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White House Publishes Revisions to Federal Agency Race and Ethnicity Reporting Categories

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On March 28, 2024, the White House unveiled revisions to the federal statistical standards for race and ethnicity data collection for federal agencies, adding a new category and requiring a combined race and ethnicity question that allows respondents to select multiple categories with which they identify.

Quick Hits

- The White House published an updated SPD 15 with revisions to the race and ethnicity data collection standards for federal agencies.

- The revisions change the race and ethnicity inquiry by making it one question and encouraging respondents to identify under multiple categories.

- Federal agencies have eighteen months to submit an agency action plan for compliance and must bring all of their data collections and programs into compliance within five years.

- The race and ethnicity categories are widely used across federal agencies and serve as a model for employers for their own data collection and required diversity reporting.

The White House's Office of Management and Budget (OMB) published updates to its *Statistical Policy Directive No. 15: Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity* (*SPD 15*) with major revisions, the first since 1997. The revisions took immediate effect and were formally published in the *Federal Register* on March 29, 2024.

OMB stated that the revisions—which come after a two-year review process that included input from more than 20,000 comments, ninety-four listening sessions, three virtual town halls, and a Tribal consultation—are "intended to result in more accurate and useful race and ethnicity data across the federal government."

Background

In 2022, OMB convened the Federal Interagency Technical Working Group on Race and Ethnicity Standard (Working Group) to review the race and ethnicity standards in the 1997 SPD 15 with the goal of "improving the quality and usefulness of Federal race and ethnicity data." The race and ethnicity standards are used by federal contractors and subcontractors for affirmative action programs (AAPs) and by employers for federal EEO-1 reporting and U.S. Equal Employment Opportunity Commission (EEOC) surveys. Many employers further use the race and ethnicity categories for their own recordkeeping purposes, and federal agencies use the categories for various surveys and federal forms.

In January 2023, OMB published the Working Group's proposals, observing that the 1997 SPD 15 standards might no longer accurately reflect the growing diversity across the United States and evolving understandings of racial and ethnic identities. During the pendency of the review process, several justices of the Supreme Court of the United States criticized the imprecision of the 1997 race and ethnicity categories throughout the Court's 237-page opinion in the June 2023 *Students for Fair Admissions, Inc. v. Harvard College* (*SFFA* decision) case, in which the Court struck down certain race-conscious admissions policies in higher education.

Revisions to SPD 15

The updated standards closely follow the Working Group's final recommendations and revise SPD 15 to require that data collection:

- combine the race and ethnicity inquiry into one question that allows respondents to select multiple categories with which they identify,

- add "Middle Eastern or North African" (MENA) as a "minimum reporting category" that is "separate and distinct from the White' category," and

- "require the collection of more detailed data as a default."

Under the 1997 standards, respondents were required to first select an ethnicity (i.e., "Hispanic or Latino" or "Not Hispanic or Latino"), and second, select a race category (i.e., "American Indian or Alaskan Native," "Asian," "Black or African American," "Native Hawaiian or Other Pacific Islander," or "White").

The revised race and ethnicity categories for minimum reporting are:

- "American Indian or Alaska Native"

- "Asian"

- "Black or African American"

- "Hispanic or Latino"

- "Middle Eastern or North African"

- "Native Hawaiian or Pacific Islander"

- "White"

The updated SPD 15 further revises some terminology and definitions used and provides agencies with guidance on the collection and presentation of race and ethnicity data pursuant to SPD 15. Additionally, the update instructs federal agencies to begin updating their surveys and forms immediately and to complete and submit an AAP, which will be made publicly available, to comply with the updated SPD 15 within eighteen months. Federal agencies will have five years to bring all data collections and programs into compliance.

OMB noted that "the revised SPD 15 maintains the long-standing position that the race and/or ethnicity categories are not to be used as determinants of eligibility for participation in any Federal program."

Looking Ahead

The new race and ethnicity categories have implications for employers as they use these categories for federal reporting compliance and their own recordkeeping purposes, including potentially influencing their own diversity, equity, and inclusion (DEI) initiatives. Covered federal contractors and subcontractors must also use the categories in meeting their affirmative action obligations.

Still, the updated SPD 15 adds only one new minimum category. OMB recognized the tension with attempting to "facilitate individual identity to the greatest extent possible while still enabling the creation of consistent

and comparable data." One of the issues OMB identified as needing further research is "[h]ow to encourage respondents to select multiple race and/or ethnicity categories when appropriate by enhancing question design and inclusive language." The agency is also establishing an Interagency Committee on Race and Ethnicity Statistical Standards that will conduct further research and regular reviews of the categories every ten years, though OMB may decide to review SPD 15 again at any time.

Employers may want to take note of the revisions to SPD 15 as these changes will directly impact many employers' compliance and recordkeeping obligations. They may also want to be on the lookout for additional guidance from federal agencies, such as the Office of Federal Contract Compliance Programs (OFCCP) and the EEOC, on when and how to implement the standards. Relevant agencies will have to take action before employers will be required to implement the new standards. In the meantime, employers may want to consider whether to use the government's new or existing categories when shaping their DEI initiatives, as racial and ethnic identities and terminology continue to evolve.

For more information about self-identification best practices, please join us for our upcoming webinar, "DEI Under Scrutiny, Part III: Best Practices for Compliant and Voluntary Self-Identification," which will take place on Tuesday, April 2, 2024, from 2:00 p.m. to 3:00 p.m. EDT. The speakers, T. Scott Kelly and Nonnie L. Shivers, will discuss the current legal landscape and practical tips for creating and deploying intentional, lawful, and effective voluntary self-identification campaigns. Register here.

Ogletree Deakins' OFCCP Compliance, Government Contracting, and Reporting and Diversity and Inclusion Practice Group will continue to monitor developments and will provide updates on the Diversity and Inclusion, Employment Law, Government Contractors, and OFCCP Compliance, Government Contracting, and Reporting blogs as additional information becomes available.

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