



Ensuring Equal Opportunity in Our Nation's Economic Recovery Efforts

When it comes to ensuring that the economic stimulus and recovery process promotes equal opportunity for all communities, the law is excellent, but it is almost entirely up to us to uphold and enforce that law.

This fact sheet provides information and ideas for ensuring that federal investments in America's economic recovery create greater and more equal opportunity for all. Specifically, it describes the ways in which existing laws require equal opportunity in jobs, housing, health care, transportation, and other sectors, and offers specific ideas for holding public and private officials accountable. **This fact sheet is not intended to be legal advice, for which readers should consult an attorney.*** Rather, it is intended to share information about public policy, and to stimulate action.

Federal laws protect equal opportunity and prohibit discrimination in virtually all of public and private efforts supported by the American Recovery and Reinvestment Act of 2009 (ARRA), also known as the "Recovery Act." And the President has directed that agencies distributing those funds take proactive efforts to enforce them.

Who is "OMB" and what do they have to do with the "Stimulus"?

On February 13, 2009, Congress passed the Recovery Act. President Obama signed ARRA into law on February 17. On February 18, the White House Office of Management and Budget (OMB)—which assists the President with overseeing and supervising the Executive Agencies—issued a memo, known as the "Implementing Guidance," that explained to all Executive Agencies the "requirements and responsibilities" in distributing the hundreds of billions of dollars in ARRA funds.

The Implementing Guidance describes procedures for distributing funds in great detail, including the requirement for agencies to ensure compliance of any government or private recipient of ARRA funds with equal opportunity, civil rights, fair labor, and environmental laws. On April 3, OMB updated the Implementing Guidance,¹ clarifying the goals and requirements of ARRA. The update included a particular focus on the duty of agencies to comply with equal opportunity laws:

Federal agencies should take additional policy considerations into account, to the extent permitted by law and practicable [...] such as supporting projects that ensure compliance with equal opportunity laws and principles [...]

(OMB Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009, April 3, 2009)

What is clear from the Implementing Guidance is that guaranteeing equal opportunity in the ARRA is both a goal of the White House and a legal responsibility of the agencies that are allocating the funds.

What are the Responsibilities of Federal Agencies Distributing Economic Stimulus Funds?

Equal opportunity is not just a good idea—it is the law. As stated specifically in the OMB Implementing Guidance, agencies distributing ARRA funds must:

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- **Ensure Compliance by ARRA Fund Recipients with All Anti-Discrimination and Equal Opportunity Statutes, Regulations, and Executive Orders** including laws prohibiting discrimination based on race, ethnicity, national origin, sex, disability, and age.²
- **Ensure Preservation of the Environment** through compliance with the National Environmental Policy Act,³ Endangered Species Act,⁴ and National Historic Preservation Act.⁵
- **Guarantee Fair Wages** by requiring contractors and subcontractors to pay no less than the “prevailing wages” found in a particular industry and metropolitan area, as required by the Davis-Bacon Act.⁶

What are the White House’s Policy Goals for the Economic Stimulus?

As explained in the OMB Implementing Guidance, the White House wants to implement the ARRA in a way that provides “long-term public benefits” and optimizes the economic activity and jobs created.⁷ To that end, all agencies are required to consider the following policy goals, to the extent possible given practical restraints, as they distribute ARRA funds:

- **Compliance with Equal Opportunity Laws and Principles** including laws requiring contractors receiving ARRA funds to guarantee that the economic opportunity created by these funds does not exclude persons or communities—either intentionally or in effect—on the basis of race, gender, age, disability, or national origin.⁸
- **Long-term Public Benefits** that improve Americans’ quality of life and economic efficiency, such as advances in technology, science, and health; environmental protection and infrastructure development; and educational quality improvements.⁹
- **Optimizing Job Creation and Economic Activity** in relation to dollars spent.¹⁰
- **Transparency and Accountability** in ensuring that projects are chosen using merit-based selection criteria, such as job creation, long-term benefits, and ability to deliver the results sought by the program.¹¹
- **Promoting Local Hiring and Community Engagement** by supporting projects that provide job opportunities to those who live within the community where an investment is being made and that engage community-based organizations in connecting economic opportunities to those who have been historically excluded or overlooked.¹²
- **Supporting Small Businesses** by providing small businesses with the opportunity to compete for prime and subcontract contracts, by utilizing existing agency offices for small disadvantaged businesses, and by awarding contracts to the extent allowed to disadvantage business enterprises.¹³
- **Supporting Good Jobs** by seeking to support contractors and subcontractors who have a proven record of complying with wage and hour, occupational safety and health, and collective bargaining laws.¹⁴

What Does “Equal Opportunity” Mean?

Creating equal opportunity—which is both a policy goal and requirement of ARRA—means that recipients of ARRA funds cannot discriminate against individuals on any prohibited basis (race, sex, disability, etc.) in hiring or any other areas, and that benefits and burdens resulting from ARRA projects should be distributed fairly and equally amongst the communities in which the projects are located. ARRA recipients may not engage in “disparate treatment” discrimination (e.g., not hiring someone on the

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basis of race or ethnicity or condoning gender-based harassment in nontraditional jobs for women) or “disparate impact” discrimination. Where a federally-funded project or program places fewer benefits or more burdens on a certain group of people based on race, gender, disability, national origin, or age, the result is a “discriminatory effect,” also known as a “disparate impact” because it creates a *disparity*. Title VI of the Civil Rights Act of 1964 and other equal opportunity laws forbid federally-funded programs and projects from having discriminatory effects or disparate impacts, and other laws prohibit such discrimination in both public and private employment, housing, and education, including job training.

Example: How an ARRA Project *Should* Be Implemented

To clarify the concept of preventing “discriminatory effects,” let’s consider a hypothetical transportation project, such as construction of a highway. The construction of a new highway connecting a city with inner and outer ring suburbs will entail state and federal (Department of Transportation) funding over multiple years. The project will include many positive opportunities for some communities, including job training, employment, contracting, and access to and from jobs, hospitals, schools, and shopping. There will also be short- and long-term burdens, including air and noise pollution, increased traffic, and the displacement of people from their homes and neighborhoods. In deciding whether to authorize the project, the Department of Transportation should consider the distribution of burdens and benefits such as:

- The demographics of the community affected as compared to those in the surrounding metropolitan area;
- Transportation needs of the community (as related to access to health services, centers of employment) and how those might be alleviated or worsened by a new highway;
- Predicted displacement of or loss of homes by families within the community, by demographic group; and
- Job training opportunities and likely jobs created for those within the community, as compared with workforce demographics and jobless rates across geographic locations.

The Department of Transportation must consider these factors in determining whether and how to distribute funds for the project. In other words, consistent with the OMB’s directive on “targeting assistance consistent with other policy goals,” the agency should prioritize support to projects that are likely to promote equal and expanded opportunity, based on both procedural protections and factual evidence.

If, by contrast, those factors indicate that large burdens or benefits will have an unequal impact on the basis of race, gender, ethnicity, or other covered characteristics, the agency must either refuse to fund the project, or determine that an institutional necessity exists and there are no less discriminatory alternatives. If the project has already been funded, and unlawful discrimination comes to light, the Department of Transportation will have to either negotiate project changes to ensure compliance, or terminate funding and possibly seek a return of federal funds.

What Can We Do to Help Protect Equal Opportunity in the Stimulus?

While the OMB Implementing Guidance is clear that agencies must ensure equal opportunity in ARRA-funded projects, there are a lot of steps and agency officials between the White House and the contractors who receive funding to implement the project. It will require the help of active residents and groups on the ground to make sure that the federal promise and requirements are actually fulfilled. Here are a few

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ways that you can help protect equal opportunity in our economic recovery:

- **Educate the Agencies:** Federal Agencies have regional offices, each with their own Office for Civil Rights (OCR) that is responsible for enforcing equal opportunity laws. Set up a meeting with your regional OCRs and find out how they are making sure that equal opportunity laws are followed in the projects in your region and state. Remind them that the White House requires not just a speedy economic recovery, but a fair and equitable one that will benefit ALL communities.
 - Department of Transportation: <http://www.dotcr.ost.dot.gov/asp/contactus.asp#3>
 - Department of Housing & Urban Development: <http://www.hud.gov/localoffices.cfm>
 - Department of Education: <http://wdcrocolp01.ed.gov/CFAPPS/OCR/contactus.cfm>
 - Department of Health & Human Services: <http://www.hhs.gov/ocr/office/about/rgn-hqaddresses.html>
- **Contact your Elected Officials:** Ask your state and local elected officials what they are doing to ensure equitable stimulus spending, and make clear to them what the law requires. Where possible, offer to help them reach communities that have been traditionally excluded from publicly funded projects.
 - Find All Your Elected Representatives: <http://www.votesmart.org/> (requires your 9-digit zip code, which you can find here: <http://zip4.usps.com/zip4/welcome.jsp>)

Let your U.S. Representative and Senators know that oversight of equitable stimulus spending is part of their responsibility, and that any new economic recovery legislation should include strong equal opportunity protections.

- House: <https://writerep.house.gov/writerep/welcome.shtml>
- Senate: http://www.senate.gov/general/contact_information/senators_cfm.cfm
- **Monitor the Economic Recovery Process:** A number of governmental, non-profit, and media websites provide information on where and how ARRA funds are being spent. They include:
 - Official ARRA Website: <http://recovery.gov>
 - ProPublica & WNYC's ShovelWatch: <http://shovelwatch.org>
 - Kirwan Institute's FairRecovery: <http://fairrecovery.org>
 - Progressive States Network's Implementing the Recovery Plan: <http://www.progressivestates.org/stimulus>
 - Foundation Center's Focus on the Economic Crisis: <http://foundationcenter.org/focus/economy/>
 - Center on Budget & Policy Priorities' Recession and Recovery: <http://www.cbpp.org/research/?fa=topic&id=28>

In addition, you can observe federally-funded projects in your state or community to see if they are saving and creating jobs that fairly employ community members. A community-based group like a "Recovering Opportunity Committee" can help collect information and share it with job seekers, the media, and others.

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- **Report Violations:** Active citizens can directly protect equal opportunity by reporting violations when they occur. The major route for reporting states or contractors who are using ARRA funds in a discriminatory way is to file a complaint with the Agency who issued the funding for the project. If you do not know which Agency is responsible, the Department of Justice's Office of Coordination and Review can refer you to the correct Agency.
 - Department of Transportation: <http://www.dotcr.ost.dot.gov/asp/Complaint.asp>
 - Department of Housing & Urban Development: <http://www.hud.gov/complaints/index.cfm>
 - Department of Education: <http://www.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt>
 - Department of Health & Human Services: <http://www.hhs.gov/ocr/office/file/index.html>
 - Department of Justice's Office of Coordination and Review:
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¹ Office of Mgmt. & Budget, Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009, at p.7, Feb. 18, 2009, as amended by Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009, at pp. 5-6, Apr. 3, 2009.

² E.g. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; Sections 501, 503, and 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C.A. §§ 791, 793, and 794; Title IX of the Education Act, 20 U.S.C. §§ 1681-88; Age Discrimination in Employment Act, 29 U.S.C. § 621, as amended (1967); Americans with Disability Act, 42 U.S.C. §§ 12101-12213, as amended (1990); Fair Housing Act of 1968, Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.*, as amended; Fair Credit Reporting Act, 15 U.S.C. § 1681 (1996); Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs, 42 U.S.C. § 4600 *et seq.* (1970).

³ Pub. L. 91-190, 42 U.S.C. 4321-4347, Jan. 1, 1970, as amended by Pub. L. 94-52, July 3, 1975, Pub. L. 94-83, August 9, 1975, and Pub. L. 97-258, § 4(b), Sept. 13, 1982.

⁴ 16 U.S.C. 1531-1544, 87 Stat. 884, as amended (1973).

⁵ 16 U.S.C. 470 *et seq.*, as amended (1966).

⁶ Pub. L. 74-403, 946 Stat. 1494, Aug. 30, 1935, as amended by Pub. L. 76-633, June 15, 1940, and Pub. L. 88-349, July 2, 1964.

⁷ Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009, at p. 4, Apr. 3, 2009.

⁸ *Id.* at 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 4.

¹² *Id.* at 5-6.

¹³ *Id.*

¹⁴ *Id.* at 6.