

# FTA

FEDERAL TRANSIT ADMINISTRATION

## Oregon Unified Certification Program DBE Compliance Review Final Report

September 2012

Federal Transit Administration

PREPARED BY  
FTA



U.S. Department of Transportation  
Federal Transit Administration

COMPLIANCE REVIEW  
OF THE  
OREGON  
UNIFIED CERTIFICATION PROGRAM  
FINAL REPORT

**September 2012**

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

**by**

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## **Section 1 - General Information**

Hosting Grant Recipient: Oregon Department of Transportation  
355 Capitol Street, NE

City/State: Salem, OR 97301

Executive Official: Matthew Garrett  
Director

On Site Liaison: Michael A. Cobb  
Manager, Office of Civil Rights  
503-986-5753

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Site visit Dates: September 13 - 15, 2011

Compliance Review Team  
Members: Benjamin Sumpter, Lead Reviewer  
Habibatu Atta  
Kristin Szwajkowski

## **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., (17), October 1, 2010 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 Oregon Unified Certification Program (OR UCP) 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 OR UCP'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 Oregon Unified Certification Program (OR UCP) is necessary.

The primary purpose of the compliance review is to determine the extent to which the Oregon Unified Certification Program (OR UCP) 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 the Oregon 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 objectives 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 OR UCP is honoring the Unified Certification Program agreement submitted to the Secretary of Transportation;
- examine the required certification procedures and standards of the OR UCP 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 OR UCP 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.

### *Oregon Unified Certification Program*

The certification Agency for the State of Oregon is the Office of Minority, Women and Emerging Small Business (OMWESB) which is housed within the Oregon Department of Consumer and Business Services. The Office of Minority, Women, and Emerging Small Business (OMWESB) was established in 1988 to provide support and technical assistance for businesses and non-profit organizations. They are also the sole certifying agency in the state of Oregon. Under the agreement with the Oregon Department of Transportation (ODOT), they are responsible for making certification determinations on behalf of FTA, FHWA, and FAA recipients. The Oregon Department of Transportation Office of Civil Rights (OCR) maintains oversight of the certification process and ensures compliance with federal regulations as they have a direct responsibility to the USDOT.

OMWESB provides staff to conduct DBE certification, de-certification, appeals, challenges, investigations of third party allegations, and public awareness and outreach activities pertaining to certification programs. The current certification staff consists of a Small Business Section Manager, four Small Business Certification Specialists, and DBE Certification Specialists hired by ODOT. The Section Manager was out of the office during the onsite review. Therefore, the review questions were fielded by the two Certification Specialists listed in the attendance sheet and the end of this report.

An interagency agreement was formed between the Unified Certification Program Partners (listed in the chart below) and the Department of Consumer and Business Services for administering the DBE unified certification function.

<b>UCP Partner Agencies</b>	
Oregon Department of Transportation (ODOT)	Tri-Met
Oregon Department of Aviation	Port of Portland
Lane Transit District	Salem Area Mass Transit District
METRO	City of Redmond
Prineville-Crook County Airport Commission	Josephine County
Port of Morrow	City of Myrtle Creek
City of Bend – Bend Area Transit	City of Hermiston
City of Portland	Morrow County
City of Corvallis	Eugene Airport



## **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. 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].
11. 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 Oregon UCP by FTA's Office of Civil Rights. The agenda letter notified the Oregon UCP of the planned site visit, requested preliminary documents, and informed the Oregon UCP 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 OR UCP Certifying Members and the review team. Subsequent to the entrance conference, a review was conducted of the OR UCP agreement and other documents submitted to the review team by the OR UCP representative. Interviews were then conducted with selected OR UCP Certifying Member representatives regarding DBE program certification standards and certification procedures. A sample of certification files were then selected and reviewed for the DBE required elements.

At the end of the review, an exit conference was held with the OR UCP Certifying Member representatives and the review team. A list of participants is included at the end of this report. At the exit conference, initial findings and corrective actions were discussed with the representatives.

Following the site visit, draft and final reports were compiled.

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

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FTA Office of Civil Rights  
1200 New Jersey Ave., S.E., E54-426  
Washington, DC 20590  
[Randelle.Ripton@dot.gov](mailto:Randelle.Ripton@dot.gov)

and

Christopher Mac Neith  
Regional Civil Rights Officer, FTA Region X  
915 Second Avenue, Suite 3142  
Seattle, WA 98174  
[Christopher.MacNeith@dot.gov](mailto:Christopher.MacNeith@dot.gov)

**Certification Files Reviewed:**

File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Removal	[REDACTED]	Y	Y	Y	Y	N/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		N/A	Y	N/A	Y	Y	N	N/A	N
File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification Denial	[REDACTED]	Y	Y	Y	N/A	Y/N	N/A	Y	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		N	Y	N/A	Y	Y	N/A	N/A	N/A
File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification >1 year	[REDACTED]	Y	Y	Y	N	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N/A	Y	Y	N/A	N/A	N/A
File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Removal	[REDACTED]	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		N/A	Y	N/A	Y	Y	N	N	N/A
File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification >1 year	[REDACTED]	Y	Y	Y	Y	N/N	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		N	Y	N/A	Y	Y	N/A	N/A	N/A
File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification Denial	[REDACTED]	Y	N/A	Y	N/A	N/N	N/A	Y	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	N/A	N/A	N/A	Y	N/A	N/A	N/A
File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Removal	[REDACTED]	Y	Y	Y	Y	N/N	N/A	Y	N/A

		<b>Cert. Decision</b>	<b>SBA Size</b>	<b>DOT/SBA MOU</b>	<b>Control Review</b>	<b>Ownership Review</b>	<b>Removal Process Followed</b>	<b>Notice of Hearing</b>	<b>Notice of Decision</b>
		Y	Y	N/A	Y	Y	N	Y	N/A
<b>File Type</b>	<b>Firm</b>	<b>USDOT Form</b>	<b>Site Visit</b>	<b>PNW</b>	<b>No Change</b>	<b>Per/Bus Tax</b>	<b>Streamline Application</b>	<b>Denial Letter</b>	<b>Appeal Letter</b>
Initial Certification Denial	██████████ ██████████	Y	Y	Y	Y	Y/Y	N/A	Y	N/A
		<b>Cert. Decision</b>	<b>SBA Size</b>	<b>DOT/SBA MOU</b>	<b>Control Review</b>	<b>Ownership Review</b>	<b>Removal Process Followed</b>	<b>Notice of Hearing</b>	<b>Notice of Decision</b>
		Y	Y	N/A	Y	Y	N/A	N/A	N/A
<b>File Type</b>	<b>Firm</b>	<b>USDOT Form</b>	<b>Site Visit</b>	<b>PNW</b>	<b>No Change</b>	<b>Per/Bus Tax</b>	<b>Streamline Application</b>	<b>Denial Letter</b>	<b>Appeal Letter</b>
Removal out-of-state	██████████ ██████████	Y	N/A	Y	Y	Y/Y	N/A	N/A	N/A
		<b>Cert. Decision</b>	<b>SBA Size</b>	<b>DOT/SBA MOU</b>	<b>Control Review</b>	<b>Ownership Review</b>	<b>Removal Process Followed</b>	<b>Notice of Hearing</b>	<b>Notice of Decision</b>
		Y	Y	N/A	Y	Y	N	N/A	N

<b>File Type</b>	<b>Firm</b>	<b>USDOT Form</b>	<b>Site Visit</b>	<b>PNW</b>	<b>No Change</b>	<b>Per/Bus Tax</b>	<b>Streamline Application</b>	<b>Denial Letter</b>	<b>Appeal Letter</b>
Initial Certification ACDBE	██████████	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
	<b>ACDBE process</b>	<b>Cert. Decision</b>	<b>SBA Size</b>	<b>DOT/SBA MOU</b>	<b>Control Review</b>	<b>Ownership Review</b>	<b>Removal Process Followed</b>	<b>Notice of Hearing</b>	<b>Notice of Decision</b>
	Y	Y	Y	N/A	Y	Y	N/A	N/A	N/A

## 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. 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 ODOT DBE program plan outlines the guidelines for DBE certification used by OMWESB. This section states that OMWESB will make determinations concerning whether individuals and firms have met the burden of demonstrating group membership, ownership, control, and social and economic disadvantage by considering all the facts in the record, viewed as a whole.

The affidavit of certification is included in the Oregon UCP application for applicants to certify that they are and have held themselves out to be a member of a designated group. The signed and notarized affidavit of certification identifying the applicant as a group member was included in the certification files provide to the review team.

### 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, deficiencies were found with the requirement for Group Membership.

The ODOT program plan states that individuals within the designated groups do not have to prove that they are socially and economically disadvantaged; however, if OMWESB needed to question whether an individual belonged to one of the designated groups, they would require the applicant to produce appropriate documentation of group membership. In making the group membership determination, OMWESB would consider whether or not the applicant considered themselves a member of a designated group for a long time prior to applying for certification and whether the applicant is regarded as a member of the designated group by members of the relevant community.

This statement in the program plan appears to contradict what is actually implemented by OMWESB. The OMWESB DBE application includes an instructional cover sheet that requests official government documentation that substantiates ethnicity and gender. They

indicate that examples include birth certificate, tribal enrollment with a federally recognized tribe, driver's license, etc. OMWESB also indicates if the information provided is inconclusive, additional documentation will be required. This government documentation is part of the routine collection process of OMWESB and not on an individual basis as stated in ODOT DBE program plan. Additionally, as per 2003 DBE rule guidance, if you have reason to question an individual's membership in a particular group you must provide a written request for additional information fully explaining the reason why you questioned the individual's group membership.

Corrective Action and Schedule: Within 60 days of receipt of the draft report, submit to FTA's Office of Civil Rights an updated DBE program plan to be consistent with DBE program requirements regarding questioning group membership. Update the program to be consistent with DBE application instructions regarding collection of proof of group membership.

**Grantee Response:** The Oregon Department of Transportation (ODOT) will revise the Policy Statement by January 31, 2012 for the Disadvantaged Business Enterprise (DBE) program to accurately follow 49 CFR 26.61(b) by changing 6.3.3 Disadvantaged Group Membership, paragraph 1, to read as follows:

For the purposes of certification, The Office of Minority, Women and Emerging Small Business (OMWESB) will presume that members of the groups identified herein are socially and economically disadvantaged unless the presumption is rebutted.

All individuals applying for certification must submit a signed, notarized statement, with his or her initial application, that he or she is a member of one of the groups designated in 13 CFR 124.103(b) and 49 CFR 26.67(a). The OMWESB will require all individuals applying for socially and economically disadvantaged status, but not meeting the requirements in 13 CFR 124.103(b) and 49 CFR 26.67(a), to fill out the Individual Determinations of Social and Economic Disadvantage questionnaire and provide appropriate documentation of group membership. Documentation may be in the form of a birth certificate, tribal enrollment with a federally recognized tribe, driver's license, etc. It must also include a written description of personal experiences of substantial and chronic social disadvantage in the U.S. based on race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or similar causes not common to individuals who are not socially disadvantaged.

The OMWESB will also consider: 1) whether or not the person has held himself or herself out to be a member of the group over a long period of time prior to application for certification; and 2) whether the person is regarded as a member of the group by the relevant community. The OMWESB may also request evidence and/or an affidavit(s) from group leaders, community members, or documentation in which the individual may have held himself or herself out as a minority member of society.

Individuals not presumed to be socially and economically disadvantaged or if the presumption is rebutted, hold the burden of demonstrating, by a preponderance of the evidence, that he/she meets the requirements of this subpart concerning group

membership or individual disadvantage. The OMWESB 's decision concerning membership in a designate group will be subject to certification appeal procedures.

**FTA Response:** FTA agrees with OMWESB’s response to the noted deficiency. To close this deficiency, provide FTA’s Office of Civil Rights with a copy of the revised Policy Statement by October 30, 2012.

### **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 the firm’s previous three fiscal years, in excess of \$22.41 million.

Discussion: During this UCP Compliance Review, a deficiency was found with the requirement of business size.

The ODOT DBE program plan indicates that they utilize 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. However, the plan must be updated to reflect the adjustment to the DOT DBE business size standard from \$20.41 million to \$22.41 million.

Corrective Action and Schedule: Within 60 days of receipt of the draft report, submit to FTA’s Office of Civil Rights an updated DBE program plan reflecting the current business size standard.

**Grantee Response:** The Oregon Department of Transportation will revise the Policy Statement by January 31, 2012 for the Disadvantaged Business Enterprise (DBE) program to accurately follow 49 CFR 26.65 by changing 6.3.2 Business Size standards to reflect the current requirements as listed under 13 CFR part 121 and further defined by the Small Business Administration. The Oregon Department of Transportation will make the revisions as follows:

	Current	Revised
General Contractor	\$20.41 Million	\$22.41 Million
Special Trade Contractor	\$13.0 Million	\$14.0 Million
Engineering, Architectural	\$4.5 Million	\$4.5 Million

**FTA Response:** OMWESB’s response partially addresses the deficiency. The Policy Statement should be revised to correctly note the current SBA size standards and the current USDOT DBE size standard with instructions that direct the certifiers to use the lower of the two. To close this finding, provide FTA’s Office of Civil Rights with a copy of the revised Policy Statement by October 30, 2012.

#### **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 \$1.32 million.

**Discussion:** During this UCP Compliance Review, deficiencies were found with the requirement for Personal Net Worth (PNW) statements.

The certification files reviewed contained the appropriate personal net worth statements for the individuals whose ownership and control were relied upon for DBE certification. The certification staff completes a PNW Worksheet for each statement received from socially and economically disadvantaged individuals. The worksheet totaled the individual's assets and liabilities, subtracted all the exclusions concerning equity in applicant firm and primary residence and divided the total by two if the spouse shared the assets. The review team considered the worksheet as a good practice to verify the accuracy of the information submitted by the individual; however, some discrepancies in the worksheet calculations were discovered.

For example, the PNW information for [REDACTED] was reviewed in the certification file for [REDACTED]. [REDACTED] completed a PNW statement as of January 26, 2011, with \$124,522 in assets and \$219,314 in liabilities for a (\$94,792) net worth total. The PNW worksheet completed on April 23, 2011 by the Certification Specialist totaled only \$41,600 in assets and \$219,314 in liabilities resulting in a sub total of (\$177,714). No exclusions were subtracted and the specialist's personal net worth total was (\$177,714). Even though none of the calculation discrepancies discovered would have resulted in a different conclusion on eligibility, the review team cautioned the specialists to review the worksheet calculations for accuracy.

**Corrective Action and Schedule:** Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a corrective action plan to verify PNW calculations for accuracy.

**Grantee Response:** OMWESB will require that two certification specialists review each personal net worth statement. The initial specialist will complete the form and the supervising specialist will review the form for accuracy. The OMWESB will continue using the two-tier review process and will monitor the information more closely as part of the routine program review and audit. The team will also take the opportunity to discuss areas for improvement and standardizing in formation. Additionally, OMWESB will attend any local training offered by FTA, FHA, and FHWA pertaining to PNW.

**FTA Response:** FTA agrees with OMWESB's response to the noted deficiency. This deficiency is now closed.



## **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.

The ODOT DBE program plan states that, in accordance with 49 CFR Part 26, Appendix E, individuals applying for certification who does not belong to a designated group must demonstrate that they are socially and economically disadvantaged. In order to determine social disadvantage, OMWESB will consider the applicant's education, employment, and company history. To make a determination based on economic disadvantage, OMWESB will regard the factors relating to the applicant's personal financial status including personal net worth, fair market value of applicable assets, and personal income for the past two years. OMWESB will also compare the applicant's financial condition relative to the financial status of small businesses within similar types of business.

The Certification Specialist advised the review team that very few requests for individual determinations are received, maybe one or two per year. A form that mirrors Appendix E is given to the applicant for completion to evaluate eligibility requirements.

## **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.

The review team examined several files with ownership split evenly between two individuals rather than the more common 51% and 49% distributions. Both individuals in these cases were determined to be socially and economically disadvantaged. Based on the certification files reviewed, it appears that the OMWESB is appropriately evaluating 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 with determining control, however, advisory comments were made regarding control.

The OMWESB advised the review team they have approximately 478 DBE certified firms in the UCP database. During fiscal years 2009 and 2010, OMWESB approved 133 firms for DBE certification and denied 18 firms. The review team analyzed 11 certification files during the onsite visit. These files consisted of new and existing certifications, removals, and denials of certification. The review team found no issues with control determinations in the certification files requested.

The review team did, however, make some observations concerning the certification process of OMWESB. Of the 18 denied firms in FY2009 and FY2010, 15 were denied because of failure to cooperate with requests for information, one was over the size limit, one had no construction board license, and one was denied due to lack of expertise. During the same two year period, 50 firms were decertified. All the firms were decertified for failure to cooperate with annual affidavits or recertification requests, except for one firm that was over the size limit. Additionally, OMWESB recorded 60 withdrawals during FY2009 and FY 2010.

All the firms denied and decertified during the two-year reporting period were for non-control issues, except for approximately one firm denied for expertise issues. Additionally, the 60 withdrawals gave the impression that firms are being coached through the certification process rather than denied or decertified. More concerning the withdrawal process is discussed in the removal section of this report. The onsite visit questionnaire is also available on ODOT's website and could possibly give otherwise ineligible applicants advanced notice to coordinate with others and communicate acceptable responses to the interviewer. OMWESB appears to advise applicants to withdraw their applications as a means of avoiding making a certification denial determination based upon the disadvantaged owner's lack of control. OMWESB was advised to review their current process to ensure that it does not: 1) foster an over-inclusiveness philosophy for meeting control requirements of DBE eligibility and 2) promote an environment that suggests or favors application withdrawals over making ineligibility determinations for firms that fail to substantiate their ability to independently control their company.

**Grantee Response:** While no deficiency is noted, the OMWESB and ODOT acknowledge the concerns discussed and take the following action.

At this time, conflicting guidance is being offered by FTA, FHWA, and FAA regarding the policy address in this section. Until further discussion, clarification, and consensus between FTA, FHWA, and FAA as a whole occur regarding standardization, the OMWESB will continue to operate with the withdrawal process. The compliance review

team also raises a concern regarding an onsite questionnaire. ODOT will remove the questionnaire as an attachment (pgs. 299-5 of Exhibit MI) to the DBE Program Policy and Program Document from the ODOT website no later than January 31, 2012.

FTA Response: FTA coordinated this report with FHWA and FAA and both agencies agree with FTA's concerns about OMWESB and ODOT's withdrawal practices. There is more on this topic in the removal section.

## **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. You may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program. 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 other rules affecting certification. The DBE regulations in Part 26.73 initially included provisions for evaluating eligibility of Indian tribes, Alaska Native Corporations, and Native Hawaiian organizations in the 1999 issuance. The 2003 amended DBE regulations included a separate evaluation process for an Alaska Native Corporations (ANCs) seeking DBE certification.

The DBE program plan has a provision demonstrating OMWESB's understanding that firms owned by an Alaska Native Corporation, Indian tribe, or a Native Hawaiian Organization may be eligible for certification as long as the size standard limits and control requirements are met.

## **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, deficiencies were found regarding meeting requirements of Part 26.81.

A copy of the interagency agreement of the Unified Certification Program Partners and the Department of Consumer and Business Services was downloaded from ODOT's website by the review team (Exhibit H-UCP Agreement). The last page of the document included a list of seventeen (17) agencies entitled "UCP Partners Agencies with Signed Agreements." The review team requested the endorsed signature page by the UCP partners. No signature page was provided during the onsite review.

A copy of the interagency agreement between ODOT and Oregon Business Development Department (OBDD) was also provided to the review team. This agreement authorizes

ODOT to fund and provide oversight of OMWESB through the OBDD every two years. The agreement was effective from July 1, 2009 through June 30, 2011. A current agreement was requested by the review team, but none was provided during the onsite review.

The DBE regulations state in 49 CFR Part 26.81 that the UCP agreement shall also commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this part. The Certification Specialist advised the review team that training is sporadic due to budget constraints. They indicated that FHWA did conduct a training approximately two months prior to the onsite review. Based on the uncertainty in responses the review team received from the Certification Specialist regarding changes in the new DBE rule and ACDBE requirements, additional training is recommended for staff to have the necessary expertise to carry out the requirements of the DBE and ACDBE programs.

**Corrective Action and Schedule:** Within 60 days of receipt of the draft report, submit to FTA's Office of Civil Rights:

- the signature pages of all UCP Partners;
- the current interagency agreement between ODOT and OBDD; and
- a corrective action plan that discusses training opportunities for OMWESB certification staff for DBE and ACDBE certification programs

**Grantee Response:** OMWESB is in the process of renewing the UCP partner agreements. Drafts of the new UCP agreements will be provided to the partners no later than February 1, 2012. Until new agreements can be executed, OMWESB prepared extensions to the 2009-2011 agreements for execution. Those extensions will be provided to the partners no later than January 6, 2012.

Attached to this report is a copy of the executed interagency agreement between ODOT and Oregon Business Development Department OBDD. OBDD will identify resources to send OMWESB staff to regional training event and webinars hosted by USDOT, FHA, FHWA, FAA, FTA related to DBE programs. Additionally, OMWESB and ODOT staff are meeting monthly to ensure that new rules and policies are being implemented as developed and also to provide an opportunity for training on specific issues identified by OMWESB and ODOT.

**FTA Response:** FTA agrees with OMWESB's response to the noted deficiency. To close this deficiency, by October 30, 2012, provide FTA's Office of Civil Rights with copies of the renewed agreements, evidence of the monthly meetings, and planned or completed additional training for certifiers.

## **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 UCP compliance review, no deficiencies were found with the requirements for the UCP directory.

The UCP DBE directory is available on OMWESB's website and a link to the directory is also provided on ODOT's website. The directory meets all requirements of 26.31 and 26.81 of the regulations. The directory also includes the applicable NAICS codes as required by the new DBE rule. The DBE rule for Airport Concessions states in 49 CFR Part 23.31(b) that the UCP directory must specify whether a firm is certified as a DBE for purposes of 26 or ACDBE for purposes of 23 or both. The certification file for ACDBE firm, [REDACTED] was examined by the review team during the onsite review. The firm was accurately identified in the UCP directory as an approved ACDBE firm.

## **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 UCP Compliance Review, no deficiencies were found with the requirements for on-site visits.

As previously reported, the onsite questionnaire is available on ODOT's website. The onsite form asks the necessary questions concerning eligibility for certification determinations. A memo, dated February 10, 2011, from the Certification Manager to the Certification Specialist describing the "DBE New Review Process" was provided during the review. The on-site visit process was outlined, which included scheduling an interview with the majority owner or qualifying individual(s), discussing owner's involvement in business, and conducting a project visit if the location is within 30 to 45 minutes of the office location.

Copies of the on-site visits conducted by OMWESB were included in the certification file reviewed. The Certification Specialists interviewed also indicated that they just started a new process with updating on-site visit reports every six years. To assist in the effort, ODOT recently hired another Certification Specialist to conduct/update DBE on-sites and assist in other areas of the DBE certification program.

### **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 UCP Compliance Review, deficiencies were found with the requirements outlined in Part 26.83.

The Uniform Certification Application Form in Appendix F of the DBE regulations is utilized by the Oregon UCP. The supporting documentation requires applicants to include, among other items, personal and business financial information, i.e., personal and business tax returns. The Certification Specialist indicated that they would maintain the three most current tax returns in the files and shred older tax returns. Several files were missing the personal tax returns from other qualifying disadvantaged individuals or had no taxes at all in the files. The Specialist noted that some information may have been archived.

The DBE rules also require that certification determinations be made within 90 days of receiving all the supporting documentation requested in the application. This period can be extended an additional 60 days upon notification to the applicant. The certification files reviewed did not specifically state the date when all information was received starting the 90-day clock. The review team did advise the Certification Specialists that several files extended well past 90 days from initial receipt. One Specialist did note that in the past there was a backlog of certification files. It was indicated the ODOT's newly hired DBE Specialist is addressing this backlog.

The 2011 DBE Program rulemaking states, "...if an applicant for DBE certification withdraws its application before you have issued a decision on the application, the applicant can resubmit the application at any time." The OMWESB "DBE New Review Process" memo states, "applicants are also given an opportunity to withdraw their application and re-apply at a later date, if unable to provide requested information. Saves time/money relating to appellate process and applicant can re-apply without waiting one year." The Certification Specialists were advised by the review team to make sure they remain objective during the process and do not advocate withdrawing an application that may otherwise be denied.

The 2011 DBE rule also states, as a recipient or UCP, you must advise each applicant within 30 days from your receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required. The Certification Specialists advised the review team that they are meeting this requirement. They indicated that the OMWESB database notifies firms that their application was received and they will notify them within 30 days of application receipt if it's complete or if additional information is required.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a corrective action plan to ensure that all required supporting documents are maintained in the files, and files are processed within 90 days of receipt of required documentation.

**Grantee Response:** The current database in the OMWESB notifies all applicants that the office received their application and a Certification Specialist is assigned to the file as soon as the Administrative Assistant enters the application into the system. As of

January 6, 2012, a new report will be available through the current database that provides a list of the following:

- 1) When the Administrative Assistant enters the application in the system and assigns the file to a Certification Specialist;
- 2) When the applicant provides all necessary information for processing; and
- 3) When the Certification Specialist completes the review of the file and certification or denial occurs.

The OMWESB is also currently researching new databases. When the OMESB establishes a new database, the agency will include this information.

**FTA Response:** OMWESB's response partially addresses the noted deficiencies. To close the deficiencies, by October 30, 2012, provide FTA's Office of Civil Rights with a sample of the new report noted above and information on additional measures taken to ensure that all documents related to certification files are maintained either with that file, or are cross-referenced and easily accessible if archived.

### **C) Annual Updates**

**Basic Requirements:** (49CFR Part 26.83) Once you have certified a DBE, it shall remain certified until and unless you have removed its certification. 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 UCP Compliance Review, no deficiencies were found with the requirement for annual updates. Advisory comments were made regarding Part 26.83 requirements.

Most of the certification files provided to the review team included the required annual update form. A one page Annual "No Change" Affidavit is collected from the DBE firm along with the most recent business tax return. [REDACTED] had been in the DBE program for several years, however, no annual affidavits were included in their file. The Certification Specialists indicated that some of the information could have been archived. The review team advised OMWESB to ensure that all files contain the required annual no change affidavits.

The January 2011 DBE Program rulemaking states that, "Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of section 26.87. You may not require DBEs to reapply for certification or require "recertification" of currently certified firms." The ODOT DBE program plan and OMWESB documents include certification renewals, certification expirations, and recertification information. The review team advised OMWESB that the ODOT DBE program plan, certification process, UCP certificates and renewal applications will need revisions to comply with this new final rule.

**Grantee Response:** While the review team did not note a deficiency under this section, ODOT and the OMWESB acknowledge the recommendations and take the following action:

The OMWESB is currently revising all applications, letters, no change affidavits, and forms to meet the current standards outlined in 49 CFR 8 26.87. In addition, during the review process, the Certification Specialists are requesting from the firm owner(s) all information needed to bring a file current and onsite reviews will occur every six years. The specialists are also working together to standardize file layout and information requested.

## **10. Interstate Certification**

Basic Requirements: (49 CFR Part 26.85). This section applies with respect to any firm that is currently certified in its home state. When a firm currently certified in its home state (“State A”) applies to another State (“State B”) for DBE certification, State B may, at its discretion, accept State A's certification and certify the firm, without further procedures. In any situation in which State B chooses not to accept State A's certification of a firm, as the applicant firm you must provide the information in paragraphs (c)(1) through (4) of Part 26.85 to State B.

Discussion: During this UCP Compliance Review, this section was not applicable because the program requirement does not go into effect until January 1, 2012.

The current Oregon UCP process includes a requirement that businesses from out-of-state must be registered with the Oregon Secretary of State prior to being certified. The preamble of the DBE final rule cautioned UCPs about imposing non-certification related requirements on out-of-state firms. The review team mentioned that OMWESB will need to revisit this requirement prior to submitting their Interstate certification process by January 2012.

The preamble states “with respect to state requirements for business licenses, the Department believes that states should not erect a “Catch 22” to prevent DBE firms from other states from becoming certified. That is, if a firm from State A wants to do business in State B as a DBE, it is unlikely to want to pay a fee to State B for a business license before it knows whether it will be certified. Making the firm get the business license and pay the fee before the certification process takes place would be an unnecessary barrier to the firm’s participation that would be contrary to this regulation.”

## **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, deficiencies were found with the requirement for denial of initial certification request.

The OMWESB provided an electronic boilerplate denial letter to the review team during the onsite visit. The letter heading referenced “Disadvantaged Business Enterprise (DBE) Notice of Denial of Certification with Opportunity for Administrative Hearing and/or US Department of Transportation (USDOT) Appeal Rights.” The body of the form denial letter included that, “Based on the review of file documentation and the state and federal laws, there is reasonable cause to believe your firm is ineligible for certification for the following reasons.” Then after the reasons are provided, two options are given to the firm. The first option is to request a contested local hearing within 21 days and to have an attorney present if the firm is a corporation. The second option is to appeal the decision directly to the USDOT within 90 days of the date of the letter.

The review team examined the denied certification files for [REDACTED], [REDACTED], and [REDACTED]. [REDACTED] was a certified DBE in its home state seeking certification by Oregon UCP. The firm was denied because the applicant individual did not have an Oregon engineering license and also was not registered with Oregon Secretary of State. [REDACTED] was denied for failure to cooperate with scheduling an onsite visit. [REDACTED] was denied for failure to cooperate with providing requested documents.

The three denial letters were all written in 2011 and included the following heading reference, “Disadvantaged Business Enterprise (DBE) Intent to Deny with Notice of Opportunity for Administrative Hearing and/or US Department of Transportation (USDOT) Appeal Rights.” These letters were labeled as “intent to deny” as opposed to the boilerplate “notice of denial”. The language in the body of the letters for [REDACTED] and [REDACTED] said that based on the information submitted and the state and federal laws, your firm “will be” denied DBE certification. The [REDACTED] letter stated that the DBE application “has been” denied.

The letter further stated that, “if you do not request a hearing within 21 days, or if you withdraw a request for a hearing, notify ODOT that you will not appear or fail to appear at a scheduled hearing, the Manager of the OMWESB may issue a final order by default denying your certification. If the Manager of the OMWESB issues a final order by default, the OMWESB designates its files on this matter as the record.” Also included in the letter was a citation that read, “if you do not request a hearing under Option 1 within 21 days, or if you withdraw your request for a hearing, notify ODOT that you will not appear, or fail to appear at a scheduled hearing, the denial determination will be final by default. The OMWESB designates its files on this matter as the record.”

The review team could not conclude if the denial would be effective as of the date of the letter or 21 days after the date of the letter. In one part of the letter it says the Manager “may” issue a final order denying certification if no response within 21 days. The other citation in the letter seems to contradict the first statement by saying the denial determination “will” be final if no response in 21 days. This same language was used in the OMWESB’s intent to remove certification letters.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a corrective action plan to revise denial letters to clarify denial status.

**Grantee Response:** The OMWESB is currently revising all letters to clarify the issues raised in this discussion. The language in each letter will be more specific as to the intent of the letter, deadlines set, and outcome of the certification; removing the confusion between "may," "intent to deny," "notice of denial," and the time frames established for the appeal process. The revisions are scheduled to be completed by mid-March 2012.

**FTA Response:** FTA agrees with ODOT's response to the noted deficiency. To close this deficiency, by October 30, 2012, provide FTA's Office of Civil Rights with the revised denial letter language for review.

## **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, deficiencies were found with the requirements for removing existing certification.

The OMWESB currently has a three-year certification term. A renewal application is completed on the third year for continued eligibility in the program. If the renewal application is not returned or other eligibility issues arise, the firm is denied certification rather than removed. [REDACTED] was issued an "intent to deny" letter on July 13, 2011, for failure to return the "application for re-certification" to OMWESB. The certification file narrative log had an entry on August 8, 2011, "Decert. Failure to submit tax info." The next entry was on August 16, 2011, and read, "Spoke w/firm. Will be signing withdrawal." An email copy was also included in the file on August 16, 2011, from the ODOT-hired DBE Certification Specialist, Carrie Hulse, to the DBE firm. The email also included an attachment of a withdrawal form. Ms. Hulse made another entry in the narrative log on September 12, 2011, that, "as of this date firm has not provided withdrawal form." The firm was not listed in the DBE directory during the compliance review.

The review team asked Ms. Hulse why existing DBE firms are allowed to withdraw from certification rather than OMWESB following the removal process. Ms. Hulse answered that these DBE firms are allowed to withdraw from certification rather than going through the decertification process that requires a 12-month waiting period before they can reapply. She indicated that they are trying to help the firms by not having a denial or decertification go on their record.

This withdrawal philosophy was substantiated in the certification records of Transit Safety Management where the firm requested not to be decertified but rather the firm asked to withdraw from program. The firm faxed a statement to OMWESB on June 1,

2011, stating, “Your letter regarding decertification was received. [REDACTED]’s withdrawal letter was faxed to your office. We ask that [REDACTED]’s certification be recorded as a withdrawal and not a decertification. Please furnish us a confirmation that our DBE certification is recorded as withdrawal.”

Similar emails and notes were found in other certification files regarding withdrawal of existing certification or after a certification determination was made. [REDACTED] file contained an email from Certification Specialist, [REDACTED], on June 29, 2011, advising the firm that the DBE application had been denied and to let her know if they wish to pursue M/WBE certification or if they preferred to withdraw, to respond prior to July 12, 2011. The narrative log in [REDACTED] certification record included an entry from what appears to be August 31, 2011 recording the firm’s frustration with the amount of time required to provide information for DBE certification and that certification had not benefited the company. The firm had been in the DBE program for a number of years and the specialist suggested withdrawal and the company representative said go ahead and email the withdrawal form. The certification record did not include an intent to remove letter or withdrawal form. The firm was not listed in the UCP directory as a DBE during the compliance review.

The certification reports from FY2009 and FY2010 included a total of 60 withdrawals. Some of the reasons for withdrawals were listed as firm graduated, no longer in business, no longer eligible, change in ownership, or no benefit. All of these reasons relate to certified firms and should constitute a removal of certification rather than a withdrawal. The 2011 DBE rule states that the withdrawal process is during the application for the initial certification phase. The regulations state in 49 CFR Part 26.83(m), *Except as otherwise provided in this paragraph, if an applicant for DBE certification withdraws its application before you have issued a decision on the application, the applicant can resubmit the application at any time.* It is important that the OMWESB be very clear on the difference between withdrawal and removal processes so that firms are afforded the appropriate due process, which includes their right to appeal.

**Corrective Action and Schedule:** Within 30 days of receipt of the draft report, submit to FTA’s Office of Civil Rights a corrective action plan to follow removal of certification rules for withdrawn firms and other firms removed from directory without following Part 26.87. Additionally, with 30 days, submit a schedule for re-reviewing the 60 ‘withdrawn’ firms to ascertain if they should have been given the due process for removal of eligibility. Submit with this schedule a plan to inform FTA of the results of the certifications.

**Grantee Response:** The OMWESB is currently revising all letters to clarify the issues raised in this discussion. The language in each letter will be more specific as to the intent of the letter, appellate rights and outcomes of the certification review/renewal. The revisions are scheduled to be completed by mid-March 2012.

**FTA Response:** ODOT’s response partially addresses the deficiencies. To close this deficiency, by October 30, 2012, provide FTA’s Office of Civil Rights with the revised letter language for review. Additionally provide status of re-reviewing the 60

'withdrawn' firms to ascertain if they should have been given the due process for removal of eligibility.

### **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 UCP Compliance Review, deficiencies were found with the Appeals to the USDOT.

The intent to remove and intent to deny letters include information for appeals to the USDOT. The DBE regulation in Part 26.89 states that a firm that has been denied certification or had their certification removed by a recipient can file an administrative appeal to the Department. The OMWESB is advised to clarify if these intent letters are final determinations or pending determinations. Once a determination is made by OMWESB, include the USDOT appeal information in the letters. *See also "Removing Existing Certification" section above.*

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a corrective action plan to revise language in letters so that appropriate reference can be made to the appeals process.

**Grantee Response:** The OMWESB is currently revising all letters regarding the appeal process to meet the current standards outlined in 49 CFR 8 26.89. The revisions are scheduled to be completed by mid-March 2012.

**FTA Response:** FTA agrees with ODOT's response to the noted deficiency. To close this deficiency, by October 30, 2012, provide FTA's Office of Civil Rights with the revised letter language for review.

## **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 UCP Compliance Review, no deficiencies were found with DBE Enforcement Actions. Oregon UCP indicated in their response letter that there had been no suspension or debarment actions regarding certification of any DBE firms.

## **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 UCP Compliance Review, no deficiencies were found with the confidentiality issues. The Oregon UCP indicated in their response letter that they had not received any open records requests for DBE certification files.

## **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. (49 CFR Part 26.73 (c)) DBE firms and firms seeking DBE certification shall cooperate fully with your requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.

Discussion: During this UCP Compliance Review, no deficiencies were found with cooperation. The Oregon UCP indicated in their response letter that they had no issues with cooperation. The review team did note in other areas of the report that most of the denials and removals were due to the firm failing to cooperate with OMWESB requests.

## Section 7 - Summary of Findings

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action Plan:	Response Due Date
1. Burden of Proof	26.61	ND			
2. Group Membership	26.63	D	Program plan is inconsistent with actual OMWESB certification process	Provide a copy of the revised Policy Statement.	October 30, 2012
3. Business Size	26.65	D	Update program plan with current DBE size limits	Provide a copy of the revised Policy Statement with correct size standards.	October 30, 2012
4. Social and Economic Disadvantage					
a) Personal Net Worth	26.67	D	Miscalculations in PNW assessments	Ensure PNW worksheets show accurate calculations	Closed
b) Individual determination	26.67	ND			
5. Ownership	26.69	ND			
6. Control	26.71	AC	Review process for over inclusiveness and denial avoidance.		
7. Other Certification Rules	26.73	ND			
8. UCP Requirements					
a) UCP agreement	26.81	D	No signed MOU Agreement expired Training needed	Submit copies of renewed UCP agreements, evidence of monthly meetings, proof of training.	October 30, 2012
b) UCP directory	26.31	ND			
9. UCP Procedures					
a) on-site visits	26.83	ND			
b) Uniform Application	26.83	D	Files missing financial info Over 90 days determinations	Submit sample certification file report.	October 30, 2012
c) Annual Updates	26.83	AC	File missing updates. Revise recert, renewal, expiration		

<b>Requirement of 49 CFR Part 26</b>	<b>Ref.</b>	<b>Site visit Finding</b>	<b>Description of Deficiencies</b>	<b>Corrective Action Plan:</b>	<b>Response Due Date</b>
			language		
10. Reserved (Interstate Certification)	26.85	N/A			
11. Denials					
a) Initial Request	26.86	D	Intent to deny letters are contracting	Submit revised denial language letter	October 30, 2012
b) Remove Existing	26.87	D	Withdrawing firms rather than going through removal process	Submit revised removal letter language.  Provide update on the review of the 60 withdrawn firms.	October 30, 2012
c) Appeals	26.89	D	Review intent to deny and intent to remove letters for USDOT appeal insertion	Submit revised appeal letter language.	October 30, 2012
12. Compliance and Enforcement					
a) DBE Enforcement Actions	26.107	ND			
b) Confidentiality	26.109	ND			
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
<b>FTA:</b>				
Randelle Ripton	FTA - Office of Civil Rights	EO Specialist, DBE Technical Lead	202-366-5086	Randelle.Ripton@fta.gov
<b>ODOT Members:</b>				
Susan Edmonds	Oregon Dept of Consumer & Business Services	Certification Specialist, Office of Minority, Women & Emerging Business	503-986-0068	susan.a.edmonds@state.or.us
Sherrin K. Coleman	ODOT	Transit Planning Program Manager	503-986-4305	sherrin.k.coleman@odot.state.or.us
Michael R. Ward	ODOT	Administrator, Public Transit Division	503-986-3413	michael.r.ward2@odot.state.or.us
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