

only in those areas in which it does meet size standards.

The Department sought comment on whether any modifications of the rule to address further the situations of firms that work as both prime contractors and subcontractors. There was no proposed language offered, but instead used recently issued guidance to shape the issue. Ten commenters favored changes with some modification or variation. One comment noted that the proposal raises concerns that DBEs who graduate from one type of work area are devising creative approaches to restructure their companies so they can remain in the DBE program. Another commenter favored change, but wanted to increase the certification gross receipts cap to \$25,000,000. The gross receipts cap is statutory, and the Department's discretion to raise it is limited to making adjustments for inflation.

Some commenters may have believed that the guidance language was a proposed change, but it was not. The major objections from those commenters opposed are that the change would be confusing and create tracking problems for the recipients. Several commenters noted questions that would be raised by the changes, including how often size standards should be checked, how it should be measured, and by whom. We recommend that size determinations be reviewed by the unified certification agency that conducted the most recent certification, and that the certifications be reviewed every three years. As such, we are not making any changes to the provision.

Evidence of Group Membership

Section 26.67 requires that recipients rebuttably presume that members of groups specified in the regulation are disadvantaged. Recipients are further required to obtain a signed, notarized statement of disadvantage from all persons whose membership in a disadvantaged group is relied upon for DBE certification. The current regulation also allows recipients to request additional proof of ethnicity. Several commenters indicated that a signed, notarized statement of ethnicity is sufficient. Other commenters felt that additional proof is necessary, however, and that they should be permitted to request additional proof rather than relying on a checked box on a form. We agree that recipients should continue to have the flexibility to require proof of ethnicity. We caution recipients, however, to apply these standards uniformly.

In particular, recipients should avoid making members of a particular ethnic group routinely meet a higher level of

proof than members of other groups. For example, many recipients accept a driver's license or a birth certificate as adequate proof of group membership. These forms of identification always indicate gender and sometimes may indicate the race of the holder. They often do not designate, however, whether an individual is Hispanic or Native American. In some instances, members of these groups have been required to provide several additional types of proof of ethnicity simply because their driver's license did not indicate their particular group membership.

The Department does not object to recipients' requirements that applicants document group membership. If a recipient chooses to require proof then it should do so uniformly, by requiring at least one piece of evidence from each applicant. A driver's license or a birth certificate may be adequate forms of proof of group membership. In cases where the required proof does not indicate specific races, however, such as Hispanic or Native American, the applicant only should be required to provide the same level of proof as members of other groups. For example, if a birth certificate is adequate for one group, then a single piece of evidence (but not multiple pieces of evidence) may be required from members of other groups. Such single pieces of evidence might include naturalization papers; Indian tribal roll cards; tribal voter registration certificate; a letter from a community group, educational institution, religious leader, or government agency stating that the individual is a member of the claimed group; or, a letter from the individual setting forth specific reasons for believing himself/herself to be a member of the designated group. If a recipient has a reasonable basis for doubting the validity of the asserted group membership of an applicant, then it is appropriate for the recipient to collect additional information. In such a case, the recipient must inform the applicant, in writing, of the reasons for seeking additional documentary evidence. It is our expectation that requiring a written record justifying the need for additional information will help to reduce the number of unnecessary requests.

Confidentiality

In the NPRM we proposed amending the confidentiality section of the regulation to parallel the existing, tighter confidentiality provision of § 26.67 concerning personal net worth information. We received twenty-three comments on this section, all of which

at least in part supported the proposed change. Therefore, recipients may not release confidential business information under any circumstance without the submitter's written consent. This proposal has the effect of extending to all confidential business information the protection previously given to PNW-related personal financial information.

Two commenters asked about UCPs and the issue of several people having access to the applicant's confidential information. Section 26.101 requires that all recipients be bound by the regulations in part 26. So while it may be necessary for confidential information to be shared among several UCP participants in the certification process, no one may release the confidential information to an outside party without the submitter's consent. Part 26 specifically intends to preempt disclosure under state or local law, so a recipient may not release this information even under local and State FOIA laws. For information that is not considered or deemed confidential business information, the recipient must comply with State freedom of information or open records laws.

Recipients may continue to report data in formats that do not reveal the submitter's name. For example, § 26.11 requires that recipients keep and maintain information on DBE and non-DBE contractors' and subcontractors' annual gross receipts of the firm. There are a variety of methods by which recipients can keep and maintain confidential information private. For example, each applicant could be assigned a case number, and all confidential matters that might be needed by different resources could refer to the case number, with only a specific entity in possession of the master list for certification purposes.

Economic Disadvantage

The majority of commenters on this section supported removing paragraph (B)(2) under "Economic Disadvantage" in Appendix E to part 26, "Individual Determinations of Social and Economic Disadvantage." This paragraph requires that in the case of applications by individuals to be considered socially and economically disadvantaged on an individual basis, the applicant submit personal financial information about his or her spouse. Because it is inconsistent with the way the Department's personal net worth provisions under § 26.67 work in the case of applicants who are members of a group presumed to be economically and socially disadvantaged, we are deleting it.

The primary result of this change is that the Department no longer requires