

TRANSPORTATION RESEARCH BOARD

Determining Social and Economic Qualifications in the DBE Program

October 15, 2020

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- This webinar is eligible for 1.75 CLE credits
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Learning Objectives

1. Correctly question a claim of group membership within the bounds of DBE regulation
2. Determine whether a firm owner not claiming a presumption of disadvantage meets the criteria for an individualized showing of disadvantage

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United States Department of Transportation

Roadmap for Evaluating Social & Economic Disadvantage in the Disadvantaged Business Enterprise (DBE) & Airport Concession DBE (ACDBE) Programs

Presented by Aarathi D. Haig and Samuel F. Brooks
Departmental Office of Civil Rights

October 2020

Presentation Outline

Part I: Introductions and Program Highlights

Part II:

- A. Presumption of social disadvantage
- B. Individualized determinations of social disadvantage
(Appendix E)

Part III:

- A. Presumption of economic disadvantage
- B. Individualized determinations of economic disadvantage
(Appendix E)

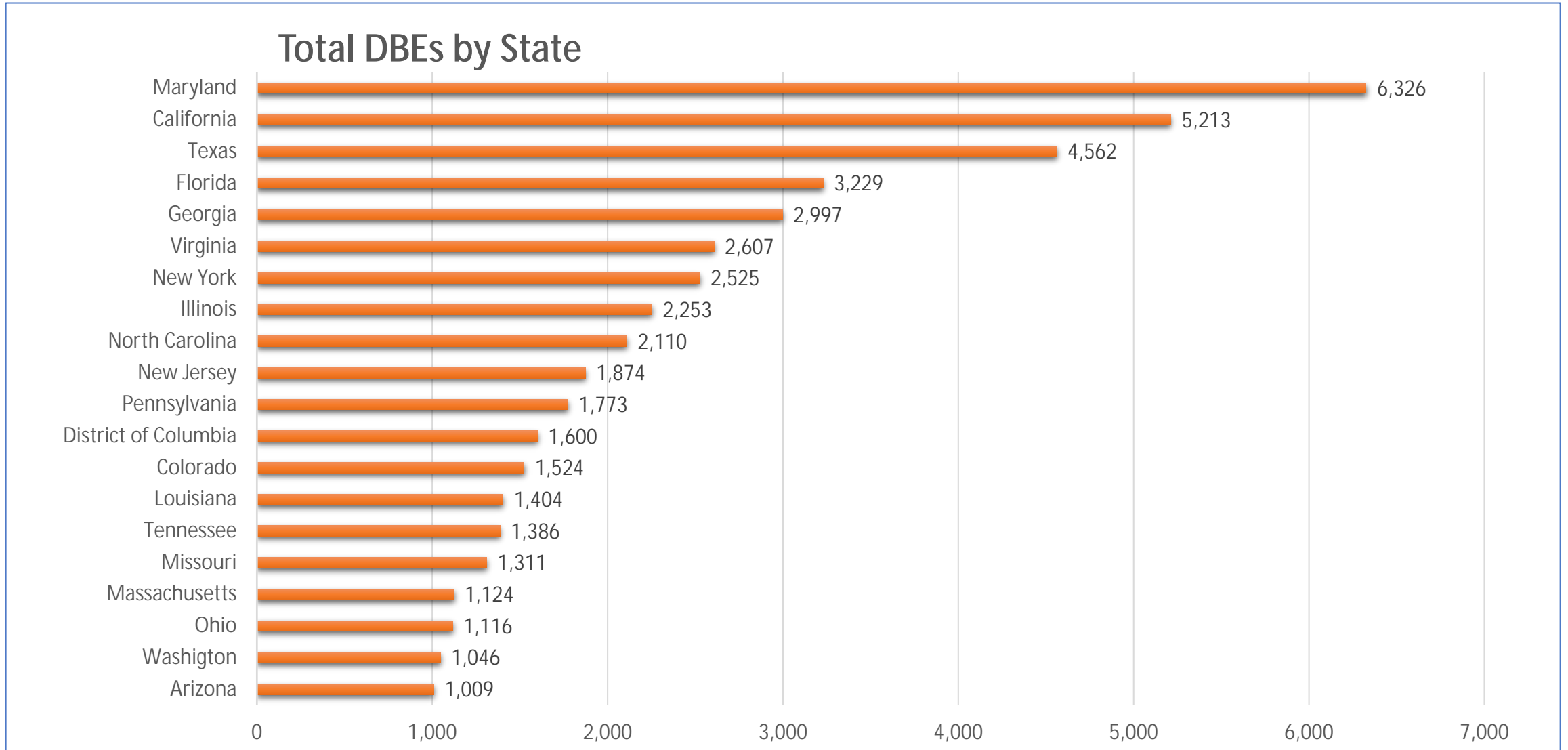
Part I:

Introductions & Program Highlights

DBE/ACDBE Program Highlights

- More than **40,000** DBE and ACDBEs in the nation
- Each year USDOT awards **\$4 - 5 billion** to DBE firms, with approximately **25,000** subcontracts
- Wide array of industries – e.g., design, architecture, construction, supply, concessions, and many more
- DBE and ACDBE certification can help small businesses reach their full potential as the national economy reopens and recovers

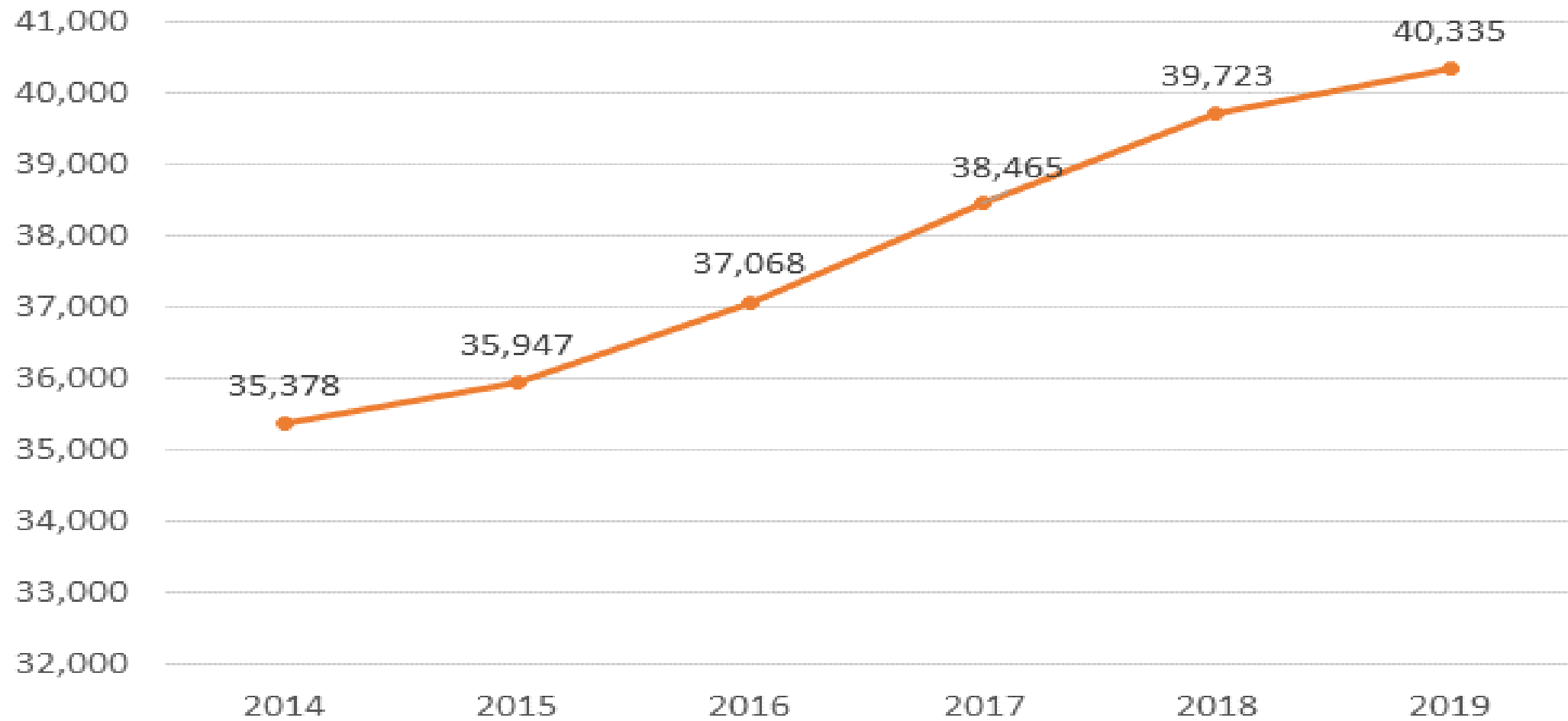
Total DBEs By State



Total DBEs By State



Total DBEs Nationwide



What You Will Learn



- ü Who is presumed socially and economically disadvantaged (SED)
- ü Burden of proof
- ü How to question group membership and personal net worth
- ü How to confirm Native American status
- ü How to evaluate individual claims of disadvantage under section 26.67(d) and Appendix E
- ü Understand pertinent appeal decisions

Certification Eligibility Nutshell



- At least one individual who is both **socially and economically disadvantaged** (SED) must **own at least 51%** of the applicant firm;
- **Personal net worth** (PNW) of the SED owner(s) must not exceed **\$1.32 million**;
- An SED owner(s) must **control** the firm's daily and long-term business operations; and
- Firm's **3-year average annual gross receipts** must not exceed **\$23.98 million** (\$56.42 million for ACDBE firms)

Part II (A):

Presumed Social Disadvantage

Groups Rebuttably Presumed SED

- Black Americans
- Hispanic Americans
- Native Americans (including Native Hawaiians and Native Alaskans)
- Asian-Pacific Americans
- Subcontinent Asian Americans
- Women



Definition of “Black Americans” (49 CFR 26.5)

“Persons having origins in any of the
Black racial groups of Africa”

Definition of “Hispanic Americans” (49 CFR 26.5)

“Persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race”

Definition of “Native Americans” (49 CFR 26.5)

“Persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians”

Definition of “Asian-Pacific Americans” (49 CFR 26.5)

“Persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong”

Definition of “Subcontinent Asian Americans” (49 CFR 26.5)

“Persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka”

Definition of “Native Americans” (49 CFR 26.5)

“Persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians”

Clarification in 2014 Final Rule:

- An individual must be an **enrolled member** of federally or state-recognized Indian tribe to receive the presumption of social disadvantage
- Individuals who are a member of a federally recognized tribe are eligible nationwide

Definition of “Indian Tribe” (49 CFR 26.5)

“Any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides”

Native American Status

Verify membership based on evidence the applicant provides, e.g., tribal enrollment card, letter from community group or government agency

Applicant's Burden of Proof



“More likely than not” (preponderance of the evidence)

- ü Signed and notarized statement of group membership (social disadvantage)
- ü Signed and notarized PNW statement with supporting documents (economic disadvantage)

Questioning Group Membership



- “Well founded reason” – written explanation and written request for additional info
- Recipient can require an individual to demonstrate that he or she has **held himself or herself out** as a member of a designated group

See **Preamble of 1999 Final Rule** (Fed. Reg. Vol. 64 Feb. 2, 1999, pp. 5117-5118) and **Preamble of 2003 Final Rule** (Fed. Reg. Vol. 68, June 16, 2003, p. 35550)

Questioning Group Membership: Case Study

18-0071 Subsurface & Tunnel Engineering, LLC

(March 18, 2019) (remand followed by certification)

- Applicant's evidence of Black American group membership: sworn statement, family photos, passport with place of birth
- Interstate certification: questioning group membership not a "good cause" reason for denial

Questioning Group Membership: Case Study

19-0157 Rountree Construction, Inc. (Feb. 28, 2020) (affirmed)

- Two months after Mr. Rountree became majority owner, firm applied for DBE certification, with Mr. Rountree claiming to be Native American and Native Hawaiian
 - GDOT properly **questioned** Mr. Rountree's group membership
 - GDOT **denied** certification because Mr. Rountree failed to proffer any evidence of group membership
- One year later, Mr. Rountree claimed Hispanic American group membership after a Georgia state court agreed to amend his birth certificate
 - GDOT denied the application on multiple ownership and control grounds

Questioning Group Membership: Case Study

19-0157 Rountree Construction, Inc. (cont'd)

- Two years later, Rountree reapplied
 - GDOT **denied** certification after challenging Mr. Rountree's Hispanic American group membership
- Rountree **appealed** and the Department **remanded** for GDOT to more fully explain its denial rationale
 - GDOT issued a **new denial decision**, finding that Mr. Rountree does not meet sections 26.71(k) and (l) requirements (control)
 - Rountree **appealed**; the Department **affirmed** under section 26.71(l)

Questioning Group Membership: Case Study

14-0191 Orion Insurance Group (Sept. 24, 2015) (affirmed)

- Applicant's evidence of "holding himself out": Ebony magazine subscription, community organization membership, DNA analysis
- Certifier found applicant did not "hold himself out" after evaluating evidence presented
- Ninth Circuit Court of Appeals upheld the denial decision
- SCOTUS did not accept appellant's writ of certiorari

See also **20-0038 Lonestar Program Control Group, LLC** (March 30, 2020) (affirmed)

Questioning Group Membership: Case Study

17-0018 Precision Layout Design (June 16, 2017) (remanded)

- Applicant (Ricky Gonzales) was born in Mississippi and both parents listed as “white” on his birth certificate
- GUCP acknowledged that “Gonzales” is “traditionally associated with Hispanic or Spanish origins” but decided that he is white because:
 - No evidence that he originated from Mexico, Puerto Rico, Cuba, Dominican Republic, Central or South America, or other Spanish or Portuguese origins
 - No evidence that he **held himself out** to be a member of the Hispanic community

Questioning Group Membership: Case Study

17-0018 Precision Layout Design (cont'd)

- GUCP did not give Mr. Gonzales a written “**well founded reason**” for questioning his Hispanic American status or request additional info
- Instead, GUCP evaluated his application under the criteria in Appendix E of the Regulation

Part II (B):

Social Disadvantage under Appendix E

Who Else Might Be SED?

An individual who a recipient finds SED on case-by-case basis under section 26.67(d) and criteria in **Appendix E. Examples***:

- Persons with disabilities
- Veterans**
- Members of Native American tribes that are not federally or state-recognized
- Persons of Middle Eastern origin
- Individuals living outside American mainstream society
- White males

**This list is not exhaustive*

**See Q&A at <https://www.transportation.gov/sites/dot.gov/files/2020-01/docr-20180425-001part26qa.pdf>

Appendix E: Background

- Policy objective is to *include* firms owned by individuals who are not presumptively SED
- Appendix E is an analytical rubric; it is the **guidance**, not the rule
- Appendix E tells certifiers what **factors** they should consider
- Applicant's **overall showing** determines the result

Appendix E Social Disadvantage: Definition

“Socially disadvantaged individuals are those who have been subjected to **racial or ethnic prejudice or cultural bias within American society** because of their identities as members of groups and **without regard to their individual qualities**. Social disadvantage must stem from **circumstances beyond their control**.”

Appendix E Social Disadvantage: Burden of Proof

Applicant must show that he is **more likely than not** socially disadvantaged based on his own **specific, substantial, and chronic experiences** of negative impact due to his identity as a member of a group and without regard to his individual qualities.

See, e.g., 16-0161 Skeens Excavating LLC (April 16, 2017) (affirmed) – general societal hardship does not equate to substantial and chronic disadvantage resulting from living outside mainstream American society

Appendix E Social Disadvantage

- (A) At least one **objective distinguishing feature** that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;
- (B) **Personal experiences** of substantial and chronic social disadvantage in American society, **not in other countries**; and

Appendix E Social Disadvantage Criteria (cont.)

(C) **Negative impact on entry into or advancement in the business world** because of the disadvantage. Recipients will consider **any relevant evidence** in assessing this element. In every case, however, recipients will consider **education, employment and business history**, where applicable, to see if the **totality of circumstances** shows disadvantage in entering into or advancing in the business world.

See, e.g., 18-0151 Subsurface Exploration Consultants, LLC (April 5, 2019) (remand) - applicant's inability to provide examples of all three elements of social disadvantage does not automatically result in ineligibility.

Part III (A):

Presumed Economic Disadvantage

Rules for Presumed SED Individuals

- Each individual whose ownership and control are relied on to qualify for DBE certification must have a PNW that does not exceed **\$1.32 million**:
 - Signed and notarized PNW statement (DOT PNW form)
 - Appropriate supporting documentation
- On a case-by-case basis, certifiers may require additional financial information, e.g., spouse's assets

Personal Net Worth Calculation

- Exclusions:
 - Ownership interest in applicant firm
 - Equity in primary residence
 - Contingent liabilities
- Include only **present value** of assets held in vested pension plans, IRAs, 401(k) accounts, etc., less the tax and interest penalties that would accrue if assets were distributed at present time
- Transfers within two years

Rebuttal of Presumption of Economic Disadvantage

- If personal net worth (PNW) statement and supporting documentation show that the individual's **PNW exceeds \$1.32 million**
- Individual's **ability to accumulate substantial wealth**
 - Certifier must initiate proceedings consistent with sections 26.67(b)(2) and 26.87
 - **Certifier bears burden of proof** in such a proceeding

Part III (B):

Economic Disadvantage under Appendix E

Appendix E: Economic Disadvantage

(A) ***General.*** Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to **diminished capital and credit opportunities** as compared to others in the same or similar line of business who are not socially disadvantaged.

(B) ***Submission of narrative and financial information.***

(1) Each individual claiming economic disadvantage must describe the conditions which are the basis for the claim in a **narrative statement**, and must submit **personal financial information**.

Appendix E: Economic Disadvantage (cont.)

(C) Factors to be considered.

In considering diminished capital and credit opportunities, recipients will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including **personal income for the past two years** (including bonuses and the value of company stock given in lieu of cash), **personal net worth**, and the **fair market value of all assets**, whether encumbered or not. Recipients will also consider the **financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification**, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that recipients will compare include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.

Appendix E: Economic Disadvantage (cont.)

(D) Transfers within two years.

(1) Except as set forth in paragraph (D)(2) of this appendix, recipients will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the DBE program, **unless** the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

Appendix E: Economic Disadvantage (cont.)

(D) *Transfers within two years* (cont.)

(2) Recipients will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(3) In determining an individual's access to capital and credit, recipients **may consider** any assets that the individual transferred within such two-year period described by paragraph (D)(1) of this appendix that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).

Appendix E Economic Disadvantage: DOT's Observations

- Unlikely that applicant can obtain reliable information concerning direct competitors' financial metrics.
- Unlikely that a certifier can precisely compare an applicant firm's overall financial condition to that of non-disadvantaged businesses in the same or similar prime industry classification. **Rougher comparisons are permissible and can be made based on publicly available data.**

See, e.g., 17-0029 McKay HVAC & Mechanical, Inc. (July 19, 2017)
(reversed)

Appendix E Tripwires



- Do not deny an application because applicant did not apply under Appendix E; notify applicant of Appendix E requirements and request him to submit appropriate evidence
 - *See, e.g., 17-0018 Precision Layout Design* (June 16, 2017) (remanded)
- Applicant need not have filed a formal discrimination claim or grievance in order to demonstrate negative impact on employment.
 - *See, e.g., 17-0090 US Comfort Building Services* (Nov. 20, 2017) (reversed in part, affirmed in part)

Appendix E Tripwires (cont.)



- Evaluate evidence of social disadvantage that occurred *after* the onset of disability or other social disadvantage
 - See, e.g., **18-0151 Subsurface Exploration Consultants, LLC** (April 5, 2019)
- Ability to obtain *some* employment does not automatically equate to zero negative impact on employment
 - See, e.g., **17-0090 US Comfort Building Services** (Nov. 20, 2017) (reversed in part, affirmed in part)

Additional Noteworthy Decisions

03-0067 Paige International, Inc. (Oct. 9, 2004) (Dept's decision affirmed by U.S. District Court, District of Columbia) (Paige Intern., Inc. v. U.S. Dept. of Transp., Not Reported in F.Supp.2d (2005))

08-0182 Best Wood Judge Firewood & Tree Service (Jan. 28, 2009) (Dept's decision affirmed following litigation)

12-0002 Green Clean California, Inc. (Aug. 13, 2013)

17-0096 Appalachian American Enterprises (Nov. 30, 2017)

More information about DBE/ACDBE programs
available at:

[https://www.transportation.gov/civil-
rights/disadvantaged-business-enterprise](https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise)

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Questions?

Comments?

Ideas?

Today's Panelists

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Moderator: Marc Pentino

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Transportation
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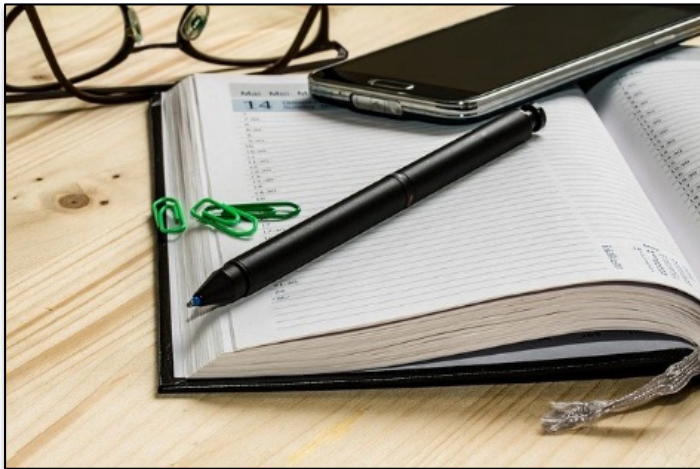
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