

April 26, 2023

VIA ONLINE SUBMISSION & E-MAIL
(Statistical Directives@omb.eop.gov)

The Honorable Richard L. Revesz
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
1800 G Street, NW, 9th Floor
Washington, DC 20503

Mr. Bob Sivinski, Chair
Ms. Karen Battle, Co-Chair
Interagency Technical Working Group
on Race and Ethnicity Standards
1650 17th Street, N.W.
Washington, DC 20500

Re: **OMB-2023-0001, Comment of Natives Count working group on Initial Proposals For Updating OMB's Race and Ethnicity Statistical Standards, 88 Fed. Reg. 5375 (Jan. 27, 2023)**

Dear Administrator Revesz, Chairman Sivinski, Co-Chairwoman Battle, and Working Group Members:

We, the undersigned indigenous organizations, individuals, and participants in the Natives Count working group, respectfully submit our comments in response to the Office of Management and Budget's notice soliciting feedback on the proposed update to OMB's 1997 Statistical Policy Directive No. 15: Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity ("SPD 15" or "Standards").

Implementation of SPD 15 has a profound impact on American Indians and Alaska Natives. The Standards establish the categories that all federal agencies must use if they intend to collect information on the demographic characteristics of population groups, whether through surveys or through program benefit applications. SPD 15 originally was developed to facilitate enforcement of federal civil rights laws. But the Standards also provide the basis for distributing hundreds of billions of dollars each year for federally funded programs and in data products for a wide range of research uses.

The federal government's duties to American Indians and Alaska Natives are unique among all populations from whom data is collected under the Standards. Tribal Nations have a government-to-government relationship with the United States. The United States Constitution, treaties, statutes, Executive Orders, and other federal laws "form the foundation of the Federal-tribal trust

relationship.” That trust responsibility “consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights.”¹

It is crucial that updates to SPD 15 respect the government-to-government relationship of the United States to Tribal Nations and allow it to fulfill its trust responsibilities. As such, the Working Group should follow certain guiding principles that build on those enumerated by the Department of the Interior:

- Respect tribal sovereignty and self-determination, which includes the right of American Indian and Alaska Native tribes to make important decisions about their own interests including those that are affected by updates to the Standards.
- Be responsive and informative in all communications and interactions with American Indian and Alaska Native tribes and individuals about updates to the Standards, including through regular tribal consultations.
- Work in partnership with American Indian and Alaska Native tribes on the development and implementation of any updates to the Standards.
- Work collaboratively and in a timely fashion with Tribal Nations and individual American Indian and Alaska Native beneficiaries when evaluating requests to ensure that any updates to and implementation of the Standards are consistent with the legal duties that the United States owes to American Indians and Alaska Natives.²

Our comments begin with an overview of recommendations relating to how any update to SPD 15 should be developed, operationalized, and implemented in a manner consistent with these principles.

We thank the Working Group for its transparency in sharing and soliciting feedback regarding its initial proposals for updating the Standards. We appreciate the tribal consultation, town halls, and individual presentations and meetings that members of the Working Group have held so far to facilitate the understanding of Tribal Nations, indigenous organizations, researchers, and other stakeholders. As the SPD 15 update is finalized and efforts are undertaken to operationalize it, we look forward to ongoing discussions that ensure that data and information collected by federal agencies about American Indians and Alaska Natives is complete, accurate, and fully accessible.

¹ Secretary of the Interior, Order No. 3335, *Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries* 1 (Aug. 20, 2014).

² See *id.* at 5.

I. GENERAL RECOMMENDATIONS

We agree that it is necessary for federal statistical standards to evolve “ensure that they are keeping pace with changes in the population and evolving needs and uses for data.”³ As the OMB Notice explains, an update to the SPD 15 Standards is necessitated in part because of “large societal, political, economic, and demographic shifts in the United States” in the past 25 years including “Increasing racial and ethnic diversity; A growing number of people who identify as more than one race or ethnicity; and Changing immigration and migration patterns.”⁴

But there are other reasons for updating the Standards. Some populations who were already present in the United States in large numbers in 1997, like those who are Middle Eastern and North African (“MENA”), simply are invisible under the current SPD 15. Other groups have found that the method of asking about their identity has not resulted in accurate counts. As we explain in our comments below, many American Indians and Alaska Natives cannot relate to the questions of “race” or “ethnicity” given the unique status that they and their Tribal Nations have with the United States.

A foundational principle for the Working Group’s efforts must be that **any SPD 15 updates cannot be a zero-sum game, in which some population groups “win” with a higher count at the expense of other population groups who “lose” through lower counts.** That point is especially true for American Indians and Alaska Natives. Since 2010, indigenous peoples have experienced the greatest percentage increase of any population group, with the count of American Indians and Alaska Natives rising by nearly 87 percent from 5.2 million up to 9.7 million – despite having the highest undercount in the 2020 Census (5.64 percent for those living on Tribal lands, compared to an undercount of 4.99 percent among Hispanics and Latinos).

To that end, **any updates to SPD 15 must be inclusive**, to ensure that respondents see their identity accurately reflected on federal surveys and in other data collection efforts. For American Indian and Alaska Native respondents, inclusion requires that:

- Any update to the Standards must continue to allow self-identification as American Indians or Alaska Natives regardless of tribal enrollment. Many of those who identify as American Indians or Alaska Natives are not enrolled citizens of a tribe.
- Any update to the Standards must facilitate identification of all Tribal Nations with whom American Indians or Alaska Natives have ties. It is common for those who identify as American Indians or Alaska Natives to have ties to more than one Tribal Nation.

³ OMB-2023-0001, Initial Proposals For Updating OMB’s Race and Ethnicity Statistical Standards, 88 Fed. Reg. 5375, 5377 (Jan. 27, 2023).

⁴ *Id.*

- Self-identity of American Indians or Alaska Natives cannot be limited to only those Tribal Nations that are recognized by the federal government or by individual states.
- Data for American Indians and Alaska Natives must not be blended into or subordinate to other racial or ethnic groups, particularly for those who also identify as Hispanic or Latino.
- Any update to the Standards must ensure that federal agencies continue to receive all detailed data for American Indians and Alaska Natives to full the United States' unique trust responsibilities to Tribal Nations.

As we discuss in response to Question 1c, we further recommend that **any updated Standards should not be fully implemented for large federal surveys, such as the decennial census, American Community Survey, and Current Population Survey, until 2030.** That delayed rollout will allow several critical activities to be completed.

First, it will give federal agencies time for design and testing of surveys, questions, instructions, and training using the updated SPD 15 Standards. Our experience with census surveys indicates that a substantial amount of time is needed to prepare a federal survey. Testing must occur from representative samples of population groups and subgroups to eliminate bias, to ensure there is no inappropriate or insensitive wording, and to confirm with the sampled populations that questions and instructions are clear and understandable. Given the breadth of the proposed changes to the Standards, that is especially true here.

Second, as we have explained above in our guiding principles, Tribal Nations must be consulted during the survey design and any questions or concerns they raise must be addressed. Tribal consultations must be:

- ***Timely***, with the consultations scheduled as expeditiously after a proposed change is identified as is practicable, providing Tribal Nations sufficient advance notice of when the consultations are proposed to occur and coordinating with Tribal Nations to avoid conflicting events;
- ***Understandable***, providing information in plain language to the Tribal representatives and others participating in the consultation in a manner that allows them to fully comprehend a proposed change, to ask questions about that change, and to identify further information they require to make an informed decision;
- ***Meaningful***, ensuring that Tribal Nations have sufficient time to consider a proposed change, confer internally and with other Tribal governments, and be able to provide their responses to a proposed change before any final recommendation or decision is made by the referring federal department or agency; and

- ***Deferential***, giving strong weight to the responses by Tribal Nations to a proposed change, consistent with the respect that the United States owes through its government-to-government relationship with the sovereign Tribal Nations.

The final product must be respectful of the needs of Tribal Nations, especially to the extent that a federal survey is used as part of the ongoing trust responsibilities that the United States owes to those Nations.

Third, the SPD 15 update will require substantial public outreach and education. As OMB acknowledges in the Federal Register Notice, this is the most significant proposed change to data collection methods in federal surveys in nearly three decades. It cannot happen overnight. Substantial resources must be dedicated to public outreach and education the changes. Ongoing and timely communications must occur with data stakeholders, particularly Tribal Nations. Information must be communicated in all American Indian and Alaska Native languages.

II. RECOMMENDATIONS IN RESPONSE TO OMB REQUESTS FOR COMMENT

For ease of reference in offering our recommendations, we have used the headings, subheadings, and questions included by OMB in the Federal Register Notice and placed them in bold type. Our use of those headings, subheadings, and questions are not an endorsement of the statements included in them. We only have included questions in our letter to which we have offered our recommendations.

1. Collect race and ethnicity information using one combined question:

We take no position due to insufficient data needed for an informed recommendation. Further targeted study should be undertaken consistent with the Summer 2024 timeframe for a final decision on the update to SPD 15.

At this time, we cannot take a position on whether data of race, ethnicity, or in the case of American Indians and Alaska Natives, their political status, should continue to be collected under separate questions or through a combined question format.

There is some research suggesting that the question approach used, namely through separate questions or a combined question, results in no significant differences for respondents identifying as American Indian or Alaska Native. For example, the 2010 Alternative Questionnaire Experiment (“AQE”) found that the “American Indian or Alaska Native ... population distributions did not change significantly across questionnaires.”⁵ The 2015 National Content Test (“NCT”) repeated these findings.⁶

⁵ U.S. Census Bureau, 2010 Census Race and Hispanic Origin Alternative Questionnaire Experiment 44 (rev. Feb. 28, 2013) (“AQE”).

⁶ See U.S. Census Bureau, 2015 National Content Test Race and Ethnicity Analysis Report 83 (Feb. 28, 2017) (“NCT”).

However, there were significant limitations on the data collection methods for both studies. Specifically, neither the AQE nor the NCT fully addressed the unique challenges of obtaining a representative sample of American Indian and Alaska Native households. These issues are discussed below in more detail in response to Question 1a. Consequently, the research on the potential impact of a combined question on indigenous households is inconclusive.

The initial proposals for updating SPD 15 indicate it is likely that the Working Group will recommend a combined question format for collection of federal data and information. If that is the final recommendation, and it is adopted, we strongly encourage that federal agencies be required to follow the general recommendations we have made above regarding the timing and implementation of the updated Standards.

Uncertainty regarding the impact on American Indians and Alaska Natives of a combined question can be mitigated, at least in part, by question and instruction design, testing, and improved data collection methods. It is paramount that because of the government-to-government status and unique trust responsibility the United States has with Tribal Nations and their citizens, federal agencies consult on in a meaningful and regular manner with Tribal governments on those activities. Our General Comments include more details of the actions that should be taken.

1a. Please provide links or references to relevant studies that examine or test any impacts of collecting race and ethnicity information using separate questions compared to a combined question.

Existing studies on the impact of a proposed combined question on American Indians and Alaska Natives acknowledge limits on research methods for reaching households of indigenous peoples. More research is needed on this question.

The 2010 Alternative Questionnaire Experiment (“AQE”) noted that it was not designed or resourced to obtain a representative sample from American Indian and Alaska Native households. The AQE explained that the sample size was too small to reach more sparsely populated areas such as those coinciding with American Indian and Alaska Native Tribal lands:

Specific treatment effects explored for specific small population groups, such as American Indian and Alaska Native, and Native Hawaiian and Other Pacific Islander people, or various ethnic subgroups were minimal. Selection of a sample sufficiently large to capture variability among some smaller ethnic groups was not cost-effective for this study. Future research should include all enumeration areas.⁷

As a result, the AQE concedes that American Indians and Alaska Natives, along with Native Hawaiians and Other Pacific Islanders and “other small population groups ... were not as well represented in the Mailout/Mailback universe.”⁸ Efforts were made to improve coverage of these underrepresented population groups through focus groups.⁹ However, our experience with focus

⁷ AQE, *supra* note 5, at 33.

⁸ *Id.*

⁹ *Id.*

groups such as those used by the AQE are that they are underinclusive of American Indians and Alaska Natives who are geographically, culturally, and linguistically isolated.

Although the NCT was a significantly larger study, it likewise failed to address several barriers to ensure a representative sample of American Indians and Alaska Natives. These barriers included:

- The study was conducted through materials that were mailed to sampled households.¹⁰ American Indian and Alaska Native households have the least access to mail services of any population group due to the widespread use of nontraditional addresses, delays receiving mail to remote areas, and distances that must be traveled for mail services. The NCT acknowledges that the results were significantly limited for “populations found in areas with lower mailability (e.g., Island Areas, American Indian reservations, and areas of remote Alaska).”¹¹
- “The NCT was a self-response test only and did not have a nonresponse follow-up component.”¹² American Indians and Alaska Natives had the lowest self-response rate of any population group in the 2010 Census, 57.8 percent.¹³ We identified similar low response rates on Tribal lands in the 2020 Census.¹⁴ Due to the low self-response rates of American Indians and Alaska Natives, the Census Bureau historically has designated Tribal areas for its in-person Remote Alaska, Update Leave, and Update Enumerate operations. The absence of in-person sampling is a significant limitation to the validity of NCT’s results for the American Indian and Alaska Native population.
- The NCT was unavailable in American Indian and Alaska Native languages. Over a quarter of all single-race American Indian and Alaska Natives speak a language other than English at home.¹⁵ Two-thirds of all speakers of American Indian or Alaska Native languages reside on a reservation or in a Native village,¹⁶ including many who are linguistically isolated, have limited English

¹⁰ NCT, *supra* note 6, at 7, 30-31 & Table 1.

¹¹ *Id.* at 39.

¹² *Id.* at 2; *see also id.* at 39 (same).

¹³ *Id.* at 32, Table 2.

¹⁴ Using the self-response data publicly reported by the Census Bureau, we estimate the following self-response rates for Tribal lands in the identified states: Arizona (without the Navajo Nation), 26.8 percent; South Dakota, 30.3 percent; North Dakota, 31.0 percent; Montana, 35.1 percent; California, 42.7 percent; New Mexico (without the Navajo Nation), 43.4 percent; Idaho, 45.9 percent; Nevada, 51.1 percent; and Oregon, 52.0 percent. The Census Bureau reported that the Navajo Nation’s self-response rate to the 2020 Census was 22.6 percent. In comparison, the national self-response for all population groups was 67.0 percent.

¹⁵ U.S. Census Bureau, Profile America Facts for Features: CB16-FF.22, American Indian and Alaska Native statistics, available at <https://www.census.gov/newsroom/facts-for-features/2016/cb16-ff22.html> (Nov. 2, 2016) (27 percent).

¹⁶ *See* U.S. Census Bureau, Native American Languages Spoken at Home in the United States and Puerto Rico: 2006-2010 at 2 (Dec. 2011).

skills, or a high rate of illiteracy.¹⁷ The Census Bureau conducts national surveys like the ACS and decennial in-person with bilingual enumerators to address language and literacy barriers. That was not done with the NCT.

- Reinterviews of those responding to the NCT were conducted by telephone.¹⁸ Telephone service is not widely available on many Tribal areas or is unaffordable to American Indian and Alaska Native households.
- The NCT’s use of 67 focus groups with “800 people across the country”¹⁹ in all population groups could not make up for the lack of a representative sample of American Indian and Alaska Native households from more than 600 federally or state-recognized Tribes.
- It is not possible to draw reliable conclusions on the NCT’s assessment of the impact of a combined question on the American Indian and Alaska Native population due to limitations arising from the absence of a reliable and representative respondent population from more sparsely populated Tribal areas.²⁰

In March 2023, the Census Bureau released additional data showing that with respect to American Indians and Alaska Natives who identify as Hispanic or Latino, there were “no clear differences ... between separate questions ... and combined question formats...” However, the source of the NCT data was “internet responses.” Internet access on Tribal lands is sparse, with the Federal Trade Commission estimating broadband penetration in tribal communities at less than ten percent.²¹ Other barriers include the cost of using the Internet and the digital divide for Tribal Elders who are heads of household. In summary, the updated findings released by the Census Bureau suffer from the limitations identified in the NCT report and the earlier AQE study.

Given the limitations of the NCT and its lack of a representative sample of the American Indian and Alaska Native population, especially those living on Tribal lands, it is not possible to draw any reliable conclusions from the NCT’s findings on the impact of using a combined question on the American Indian and Alaska Native population.

We agree with and renew the recommendation in the AQE that additional research is needed to obtain a fully representative sample of American Indians and Alaska Natives on the impact of using a combined question approach compared to the existing separate questions approach. We understand that there is little time available for such a study, but nevertheless encourage the

¹⁷ See U.S. Census Bureau, Public Use Data File for the 2021 Determinations under Section 203 of the Voting Rights Act, available at <https://www.census.gov/data/datasets/2021/dec/rdo/section-203-determinations.html> (Dec. 8, 2021).

¹⁸ NCT, *supra* note 6, at 33.

¹⁹ *Id.* at 7.

²⁰ *Id.* at 39.

²¹ Parkhurst et al., The Digital Reality: E-Government and Access to Technology and Internet for American Indian and Alaska Native Populations 3, available at <https://pdfs.semanticscholar.org/4bb4/f5efcd1cf4ec342b5d45dd824bb10d9bb0f2.pdf>.

Working Group to undertake research that specifically targets the sampling limitations of the AQE and NCT for American Indians and Alaska Natives. We believe that targeted research could be completed before a final decision on the SPD 15 update is made in Summer 2024, allowing OMB to make a better-informed decision.

1b. To what extent would a combined race and ethnicity question that allows for the selection of one or more categories impact people's ability to self-report all aspects of their identity?

For the reasons stated in response to Question 1b, the answer to this question is uncertain. At present, we do not have sufficient data or information to reach a conclusion on the impact of a combined question allowing for the selection of one or more categories.

With that qualification, it appears that proper question and instruction design, testing, outreach, and communications could mitigate any negative impact that a combined question may have on self-identification of all categories reflecting the self-identity of responding American Indians and Alaska Natives. We have provided more details above in our General Recommendations.

1c. If a combined race and ethnicity question is implemented, what suggestions do you have for addressing challenges for data collection, processing, analysis, and reporting of data?

If a combined question is implemented, we have offered details above in our General Recommendations that are responsive to this question.

As we have explained, many of the challenges in data collection, processing, analysis, and reporting of data can be worked out by implementing an updated SPD 15 over time. Rollout for large national surveys like the decennial census, the American Community Survey, and Current Population Survey, should not occur until 2030. In the interim, following the final adoption of the updated Standards, implementation should utilize other available federal surveys to work out the challenges identified in the question. Doing so will provide invaluable feedback on how those challenges have materialized (if at all), allowing federal agencies to respond accordingly in their information and data collection methods, analysis, and products.

While we understand the importance of rapidly implementing the updated SPD 15 to certain populations, such as the MENA population, we believe it is important to balance the timeframe for rolling out surveys using the updated Standards with the need for high-quality, accurate information and data.

1d. What other challenges should we be aware of that respondents or agencies might face in converting their surveys and forms to a one question format from the current two-question format?

It is essential that the Working Group continue to function and meet regularly, even after any updated Standards are adopted. The last time SPD 15 was updated in 1997, it took federal agencies years to update their statistical modeling, data collection efforts, and products to reflect the changes. There will be an ongoing need for discussion, feedback, and guidance from the Working Group to federal agencies as they move forward in operationalizing any update to SPD 15. The

Working Group also can serve as a platform for federal agencies to share their experiences and best practices with other agencies, making the transition to new Standards much smoother.

2. Add “Middle Eastern or North African” (MENA) as a new minimum category.

We support this proposal. We defer to the MENA community for further recommendations.

We support the addition of Middle Eastern or North African (MENA) as a minimum category that federal agencies use in collecting demographic information and data. We defer to the recommendations made by organizations representing Middle Eastern, North African, and Arab-American populations in response to the OMB’s specific questions on the MENA category.

3. Require the collection of detailed race and ethnicity categories by default.

We support this proposal, with additional recommendations.

3a. Is the example design seen in Figure 2 inclusive such that all individuals are represented?

No, it is not, for three reasons.

First, as explained in response to Question 4b, the question “What is your race or ethnicity” does not acknowledge the government-to-government status of Tribal Nations and the unique trust responsibilities the United States owes to those Tribal Nations and their citizens.

Second, the definition of “American Indian or Alaska Native,” which “includes all individuals who identify with any of the original peoples of North, Central, and South America,”²² is an overinclusive category that should be broken down further. The United States is in a government-to-government relationship with and owes trust responsibilities to federally recognized Tribal Nations and their citizens. However, that is not true for the indigenous peoples of Canada, the Caribbean, Central America, or South America who are not citizens of federally recognized Tribal Nations.²³

²² 88 Fed. Reg. at 5,383.

²³ It is true that some border Tribal Nations in the United States have traditional lands located in Mexico. At least “seven Indigenous peoples and their homelands were divided by the historical establishment of the U.S.-Mexico international border—the Yaqui / Yoeme, the O’odham, the Cocopah / Cucapá, the Kumeyaay / Kumiai, the Pai, the Apaches, and the Kickapoo / Kikapú.” Alianza Indígena Sin Fronteras & Prof. Christina Leza, *Indigenous Alliance Without Borders, Handbook on Indigenous Peoples’ Border Crossing Rights Between the United States and Mexico* at 2, available at <https://www.ohchr.org>. The lands of these Tribal Nations were divided under the Treaty of Guadalupe Hidalgo of 1848, the Gadsden Purchase of 1853, and the Chamizal Treaty of 1963. *Id.* Certain indigenous peoples of eastern Alaska likewise have some cross-border traditional lands in Canada, such as the Gwich’in peoples. However, we believe that using the proposed definition of North American Indian or Alaska Native is sufficiently clear to allow American Indian or Alaska Native respondents to select one or more subcategories that accurately reflect their self-identity (including those who also identify with cross-border indigenous peoples).

We propose that this definitional issue be corrected by subdividing “American Indian or Alaska Native” into three distinct subcategories that track how the Census Bureau codes identification of tribes:

1. North American Indian or Alaska Native – includes all individuals who identify with any of the original peoples of North America other than the First Nations of Canada.²⁴
2. Canadian First Nations – includes all individuals who identify with any of the original peoples of Canada and its First Nations.²⁵
3. Caribbean, South or Central American Indian – includes all individuals who identify with any of the original peoples of the Caribbean,²⁶ South America, or Central America.²⁷

This creates a clear point of division needed to monitor the programs administered as part of that trust responsibility. Respondents would be counted in the American Indian or Alaska Native category if they check one or more of the boxes for any of the three subcategories.

Third, the examples of Tribes, American Indian villages, and other indigenous peoples that are included below “American Indian or Alaska Native” should be applied to each of the three subcategories we have identified.

During the 2020 Census, many American Indians and Alaska Natives indicated that they could not understand why “Mayan” and “Aztec” were included as examples above the write-in area. They explained that it did not make sense because those were not federally recognized Tribes and they believed the population identifying as “Mayan” or “Aztec” is much smaller than federally recognized Tribes that were not listed on the decennial census form. We understand from the Census Bureau’s explanation that “Mayan” and “Aztec” were included as examples of the two most populous indigenous peoples of Central and South America in the United States. Our recommendation regarding the addition of three American Indian and Alaska Native subcategories would resolve this concern.

We recommend that for each of the subcategories, that examples of at least the two most populous American Indian, Alaska Native, or indigenous peoples be included. “North American Indian or Alaska Native” would include four such examples, identifying the two most populous federally recognized American Indian Tribes and the two most populous federally recognized Alaska Native Tribes or villages, followed by a write-in line for that subcategory:

²⁴ See NCT, *supra* note 6, at 235-65 (listing tribes coded as “American Indian” and “Alaska Native”).

²⁵ See *id.* at 265-69 (listing tribes coded as “Canadian and French American Indian”).

²⁶ The Taíno people of Puerto Rico are indigenous peoples of the United States. However, the Taíno are not a federally recognized tribe and are descendants of the Arawak, who are indigenous peoples of the Caribbean and northern South America. As such, the Taíno are best categorized as a Caribbean, Central or South American Indian people.

²⁷ See NCT, *supra* note 6, at 269-71 (listing tribes coded as “Central American Indian,” “Mexican American Indian,” “South American Indian,” and “Spanish American Indian.”).

1. North American Indian or Alaska Native – includes all individuals who identify with any of the original peoples of North America other than the First Nations of Canada. (Enter, for example, Navajo Nation, Blackfeet Tribe, Native Village of Barrow Inupiat Tribal Government, Tlingit, etc.):
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2. Canadian First Nations – includes all individuals who identify with any of the original peoples of Canada and its First Nations (Enter, for example, Six Nations of the Grand River, Kahnawake Mohawk Territory,²⁸ etc.):
-

3. Caribbean, South or Central American Indian – includes all individuals who identify with any of the original peoples of the Caribbean, South America, or Central America (Enter, for example, Taíno, Mayan, Aztec, etc.):
-

Concerns have been raised about the American Indian or Alaska Native category being treated differently from other population categories because there were no checkboxes. The NCT explains why use of checkboxes is not feasible for the American Indian or Alaska Native category:

[W]e know from Census Bureau research that there are hundreds of very small detailed AIAN tribes, villages, and indigenous groups for which Census Bureau data is collected and tabulated, and if we were to employ the six largest American Indian groups and Alaska Native groups as checkboxes, they would represent only about 10 percent of the entire AIAN population. Therefore, we employed a different approach for collecting detailed responses from AIAN respondents by providing a write-in area and additional checkboxes for each of the main AIAN conceptual components referenced in the OMB definition (e.g., American Indian, Alaska Native, and Central/South American Indian) along with detailed examples and a distinct write-in area. The results were as we expected, showing that about 10 percent or less of the detailed AIAN responses were within the “larger” groups and the vast majority were “smaller” groups.²⁹

The NCT found that the optimal solution is “to use **one write-in line to collect detailed AIAN responses...**”³⁰ We agree and recommend that one write-in line is provided under each of the three subcategories of American Indian or Alaska Native, such as the examples we have provided above.

²⁸ We have offered examples of two of the more populous First Nations in Canada. However, we would defer to the Census Bureau and to the Working Group as to which two examples should be used as representative of Canadian First Nations.

²⁹ NCT, *supra* note 6, at 52.

³⁰ *Id.* at 86 (emphasis in original).

3b. The example design seen in Figure 2 collects additional detail primarily by country of origin. What other potential types of detail would create useful data or help respondents to identify themselves?

Please see our response to Question 3a.

3c. Some Federal information collections are able to use open-ended write-in fields to collect detailed racial and ethnic responses, while some collections must use a residual closed-ended category (e.g., “Another Asian Group”). What are the impacts of using a closed-ended category without collecting further detail through open-ended written responses?

In some instances, open-ended responses make data disaggregation more complex due to the variety of ways individuals may refer to the same population group. This can be true within the American Indian or Alaskan Native group as tribes reclaim their native names but still may be referred to by a variety of colonial names. Nevertheless, federal agencies have well-developed protocols to overcome this challenge through collaboration with federally recognized Tribal Nations and other indigenous peoples.

In particular, the Census Bureau has regular consultations that allow Tribal Nations to identify all the ways in which a Tribal citizens may identify their Tribe. For example, responses are coded as the Native Village of Tuntutuliak, a federally recognized Tribe in Alaska, if they use: the formal name, “Native Village of Tuntutuliak”; the name of the Alaska Native village, “Tuntutuliak”; a short form of the Alaska Native village commonly used by Tribal citizens, “Tunt”; E02499, the code assigned by the Bureau of Indian Affairs to the Native Village of Tuntutuliak³¹; methods of identifying the Native Village of Tuntutuliak used by other federal or state agencies; and other identifications.

One limitation of the open-ended approach that impacts Alaska Natives occurs when respondents identify their Alaska Native Corporations established under the Alaska Native Claims Settlement Act, or ANCSA, and not the a name or code associated with their federally recognized Alaska Native Tribe. Using the example from the previous paragraph, an open-ended response of “Calista Corporation,” “Calista Corp.,” or “Calista,” which is the ANCSA Region for citizens of the Native Village of Tuntutuliak, cannot be coded as the Native Village of Tuntutuliak without further information. That is because the Calista Corporation includes more than two dozen federally recognized Tribes in its ANCSA Region.³² However, federal agencies such as the Census Bureau, working in partnership with organizations like the Alaska Federation of Natives, have addressed this limitation of open-ended responses by education and outreach to Alaska Native respondents on the need to identify their federally recognized Tribe and not their ANCSA corporation.

³¹ See U.S. Dep’t of the Interior, Bureau of Indian Affairs, Identification Codes for Tribal Governments at 5, available at https://highways.dot.gov/sites/fhwa.dot.gov/files/docs/federal-lands/programs-tribal/31161/6-codes-list_1.pdf. “The code contains a letter representing the BIA Region, two digits identifying the BIA Agency, and three digits identifying the Tribal Government.” *Id.* at 1.

³² See Calista Corp., Map of Villages in the Calista ANCSA Region, available at https://www.calistacorp.com/wp-content/uploads/2022/08/12-30-21_Calista_Region_Map_Villages.png.

Conversely, closed-ended categories may limit choices and result in people from smaller racial and ethnic groups being merged into a single grouping which could lead towards the invisibility of those groups within the data sets.

Any information or data gathered about American Indians or Alaska Natives that is to be used for representation in non-Tribal elections, civil rights enforcement or compliance, programmatic work, appropriations, grant applications, research or other specific needs of a Tribal Nation and its citizens, should utilize an open-ended question approach with instructions that the respondent identify all their Tribes.

3d. What should agencies consider when weighing the benefits and burdens of collecting or providing more granular data than the minimum categories?

Any information or data gathered about American Indians or Alaska Natives that is to be used for representation in non-Tribal elections, civil rights enforcement or compliance, programmatic work, appropriations, grant applications, research or other specific needs of a Tribal Nation and its citizens, should utilize a detailed approach that allows the respondent to identify all their Tribes. That also is true for any uses that a federal agency has by statute, regulation, or other needs relating to fulfillment of the trust responsibilities of the United States to the American Indian or Alaska Native Tribe.

3e. Is it appropriate for agencies to collect detailed data even though those data may not be published or may require combining multiple years of data due to small sample sizes?

Yes, for the purposes noted in response to Question 3d.

It is commonplace that sample sizes for federal surveys of American Indian and Alaska Native Tribal Nations may be so small that it is necessary to aggregate data for several years. For example, although the American Community Survey is an ongoing survey with sampled data produced every year, one-year estimates only are available for most areas with populations of 65,000 or more. Only a handful of Tribal Nations can meet that threshold, with most American Indian and Alaska Native Tribes having smaller populations. On the other hand, census data for many sparsely populated Tribal Nations is provided through five-year ACS estimates.

It also is common for some federally gathered survey data to be suppressed for Tribal Nations to protect the privacy of respondents who live in areas with smaller populations. Nevertheless, agencies still need to collect detailed data for American Indian and Alaska Native Tribes and communities where data suppression will be used because of the purposes noted in response to Question 3d.

3f. What guidance should be included in SPD 15 or elsewhere to help agencies identify different collection and tabulation options for more disaggregated data than the minimum categories? Should the standards establish a preferred approach to collecting additional detail within the minimum categories, or encourage agencies to collect additional information while granting flexibility as to the kind of information and level of detail?

Please see our response to Questions 3d and 3e.

3g. Is the current “default” structure of the recommendation appropriate? Should SPD–15 pursue a more voluntary approach to the collection of disaggregated data, as opposed to having a default of collecting such data unless certain conditions are met?

Yes, for the reasons noted in response to Questions 3d and 3e. Generally, the “default” structure must be used by federal agencies to fulfill their duties by statute, regulation, or other requirements in furtherance of meeting the trust responsibilities of the United States to American Indian or Alaska Native Tribes.

3h. What techniques are recommended for collecting or providing detailed race and ethnicity data for categories with smaller population sizes within the U.S.?

When collecting and providing detailed racial and ethnic data for categories with smaller population sizes within the U.S., federal agencies using sampled data should be required to report that data over time when accurate estimates are available. See our response to Question 3e for more information. Data from complete counts such as the decennial census can be made available according to the planned product release schedule.

Oversampling can result in accurate data for sampled surveys if the responses are representative of the population being sampled.

4. Update Terminology in SPD 15:

We support this proposal, with additional recommendations.

4a.2. Please refer to Section D, Previously Tested Definitions of Minimum Categories. Are these draft definitions: i. Comprehensive in coverage of all racial and ethnic identities within the U.S.? ii. Using equivalent criteria? iii. Reflective of meaningful distinctions? iv. Easy to understand? v. Respectful of how people refer to themselves? Please suggest any alternative language that you feel would improve the definitions.

The minimum category definition of American Indian or Alaska Native is not comprehensive of all identities in the U.S. We recommend the minimum category definition be updated to reflect the three subcategories we have identified in response to Question 3a. Furthermore, some of the tribes and indigenous peoples that are coded by the Census Bureau³³ are not reflected in the examples; we recommend that examples be included of those tribes and indigenous peoples.

³³ See NCT, *supra* note 6, at 235-71.

We recommend that, as revised, the minimum category definition of American Indian or Alaska Native be:

“American Indian or Alaska Native” includes all individuals who identify with any of the original peoples of North, Central, and South America and the Caribbean. It includes people who identify as “American Indian,” “Alaska Native,” citizen of Canadian First Nations, and other indigenous peoples of the Americas and includes groups such as Navajo Nation, Blackfeet Tribe, Native Village of Barrow Inupiat Traditional Government, Tlingit, Six Nations of the Grand River, Kahnawake Mohawk Territory, Taíno, Mayan, Aztec, etc.

This minimum definition tracks how we recommend the detailed category of American Indian or Alaska Native be defined. The examples make clear that it includes two groups of indigenous peoples not included in the existing definition, Canadian First Nations peoples and Caribbean indigenous peoples such as the Taíno, who are the most populous indigenous tribe in Puerto Rico.

4b. As seen in Figure 2, based on the Working Group’s initial proposal, the question stem asks “What is your race or ethnicity?” Do you prefer a different question stem such as: “What is your race and/or ethnicity?”, “What is your race/ethnicity?”, “How do you identify?”, etc.? If so, please explain.

We recommend not using the question stem in Figure 2, which asks “What is your race or ethnicity?”, because “race or ethnicity” does not reflect the unique government-to-government relationship of the United States with American Indian and Alaska Native Tribes and villages. Many people who identify as American Indian or Alaska Native do not view their identity through the lens of race or ethnicity. Rather, their identity is defined by their political status and the trust responsibilities of the United States to federally recognized Tribes and citizens of those Tribes.

The AQE and NCT tested alternative language for how American Indians or Alaska Natives identify themselves with mixed results:

From the 2010 AQE research and recent 2014 qualitative research that the Census Bureau conducted with American Indians, Alaska Natives, and Central and South American Indian respondents, we know the instruction to “Print enrolled or principal tribe” causes confusion for many American Indian and Alaska Native respondents and means different things to different people. The research found that American Indian and Alaska Native respondents were confused by the use of different terms and concepts (e.g., “enrolled,” “affiliated,” “villages,” “race,” “origin,” “tribe,” etc.) and there was disagreement among focus group participants as to what “affiliated tribe” or “enrolled” or “villages” meant.

The overwhelming sentiment from 2014 AIAN focus group participants was that they want to be treated equally with other race/ethnicity groups, and this was

accomplished by not using different terminology (i.e., enrolled, affiliated, villages, etc.).³⁴

We recommend that instead of “race or ethnicity” that federal agencies use the question stem, **“How do you identify?”**. That provides a neutral and clear way of asking for the data to which we all respondents, not just those who are American Indian or Alaska Native, can relate.

5. Guidance is necessary to implement SPD 15 revisions on Federal information collections.

5a. For data providers who collect race and ethnicity data that is then sent to a Federal agency, are there additional guidance needs that have not been addressed in the initial proposals?

All responses reported by those surveyed should be reported publicly, except where privacy protections require suppression. The federal agency collecting the information or data should not apply a rule set that only reports selected responses. For example, if an individual marks “Hispanic or Latino” and “American Indian or Alaska Native,” both values should be provided rather than reporting the person as only “Hispanic or Latino,” only “American Indian or Alaska Native” or as a person reporting “two or more racial or ethnic groups.”

It is especially important that data for those identifying as American Indian or Alaska Native be reported for the reasons noted in response to Question 3d.

5c. What guidance on bridging should be provided for agencies to implement potential revisions to SPD 15?

Bridging must occur between data collected and produced under any updates to the Standards and under the existing SPD 15 guidance. Meaningful comparisons must be available to identify demographic changes over time, which are important for many of the uses identified in response to Question 3d.

5d. How should race and ethnicity be collected when some method other than respondent self-identification is necessary (e.g., by proxy or observation)?

We recommend that whenever possible, other data provided by the respondent be used when the respondent fails to self-identify on a federal survey. High quality administrative records that include data responsive to the updated SPD 15 Standards should be collected by federal agencies. Alternatively, if previous federal surveys collected data responsive to the updated Standards from a surveyed individual or household, that data could be imputed to the same individual or household.

Race, ethnicity, or citizenship in a Tribal Nation or Alaska Native community is not susceptible to accurate identification by proxy or observation. In our experience, proxy interviews on data characteristics that may be the products of subjective bias or stereotyping are not reliable. Some

³⁴ See NCT, *supra* note 6, at 24.

examples include: a light-skinned individual identified by a third party as White when the individual self-identifies with another category (such as Hispanic or Latino, MENA, or even Black); and a citizen of the San Carlos Apache Tribe who self-identifies as American Indian but is viewed by others as Hispanic or Latino because of their skin color.

Identification by observation should be limited to data sources in which the observer has a legal duty to report accurate information, such as on an EEO-1 that must be submitted to the U.S. Department of Labor annually by private employers with 100 or more employees and federal contractors with 50 or more employees.³⁵ Those data sources are likely to be more reliable than observations by other third parties, such as neighbors, because the observation is required by law and willfully false statements are punishable as a federal crime.³⁶

5e. What guidance should be provided for the collection and reporting of race and ethnicity data in situations where self-identification is unavailable?

Please see our response to Question 5d.

6. Comments On Any Additional Topics and Future Research.

6a. SPD 15 does not dictate the order in which the minimum categories should be displayed on Federal information collections. Agencies generally order alphabetically or by population size; however, both approaches have received criticism. What order, alphabetical or by population size, do you prefer and why? Or what alternative approach would you recommend?

We recommend that the order of responses be determined by question design and testing by each collecting federal agency, to ensure that responses are not biased because of question order.

6b. The current minimum categories are termed: • American Indian or Alaska Native • Asian • Black or African American • Hispanic or Latino • Native Hawaiian or Other Pacific Islander • White. Do you have suggestions for different terms for any of these categories?

Please see our response to Question 3a.

6d. The proposals in this FRN represent the Working Group’s initial suggestions for revisions to SPD 15 to improve the accuracy and usefulness of Federal race and ethnicity data. The Working Group and OMB welcome comments and suggestions on any other ways that SPD 15 could be revised to produce more accurate and useful race and ethnicity data.

We strongly support removal of the phrase “who maintain tribal affiliation or community attachment” in the American Indian or Alaska Native category. As we explain in our response to Question 4d, the NCT “found that American Indian and Alaska Native respondents were confused by the use of different terms and concepts (e.g., ‘enrolled,’ ‘affiliated,’ ‘villages,’ ‘race,’ ‘origin,’

³⁵ See 42 U.S.C. § 2000e-8(c); 29 C.F.R. §§ 1602.7-.14; 41 C.F.R. § 60-1.7(a).

³⁶ See EEO-1 Form, available at https://www.eeoc.gov/sites/default/files/migrated_files/employers/eeo1survey/eeo1-2-2.pdf (providing on page 2 that “Willfully False Statements on this Report are Punishable by Law, U.S. Code, Title 18, Section 1001”).

‘tribe,’ etc.) and there was disagreement among focus group participants as to what ‘affiliated tribe’ or ‘enrolled’ or ‘villages’ meant.”³⁷

Finally, we note that the group designations and definitions leave out Aboriginal Australians. It is not clear if they should be included among the “Black or African American” group or some other grouping sine their origins do not trace back to the Black racial groups of Africa but are a distinct racial grouping.

III. CONCLUSION

We thank OMB and the Working Group for the opportunity to share our recommendations and comments on the proposed updates to the SPD 15 Standards. If you require further information, please contact Sandra Mitrovich, Director of External Engagement, National Congress of American Indians, at (580) 704-6300 or smitrovich@ncai.org, Nicole Borromeo, Executive Vice President and General Counsel, Alaska Federation of Natives, at (907) 274-3611 or nborromeo@nativefederation.org, or James Tucker, Convener of the Natives Count working group at (703) 297-0485 or jttarizona@aol.com.

Very truly yours,

³⁷ See NCT, *supra* note 6, at 24.