



Disadvantaged Business Enterprise Program  
Airport Concessions Disadvantaged Business Enterprise Program

**FINAL RULE**

OST • FAA • FHWA • FTA

**49 CFR Parts 23 and 26**

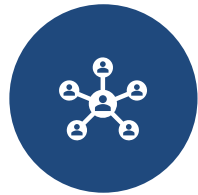
**Certification Eligibility  
(Subpart D)**



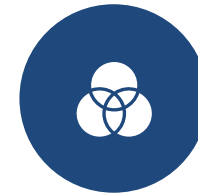
# Certification Eligibility Rule Changes Covered



Definition Additions and  
Amendments § 26.5



General Certification Rules  
§ 26.63



Business Size §§ 26.65, 23.33



Personal Net Worth (PNW)  
Adjustment § 26.68



Calculating Personal Net  
Worth § 26.68



Ownership § 26.69



Presumption of Social and  
Economic Disadvantage §§  
26.5, 26.63, 26.67



Control §26.71



# Definitions and Acronyms Amended

## PART 26

## PART 23

Disadvantaged Business Enterprise	Home State	PN and ODF	Principal place of business	Recipient	SEDO
No change	No longer used as a term of art in the regulation and its definition is removed	Personal narrative  Objective Distinguishing Features	No change, , but clarification added:  The term does not include construction trailers or other temporary construction sites	Now referred to as <u>certifier</u> where appropriate	Socially and economically disadvantaged owner

- Adopts existing definitions in Part 26
- Amends definition of ACDBE and concessions
- Adds definition of sublease, subconcession, or subcontractor

# General Certification Rules New and Reformulated: § 26.63 and 26.69

- Certifiers determines eligibility based on evidence it has at the time of its decision, **not based on historical or outdated information**
- Cannot condition eligibility on state prequal requirements
- Certification is not a warranty of competence or suitability
- Certifiers must deny applications or decertify a DBE if sham transactions or false representations are present.

## Indirect ownership: Parent/Subsidiary Structure

(SEDOs can indirectly own a subsidiary through a parent company but no intermediary. 6 examples provided.)

## Ability to Cure

- SEDO or firm may take curative measures, *or complete legitimate transactions in good faith* that to remove, surmount, or correct defects in eligibility. E.g., alter the terms of ownership, make additional investments, or bolster underlying documentation.
- Certifiers may notify the firm of eligibility concerns and give the firm time to remedy impediments to certification.
- The firm may take curative action and present evidence of such up to the time of the certifier's decision.
- Certifiers may provide general assistance and guidance but not professional (legal, accounting, etc.) advice or opinions

# DBE and ACDBE Size Calculations (Clarifications)



## Part 26: § 26.65

DBEs working on FTA and FHWA Assisted Contracts Must Meet 2 Standards

- NAICS code caps are adjusted by the SBA. Size calculation is based on a **5-year average**
- Statutory size cap (\$30.72 million) is adjusted yearly. Size calculation is based on a **3-year average**.



DBEs working on FAA-assisted contracts must meet only the NAICS code size limits.



## Part 23: §23.33

- ACDBEs size standards averaged **over 5 years**.
- \$56.42 million, banks \$1 billion in assets, passenger car rental \$75.23 million, etc.
- Joint venture receipts must be included in the size calculation in proportion to the ACDBE's ownership interests, unless the proportionate share is already accounted for in receipts and transactions between the firm and its JV partner.

All caps calculated on a cash basis!

# Personal Net Worth (PNW) Cap Increase and General Rules (§ 26.68)

Cap Raised from \$1.32 million to **\$2,047,000**

*\*Major change:  
Exclude retirement  
accounts in full, but  
report them*

## Assets

Includes most common forms of wealth (e.g., an owner's personal and shared assets, real estate and trust assets, cash and cash on hand, the value of outside businesses, life insurance policies).

## General Rule

**Ownership tracks title to the asset or obligor status on the liability** except where otherwise provided or when the transaction results in evasion or abuse.

## Future Adjustment

- Limit will be adjusted without rulemaking every 3 years and posted on U.S. DOT website.
- Adjustment based on Federal Reserve Board's Survey of Consumer Finances, takes inflation into account.



# Personal Net Worth Reporting, highlighted changes



## Retirement Assets:

Report at full value but ***exclude*** them in full from the calculation. (May not report loans against retirement assets as liabilities)



## Motor Vehicle

Report values in the proportion to which she holds title in her name or of which she is the principal operator. However, leased vehicles should not be reported.



## Assets held as Community Property or Jointly:

Include full value of assets without regard to community property, equitable distribution or similar state laws. Title determines ownership.



## Debt Instrument

A natural person's signatory (not guarantor) status on a debt instrument generally determines ownership of the liability. In cases in which another party consistently makes payments on the debt, however, the certifier may determine, that for eligibility purposes the debt does not belong to the formal obligor.  
(new)

# Reporting Assets and Liabilities: Changes and Clarifications

Item	Old Rule	New Rule
<b>Contents of primary residence</b>	Not addressed	Include the full value unless he/she cohabits with a spouse or domestic partner, in which case exclude only 50% of those assets (change).
<b>Community property &amp; joint assets</b>	Include the value of the asset attributed to each person. (50% in community property)	Include full value of assets without regard to community property, equitable distribution, or similar state laws, title determines ownership.
<b>Retirement Assets</b>	Present value included, less the tax and interest penalties	Report assets at full value but <b>exclude</b> them from the calculation.
<b>Contingent and other liabilities</b>	Exclude - Do not use a contingent liability to reduce net worth	Exclude the liabilities of any other party and those contingent on future event or of underdetermined value as of the date of the PNW statement. Certifiers may consider whether another party pays this debt.
<b>Motor vehicles</b>	Include	Include vehicles titled in the owner's name or of which they are the primary operator. Leased vehicles should not be reported.
<b>Assets transferred within 2 years</b>	Include if transferred to immediate family member, a trust, or the applicant firm for less than FMV.	Includes assets transferred to relatives or related entities within the 2 years preceding any UCA or DOE, when the assets have an aggregate value of more than \$20K. See exceptions



# Social Disadvantage and Group Membership (§ 26.67)

## Basic Principles Retained

- Congress continues to recognize certain individuals as disadvantaged in the transportation sectors due to past and present discrimination.
- These groups are rebuttably presumed disadvantaged.
- Qualifying owners need to submit the DOE and application.
- Questioning the owner's claim of membership in one or more of the groups whose members are presumed disadvantaged is a separate process from rebutting a presumption of social and economic disadvantage.

(Owners with Native American status must also provide proof of enrollment in a federally or state recognized Indian Tribe, or proof the individual is an Alaska Native or Native Hawaiian).

# Certifiers Questioning Group Membership: Requires a well-founded reason

- ✓ Must explain in writing (by email) the reasons to question their claim of group membership
- ✓ Instruct the individual to submit evidence demonstrating that they have held herself/himself/themselves out publicly as a member of the group for a long period of time prior to applying for DBE certification, and that the relevant community considers the individual a member.
- ✓ May not require the individual to provide evidence beyond that related to group membership.
- ✓ Must email the owner a decision no later than 30 days after receiving timely submitted evidence.
- ✓ If a certifier determines that an individual has not demonstrated group membership, the decision must specifically reference the record evidence and give a detailed explanation of why the evidence was insufficient.
- ✓ Must inform the individual of the right to appeal to USDOT and of the right to **reapply at any time**.

If certifiers question group membership and identify a well-founded reason, then the owner:

- Bears the burden of proving, by a preponderance of the evidence, that the owner is a member of the group.
- Must demonstrate they have held herself/himself/themselves out publicly as a member of the group for a long period of time prior to applying for certification, and that the relevant community considers the individual a member.
- Must email this evidence to the certifier **no later than 20 days** after the written explanation.

# Rebuttal of Economic Disadvantage

“Ability to accumulate substantial wealth” and the 6-factor test eliminated!!

To rebut the presumption, the certifier must prove that a reasonable person would not consider the individual economically disadvantaged.

- ✓ Certifiers may consider assets and income, free use of them or ready access to their benefits, and any other trappings of wealth that the certifier considers relevant.
- ✓ There are no limitations or exclusions (includes retirement assets, income, equity, etc.)

A broad and general analysis suffices in most cases: E.g., *the owner has, or enjoys the benefits of, income of X; two homes worth approximately Y; substantial interests in outside businesses Q, R, and S; four rental properties of aggregate value Z; etc.*

The certifier need only demonstrate “ballpark” values based on available evidence.

Must hold a § 26.87 proceeding.

# Individual Showing of Social and Economic Disadvantage § 26.67(d)



An owner who is not presumed to be SED may demonstrate that he is SED based on his own experiences and circumstances that occurred within American society.

**Appendix E is Removed** but owner provides the certifier a **Personal Narrative (PN)**:

- Describes in detail specific acts or omissions by others, which impeded his progress or success in education, employment, and/or business, including obtaining financing on terms available to similarly situated, non-disadvantaged persons.
- Identifies at least one objective basis for the detrimental discrimination. The basis may be any identifiable status or condition.
- Describes this objective distinguishing feature(s) (ODF) in sufficient detail to justify the owner's conclusion that it prompted the prejudicial acts or omissions.
- States how and to what extent the discrimination caused the owner harm, including a full description of type and magnitude.

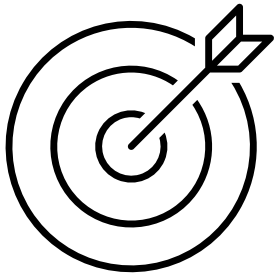
# Individual Determinations of Social and Economic Disadvantage, Personal Narrative cont'd § 26.67(d)



- The owner must establish that he is economically disadvantaged in fact and that he is economically disadvantaged relative to similarly situated non-disadvantaged individuals.
- The owner must attach to the PN a current PNW statement and any other financial information he considers relevant.
- This rule does not prescribe how the owner must satisfy his burden of proving disadvantage. He need not, for example, have filed any formal complaint, or prove discrimination under a particular statute.

*Example:* A white male claiming to have experienced employment discrimination must provide evidence that his employment status and/or limited opportunities to earn income result from specific prejudicial acts directed at him personally because of an ODF, and not, e.g., an economic recession that caused widespread unemployment.

# Ownership Provisions Rebuilt: §26.69



## Objectives

**Modernize and streamline (e.g., continuing contributions)**

**Describe v. prescribe (e.g., investments)**

**Proportionality and common sense**

**Simplify, clarify, and conform (e.g., gifts, title)**

**Owner as “ultimate decision-maker”**

**Substance over form**

**Purge vague, unhelpful rules**

# General Rules of Ownership §26.69

## Acquisition, Proportionality, Maintenance

### Acquisition:

The SEDO acquires ownership at fair value and by one or more “investments.”

### Proportion:

No owner derives benefits or bears burdens that are clearly disproportionate to their ownership shares.

### Maintenance:

These requirements continue to apply after the SEDO’s acquisition and the firm’s certification. The SEDO must maintain his/her investment and its proportion relative to those of other owners.

- (i) The SEDO may not withdraw or revoke his/her investment.
- (ii) When an existing co-owner contributes significant, additional, post-acquisition cash or property to the firm, the SEDO must increase her own investment to a level not clearly disproportionate to the non-SEDO’s investment.



# Investments, Overview Purchases, capital contributions



**Investments.** A SEDO may acquire ownership by purchase, capital contribution, or gift.

Additional purchases, contributions, and qualifying gifts are also investments.

## Requirements:

- Investments are unconditional and at full risk of loss.
- Investments include a significant outlay of the SEDO's own money.
- Title determines ownership of assets used for investments and of ownership interests themselves. This applies regardless of contrary community property, equitable distribution, banking, contract, or similar laws.
  - (i) The person who has title to the asset owns it in proportion to her share of title.
  - (ii) However, the title rule is deemed not to apply when it produces a certification result that is manifestly unjust.

If the SEDO jointly (50/50) owns an investment of cash or property, the SEDO may claim at least a 51 percent ownership interest only if the other joint owner formally transfers to the SEDO enough of his ownership in the invested asset(s) to bring the SEDO's investment to at least 51 percent of all investments in the firm. Such transfers may be gifts.

# Purchases and Capital Contributions, cont'd

## Investments

- A **purchase** of an ownership interest if the consideration is entirely monetary and not a trade of property or services.
- Capital that the SEDO contributes directly to the company if the **contribution** is all cash or a combination of cash and tangible property and/or realty.
- The proceeds of loans may count to the extent that they finance the SEDO's qualifying purchase or capital contribution.
- Debt-financed purchases or capital contributions are investments (see § 26.70).
- **Gifts** to the SEDO (next slide)

## Not Investments

- Contributions of time, labor, services, and the like are not investments or components of investments.
- Loans
- Guarantees
- The firm's purchases or sales of property, including ownership in itself or other companies, are not the SEDO's investments.
- Other persons' or entities' purchases, or capital contributions are not the SEDO's investments.



## Gifts Can Include:

- Partial gifts, bequests, inheritances, trust distributions, and transfers for inadequate consideration.
- Gifts of ownership interests and to gifts of cash or property that the SEDO invests.

## **Gifts to the SEDO can qualify as an investment if:**

- (1) The transferor/donor is or immediately becomes uninvolved with the firm in any capacity and in any other business that contracts with the firm other than as a lessor or provider of standard support services;
- (2) The transferor does not derive undue benefit
- (3) A writing documents the gift.

*When the SEDO cannot reasonably produce better evidence, a receipt, cancelled check, or transfer confirmation suffices, if the writing identifies transferor, transferee, amount or value, and date.*

# Ownership Provisions, cont'd

## Loans and Debt-Financed Investments (New § 26.70)



SEDO may borrow money to **finance** an investment entirely or partially if the SEDO has paid, on a net basis, **at least 15%** of the total value of the investment by the time the firm applies for certification.

- (1) The SEDO pays the net 15% portion of the investment to Seller or Applicant (as the case may be) from her own, not borrowed, money.
- (2) Money that the SEDO receives as a § 26.69(e) gift is her own money.
- (3) The firm does not finance any part of the investment, directly or indirectly.



The loan is real, enforceable, not in default, not offset by another agreement, and on standard commercial, arm's length terms. The following conditions also apply.

- The SEDO is the sole debtor.
- The firm is not party to the loan in any capacity, including as a guarantor.
- The SEDO does not rely on the company's credit or other resources to repay any part of the debt or otherwise to finance any part of her investment.
- The loan agreement requires level, regularly recurring payments of principal and interest, according to a standard amortization schedule, at least until the SEDO satisfies items 1-3 above
- The loan agreement permits prepayments, including by refinancing.

**Example 1:** A SEDO who borrows \$9,000 of her \$10,000 cash investment in Applicant, Inc., must have repaid, from her own funds, at least \$500 of the loan's principal by the time Applicant, Inc. applies for certification.

**Example 2:** A SEDO who finances \$8,000 of a \$10,000 investment in Applicant may apply for certification.

**Example 3:** A SEDO who contributes to the Applicant equipment worth \$40,000, which she purchased with \$10,000 of her own money and \$30,000 of seller financing may apply for certification at any time.

# Ownership Provisions Rebuilt, cont'd

## Loans and Debt-Financed Investments



**Question:** What happens If the creditor forgives or cancels all or part of the debt, or the SEDO defaults?

**Answer:** The entire debt-financed portion of the SEDO's purchase or capital contribution is no longer an investment.

**Example:** SEDO finances \$40,000 of a \$50,000 investment, and the firm becomes certified. When the SEDO has repaid half of the loan's principal and associated interest, the creditor forgives the remaining \$20,000 debt. The SEDO's investment is now \$10,000.

This does not prohibit refinancing with debt that meets the requirements of § 26.70 or preclude prompt curation under § 26.69(f).

# Control § 26.71(a)

## General Rules

- One or more SEDOs of the firm must control it.  
(Control by any SEDO is sufficient)
- Control determinations must consider all pertinent facts, viewed together and in context.
- A firm must have operations in the business for which it seeks certification at the time it applies. Certifiers do not certify plans or intentions, or issue contingent or conditional certifications.

## Subtopics

“Operations” requirement  
SEDO as ultimate decision maker  
Expertise and Delegation  
Independence  
Licensing and other sections deleted!  
NAICS Codes

# Control, cont'd

## SEDO - The Ultimate Decision Maker



**A SEDO must be the ultimate decision maker** in fact, regardless of operational, policy, or delegation arrangements.

**Governance.** Governance provisions may not require that any SEDO obtain concurrence or consent from a non-SEDO to transact business on behalf of the firm.

- *Highest officer position.* A SEDO must hold the highest officer position in the company (e.g., chief executive officer or president).
- *Board of directors.* A SEDO must have present control of the firm's board of directors through the number of eligible votes.
  - *Quorum requirements.* Quorum provisions must not block the SEDO from calling a meeting to vote and transact business on behalf of the firm.
  - *Shareholder actions.* A SEDO's authority to change the firm's composition via shareholder action does not prove control.
- *Partnerships.* In a partnership, at least one SEDO must serve as a general partner, with control over all partnership decisions.

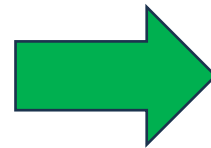
*Note Exceptions. Bylaws or other governing provisions that require non-SEDO consent for extraordinary actions generally do not contravene the rules in paragraph (c) of this section. For example, -- a sale of the company or substantially all of its assets, mergers, and a sudden, wholesale change of type of business.*



# Control, cont'd – Expertise of the SEDO

## Old § 26.71(g)

- SEDOs must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations.
- SEDOs are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees.
- SEDOs must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking.
- Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient.



## New § § 26.71(d), (e)

At least one SEDO must have an overall understanding of the business and its essential operations sufficient to make sound managerial decisions not primarily of an administrative nature.

The requirements of this paragraph vary with type of business, degree of technological complexity, and scale.

The firm must show that the SEDO critically analyzes information provided by non-SEDOs and uses that analysis to make independent decisions.

# Control, cont'd – Decisions and Delegations § 26.71 (e) and (f)



**SEDO decisions.** The firm must show that the SEDO critically analyzes information provided by non-SEDOS and uses that analysis to make independent decisions.

**Delegation.** A SEDO **may delegate** administrative activities or operational oversight to a non-SED individual as long as at least one SEDO retains unilateral power to fire the delegate(s), and the **chain of command is evident** to all participants in the company and to all persons and entities with whom the firm conducts business.

- (1) No non-SED participant may have power equal to or greater than that of a SEDO, considering all the circumstances. Aggregate magnitude and significance govern; a numerical tally does not.
- (2) Non-SED participants may not make non-routine purchases or disbursements, enter into substantial contracts, or make decisions that affect company viability without the SEDO's consent.
- (3) Written provisions or policies that specify the terms under which non-SED participants may sign or act on the SEDO's behalf with respect to recurring matters generally do not violate the rule as long as they are consistent with the SEDO having ultimate responsibility for the action.

# Control § 26.71(g) cont'd– Independent Business

*Former (b) is now (g), and reads:*

- (1) If the firm receives from or shares personnel, facilities, equipment, financial support, or other essential resources, with another business (whether a DBE or non-DBE firm) or individual on other than commercially reasonable terms, the firm must prove that it would be viable as a going concern without the arrangement.
- (2) The firm must not regularly use another firm's business-critical vehicles, equipment, machinery, or facilities to provide a product or service under contract to the same firm or one in a substantially similar business.

*Exception 1.* [This] does not preclude the firm from providing services to a single customer or to a small number of them, provided that the firm is not merely a conduit, captive, or unnecessary third party acting on behalf of another firm or individual. Similarly, providing a volume discount to such a customer does not impair viability unless the firm repeatedly provides the service at a significant and unsustainable loss.

*Exception 2.* A firm may share essential resources and deal exclusively with another firm that a SEDO controls and of which the SEDO owns at least 51 percent ownership.

# Outdated Control Rules Deleted!!

§ 26.71(h) (licensing)

§ 26.71(i) (differences in remuneration)

§ 26.71(j) (outside employment)

§ 26.71(k) (family relationships)

§ 26.71(l) (transfer of a firm to a SEDO when the non-SEDO transferor remains involved)\*

§ 26.71(m) (ownership and leasing of equipment)

§ 26.71(p) (ability of non-SEDOs to bind the firm without SEDO's consent)

§ 26.71(q) (use of employee leasing companies).

*\*Note the change in the ownership rule -- the former owner is required to immediately become uninvolved with the company or other business that performs similar work or contracts with the applicant firm other than as a lessor or provider of standard support services.*

# NAICS Codes § 26.71(n) re-designated as § 26.73

## Minor changes



### General:

- DBEs are certified in the specific types of work that the SEDO controls.
- Multiple NAICS codes may be assigned.
- DBEs can request certification in additional lines of work: Need only to demonstrate SEDO's control of the firm in those areas.

### Details:

- (1) A correct NAICS code is the one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification.
- (2) If there is not a NAICS code that fully, clearly, or sufficiently narrowly describes the type(s) of work for which the firm seeks certification, **the certifier must** supplement or limit the assigned NAICS code(s) with a clear, specific, and concise narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is insufficient.
- (3) Firms and certifiers must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. The firm bears the burden of providing detailed company information the certifying agency needs to make an appropriate NAICS code designation.
- (4) **A certifier may change a certification classification or description if there is a factual basis in the record, in which case it must notify the firm 30 days before making the change. Certifiers may not apply such changes retroactively.**
- (5) In addition to applying the appropriate NAICS code, the certifier may apply a descriptor from a classification scheme of equivalent detail and specificity. Such a descriptor (e.g., a "work code") does not supersede or limit the types of work for which a DBE is eligible under an appropriate NAICS code.

# 2024 Live and Recorded DBE/ACDBE Rule Trainings

- **April 23, 1:00-2:30 PM ET:** ACDBE Final Rule Overview (FAA) - DBE/ACDBE Final Rule Changes
- **April 29, 1:00-2:30 PM ET:** Certification Eligibility Requirements
- **May 1, 1:00-2:30 PM ET:** Certification Procedures
- **May 8, 1:00-3:00 PM ET:** DBE Supplier Definitions, CUF Performance, and Pre-Award Counting Requirements
- **May 21, 3:00-4:30 PM ET:** FTA's Tier II Requirements in the New DBE Rule
- **May 22, 1:00-2:00 PM ET:** DBE status after losing certification during contract performance
- **June 18, 1:00-3:00 PM ET:** DBE Open Ended Performance Plans (OEPP) for Design-Build Contracts
- **July 24, 1:00-2:30 PM ET:** Prompt payment and Return of Retainage requirements
- **July 30, 3:00-4:30 PM ET:** Requirements for TVMs in the New DBE Rule
- **TBD:** Counting and Compliance

# Question and Answers, Resources

## Further Information and Register for Trainings

Visit: [www.transportation.gov/dbe-rulemaking](http://www.transportation.gov/dbe-rulemaking)

Rule and preamble

Summary Sheet of Rule Changes

List of Timelines

Overview Video

Implementation Guidance – Parts 23 and 26

Questions: [dbe\\_finalrule@dot.gov](mailto:dbe_finalrule@dot.gov)





## Question and Answer Session