

spouses to complete PNW forms in addition to the applicant, even in cases of individual requests to be considered as disadvantaged (the Department never has permitted the routine collection of spousal information in other contexts). We are preserving, however, the ability for recipients to request relevant information from spouses on a case-by-case basis when the recipient has a specific reason to look into the spouse's finances. For example, when there has been a transfer of assets to the spouse within the previous two years, it is appropriate to collect certain information about the spouse, because assets transferred to the spouse are attributed to the applicant for purposes of calculating PNW. We also recognize that the recipients will want to be able to investigate a spouse's finances in situations where the recipient suspects the applicant is fraudulently transferring assets over to his/her spouse in order to qualify as a disadvantaged individual or when there is an affiliation relationship between the applicant's business and a spouse's business.

#### Credit for Trucking Firms

The issue of how to count DBE credit for trucking operations, which was debated vigorously among commenters to the 1999 final rule, has continued to be controversial. The SNPRM that led to the 1999 final rule proposed that to be performing a commercially useful function (CUF), a DBE trucking firm had to own fifty percent of the trucks it used in connection with a contract. A number of comments said that this requirement was out of step with industry practice, which commonly involves companies leasing trucks from owner-operators and other sources for purposes of a project. The final rule provided that a DBE need not provide all the trucks on a contract to receive credit for transportation services, but it must control the trucking operations for which it seeks credit. It must have at least one truck and driver of its own, but it can lease trucks owned by others, both DBEs and non-DBEs, including owner-operators. For work done with its own trucks and drivers, and for work done with DBE lessees, the firm receives credit for all transportation services provided. For work done with non-DBE lessees, the firm gets credit only for the fees or commissions it receives for arranging the transportation services, because the services themselves are being performed by non-DBEs.

In the years since the publication of the final rule, the Department has received communications from a number of state DOTs, trucking

companies, and other parties saying that the portion of the rule limiting credit for trucks leased from non-DBE firms reduced opportunities for DBE trucking companies and did not take into account sufficiently the important role of leasing in the trucking industry. In response, the Department asked in the preamble to the May 2001 NPRM whether the rule should expand the credit available for DBE truck leasing (e.g., by counting credit for twice the number of trucks a DBE owned, so that a DBE that owned one truck used on a contract and leased another from a non-DBE firm would get credit for two trucks).

Commenters to the NPRM were divided on the issue. Eleven commenters preferred to leave the current rule in place, citing administrative simplicity and prevention of abuse as their major reasons. Five commenters endorsed the example suggested in the NPRM preamble of permitting credit for twice the number of trucks a DBE owns, and six others suggested variations on that example (e.g., authorizing credit for three times the number of trucks owned by the DBE). Some commenters emphasized the need for safeguards to ward off potential abuse of the provision. Twenty-three commenters favored permitting credit for all leased trucks used by a DBE on a contract, subject to certain safeguards (e.g., for trucks on long-term leases, the DBE firm is responsible for supervision and control of all trucks on the contract).

The principle that DBE participation should be counted only for work performed with a DBE firm's own forces is an important one that the Department's DBE program follows consistently. For example, when a DBE firm subcontracts part of its work to a non-DBE firm, the subcontracted portion does not count toward DBE goals, as per § 26.55(a)(3). The Department's existing counting provision for trucking services was explicitly designed to be consistent with this principle (64 FR 5116 (Feb. 2, 1999)). Allowing credit for unlimited use of non-DBE leased trucks could also lead to program abuses and reduce DBE contracting opportunities for DBEs in other types of work.

At the same time, the Department is aware that flexibility in administering the DBE program is important to recipients and contractors, and we are sensitive to the concerns of trucking companies that opportunities may have been reduced under the 1999 final rule. In light of these factors, the Department has granted program waivers to two states, Indiana and Wisconsin,

permitting credit for leased trucks for twice the number of trucks owned by DBE trucking firms on a contract. The Department believes that this approach reasonably accommodates many of the concerns commenters expressed with respect to reduced DBE trucking participation while not departing from the Department's principle of counting DBE credit only for work performed by DBE firms themselves.

Consequently, the Department, in this final rule, will adopt the following approach. Recipients may count for DBE credit the dollar volume attributable to no more than twice the number of trucks on a contract owned by a DBE firm or leased from another DBE firm, but is not required to do so. For example, if DBE Firm X owned two trucks, leased two others from another DBE firm, and leased six others from a non-DBE firm, the DBE credit authorized for Firm X's participation would be equivalent to the dollar volume of work attributable to eight trucks (four trucks owned by or leased from DBEs, multiplied by two). DBE credit for the remaining two non-DBE trucks leased for the contract would be limited to the fees or commissions received by the DBE firm pertaining to those two trucks.

The final rule permits, but does not require, recipients to count credit in this manner. That is, a recipient could choose to continue the counting provisions its DBE program adopted to comply with the 1999 final rule. If a recipient chooses to modify its counting provisions to count the additional credit for non-DBE lessees permitted by today's amendment, it must do so via a change to its DBE program approved by the cognizant FHWA, FTA, or FAA office. The OA approval is necessary to ensure the appropriate safeguards are taken by the recipients to prevent fraud.

#### III. Alaska Native Corporations

In § 26.73(h) of the current DBE rule, the Department codified its interpretation of former 49 CFR part 23 that ANC-owned firms, as well as firms owned by Indian tribes and Native Hawaiian Organizations, must meet the DBE rule's eligibility standards concerning size and control. In the preamble to the February 1999 final rule (64 FR 5121 (Feb. 2, 1999)), the Department explained why it did not believe that 43 U.S.C. 1626(e), a provision of the Alaska Native Claims Settlement Act (ANCSA), mandated different treatment for ANC-owned firms in the DOT DBE program. The Department continues to believe that the legal and policy reasoning behind this provision was sound. However, an