

FTA

FEDERAL TRANSIT ADMINISTRATION

Virginia Unified Certification Program DBE Compliance Review Final Report

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PREPARED BY
Milligan & Company, LLC



U.S. Department of Transportation
Federal Transit Administration

COMPLIANCE REVIEW
OF THE
VIRGINIA
UNIFIED CERTIFICATION PROGRAM
FINAL REPORT

April 2012

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

by

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Section 1 - General Information

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Site Visit Dates: June 14 - 16, 2011

Compliance Review Team
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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., (18), October 1, 2011 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 Virginia Unified Certification Program (VAUCP) 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 VAUCP'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 Virginia Unified Certification Program (VAUCP) is necessary.

The primary purpose of the compliance review is to determine the extent to which the Virginia Unified Certification Program (VAUCP) 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 Virginia 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 Parts 26 and 23.

The objectives of this compliance review are to:

- determine whether the VAUCP is honoring the Unified Certification Program agreement submitted to the Secretary of Transportation;
- examine the required certification procedures and standards of the VAUCP 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 VAUCP 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 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.

Virginia Unified Certification Program

Established in 1972, the Virginia Department of Minority Business Enterprise (DMBE) was created by Executive Order. At its inception, the mission of the agency was to organize state and local resources for the benefit of minority businesses, as well as to provide the companies with technical assistance. In 1989, the DMBE legislation was amended and changes were made to the certification process and language to the program was changed to include women owned businesses and other disadvantaged business entities.

Following the findings and recommendations, and upon approval by the Governor, state certifications were consolidated and the certification responsibilities for women business certification, DMBE's minority business certification, and Virginia DOT's DBE certification programs were centralized under the DMBE umbrella. The certification staff, which was at that time within VDOT's Civil Rights Division, was transferred to DMBE where it continued to perform the certification of DBEs in accordance with the federal regulations.

Currently, the DMBE is one of two certifying agencies for the Virginia Unified Certification Program. They are responsible for making certification determinations on behalf of FTA, FHWA, and FAA recipients. The Metropolitan Washington Airport Authority (MWAA) typically handles the airport concessionaire certification applications and other DBE applications.

The following six agencies are the members of the Virginia UCP:

- Virginia Department of Transportation (VDOT)
- Virginia Department of Minority Business Enterprise (DMBE)
- Metropolitan Washington Airport Authority (MWAA)
- Virginia Department of Rail and Public Transportation (VDRPT)
- Virginia Department of Aviation (VDOA)
- Virginia Port Authority (VPA)

Regional UCP MOU

The District Department of Transportation, Washington Metropolitan Area Transit Authority, Maryland Department of Transportation, Commonwealth of Virginia Department of Minority Business Enterprise, and Metropolitan Washington Airports Authority entered into a Memorandum of Understanding in August 2008.

The agencies established a Modified Certification Reciprocity Program (MCRP) to lessen the duplicative efforts, facilitate the efficient transfer of information among the parties, and improve the certification process for applicants seeking DBE or ACDBE certification in the District of Columbia, Maryland and Virginia.

The Reciprocal Certification Agency requires the DBE/ACDBE applicant to submit all of the following:

- a) Completed Uniform Certification Application form, including the Affidavit of Certification, as set forth in 49 CFR Part 26, Appendix F;
- b) Personal net worth statement;
- c) Individual Federal tax return for the latest tax year;
- d) Firm's Federal tax return for the latest tax year; and
- e) Copy of the latest letter of certification received by the home state

The Reciprocal Certification Agency requests copies of the most recent onsite report. The agency will make whatever further inquiries and requests it deems necessary for its decision-making process.

The Reciprocal Certification Agency will have the discretion to take any of the following actions:

- a) Certify the DBE/ACDBE in reliance on the certification decision of the home state;
- b) Make an independent certification decision based on documentation provided by the home state, augmented by any additional information it obtains; or
- c) Proceed with its ordinary application process without regard to the actions taken by any other party. The Reciprocal Certification Agency will notify the home state in writing within 30 days of taking this action.

After it makes a certification decision, the Reciprocal Certification Agency will send a letter of certification or letter of denial to the firm. The agency will also send a copy of any letter of denial to the home state within 30 days of the date of the letter. If a party removes the certification of a DBE/ACDBE, then the party will send a copy of the removal of certification letter to the other parties, within 30 days of the date of the letter.

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 Virginia UCP by FTA's Office of Civil Rights. The agenda letter notified the Virginia UCP of the planned site visit, requested preliminary documents, and informed the Virginia 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 VAUCP Certifying Members and the review team. Subsequent to the entrance conference, a review was conducted of the VAUCP agreement and other documents submitted to the review team by the VAUCP representative. Interviews were then conducted with selected VAUCP 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.

Agency	Location	Interviewed	Files Reviewed
Department of Minority Business Enterprise	Richmond, VA	June 14, 2011	June 14 -16, 2011
Metropolitan Washington Airports Authority	Northern Virginia	June 17, 2011	N/A

At the end of the review, an exit conference was held with the VAUCP Certifying Member representatives, FTA 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, a draft report was 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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Department of Minority Business Enterprise:

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

**MD DOT certified firm

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 Virginia Unified Certification Program (VAUCP) Plan indicates the UCP will follow all certification procedures and standards of 49 CFR Part 26. The files reviewed during the compliance review supported that VAUCP followed 49 CFR Part 26.61 regarding burden of proof allocation. The applications contained a signed, notarized statement from individuals presumed to be socially and economically disadvantaged.

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 found with the requirement for Group Membership. However, an advisory comment was made regarding group membership determinations.

The certification application used by the Department of Minority Business Enterprise (DMBE) has a section entitled *Additional Information Required by the Virginia UCP*. One of the items states, "If claiming Minority status, you may be asked to submit documentary proof of status such as a government-issued photo-ID or other document (e.g. birth certificate) showing minority status, membership in minority cultural organizations (e.g. Hispanic Chamber of Commerce, Minority church), letters of recommendation from the Minority community in which you are claiming membership, or a Tribal Card from a Native American Tribe."

The review team advised the Virginia UCP representatives to refer to the 2003 DBE Federal Register for guidance on ensuring that you do not cause an undue burden on a particular group member. Procedures were also recommended for the UCP concerning group membership. These procedures should discuss if proof of group membership will be collected from all applicants or on a case-by-case basis and ensure that the procedures in Part 26.63 are followed.

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, no deficiencies were found with the requirement of business size.

The VAUCP certification members indicated that they utilize the North American Industry Classification System (NAICS) codes to determine if an applicant firm meets the requirements of 13 CFR Part 121 for the appropriate type(s) of work the firm seeks to perform in DOT-assisted contracts. The VAUCP certifying members interviewed were also aware of the adjustment to the DOT DBE business size standard from \$20.41 million to \$22.41 million.

In response to an annual update request for the 2009 tax returns, the DBE firm [REDACTED] notified the DMBE that they had exceeded the DOT's size standard. Subsequently, the DMBE sent the firm a letter notifying the applicant that it had exceeded the \$22.41 million DOT size standard and was no longer eligible for the program.

4. Social and Economic Disadvantage

A) Presumption of Disadvantage

Basic Requirement: (49 CFR Part 26.67 (a)(1)) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement for presumption of disadvantage. However, an advisory comment was made in regards to presumed disadvantaged members.

The review team recommended that the DMBE amend their DBE Evaluation Procedures (revised 10/21/2005) to include the designated presumptively socially and economically disadvantaged group members. The document identified the following groups to be presumed disadvantaged: Black Americans, Hispanic Americans, Asian Indians, Native Americans, Portuguese, and/or women. The DBE regulations major categories of presumed disadvantaged members include Black American, Hispanic Americans, Asian Pacific Americans, Sub-continent Asian Americans, Native Americans, and women.

The DBE regulation in Part 26.61 (c) states you must presume members of groups identified in Part 26.67(a) are socially disadvantaged. This means they do not have the burden of proving to you (UCPs) that they are socially and economically disadvantaged. Part 26.67 (a)(1) requires the applicant to submit a signed, notarized certification that the disadvantaged owner is socially and economically disadvantaged. This notarized Affidavit of Certification is part of the Uniform Certification Application found in Appendix F of the DBE regulations. The certification files reviewed by the review team included the statement of disadvantage.

B) 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, no deficiencies were found with the requirement for Personal Net Worth (PNW) statements. However, advisory comments were made.

During the onsite review, representatives from DMBE indicated that all DBE owners are required to submit a personal financial statement. The VAUCP personal financial statement was reviewed for compliance with this part. The preceding page includes instructions for completing the personal financial statement which indicates that “companies with more than one DBE owner should require EACH disadvantaged owner to complete the personal financial statements.” The instructions that are actually on the personal financial statement indicate to complete this form for each disadvantaged owner the company relies for its DBE certification.

The DBE regulations state in part 26.67 (a)(2), that each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon must submit a personal financial statement. The DMBE representatives must ensure that this process is followed in form and in practice. Representatives from MWAA indicated that personal financial statements are collected from individuals whose certification is relied upon.

The certification file for [REDACTED] was reviewed during the onsite review. The firm was a new applicant seeking DBE certification in 2009. The applicant was denied certification due to the owner exceeding the allowable personal net worth cap. There was limited documentation as to what was excluded from the individual’s net worth. The instructions preceding the personal financial statement advise the applicant not to include the assets or liability of the applicant’s primary residence because it is exempt. The instructions also state that the applicant business equity is exempt; however, there was no mention of not including the business equity in the calculation. The review team could not find documented analysis from the DMBE specialist as to considerations of exclusions in the calculation personal net worth for the files reviewed, i.e. exclusions for business equity, retirement accounts, etc. The review team recommended more documentation of personal net worth analysis for audit and quality control purposes.

C) 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 Virginia UCP certifying members interviewed from DMBE and MWAA understood the requirements of Appendix E in the DBE regulations. The DMBE representative indicated that there are approximately five firms certified under Appendix E. These firms were certified prior to the current administration and executive staff and were considered by DMBE as questionable. However, current DMBE staff indicated that due to removal requirements in 26.87 regarding reinterpretation of regulations, they could not initiate removal proceedings. Representatives from MWAA indicated that two or three firms have applied for certification under Appendix E during their tenure and all had been denied.

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 certification file for [REDACTED] raised questions regarding ownership. [REDACTED], a Maryland firm, gave 10% ownership to a non-DBE firm for a loan for operating capital. A copy of the Maryland DOT on-site visit provided some background information on the loan and mentioned that the promissory note was provided for the file. This file was approved by DMBE as part of a streamlined process under the MOU between Maryland, Virginia and the District of Columbia. Therefore, this DMBE file included limited background information regarding the considerations of the promissory note from the non-DBE firm.

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, deficiencies were found with determining control.

Several of the certification records raised questions concerning control by socially and economically disadvantaged owners. [REDACTED] is a Virginia based firm that was denied certification based on the owner exceeding the personal net worth limit. However, upon review of the certification record several control issues existed that were not included in the denial letter. The firm was seeking certification in NAICS codes 484220 Flatbed Trucking, Local and 484230 Flatbed Trucking, Long Distance. The comments from the DBE Document Checklist completed by the certification specialist indicated that the company traded as a broker; did not own any trucks itself but purchased some trailers; and leased flatbed trucks from [REDACTED], owned by the non-disadvantaged husband, and also from other smaller trucking companies and independent operators.

Other areas of concern were the lack of documentation and analysis in files for socially and economically owners when other disadvantaged individuals were involved in the firm. [REDACTED] was a Maryland DOT certified firm that identified the disadvantaged wife as the 100% owner. The certification application indicated that the husband, a disadvantaged individual, owned another company. The wife was primarily responsible for administrative functions. Even though both are socially and economically disadvantaged individuals, the presumed lack of technical experience of the wife and 100% owner could have raised questions of her control.

A lack of control documentation was also noted for [REDACTED], a Virginia based firm, with socially and economically disadvantaged spouses owning 51% (wife) and 49% (husband) interests. The certification file was missing the operating agreement for the firm.

The review team also noted concerns about the terminology used in the DMBE Handbook for DBE Analysts. Section 4H of the handbook mentions that state law “requires that a professional engineering (P.E.) firm’s owner and controller must have a professional engineer’s license. The majority owner must have the P.E. License to control the firm.” The DMBE training manual did not include this specific requirement. The DMBE representative clarified that the handbook was drafted by a previous administration and was an incorrect statement of current state law requirements and would be amended.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA’s Office of Civil Rights a plan and schedule for ensuring that control documentation is collected and analyzed for all applicant firms.

2011 DBE Program Rulemaking

The regulations state that you cannot limit the number of NAICS codes of which a firm is eligible. The VAUCP certification application limits the NAICS codes to ten categories. This will need to be revised to be in accordance with the new regulations.

Recipient Response:

The FTA compliance review team selected and reviewed files from the time period of FY2009. The current DMBE management team identified DBE control requirement issues in 2009, and implemented corrective actions at that time. In February 2010, DMBE required all Certification Officers and other staff to attend mandatory DBE in-house training. On February 18, 2010 a two hour training session was held focused on control issues (49 CFR 26.1). On March 4, 2010, another two hour training session was held focused on the denial process. Additionally, a certification officer was assigned as Quality Control Officer for Quality Assurance to ensure adherence with 49 CFR Part 26 requirements.

Action steps to ensure compliance	Date of final implementation
Step 1: Certification Officers (CO) will review 49 CFR 26.71 for complete understanding	2/16/10
Step 2: CO will participate in a two hour group training conducted by DMBE Management staff	2/16/10
Step 3: CO meetings to present any control determination issues to Certification Manager	7/1/11
Step 4: CO continuing education and training	Continuous
Step 5: Six month evaluation and review	6/30/12

FTA Response:

Certification activity for fiscal years 2009 and 2010 was requested in preparation for the review. The certification determinations for the files in question were completed prior to the DBE In-house training conducted by DMBE. FTA accepts the action steps that have been completed and the six month evaluation to be conducted on June 30, 2012. Submit to FTA Office of Civil Rights by July 13, 2012, the results of the scheduled six month evaluation and review performed by the UCP.

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 DMBE training manual included detailed information concerning Alaska Native Corporations and Native Hawaiian organizations. The manual gave historical information on legislation and how to address applicants seeking certification from these organizations.

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 the VAUCP Agreement.

The Commonwealth of Virginia Department of Transportation (VDOT) served as the lead agency for the Virginia UCP before delegating responsibilities to DMBE. A March 2002 letter from VDOT to the Federal Highway Administration regional office in Richmond, VA was provided to the review team. The letter indicated that the Virginia UCP agreement was executed and forwarded to FHWA for approval. The DMBE representatives advised the review team that much of the historical UCP information was not transferred from VDOT.

The Virginia UCP plan indicates that five recipients of USDOT funds and/or grants are signatories to the Commonwealth of Virginia's Unified Certification Program. The signatories include Virginia Department of Transportation (VDOT), Metropolitan Washington Airport Authority (MWAA), Virginia Department of Rail and Public Transportation (VDRPT), Virginia Department of Aviation (VDOA), and Virginia Port Authority (VPA).

The plan also included a VAUCP Sub Recipient Agreement for VDOA recipients to sign. However, the DMBE representatives indicated that they have had a difficult time getting the smaller airports and other transit recipients to become signatories to the VAUCP.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan and schedule to have all DOT recipients in Virginia become signatories to the Virginia UCP.

Recipient Response:

All USDOT recipients in Virginia will be included as signatories to the planned Virginia UCP agreement. All recipients will be requested to attend a kick-off meeting to revise

the Virginia UCP agreement and the new agreement will be signed by the end of April 2012.

Action steps to ensure compliance	Accomplished by
Step 1: DMBE to identify and make contact with all recipients and sub-recipients in Virginia	2/28/12
Step 2: DMBE to draft updated VAUCP agreement for all recipient and sub-recipients to sign	3/30/12
Step 3: Obtain FHWA approval of updated VAUCP agreement	4/15/12
Step 4: Obtain signatures on all VAUCP agreements	4/30/12
Step 5: receive signed VAUCP agreements and sub-agreements from recipients and sub-recipients in Virginia	5/15/12

FTA Response:

FTA accepts the action plan and schedule to obtain all signatures from USDOT recipients for the Virginia UCP agreement. Submit to FTA Office of Civil Rights by June 1, 2012, verification that all USDOT recipients are signatories to the Virginia UCP.

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, deficiencies were found with the requirements for the UCP directory.

The Virginia UCP directory is maintained by the DMBE and includes the firm’s contact information, VDOT work codes, NAICS codes and description, certifying agency, and type of DBE certification designation, i.e. MBE or WBE. The directory is updated with DMBE information daily and as changes occurs. Metropolitan Washington Airport Authority sends certification information to DMBE to upload to the directory on a weekly basis and also has its own directory of firms they have certified on their website.

The Virginia UCP is currently addressing duplication issues with firms applying to both locations and showing on both directories. To address the issue, DMBE is receiving certification information monthly from MWAA of files received, completed, removed and denied to look for duplicates. MWAA representatives indicated that they send information to DMBE more frequently than monthly. The current system is in need of reform because one of the files selected by the review team, [REDACTED], was removed by DMBE but continued to be included in the UCP directory as a certified firm by MWAA. The firm maintained certifications with both agencies until they were removed by DMBE for failure to submit annual update information.

The Virginia UCP representatives were also reminded that Airport Concessionaire DBEs (ACDBEs) are also included in the directory and must be identified as such. The DBE

regulations for 49 CFR Part 23.31 require that the UCP directory specify whether a firm is certified as a DBE for Part 26, an ACDBE for Part 23, or both. This information is captured in the additional information section of the Virginia UCP application.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA’s Office of Civil Rights a plan and schedule to:

- eliminate duplication of certification efforts by both agencies; and
- identify if the firm is an ACDBE in accordance with 49 CFR Part 23.31

January 2011 DBE Program Rulemaking

Requires that directories include by August 26, 2011, the most specific NAICS codes that describe the type of work for which DBE are certified. Virginia UCP is in compliance with the NAICS designation requirement.

Recipient Response:

Address duplicates in directory and with agencies; identify if the firm is an ACDBE in accordance with 49 CFT 23.31. All duplication in UCP directory and also in efforts by DMBE and MWAA has been eliminated and ACDBE’s are identified in accordance with 49 CFR 23.31.

Currently 92 firms have been identified to have received the DBE certification from both DMBE and MWAA. Approximately 72% of the firms were certified prior to 2005 when Virginia DOT was responsible for the DBE certification program. Prior to 2011, there was no mechanism to transfer secured information electronically between DMBE and MWAA to systemically verify the duplications in both certification systems. The secured system has been established between since April 2011. After months of testing, we now have a workable system to make duplication verification on a weekly basis. Meanwhile, the DMBE and MWAA are in the process of implementing the mechanism of transferring and consolidating these 92 DBE applications and documents.

Action steps to ensure compliance	Dates Accomplished
Step 1: Identify firms received certification from both DMBE and MWAA	10/15/11
Step 2: DMBE will properly identify the DBE certification agency for each of the 92	12/31/11
Step 3: DMBE and MWAA organize the DBE files to be transferred between two certification agencies to consolidate the DBE records and eliminate the duplications. The electronic systems will be updated accordingly by DMBE and MWAA to eliminate the duplications in the UCP directory	1/30/12

FTA Response:

FTA partially accepts the action plan and schedule proposed by the UCP. In addition to removing duplicates from the directory, FTA requests certification procedures to capture duplicate applications to the certifying partners in the Virginia UCP. Submit to FTA Office of Civil Rights by June 1, 2012, certification procedures to ensure that duplicate

applications are not processed and verification that all existing duplicates have been removed from the UCP 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, deficiencies were found with the requirements for on-site visits.

The Virginia UCP onsite visit form was provided to the review team. The onsite form contained comprehensive questions in regards to determining if the applicant meets eligibility requirements of the DBE program. The DMBE representatives advised the review team that a digitally recorded interview is conducted with the owner(s) of the applicant firm. The onsite form does not include questions about the applicant's jobsite. The DMBE representatives confirmed that they currently do not go out to jobsites, however, they will develop procedures for conducting the jobsite visits. The certification file record for [REDACTED] included information pertaining to a jobsite visit that was conducted by Maryland DOT.

MWAA representatives indicated that they conduct interviews with the applicant firm's owners. Jobsite visits are also conducted by MWAA, when applicable. Jobsite visits to the terminal are conducted for airport concessionaires.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan and schedule to incorporate jobsites visits into VAUCP onsite visit procedures.

Recipient Response:

DMBE has revised the VAUCP on-site visit form to include questions to collect information on any jobsite the applicant firm is performing on at the time of application. Any jobsites identified, at the time of onsite visit scheduling, will be visited to gather additional information which may be utilized to determine certification eligibility. The jobsite information will be documented on the revised on-site visit report form. On-site visit training was conducted for Agency employees on February 26, 2010.

Action Steps to ensure compliance	Dates accomplished
Step 1: DMBE develop procedures for jobsite visits, developing jobsite questions, revise on-site review report form	12/6/11
Step 2: DMBE add finalized jobsite procedure and questions to process	12/6/11
Step 3: DMBE revises on-site review form	12/6/11

Step 4: DMBE disseminates revised on-sites procedures	12/6/11
Step 5: DMBE review of on-site procedures to evaluate 49 CFR 26.83 compliance implementation	6/30/12

FTA Response:

FTA accepts the action plan and schedule proposed by the UCP. Submit to FTA Office of Civil Rights by July 13, 2012, a copy of the revised on-site visit form and results from the scheduled onsite visit procedures review at the end of June 2012.

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 Certification Application Form in Appendix F.

The requirements to use the Uniform Certification Application Form were in the 2003 amendment to 49 CFR Part 26. The Virginia UCP utilizes the appropriate certification application form for determining eligibility in the DBE program.

The 2003 DBE File Rulemaking provided recipients, with the written consent of the cognizant operating administration, to (1) supplement the uniform application form with a one to two page attachment containing the additional information collection requirements, and (2) require applicants to submit additional supporting documents not already listed in or required by the uniform application. The Virginia UCP application includes a section entitled, *Additional information required by Virginia UCP*. The section consists of requests of information such as: NAICS codes selection; Virginia Certificate of Authority to Do Business in Virginia requirements; and notice that additional minority status information may be requested.

The January 2011 DBE Program Rulemaking

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 DMBE will need to review their current policy regarding the withdrawal process for compliance with this requirement. The DBE Evaluation Process Procedures state, “a firm withdrawing their application after preliminary denial, will need to wait one year from date of preliminary denial.”

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 DBE Compliance Review, no deficiencies were found with the requirement for annual updates.

The DMBE emails the DBE two months prior to their anniversary date to notify them of the items to submit for continued certification and instructions for sending the items to DMBE. The items include a notarized affidavit of no change, contact information update, notarized personal financial statement, and last year's Federal personal and business taxes.

Two months prior to the firm's third anniversary date, an email is sent to notify the firm of their upcoming third year anniversary date. The firm must submit the same information as an annual update except a new DBE Uniform Certification Application is completed in lieu of the no change affidavit.

The MWAA representatives described a similar process for supporting documentation on annual updates. However, MWAA does not have a three year renewal process, like the DMBE. MWAA collects no change affidavits annually throughout the firm's participation in the DBE program.

The January 2011 DBE Program Rulemaking:

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 DMBE will need to modify their three year renewal procedures to comply with this new rule.

10. DOT/SBA MOU - 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, the requirement for a DOT / SBA MOU was not applicable.

The January 2011 DBE Program Rulemaking

49 CFR Part 26.84 has been removed. 49 CFR Part 26.85 was replaced with Interstate certification requirements.

The Virginia UCP application includes a section for additional information required by the UCP. A certificate of authority is required to be submitted with supporting documentation in the certification application. This section states, “If your firm is NOT a Virginia Home State company, and if you intend physically to come into Virginia to work, you need to have a Certificate of Authority to Do Business in Virginia, from the Virginia State Corporation Commission. If you do not have such a Certificate, and need one, please visit the Commission’s website at www.scc.virginia.gov to obtain one, and enclose a copy of it with your other supporting documents to this application.”

The pre-amble of the DBE Federal Register states the following, “*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 certification file records of [REDACTED] and [REDACTED] were reviewed for initial denial of certification requirements. [REDACTED] was denied on February 13, 2009 because the owner’s personal net worth exceeded the allowed limits. However, the denial letter did not include other control concerns in the applicant firm. Some of the issues the review team raised include: the husband owning a trucking company that leases to the firm; the firm owning no trucks; husband serving as operational manager of the firm; no evidence that the owner is capable of running the firm; no resume that discusses owner’s education or work experience; and owner’s job responsibilities are office administration related. All of the applicable reasons for denial should be included in the denial letter. An applicant can now reapply, under the new DBE rule that was denied certification for exceeding the former \$750,000 personal net worth limit without waiting up to a full year. The [REDACTED]

owner's net worth was under the new net worth threshold and if the denial had been within a year of the new rule, the applicant could have reapplied immediately.

[REDACTED] was denied certification on March 16, 2010 for lack of control. The DMBE determined that the disadvantaged owner's resume did not demonstrate the required skills to exhibit managerial control over the firm. The owner's non-disadvantaged husband is a civil engineer with 17 years experience in the field compared to the owner's one year of experience. The non-disadvantaged individual executed contracts and committed the firm while the disadvantaged owner had not signed documents submitted. It was DMBE's conclusion that the non-disadvantaged individual was disproportionately responsible for the operation of the firm.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan and schedule to identify other denials where economic disadvantage was the only reason for denial and other eligibility issues existed. Submit a plan and schedule to draft procedures for completing denial letters.

Recipient Response:

The FTA compliance review team selected and reviewed files from the time period of FY2009. The current DMBE management team identified issues with the written explanations supporting ineligibility and denial of DBE certification in 2009, and implemented corrective actions at that time. In February 2010, DMBE required all Certification Officers and other staff to attend mandatory DBE in-house training. On February 18, 2010 a two hour training session was held focused on control issues (49 CFR 26.1). On March 4, 2010, another two hour training session was held focused on the denial process. Additionally, a certification officer was assigned as Quality Control Officer for Quality Assurance to ensure adherence with 49 CFR Part 26 requirements.

Action steps to ensure compliance	Dates Accomplished
Step 1: Certification Officers (CO) will review 49 CFR 26.86 for complete understanding	3/4/10
Step 2: CO will participate in a two hour group training conducted by DMBE Management staff	3/4/10
Step 3: CO meetings to present any denial letter issues to Certification Manager	7/1/11
Step 4: CO continuing education and training	7/1/11
Step 5: Six month evaluation and review	6/30/12

FTA Response:

FTA partially accepts the action plan and schedule proposed by the UCP. The plan for drafting procedures for completing denial letters is addressed in the action plan. However, the corrective action also called for identification of firms denied certification due to the sole reason of not being economically disadvantaged but other issues existed. Submit to FTA Office of Civil Rights by July 13, 2012, a listing of firms that were denied certification in the past 12 months solely for economic ineligibility. Identify which of these denied firms also had other eligibility issues that were not mentioned in the letter.

Additionally, submit the results of the six month evaluation and review scheduled for the end of June 2012.

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.

Four DMBE certification file records were reviewed for compliance with removal procedures. These files included [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. All of the firm's certifications, except for [REDACTED], were removed for failure to cooperate with request for an annual update. The applicants were issued intent to remove letters outlining the reasons for presumed ineligibility. The firms were allowed 15 days from receipt of letter to submit information or request an informal hearing. The letter advised the firm that if they failed to respond within 15 days, the firm's eligibility would be removed. There was no record in the files of a final determination of removal or information advising the firms of their right to appeal to the USDOT. The review team also noted that [REDACTED] had intent to remove letters sent on April 27, 2010 and June 2, 2010. The DMBE representative indicated that a final determination letter was intended for the second letter to the firm. In an effort to "clean up the files," DMBE sent out approximately 300 to 400 removal letters to firms that had not completed annual no change affidavits.

[REDACTED] certification notified the DMBE that they had exceeded the DOT size standard of \$22.41 million. A letter of "final denial" was sent to the firm indicating their decision was based on the firm exceeding the size standard and referenced receipt of the firm's email advising the DMBE of their ineligibility to participate in the program. Since the firm was an existing DBE, a letter of removal would have been the appropriate course of action.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan and schedule to follow removal guidelines in Part 26.87 of the DBE regulation.

Recipient Response:

DMBE sent out approximately 300 to 400 removal letters to firms that had not responded or completed annual affidavits of no change. Some of these letters were not followed up with final denial and de-certification letters. DMBE has revised and corrected this issue to be in compliance with Part 26.87.

Action steps to ensure compliance	Date of final implementation
Step 1: Certification Officers (CO) will review 49 CFR 26.87 for complete understanding	11/28/11

Step 2: Certification Manager will follow guidelines and procedures outlined in Part 26.87	11/28/11
Step 3: Certification Manager will review DMBE procedures to ensure procedures are in accordance with Part 26.87	11/28/11
Step 4: Certification Manager will immediately implement the adherence to Part 26.87	11/28/11
Step 5: Six month evaluation and review	6/30/12

FTA Response:

FTA accepts the action plan and schedule proposed by the UCP. Submit to FTA Office of Civil Rights by July 13, 2012, the results of the six month evaluation and review to be conducted by UCP at the end of June 2012.

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, deficiencies were made with the appeals to the USDOT.

The Virginia UCP plan describes that each certifying member will continue their informal appeal process. The appeals process for the MWAA and DMBE is described in the UCP plan.

Applicants denied DBE certification by the MWAA may file an appeal of the denial with the President and Chief Executive Officer of the MWAA within 30 days after receipt of the denial letter. The appeal will be investigated by staff or consultants under contract with the MWAA who did not conduct the original review of the DBE certification application. At the conclusion of the appeal review, a recommendation will be made to the President and Chief Executive Officer. A disposition by the President and CEO will be rendered within 30 days of completion of the investigation and staff review. Firms denied certification may file an appeal with USDOT in accordance with 49 CFR Part 26.

The MWAA representatives confirmed this process for initial denials. There is a three person committee for certification removals. They also confirmed that an applicant or a firm removed from the program can go directly to USDOT in lieu of going through the informal appeal process.

Applicants denied DBE certification by DMBE may file an appeal with the Director of DMBE within 30 days of receipt of the denial letter. An informal hearing will be arranged with the applicant, staff, and legal counsel if the firm is represented by same. Other persons may be added to the committee. The applicant’s appeal will be investigated and the hearing will consider the issues raised by the applicant in its appeal. A final determination will be rendered within 30 days after the hearing or 30 days after receipt of requested information. Firms denied certification may appeal to the USDOT.

The DMBE representatives described their process as consisting of notifying the applicant of a preliminary denial. The applicant can rebut the reasons for denial with the certification supervisor and another specialist not involved in the denial recommendation. A final denial letter is sent to the firm advising them of their appeal rights to the USDOT. The applicant can also appeal to the Director who makes the final determination. However, the review team was advised that there is no current process to inform the applicant of the opportunity to appeal to the Director. The Director advised the review team that there were approximately three appealing firms pending her review for a final determination. It was the review team understanding that these appealing firms learned of the informal process through phone calls to the DMBE.

The current Director of DMBE was appointed to the position by local officials in July 2010. The review team was advised that appointments to the Director’s position had changed several times in the past five years. The review team expressed concerns with the Director making final determinations of eligibility for firms appealing denials. These concerns are based on the political influence of the position, frequency of turnover based on current state administration, and possible limited knowledge of DBE regulations.

The USDOT Official Questions and Answers discuss procedures for UCPs with state level appeal processes. *“UCPs should ensure that any state-level appeal process from certification decisions available to firms calls for appeals to be heard and decided by experienced, professional employees very familiar with DOT DBE program certification standards and procedures. The individuals making decisions on appeal should, to the maximum extent possible, be insulated from political pressure (e.g., by firewalls prohibiting contact with them by state or local elected or appointed officials concerning the merits or outcome of a case). In DOT’s experience, a flawed state appeal process can be worse than none at all.”*

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA’s Office of Civil Rights a plan for drafting certification appeal procedures to UCP and USDOT.

Recipient Response:

The FTA Compliance Review Team reviewed the VAUCP executed in 2002. In 2010, DMBE management identified issues regarding the informal hearing appeal process, as it was written in 2002. DMBE and MWAA had discussed the process of the President of MWAA and the Director of DMBE having authority to make final determinations in the appeals process. DMBE had determined that the VAUCP needed updating and the informal hearing appeal process section required revision to remove the option for the Director/President of the respective agencies to hear an appeal of denial from an applicant.

Action steps to ensure compliance	Date Accomplished
Step 1: DMBE schedule meeting with Department of Transportation, MWAA and other recipients needed to discuss actions required to update and revise VAUCP Agreement	12/7/11

Step 2: VAUCP Recipients review and discuss the removal of the informal hearing appeal process, specifically insulating the process from political influence/pressure	3/30/12
Step 3: VAUCP Recipients agree to remove state informal hearing appeal process and adopt use of USDOT appeal process only or draft state appeal procedures in compliance with Part 26.89	3/30/12
Step 4: VAUCP Recipients submit revised/updated agreement to FHWA, if required for approval	4/15/12
Step 5: DMBE obtains approved updated, revised, and signed VAUCP Agreement and provide to FTA	5/15/12

FTA Response:

FTA accepts the action plan and schedule proposed by the UCP. Submit to FTA Office of Civil Rights by June 1, 2012, the procedures adopted by the VUCP regarding appeals of certification determinations.

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. Virginia UCP certifying members indicated 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 DBE Compliance Review, a deficiency was found with the confidentiality issues in the VAUCP.

The USDOT 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.

The Virginia UCP plan states that each certifying member will safeguard from disclosure to unauthorized persons information gathered as part of the certification process in accordance with the requirements of 49 CFR Part 26.83. “Members in possession of such information will also safeguard the information from disclosure in accordance with 49 CFR Part 26.83. Requests for information, including media contacts, concerning a DBE or a firm that applied for DBE certification will be handled by the Certifying Member that handled the application. Members will comply with 49 CFR Part 26.83 and any applicable Freedom of Information statutes or policies in determining what information may be released.”

The review team recommends that Virginia UCP review confidentiality language in its plan regarding compliance with “any applicable freedom of information statutes or policies” if the DBE prohibitions apply even in the face of a requests under a state freedom of information or open records law. The DMBE noted that one request for information was generated for the certification of [REDACTED].

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA’s Office of Civil Rights a plan to:

- review confidentiality language and procedures in UCP plan; and
- provide dates, requesting party, and status of all requests for information

Recipient Response:

DMBE acted under the advice of the Commonwealth of Virginia Office of Attorney General regarding FOI laws. However, DMBE has since utilized procedures for compliance with DBE regulations.

Action steps to ensure compliance	Date Accomplished
Step 1: DMBE and MWAA review confidentiality language and procedures in UCP plan	1/31/12
Step 2: DMBE and MWAA develop revised and updated procedures for VAUCP plan, if applicable	2/28/12
Step 3: DMBE and MWAA identify and list request for information to determine if handled in accordance with DBE regulations.	2/28/12
Step 4: DMBE and MWAA prepare list indicating the status of all request for information, to include dates, and requesting party.	4/30/12
Step 5: Six month evaluation and review	6/30/12

FTA Response:

FTA accepts the action plan and schedule proposed by the UCP. Submit to FTA Office of Civil Rights by July 13, 2012, a listing of all FOI requests as per corrective action for past two years and results of the six month evaluation and review.

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 DBE Compliance Review, no deficiencies were made with cooperation. However, an advisory comment was made regarding dispute resolutions.

The Department's guidance 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 and UCP agreements should always include a dispute-resolution mechanism. The review team advises that Virginia UCP should develop dispute-resolution procedures. Given the existing issues in the Virginia UCP with duplication of firms certified by both agencies, disputes could arise with a duplicate firm that is denied or removed by one agency and approved the other.

Section 7 – Summary of Findings

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Submit Corrective Action Plan and Schedule for the following:	Response Days/Date
1. Burden of Proof	26.61	ND			
2. Group Membership	26.63	AC	Review language used in application for compliance with this part		
3. Business Size	26.65	ND			
4. Social and Economic Disadvantage					
a) Presumption of Disadvantage	26.67	AC	Revise term used in procedure		
b) Personal Net Worth	26.67	AC	Improve documentation and analysis of pnw forms		
c) Individual determination	26.67	ND			
5. Ownership	26.69	ND			
6. Control	26.71	D	Insufficient review of control requirements	Submit the results of the scheduled six month evaluation and review performed by the UCP.	July 13, 2012
7. Other Certification Rules	26.73	ND			
8. UCP Requirements					
a) UCP agreement	26.81	D	All recipients are not UCP signed members	Submit verification that all USDOT recipients are signatories to the Virginia UCP.	June 1, 2012
b) UCP directory	26.31	D	Duplicates in UCP directory	Submit certification procedures to ensure that duplicate applications are not processed and verification that all existing duplicates have been removed from the UCP directory.	March 1, 2012
9. UCP Procedures					
a) On-site visits	26.83	D	Not conducting job site visits	Submit a copy of the revised on-site visit form and results from the scheduled onsite visit procedures review at the end of June 2012.	July 13, 2012

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Submit Corrective Action Plan and Schedule for the following:	Response Days/Date
b) Uniform Application	26.83	ND			
c) Annual Updates	26.83	ND			
10. Interstate Certification	26.85	N/A			
11. Denials					
a) Initial Request	26.86	D	Not including all applicable reasons for ineligibility in denial letters.	Submit a listing of firms that were denied certification in the past 12 months solely for economic ineligibility. Identify which of these denied firms also had other eligibility issues that were not mentioned in the letter. Additionally, submit the results of the six month evaluation and review scheduled for the end of June 2012.	July 13, 2012
b) Remove Existing	26.87	D	No final determination letters or opportunity to appeal to USDOT	Submit the results of the six month evaluation and review to be conducted by UCP at the end of June 2012.	July 13, 2012
c) Appeals	26.89	D	Informal appeal process not free from political influence	Submit the procedures adopted by the VUCP regarding appeals of certification determinations.	June 1, 2012
12. Compliance and Enforcement					
a) DBE Enforcement Actions	26.107	ND			
b) Confidentiality	26.109	D	Language references compliance with FOI laws	Submit a listing of all FOI requests as per corrective action for past two years and results of the six month evaluation and review.	July 13, 2012
c) Cooperation	26.109	AC	Incorporate dispute resolution procedures		

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
FTA:				
Ryan Inman	FTA - Office of Civil Rights (via teleconference)	EO Specialist, DBE Technical Lead	202-366-5017	Ryan.inman@dot.gov
VAUCP Members:				
Ida Outlaw McPherson	Dept. of Minority Business Enterprise	Director	804-371-6228	Ida.mcpherson@dmbe.virginia.gov
Angela Chiang	Dept. of Minority Business Enterprise	Director of Operations	804-786-1087	Angela.chiang@dmbe.virginia.gov
Calvin Thweatt	Dept. of Minority Business Enterprise	Certification & Technical Service Manager	804-786-3109	Calvin.thweatt@dmbe.virginia.gov
Richard Gordon	Metropolitan Washington Airport Authority	Equal Opportunity Manager	703-417-8360	Richard.gordon@mwa.com
Betty Toulson	Metropolitan Washington Airport Authority	Equal Opportunity	703-417-8360	Betty.toulson@mwa.com
Milligan & Co LLC:				
Benjamin Sumpter	Milligan & Co., LLC	Lead Reviewer	215-496-9100	Bsumpter@milligancpa.com
Habibatu Atta	Milligan & Co., LLC	Reviewer	215-496-9100	Hatta@milligancpa.com