

**COMPLIANCE REVIEW REPORT
OF THE
CALIFORNIA
UNIFIED CERTIFICATION PROGRAM**

August 2010

**Prepared for the
Federal Transit Administration
Office of Civil Rights**

by

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SECTION 1 - GENERAL INFORMATION

Hosting Grant Recipient: San Francisco Bay Area Rapid Transit
300 Lakeside Drive

City/State: Oakland, CA 94612

Grantee Number: 1957

Executive Official: Dorothy W. Dugger
General Manager

On Site Liaison: Linda Wells-Grogan
DBE Program Manager
510-464-6195

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Site visit Dates: February 24-25, 2009

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SECTION 2 - JURISDICTION AND AUTHORITIES

The Federal Transit Administration (FTA) Office of Civil Rights is authorized by the Secretary of Transportation to conduct civil rights compliance reviews. The reviews are undertaken to ensure compliance of applicants, recipients, and subrecipients with Section 12 of the Master Agreement, Federal Transit Administration M.A., (15), October 1, 2008 and 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs."

The Federal Transit Administration (FTA) of the U.S. Department of Transportation (DOT) provides financial assistance to transit agencies, Metropolitan Planning Organizations (MPOs) and State Departments of Transportation (State DOTs). These recipients are required to comply with Federal civil rights provisions. The FTA Office of Civil Rights (TCR) oversees grantee compliance with these provisions through compliance reviews, which are conducted at TCR's discretion.

The California Unified Certification Program (CUCP) members, which are direct or indirect recipients of FTA funding assistance, are subject to the Disadvantaged Business Enterprise (DBE) compliance conditions associated with the use of these funds pursuant to 49 CFR Part 26. These regulations define the components that must be addressed and incorporated in CUCP's agreement and were the basis for the selection of compliance elements that were reviewed.

SECTION 3 – PURPOSE AND OBJECTIVES

PURPOSE

The FTA Office of Civil Rights periodically conducts discretionary reviews of grant recipients and subrecipients to determine whether they are honoring their commitment, as represented by certification to FTA, to comply with their responsibilities under 49 CFR Part 26. In keeping with its regulations and guidelines, FTA has determined that a compliance review of the California Unified Certification Program (CUCP) is necessary.

The primary purpose of the compliance review is to determine the extent to which the California Unified Certification Program (CUCP) has met its DBE certification program goals and objectives, as represented to DOT in its Unified Certification Program agreement. This compliance review is intended to be a fact-finding process to: (1) examine California Unified Certification Program and its implementation, (2) make recommendations regarding corrective actions deemed necessary and appropriate, and (3) provide technical assistance.

This compliance review is not to directly investigate whether there has been discrimination against disadvantaged businesses by the grant recipient or its subrecipients, nor to adjudicate these issues in behalf of any party.

OBJECTIVES

The responsibilities of Unified Certification Programs, as specified in 49 CFR Part 26, are to:

- follow the certification procedures and standards and the non-discrimination requirements of 49 CFR Parts 26 and 23;
- cooperate fully with all oversight, review and monitoring activities of the United States Department of Transportation (USDOT) and its operating administrations;
- implement USDOT directives and guidance on DBE certification matters;
- make all certification and decertification decisions on behalf of all UCP members with respect to participation in the USDOT DBE Program. Certification decisions by the UCP shall be binding on all UCP members. Certification decision must be made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE;
- provide a single DBE certification that will be honored by all UCP members;
- maintain a unified DBE directory containing at least the following information for each firm listed: address, phone number and the types of work the firm has been certified to perform. The UCP shall make the directory available to the public electronically, on the internet, as well as in print. The UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made; and
- ensure the UCP agreement shall commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of 49 CFR Part 26 and 23.

The objectives of this compliance review are to:

- determine whether the CUCP is honoring the Unified Certification Program agreement submitted to the Secretary of Transportation;
- examine the required certification procedures and standards of the CUCP against the Disadvantaged Business Enterprise program compliance standards set forth in the regulations and to document the compliance status of each component; and
- gather information and data regarding the operation of the CUCP from certifying members through interviews and certification file review.

SECTION 4 – BACKGROUND INFORMATION

Prior to the 1999 DBE Final Rule 49 CFR Part 26, applicants seeking participation on DOT assisted projects as a Disadvantaged Business Enterprise (DBE) could be required to be certified by multiple DOT recipients in a state. Subpart E, of 49 CFR Part 26.81 now requires DOT recipients to participate in a Unified Certification Program (UCP) that shall provide one-stop shopping to applicants for DBE certification. An applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.

An agreement establishing the UCP for the state was to be submitted to the Secretary of Transportation within three years of March 4, 1999. The agreement was to provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of part 26, on the same basis as recipients. The UCP is also required to cooperate fully with oversight, review, and monitoring activities of DOT and its operating administration.

The California UCP submitted their Memorandum of Agreement (MOA) plan to the Secretary of Transportation on May 1, 2001. The representatives of the CUCP were proud to note that California was the first approved UCP in the nation on March 13, 2002. The CUCP has subsequently revised its MOA over the years on January 1, 2002; March 24, 2003; November 16, 2004; and March 21, 2006.

Exhibit D of the CUCP MOA states that the CUCP is governed by an Executive Committee. This committee is comprised of all the Certifying Members (CMs) and two Non-certifying Members (NCMs), one each from the Northern and Southern clusters. The committee meets at least once per quarter to discuss issues relating to the administration of the CUCP. The Northern and Southern Clusters also conduct meetings on a monthly basis to discuss issues arising within their clusters and certain certification files.

The MOA stated that UCP members agreed to the use of certifying agencies organized into two regional Clusters throughout the State of California and comprised of the U.S. DOT modal administration's state highway agency, airports, and transit agency grant recipients. These entities are divided into designated consortiums by geographic proximity within the state to facilitate DBE certification activities. These Clusters are:

Cluster 1: Riverside, Imperial & San Diego (RIS) area, which includes USDOT recipients in Riverside, Imperial and San Diego Counties; and Los Angeles area, which includes USDOT recipients in Kern, Los Angeles, Orange, San Bernardino, San Luis Obispo, Santa Barbara and Ventura Counties.

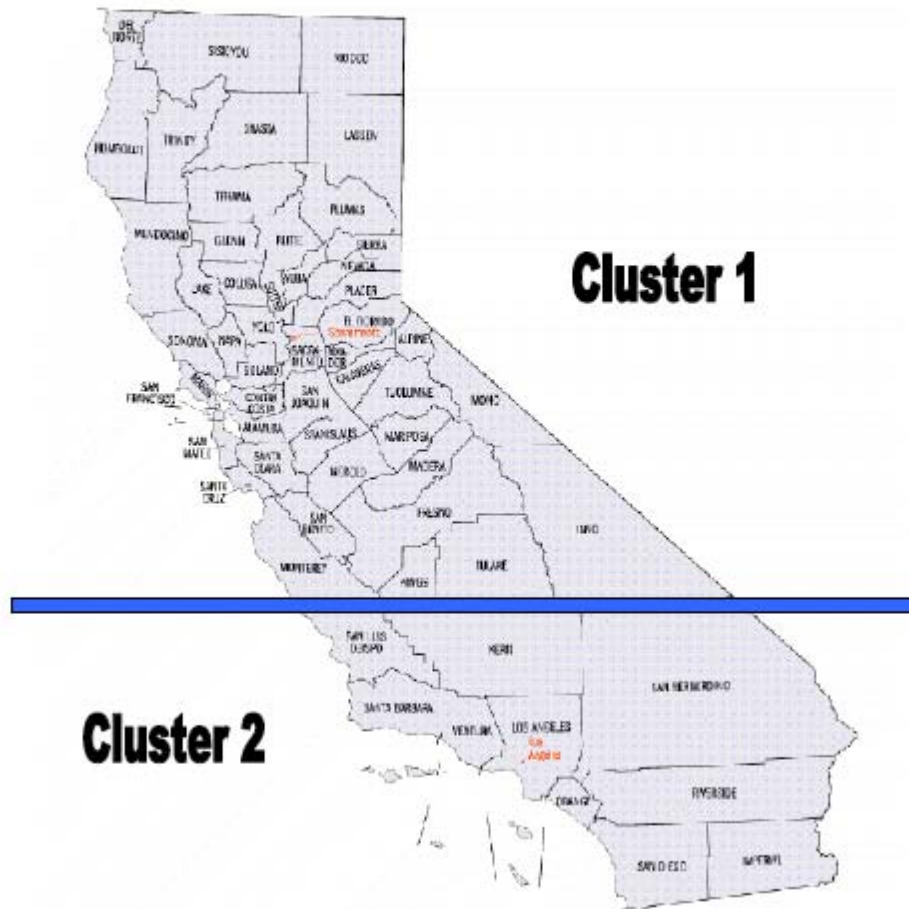
Cluster 2: Bay Area/Central Valley area, which includes USDOT recipients in Alameda, Amador, Calaveras, Contra Costa, Fresno, Kings, Madera, Marin, Mariposa, Merced, Monterey, Napa, San Benito, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Solano, Sonoma, Stanislaus, Tulare and Tuolumne Counties; and Northern California area, which includes USDOT recipients in Alpine, Butte, Colusa, Del Norte, El Dorado, Glenn, Humboldt, Inyo, Lake, Lassen, Mendocino, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, Shasta, Sierra, Siskiyou, Sutter, Tehama, Trinity, Yolo and Yuba Counties; and CalTrans.

(Please see regional boundaries map attached.)

Due to the size of the State of California, the UCP agreed that using the two Clusters in the DBE certification process was a vital component of the overall UCP for all U.S. DOT recipients in California. The Cluster agencies provide a forum for discussions between certifying member agencies. Both Clusters follow the same DBE certification process. A basic description of the multiphase DBE certification process used is as follows:

1. The individual certifying member agency will complete a file review of all the required paperwork, conduct a site visit, determine the eligibility or ineligibility of a firm, and report its decision to the regional Cluster for oversight purposes.
2. The Cluster will meet and review a synopsis of the DBE certification activity submitted by its members. If a member (or members) of the Cluster disagrees with the decision of a certifying member, the dissenting member(s) of the Cluster may file a written ineligibility complaint with the certifying member and will provide the certifying member any information it has that may not have been considered when the certifying member rendered its decision. The certifying member is obligated to investigate the complaint in accordance with the regulations.
3. The certifying agency will enter information on the approved and certified firm in the UCP database of certified DBE firms.
4. The certifying agency will also enter information in the list of denied firms, for firms denied certification or that have become ineligible.
5. For firms certified, the certifying agency will maintain the DBE file, request annual update information, and provide updated information to the DBE database. For firms denied or found ineligible, the certifying agency will remain the primary agency for such denied or ineligible firms for any future certification application by the firm. Each agency shall maintain all files in an orderly manner so as to facilitate any review by U.S. DOT.
6. Firms that are denied certification or that are found ineligible will be provided due process as set out in 49 CFR 26.87 and 26.89.
7. If the firm files an appeal with U.S. DOT, the certifying agency will apprise the Cluster of the U.S. DOT decision and will take any necessary steps to comply with U.S. DOT directives.
8. Members will enter information on newly-certified DBEs and any changes to existing certified DBE profiles in the database. Members will also provide information on denied or ineligible firms. The current database will be retrievable at the Caltrans database website. Caltrans will update this database weekly (or more frequently at its discretion).

REGIONAL BOUNDARIES MAP



SECTION 5 – SCOPE AND METHODOLOGY

Scope

Implementation of the following twelve required DBE UCP program components specified by the FTA are reviewed in this report.

1. You must rebuttably presume that members of the designated groups identified in 26.67 are socially and economically disadvantaged [49 CFR 26.61].
2. If you have a well founded reason to question the individual's claim of membership in that group, you must require the individual to present additional evidence that he or she is a member of the group [49 CFR 26.63].
3. You must apply current Small Business Administration (SBA) business size standards found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts [49 CFR 26.65].
4. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged [49 CFR 26.67].
5. In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record, viewed as a whole [49 CFR 26.69].
6. In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole [49 CFR 26.71].
7. Other rules affecting certification include not considering commercially useful function issues, evaluating the eligibility of a firm on the basis of present circumstances, and making sure only firms organized for profit may be eligible DBEs [49 CFR 26.73].
8. You and all other DOT recipients in your state must participate in a Unified Certification Program (UCP). You must maintain and make available to interested persons a directory identifying all firms eligible to participate as DBEs in your program [49 CFR 26.81 and 26.31].
9. You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program [49 CFR 26.83].
10. You must accept the certification applications, forms and packages submitted by a firm to the SBA for either the 8(a) BD or SDB programs, in lieu of requiring the applicant firm to complete your own application forms and packages [49 CFR 26.84 and 26.85].
11. When you deny a request by a firm to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial [49 CFR 26.86 – 26.89].

12. If you fail to comply with any requirement of this part, you may be subject to formal enforcement action under program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied [49 CFR 26.101 – 26.109].

Methodology

The initial step in the scope of this Compliance Review consisted of consultation with the FTA Office of Civil Rights and a review of available information from the Unified Certification Program websites and other sources. Subsequent to this review, potential dates for the site visit were coordinated.

An agenda letter was then compiled and sent to the CUCP by FTA's Office of Civil Rights. The agenda letter notified the CUCP of the planned site visit, requested preliminary documents, and informed the CUCP of additional documents needed and areas that would be covered during the on-site portion of the review.

The documents received prior to the on-site portion of the review were examined and an itinerary for the site visit was developed. An entrance conference was conducted at the beginning of the Compliance Review with the CUCP certifying members and the review team.

Subsequent to the entrance conference, a review was conducted of the CUCP agreement and other documents submitted to the review team by the CUCP representative. Interviews were then conducted with CUCP certifying members regarding DBE program certification standards and certification procedures. A sample of certification files (see table on next page) were then selected and reviewed for their required elements.

At the end of the review, an exit conference was held with the CUCP certifying members and the review team. A list of attendees is included at the end of this report. At the exit conference, initial findings and corrective actions were discussed with the CUCP certifying members.

Following the site visit, a draft report was compiled. Comments to the draft report were submitted by CUCP on August 12, 2009. Those comments were incorporated into this final report.

NOTE: Materials and information to address findings and corrective actions in the report should be sent to the attention of:

Ryan Inman
FTA Office of Civil Rights
1200 New Jersey Ave., S.E.
E54-426
Washington, DC 20590
202-366-5017
Ryan.inman@dot.gov

Certification Files Sampled

San Francisco Bay Area Rapid Transit District

File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Approval <1 year	[REDACTED]	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
Approval <1 year	[REDACTED]	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
Removal	[REDACTED]	N*	Y	Y	N	Y/Y	N/A	Y	N/A
Removal	[REDACTED]	Y	Y	Y	N	N/Y	N/A	Y	N/A
Removal	[REDACTED]	N*	Y	Y	Y	Y/N	N/A	Y	N/A
Recertification	[REDACTED]	N*	Y	Y	N	Y/Y	Y	N/A	N/A
Recertification	[REDACTED]	Y	Y	Y	N	Y/Y	Y	N/A	N/A

*Application form prior to 2003 USDOT Form

Valley Transportation Authority

File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Denial	[REDACTED]	Y	Y	Y	N/A	Y/Y	N/A	Y	N/A
Initial Denial	[REDACTED]	Y	Y	Y	N/A	Y/Y	N/A	Y	N/A

Central Contra Costa Transit Authority

File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Approval 1 >year	[REDACTED]	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
Approval <1 year	[REDACTED]	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
Removal	[REDACTED]	Y	Y	Y	Y	Y/Y	N/A	Y	N/A

San Francisco Municipal Railway

File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Approval 1 >year	[REDACTED]	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
Initial Denial	[REDACTED]	Y	Y	Y	N/A	Y/Y	N/A	Y	Y

San Mateo County Transit District

File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Denial	[REDACTED]	Y	Y	Y	N/A	Y/Y	N/A	Y	Y

SECTION 6 – ISSUES AND RECOMMENDATIONS

1. **Burden of Proof**

Basic Requirement: (49 CFR Part 26.61) UCPs must rebuttably presume that members of the designated groups identified in 26.67(a) are socially and economically disadvantaged. This means they do not have the burden of proving to you that they are socially and economically disadvantaged. Individuals must submit a signed, notarized statement that they are a member of one of the groups in 26.67.

Discussion: During this UCP Compliance review, no deficiencies were found with requirements for burden of proof. The CUCP uses the U.S. Department of Transportation (USDOT) Uniform Application Form found in Appendix F, which includes the statement of social disadvantage.

2. **Group Membership**

Basic Requirement: (49 CFR Part 26.63) If a UCP has a well founded reason to question the individual's claim of membership in that group, you must require the individual to present additional evidence that he or she is a member of the group. You must provide the individual a written explanation of your reasons for questioning his or her group membership. You must take special care to ensure that you do not impose a disproportionate burden on members of any particular designated group.

Discussion: During this UCP Compliance Review, no deficiencies were made with the requirement for group membership. The regulations allow UCPs to include a supplemental form in addition to the Uniform Application Form. The CUCP developed a supplemental document checklist form that requests additional information about the applicant's group membership and citizenship. For group membership determination, applicants must provide a document evidencing "ethnic heritage" or similar document evidencing "ethnic community affiliation." This information could include applicant's birth certificate, parents' birth certificate, U.S. Passports, Green Cards, etc. The CUCP appropriately requested this information in a supplemental form and not in the Uniform Application Form.

3. **Business Size**

Basic Requirement: (49 CFR Part 26.65) A UCP must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts. A firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts over \$20.41 million.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement of business size. The CUCP utilizes the North American Industry Classification System (NAICS) codes to determine if an applicant firm meets the requirements of 13 CFR 121 for the appropriate type(s) of work the firm seeks to perform in DOT-assisted contracts. The review team found no issues with how these firms were coded for the types of work performed in the files reviewed. The CUCP also appears to accurately assess the DOT size standard of \$20.41 million to be considered a small business concern for certification in the DBE program.

4. Social and Economic Disadvantage

A) Personal Net Worth

Basic Requirement: (49 CFR Part 26.67 (a)(2)) A UCP must require each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification to certify that he or she has a personal net worth that does not exceed \$750,000.

Discussion: During this UCP Compliance Review, deficiencies were found with the requirement for Personal Net Worth (PNW) statements. The CUCP MOA included two application packages for both DBE applicants and ACDBE applicants. These application packages included the appropriate Uniform Application Form in addition to the recommended Small Business Administration (SBA) Personal Net Worth (PNW) Financial Statement. The CUCP also included instructions for the applicants completing the PNW in both the DBE and ACDBE packages. However, the review team found discrepancies in the PNW instructions regarding spousal information in the two packages which are highlighted below.

The DBE Certification Package PNW instructions cite the following:

Please do not make adjustments to your figures pursuant to U.S. Department of Transportation (U.S. DOT) regulations 49 CFR Part 26. The agency that you apply to will use the information provided on your completed Personal Financial Statement to determine your *Personal Net Worth According to 49 CFR Part 26*. An individual's *Personal Net Worth According to 49 CFR Part 26* includes only his or her own share of assets held jointly or as community property with the individual's spouse and excludes the following:

General Instructions

- You must fill out all line items on the Personal Financial Statement (SBA Form 413) to the best of your ability.
- On the form, above the *Personal Financial Statement* heading, indicate if financial information is for a “married couple” or “single individual.”
- On a separate sheet, identify all property that is not held jointly or as community property, and include values and ownership.
- If necessary, use additional sheet(s) of paper to report all information and details.
- If you have any questions about completing this form, please contact one of the certifying agencies on the Roster of Certifying Agencies.

The ACDBE Certification Package PNW instructions city the following:

Instructions to complete Personal Financial Statement for the California Unified Certification Program:

1. Fill out all line items to the best of your ability. Be sure to include the DATE in the upper right corner of the First page.
2. Include all of your and, if applicable, your spouse's assets and liabilities.
3. Assets that must be included are real property (includes rental or vacation homes), personal property wherever located (includes household goods, collectibles, clothing and jewelry), other businesses, vehicles, boats, trailers, cash, bank accounts, stocks, bonds, retirement accounts, insurance policies and any other assets where you have an ownership interest.
4. Complete Section 4 for all of your real estate. Be sure to include and identify which is your primary residence.
5. For married individuals, list both names and all property, including both community and separate property. Complete Section 5 to identify separate property for each spouse.

The USDOT DBE Final Rule removed the requirement for spousal personal financial information in Appendix E, Individual Determinations of Social and Economic Disadvantaged in the 2003. It was also reiterated in the preamble that the department never required the routine collection of spousal personal financial information. The representatives present during the CUCP compliance review were unaware that the PNW instructions were different between the two certification packages and will begin discussions with the Executive Committee to correct any inconsistencies with the DBE regulations.

Corrective Action and Schedule: Within 90 days of the issuance of the final report, CUCP must submit to Ryan Inman at FTA's Office of Civil Rights revised instructions in their ACDBE PNW application package that are consistent with the DBE regulations. The instructions should not require the routine collection of spousal personal financial information.

UCP Response: The ACDBE subcommittee will meet and discuss implementing use of DBE PNW form in the DBE package, which does not make reference to spousal financial information.

DOT Response: DOT partially concurs with UCP response. To close this finding, provide a copy of a revised ACDBE PNW form/instructions by November 1, 2010 to Ryan Inman at FTA's Office of Civil Rights.

B) Individual determinations of social and economic disadvantage

Basic Requirement: (49 CFR Part 26.67 (d)) Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged may apply for DBE certification. UCPs must make a case-by-case determination of whether each individual

whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged.

Discussion: During the UCP Compliance Review, no deficiencies were found with the requirement of individual determinations. Individuals who are not members of a presumed group can apply for an individual determination of social and economic disadvantaged. The UCP must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. The applicant is required to provide sufficient information to permit determinations under the guidance of Appendix E of the regulations. The CUCP certifiers interviewed indicated they had experience evaluating these types of request and verified that they used the guidance of Appendix E to make the determinations.

5. Ownership

Basic Requirement: (49 CFR Part 26.69) In determining whether the socially and economically disadvantaged participants in a firm own the firm, UCPs must consider all the facts in the record, viewed as a whole. To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement of ownership. UCPs must evaluate if applicant firms are at least 51 percent owned by socially and economically disadvantaged individuals. The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Based on the certification files reviewed, it appears that the CUCP certifiers are appropriately allocating ownership percentages of socially and economically disadvantaged owners for certification.

6. Control

Basic Requirement: (49 CFR Part 26.71) In determining whether socially and economically disadvantaged owners control a firm, UCPs must consider all the facts in the record, viewed as a whole.

Discussion: During this UCP Compliance Review, no deficiencies were found in the area of control. The interviews and files reviewed indicated that the certifiers of the CUCP had a strong grasp of the elements concerning socially and economically disadvantaged individuals controlling the applicant firm. Several of the denials of initial certification were based on lack of control in the applicant firm. The reasons were well documented and referenced the areas of concern for each applicant denied certification as a DBE. Several of the files reviewed had appealed to the U.S. DOT and were upheld based on their documentation of issues concerning control.

7. Other Rules Affecting Certification

Basic Requirement: (49 CFR Part 26.73) UCPs must not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE. DBE firms and firms seeking DBE certification shall cooperate fully with UCP requests for information relevant to the certification process.

Discussion: During this UCP Compliance Review, no deficiencies were found with the other rules affecting certification. This section of the regulations covers areas dealing with commercially useful functions and regular dealer issues affecting the certification determination. None of the interviews or file reviewed indicated any issues in the CUCP with either of these areas. This section also covers determination of ownership and control through parent or holding companies. In these situations, disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, the UCP may certify the subsidiary if it otherwise meets all requirements of subpart D. No CUCP files were reviewed that met the criteria of a subsidiary controlled by disadvantaged individuals through a parent company.

8. UCP Requirements

A) UCP Agreement

Basic Requirements: (49 CFR Part 26.81) All DOT recipients in a state must participate in a Unified Certification Program. Recipients must sign an agreement establishing the UCP for the state and submit the agreement to the Secretary for approval.

Discussion: During this UCP Compliance Review, an advisory comment was made regarding the UCP Memorandum of Agreement. The CUCP MOA in section 4.05 Ineligibility Complaints outlines a process where UCP Members can file complaints against any DBE certified firm. The MOA read as follows:

Any UCP Member has the right to initiate an Ineligibility Complaint of any DBE-certified firm included in the UCP DBE Database. The complaint must be in writing and specify the alleged reasons why the firm is ineligible.

To ensure firms previously denied and decertified as ineligible do not become included in the UCP DBE Database until at least twelve months from denial or decertification, all UCP Members will periodically review the firms listed in the DBE Database. Where firms are identified that were previously denied or decertified by a CM Agency, and that CM Agency has cause to believe the firm continues to be ineligible for certification, that CM Agency will forward an ineligibility complaint to the current CM Agency. Upon receipt of the ineligibility complaint, the current CM Agency will review any new evidence, request additional information from the firm and/or conduct a site visit review, if deemed necessary, and make its determination. The CM Agency will report to the Regional Cluster on its findings. Information on this action will be input into the UCP Database by the CM Agency after the firm has been afforded due process under 26.87 and 26.89.

The review team received correspondence between two CUCP members that outlined this process. Orange County Transportation Authority (OCTA) filed a third party challenge with the City of Los Angeles Office of Contract Compliance on October 30, 2007. The challenge was regarding the certification of [REDACTED], a DBE firm certified

by the City of Los Angeles. The letter was written on CUCP letter head and stated the letter was on behalf of the CUCP. OCTA challenged [REDACTED] DBE certification because they had multiple certifications of two different firms, providing delivery services and electrical contracting and the disadvantaged owner didn't have actual control of the firm.

The City of Los Angeles responded to the third party challenge on March 13, 2008. The City of Los Angeles refuted the allegations of multiple certifications of [REDACTED] stating that they noticed duplication in the database and had sent OCTA notification that the firm in question was dissolved. The City of Los Angeles also advised OCTA they found no reasonable cause to remove [REDACTED] DBE certification based on lack of control and stated that OCTA could file an administrative appeal to DOT in accordance to 49 CFR Part 26.89 (a)(2),(3).

USDOT's Official Questions and Answers (Q&A) includes the question, "What points should UCP members emphasize in working together to make certification decisions?" (posted 6/18/08). The answer indicated that in the event of a disagreement – (e.g., one or more UCP members believe a firm should not be certified and others believe the firm is eligible) UCP members should work through their differences. UCP agreements should always include a dispute-resolution mechanism.

The CUCP has such a dispute resolution mechanism as stated in section 4.06 of their MOA. It states that the Executive Committee will resolve disputes that cannot be resolved between or among CM (Certifying Members) Agencies. The Q&A also states that the decision of the UCP about a firm's eligibility is binding on all UCP members and staff. It is not appropriate for one UCP member, or the staff of a UCP member, to file a certification appeal with DOT because of disagreement with the UCP's decision. The Department's Office of Civil Right will not consider such a complaint. Therefore, the City of Los Angeles reference that OCTA may file an administrative appeal to DOT was inappropriate according to their MOA and inconsistent with the guidance given in the Q&A.

Another advisory comment was made regarding processing certification request from firms outside of the CUCP. The Department issued guidance to reduce the burdens on firms applying for certification outside their home states. The Official Questions & Answers, includes the question "What steps should recipients and UCPs take to reduce certification burdens on applicants who are certified in other states or certified by SBA?" (posted on 6/18/08). The answer indicated that UCPs should not unnecessarily require the preparation of duplicative certification application packages.

The CUCP DBE certification package instructions state, "If your firm is located outside of California and is certified as a DBE at its home state, please forward your completed certification packet, along with a copy of your DBE certificate, to the California Department of Transportation." There is no mention of a streamlined process referred to in the applicable Q&A.

Recommended Action: CUCP should revisit their internal third party challenge procedure between UCP members. If the process is retained, the MOA should state that appeals of internal third party challenges among CM Agencies should stop at the Executive Committee level and not be appealed to the US DOT. The CUCP should also revise the CUCP application package and MOA to include a streamlined process for out-of-state DBE firms seeking certification by the CUCP.

UCP Response #1: The CUCP MOA is correct as written. There is no reference to members appealing to the USDOT. The MOA clearly states that such disputes will be resolved by the Executive Committee and binding on all members.

UCP Response #2: The CUCP will review its certification process for out of state firms for possible ways to streamline the process.

DOT Response: DOT concurs with both responses. DOT agrees that the CUCP MOA clearly states that disputes will be resolved by the Executive Committee. The recommendation was based on a letter sent from the CUCP to another UCP member indicating an option to appeal to USDOT. The advisory comment discussion in the report was based on UCP members following the dispute resolution outlined in the MOA.

B) UCP Directory

Basic Requirements: (49 CFR Part 26.31 and 26.81(g)) UCPs must maintain a unified DBE directory containing, for all firms certified by the UCP, the information required by 26.31. The listing shall include for each firm, its address, phone number, and the types of work the firm has been certified to perform as a DBE. The UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for the UCP Directory. The CUCP MOA section 3.04 identifies California Department of Transportation (CALTRANS) as the “DBE Database Manager” for all DBE certifications made the CM agencies , including maintaining the electronic DBE database. The CUCP indicated during the review that this Oracle database is updated in real-time as soon as changes are made. It’s also available in a downloadable excel format for contractors and users. The CUCP is currently in the process of developing a tutorial for the end-users in accessing the DBE Directory.

9. UCP Procedures

A) On-site Visits

Basic Requirements: (49 CFR Part 26.83(c)) UCPs must perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their resumes and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area.

Discussion: During this DBE Compliance Review, an advisory comment was made with the requirements for on-site visits. The CUCP MOA included a uniform site visit form for all the Certifying Members to utilize when conducting site visits. Interviews were conducted with Certifying Members from the Northern and Southern Clusters. All of the files reviewed contained proof that an on-site visit to the offices of the applicant firm was conducted. However, only a few members stated that visiting the job site of the applicant firm was part of their site visit process. The regulations state that the UCP must perform an on-site visit to the offices of the firm. UCPs must interview the principal officers of the firm and review their resumes and/or work histories. UCPs must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in the jurisdiction of local area. The City of Los Angeles was one of the Certifying Members that incorporated visiting job sites as part of their normal on-site visit process if within their local area. The City of Los Angeles has a supplemental questionnaire/checklist they utilize when jobsite visits are conducted.

The CUCP MOA has site visit procedures and questionnaire outlined in Exhibit "T" that discuss the on-site visit procedures. These procedures cover the basic principles of conducting an effective on-site visit. However, the review team did not see information on how often on-site visits are to be updated. USDOT's Official Questions and Answers includes the question, "What points should UCP members emphasize in working together to make certifications decisions?" The answer provides guidance on updating on-site visit reviews. The department recommends that any on-site review over three years old should be updated to reflect current status. This guidance was posted in 2008 and it is recommended that the CUCP discuss how they will address this guidance.

Recommended Action: Executive Committee should discuss among the Certifying Members developing procedures to conduct on-site visits to jobsites if active at the time of application and located in the area. The CUCP should also discuss incorporating procedures to update on-site reviews every three years.

UCP Response #1: The CUCP will instruct Certifying Members to visit active work sites of applicants where applicable. The CUCP Clusters will monitor at monthly meetings.

UCP Response #2: The CUCP believes that updating on sites every 3 years is a burden on Certifying members and resources may be better utilized. We will continue the practice of conducting additional on sites based on cause or as needed.

DOT Response: DOT concurs with notifying members to conduct work site visits. Conducting onsite visits every three years was based on a recommendation from the DOT Official Question & Answers revised in 2008. The Department sought comments in a current Notice of Proposed Rule Making regarding an appropriate time frame for updating onsite visits. The Department will continue to monitor frequency of onsite visits until a regulatory requirement is determined.

B) Uniform Application

Basic Requirements: (49 CFR Part 26.83 (i)) UCPs must use the application form provided in Appendix F of the regulations without change or revision. However, you

may provide in your DBE program, with the approval of the concerned operating administration, for supplementing the form by requesting additional information not inconsistent with this part.

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for using the Uniform Application Form in Appendix F. The CUCP MOA states that the Certifying Members will use the Uniform Application Form to review DBE applicants seeking certification. The CUCP also appropriately incorporated a supplemental questionnaire that request additional documents to facilitate the certification process in California. The certification files examined during the compliance review supported the CUCP's use of the Uniform Application Form.

C) Annual Updates

Basic Requirements: (49CFR Part 26.83 (j) If you are a DBE, you must provide to the UCP, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths.

Discussion: During this DBE Compliance Review, deficiencies were found with the requirement for annual updates. The CUCP MOA includes an annual No Change Declaration Form and a DBE Renewal Application. The Certifying Members mentioned during the compliance review that it was agreed that certifications would be valid for a period of five years. During the five-year period, DBEs are required to supply a No Change Declaration Form to the appropriate agency.

The certification files examined by the review team found that San Francisco Bay Area Rapid Transit (BART) did not routinely collect the No Change Declaration Form developed by the CUCP (see list of files reviewed in background section of this report). The files contained DBE Renewal Applications every three years; however, there were no annual updates conducted during the three year period. The BART staff informed the review team that the CUCP formerly had a three-year certification term limit and required DBE Renewal Applications every three years. In regards of the missing annual updates, BART realized there were issues conducting annual updates during the certification term and attributed it to a lack of staff to process the annual updates. The review team did find evidence that annual updates were requested from the DBE firms, but there was no evidence that BART took action on non-responses to those requests. The DBE Manager for BART indicated that four additional staff were hired recently and will address the absence of annual updates in the certification files.

Corrective Action and Schedule: Within 90 days of the issuance of the final report, CUCP must submit to Ryan Inman at FTA's Office of Civil Rights evidence that all Certifying Member Agencies in the CUCP are collecting annual updates of certification.

UCP response: in March 2009, BART began reviewing all files to insure annual updates have been completed. The contact person is BART DBE Manager, Linda Wells-Grogan.

DOT response: DOT concurs with UCP's response. This deficiency is now closed.

10. DOT / SBA MOU

Basic Requirements: (49 CFR Part 26.84 – 26.85) UCPs must accept the certification applications, forms and packages submitted by a firm to the SBA for either the 8(a) BD or SDB programs, in lieu of requiring the applicant firm to complete your own application forms and packages.

Discussion: During this UCP Compliance Review, no deficiencies were found with processing SBA certified firms. The MOA states that the California UCP and its CM Agencies may accept and recognize certifications made by the U.S. Small Business Administration (SBA) under its 8(a) Business Development (BD) and Small Disadvantage Business (SDB) Programs. CM Agencies will process applications submitted by SBA-certified firms pursuant to the DOT/SBA MOU as specified in Sections 26.84 through 26.87. Separate interviews were conducted with the Northern and Southern Clusters about their review process for SBA certified firms. The representatives from the Southern Cluster indicated that they have a modified application process for SBA certified firms. Firms can submit their SBA application package in lieu of the CUCP application. On-site visits are also conducted of SBA certified firms. The representatives for the Northern Cluster indicated they had not received request for SBA certified firms in a number of years. Although the CUCP MOA does not address specifically a process for reviewing SBA certified firms, it appears that the CUCP has appropriate implementation practices of this section of the regulations.

11. Denials of Certification

A) Initial Request Denials

Basic Requirement: (49 CFR Part 26.86) When a UCP deny a request by a firm, which is not currently certified with them, to be certified as a DBE, the UCP must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that support each reason for the denial.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement for denial of initial certification request. Several of the certification files examined by the review team were initial denials of DBE certification. The denial letters were very detailed, thoroughly explaining the reasons for denial and reference to the regulation. The CUCP provided a Standard Forms Booklet (revised January 2009) that included a sample denial letter template. This template provided detail of the reasons for denial and common finding areas. The template and letters reviewed in the certification files appropriately included information for appealing the denial determination to the US DOT.

B) Removing Existing Certification

Basic Requirement: (49 CFR Part 26.87) If a UCP determines that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirements for removing existing certification. The Standard Forms Booklet included a process for conducting removals of DBE certification. Templates letters were also included in this booklet specifying all the various reasons for removal of certification. The files examined during the review included appropriate procedures of 26.87 and gave the DBE due process with requesting an informal hearing with the designated UCP representative. The review did suggest that the CUCP Executive Committee discuss methods to notify their Non Certifying Member agencies (NCMs) of the DBEs who had their certification removed.

C) Appeals to the DOT

Basic Requirement: (49 CFR Part 26.89) When the Department receives an appeal and requests a copy of the recipient's administrative record, the UCP must provide the administrative record, including a hearing transcript, within 20 days of the Department's request.

Discussion: During this DBE Compliance Review, no deficiencies were found with appeals to the USDOT. The CUCP MOA outlined that all appeals of initial denials will be heard only by the US DOT. The MOA also included detailed procedures for appeals of existing DBE firms. These procedures outlined the process of conducting informal hearings and written appeals of firms who are protesting removal of their DBE certification. The review team requested documentation of the individuals used to meet the separation of function requirement for informal appeal hearings. The individuals for the Southern Cluster were as follows:

- City of Los Angeles-Hannah Choi, Program Manager, Office of Contract Compliance Bureau of Contract Administration
- Los Angeles County MTA-Linda Wright, Deputy Executive Officer, Diversity Economic Opportunity Department

The individuals for the Northern Cluster were as follows:

- Valley Transit Authority-Thomas Smith, Manager, Contracts & Material Management
- Central Contra Costa Transit Authority-Rick Ramaier, General Manager
- San Mateo County Transit District-Reconsideration Committee:
Ivan McAvoy, Chief Development Officer
Chuck Harvey, Chief Operating Officer
George Cameron, Chief Admin Officer
San Francisco Municipal Transit Authority-Wayne Wong, Department Manager, Office of Civil Rights
- Bay Area Rapid Transit-Andre Bourse, Director, Contract Compliance Office, Equal Opportunity Office

12. Compliance and Enforcement

A) DBE Enforcement Actions

Basic Requirement: (49 CFR Part 26.107) If a firm does not meet the eligibility criteria of subpart D and attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceeding against you under 49 CFR part 29.

Discussion: During this DBE Compliance Review, no deficiencies were found with DBE Enforcement Actions. Los Angeles County MTA (Metro) has information on their website of firms that have been suspended and debarred from doing business with Metro. Metro also includes a link to the Excluded Parties Listing System (EPLS) for federal procurement.

B) Confidentiality

Basic Requirement: (49 CFR Part 26.109 (a)) Notwithstanding any provision of Federal or state law, UCPs must not release information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes for DBE certification and supporting documentation.

Discussion: During this DBE Compliance Review, an advisory comment was made with the confidentiality issues in the CUCP. The Department issued additional guidance concerning confidentiality in the Official Questions & Answers. Under the DOT DBE regulation, a recipient or UCP is prohibited from disclosing to any third party, without the submitter's written consent, a personal net worth statement or supporting documentation. UCPs are likewise prohibited from disclosing confidential business information, including applications for DBE certification and supporting information. These prohibitions apply even in the face of a request under a state freedom of information or open records law.

In the course of reviewing an application or otherwise considering the eligibility of a firm, the UCP and its staff may produce documents (e.g. memoranda, evaluations, records, notes, other working papers) that reproduce or refer to the information subject to the disclosure prohibitions of the DOT rule.

The review team expressed concerns with language in the CUCP DBE Renewal Application. The application contained the language concerning personal information that appeared to be inconsistent with the DBE regulations concerning confidentiality. The language is as appears below:

PERSONAL INFORMATION NOTICE

Pursuant to the Federal Privacy Act (P.L. 93-579) and the Information Practices Act of 1977 (Civil Code Sections 1798, et. seq.), notice is hereby given for the request of personal information by this form. The requested personal information is voluntary. The principal purpose of the voluntary information is to facilitate the processing of this form. The failure to provide all or any part of the requested information may delay processing of this form. No disclosure of personal information will be made unless permissible under Article 6, Section 1798.24 of the IPA of 1977. Each individual has the right upon request and proper

identification, to inspect all personal information in any record maintained on the individual by an identifying particular. Direct any inquiries on information maintenance to the IPA Officer.

This language states that personal information will not be disclosed unless permissible under Article 6, Section 1798.24 of the IPA of 1977. This language was adopted by the CUCP as per the request of a certifying member agency. The CM agency previously had this language in their renewal application and their legal department wanted to incorporate it into the CUCP. No one was able to provide reasons why this language was required in the application.

Recommended Action: The CUCP Executive Committee should discuss removing this language from their DBE Renewal Application.

UCP Response: Language on DBE Renewal Application- Language was removed and revised was implemented June 4, 2009.

DOT Response: DOT concurs with UCP response.

C) Cooperation

Basic Requirement: (49 CFR Part 26.109 (c)) All participants in the Department's DBE program are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information.

Discussion: During this DBE Compliance Review, no deficiencies were found with cooperation. The Department addressed cooperation in two areas of the 2008 updated Questions & Answers. UCPs were encouraged to reduce burdens on applicant who are certified in other states or certified by SBA. UCPs must promptly provide requested information or on-site visit information to other UCPs or the SBA.

The other area discussed in the 2008 updated Questions & Answers was the emphasis of UCP members working together to make certification decisions. The guidance instructed UCP members to work through their differences. UCP agreements should always include a dispute-resolution mechanism. The CUCP MOA states that Executive Committee will resolve disputes that cannot be resolved between or among the CM agencies.

SECTION 7 – SUMMARY OF FINDINGS

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action(s)	Current Status
1. Burden of Proof	26.61	ND			
2. Group Membership	26.63	ND			
3. Business Size	26.65	ND			
4. Social and Economic Disadvantage a) Personal Net Worth b) Individual determination	26.67	 D ND	ACDBE PNW application requires routine collection of spousal personal financial information.	Review application instruction to make consistent with DBE regulations.	Provide revised form/instructi ons by 11/1/2010.
5. Ownership	26.69	ND			
6. Control	26.71	ND			
7. Other Certification Rules	26.73	ND			

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action(s)	Current Status
8. UCP Requirements					
a) UCP agreement	26.81	AC	Internal third party complaint process reference appealing to US DOT. No streamlined process for out-of-state requests.	Remove reference of UCP members appealing to US DOT in regard to disagreements on determinations. Discuss incorporating streamlined process for out-of-state firms.	Concur with additional comments
b) UCP directory	26.31	ND			
9. UCP Procedures					
a) on-site visits	26.83	AC	UCP certification members not visiting the work sites of applicants.	Visit worksites in local jurisdiction for future applicants.	Concur
			Update On-Sites	On-site visits should be updated every 3 years	Concur with additional comments
b) Uniform Application		ND			
c) Annual Updates		D	BART not routinely collecting annual updates.	Incorporate process to ensure annual updates are collected.	Closed
10. DOT/SBA MOU	26.84 – 26.85	ND			
11. Denials					
a) Initial Request	26.86	ND			
b) Remove Existing	26.87	ND			
c) Appeals	26.89	ND			
12. Compliance and Enforcement					
a) DBE Enforcement Actions	26.107	ND			
b) Confidentiality	26.109	AC	DBE Renewal Application reference possible release of personal information.	Review application to ensure language is not inconsistent with the regulation concerning confidentiality.	Concur
c) Cooperation	26.109	ND			

Findings at the time of the site visit: ND = No deficiencies found; D = Deficiency; NA = Not Applicable; NR = Not Reviewed

SECTION 8 - LIST OF ATTENDEES

Name	Organization	Title	Phone	Email
Northern Cluster CUCP Members:				
Raymond Lee	SAMTRANS	DBE Officer	650-508-7939	leer@samtrans.com
Shelia Evans-Peguese	SF MTA	Contract Compliance Officer	418-701-4436	Sheila.evan-peguese@sfmta.com
Linda Wells Grogan	BART	DBE Manager	570-464-6195	lwells@bart.gov
Sandra Crumpler	SF Airport	Manager-DBE Program	650-821-5021	Sandra.crumpler@flysfso.com
Janet Madrigal	CCCTA	Civil Rights Administrator	925-680-2044	madrigal@cccta.org
Maria Cordero	SF MTA	CCO	415-701-5239	Maria.cordero@stmta.com
Hayden Lee	VTA	SBE/DBE Consultant	408-321-5574	Hayden.lee@vta.org
Ron Granada	BART	CRO	510-464-6103	rgranada@bart.gov
Ruby Smith	BART	Sr. CRO	510-464-6324	rsmith@bart.gov
Southern Cluster CUCP Members:				
Conference Call				
Janice Salais	CALTRANS		916-321-0841	Janice-salais@dot.ca.gov
Angela de la Rosa	City of Los Angeles		213-847-2650	Angela.delarosa@lacity.org
Rolando Tuason	City of Los Angeles		213-847-2642	Rolando.tuason@lacity.org
Shirley Wong	LACMTA		213-922-5419	wongs@metro.net
FTA:				
Via Conference Call				
Derrin Jourdan	FTA	Region IX CRO	415-744-2729	Derrin.Jourdan@dot.gov
Ryan Inman	FTA	HQ Office of CR	202-366-5017	Ryan.Inman@dot.gov
Milligan & Co LLC:				
Benjamin Sumpter	Milligan & Co., LLC	Lead Reviewer	215-496-9100	bsumpter@milligancpa.com
John Clare	Milligan & Co., LLC	Reviewer	315-729-9073	jclare@twcnny.rr.com