DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 23

[OST Docket No. 64c; Notice No. 83-7]

Participation by Minority Business Enterprises in Department of Transportation Programs

AGENCY: Department of Transportation.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This proposed rule would implement section 105(f) of the Surface Transportation Assistance Act of 1982, which provides that ten percent of funds authorized to be appropriated by the Act be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. The proposed rule would add a new Subpart D to the Department's existing minority business enterprise rule, permitting recipients of financial assistance from the Department to comply with the new statutory requirement with a minimum of disruption to existing administrative practice.

DATE: Comments must be received by the Department by March 21, 1983.

ADDRESS: Interested persons should submit comments to Docket Clerk, OST Docket No. 64c, Department of Transportation, 400 7th St., SW., Room 10421, Washington, D.C. 20590. Commenters wishing to have their submissions acknowledged should include a stamped, self-addressed postcard with their comments. The Docket Clerk will time and date stamp the postcard and return it to the commenter. Comments will be available for inspection at the above address from 9:00 a.m. to 5:30 p.m. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Office of the Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th St., S.W., Room 10421, Washington, D.C. 20590, (202) 426-4723.

SUPPLEMENTARY INFORMATION:

Background

The Statute and its Scope

This proposed rule would implement section 105(f) of the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424). Section 105(f) provides as follows:

> Except to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act (15 U.S.C. section 637(d)) and relevant subcontracting regulations promulgated pursuant thereto.

The provision resulted from an amendment introduced by Rep. Parren Mitchell. Senator Alan Cranston sponsored a similar amendment. According to the floor statements made by Rep. Mitchell and Senator Cranston, the amendment was intended to ensure that minorities participated as fully as possible in the economic benefits resulting from the Act. The floor statements made specific reference to the minority set-aside provision of the Public Works Employment Act Amendments of 1977 (Pub. L. 95-28) on which section 105(f) was modeled.

In mentioning the serious unemployment problem among minorities and in judging that a "set aside" provision like section 105(f) was "the most direct way to assure that * * * disadvantaged business owners participate to the fullest extent possible" in the benefits of the Act (*Daily Congressional Record* S 14211, December 8, 1982), Congress explicitly adopted a rationale for affirmative action. By referring to the 1977 provision, Congress also took into account the more lengthy discussion of the need for such action which preceded its enactment. The Department takes notice of the history of Congressional action underlying the 1977 provision, much of which is cited in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), which upheld the constitutionality of the 1977 provision and its implementation by the Department of Commerce. The Department has taken this background into account in its implementation of section 105(f).

The Department has carefully considered the question of the scope and applicability of section 105(f). This question arises because of the ambiguity of the reference in section 105(f) to funds authorized to be appropriated under "this Act." In context, "this Act" could be taken to mean the entire Surface Transportation Assistance Act of 1982 or only Title I of the Act, titled the "Highway Improvement Act of 1982."

Given this ambiguity, the Department has looked to the legislative history of the section. While this history is not extensive, it does indicate a strong concern by Rep. Mitchell and Senator Cranston that the jobs and other economic benefits flowing from the gasoline user fee help members of minority groups. The user fee goes toward major construction programs funded by the Surface Transportation Assistance Act in highways, highway safety and mass transportation. These are the programs in which job creation is most likely to occur. Construing the statute to cover these programs is the interpretation most consistent with the intent of Congress.

Limiting the application of section 105(f) to programs under the Highway Improvement Act of 1982 would omit coverage of most UMTA programs as well as of the provisions of section 202 of the Act for bridge replacement and rehabilitation and elimination of hazards. Since these programs receive substantial funding from the gasoline user fee and assist major construction projects with significant potential for the creation of jobs and business opportunities, these programs come within the intent of Congress of section 105(f).

The most direct statement in the legislative history concerning the applicability of section 105(f) supports this interpretation of its intended coverage. In his floor statement, Rep. Mitchell said that his amendment was intended to apply to the "Surface Transportation Assistance At of 1982" (the title of the entire Act). The Department regards the legislative history of the section as clearly resolving the ambiguity concerning the applicability of the section in favor of coverage of the entire Surface Transportation Assistance Act of 1982.

This view of the statute creates one important practical problem. Intrepreting the statute to apply to all programs under the Surface Transportation Assistance Act of 1982 would result in coverage of a number of programs unaffected by the gasoline user fee and/or which have relatively minor potential for job and business opportunity creation. The Department believes that Congress did not believe that coverage of programs of this kind was significant. In the Department's judgment, the MBE contracting opportunities gained by coverage of these programs would not justify the administrative burdens invovled for recipients. For this reason, the Department proposes to determine, under the Secretary's discretionary authority in section 105(f) ("Except to the extent that the Secretary determines otherwise * * *"), that this subpart will not apply to the following provisions of the Act:

Section 203—NHTSA Highway Safety Grant Program

Section 402—Grants to States for Commercial Motor Vehicle Safety Programs

Section 421—State Recreational Boating
Section 422—Reforestation
Section 423—Promotion of Fisheries
Section 426—Airway and Airport Development Program

The Department seeks comments concerning whether these proposed exclusions from the coverage of section 105(f) and this subpart are appropriate.

Section 105(f) applies not only to the federal-aid highway program but also to the direct Federal highway program operated by FHWA. Under this program FHWA contracts with private firms to build certain highways. Neither the existing 49 CFR Part 23 nor this proposed rule apply to the direct Federal program, since it is not a Federal financial assistance program. However, FHWA seeks MBE participation in the direct Federal program through means including sections 8(a) and 8(d) of the Small Business Act. In recent years, the level of MBE participation in the program has exceeded ten percent. FHWA is committed to meeting or exceeding the ten percent participation requirement of section 105(f) in the direct Federal program. In the same sense, UMTA will apply section 105(f) to its direct procurement activities.

Relationship to Existing Minority Business Enterprise Rule

The Department's minority business enterprise (MBE) rule (49 CFR Part 23) continues fully in effect. Promulgation of a final rule based on this NPRM (which would result in a new Subpart D of 49 CFR Part 23) would have no effect on recipients of Federal financial assistance from the Fedeal Aviation Administration, the National Highway Traffic Safety Administration and the Federal Railroad Administration. These recipients would continue to implement 49 CFR Part 23 without change.

The new subpart would affect recipients of Federal financial assistance from FHWA and UMTA programs funded through the Surface Transportation Assistance Act of 1982. UMTA and FHWA recipients would set overall goals as provided in the new subpart rather than as provided in the existing MBE regulation. However, this change and the associated amendments contained in this NPRM (relating to such matters as definitions, waivers, and compliance) would be the only changes FHWA and UMTA recipients would make in implementing their MBE programs.

In all other respects, FHWA and UMTA recipients would continue to implement the existing 49 CFR Part 23. For example, recipients would continue to operate their programs and goals for businesses owned and controlled by women without change. Recipients would continue to award individual contracts in the same way as now provided by 49 CFR Part 23, requiring the apparent successful competitor for a contract to make good faith efforts to meet contract goals. Recipients would also continue to examine and certify the eligibility of MBE's as they do now.

The major change made by this subpart would concern overall goals. Under the existing regulation, overall goals are simply an administrative mechanism designed to help recipients meet their obligation to ensure that MBEs have an equal opportunity to compete for and perform DOT-assisted contracts. The present overall goals are established by recipients as a benchmark against which they can measure the performance of their MBE programs. The goals represent a level of MBE participation which it is reasonable to expect, given fully equal opportunities for MBEs. Failure to meet an overall goal is not regarded as noncompliance with the regulation. Rather, it is an indication that administrative changes or improvements in a recipient's MBE program may be necessary.

Under the proposed rule, the Department sets recipients' overall goals at a minimum of ten percent, unless a waiver is granted in accordance with paragraph 23.65. Failure by a recipient to meet its overall goal is regarded as noncompliance with the regulation. The overall goals proposed by this NPRM, unlike the overall goals of the existing rule, go beyond seeking to ensure equal opportunities for MBEs. Rather, the overall goals of the proposed subpart implement the commitment of section 105(f) to an affirmative action policy designed to overcome the effects of past discrimination and disadvantage. As proper for a policy of this kind, it is limited in duration.

Section-By-Section Analysis

Section 23.61 Purpose.

This section states the purpose of the proposed Subpart D, which is to implement section 105(f). As a matter of policy, the Department places a high priority on the development and support of MBEs, and will enforce strictly MBE participation requirements of section 105(f).

Section 23.62 Applicability.

This section describes the applicability of the proposed Subpart D to FHWA and UMTA programs. In order to be covered by this subpart (i.e., to be part of the base from which the overall goals of § 23.64 are calculated), funds must meet three criteria. First, the funds must have been authorized by the appropriate statutory provisions. With respect to FHWA programs, the appropriate provisions are Title I and section 202 of Title II of the Act. Title I funds most FHWA programs; section 202 funds the bridge rehabilitation and replacement and hazard elimination programs. Section 202 funds are considered Federal-aid highway funds for purposes of this subpart.

With respect to UMTA programs, the appropriate provisions of the Act are Title I (insofar as it authorizes appropriations for transit substitute projects under the Interstate transfer program) and Title III (which funds most UMTA programs). The Department recognizes that applying these MBE requirements to section 9 funds would to some extent impinge upon the concept of freeing "block grants" from Federally-imposed requirements. However, given that Congress intended section 105(f) to apply to all UMTA programs, the Department does not believe that it would be appropriate to exempt section 9 funds.

In addition to funds authorized to be appropriated under the Act, the proposed rules would apply to all other UMTA programs and projects funds for which are authorized by the Urban Mass Transportation Act of 1964, as amended. For example, programs and capital projects, funds for which are authorized under sections 3 and 5 of the Urban Mass Transportation Act, would be covered, even though these funds were not authorized by the Surface Transportation Assistance Act of 1982.

The purpose of this extension of section 105(f) goals to UMTA programs beyond those funded by the Surface Transportation Assistance Act of 1982 is to apply one set of administrative requirements uniformly to all UMTA programs funded by the Act or the Urban Mass Transportation Act. This is particularly important because, in many instances, funds from different UMTA sources are comingled in projects of a given recipient. Using the same administrative system to administer MBE requirements for all UMTA programs should minimize confusion and administrative burdens for recipients. Also, since most UMTA recipients have consistently met or exceeded ten percent goals under the existing 49 CFR Part 23, the Department does not believe that this proposal (particularly given the waiver provision of § 23.65) will create hardship for recipients.

The Department does not propose, at this time, to continue the coverage of UMTA programs not authorized by the

Act beyond the time when funds authorized by the Act are exhausted. This is for two reasons. First, affirmative action remedies of the kind specified by section 105(f) are properly limited in duration. Second, the Department believes that it is desirable that all UMTA programs be administered under the same MBE requirements, both now and after the section 105(f) requirements are no longer in effect.

The Department's authority to extend the section 105(f) procedures to UMTA programs not funded by the Surface Transportation Assistance Act of 1982 derives from section 19 of the Urban Mass Transportation Act of 1964 (49 U.S.C. 1615). Section 19 provides, in relevant part, that:

> (a)(1) No person in the United States shall on the grounds of race, color, creed, national origin, sex, or age be excluded from participation in, or denied the benefits of, or be subject to discrimination under any project, program, or activity funded in whole or in part through financial assistance under this chapter. The provisions of this section shall apply to employment *and business opportunities* and shall be considered to be in addition to and not in lieu of the provisions of Title VI of the Civil Rights Act of 1964.
>
> (2) The Secretary *shall take affirmative action* to ensure compliance with subsection (a)(1) of this section. (Emphasis added.)

The Department proposes to interpret the Secretary's authority to take affirmative action with respect to business opportunities to permit the use of Subpart D procedures in all UMTA programs.

It should be pointed out that under this applicability provision, the base for the calculation of overall goals under § 23.64(a) would include only Federal funds, not the recipient's matching share. This approach appears to be consistent with the language of section 105(f), which requires ten percent participation in funds authorized to be appropriated by the Act (which are Federal funds, not state or local funds).

The second criterion is that, to be included in the base from which overall goals are calculated, the funds must be apportioned or allocated to recipients. Some funds authorized by the Act, while they come within the literal language of section 105(f), never actually flow to recipients (e.g., because of Federal obligation ceilings or the unavailability of state or local matching funds). It would not be reasonble to require recipients to establish goals for such funds.

The third criterion is that the funds must actually participate in contracts. Some FHWA and UMTA funds flow to recipients for purposes that do not result in contracting opportunities. Again, the Department proposes not to require recipients to meet MBE goals for funds that could not be expended with MBEs. For example, FHWA recipients pay compensation to owners of property acquired for highway right-of-way. The amount of this compensation would not count toward the base from which overall goals are calculated, although expenditures to private parties connected with the property transaction (e.g., fees to lawyers involved in negotiations for acquiring the property) would count.

It should be emphasized that all types of contracting are intended to be included in the base from which overall goals are calculated. This subpart applies not only to construction contracts but also to contracts for the services of engineers, architects and other professionals (e.g., lawyers retained for condemnation cases, management consultants for recipients' organizations), contracts for support services (e.g., research, data processing, security, janitorial), and any other kind of contract in which funds covered by the proposed subpart participate.

The second and third criteria are proposed under the discretion granted by the first clause of section 105(f) ("Except to the extent that the Secretary determines otherwise * * *"). To establish these criteria, the Secretary proposes to determine that, of the funds authorized to be appropriated by the Surface Transportation Assistance Act of 1982, only those funds apportioned or allocated to recipients which they use for contracting purposes would constitute the base from which overall goals under this subpart are calculated.

Section 23.63 Definitions.

Section 105(f) requires the expenditure of ten percent of the funds authorized under the Act with "small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act * * * and relevant subcontracting regulations promulgated pursuant thereto." To comply with this requirement, the Department is proposing definitions, applicable only to this subpart, which are consistent with those of section 8(d) and its implementing regulations (e.g., 45 FR 31028, May 9, 1980).

The reference to section 8(d) and these subcontracting regulations, in the Department's view, concerns only the definition of socially and economically disadvantaged individuals. This is apparent from the wording of section 105(f). In addition, it would be inappropriate and administratively cumbersome to attempt to apply to recipients of DOT financial assistance and their contractors the administrative scheme (which includes, for example, detailed subcontracting plans for prime contractors in some contracts) of section 8(d), which is closely tied to Federal agency procurement practices.

The definitions derived from section 8(d) are similar, but not identical, to the definitions in § 23.5 of the Department's MBE regulation. Recipients would use the definitions proposed in this section in determining the eligibility of firms to participate in contracts covered by this subpart, but would continue to use the definitions of § 23.5 for other contracts. This means that, in a few cases, a firm eligible to participate as an MBE firm in Federal Aviation Administration or Federal Railroad Administration contracts might not be eligible to participate in FHWA or UMTA contracts under this subpart. The Department realizes that this dual set of definitions could cause confusion, and that having different definitions is not desirable on a long-term basis. For this reason, the Department intends, in future rulemaking on this subject, to propose a single set of definitions that would be used for all purposes.

Since 49 CFR Part 23 consistently uses the terms "minority" and "minority business enterprise," these terms would be retained in this subpart. However, "minority" would be defined in this subpart by a cross-reference to the definition of "socially and economically disadvantaged individuals." "Minority business enterprise" or "MBE" would be defined in the same way that section 8(d) of the Small Business Act and its implementing rules define "small business concern owned and controlled by socially and economically disadvantaged individuals." This definition of MBE is essentially the same as the definition of § 23.5, except for the reference to socially and economically disadvantaged individuals.

"Small business concern" is not defined in § 23.5, but the substance of this definition is incorporated in the § 23.5 definition of "MBE." Again, this definition is not intended to cause recipients to change their standards for certifying MBEs. One problem that has caused confusion under the MBE regulation is the question of *which* "relevant regulation" promulgated pursuant to section 3 of the Small Business Act recipients should use in determining whether a firm is a small business concern. The Department seeks comment on whether there are some portions of SBA's firm size standards (13 CFR Part 121) which are particularly

appropriate for use in connection with the DOT MBE program.

The definition of "socially and economically disadvantaged individuals" is somewhat different from the definition of "minority" in § 23.5. First, in order to qualify as a socially and economically disadvantaged individual, a person must be a U.S. citizen. Lawful permanent residents who are not citizens are "minorities" under § 23.5 but not "socially and economically disadvantaged individuals" under this subpart.

Second, persons must actually be socially and economically disadvantaged in order to qualify under this definition. Recipients can presume that members of the enumerated minority groups are socially and economically disadvantaged; however, this presumption is rebuttable. For example, a receipient should not certify as eligible for participation under Subpart D a minority business owned by someone who is demonstrably not economically disadvantaged (e.g., an individual whose business or other activities over a period of years has created substantial wealth, a child of highly successful and affluent parents whom the parents set up in a firm spun off their business). By contrast, under § 23.5, a business owned and controlled by any minority individual, regardless of economic status, is eligible as an MBE.

Third, persons must normally fall into one of the minority groups listed in the definition. There are no important differences between the definitions of "Black Americans" and "Native Americans" in this proposed section and the definitions of "Black" and "American Indian and Alaskan Native" in § 23.5. The definition of "Hispanic Americans" in this section is identical to the definition of "Hispanic" in § 23.5, as amended (46 Fed. Reg. 60458, December 10, 1981). However, persons with origins in Portugal would not be regarded as socially and economically disadvantaged persons, since they are not included in the definition of "Hispanic Americans" and SBA has never added Portuguese-Americans to their list of groups members of which may be presumed to be socially and economically disadvantaged individuals. The definition of "Asian-Pacific Americans" in this NPRM does not include people from some countries (e.g., Burma, Thailand) who could be regarded as having origins in Southeast Asia, and hence eligible under § 23.5.

If the SBA grants 8(a) certification to any business, that business is automatically considered to be eligible to participate as an MBE for purposes of Subpart D, even if the owner of the business does not fall into one of the normal minority categories (e.g., an Appalachian white male, a Hasidic Jew, a white woman). Also, SBA may from time to time add new groups to its roster of groups presumed to be socially and economically disadvantaged. Any groups which SBA lists in this way will become eligible for participation in DOT-assisted contracts under Subpart D. It was in this way, for example, that persons with origins in the countries of the Indian subcontinent (i.e., India, Pakistan, Bangledesh) were included in the definition of Asian-Pacific Americans.

Section 23.64 Overall Goals.

Subsection (a) of this section is the key provision of Subpart D. Paragraph (a)(1) requires recipients of funds to which this subpart applies to set overall goals of not less than ten percent of the aggregate dollar amount of all Federal-aid highway and transit funds, respectively, to be expended in contracts during the forthcoming fiscal year. This means that recipients which receive funds from both UMTA and FHWA would have to set separate goals for their highway and transit programs. The Department solicits comment on ways to minimize administrative inconvenience that could result from such recipients (e.g., state DOTs) having to submit more than one goal to DOT. The requirements of this paragraph may be waived only through the procedures of § 23.65.

The reference to § 23.41 is intended to prevent the imposition of new administrative burdens on recipients who are not required to have an MBE program under the existing regulation (§ 23.41 would be amended to include all UMTA programs funded by the Act). The reference would ensure that a recipient which is not required to have an MBE program under § 23.41 (e.g., an UMTA recipient which receives less than $250,000 in UMTA assistance) would not have to create a program in order to comply with Subpart D. Recipients which are not required to have an MBE program would not have to submit overall goals to the Department under this subpart.

With respect to goals for UMTA transit programs, paragraph (a)(2) would give the UMTA Administrator discretion to permit an UMTA recipient to set an overall goal applicable to a particular grant, project, or group of grants or projects, even if the grants or projects involved are not confined to a given fiscal year. This approach may make more sense than an annual goal in some circumstances.

The Department strongly encourages recipients to exceed ten percent participation whenever it is possible to do so. Subsection (b) points out that, in areas with relatively high minority populations, such as large cities and highly urbanized areas, it is expected that recipients will spend substantially more than ten percent of covered funds with MBEs. The Department will evaluate recipients' performance in this regard when considering the approval of goals and waiver requests.

Subsection (c) emphasizes that goals under this section are submitted to the FHWA or UMTA Administrator, as applicable, in the same manner and at the same time as overall goals are submitted under § 23.45(g)(3) for the remainder of recipients' programs under Subpart C of 49 CFR Part 23. In order for the recipient to be in compliance with Subpart D, the Administrator must approve the overall goal submitted under this section.

The Administrator retains full discretion with respect to the approval of overall goals. Even if the recipient has requested approval of an annual overall goal of ten percent or more, the Administrator need not approve it if he or she determines that the recipient can achieve a higher level of MBE participation during the fiscal year. For example, if a certain recipient has had a 15 percent overall goal in recent years and has met or come close to meeting that goal, the Administrator is free to disapprove a requested 11 percent goal and require the recipient's goal to be 15 percent. Under subsection (a), ten percent is a floor for recipient's overall goals, not a ceiling above which recipients may not be required to rise if doing so is reasonably achievable.

The statutory ten percent goal affects funds authorized by the Surface Transportation Assistance Act of 1982 for fiscal year 1983, which has already begun. Obviously, submission of overall goals under this section and requests for waivers under § 23.65 before the beginning of the fiscal year is not possible for this fiscal year. FHWA and UMTA will provide administrative guidance to recipients in the near future concerning the handling of these matters for fiscal year 1983.

Subsection (d) points out that work performed by firms owned and controlled by women, who are not also socially and economically disadvantaged individuals, cannot count toward goals under this subpart. This is because (aside from the few women who have received 8(a) certification from SBA) non-minority women are not defined as socially and economically

disadvantaged individuals by section 8(d) of the Small Business Act and its implementing regulations. At the same time, recipients are required to continue to set separate goals for firms owned and controlled by women under Subpart C of 49 CFR Part 23. Subpart D does not change recipients' programs for such firms at all.

Section 23.65 Waivers.

The Department clearly recognizes that there may be situations in which, despite all a recipient can reasonably be expected to do to meet a ten percent annual overall goal, that goal will be out of reach. For this reason, the Department is proposing to allow the FHWA or UMTA Administrator, as applicable, to waive the ten percent minimum overall goal and to set a lower goal for a given fiscal year.

The Department is given discretion to grant waivers by the "Except to the extent that the Secretary determines otherwise . . ." language of section 105(f). Based on identical language in the 1977 Public Works Act MBE set-aside provision, the Department of Commerce administratively provided for a waiver of this kind. The existence of this waiver was one of the factors cited by the Supreme Court in *Fullilove* v. *Klutznick* in upholding the constitutionality of the statute and the Department of Commerce's implementation of it.

Subsection (a) sets out procedural requirements for waiver requests. The request must be made prior to the beginning of the fiscal year, no later than the time that recipients submit overall goals for approval. As with overall goal submissions, FHWA and UMTA will provide administrative guidance to recipients concerning the timing of waiver requests for fiscal year 1983. Recipients send requests for waivers to the UMTA or FHWA Administrator through the appropriate field offices of UMTA or FHWA. The field offices attach a recommendation to the Administrator concerning the request. The request must include enough information to permit the Administrator to make an informed decision on the request, in accordance with the waiver criteria of subsection (b). A waiver request applies to only one fiscal year. Even if a request is granted for one fiscal year, the recipient must submit a new request for the following fiscal year.

As a general matter, the Department believes it would be useful for recipients to involve the public, including minority contractors, in their decisions concerning goals and waiver requests. Specifically, the Department is considering whether it should require public participation in the important decision of whether a recipient seeks a waiver of its obligation to have a ten percent overall goal.

Clearly, the views of the public, including minority contractors, in a jurisdiction seeking a waiver could shed important light on questions such as the availability of MBEs and the effectiveness of a recipient's efforts to increase MBE participation. This information could assist the recipient in determining where it needed to improve its MBE program and the Department in determining whether a waiver request was meritorious. At the same time, the Department would not want to set up a public participation mechanism that was too burdensome for recipients or that created undue delay in the goal-setting and waiver processes.

The Department would like commenters interested in this issue to consider several questions. Should the Department establish a public participation mechanism for waivers? If so, how would a good mechanism work? If the mechanism involved an opportunity for comment, would it be better to have the comments directed to recipients before a waiver request was sent to the Department, to the Department following the waiver request, or both? Should the Department designate a specific party (e.g., a minority contractors' association, a historically black college or university) to act as the commenter or focal point for minority community comments concerning a given recipient's waiver request? How much weight should the Department give the views of the public generally, and the minority community or minority contractor community in particular, in determining whether to grant a waiver? The Department seeks comments to help answer these questions as well as comments concerning how, if at all, the final rule should treat the matter of minority community participation.

Each Administrator is authorized to waive the minimum ten percent goal only for the programs of his or her own Administration. The Department believes that a joint waiver for both FHWA and UMTA programs would be too complex administratively and would not take into account the differences between the two programs. A recipient of both FHWA and UMTA funds may, but is not required to, submit separate waiver requests. However, the FHWA and UMTA Administrators will consider waiver requests only as they affect the programs of each. FHWA and UMTA would not be required to make the same decision with respect to the waiver request of a given recipient. For example, FHWA could approve a waiver request for the highway programs of a state DOT while UMTA denied a request for the state DOT's UMTA programs. In approving waiver requests for a recipient, UMTA and FHWA could set different adjusted overall goals.

Subsection (b) lists the factors that the FHWA or UMTA Administrator would consider in deciding whether to grant a waiver. Paragraphs (1), (2) and (4) concern the efforts that the recipient makes to improve opportunities for MBEs. In order to make the ten percent goals mandated by section 105(f), it is likely that recipients will have to do more than provide equal opportunities for MBEs. They will have to take affirmative action to improve the participation of MBEs in contracts covered by this subpart. To obtain a waiver, a recipient needs to show that it is taking all the affirmative action it can to locate and utilize MBEs, encourage and help to develop them, and remove legal and other barriers to their participation at a level sufficient to meet a ten percent overall goal.

In connection with paragraph (4), it should be emphasized that recipients are expected to make efforts to surmount barriers that exist pursuant to state or local law. Consequently, difficulties that a recipient has in meeting MBE goals because of existing state statutes or local ordinances (e.g., a state law that does not permit waiving high bonding requirements for MBEs) would be given little, if any, weight in decisions on waiver requests. Of course, controlling decisions of state supreme courts or Federal courts affecting recipients' MBE programs would influence DOT's expectations for recipients' performance.

Paragraph (3) concerns the availability of MBEs to perform work on contracts covered by Subpart D. In determining the availability of MBEs, it will be necessary to consider not only the MBEs actually resident in a recipient's jurisdiction, but also those from other jurisdictions who are available for work on the recipient's contracts. For example, if a predominantly rural state has a large urban area just over the state line, the state would have to include those MBEs from the urban areas who were willing to work on the state's highway projects. State or local legal requirements limiting contracting opportunities to resident companies are not authorized in the Federal-aid highway program (see 23 CFR Part 635, Subpart A) and are not, in

any event, a valid reason for failing to consider firms from other jurisdictions.

In some circumstances, the total number of MBE's available to perform work on the recipients' contracts may not, in itself, give the Administrator an accurate picture of the recipient's ability to meet its overall goal for a given fiscal year. For example, in a given year a state highway agency might spend a significant portion of the funds authorized by the Act on a single large project requiring very specialized contractors (e.g., an underwater tunnel). While the total number of MBE highway construction contractors in the state might be fairly large, the number of MBE contractors qualified to perform the specialty needed for the particular major project might be quite small. In such an exceptional circumstance, the recipient's ability to meet a ten percent overall goal could be reduced. The UMTA and FHWA Administrators would give such unusual circumstances appropriate weight in deciding whether to grant waivers.

As paragraph (5) states, the minority population of the recipient's jurisdiction would be given consideration. However, this is probably the least important of the waiver criteria, and the FHWA and UMTA Administrators would only consider minority population as a very general indicator of the MBE participation potential of an area, in conjunction with the other factors mentioned in subsection (b).

Subsection (c) supplies a bottom line to the waiver provision. Paragraph (1) provides that the FHWA or UMTA Administrator grants a waiver only if he or she determines that the recipient is making all feasible efforts to meet its annual overall goal but will be unable to do so because there are not enough eligible and qualified MBEs available. This determination is left to the Administrator's discretion and judgment. Paragraph (2) provides for coordination of waiver requests with the Department's Office of Small and Disadvantaged Business Utilization (OSADBU). The Director of OSADBU will have the opportunity to review and comment on a waiver request before the Administrator decides whether to grant the request, and will make comments expeditiously in order to avoid delay in processing the request.

Paragraph (3) provides that, if the Administrator grants a waiver, the Administrator would then establish a new overall goal for the fiscal year in question. This adjusted annual overall goal would be less than ten percent. However, the adjusted overall goal is not required to be the goal requested by the recipient. For example, if a recipient requested a waiver to a five percent goal, the Administrator could waive the ten percent goal requirement but decide that seven percent was appropriate. The Administrator could also place any reasonable procedural or substantive condition on the waiver (e.g., take a particular affirmative step, change a procedure, report to the Administrator at a certain date concerning progress in improving MBE participation).

Section 23.66 Compliance.

Subsection (a) is intended to clarify the distinction between the compliance and enforcement provisions of this section—which apply only to this subpart—and Subpart E of 49 CFR Part 23. Subpart E applies to all other matters under the Department's MBE regulation, but does not apply to Subpart D.

Subpart E is based on the model of enforcement procedures under Title VI of the Civil Rights Act of 1964. Nondiscrimination statutes like Title VI. However, Subpart D does not rest on the authority of Title VI. Rather, it is based on section 105(f), a provision of a statute authorizing financial assistance in FHWA and UMTA programs. Compliance with section 105(f), as implemented by the Department's regulations, is a condition of receiving financial assistance from these programs, no different from the many other planning, environmental, etc. conditions placed on receipt of such funds.

Consequently, as subsection (e) of this section provides, the FHWA and UMTA Administrators have at their disposal for purposes of Subpart D the same enforcement mechanisms they have with respect to any condition of financial assistance in their respective programs. In the case of FHWA, the Administrator can use 23 CFR 1.36, which provides:

> If the Administrator determines that a State has violated or failed to comply with the Federal laws or the regulations in this part with respect to a project, he may withhold payment to the State of Federal funds on account of such project, withhold approval of further projects in the State, and take such other action that he deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the State to the satisfaction of the Administrator.

Paragraph (e)(1) would specifically delegate to the Administrator the authority to use his powers under 23 CFR § 1.36 to enforce compliance with this subpart.

With respect to recipients of funds administered by UMTA, paragraph (e)(2) permits the UMTA Administrator to use UMTA's normal means for dealing with noncompliance with grant conditions to enforce compliance with Subpart D. These means, which are roughly equivalent to the authority of the FHWA Administrator under 23 CFR 1.36, may include suspension or termination of Federal funds or the refusal to approve projects, grants, or contracts until deficiencies are remedied.

Subsections (b), (c), and (d) set forth the enforcement scheme for the subpart. First, subsection (b) provides that a recipient fails to comply with Subpart D if it does not have an approved annual goal (i.e., it did not submit a goal or it submitted a goal which the Administrator disapproved and failed to resubmit an acceptable goal) or an approved MBE program under 49 CFR Part 23 with which to meet the goal. Noncompliance with subsection (b) automatically places a recipient in jeopardy of enforcement action under subsection (e).

Subsection (c) requires a recipient which has failed to meet its annual overall goal and seeks to avoid remedial or enforcement action under this section to demonstrate to the Administrator why it failed. The recipient must not only explain the reasons why it could not achieve the goal but also why meeting the goal was beyond the recipient's power. Explanations of failure to achieve a goal that rely on matters within the control of the recipient are unlikely to excuse the failure.

If the Administrator determines that the recipient's failure to meet the goal was not supported or adequately justified, subsection (d) directs the Administrator to order the recipient to take appropriate remedial action to make up for the failure. Remedial action could include, for example, particular affirmative action steps to be taken in the future, such as setting aside a portion of the recipient's Federal financial assistance, contracts, or projects for performance by MBEs. This remedial action would be in addition to the recipient's obligation to meet the annual overall goal covering the period during which the remedial action was taking place. Failure to take the remedial action ordered by the Administrator would itself be noncompliance with Subpart D, subjecting the recipient to enforcement action under subsection (e).

The Administrator is not required to wait until the end of a fiscal year to impose remedial steps. If it reasonably appeared to the Administrator that a recipient was not going to be able to meet its goal, and, within a reasonable

time set by the Administrator, the recipient could not satisfactorily explain the impending failure, the Administrator could direct the recipient to begin remedial action at once.

Amendments to 49 CFR 23.41(a)(2)(i) and (a)(3)(ii)

The Department also proposes to make technical amendments to two subparagraphs of the existing MBE regulation. The two provisions spell out which UMTA recipients are required to submit MBE programs. In their present form, these provisions omit mention of the UMTA section 18 program, for which additional funds are authorized under the Act, and do not include the section 9 and 9A programs, which the Act creates. The amendments simply add these three programs to the list of UMTA programs funding from which can trigger the MBE program requirement of 49 CFR Part 23. As amended, the provisions would specify that recipients who receive $250,000 or $500,000, respectively, from any combination of the section 3, 5, 9, 9A, 17 and 18 programs would be subject to one of the MBE program requirements of the rule.

This amendment is important in the context of the proposed Subpart D because the new subpart would implement section 105(f) through existing MBE programs. Recipients who do not have to have MBE programs under § 23.41 would not be required to comply with the goal requirements of Subpart D. Consequently, it is important that the criteria in § 23.41 for determining who must have an MBE program be current.

Administrative Matters

Shortened Comment Period

Under normal circumstances, the Department would provide a comment period longer than the one allowed for this proposed rule. Indeed, under section 12(b) of the Department of Transportation's Regulatory Policies and Procedures, the public is normally provided a 60 day comment period on significant regulations. The Procedures require an explanation of the reasons for a shorter comment period.

In this case, the reason for using a shorter comment period is that section 105(f) became effective on January 6, 1983, and applies to very large sums of money apportioned to the states on the same date. If recipients are to comply with the statute as it applies to current fiscal year funds, it is essential that the regulations setting forth compliance standards and procedures be promulgated very quickly. Given the necessity for making policy and legal determinations concerning implementation of section 105(f), drafting an NPRM, and coordinating the rule within the Department and with OMB under Executive Order 12291, the Department has proceeded to the publication of this NPRM as quickly as possible. Delay in moving from this NPRM to a final rule would make it much more difficult for the recipients to meet their ten percent goals for fiscal year 1983, leading to the possibility of enforcement action against recipients as well as overall failure to meet the objectives of the statute in this fiscal year.

For these same reasons, the Department is considering making the final rule based on this NPRM effective immediately on publication, rather than observing the normal 30 day waiting period between the date of publication and effective date. In the Department's view, the circumstances mentioned above are sufficient to constitute "good cause" for waiving the 30 day period under 5 U.S.C. 553(d).

Because the Department is also concerned with being able to make maximum use of the comments of recipients, contractors, and other interested parties, the Department is considering keeping the docket open for comments for a period of time following the publication of a final rule. Following the close of this extended comment period, the Department would either publish further revisions to the rule or a notice responding to the additional comments.

Executive Order 12291 and DOT Regulatory Policies and Procedures

The Department has determined that this NPRM does not constitute a major rule under the criteria of Executive Order 12291. However, it is a significant rule under the Department's Regulatory Policies and Procedures. It is significant because it affects to major DOT financial assistance programs and is based on a statute that may be controversial. A regulatory evaluation has been prepared and is on file in the rulemaking docket.

Regulatory Flexibility Act

Under the criteria of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Department has determined that this regulation may have a significant economic impact on a substantial number of small entities. Most minority businesses are small entities. This regulation would require a substantial increase in the use of small minority businesses in many parts of the country. While this impact would be a positive one, it comes under the criteria of the Regulatory Flexibility Act. A preliminary regulatory flexibility analysis has been incorporated in the regulatory evaluation placed in the rulemaking docket. Comments are invited on the impact of this proposed rule on small entities.

List of Subjects in 49 CFR Part 23

Minority businesses, Transportation, Highways and roads, Mass transportation.

Issued at Washington, D.C., this 24th day of February, 1983.

Elizabeth Hanford Dole,

Secretary of Transportation.

1. For the reasons set forth in the preamble, the Department of Transportation proposes to amend Part 23 of Title 49, Code of Federal Regulations, by adding thereto a new Subpart D, to read as follows:

PART 23—[AMENDED]

* * * * *

Subpart D—Special Provisions for Recipients of Funds Under the Surface Transportation Assistance Act of 1982

Sec.

Authority: Section 105(f) of the Surface Transportation Assistance Act of 1982 (Pub. L. 97–424).

§ 23.61 Purpose.

The purpose of this subpart is to implement section 105(f) of the Surface Transportation Assistance Act of 1982 (Pub. L. 97–424), concerning small business concerns owned and controlled by socially and economically disadvantaged individuals.

§ 23.62 Applicability.

This subpart applies to all Federal-aid highway funds authorized to be appropriated by Title I and section 202 of Title II of the Act, and to all urban mass transportation funds authorized to be appropriated by Titles I and III of the Act or by the Urban Mass Transportation Act of 1964, as amended, apportioned or allocated to recipients, which participate in DOT-assisted prime contracts or subcontracts.

§ 23.63 Definitions.

The following definitions apply to this subpart. Where these definitions are inconsistent with the definitions of § 23.5 of this part, these definitions control for purposes of Subpart D. The

definitions of § 23.5 control for all other purposes under this part.

"Act" means the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424).

"Minority"—See definition of "socially and economically disadvantaged individuals."

"Minority business enterprise" or "MBE" means a small business concern (1) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and, (2) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

"Small business concern" means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

"Socially and economically disadvantaged individuals" means those individuals who are citizens of the United States and who are Black Americans, Hispanic Americans, Native Americans, or Asian-Pacific Americans and any other minorities or individuals found to be disadvantaged by the Small Business Administration pursuant to section 8(a) of the Small Business Act. For convenience, these individuals and groups are referred to as "minorities" in this subpart. Recipients may make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged (the certification appeals mechanism of § 23.55 of this Part shall be available with respect to individuals alleged not to be socially and economically disadvantaged):

(1) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(2) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race;

(3) "Native Americans," which includes persons who are American Indians, Eskimos, Aluets, or Native Hawaiians; and

(4) "Asian-Pacific Americans" which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, India, Pakistan, Bangladesh, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas.

§ 23.64 Overall goals.

(a)(1) Each recipient of Federal-aid highway funds or urban mass transportation funds to which this subpart applies, that is required to establish an MBE program under § 23.41 of this part, shall set an annual overall goal of not less than ten percent of the dollar value of such funds to be used in DOT-assisted prime contracts and subcontracts during each fiscal year, unless the FHWA or UMTA Administrator has specifically granted a waiver under § 23.65 of this subpart.

(2) In appropriate cases, the UMTA Administrator may permit UMTA recipients to express this goal as a percentage of the funds for a particular grant, project, or group of grants or projects.

(b) It is expected that recipients will spend substantially more than ten percent of covered funds with MBEs in areas of relatively high minority concentration, such as large cities and highly urbanized areas.

(c) Each recipient shall submit the goals required by subsection (a) of this section to the concerned Departmental element for approval as provided in § 23.45(g)(3) of this part.

(d) Work performed by firms owned and controlled by women who are not socially and economically disadvantaged individuals shall not be counted toward goals under this subpart. Recipients shall continue to implement programs and goals for businesses owned and controlled by women as provided in Subpart C of this part.

§ 23.65 Waivers.

(a)(1) Any recipient may request the Administrator of the concerned Departmental element to grant a waiver of the ten percent annual overall goal required by § 23.64(a) of this part.

(2) A separate waiver request shall be made for each fiscal year for which the recipient seeks a waiver.

(3) Each waiver request shall be accompanied by sufficient information to permit the Administrator to determine whether a waiver is justified, in accordance with the waiver criteria of subsection (b) of this section.

(4) The recipient shall make its waiver request before the beginning of the fiscal year to which it applies, no later than the time it submits its request for approval of its annual overall goal for that fiscal year.

(3) Recipients shall submit waiver requests to the Administrator of the concerned Departmental element through the cognizant FHWA Division and Regional Offices or the UMTA Regional Office, as applicable. The FHWA Division and Regional Offices or the UMTA Regional Office forward the request to the Administrator, attaching their recommendation concerning whether the request should be granted, denied, or modified.

(b) The Administrator of the concerned Departmental element shall evaluate requests for waivers according to the following criteria:

(1) *Efforts to locate and utilize MBEs.* This includes soliciting the aid of the Minority Business Development Administration, the Small Business Administration, the Department of Transportation's Office of Small and Disadvantaged Business Utilization and other sources for locating MBEs. This also includes the recipient's efforts, through advertisements, publications, or other communications, to make MBEs aware of contracting opportunities. In connection with this criterion, the concerned Departmental element also reviews the growth of the recipient's annual overall MBE goals and accomplishments in the recent past.

(2) *Initiatives to encourage and develop MBEs.* The concerned Departmental element will consider all documented efforts made by the recipient to assist the formation and growth of MBE firms. This includes technical assistance and support services provided to MBEs and solicitation of available sources for assisting MBEs. For recipients of Federal-aid highway funds, this also includes soliciting the aid of the FHWA Supportive Services Program.

(3) *The number of MBEs available for work on contracts covered by this subpart.* An MBE directory or list of MBEs certified by the recipient shall be available for review. In no case shall the number of MBEs deemed available for work on the recipient's contracts be limited by state or local residency requirements or other formal or informal restrictions on the area from which MBEs are selected. In evaluating the availability of MBEs under this paragraph, the Administrator of the concerned Departmental element takes into account unusual circumstances, such as the expenditure of a significant portion of the recipient's funds in a single fiscal year on a large project requiring specialized expertise which available MBEs do not have.

(4) *Efforts made by the state to remove legal or other barriers to the participation of MBEs in the recipient's contracts at a level sufficient to meet the recipient's annual overall goal.* This includes such actions as lowering or waiving bonding requirements for MBEs, setting aside contracts for MBEs,

assisting MBEs in the acquisition of capital and other resources necessary to effective participation, and eliminating or waiving licensing or prequalification requirements for MBEs. Difficulties caused by state or local law are not grounds for a waiver.

(5) *The size of the minority population.* This factor is of limited significance by itself, and will be used in conjunction with other criteria.

(c)(1) The Administrator of the concerned Departmental element approves a waiver request only if he or she determines that the recipient has demonstrated that it is making all feasible efforts to meet its annual overall goals but will be unable to do so because there are not sufficient eligible and qualified MBEs.

(2) Before acting on a waiver request, the Administrator provides the director of the Office of Small and Disadvantaged Business Utilization with an opportunity to review and comment on the waiver request.

(3) If the Administrator grants the waiver, he or she establishes an adjusted annual overall goal that the recipient is required to meet for the fiscal year in question. The Administrator may condition the grant of a waiver on any reasonable future action by the recipient.

§ 23.66 Compliance.

(a) Compliance with the requirements of this subpart is enforced through the provisions of this section, not through the provisions of Subpart E of this part.

(b) Failure of a recipient to have approved annual overall goals, as required by § 23.64(a) of this subpart, or to have an approved MBE program, is noncompliance with this subpart.

(c) If a recipient fails to meet an approved annual overall goal in any fiscal year, it shall demonstrate to the Administrator of the concerned Departmental element why the the goal should not be achieved and why meeting the goal was beyond the recipient's power to control.

(d) If the Administrator determines that the recipient's failure to meet an annual overall goal is not supported or adaquately justified, the Administrator shall direct the recipient to take appropriate remedial action. Failure to take the remedial action directed by the Administrator is noncompliance with this subpart.

(e)(1) In the event of noncompliance with this subpart by a recipient of Federal-aid highway funds, the FHWA Administrator may take any action provided for in 23 CFR 1.36.

(2) In the event of noncompliance with this subpart by a recipient of funds administered by UMTA, the UMTA Administrator may take appropriate enforcement action. Such action may include, pursuant to grant agreements, the suspension or termination of Federal funds or the refusal to approve projects, grants, or contracts until deficiencies are remedied.

§ 23.41 [Amended]

2. The Department also proposes to amend § 23.41(a) of Title 49 of the code of Federal Regulations as follows:

a. By amending § 23.41(a)(2)(i) thereof to read as follows:

(i) Applicants for funds in excess of $250,000, exclusive of transit vehicle purchases, under sections 3, 5, 9, 9A, 17 and 18 of the Urban Mass Transportation Act of 1964, as amended. and Federal-aid urban systems;

b. By amending § 23.41(a)(3)(ii) thereof to read as follows:

(ii) Applicants for funds in excess of $500,000, exclusive of transit vehicle purposes, under sections 3, 5, 9, 9A, 17 and 18 of the Urban Mass Transportation Act of 1964, as amended. and Federal Aid Urban Systems;

[FR Doc. 83-5187 Filed 2-25-83; 8:45 am]

BILLING CODE 4910-62-M