



The Opportunity Impact Statement: Expanding the American Dream

Introduction

The ongoing investments in the nation's economic recovery have the potential to revitalize not only our economy, but also the American promise of opportunity itself. American opportunity is the idea that everyone should have a fair chance to achieve his or her full potential, and that ensuring this fair chance requires not only certain basic conditions, but also the fulfillment of specific core values: equal treatment, economic security and mobility, a voice in decisions that affect us, a chance to start over after misfortune or missteps, and a sense of shared responsibility for each other as members of a common society. Fulfilling those values is not merely good policy, but part of our fundamental human rights.

An important chance to promote opportunity arises each time a governmental body supports or controls a major public or private project. Taxpayers support, and governments initiate and regulate, a wide range of projects, from highways and mass transit lines, to schools and hospitals, to land use and economic development, to law enforcement and environmental protection. These projects, in turn, can improve or restrict access to quality jobs, housing, education, business opportunities, and good health, among other opportunities. And, depending on their design and administration, they can serve all Americans fairly and effectively, or they can create and perpetuate unfairness and inequality based on race, gender, or other aspects of who we are.

Despite the progress we have made as a nation, research shows that people of color, women, immigrants, and low-income people continue to face unequal barriers to opportunity in a range of situations, including education, employment, health care, housing, economic development, asset building, business opportunities, environmental protection, and in the criminal justice system.¹ In authorizing, funding, and regulating projects, federal, state, and local governments have a responsibility to keep the doors of opportunity equally open to everyone. And history shows that when they fulfill that role, we move forward together as a society.

The need for promoting opportunity is stronger than ever, given current efforts to revitalize the economy through the American Recovery and Reinvestment Act of 2009, Troubled Assets Relief Program (TARP), and other recovery proposals under consideration by the President and Congress. These plans involve unprecedented federal spending linking multiple

¹ For a summary of government data on opportunity for different groups at the national level, see *The State of Opportunity in America, 2009*, at <http://www.opportunityagenda.org/stateofopportunity>.

sectors, and create an opportunity to a new and promising policy strategy designed to ensure that publicly supported and regulated projects expand opportunity equally to all the communities they serve: The Opportunity Impact Statement.

The Idea: The Opportunity Impact Statement

The Opportunity Impact Statement (OIS) is a comprehensive evaluation tool that public bodies, affected communities, and the private sector can use to ensure that programs and projects offer equal and expanded opportunity for everyone in a community or region, as required by law.

There are a large number of statutes, regulations, and executive orders that are designed to assure that recipients of federal funds do not discriminate—in either purpose or effect—on the basis of race, color, ethnicity, disability, gender or other social characteristics.² Although federal

Deciding Between Opportunity and Inequality: Two Case Studies

The importance of a coordinated equal opportunity process is evident in the juxtaposition of two case studies: the rebuilding of New Orleans after Hurricane Katrina and the development of the Staples Center in Los Angeles.

Years after Hurricane Katrina, the reconstruction of the Gulf Coast has perpetuated, rather than ameliorated, unequal opportunity. Black and Latino evacuees were more than twice as likely to be unemployed two months after the storm as their white counterparts; a comprehensive survey by the Advancement Project attributes this in part to failed housing policy, lack of transportation, and discrimination that shut out many people of color from reconstruction jobs. Lucrative FEMA contracts that had the potential to reinvigorate local businesses and economies went mostly to large out-of-state companies, with only 5.4% of \$3.7 million in contracts given through November 2005 going to Louisiana companies. Minority contractors, too, were largely overlooked in the initial contract awards. Exacerbating this situation was the effort of the Bush Administration to limit labor and equal opportunity protections in the reconstruction effort, such as his Sept. 8, 2005 suspension of the Davis-Bacon Act in the Gulf Coast, which eliminated a guarantee of federally-contracted workers receiving prevailing wages and made it harder for unionized contractors to receive federal reconstruction funds.* Such careless application of federal resources has led to further inequality in the Gulf Coast.

In contrast, the voluntary Community Benefits Agreement developed in conjunction with the construction of the sports and entertainment district of Los Angeles' Staples Center. The Staples Center was constructed in 1999 without community input, resulting in the displacement of over 200 families and less-than-ideal labor contracts for workers. By working together on the proposed \$1 billion expansion of the district, both developer AEG and over two dozen community groups were able to agree to a Community Benefits Agreement that included a goal of hiring local residents for 50% of the jobs created (with priority given to those displaced by construction), and for 70% of jobs to be living wage or union jobs. New commercial housing was paired with affordable housing, local parks, and recreation improvements. Informed economic development that considers the facts on the ground can expand and increase opportunity.**

* Thomas B. Edsall, *Bush Suspends Pay Act In Area Hit By Storm*, Washington Post, Sept. 9, 2005, D03.

** For more information on these case studies, see "Jobs and Business: The State of Opportunity for Workers Restoring the Gulf," http://opportunityagenda.org/files/field_file/Katrina%20Jobs.pdf; "Community Benefits Agreements Victories," http://www.goodjobsfirst.org/accountable_development/community_benefit_vic.cfm.

² See *infra* "Legal Underpinnings."

agencies are obliged to enforce these laws, enforcement mechanisms were significantly neglected over most of the past decade. This has created an inconsistent application of the law that poses an obstacle to speedy and fair implementation of federally funded projects. Further, in cases of large federally-funded programs such as the Recovery Act that implicate a myriad of industries and sectors, the lack of a comprehensive approach to equal opportunity compliance can lead to redundancy and delay. The Opportunity Impact Statement creates a uniform enforcement protocol with consistent metrics to facilitate compliance with anti-discrimination protections and proactively to promote greater opportunity. Drawing from best practices found in the application of other impact statements, as well as avoiding established pitfalls, the OIS will expedite the existing equal opportunity protections that ensure the most effective application of federal funds.

Elements of the Opportunity Impact Statement

On both the federal and state level, impact statements are a well-established practice, intended to ensure that policymakers have full awareness of the impact of proposed rules before taking major action. Fiscal impact statements from the non-partisan Congressional Budget Office outline the costs and benefits of congressional legislation, and many states have adopted similar financial analyses for legislative action.³ Iowa, Connecticut, and Minnesota have established impact statements that review proposed changes in criminal justice policy to determine whether such action will exacerbate or reduce racial disparities in sentencing and incarceration.⁴ Another well-known impact statement is the federal Environmental Impact Statement (EIS) found in the National Environmental Policy Act (NEPA)⁵ that federal agencies must prepare when a major construction or other project is likely to have a significant effect on the environment. An EIS is prepared based on available data and investigation. It compares the proposed project to other alternative approaches, and invites public scrutiny and public comment. Ultimately, it aims to facilitate informed, sophisticated, and democratic decision making that pursues sustainable development in service to the public interest.

The Opportunity Impact Statement pursues similar goals in the context of opportunity. The OIS is designed to promote careful consideration of significant positive and negative opportunity impacts arising from proposed federally-funded projects. It also creates a single formal evaluation procedure that both assures an opportunity for meaningful public participation in the agency's consideration of the proposed action and avoids duplicative or uncoordinated attempts at complying with equal opportunity mandates after the fact. The Opportunity Impact Statement will bring the voice of affected communities, structured efficiency, and balanced analysis to the table in the context of opportunity.

Using empirical data as well as community input and investigation, the OIS will assess

³ See, e.g., Nat'l Conf. of State Legislatures, Fiscal Impact Statements, <http://www.ncsl.org/programs/legismgt/elect/FiscalImpact.htm>; Nat'l Conf. of State Legislatures, Sites of Legislative Fiscal Offices, <http://www.ncsl.org/programs/fiscal/flstsite.htm>; State of Oregon, Staff Measures Summaries Home Page, <http://www.leg.state.or.us/comm/sms/SMS01Frameset.html>; South Carolina Budget & Control Board, Office of State Budget – Fiscal Impact Statements, <http://www.budget.sc.gov/OSB-fiscal-impact.phtm>.

⁴ Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 CRIM. JUSTICE No. 4 (2009).

⁵ 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.

the extent to which a project will expand or contract opportunity for all—e.g., would jobs be created or lost? Would affordable housing be created or destroyed? —as well as the extent to which it will equitably serve residents and communities of different races, incomes, and other diverse characteristics—e.g., would displacement or environmental hazards be equitably shared by affected communities?

These factors would be considered in the context of communities' differing assets, needs, and characteristics. For example, will a construction project offer job-training opportunities to both women and men from communities with high unemployment rates, or will it bypass those communities? Will a new highway or light rail system connect distressed minority neighborhoods to quality jobs, hospitals, and green markets, or will it further isolate those communities? Experience shows that simply asking these types of questions and requiring a thorough and public response will have a positive effect on the development of publicly subsidized or authorized projects. And, where necessary, it will help identify and address potential and actual violations of equal opportunity laws in a timely manner.

The Opportunity Impact Statement would include four major elements:

1. *Coverage of Projects Involving Public Funds or Governmental Engagement.*

The mechanism applies to projects intertwined with taxpayer or government resources. It does not apply to wholly private activities—though private entities might voluntarily choose to employ it.

2. *Data Collection and Analysis.*

The Opportunity Impact Statement will collect and analyze data regarding the characteristics of affected communities (e.g., employment rates and health status, socioeconomic and racial make up, etc.), as well as the assets and opportunities currently available to those communities (e.g., access to hospitals, schools, banking, jobs, etc.), both independently, and in comparison to surrounding communities. In some cases, historical patterns (e.g., patterns of hospital closings, housing segregation) will also be relevant. An important part of the analysis will be the consideration of alternative approaches to achieving the goals of the project that may be more effective in ensuring equal access to greater opportunity, as well as changes that could mitigate or remove negative implications. Standardized metrics drawing upon both established and available government research will expedite the evaluation of a project's impact on opportunity, primarily in five areas: jobs and economic development, housing, health, education, and transportation and related infrastructure.

3. *Public Comment and Participation.*

Members of the public—especially communities that would be positively or negatively affected by the proposed project—will participate in the decision making process in two ways. In the initial fact-finding stage, input from civil society will help guide information gathering regarding relevant impacts, potential alternatives, and sources of additional information. Once a preliminary assessment has been created, the public will have the opportunity to comment on the conclusions, express concerns or support, and complement factual information with practical human experiences and interaction.

4. *Transparency and Accountability.*

The OIS process will result in a public, written report, as well as a record of the goals, data, analysis, and public comments that led to the report's conclusions. The report will guide governmental and community decision making regarding the proposed project while providing guidelines for the future development and regulation of projects that are ultimately approved. Moreover, the OIS serves as a uniform record across agencies demonstrating good faith efforts to comply with equal opportunity requirements. In those instances in which the OIS identifies that a project, as planned, would violate federal law, modifications or rejection of funding would be required.

Legal Underpinnings

A network of federal statutes and their implementing regulations provides the underpinning for the Opportunity Impact Statement:

- Title VI of the Civil Rights Act of 1964 and the federal regulations that implement it,⁶ which prohibit policies that have a discriminatory intent or effect based on race or language ability in federally funded programs;
- Title VII of the Civil Rights Act,⁷ which prohibits racial, gender, and religious discrimination in both private and governmental employment;
- Section 504 of the Rehabilitation Act,⁸ which prohibits discrimination in those programs based on disability;
- Title IX of the Education Act,⁹ which prohibits gender discrimination in federally funded education programs;
- The Age Discrimination in Employment Act,¹⁰ which prohibits discrimination based on employment of persons 40 years of age or older;
- The Americans with Disability Act,¹¹ which prohibits employment discrimination against persons with disabilities in both public and private employment;
- The Fair Housing Act of 1968,¹² which requires the promotion of fair housing by government and prohibits housing discrimination based on race, religion, sex, disability, or familial status;
- The Fair Credit Reporting Act,¹³ which provides basic consumer credit protections when such information is used for credit, insurance, or employment purposes;
- The Home Mortgage Disclosure Act,¹⁴ which identifies discriminatory lending patterns and determines whether lenders are serving their community's housing needs;

⁶ 42 U.S.C. § 2000d *et seq.*

⁷ 42 U.S.C. § 2000e *et seq.* (1964).

⁸ Sections 501, 503, and 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C.A. §§ 791, 793, and 794.

⁹ 20 U.S.C. §§ 1681-88.

¹⁰ 29 U.S.C. § 621, as amended (1967).

¹¹ 42 U.S.C. §§ 12101-12213, as amended (1990).

¹² Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.*, as amended.

¹³ 15 U.S.C. § 1681 (1996).

- The Hill-Burton Act,¹⁵ which prohibits discrimination based on race, color, national origin, or creed in access to hospitals that have used federal capital investment funds, and requires provision of uncompensated care;
- Medicaid's Equal Access Provision,¹⁶ which requires that provider reimbursement rates are sufficient to ensure access to services available to the general population; and
- The Uniform Relocation Act,¹⁷ which requires fair and equitable treatment of persons dislocated by federally funded projects, relocation assistance to displaced persons that minimizes financial and emotional impact, and improvement of the housing condition of displaced persons living in substandard housing.

In addition to prohibiting discrimination against people and communities on the basis of race, color, ethnicity, disability, gender and other characteristics, many of these laws require information collection and the analysis of data similar to that covered by the OIS.

A series of Executive Orders reinforces the federal responsibility comprehensively and effectively to address equal opportunity:

- Executive Order 11246,¹⁸ which requires affirmative action in employment decisions by federal contractors and federally assisted construction contractors and subcontractors;
- Executive Order 11478,¹⁹ which requires affirmative establishment of equal opportunity programs in each Executive department and agency;
- Executive Order 12250,²⁰ which requires the Attorney General to coordinate and enforce the implementation of nondiscrimination laws across Executive agencies;
- Executive Order 12866,²¹ which requires Executive agencies to implement a regulatory and oversight system that fulfills statutory obligations, such as those nondiscrimination laws listed above;
- Executive Order 12898,²² which requires that no racial, ethnic, socioeconomic, or other group of people should bear disproportionate environmental burdens resulting from industrial, commercial, or government operations or policies;
- Executive Orders 13078²³ and 13163,²⁴ which requires the establishment of a National Task Force on Employment of Adults with Disabilities that in part conducts data analysis and research to improve rates of employment for adults with disabilities, and requires

¹⁴ 12 U.S.C. §§ 2801-2810 (1975).

¹⁵ Hospital Survey and Construction Act, P.L. 79-725 (1946).

¹⁶ 42 U.S.C. § 1396a(a)(30)(A) (2006); see also 42 C.F.R. § 447.204 (2006).

¹⁷ Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs, 42 U.S.C. § 4600 *et seq.* (1970).

¹⁸ 30 Fed. Reg. 12319 (1965), as amended.

¹⁹ 34 Fed. Reg. 12985 (1969), as amended.

²⁰ 45 Fed. Reg. 72995, 3 CFR, 1980 Comp., p. 298 (1980).

²¹ 58 Fed. Reg. 51735 (1993); *see also* Executive Order 13497, 74 Fed. Reg. 6113 (2009).

²² 59 Fed. Reg. 7629 (1994).

²³ 63 Fed. Reg. 13111 (1998).

²⁴ 65 Fed. Reg. 46563 (2000).

federal agencies to increase employment of individuals with disabilities;

- Executive Order 13125²⁵ and 13339,²⁶ which requires Executive departments and agencies to increase participation of Asian Americans and Pacific Islanders in federal programs where the communities may be underserved, and to increase economic opportunity and business participation of Asian Americans and Pacific Islanders;
- Executive Order 13160,²⁷ which forbids discrimination by race, sex, color, national origin, disability, religion, age, sexual orientation, or status as a parent in federally conducted education and training programs; and
- Executive Order 13171,²⁸ which requires Executive departments and agencies to improve the representation of Latinos in federal employment.

Complementing these federal laws, international human rights laws support the use of the Opportunity Impact Statement. These include the Covenant on Civil and Political Rights²⁹ and the Convention on the Elimination of Racial Discrimination,³⁰ both of which the United States has ratified, as well as the Convention on the Rights of the Child³¹ and the Convention on the Elimination of Discrimination Against Women (CEDAW),³² which the United States has signed but not yet ratified. The U.S. Supreme Court has increasingly relied on these standards in its interpretation of domestic legal obligations.³³

Implementation of these laws by federal agencies is governed by Executive Order 13107,³⁴ directing all agencies to comply with obligations under international human rights treaties and establishing an Interagency Working Group on Human Rights Treaties. The Interagency Working Group was effectively disbanded during President George W. Bush's administration, failing to implement the Working Group's policy coordination committee's action plan. There is now an opportunity for President Obama and his Administration to not only revitalize the Interagency Working Group, but to refine E.O. 13107 to ensure the new Working Group's success.³⁵

Municipalities have also recognized the potential of international human rights law in supporting our national commitment to equal opportunity. Earlier this decade, the City of San

²⁵ 64 Fed. Reg. 31105 (1999).

²⁶ 69 Fed. Reg. 28037 (2004).

²⁷ 65 Fed. Reg. 39775 (2000).

²⁸ 65 Fed. Reg. 61251 (2000).

²⁹ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

³⁰ G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.

³¹ G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990.

³² G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981.

³³ *E.g.* *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (citing the prohibition on juvenile death penalty in the Convention on the Rights of the Child); *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁴ 63 Fed. Reg. 68991 (1998), 38 ILM 493 (1990).

³⁵ For a comprehensive analysis and recommendation of best practices in reinstating the Interagency Working Group on Human Rights, see Catherine Powell, *Human Rights at Home: A Domestic Policy Blueprint for the New Administration* (Oct. 2008), available at <http://www.acslaw.org/node/7549>.

Francisco adopted CEDAW as part of its municipal law,³⁶ resulting in a gender audit that was similar in key aspects to the Opportunity Impact Statement.

Adoption and Implementation

Existing law supports the use of an OIS process in many instances. The web of federal laws, executive orders, and treaties described above supports and, in some cases, require the collection, reporting, and consideration of impact data based on race, ethnicity, gender, disability, and language status. Laws in many sectors, such as health care and education, requires inclusion and equitable treatment of low-income communities. And existing mechanisms, such as the Certificate of Need process that many states use to consider the distribution of health care resources, require only minor practical changes to fit within the Opportunity Impact Statement model. Indeed, Executive Order 12250³⁷ and a number of agency implementing regulations under Title VI appear to require some affirmative mechanism of this kind.³⁸ Moreover, Executive Order 12866,³⁹ as revitalized by Executive Order 13497,⁴⁰ signed by President Obama in January, directs agencies to implement effective and coordinated regulatory and oversight procedures. The Opportunity Impact Statement may serve as an efficient vehicle for fulfilling these agency responsibilities.

How It Will Work

As described above, the Opportunity Impact Statement draws from the lessons of other impact statements. The Opportunity Impact Statement will seek to provide a comprehensive and fair evaluation of significant opportunity impacts as well as reasonable alternatives, providing decisionmakers and the public with full information and allowing for the minimization of adverse impacts.⁴¹ Agency implementation of Opportunity Impact Statements will balance both the need for efficiency in review of necessary government-funded projects with evidence-based evaluation and transparency. The process envisions that an agency will have approval authority over projects within its mandate, and will use the Opportunity Impact Statement to guide and strengthen its evaluation of proposals, as well as to ensure federal anti-discrimination law compliance.

³⁶ City and County of San Francisco, Local Implementation of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Chapter 12K (2000), *available at* http://www.sfgov.org/site/cosw_page.asp?id=10849.

³⁷ 45 Fed. Reg. 72995, 3 CFR, 1980 Comp., p. 298 (1980).

³⁸ *E.g.*, 10 CFR 1040.11 -1040.14 (regulating the Department of Energy); 34 CFR 100.1-100.13 (regulating the Department of Education); 49 CFR 21.1-21.23 (regulating the Department of Transportation).

³⁹ 58 Fed. Reg. 51735 (1993).

⁴⁰ 74 Fed. Reg. 6113 (2009).

⁴¹ These goals have been tested in fora such as the Environmental Impact Statement, as created by NEPA, 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. Both successes and pitfalls of existing impact statements are discussed throughout this document.

Proposed Opportunity Impact Statement Process

Opportunity Assessment

The *Opportunity Assessment* is an initial agency evaluation of the impact a project may have on opportunity for affected communities. The purpose of the Assessment is to inform and influence decisionmakers on whether to accept, reject, or require changes to a proposal. This assessment will be submitted by those proposing the project under review, and will serve as either a gateway to a complete and full Opportunity Impact Statement or, with a Finding of Equal and Expanded Opportunity (FEEEO), permit the proposed plan to move forward without changes. In this last sense, the Assessment ensures that projects with strong evidence of positive effects on opportunity are immediately approved.

In sum, the Opportunity Assessment is a concise public document which serves to:

1. Briefly provide sufficient evidence and analysis for determining whether to prepare a full Opportunity Impact Statement or a Finding of Equal and Expanded Opportunity;
2. Demonstrate and assist with compliance with laws when no Opportunity Impact Statement is necessary;
3. Facilitate preparation of a statement when one is necessary by identifying the pertinent issues to be addressed in the Opportunity Impact Statement; and
4. Determine the need for the project, potential effects of a project on the opportunity of a population, distribution of those effects within the population, and any available alternatives.

All stakeholders may prepare an Opportunity Assessment on an action at any time in order to assist agency planning and decision making. The ultimate goal of the Assessment is to determine whether a full-blown Opportunity Impact Statement is necessary. Where necessary to expedite consideration, a determination may be made solely by the regulatory body without public input, affording the regulatory agency a significant degree of discretion. If a “Finding of Equal and Expanded Opportunity” is made, the project may move forward as planned. However, if the Assessment determines that there will be a significant negative impact on opportunity as a result of the proposed project, a full Opportunity Impact Statement procedure will be initiated.

As timeliness is a substantial concern in the application of any new procedures, the OIS envisions proposals should have a mechanism to expedite review in a manner that continues to ensure equal opportunity. One such mechanism is an analog to the Uniform Guidelines on Employment Selection Procedures.⁴² The Uniform Guidelines create a single set of nondiscrimination principles that employers seeking federal contracts can affirmatively take to comply with federal law in testing and other employee selection procedures. Built upon practical agency experience, prior guidelines, court decisions, and the best research and standards of psychological professionals, the Uniform Guidelines allow federal contractors the ability to proactively ensure compliance with Title VII of the Civil Rights Act of 1964.⁴³ The Opportunity Impact Statement envisions a parallel set of Uniform Guidelines relating to equal and expanded

⁴² 41 CFR 60-3 (1978).

⁴³ 42 U.S.C. § 2000e *et seq.*

opportunity that will create a presumption for a Finding of Equal and Expanded Opportunity, allowing compliant projects to move forward without further delay.

As with the Uniform Guidelines on Employment Selection Procedures, guidelines within the OIS would draw upon the expertise and research of social scientists familiar with the impact of government funded projects upon opportunity. Such knowledge could allow the development of numerical metrics for evaluation of potential adverse impacts to opportunity in areas such as health, education, housing, economic development, and infrastructure. The guidelines would lay out minimum standards required in crafting a proposal that expands opportunity equally; for example, by providing benchmarks based on such metrics as percentage of jobs created accessible to local residents, or other variants of Opportunity Metrics discussed below.

An Opportunity Assessment is not necessary if the agency has decided to prepare a complete Opportunity Impact Statement.

Full Opportunity Impact Statement Process

The Opportunity Impact Statement process consists of three stages:

1. Draft Opportunity Impact Statement
2. Public Comment Period
3. Final Opportunity Impact Statement

Draft Opportunity Impact Statements would be prepared in accordance with the scope of the project decided upon during the Opportunity Assessment, which will determine what opportunity factors and considerations will be examined. In addition, they must fulfill to the fullest extent possible the requirements established for final Statements. Those requirements should include:

1. The opportunity impact, measured by delivery of and/or access to services, job creation, business openings, and community opportunity to participate in the benefits of the project, with a discussion of community need;
2. Any adverse effects on the population's opportunity which cannot be avoided should the proposal be implemented;
3. Alternatives to the proposed action or ameliorative effects, including a cost-benefit analysis; and
4. The degree to which the project will impact services or industries in a manner that will meet projected long-term community employment and infrastructure needs.

The ultimate format for Opportunity Impact Statements should encourage both solid analysis and clear presentation of the alternatives, allowing the agency, the applicant, and members of the affected communities to understand the opportunity implications of the proposed project.

Following the Draft Statement, the process provides for an open and substantive Public Comment Period, including proactive outreach to stakeholders, including:

1. Agencies that have jurisdiction by law or special expertise with respect to any service area or industry involved;
2. The project applicant; and
3. The public, affirmatively soliciting comments from those persons or organizations that are both directly and indirectly affected by the project proposed, or who would be affected by identified alternatives.

The final Opportunity Impact Statement will assess and consider all comments and respond in one of the following ways:

1. Require applicant modification of the proposed action;
2. Develop and evaluate plausible alternatives not previously given serious consideration by the agency;
3. Supplement, or modify the agency's analyses;
4. Make factual corrections;
5. Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

Possible Opportunity Metrics

The data necessary to measure opportunity impact will frequently be available from existing sources. After identifying the relevant geographic area, agencies applying the Opportunity Impact Statement would draw first from existing federal, state, and municipal data, including Census data, to determine likely impact.⁴⁴

Not all of the metrics for measuring opportunity will be applicable for every project, but holistic consideration of projects across categories similar to those suggested here will ensure that potential projects address both short-term and long-term impacts on a community's opportunity.

Possible metrics include both absolute opportunity and equality of opportunity based on covered characteristics across the following measures:

1. **Economic Development – Small Businesses and Jobs:** Does the project encourage economic development of the affected communities by promoting small businesses and creating high-quality, community-accessible jobs?
 - a. Contracting Locally – Does the project have contracting rules that employ local residents and assist local small businesses?
 - b. Accessible Jobs – Are new jobs created within the affected communities and accessible to community residents? If the jobs created are not compatible with the skills of community residents, does the project create on-the-job training or apprenticeship positions for community residents?
 - c. Revitalization – Does the project increase the number of vacant/unused

⁴⁴ Federal data that demonstrates access to opportunity is available on a wide range of issues. See The Opportunity Agenda, The State of Opportunity 2009, available at <http://opportunityagenda.org/stateofopportunity>.

- properties, or does it utilize vacant property for purposes beneficial to the affected communities?
- d. Equal Opportunity and Anti-Discrimination – Where required, does the project implement affirmative action in hiring or contract distribution, to help reform deep and/or abiding discrimination within industries or communities?
 - e. Non-Discrimination – Does the project provide equal, meaningful access to employment and services generated by the project to persons of all genders, races, ethnicities, primary languages, disability statuses, and sexual orientations?
 - f. Reducing Barriers to Mobility – Does the project include measures to ensure that the populations with the greatest barriers to upward mobility (i.e., under 200% FPL) have access to created jobs?
 - g. Rehabilitation and Recidivism Prevention – Does the project include measures or programs that reduce, rather than increase, arrest, incarceration, and recidivism?
 - h. Support systems – Will the project create or include child care, family leave, or other opportunities shown to enable equal job participation by women?
2. **Health:** Does the project improve or lessen the opportunity for impacted residents and communities to live under healthy conditions? This can be measured by examining:
- a. Access to health care services – measured by the Health Resources and Service Administration’s Index of Medical Underservice.⁴⁵ Will the project increase or decrease access to primary care for underserved and vulnerable populations?
 - b. Nutrition – measured by the Institute of Medicine’s State of USA Health Indicators.⁴⁶ Will the project increase or decrease the percentage of adults able to conform to federal dietary guidelines as measured by federally collected data?
 - c. Physically Unhealthy Days – measured by the CDC.⁴⁷ Will the project decrease or increase the number of physically unhealthy days experienced by residents?
 - d. Environmental Exposure – Will the project entail environmental hazards or clean-up efforts?
 - e. Reducing Barriers to Mobility – Where the project creates new services, does the project include measures to ensure that the populations with the greatest barriers to upward mobility (i.e., under 200% FPL) have access to the health care created?
 - f. Cultural and Linguistic Access – measured by the Office of Minority Health’s Culturally and Linguistically Appropriate Services (CLAS) standards.⁴⁸ Are the projects’ benefits, services, and opportunities culturally and linguistically accessible?
3. **Education:** Does the project improve or lessen the opportunity for affected residents and communities to access quality education and job training?
- a. K-12 – measured by state and Department of Education data on classroom size, school resources, and graduation rates. Will the project improve or worsen the educational opportunity of students in the affected communities?

⁴⁵ Health Resources & Servs. Admin., U.S. Dep’t of Health & Human Servs., HPSA Designation, <http://bhpr.hrsa.gov/shortage/muaguide.htm>.

⁴⁶ Institute of Medicine, State of U.S.A. Health Indicators, <http://www.iom.edu/CMS/3793/55146/60706.aspx>.

⁴⁷ Ctrs. for Disease Control & Prevention, *Health-Related Quality of Life – Prevalence Data, Mean Physically Unhealthy Days*, available at <http://apps.nccd.cdc.gov/HRQOL/TrendV.asp?State=1&Category=1&Measure=2>.

⁴⁸ Office of Minority Health, U.S. Dep’t of Health & Human Servs., National Standards, <http://www.omhrc.gov/templates/browse.aspx?lvl=2&lvlID=15>.

- b. School Integration – measured by the U.S. Census Bureau⁴⁹ and the Pew Hispanic Center.⁵⁰ Will school construction expansion or demolition increase or decrease school integration?
 - c. Higher education – measured by the National Center for Education Statistics’ Integrated Postsecondary Education Data System.⁵¹ Will the project increase or decrease the number of residents likely to enroll and complete degree programs?
 - d. Apprenticeships and Job Training – Will the project create job training or apprenticeship opportunities within the affected communities?
 - e. Child care, daycare, and preschool – measured by state data on child care and preschool availability. Will the project improve or worsen the ratio of childcare availability to the population of children in need of such care, considering also the projected population changes over the course of the project?
 - f. Reducing Barriers to Mobility – Where the project creates new services, does the project include measures to ensure that the populations with the greatest barriers to upward mobility (i.e., under 200% FPL) have access to the educational opportunities created?
4. **Housing:** Does the project improve or lessen the opportunity for affected residents and communities to access stable, safe and quality housing?
- a. Affordable housing – Are provisions for more affordable housing integrated into new project designs? Does the project include measures to ensure that the populations with the greatest barriers to upward mobility (i.e., under 200% FPL) have access to more quality housing?
 - b. Property Values and Rent Levels – measured in part by the concentration of “rent stress” in the community, of those renters paying over 30% of income on gross rent. Are measures including in the project to maintain stable property values and rent levels?
 - c. Foreclosure Prevention – measured by records of foreclosures as well as concentration of “mortgage stress” in the community, of those homeowners paying over 30% of income on their mortgages. Does the project anticipate existing and potential foreclosures in the impacted community and integrate measures to assist those threatened by foreclosure?
 - d. Green Areas – Does the project increase or decrease the proximity of sizeable green areas (i.e., parks) to housing?
 - e. Residential Integration – measured by the U.S. Census Bureau.⁵² Does the project promote or discourage racially and socioeconomically integrated housing and neighborhoods, and does it include affirmative fair housing measures, as required under existing law?
5. **Transportation and Related Infrastructure:** Does the project make it easier or more difficult for the impacted community to access benefits, services, and opportunities? Does the project integrate the affected communities with surrounding communities, not

⁴⁹ U.S. Census Bureau, Housing Patterns, http://www.census.gov/hhes/www/housing/housing_patterns/housing_patterns.html.

⁵⁰ Pew Hispanic Center, *Racial and Ethnic Composition of Schools*, August 30, 2007, Table 1 available at <http://pewhispanic.org/files/reports/79.pdf>.

⁵¹ Nat’l Ctr. for Educ. Statistics, U.S. Dep’t of Education, Integrated Postsecondary Education Data System, <http://nces.ed.gov/ipeds/>.

⁵² U.S. Census Bureau, Housing Patterns, *supra* note 23.

only in terms of racial, ethnic, and socioeconomic integration, but also in terms of bringing services essential to opportunity to isolated populations, and increasing the civic participation of the affected communities?

- a. Transportation – measured in part by distance to major transit hubs and average travel time to work. Does the project expand or restrict transportation paths utilized by the community impacted? Does it expand or restrict access to public transit, walkways, and bicycle paths? Does it support public transportation programs that reliably and efficiently help people who live in areas of high unemployment to commute to areas of high job growth and opportunity?
- b. Economic Security – Does the project promote businesses or services that encourage or discourage economic security (e.g., banks vs. cash-checking facilities, bankruptcy prevention efforts such as credit counseling, and enforcement of fair lending laws)?
- c. Civic Participation – Does the project include measures to increase voter registration, enfranchisement, and civic participation of the community?

No one project is likely to involve an inquiry into the full range of opportunity indicators set out above; rather, this non-exhaustive list suggests the range of factors likely to be relevant across multiple projects.

In many cases, the Opportunity Assessment or OIS will reveal no cause for denial or modification, and the project will go forward. Data and public comments developed in the process, however, may be part of subsequent monitoring or complaint resolution.

Where the OIS process reveals that a proposed project would violate federal law, the project clearly must be either rejected or amended to produce compliance. This includes, for example, evidence that a project would have a significant racially discriminatory effect, and that less discriminatory alternatives exist that would achieve the project's purposes. In other cases, a proposed project may comply with the letter of the law, but public comment or investigation may reveal more effective methods of achieving the project's goals, which the applicant may choose voluntarily to adopt or which might be negotiated with federal authorities. Where evidence of ongoing illegality arises during the course of the process, it should be addressed through agency enforcement action or, if necessary, referral to the Department of Justice.

Example: Publicly Funded Transportation Project

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 a period of 5 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.

Inherent in the development, funding, and approval of this proposed project are a range of decisions regarding the quality, quantity, and fair distribution of those burdens and benefits. Historically, those decisions have not always maximized the overall expansion of opportunity

(e.g., jobs created, green areas developed), and have often imposed the greatest burdens and fewest benefits on communities of color, poor communities, and women.⁵³ Nor have these or other residents typically been a part of past decision making.

In deciding whether to authorize and underwrite the project, as well as identifying conditions on its approval, governmental and community leaders can use the Opportunity Impact Statement process as a way to gather and analyze relevant information; to consider equal access to opportunity in the context of viable alternatives, as required by federal equal opportunity laws; and to ensure democratic input, transparency, and accountability.

In this case, the Department of Transportation (DOT) would first engage in an Opportunity Assessment of whether the project has significant impact on the opportunity of the affected communities. This public document would “scope” the project—outlining the communities and metropolitan area affected—and determine whether the burdens and benefits of the project are distributed in a way that substantially impacts the expansion or retraction of opportunity for each impacted community. Community members and other interested groups would have the chance to submit their own Opportunity Assessments to DOT for consideration in the decision.

Given the breadth of a new highway project, DOT would likely find significant impact and determine that a full OIS is necessary. In creating a Draft OIS, DOT would collect and analyze data appropriate to the metrics listed above, including, for example:

- The demographics of communities that would be affected, positively and negatively, by the proposed project, as compared with the identified alternatives and the metro area as a whole;
- Relevant conditions within these communities—e.g., an existing concentration of environmental hazards or high asthma rates that make some communities particularly sensitive to new construction and pollution, 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 families and related impact on rates of homeownership within the community, by demographic group;

⁵³ See, e.g., Executive Order 12898, 59 Fed. Reg 7629 (1994); *St. Francis Prayer Ctr. v. Michigan Dept. of Env'tl. Quality*, EPA Complaint 05R-98-R5 (commonly known as the “Select Steel” case, in which parishioners from a largely African American community alleged the granting a permit for the construction of a steel-recycling plant would have a discriminatory impact on the community of color in violation of Title VI); U.S. Environmental Protection Agency, “In re: Shintech Inc., Order Responding to Petitioners’ Requests that the Administrator Object to Issuance of State Operating Permits, Permit Nos. 2466-VO, 2467-VO, 2468-VO,” Oct. 28, 2002, pp. 1–2, <http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/shin1997.pdf> (commonly known as the “Shintech” case, in which advocacy groups alleged, on behalf of the largely low-income community of color, that granting a permit for a toxic waste facility would have a discriminatory impact on the community of color in violation of Title VI).

- Job training opportunities and likely jobs created, as compared with other viable alternatives; and
- Workforce demographics, employment rates, qualifications, and training needs of the relevant communities.
- Opportunities for communities with high unemployment to quality jobs, education, and other mobility-inducing assets.

Alternative approaches might range from slightly different routes for the highway to a more substantial shift to mass transit.⁵⁴

Applicable federal, state, local, and international standards would be incorporated into the Opportunity Impact Statement process. Specifically, all programs that receive funding from the U.S. Department of Transportation are bound by Title VI of the Civil Rights Act of 1964, the Rehabilitation Act, and the regulations that the DOT has promulgated to implement each statute. These provisions, respectively, require federally funded programs to ensure that their activities do not have the effect of discriminating against or excluding people based on their race or disability. The Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA) further requires recipients of DOT funds to “ensure that persons displaced as a direct result of Federal or federally-assisted projects are treated fairly, consistently, and equitably so that such persons will not suffer disproportionate injuries as a result of projects designed for the benefit of the public as a whole.” Both Title VI and the URA also require assistance to people with limited English proficiency.

Following publication of the Draft OIS, the community would have a meaningful opportunity to comment, including public forums where appropriate. DOT, in creating a Final OIS, would be called upon to respond to comments, either by changing elements of the project or explaining why the project differs in design from a comment’s recommendation. As with the Opportunity Assessment and the Draft OIS, the Final Opportunity Impact Statement would be a public document, both increasing transparency and documenting the agency’s decision-making process and compliance with existing law.

By utilizing the uniform evaluation instrument of the OIS, DOT would avoid redundancies and facilitate coordination of efforts by the Department of Labor, the Environmental Protection Agency, the Equal Employment Opportunity Commission, and the Department of Justice in complying with equal opportunity mandates. It would also greatly reduce the likelihood of civil rights litigation, which could significantly delay the project and drive up its costs.

⁵⁴ See *Labor/Cnty. Strategy Ctr. v. L.A. County Metro. Transp. Auth.*, Case No. CV 94-5936 TJH (Mcx), Consent Decree (1996), available at <http://www.busridersunion.org/engli/pdf%20files/Consent%20Decree%20pdfs/Consent%20Decree%20Documents/consent-decree-10-96.pdf> (holding that “equal and equitable access” to a “fully integrated mass transportation system” requires that long-range planning, capital investment, and annual budgets consider and give priority to the need of predominantly low-income “transit-dependent” residents).

Timing

The Opportunity Impact Statement is intended to facilitate and improve the evaluation and enforcement processes of agencies, while creating an “opportunity multiplier effect,” such that government projects assist in building long-term economic security and mobility for all Americans. To that end, the OIS should draw on the best elements of other impact statements while improving on problematic areas. Among other goals, it should increase efficiency of review through greater coordination, predictability, and uniformity of data collection, review, and decisionmaking.

Research on the operation of Environmental Impact Statements shows that preparation times vary widely, from less than two to more than a dozen months in the case of environmentally complex projects. Development of OIS procedures should draw from best practices for swift, yet rigorous review. Because the OIS process will proceed in parallel with environmental and other reviews, it should not result in significant additional delays in needed projects.

In these times of pursuing economic recovery, the OIS seeks to build upon current best practices and resources of the federal government. To that end, its design and structure should seek the use of best available data already accessible to agencies and communities. In this way, the burden of data collection is minimized.

Conclusion

The Opportunity Impact Statement carries the potential to expand opportunity greatly in communities around the country while encouraging public accountability and civic engagement. Moreover, it is a flexible tool that can be applied to any number of projects, big or small. We believe that providing the Opportunity Impact Statement is an important step in realizing our society’s promise as a land of opportunity.