



February 1, 2016

The Honorable Shaun Donovan, Director
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Re: Discrimination on the Basis of Sex, Notice of Proposed Rulemaking, RIN 1250-AA05

Dear Director Donovan,

On behalf of the National Center for Transgender Equality, I am writing to you concerning the Department of Labor's proposed rule regarding Discrimination on the Basis of Sex, currently under review by OMB. As you continue to consider the Department's proposed rule, we urge you to ensure that the final rule reflects the full scope of federal contractors' obligations under Title VII and EO 11246. In particular, we ask that you emphasize the federal contractors' legal obligation to provide equal and nondiscriminatory health benefits regardless of gender identity or transgender status.

Discrimination in health insurance is one of the most common, and most blatant, forms of discrimination against transgender people. Many insurance plans sponsored by employers, including federal contractors, exclude transition-related treatments, deny transgender employees health care services that are otherwise covered for non-transgender people, and otherwise limit or deny coverage in a discriminatory manner.

Title VII—and by extension EO 11246—prohibits employers from discriminating based on gender identity in the conferral of benefits, including the provision of health benefits.ⁱ Employers that offer health care benefits should provide access to the same health care benefits for transgender and non-transgender employees, and the health plans may not deny or limit coverage on the basis of gender identity and related medical conditions. For example, an employer cannot discriminate against transgender individuals by arbitrarily singling them out for categorical denials of coverage for benefits provided to non-transgender people.ⁱⁱ The EEOC recently implemented this requirement in a settlement of a Title VII lawsuit against Deluxe Financial Services, which directed the employer to ensure compliance with Title VII by removing any “partial or categorical exclusions for otherwise necessary medical care solely on the basis of sex (including transgender status) and gender dysphoria.”ⁱⁱⁱ

Transgender-specific exclusions cannot be justified on any neutral basis, such as safety or medical necessity. Every major medical association in the United States recognizes the safety, efficacy, and necessity of medical interventions for gender dysphoria and opposes transgender exclusions.^{iv} This consensus informed decisions by the Department of Health and Human Services (HHS) to overturn Medicare's exclusion of transition-related medical procedures in 2014,^v and more recently to require plans under Medicare to provide transition-related care in accordance with accepted clinical standards for medical necessity.^{vi} It also informed the decision of the Office of Personnel Management (OPM) in

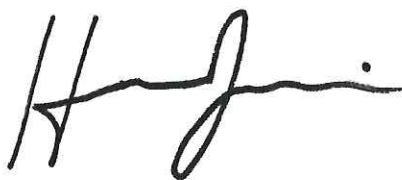
2015 to direct federal employee health plans to remove transgender exclusions.^{vii} To date, 12 states and the District of Columbia have, by regulations or guidance, expressly banned transgender exclusions on the ground that they discriminate based on sex, gender identity, and health condition and/or violate mental health parity or unfair insurance practice laws.^{viii}

Interpreting Title VII and EO 11246 to prohibit health plan exclusions targeting transgender people is consistent with the approach taken by the Department of Health and Human Services to gender discrimination under the Affordable Care Act. In a recent proposed rule, HHS interpreted Section 1557 of the ACA to prohibit health care discrimination on the basis of gender identity in ACA-covered health plans, including most employer-sponsored plans.^{ix} The proposed rule provides that blanket exclusions of transition-related care, as well as and other policies that discriminatorily deny or limit coverage for transition-related care violate Section 1557. In addition to prohibiting complete exclusions targeting transgender people, HHS stated that a denial or limitation of care may be discriminatory when it is solely based on the fact that a service used for the purpose of gender transition, evidence of which can include the plan's coverage of substantially similar services for other conditions.^x For example, the hormone therapy involved in gender transition, for example, is the same as that prescribed for endocrine disorders, such as hypogonadism, or women with menopausal symptoms.^{xi} The reconstructive surgical procedures that may be used in gender transition are also regularly covered by insurance companies for non-transgender individuals for purposes such as treating injuries, or for cancer treatment or prevention.^{xii} A health insurance policy that covers such services for non-transgender people but not for medically necessary transition-related care may therefore violate Section 1557. While HHS' final rule is expected to further clarify the application of Section 1557 to employer-sponsored plans, the proposed rule should inform OFCCP's approach to preventing gender-based discrimination in employer health benefits.

We urge OMB to ensure that the final rule appropriate reflects these developments in the interpretation of federal law, and clarifies that Title VII and EO 11246 prohibit federal contractors from offering employee health plans with categorical exclusions for some or all treatments related to gender transition or that otherwise discriminate on the basis of gender identity or transgender status.

We would greatly value the opportunity to discuss these recommendations with you or your staff while the rule is under review.

Sincerely,

A handwritten signature in black ink, appearing to read 'H. J. Tobin', with a stylized flourish at the end.

Harper Jean Tobin
Director of Policy
National Center for Transgender Equality

ⁱ See, e.g. *United States v. Se. Okla. State Univ.*, No. CIV-15-324-C, 2015 WL 4606079 (W.D. Okla. Jul. 10, 2015) (refusing to dismiss Title VII claim which included allegation of discriminatory benefit denial under transgender exclusion); Consent Decree, *EEOC v. Deluxe Fin. Servs. Corp.*, No. 0:15-cv-02646-ADM-SER, at *10 (D. Minn. Jan. 20, 2016) (employer required to remove exclusions based on transgender status from employee health plan to comply with Title VII). Cf. also *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 684 (1983) (employer's exclusion of pregnancy-related conditions violated Title VII); Commission Decision on Coverage of Contraception, 2000 WL 33407187 (E.E.O.C. Guidance Dec. 14, 2000) (an exclusion of prescription contraceptives, while facially neutral, was discriminatory because affected only female-assigned individuals).

ⁱⁱ Consent Decree, *Deluxe Fin. Servs. Corp.*, No. 0:15-cv-02646-ADM-SER, at *11 (D. Minn. Jan. 20, 2016) (“[I]f the health benefits plan covers exogenous hormone therapy for non-transgender enrollees who demonstrate medical necessity for treatment, the plan cannot exclude exogenous hormone therapy for transgender enrollees or persons diagnosed with gender dysphoria where medical necessity for treatment is also demonstrated.”).

ⁱⁱⁱ *Id.*

^{iv} See, e.g., Am. College of Physicians, *Lesbian, Gay, Bisexual and Transgender Health Disparities: A Policy Position Paper from the American College of Physicians*, 163 ANNALS OF INTERNAL MEDICINE 135, 140 (2015); Am. Psychiatric Ass’n, *Position Statement on Access to Care for Transgender and Gender Variant Individuals* (2012); Am. Medical Ass’n, *AMA Policies on GLBT Issues, Patient-Centered Policy H-185.950, Removing Financial Barriers to Care for Transgender Patients* (2008); Am. Psychological Ass’n, *Policy on Transgender, Gender Identity & Gender Expression Non-Discrimination* (2008).

^v See Dep’t of Health & Human Servs., NCD 140.3, *Transsexual Surgery* (2014).

^{vi} See Dep’t of Health & Human Servs., Decision of Medicare Appeals Council, No. M-15-1069 (Jan. 21, 2016).

^{vii} FEHB Program Carrier Letter No. 2015-12, *Covered Benefits for Gender Transition Services* (Jun. 23, 2015).

^{viii} These states are California, Colorado, Connecticut, Illinois, Massachusetts, Minnesota, Nevada, New York, Oregon, Rhode Island, Vermont, and Washington State.

^{ix} *Nondiscrimination in Health Programs and Activities*, 80 Fed. Reg. 54,172, 54,189 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92).

^x *Id.*

^{xi} Wylie C. Hembree et al., *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*. J. CLINICAL ENDOCRINOLOGY & METABOLISM, 3132 (2009).

^{xii} Dep’t of Health & Human Servs., NCD 140.3, *Transsexual Surgery*, 12 (2014).

Proposed rule language (new § 60-20.4(f))

Contractors may not provide employees with health insurance that partially or categorically excludes otherwise medically necessary care solely on the basis of sex (including transgender status) or gender dysphoria, or otherwise discriminates on the basis of transgender status.

Explanation (proposed preamble language)

Examples of limitations that discriminate against transgender individuals include if: (a) an individual is denied coverage for a service to treat gender dysphoria even though substantially similar services are covered for treatment of other conditions (for example, if the health benefits plan covers exogenous hormone therapy for non-transgender enrollees who demonstrate medical necessity for treatment but does not cover such therapy for transgender enrollees), or (b) a plan applies stricter medical necessity or prior authorization requirements for a particular service when the service used to treat gender dysphoria than when used to treat other conditions (for example, if a plan applies additional medical necessity criteria not based on the most current, relevant clinical standard of care).

Frequently Asked Questions

Section 1557 of the Affordable Care Act

Notice of Proposed Rulemaking

1. What is Section 1557 and when did it take effect?

Section 1557 is the nondiscrimination provision of the Affordable Care Act (ACA). The law prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in health programs and activities that receive federal financial assistance from the federal government or are administered by an Executive agency or any entity established under Title I of the ACA. Section 1557 has been in effect since its enactment in 2010.

2. In what ways does Section 1557 protect consumers?

Section 1557 makes it unlawful for any health care provider, such as a hospital or doctor, that receives funding from the federal government to refuse to treat an individual – or to otherwise discriminate against the individual – based on the individual's race, color, national origin, sex, age or disability. Section 1557 imposes similar requirements on insurers that get federal funding; they are barred, among other things, from excluding or adversely treating an individual on any of these prohibited bases. Under the proposed rule, Section 1557 also applies to the Health Insurance Marketplace and health programs administered by the Department of Health and Human Services (HHS).

3. How is the proposed rule under Section 1557 different from rules under the other civil rights laws the Office for Civil Rights already enforces?

The proposed rule combines and harmonizes existing, well-established federal civil rights laws and clarifies the standards HHS would apply in implementing Section 1557 of the Affordable Care Act, which says that individuals cannot be denied access to health care or health coverage or otherwise discriminated against because of their race, color, national origin, sex, age, or disability.

Building on long-standing and familiar civil rights principles, the proposed rule takes important steps forward. Section 1557 is the first federal civil rights law to prohibit discrimination on the basis of sex in health care. It extends nondiscrimination protections to individuals enrolled in coverage through the Health Insurance Marketplaces and certain other health coverage plans. And it holds HHS's health programs accountable under the standards of the rule.

health programs and activities require?

The proposed provision requires covered entities to provide individuals equal access to health programs and activities without discrimination on the basis of sex and to treat individuals consistent with their gender identity. This provision applies to all health programs and activities, including access to facilities, administered by the covered entity. This proposed approach is consistent with recent guidance and enforcement actions taken by the Department of Education, the Department of Justice, and the Equal Employment Opportunity Commission.

5. What does the provision regarding nondiscrimination in health insurance and other health coverage prohibit?

The proposed provision prohibits covered entities from discriminating on the basis of race, color, national origin, sex, age or disability when providing or administering health insurance or other health coverage. This prohibition applies to all health insurance issuers that are recipients of federal financial assistance, such as premium tax credits and cost sharing reductions associated with coverage offered through the Marketplaces, or Medicare Part D payments.

Under the proposed provision, a covered entity cannot: deny, cancel, limit, or refuse to issue or renew an insurance policy; deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions; or employ marketing practices or benefit designs that discriminate on the basis of race, color, national origin, sex, age, or disability. The proposed rule does not require plans to cover any particular benefit or service, but a covered entity cannot have a coverage policy that operates in a discriminatory manner.

The proposed provision also prohibits a covered entity from denying any claim, or imposing additional cost sharing or other limitations, on any health care services that are ordinarily or exclusively available to individuals of one gender, based on the fact that an individual's sex assigned at birth, gender identity, or recorded gender is different than the one to which the health care services are ordinarily or exclusively available.

Under the proposed rule, explicit categorical exclusions in coverage for all health care services related to gender transition are facially discriminatory. Additionally, when providing or administering health insurance or other health coverage, a covered entity cannot deny or limit coverage, or deny a claim for any health care services related to gender transition if such denial or limitation results in discrimination against a transgender individual.

Transgender Health Care Coverage | HealthCare.gov

Transgender Health Care

Transgender people have important details to consider in the Health Insurance Marketplace.

Applying for Marketplace coverage

When you apply for Marketplace coverage as a transgender person, you should use the first, middle, and last name that are on your Social Security card. If you get a letter or an email saying there are “inconsistencies” or “data matching issues” in your application because your name doesn’t match the name on file with the Social Security Administration (SSA), you can go back to your application and update your name.

On your Marketplace application, it’s also recommended that you select the sex that appears on the majority of your other legal documents, such as your driver’s license or Social Security card. While the Marketplace doesn’t check an applicant’s sex against any other government record, including SSA, some state Medicaid agencies may verify your sex against available records. **Note:** The information you put on your Marketplace application will go to your health insurance company.

If you change your name and/or sex after you enroll in a plan, you should be able to update the information when you log in. If you have trouble updating this information, contact the Marketplace Call Center.

Sex-specific preventive services

Marketplace health plans must cover a set of preventive services — like shots and screening tests — at no cost to you when delivered by a doctor or other provider within your plan’s network.

Your health insurance company can’t limit sex-specific recommended preventive services based on your sex assigned at birth, gender identity, or recorded gender — for example, a transgender man who has residual breast tissue or an intact cervix getting a mammogram or pap smear.

If your doctor determines that the preventive service is medically appropriate for you and you meet the criteria for this recommendation and coverage requirements, your plan must cover the service without charging you a copayment or coinsurance, even if you haven’t met your yearly deductible.

Plans with transgender exclusions

Many health plans are still using exclusions such as “services related to sex change” or “sex reassignment surgery” to deny coverage to transgender people for certain health care services. Coverage varies by state.

Before you enroll in a plan, you should always look at the complete terms of coverage that are included in the “Evidence of Coverage,” “Certificate of Coverage,” or contract of insurance. This contains the full explanation of which procedures and services are covered or excluded under each plan. Plans might use different language to describe these kinds of exclusions. Look for language like “All procedures related to being transgender are not covered.” Other terms to look for include “gender change,” “transsexualism,” “gender identity disorder,” and “gender identity dysphoria.”

You can access the full terms of coverage through a plan’s [Summary of Benefits and Coverage](#). If you’re still not sure about how services would be covered or excluded, you should contact the plan’s issuer directly by phone.

These transgender health insurance exclusions may be unlawful sex discrimination. The health care law prohibits discrimination on the basis of sex, among other bases, in certain health programs and activities.

If you believe a plan unlawfully discriminates, you can file complaints of discrimination with your state’s Department of Insurance or the [U.S. Department of Health & Human Services Office for Civil Rights](#).

Once you’re enrolled in a plan, if your health insurance company refuses to pay a claim or ends your coverage, you also have the [right to appeal the decision](#) and have it reviewed by an independent third party.

Can we improve this page?

GET STARTED

BUILDING WORKPLACE EQUALITY WITH THE CORPORATE EQUALITY INDEX

Administered by the nation's largest non-partisan/non-profit LGBT civil rights organization, the HRC Foundation's Corporate Equality Index (CEI) survey and report provides an in-depth analysis and rating of large U.S. employers and their policies and practices for lesbian, gay, bisexual and transgender employees.



Equality is good for business:

- A majority of the Fortune 500 and AmLaw 200 participate in the CEI survey and report
- A community with \$884 billion in market share is watching your corporate practices
- The CEI garners national news, and has been featured in:



The CEI survey, affiliated resources, and consultation from HRC staff are free of charge.

The CEI is designed to not only be a report out on workplace standards for LGBT employees, but also a roadmap to full LGBT workplace inclusion. HRC is committed to helping your company meet the best practices identified in the CEI and achieve excellence in LGBT workplace equality.

The CEI Evaluates Companies Based On:

Non-Discrimination Policy

- sexual orientation
- gender identity

Employment Benefits

- equal partner/spousal benefits
- transgender-inclusive benefits

Organizational LGBT Competency

- diversity/competency training and metrics
- employee group
- engagement or diversity metrics

Public Engagement

Responsible Citizenship

CEI 2016 QUICK FACTS

851 companies were rated in the CEI

321 of the participating businesses were Fortune 500 companies

511 employers offer transgender-inclusive health care coverage

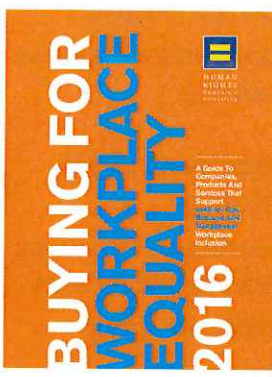
“ We're proud to receive a perfect score on the Corporate Equality Index for a 14th straight year. This honor recognizes JPMorgan Chase's long-standing support of the LGBT community. By fostering a diverse and inclusive environment in our firm, we can approach challenges and opportunities with myriad viewpoints, enabling us to best serve our global client base.”

— Mary Callahan Erdoes, CEO, J.P. Morgan Asset Management

BUYING FOR WORKPLACE EQUALITY

In 14 years, the CEI has helped lead a sea-change in workplace standards for LGBT inclusion across the country.

These ratings matter to talented employees when they consider where to work, and they matter to consumers when they consider where to spend their dollars.



All consumer-oriented businesses rated in the CEI are included in our “Buying for Workplace Equality” guide. This guide gives buying power to people who value LGBT inclusion in the workplace, which is projected to be \$884 billion.

Source: Witeck Communications and MarketResearch.com

In 2016, it is still legal to fire people because of their sexual orientation in 28 states and because of their gender identity in 31 states.

Yet, the most successful businesses are ahead of the law.

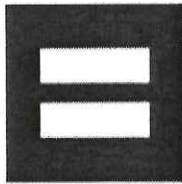
A majority of Fortune 500 companies, spurred by CEI standards, include both sexual orientation and gender identity in their non-discrimination policies.



Businesses that earn a 100% are nationally recognized as our **“Best Places to Work for LGBT Equality.”**

Please join us in advancing equality for LGBT employees in the workplace by participating in the 2017 Corporate Equality Index. **The deadline to submit your survey is August 2016.** To learn more, please contact cei@hrc.org or visit hrc.org/cei.





HUMAN
RIGHTS
CAMPAIGN®

March 31, 2015

Debra A. Carr, Director
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Ave. NW, Room C-3325
Washington, DC 20210

RE: RIN 1250-AA05 – Discrimination on the Basis of Sex

Dear Ms. Carr:

On behalf of the Human Rights Campaign's more than 1.5 million members and supporters nationwide, I write in response to the proposed revisions to the Sex Discrimination Guidelines for federal contractors administered by the Office of Federal Contract Compliance Programs (OFCCP). We applaud OFCCP's commitment to updating these critical guidelines and aligning contractor standards with both Executive Order 11,246 and existing law. These revisions will undoubtedly serve as a critical tool for combatting sex-based employment discrimination.

The Proposed Guidelines and LGBT Workers

As we discuss below, we especially appreciate the inclusion of protections on the basis of sex stereotyping and gender identity within the proposed guidelines. Despite recent advances in equality, lesbian, gay, bisexual, and transgender (LGBT) workers across the country still face discrimination on the job simply because of who they are. Currently, 29 states offer no explicit protections from discrimination on the basis of sexual orientation, and 32 states offer no explicit protections on the basis of gender identity. In the absence of uniform, nation-wide protections, many LGBT people who experience discrimination are left with little recourse. The OFCCP revised guidelines not only provide much needed protection for LGBT people working for federal contractors and subcontractors, they also set an important example of fair and effective personnel policies for private employers.

Anti-LGBT Bias is Unlawful Sex Discrimination

As revised, the proposed guidelines clarify that anti-LGBT bias is prohibited as a form of unlawful sex discrimination. We support the prohibition of discrimination against workers on the basis of gender identity or gender-based stereotyping as a form of sex discrimination. This interpretation will provide much needed support for transgender and gender nonconforming workers. In a recent survey, 47% of transgender workers reported experiencing discrimination on the job – in the hiring or promotion process or through termination.¹ This discrimination in employment compounds inequality many LGBT people experience in housing, education, and healthcare – contributing to increased incidence of poverty and homelessness for our community.

This interpretation is consistent with the current status of federal law and EEOC policy pertaining to sex discrimination.² Although the proposed guidelines provide the important clarification that transgender employees must have access to the bathroom facilities consistent with their gender identity, we support further strengthening of this provision to include all workplace facilities, and by providing that single user restrooms not be segregated by sex. Additionally, § 60-20.3 as proposed contains an exception for bona fide occupational qualification (BFOQs). We support further clarification that a valid BFOQ must be applied based on an employee's gender identity. We also recognize that, although the guidelines do provide an example of illegal sex discrimination on the basis of an employee's nonconformity to "sex-role expectations by being in a relationship with a person of the same sex" we support more explicit inclusion of discrimination based on sexual orientation by including "sexual orientation" along with gender identity in § 60-20.2(a), § 60-20.7(b), and § 60-20.8(b).

Obligation to Protect Against and Respond to Sex-Based Harassment

Sex-based harassment on the job is an invidious form of sex discrimination. Women and LGBT workers face high rates of sex-based harassment on the job. Too often, however, workers do not report these incidents due to fear of retaliation or termination. The proposed addition of § 60-20.8 to address sex-based harassment is a meaningful acknowledgement of the pervasiveness of this type of discrimination and the lived experience of so many workers. We urge that OFCCP's specification that harassment "because of sex" be broadly interpreted. Due to the many forms that sex-based harassment can take, a broad interpretation is necessary in order to ensure that the rule will provide real protections for workers. We applaud the proposed incorporation of the EEOC's Guidelines relating to sexual harassment into the guidelines. This will provide employers with increased clarity regarding their obligation to prevent and respond to such harassment in the workplace.

While the proposed additions will serve as helpful tools for workers and their employers, we also acknowledge that the guidelines will be more effective with additional clarification. We urge OFCCP to provide that employers may be held vicariously liable for harassment perpetrated by

¹ Brad Sears & Christy Mallory, The Williams Institute, Documented Evidence of Employment Discrimination & Its Effects on LGBT People, 4 (July 2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/SearsMallory-Discrimination-July-20111.pdf>.

² See, e.g. *Jacqueline A. Cote v. Wal-Mart Stores East, LP*; EEOC Charge No. 523-2014-00916.

their employees who have the authority to make employment decisions. This additional clarification would not only provide additional weight to the guidelines, but would also be consistent with Supreme Court precedent involving employer liability for supervisor harassment. We also encourage OFCCP to provide additional guidance as to what harassment on the basis of gender identity or transgender status may look like – for example the intentional and repeated use of a former name or pronouns that are not consistent with a worker’s lived gender identity.

LGBT Workers Suffer from Pay Discrimination and will Benefit from a Narrowed Wage Gap

OFCCP’s proposed §§ 60-20.3 and 60-20.4 include important clarifications to the law, which will serve as a meaningful step towards preventing and reducing sex-based pay discrimination. The wage gap, which remains at 78 cents on the dollar is compounded for lesbian and bisexual female workers. These dual female headed households have the highest incidents of poverty of all types of couples.³ These couples experience an intersection of discrimination based both on sex as well as sexual orientation. The proposed update to the definition of “compensation” brings it in line with the current understanding of compensation in other areas within OFCCP’s prevue. By replacing the current term “wage schedules” that is currently used by the guidelines, the proposed language change modernizes the guidelines – making them a more inclusive and accurate reflection of what employees actually receive in exchange for their work. We also applaud the proposed independent compliance reviews. This will help to smoke out wage discrimination in instances where employees will refrain from reporting discrimination due to fear of retaliation. Such compliance reviews are consistent with the overall goal of OFCCP’s proposed rule to prohibit punitive pay secrecy policies in federal contracts.

Although we appreciate the proposed changes as an important first step, the wage gap portion of the proposed guidelines could be strengthened. We encourage OFCCP to encourage employers to take affirmative steps towards ending the wage gap and encouraging transparency in pay practices across the board.

* * * *

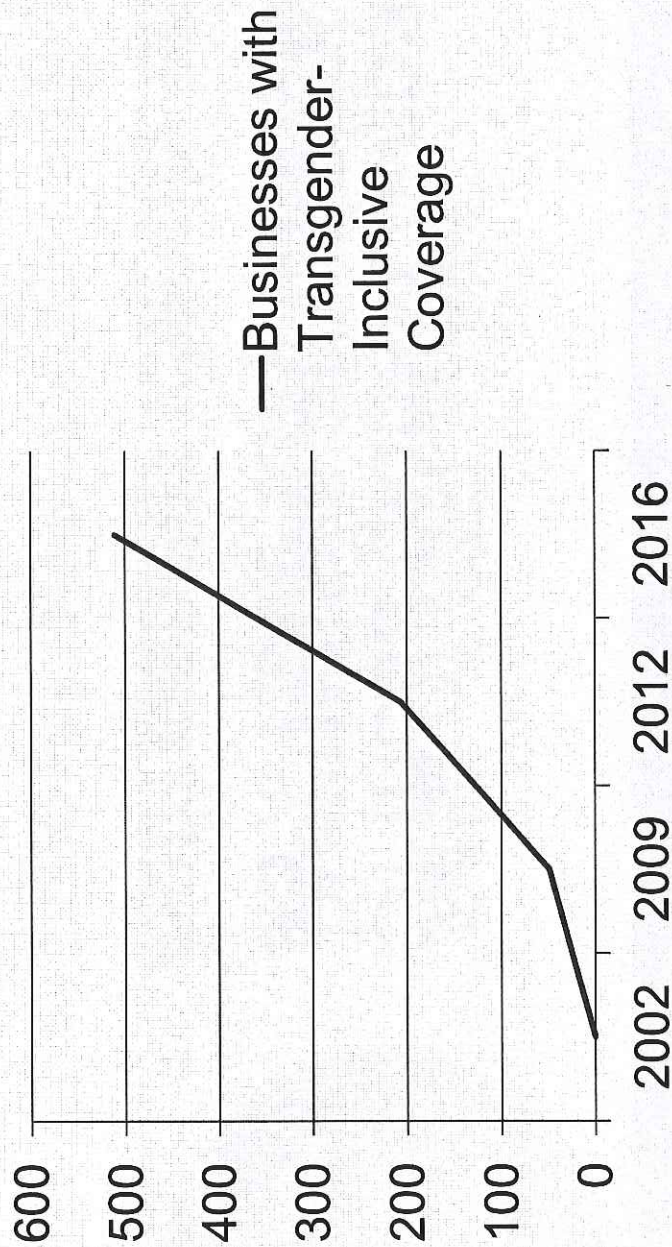
We appreciate the opportunity to provide these comments. Please do not hesitate to contact me if I can provide any additional information or clarification.

Sincerely

³ Poverty in the Lesbian, Gay, and Bisexual Community, March 2009. Randy Albelda, M.V. Lee Badgett, Alyssa Schneebaum,, Gary J. Gates; The Williams Institute. Available at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf>.

TRANSGENDER-INCLUSIVE HEALTH CARE COVERAGE

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54% of CEI-rated companies,
Of those global companies,
businesses are global
95% have fully inclusive –

both gender identity and
sexual orientation - globally
applicable non-
discrimination policies and/or
codes of conduct.