



**American  
Public Transportation  
Association**

October 31, 2022

---

**EXECUTIVE COMMITTEE**

CHAIR

Dorval R. Carter, Jr.

VICE CHAIR

Adelee Le Grand

SECRETARY-TREASURER

Jeffrey Wharton

IMMEDIATE PAST CHAIR

Jeffrey A. Nelson

Jose Bustamante  
Bill Carpenter  
Francis "Buddy" Coleman  
Jim Derwinski  
Dawn Distler  
Denise Figueroa  
Jannet Walker-Ford  
Carolyn Gonot  
Michele Wong Krause  
Richard J. Leary  
Henry Li  
MJ Maynard  
Raymond J. Melleady  
Allan Pollock  
Naomi Renek  
Leslie S. Richards  
Rita A. Scott  
Doug Tisdale  
Thomas Waldron

---

**PRESIDENT AND CEO**

Paul P. Skoutelas

Docket Operations  
U.S. Department of Transportation  
1200 New Jersey Avenue, SE  
West Building, Ground Floor  
Room W12-140  
Washington, DC 20590-0001

Re: DOT-OST-2022-0051

Dear Docket Clerk:

The American Public Transportation Association (APTA) represents an \$80 billion industry that directly employs 450,000 people and supports millions of private-sector jobs. We are pleased to offer comments regarding the Department of Transportation's (DOT) Disadvantaged Business Enterprise and Airport Concession Disadvantaged Business Enterprise Program Implementation Modifications published in the *Federal Register* at 87 FR 43620 on July 21, 2022.

The DOT's Disadvantaged Business Enterprise (DBE) program was established through a series of legislative and regulatory initiatives to remedy past and current discrimination against minority- and women-owned businesses to ensure that they are provided equal opportunity to compete for DOT-assisted public transit, highway, and airport contracts. APTA and its members are strong supporters of the DBE program, and are diligent in administering the program to promote DBE participation in Federal Transit Administration (FTA)-funded projects.

Over the past two years, the public transportation industry has received historic funding levels, including \$70 billion in COVID-19 emergency relief and more than \$200 billion of public transit and passenger rail investment over the next five years. Our industry will be defined by the opportunities that we provide for minority and disadvantaged businesses

---

1300 I Street NW  
Suite 1200 East  
Washington, DC 20005  
p: (202) 496-4800  
f: (202) 496-4324

**APTA.COM**

to share in this historic funding. APTA members stand ready, willing, and able to assist in this effort.

While certain revisions to the DBE program have long been sought, such as some of the proposed certification changes, other aspects of the DBE Notice of Proposed Rulemaking (NPRM) appear to either complicate or substantially increase the burden on recipients and businesses who are seeking to comply with DBE rules. APTA is concerned that the NPRM focuses on compliance, as opposed to building a capacity-enhancing, collaborative program designed to ensure the accessibility and success of DBE businesses competing for public transit-related projects. Moreover, many APTA members believe that the program is long-past due for a name change, as the term “Disadvantaged” has negative connotations. APTA suggests DOT consider renaming the program to better reflect the fact that its purpose is to help “Historically Underutilized Businesses” gain a foothold in the infrastructure industry.

APTA surveyed its members and submits the following comments below.

## **I. DBE Administrative Requirements**

### **a. Definitions**

In § 26.5, DOT proposes to change the definition of DBE to mean a for-profit small business concern engaged in “transportation-related industries.”<sup>1</sup> APTA is concerned the term “transportation-related industries” is not defined in the proposal and could lead to differing interpretations among DBE certifiers. APTA suggests DOT include either a definition of “transportation-related industries” or guidance on how to evaluate whether a business is in a “transportation-related industry.”

### **b. Threshold Program Requirements (§ 26.21)**

In § 26.21, DOT proposes to increase the cumulative threshold requirement for an FTA recipient to maintain a DBE program, from \$250,000 to \$670,000 for FTA recipients receiving planning, capital and/or operating assistance. These recipients must have a local DBE program, meeting certain requirements of 49 C.F.R. Part 26.<sup>2</sup> APTA supports increasing the cumulative threshold as it will help reduce the burden on FTA recipients awarding contracts with a low-dollar value.

### **c. Unified Certification Program (UCP) Directories (§ 26.31)**

APTA supports DOT’s proposal to direct UCPs to expand their directories of DBE firms, allowing them to display other essential information about DBEs that attests to the firms’ ability, availability, and capacity to perform work.<sup>3</sup> DOT proposes to require UCPs to amend their

---

<sup>1</sup> DOT, Disadvantaged Business Enterprise and Airport Concession Disadvantaged Business Enterprise Program Implementation Modifications (DBE NPRM), 87 Fed. Reg. 43620, 43669 (July 21, 2022).

<sup>2</sup> *Id.* at 43670.

<sup>3</sup> *Id.* at 43627, 43670-43671.

directories so that firms would have a “standard set of options for information they can choose to make public, such as a capability statement, state licenses held, pre-qualifications, personnel and firm qualifications, bonding coverage, recently completed project(s), equipment capability, and a link to the firm’s website.”<sup>4</sup> Under the proposed rule, UCPs would be required to incorporate these information fields as additional criteria by which the public can search and filter the UCP directory. APTA agrees that creating additional categories in UCP directories would be very helpful and allow prime contractors to conduct targeted and meaningful outreach to DBE firms.

In addition, APTA encourages DOT to require UCP DBE directories to be uniform in format as well as searchable. APTA members note that the ease of searching and downloading data differs by state. Each directory should have the ability to download data into a universal format (e.g., Excel) to allow both prime and general contractors to easily search for available DBEs. Some APTA members advise that California, New York, New Jersey, and Pennsylvania are good models of organized, searchable, and accessible UCP DBE directories. Uniform, easily accessed, and downloadable DBE lists would assist in pairing contractors with available DBEs for projects.

**d. Monitoring, Reporting, and Prompt Payment Requirements**

**i. Monitoring and Reporting Requirements (§§ 26.11, 26.37)**

Overall, DOT’s DBE NPRM make several changes to both the reporting and monitoring requirements for FTA grant recipients, increasing the already significant paperwork burden that recipients, vendors, and DBEs currently experience participating in the program. APTA cautions that any additional administrative burden placed on DBE program requirements could result in fewer DBE businesses participating, resulting in fewer bids, less competition, and longer lead times for new capital projects.

In § 26.11, DOT proposes to require recipients to collect 10 additional data fields, such as names of DBE contractors that performed work and the work categories/trades performed, dollar value of contracts, number of firms that were listed at commitment but replaced (as well as an explanation for the replacement), and number of firms decertified during the reporting period for the Uniform Report.<sup>5</sup> Gathering and consolidating the additional information will require more manpower hours and increase costs to generate this automated data into one report. Currently, there is no standard software or database used to comply with the DBE administrative requirements. As a result, recipients will be required to contract or develop software to collect and organize this data at substantial additional cost. APTA suggests rather than “instructing recipients to submit [the Uniform Report] in a form acceptable to the concerned OA”, DOT determine a uniform methodology for submission applicable to all recipients.<sup>6</sup>

---

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 43624, 43669-43670.

<sup>6</sup> *Id.* at 43624.

Moreover, in § 26.11(c), DOT proposes to require recipients to enter “bidders list” data to a centralized database specified by the Department.<sup>7</sup> While APTA agrees with the concept of a centralized database to capture this information, more research and information will be needed to understand the nature of the database that will be used to input and capture this data, as well as the audience that the database will serve. APTA also suggests DOT create a standard form for “bidders list” data for recipients to use in collecting and uploading the information to its database, which would ensure consistency, achieve DOT’s objective, and simplify data collection for recipients.

Last, APTA notes many of DOT’s proposed changes will require additional data collection necessitating investment in software and systems to capture and report the data to the intended operating administrations and/or the public. APTA suggests DOT consider creating a centralized database for all data required to be reported for recipients, vendors, and subcontractors to use in administering the DBE program. Creation of such a centralized system would go a long way toward supporting the overall goals of the DBE program—that is, advancing equity and expanding access to federal contracting opportunities. In the alternative, DOT should make available grant monies to allow for the purchase and implementation of standardized software or purchase software licenses for recipients to collect and organize data to comply with these various administrative requirements.

## **ii. Prompt Payment Requirements (§ 26.29)**

APTA members strongly support helping DBEs build the financial capacity to participate in FTA-assisted contracts. DOT notes in the preamble that “prompt payment” is a serious concern among DBE businesses and late payments can act as a barrier to DBEs successfully competing for contracts.<sup>8</sup> DOT proposes to require recipients to have “proactive monitoring and oversight” of a prime contractor’s compliance with subcontractor prompt payment (as well as lower-tier subcontractors) and prompt return of retainage by the recipient. In addition, DOT specifically excludes reliance on complaints or notifications from subcontractors as to late payments as an insufficient method of oversight.<sup>9</sup> While APTA agrees that tracking systems to address the flow of when payments are being made are an important component to address this issue, it is challenging to implement given the multiple projects, contractors, and subcontractors that each recipient would be required to oversee.

APTA suggests DOT consider the total payment ecosystem from the DBE business invoice, to the prime contractor, to the recipient or state DOT, all of whom have a hand in ensuring invoices are submitted and are paid in an expeditious fashion. APTA members believe prompt payments are a necessary and shared responsibility among all of the parties involved in this ecosystem, and the rules should reflect that relationship.

Moreover, APTA members are concerned that, especially for smaller recipients, the creation of new payment tracking systems will be a significant cost burden. While larger transit agencies might have access to commercial software to track payments, smaller transit agencies may not be able to afford

---

<sup>7</sup> *Id.* at 43669.

<sup>8</sup> *Id.* at 43628, 43670.

<sup>9</sup> *Id.*

software or other technologies to assume this close monitoring. This is especially true where a smaller agency may not be required to participate in the full DBE program each year, because it is below the new threshold.

APTA suggests DOT develop its own or purchase software licenses for grantees to track these requirements. Such software systems are currently being used by several DOT recipients. APTA suggests DOT canvass state DOTs on systems currently in use to inform on the merits of a more robust national system. In addition, DOT should provide guidance on the methods to ensure prompt and expeditious payment that takes into consideration all of the participants in the payment ecosystem.

## **II. DBE Participation Counting Toward Goals**

DOT's DBE NPRM makes sweeping changes to how materials and supplies are counted toward a recipient's DBE goals.

### **a. Overall Limitation on DBE Supplier Credit (§ 26.55(e)(6))**

APTA members are concerned about the proposal to limit the total allowable credit for a prime contractor's expenditures with DBE suppliers (e.g., manufacturers, regular dealers, distributors, and transaction facilitators) to no more than 50 percent of the contract goal. The proposal includes an exception to the cap for material-intensive projects granted on a contract-by-contract basis.<sup>10</sup> The proposed 50 percent overall limitation on supplier credit is arbitrary and does not take into consideration the unique characteristics of each project, the needs associated with each contract, and the availability of DBEs to meet those unique needs.

In its Regulatory Impact Analysis (RIA), DOT notes that capping the supplier credit may have a distributional effect of taking work away from DBE suppliers in favor of DBEs who perform other tasks.<sup>11</sup> APTA members are concerned that the more complicated the schedule and counting of supplier credits, the less likely that DBE suppliers will be used to fulfill DBE contract goals. This would disadvantage those DBE businesses that have made substantial investments in supplies and equipment to compete for infrastructure contracts.

If DOT opts to keep this overall limit, it must provide more detail as to the parameters required for the DOT Operating Administration(s) (e.g., FTA) to approve exceptions. The proposed rule notes only that exceptions may be granted on "material intensive" contracts, with no other information provided. APTA also suggests that a lack of available DBEs to perform specialized subcontract work (e.g., signal work) on a particular contract also be included as a parameter to waive the 50 percent limit on material supplier credit. It would be helpful if DOT provided a list of factors to be considered when determining if a contract qualifies for an exception to the overall supplier credit limitation.

---

<sup>10</sup> *Id.* at 43674.

<sup>11</sup> DOT, Regulatory Impact Analysis to accompany DBE NPRM (May 20, 2022), at 22.

**b. Supplier Credit Calculations (§ 26.55(e)(1)-(5))**

At the outset, APTA members are concerned that DOT's changes in supplier credits will make it harder for recipients to keep track of suppliers and accurately count the value toward the contract goal. In addition to limiting the overall supplier credit to no more than 50 percent of the contract goal, DOT proposes to allow drop shippers with distributorship agreements to be counted at 40 percent supplier credit.<sup>12</sup>

APTA is concerned that the new counting rules are confusing, could lead to inconsistent application by transit agencies, and impact the ability to meet contract goals. In addition, while some larger transit agencies likely have access to commercial software to assign values to DBE manufacturers and suppliers, smaller transit agencies may not be able to afford software or other technologies to accurately track these percentages and allocate them correctly. This is especially true where a smaller agency may not be required to participate in the full DBE program each year. DOT should also make it clear how recipients should differentiate between suppliers (i.e., manufacturer, regular dealer, distributor, and transaction facilitator) and brokers when assigning credit.

APTA suggests state DBE certificates and UCP directories list the counting values that are assigned to each DBE that is certified, as DBEs perform at multiple levels and at differing assigned values. A business can be both a manufacturer and a distributor depending upon the contract it is performing. Having the counting value listed per function on the DBE certificate would help ensure prime contractors are reporting the accurate counting values depending on the job that the DBE is actually performing under the contract.

**c. Regular Dealer (§ 26.55(e)(2))**

DOT proposes to require recipients to establish a system to determine, prior to award, that DBE suppliers meet the fundamental characteristics of a regular dealer.<sup>13</sup> In addition, a recipient would be required to ensure each DBE supplier is eligible for 60 percent credit based on its demonstrated capacity to perform a commercially useful function (CUF) as a regular dealer. Moreover, the NPRM requires recipients to establish pre-award procedures to determine whether a DBE supplier submitted by the contractor/bidder as a regular dealer has demonstrated the ability and intent to perform as a regular dealer during the contract.<sup>14</sup>

APTA members suggest that any determination of whether a DBE is a regular dealer should come from, and be the responsibility of, UCPs, not individual recipients. Many public transit agencies lack the staff and resources to track every DBE to determine whether or not it is a regular dealer. Uniformity is needed to collect the information and ensure it is available to recipients prior to a contract award. As noted above, APTA supports DOT's proposal in §§ 26.31 and 26.81 to expand

---

<sup>12</sup> *Id.* at 43673.

<sup>13</sup> In the preamble, the DOT describes this determination as one in which the DBE is "regularly engaged in the purchase or sale of items, or those of the general character called for in the contract." *Id.* at 43632.

<sup>14</sup> *Id.* at 43673.

the information allowed to be entered into the UCP directories and encourages DOT to allow DBEs to include enough information into the business description to make it easily identifiable as to whether or not a business is a “regular dealer.” This approach would reduce the need for duplicative reviews from transit agency recipients.

**d. Transit Vehicle Manufacturers (§ 26.49)**

APTA appreciates the clarifications to § 26.5 for the definitions of transit vehicle, transit vehicle dealership, and transit vehicle manufacturer. In addition, APTA supports changing the reference term “certified TVMs” to “eligible TVMs” in § 26.49(a)(1), as it much more accurately reflects the fact that no formal certification of a TVM is needed from FTA for the TVM to bid on a contract.<sup>15</sup>

DOT correctly notes in the preamble that the current “Uniform Report of DBE Awards/Commitments and Payments” causes confusion and inconsistent reporting at the TVM level.<sup>16</sup> APTA is supportive of the changes to § 26.49(c) to clarify that an eligible TVM must fulfill the relevant reporting requirements only for the years in which they are eligible. In addition, APTA suggests that for TVMs, the term “Awards/Commitments” in Section A of the Uniform Report, should only encompass those TVM-issued subcontracts/purchase orders to suppliers for work performed inside the United States and its territories, possessions, and commonwealths. This change would be consistent with the language in § 26.49(b) that excludes, for purposes of calculating TVM DBE goals, funds attributable to work performed outside the United States.

Last, APTA suggests TVMs should be required to submit their DBE goals in the same three-year interval as recipients. Many TVMs are small business cutaway builders that have very limited staff and whose job responsibilities are often split between DBE Liaison Officer and other company functions. This would greatly decrease the paperwork burden on these small TVMs and put them on the same reporting cycle as FTA recipients.

**III. Good Faith Efforts Procedures for Contract Goals (§ 26.53)**

APTA supports the proposed changes to § 26.53, which would require prime contractors responding to a Request for Proposal on a design-build procurement to submit an open-ended DBE Performance Plan (DPP) with the proposal.<sup>17</sup> APTA believes this change will allow for enhanced opportunities for DBE participation, but suggests DOT encourage prime contractors to give commitments on those DBEs that they know they will use to perform the work up front and then the rest as the contract moves forward. Moreover, DOT should harmonize the DPP flexibilities it proposes with the semi-annual reports that recipients are required to submit so they do not result in shortfalls of the DBE goals.

---

<sup>15</sup> *Id.* at 43669, 43671-43672.

<sup>16</sup> *Id.* at 43630.

<sup>17</sup> *Id.* at 43672.

The proposal also requires recipients to monitor the prime contractor's adherence to the DPP and to evaluate good faith efforts throughout the life of the project. APTA members note some agencies may not have the capacity to stand up tracking systems to monitor DPP plans. APTA suggests DOT spearhead a program to develop easy to use tracking software or to otherwise implement grant programs to assist agencies in purchasing software to monitor these DPP programs.

APTA members also suggest DOT clarify how change orders and the accompanying DBE goals during the life of a project should be handled, including those that would be administered under the new DPP proposal. Most transit capital projects are multi-year, multi-staged efforts and are extremely complex. After a contract is out for bid, teams are formed, and DBE goals are set. Oftentimes, change orders are required that may be significant in cost and may impact the DBE goals and thus the responsibilities associated with fulfilling those goals as a project is underway. More guidance and clarity are needed to address these realities.

#### **IV. DBE Certification Proposals**

##### **a. Personal Net Worth (§ 26.68)**

APTA applauds DOT's proposal to increase the Personal Net Worth (PNW) standard and eliminate retirement funds in the calculation of PNW. The PNW has remained unchanged since 2011. However, APTA believes the proposal to increase the PNW standard to \$1.6 million is insufficient. In fact, the proposed \$1.6 million does not fully reflect the impact of inflation since the 2011 adjustment. Simply adjusting for inflation would bring the PNW cap to \$1.77 million.<sup>18</sup>

An increase beyond DOT's proposed \$1.6 million PNW is supported by others in the public transportation community. APTA is a proud member of the Equity in Infrastructure Project (EIP), whose goal is to create more opportunities for Historically Underutilized Businesses (HUBs) to build generational wealth and reduce the racial wealth gap by creating more prime, joint venture, and equity contracting opportunities for these firms.<sup>19</sup> EIP identified DOT's PNW certification requirement as needing change to help advance minority contracting opportunities, and has called for an increase from \$1.32 million to "at least \$2.6 million, but ideally \$5 million."<sup>20</sup> APTA wholeheartedly supports a significant increase to the PNW beyond the \$1.6 million proposed, as it would ensure the cost of living, cost of doing business, and other inflationary factors, which vary regionally, are taken into account and do not act as a barrier to potential DBEs entering the program.

In addition, many of our members believe DOT should explore establishing regional PNW caps that would take into account cost of living and doing business, and other regional factors. Many state and local Minority and Women Business Enterprise (M/WBE) programs rely on such an approach to setting the PNW standards for their programs. For example, the State of New York's PNW cap is

---

<sup>18</sup> See BLS CPI for All Urban Consumers, Series ID CUUR0000SA0. U.S. City Average, not seasonally adjusted.

<sup>19</sup> See Equity In Infrastructure Project (EIP), [Home | The Equity in Infrastructure Project](#).

<sup>20</sup> John Porcari, Co-Founder, EIP presentation, *APTA Kaleidoscope: Equity in Infrastructure Project: Taking Action Now* (August 24, 2022).



\$15 million, the city of Chicago's PNW is \$2.5 million, and the State of Maryland's is \$1.8 million for 2022. Both Chicago and Maryland adjust their PNW caps annually based on the Consumer Price Index (CPI).

A regional approach to setting the PNW would improve the business climate for DBEs including easier access to capital, bonding, and contracting opportunities. For example, the New York metro area has a cost of living that is 69 percent higher than the national average. In that case, a region-specific adjustment applied to the \$1.77 million inflation-adjusted PNW cap yields \$2.998, or approximately \$3.0 million (well above the \$1.6 million proposed).<sup>21</sup> To facilitate a regional approach, APTA proposes that no regional PNW cap be applied to regions with costs of living below the national average. This approach would allow for proportional adjustments to the cap in areas with higher costs of living and doing business, but would not adjust the cap downward in areas with lower costs thus maintaining balance in the federal DBE program.

APTA strongly supports DOT's proposal to exclude retirement assets from the PNW calculation.<sup>22</sup> In addition, we are pleased that DOT continues to support the existing exclusion of the owner's equity in their primary residence (now without reference to state marital laws or community property rules) and interest in the applicant or certified firm.

In addition, APTA strongly recommends that DOT exclude household contents from the PNW calculation. DOT proposes household contents be valued as "at least the total amount for which they are insured taking into account all policies, riders, amendments, and endorsements".<sup>23</sup> However, this calculation does not take into account the depreciation of household contents over time or the fact that there is regional disparity in the way that insurance policies value household contents. Many insurance policies value household contents as a percentage of the house value. Depending upon where you live and your insurance policy, the value of a DBE applicant's house could drive up the value of the household contents for purposes of the PNW calculation. Adopting this approach is tantamount to including a DBE's equity in their primary residence, and could also negate the benefit of excluding retirement accounts from the calculation of the PNW.

If adopted, the proposal to include household contents based on insurance value could increase barriers to individuals to participating in the DBE program, and would increase the burden on certifiers tasked with administering these provisions. Accordingly, APTA strongly recommends excluding the value of household contents as a part of the PNW calculation, just as it has always excluded the household value itself.

---

<sup>21</sup> This figure is an example for the New York metro area; specific adjustments for other regions will vary.

<sup>22</sup> *Id.* 43639, 43677.

<sup>23</sup> *Id.* at 43676.

**b. Social and Economic Disadvantage (§ 26.67)**

APTA appreciates the reorganization of §§ 26.5, 26.63, and 26.67 for clarity.

APTA supports DOT's replacement of the phrase "a long period of time" with a definitive time period of five years for determining the length of time an individual has held themselves out to be a member of a socially disadvantaged group in § 26.67(b)(1).<sup>24</sup>

In § 26.67(c), evidence and rebuttal of social disadvantage, DOT proposes to replace the "Ability to Accumulate Substantial Wealth" standard and its six concomitant factors, with a "Reasonable Person" approach.<sup>25</sup> Although DOT proposes some indicators to guide this "Reasonable Person" determination (e.g., ready access to wealth, lavish lifestyle, income or assets of a type or magnitude inconsistent with economic disadvantage, and disregard liabilities entirely), APTA members are concerned this approach would be very subjective and it is unclear who would be responsible for making such determinations. Without identifying an objective standard of evaluation, adoption of this approach could result in a patchwork of inconsistent determinations depending on the state.

In addition, APTA members question the wholesale removal of Appendix E requirements for the Individualized Determinations of social and economic disadvantage (SED) status,<sup>26</sup> fearing that it will result in an uneven application of the standards across the United States, culminating in a dilution of the DBE program with individuals who should not be eligible. Moreover, an inconsistent application of this determination could impact the certification of individuals in other states, further diluting the program. APTA suggests DOT review Appendix E and seek ways to revise it without dismissing it entirely from the certifier's tools of evaluation.

**c. Ownership (§ 26.69)**

APTA appreciates the simplification and reorganization of the "ownership" standards relating to business operations for the DBE program in new § 26.69(b).<sup>27</sup>

However, APTA is concerned about DOT's proposal in § 26.69(b) to replace the concept of "real, substantial, and continuing" (RS&C) capital contributions and ownership with the requirement that transactions affecting ownership make "Reasonable Economic Sense" (RES).<sup>28</sup> Much like the SED determination above, removing the RS&C for RES is fraught with potential inconsistencies, which could lead to haphazard application across the U.S. If DOT proceeds with RES, APTA suggests it provide detailed guidelines to be considered when making an RES determination.

---

<sup>24</sup> *Id.* at 43675.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 43642.

<sup>27</sup> *Id.* at 43677.

<sup>28</sup> *Id.*

**d. Control (§ 26.71)**

The proposed rule includes significant revisions to § 26.71 including that a company must have operations in the type of business it seeks to perform; the SEDO must be the “ultimate decision maker”; and the SEDO must “have an overall understanding of the business and its essential operations sufficient to make sound managerial decisions not primarily of an administrative nature.”<sup>29</sup> DOT notes in the preamble that the proper inquiry into control is whether the “SEDO controls the firm through managerial oversight, revocable delegation of authority and critical and independent decision-making.”<sup>30</sup> APTA members note that for services requiring licenses, many states will disregard certain North American Industry Classification codes if an owner is not licensed to perform the services themselves. APTA agrees with DOT’s proposal to remove § 26.71(h) (license rule), and clarify that the proper question is whether the owner has sufficient knowledge to make managerial decisions for the business.<sup>31</sup> APTA supports the proposed changes in § 26.71 to demonstrate the elements of control for purposes of certification.

**V. Interstate Certification (§ 26.85)**

APTA strongly supports DOT’s proposal to streamline the interstate certification process by requiring reciprocity among states, reducing the required materials to be submitted for an interstate certification application, and by limiting the review to 10 business days by a state for which interstate certification is sought.<sup>32</sup> These long-overdue changes to ensure expedited processes for verifying and granting certifications will go a long way towards easing the burden for those DBEs who want to certify in more than one state. In addition, APTA agrees with the proposal to make permanent the virtual on-site visit flexibilities that were extended during the COVID-19 pandemic as it relates to certification proceedings.

**VI. Annual Certification Requirements**

Proposed § 26.85(g)(3)(i) would require a DBE submit an annual Declaration of Eligibility (DOE) with documents of gross receipts to confirm small business size to the UCP of each state in which it is certified.<sup>33</sup> Requiring DBEs to certify annually to each state it is certified is a huge burden to both the DBE and the certifier, who must review each renewal. DOT suggests that a centralized database might be used to make the process more efficient.<sup>34</sup> APTA agrees with this concept.

---

<sup>29</sup> *Id.* at 43678.

<sup>30</sup> *Id.* at 43643.

<sup>31</sup> *Id.* at 43645. For example, being the ultimate decision maker in an engineering business demonstrates control whereas having an engineer’s license does not.

<sup>32</sup> *Id.* at 43680.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 43648.

APTA also requests that after a DBE is certified, resubmittal of the DOE take place every three years. Our members responsible for certifying report that many DBEs have gross sales well under the DOT's three-year gross sales threshold and are also not likely to exceed the PNW threshold in any given year. For those DBEs in particular, submitting paperwork annually is unduly burdensome, especially where their circumstances are not likely to change over the year.

## **VII. Decertification Proceedings (§ 26.85)**

DOT proposes in § 26.85(g)(4) to allow any UCP to take part in a decertification proceeding initiated by another state.<sup>35</sup> Moreover, proposed § 26.85(g)(4)(ii) states that after a UCP joins another state's decertification proceedings, then the decision applies to all states that are a party to the action.<sup>36</sup> Under proposed § 26.85(g)(6), DOT states that if it upholds a UCP's decertification of a firm, then the firm is automatically decertified *in all states in which it is certified*. (emphasis added)<sup>37</sup> APTA strongly disagrees with this approach and requests that DOT revise § 26.85(g)(6) to ensure that any final decertification apply only to those states who were a party to the original decertification action. Such a change would make it consistent with the proposed changes in § 26.85(g)(4)(ii).

## **VIII. Graduating DBEs from the Federal Program**

To ensure artificial barriers do not hamper the growth and success of the DBE program, DOT should consider creating a gradual phase out from the program for those DBE businesses that exceed either the PNW cap or business size, or both. For example, the City of Chicago has a graduation program for firms for which annual average gross receipts have surpassed the City's limits. Those firms continue to remain eligible to receive MBE or WBE credit at reduced levels for up to three years beyond the point at which they have become established businesses. Under that program, the firms receive 75 percent credit for participation in new city contracts in the first year, 50 percent credit in the second year, and then 25 percent credit during the third year if starting a new contract.<sup>38</sup>

A program that allows for a gradual shift from the DBE program, as opposed to abruptly being dropped after certain thresholds are met, would serve to support DBE businesses to succeed outside of the program, which is the ultimate goal of the program.

---

<sup>35</sup> *Id.* at 43680.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 43681.

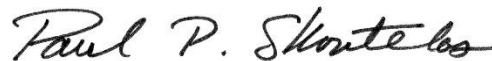
<sup>38</sup> See City of Chicago, MBE/WBE GRADUATION PHASE-OUT PROGRAM (July 1, 2013), accessed at [MBEWBEGraduationPhaseOutProgram.pdf \(chicago.gov\)](https://www.chicago.gov/Content/Attachments/2013/07/MBEWBEGraduationPhaseOutProgram.pdf)

Docket Clerk  
October 31, 2022  
Page 13

APTA appreciates the opportunity to comment on this NPRM. As noted above, many of the changes to the DBE program have long been sought, and APTA urges DOT to make completing this rulemaking a top priority.

If there are any questions regarding this letter, please contact APTA's General Counsel, Linda Ford at [lford@apta.com](mailto:lford@apta.com).

Sincerely yours,

A handwritten signature in black ink that reads "Paul P. Skoutelas". The signature is written in a cursive, flowing style.

Paul P. Skoutelas  
President and CEO