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Submitted via www.regulations.gov

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U.S. Department of Transportation
1200 New Jersey Ave, S.E.
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Mr. John Benison
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Office of Civil Rights
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Re: Comments on DBE & ACDBE Program Implementation Modifications
Docket DOT-OST-2022-0051/RIN 2105-AE98

Dear Director Marion and Assistant Administrator Benison:

Airports Council International – North America (ACI-NA) is pleased to have the opportunity to submit these comments in response to the Notice of Proposed Rulemaking on DBE and ACDBE Program Implementation Modifications in the above referenced docket (NPRM).

ACI-NA is a trade association whose members are state, regional, and local government bodies that own and operate the principal commercial service airports in North America. The organization has more than 250 U.S. airport members that, in the aggregate, operate approximately 350 airports. In addition, ACI-NA has more than 400 corporate associate members consisting of aviation-related businesses, many of which participate in U.S. airport concession programs and airport infrastructure projects funded with federal grants-in-aid.

In order to fully inform its comments, ACI-NA convened a working group comprised of representatives from several of its standing committees, including the Business Diversity, Commercial Management, Legal Affairs, and Finance committees. Through the working group, ACI-NA members from different disciplines reviewed and reacted to each of the proposed changes outlined in the NPRM and, where appropriate and as necessary, proposed new or revised regulatory language to better reflect today's airport environment.

ACI-NA members have a significant stake in how DBE and ACDBE rules are revised, and we appreciate consideration of the comments detailed below.

Part 26

Subpart A—General

1. **Bipartisan Infrastructure Law (BIL) and Fixing America's Surface Transportation Act (FAST Act) (§ 26.3)**

We support the addition of the applicable Titles in the reference to the Department of Transportation (DOT) surface authorizations, BIL, and FAST Act.

2. Definitions (§ 26.5)

Disadvantaged Business Enterprise – We do not support limiting the definition "to business concerns engaged in transportation-related industries," as proposed. Instead, we recommend that DOT clarify the language in the existing guidance. Many certified firms operate businesses that appear to be unrelated to transportation but provide important services for airports. This includes firms providing professional services and concessionaire suppliers.

Unsworn Declaration – We support the proposal to eliminate sworn affidavits requiring notarization and, instead, use unsworn declarations made under penalty of perjury.

3. Reporting Requirements (§ 26.11 and Appendix B)

Uniform Report – We do not oppose the reporting of terminated DBEs. However, we do not support including this information in the Uniform Report and request that DOT develop a separate report, similar to that required for prompt payment complaints. Given that the current Uniform Report is already very complex and burdensome for airports, and that terminations occur infrequently, it is reasonable to require this reporting in a separate report. We understand DOT's desire to obtain information on decertified firms, however it should be the responsibility of Unified Certification Programs (UCPs) to report this data. Currently, unless an airport is the certifying agency, the airport does not know when a firm is decertified. Airports verify certification at the time that firms are listed in a bid and again when the Uniform Report is prepared. If a firm disappears from the directory in between those times, it can be very time consuming to obtain the details of the decertification unless the firm has been entered into the Departmental Office of Civil Rights (DOCR) database, which frequently does not happen. Moreover, collecting decertification information from airports, as recipient agencies, as opposed to certifying agencies, will lead to incomplete or duplicate information being collected. Additionally, we do not support including the contract number on the Uniform Reports because airports already include Airport Improvement Program (AIP) grant numbers in the reports. Airports use a variety of contract types, including purchase orders and task orders and, in some cases, no contract number is assigned as AIP grants can be used for in-house accounting purposes. More fundamentally, we do not see the value in adding contract numbers to the Uniform Report and believe the cost of collecting and reporting this information significantly outweighs any benefit to DOT or the program.

Bidders Lists - We do not support the proposed new requirement to report Bidders' List, and urge DOT to retain the existing requirement. Data collected in Bidders' Lists does not always provide an accurate reflection of firms that seek to do business with the recipient agency. The information is unverifiable and therefore, cannot and should not be relied as accurate. Instead, we recommend that DOT consider developing a registration process for contractors and subcontractors interested in federally assisted transportation projects.

Map 21 Data Reports – While we do not object to requiring state departments of transportation, on behalf of their UCPs, to include ACDBE data in their yearly report to DOCR, we do not agree that this data will provide an accurate annual snapshot of the number and availability of ACDBEs for airport concession opportunities. The FAA DBE System lists over 4,000 ACDBEs. However, only 634 of those ACDBEs are certified in Food/Beverage or Retail, where the majority of ACDBE participation occurs. It would be more useful for DOT to collect information on how many firms are certified in trades that represent direct ownership opportunities (e.g., food/beverage, retail, advertising, foreign currency, etc.), since airports are required to set goals based on direct ownership arrangements for non-car rental concessions, and how many are certified in supplier trades utilized by car rental firms.

Subpart B—Administrative Requirements for DBE Programs for Federally Assisted Contracting

4. Threshold Program Requirement for FTA Recipients (§ 26.21)
We agree with DOT's rationale for increasing the threshold for Federal Transit Administration (FTA) recipients to have a DBE Program meeting all the requirements of the rule. Likewise, we urge DOT to also amend the regulation for FAA recipients, using the same rationale, so that only those airport sponsors receiving more than $670,000 in FAA funds for planning, capital, and/or operating assistance in a single Federal fiscal year would be obligated to have a DBE Program meeting all the requirements of the rule. This change would greatly reduce the administrative burden and costs for small airports and FAA. We also urge DOT to periodically adjust the threshold for inflation using the Consumer Price Index.

5. Unified Certification Program (UCP) DBE/ACDBE Directories (§§ 26.31 and 26.81(g))
We support eliminating the requirement for a paper directory contained in § 26.81 given that all directories are required to be available online.

6. Monitoring Requirements (§ 26.37)
We support this clarification. However, we request confirmation that airport recipients can use a "checklist" signed by the authorized official for verification of monitoring of contractors and subcontractors.

Subpart C—Goals, Good Faith Efforts, and Counting

7. Prompt Payment and Retainage (§ 26.29)
We do not oppose the addition of this language, which was included in previously issued DOT guidance. However, while we understand this revision clarifies that the requirements are intended to flow down to all lower tier subcontractors, we are concerned that this creates significant challenges for small airports that do not have the personnel or software to effectively monitor compliance. We urge DOT to include in the revised regulations options for small airports to conduct their monitoring.

8. Transit Vehicle Manufacturers (TVMs) (§ 26.49)
Section Heading and Post-award Reporting Requirements - We support the added language expressly providing that TVMs' goals are set nationally and submitted annually to the FTA. We also urge FAA to study whether amending § 23.49 to implement a similar process for national car rental agencies to submit national goals would enhance the ACDBE program. Collecting and reporting accurate and timely information from car rental companies is a continuing problem for airport sponsors, as data by trade and geographic location is difficult to collect and verify.

Vehicle inventory and other purchases are often made nationally and distributed to local offices and then inventory is moved as needs change in the various markets. It is virtually impossible for every airport to track where the fleet is purchased or sold, as airports have no method of verifying the purchases or the sales at sites not located on their property. If FAA's analysis indicates that submission of national car rental goals would resolve the issues discussed above, FAA should seek statutory authority to require it.

9. Good Faith Efforts Procedures for Contracts with DBE Goals (§ 26.53)
We support the revision that grant recipients requesting design-build proposals must require submission of a DBE Performance Plan (DPP) with the proposals. Airports that have requirements similar to the DPP have found it very helpful in dealing with unknown information on the construction portion of a project when the design-build project is awarded. We also support the proposed change clarifying that the prime contractor or prime concessionaire would be permitted to propose a substitution only after obtaining the recipient's written concurrence with the proposed termination.

10. DBE Supplier Credit (§ 26.55(e))
Limiting DBE Supplier Goal Credit –We take no position for allowing exceptions, on a contract-by-contract basis, to the crediting limit for DBE material suppliers with the prior approval of the appropriate Operating Administration ("OA"). However, if DOT adopts that change, it must also impose a time limit for the relevant OA to act. A time limit is critical because, otherwise, bids and projects will be significantly delayed if a response is not received in a timely manner. We suggest a "not-to-exceed five-day" turn-around.

Evaluating a Supplier's Designation as a Regular Dealer – We strongly object to DOT's proposal requiring recipients to establish a system to determine, prior to award, that the DBE supplier meets the fundamental characteristics of a "regular dealer" for purposes of counting towards an established DBE goal. This will be extremely difficult and cause undue problems and delays. First, suppliers are often located out of the recipient's state and it is almost impossible to verify whether a dealer regularly carries a product in its inventory or whether it carries products of a similar character on a regular basis. Often the list of supplies to be purchased is quite lengthy, containing items such as a specific wire, a specific dowel basket, or a specific lightbulb. The reviewer has no way of knowing whether a certain supplier regularly carries these items in stock. We believe that the time to make the designation of whether a firm is a broker, regular dealer, or manufacturer should be at certification. If a firm does not have a warehouse and does not stock inventory, a broker NAICS code should be given, not a wholesaler or manufacturer code. If a firm is a manufacturer with facilities to manufacture, a manufacturer NAICS code should be given. If a firm has a warehouse and stocks inventory, it should be given a retailer or wholesaler code for the types of products it carries. If DOT does require that the determination be made pre-award, recipients should be deemed in compliance by obtaining affidavits from the supplier and bidder at the time of bid.

Drop-Shipping and Delivery from Other Sources – We oppose the proposal that recipients be required to review the language in distributorship agreements, prior to contract award, to determine their validity relevant to each purchase order/subcontract, and the risk assumed by the DBE. This will be difficult to implement, most fundamentally because recipients do not require distributor agreements at the time of bid. Further, the majority of recipients do not have the expertise or staff to effectively review distributorship agreements. If a distributor does not stock inventory or have delivery equipment, it should be classified as a Wholesale Trade Agent at the time of certification.

Negotiating the Price of Supplies – We support a requirement that DBEs must negotiate price when possible. However, there are many supplies for which DBEs are unable to negotiate quantity or quality because the airport or FAA specifies the particular product (runway lighting is an example). For certain products (again, runway lighting is an example), a DBE supplier may perform a significant amount of work in developing take-offs for products manufactured to spec, assume the risk for shipping, and pay for the product directly. In such a case, it may make economic sense to drop-ship the product directly to the user as shipping product from the manufacturer to the dealer and then shipping it from there to the user incurs additional freight costs and puts a DBE supplier at a disadvantage. This type of arrangement should be permitted to be counted at the level of a regular dealer. We also oppose the 4th level of supplier counting related to distributors as this unnecessarily complicates counting DBE participation.

DBE Manufacturers - We support the proposal to clarify the meaning of the term "manufacturer" in this section.

Suppliers of Specialty Items – We support the proposal to consider a DBE that supplies items that are not typically stocked as a regular dealer of bulk items that can receive 60 percent credit for the items if it owns and operates its own distribution equipment. However, we oppose requiring recipients to develop pre-award procedures to verify this. DOT should deem recipients in compliance with this section if they obtain affidavits or sworn declaration from DBEs and bidders that are submitted with the bids.

Subpart D—Certification Standards

11. General Certification Rules (§ 26.63)
We support changing "recipient" to "certifier" throughout subparts D and E to assist firms seeking certification. We also support DOT clarifying ownership by holding or parent firms; however, the rule needs to provide additional information regarding certification of parent or holding firms rather than subsidiaries. For example, is a firm required to conduct operations under the parent company for the parent company to be certified? If the parent firm is certified, does that automatically certify subsidiaries? Which firms in the ownership line-up are excluded from the PNW calculation?

12. Business Size (§§ 26.65, 23.33)
We support the clarification in the ACDBE regulation to be consistent with the DBE regulation. We request further clarity in recordkeeping obligations under § 26.11 regarding the various rules: five years for SBA size standard, three years for the DOT cap, and no DOT cap for FAA contractors. We also believe there should be a special designation for FAA contractors ineligible for FTA and FHWA work. The FAA designation should be standardized for clarity, especially for interstate applications since the NPRM is proposing changes that would require certification without the ability to review the supporting documentation.

Future Adjustments and Technical Amendments – We appreciate DOT recognizing there may be a need for different size standards for the various ACDBE categories. DOT and FAA should conduct a detailed analysis to determine if different standards should be established for different types of concessions. For example, it is very likely that a higher standard for food and beverage concessions and duty-free stores can be justified based on higher up-front investment needs.

13. Personal Net Worth (PNW) Adjustment

Rationale for $1.60 Million Adjustment - We believe that more analysis is necessary before increasing the PNW cap to $1.6 million. For example, it is unclear whether the comparable data used includes exclusions for primary residence, applicant business, and retirement assets. In addition, the NPRM does not provide a compelling rationale for using the 90th percentile as proposed. The reports cited in the NPRM do not support the proposition for which they are cited (and the web link provided on the NPRM to the Credit Suisse "World Wealth Report 2020" at NPRM ft.23 does not work). Further, DOT states that its own analysis is broad-based and does not focus on the types of businesses that could be involved in the DBE and ACDBE programs (acknowledging that The Survey of Consumer Finances (*SCF*) "does not contain sufficient detail on the industry of the business owners to permit a more focused analysis"). Finally, DOT states that the one rationale for the PNW cap is to accommodate ACDBE concessionaires and their higher standards for entry in the industry. But if a PNW increase were to be considered, DOT should narrowly tailor the PNW for ACDBE concessionaires rather than expand the PNW for all businesses.

Periodic Adjustments to the PNW Cap - We support a periodic adjustment to the PNW cap. However, there appears to be an error in the calculation as the denominator on page 43677, which states: "Q1 – Q4 Average Household Net Worth of 2019 ($114,189,981 million)." We do not believe DOT intended the number to be $114.2 billion.

Rules for Reporting PNW - We do not support the exclusion of retirement assets as this may cause a significant discrepancy in the economic status of participants. It is important to note that the calculation of the proposed new PNW cap of $1.6 million is compared to White, Non-Hispanic self-employed business owners in the 90th percentile. If the comparative figure includes primary residence, business value, and retirement accounts, it would be an invalid comparison. Further, excluding retirement accounts enables a person to have an unlimited net worth as long as any wealth more than $1.6 million (excluding the owner's primary residence and business) is held in a retirement account. Additionally, this proposal discriminates against those individuals who accumulate property as a retirement strategy instead of using traditional retirement accounts. We also do not support the elimination of community property or equitable distribution considerations as title in these cases does not relate to legal ownership. The law in community property states provides that marital property is owned in equal shares by each spouse even if the asset is held in only one spouse's name unless an agreement specifies otherwise. Adopting DOT's proposal to eliminate community property ownership would allow an individual with a wealthy spouse to ignore assets that they legally own in equal shares, opening the program to abuse. Moreover, if DOT were to adopt interstate certification reciprocity (see Interstate Certification (§ 26.85) comments), the exclusion of community property from the PNW calculation could lead to "forum shopping" for certification. It appears DOT's rationale for excluding retirement assets is that certifiers have complained about the difficulties in calculating applicable taxes and penalties from the value. Either additional training or setting a standard percentage of retirement assets that should be excluded from PNW would solve this issue while keeping with the overall aims of the DBE program.

14. Social and Economic Disadvantage *(§§ 26.5, 26.63, and 26.67)*

Evidence and Rebuttal of Social Disadvantage- We support eliminating a certifier's ability to routinely ask for evidence of race, ethnicity or gender. Given that the applicant signs an affidavit under penalty of perjury, there is no need to question this information without good cause.

Evidence and Rebuttal of Economic Disadvantage- We oppose eliminating the six criteria currently used in determining ability to accumulate substantial wealth (AASW) in favor of the

"big picture approach" now proposed by DOT. AASW is difficult to assess and will be even more difficult without specific factors that should be considered when making such a determination. DOT's proposed approach is too subjective and vague and will likely result in unnecessary added confusion. What may look like substantial wealth to one certifier may not look like substantial wealth to another. Subjecting such decisions to personal opinions is not good public policy.

Individualized Determinations of SED Status - We oppose the less prescriptive rules proposed by DOT. The greater the amount of subjectivity, the more difficult it is to make and support a decision on social and economic disadvantage (SED). DOT should provide more specific guidance for applicants and certifiers, not less. Less prescriptive measures will increase certifier subjectivity, compromising the program's integrity.

15. Ownership (§ 26.69)
We oppose the proposed revisions. Specifically, the change from "real, substantial, and continuing" to "reasonable economic sense" would be difficult to implement uniformly. Many certifiers are not experts in financial transactions or accounting and may not be able to evaluate if a transaction is or is not reasonable.

16. Control (§ 26.71)
We oppose the requirement to have operations prior to certification because it would exclude new firms. Instead, we propose an experience requirement that will allow new businesses to become certified if the SEDO has sufficient experience in the trade for which the firm seeks certification. We believe this should apply to both DBEs and ACDBEs.

Subpart E—Certification Procedures

17. Technical Corrections to UCP Requirements (§ 26.81)
We support the proposal to make minor technical changes to remove outdated or irrelevant language.

18. Virtual On-site Visits (§ 26.83(c)(1) and (h)(1))
We support the revision to make permanent the flexibility to conduct virtual on-site visits originally provided in March 2020 and June 2021 guidance in response to the COVID-19 pandemic. We also agree that the certifier should retain the discretion to conduct in-person on-site visits as well as limiting the amount of time a certification review may be extended from the current 60 days to 30 days.

19. Timely Processing of In-state Certification Applications (§ 26.83(k))
We support reducing the extension period from 60 days to 30 days. We appreciate DOT recognizing there may be instances when the certifier might need additional time beyond the proposed 30-day extension period, for example for firms implementing curative measures or for those that are submitting revised documents. In addition, we propose that OAs be required to respond to extension requests within 30 days. We also support a limit for the curative measures as this could result in certified firms that have restructured being able to qualify on paper but not in practice, especially if the firm is new and certifiers cannot evaluate control. There does not appear to be language permitting periodic, routine reviews and site-visits. We request the inclusion of regulatory language permitting such periodic (three- to five-year) reviews of PNW statements and updated site visits as firms do not report changes to their PNW and information from previous on-sites may no longer be relevant. It is important that the regulations clearly provide certifiers the ability to conduct these reviews and site visits.

20. Curative Measures
We support codifying the 2019 DOT memorandum regarding curative measures during the DBE and ACDBE certification process. The provision should allow applicants to correct minor paperwork errors and/or revise documents within the § 26.83(l) review period, but not to restructure their business. .

21. Interstate Certification (§ 26.85)
Issues with the Current Rule - We support DOT's goals of preserving the integrity of the DBE Program and improving the efficiency of the interstate certification process. Although we support the proposal that UCPs accept certifications from other states, we urge DOT not to implement such interstate reciprocity until it can build a robust oversight and enforcement mechanism for certification. There is great disparity in the way that UCPs certify DBEs and ACDBEs throughout the country, with significant inconsistency in the application of the regulations. These problems will only increase if interstate certification is required without a proper oversight system in place. At a minimum, oversight should include a requirement for biannual certification of UCPs to ensure consistency in the implementation of certification rules. We also believe that the best system to assist DBEs and ACDBEs seeking interstate certification is the establishment of a secure centralized national portal where each state would upload their certification files. This portal would greatly simplify and expedite the process as well as help secure sensitive personal and financial data submitted to UCPs by firms seeking certification.

Post-interstate Certification Procedures – We support the proposed clarification that the DBE/ACDBE must submit an annual Declaration of Eligibility (DOE), with documentation of gross receipts to confirm small business size, to the UCP of each state in which it is certified. We also strongly encourage the creation of centralized portal where DBEs could upload current annual and material change declarations to avoid having to submit this information to each state. UCPs could also upload their certifications as described in our comments regarding interstate certification.

22. Denials of In-state Certification Applications (§ 26.86)
We support removing the requirement for the certifier to gain approval of the OA before allowing a shorter waiting period to resubmit for certification after denial. We also support changing the regulations to establish the beginning date of the waiting period as the date the certifier sends the denial letter.

23. Decertification Procedures (§ 26.87)
Failure to Submit Declaration of Eligibility (DOE) - We support the proposed revisions in this section with respect to decertification, especially the proposal that firms that receive a notice of intent to decertify for failure to provide a timely DOE are not eligible for an informal hearing. This change should result in a significant savings of time and resources for all parties involved.

Virtual Informal Hearings – We support the proposal to make permanent the option to conduct hearings virtually. This change should result in a significant savings for all parties because of the reduction in travel time and costs associated with in-person hearings.

24. Counting DBE Participation after Decertification (§ 26.87(j))
No comments.

25. Summary Suspension (§ 26.88)
No comments.

26. Certification Appeals to DOCR (§ 26.89)
No comments.

27. Updates to Appendices F and G
We support the proposal to remove Appendices F (Uniform Certification Application/UCA) and G (Personal Net Worth Statement) from Part 26, as well as the technical changes to the UCA. However, given the significant administrative burden in completing these forms, we request that DOT provide a copy of the proposed new forms to certifiers for their comments prior to requiring their use.

Part 23

Subpart A—General

28. Aligning Part 23 with Part 26 Objectives (§ 23.1)
We support adding the program objectives similar to § 26.1 of the DBE Program to § 23.1 for the ACDBE Program.

29. Definitions (§ 23.3)
Concession - We support the proposed revision of the definition of "concession" to reflect DOT's interpretation that concessions are businesses that serve the "traveling public," although we note the NPRM did not provide a proposed updated definition. For the sake of clarity, the new definition should read as follows:

> a business, located on an airport subject to this part, that is engaged in the sale of consumer goods or services to the traveling public under an agreement with the recipient, another concessionaire, or the owner or lessee of a terminal, if other than the recipient.

This is consistent with the concept of concessions since the beginnings of what is now the DOT DBE/ACDBE program. In the very first iteration of Part 23, DOT stated, "…both construction contracts for the runway and lease agreements for concessionaires in the airport terminal fall under the requirements of the regulation. 45 Fed. Reg. 21176 (March 31, 1980) (emphasis added)." DOT went on to state that "The airport concessionaire is…the most typical lessee covered by the regulation. Other lessees include providers of food and ground transportation services to passengers or store owners renting space on airport concourses and providers of services to airport concourses." Id. The next DOT statement on the subject, a guidance document issued in July 1980, distinguished between aeronautical activities (e.g., lease agreements with airlines in their normal passenger- or freight-carrying capacities) and businesses that provide services to the facility or the public on the facility, specifically "a business occupying a traditional 'concessionaire' position at an airport," 45 Fed. Reg. 45283 (July 3, 1980).

These provisions of DOT rules, focusing on consumer-oriented businesses in terminals, were already in place before Congress took action to require an ACDBE program by statute. The statutory provision, offered as a floor amendment by Rep. Cardiss Collins, with the support of the late Rep. Norman Mineta and the concurrence of Rep. Newt Gingrich, related to "business[es]' at an airport which sell food, beverages, printed materials, or other consumer products to the public…." These businesses are what we now call ACDBEs. Rep. Collins' amendment became section 109(h) of Public Law 110-223, the 1987 Reauthorization Act.

Rep. Collins expanded on this emphasis in the floor statements supporting her amendment:

> My amendment provides the statutory authority for this [already existing DOT regulation] by requiring that minority and women-owned firms share in at least 10 percent of the revenues generated by businesses that sell food, beverages, printed materials, and other consumer products.
>
> As airports continue to expand and grow across the country, more and more opportunities are becoming available for businesses that sell food, beverages, and printed materials, or other consumer products. This represents a significant potential for the creation of jobs and additional revenues for small firms. I believe that there should be at least a minimum level of commitment to these small minority and women-owned firms.
>
> To date, this commitment simply has not been made in view of increased business opportunities at airports . . .. My amendment would open up business opportunities to minorities and females . . .. Leasing opportunities, such as those for concessions for airports…[and] DOT recipients should be obliged to ensure that minority businesses have a fair share . . ..

133 Congressional Record at 25986-87 (October 1, 1987). Rep. (later DOT Secretary) Mineta added, "The provision of food and retail service to airline passengers in terminals is an area where opportunities for DBEs should be encouraged." Id. (emphasis added). Another supporter, Rep. Richardson, stated that:

> The amendment increases the set-aside for minority-operated concessions—food, magazines, et cetera. This . . . is especially important if we are truly interested in helping small minority- and women-owned businesses. As all of who travel extensively already know, airport concessions have a captive market. An airport concession, unless poorly managed, is a sure way to a successful business . . .. Currently, only a limited number of firms have the majority of concessions throughout the country. If the marketplace is not to replace this oligopoly, then we in Congress are justified in opening the concession business to different groups.

Id. It is clear from these statements that those involved in the creation of the statutory basis of the ACDBE program intended that it apply to the traditional sorts of business we see in airport terminals – food and beverage, news and gifts, and retail.

DOT took years to issue a final regulation implementing this statute. In addition to citing portions of the statements of Rep. Collins and Rep. Mineta noted above, the preamble to the rule said that service providers like "car rental agencies, FBOs, telephone services, secretarial services, advertising, lockers, televisions, baggage carts, ground transportation, flight schools, insurance, and hotels, and motels" had been considered concessions under the original Part 23 program. See 57 Fed. Reg. 18402 (April 30, 1992). Except for FBOs and flights schools, which were excluded from the rule's definition of concessions (along with other aeronautical activities), all of these were businesses that served passengers and other members of the traveling public. In Appendix A to that final rule, DOT listed the types of businesses that are frequently operated

as concessions. This Appendix (see Id. at 18414) listed 32 specific types of concessions,[1] every one of which was a business that served the traveling public on the airport.

A subsequent NPRM intended to clarify the role of management contracts and car rental companies under the concessions rule, but did not affect the basic definition of "concession" described above. See 56 Fed. Reg. 52050 (October 6, 1993). Further clarifications were proposed in a Supplemental Notice of Proposed Rulemaking (SNPRM), such as excluding long distance telephone services from the definition of a concession, since such services were not typically located at the airport. 62 Fed. Reg. 29578 (May 30, 1997). However, when DOT published a final rule, which moved the DBE program into a new 49 CFR Part 26, the agency did not finalize changes to the ACDBE program, which remained governed by the existing provisions of Part 23. 64 Fed. Reg. 5124 (February 2, 1999).

Later, DOT proposed additional changes to Part 23 in a new SNPRM. 65 Fed. Reg. 54455 (Sept. 8, 2000). In addition to proposing definitional language for "concession" that is nearly identical to the current regulatory text, the SNPRM included an appendix that, like its predecessor, listed size standards for various types of concessions, all of which are businesses that serve the traveling public at airports. The preamble also sought comment on the following matter:

> One issue of which we have become aware concerns businesses that may occupy a portion of airport property, serve the public in general, but do not focus on serving passengers who use airport for air transportation. For example, an airport may lease space on its property, perhaps some miles from the terminal, for a supermarket or other retail establishment that serves the local population but is not, except perhaps incidentally, used by persons who go to the terminal to catch a flight. We seek comment on whether we should exclude such businesses from the definition of concession. We might do so, for example, by changing this definition to refer to businesses that "primarily serve the traveling public on the airport".

DOT also noted, in the context of a discussion of advertising firms, that

> Placing advertising signs and other media in public portions of an airport (e.g., the terminal, the roadways leading to the terminal) is analogous to other businesses that we view as concessions. A firm typically pays to lease space from the airport and places objects in airport buildings and grounds that are directed at the traveling public. (Id.)

1. The listed businesses were food and beverage, book stores, auto rental, banks, hotels and motels, insurance machines and counters, gift/novelty/souvenir shops, newsstands, shoe shine stands, barber shops, automobile parking, jewelry stores, liquor stores, travel agencies, drug stores, pastries and baked goods, luggage cart rental, coin-operated TVs, game rooms, luggage and leather goods stores, candy/nut/confectionary stores, toy stores, beauty shops, vending machines, coin-operated lockers, florists, advertising, taxicab, limousines, duty free shops, pay telephones, gambling machines, and other concessions. While this appendix does not appear in the current Part 23, given changes in way that size standards are now expressed, it shows how DOT, in the regulatory issuance closest in time to the enactment of the statute, viewed the proper scope of concessions covered by its rule.

This statement underlines the common understanding, consistent with the language and history of the concessions provisions of Part 23, that concessions are businesses directed at the traveling public.

In the final rule based on this NPRM, see 70 Fed. Reg. 14501 (March 22, 2005), DOT agreed with this viewpoint:

> Concession businesses must serve the public on the airport. Airport and ACDBE trade associations, one business, and nine airports supported the consequent concept that businesses on airport property that do not primarily serve travelers should not be counted as concessions…We agree that businesses that do not primarily serve the public should not be viewed as concessions.

DOT, while explicitly agreeing with the comments suggesting that businesses on airport property that do not primarily serve travelers should not be counted as concessions, did not adopt regulatory text language specifically clarifying that such businesses did not fall under the definition of a concession. It may be that such an explicit clarification was deemed unnecessary at that time. However, as discussed above, the legislative and regulatory history of the concessions provision focuses exclusively on businesses that serve the traveling public on the airport, conclusively supporting the proposed revision.

Additional clarification is also needed regarding classification and use of North American Industrial Classification System (NAICS) codes for concessions. The regulation requires the use of the NAICS code designation that best describes the primary business of a firm. However, there is little consistency in the assignment of NAICS codes for airport concessions between certifying agencies. It is often difficult to determine the appropriate codes for each type of airport concession, e.g., should food and beverage be 722310 “Food Service Contractor” or 722511 “Full-Service Restaurants”, 722513 “Limited-Service Restaurants” or 722410 “Drinking Places”? It appears that some certifiers assign retail codes to any retail firm while others assign the specific code based on the owner’s specific experience (e.g., bookstores, electronic stores, etc.). Standardizing these codes and providing clarification on their use would also be very helpful in goal setting and in interstate certification.

We advocate deleting the following from the regulatory language:

> *Example to paragraph (2):* A supplier of goods or a management contractor maintains its office or primary place of business off the airport. However, the supplier provides goods to a retail establishment in the airport; or the management contractor operates the parking facility on the airport.

These examples do not align with other concession agreements that generate revenue to an airport and are not helpful in determining whether or not a business is an airport concession.

Personal Net Worth- We support the proposed revision to delete the $3 million exclusion. Additional comments on modifying the PNW are provided in Section 13. Personal Net Worth (PNW) Adjustment above.

Sublease -We support the proposal to add a definition for “sublease” clarifying that the use of the words “sublease, subconcession, or subcontract” in describing an agreement do not determine whether the participation can be counted as direct ownership. However, we

recommend stating in the definition of a sublease whether a capital investment from the ACDBE is required. We also support adding a definition of the term “subconcession” to § 23.3.

Subpart B—ACDBE Programs

30. Direct Ownership, Goal Setting, and Good Faith Efforts Requirements (§ 23.25)
We support the proposed clarification that a concession-specific goal for any concession other than a car rental may be based on purchases or leases of goods and services when the analysis for the relative availability of ACDBEs and all relevant evidence reasonably supports that the goal cannot be achieved with direct ownership. Additionally, we support redefining the term "direct ownership arrangement" as the current definition would require a lease, sublease or joint venture arrangement for the concession operation. A franchise or license agreement could operate as a supplier or a direct ownership arrangement, depending on the agreement.

31. Fostering ACDBE Small Business Participation (§ 23.26)
We do not oppose adding a provision in Part 23 mirroring § 26.39 that would require airports to create a program specifically designed to foster small business participation. However, we are concerned about the additional work required to periodically report on this new program. We urge DOT to minimize the administrative burden by establishing a supplemental report to the Uniform Report. We also request that DOT modify the language in Paragraph (b)(3) which states: "On concession opportunities that do not include ACDBE contract goals, require prime concessionaires to provide subleasing opportunities of a size that small businesses, including ACDBEs, can reasonably operate." This is not feasible, as not every opportunity lends itself to subleasing. For example, single-unit solicitations cannot support subleasing, nor can multi-unit operations comprised of high productivity units paired with low productivity units. We suggest changing the language to "consider requiring subleasing" on these opportunities.

32. Retaining and Reporting Information about ACDBE Program Implementation (§ 23.27)
Active Participants List – We do not believe the proposed Active Participants List would provide DOT the information outlined in the NPRM, comparable to a Part 26 Bidders List. While airports are able to develop Expressions of Interest lists, these are rarely comprehensive and will not provide DOT with accurate data on how many and what types of ACDBEs are certified, or seeking concession opportunities as primes, joint venture participants (particularly in cases where primes select the other joint venture participants), or subconcessionaires. Because the data from an Active Participants List will not provide accurate information, we oppose the burdensome new requirement to load it into a searchable, centralized database. It would not be a good source of information and, in fact, is likely to provide misleading data that would prevent recipients from correctly evaluating ACDBE availability for goal-setting purposes. The collection and reporting of an Active Participants List would also require additional staff, which cannot be justified considering the quality of the data that would be reported. If, however, DOT does require airports to load this potentially misleading information into a centralized database, the date for reporting should be March 1 as part of the ACDBE Uniform Report.

Subpart C—Certification and Eligibility of ACDBEs

33. Size Standards (§ 23.33)
We support the clarification in the ACDBE regulation providing that the calculation of gross revenues to be over the most recent five years, rather than three years, which is consistent with the DBE regulation.

Future Adjustments and Technical Amendments – We appreciate DOT recognizing there may be a need for different size standards for the various ACDBE categories. DOT and FAA should conduct a detailed analysis to determine if different standards should be established for different types of concessions. It is very likely that a higher standard for food and beverage concessions as well as duty free stores is justified, as those businesses have significantly higher up-front investment needs.

34. Certifying Firms that Do Not Perform Work Relevant to the Airport's Concessions (§ 23.39)
We support the proposed addition clarifying that applicants should not be certified if they intend to perform activities solely related to the renovation, repair, or construction of a concession facility for which airports cannot count their participation toward an ACDBE goal. However, it is also important that DOT provide specific language that does not exclude the certification of firms that provide services such as electrical, plumbing or maintenance work to concessionaires as a maintenance service, not related to initial construction.

Subpart D—Goals, Good Faith Efforts, and Counting

35. Removing Consultation Requirement When No New Concession Opportunities Exist
We strongly support this revision, a change that ACI-NA has advocated in the past. We agree that the regulatory requirement for recipients to perform consultation when there are no concession opportunities to evaluate or promote is misleading and burdensome. This revision will save time and money for airport staff and respect the resources of ACDBEs who may attend a meeting only to be disappointed to learn that there are no opportunities in which they can participate.

36. Non-Car Rental Concession Goal Base (§ 23.47)
We support the proposed change, however, the goal setting methodology of adding amounts to the numerator and denominator are inconsistent with the calculation in the Uniform Report. As a result, goals set in this fashion will not relate to the accomplishment because the Uniform Report's automatic calculation adds purchases only to the numerator. In addition, clarification is required regarding whether gross revenues should be included in the base on the Uniform Report for concessions when the goal is based on the purchase of goods and services. We are seeking this clarification because car rental revenues must be reported even when goals are set based on the purchase of goods and services.

37. Counting ACDBE Participation After Decertification (§ 23.55)
We oppose a requirement that recipients, as opposed to UCPs, evaluate changes in a firm's status because many airports are not certifying agencies and have no expertise in certification. Instead, we advocate that DOT require an ACDBE that is decertified due to size or PNW to notify the UCP that it would like to continue to count for the duration of any agreement currently in place and, therefore, requests continued monitoring of "no change." The UCP would need to create a special designation or directory entry to indicate that the firm is no longer certified because it exceeds the size standard or the owner(s) exceed the PNW, but the firm remains eligible in all other respects. However, the most effective system to address ACDBE decertifications would be to establish a secure, centralized, national portal where each UCP would upload firms that have been decertified.

38. Shortfall Analysis Submission Date (§ 23.57)
We support extending the due date of the Part 23 Shortfall Analysis to allow airports to submit their report 30 days after submission of their Uniform Report. ACI-NA had previously requested

such change to make this Part 23 requirement consistent with the similar requirement in Part 26.

Subpart E—Other Provisions

39. Long-term Exclusive Agreements (§ 23.75)

Five-year Term for Long-term Agreements – We request that DOT reconsider its position on Long-term Exclusive (LTE) agreements and develop a process that is less onerous and more feasible for airports. Airports and their business partners have provided numerous comments since the Joint Venture Guidance was promulgated regarding LTE requirements. Specifically, the LTE approval process requires the submission of documents and data that may not be available prior to awarding the contract. Moreover, when the documentation is available for submission, FAA's review can take months, leaving the airport with the Hobson's choice between awarding the contract without full FAA approval and losing the opportunity to provide additional concession options for the traveling public. As an alternative to the current LTE approval process, we propose the adoption of a two-step process. First, when an airport anticipates that a concessions contract will be for a term greater than ten years, the airport would send the goal analysis to FAA as a notification before solicitation. Then, after the solicitation process has concluded, the airport would send FAA information on the level of interest and availability of ACDBEs, and showing that the contract was awarded to a proposer that met the goal or made good faith efforts to meet the goal. We believe that this process would meet DOT and FAA goal to ensure that contracts are not awarded absent appropriate ACDBE participation, without requiring the burdensome process now in place. If DOT does not implement ACI-NA's suggested revision, we advocate that "long-term" be redefined from "a term longer than five years" to "a term longer than ten years" to allow concessionaires to better amortize the significant investment required in airport concessions. We do not agree that revising the definition of LTE agreements would reduce the degree of oversight FAA can exercise under the rule. DOT could revise the regulations to require the submission of a goal analysis for new concession leases exceeding ten years without requiring the onerous information currently required for LTE approvals. Additionally, many airports have experienced extensive delays in FAA responding to their LTE submissions. DOT should implement a time limit of not more than 15 days for FAA to respond to any LTE requests, and if FAA does not respond by the regulatory deadline, the LTE should be deemed approved.

Long-term Agreements and Options – If DOT does not implement the revised process advocated by ACI-NA above for long-term agreements, the definition of long-term agreement should be revised to state that options are subject to the regulation's requirements only if the options result in a lease period of more than ten years.

Long-term Agreements and Holdovers – There are many valid reasons for holdovers to occur and they are often critical to meet the short-term needs of the parties involved in the agreement. FAA should permit holdovers for up to 12 months without triggering the long-term agreement requirements. If FAA does not revise the regulations to allow holdovers of up to 12 months, airports must be provided a period of at least 12 months to solicit participation in the concession opportunity.

Definition of Exclusive Agreement – DOT should revise the regulations to define exclusive agreement as a contract that does not have ACDBE participation at levels approved in the airport's overall goal for the applicable trade.

Amending Document Requirements – If DOT does not implement the revised process advocated by ACI-NA above, we support the proposed revisions regarding documents required for approval of long-term agreements.

40. Local Geographic Preferences (§ 23.79)
We support the proposal making clear that local geographic preferences are not permitted regardless of concession certification status.

41. Appendix A to Part 23: Uniform Report of ACDBE Participation Form
We support the proposal to remove the Uniform Report of ACDBE Participation from Appendix A. However, given the significant administrative burden in completing the Uniform Report, we request the DOT provide airports notice and an opportunity to comment on the proposed new form prior to requiring its use to ensure the data that is required to be reported is meaningful and the instruction are clear.

Block #5 Instructions of Appendix A, Definition of Goods and Services – We support the proposal that goods and services purchased by the airport should not be included in the Uniform Report. However, we request further clarification on the reporting of the purchase of goods and services by concessionaires, specifically explaining why total purchases are not included in the total line of column A, although ACDBE purchases are included in the total line of column C. This leads to a calculation that can distort the percentage of ACDBE participation and lead to misinterpretation of the data. DOT should revisit this calculation on the Uniform Report. There should also be clear instructions on the reporting of gross revenues if a goal was set based on purchases.

Blocks #10 and #11 Reporting of ACDBEs Owned by Members of Different Socially Disadvantaged Groups – We oppose amending the requirements under block #11 in the Uniform Report to report the different races, ethnicities, and/or genders of ACDBEs owned by multiple individuals. This reporting is overly burdensome, and many airports do not have a breakdown of ownership by the proposed categories because they are not the certifiers. Airports that are not certifiers do not have that information. In other cases, where the airport has that information, airport staff would have to perform complicated calculations that may not provide accurate ACDBE information. We question whether there is a substantive benefit for this very burdensome reporting, especially given questions about its accuracy.

42. Technical Corrections
We support the proposed revisions to make provisions in Part 23 consistent with Part 26, to clarify existing requirements and correct typographical errors, and references to obsolete or duplicative provisions and cross-references.

G. Paperwork Reduction Act
We do not agree with the estimated hours to complete three proposed new requirements:

- 1. ACDBE Small Business Program Element: DOT estimates that it will take each primary airport 5.6 hours to comply with the new program. ACI-NA member airports estimate that at least 40 hours annually are required. In fact, initially it could take more than 100 hours to establish the program, given the numerous staff that will need to be involved;
- 2. ACDBE Active Participants List: DOT estimates that it will take each primary airport 42 hours to comply with the new program. ACI-NA member airports estimate that at least 60 hours are required for a program with questionable benefits as described in our comments above; and

- 3. ACDBE Annual Report of Percentages of ACDBEs in Various Categories: DO T estimates that it will take each primary airport 3.2 hours to comply with the new program. ACI-NA member airports estimate that at least 25 hours annually are required.

On behalf of the airport community that ACI-NA represents, we appreciate and thank you for the opportunity to provide our comments to this very important NPRM. ACI-NA stands ready to work with DOT and FAA to ensure the continuity of strong and vibrant DBE and ACDBE programs.

Respectfully submitted,

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General Counsel