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COMMITTEE ON SMALL BUSINESS  
SUBCOMMITTEE ON SBA AND SBIC AUTHORITY,  
MINORITY ENTERPRISE AND GENERAL SMALL BUSINESS PROBLEMS  
UNITED STATES HOUSE OF REPRESENTATIVES  
REGARDING H. R. 1961  
JUNE 27, 1985

Mr. Chairman and members of the Subcommittee:

Good morning. I am Jim J. Marquez, General Counsel of the Department of Transportation. I am pleased to be here today to discuss the Department's views on H.R. 1961, a bill which the Chairman has introduced to amend section 16 of the Small Business Act.

You mentioned this bill to us in the course of the Subcommittee's June 5, 1985, hearing concerning the Department's disadvantaged business enterprise (DBE) program. I stated at that time that we support the general concept of increasing penalties for fraud and abuse in the DBE program.

The Department is strongly in favor of the principle that only legitimate disadvantaged business should participate in our programs, and that front firms and others which try illegitimately to take advantage of the program should be screened out of the program and, where the law and the facts make it appropriate, penalized. I believe that the Department has made reasonable efforts to ensure that only legitimate firms are certified for participation. We must always remain vigilant against fronts, but the Department of Transportation does not believe that abuses of

this kind undermine the need for a carefully designed program. We also do not believe that the fact that some fronts undoubtedly exist should undermine current efforts to improve opportunities for legitimate disadvantaged businesses in our financial assistance programs.

We support the intent of the bill to increase the penalties for fraud and abuse in the DBE program. However, I would draw to the Subcommittee's attention a few technical comments.

The bill would amend section 16(a) of the Small Business Act by increasing the maximum penalties under the statute from \$5000 and two years to \$50,000 and five years. We believe that these increases in penalties would increase the deterrent value of the statute for Small Business Administration (SBA) programs as well as those of the Department. The availability of stiffer fines and sentences will impress upon potential abusers of these programs that the Federal government is serious about dealing with their conduct.

We would, however, call to the Subcommittee's attention recent legislation amending the provisions of the Federal criminal statutes concerning fines and incarceration. The Comprehensive Crime Control Act of 1984 (Pub. L. 98-473; October 12, 1984), as amended by H. R. 5846 (Pub. L. 98-596; October 30, 1984), significantly raises the maximum fines and prison terms which may be imposed for felony violations of Federal criminal statutes. Under these statutes, an individual may be fined up to \$250,000 for a felony; an organization, up to \$500,000. The court also has

the discretion to fine the defendant up to twice the amount of any gross pecuniary gain he has obtained, or loss he has caused another, as the result of his offense. The legislation also provides for increased prison sentences. It is our understanding that these provisions apply to felony violations of all Federal criminal statutes.

Because section 16(a) already calls for a sentence of up to two years imprisonment, violation of the statute involves a felony. It is possible, therefore, that some or all of the penalty increases proposed by the bill have already been achieved by the more general sentencing legislation. Perhaps what is needed is to conform the fine levels in your bill with the higher levels Congress enacted last year.

The proposal to substitute the words "United States" for the word "Administration" may facilitate the prosecution of some cases, under SBA programs, where false statements or other fraudulent representations are made to Federal agencies other than the SBA itself (e.g., a firm makes a false statement to DOT in connection with a solicitation for an 8(a) contract). However, we believe that this change in the statute would have limited application to our disadvantaged business enterprise program.

With the possible exception of a false statement made directly to the Department in connection with a certification appeal or third-party complaint under 49 CFR §23.55, any false statement or representation under the DBE program would be made to influence the action, not of the United States or any Federal

agency, but of a state or local government agency that received financial assistance from the Department. Consequently, this amendment to the statute's language would not bring the conduct within the ambit of the statute and its criminal penalties. We do not believe that this would be a serious problem, however, since the broad sweep of another statute 18 U.S.C. §1001, provides penalties for fraudulent statements regarding any matter under the jurisdiction of the United States.

The final provision of the bill is probably the most important one in terms of the statute's applicability to the Department's DBE programs. The present language of the statute applies to actions taken for the purpose of obtaining money, property or value under the Small Business Act. The bill would add, after the word "Act," the words "including any contract or subcontract subject to the provisions of this Act or any other provision of law which refers to section 8(d) of this Act for a definition of eligibility." (emphasis added)

The intent of this language is clearly to cover misconduct in connection with contracts and subcontracts let by state and local recipients of financial assistance under the Department's highway and transit programs. These programs are affected by section 105(f) of the Surface Transportation Assistance Act of 1982, which provides that

Except to the extent that the Secretary determines otherwise, not less than ten percent of the amounts authorized to be appropriated under this act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act....

Section 105(f) clearly refers to section 8(d) of the Small Business Act for a definition of eligibility.

We would raise the question, however, of whether, strictly speaking, a contract let by a state or local government agency receiving financial assistance from the Department's mass transit or highway programs is "subject to" section 105(f). Section 105(f) can be construed essentially as a direction from Congress to the Secretary of Transportation to ensure that the appropriate funds are expended with disadvantaged businesses. It does not, on its face, directly impose any obligations on state or local financial assistance recipients or make their contracts "subject" to its provisions.

While the intent of this provision of the bill is clear to us, a criminal statute must be construed strictly. It is conceivable that a court might accept a defendant's argument that the statute did not reach an allegedly false statement he made with the purpose of securing a DBE subcontract on a state or local Federally-assisted highway or mass transit project.

We believe that this potential statutory construction problem could be avoided by rewording the proposed amendment to read "including any contract or subcontract subject to the provisions of this Act, or made available in accordance with any other provision of law which refers to section 8(d) of this Act for a definition of eligibility."

This alteration of the amendment would make the penalties of section 16(a) clearly applicable to misconduct in connection with obtaining DBE contracts made available as part of STAA financial assistance programs.

Thank you for the opportunity to comment. I will be pleased to respond to your questions at this time.