raw agricultural commodity hops to read as follows:

§ 180.1046 Dimethylformamide; exemption from the requirement of a tolerance.

(a) * * *

Commodities

* * * * *

Hops

* * * * *

[FR Doc. 87-24122 Filed 10-20-87; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 22

[CC Docket No. 80-57]

Revision and Update of Public Mobile Service Rules; Correction

AGENCY: Federal Communications Commission.

ACTION: Final rule; correction.

SUMMARY: This document corrects the amendatory language for § 22.15, as appearing in the Final Rule document in this proceeding concerning Part 22.

FOR FURTHER INFORMATION CONTACT: Carmen Borkowski (202) 632-6450.

SUPPLEMENTARY INFORMATION: On April 2, 1987, the Commission published a final rule concerning the revision of Part 22 (52 FR 10571).

§ 22.15 [Correctly amended]

The amendatory language for § 22.15 is hereby corrected to read: "Section 22.15 is amended by revising paragraphs (b)(1), (i), (ii) and (b)(2)(i) and by adding paragraph (b)(1)(iii) to read as follows:"

Federal Communications Commission,

William J. Tricarico,

Secretary.

[FR Doc. 87-24375 Filed 10-20-87; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF TRANSPORTATION

49 CFR Part 23

[Docket No. 64f and 64g; Notice No. 87-21]

Participation by Minority Business Enterprise in Department of Transportation Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule; request for comments.

SUMMARY: Congress recently enacted section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA). This section requires amendments in the Department's disadvantaged business enterprise (DBE) program, the most important of which is making women a presumptively disadvantaged class for purposes of the program. This rule makes the changes mandated by the new statute. In addition, the rule amends the definition of "Hispanic" to include Portuguese-Americans, consistent with Small Business Administration practice. It also changes the way in which purchases of materials and supplies from minority, women-owned, and disadvantaged business enterprises are counted toward recipients' and contractors' goals.

DATES: This rule is effective on October 21, 1987. Comments in response to the request for public comment are due December 21, 1987. Late-filed comments will be considered to the extent practicable.

ADDRESS: Comments should be addressed to Docket Clerk, Docket 64g, Department of Transportation, Room 4107, 400 7th Street SW., Washington, DC 20590. Comments will be available for review by the public at this address from 9:00 a.m. through 5:30 p.m., Monday through Friday. Commenters wishing acknowledgment of their comments should include a stamped, self-addressed postcard with their comment. The Docket Clerk will date stamp and sign the card and return it to the commenter.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy, Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street SW., Room 10424, Washington, DC 20590. (202) 366-9306.

SUPPLEMENTARY INFORMATION: This final rule serves three purposes. First, and most important, it amends the Department's disadvantaged business enterprise (DBE) regulations to conform with recent Congressional action that modified the statutory basis for the DBE program. These changes make women presumptively disadvantaged individuals for purposes of the program, set an average annual gross revenue limit of $14 million (over a three-year period) for being considered a small business under the program, and require the Department to establish certification process guidelines for recipients.

Second, the rule makes a minor modification to the definition of "Hispanic" used in the DBE program. The amendment would include Portuguese Americans within the definition of Hispanic, in order to make the Department's administration of this program consistent with Small Business Administration (SBA) administrative practice in similar programs.

Third, the Department is taking final action concerning the credit allowed toward goals for the use of MBE, DBE and WBE suppliers, in the FAA and FRA as well as in the FHWA and UMTA programs. This action is based on an October 1985 notice of proposed rulemaking (NPRM). This action would permit 60 percent of the value of goods purchased from an MBE, DBE, or WBE "regular dealer" to be counted toward a contractor's or recipient's goal. The percentage of goods countable toward goals would be reevaluated after two years. This rule also clarifies the application of the "commercially useful function" concept.

Request for Comments

The Department is seeking comments on the first two portions of the rule—changes to reflect section 106(c) of the STURAA and the amendment to the definition of Hispanic—since the Department has not previously provided interested persons the opportunity to comment on these matters. Following the receipt of comments on these subjects, the Department will publish a notice responding to the comments and, if appropriate, will promulgate amendments to the affected regulatory provisions.

The third portion of the rule, concerning suppliers, was the subject of an NPRM (50 FR 40422, October 2, 1985), and comments were obtained concerning the matters it covers. Consequently, comments are not being sought on the provisions of the final, rule provisions on this subject. However, the Department is seeking comments on whether a different percentage of credit for the use of DBE suppliers is appropriate for Urban Mass Transportation Administration (UMTA) programs than is applied to the rest of the Department's programs. Specifically, the Department seeks comment on whether, on a permanent or pilot program basis, goods purchased from DBE regular dealers in the UMTA program should be counted at 100 percent of their value.

Changes to Conform to Section 106(c) of the STURAA

Section 106(c) continues the DBE program established in 1983 by section 105(f) the Surface Transportation Assistance Act of 1982. The basic structure of the DBE program remains intact, with the exceptions discussed below. Funds authorized by the 1982

legislation which have not been obligated by the date of enactment of the STURAA (April 2, 1987) are governed by the DBE provisions of section 106(c) of the STURAA, not by the provisions of section 105(f) of the 1982 Act.

The rule makes technical changes to § 23.61, the definition of "Act" in § 23.62, and the applicability language of § 23.63 to reflect the enactment of section 106(c) of the STURAA as the replacement for section 105(f) of the Surface Transportation Assistance Act of 1982. Appendix A, which follows Subpart D of the rule and provides a section-by-section explanation of its operation, is also being amended to conform to all changes made to the Part 23 by this rule.

Section 106(c)(2)(B) provides that women, like Black Americans, Hispanic Americans, and the other groups currently designated in the regulations, are presumed to be socially and disadvantaged individuals for purposes of the DBE program. To implement this provision, the Department is amending the definition of "socially and economically disadvantaged individuals" by adding a reference to women.

This change has an important implication for the administration of the Department's program. Heretofore, each recipient has had to have two separate goals: One for DBEs and one for WBEs. With the addition of women as a "presumptive" group, it no longer is practicable to retain this two-goal system. The legislative history of section 106(c) indicates that Congress intended the Department to adopt a one-goal system for DBEs under the new legislation.

Consequently, the Department is amending § 23.45(g)(4) to specify that, from now on, the DBE program will have only one goal. That is, each recipient's DBE program will have a single overall goal for DBEs, and each contract on which a goal is required will have a single contracting goal for DBEs. There will no longer be separate DBE and WBE goals.

Section 106(c)(4) of the STURAA requires the Department to establish uniform standards for recipients' certifications of DBE eligibility. In this rule, the Department is requiring recipients to take those steps specifically listed in the legislation. The steps listed in the amended § 23.45(f) are not the only possible things that recipients should do in certification. The Department seek comments on what additions or modifications should be made to this list.

Congress determined, in order to ensure that the DBE program meets its objective of helping small minority businesses become self-sufficient and able to compete in the market with non-disadvantaged firms, that DBE firms should "graduate" from the program once their average annual receipts reached $14 million. Section 106(c)(2)(A) of the STURAA mandates this result. An amendment to the definition of "small business concern" in § 23.62 implements this provision of the statute.

Section 106(c) makes the $14 million figure subject to adjustment by the Secretary for inflation. The regulation provides that the Secretary shall make such adjustments from time to time. The Department seeks comment on the methodology for and frequency of these adjustments.

Finally, section 106(c)(3) requires an annually-updated list of eligible DBEs. Section 23.45(e) of the regulation already requires recipients to compile a directory. This rule implements the new statute by requiring the directory to be updated annually. Recipients will be expected, when they make their next annual update, to list all DBE firms, those owned and controlled by women as well as those owned and controlled by minorities. It is likely that most or all recipients already include the addresses of firms listed in their directories; however, in order to ensure conformity with section 106(c)'s requirement that the location of firms be stated, the regulation is amended specifically to require the listing of firms' addresses.

The DBE program—and hence the changes this rule makes in response to section 106(c) of the STURAA—continues to apply only to the Department's financial assistance programs for highways and urban mass transportation; it does not apply to other DOT financial assistance programs, such as the programs for airports and intercity rail service. Consequently, for example, airport sponsors receiving financial assistance from the FAA would continue to set separate goals for MBEs and WBEs.

The portion of the Congressional Conference Report on section 106(c) (House Report 100–27, at p. 148) urges the Secretary to reexamine existing waiver provisions (i.e., 49 CFR 23.65) and revise them to permit any state to more readily adjust its goal from the ten percent requirement, if that percentage does not reflect a reasonable goal. The Department seeks comment on what modifications to § 23.65, if any, are appropriate in light of this recommendation.

The Conference Report also expressed the view that participation of minorities and women should be equitably distributed throughout the highway construction industry and that the implementation of the DBE program should not fall disproportionately on any one segment of the industry. Neither 106(c) nor the Conference report contains any directions or recommendations to the Secretary concerning what steps it would be reasonable for the Department to take in light of this expressed view. The Department seeks comment on any modifications of Part 23 that would be appropriate in response to the views expressed on this point in the Conference Report.

Amendment to Definition of Hispanic

The Department's DBE rule defines eligible businesses as being small business concerns owned and controlled by socially and economically disadvantaged individuals. It does so because section 105(f) of the Surface Transportation Assistance Act of 1982, and its successor, section 106(c) of the STURAA, explicitly direct the Department to use this definition, which derives from section 8(d) of the Small Business Act and implementing regulations issued by the Small Business Administration (SBA).

One of the groups presumed to be disadvantaged, under this definition, is "Hispanic Americans." Because an applicable government-wide definition of the term "Hispanic" did not include Portuguese-Americans, and because the SBA has never, through regulation, determined that Portuguese-Americans were disadvantaged, the Department's 1983 rule implementing section 105(f) did not treat Portuguese-Americans as part of the presumptively disadvantaged "Hispanic Americans" group.

Subsequently, the Department learned that internal SBA guidance directed that agency's personnel to regard Portuguese-Americans as Hispanics. Specifically, SBA provided a copy of a March 1986 internal directive, SBA Notice No. 8000–68, to the Department in December 1986. The notice provides in pertinent part:

> [W]ith respect to Portuguese Americans and Section 8(a) eligibility * * * such individuals are eligible as Hispanic Americans. In practice, the Agency has applied the phrase Hispanic Americans as including those individuals whose ancestry and culture are rooted in South American, Central American, Cuba, Dominican Republic, Puerto Rico, or the Iberian Peninsula, including Portugal.

While the Department's existing definition is consistent with applicable statutes, the Department has determined, as a policy matter, to amend the definition of "Hispanic

Americans" to include persons of Portuguese culture or origin. The Department believes it would be beneficial to make its DBE program consistent with the minority business programs of the SBA in this respect in order to avoid confusion. In addition, this change would make the definitions of Subpart D of Part 23 (applying to highway and mass transit programs) more consistent with those of Subpart A (applying to aviation and rail programs). Portuguese-Americans have been eligible to participate in the airport and rail programs since 1981.

Credit for Use of Suppliers and "Commercially Useful Function"

The Department's current MBE/DBE rules limit the credit toward goals that a recipient or contractor can obtain for purchasing materials and suppliers from an MBE, WBE, DBE firm that does not manufacture the materials or supplies. Section 23.47(e) of the regulation provides as follows:

(e) A recipient or contractor may count toward its MBE goals expenditures for materials and supplies obtained from MBE suppliers and manufacturers, provided that the MBEs assume the actual and contractual responsibility for the provision of the materials and supplies.

(1) The recipient or contractor may count its entire expenditure to an MBE manufacturer (i.e., a supplier that produces goods from raw materials or substantially alters them before resale).

(2) The recipient may count 20 percent of its expenditures to MBE suppliers that are not manufacturers, provided that the MBE supplier performs a commercially useful function in the supply process.

The Department proposed to change this provision. In an October 2, 1985, notice of proposed rulemaking (NPRM), the Department proposed to allow an unspecified, but increased, percentage of the cost of materials purchased from an MBE, WBE, or DBE supplier who was a "regular dealer" to count toward goals. In addition, the NPRM proposed refinements to the concept of "commercially useful function" that would more precisely define the credit allowable toward goals for use of MBE, WBE, and DBE firms performing such functions as hauling, professional and technical services, manufacturers' representatives, and insurance agents.

The Department received 56 comments on the NPRM. Of these, 27 favored increasing the percentage to 100 percent. Another 16 favored raising the percentage to a figure less than 100 percent (most of these comments recommended a percentage between 30 and 80 percent). The remaining comments did not take a position on this issue.

The reasons for increasing the percentage cited by those commenters favoring an increase were essentially those mentioned in the preamble to the NPRM. First, the current provision may have an adverse effect on MBE, DBE, or WBE suppliers, in that it provides less incentive for recipients and contractors to use their services than the services of other kinds of eligible firms (which are counted at 100 percent of the value of their products or services).

Second, it is likely to be more cost-effective for a recipient to use its resources to develop contacts with or provide technical assistance to a firm the use of which will result in 100 percent credit than one for which the "payoff" in terms of credit towards goals will be 20 cents on the dollar. As a result, the rule could unintentionally skew recipient's programs toward construction contractors and other service providers and away from dealers and suppliers of products.

Third, the provision may make it more difficult for some recipients to meet goals than others. For example, Urban Mass Transportation Administration (UMTA) recipients of operating assistance must meet their DBE goals largely through procurements of materials and supplies (e.g., bus fuel, spare parts). Since these recipients can get only 20 percent credit for the use of the MBE/DBE firms that provide these materials and supplies, the recipients will have a more difficult time meeting goals than those recipients (e.g., transit authorities or highway departments that do substantial amounts of construction contracting) 100 percent of the value of whose DBE contracts can be counted toward goals.

Fourth, some commenters also pointed out that the present rule is inconsistent with respect to treatment of the costs of supplies. If an MBE, DBE or WBE construction contractor buys supplies for a job from a non-minority firm, the entire cost of those supplies is credited toward the goal, since it becomes part of the contract price. If a recipient or non-minority contractor purchases the same supplies from an MBE, WBE, or DBE supplier, however, only 20 percent of the value of the supplies is credited toward the recipient's goals.

Commenters who opposed raising the percentage basically did so for the reasons cited in the original rule on this subject. That is, the commenters were concerned that prime contractors would rather meet goals through purchasing supplies than by using MBE, DBE, or WBE subcontractors, and that increasing the percentage of supply costs allowable toward goals would adversely affect subcontractors. In addition, these commenters cited the relatively low portion of "value added" by suppliers, as contrasted with other sorts of contractors. They also expressed the concern that the proposal might increase the participation of brokers and manufacturers' representatives, which they viewed as inconsistent with the intent of the program.

The commenters who supported increasing the percentage, but to a figure less than 100 percent, generally did so in the belief that a compromise recognizing the validity of arguments for not changing the rule and for changing it to 100 percent was desirable. These commenters proposed percentages ranging from 30 to 80 percent. Some of these comments also recommended sliding scales (e.g., 100 percent for the first $25,000 worth of materials, smaller percentages for additional amounts).

The Department recognizes that commenters on all sides of this issue have legitimate concerns. Consequently, the Department has concluded that the most appropriate response to these concerns is to raise the percentage of the value of goods purchased through regular dealers to 60 percent. Choosing this percentage will mitigate significantly the problems cited by recipients and suppliers with the current 20 percent figure. As a percentage significantly less than 100, however, it will avoid to a considerable degree the problems cited by other commenters. The Department will reevaluate this decision after two years to determine whether, on the basis of recipients', contractors' and suppliers' experience, it is appropriate to raise it, lower it, or leave it at 60 percent.

The most significant support for counting 100 percent of goods purchased from DBE suppliers came from transit authorities and suppliers to transit authorities. Some of these commenters appeared to believe that there are considerations specific to the transit program (especially for smaller transit authorities) that make 100 percent counting especially appropriate in that program. The Department is seeking comment on whether there should be a different percentage used for the transit program from that used in the rest of the Department's programs (e.g., 100 percent). The Department also seeks comment on whether, if a different percentage is used for the UMTA program, it should be used on a pilot program basis, subject to reevaluation after a certain amount of time, or whether the change should be permanent.

With respect to the "regular dealer" concept, a number of commenters asked for clarification. Some commenters asked whether recipients were required to certify firms as regular dealers. The Department does not intend to require certification, as such. Before a recipient may count (or permit a contractor to count) 60 percent of the value of a product toward a goal, the recipient must ensure that the firm is a regular dealer in the product involved. (Obviously, a firm may be a regular dealer in one product but not in another. It is intended that 60 percent credit be permitted only where the firm is a regular dealer in the product involved in the particular transaction.) This determination could be made on a case-by-case basis or could be done through a certification process. The choice is up to the recipient.

One commenter suggested that, in order that recipients could avoid the administrative burden of determining whether firms were regular dealers, firms should be able to self-certify as regular dealers. The Department believes that this approach would be too open to abuse, and we have not adopted it.

A number of commenters addressed the NPRM's provision concerning suppliers of bulk goods, such as fuel oil dealers. The NPRM said that bulk goods suppliers did not have to keep such products in stock, but must own, operate, or maintain distribution equipment and have, as their principal business, and in their own name, the purchase and sale of the products. Some comments approved this proposal. Some said that even bulk goods suppliers should have to maintain an inventory of the product; others said that distribution equipment should not be required.

A key purpose of the "regular dealer" definition is to distinguish between firms that supply a product on a regular basis to the public and those that supply the product on only an ad hoc basis in relation to a particular contract or contractor. Such indications of being a regular, established, supplier as maintaining an inventory or distribution equipment are very useful in making this distinction. At the same time, business practices may differ for suppliers of different types of goods or in different parts of the country, and an absolute, across-the-board requirement for either the maintenance of an inventory or possession of distribution equipment could be unrealistic.

For this reason, the final rule will permit a supplier of bulk goods to be regarded as a regular dealer if, in addition to meeting other parts of the definition, it either maintains an inventory of the product in stock or owns or operates distribution equipment. The final rule will not require both an inventory and distribution equipment.

There were few comments on the NPRM's proposals to clarify the counting provisions applicable to contractors who are neither suppliers nor construction contractors. These comments generally supported the NPRM's approach of counting fees and commissions for such participants. One comment suggested that fees and commissions for brokers and manufacturer's representatives should be counted. This is consistent with the Department's intent in the NPRM, and such fees and commissions may be counted under the final rule, provided, of course, that the broker or manufacturer's representative performs a commercially useful function in a given transaction.

Another commenter said that counting fees and commissions would be too administratively burdensome, and suggested a flat 10 percent rate for counting the contributions of firms that were not regular dealers. The Department did not adopt this suggestion. The Department does not believe that its approach is burdensome, and a 10 percent rate might well overstate the credit due such firms in many instances. Consequently, the NPRM provision has been retained with only minor changes.

In implementing the amended rule, recipients should keep in mind the concept of "commercially useful function." According to § 23.47(d), work performed by an MBE, DBE or WBE firm in a particular transaction can be counted toward goals only if the recipient determines that it involves a commercially useful function. That is, in light of industry practices and other relevant considerations, does the MBE, DBE or WBE firm have a necessary and useful role in the transaction, of a kind for which there is a market outside the context of the MBE/DBE/WBE program, or is the firm's role a superfluous step added in an attempt to obtain credit toward goals? If, in the recipient's judgment, the firm does not perform a commercially useful function in the transaction, no credit toward goals may be awarded, and the counting provisions of the regulation never come into play.

It should be noted that the question of whether a firm is performing a commercially useful function is completely separate from the question of whether the firm is an eligible MBE, DBE, or WBE. A firm is eligible if it meets the definitional criteria (see §§ 23.5 or 23.62) and ownership and control requirements (see § 23.53) of the regulation.

The issue of whether an eligible firm performs a commercially useful function arises only in the context of how much, if any, "credit" toward MBE, DBE, or WBE goals can be counted for the firm's participation in a contract (see § 23.47). An eligible firm may perform a commercially useful function on one contract and not on another.

The fact that a firm does not perform a commercially useful function in a certain transaction does not mean that the firm loses eligibility (i.e., that it should be decertified or not recertified, as though it were no longer owned and controlled by its minority, disadvantaged, or women participants), only that no credit can be counted for its participation in the transaction.

Of course, there may be circumstances in which the participation of a firm in transactions in which it perform no commercially useful function may constitute part of a pattern of relationships with non-minority businesses that brings the firm's independence and control into question. In this sense, connection between "no commercially useful function" and program eligibility could exist. There may also be circumstances in which performing no commercially useful function (e.g., in an intentional pass-through scheme) could involve fraud or other disreputable conduct, leading to a firm to being subject to a declaration of non-responsibility, suspension or debarment, or even criminal prosecution.

If the recipient determines that the firm is performing a commercially useful function, the recipient must then decide what that function is. If the commercially useful function is that of a regular dealer, the recipient may then count 60 percent of the value of the product supplied toward MBE, DBE, or WBE goals.

A regular dealer must be engaged in selling the product in question *to the public.* This is important in distinguishing a *regular* dealer, which has a regular trade with a variety of customers, from a firm which performs supplier-like functions on a *ad hoc* basis or for only one or two contractors with whom it has a special relationship.

As noted above, a supplier of bulk goods may qualify as a regular dealer if it either maintains an inventory or owns or operates distribution equipment. With respect to the distribution equipment (e.g., a fleet of trucks), the term "or operates" is intended to cover a situation in which the supplier leases the equipment on a regular basis for its

entire business. It is not intended to cover a situation in which the firm simply provides drivers for trucks owned or leased by another party (e.g., a prime contractor) or leases such a party's trucks on an *ad hoc* basis for a specific job.

If the commercially useful function being performed is not that of a regular dealer, but rather that of delivery of products, obtaining bonding or insurance, procurement of personnel, acting as a broker or manufacturer's representative in the procurement of supplies, facilities, or materials, etc., the counting rules of § 23.47(f) would apply.

Under paragraph (f), for example, a business that simply transfers title of a product from manufacturer to ultimate purchaser (e.g., a sales representative who reinvoices a steel product from the steel company to the recipient or contractor) or a firm that puts a product into a container for delivery would not be considered a regular dealer. The recipient or contractor would not receive credit based on a percentage of the cost of the product for working with such firms.

Subparagraph (f)(1) concerns the use of services that help the recipient or contractor obtain needed supplies, personnel, materials or equipment to perform a contract or program function. Only the fee received by the service provider could be counted toward goals. For example, use of a minority sales representative or distributor for a steel company, if performing a commercially useful function at all, would entitle the recipient or contractor receiving the steel to count only the fee paid to the representative or distributor toward its goal. No portion of the price of the steel would count toward the goal. This provision would also govern fees for professional and other services obtained expressly and solely to perform work relating to a specific contract or program function.

Subparagraph (f)(2) concerns transportation or delivery services. If an MBE, DBE or WBE trucking company picks up a product from a manufacturer or regular dealer and delivers the product to the recipient or contractor, the commercially useful function it is performing is not that of a supplier, but simply that of a transporter of goods. Unless the trucking company is itself the manufacturer of or a regular dealer in the product, credit cannot be given based on a percentage of the cost of the product. Rather, credit would be allowed for the cost of the transportation service.

Subparagraph (f)(3) applies the same principle to bonding and insurance matters. Contractors often are required to obtain bonding and insurance concerning their work in DOT-assisted contracts. When they obtain a bond or an insurance policy from an MBE, DBE, or WBE agent, the amount allowable toward goals is not any portion of the face value of the policy or bond or the total premium, but rather the fee received by the agent for selling the bond or insurance policy.

The Department is aware that the rule's language does not explicitly mention every kind of business that works in DOT financial assistance programs. In administering this rule, the Department's operating administrations would, on a case-by-case basis, determine the appropriate regulatory provision to apply in a particular situation.

These provisions would apply to prime contracts and purchases by recipients as well as to subcontracts let by prime contractors. The rule provides that only services required by a DOT-assisted contract are eligible for credit; a DOT-assisted contract, for this purpose, can mean a direct purchase of goods or services by a transit authority as well as by a prime construction contractor under a highway contract. The amendments to § 23.47 apply to all financial assistance programs in the Department (e.g., the airport and intercity rail programs as well as the highway and urban mass transportation programs).

Regulatory Process Matters

The Department has determined that this rule does not constitute a major rule under the criteria of Executive Order 12291. It is a significant rule under the Department's Regulatory Policies and Procedures. Since the regulation simply makes administrative adjustments to an existing program, its economic impacts are expected to be small, and the Department has consequently not prepared a regulatory evaluation.

Since proposed rules have not been issued with respect to the portions of this rule implementing section 106(c) of the STURAA and concerning the definition of Hispanic, the Regulatory Flexibility Act does not apply to these provisions. With respect to the supplier credit and commercially useful function portions of the rule, the Act does apply.

As noted in the NPRM, the Department considered whether the proposal for these amendments would have a significant economic impact on a substantial number of small entities. The entities in question are small businesses who act as suppliers to DOT recipients and contractors. The changes in counting procedures will benefit regular dealers by increasing the credit that may be counted toward DBE/WBE goals for the purchase of supplies. For businesses that do not perform supply services, the proposal will clarify existing policy that only the fee for their service may be counted toward goals. The overall effect of the proposal will be to increase opportunities for participation in DOT financial assistance programs.

Comments to the rule did not suggest that even these benefits would be of major magnitude, however, and none of the comments suggested that the proposal would have any adverse consequences for small entities. Consequently, the Department certifies that the rule will not have a significant economic effect on a substantial number of small entities.

The portions of the rule which have not previously been the subject of an NPRM concern matters under Federal grants, and hence are exempt from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. 553(a)(2)). In addition, the portions of the rule implementing section 106(c) of the STURAA must be implemented rapidly, in order to ensure that the provisions apply to funds authorized by the Act, as Congress intended. It is reasonable to promulgate the amendment to the definition of Hispanic at the same time as other changes are made to the definition of "socially and economically disadvantaged individuals," in order to avoid confusion by recipients administering the program. For these reasons, the Department has determined that there is good cause to promulgate these portions of the rule without prior notice and comment (see 5 U.S.C. 553(b)(B)) and to make the rule effective immediately, rather than after a 30-day period (see 5 U.S.C. 553(c)(3)).

List of Subjects in 49 CFR Part 23

Minority businesses, Highways, Mass transportation.

Issued in Washington, DC on October 6, 1987.

Jim Burnley,

Acting Secretary of Transportation.

In consideration of the foregoing, the Department of Transportation amends 49 CFR Part 23 as follows:

PART 23—[AMENDED]

1. The authority citation for Part 23 is revised to read as follows and the authority citation for Subpart D is removed:

Authority: Sec. 905 of the Railroad Revitalization and Regulatory Reform Act of 1978 (45 U.S.C. 803); sec. 30 of the Airport and Airway Development Act of 1970, as

amended (49 U.S.C. 1730); sec. 19 of the Urban Mass Transportation Act 1964, as amended (Pub. L. 95–599); Title 23 of the U.S. Code (relating to highways and highway safety); Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*); The Federal Property and Administrative Services Act of 1949 (49 U.S.C. 471 *et seq.*); sec. 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100–17); Executive Order 11625; Executive Order 12138.

2. Section 23.45(e) is amended by adding the following sentence at the end of the paragraph:

§ 23.45 [Amended]

* * * * *

(e) * * * Recipients subject to the disadvantaged business enterprise program requirements of Subpart D of this Part shall compile and update their directories annually. The directories shall include the addresses of listed firms.

* * * * *

3. Section 23.45(f)(3) is added to read as follows:

* * * * *

(f) * * *

(3) Recipients covered by the disadvantaged business program requirements of Subpart D of this Part shall, in determining whether a firm is an eligible disadvantaged business enterprise, take at least the following steps:

(i) Perform an on-site visit to the offices of the firm and to any job sites on which the firm is working at the time of the eligibility investigation;

(ii) Obtain the resumes or work histories of the principal owners of the firm and personally interview these individuals;

(iii) Analyze the ownership of stock in the firm, if it is a corporation;

(iv) Analyze the bonding and financial capacity of the firm;

(v) Determine the work history of the firm, including contracts it has received and work it has completed;

(vi) Obtain or compile a list of equipment owned or available to the firm and the licenses of the firm and its key personnel to perform the work it seeks to do as part of the DBE program; and

(vii) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program.

* * * * *

4. Section 23.45(g)(4) is revised to read as follows:

§ 23.45 [Amended]

(g) * * *

* * * * *

(4) Recipients covered by the disadvantaged business enterprise program requirements of Subpart D of this Part shall establish an overall goal and contract goal for firms owned and controlled by socially and economically disadvantaged individuals. Other recipients shall establish separate overall and contract goals for firms owned and controlled by minorities and firms owned and controlled by women, respectively.

* * * * *

5. Section 23.47 is amended by revising paragraph (e) and by adding a new paragraph (f), to read as follows:

§ 23.47 [Amended]

* * * * *

(e) (1) A recipient or contractor may count toward its MBE, DBE or WBE goals 60 percent of its expenditures for materials and supplies required under a contract and obtained from an MBE, DBE or WBE regular dealer, and 100 percent of such expenditures to an MBE, WBE, or DBE manufacturer.

(2) For purposes of this section, a manufacturer is a firm that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the recipient or contractor.

(3) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the firm must engage in, as its principal business, and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock, if it owns or operates distribution equipment. Brokers and packagers shall not be regarded as manufacturers or regular dealers within the meaning of this section.

(f) A recipient or contractor may count toward its MBE, DBE, or WBE goals the following expenditures to MBE, DBE, or WBE firms that are not manufacturers or regular dealers:

(1) The fees or commissions charged for providing a *bona fide* service, such as professional, technical, consultant or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fee or commission is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(2) The fees charged for delivery of materials and supplies required on a job site (but not the cost of the materials and supplies themselves) when the hauler, trucker, or delivery service is not also the manufacturer of or a regular dealer in the materials and supplies, provided that the fee is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) The fees or commissions charged for providing any bonds or insurance specifically required for the performance of the contract, provided that the fee or commission is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

6. Section 23.61(a) is amended by revising the first sentence up to the first comma to read as follows:

§ 23.61 [Amended]

(a) The purpose of this subpart is to implement section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100–17) so that, * * *

* * * * *

7. Section 23.61(b) is amended by removing the words "section 105(f)" and substituting the words "section 106(c)".

8. Section 23.62 is amended by revising the definition of "Act" to read as follows:

§ 23.62 [Amended]

* * * * *

"Act" means the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100–17).

* * * * *

9. Section 23.62 is amended by removing the period(.) at the end of the definition of "Small business concern," and adding the following words:

* * * * *

"Small business concern" * * * except that a small business concern shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has annual average gross receipts in excess of $14 million over the previous three fiscal years. The Secretary shall adjust this figure from time to time for inflation.

* * * * *

10. Section 23.62 is amended by adding, in the definition of "Socially and economically disadvantaged individuals," immediately following the words "(or lawfully admitted permanent residents) and who are" the word

"women,"; and by adding, in the definition entitled "(b) 'Hispanic Americans'," immediately after the words "or other Spanish" the words "or Portuguese."

11. Section 23.63 is revised to read as follows:

§ 23.63 Applicability.

This subpart applies to all DOT financial assistance in the following categories that recipients expend in DOT-assisted contracts:

(a) Federal-aid highway funds authorized by Title I of the Act;

(b) Urban mass transportation funds authorized by Title I or III of the Act or the Urban Mass Transportation Act of 1964, as amended; and

(c) Funds authorized by Title I, II (except section 203) or III of the Surface Transportation Assistance Act of 1982 (Pub. L. 97–424) and obligated on or after April 2, 1987.

Appendix A—[Amended]

12. The portion of Appendix A, following Subpart D, entitled "Section 23.61 Purpose." is amended in its first sentence, by removing the words "105(f) of the Surface Transportation Assistance Act of 1982." and substituting the words "106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987."; and, in the third sentence, by removing the word "105(f)" in both places where it occurs and substituting the word "106(c)".

13. The portion of Appendix A, following Subpart D, entitled "Section 23.62 Definitions" is amended by removing the words "Surface Transportation Assistance Act of 1982." in the first sentence and substituting the words "Surface Transportation and Uniform Relocation Assistance Act of 1987."

14. The portion of Appendix A, following Subpart D, entitled "Section 23.62 Definitions" is amended by adding the following new paragraphs following the end of the paragraph entitled "small business concerns":

Congress determined, in order to ensure that the DBE program meets its objective of helping small minority businesses become self-sufficient and able to compete in the market with non-disadvantaged firms, that DBE firms should "graduate" from the program once their average annual receipts reached $14 million.

In implementing this provision, recipients should note that a firm is not "graduated" from the program, and hence no longer an eligible DBE, until its average annual gross receipts over the previous three-year period exceed $14 million. The fact that a firm exceeds $14 million in gross receipts in a single year does not necessarily result in "graduation." For example, suppose a firm has the following history:

1985—$11 million
1986—$13 million
1987—$14 million
1988—$14 million
1989—$15 million

The firm makes $14 million in 1987. However, the firm's average annual gross receipts for 1985–87 are $12.67 million, so the firm remains eligible in 1988. This hypothetical firm would remain eligible in 1989 as well, since its average annual gross receipts for 1986–88 would be $13.67 million. However, the firm's average annual gross receipts for 1987–89 would be $14.3 million. As a result, the firm would not be an eligible DBE in 1990.

It should also be pointed out the $14 million ceiling, like small business size limits under section 3 of the Small Business Act, includes revenues of "affiliates" of the firm as well as the firm itself. This is the import of the "any concern or group of concerns" language. In addition, firms still are subject to applicable lower limits on business size established by the Small Business Administration in 13 CFR Part 121. For example, if SBA regulations say that $7.5 million average gross annual revenues is the size limit for a certain type of business, that size limit, rather than the overall $14 million ceiling, determines whether the firm qualifies in terms of its size to be a DBE.

15. The portion of Appendix A, following Subpart D, entitled "Section 23.62 Definitions" is amended by adding, at the end of the list of designated groups in the fourth sentence of the paragraph entitled "Socially and economically disadvantaged individuals", following the words "Asian Indian Americans," the words "or women."

16. The portion of Appendix A, following Subpart D, entitled "Section 23.62 Definitions" is amended by removing the words "Burma, Thailand, and Portugal" from the last sentence of the paragraph entitled "Socially and economically disadvantaged individuals" and from the first sentence of the paragraph immediately following the paragraph entitled "Socially and economically disadvantaged individuals" and substituting, in each case, the words "Burma and Thailand."

17. The portion of Appendix A, following Subpart D, entitled "Section 23.62 Definitions" is amended by removing the words "non-minority women," from the second sentence of the last paragraph.

18. The portion of Appendix A, following Subpart D, entitled "Section 23.63 Applicability." is amended by revising the second paragraph to read as follows:

The first category of program funds to which Subpart D applies is Federal-aid highway funds authorized by Title I of the Act. The second category is urban mass transportation funds authorized by Title I (i.e., interstate transfer and substitution funds) or Title III of the Act. The third category is funds authorized by Title I, Title II (except section 203), or Title III of the Surface Transportation Assistance Act of 1982 which were obligated on or after April 2, 1987 (the enactment date of the STURAA).

19. The portion of Appendix A, following Subpart D, entitled "Relationship Between Subpart D and the Remainder of 49 CFR Part 23" is amended by revising the second paragraph to read as follows:

With respect to FHWA and UMTA-assisted programs, recipients will now set only one DBE goal, at both the overall and contract goal level. There are no longer separate DBE and WBE goals. Rather, the single DBE goal applies to all DBEs, whether they are owned and controlled by minorities or by women.

[FR Doc. 87–24233 Filed 10–16–87; 10:09 am]
BILLING CODE 4910–62–M