

April 28, 2017

Via Federal eRulemaking Portal: <http://www.regulations.gov>

Dr. Nancy A. Potok  
Chief Statistician  
Office of Management and Budget  
1800 G St., 9th Floor  
Washington, DC 20503

**Re: Comments on Federal Interagency Working Group Proposals for Revision of the *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 82 Fed. Reg. 12242 (March 1, 2017)**

Dear Dr. Potok:

The Equal Employment Advisory Council (“EEAC”) welcomes the opportunity to file these supplemental comments regarding the Office of Management and Budget’s (“OMB”) review of its *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity* (the “Standards”), notice of which was published in the *Federal Register* on March 1, 2017.<sup>1</sup>

Our comments today build upon EEAC’s response to OMB’s September 30, 2016, *Federal Register* notice announcing that it was conducting a “limited” review of — and considering four specific revisions to — the Standards, which were last revised in 1997 (the “1997 Standards”).<sup>2</sup> Because the issues raised by that earlier notice remain open for consideration, we are attaching our original comment letter for your consideration.

Briefly, our original comment letter urged OMB to consider the practical and financial impact that any changes to the 1997 Standards would have on American businesses. Specifically, we recommended *against* any changes that would require employers to alter the manner in which they solicit, collect, maintain, and report race and ethnicity data to the federal government. We also recommended that OMB clarify its position on the use of the “two-question format” for collecting race and ethnicity data by declaring this format to be permissible but no longer the “preferred method for collecting data on race and ethnicity.”

Our supplemental comment letter addresses two new issues raised by the recommendations of the Federal Interagency Working Group for Research on Race and Ethnicity (“Working Group”) in its interim report on possible revisions to the 1997 Standards. These issues are as follows: (1) the possibility of additional, mandatory reporting subgroups within the

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<sup>1</sup> 82 Fed. Reg. 12242 (March 1, 2017).

<sup>2</sup> 81 Fed. Reg. 67398 (September 30, 2016).

six existing reporting categories; and (2) the inclusion and/or exclusion of specific ethnoreligious groups in defining a Middle Eastern and North African classification.

As discussed below, we are concerned that the manner in which these data are often collected — visual observation — presents privacy and confidentiality concerns that far outweigh any nominal benefit potentially derived from their collection. We therefore urge OMB to exercise caution and, consistent with our original comments, recommend that any new classifications be classified as optional.

#### STATEMENT OF INTEREST

EEAC is the nation's largest nonprofit association of employers dedicated to the advancement of practical and effective programs to eliminate employment discrimination. Formed in 1976, EEAC's membership includes approximately 260 of the nation's leading and largest employers, all of which are firmly committed to the principles and practice of workplace nondiscrimination. All of our members are employers subject to the compliance, recordkeeping, and reporting requirements imposed by federal statutes and regulations prohibiting workplace discrimination, and all file the Employer Information Report ("EEO-1") each year. Furthermore, the vast majority of EEAC's members are federal contractors subject to the additional recordkeeping, reporting, and compliance requirements imposed by Executive Order 11246, Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act, Section 503 of the Rehabilitation Act, and the implementing regulations issued thereunder by the U.S. Department of Labor ("DOL").

EEAC has worked closely with OMB on the issue of race/ethnicity classification for many years. Indeed, we were deeply involved in the development of the 1997 Standards, offering testimony at a hearing held by OMB in Boston in July of 1994, and filing numerous written comments between 1994 and 1997. Following the release of the 1997 Standards, EEAC established a special task force to provide OMB and other federal agencies with feedback on their impact to private-sector employers. We communicated frequently with OMB and federal enforcement agencies, and even hosted a special inter-agency meeting attended by representatives from OMB, the Equal Employment Opportunity Commission ("EEOC"), the Office of Federal Contract Compliance Programs ("OFCCP"), the Office of the Solicitor of Labor, the Bureau of Labor Statistics, the Department of Justice Civil Rights Division, and the Department of Health and Human Services National Center for Health Statistics.

And for the past 20 years, we have worked tirelessly with both the EEOC and OFCCP on the collection, maintenance, and reporting of race and ethnicity data under the 1997 Standards. Indeed, over the years we often have been the only organization to submit public comments in response to the EEOC's invitations for stakeholder input on the burdens and utility of the EEO-1

Report.<sup>3</sup> We also note that, based on our review of the comments submitted in response to OMB's initial *Federal Register* notice, ours were the only ones filed on behalf of private-sector employers. As such, EEAC is uniquely qualified to comment on the Working Group's proposals with respect to their impact on private-sector employers.

THE ADDITION OF NEW MANDATORY REPORTING CATEGORIES WILL IMPEDE THE VOLUNTARY AND CONFIDENTIAL COLLECTION OF RACE AND ETHNICITY DATA

While we recognize that the primary purpose of the 1997 Standards is to facilitate the collection and reporting of race and ethnicity by the federal government, it is important to keep in mind that private-sector employers are one of the primary sources of these data as they relate to the U.S. workforce. The successful collection of race and ethnicity data from employees is premised on the understanding that providing these data is voluntary and the assurance that they will be kept confidential.

Offering individuals the opportunity to self-identify race, ethnicity, and sex has been the EEOC's "preferred" method of collecting the demographic data needed for the EEO-1 Report, and the method used by virtually all EEAC members for compliance purposes. However, when an employee declines to self-identify, EEOC regulations and other guidance direct the employer to conduct a visual identification of the employee's race/ethnicity.<sup>4</sup> OFCCP has issued similar guidance for federal contractors subject to Executive Order 11246 and its implementing regulations,<sup>5</sup> and informal guidance from both agencies extends this practice to applicants as well.<sup>6</sup>

The voluntary and confidential nature of these collections is therefore undercut by the fact that, under the direction of the federal government's two leading equal employment opportunity enforcement agencies, employers must assign a race and/or ethnicity to an individual who specifically declines to self-identify. These determinations by visual observation are at best educated guesses, even under a classification system that has only seven possible reporting categories.

This fact is not lost on employees, who often learn of their "identified" race or ethnicity by viewing their own data in the self-service portals found in most employers' human resources information systems. We believe that both the accuracy and sometimes-contentious nature of

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<sup>3</sup> See, for example, the supporting documents maintained by the Office of Management and Budget related to the EEOC's 2014, 2011, and 2009 information collection requests for approval of the EEO-1 Report, available at [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201412-3046-001](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201412-3046-001), [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201104-3046-003](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201104-3046-003), and [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=200901-3046-001](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=200901-3046-001).

<sup>4</sup> 29 CFR § 1602.13.

<sup>5</sup> See Directive 283 (August 14, 2008) (<https://www.dol.gov/ofccp/regs/compliance/directives/dir283.htm>).

<sup>6</sup> See *Adoption of Questions and Answers To Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures*, 44 Fed. Reg. 11996 (March 2, 1979).

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these collections will only become more problematic by the addition of new, mandatory reporting categories, particularly if ethnoreligious groups are specifically included in the definitions of these categories.

In our view, these drawbacks far outweigh any nominal benefit that might be gained from implementing new *mandatory* reporting categories. And while we can appreciate how these additional detailed data might be relevant in large datasets such as those published by the U.S. Census Bureau, their accuracy in smaller datasets, such as those for a specific employer or even an entire industry, is questionable, and their utility for meaningful analysis is even more so. As such, EEAC recommends that if OMB were to establish any new race/ethnicity collection, maintenance, and reporting categories under its Standards, that these categories be clearly defined as voluntary for all private-sector employers.

#### CONCLUSION

EEAC appreciates this opportunity to comment on the Working Group's proposals and stands ready to discuss these issues with OMB at any time.

Sincerely,

A handwritten signature in black ink, appearing to read "Danny E. Petrella". The signature is fluid and cursive, with a large, stylized initial "D" and "P".

Danny E. Petrella  
Senior Counsel