

or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before establishing any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, an agency must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local or tribal governments or the private sector. The proposed rule would impose no enforceable duty on any State, local or tribal governments or the private sector. This proposed rule applies to gasoline refiners. Today's proposed action would provide regulated parties with more flexibility with respect to compliance with the anti-dumping requirements.

#### *G. Executive Order 13045: Children's Health Protection*

Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be economically significant as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

We interpret Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This proposed rule is not subject to Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it does not involve decisions on environmental health risks or safety risks that may disproportionately affect children. This proposed rule permits

flexibility in establishing extended anti-dumping compliance periods in narrow circumstances where a net environmental benefit is expected.

#### *H. National Technology Transfer and Advancement Act of 1995 (NTTAA)*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs us to use voluntary consensus standards in our regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs us to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. Today's proposed action would not establish new technical standards or analytical test methods, and would not affect existing technical standards or analytical test methods.

#### *J. Statutory Authority*

Sections 114, 211, and 301(a) the Clean Air Act as amended (42 U.S.C. 7414, 7545, and 7601(a)).

#### **List of Subjects in 40 CFR Part 80**

Environmental protection, Air pollution control, Anti-dumping, Reformulated gasoline.

Dated: August 30, 2000.

**Carol M. Browner,**

*Administrator.*

[FR Doc. 00-22809 Filed 9-7-00; 8:45 am]

**BILLING CODE 6560-50-P**

## **DEPARTMENT OF TRANSPORTATION**

### **Office of the Secretary**

#### **49 CFR Parts 23 and 26**

[Docket OST-97-2550]

RIN 2105-AB92

#### **Participation by Disadvantaged Business Enterprises in Department of Transportation Programs**

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Supplemental notice of proposed rulemaking (SNPRM).

**SUMMARY:** In May 1997, the Department issued a supplemental notice of proposed rulemaking (SNPRM) to revise its disadvantaged business enterprise

(DBE) regulation. The SNPRM included proposals for revising the airport concessions portion of the DBE program. When the Department, in February 1999, issued the final rule based on the SNPRM, we did not publish a final version of the airport concessions proposal.

This SNPRM seeks comments on an airport concessions subpart to part 26 that takes into account comments on the May 1997 SNPRM, adapts provisions of the rest of part 26 to the concessions context, and proposes options for provisions affecting car rental operations at airports. These options are based in part on a recent memorandum of understanding between the American Car Rental Association and the Airport Minority Advisory Council making recommendations to the Department on this aspect of the rulemaking.

**DATES:** Comments should be received by October 23, 2000. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** Comments should be sent to Docket Clerk, Attn: Docket No. OST-97-2550, Department of Transportation, 400 7th Street, SW., Room PL401, Washington DC, 20590. For the convenience of persons wishing to review the docket, it is requested that comments be sent in triplicate. Persons wishing their comments to be acknowledged should enclose a stamped, self-addressed postcard with their comments. The docket clerk will date stamp the postcard and return it to the sender. Comments may be reviewed at the above address from 9 a.m. through 5:30 p.m. Monday through Friday. Commenters may also submit their comments electronically. Instructions for electronic submission may be found at the following web address: <http://dms.dot.gov/submit/>. The public may also review docketed comments electronically. The following web address provides instructions and access to the DOT electronic docket: <http://dms.dot.gov/search/>.

**FOR FURTHER INFORMATION CONTACT:** Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, SW., Room 10424, Washington, DC 20590, phone numbers (202) 366-9310 (voice), (202) 366-9313 (fax), (202) 755-7687 (TDD), [bob.ashby@ost.dot.gov](mailto:bob.ashby@ost.dot.gov) (e-mail).

**SUPPLEMENTARY INFORMATION:** The airport concessions provision of the DBE regulation implements statutory authority that is separate from the authority for the DBE program for DOT-assisted contracting. It applies to an industry—airport concessions—that

differs in a number of respects from the industries involved in DOT-assisted contracting, whether in airports, transit, or highways.

The types of business opportunities this subpart concerns include concessionaires, management contractors, and firms that supply goods or services to them. None of this work is eligible for FAA grant funds. Concession agreements generally involve high rent payments to the airport, often computed as a percentage of the concessionaire's annual gross receipts or a fixed amount, whichever is greater. Larger concessionaires are often required to make a substantial investment in a leased facility, which may be amortized over a period exceeding five years. In some instances, airports grant a firm the exclusive privilege to provide a particular type of concession, such as food and beverage services, to the entire airport.

Because of these unique features of airport concessions, this subpart differs in a number of respects from the provisions of the DOT-assisted contracting portions of the DBE rule. For example, the counting provisions of the rule, particularly with respect to car rental operations, differ significantly from those in the remainder of our DBE rules. Many provisions are parallel, however. Except with respect to size and personal net worth standards, which differ because of the economic characteristics of concessions, this subpart uses the certification standards of the rest of part 26. The basic narrow tailoring principles of part 26, including those pertaining to goal setting, apply here as well.

We sought comment on this subpart in our May 1997 DBE supplemental notice of proposed rulemaking (SNPRM). Because three years have elapsed since the 1997 notice and because this version of the document is different from the 1997 version in a number of respects, we have decided to seek additional comment. This new SNPRM reflects many of the comments we received on the May 1997 notice. When we refer to comments in discussing the provisions of the SNPRM, we are referring to comments on the May 1997 notice.

### Section-by-Section Discussion

#### FAA Guidance

One comment asked whether the final rule modifies FAA guidance interpreting 49 CFR part 23. As under the rest of part 26 (see § 26.15), the new rule would completely replace the old rule. Guidance issued under the concessions portion of old part 23

would no longer be in effect, once this subpart takes effect, because it interprets and implements a rule that has been removed from the Code of Federal Regulations. The provisions of the final version of this SNPRM would now govern and will be incorporated into any new technical assistance that FAA or DOT may issue. One piece of guidance we anticipate issuing at the time of, or shortly after, the publication of the final rule is a "sample plan" to assist airports in drafting their concessions program. We would put this sample plan on our web site, as we did for the sample plan we issued for the Federally-assisted contracts portion of part 26.

#### *Section 26.111 Do the Provisions of Subparts A–F of this Part Apply to This Subpart?*

This provision says that the rest of part 26 applies to the airport concessions program, except where this subpart provides differently.

#### *Section 26.113 What Do the Terms Used in This Subpart Mean?*

The concession provisions in 49 CFR part 23 incorporated the definition of "affiliation" from regulations of the Small Business Administration (SBA) 13 CFR part 121. Under part 121, affiliation may arise through joint venture arrangements, requiring the parties to combine their gross receipts in making a determination of business size. The SNPRM proposed to delete this provision from affiliation rules employed in the concession program. Two comments concurred with the proposal, and this SNPRM would adopt it. This SNPRM also reflects an amendment made to SBA's definition, which was published in the January 31, 1996 **Federal Register** (61 FR 3280).

This SNPRM would add a new definition of "car dealership," which is intended to clarify the SNPRM's provisions concerning purchase of vehicles by car rental operations and others.

Five comments addressed the proposed exclusion from the definition of "concession" of firms that only pick up and/or discharge customers at the airport, and that have no on-airport facility. Three supported the change, while two requested clarification. This SNPRM clarifies that a car rental is considered "at the airport" if it has an on-airport facility, including a counter at which its services are sold to the public, or a ready return facility. The types of facilities cited in the SNPRM are intended as examples, and a firm need not have a particular one to qualify as a concessionaire.

In addition, in response to comments and because the Department has received numerous questions on the issue, we are proposing to make contracts for on-airport advertising part of the definition of "concession." Placing advertising signs and other media in public portions of an airport (e.g., the terminal, the roadways leading to the terminal) is analogous to other businesses that we view as concessions. A firm typically pays to lease space from the airport and places objects in airport buildings and grounds that are directed at the traveling public. This can be a significant business opportunity for small businesses, including DBEs. However, the advertising agency usually does not have an office or store on the airport from which it sells goods or services to the traveling public. As a result, there has been uncertainty about whether advertising meets the current definition of "concession." To resolve this uncertainty, and because we believe that, as a matter of policy, it makes sense to make this type of business opportunity more readily available to DBEs, we are proposing to add this kind of advertising to the program. We seek comment on this proposal.

Under this SNPRM, all entities meeting the definition of "concession" are included in the base from which overall DBE goals are calculated, regardless of when the contract was awarded. At the same time, the proposed rule makes clear that sponsors are not required to modify or abrogate an existing concession agreement (one executed prior to the effective date of the final rule) during its term. The same procedure was used when subpart F of 49 CFR part 23, was published in 1992.

One issue of which we have become aware concerns businesses that may occupy a portion of airport property, serve the public in general, but do not focus on serving passengers who use airport for air transportation. For example, an airport may lease space on its property, perhaps some miles from the terminal, for a supermarket or other retail establishment that serves the local population but is not, except perhaps incidentally, used by persons who go to the terminal to catch a flight. We seek comment on whether we should exclude such businesses from the definition of concession. We might do so, for example, by changing this definition to refer to businesses that "primarily serve the traveling public on the airport."

In response to a comment, the term "concessionaire" has been modified to include firms that own and control a portion of a concession, in addition to those that own 100 percent of one. This

is in accord with our policy established at the inception of the program that concessionaires include sublessees and joint venture partners.

The term "direct ownership arrangement" has been modified to include a reference to licensees. We concur with a comment stating that while some corporations use licenses, others use franchises to establish non-company owned locations at airports. Since the two arrangements are not interchangeable as a matter of law, both are named. This SNPRM adopts the term "management contract or subcontract" with minor changes to clarify the coverage of subcontractors.

This SNPRM retains the 1997 SNPRM's proposal that a "small business concern" must be an "existing" business. Of three comments on the matter, one concurred, a second opposed it, while a third requested clarification. The one opposed believes that the provision will unreasonably limit a sponsor's flexibility. It stated that it is relatively common for existing firms to form new, separate corporations or other legal entities for each of its airport concessions. The comment said that such firms have either formed the new legal entity or have applied for certification for the existing entity with the proviso that the new entity would be formed if awarded the contract.

The Department believes that only existing firms should be permitted to apply for certification as a DBE. Approval of an application based on an assurance that an entity will subsequently form a firm would pose legal difficulties and undermine the integrity of the certification process.

For example, an entity might refuse to form the legal structure that it represented in its application, leaving the sponsor with no recourse but to impose contract sanctions.

An existing firm need not be operational or demonstrate that it previously performed contracts at the time of its application for certification. However, it would be required to specify its legal form and meet applicable eligibility standards. We have retained the provision that a firm cannot be denied certification solely because it was newly formed. For a sole proprietorship, which consists of a single individual, the applicant must, like other firms, submit appropriate information sufficient for the sponsor to make an eligibility determination.

The 1997 SNPRM invited comments on whether the concession program should employ a personal net worth (PNW) standard. Under such a provision, if an individual presumed to be socially and economically

disadvantaged has a PNW above the standard, the presumption of economic disadvantage would be rebutted. Six commenters favored using a PNW standard in the concession program, while one commenter (a firm) generally opposed the use of any standard, for many of the same reasons that commenters opposed adopting the standard in the rest of part 26 (e.g., a PNW standard "penalizes success," the information collection requirements are too intrusive).

Two sponsors recommended a threshold of \$750,000 in order to be consistent with the figure proposed by DOT in the 1992 NPRM, and subsequently adopted in part 26, for the contracting program. Any higher level, said one, would raise an issue of fairness and credibility with the public. Others recommended \$1.5 million and \$2 million for the threshold, while another favored tying it to the relative difference in size standards in the contracting and concession programs. Another sponsor commented that it does not consider itself qualified to determine an appropriate level and asked the Department to provide a rationale for any that is selected. It suggested that an individual's ability or inability to obtain a letter of credit or a bond of a certain value would be a better indicator. It also commented that not all wealth (e.g., undeveloped land) appearing on a personal net worth statement has economic value for the owner.

The Department discussed in some detail why it adopted a PNW standard in the rest of part 26, and this discussion applies in the concessions context as well. While we are well aware that this approach has disadvantages (e.g., some firms may be unable to participate in the program as a result), we believe that a PNW standard can be a useful safeguard against including in the program firms owned by individuals who it is difficult to view as economically disadvantaged. We believe that the concept of program eligibility based on economic disadvantage appears to call for a threshold for determining when an owner is no longer disadvantaged. The DBE concession program is not intended to assist enterprises owned and controlled by socially disadvantaged individuals who have accumulated substantial wealth. Also, in a narrowly tailored program that is subject to judicial review, we believe that using a PNW standard to ensure that the program is not overinclusive can be very important in defending the program in litigation.

Because of differences between the concessions program and the DOT-assisted contracting program, however (e.g., the higher cash flow of concessions, the need to raise significant capital to compete at multiple airports), DOT has decided to adopt a different personal net PNW standard for the concessions program. We believe that \$2 million will be a standard that will achieve the objectives of a PNW standard while not interfering unduly with the ability of firms to succeed in the concessions business. We believe that the \$2 million limitation is high enough to enable an owner to expand to several airports, yet is sufficiently low to prevent the individual from amassing unlimited assets. The figure also considers the substantial capital investment and higher operating costs generally associated with a concession, compared to DOT-assisted contracts. The figure would be subject to the same exclusions as the PNW standard in the contracting program (see § 26.67, "What rules determine social and economic disadvantage?")

#### *Section 26.115 To Whom Does This Subpart Apply?*

Since we received no substantive comments opposed to this section, it has been included without change.

#### *Section 26.117 What Are the Nondiscrimination and Assurance Requirements of This Subpart for Sponsors?*

These requirements were not the subject of substantive comments to the previous SNPRM, and have been included without change.

#### *Section 26.119 What Information Do Sponsors Have to Retain and Report About the DBE Concession Program?*

This provision is essentially parallel to § 26.11 and was included for the same reasons as discussed in the preamble to that section. The bidders' list requirement of that section is not repeated here, but does apply to firms seeking concession opportunities.

#### *Section 26.121 Who Must Implement a DBE Concessions Plan?*

One comment concurred with this May 1997 version of this section, while another urged the Department to require small primary airports to submit DBE concession plans every two years, rather than annually. This SNPRM would retain the provision that requires only primary airport sponsors to implement a DBE concession plan. Sponsors of general aviation airports, reliever airports, and nonprimary commercial

service airports are not subject to this requirement. Rather, they must take appropriate outreach steps to encourage available DBEs to participate as concessionaires whenever there is a concession opportunity. This provision significantly reduces burdens on them.

As a clarification, the language of this version of the proposed regulatory text gives sponsors who own more than one airport the option to submit a concessions plan covering all of the airports. There would be separate goals for each, however. Under the SNPRM, submitting a plan would be a one-time exercise, with additional submissions needed only in the case of significant changes to a plan that FAA had approved.

The FAA intends to issue, in conjunction with the publication of the final rule, guidance for the drafting of concessions plans. This will take the form of a sample concessions plan analogous to the sample DBE program currently on the Department's web site for the financial assistance portion of the DBE program.

*Section 26.123 What is the basic DBE goal requirement for sponsors?*

*Section 26.125 What is the base for a sponsor's goal for concessions and covered activities other than car rentals?*

*Section 26.129 How are a sponsor's goals expressed and calculated?*

*Section 26.131 What are public participation requirements concerning a sponsor's goals?*

*Section 26.133 What are the contents of a sponsor's goal submissions to FAA?*

*Section 26.135 What does FAA do with your goal submission?*

*Section 26.137 What are the sponsor's obligations concerning the use of race-neutral and race-conscious measures?*

*Section 26.139 What are the steps a sponsor takes to meet its DBE goals?*

This proposed set of requirements for goal-setting differs from that of the May 1997 SNPRM in some respects. Most importantly, this SNPRM proposes the requirement that sponsors must have two overall goals: One for concessions and covered activities other than car rentals, and the second for car rentals. Car rental goals are discussed separately below. Consistent with statutory requirements, management contracts and purchases by concessions from DBE suppliers form part of the goal.

Sponsors' goal submissions would cover a period of three to five years, in order to reduce the administrative burdens associated with the goal calculation and review process. The submissions would include goals for

each year in the period, however. If circumstances changed significantly during this period, recipients would have to make a mid-course adjustment.

We propose that sponsors would calculate their goals by using methods parallel to those used in Federally-assisted contracting under the rest of part 26. This approach to goal-setting is by now familiar to airports, since they have already used it in their Federally-assisted contracting DBE programs. We seek comment on whether there should be any adjustments made to these requirements in view of the differences between contracting and concessions.

In the May 1997 SNPRM and the current rule, the Department proposed that sponsors could base goals on the number of concessions, rather than the dollar volume of concessions. While this approach appears permitted by the language of the concessions statute, it has been used infrequently. It may be less suited to measuring the "level playing field" that we seek to describe in the goal setting process. For this reason, we propose that a sponsor would have to use the program waiver process of § 26.15 to employ this approach. To ensure legal sufficiency of such a waiver request, the FAA Chief Counsel's office would concur in any waiver request before it was sent to the Administrator for action.

The only situation we foresee in which this approach would be necessary is one in which the airport does not know the gross receipts of all or a significant portion of its concessionaires. One alternative would be to require concessionaires to make this information available to airports, though we recognize that the businesses might prefer to keep this information confidential. We seek comment on the best way of resolving this issue.

The proposed rule notes that a firm's overall receipts from non-concession activities do not form part of the base for goals. For example, airline and other aeronautical activities are not considered concessions. Therefore, the portion of a food service business's receipts from catering to airlines would not be part of the base for goals.

Comments were mixed on the 1997 SNPRM's proposals to require sponsors to provide for public participation in setting overall goals. Some felt the process would be burdensome and of little value. Since sponsors are generally public agencies, information on their concession plans is readily available to the public, commenters said. While this true, sponsors do not uniformly invite input from interested persons or groups when establishing overall goals. We believe that the process will assist in

setting the goals at levels that are reasonable and consistent with the factors upon which goals are based. The objective of the process is to involve as many stakeholders as possible and to do so prior to setting the goals.

Therefore, this SNRM retains the public participation provision with some modifications. It adds to the organizations that sponsors must consult. They now include, in addition to minority, women's, and concessionaire groups (changed from "general contractor" groups), trade associations representing concessionaires currently located at the airport as well as existing concessionaires themselves. The SNPRM would not pre-empt state or local freedom of information or sunshine act procedures.

A sponsor is required to provide for public participation at the beginning of each 3-5 year goal submission process. The requirement to "consult" with organizations as referenced in the rule means that sponsors should conduct informal outreach and actively solicit their views. A public hearing is not required.

Comments said that the public participation process is intended to benefit the sponsor, which is responsible for adopting and submitting acceptable goals. Further, the process does not confer any third party rights or private rights of action. While we concur with these statements, we have not adopted a recommendation to include disclaimers to this effect. Since the notice to be published advises that comments are for informational purposes only, we believe that it adequately expresses the intent and limitations of the public participation process.

In connection with the public participation process, several comments recommended that overall goals for concessions be set on the same cycle as goals for DOT-assisted contracting, so that a single notice can be published concerning both. The Department has no objection to this approach. We will require goals (except for the first time) to be submitted on August 1, as is the case for Federally-assisted contracting goals, though of course concessions goals would not have to be submitted every year.

The public participation process is not intended to substitute for the requirement that sponsors and concessionaires make good faith efforts in notifying and soliciting the interest of DBEs in specific concession offerings. We concur with a comment that public prebid or preproposal conferences provide an excellent forum in which to

discuss all aspects of a contract offering, including DBE contract goals. However, such goals should initially be submitted as part of the sponsor's concession plan. The intent of the rule is that overall goals and contract goals are to be reviewed and approved by FAA prior to contract solicitation.

As under the rest of part 26, this subpart prohibits group-specific goals. Goals must cover DBEs as a whole. However, as under the rest of part 26, recipients may seek a program waiver if they believe group-specific goals are necessary (see § 26.15).

In a narrowly tailored affirmative action program, sponsors need to consider two types of measures for meeting their goals: Race-neutral and race-conscious measures. This SNPRM lists several examples of each. The SNPRM notes that these efforts should be spread among various types of business opportunities, and not concentrated in one place. As under the rest of part 26, sponsors must estimate the portion of their goals they project meeting through race-conscious and race-neutral means. Sponsors would make this estimate in the same way they make the parallel estimate under the rest of part 26. Maintaining data on race-conscious and race-neutral participation would also be required. As generally under part 26, sponsors would not be penalized simply for failing to meet their overall goal, as long as they operate their program in good faith.

*Section 26.141 How do concessionaires and covered activities other than car rentals meet concession-specific DBE goals?*

*Section 26.145 How do sponsors count DBE participation toward goals for items other than car rentals?*

The most common race-conscious measure sponsors are likely to use to obtain DBE participation is the concession-specific goal, analogous to the contract goal in the DOT-assisted contracting portion of part 26. As with contract goals, a concessionaire must either meet a concession-specific goal or demonstrate good faith efforts to the sponsor. For the most part, counting DBE participation toward concession-specific goals follows the same rules as counting DBE participation under the rest of part 26.

There are some differences, however. The SNPRM would specify that costs in building concession facilities could count toward concession goals. One comment on the 1997 SNPRM concurred with the proposal to not require a DBE who performs a concession or management contract to perform at least 30 percent of the work

with its own forces in order to be considered to perform a commercially useful function. Another comment disagreed, saying that 30 percent represents a reasonable minimum amount in a joint venture and anything less reduces the DBE's role to a passive one.

The Department believes that the 30 percent rule may impose an unrealistically high standard for concessions and management contracts. DBE participation in these arrangements often is less, yet DBEs participate meaningfully. Moreover, a DBE partner in a joint venture must have a clearly defined role in order to qualify as eligible for participation. Accordingly, the SNPRM would not apply the 30 percent requirement to either concessions or management contracts. Nevertheless, recipients would be responsible for ensuring that DBEs perform a commercially useful function in order for their participation to count toward DBE goals.

This section also proposes counting 100 percent of the amount of cost of materials and supplies obtained from DBE regular dealers. This differs from the contracts portion of part 26. The reason for the difference is that the 100 percent rule here appears more consistent with the concessions statute and its legislative history. We seek comment on this issue and on whether there should be additional concession-specific counting provisions.

*Section 26.127 What is the base for a sponsor's goal for car rentals?*

*Section 26.143 How do car rental companies meet concession-specific DBE goals?*

*Section 26.147 How do sponsors count DBE participation toward car rental goals?*

Car rentals have long been the most difficult and contentious subject in the concessions rulemaking. Recently, the American Car Rental Association (ACRA), which represents many car rental companies, and the Airport Minority Advisory Committee (AMAC), which represents many DBE firms that work at airports, agreed on a memorandum of understanding concerning the treatment of car rental operations under this rule. The MOU makes a number of recommendations to the Department on this issue. For commenters' information, we are reproducing the text of this agreement below (signature lines and some duplicative heading material have been omitted):

**Memorandum of Understanding Between the Airport Minority Advisory Council and the American Car Rental Association Members Including Alamo Rent-A-Car, Inc.; Budget Rent A Car Corp.; Dollar Rent A Car Systems Inc.; Enterprise Rent-A-Car Company; and, National Car Rental System, Inc.; The Hertz Corporation, and, Avis Rent A Car System, Inc. on Issues Relating to the Department of Transportation's Pending Regulations on Disadvantaged Business Enterprise Participation in Airport Concessions, March 13, 1999**

*I. The Parties to the Memorandum of Understanding*

- This Memorandum of Understanding ("MOU") is between the Airport Minority Advisory Council ("AMAC"), Alamo Rent-a-Car, Inc., Budget Rent A Car Corp., Dollar Rent A Car Systems, Inc., Enterprise Rent-a-Car Company, and National Car Rental System, Inc., each a member company of the American Car Rental Association ("ACRA"), the Hertz Corporation ("Hertz"), and Avis Rent A Car System, Inc. ("Avis"). The member companies of ACRA, Hertz and Avis are hereinafter collectively referred to as "the car rental companies". AMAC and the car rental companies are hereinafter collectively referred to as "the Parties" and individually as a "Party".

- This MOU expresses the consensus of the Parties regarding the subject matter hereof, and sets forth each Party's intent with regard to the issues discussed. This MOU is not intended as a contract; however, the Parties intend to act in accordance with the understandings contained herein.

*II. Basis for Memorandum of Understanding*

*Whereas:*

- The Parties are keenly interested in assuring the continued viability of the federal disadvantaged business enterprise ("DBE") airport concessions program;

- The Parties strongly believe that it is in their mutual interest and the interest of DBEs that the U.S. Department of Transportation ("DOT") promulgate a final rule governing DBE participation in airport concessions as soon as possible;

- The Parties desire to assist DOT develop a final DBE airport concessions rule that is both practical and effective in terms of public policy and business practices; and

- The Parties have engaged in a process of constructive dialogue concerning certain critical issues regarding the objectives and content of a final DBE airport concessions program rule and the implementation of the rule.

AMAC and the car rental companies do hereby agree to advance and advocate, both together and separately, in public and in private, the principles embodied in this MOU and to work to assure their inclusion in a final DOT rule governing DBE participation in airport concessions. Further, the Parties also agree to explore appropriate ways in which they can work together to enhance DBE business opportunities with and within the rental car industry.

*III. DBE Dealer Size Standard*

- AMAC and the car rental companies collectively recognize that the existing Small

Business Administration ("SBA") size standard for new car dealers should not be applied to the DBE airport concessions program because of the large volume of vehicles purchased by car rental companies through their fleet programs; and,

- AMAC and the car rental companies collectively urge DOT to adopt a new car dealer size standard of 500 or fewer employees as the criteria for determining whether a new car dealer meets the definition of a small business under the DBE airport concessions program.

#### IV. Unified Certification Program

- The Parties are aware that DOT has promulgated a new Unified Certification Program to promote more simplicity and uniformity in the DBE certification process for all DOT-assisted contracts, while at the same time maintaining the integrity of the process. Toward this latter goal, this new requirement includes appropriate review mechanisms for airports and due process safeguards for DBE firms. The Parties urge DOT to apply the Unified Certification Program requirements to the airport concessions program.

#### V. Federal and Airport DBE Participation Goals and Compliance by Car Rental Companies

- The Parties agree that 10 percent of the gross revenues generated by car rental concessions operating at federally-assisted airports is an appropriate nationwide aspirational goal for the DOT airport concessions program.

- The Parties believe that compliance by a car rental company with federal and individual airport DBE participation goals may be achieved either through direct ownership arrangements, through vendor services and purchases, or through a combination thereof. Further, the Parties agree that under federal law applicable to the DBE airport concessions program, with respect to car rental concessions DBE vendor purchases and/or direct ownership arrangements are equally valid and, accordingly, no preferences or quotas are permitted. The Parties urge DOT to include a clear statement of the law concerning this matter. Specifically, the final rule promulgated for DBE participation in airport car rental concessions should clearly state that "good faith" compliance efforts by a car rental company do not require the company to pursue direct ownership arrangements before pursuing vendor purchases.

#### VI. "Good Faith" Efforts and Compliance with DBE Goals

- The Parties believe that a "good faith efforts" standard substantially similar to the standard applicable to DBE participation in DOT-assisted contracts should be included in the final DOT airport concessions program rule.

- The Parties believe that the actions listed below are primary examples of bona fide good faith efforts with respect to DBE participation in airport concessions and that they should be acknowledged as such when undertaken by the car rental industry:

- Conduct a comprehensive survey of vendors to determine which qualify as DBE's

for purposes of the airport concessions program and encourage other vendors who may be eligible to apply for certification.

- Identify opportunities for DBE's to provide goods and services, and engage in proactive outreach efforts to inform such firms of the opportunities.
- Join and support local and national minority, women, and small business organizations.
- Advertise in local and national DBE-focused publications for vendors that can provide needed goods and services.
- Make DBEs aware of solicitations in a timely manner and meet with firms to determine whether they fulfill requirements as car rental operators, or suppliers of goods and services.
- Document outreach efforts, including those that are unsuccessful.
- Whenever a new opportunity arises, use a combination of sources and outreach efforts (such as those cited above) to identify DBEs that fulfill the need.

#### VII. Ownership Arrangements

- The Parties encourage DOT to acknowledge that in the first instance a decision to enter into a direct ownership arrangement with a DBE firm is a discretionary matter for the car rental company. Thereafter, once a decision has been made the option to enter into a joint venture, franchise agreement, or other ownership transaction with a DBE firm for purposes of compliance with an airport's DBE goal (to operate a rental car concession or otherwise) is a business decision to be made exclusively by the car rental company and its potential DBE co-venturer, franchisee, or partner.

#### VIII. DBE Participation Goals and Car Rental Company Vehicle Purchases

- The Parties believe that it is essential for the final DOT airport concessions program rule to acknowledge and take into account the significance and the cost of new vehicles acquired by car rental companies (given that new vehicles constitute the bulk of a car rental company's vendor purchases).

- The Parties agree that the functions performed by dealers in transferring ownership of new vehicles are necessary and constitute a commercially useful function. Subject to the aggregate credit percentage limitation outlined below, when those functions are performed by a certified DBE vehicle dealer the Parties agree that a car rental company should be given full credit for the contract price of the vehicle toward the company's DBE compliance goal. However, the Parties further agree it is critical to encourage DBE participation in a wide array of business opportunities. Thus, the Parties recommend that not more than seventy (70) percent of a car rental company's DBE goal at an airport can be satisfied by new vehicle acquisitions. Nevertheless when an airport has established an approved DBE participation goal greater than 10 percent, the Parties recommend that the portion of the goal beyond 10 percent may be satisfied through additional vehicle acquisitions.

#### IX. National and Regional DBE Vendor Contracts; Geographic Preferences

- The Parties believe that the final DBE airport concessions program rule should take into account the use by car rental companies of national and regional vendor contracts for the acquisition of certain products and services utilized at multiple airport car rental concession locations. Given that such a contract may represent a potential growth opportunity, the Parties recommend that an airport serviced under such a contract with a certified DBE firm allocate and credit a pro rata share of the contract revenues toward the car rental company's DBE compliance goal.

The allocations would be based on information provided by the car rental company, which would bear the responsibility for its accuracy, and would be subject to audit by DOT.

- The Parties recommend that, for federal DBE goal compliance purposes, DOT specify the nation as a whole as the market area from which a car rental company can seek DBE's to participate in an airport's concessions program.

#### X. Duration and Effect of MOU

- The Parties agree that policy recommendations contained in this MOU do not have the effect of law or supercede the DOT airport concessions program rules and regulations. Nor do the policy recommendations constitute an admission against interest with respect to the contents hereof or to the provisions of federal law authorizing the airport DBE concessions program.

- The Parties acknowledge that the car rental companies are subject to the provisions of the existing DOT airport concessions program rules until such time as new regulations are promulgated.

- The Parties agree that upon promulgation of a final airport DBE concessions rule that this MOU shall be of no further force or effect.

The undersigned officers of AMAC and the car rental companies agree that their organizations, their members, and their representatives will support all of the terms of this Memorandum of Understanding in both public and private. To the extent necessary, AMAC and the car rental companies agree to meet with DOT representatives to urge the adoption of a final DOT DBE airport concessions rule consistent with the terms of this Memorandum of Understanding.

#### Addendum to the Memorandum of Understanding

This Addendum to the Memorandum of Understanding dated March 13, 1999, ("Memorandum") by and between Alamo Rent-a-Car, Inc.; Budget Rent A Car Corp.; Dollar Rent A Car Systems, Inc.; Enterprise Rent-A-Car Co.; National Car Rental System, Inc., each a member company of the American Car Rental Association ("ACRA"), The Hertz Corporation ("Hertz") and Avis Rent A Car System, Inc. ("Avis"), (ACRA, Hertz and Avis are collectively referred to herein as the "Companies") and the Airport Minority Advisory Council ("AMAC") is by and between the Companies, AMAC, and Thrifty Rent-A-Car Systems, Inc. ("Thrifty").

Whereas, Thrifty is a member of ACRA;

Whereas, Thrifty is by strategy and design a franchise system with more than 90% of its retail outlets worldwide owned by independent businesses who are licensed to use the Thrifty trade names, systems and technologies; and

Whereas, Thrifty has adopted a program especially designed to increase diversity in our franchise owner base.

Thrifty supports and agrees with all of the principles expressed in the Memorandum except for the statement in Paragraph 2, Article V regarding preferences and "co-equal" methods of car rental company compliance with Federal and airport DBE participation goals.

The Department appreciates the efforts of AMAC and ACRA, and notes that their MOU provides useful information for the development of the Department's proposals in this SNPRM. Because the approach the MOU takes toward counting car rental DBE participation differs significantly from the counting approach taken by the rest of part 26, and because the dollar volumes of the car rental business at many airports is very high, we believe that it is best to incorporate the MOU's concepts in a separate portion of the DBE rule. Airports would have car rental goals that are separate from their other DBE goals, and the counting mechanism in this portion of the rule would apply only to car rental goals. The purpose of this separate treatment is to ensure that the car rental portion of an airport's concession operations does not so dominate the DBE concessions program that other types of concessions (e.g., retail stores in the terminal) are overlooked. The method for calculating car rental goals would essentially be the same as described above for other types of concessions. Both are modeled on the narrowly-tailored methods for goal setting in the DOT-assisted contracting portion of part 26.

The Department seeks comment on an additional option for calculating car rental goals. This option envisions that car rental companies themselves would voluntarily establish nationwide goals for DBE participation. Following FAA approval, the companies would certify their compliance with this requirement to airports. The individual airports would not have the task of calculating their own car rental goals, and the companies would not have to work with multiple airports on car rental goals. This approach would therefore reduce administrative burdens on everyone concerned. It also responds to the desire of the parties to the MOU for a national approach to car rental goals. The companies would use a goal calculation

approach like that described above for airports.

We are aware that some airports may be concerned that this national approach might diminish their ability to respond to local conditions and constituencies. We seek comment on this point, and on how this concern is best balanced with this option's greater administrative efficiency. This option would also include a provision directing car rental companies to spread their DBE participation equitably throughout their systems, lest a company meet all its obligations in a few parts of the country to the exclusion of others.

We do not believe this option is mutually exclusive with the proposal to authorize airports to set car rental goals. For example, the final rule might say that, when a car rental company had an FAA-approved national goal, local airports would accept their certification. Where a company did not have a national goal, or where there was a local company, the airport would set its own car rental goal. The Department seeks comments on these approaches and how they might work together. In both approaches, the companies would make good faith efforts to meet goals in a way parallel to that described above for airports.

The proposed car rental provisions incorporate the list of good faith efforts mentioned in the MOU. They also restate the statutory provision that says that car rental companies are not required to change their corporate structure to comply with this regulation. This "change to corporate structure" language was the source of some comment on the May 1997 SNPRM. Three organizations commented on the meaning of the phrase. One firm stated that it consists of corporately-owned and managed operations at large or medium size airports except for certain pre-existing license agreements. When an opportunity arises, it acquires licenses at large or medium size airports. It comments that its firm is very much a system of airport operations owned and operated by a corporate entity. It believes that any rule that would compel it to abandon this structure would violate the statute. Further, the firm stated that any rule compelling it to make any detailed justification for its existing corporate structure would be unnecessary.

Another comment expressed concern that DOT may be seeking to adopt a very narrow definition so that in some circumstances sponsors may argue that a specific concession bid requirement does not require a change in corporate structure. This commenter believes that such ambiguity can only give rise to

future disagreements or conflicts between the car rental industry and sponsors. A summary of other points made by this comment follows.

Any attempt to force car rentals into direct ownership arrangements, either as a condition of bidding on a concession contract or as a determining factor in location of a concessionaire's facilities at an airport, directly violates both the language of the statute and intent of Congress. Each time a car rental sells a license or franchise to operate a car rental establishment at an airport, a change in corporate structure of the lessor or franchisor is required. Direct ownership possibilities do not arise frequently at airports across the country for most companies in the car rental industry. For larger nationwide car rentals, most of their airport locations are company owned and operated. For these larger firms, franchisees or licensees that do exist almost uniformly have perpetual franchises or licenses to operate at an airport or in a region. Thus, DOT and sponsors should not assume that just because a new concession contract is being bid at an airport, each car rental has an opportunity to engage in a direct ownership arrangement without changing its corporate structure.

Car rentals may have franchises and licensees extensively during the early years of a firm's existence as they attempt to spread across the country. As these companies mature and reach all their desired markets, the parent company starts to buy back whatever franchises or licenses become available. Car rentals follow this basic strategy because, under federal law, they are prohibited from dictating pricing policies to franchisees and licensees. In order to build a truly nationwide car rental company, most corporations desire to control the quality of service, pricing, quality of vehicles rented, and as many other aspects of the rental transaction and the interaction with customers as possible. As a result, as franchises and licenses become available, car rentals tend to buy them back.

The Department concurs that a decision to operate a car rental through a franchise or license, rather than directly by the corporation, changes a firm's corporate structure. The selling of a franchise or license is not explicitly referenced in the legislative history pertaining to change in corporate structure. Nevertheless, we believe that such a sale does constitute a "transfer of assets," which is cited in the Congressional statement as an indicator of a change in corporate structure.

We believe that a change in corporate structure includes a decision by a firm to sell a franchise or license to operate at a particular airport facility. If a corporation notifies a sponsor that it will sell a franchise or license to operate at the airport, the sponsor would be authorized to require the firm to make good faith efforts to meet a DBE goal. Good faith efforts would include

notifying DBE firms of this opportunity and taking other appropriate steps.

A third commenter believes that the provision would perpetuate a system in which DBEs are not provided opportunities to participate in direct ownership arrangements in the car rental industry. It comments that the broad definition of "change to corporate structure" proposed in the May 1997 SNPRM would eliminate any requirements for car rentals to make good faith efforts to involve DBEs in such arrangements. It recommends that DOT consider requiring car rentals to demonstrate positive efforts in this area, just as other concessionaires and DOT-assisted contractors must do. The Department believes that the current SNPRM, in its language concerning direct ownership arrangements, correctly interprets the constraints imposed by statute in levying requirements on car rentals and responds to the points made in the MOU.

The SNPRM proposes a counting mechanism patterned after that of the MOU. One difference between the MOU and the SNPRM pertains to the percentage of a goal that may be met through vehicle purchases. The MOU provides that a car rental operation could meet up to 70 percent of its goal through vehicle acquisitions, with the rest presumably coming through vendor purchases and other means. The SNPRM incorporates this recommendation. However, the MOU also suggests that when an airport has established an approved DBE participation goal greater than 10 percent, the portion of the goal beyond 10 percent could be satisfied through additional vehicle acquisitions. The SNPRM does not include this latter provision. In our view, it places too much weight on the statutory aspirational 10 percent goal as an actual operational portion of the program. It also would have the effect of capping the proportion of DBE participation in car rentals from sources other than vehicle acquisitions to what may be less than one might expect in a "level playing field" situation. We do not think this is advisable as a matter of law or policy. However, we seek further comment on this issue.

The SNPRM makes it clear that car rental companies are not required to meet their goals through direct ownership arrangements. However, any participation they choose to obtain through such arrangements may be counted toward their goals.

*Section 26.149 What Certification Procedures and Standards Do Recipients Use To Certify DBE Concessionaires?*

The SNPRM proposes that, with the exceptions listed in this section, certification for the concessions program be treated the same as certification for other purposes under part 26. The exceptions concern such subjects as size, personal net worth, and affiliation.

The SNPRM does not propose to adopt certain additional changes that commenters on the May 1997 SNPRM requested. One comment requested that sponsors be allowed to report to FAA, but not count toward their goals, a DBE who is a limited partner in a limited partnership. The comment said that in a concession such as a duty-free shop, the functions of a limited partner, although not as substantial as a general partner or a joint venture partner, are nevertheless meaningful. This sponsor commented that DBEs were reluctant to enter into joint ventures with non-DBEs for duty-free concessions because even if the DBE's interest is relatively small, it would be potentially responsible for liabilities and obligations of the entire joint venture or partnership.

The limited partner in a limited partnership cannot, by statute, exercise control over the operations of the business. In view of this, we take the position that a limited partnership is not eligible for certification if the general partner is a non-DBE or a non-disadvantaged individual. The DBE participation that sponsors report to FAA annually includes accomplishments in meeting the overall goal. Only those firms certified as DBEs in accordance with this part can be counted toward meeting the goals. The definition of "joint venture" in § 26.5 has been modified to specify that the capital contribution by the DBE joint venture partner must be commensurate with its ownership interest.

One commenter recommended that the rule provide guidelines on the eligibility of Limited Liability Corporations (LLC), saying that this arrangement is commonly used in concessions throughout the country. The comment also said:

\* \* \* one of its basic characteristics is that management of the company may be rotated among its members (same as shareholders in a corporation). Thus, it is important that sponsors obtain written assurances that no management responsibility changes will be made within the firm without prior notification to (the) sponsor. The rest of the business structure parallels a corporation, and should be reviewed as such.

The Department's research indicates that LLCs vary in structure from one state to another. In the absence of a uniform national statute or standards, we have decided not to specifically address LLCs in the rule. However, like every other applicant for certification, a business that proposes to operate as an LLC must meet the eligibility standards adopted in the final rule.

Under § 26.83(i), a DBE is required to inform the recipient (or UCP) in writing of any change in its circumstances affecting its ability to meet eligibility standards, including control, or any material changes to the information in its application form. The written notice must be provided within 30 days of occurrence of the change. We believe that this procedure will enable recipients to decide whether a firm continues to qualify as a DBE. We do not concur that a DBE should be required to notify the recipient prior to making changes to its management responsibilities. As discussed in connection with the definition of "existing firm" in § 26.111, a recipient can deny certification or recertification only to existing firms. It cannot make a determination based on a proposed change, nor should it be required to give advice to a firm on the acceptability of the proposed change.

The May 1997 SNPRM did not propose to permit "dealers in development" (*i.e.*, dealers participating in manufacturers' development programs that did not fully meet part 26 ownership and control criteria) to be certified as DBEs. All four comments on the matter opposed the Department's approach. Comments to the May 1997 SNPRM repeated assurances that although disadvantaged individuals own less than 51 percent of these businesses, they exercise control over the daily operations. Further, allowing their participation would accelerate the redemption by these owners of preferred stock held by the manufacturer and hence, their road to 51 percent ownership. Other comments said that the proposal excludes small disadvantaged businesses from reaping the benefits of the DBE program in favor of larger, "less disadvantaged" businesses that have been able to accumulate the more than \$1 million in start-up costs needed to capitalize a dealership.

Comments requested that DOT grant a narrowly-crafted exception to the DBE ownership requirements which permits these dealers participating in a recognized development program to be eligible as DBE vendors. The car rental industry needs a large number of certified DBE new car dealers from

which to purchase cars, a comment says, to assist them in meeting goals.

In the preamble to the May 1997 SNPRM, we explained why these arrangements do not meet eligibility standards for ownership or control. In particular, to qualify as a DBE, the control of the operations of a business must rest with one or more disadvantaged individuals who own it. In the case of some dealers in development, however, disadvantaged individuals own less than 51 percent of the business. Thus, control of the firm cannot rest with disadvantaged individuals, as required under the statutory definition of a DBE, if the manufacturer is a non-DBE. The Department does not have the authority to grant an exemption, however carefully crafted, from a statutory requirement.

We also concluded that the dealers in development and the manufacturers could be viewed as having a franchisor/franchisee relationship. Under this final rule, a business operating under a franchise agreement is eligible for certification only if it qualifies as a DBE and the franchisor is not affiliated with the franchisee. If the firms are affiliated, then their gross receipts are combined when making a size determination. Since the manufacturer in a dealer development program controls the business, affiliation is inferred. Assuming that the number of employees of the manufacturer exceeds the limit of 500 set by this regulation, dealers in development would not meet the applicable size standard.

Based on this analysis, these arrangements do not meet any of the three statutory standards for DBE eligibility—ownership, control, and size. Since the manufacturer owns as much as 80 percent of the business, we would generally presume that it would retain 80 percent of profits made through participating in the DBE program. We would also expect the DBE generally to retain 20 percent. We believe that counting such dollars as meeting DBE goals conflicts with the goals and objectives of the program. Further, with the very extensive resources available to the manufacturer, these arrangements could be expected to compete successfully against smaller firms, including DBEs meeting eligibility criteria. DBEs could be prevented from gaining the benefits of the program in favor of firms that do not qualify under such criteria. This result also runs counter to the program's goals and objectives.

We stated in the preamble to the May 1997 SNPRM that in the event the Department adopts a developmental

program or a mentor-protégé program for concessions at a future date, we would reexamine our position to determine if dealers in development qualify. The DOT-assisted contracting portion of part 26 does provide for a mentor-protégé program. We point this out simply to observe that DBEs participating as protégés in this program must meet eligibility standards. For these reasons, we have not adopted the recommendation to allow dealers in development to qualify as DBE participation in the concession program.

The fact that the Department cannot make an exception to the certification standards for dealers in development should by no means be taken as a disparagement of the program. The Department applauds the goals of the program and the noteworthy efforts of the major automobile manufacturers to provide opportunities for fledgling businesses to grow into self-sustaining entities.

*Section 26.151 What Monitoring and Compliance Procedures Must Sponsors Follow?*

This section is not changed substantively from the May 1997 version. The principles established under the DBE contracting program for monitoring prime contractors' compliance may also be useful in the concession program. A primary purpose of the procedures is to verify that the work committed to DBEs as a condition of contract award is actually performed by the DBEs. Sponsors would generally rely on local law to enforce contractual provisions in the event of noncompliance. The grant legislation does not specify contract sanctions.

*Section 26.153 Does a Sponsor Have To Change Existing Concession Agreements?*

This SNRM rule would retain the May 1997 provision that sponsors are not required to modify or abrogate existing concession agreements, defined as ones executed prior to the effective date of this part. Under the rule, it is the sponsor that establishes and levies individual contract goals. One commenter wanted to know whether bidders and proposers will be responsible for establishing these levels. As discussed above, however, sponsors must provide for public participation in goal-setting process, and overall goals depend, in part, on the percentage levels of individual contract goals.

*Section 26.155 What Requirements Apply to Privately-Owned Terminal Buildings?*

This provision is identical to the version in the May 1997 SNPRM. We did not receive any comments on it.

*Section 26.157 Can Sponsors Enter Into Long-Term, Exclusive Agreements With Concessionaires?*

This provision proposes that long-term, exclusive leases are prohibited, except where the sponsor obtains FAA approval. The section proposes a procedure for obtaining such approval, including a list of information FAA needs before it can grant this approval. DBE participation would be a key part of this information. Comments on the May 1997 version of this section generally favored requiring opportunities for DBE participation as part of a long-term, exclusive lease arrangement.

*Section 26.159 Does This Subpart Preempt Local Requirements?*

This proposed section restates the statutory provision that the regulation does not preempt local requirements. Sponsors may, however, have to take steps to avoid situations where a local requirement conflicts with a Federal requirement. It should be noted also that this provision refers to substantive DBE and similar requirements of local entities, not to Federal requirements for confidentiality (e.g., with respect to information submitted in response to PNW requirements).

*Section 26.161 Does This Subpart Permit Sponsors To Use Local Geographic Preferences?*

This SNPRM proposes to allow a geographical preference in concessions in limited situations. Several comments on the May 1997 SNPRM addressed this subject. One asked if a sponsor could deny a DBE an opportunity to compete for a contract solely because it resides outside a given geographic area. Another said that lack of guidance on the matter further frustrates reasonable means of compliance because sponsors do not consider the limitations in availability and competitive pricing in the sponsor's geographic area. Another comment also opposed local geographic preferences, saying that if the Department has concluded that Congress made a nationwide determination of discrimination in the airport concession industry, then any remedial action it takes, such as the DBE concession program, must be nationwide in scope. The comment urged the Department to correct this contradiction and prohibit local

preferences in the DBE airport concession program unless a local governmental entity has made an independent determination of racial discrimination in the airport concession industry in the local geographic area. The comment states further:

Sponsors must not be permitted to rely on an alleged congressional determination of nationwide discrimination to adopt local racial preferences. The Supreme Court declared in *Crosby*: "We have never approved extrapolation of discrimination in one jurisdiction from the experience of another \* \* \*" (S)everal firms in the (car rental) industry feature the vehicles of specific automobile manufacturers in their rental fleets. The industry's experience in the past has been that new car dealers selling these featured makes of vehicles are not available in all areas, or that local preferences encourage those dealers that are available to quote vehicle prices that are substantially higher than those dealers outside of the local geographic area.

The Department recognizes that sponsors have a special stake in facilitating participation by firms doing business in their local areas, and it is not the purpose of the DBE program to intrude upon that mission. As noted, the prohibition on local geographical preferences in 49 CFR part 18 applies only to DOT-assisted contracts and not to concessions. Further, under part 18, geographical location can be a selection criterion, subject to certain limitations, when a recipient contracts for architectural and engineering services (49 CFR 18.36(c)(2)). At the same time, the Department recognizes that local geographical preferences have disadvantages, such as the elimination of the benefits of wider competition for business opportunities and the possible loss of opportunities for DBEs who are not located in the locality served by an airport.

Based on these considerations, the Department has decided to propose allowing local geographical preferences, but only under limited circumstances. A sponsor would have to submit a program waiver request under § 26.15 in order to secure approval for a geographic preference. The FAA Administrator would decide whether to grant the request.

The requested waiver would have to conform to several requirements. The preference would have to be described in detail as to area and operation. When the procedure is used, the contract solicitation would have to fully inform competitors of the operation of the preference. The preference would have to be designed and implemented on a race-neutral basis, applying equally to DBEs and non-DBEs. Thus, if a sponsor restricted the geographical area of firms

eligible to compete for a given contract, all DBEs and non-DBEs within the area to which the preference pertains must be allowed to compete. A preference would be unacceptable if it conflicted with any provision of the rule or has the effect of defeating or substantially impairing accomplishment of the program's objectives. Any goals set on contracts subject to the preference would have to be based on the relative availability of DBEs within the area covered by the preference and could not have the effect of limiting DBE participation. The preference would not have to be applied to every covered contract, however.

Because of the potential problems that could arise with the use of local preferences, the Department seeks comment on whether, even with these safeguards, the final rule should permit preferences.

#### *Appendix F—Size Standards for the Airport Concession Program*

All five comments on the proposed size standard for car dealerships concurred, and the proposal is retained as part of the SNPRM. One comment concurred with the proposed inflationary adjustment to the size standards for concessionaires. The adjustment in the final rule has been updated to reflect more recent statistical information. The Department of Commerce, Bureau of Economic Analysis, prepares estimates of personal consumption expenditures of goods and services, many of which are sold to the public by airport concessionaires. The implicit price deflator for personal consumption expenditures was 11.3 from June 1992 to March 1998. (In the interim between this time and the publication of our final rule based on this SNPRM, FAA will update this information and make adjustments as needed.) Since size standards for concessionaires were originally established and became effective June 1, 1992, the second quarter of 1992 is used as the base period. 11.3 percent represents the rate of increase since that time. By multiplying the appropriate size standard by 1.113, we are able to adjust dollar figures for inflation. Thus, \$40,000,000 multiplied by 1.113 yields \$44,520,000 as the new size standard for auto rental concessions. \$30,000,000, when multiplied by 1.113, yields \$33,390,000 as the new size standard for many other categories of concessionaires.

One comment concurred with the proposed size standard of \$5.0 million for operators of parking lots. A second comment said that the standard appeared low when compared to ones

for concessionaires. We point out, however, that a management contractor does not normally incur the substantial capital costs generally associated with a concession. The proposed standard of \$5 million is taken from the SBA's regulations at 13 CFR part 121. Further, it applies only if a parking lot is operated under a management contract. If it is operated as a concession, the applicable size standard would be \$33,390,000.

Under the SNPRM, other activities operated under management contracts need to meet the appropriate size standard in 13 CFR part 121. Although the legislation delegates authority to the Secretary to set size standards for the concession program, we have chosen to use SBA's in this case.

One commenter (a sponsor) on the 1997 SNPRM said that the size standards for concessionaires cannot withstand strict scrutiny in determining that a firm is owned and controlled by socially and economically disadvantaged. The comment said that the public may question how a barbershop or shoe shine with gross sales of over \$33 million could be considered either socially or economically disadvantaged. It believes that these standards may raise a question of fairness with the public and challenge the program's credibility.

It should be noted that the size standards for concessionaires were initially adopted by the Department when subpart F was added to 49 CFR part 23. The particular standards were selected only after the Department gave full consideration to all comments. A discussion of the comments and various alternatives considered can be found in the preamble to the April 1, 1992 **Federal Register** (57 FR 18400). This notice amended 49 CFR part 23 to add subpart F. It should be noted that size standards employed in the DBE program apply to firms. Owners of DBE firms, by contrast, must be "socially and economically disadvantaged." As such, this standard applies to individuals. We believe that the current size standards conform to the legislative provisions.

#### **Regulatory Analyses and Notices**

##### *Executive Order 12866*

This rule is not a significant rule under Executive Order 12866. It is significant under the Department's Rulemaking Policies and Procedures, because of the substantial public interest concerning and policy importance of programs to ensure nondiscrimination in Federally-assisted contracting. Moreover, we do not believe that the rule will have

significant economic impacts. In evaluating the potential economic impact of this rule, we begin by noting that it does not create a new program. It simply revises the rule governing an existing program. The economic impacts of the DBE program are created by the existing regulation and the statutes that mandate it, not by these revisions. Some changes that we propose in this program may have some positive economic impacts. For example, if car rental companies set goals on a national basis, there will be some reductions in administrative burdens and costs for both recipients and the companies.

The rule's "narrow tailoring" changes are likely to be neutral in terms of their overall economic impact. These could have some distributive impacts (e.g., if the proposed goal-setting mechanism results in changes in DBE goals, a different mix of firms may work on recipients' contracts), but there would probably not be net gains or losses to the economy. There could be some short-term costs to recipients owing to changes in program administration resulting from "narrow tailoring," however.

In any event, the economic impacts are quite speculative and appear nearly impossible to quantify. Comments did not provide, and the Department does not have, any significant information that would allow the Department to estimate any such impacts. To the extent that we receive additional information about economic impacts from commenters, we will incorporate it at the final rule stage.

#### *Regulatory Flexibility Act Analysis*

This part of DBE program is aimed at improving contracting opportunities for small businesses owned and controlled by socially and economically disadvantaged individuals in airport concessions. Virtually all the businesses it affects are small entities. There is no doubt that a DBE rule always affects a substantial number of small entities.

This proposed rule, while improving program administration and facilitating DBE participation and responding to legal developments, appears essentially cost-neutral with respect to small entities in general. It does not impose new burdens or costs on small entities, compared to the existing rule. It does not affect the total funds or business opportunities available to small businesses that seek to work in airport concessions. To the extent that the proposals in this rule (e.g., with respect to changes in the methods used to set overall goals) lead to different goals than the existing rule, some small firms may gain, and others lose, business.

There is no data of which the Department is aware that would permit us, at this time, to measure the distributive effects of the revisions on various types of small entities. It is likely that any attempt to gauge these effects would be highly speculative. For this reason, we are not able to make a quantitative, or even a precise qualitative, estimate of these effects.

#### *Paperwork Reduction Act*

A number of provisions of this SNPRM involve information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA). These requirements continue existing part 23 requirements, major elements of the DBE program that recipients and contractors have been implementing since the inception of the concessions part of the program. While the SNPRM would modify these requirements in some ways, the Department believes the overall burden of these requirements will remain the same or shrink. These requirements are the following:

- Firms applying for DBE certification must provide information to recipients to allow them to make eligibility decisions. Currently certified firms must provide information to recipients to allow them to review the firms' continuing eligibility. (After the UCP requirements of the rule are implemented, the burdens of the certification provisions should be substantially reduced.)
- Recipients must maintain a directory of certified DBE firms. (Once UCPs are implemented, there will be 52 consolidated directories rather than the hundreds now required, reducing burdens substantially.)
- Recipients must calculate concessions goals and transmit them to the FAA for approval. (The process of setting overall goals is more flexible, but may also be more complex, than under part 23. As they make their transition to the final rule's goal-setting process during the first years of implementation, recipients may temporarily expend more hours than in the past on information-related tasks.)
- Recipients must have a concessions plan approved by the FAA. (The SNPRM includes a one-time requirement to submit a revised program document making changes to conform to the new regulation.)

The Department is in the process of estimating the burden hours resulting from these requirements.

Both as the result of comments and what the Department learns as it implements the DBE program under part 26, it is possible for the Department's information needs and the way we meet

them to change. Sometimes the way we collect information can be changed informally (e.g., by guidance telling recipients they need not repeat information that does not change significantly from year to year). In other circumstances, a technical amendment to the regulation may be needed. In any case, the Department will remain sensitive to situations in which modifying information collection requirements becomes appropriate.

As required by the PRA, the Department will submit an information collection approval request to OMB. Organizations and individuals desiring to submit comments on information collection requirements should direct them to the Department's docket for this rulemaking. You may also submit copies of your comments to the Office of Information and Regulatory Affairs (OIRA), OMB, Room 10235, New Executive Office Building, Washington, DC, 20503; Attention: Desk Officer for U.S. Department of Transportation.

The Department considers comments by the public on information collections for several purposes:

- Evaluating the necessity of information collections for the proper performance of the Department's functions, including whether the information has practical utility.
- Evaluating the accuracy of the Department's estimate of the burden of the information collections, including the validity of the methods and assumptions used.
- Enhancing the quality, usefulness, and clarity of the information to be collected.
- Minimizing the burden of the collection of information on respondents, including through the use of electronic and other methods.

The Department points out that all the information collection elements discussed in this section of the preamble have not only been part of the Department's DBE program for many years, but have also been the subject of extensive public comment following the 1992 NPRM and 1997 SNPRM. Among the over 900 comments received in response to these notices were a number addressing administrative burden issues surrounding these program elements. In the February 1998 final rule for the rest of part 26, and in this SNPRM, the Department has responded to these comments.

#### *Federalism*

The rule does not have sufficient Federalism impacts to warrant the preparation of a Federalism assessment. While the rule concerns the activities of state and local governments in DOT

financial assistance programs, the rule does not significantly alter the role of state and local governments vis-a-vis DOT from the present part 23. The availability of program waivers could allow greater flexibility for state and local participants, however.

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

Administrative practice and procedure, Airports, Civil rights, Concessions, Government Contracts, Grant programs -transportation, Highways and roads, Mass transportation, Minority business, Reporting and recordkeeping requirements.

Issued This 31st day of July, 2000, at Washington, D.C.

**Rodney E. Slater,**

*Secretary of Transportation.*

For the reasons stated in the preamble, the Department proposes to take the following actions:

#### PART 23—[REMOVED]

1. Remove part 23 of Title 49, Code of Federal Regulations.
2. Revise the authority citation for 49 CFR part 26 to read as follows:

**Authority:** 23 U.S.C. 324; 42 U.S.C. 2000d, *et seq.*; 49 U.S.C. 1615, 47107, 47113, 47123; 49 U.S.C. 47107 and 47123; Executive Order 12138, 3 CFR, 1979 Comp., p. 393, Sec. 1101(b), Pub. L. 105-178, 112 Stat. 107,113.

3. Add a new subpart G of 49 CFR part 26, to read as follows:

#### Subpart G—DBE Participation in Airport Concessions

Sec.

- 26.111 Do the provisions of subparts A–F of this Part apply to this subpart?
- 26.113 What do the terms used in this subpart mean?
- 26.115 To whom does this subpart apply?
- 26.117 What are the nondiscrimination and assurance requirements of this subpart for sponsors?
- 26.119 What information do sponsors have to retain and report about the DBE concession program?
- 26.121 Who must implement a DBE concessions plan?
- 26.123 What is the basic DBE goal requirement for sponsors?
- 26.125 What is the base for a sponsor's goal for concessions and covered activities other than car rentals?
- 26.127 What is the base for a sponsor's goal car rentals?
- 26.129 How are a sponsor's goals expressed and calculated?
- 26.131 What are public participation requirements concerning a sponsor's goals?
- 26.133 What are the contents of a sponsor's goal submissions to FAA?
- 26.135 What does FAA do with your goal submission?

- 26.137 What are the sponsor's obligations concerning the use of race-neutral and race-conscious measures?
- 26.139 What are the steps a sponsor takes to meet its DBE goals?
- 26.141 How do concessionaires and covered activities other than car rentals meet concession-specific DBE goals?
- 26.143 How do car rental companies meet concession-specific DBE goals?
- 26.145 How do sponsors count DBE participation toward goals for items other than car rentals?
- 26.147 How do sponsors count DBE participation toward car rental goals?
- 26.149 What certification standards and procedures do recipients use to certify DBE concessionaires?
- 26.151 What monitoring and compliance procedures must sponsors follow?
- 26.153 Does a sponsor have to change existing concession agreements?
- 26.155 What requirements apply to privately-owned terminal buildings?
- 26.157 Can sponsors enter into long-term, exclusive agreements with concessionaires?
- 26.159 Does this subpart preempt local requirements?
- 26.161 Does this subpart permit sponsors to use local geographic preferences?
- Appendix F to Part 26—Size Standards for Airport Concessionaires

#### § 26.111 Do the provisions of subparts A–F of this part apply to this subpart?

Except where provisions of this subpart differ from or add to those of subparts A–F of this part, the provisions of subparts A–F apply to the DBE program for airport concessions of this subpart G.

#### § 26.113 What do the terms used in this subpart mean?

*Affiliation* has the same meaning as in § 26.5, except that the provisions of SBA regulations concerning affiliation in the context of joint ventures (13 CFR 121.103(f)) do not apply to this subpart.

*Car dealership* means an establishment primarily engaged in the retail sale of new automobiles or new and used automobiles. Car dealerships frequently maintain repair departments and carry stocks of replacement parts, tires, batteries, and automotive accessories. Such establishments also frequently sell pickups and vans at retail. In the standard industrial classification system, car dealerships are categorized in SIC 5511, "Motor Vehicle Dealers (New and Used)."

*Concession* means a for-profit business enterprise, located on an airport subject to this subpart, that is engaged in the sale of consumer goods or services to the public under an agreement with the sponsor, another concessionaire, or the owner of a terminal, if other than the sponsor.

(1) For purposes of this subpart, a business is not considered to be

"located on the airport" solely because it picks up and/or delivers customers under a permit, license, or other agreement. For example, providers of taxi, limousine, car rental, or hotel services are not considered to be located on the airport just because they send shuttles onto airport grounds to pick up passengers or drop them off. A business is considered to be "located on the airport," however, if it has an on-airport facility. Such facilities include in the case of a taxi operator, a dispatcher; in the case of a limousine service, a booth selling tickets to the public; in the case of a car rental, a counter at which its services are sold to the public or a ready return facility; and in the case of a hotel operator, a hotel located anywhere on airport property.

(3) Any business meeting the definition of concession is covered by this subpart, regardless of the name given to the agreement with the sponsor, concessionaire, or airport terminal owner. A concession may be operated under various types of agreements, including:

- (i) Leases.
- (ii) Subleases.
- (iii) Permits.
- (iv) Contracts or subcontracts.
- (v) Other instruments or arrangements.

(4) A company in the business of placing advertising in airport terminals or on airport grounds on behalf of others is considered to be a concession, even though its offices are not located on the airport and it does not sell its services directly to the public.

(5) The conduct of an aeronautical activity is not considered a concession for purposes of this subpart. Aeronautical activities include scheduled and non-scheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freight carrying capacities; fixed base operators; flight schools; recreational service providers (e.g., sky-diving, parachute-jumping, flying guides); and air tour services.

(6) Other examples of entities that do not meet the definition of a concession include flight kitchens and in-flight caterers servicing air carriers, government agencies, industrial plants, farm leases, individuals leasing hangar space, custodial and security contracts, telephone and electric service, and skycap services under contract with an air carrier.

(7) Appendix F to this part contains a listing of the types of businesses that are frequently operated as concessions.

*Concessionaire* means a firm that owns and controls a concession or a portion of a concession.

*Covered activities* means concessions, management contracts and subcontracts, and the provision of goods and services to concessionaires.

*Direct ownership arrangement* means a joint venture, partnership, sublease, licensee, franchise, or other arrangement in which a firm owns and controls a concession.

*Management contract or subcontract* means an agreement with a sponsor or another management contractor (but not with a concessionaire) under which a firm directs or operates one or more business activities, the assets of which are owned, leased, or otherwise controlled by the sponsor. The managing agent generally receives, as compensation, a flat fee or a percentage of the gross receipts or profit from the business activity. For purposes of this subpart, the business activity operated or directed by the managing agent must be other than an aeronautical activity, be located at an airport subject to this subpart, and be engaged in the sale of consumer goods or services to the public.

*Material amendment* means a substantial change to the basic rights or obligations of the parties to a concession agreement. Examples of material amendments include an extension to the term not provided for in the original agreement or a substantial increase in the scope of the concession privilege. Examples of nonmaterial amendments include a change in the name of the concessionaire or a change to the payment due dates.

*Primary airport* means a commercial service airport that the Secretary determines to have more than 10,000 passengers enplaned annually.

*Small business concern* means an existing for-profit business that does not exceed the size standards of appendix F to this part. With respect to concessionaires and other businesses involved in other covered activities under this subpart, the annual gross receipts cap of § 26.65(b) does not apply.

(1) A concessionaire qualifying under this definition that exceeds the size standard after entering a concession agreement, but which otherwise remains eligible, may continue to be counted as DBE participation toward the overall goals and any contract goals set under this subpart, until the current agreement, including the exercise of options, expires.

(2) If a concessionaire or business involved in another covered activity under this subpart was certified as a minority/woman/or disadvantaged business enterprise (MBE/WBE/DBE) prior to [insert effective date of this

subpart], pursuant to a requirement in former § 23.43(d) or former subpart F of 49 CFR part 23, and the firm has exceeded the size standard, it may be counted as DBE participation until the current agreement, including the exercise of options, expires, provided that the firm remains otherwise eligible.

(3) Any firm falling under "Standard Industrial Classification (SIC)" code 5511 (which applies to car dealerships) shall be considered a small business concern for purposes of this subpart, if it has no more than 500 employees.

(4) The Secretary may periodically adjust the size standards in appendix F to this part for inflation.

*Socially and economically disadvantaged individuals* has the same meaning as provided in § 26.5, § 26.67 and appendix E to this part, except that for purposes of this subpart, the presumption of economic disadvantage shall be deemed to be rebutted when the individual's personal net worth exceeds \$2 million.

*Sponsor* means the recipient of an FAA grant.

#### **§ 26.115 To whom does this subpart apply?**

If you are a sponsor that has received a grant for airport development after January 1988 that was authorized under Title 49 of the United States Code, this subpart applies to you. The threshold of § 26.21(a)(3) does not apply to requirements of this subpart.

#### **§ 26.117 What are the nondiscrimination and assurance requirements of this subpart for sponsors?**

(a) As a sponsor, you must abide by the non-discrimination requirements of § 26.7 with respect to the award and performance of any concession agreement, management contract or subcontract, purchase or lease agreement, or other agreement covered by this subpart.

(b) You must also take all necessary and reasonable steps to ensure nondiscrimination in the award and administration of contracts and agreements covered by this subpart.

(c) You must include the following assurances in all concession agreements and management contracts you execute with any firm after [insert effective date of this subpart]:

(1) This agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR part 26, subpart G. The concessionaire or contractor agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any

concession agreement, management contract, or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR part 26, subpart G.

(2) The concessionaire or contractor agrees to include the above statements in any subsequent concession agreement or contract covered by 49 CFR part 26, subpart G, that it enters and cause those businesses to similarly include the statements in further agreements.

#### **§ 26.119 What information do sponsors have to retain and report about the DBE concession program?**

(a) As a sponsor, you must retain sufficient basic information about your program implementation, your certification of DBEs, and the award and performance of agreements and contracts to enable the FAA to determine your compliance with this subpart. You must retain this data for a minimum of three years following the end of the concession agreement or other covered contract.

(b) You must submit to FAA an annual analysis of the accomplishments you have made toward achieving your goals. This analysis must show the effect of those results on the overall level of DBE participation in the your concessions program.

(c) You must report data to the appropriate FAA Regional Office. You must comply with this requirement in a format, and with a frequency, determined by the FAA Administrator.

#### **§ 26.121 Who must implement a DBE concessions plan?**

(a) If you are the owner of a primary airport, you must implement a DBE concessions plan implementing the requirements of this subpart. If you are the owner of more than one primary airport, you may implement one plan for all your locations. If you do so, you must establish separate overall goals for each location that has received FAA airport development assistance.

(b) You must submit your plan to the appropriate FAA regional office for approval by [insert date nine months from the effective date of this subpart].

(c) If you make any significant changes in this plan, you must provide them to the FAA as soon as you make them.

(d) If you are a sponsor of a non-commercial service airport, a general aviation airport, or a reliever airport, you are not required to implement a DBE concession plan. However, you must take appropriate outreach steps to encourage available DBEs to participate as concessionaires whenever there is a concession opportunity.

**§ 26.123 What is the basic DBE goal requirement for sponsors?**

(a) If you are a sponsor who must implement a DBE concessions plan, you must establish two different DBE goals. The first is for all concessions and covered activities other than car rentals. The second is for car rentals. Follow the provisions of this section and §§ 26.125—26.139 of this subpart with respect to both these goals.

(b) Your goal submission must cover a three to five-year period, as agreed upon between you and the FAA. The submission must include goals for each year in the period covered by the submission.

*Example to Paragraph (b):* You make a goal submission for the period 2001–2005. The submission would include an annual goal for car rentals and an annual goal for other concessions and covered activities for 2001, 2002, 2003, 2004, and 2005. You would calculate each of these goals in the same way, using the same data and reasoning (i.e., for Step 1 and Step 2 of the goal-setting process). However, the amount of the goal and the estimate of race conscious/race neutral participation may differ from year to year within the period depending on the types of opportunities for concessions and other covered activities you anticipate during each year of the period.

(c) You must review your goals annually to make sure they continue to fit your circumstances appropriately. You must report any significant adjustments to your goals to FAA.

(d) You must submit your goals to the appropriate FAA regional office for review. Your first concessions goal is due [insert a date nine months from the effective date of this subpart]. You then submit new goals by August 1 of each year in which you establish new goals (e.g., for a recipient who will submit a new set of goals every three years, August 1, 2004).

**§ 26.125 What is the base for a sponsor's goal for concessions and covered activities other than car rentals?**

(a) If you are a sponsor, the base for this goal includes the total gross receipts of concessions and other covered activities at your airport.

(b) This figure includes the gross contract amount of management contracts but does not include the gross receipts of car rental operations.

(c) This figure includes the estimated dollar value of goods and services that a concessionaire (except a car rental) will purchase from DBEs and use in operating the concession.

(d) This figure includes the net payments to the airport for banks and banking services, including automated teller machines (ATM) and foreign currency exchanges.

(e) This figure does not include any portion of a firm's estimated gross receipts that will not be generated from a concession or other covered activity.

*Example to Paragraph (e):* A firm operates a restaurant in the airport terminal which serves the traveling public and, under the same lease agreement, provides in-flight catering service to air carriers. The projected gross receipts from the restaurant are included in the overall goal calculation, while the gross receipts to be earned by the in-flight catering services are not.

(f) If you have any concession agreements that do not provide for you to know the value of the gross receipts earned by the concession, you must use the net payment from the concession to the airport and combine these figures with the estimated gross receipts from other agreements for purposes of calculating overall goals. You must identify any such concession agreements in your goal submission.

**§ 26.127 What is the base for a sponsor's goal car rentals?**

The base for your goal is the total gross receipts of car rental operations at your airport.

**§ 26.129 How are a sponsor's goals expressed and calculated?**

(a) If you are a sponsor, you must express your goals as a percentage of the base calculated under § 26.125 or § 26.127. This percentage represents your estimate of the DBE participation you would obtain in the absence of discrimination and its effects (i.e., the DBE participation you would expect if there were a "level playing field").

(b) You must use a two-step method for calculating the goal.

(1) In Step 1, you determine the relative availability of DBE concessionaires and other covered entities. You use the best available data. Depending on how the markets for different types of business are structured, this relative availability may be determined on a local, regional, or national basis for particular types of businesses. For example, using this data, you would establish a percentage of gross receipts of available DBE concessionaires/gross receipts of all available concessionaires.

(2) In Step 2, you adjust this availability figure to reflect such factors as the past participation of DBEs in your concessions and other covered opportunities, information from disparity studies, and barriers to DBEs' ability to participate in these concessions opportunities.

(3) Use § 26.45 for guidance in performing Step 1 and Step 2.

(c) If, as an alternative to establishing a goal meeting the requirements of this

section, you wish to submit a goal based on a percentage of concession and other covered activity contracts, you must meet the following requirements:

(1) You must submit a program waiver request meeting the requirements of § 26.15(b). In the case of such a request, the Secretary's authority to review and approve the request is delegated to the FAA Administrator.

(2) Your request must include the following additional showings:

(i) More than half of the concession agreements do not provide for the sponsor to know the value of the gross receipts earned; or

(ii) Other circumstances at the airport exist that make it impracticable to use gross receipts as the basis for calculating the goals.

(d) Your goals established under this subpart must provide for participation by all certified 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 subpart. If you fail to comply with this requirement, you are not eligible to receive FAA financial assistance.

**§ 26.131 What are public participation requirements concerning a sponsor's goals?**

(a) As a sponsor, you must provide for public participation by taking at least the steps listed in this paragraphs (b) and (c) of this section before submitting your overall goals to FAA (i.e., every three to five years when you submit new concessions goals).

(b) You must consult with minority and women's business groups, community organizations, trade associations representing concessionaires currently located at the airport, as well as existing concessionaires themselves, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the sponsor's efforts to increase participation of DBEs.

(c) You must publish a notice announcing your proposed goals and a description of how they were selected. You must make information on your goal selection method, process, and data available for inspection during normal business hours at your main office for 30 days following the date of the notice. You must accept comments on the goals for 45 days from the date of the notice. Your notice must include addresses (including electronic addresses, where available) to which comments may be sent and must be published in general

circulation media and available minority-focus media and trade association publications.

**§ 26.133 What are the contents of a sponsor's goal submissions to FAA?**

(a) Your submission must include your goals, a description of the method used to calculate them, and the data you relied on. You must "show your work" to enable the FAA to understand how you concluded your goals are appropriate. This means that you must provide to the FAA the data, calculations, assumptions, and reasoning used in establishing your goals.

(b) You must estimate the portion of your goal you can meet using race-neutral measures (see § 26.137). You then use race-conscious measures to meet the remainder of your goal. You must include your projection of the portions of your goal you expect to be able to meet through race-neutral and race-conscious measures, and the data and analysis on which it is based, in your goal submission to FAA. You must provide data and analysis to FAA supporting your projection.

(c) You must also include information on the concessions that will operate at the airport during the period covered by the submission. For each concession agreement, you must provide the following information, together with any additional information requested by the FAA Regional Civil Rights Officer:

- (1) Name of firm (if known).
- (2) Type of business (e.g. bookstore, car rental, baggage carts).
- (3) Beginning and expiration dates of agreement, including options to renew.
- (4) For new agreements, method of solicitation proposed by sponsor (e.g. request for proposals, invitation for bids).
- (5) Dates that material amendments will be made to the agreement (if known).
- (6) The estimated gross receipts for each goal period established in the plan.
- (7) Identification of those concessionaires that have been certified under this subpart as DBEs.

**§ 26.135 What does FAA do with your goal submission?**

(a) FAA will approve or disapprove the way you calculated your goals as part of its review of your plan or goal submission. Except as provided in paragraph (b) of this section, the FAA does not approve or disapprove the goal itself (*i.e.*, the number).

(b) If the FAA determines that way you calculated your goals is inadequate, the FAA may, after consulting with you, establish an adjusted goal. The adjusted

goal represents the FAA's determination of an appropriate overall goal for DBE participation in the sponsor's concession program, based on relevant data and analysis. The adjusted goal is binding on you.

(c) The provisions of § 26.47 apply in the event you fail to meet your goals.

**§ 26.137 What are the sponsor's obligations concerning the use of race-neutral and race-conscious measures?**

(a) As a sponsor, you must give priority to implementing race-neutral measures. This means that you must meet as much of your goal through race-neutral efforts as you can. This does not mean that you must use race-neutral measures chronologically before you begin using race-conscious measures.

(b) You must provide your projection of the portion of each of your goals you expect to meet through race-neutral and race-conscious means, respectively, and the basis for this projection, to the FAA as part of your goal submission (see § 26.133(b)).

(c) If your actual participation does not reflect this projection, you must make appropriate adjustments in your use of race-conscious and race-neutral efforts. For example, if you projected meeting a 12 percent overall goal with 2 percent race-conscious participation and 10 percent race-neutral participation, and midway through the period covered by the goal you have only obtained 3 percent race-neutral participation, you would need to consider increasing your use of race-conscious good faith measures.

(d) In any year in which you project meeting part of your goal through race-neutral measures and the remainder through race-conscious measures, you must maintain data separately on DBE achievements obtained through these respective means. You must report this data to the FAA Regional Civil Rights office with the other data you submit under § 26.119.

**§ 26.139 What are the steps a sponsor takes to meet its DBE goals?**

(a) You must, to the extent practicable, seek to obtain DBE participation in all types of concessions and other covered activities and not concentrate participation in one category or a few categories to the exclusion of others.

(b) You must include in your concessions plan a narrative description of the types of measures you intend to make to achieve your goals.

(c) The following are examples of race-neutral measures you can implement:

(1) Locating and identifying DBEs who may be interested in participating as concessionaires under this subpart;

(2) Notifying DBEs and other organizations of concession opportunities and encouraging them to compete, when appropriate;

(3) When practical, structuring concession activities so as to encourage and facilitate the participation of DBEs;

(4) Providing technical assistance to DBEs in overcoming limitations, such as inability to obtain bonding or financing;

(5) Ensuring that competitors for concession opportunities are informed of DBE requirements during pre-solicitation meetings;

(6) Providing information concerning the availability of DBE firms to competitors to assist them in meeting DBE requirements;

(7) Establishing a business development program (see § 26.35); and

(8) Taking other appropriate steps to foster DBE participation.

(f) The following are examples of race-conscious measures you can implement:

(1) Establishing concession-specific goals for particular opportunities for concessions and other covered activities.

(i) If the goal is to attain a direct ownership arrangement with a DBE, calculate the goal as a percentage of the total estimated annual gross receipts from the concession.

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

(iii) To be eligible to be awarded the concession, competitors would have to meet this goal or document that they made sufficient good faith efforts to do so.

(iv) The administrative procedures applicable to contract goals in § 26.51-53 apply with respect to concession-specific goals.

(2) Evaluation credits or other methods that take a competitor's ability to provide DBE participation into account in awarding a concession.

(3) Negotiation with a potential concessionaire to include DBE participation, through direct ownership arrangements or otherwise, in the operation of the concession.

(4) Set-asides, only to the extent permitted in § 26.43(b).

**§ 26.141 How do concessionaires and covered activities other than car rentals meet concession-specific DBE goals?**

(a) This section applies to you if you are a concession or covered activity,

other than a car rental company, and the sponsor has set a concession-specific goal concerning your activity.

(b) You must either meet the goal the sponsor has set or demonstrate sufficient good faith efforts to the sponsor. These two ways of meeting your goal are equally acceptable under this subpart.

(c) For purposes of this subpart, making sufficient good faith efforts means taking steps which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to achieve your goal.

(d) Appendix A to this part 26 provides guidance concerning the kinds of good faith efforts that you are expected to make.

**§ 26.143 How do car rental companies meet concession-specific DBE goals?**

(a) This section applies to you if you are a car rental company and the sponsor has set a concession-specific goal concerning your activity.

(b) You must either meet the goal the sponsor has set or demonstrate sufficient good faith efforts to the sponsor. These two ways of meeting your goal are equally acceptable under this subpart.

(c) The following are examples of good faith efforts you can use:

(1) The methods outlined in § 26.139.

(2) Your efforts to obtain DBE participation through direct ownership arrangements. While this subpart does not require you to seek direct participation by DBEs in car rental operations, the sponsor will consider any efforts you make to do so in evaluating your good faith efforts.

(3) The following additional steps:

(i) Conducting a comprehensive survey of vendors to determine which qualify as DBEs for purposes of the airport concessions program and encouraging other vendors who may be eligible to apply for certification.

(ii) Identifying opportunities for DBE's to provide goods and services, and engage in proactive outreach efforts to inform such firms of the opportunities.

(iii) Joining and supporting local and national minority, women, and small business organizations.

(iv) Advertising in local and national DBE-focused publications for vendors that can provide needed goods and services.

(v) Making DBEs aware of solicitations in a timely manner and meeting with firms to determine whether they fulfill requirements as car rental operators, or suppliers of goods and services.

(vi) Documenting outreach efforts, including those that are unsuccessful.

(vii) Whenever a new opportunity arises, using a combination of sources and outreach efforts (such as those cited above) to identify DBEs that fulfill the need.

(c) You are not required to change your corporate structure in order to meet your goal.

**§ 26.145 How do sponsors count DBE participation toward goals for items other than car rentals?**

(a) As a sponsor, you must apply the counting provisions of this section to your goal for concessions and covered activities other than car rentals. See § 26.147 for information on how to count DBE participation for car rentals.

(b) You count only DBE participation that results from a commercially useful function. For purposes of this subpart, the term commercially useful function has the same meaning as in § 26.55(c), except that the requirements of § 26.55(c)(3) shall not apply to a concession agreement or management contract or subcontract.

(c) Count the total dollar value of a management contract or subcontract with a DBE. However, if the DBE enters into a subcontract with a non-DBE, do not count the portion of the value of the subcontract performed by the non-DBE.

(d) Count the total dollar value of gross receipts a DBE earns under a concession agreement toward the goals. However, if the DBE enters into a subconcession agreement with a non-DBE, do not count any of the gross receipts earned by the non-DBE.

(e) When a DBE performs as a subconcessionaire to a non-DBE, count only the portion of the gross receipts earned by the DBE under its subagreement.

(f) When a concession is performed by a joint venture involving a DBE and a non-DBE, count a portion of the gross receipts equal to the percentage of the ownership and control by the DBE partner in the joint venture. To perform a commercially useful function as part of a joint venture, the DBE must be independently responsible for an identifiable portion of the work of the joint venture.

(g) Count costs incurred in connection with the renovation, repair, or construction of a concession facility (sometimes referred to as the "build-out").

(h) Count the entire amount of fees or commissions charged by a DBE firm for a *bona fide* service, provided that, as the sponsor, you determine this amount to be reasonable and not excessive as compared with fees customarily allowed for similar services. Such services may include, but are not limited to,

professional, technical, consultant, legal, security systems, advertising, building cleaning and maintenance, computer programming, or managerial.

(i) Count 100 percent of the cost of goods obtained from a DBE manufacturer. For purposes of this subpart, the term *manufacturer* has the same meaning as in § 26.55(e)(1)(ii).

(j) Count 100 percent of the cost of goods purchased or leased from a DBE regular dealer.

(k) If you obtain goods purchased from a DBE which is neither a manufacturer nor a regular dealer, count credit toward DBE goals as follows:

(1) Count the entire amount of fees or commissions charged for assistance in the procurement of the goods, provided that this amount is reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the goods themselves.

(2) Count the entire amount of fees or transportation charges for the delivery of goods required for a concession, provided that this amount is reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of goods themselves.

(l) If a firm has not been certified as a DBE in accordance with the standards in this part, the firm's participation may not count toward DBE goals.

(m) Except in the case of a concessionaire that exceeds the small business size standard during the term of a contract, as referenced under the definition of a "small business concern," the work performed or gross receipts earned by a firm after its eligibility has been removed may not be counted toward DBE goals.

**§ 26.147 How do sponsors count DBE participation toward car rental goals?**

(a) As a sponsor, you must apply the counting provisions of this section to your goal for car rentals. See § 26.145 for information on how to count DBE participation for concessions and covered activities other than car rentals.

(b) Count the full value of vehicles purchased through DBE car dealers toward your goal. Provided, that neither you nor a car rental company may meet more than 70 percent of a car rental goal through this means.

(c) Count the entire amount of the cost charged by a DBE for repairing vehicles, provided that it is reasonable and not excessive as compared with fees customarily allowed for similar services.

(d) Count the entire amount of the fee or commission charged by a DBE to manage a car rental concession under an agreement with the concessionaire

toward DBE goals, provided that it is reasonable and not excessive as compared with fees customarily allowed for similar services.

(e) Do not count any portion of a fee paid by a manufacturer to a car dealership for reimbursement of work performed under the manufacturer's warranty.

(f) For other goods and services, count participation toward DBE goals as provided in §§ 26.55 and 26.145. In the event of any conflict between these two sections, § 26.145 will control.

(g) If a car rental company has a national or regional contract for the purchases of vehicles, other goods, or services, count a pro-rated share of the amount of that contract toward the goals for your airport. Use the proportion of the company's applicable gross receipts as the basis for making this pro-rated assignment of DBE participation.

*Example to Paragraph (g):* Car Rental Company X signs a regional contract with a DBE car dealer to supply cars to all five airports in a state. The five airports each account for 20 percent of X's gross receipts in that state. Twenty percent of the value of the cars purchased through the DBE car dealer would count toward the goal of each airport.

(h) While this subpart does not require you to obtain DBE participation through direct ownership arrangements, you count participation through such an arrangement toward your DBE goal.

**§ 26.149 What certification standards and procedures do recipients use to certify DBE concessionaires?**

(a) If you are a sponsor, you must, except as provided in this section, use the procedures and standards of §§ 26.61–91 to certify DBEs for participation in your concessions program.

(b) The personal net worth threshold used in rebutting the presumption of disadvantage, referenced in § 26.67(b) and in appendix E to this part, is \$2 million for purposes of this subpart;

(c) The provisions of § 26.71(n), concerning affiliation, do not apply to this subpart.

(d) Section 26.83 (c)(1) through (c)(6) do not apply to certifications for airport concessions purposes. Instead, in determining whether a firm is an eligible DBE, you must take the following steps:

(1) Obtain the resumes or work histories of the principal owners of the firm and personally interview these individuals;

(2) Analyze the ownership of stock of the firm, if it is a corporation;

(3) Analyze the bonding and financial capacity of the firm;

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

(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) If you determine it is necessary to validate the certification information submitted by the firm, perform an on-site visit to the offices of the firm and to any facilities within the sponsor's jurisdiction or local area before making an eligibility determination.

(e) In reviewing the affidavit required by § 26.83(h), you must ensure that the DBE firm meets the appropriate size standard in appendix F to this part.

(f) For purposes of this subpart, the term "prime contractor" in § 26.87(i) 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 sponsor.

(g) The procedures of § 26.87(i)(2) apply to this subpart, except when you remove a concessionaire's eligibility because the firm exceeded the size standard after entering a concession agreement. In such instances, the procedures set forth under the definition of a "small business concern" in § 26.113 shall apply.

(h) When UCPs are established in a state (see § 26.81), the UCP, rather than individual sponsors, will certify firms for the DBE concessions program.

(i) Car rental companies and private terminal owners are not authorized to certify firms as DBEs. As a car rental company or private terminal owner, you must obtain DBE participation from firms that a sponsor or a UCP has certified as DBEs.

(j) When you certify firms as airport concessionaires, identify them in your directory in a way that makes it easy for readers to find them. For example, you could use a special symbol next to a firm's name in the directory to identify it as a concessionaire or place certified concessionaires in a separate section of the directory.

**§ 26.151 What monitoring and compliance procedures must sponsors follow?**

(a) If you are a sponsor, you must implement appropriate mechanisms to ensure compliance with the requirements of this subpart by all participants in the program. You must include in your concessions plan the specific provisions to be inserted into

concession agreements and management contracts, the enforcement mechanisms, and other means you use to ensure compliance. These provisions shall include a monitoring and enforcement mechanism to verify that the work committed to DBEs is actually performed by the DBEs.

(b) This subpart does not authorize or preclude you from imposing additional requirements on firms engaged, or seeking to be engaged, in contracting or concessions activities at your airport. However, you must include in your concessions plan a description, together with a citation of state or local law, regulation, or policy, to support such additional requirements.

**§ 26.153 Does a sponsor have to change existing concession agreements?**

No. Nothing in this subpart requires you to modify or abrogate an existing concession agreement (one executed prior to the date the sponsor became subject to this subpart) during its term. When an option to renew such an agreement is exercised or when a material amendment is made, you must assess potential for DBE participation and may, if permitted by the agreement, use any means authorized by this subpart to obtain DBE participation in the renewed or amended agreement.

**§ 26.155 What requirements apply to privately-owned terminal buildings?**

(a) If you are a sponsor on whose airport there is a privately-owned terminal building that has concessions, this section applies to you.

(b) You must pass through the applicable requirements of this subpart to the private terminal owner by an agreement with the owner or by other means. You must ensure that the terminal owner complies with the requirements of this subpart.

(c) If your airport is a primary airport, you must obtain from the terminal owner the goals and other elements of the DBE concession plan required under this subpart. You must incorporate this information into your concession plan and submit it to the FAA in accordance with this subpart.

(d) If the terminal building is a non-primary commercial service airport general aviation airport, or reliever airport, the sponsor shall ensure that the owner complies with the requirements in § 26.121(d).

**§ 26.157 Can sponsors 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 the operation of concessions. For

purposes of this section, a long-term agreement is one having a term in excess of five years. The FAA has issued guidelines for determining whether an agreement is exclusive, as used in this section. You can obtain them from any FAA Regional Civil Rights Officer or from the FAA Office of Civil Rights, 800 Independence Avenue, SW., Washington, DC 20591, Attention, ACR-4.

(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 civil rights officer approves of a 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 civil rights officer:

(1) A description of the special local circumstances that warrant a long-term, exclusive agreement.

(2) A copy of the draft and final leasing and subleasing or other agreements. This long-term, exclusive agreement must provide that:

(i) A number of DBEs that roughly reflects their availability in the absence of discrimination to do the types of work required will participate as concessionaires throughout the term of the agreement and account for at a percentage of the estimated annual gross receipts equivalent to a level set in accordance with §§ 26.125–127 of this subpart.

(ii) You will review the extent of DBE participation before the exercise of each renewal option to consider whether an increase or decrease in DBE participation may be warranted.

(iii) A DBE concessionaire that is unable to perform successfully will be replaced by another DBE concessionaire, if the remaining term of the agreement makes this feasible. In the event that such action is not feasible, you will require the concessionaire to make good faith efforts during the remaining term of the agreement encourage DBEs to compete for the purchases and/or leases of goods and services to be made by the concessionaire.

(3) Assurances that any DBE participant will be in an acceptable form, such as a sublease, joint venture, or partnership.

(4) Documentation that DBE participants are properly certified.

(5) A description of the type of business or businesses to be operated

(e.g., location, storage and delivery space, “back-of-the-house facilities” such as kitchens, window display space, advertising space, and other amenities that will increase the DBE’s chance to succeed).

(6) Information on the investment required on the part of the DBE and any unusual management or financial arrangements between the prime concessionaire and DBE.

(7) Information on the estimated gross receipts and net profit to be earned by the DBE.

**§ 26.159 Does this subpart preempt local requirements?**

Nothing in this subpart preempts any State or local law, regulation, or policy enacted by the governing body of a sponsor, or the authority of any State or local government or sponsor to adopt or enforce any law, regulation, or policy relating to DBEs. In the event that a State or local law, regulation, or policy conflicts with the requirements of this subpart, the sponsor shall, as a condition of remaining eligible to receive Federal financial assistance from the DOT, take such steps as may be necessary to comply with the requirements of this subpart.

**§ 26.161 Does this subpart permit sponsors to use local geographic preferences?**

(a) As a sponsor you are permitted to use a local geographic preference only as provided in this section. By a local geographic preference, we mean any requirement that you impose that gives a DBE located near you an advantage over DBEs from other places in obtaining business as or with a concession or other covered activity at your airport.

(b) You must submit a program waiver request meeting the requirements of § 26.15(b). In the case of such a request, the Secretary’s authority to review and approve the request is delegated to the FAA Administrator.

(c) In order for your request to be granted, you must make the following additional showings:

(1) The preference does not conflict with any provision of this part or have the effect of defeating or substantially impairing accomplishment of the objectives of the program;

(2) The preference does not have the effect of limiting or foreclosing DBE participation in your concessions and other covered activities;

(3) The preference will make it possible for you to diversify the DBE firms participating in your concession and other covered activities (e.g., by permitting smaller DBEs to participate

that otherwise would be unable to compete in certain fields with larger, better-established DBEs from other areas);

(4) The preference applies on a race-neutral basis, to DBEs and non-DBEs alike;

(5) The preference is consistent with Federal law; and

(6) The preference meets any additional conditions established by the Administrator.

**APPENDIX F TO PART 26.—SIZE STANDARDS FOR AIRPORT CONCESSIONAIRES MAXIMUM AVERAGE ANNUAL GROSS RECEIPTS IN PRECEDING 3 YEARS**

[In millions of dollars]

Concession	Amount
Auto Rentals .....	44,520
Toy stores .....	33,390
Beauty shops .....	33,390
Vending machines .....	33,390
Coin-operated lockers .....	33,390
Florists .....	33,390
Advertising .....	33,390
Taxicabs .....	33,390
Limousines .....	33,390
Duty free shops .....	33,390
Local pay telephone service .....	1 1500
Gambling machines .....	33,390
Other concessions not shown above .....	33,390
<b>OTHER PARTICIPANTS</b>	
Management contractors:	
Parking lots .....	5.0
Other .....	(2)
Motor vehicle dealers (new and used) .....	1 500
Other providers of goods or services .....	(2)

<sup>1</sup> For these types of businesses, the standard is expressed in terms of number of employees, rather than dollars.

<sup>2</sup> As defined in 13 CFR Part 121.

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**DEPARTMENT OF TRANSPORTATION**

**Surface Transportation Board**

**49 CFR Part 1244**

[STB Ex Parte No. 385 (Sub–No. 5)]

**Modification of the Carload Waybill Sample Reporting Procedures**

**AGENCY:** Surface Transportation Board, DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Surface Transportation Board solicits comments on modifying the Waybill Sample reporting regulations to require all railroads to