

June 6, 2022

Administration on Aging  
Administration for Community Living  
Submitted via email to [OAAregulations@acl.hhs.gov](mailto:OAAregulations@acl.hhs.gov)

**RE: Request for Information: Older Americans Act Regulations  
(RIN # 0985-AA17)**

To Whom It May Concern,

We are grateful for the opportunity to provide comments to the Administration for Community Living (the “Administration”) regarding its above-captioned request for information on potential amendments to its regulations issued to implement certain provisions of the Older Americans Act of 1965, as amended (the “OAA”). *See* 87 Fed. Reg. 27,160 (May 06, 2022).

The undersigned are scholars affiliated with the Williams Institute at the UCLA School of Law. The Williams Institute is dedicated to conducting rigorous and independent research on sexual orientation and gender identity (“SOGI”), including on disparities and discrimination experienced by lesbian, gay, bisexual, and transgender (“LGBT”) people. The Williams Institute collects and analyzes original data, as well as analyzes governmental and private data, and has long worked with federal agencies to improve data collection on the U.S. population. These efforts include producing widely-cited best practices for the collection of SOGI information on population-based surveys.<sup>1</sup>

We write in response to the request by the Administration for comments on “recommended changes, additions, or deletions” to its regulations for programs authorized under Titles III, VI, and VII of the OAA.<sup>2</sup> More specifically, we write to recommend that the Administration consider the addition of regulations: (1) providing for the standardized collection of information on participants’ SOGI; and (2) requiring that participating entities provide assurances related to non-discrimination and confidentiality of information to facilitate the participation of LGBT people in both funded programs and associated collections of data. In Part I, we provide a review of relevant existing research on LGBT older adults, including on their experiences with discrimination and observed disparities when compared to non-LGBT older adults—including from studies on the impact of the COVID-19 pandemic—suggesting that LGBT older adults are a population with “greatest social need.” In Part II, we review provisions of the OAA supporting the collection of information on participants’ SOGI to effectuate both general requirements and those related to populations with greatest social need. Finally, in Part III, we conclude by providing our recommendations for potential regulatory activity by the Administration, alongside a review of existing research on best practices for the collection of

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<sup>1</sup> *See, e.g.*, GENDER IDENTITY IN U.S. SURVEILLANCE (GENIUSS) GROUP, WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS TO IDENTIFY TRANSGENDER AND OTHER GENDER MINORITY RESPONDENTS ON POPULATION-BASED SURVEYS (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Survey-Measures-Trans-GenIUSS-Sep-2014.pdf>; SEXUAL MINORITY ASSESSMENT RESEARCH TEAM (SMART), WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS ABOUT SEXUAL ORIENTATION ON SURVEYS (2009), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Best-Practices-SO-Surveys-Nov-2009.pdf>.

<sup>2</sup> 87 Fed. Reg. at 27,160.

SOGI information, including measures recommended by an ad hoc panel formed by the National Academies of Sciences, Engineering, and Medicine consistent with the existing practices of other federal agencies already collecting SOGI information.

## **I. Research Documents Health and Economic Disparities and Discrimination Experienced by LGBT Older Adults**

The Administration’s request for information indicates that, in considering potential regulatory actions to implement the reauthorized OAA, it is particularly interested in actions that might align with a recent executive order related to equity.<sup>3</sup> Notably, in defining “equity,” that order expressly names “lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons” among the populations that have historically experienced denials of “consistent and systematic fair, just, and impartial treatment” by laws, policies, and institutions.<sup>4</sup> Likewise, the Administration has itself noted that “isolation due to sexual orientation or gender identity may restrict a person’s ability to perform normal daily tasks or live independently” and that, as a result, “LGBTQ+ older adults should be targeted for services and supports because they meet the Older Americans Act definition of ‘greatest social need.’”<sup>5</sup> Below, we offer a review of existing research on LGBT older adults in support of these conclusions.

LGBT-identified people comprise approximately 4.5% of the U.S. adult population.<sup>6</sup> We estimate that approximately 11 million adults in the U.S. identify as LGBT, including approximately 1.4 million adults who are transgender.<sup>7</sup> Estimates on the population of LGBT older adults in the U.S. vary, with some researchers estimating that the population of LGBT people over 50 will double to over 5 million adults by 2030.<sup>8</sup> We estimate that approximately 7% of LGBT adults in the U.S. are age 65 or older,<sup>9</sup> including approximately 217,000 transgender older adults.<sup>10</sup>

Similar to the country as a whole, the population of LGBT adults in the U.S. is demographically diverse. For example, drawing from Gallup Daily Tracking data collected between 2015 and 2017, we’ve previously estimated that 58% of LGBT adults are female.<sup>11</sup>

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<sup>3</sup> 87 Fed. Reg. at 27,161, *citing* Exec. Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009 (Jan. 20, 2021).

<sup>4</sup> 86 Fed. Reg. at 7009.

<sup>5</sup> Brian Altman, ACL: *Proud to Serve and Support LGBTQ+ Older Adults*, ACL BLOG (June 16, 2021), <https://acl.gov/news-and-events/acl-blog/acl-proud-serve-and-support-lgbtq-older-adults>.

<sup>6</sup> KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST., ADULT LGBT POPULATION IN THE UNITED STATES 1 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Adult-US-Pop-Jul-2020.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> SOON KYU CHOI & ILAN H. MEYER, WILLIAMS INST., LGBT AGING: A REVIEW OF RESEARCH FINDINGS, NEEDS, AND POLICY IMPLICATIONS 2 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-Aug-2016.pdf>.

<sup>9</sup> *LGBT Demographic Data Interactive*, WILLIAMS INST. (January 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#demographic>.

<sup>10</sup> ANDREW R. FLORES ET AL., WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 5 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf>.

<sup>11</sup> WILLIAMS INST., *supra* note 9.

Similarly, we estimate that 21% of LGBT adults identify as Latino/a or Hispanic, 12% as Black, and 5% as more than one race.<sup>12</sup>

A longstanding body of research reflects that LGBT people report experiences with public and private discrimination in the United States, and similarly report health and other disparities when compared to their non-LGBT peers that are often related to their SOGI and such experiences with discrimination and other forms of stigma. In *Obergefell v. Hodges*, the Supreme Court observed that gay men and lesbians have been “prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.”<sup>13</sup> The Seventh Circuit has similarly explained that “homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world[.]”<sup>14</sup> And with respect to transgender people, the District of Columbia Court of Appeals has observed that “[t]he hostility and discrimination that transgender individuals face in our society today is well-documented.”<sup>15</sup>

While social acceptance and the legal rights of LGBT people in the United States have generally improved over the past few decades (in some places more than others), ample research confirms that anti-LGBT stigma and discrimination remain widespread, and that certain disparities only continue to widen, in particular when factoring in the compounding effects of discrimination faced along intersectional dimensions of race, ethnicity, and sex, alongside SOGI. Below, we offer a brief review of existing research on this population, with an emphasis on noting studies specifically on LGBT older adults where possible.

Williams Institute research has shown that LGBT older adults face unique challenges within the context of aging compared to their cisgender, heterosexual peers, including reporting worse mental and physical health outcomes; barriers to receiving formal and informal health care and social support; and experiences of discrimination based on SOGI.<sup>16</sup> Such experiences with discrimination include incidents of overt homophobia or transphobia by health care providers, leading some to delay or avoid obtaining care, or otherwise conceal their SOGI from providers, for fear of discrimination.<sup>17</sup> Recent studies suggest this fear remains salient among LGBT people generally; for example, among respondents to our NIH-funded Generations (HD078526) and TransPop (HD090468) studies on sexual and gender minority people, respectively, one-third of sexual minorities and almost two-thirds of transgender people reported worrying about being negatively judged in interactions with a health care provider.<sup>18</sup> Additionally, these findings are consistent with our and others’ research on LGBT adults’ health more broadly, including a wide

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<sup>12</sup> *Id.*

<sup>13</sup> 135 S. Ct. 2584, 2596 (2015).

<sup>14</sup> *Baskin v. Bogan*, 766 F.3d 648, 663 (7<sup>th</sup> Cir. 2014); *see also Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) (“It is easy to conclude that homosexuals have suffered a history of discrimination.”), *aff’d*, 570 U.S. 744 (2013).

<sup>15</sup> *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014).

<sup>16</sup> *CHOI & MEYER, supra* note 8, at 0–1.

<sup>17</sup> *Id.* at 7.

<sup>18</sup> ILAN H. MEYER, BIANCA D.M. WILSON & KATHRYN O’NEILL, WILLIAMS INST., LGBTQ PEOPLE IN THE US: SELECT FINDINGS FROM THE GENERATIONS AND TRANSPop STUDIES 27 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Generations-TransPop-Toplines-Jun-2021.pdf>.

range of studies utilizing data collected through the National Health Interview Survey, which began measuring respondents' sexual orientation in 2013.<sup>19</sup>

The HIV epidemic has had a disproportionate impact on LGBT people; the CDC has estimated that among the 34,800 new HIV infections in the U.S. in 2019, 70% (24,500) were among gay and bisexual men.<sup>20</sup> Likewise, the CDC estimates that 2% of new HIV infections in 2019 were among transgender people.<sup>21</sup> While there are no national HIV prevalence data for LGBT older adults, a 2011 study found that 9% of a nationally surveyed non-probability sample of LGBT older adults was living with HIV.<sup>22</sup> The population of people in the U.S. living with HIV is aging due to the availability of antiretroviral therapy, with individuals age 50 and over comprising almost half (46.8%) of the clients served by the Ryan White HIV/AIDS Program.<sup>23</sup>

Existing research suggests that the health disparities observed when comparing LGBT older adults to their non-LGBT counterparts are particularly pronounced for those who are transgender. These findings include higher rates of internalized stigma and suicidal ideation among transgender people, even when compared to their cisgender LGB peers.<sup>24</sup> Transgender older adults also often encounter unique challenges related to health care access beyond those reported by cisgender LGB older adults, as their population “may seek more frequent and intimate health care due to age related physical conditions and disabilities.”<sup>25</sup>

Such poorer health outcomes are likely influenced in part by LGBT populations' experiences with economic insecurity, including reports of higher poverty rates among LGBT people across the life course.<sup>26</sup> Similarly, Williams Institute research has noted high rates of food insecurity among all LGBT people,<sup>27</sup> including evidence of particular vulnerabilities for

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<sup>19</sup> Williams Institute Scholars, Comment Letter on Review of the National Health Interview Survey (June 15, 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Comment-NHIS-Jun-2020.pdf>. A table documenting many of these studies is included as an appendix to *id.*

<sup>20</sup> *HIV and Gay and Bisexual Men: HIV Incidence*, CDC.GOV (Sept. 16, 2021), <https://www.cdc.gov/hiv/group/msm/msm-content/incidence.html>.

<sup>21</sup> *HIV and Transgender People: HIV Diagnoses*, CDC.GOV (Apr. 13, 2022), <https://www.cdc.gov/hiv/group/gender/transgender/hiv-diagnoses.html>.

<sup>22</sup> Karen I. Fredriksen-Goldsen et al., *The Aging and Health Report: Disparities and Resilience among Lesbian, Gay, Bisexual, and Transgender Older Adults*, <https://depts.washington.edu/agepride/wordpress/wp-content/uploads/2012/10/Full-report10-25-12.pdf>.

<sup>23</sup> <https://www.hiv.gov/hiv-basics/living-well-with-hiv/taking-care-of-yourself/aging-with-hiv>

<sup>24</sup> CHOI & MEYER, *supra* note 8, at 3.

<sup>25</sup> *Id.* at 8.

<sup>26</sup> M.V. LEE BADGETT ET AL., WILLIAMS INST., *LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS 14–15* (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>. While our study found that poverty rates were higher for LGBT people when compared to non-LGBT people across every age group including those over age 65, the observed differences were only statistically significant among people aged 18 to 44 years old. *Id.*

<sup>27</sup> KERITH J. CONRON ET AL., WILLIAMS INST., *FOOD INSUFFICIENCY AMONG LGBT ADULTS DURING THE COVID-19 PANDEMIC* (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Food-Insufficiency-Apr-2022.pdf>; KERITH J. CONRON & KATHRYN K. O'NEILL, WILLIAMS INST., *FOOD INSUFFICIENCY AMONG TRANSGENDER ADULTS DURING THE COVID-19 PANDEMIC*, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Food-Insufficiency-Update-Apr-2022.pdf>; BIANCA D.M. WILSON & KERITH J. CONRON, WILLIAMS INST., *NATIONAL ESTIMATES OF FOOD INSECURITY: LGBT PEOPLE AND COVID-19* (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Food-Insecurity-COVID19-Apr-2020.pdf>; TAYLOR N.T.

LGBT older adults.<sup>28</sup> Our research suggests that among LGBT people, transgender people are disproportionately likely to experience certain forms of economic insecurity, similar to their experiences with certain negative health outcomes: for example, data collected between 2016 and 2019 show that 8% of transgender people experienced homelessness within the prior year, compared to 3% of cisgender LGB people and 1% of non-LGBT people.<sup>29</sup> Similarly, a 2019 Williams Institute study found that poverty rates among transgender people were higher than those reported by cisgender heterosexual men in every age group, and were significantly higher than those reported by cisgender heterosexual women for the 35–44 (42.5% v. 21.6%) and 55–64 (25.1% v. 12.5%) age groups.<sup>30</sup> In accordance with these findings, in a recent study on California, we found that transgender adults were significantly more likely than cisgender adults to report being covered by Medi-Cal or other public health insurance.<sup>31</sup>

Data collected prior to the COVID-19 pandemic suggest that transgender older adults are likely disproportionately vulnerable to experiencing the negative health outcomes associated with COVID-19. We previously estimated that, across the U.S., 137,600 transgender people lack health insurance; 450,000 transgender people had not gone to a doctor in the past year because they could not afford it; and 319,800 transgender adults had one or more medical conditions putting them at increased risk of serious illness related to COVID-19, including asthma, diabetes, heart disease, and HIV.<sup>32</sup> A separate report highlighting health vulnerabilities among LGBT older adults in California found that a significant number of LGBT people in the state are age 65 and older—an estimated 162,000 LGB and 9,000 transgender people at the time—many of whom also suffer from asthma, heart disease, and diabetes.<sup>33</sup>

Our recent research on the impact of the COVID-19 pandemic on U.S. adults also suggests that LGBT adults, particularly LGBT people of color and gender minority people, have been disproportionately experiencing its negative economic effects,<sup>34</sup> which may in turn be

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BROWN ET AL., WILLIAMS INST., FOOD INSECURITY AND SNAP PARTICIPATION IN THE LGBT COMMUNITY (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Food-Insecurity-SNAP-July-2016.pdf>.

<sup>28</sup> See, e.g., BIANCA D.M. WILSON ET AL., WILLIAMS INST., “WE’RE STILL HUNGRY” LIVED EXPERIENCES WITH FOOD INSECURITY AND FOOD PROGRAMS AMONG LGBTQ PEOPLE 18 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-Food-Bank-Jun-2020.pdf> (noting the majority of discussions on the use of food banks to manage food insecurity were among respondents age 50 and older).

<sup>29</sup> BIANCA D.M. WILSON ET AL., WILLIAMS INST., HOMELESSNESS AMONG LGBT ADULTS IN THE US 1 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Homelessness-May-2020.pdf>.

<sup>30</sup> M.V. LEE BADGETT ET AL., WILLIAMS INST., LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS 14–15 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>.

<sup>31</sup> SUSAN H. BABEY, JOELLE WOLSTEIN, JODY L. HERMAN & BIANCA D.M. WILSON, UCLA CTR. FOR HEALTH POL’Y RES. & WILLIAMS INST., GAPS IN HEALTH CARE ACCESS AND HEALTH INSURANCE AMONG LGBT POPULATIONS IN CALIFORNIA 5 (2022), <https://williamsinstitute.law.ucla.edu/publications/gaps-health-care-lgbt-ca>.

<sup>32</sup> JODY L. HERMAN & KATHRYN O’NEILL, WILLIAMS INST., VULNERABILITIES TO COVID-19 AMONG TRANSGENDER ADULTS IN THE U.S. 1–2 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-COVID19-Apr-2020.pdf>.

<sup>33</sup> ILAN H. MEYER & SOON KYU CHOI, WILLIAMS INST., VULNERABILITIES TO COVID-19 AMONG OLDER LGBT ADULTS IN CALIFORNIA 1–2 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Older-LGB-COVID-CA-Apr-2020.pdf>.

<sup>34</sup> See also Thom File & Joey Marshall, *Household Pulse Survey Shows LGBT Adults More Likely to Report Living in Households With Food and Economic Insecurity Than Non-LGBT Respondents*, U.S. CENSUS BUREAU, <https://www.census.gov/library/stories/2021/08/lgbt-community-harder-hit-by-economic-impact-of-pandemic.html>

impacting their health outcomes. For example, in a study on people ages 45 and older, we found that LGBT respondents—particularly LGBT respondents of color—were more likely to report job loss, problems affording basic household goods, and other negative economic impacts related to COVID-19 than older non-LGBT respondents.<sup>35</sup> While our study found that a greater percentage of older LGBT people of color had tested positive for COVID-19 when compared to older White LGBT people, these differences were not statistically significant.<sup>36</sup>

## II. The Required Collection of SOGI Information and Related Assurances are Consistent with the Mission and Purposes of the OAA

While existing research provides valuable insight into the lives and experiences of LGBT older adults, there is a continued need for quality, representative data on this population across a range of contexts.<sup>37</sup> Various provisions of the OAA support the Administration’s addition of regulations requiring the collection of SOGI information by participating entities and related assurances of non-discrimination and confidentiality, by indicating that the collection, evaluation, and dissemination of a broad range of objective, quality data (and subsequent research-informed technical assistance) by the Administration is a central component of Congress’s intended vision for its implementation of the OAA.

The OAA provides that the Administration is responsible for assisting in the “establishment and implementation of programs designed to meet the health and economic needs of older individuals” through various supportive services related to health, housing, transportation, cultural experiences, and more.<sup>38</sup> The OAA mandates that the Administration “collect and disseminate information related to problems of the aged and aging,” including specific requirements that it “provide technical assistance and consultation to States and political subdivisions thereof with respect to programs for the aged and aging” and “gather statistics in the field of aging which other Federal agencies are not collecting[.]”<sup>39</sup> It is our understanding that the Administration, like other federal agencies, is not currently collecting or disseminating original data on LGBT older adults, including on their experiences in OAA-funded programs.

The OAA has also long maintained provisions requiring that funding be targeted, among other groups, to populations with “greatest social need,” and the Administration has previously

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(noting the U.S. Census Bureau’s similar findings, based on data collected during the first waves of the Household Pulse Survey that included SOGI measures).

<sup>35</sup> CHRISTY MALLORY, BRAD SEARS & ANDREW R. FLORES, WILLIAMS INST., COVID-19 AND LGBT ADULTS AGES 45 AND OLDER IN THE US 2–3 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/COVID-LGBT-45-May-2021.pdf>.

<sup>36</sup> *Id.* at 10 (noting that among those reporting being tested “12.8% of older LGBT people of color and 5.5% of older white LGBT people tested positive. . . . Older non-LGBT people of color (9.4%) and older white non-LGBT people (6.5%) tested positive at similar rates.”).

<sup>37</sup> See ANDREW BURWICK ET AL., MATHEMATICA POLICY RESEARCH, HUMAN SERVICES FOR LOW-INCOME AND AT-RISK LGBT POPULATIONS: AN ASSESSMENT OF THE KNOWLEDGE BASE AND RESEARCH NEEDS 19 (2014) (advising that “data from federal and state surveys with large population-based samples are needed to develop findings that are representative of the LGBT population at the state or national level and to generate sample sizes large enough to explore the characteristics and experiences of LGBT subpopulations defined by sexual orientation, gender identity, race/ethnicity, and other characteristics.”).

<sup>38</sup> 42 U.S.C. § 3012(a)(5).

<sup>39</sup> 42 U.S.C. §§ 3012(a)(2), (6), (8).

expressed in guidance its view that LGBT older adults are such a population.<sup>40</sup> Under the OAA, “greatest social need” refers to need caused by “noneconomic factors,” including “cultural, social, or geographic isolation . . . that (i) restricts the ability of an individual to perform normal daily tasks; or (ii) threatens the capacity of that individual to live independently.”<sup>41</sup> The body of research described above on disparities and discrimination supports the conclusion that LGBT older adults are indeed a population living with greatest social need.

Notably, the OAA as reauthorized contains several provisions calling for the collection and evaluation of data on populations with greatest social need. For example, Area Plans are required to determine the extent of need for specific services by, in part, considering the “number of older individuals who have greatest social need” and “evaluating the effectiveness of the use of resources in meeting such need.”<sup>42</sup> These plans are authorized to enter into agreements “with providers of supportive services, nutrition services, or multipurpose senior centers in such area, for the provision of such services or centers to meet such need[.]”<sup>43</sup> Similarly, State Plans are required to conduct “periodic evaluations” on the effectiveness of services provided to individuals with greatest social need,<sup>44</sup> and must provide assurances that their outreach efforts will be inclusive of such individuals with greatest social need.<sup>45</sup> Without collecting information on participants’ SOGI, it is unlikely that participating plans will be able to confirm their compliance with these requirements with respect to LGBT older adults. However, plans may be unaware that they can or should be collecting such information, and/or may be unfamiliar with best practices and existing research on SOGI measurement, given the current lack of regulations to that effect. Likewise, while the OAA maintains a requirement that plans report on “data collected to determine the services that are needed by older individuals whose needs were the focus of all centers funded under subchapter IV in fiscal year 2019[.]”<sup>46</sup> the text of the OAA as reauthorized and existing regulations do not make any direct reference to LGBT older adults with respect to this requirement. As a result, plans may be unaware that LGBT older adults are indeed such a population from whom data collection is required, as the National Resource Center on LGBT Aging was funded by said subchapter.<sup>47</sup>

Finally, we note that under the OAA, the Administration is required to “directly assist the Secretary [of Health and Human Services] in all matters pertaining to problems of the aged and aging.”<sup>48</sup> Under the terms of a recent executive order calling for the prevention of discrimination on the bases of SOGI, agency heads including the Secretary of Health and Human Services must

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<sup>40</sup> ALISON BARKOFF, GUIDANCE FOR DEVELOPING STATE PLANS ON AGING (Aug. 5, 2021), [https://www.lgbtagingcenter.org/resources/pdfs/State%20Plan%20Guidance\\_Plans%20Due%20Oct%202022\\_ACL%20SUA%20Directors%20Letter%20\\_01\\_2021.pdf](https://www.lgbtagingcenter.org/resources/pdfs/State%20Plan%20Guidance_Plans%20Due%20Oct%202022_ACL%20SUA%20Directors%20Letter%20_01_2021.pdf).

<sup>41</sup> 42 U.S.C. § 3002(24).

<sup>42</sup> 42 U.S.C. § 3026(a)(1).

<sup>43</sup> *Id.*

<sup>44</sup> 42 U.S.C. § 3027(a)(4).

<sup>45</sup> 42 U.S.C. § 3027(a)(16)(A)(iii). Area Plans are subject to a similar requirement, see 42 U.S.C. § 3026(a)(4)(B)(i)(III).

<sup>46</sup> 42 U.S.C. §§ 3026(a)(18)(A), 3027(a)(30)(A).

<sup>47</sup> CONG. RES. SERV., OLDER AMERICANS ACT: OVERVIEW AND FUNDING 7 (2021), <https://crsreports.congress.gov/product/pdf/R/R43414>.

<sup>48</sup> 42 U.S.C. § 3012(a)(3).

review existing regulations, guidance, and programs to consider their revision if same would ensure compliance with statutes and other authorities prohibiting such discrimination.<sup>49</sup>

### **III. Recommendations for Regulatory Activity Related to LGBT Older Adults**

To effectuate these requirements related to the collection, evaluation, and dissemination of participant data, both generally and specific to older adults with greatest social need, we recommend that the Administration consider the addition of regulations at 45 CFR § 1321 et seq. requiring that participating Area Plans and State Plans: (1) engage in the standardized collection of information on participants' SOGI and their experiences with perceived discrimination based on SOGI, consistent with existing research and best practices; and (2) provide assurances of SOGI non-discrimination and confidentiality of information to encourage program and data collection participation by LGBT people. Requiring such information collection would be consistent with recent regulatory activity by other agencies, such as the Department of the Treasury's recent implementation of annual reporting requirements for the State Small Business Credit Initiative that include SOGI.<sup>50</sup> Likewise, the Federal Aviation Administration recently amended its required grant assurance on civil rights to expressly list applicable civil rights statutes and their protected bases, including direct reference to SOGI discrimination being encompassed by laws prohibiting sex discrimination consistent with Executive Order 13988.<sup>51</sup>

The Administration currently maintains a regulation requiring that participating states collect and submit “objectively collected and statistically valid data with evaluative conclusions concerning the unmet need for supportive services, nutrition services, and multipurpose senior centers”<sup>52</sup>—such a provision could either be amended to specifically require information on participants' SOGI, or used as a model for additional regulations specific to SOGI and other demographic items relevant to determinations of social need. Similarly, the Administration maintains a confidentiality and disclosure of information regulation<sup>53</sup> that it could consider either amending or supplementing through additional regulations to ensure that demographic data are collected appropriately by participating entities. While the Administration has noted in its own current regulations the applicability of other regulations, including non-discrimination provisions, on covered entities,<sup>54</sup> the Administration should consider whether this provision requires amendment or supplement to ensure that participating entities are fully aware of the extent of such legal requirements, including any protections against discrimination based on SOGI. Likewise, the Administration should consider whether, and if so, how, participating plans should be required to provide notice to participants of any such non-discrimination requirements.

Research on federal implementations of SOGI measures suggests that respondents are unlikely to consider SOGI information to be particularly sensitive, and would therefore provide

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<sup>49</sup> Exec. Order 13988. Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021).

<sup>50</sup> 31 CFR §§ 35.28(h), (i).

<sup>51</sup> Airport Improvement Program (AIP) Grant Assurances, 87 Fed. Reg. 19,571 (Apr. 04, 2022); FAA, ASSURANCES: AIRPORT SPONSORS (2022), [https://www.faa.gov/airports/aip/grant\\_assurances/media/assurances-airport-sponsors-2022-05.pdf](https://www.faa.gov/airports/aip/grant_assurances/media/assurances-airport-sponsors-2022-05.pdf).

<sup>52</sup> 45 CFR § 1321.52.

<sup>53</sup> 45 CFR § 1321.51.

<sup>54</sup> 45 CFR § 1321.5.

such information if asked.<sup>55</sup> Similarly, studies suggest that sexual minority people are not a population that is difficult to survey.<sup>56</sup> Questions measuring sexual orientation have been included on federal surveys for over two decades,<sup>57</sup> including in large-scale, population-based surveys administered by the Centers for Disease Control and Prevention.<sup>58</sup> Questions used to identify transgender respondents have been included on state and investigator-led surveys for some time, with more common use of both sexual orientation and gender identity questions, including in federal surveys, over the last decade.<sup>59</sup> The federal government has long engaged in its own review of best practices for the measurement of SOGI, including through its Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys organized through the Federal Committee on Statistical Methodology.<sup>60</sup>

The federal government has also supported others' research on this topic, including by funding the research of an ad hoc panel formed by the National Academies of Sciences, Engineering, and Medicine focused on SOGI-related methodological issues (the "NASEM Panel").<sup>61</sup> The NASEM Panel recently released a consensus study report offering guidance and best practices for collecting data on SOGI, as well as on variations in sex characteristics, in population-based surveys, as well as clinical and administrative settings.<sup>62</sup> The NASEM Panel's report also provides guiding principles for such data collection, specifically inclusiveness, precision, respecting autonomy, collecting only necessary data, and a dedication to confidentiality.<sup>63</sup> The NASEM Panel's recommended measures are consistent with those currently utilized by a number of federal agencies, such as the U.S. Census Bureau through its

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<sup>55</sup> See, e.g., Sean Cahill et al., *Do Ask, Do Tell: High Levels of Acceptability by Patients of Routine Collection of Sexual Orientation and Gender Identity Data in Four Diverse American Community Health Centers*, 9 PLOS ONE 1 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4157837/pdf/pone.0107104.pdf>.

<sup>56</sup> See, e.g., Nancy Bates et al., *Are Sexual Minorities Hard-to-Survey? Insights from the 2020 Census Barriers, Attitudes, and Motivators Study (CBAMS) Survey*, 35 J. OFFICIAL STATS. 709 (2019), <https://sciendo.com/article/10.2478/jos-2019-0030>.

<sup>57</sup> See FEDERAL INTERAGENCY WORKING GROUP ON IMPROVING MEASUREMENT OF SEXUAL ORIENTATION AND GENDER IDENTITY IN FEDERAL SURVEYS, CURRENT MEASURES OF SEXUAL ORIENTATION AND GENDER IDENTITY IN FEDERAL SURVEYS 3 (2016), [https://cpb-us-e1.wpmucdn.com/sites.northwestern.edu/dist/3/817/files/2017/01/WorkingGroupPaper1\\_CurrentMeasures\\_08-16-1xnai8d.pdf](https://cpb-us-e1.wpmucdn.com/sites.northwestern.edu/dist/3/817/files/2017/01/WorkingGroupPaper1_CurrentMeasures_08-16-1xnai8d.pdf).

<sup>58</sup> See, e.g., *2019 BRFSS Survey Data and Documentation*, CDC.GOV (Aug. 31, 2020), [https://www.cdc.gov/brfss/annual\\_data/annual\\_2019.html](https://www.cdc.gov/brfss/annual_data/annual_2019.html); *Questionnaires | YBRS*, CDC.GOV (Nov. 17, 2020), <https://www.cdc.gov/healthyyouth/data/yrbs/questionnaires.htm>.

<sup>59</sup> Williams Institute Scholars, Comment Letter on Proposed Basic Demographic Items for the Current Population Survey (March 22, 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Comment-NHIS-Jun-2020.pdf>.

<sup>60</sup> See generally *Measuring Sexual Orientation and Gender Identity Research Group*, FED. COMM. STAT. METHODOLOGY (2018), <https://nces.ed.gov/FCSM/SOGL.asp>.

<sup>61</sup> *Measuring Sex, Gender Identity, and Sexual Orientation for the National Institutes of Health*, NAT'L ACADEMIES OF SCIENCES, ENGINEERING, & MED., <https://www.nationalacademies.org/our-work/measuring-sex-gender-identity-and-sexual-orientation-for-the-national-institutes-of-health> (last accessed May 03, 2022).

<sup>62</sup> NAT'L ACADEMIES OF SCIENCES, ENGINEERING, & MED., *MEASURING SEX, GENDER IDENTITY, AND SEXUAL ORIENTATION* (2022), <https://nap.nationalacademies.org/catalog/26424/measuring-sex-gender-identity-and-sexual-orientation>.

<sup>63</sup> *Id.* at S-4.

Household Pulse Survey;<sup>64</sup> have undergone extensive testing; and have been observed to improve the “overall measurement quality” of studies.<sup>65</sup>

As scholars with experience in measurement development and testing, we would recommend that the Administration consider this body of research in developing regulatory approaches to the collection of SOGI information by participating entities. Additionally, we recommend that the Administration assess the performance of any implemented SOGI measures, and all other data items collected, and making revisions to its regulations and measures as needed. Likewise, we note our concern with potential harm to respondents due to breach of confidentiality, and request that the Administration ensure that the data contemplated here are collected and reported using all appropriate privacy standards. All entities responsible for data collection should ensure the confidentiality of respondents’ demographic information.

Thank you for your consideration. Please direct any correspondence, including questions, to [vasquezl@law.ucla.edu](mailto:vasquezl@law.ucla.edu).

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<sup>64</sup> Thom File & Jason-Harold Lee, *Phase 3.2 of Census Bureau Survey Questions Now Include SOGI, Child Tax Credit, COVID Vaccination of Children*, U.S. Census Bureau (Aug. 05, 2021), <https://www.census.gov/library/stories/2021/08/household-pulse-survey-updates-sex-question-now-asks-sexual-orientation-and-gender-identity.html>.

<sup>65</sup> NAT’L ACADEMIES OF SCIENCES, ENGINEERING, & MED., *supra* note 62, at S-6, 5-9.

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