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Submitted via www.regulations.gov

April 27, 2023

Mr. Bob Sivinski
Chair, Interagency Technical Working Group on Race and Ethnicity Standards
1650 17th Street NW
Washington, DC 20500

RE: Initial Proposals for Updating OMB's Race and Ethnicity Statistical Standards (62 FR 58723)

Dear Chair Sivinski:

I write on behalf of MALDEF (Mexican American Legal Defense and Educational Fund), in response to the proposed revisions to the Office of Management and Budget's (OMB) Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity (Standards), recommended by the Federal Interagency Working Group for Research on Race and Ethnicity (Working Group). The following comments are in response to the *Initial Proposals for Updating OMB's Race and Ethnicity Statistical Standards*, which were published in the Federal Register on January 27, 2023. MALDEF takes this opportunity to express its views on the initial proposal to revise the Federal Standards, specifically how these changes will affect Latinos in the U.S. and their interactions with all federal agencies, particularly during the 2030 Census and beyond.

Founded in 1968, MALDEF is the nation's leading Latino legal civil rights law firm. Described as the "law firm of the Latino community," MALDEF promotes the civil rights of all Latinos in the U.S., in the areas of immigrant rights, employment, education, voting rights, and freedom from open bias.

MALDEF relies heavily on the data collected by federal agencies and others to advance its litigation and policy efforts in all of the organization's areas of focus. For instance, MALDEF relies on the accuracy and completeness of Census Bureau -produced data for voting rights litigation in order to successfully identify population totals, bring suit against discriminatory voting plans, and achieve the enforcement of the civil rights of Latino voters.

MALDEF previously served on the Census Bureau's National Advisory Committee on Racial, Ethnic and Other Populations, and has long worked on issues related to the Census and other agency data collection. MALDEF has also worked in previous censuses within the Latino community to promote high rates of participation, as we understand how crucial this data is to civil rights protection. The plans to revise the current Standards for race and ethnicity data are crucial to civil rights work, and MALDEF is deeply invested in the accuracy and completeness of federal data collection. An increasing number of Latino

respondents face confusion and challenges answering separate questions on Hispanic origin and race, threatening the accuracy and completeness of this data. **As explained in detail below, MALDEF supports the Working Group’s proposal to allow for a combined-question format, which research shows will improve data accuracy and completeness for Latinos, including subgroups, and other race or ethnic categories.**

The OMB Working Group is undertaking a review of the Federal Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity. These Standards establish the minimum race and ethnicity categories that agencies must use for collecting data on race and ethnicity. The need for complete and accurate data is also balanced with a preference for self-identification when collecting race and ethnicity data.¹ While the standards do not prevent agencies from collecting more detailed reporting on race and ethnicity, they are often treated as a ceiling by federal agencies and private data collectors. Race and ethnicity data has been collected and widely used for “civil rights monitoring and enforcement covering areas such as employment, voting rights, housing and mortgage lending, health care services, and educational opportunities,” since the 1960s.² The history of this data collection has centered largely around federal agency needs for consistent race and ethnicity data, as this data is integral to civil rights laws that provide protections for populations that have historically been targeted for discrimination.³ For example, race and ethnicity data are used to ensure compliance with the Voting Rights Act of 1965 (VRA) and enforcement of bilingual election assistance in federal elections, to ensure full compliance and enforcement of equal employment opportunities protected under the Civil Rights Act of 1964, or to allocate funding for bilingual education services to certain school districts as required under the Bilingual Education Act, among many other important civil rights statutes.⁴

One way MALDEF uses race and ethnicity data is in litigation to protect the voting rights of the Latino voters. Census Bureau data products, including race and ethnicity data, are used to determine where people live as part of the redistricting process. The VRA requires that districts be created in a way that provides an opportunity for minorities to elect a candidate of that minority group’s choice, so long as certain conditions are met. Race is still a permissible consideration if and when necessary to satisfy a compelling state interest, such as compliance with VRA requirements. MALDEF brings litigation in jurisdictions where map drawers fail to create majority-Latino districts when specific race and ethnicity data demonstrates that there is a sufficient Latino population size in that jurisdiction to do so. Thus, it is critical that MALDEF and other data users are able to use the most complete and accurate data possible.

It has been more than 20 years since the OMB has revised these standards, and given the significant shifts in population in the U.S. over the past several decades, this review is necessary and timely. As communities become more diverse, there will be greater need to ensure that methods for data collection keep pace with population and societal changes. The standards must also be more flexible and accommodating of new and more intersectional self-identification responses and evolving terminology.

¹ *Standards for the Classification of Federal Data on Race and Ethnicity*, OFFICE OF MANAGEMENT AND BUDGET (Aug. 28, 1995), https://obamawhitehouse.archives.gov/omb/fedreg_race-ethnicity.

² *Id.*

³ *Id.*

⁴ *Why We Ask Questions About... Race*, U.S. CENSUS BUREAU, <https://www.census.gov/acs/www/about/why-we-ask-each-question/race/> (last visited Apr. 27, 2023).

The Latino population has also grown substantially in recent decades, and today Latinos comprise 19 percent, or nearly one-fifth, of the U.S. total population.

I. Proposal to collect race and ethnicity information using one combined question

Under the current standards, some Latinos face a unique challenge in accurately answering separate questions for ethnicity and race, meaning some Latinos have trouble answering a race question by selecting one of the five OMB major race categories. This is reflected in the Census Bureau's data collection challenges. In 2020, "Some Other Race" (SOR) was the second largest racial category in the decennial census.⁵ According to the Census Bureau, about 45.3 million individuals who identified as Hispanic or Latino "were classified as Some Other Race either alone or in combination, compared to only 4.6 million people who were not of Hispanic or Latino origin."⁶ Of those who were classified as SOR alone, 93.9% were of Hispanic or Latino origin.⁷

The continued growth of the SOR category in the decennial census presents evolving questions about how the current standards serve the interests of civil rights and antidiscrimination laws. In 2015, the Census Bureau undertook the largest census content test to date, which included an overall objective to "test alternative versions of the race and ethnicity questions."⁸ In previous research, the Census Bureau found that nearly half of Hispanic respondents did not select one of the OMB race categories.⁹ The Census Bureau has been researching potential improvements to measure race and ethnicity for several decades, and noted that their "research acknowledge[d] that a growing number of people find the current race and ethnicity categories confusing, or they wish to see their own specific group reflected on the census."¹⁰

In 2010, the Census Bureau conducted the Alternative Questionnaire Experiment (AQE), in which the Census Bureau mailed 2010 decennial Census questionnaires with experimental designs for the Hispanic origin and race questions, and then conducted follow-up interviews and focus groups.¹¹ The Census Bureau also conducted the 2015 National Content Test, to supplement the 2010 AQE, to further research ways to collect race and ethnicity data, including information for detailed subgroups for all majority reporting categories. The 2015 NCT included testing of the addition of a Middle Eastern North African (MENA) category.

In 2014, Census Bureau researchers found that 43.5 percent of Hispanics did not report an OMB race category, including 30.5 percent who reported or were classified as SOR alone.¹² Based on the Census Bureau's 2015 NCT study, the Census Bureau found that a combined question format yielded

⁵ U.S. Census Bureau, *2020 Census Redistricting Data (Public Law 94-171) Summary File News Conference*, YouTube (Aug. 12, 2021), <https://www.youtube.com/watch?v=us6Qzzps5l4&t=4934s>.

⁶ *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU (Aug 12, 2021), <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html>.

⁷ *Id.*

⁸ U.S. CENSUS BUREAU, 2015 NATIONAL CONTENT TEST: RACE AND ETHNICITY ANALYSIS REPORT, 1 (Feb. 28, 2017).

⁹ *Id.* at 4.

¹⁰ *Id.* at 6.

¹¹ *Id.* at 7–8.

¹² *Id.* at 7.

significantly lower percentages of respondents selecting SOR, invalid responses, or missing responses, when compared to the separate-question format.¹³ The 2015 NCT study found that more than 70 percent of respondents that identified as Hispanic did not select another major race or ethnic category, demonstrating that many Hispanics would like to choose Hispanic alone when providing a response.¹⁴ When Latinos responded to separate questions asking about race and ethnicity, 30 percent of Hispanics reported Hispanic and Some Other Race, and another 36 percent reported Hispanic, with Some Other Race and another group, which most often was White.¹⁵ Importantly, detailed reporting was the same or higher for the combined question with detailed checkboxes format versus the separate-question format, for every major ethnic or racial group.¹⁶ Focus group discussions from the Census Bureau's 2010 AQE qualitative focus group research showed that most Hispanics wanted to identify as Hispanic alone, and that in a separate-question format, most skipped the race question or provided an answer that did not accurately reflect how they prefer to self-identify, such as reporting white.¹⁷

The current standards no longer appear to be sustainable in producing the best, most complete, and most accurate data on race and ethnicity today, as evidenced by the significant growth of the Some Other Race category in the decennial Census; quantitative and qualitative research conducted by the Bureau; and MALDEF's own experience, as well as that of our Census partners, engaging in Census and data collection outreach. There is confusion among a growing number of Latinos about how to answer separate questions on race and ethnicity based on self-identification.

Furthermore, given the politicization of the 2020 Census by the Trump Administration and the efforts to add a citizenship question and acquire administrative records on undocumented immigrants, MALDEF is concerned about the effect that a separate question may have on response rates for the Latino and immigrant community. MALDEF is particularly worried about how increasing anti-immigrant rhetoric and attacks may be influencing how Latino immigrant families and respondents perceive a separate and singular question about Hispanic origin. In a context of increasing political polarization and divisive rhetoric surrounding issues of race and immigration, a singular question focusing solely on identity as Hispanic is likely to be viewed by many respondents with suspicion and fear. This likelihood, which would increase the rate of non-response to the question, increases as the general population's knowledge or understanding of the original reason for a separate question diminishes over time. A negative perception of a separate Hispanic origin question might influence individuals not to respond because they fear some negative government action, thus affecting the accuracy and completeness of this data.

MALDEF believes that research, testing, and implementation of improvements to data collection are a necessary and ongoing process. Particularly, when collecting race, ethnicity, and national origin data, the process for measuring this data must keep pace with shifting demographics and the evolution of social constructs.

Based on the need for more accurate and complete data of the U.S. population—including accurate and complete data for the Latino population in the U.S.—and the Census Bureau's research, which shows

¹³ *Id.* at 58.

¹⁴ *Id.* at 46.

¹⁵ *Id.* at 46.

¹⁶ *Id.* at 58.

¹⁷ *Id.* at 46–47.

that a combined-question format yields more accurate and complete data for all racial and ethnic categories, MALDEF supports revising the Standards to provide for a combined-question format to collect race and ethnicity data. MALDEF also supports the addition of a Middle Eastern North African category, in order to further improve race and ethnicity data collection.

However, MALDEF also believes that there remains important research to be done before any change is finalized or implemented to ensure optimal data collection. There must be protections and policies accompanying any change to ensure that the format improves data collection for all racial and ethnic categories, and importantly, for all sub-groups and respondents that select more than one racial or ethnic category, particularly the Afro-Latino population and the Arab-Latino population, to ensure these populations are completely and accurately represented in the data.

A. Question Stem

MALDEF understands the need to make sure that all Latinos who self-identify as such must be able to not only accurately respond to data collection surveys, but must also be shown in the tabulation and reporting of that data to the public and for government purposes. This is particularly true for specific groups of the Latino population, such as Afro-Latinos. A combined question format must allow respondents the ability to select multiple race or ethnicity responses. Improved data, specifically with respect to more complete and accurate Hispanic or Latino data, is critically important for the Latino population, and given its size, for the total U.S. population as well. But OMB and the Census Bureau must also prioritize research, as well as stakeholder and community engagement, that focuses on ensuring that the question phrasing and the sub-group checkboxes yield the most complete and accurate counts possible for all sub-groups.

We are mindful of concerns that changes to data collection might lead to increased loss of data for certain populations, specifically in the Black/African American and American Indian and Alaska Native categories. It is promising that in its 2015 NCT, the Census Bureau found that reporting for the Black/African American race category for Hispanics was higher in a combined question format with detailed multiple checkboxes and write-in space, than it was for a separate-question format. We urge additional testing of methods and policies that can further improve data collection to ensure that if adopted, a new combined-question format mitigates any loss of data for the major categories and for subgroups while also yielding better quality data for all racial and ethnic categories.

MALDEF urges OMB and the Census Bureau to test and identify the best question directions that will articulate to Afro-Latino respondents that they should consider selecting the Black/African American race category, as well as the Hispanic/Latino ethnic category, if they identify with both categories. MALDEF believes that testing of specific directions is necessary, and might include instructions such as, “If the respondent identifies as Afro-Latino, the individual should consider selecting both the Hispanic/Latino and Black/African American categories,” or other phrasing intended to clearly articulate that Afro-Latinos should consider whether they want to select both categories. This is particularly important in the early implementation of any change. In addition to exploring question phrasing that incorporates the concepts of race and ethnicity, the Working Group should consider questions that do not use those terms, such as, “With which of the following groups do you identify?”

B. Checkboxes

Further research must also test and identify the most inclusive and appropriate detailed sub-group checkboxes to be included under each racial or ethnic category. The subgroups checkboxes and examples should be more reflective of the range of origins that may exist in each major category. It is critical that in developing the list of checkboxes and examples, that the Census Bureau and OMB engage in direct, broad, and meaningful consultation with community stakeholders and data users early in the process to allow the Census Bureau and OMB to test suggested possibilities.

Specifically, OMB and the Census Bureau should conduct testing on:

- Whether an Afro-Latino checkbox should be included under the Black/African American and Hispanic/Latino categories, and if it would help produce better, more complete and accurate data for Afro-Latinos.
- Identifying a Latin American country for inclusion as a checkbox under the Black/African American category, such as the Dominican Republic, to make clear that the category is broad enough to include all individuals who self-identify as Black, such as Afro-Latinos. Currently the Black/African American category includes no countries from Latin America.
- Whether OMB and the Census Bureau should continue testing of national origin/detailed checkboxes periodically as population trends in the U.S. and across the globe change.

Finally, MALDEF is strongly of the view that “Spanish/Spaniard” does not belong in the Latino category as a subgroup or example; it belongs solely in the White category.

II. Proposal to require the collection of detailed race and ethnicity categories by default

The Working Group has asked for comments related to the minimum reporting categories for race and ethnicity. MALDEF supports the Working Group’s recommendation to require detailed minimum reporting categories for federal agencies to use when collecting and presenting race and ethnicity data. However, the proposal to allow agencies to abandon detailed data collections where the agency believes it is not worth the additional agency or public burden is unlikely to function as a true requirement for collecting detailed disaggregated data.

Disaggregated data is important for understanding disparities, differences, and distinct needs within a main racial or ethnic category. As the Latino community continues to grow, disaggregated data becomes even more important. Latinos of different races or countries of origin may experience distinct barriers as a whole or in certain regions, and may require tailored support and services. Without disaggregated data, these nuances and diversity of experiences risks being lost. We urge OMB and the Census Bureau to require that agencies collect disaggregated detailed data, unless the agency seeks an exception to depart from the standards from OMB.

With respect to the burden and cost that issuing specific guidelines for detailed collection of race and ethnicity might have on federal agencies, state and local agencies, private sector entities, and the public, MALDEF again emphasizes the importance of detailed subgroup data and its critical function for protecting civil rights and understanding the diversity within the Latino and other non-white communities.

A. Collection and reporting of multiple subgroups

The current OMB standards do not allow for reporting more than one Hispanic/Latino country of origin or subgroup (e.g., someone cannot be reported as both Mexican and Puerto Rican), or to report someone

of mixed Hispanic/non-Hispanic heritage. The standards should be revised to allow individuals to select multiple subgroups and to have that data tabulated and reported out so that data users and communities can gain greater detail about the Latino community and the distinct needs and civil rights concerns of each subgroup.

III. Consistency

MALDEF additionally recommends that when issuing new Standards for data collection, OMB should require consistent methods of collection across agencies. The Working Group contemplates allowing various approaches to data collection, raising the possibility of inconsistent collection and reporting that would make it difficult to compare data across agencies. Implementing new standards may be more challenging for certain agencies or sub-agencies than others, but the changes made now to these Standards will help drive agency data collection to meet current needs and bring them in line with current population trends, while guaranteeing the use of scientifically rigorous methodology. In that vein, OMB should issue guidance to ensure that data collection is as consistent as possible across platforms. The Census Bureau's 2015 NCT report indicates the checkboxes in a combined question format yields detailed reporting for all racial and ethnic subgroup subgroups that is the same or higher than other question formats. This is an important potential benefit of the combined question format. But a requirement that does not apply the Standards across all formats will realize improvements in data collection only for certain collection platforms and not others. With the increased use of technology by federal agencies to collect data, online or digital platforms are the most preferred method of responding from an agency and often from a respondent's perspective.¹⁸ But they are not necessarily the most successful, given that evidence shows that online surveys may yield lower response rates.¹⁹ In addition, a push to internet data collection creates response rate issues for communities with limited access to the internet, such as elderly, limited English proficient, or low-income populations. OMB's guidance should ensure that respondents using paper-based responses have equal access to accurately self-identify.

IV. Race and ethnicity data tabulation

While MALDEF is supportive of whichever single-question format most accurately produces total population and subgroup populations for all Latinos, including Afro-Latinos, the tabulation of race and ethnicity responses is of critical concern. The Census Bureau found that "[w]hen Hispanics have an opportunity to choose Hispanic as their category in the combined question, the SOR identification drops down to the residual response group that it was intended to be."²⁰ At the same time, the Census Bureau found that "[t]here were no significant differences in the reporting of Asian, Black, or NHPI when comparing the Separate Question format to the combined question formats."²¹

¹⁸ See D'Vera Cohn, *Census Bureau Plans to Trade Paper Responses for Digital Ones*, PEW RESEARCH CENTER (Feb. 24, 2016), <http://www.pewresearch.org/fact-tank/2016/02/24/for-2020-census-bureau-plans-to-trade-paper-responses-for-digital-ones/>; see generally Gavin Gradnigo et al., *Survey Research Response Rates: Internet Technology vs. Snail Mail*, 18 J. BUS. INDUSTRY & ECON. 127 (2013); Tse-Hua Shih, *Comparing Response Rates in E-mail and Paper Surveys: A Meta-Analysis*, 20 ED. RESEARCH REV. 26 (2008).

¹⁹ *Id.*

²⁰ U.S. CENSUS BUREAU, *supra* note 8, at 42.

²¹ *Id.* at 42.

Should OMB move forward with a combined question format, the Standards should allow for reporting and tabulation that: 1) allows individuals to select multiple responses and be tabulated under multiple responses or to only identify as an “ethnicity” (Hispanics, or MENA if approved as an ethnicity); and 2) provides for the tabulation of a race or ethnicity category’s total population.

MALDEF would be very concerned with any tabulation standards that impose a racial classification on Hispanic or Latino respondents that make no race selection or select SOR, or reporting and tabulations that do not provide users with the ability to obtain the Hispanic total population, meaning whenever Hispanic was selected alone or in combination. Under the current standards, the Census Bureau imputes race for respondents that do not select a race category or select “Some Other Race” on the Census race question. As a result, some individuals are assigned a “white” race category, based on methodology that takes into account factors such as respondent, family, and neighbor characteristics, administrative records, and other sources. The number of Hispanic/Latino respondents for which race is imputed, and how, is unknown. This practice, however, undercuts the principle of self-identification, and further demonstrates why the procedures for collection, tabulation, and reporting of race and ethnicity data under the current standards are not producing the best data possible.

Data tabulation and reporting is particularly important for organizations like MALDEF. Given MALDEF’s litigation to enforce civil rights protections, federal agency statistics are critical to the organization’s core mission. Our cases are often dependent on the reporting of the total Hispanic population cross tabulated with other key data in order to establish critical facts and demonstrate discrimination against Hispanics. For instance, in MALDEF’s voting rights work, the organization relies on the Census Redistricting Data, provided under Public Law 94-171,¹⁵ which reports Hispanic population cross tabulated with voting age population or citizen voting age population. The Census Bureau’s current consideration of how to tabulate data from a combined-question format, as compared to current tabulation and reporting, will depend greatly on OMB’s direction and revised Standards. MALDEF urges OMB and the Census Bureau to remain in close consultation throughout any revision process with stakeholders and data users, like MALDEF and others, to ensure that tabulation and reporting policies and procedures improve upon current practices and provide users the most accurate, complete, and usable data possible.

OMB and the Census Bureau should work to mitigate any potential loss of data through the use of a combined-question format. A reporting structure that would require only minimum reporting categories for each race or ethnicity category alone and a “two or more responses” category for all other multiple responses would be insufficient. MALDEF believes that all race and ethnicity data should be tabulated and reported as collected as much as possible, and disclosure only limited by legitimate and substantial privacy concerns. MALDEF intends to engage with OMB, the Census Bureau, and relevant agencies that collect and report data for civil rights protections over the coming months to protect the data reporting necessary for our work, specifically the preservation of Hispanic total population (for all respondents selecting Hispanic alone or in combination) in tabulation and reporting, and for accurate and complete tabulation and reporting of all Hispanic subgroups and Hispanic respondents that select one or more other race or ethnic categories (for instance someone who selects both Hispanic and MENA).

OMB has the opportunity to set the trend for data collection, particularly given the rapid growth in diversity across the country and the expected trends in population growth over the next several decades.

The need for more detailed subgroup racial and ethnic data is important for understanding the composition of our local, state, and national communities in order to establish sound policy and efficient programming and services. Ultimately, a failure to push for updated standards that provide more detailed and comprehensive collection on race and ethnicity data will result in greater costs down the road, both to the government and the public. Along those lines, MALDEF would be concerned with OMB guidance that would only encourage that the detailed reporting be collected, but did not require it by federal agencies. Again, OMB recognizes that it sets the trend for data collection, but the likelihood of many federal agencies complying with even a strong recommendation is low. In order to ease agencies into the implementation of new Standards, OMB should investigate the possibility of prioritizing the order in which the agencies implement these Standards. This would ensure that those that collect and report data that would be most useful at a disaggregated level are able to do so first.

V. Conclusion

For the foregoing reasons, MALDEF supports the proposal to allow for a combined-question format to collect race and ethnicity data, but recommends further research and testing on specific wording and instructions to ensure this format completely and accurately captures all populations. We also urge the Working Group to fully engage with stakeholders, communities, and data users throughout the process to ensure concerns with potential data loss are addressed and mitigated, and that the final Standards implement policies and procedures that will be a benefit to our work in civil rights enforcement by improving the quality of the data and its usability.

Please reach out with any questions or concerns at (202) 293-2828 or asenteno@maldef.org.

Thank you,

A handwritten signature in black ink, appearing to read "Andrea Senteno", with a stylized flourish at the end.

Andrea Senteno
Regional Counsel