

Assessment of Cost and Benefits Associated with the Implementation of EO 13166



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON D.C. 20503

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AGENCY: Office of Management and Budget, Executive Office of the President

ACTION: Request for Information

SUMMARY: This notice requests information that will inform the development of an assessment of the costs and benefits associated with the implementation of Executive Order 13166. EO 13166, issued in August of 2000, is designed to ensure that persons with limited English proficiency (LEP) have adequate access to federally funded services, consistent with Title VI of the Civil Rights Act, which prohibits discrimination based on national origin. The Office of Management and Budget (OMB) has been tasked by Congressional appropriators with assessing the total costs and benefits of implementation. The Treasury, and General Government Appropriations Act of 2002 (PL 107-67), states that OMB shall submit, "... a report to the Committees on Appropriations that provides an assessment of the total costs and benefits of implementing Executive Order No. 13166: Provided further, That such an assessment shall be submitted no later than 120 days after enactment of this Act." OMB is seeking information that will enable it to comply with this mandate by developing meaningful estimates of costs and benefits of implementation.

DATES: Comments must be received by December 31, 2001.

ADDRESSES: Responses to this request for information should be addressed to Brenda Aguilar of the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503

FOR FURTHER INFORMATION CONTACT: Brenda Aguilar at phone (202) 395-6929; fax: (202) 395-6974; e-mail: baguilar@omb.eop.gov.

SUPPLEMENTARY INFORMATION: In PL 107-67, Congress directed the OMB to provide, within 120 days of enactment, "... a report to the Committees on Appropriations that provides an assessment of the total costs and benefits of implementing Executive Order No. 13166" One component of OMB's overall data collection strategy is the solicitation of relevant information from the public that will assist us in quantifying these costs and benefits. For the purposes of this solicitation, OMB is seeking both qualitative and quantitative information on the costs and benefits of EO 13166. We recognize that monetizing or even quantifying some of the effects of the EO may be quite difficult. Therefore, while we encourage the public to provide information in quantifiable units (e.g., dollars or time) where possible, we are also interested in descriptions of EO 13166's unquantifiable effects.

Background. Executive Order No. 13166 was created to, "... improve access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency (LEP)" To accomplish this goal, EO 13166 mandates that, "... each Federal agency shall examine the services it provides and develop and implement a system by which LEP persons can meaningfully access those services consistent with, and without unduly burdening, the fundamental mission of the agency." However, the scope of EO 13166 is not limited to federally operated programs. The EO also requires, "... each Federal agency shall also work to ensure that recipients of Federal financial assistance (recipients) provide meaningful access to their LEP applicants and beneficiaries." This means that the EO is intended to apply not only to all federally conducted activities, but also to all entities that receive federal funds, such as State and local governments, and private or nonprofit grantees or contractors. However, by recognizing that the imposition of inflexible and burdensome requirements could, "unduly" burden the "fundamental mission of the agency," the EO contemplates weighing of implementation costs and benefits. Further, the DOJ implementing guidance reinforces this by stating, "What constitutes reasonable steps to ensure meaningful access will be contingent upon a number of factors," each of which is discussed in this paper.

Under EO 13166, the Department of Justice (DOJ) has been given the responsibility of assisting agencies with compliance and coordinating the federal government's overall response. Pursuant to this responsibility, DOJ issued implementing guidance in conjunction with the issuance of the EO in August of 2000, and continues to advise federal agencies on how to develop the plans and guidance documents mandated by EO 13166. Agency plans and guidance documents are reviewed and approved by DOJ based upon their consistency with the EO.

The DOJ guidance establishes a framework for agencies to evaluate what constitutes, "reasonable steps to ensure meaningful access," as required by the EO. To do so, the guidance document delineates several factors that may be taken into account in agencies' EO 13166 implementation decisions:

- **Number or Proportion of LEP Individuals:** The guidance acknowledges that while even, "programs that serve a few or even one LEP person are still subject to the Title VI obligation to take reasonable steps to provide meaningful opportunities for access ... [t]he steps that are reasonable for a recipient who serves one LEP person a year may be different than those expected from a recipient that serves several LEP persons each day." For example, in the case of an organization or program that provides services to very few LEP individuals, compliance may involve preparation to use a commercially available interpreter service, rather than any intricate internal planning and procedures.
- **Frequency of Contact with the Program:** The guidance explains that the, "[f]requency of contacts between the program or activity and LEP individuals is another factor to be weighed." Programs or activities that must be accessed by LEP individuals on a daily basis, as with elementary or secondary school attendance, "... a recipient has greater duties than if such contact is unpredictable or infrequent." DOJ encourages recipients of federal funds to take local conditions into account when determining the frequency of contact, and acknowledges that individual recipients "should have the flexibility to tailor their services to those needs."
- **Nature and Importance of the Program:** Stating that, "... [t]he importance of the recipient's program to beneficiaries will affect the determination of what reasonable steps are required," the guidance explains that, "[m]ore affirmative steps must be taken in programs where the denial or delay of access may have life or death implications than in programs that are not as crucial to one's day-to-day existence." The example provided distinguishes between the obligations of a federally assisted school or hospital and those of a federally assisted zoo or theater. Further, DOJ guidance requires federal agencies and their recipients to consider the long-term importance of the benefit, stating, "A decision by a federal, state or local entity to make an activity compulsory, such as elementary and secondary school attendance or medical inoculations, serves as strong evidence of the program's importance."
- **Resources Available:** The DOJ guidance further acknowledges that, "[t]he resources available to a recipient of federal assistance may have an impact on the nature of the steps that recipients must take." DOJ recognizes that a small recipient with limited resources may be unable to take the same steps as a larger recipient to provide LEP assistance without "unduly" burdening its fundamental mission, particularly when programs serve a limited number of eligible LEP individuals, contact with the program is infrequent, the total cost of providing translation services is relatively high, or the program is not critical to an individual's daily existence.

Continuing, the DOJ guidance asks agencies to address "the appropriate mix of written and oral language assistance," and explains that agencies must decide, "... which documents must be translated, when oral translation is necessary..." The DOJ guidance states, "It is the responsibility of the federal assistance-granting agencies, in conducting their Title VI compliance activities, to make more specific judgments by applying their program expertise to concrete cases."

On October 26, 2001, DOJ issued a memorandum to all agencies that states, "... agencies that have issued Limited English Proficiency ("LEP") guidance for their recipients pursuant to Executive Order 13166 and Title VI of the Civil Rights Act should, after notifying the Department of Justice ("DOJ"), publish a notice asking for public comment on the guidance documents they have issued. Based on the public comment it receives and this Memorandum, an agency may need to clarify or modify its existing guidance. Agencies that have not yet published guidance documents should submit agency-specific guidance to the Department of Justice. Following approval by the Department of Justice and before finalizing its guidance each agency should obtain public comment on their proposed guidance documents."

The purpose of issuing the Memorandum was to ensure that the public had an adequate opportunity to review agency guidance prior to its implementation, consistent with the notice and comment provisions of the APA, and to state DOJ's position on a recent Supreme Court case addressing the scope of the Title VI provisions regarding disparate impact regulations. Although the Court held in *Alexander v. Sandoval*, 121 S.Ct. 1511 (2001) that there is no private right of action under such regulations, the decision did not invalidate such regulations, and therefore, DOJ explains that EO 13166 "remains in force."

Request for Comments. In order to assess the total costs and benefits of implementing EO 13166, it will be necessary to obtain a significant amount of data. While estimating the costs and benefits associated with any policy is difficult, this case will be particularly challenging given the breadth and depth of activities covered by the EO. In a "Q&A" document released by DOJ, the scope of EO 13166 is defined as, "... anything a federal agency does ..." to include, "the provision of federal benefits or services, the imposition of a burden on a member of the public, and any other activities a federal agency conducts." This would include anything from the receipt of benefits such as Social Security to law enforcement activities or the imposition of taxes. Specifically, OMB is seeking information that will provide assistance in:

- Determining how best to quantify the numbers of LEP individuals and which languages they speak.
- Understanding the number of different languages spoken by LEP individuals, and their geographic distribution.
- Characterizing the interactions of LEP individuals with both federal and federally funded entities. For example, how frequently do LEP individuals interact with government at all levels? What types of government services do LEP individuals typically access? Are there types of services that LEP individuals access more or less frequently than non-LEP individuals?
- Determining the costs and benefits of improving English language proficiency among LEP individuals.

- Understanding and quantifying the level of services provided by the government or government funded organizations to address the special needs of LEP individuals prior to EO 13166 and to what extent changes will be necessary to achieve full compliance with EO 13166 and related agency guidance.
- Quantifying and describing the costs to the federal government or recipients of federal funds of providing oral and written translation services.
- Quantifying and describing the benefits to LEP individuals and society as a result of having oral and written translation services available, in accordance with EO 13166.
- Identifying any existing studies of the costs and benefits of improving the quality of communications and interactions between LEP individuals and the federal government or federally funded services. We are also interested in studies of similar language or translation issues internationally, (e.g. Canada, European Union, United Nations and OEDC).
- Identifying "real-world" case studies that illustrate the costs and benefits of providing translation services to LEP individuals, as envisioned by EO 13166, and related agency guidance. We are seeking examples from multiple perspectives, including LEP individuals, federal agencies/recipients of federal funds, and the international context.
- Identifying existing academic research and "real-world" case studies from the following sectors: health, social services/income maintenance, education, transportation, law enforcement and trade, as well as recommendations of additional sectors or perspectives from which to address this issue.
- Identifying any other information or resources that the public believes will assist us in our efforts to assess the benefits and costs of EO 13166.

OMB appreciates any information that persons may have on these and other subjects related to the implementation of EO 13166. After considering the information received, OMB will develop and issue a report to Congress by March 12, 2001.

John D. Graham

Administrator

Office of Information and Regulatory Affairs