

own independent assessment. Moreover, a number of commenters strongly maintained that by requiring applicants to submit personal income tax information, rather than merely a CPA's affidavit, recipients could better safeguard the integrity of the DBE program because they would be able to certify applicants' eligibility to the Department with unqualified certainty, having done the eligibility determination as to PNW themselves. Of particular concern to those commenters opposed to the CPA affidavit was the fact that it could not be guaranteed that the various CPAs utilized by applicants would be familiar with the technical aspects of the DBE program, and that such CPAs would only, and could only, certify the PNW of applicants based on the information provided to them, which would not be available to the recipients if an affidavit were allowed to supplant the current requirement of actual documentation. This, they speculated, could lead to potential misinformation and, as a consequence, various forms of disclaimers and waivers by the CPAs in order to shield them from liability based on an applicant's supply of faulty or incomplete information. Accordingly, a majority of commenters opposed were concerned that this proposed alternative, while appearing more efficient, would open the door to, and increase the potential for, fraud and abuse by reducing the level of scrutiny with which a recipient could exercise over the applications submitted and in making the ultimate eligibility determinations.

The Department is clearly concerned with maintaining the integrity of the program. Central to the narrow tailoring of the DBE program is the PNW requirement, and as such there is a great need to ensure that every measure is taken to qualify applicants who are truly socially and economically disadvantaged within the meaning of the statutes governing the DBE program and as intended by Congress. Thus, a thorough eligibility determination process that is not overly burdensome is required. Having been persuaded by the recipients' comments opposing the CPA option on grounds of maintaining program integrity, the Department has decided not to adopt this proposal. Therefore, individual applicants are required to submit their personal income tax information to DOT recipients so that the recipients themselves can make unqualified and accurate determinations of applicants' eligibility under the DBE program.

It should be emphasized that the privacy and confidentiality concerns

raised by many of the commenters does not go unheeded. The final rule, as it has existed since 1999, explicitly requires that the personal financial information of applicants be kept strictly confidential. This confidentiality requirement is not taken lightly, and cannot and will not be compromised. We note that the regulation has been amended previously to prohibit the release by recipients of applicants' PNW-related personal financial information, even in the face of State freedom of information or open records laws.

We understand the justifiable privacy concerns associated with collecting personal tax returns; nevertheless, it is incumbent upon the Department to safeguard the integrity of the program. Providing the recipients with the necessary means and information to determine the eligibility of applicants to participate in the DBE program is critical to accomplishing this end, and such determinations must be unqualified and verified. This, we believe, is necessary to ensure that the DBE program is indeed narrowly tailored, so as to comply with *Adarand* and its progeny.

The 2001 NPRM went further in its proposed changes to § 26.67 as to the calculation of an applicant's PNW. The proposed change addressed vested pension plans, Individual Retirement Accounts, 401(k) accounts, and other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences. We proposed two options: (1) That PNW should include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time; and/or (2) to exclude such assets altogether from the PNW calculation.

As with the PNW proposal, the public comments received regarding retirement assets were sharply divided. Some commenters suggested that either method would be acceptable. One commenter offered a variation on these two proposed methods of calculating PNW—having applicants list their accounts and like assets, but not actually including them in the PNW calculation unless they are accessed. Another commenter suggested only counting such assets at the point they become vested.

A substantial number of other commenters opposed the inclusion of pension plans and other retirement assets in the PNW calculation, arguing that only liquid assets should be included, and because such assets are

not available without penalty they should not be counted. These commenters also voiced the concern that calculating the penalty (*i.e.*, present value minus taxes and interest penalties if withdrawn) would be too problematic and burdensome on small business owners and recipients. It would also be difficult to verify. Others suggested that retirement assets have no bearing on whether a particular DBE has the present ability to do the required work within the program, and therefore should be excluded from any PNW calculation. To include such assets in the PNW calculation, some commenters contended, would be to penalize DBEs for investing wisely.

A similarly substantial number of commenters, mostly recipients, strongly urged the inclusion of pension plans and other retirement assets in the PNW calculation. Many supporters of the inclusion of such assets stressed that to exclude them would go against generally accepted accounting practices. One commenter stated that the proposal of counting the assets and then taking into account the consequent liability is fairer than simply counting the asset in whole. Other commenters suggested that it is important to include these assets in the PNW calculation because it would prevent applicants from diverting funds to such accounts in order to meet the PNW requirement, and thereby preclude any possibility of fraud or abuse. One commenter stated that retirement assets are plainly assets, and therefore should be included in any accounting of PNW, taking appropriate account of penalties and present value.

Although retirement assets may not be readily available as sources of financing for business operations, they are part of a person's overall wealth. While we understand that it may be difficult to calculate the assets, we must maintain the integrity of the program and ensure that the calculation reflects the individual's true wealth. To exclude these assets would be misleading and could compromise the integrity of the program. Therefore, we are continuing to require that the present value of assets be counted. Recipients should count only the present value of the retirement savings or investment device toward the personal net worth calculation. That is, the recipient needs to determine how much the asset is actually worth today, not what its face value is or what the individual's return on it may be at some point in the future. In making this determination, the recipient would subtract the interest or tax penalties the individual would incur if he or she withdrew the assets today.