Final

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REGARDING MINORITY BUSINESS ENTERPRISE

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Good morning. I am pleased to have the opportunity to discuss the Department's implementation of section 105(f) of the Surface Transportation Assistance Act of 1982. Section 105(f) requires, except to the extent that the Secretary determines otherwise, that not less than 10 percent of the funds authorized to be appropriated by the Act be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

The Department takes very seriously the obligation placed upon us by Congress in section 105(f) and commends this Subcommittee and its Chairwoman Cardiss Collins for their interest in this Department's activities to implement section 105(f). The final rule that we published on July 21, we believe, provides a reasonable and responsible framework for increasing disadvantaged business participation in our highway and mass transit programs. This final rule reflects the Department's response to the over 1,600 comments we received on our notice of proposed rulemaking.

Before describing for you the major features of the regulation, I would like to discuss the Department's activities in this area. Our earliest significant initiative on behalf of minority business enterprise (MBE) occurred in 1969 when the Federal Highway Administration (FHWA) imposed a requirement on

Federal-aid highway construction contractors to use their best efforts to use minority subcontractors among their employees. In 1975, the FHWA expanded this program by establishing a nationwide goal of prequalifying or licensing 500 additional minority businesses by July 1978. Most of the States exceeded their share of this goal. In addition, FHWA required the States and FHWA field offices to review and evaluate State prequalification and licensing requirements to assure that unreasonably complex, costly or difficult requirements were not used, or that these types of requirements be eliminated for all subcontractors, and for prime contractors on contracts smaller than $100,000. Our expanded program also required the State highway agencies to seek out, identify and compile a list of minority business firms that wished to participate in the Federal-aid highway construction program and to distribute the list to prime contractors. We also required all bidders and contractors who intended to sublet part of the contract work to affirmatively solicit the interest, capability and prices of potential MBE subcontractors. To assure that appropriate emphasis was being placed on increasing MBE participation in the Federal-aid highway construction program, we began establishing annual nationwide goals for MBE participation in 1977.

In 1980, the Department published a comprehensive minority business enterprise (MBE) regulation (49 CFR Part 23). The 1980 regulation required recipients of significant amounts of financial assistance from the Department to have minority business programs. The majority of this program continues under the 1983 rule. Recipients' minority business programs under the 1983 rule must include separate overall program goals for the participation of minority and women-owned businesses. These overall goals are expressed as a percentage of the total of the DOT-assisted contracting the recipient

expects to do in a given fiscal year. The recipient must obtain DOT's approval of these goals. The recipient also sets separate contract goals for the participation of minority and women-owned firms and each prime contract in which it is reasonable to expect participation by such firms. The apparent successful bidder on a prime contract must either meet the goals (e.g., through the use of MBE subcontractors) or demonstrate to the recipient that it made good faith efforts to do so.

There has been a substantial increase in minority business participation since the Department's 1980 regulation went into effect. The largest DOT financial assistance program is the Federal-aid highway program. In fiscal year 1979, the last full fiscal year before the Department promulgated 49 CFR Part 23, MBE contract awards from States in the Federal-aid highway program totaled approximately $164 million, or 2.2 percent of Federal-aid funds distributed to States. In fiscal year 1981, the first full fiscal year in which the regulation was in effect, MBE awards in the Federal-aid highway program totaled approximately $355 million, or 4.2 percent. In fiscal year 1982, the amount of awards increased to approximately $415 million, or 5.3 percent. In fiscal year 1982, in other words, minority businesses received more than 2 1/2 times the dollar amount of contracts than they did in fiscal year 1979.

In creating a regulatory mechanism to carry out section 105(f), we believe it reasonable to build on the existing foundation of 49 CFR Part 23. The 1980 regulation provided the key elements of the program -- contract goals set by recipients, good faith efforts by contractors to meet contract goals, and

certification of the eligibiltiy of participating firms by recipients -- would remain in effect. However, section 105(f) made three substantial changes. First, it provided additional statutory authority for the program. The 1980 regulation was effected based on the general discretion of the Secretary and the general nondiscrimination mandate of Title VI. Section 105(f) specifically called for an affirmative action program as opposed to the nondiscrimination emphasis of Title VI and the Department's original MBE rule.

Second, section 105(f) set the level of participation the Department expected to obtain. This 10 percent level applies throughout the FHWA and UMTA programs. The 1983 regulation implementing the statute requires each State to set a commensurate goal. Finally section 105(f) altered the previous program by requiring use of the definitions appearing in 8(d) of the Small Business Act (SBA) (codified at 15 U.S.C. section 637(d)). Since this definition focuses on businesses owned and controlled by socially and economically disadvantaged individuals, rather than minority business as such, section 105(f) altered the tone of the MBE (now DBE) program.

It is important to realize that, consistent with section 105(f)'s use of the section 8(d) definitions, this is a "disadvantaged business" regulation rather than a "minority business enterprise" regulation, as such. Recipients will make a rebuttable presumption that firms owned and controlled by Blacks, Hispanics, American Indians, Asian Pacific Americans, and Asian Indian Americans are disadvantaged businesses. People who are not members of one of these groups, such as nonminority women, will have the opportunity to demonstrate to recipients, on an individual, case-by-case basis, that they too

are socially and economically disadvantaged. In addition, of course, the Department's existing program for women-owned business under 49 CFR Part 23 will continue in effect.

We recognize, and state in the final rule, that the 10 percent disadvantaged business participation level established by section 105(f) for DOT will be achieved if recipients set and meet overall disadvantaged business goals of at least 10 percent. We also recognize, however, that it may not be reasonable to expect every recipient to meet a 10 percent goal at once. Under the final rule, a recipient may request approval of a goal of less than 10 percent. To decide whether a lower goal is justifiable, the Department needs information about the availability of disadvantaged businesses to work on recipient's DOT-assisted contracts and the efforts the recipients are making to increase disadvantaged business participation. Recipients requesting approval of a lower goal will be asked to submit such information. The Department's decision to approve a lower goal will be made depending on the merits of each case. Before requesting a lower goal, recipients must consult with minority and general contractors organizations, community organizations, and other interested groups. The Department would approve a lower goal if the recipient was making all appropriate efforts to increase participation to a 10 percent level and, given the availability of disadvantaged business, the lower goal represented a reasonable expectation for the recipient's disadvantaged business participation.

We expect our recipients to take their responsibilities under section 105(f) seriously. We are working with them cooperatively to make sure that they understand these responsibilities and that they do the best job they can to increase disadvantaged business participation. However, we also recognize that, in the event that a recipient does not fulfill its obligation under the regulation, appropriate enforcement procedures are also necessary. The regulation provides that a recipient will be in noncompliance with the regulation in any of three circumstances. A recipient will be in noncompliance if it does not have a disadvantaged business program consistent with the requirements of 49 CFR Part 23, or if it does not have an approved overall goal. Finally, a recipient will be in noncompliance if, having been unable to explain to the Department's satisfaction that a failure to meet its overall goal was for reasons beyond its control, it then fails to take remedial action to improve its disadvantaged business participation as the Department requests.

A recipient is not regarded as being in noncompliance, however, simply because it has failed to achieve the level of disadvantaged participation called for in its overall goal. Determining that a recipient is not in compliance simply because it failed to achieve its overall goal would in effect establish a federally mandated quota system. We believe such a quota system to be unsound as a matter of both law and policy.

The Department is committed to achieving the objective of section 105(f), but at the same time it has a responsibility to avoid the imposition of additional administrative burdens in situations where these additional requirements are not likely to increase our ability to implement the statute.

This is the case of the program exclusions included in the final rule. The reason for excluding programs like NHTSA's Highway Safety Grant Program, grants to States for Commercial Motor Vehicle Safety Programs, the Coast Guard State Recreational Boating Program, and the Reforestation and Promotion of Fisheries Programs, are various. These programs are not funded by the gasoline user fee or had little potential for job or business opportunity creation. In addition, the contracting opportunities for disadvantaged businesses gained by coverage of these programs by the regulation would not justify the additional administrative burdens involved for recipients. More importantly, because these exemptions are relatively small, they should not affect the ability of the Department of achieve the objectives of the statute.

Another of the programs excluded by the final regulation that deserves special mention, is the supplemental discretionary fund for the FAA's Airport and Airway Improvement Program. As explained in the preamble to the final rule, the most important reason for this exclusion is that the administrative mechanics of the regulation are designed primarily for the Department's highway and transit programs. Unlike these two programs, the FAA airport program involve direct, often one time, grants to various airports; and as a result the long term aggregate achievement of DBE's goals would not fit the situation of FAA recipients. Another factor that was considered in making the determination to exclude this program, was the fact that the supplemental discretionary fund authorized by the STAA of 1982 is only a small part of FAA's program. This would create the unwanted situation where the objective of section 105(f) would apply to only a small portion of the airport program therefore resulting in the application of different administrative requirements, depending on the

statutory source of funding. This problem becomes more complex when it is considered that funds authorized by the 1982 Act are intermingled with funds from other sources in the same grant. A final factor considered in authorizing this exclusion was the timing of the regulation, which was not issued until the fourth quarter of fiscal year 1983. The FAA had already apportioned funds, many grants had already been made, and it was, and is, uncertain if Congress was going to appropriate STAA funds for this program for fiscal years 1984 and 1985. All these factors resulted in very little opportunity for the administrative provisions of the final regulation to actually operate.

If section 105(f) and our regulation are to have a meaningful effect on opportunities for legitimate qualifying businesses, it is crucial that we do not let "fronts" -- firms that purport to be owned and controlled by qualifying individuals but which, in fact, are not -- take advantage of the opportunity to participate. Because of the number of potential MBE contractors, DOT does not have the staff to individually "screen" or certify each one. We must rely on the States to do this. Title 49 CFR Part 23 requires recipients to screen firms so that only legitimate qualifying businesses participate, but this is not an easy job. Permitting only eligible businesses to participate is of vital importance to our program, and is one of the areas in which DOT's headquarter and regional civil rights, legal, and Inspector General staffs participate. In addition, realistic goals that represent reasonable expectations for DBE performance help to reduce incentives to create "fronts."

Some commenters in the rulemaking process expressed concern over whether the rebuttable presumption of social and economic disadvantage required them to investigate the status of each business owner seeking certification under

the regulation. The final rule clarifies that this is not the case. The basic meaning of a presumption of social and economic disadvantage is that the recipient assumes that a member of the designated groups is socially and economically disadvantaged. In making certification decisions, the recipient relies on this presumption, and does not investigate the social and economic status of individuals who fall into one of the presumptive groups. However, saying that the presumption is rebuttable means that a third party may challenge the actual social and/or economic disadvantage of a business owner who has received or is seeking certification for his firm from the recipient. We believe that this rebuttable presumption strengthens the legal defensibility of the statute.

The procedures for making such a challenge and insuring that the challenged firm receives due process are clearly spelled out in the regulation. While a challenge is in process, the presumption of social and economic disadvantage remains in effect. Therefore, if a firm has been certified, and the social and economic disadvantage of its owner is under challenge, the firm continues to be certified and eligible to be considered a disadvantaged business for purposes of the recipient's DOT-assisted contracting activities.

Public participation is considered vital by the regulation when a State is proposing a goal of less than 10 percent. In justifying such a goal, the State must submit evidence of public participation and comments. Approval of one State's request has already been delayed pending receipt of just such information (Wyoming). In addition, all States are required to establish a comment period of 45 days when submitting a goal of less than 10 percent.

I want to reiterate that the Department of Transportation is seriously committed to carrying out our responsibility under section 105(f). We have no intention of resting satisfied with past achievements. We recognize, as President Reagan said in his December 17, 1982, statement on the subject, that "our fellow citizen in the minority community lack the opportunities and incentive -- not the capabilities -- to get ahead. Given the proper incentives and a general environment of economic progress, American minority business can thrive and serve as a mighty engine for social progress." We share the President's expressed commitment to "a vibrant and expanding minority business community." In his statement, President Reagan underlined his commitment to encouraging minority business participation in financial assistance programs. In carrying out section 105(f), the Department is very conscious that it is carrying out not only the intent of Congress but also an important policy of the President of the United States. We look forward to working with the Congress, recipients, and contractors in carrying out this commitment.

This ends my prepared testimony. I would be happy to respond to your questions.