

(c) *Indian tribes, NHOs, and ANCs*—(1) *Indian tribes and NHOs*. A firm that is owned by an Indian tribe or Native Hawaiian organization (NHO), rather than by Indians or Native Hawaiians as individuals, is eligible if it meets all other certification requirements in this part. Such a firm must satisfy all requirements of this part.

(2) *Alaska Native Corporations (ANCs)*. (i) Notwithstanding any other provisions of this subpart, a subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification as a DBE if it meets all the following requirements:

(A) The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by Natives and descendants of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;

(B) The shares of stock or other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common

Stock represent a majority of both the total equity of the entity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and

(C) The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.

(ii) As a certifier to whom an ANC-related entity applies for certification, you do not use the DOT Uniform Certified Application. You must obtain from the firm documentation sufficient to demonstrate that the entity meets the requirements of paragraph (c)(2)(i) of this section. You must also obtain sufficient information about the firm to allow you to administer your program (e.g., information that would appear in your UCP directory).

(iii) If an ANC-related firm does not meet all the conditions of paragraph (c)(2)(i) of this section, then it must meet the requirements of paragraph (c)(1) of this section in order to be certified.

49. Revise § 26.65 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. You must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts, including the primary industry classification of the applicant. A firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined in 13 CFR 121.104, over the firm's previous five fiscal years, in excess of the applicable SBA size standard(s).

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE for the purposes of FHWA and FTA-assisted work in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined in 13 CFR 121.104, over the firm's previous three fiscal years, in excess of \$28.48 million (as of March

1, 2022). The Department will adjust this amount for inflation on an annual basis. The adjusted amount will be published on the Department's website in subsequent years.

50. Revise § 26.67 to read as follows:

§ 26.67 What rules determine social and economic disadvantage?

(a) *Group membership*—(1) *General rule.* Citizens of the United States (or lawfully admitted permanent residents) who are women, Black American, Hispanic American, Native American, Asian Pacific American, Subcontinent Asian American, or other minorities found to be disadvantaged by the Small Business Administration (SBA), are rebuttably presumed to be socially and economically disadvantaged.

(2) *Evidence of group membership.* To claim group membership, a firm owner must indicate on the Declaration of Eligibility (DOE), found in the Uniform Certification Application (UCA), in which of the group(s) in paragraph (a)(1) of this section the owner is a member and submit the signed and sworn DOE with the applicant firm's UCA. The DOE is the only evidence of group membership an owner must provide with the UCA.

(3) *Questioning group membership.* You may not question an individual's claim of group membership as a matter of course. You must not impose a disproportionate burden on members of any particular group. Imposing a disproportionate burden on members of a particular group could violate Title VI of the Civil Rights Act of 1964, paragraph (b) of this section, and/or 49 CFR part 21.

(i) If you have a well-founded reason(s) to question an individual's claim of membership in a group in paragraph (a)(1) of this section, you must email the individual a written explanation of your reason(s), using the email address for the firm or individual provided in the UCA (for applicants) or the most recent you have on file (for certified firms). The individual bears the burden of proving, by a preponderance of the evidence, that the individual is a member of the group in question.

(ii) Your written explanation must meet all the following criteria:

(A) Specifically describe the evidence that forms the basis for your well-founded reason(s).

(B) Instruct the individual to submit evidence demonstrating that the individual has held herself/himself/themself/themselves out publicly as a member of the group for at least 5 years prior to applying for DBE certification, and that the relevant community considers the individual a member. You may not require the individual to provide evidence beyond that related to group membership.

(iii) The owner must email you the evidence described in paragraph (a)(3)(ii)(B) of this section no later than 15 days of your written explanation. If the owner untimely sends you information, you may use your discretion whether to consider it; however, you must still email the owner a final decision no later than 30 days after receiving timely submitted evidence.

(iv) If you determine that an individual has not demonstrated group membership by a preponderance of the evidence, your final decision must specifically reference the evidence in the record that formed the basis for your conclusion and give a detailed explanation of why the evidence submitted was insufficient. It must also inform the individual of the right to appeal, as provided in § 26.89(c), and of the right to reapply at any time by amending the original UCA with evidence of individual social and economic disadvantage under paragraph (d) of this section.

(b) *Evidence and rebuttal of social disadvantage.* (1) If you have a reasonable basis to believe that an individual who is a member of a group in paragraph (a)(1) of this section is not, in fact, socially disadvantaged, you must initiate a proceeding to determine whether the individual's presumption should be regarded as rebutted. Your proceeding must fully comply with the requirements of § 26.87. You have the burden of demonstrating, by a preponderance of the evidence, that the individual is not, in fact, socially disadvantaged. To meet the burden,

you must produce evidence that the individual has not been subjected to racial or ethnic prejudice or cultural bias within American society because of the individual's identity as a member of a group in paragraph (a)(1) of this section and without regard to individual qualities. Social disadvantage must stem from circumstances beyond the individual's control.

(2) If an individual's presumption of social disadvantage has been rebutted based on a finding, by the preponderance of the evidence, that the individual is not socially disadvantaged, your final decision must inform the individual of the right to appeal, as provided in § 26.89(c), and of the right to reapply at any time by amending the original UCA with evidence of individual social and economic disadvantage under paragraph (d) of this section.

(c) *Evidence and rebuttal of economic disadvantage.* (1) Each owner(s) on whom the applicant firm relies for certification eligibility must submit the DOE found in the UCA. The owner(s) must declare that the owner's personal net worth (PNW) does not exceed \$1.60 million and corroborate the declaration by completing the PNW Statement available at <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/ready-apply> without alteration and by using the calculation rules in § 26.68. You must not attempt to rebut presumed economic disadvantage as a matter of course.

(i) An owner whose PNW exceeds the regulation's \$1.60 million limit is not presumed economically disadvantaged. The limit is exact. Rounding down is impermissible.

(ii) A certifier may require an owner to provide additional information on a case-by-case basis to verify the accuracy and completeness of the PNW Statement. The certifier must have a demonstrable need for the additional information and avoid imposing an unnecessary burden on an owner. Nor may you impose a disproportionate burden on members of any particular group as doing so could violate Title VI of the Civil Rights Act of 1964, paragraph (b) of this section, and/or 49 CFR part 21.

(2)(i) If you have a reasonable basis to believe that an individual who submits a PNW Statement that is below the \$1.60 million limit is not economically disadvantaged, you may rebut the individual's presumption of economic disadvantage.

(ii) In determining whether an individual's presumption of economic disadvantage should be rebutted, you must initiate a proceeding fully complying with the requirements of § 26.87. You have the burden of demonstrating, by a preponderance of the evidence, that a reasonable person would not consider the individual economically disadvantaged. To meet the burden, you must produce evidence that demonstrates that a reasonable person would not consider the individual economically disadvantaged. You may consider indicators including, but not limited to ready access to wealth; lavish lifestyle; income or assets of a type or magnitude inconsistent with economic disadvantage; or other circumstances that economically disadvantaged people typically do not enjoy. This inquiry gives the § 26.68 asset exclusions, and limitations on inclusions, no effect. It disregards liabilities entirely.

(iii) If you determine that the owner's presumption of economic disadvantage is rebutted, your decision must inform the firm of the right to appeal as provided in § 26.89(c).

(d) *Individualized determinations of social and economic disadvantage*—(1) *Burden of proof*. Firms owned and controlled by individual(s) who are not presumed SED may be eligible for DBE certification. The firm must prove, by a preponderance of the evidence, that the owner seeking to establish an individualized showing of social and economic disadvantage meets the criteria in paragraphs (d)(3) and (4) of this section.

(i) You must consider the evidence presented as a whole. There is no checklist of required evidence.

(ii) An individual need not have filed a complaint of discrimination in order to successfully demonstrate social and/or economic disadvantage.

(2) *Individuals with disabilities*. The Department acknowledges that individuals with disabilities encounter many physical and attitudinal barriers that individuals without

disabilities do not have to overcome. It is plausible that many individuals with disabilities – including “invisible” disabilities such as (but not limited to) post-traumatic stress disorder, major depressive disorder, dyslexia, anxiety disorder – may be socially and economically disadvantaged. As public entities, certifiers must fully comply with Title II of the American Disabilities Act, which includes ensuring that their DBE programs are fully accessible to individuals with disabilities.

(3) *Individualized determination of social disadvantage.* (i) An owner seeking to establish an individualized showing of social disadvantage must identify at least one objective distinguishing feature that resulted in racial, ethnic, cultural, or other prejudice within American society because of the owner’s membership in a group and without regard to individual identity.

(ii) The owner must describe with particularity how the objective distinguishing feature identified in paragraph (d)(3)(i) of this section has resulted in the owner’s social disadvantage. The owner may provide evidence related to the owner’s education, employment, or any other evidence the owner considers relevant.

Example 1 to paragraph (d)(3). A White male claiming to have experienced disadvantage in employment must provide evidence that his status of belonging to a particular group, e.g., persons with dyslexia, contributed to his disadvantage, as opposed to, e.g., a nationwide economic recession that resulted in widespread unemployment.

(4) *Individualized determination of economic disadvantage.* (i) The owner must submit the Personal Net Worth Statement, available at <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/ready-apply>, using the calculation rules in § 26.68. An owner whose PNW exceeds \$1.60 million is not economically disadvantaged under any circumstance.

(ii) The owner must describe with particularity how the owner’s objective distinguishing feature identified in paragraph (d)(3)(i) of this section has resulted in the

owner's economic disadvantage. The owner may provide any financial or other information that the owner considers relevant.

51. Add § 26.68 to read as follows:

§ 26.68 Personal net worth.

(a) *Calculation.* (1) Exclude the SEDO's ownership interest in the applicant or certified firm.

(2) Exclude the SEDO's equity in the SEDO's primary residence, without reference to state marital laws or community property rules. Title to the property governs.

Example 1 to paragraph (a)(2). The SEDO and their spouse hold joint title to their primary residence, for which they paid \$300,000 and are coequal debtors on a bank mortgage and a home equity line of credit with current combined balances of \$150,000. The SEDO may exclude the SEDO's \$75,000 share of the equity. There is no exclusion when the SEDO does not own the home or when attributable debt balances exceed the purchase price.

(3) One hundred percent of the contents of the SEDO's primary residence belong to the SEDO. The total value of household contents is at least the total amount for which they are insured, taking into account all policies, riders, amendments, and endorsements. If the SEDO's spouse or domestic partner cohabits with the SEDO, and the SEDO's primary residence is also the spouse or domestic partner's primary residence, then, subject to the following special rules, the SEDO is deemed to own 50% of those assets.

(4) Motor vehicles of any type belong to the natural person who holds title.

(5) Exclude liabilities contingent on a future event, of unfixed value, and those not owed in full on the date of the PNW Statement.

Example 2 to paragraph (a)(5). The SEDO may not report a projected liability for Federal income tax unless and until the SEDO has reported the precise amount of the SEDO's tax liability on a personal, Federal tax return, duly signed, dated, and filed with the Internal Revenue Service (IRS). If the SEDO has so reported to the IRS, the SEDO may exclude from

the PNW Statement only the net amount still owed to the IRS, and not in arrears, on the latter of the regular due date (e.g., April 15) for the return or the date of the PNW Statement. If the SEDO reports and documents such a tax liability, the SEDO must also provide the SEDO's request for deferred payment and, if applicable, the IRS's acquiescence.

(6) A natural person's signatory (not guarantor) status on any debt instrument determines ownership of the liability. A business entity's debt is not the SEDO's liability at all unless:

- (i) The SEDO cosigns and is liable for 100% of the debt in the event of default; and
- (ii) The creditor is a traditional financial institution or an entity that sells and finances sales of equipment in the ordinary course of its business, provided that the DBE or applicant actually uses the equipment other than incidentally in its business and the equipment secures the debt.

Example 3 to paragraph (a)(6). When the SEDO and two other natural persons are jointly and severally liable to repay the debt, the SEDO may claim to be liable for only one third of principal and interest presently owing.

(7) Include assets transferred to relatives or related entities within the two years preceding an application for certification or one year preceding the due date for a § 26.83(j) declaration, when the assets so transferred during the period have an aggregate value of more than \$20,000. Relatives include the owner's spouse or domestic partner, children (whether biological, adopted or stepchildren), siblings (including stepsiblings and those of the spouse or domestic partner), and parents (including stepparents and those of the spouse or domestic partner). Related entities include for-profit privately held companies of which any relative is an owner, officer, director, or equivalent; and family or other trusts of which any relative is grantor, trustee, or beneficiary, except when the transfer is irrevocable.

(8) Exclude the SEDO's direct payments, on behalf of immediate family members or their children, to unrelated providers of healthcare, education, or legal services.

(9) Exclude the SEDO's direct payments to providers of goods and services directly related to a celebration of an immediate family member or her children's significant, normally non-recurring life event such as a christening, munj, bat mitzvah, graduation, wedding, retirement, memorial, or culturally analogous similar commemoration.

(10) Exclude all assets of the SEDO that are held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or retirement investment programs.

(b) *Regulatory adjustments.* The PNW cap will be adjusted by January 1, 2024, or within [DATE 180 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE]. It will be adjusted by multiplying \$1,600,000 by the growth in total household net worth since 2019 as described by "Financial Accounts of the United States: Balance Sheet of Households and Nonprofit Organizations" produced by the Board of Governors of the Federal Reserve (<https://www.federalreserve.gov/releases/z1/>). Subsequent PNW adjustments will be made every 5 years on the anniversary of the initial adjustment. The Department will post future PNW limit adjustments on the Departmental Office of Civil Rights' webpage.

(1) The PNW adjustment will be based on the following formula:

$$\text{Future Year PNW cap} = [\$1,600,000] * \left[\frac{\text{Q1} - \text{Q4 Average Household Net Worth of Future year}}{\text{Q1} - \text{Q4 Average Household Net Worth of 2019 } (\$114,189,981 \text{ million})} \right]$$

(2) The PNW cap will not be adjusted if the future year PNW cap determined under paragraph (b)(1) of this section is less than the previous amount. The cap will increase each year after the Federal Reserve releases its annual data, so long as the amount determined under paragraph (b)(1) is greater than the previous PNW cap.

(c) *Confidentiality.* 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 § 26.89 or to any other state to which the individual's firm has applied for certification under § 26.85.

52. Revise § 26.69 to read as follows:

§ 26.69 What rules govern determinations of ownership?

(a) *General rule.* A firm's SEDO(s) must own at least 51% of every class of ownership. Each SEDO whose ownership is necessary to the firm's eligibility must demonstrate that his or her ownership satisfies the requirements of this section. If not, the firm is ineligible.

(b) *Ownership acquisition and maintenance.* The SEDO's acquisition and maintenance of his or her ownership interest makes reasonable economic sense (RES) under the circumstances.

(1) *Acquisition.* RES depends in part on the SEDO having acquired ownership at fair value.

(2) *Continuation.* The SEDO's continued ownership makes RES if he or she does not derive undue benefit relative to other owners.

(3) *Proportionality.* RES requires that neither SEDOs nor non-SEDOs derive benefits or bear burdens that are clearly disproportionate to their ownership shares.

(c) *Investments.* The SEDO may acquire ownership by purchase, capital contribution, or gift. Subject to the other requirements of this section, each is considered an "investment" in the firm, as are additional purchases, contributions, and gifts. All investments relied upon for eligibility must make RES.

(1) *Irrevocability.* Investments must be unconditional, irrevocable, and at full risk of loss.

(2) *Title.* Title generally determines ownership of investments. The rule in this paragraph (c)(2) operates independently of state or local community property, equitable distribution, or similar provisions. Thus, the person who has title to the investment owns it in proportion to his or her share of title.

(3) *Joint ownership.* When the SEDO jointly owns an investment of cash or property, the SEDO may claim at least a 51% ownership interest only if the other joint owner formally transfers to the SEDO enough of his or her ownership in the investment to bring the SEDO's investment to at least 51% of all investments in the firm. Such transfers may be gifts if they meet the requirements of paragraph (c)(4) of this section.

(4) *Gifts, including by bequest or inheritance.* A gift of an ownership interest to the SEDO is an investment that makes RES when it satisfies the following criteria:

(i) The transferor is or immediately becomes uninvolved with the applicant or DBE in any capacity and in any other business that performs similar work or contracts with the firm other than as a lessor or provider of standard support services;

(ii) The transferor does not derive undue benefit; and

(iii) A writing (e.g., a cancelled check when there is no better evidence) documents the gift.

(d) *Purchases and capital contributions.* (1) Purchases of ownership interests are investments when the consideration is entirely monetary and not a trade of property or services.

(2) Contributed capital may be cash, tangible property, realty, or a combination.

(3) Contributions of expertise or intangible property are investments when they are extraordinary, uniquely suited to the firm's main business, and of reasonably and credibly ascertained value documented at the time of the company's application. In addition, and in all cases, the SEDO must have a substantial financial investment at the time the firm applies for certification and thereafter.

(4) Contributions of time, labor, services, and the like are not investments.

(5) Loans to or from the firm or a non-disadvantaged owner, guarantees, the firm's own purchases and redemptions, and capital contributed by others are not the SEDO's investments.

(e) *Debt-financed investments*—(1) *General rule.* Subject to the other provisions of this section, including the RES requirement, the SEDO may borrow money to finance his/her/their investment entirely or partially if the SEDO has paid, on a net basis, at least 15% of the total value of the investment by the time the firm applies for certification. The net payment must be from the SEDO's own, not borrowed, money. Money that the SEDO receives as a gift or transfer described in paragraph (c)(3) or (4) of this section is the SEDO's own.

Example 1 to paragraph (e)(1). A SEDO who borrows \$9,000 of her \$10,000 investment in Applicant, Inc., must have repaid, from her own funds, at least \$500 of the loan's principal by the time of application.

Example 2 to paragraph (e)(1). A SEDO who finances \$8,000 of a \$10,000 investment in Applicant, Inc., may apply for certification at any time.

(2) The SEDO must have a significant amount of the SEDO's own money invested and at full risk of loss.

(3) The loan must be real, enforceable, not in default, and not offset by another agreement.

(4) The SEDO must be the debtor.

(5) The firm may not be party to the loan in any capacity, nor can its property serve as collateral. The SEDO may not rely on the company's credit to finance his or her investment.

(6) When the creditor forgives the debt or the SEDO defaults, the firm is no longer eligible.

(7) The overall investment must make RES.

(f) *Curative measures.* The rules of this section do not preclude transactions that further the objectives of, and compliance with, the provisions of this part. The SEDO or firm may enter into legitimate transactions, alter the terms of ownership, make additional investments, or bolster underlying documentation in a good faith effort to correct

impediments to eligibility, as long as the actions are consistent with this part and make RES. The certifier should not hinder the SEDO or firm when it attempts to become compliant with certification requirements of this part.

(g) *Anti-abuse rules.* (1) Transactions lacking RES or apparent business purpose may be disregarded.

(2) Multiple transactions occurring within any 2-year period may be considered one transaction that leads from beginning circumstances to end result.

(3) Transactions that have evasive effect are null and void.

53. Revise § 26.71 to read as follows:

§ 26.71 What rules govern determinations concerning control?

(a) *General rules.* (1) SEDOs of at least 51% of the company must control it.

(2) Control determinations must consider all pertinent facts, viewed together and in context.

(3) A firm must have operations in the business for which it seeks certification at the time it applies. Certifiers do not certify plans or intentions or issue contingent or conditional certifications.

(b) *SEDO as final decision maker.* The SEDO must be the ultimate decision maker in fact, regardless of operational, policy, or delegation arrangements.

(c) *Governance.* Governance provisions may not require that the SEDO obtain concurrence or consent from a non-SEDO or other participant to transact business on behalf of the firm.

(1) *Highest officer position.* A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).

(2) *Board of directors.* Except as detailed in paragraph (c)(4) of this section, the SEDO must have present control of the firm's board of directors, or other governing body, through the number of eligible votes.

(i) *Quorum requirements.* Provisions for the establishment of a quorum must not block the SEDO from calling a meeting to vote and transact business on behalf of the firm.

(ii) *Shareholder actions.* SEDO(s) authority to change the firm's composition via shareholder action does not prove control within the meaning of paragraph (c) of this section.

(3) *Partnerships.* In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

(4) *Exception.* Bylaws or other governing provisions that require non-SEDO consent for extraordinary actions generally do not contravene the rules in paragraph (c) of this section. Non-exclusive examples are a sale of the company or substantially all of its assets, mergers, and a sudden, wholesale change of type of business.

(d) *Expertise.* The SEDO must have an overall understanding of the business and its essential operations sufficient to make sound managerial decisions not primarily of an administrative nature. The requirements of this paragraph (d) vary with type of business, degree of technological intensity, and scale. In some cases, managerial competence suffices.

(e) *SEDO decisions.* The firm must show that the SEDO critically analyzes operational information provided to the owner by other participants in the firm's activities and has made reasonable business decisions based on the SEDO's independent analysis.

(f) *Delegation.* The SEDO may delegate administrative activities or operational oversight to others if the SEDO retains unilateral power to terminate the delegate(s) and the chain of command is evident to all participants in the company and persons associated with the firm does business.

(1) No non-SED participant may have power equal to or greater than that of the SEDO, considering all the circumstances. Aggregate magnitude and significance govern; a numerical tally does not.

(2) Non-SED participants may not make non-routine purchases or disbursements, enter into substantial contracts, or make decisions that affect company viability without the SEDO's consent.

(3) Written provisions or policies that specify the terms under which non-SED participants may sign or act on the SEDO's behalf with respect to recurring matters generally do not violate paragraph (f) of this section, as long as they are consistent with the SEDO having exclusive and ultimate responsibility for the action.

(g) *Independent business.* When the firm receives from or shares personnel, facilities, equipment, financial support, or other essential resources, with another business or individual on other than commercially reasonable terms, the firm must prove that it would be viable as a going concern without the arrangement.

(h) *Franchise and license agreements.* (1) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, you should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, if the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

(2) A DBE must not regularly use another firm's business-critical vehicles, equipment, machinery, or facilities to provide a product or service under contract to the same firm or one in a substantially similar business.

(i) *Exception 1.* This paragraph (h)(2) does not preclude the firm from providing services to a single customer or to a small number of them, provided that the firm is not merely a conduit, captive, or unnecessary third party acting on behalf of another firm or individual. Similarly, providing a volume discount to such a customer does not impair viability unless the firm repeatedly provides the service at a significant and unsustainable loss.

(ii) *Exception 2.* A DBE may share essential resources and deal exclusively with another firm that the SEDO 51% owns and controls.

54. Revise § 26.73 to read as follows:

§ 26.73 What rules govern the assignment of NAICS codes?

(a) You must grant certification to a firm only for specific types of work in which the SEDOs control. To become certified in an additional type of work, the firm must demonstrate to you only that its SEDOs control the firm with respect to that type of work. You must not require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

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

(2) Firms and certifiers must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has

determined the firm's owners can control. The firm bears the burden of providing detailed company information the certifying agency needs to make an appropriate NAICS code designation.

(3) If a firm believes that there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified as a DBE, the firm may request that the certifying agency, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is not sufficient for this purpose, and recipients should not rely on such a description in determining whether a firm's participation can be counted toward DBE goals.

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

(b) [Reserved]

55. Amend § 26.81 by:

- a. Revising paragraphs (a)(1) and 5.
- b. In paragraph (e), removing the word "the" from the first sentence.
- c. Revising paragraph (g).

The revisions read as follows:

§ 26.81 What are the requirements for Unified Certification Programs?

(a) * * *

(1) You and the other recipients in your state must sign an agreement establishing the UCP for that state and submit the agreement to the Secretary for approval.

* * * * *

(5) If you and the other recipients in your state fail to meet the deadlines set forth in paragraph (a) of this section, you will have the opportunity to make an explanation to the Secretary why a deadline could not be met and why meeting the deadline was beyond your control. If you fail to make such an explanation, or the explanation does not justify the failure to meet the deadline, the Secretary will direct you to complete the required action by a certain date. If you and the other recipients fail to carry out this direction in a timely manner, you are collectively in noncompliance with this part.

* * * * *

(g) Each UCP must maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other states certified under the provisions of this part), the information required by § 26.31. The UCP must make the directory available to the public electronically, on the internet. The UCP must update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.

* * * * *

56. Amend § 26.83 by:

- a. Revising the section heading and paragraph (c)(1)(i), (c)(3), (h), (i)(3), (j), (k), (l), and (m).
- b. Adding paragraph (n).

The revisions and addition read as follows:

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

* * * * *

(c)(1) * * *

(i) Perform an on-site visit, virtually or in person, to the firm's principal place of business. You must interview the principal owners and officers and review their résumés and/or work histories. You may interview key personnel of the firm if necessary. You may make an audio recording of the interview. You must also perform an on-site visit, either

virtually or in-person, to job sites if there are sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area;

* * * * *

(3) You must make sure that the applicant attests to the accuracy and truthfulness of the information on the application form. This must be done in the form of an unsworn Declaration of Eligibility executed under penalty of perjury of the laws of the United States.

* * * * *

(h)(1) Once you have certified a DBE, it must remain certified until and unless you have removed its certification, in whole or in part (i.e, NAICS Code removal), through the procedures of § 26.87.

(2) You may not require a DBE to reapply for certification or undergo a recertification process. However, you may conduct a certification review of a DBE firm, including a new on-site review (virtually or in person), 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 § 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 (virtually or in person) on an unannounced basis, at the firm's offices and job sites. You may also rely upon the site visit report of any other certifier with respect to a firm applying for certification, if it falls within the on-site review timeframe specified in your UCP agreement.

(i) * * *

(3) The notice must take the form of an unsworn Declaration of Eligibility executed under penalty of perjury of the laws of the United States. You must provide the written notification within 30 days of the occurrence of the change. If you fail to make timely notification of such a change, you will be deemed to have failed to cooperate under § 26.109(c).

(j) If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, an unsworn Declaration of Eligibility executed under penalty of perjury of the laws of the United States. This declaration 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 declaration must 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 (e.g., submission of Federal tax returns). If you fail to provide this declaration in a timely manner, you will be deemed to have failed to cooperate under § 26.109(c).

(k) You must advise each applicant within 30 days from your receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.

(l) If you are a certifier, you must issue decisions on applications for certification within 90 days of receipt of all information required from the applicant under this part. You may extend this time period once, for no more than an additional 30 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. On a case-by-case basis, the concerned OA may allow you to further extend the deadline one time if it receives from you a written explanation of why you need more time. Your failure to issue a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under § 26.89. You may also be subject to noncompliance penalties described in §§ 26.103 and 26.105.

(m)(1) You may notify the applicant about ineligibility concerns that you may have and allow the firm to rectify deficiencies within the period for making a decision in paragraph (1) of this section.

(2) If a firm takes curative measure before your decision, you must consider any evidence it submits to you of having taken such measures. A curative measure does not automatically equate to a firm's attempt to circumvent the rules of this part.

Example 1 to paragraph (m)(2). The firm may obtain proof of a financial contribution meeting the ownership requirements in § 26.69.

Example 2 to paragraph (m)(2). The firm might revise a disqualifying operating agreement or bylaw provision to meet the control requirements in § 26.71.

(n) Except as otherwise provided in this paragraph (n), if an applicant for DBE certification withdraws its application before you have issued a decision on the application, the applicant can resubmit the application at any time. As a recipient or UCP, you may not apply the waiting period provided under § 26.86(c) before allowing the applicant to resubmit its application. However, you may place the reapplication at the "end of the line," behind other applications that have been made since the firm's previous application was withdrawn. You may also apply the waiting period provided under § 26.86(c) to a firm that has established a pattern of frequently withdrawing applications before you make a decision.

57. Revise § 26.85 to read as follows:

§ 26.85 Interstate certification.

(a) *Applicability.* This section applies to a DBE certified in any state ("State A").

(b) *General rule.* When a DBE certified in State A applies to another state ("State B") for DBE certification, State B must accept State A's certification of the DBE.

(c) *Application procedure.* To obtain certification in State B, the DBE must provide:

(1) A cover letter with its application that specifies that it is applying for interstate certification;

(2) A copy of the certificate from State A or an electronic image of the UCP directory of State A that shows the DBE certification; and

(3) A DOE signed under penalty of perjury. This is the same declaration described in § 26.83(j).

(d) *Verification of eligibility.* Within 10 business days of receiving the documents required under paragraph (c) of this section, State B must verify the certification of the DBE by reference to the online UCP directory of State A.

(e) *Certification.* If the DBE fulfils the requirements of paragraph (c) of this section and State B affirmatively verifies the State A certification, State B must certify the DBE without undergoing further procedures and provide the DBE with a letter documenting its certification in State B.

(f) *Noncompliance.* Failure of State B to comply with paragraphs (d) and (e) of this section would be considered non-compliance with this part.

(g) *Post-interstate certification proceedings—(1) Requests for records.* After State B certifies the DBE, the UCP may request a fully unredacted copy of all, or a portion of, the DBE's certification file from any other UCP in which the DBE is certified.

(2) *Availability of records.* A UCP must provide a complete unredacted copy of the DBE's certification material to State B within 10 business days of receiving the request. Confidentiality requirements of §§ 26.83(d) and 26.109(b) do not apply.

(3) *Oversight and compliance activities related to an out-of-state DBE.* Once State B certifies a DBE through the interstate certification process, it becomes a DBE in State B and must be treated like any other DBE in its directory of certified firms.

(i) The DBE must provide an annual Declaration of Eligibility with documentation of gross receipts, under § 26.83(j), to State B on the anniversary date of the DBE's State A certification.

(ii) State B may conduct its own certification review of a DBE under § 26.83(h), or as specified in its UCP plan.

(iii) State B must conduct its own investigation of third-party complaints, State A, or any other UCP where the firm holds certification, must cooperate to the extent required by paragraph (h) of this section and § 26.109(c).

(iv) Except as described in paragraph (j) of this section, State B must initiate its own decertification proceedings to remove a DBE's eligibility if it finds reasonable cause to believe that the DBE is ineligible.

(v) If State B decertifies a DBE for any reason, State B must email a copy of its decision to State A and make the decision available to any UCP upon request within 10 business days.

(4) *Joint decertification proceedings.* Any UCP may join a decertification proceeding initiated by another state, pursuant to § 26.87, on the same grounds and facts specified in the notice proposing to remove eligibility.

(i) The UCP joining the decertification proceeding may present evidence at the hearing, but it cannot add additional grounds for decertification not specified in the initiating state's notice proposing removal.

(ii) After a UCP(s) joins another state's decertification proceedings, the final notice of decision applies to all states that are a party to the action. The final notice must include the appeal instructions in § 26.86(a).

(5) *Ineligibility database.* (i) When a UCP decertifies a firm, in whole or in part (i.e., NAICS code removal), it must make an entry in the Departmental Office of Civil Rights' (DOCR) online ineligibility database. The UCP must enter the following information:

- (A) The name of the firm;
- (B) The name(s) of the firm's owner(s);
- (C) The type and date of the action; and

(D) The reason for the action.

(ii) A UCP must check DOCR's online ineligibility database at least once every month to determine whether any DBE your UCP certified or is applying to your UCP is in the database.

(iii) For any such firm in paragraph (k)(2) of this section that is on the list, a UCP must promptly request a copy of the adverse decision from the UCP that made the decision. If the UCP receives such a request, it must provide a copy of the decision to the requesting UCP within 5 business days of receiving the request. The UCP receiving the decision must then consider the information in the decision in determining what, if any, action to take with respect to the DBE firm or applicant.

(6) *Effect of DOT's appeal decisions.* If a DBE appeals a decertification decision, and the Department upholds the decision, the firm will lose its DBE eligibility in every UCP in which it is certified.

(i) *Exception.* The rules of this section do not apply when the Department upholds a decertification decision that is based on grounds specific to a DBE's actions pertaining to a specific UCP under §§ 26.83(j) (Declaration of Eligibility) and 26.87(e)(6) (failure to cooperate).

(ii) [Reserved]

58. Revise § 26.86 to read as follows:

§ 26.86 What rules govern certifiers' denials of in-state certification applications?

(a) When you deny a request by a firm an application for certification, you must provide the applicant firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason. You must also include, verbatim, the following instructions for filing an appeal with DOT:

You may appeal this decision to the U.S. Department of Transportation. If you want to file an appeal, you must email the Department at DBEAppeals@dot.gov

within 45 days of the date of this decision, setting forth a full and specific statement as to why you believe this decision is erroneous, what significant facts that you believe we did not consider, or what provisions of the DBE program regulation you believe we misapplied. You have the right to request copies of all documents and other information on which this decision is based. USDOT does not accept notices of intent to appeal, partial appeals, or otherwise non-compliant submissions. Please include a copy of this letter and your contact information when you file your appeal.

(b) You must promptly provide the applicant copies of all documents and other information on which you based the denial if the applicant requests them.

(c) You must establish waiting period of no more than twelve months. After the waiting period expires, the denied firm may reapply to any member of the UCP that denied the application. The time period for reapplication begins to run on the date you send the denial letter. An applicant's appeal of your decision to the Department pursuant to § 26.89 does not extend this period. You must include this information, including the waiting period for reapplication, in your denial letter.

59. Revise § 26.87 to read as follows:

§ 26.87 What procedures does a certifier use to remove a DBE's certification?

(a) *Burden of proof.* If you seek to decertify a DBE under the circumstances described in paragraph (b), (c), or (d) of this section, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(b) *Ineligibility complaint.* (1) Any person may file with you a written complaint explaining why you should decertify a certified firm. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is

ineligible and should not continue to be certified. Confidentiality of complainants' identities must be protected as provided in § 26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is no longer eligible for DBE certification, you must provide the firm written notice of your intent to decertify it, setting forth the reasons for the proposed determination. The written notice must offer the firm an opportunity for an informal hearing or to submit written arguments or evidence demonstrating its continued eligibility. If you determine that reasonable cause for decertifying the firm does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) *DOT directive.* (1) If an OA determines that there is reasonable cause to believe that a firm you or another member of your UCP certified does not meet the eligibility criteria of this part, the OA may direct you to initiate a proceeding to remove the firm's certification.

(2) The OA must provide you and the firm written notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence a proceeding to remove eligibility as provided by paragraph (d) of this section.

(d) *Certifier-initiated proceeding.* If you determine that you have reasonable cause to decertify a firm, you must provide the firm written notice of your intent (NOI) to decertify it. The NOI must state clearly and succinctly each of the reasons for the proposed action and must specifically identify all the information on which you base each reason.

(e) *Grounds for decertification.* Your notices of intent and final decertification decisions must specifically identify which of the following ground(s) you rely on:

(1) Changes in the firm's circumstances since the certification of the firm by you or another member of your UCP that render the firm unable to meet the eligibility standards of this part;

(2) The firm fails to timely submit an annual Declaration of Eligibility per § 26.83(j);

(3) Information or evidence regarding the firm's eligibility that was not available to you at the time the firm was certified;

(4) Information relevant to eligibility that the firm concealed or misrepresented;

(5) A change in DOT's certification standards or requirements after the firm was certified. In this instance, you must offer the firm, in writing, an opportunity to cure any defects within 30 days. If the firm does not do so, you may proceed with sending the firm a notice of intent to decertify;

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

(7) The firm has failed to cooperate with you under § 26.109(c);

(8) The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program; or

(9) The firm has been suspended or debarred for conduct related to the DBE program. The notice required by paragraph (h) of this section must include a copy of the suspension or debarment action. A decision to remove a firm for this reason will not be subject to the hearing procedures in paragraph (d) of this section.

(f) *Hearing.* When you notify a DBE that you have reasonable cause to decertify it, as provided in paragraph (b), (c), or (d) of this section, you must give the firm written notification of an opportunity for an informal hearing. The hearing must be conducted either in person or virtually using an interactive video conference. The firm may accept the hearing offer via properly addressed email sent by 4:30 p.m. in the certifier's time zone by the 7th

day following the date of the NOI; failure of the firm to do so will result in the firm's forfeiture of the hearing opportunity. You and the firm must schedule and conduct the hearing not more than 45 business days (unless otherwise authorized by the appropriate OA) after you notify the firm of the opportunity to have a hearing. The firm may elect to submit written arguments or other information in lieu of a hearing. In either situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm is no longer eligible for participation in the DBE program. The firm must submit the written arguments or other information no later than 7 days prior to the hearing date.

(1) At the hearing the SEDO may respond to the reasons for the proposal to remove the firm's certification and provide information and arguments concerning why it should remain certified. However, the firm is not entitled to a hearing if the ground for decertification is the firm's failure to timely submit a § 26.83(j) annual declaration. If the firm does not provide the annual declaration within 15 days of your NOI, you may issue a final notice of decertification based on § 26.83(j) and/or § 26.109(c).

(2) Questions related to the SEDO's control of the firm must be answered by the SEDO. The SEDO's attorney, a non-SEDO or other individuals involved with the firm are permitted to attend the hearing and answer questions related to their own experience or more generally about the firm's ownership, structure, and operations. No part of this paragraph (f)(2) precludes the SEDO from having attorney representation at the hearing.

(3) You must maintain a complete and verbatim record of the hearing, either in writing or audio (or both). If the firm appeals to DOT under § 26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing.

(g) *Separation of functions.* You must ensure that the decision in a proceeding to decertify a firm is made by an office and personnel that did not take part in actions leading to

or seeking to implement the proposal to decertify the firm and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) Your method of implementing this requirement must be made part of your DBE program and approved by the appropriate OA.

(2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of this part.

(h) *Notice of decision.* You must send the firm a final written decision no later than 30 days of the informal hearing and/or receiving written arguments/evidence from the firm in response to your NOI. If you decide to decertify the firm, you must provide the firm a written notice of decertification (NOD).

(1) The NOD must describe with particularity the reason(s) for your decision, including specific references to the evidence in the record that supports each reason. The NOD must also inform the firm of the consequences of your decision under paragraph (j) of this section and of its appeal rights under § 26.89.

(2) You must send copies of the NOD to the complainant in an ineligibility complaint or to the OA that directed you to initiate the proceeding.

(3) When sending a copy of an NOD to a complainant other than an OA, you must not include information reasonably construed as confidential business information, unless you have the written consent of the firm that submitted the information.

(4) You must make an entry in DOCR's online ineligibility determination database. You must enter the name of the firm, names(s) of the firm's owner(s), date of your decision, and the reason(s) for your action.

(i) *Status of firm during proceeding.* (1) A firm remains an eligible DBE during the pendency of your proceeding to remove its eligibility.

(2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (h) of this section.

(j) *Effects of removal of eligibility.* When you remove a firm's eligibility, you must take the following actions:

(1) When a prime contractor has made a commitment to using the ineligible firm, but a subcontract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal. You must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to you that it has made good faith efforts to do so.

(2) When you have made a commitment to using a DBE prime contractor, but a contract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward your overall DBE goal.

(3) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm and may continue to receive credit toward the DBE goal for the firm's work. In this case, however, the prime contractor may not extend or add work to the contract after the firm was notified of its ineligibility without prior written concurrence from recipient.

(4) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm as set forth in paragraph (j)(3) of this section; however, the portion of the ineligible firm's continued performance of the contract must not count toward your overall goal.

(5) If you have executed a prime contract with a DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility must not count toward your overall goal, but the DBE's performance of the contract may continue to count toward satisfying the contract goal.

(6) The following exceptions apply to paragraph (j) of this section.

(i) If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, you may continue to count the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility toward your overall goal as well as toward the contract goals.

(ii) If the DBE's ineligibility results from its acquisition by a non-DBE, you may not continue to count the portion of the ineligible firm's performance on the contract remaining after you issued the notice of its ineligibility toward either the contract goal or your overall goal, even if a prime contractor has executed a subcontract with the firm or you have executed a prime contract with the DBE that was later ruled ineligible. In this case, if eliminating the credit of the ineligible firm will affect the prime contractor's ability to meet the contract goal, you must direct the prime contractor to subcontract to an eligible DBE firm to the extent needed to meet the contract goal, or demonstrate to you that it has made good faith efforts to do so.

60. Revise § 26.88 to read as follows:

§ 26.88 Summary suspension of certification.

(a) *Definition, operation, and effect.* Summary suspension is an extraordinary remedy for lapses in compliance that cannot reasonably or adequately be resolved by other means. A certifier may summarily suspend a DBE's certification in the circumstances and according to the procedures described in this section.

(1) A firm's certification is suspended under this part as soon as the certifier transmits electronic notice to its owner at the last known email address.

(2) During the suspension period, the DBE may not be considered to meet a contract or participation goal on contracts executed during the suspension period.

(b) *Mandatory and elective suspensions*—(1) *Mandatory.* The certifier must summarily suspend a DBE's certification when:

(i) The certifier has clear and credible evidence of the DBE's or its SEDO's involvement in fraud or other serious criminal activity.

(ii) The OA with oversight so directs.

(2) *Elective*. The certifier has discretion to suspend summarily when:

(i) It has clear and credible evidence that the DBE's continued certification poses a substantial threat to program integrity; or

(ii) An owner upon whom the firm relies for eligibility does not timely file the declaration and gross receipts documentation that § 26.83(j) requires.

(3) *Flexibilities*. In most cases, an information request or notice of intent under § 26.87 to decertify is a sufficient response to events described in paragraphs (b)(1) and (2) of this section. The certifier should consider the burden to the DBE and to itself in determining whether summary suspension is a more prudent and proportionate, effective response. The certifier may elect to suspend the same DBE just once in any 12-month period.

(c) *Procedures*—(1) *Notice*. The certifier must notify the firm, by email, of its summary suspension on a business day during regular business hours. The notice must explain the action, the reason for it, the consequences, and the evidence on which the certifier relies.

(i) Elective summary suspensions must only provide a single reason for the action.

(ii) Mandatory summary suspensions may provide multiple reasons.

(iii) In either scenario, i.e., elective or mandatory, the notice must demand that the DBE show cause why it should remain certified and provide the time and date of a virtual show-cause hearing at which the firm may present information and arguments concerning why the certifier should lift the suspension.

(2) *Other requirements*. As used in this section, “days” refers to calendar days unless otherwise stated. The hearing date must be on a business day that is at least 15 but not more than 25 days after the date of the notice. The DBE may respond in writing in lieu of or in

addition to attending the hearing; however, it will have waived its right to a hearing if it does not confirm its attendance within 10 days of the notice and will have forfeited its certification if it does not acknowledge the notice within 15 days. The show-cause hearing must be conducted as a video conference on a standard commercial platform that the DBE may readily access at no cost.

(3) *DBE response.* The DBE may provide information and arguments concerning its continuing eligibility until the 15th day following the suspension notice or the day of the hearing, if any, whichever is later. The DBE may email or fax its written response or send it via common carrier or courier. Email submissions correctly addressed are effective when sent; faxes are effective when and to the extent confirmed; and physical deliveries are effective when the carrier confirms delivery. While there is no requirement that the DBE appear at the scheduled hearing, as noted in paragraph (c)(2) of this section, it must opt in, acknowledge, and/or respond within the time frames noted. The certifier may permit additional submissions after the hearing, as long as the extension is on a business day that is not more than 30 days after the notice.

(4) *Failure to cancel or appear.* If the DBE confirms its attendance at the hearing, does not cancel its confirmation at least 5 days before the hearing, and does not appear, it forfeits its certification. If the certifier does not hold a hearing that the DBE has accepted, it forfeits the suspension. The parties, however, may negotiate in good faith to reschedule to another time or business day that is no later than 29 days from the notice of suspension.

(5) *Scope and burdens.* (i) Suspension proceedings are limited to the suspension ground specified in the notice.

(ii) The certifier may not amend its reason for summarily suspending certification, nor may it electively suspend the firm again during the 12-month period following the notice.

(iii) The DBE has the burden of producing information and/or making arguments concerning its continued eligibility, but it need only contest the reason cited. No other evidence is required.

(iv) The certifier has the burden of proving its case by a preponderance of the evidence. It must send the suspended firm a notice of decertification (NOD) within 30 days of the suspension notice or lift the suspension. Any NOD must rely only on the reason given in the summary suspension notice, and it must meet requirements in § 26.87(g). Such an NOD is deemed to be a final decision under § 26.87(g) to remove certification.

(v) The DBE's failure to provide information contesting the suspension does not impair the certifier's ability to prove its case. That is, the uncontested evidence upon which the certifier relies in its notice will constitute a preponderance of the evidence for purposes of the NOD, and the decertification will become final, provided that the certifier complies with applicable rules in this part.

(6) *Duration.* The DBE remains suspended during the proceedings described in this section but in no case for more than 30 days. If the certifier has not lifted the suspension or provided a rule-compliant NOD by 4 p.m. in the certifier's time zone on the 45th day, then it must lift the suspension and amend DBE lists and databases as necessary, by 12 p.m. in the certifier's time zone the following business day.

(d) *Remedies*—(1) *Appeal.* The DBE may appeal a final decision under paragraph (c)(5)(iv) of this section, as provided in § 26.89(c), but may *not* appeal the suspension itself, unless paragraph (d)(2) of this section applies.

(2) *Injunctive relief.* A new, elective suspension occurring within 12 months of an earlier elective suspension is null and void. The DBE subject to such a suspension may immediately petition the Department to enjoin its enforcement. Similarly, a suspended DBE may request injunctive relief when the certifier fails to act within the time specified in paragraph (c)(6) of this section. In either case, the DBE must:

- (i) Email the request under the subject line, “Request for Injunctive Relief”;
- (ii) Limit the request to a one-page explanation that includes the certifier’s name and the suspension dates; contact information for the certifier, the DBE, and the DBE’s SEDO(s); and the general nature and date of the firm’s response, if any, to the second suspension notice; and
- (iii) Attach both suspension notices.

(3) *Withdrawal*. A DBE may withdraw from the program at any time before the certifier’s final decision to remove certification.

61. Revise § 26.89 to read as follows:

§ 26.89 Appeals to the Department.

(a)(1) If you are a firm that is denied certification or whose certification is removed by a certifier, you may appeal to the Department.

(2) If you are a complainant in an ineligibility complaint to a certifier (or the concerned Operating Administration in the circumstances provided in § 26.87(c)), you may appeal to the Department if the certifier does not find reasonable cause to propose removing the firm’s certification or, following a removal of eligibility proceeding, determines that the firm is eligible.

(3) If you want to file an appeal, you must send a letter to the Department within 45 days of the date of the certifier’s final decision, including information and setting forth a full and specific statement as to why you believe the decision is erroneous, what significant fact(s) the certifier failed to consider, or what provisions of this part you believe the certifier did not properly apply. The Department may accept an appeal filed later than 45 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.

(4) You may email your appeal to DBEAppeals@dot.gov or mail or deliver it to U.S. Department of Transportation, Departmental Office of Civil Rights, W78-101, 1200 New Jersey Avenue S.E., Washington, DC 20590-0001.

(b) Pending the Department's decision, the certifier's decision remains in effect. The Department does not stay the effect of the decision while it is considering an appeal.

(c) When it receives an appeal, the Department requests a copy of the certifier's complete administrative record in the matter. The certifier must provide the administrative record, including a hearing transcript, within 20 days of the Department's request. The Department may extend this time period on the basis of a certifier's showing of good cause.

(1) If you are an appellant who is a firm which has been denied certification, whose certification has been removed, whose owner is determined not to be a member of a designated disadvantaged group, or whose owner the presumption of disadvantage has been rebutted, your letter must state the name and address of any other recipient which currently certifies the firm, which has rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, or before which an application for certification or a removal of eligibility is pending. Failure to provide this information may be deemed a failure to cooperate under § 26.109(c).

(2) If you are an appellant other than one described in paragraph (c)(1) of this section, the Department will request, and the firm whose certification has been questioned must promptly provide, the information called for in paragraph (c)(1) of this section. Failure to provide this information may be deemed a failure to cooperate under § 26.109(c).

(d)(1) You must ensure that the administrative record is well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to you for immediate correction. Failure to send a corrected record within seven days of the Department's request will be deemed a failure to cooperate under § 26.109(c).

(2) If an appeal is brought concerning one certifier's certification decision regarding a firm, and that certifier relied on the decision and/or administrative record of another certifier, this requirement applies to both certifiers involved.

(e) The Department decides only the issue(s) presented on appeal. It does not reexamine overall eligibility, conduct a *de novo* review, or hold hearings. It considers the administrative record and any additional information it considers relevant. The Department resolves appeals on substantive and/or procedural grounds.

(f)(1) The Department affirms your decision if it determines that your decision is supported by substantial evidence and is consistent with the provisions of this part concerning certification.

(2) The Department reverses your decision if it determines that your decision is not supported by substantial evidence or is inconsistent with the provisions of this part concerning certification. The Department will direct you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.

(3) The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.

(4) If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the decision to you with instructions seeking clarification and/or augmentation of the record. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.

(5) The Department does not uphold your decision based on grounds not specified in your decision.

(6) The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.

(7) The Department may summarily dismiss an appeal. Reasons for doing so may include (but are not limited to) the Department's own initiative, a withdrawal request from the appellant, non-compliance with paragraph (c) of this section, or a request by the certifier to reconsider its decision.

(g) The Department does not issue advisory opinions.

(h) The Department provides written notice of its decision to you, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other certifier whose administrative record or decision has been involved in the proceeding (see paragraph (d) of this section).

(i) If practicable, the Department will issue a written decision within 180 calendar days of receiving the complete administrative record. If the Department does not make its decision within this period, the Department will provide written notice to concerned parties, including a statement of the reason(s) for the delay and an approximate date by which it will render an appeal decision.

(j) As a certifier, when you provide supplemental information to the Department, you must also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable state laws concerning freedom of information and privacy. The Department makes available, on request by the firm and any third-party complainant involved, any supplemental information it receives from any source.

(k) All decisions under this section are administratively final and are not subject to petitions for reconsideration.

(l) Final decisions are normally published without redactions on DOCR's website. Decisions will likely contain confidential business and financial information and/or

personally identifiable information. Therefore, DOCR, within its full discretion, may publish final decisions issued under this section with any necessary redactions.

§ 26.91 [Amended]

62. Amend § 26.91 by:

- a. Removing the words “recipients” and “recipient” wherever they appear and adding in their places the words “certifiers” and “certifier”, respectively.
- b. In paragraph (b)(1), removing the cross-reference “§ 26.87(i)” and adding in its place the cross-reference “§ 26.87(j)”.

§ 26.103 [Amended]

63. Amend § 26.103 in paragraph (d)(2) by removing the words “being in compliance” and adding in their place the word “complying”.

Appendix A to Part 26 [Amended]

64. Amend appendix A in paragraph IV.A.(1) by removing the word “conducting” and adding in its place the word “conducting”.

Appendix B to Part 26 [Removed and Reserved]

65. Remove and reserve appendix B to part 26.

Appendices E through G to Part 26 [Removed]

66. Remove appendices E through G to part 26.