



# Memorandum

Subject: **ACTION:** Legal Sufficiency Review of  
Disadvantaged Business Enterprise  
(DBE) Goal Setting Decision Document

Date:

**JUL 20 2016**

From: Thomas G. Echikson  
Chief Counsel

In Reply Refer To:  
HCC-40 and HCR-30

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To: Directors of Field Services  
Division Administrators  
Assistant Chief Counsels in Field Legal  
Services

As an essential element of accomplishing the remedial objective of the DBE program, State Departments of Transportation (State DOTs), as primary recipients of U.S. Department of Transportation (DOT) financial assistance, are required to establish an annual overall goal for DBE participation that comes as close as possible to approximating the level of participation one would expect in the absence of discrimination or its continuing effects. Beginning in March 2010, DOT began to require that recipients of DOT financial assistance submit their overall DBE goal methodology for approval by the appropriate DOT operating administration every three years. *See* 49 Fed. Reg. 5535 (Feb. 3, 2010). The annual overall DBE goal based on approved submissions is in place for three years. This means that each year during the three year period the overall goal will remain the same until the next review cycle and each fiscal year the recipient State DOT must make a good faith effort to meet the goal.

The Federal Highway Administration's (FHWA's) internal review process requires Division Offices to obtain a legal sufficiency review from the Office of Chief Counsel (HCC) of their goal-approval decision documents, which explains the basis for FHWA approval of the a State's overall goal methodology, race- and gender-neutral participation projections, and goal setting process. In 2012, HCC requested that the Division Offices submit their decision documents for legal sufficiency review to the Federal-aid HCC office located in their geographic area (North, South, Mid-America, and West).

Since that time, the Office of Civil Rights (HCR) and HCC have found that FHWA's review of the States' DBE overall goal methodologies benefits from input and guidance provided by HCR to the Divisions prior to HCC's legal sufficiency review. This memorandum sets forth a revised internal review process for the States' DBE overall goal methodologies that incorporates input from HCR.

Both HCR and HCC request that the Divisions incorporate this revised process into the review of goal methodologies beginning with the methodologies that are required to be submitted to FHWA by August 1, 2016.

### Review Process Steps

1. States that are scheduled to submit a DBE overall goal methodology in a given year must submit their methodologies to their respective FHWA Divisions by August 1.
2. Upon receipt, the FHWA Division should send a letter to the State DOT: (a) acknowledging receipt of the goal methodology; (b) directing the State to operate under the submitted goal unless and until the Division directs otherwise; (c) stating that FHWA will review the adequacy and soundness of the methodology; and (d) stating that FHWA may approve the submitted goal or, after consulting with the State DOT, adjust the overall goal or direct the State DOT to do so.
3. The FHWA Division should review the goal methodology for consistency with the DOT DBE regulations at 49 CFR Part 26 and with [DOT DBE goal-setting guidance](#) and clarify any questions they may have with the State DOT. After reviewing the methodology with the State, the Division should prepare a draft decision document to approve the goal methodology.
4. At any point during the Division's review of the goal methodology, the Division may reach out to HCR's DBE unit for guidance or assistance.
5. Regardless of whether the Division has worked with HCR to prepare its decision document, the Division should submit the final decision document to HCR's DBE unit for review and comment. HCR may ask for a copy of the State's methodology and a disparity study, if relevant.
6. To the extent that HCR has questions or concerns about the goal methodology, it should work with the Division and the State to resolve those questions until it is satisfied that the goal methodology and the decision document are consistent with DOT DBE policy and guidance.
7. At any point during HCR's review of the goal methodology, HCR may reach out to HCC for input on legal and/or programmatic issues. This consultation does not trigger HCC's legal sufficiency review. If HCR chooses to reach out to HCC, HCR should contact the attorney in the appropriate HCC Field Legal Services office for the State under review and HCC's Civil Rights Team Leader in headquarters. The HCC Field Legal Services office and HCC's Civil Rights Team in headquarters will collectively coordinate HCC's input to HCR.
8. Regardless of whether HCR has worked with HCC to review the goal methodology, once HCR has completed its review and coordinated input on the Division's decision document with the Division, the Division should submit its final decision document to the appropriate HCC Field Legal Services office for its geographic area and should copy HCR on its correspondence to HCC. The legal sufficiency review conducted by HCC is separate from and follows the review conducted by HCR. A goal methodology submitted to HCR is not under legal sufficiency review. HCC's legal sufficiency review commences after the Division has consulted with HCR and only after the Division submits the goal methodology directly to the appropriate HCC Field Legal Services office for its geographic area.
9. The HCC Field Legal Services attorney should review the goal methodology and decision document for legal sufficiency, which includes review of the State's compliance with DBE regulatory requirements, adherence to DOT's basic DBE goal setting principles and guidance, and the adequacy of the State's explanations of its methodology and process. The Field Legal Services attorneys are encouraged to reach out to the HCC Civil Rights Team members in Washington and/or members of HCR's staff if they have any questions about the goal methodology.

10. If the Field Legal Services attorney finds that the State's methodology is not legally sufficient, the attorney should communicate his/her concerns to HCR and the Division for resolution of the issues. If necessary, FHWA may require the State to submit a revised methodology, at which point the above review process would start again.
11. If the Field Legal Services attorney is satisfied that the goal methodology is legally sufficient, the attorney should draft a legal sufficiency memorandum that should be sent to the Division office for its files and copy HCR. This memo is intended for internal use only, and should not be shared outside of FHWA.
12. Upon receipt of the legal sufficiency memo, the Division should send its decision document to the State DOT, copying HCR, approving the State's goal methodology.

Attached to this memorandum is the State DOT submission schedule for the upcoming three-year period; the link to the internal Sharepoint site in which Divisions should submit goal methodology decision documents; and HCC Field Legal Staff contacts by geographic region.

Questions about this memorandum should be directed to Jim Esselman, HCC Civil Rights Team Leader, at [james.esselman@dot.gov](mailto:james.esselman@dot.gov), or to Martha Kenley, National DBE Program Manager, at [Martha.Kenley@dot.gov](mailto:Martha.Kenley@dot.gov).

## ATTACHMENT

### **FHWA THREE YEAR OVERALL DBE GOAL SUBMISSION SCHEDULE**

The schedule for DBE goal submissions by State DOT listed below is as follows:

#### ***August 1, 2016***

Nevada, Hawaii, Oregon, Idaho, Montana, Indiana, Michigan, Ohio, Kentucky, New York, Delaware, New Jersey, Massachusetts, Oklahoma, Arkansas, Louisiana, Mississippi, and Texas

#### ***August 1, 2017***

Arizona, Alaska, Washington, Nebraska, Missouri, Iowa, Wisconsin, North Dakota, New Hampshire, Pennsylvania, Rhode Island, Virginia, Florida, Puerto Rico, South Carolina, Tennessee, and New Mexico

#### ***August 1, 2018***

California, Utah, Wyoming, Colorado, South Dakota, Kansas, Minnesota, Illinois, District of Columbia, Connecticut, Maryland, West Virginia, Vermont, North Carolina, Maine, Alabama, Virgin Islands, and Georgia

#### **Civil Rights Discipline SharePoint site**

To submit a goal methodology decision document and a copy of the methodology itself, please click [here](#).

#### **HCC Contact Information**

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