

April 11, 2022

Office of Recovery Programs  
Department of the Treasury  
1500 Pennsylvania Avenue NW  
Washington, DC 20220  
Submitted via *regulations.gov*

**RE: State Small Business Credit Initiative; Demographics-Related Reporting Requirements (RIN 1505-AC79)**

To Whom It May Concern,

We are grateful for the opportunity to provide comments to the Department of the Treasury (the “Department”) on its above-captioned Interim Final Rule (the “Rule”), which would modify existing regulations to institute reporting requirements for jurisdictions providing certain forms of financial support or other assistance under the State Small Business Credit Initiative (“SSBCI”), as amended by the American Rescue Plan Act of 2021 (“ARPA”). *See* 87 Fed. Reg. 13,628 (March 10, 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 discrimination and stigma 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 Department’s request for comment on the Rule, and specifically in support of the Department’s proposal that participating jurisdictions collect data on the SOGI of the principal owners of small businesses receiving aid under the SSBCI. In Part I, we briefly review acts of Congress relevant to the SSBCI, noting that these statutes grant the Department broad authority for requiring the collection of data, including on SOGI, through the Rule. In Part II, we provide a review of relevant existing research on LGBT people, including on their demographics, experiences with discrimination, and observed disparities when compared to non-LGBT people—including from studies on the impact of the COVID-19 pandemic—suggesting that LGBT populations in the United States experience social and economic disadvantage that is relevant to the SSBCI’s purposes. Finally, in Part III, we discuss how the

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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>.

Department might require that such data be collected by covered jurisdictions, as informed by our past research on the collection of SOGI information through surveys and other instruments, and by the practices of other federal agencies already collecting SOGI information, including the U.S. Census Bureau through its Household Pulse Survey.

## **I. The Department Maintains the Regulatory Authority to Mandate the Collection of SOGI Information**

First, we note that the Department, through the Secretary of the Treasury, maintains broad grants of authority through which it can issue regulations and other guidance requiring the collection of SOGI information for the purposes of implementing and monitoring the SSBCI.

As the Department is aware, the SSBCI predates the COVID-19 pandemic, having been created through an act of Congress in 2010.<sup>2</sup> As described by the Department, the SSBCI is intended to “strengthen state programs that support private financing to small business and small manufacturers.”<sup>3</sup> Since their enactment, the SSBCI statutes have granted the Secretary, “in consultation with the Administrator of the Small Business Administration,” the broad authority to issue regulations and other guidance to “implement” the SSBCI, including by specifically authorizing the creation of “compliance and reporting requirements” for participating jurisdictions.<sup>4</sup> When first creating the SSBCI, Congress likewise created an annual reporting requirement for participating jurisdictions that enumerates specific data that participating jurisdictions must provide, alongside any “[s]uch other data as the Secretary, in the Secretary’s sole discretion, may require to carry out the purposes of the [SSBCI] Program.”<sup>5</sup>

When the program was reauthorized by the ARPA, the SSBCI statutes were amended to require that participating jurisdictions provide aid to small businesses owned and controlled by “socially and economically disadvantaged individuals.”<sup>6</sup> Specifically, the Department notes in the Rule that the ARPA provided an infusion of capital funding and other appropriations for technical support for the benefit of these businesses.<sup>7</sup> Citing to legislative materials, the Department asserts that the intended purpose of these allocations is to “address the widespread challenges that these businesses have faced in light of the COVID-19 pandemic.”<sup>8</sup> Notably, these recent amendments did not modify the grant of authority provisions in the SSBCI statutes, meaning the Department remains authorized to issue regulations and guidance, and require data collection, to implement these new provisions under that preexisting grant.

While Congress has allowed the Department to ultimately determine whether a business is owned and controlled by a qualifying individual under these criteria, it has helpfully provided two baseline definitions to guide those inquiries.<sup>9</sup> For social disadvantage, Congress has called

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<sup>2</sup> State Small Business Credit Initiative Act of 2010, Pub. L. No. 111-240, 124 Stat. 2582 (2010).

<sup>3</sup> U.S. DEP’T OF TREASURY, STATE SMALL BUSINESS CREDIT INITIATIVE – FREQUENTLY ASKED QUESTIONS (FAQS) (2011), [https://www.treasury.gov/resource-center/sb-programs/Documents/SSBCI\\_FAQs\\_FINAL\\_052011.pdf](https://www.treasury.gov/resource-center/sb-programs/Documents/SSBCI_FAQs_FINAL_052011.pdf).

<sup>4</sup> 12 U.S.C. § 5709.

<sup>5</sup> 12 U.S.C. § 5706(b)(5).

<sup>6</sup> *See, e.g.*, 12 U.S.C. § 5708(e).

<sup>7</sup> 87 Fed. Reg. at 13,629.

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

<sup>9</sup> 12 U.S.C. § 5701(18).

for looking at whether the principal owner has been “subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.”<sup>10</sup> For economic disadvantage, Congress has called for examining whether the principal owner is someone “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the small business area who are not socially disadvantaged.”<sup>11</sup> The Rule establishes that the Department has determined that information on principal owners’ SOGI is relevant to determining whether a business is owned by a socially or economically disadvantaged individual;<sup>12</sup> below, we offer a review of research in support of this conclusion, and more specifically, in support of LGBT populations being considered socially and economically disadvantaged by the Department for the purposes of the SSBCI.

## II. Existing Research Reflects that LGBT Populations Face Social and Economic Disadvantage

A longstanding body of research reflects that LGBT people report ongoing experiences with public and private discrimination in the United States, as well as economic 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. This research includes accounts of experiences with discrimination and other forms of bias in the specific context of their attempts to access credit, though we note limitations in this research that are often driven by the fact that, until the recent implementation of this Rule,<sup>13</sup> seemingly none of the government-administered data collections related to small businesses require the collection of SOGI information.<sup>14</sup>

Similarly, to the extent that we have research on the experiences of LGBT people attempting to access credit derived from government sources, this is often limited to those that collect demographic data about same-sex couples who are cohabitating.<sup>15</sup> While helpful in

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<sup>10</sup> 15 U.S.C. § 637 (a)(5).

<sup>11</sup> 15 U.S.C. § 637 (a)(6).

<sup>12</sup> See, e.g., 35 C.F.R. § 35.27(g)(11)(ii) (naming “lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons” within a list of “underserved communities” that have been denied “consistent and systematic fair, just, and impartial treatment”, and considering membership in such a community as sufficient to qualify as a “socially and economically disadvantaged individual (SEDI) demographics-related business”).

<sup>13</sup> 35 C.F.R. § 35.28(h)–(i).

<sup>14</sup> See, e.g., 12 C.F.R. § 1002.13 (noting the demographic elements that covered creditors are currently required to collect by the Bureau of Consumer Financial Protection, with SOGI not being among those to be collected); U.S. CENSUS BUREAU, SMALL BUSINESS PULSE SURVEY PHASE 7 QUESTIONNAIRE, <https://www2.census.gov/data/experimental-data-products/small-business-pulse-survey/small-business-pulse-survey-questionnaire.pdf> (last visited Apr. 6, 2022) (asking no demographic questions whatsoever); *About the Annual Business Survey (ABS)*, U.S. CENSUS BUREAU (Oct. 08, 2021), <https://www.census.gov/programs-surveys/abs/about.html> (noting that respondents are asked about their sex, race, ethnicity, and veteran status).

<sup>15</sup> These examples include a number of surveys managed by the U.S. Census Bureau, including the American Community Survey, the American Housing Survey, and the Current Population Survey. See U.S. CENSUS BUREAU, THE AMERICAN COMMUNITY SURVEY 3 (2020), <https://www2.census.gov/programs-surveys/acs/methodology/questionnaires/2020/quest20.pdf?#> (noting that respondents may indicate that the second person in the shared survey is their “same-sex husband/wife/spouse”); U.S. CENSUS BUREAU, 2019 AMERICAN HOUSING SURVEY INSTRUMENT ITEMS 29 (2019), <https://www2.census.gov/programs-surveys/ahs/2019/2019%20AHS%20Items%20Booklet.pdf?#> (same); U.S. CENSUS BUREAU, BASIC CPS ITEMS

generating knowledge about an estimated 2 million LGBT adults,<sup>16</sup> relying on these surveys would leave gaps in our knowledge about the experiences of the nearly 9 million LGBT adults who are not living in same-sex, cohabitating couple households.<sup>17</sup> And, this is often accomplished through a marital status question,<sup>18</sup> which may further narrow information to a more limited group of LGBT people.

Given these limitations, below we offer a brief review of existing demographic research on LGBT people, as well as research on their experiences with discrimination in contexts outside of credit, that suggest LGBT small business owners experience social and economic disadvantage in the United States. Similarly, we also note our recent research on the greater economic impacts of the COVID-19 pandemic on LGBT people of color compared to other groups. Finally, we conclude this section with a review of available research about LGBT people and same-sex couples attempting to access credit in certain contexts, and which suggest that LGBT small businesses owners may face similar experiences and challenges in contexts relevant to the SSBCI.

#### A. Estimates on LGBT Adults in the United States

LGBT-identified people comprise approximately 4.5% of the U.S. adult population.<sup>19</sup> Younger people are more likely than older people to identify as LGBT.<sup>20</sup> We estimate that approximately 11 million adults in the U.S. identify as LGBT.<sup>21</sup> This includes approximately 1.4 million adults who are transgender.<sup>22</sup>

LGBT adults in the U.S. reflect the demographic diversity of the country as a whole. 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>23</sup> 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>24</sup>

Over 7.7 million LGBT adults live in states without explicit statutory protections against SOGI discrimination in credit.<sup>25</sup> Only thirty states have enacted analogues to the federal Equal

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BOOKLET DEMOGRAPHIC ITEMS 4, <https://www2.census.gov/programs-surveys/cps/techdocs/questionnaires/Demographics.pdf> (last visited Apr. 6, 2022) (same).

<sup>16</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>17</sup> *Id.*

<sup>18</sup> See, e.g., examples discussed *supra* note 15.

<sup>19</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>20</sup> See KERITH J. CONRON, WILLIAMS INST., LGBT YOUTH POPULATION IN THE UNITED STATES 2 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Youth-US-Pop-Sep-2020.pdf>.

<sup>21</sup> CONRON & GOLDBERG, *supra* note 19.

<sup>22</sup> CONRON & GOLDBERG, *supra* note 19.

<sup>23</sup> *LGBT Demographic Data Interactive*, WILLIAMS INST. (January 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#demographic>.

<sup>24</sup> *Id.*

<sup>25</sup> KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST. LGBT PEOPLE IN THE US NOT PROTECTED BY STATE NON-DISCRIMINATION STATUTES (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf>.

Credit Opportunity Act (“ECOA”) in their own efforts to address credit discrimination.<sup>26</sup> While all thirty bar sex discrimination in credit, only half explicitly prohibit SOGI discrimination.<sup>27</sup> Notably, even if each of the remaining fifteen state analogues of the ECOA which explicitly prohibit sex discrimination—but not SOGI discrimination—were to be interpreted consistent with the Supreme Court’s reasoning in *Bostock v. Clayton County*,<sup>28</sup> we estimate that only an additional 2,530,000 LGBT adults would gain protection from credit discrimination under state law.<sup>29</sup> This would still leave over 5 million LGBT adults in the United States without protection from credit discrimination under state law.<sup>30</sup>

### *B. Discrimination and Disparities Reported by LGBT Adults in the U.S.*

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>31</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>32</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>33</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 violence, 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.

The Williams Institute conducted two large LGBTQ-specific<sup>34</sup> population-based national surveys through the NIH-funded Generations and TransPop studies on sexual and gender

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<sup>26</sup> CHRISTY MALLORY, LUIS A. VASQUEZ & CELIA MEREDITH, WILLIAMS INST., LEGAL PROTECTIONS FOR LGBT PEOPLE AFTER *BOSTOCK V. CLAYTON COUNTY* 16 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Bostock-State-Laws-Jul-2020.pdf>.

<sup>27</sup> *Nondiscrimination Laws – Credit*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws/credit](https://www.lgbtmap.org/equality-maps/non_discrimination_laws/credit) (last visited Apr. 11, 2022).

<sup>28</sup> 140 S. Ct. 1731, 1738 (2020) (holding that the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964 encompasses SOGI discrimination by deference to the “ordinary public meaning” of the terms contained within same—in particular, its prohibition on discrimination “because of . . . sex”).

<sup>29</sup> *See id.*; MALLORY, VASQUEZ & MEREDITH, *supra* note 26.

<sup>30</sup> MALLORY, VASQUEZ & MEREDITH, *supra* note 26.

<sup>31</sup> 135 S. Ct. 2584, 2596 (2015).

<sup>32</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>33</sup> *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014).

<sup>34</sup> Consistent with the literature on sexual and gender minority people, “LGBTQ”—with the Q representing questioning or queer—is often used to capture individuals, generally youth, who identify their SOGI using such terms, including those whose identities are less developed or more fluid. Certainly, adults question their SOGI and can identify as queer. *See, e.g., 6% of Non-Transgender Sexual Minority Adults in the US Identify as Queer*, WILLIAMS INST. (Jan. 22, 2020), <https://williamsinstitute.law.ucla.edu/press/sexual-minority-queer-press-release>.

minority people, respectively.<sup>35</sup> Using these data, we found that, as adults, more than one-third of LGBTQ people have been hit, beaten, or physically or sexually assaulted; been robbed or had property stolen; or had an object thrown at them.<sup>36</sup> Similarly, more than half of LGBTQ people report having experienced threats of violence, and approximately 3 out of 4 having been verbally insulted or abused.<sup>37</sup> Looking more broadly at adverse life events, we found that 48% percent of transgender people, 39% of GBQ cisgender men, and 38% of LBQ cisgender women had been fired or been denied a job at least once as adults.<sup>38</sup> These findings are consistent with a 2021 study conducted by the Williams Institute, including one drawing from data collected in May of 2021—following both the start of the COVID-19 pandemic and the Court’s decision in *Bostock*—which found that one-third (31.1%) of LGBT respondents reported experiencing discrimination or harassment based on their SOGI in the workplace within the past five years.<sup>39</sup>

Turning to economic and other disparities observed among LGBTQ people within our national dataset, we found that—prior to the pandemic—LGBTQ people were more likely to report unemployment when compared to the national average (8.1% vs. 4.1%, at the end of 2017).<sup>40</sup> Similarly, LBQ cisgender women (48.3%) and transgender people (47.7%) were more likely than GBQ cisgender men (31.5%) to be living in a low-income household, with all three groups reporting rates higher than that of the general U.S. population (30.4%).<sup>41</sup> Additionally, we found that 16.9% of non-transgender sexual minority adults report having experienced homelessness in their lifetimes, compared to 6.2% of the general population.<sup>42</sup> LGBTQ people reported experiencing a number of stressful events in the year prior to the survey, including 29.4% who reported a “major financial crisis,” declaring bankruptcy, or being unable to pay bills on time more than once.<sup>43</sup>

Our recent research on the impact of the COVID-19 pandemic on U.S. adults suggests that LGBT adults, particularly LGBT people of color and gender minority people, have been

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However, few studies relevant to this comment include measures to allow for the identification and analysis of LGBT adults who specifically identify as queer or questioning; hence, we generally use “LGBT” when discussing sexual and gender minority adults unless supported by the underlying study.

<sup>35</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 1 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Generations-TransPop-Toplines-Jun-2021.pdf>.

<sup>36</sup> *Id.* at 17–18.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 19.

<sup>39</sup> BRAD SEARS, CHRISTY MALLORY, ANDREW R. FLORES & KERITH J. CONRON, WILLIAMS INST., LGBT PEOPLE’S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT 13 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf>.

<sup>40</sup> MEYER, WILSON & O’NEILL, *supra* note 35, at 11.

<sup>41</sup> *Id.* at 10–11.

<sup>42</sup> BIANCA D.M. WILSON, SOON KYU CHOI, GARY W. HARPER, MARGUERITA LIGHTFOOT, STEPHEN RUSSELL & ILAN H. MEYER, WILLIAMS INST., HOMELESS AMONG LGBT ADULTS IN THE US 2 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Homelessness-May-2020.pdf>. Similarly, data from the largest community survey of transgender adults in the United States to date indicate that approximate 30% of transgender adults have experienced homelessness in their lifetimes. KATHRYN O’NEILL, BIANCA D.M. WILSON & JODY L. HERMAN, WILLIAMS INST., HOMELESS SHELTER ACCESS AMONG TRANSGENDER ADULTS: FINDINGS FROM THE 2015 U.S. TRANSGENDER SURVEY 2 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Homeless-Shelter-Nov-2011.pdf>.

<sup>43</sup> MEYER, WILSON & O’NEILL, *supra* note 35, at 20.

disproportionately experiencing its negative economic effects.<sup>44</sup> For example, in one study, we found that LGBT respondents were more likely than their non-LGBT counterparts to be laid off (12.4% vs. 7.8%) or furloughed (14.1% vs. 9.7%) from their jobs; to report problems affording basic household goods (23.5% vs. 16.8%); and to report problems paying their rent or mortgage (19.9% vs. 11.7%).<sup>45</sup> LGBT people of color were more than twice as likely to report that their ability to pay for household goods got worse (28.7% vs. 14.2%) and were over three times as likely to report that their ability to pay their rent or mortgage (26.3% vs. 8.8%) got worse as compared to non-LGBT White people.<sup>46</sup> More than half (63.1%) of LGBT people of color reported being very concerned about their ability to pay their bills, as compared to 42.4% of LGBT White and 33.2% of non-LGBT White people.<sup>47</sup> A second study drawing from that same dataset found that older LGBT people (ages 45 and older) are more likely to report experiencing the economic impacts of the pandemic than older non-LGBT people (ages 45 and older).<sup>48</sup> Similarly, analyzing data collected by the U.S. Census Bureau through its Household Pulse Survey between June and October 2021, we found that transgender people were three times more likely than cisgender people to report facing food insufficiency during the pandemic.<sup>49</sup> Indeed, we found that,

[a]cross several indicators of socioeconomic status, larger proportions of transgender adults were disadvantaged as compared to their cisgender counterparts. Nearly half (48.0%) of transgender adults had a high school education or less, 13.9% were in the workforce, but not working for pay in the last 7 days, nearly a third (30.7%) were living at or below the federal poverty level (FPL), and nearly half (48.7%) reported difficulty paying for usual household expenses, including but not limited to “food, rent or mortgage, car payments, medical expenses, student loans, and so on” in the last 7 days.<sup>50</sup>

### *C. Specific Research on LGBT People and Credit*

While limited, existing research does suggest that, throughout their lives, LGBT adults will face challenges in attempting to access credit and across the broad range of credit-related

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<sup>44</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> (noting the U.S. Census Bureau’s similar findings, based on data collected during the initial waves of the Household Pulse Survey that included SOGI measures).

<sup>45</sup> BRAD SEARS, KERITH J. CONRON & ANDREW R. FLORES, WILLIAMS INST., *THE IMPACT OF THE FALL 2020 COVID-19 SURGE ON LGBT ADULTS IN THE US 3* (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/COVID-LGBT-Fall-Surge-Feb-2021.pdf>.

<sup>46</sup> *Id.* at 10.

<sup>47</sup> *Id.*

<sup>48</sup> CHRISTY MALLORY, BRAD SEARS & ANDREW R. FLORES, WILLIAMS INST., *COVID-19 AND LGBT ADULTS AGES 45 AND OLDER IN THE US 2* (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/COVID-LGBT-45-May-2021.pdf>.

<sup>49</sup> KERITH J. CONRON & KATHRYN K. O’NEILL, WILLIAMS INST., *FOOD INSUFFICIENCY AMONG TRANSGENDER ADULTS DURING THE COVID-19 PANDEMIC 3* (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Food-Insufficiency-Dec-2021.pdf>.

<sup>50</sup> *Id.*

activities.<sup>51</sup> For example, some same-sex couples report being denied lines of credit and home sales solely because of their SOGI.<sup>52</sup> Studies have shown that these couples are more likely to be charged higher rates for mortgages even when approved.<sup>53</sup> And, research has tied these experiences to lower homeownership rates observed among same-sex couples and LGBT people when compared to different-sex couples and non-LGBT people.<sup>54</sup> Below, we discuss various studies indicating that LGBT people face widespread discrimination and other challenges related to their ability to access credit, and which suggests that LGBT small business owners attempting to access credit, including through the SSBCI, may report similar experiences and outcomes.

A recent study from the Center for LGBTQ Economic Advancement & Research (“CLEAR”) looked at data from the Federal Reserve Board’s Survey of Household Economic Decisionmaking, which began including SOGI measures as of 2019.<sup>55</sup> Using those data, CLEAR found that evidence that LGBT people appear less likely to be able to access credit in the United States, including that,

LGBT households were more likely to have applied for credit in the previous 12 months (44.5% vs. 39.5%). . . . More than one in three LGBT consumers who had submitted applications were turned down for credit in the previous 12 months (35.1%), whereas only one in five (21.3%) non-LGBT consumers were turned down. LGBT consumers were also 1.25 times more likely to have been approved for credit but not given as much credit as they wanted. More than one in six LGBT consumers who had applied for credit were given less than they had applied for (18.4%), as compared to 14.5% of non-LGBT consumers.<sup>56</sup>

Additionally, LGBT households in the study “were 1.25x more likely to be unbanked or underbanked” than non-LGBT households (23.0% vs. 18.0%)<sup>57</sup> and LGBT adults were “nearly 2x more likely to indicate their [credit] scores were ‘poor’ or ‘very poor’ as compared to non-LGBT adults (16.1% vs. 8.2%).”<sup>58</sup> Consistent with research on intersectional discrimination in other contexts, CLEAR found that race and sex appeared to compound the impacts of SOGI here as well. LGBT female adults reported being denied access to credit they had applied for in the last year more often than non-LGBT female adults (37.5% vs. 23.9%).<sup>59</sup> Likewise, more than half of Black LGBT adults applying for credit were turned down, and were more likely to report such experiences than their non-LGBT peers (58.3% vs. 41.7%).<sup>60</sup> Similarly, female LGBT households were even more likely to report being unbanked or underbanked (27.0%, compared

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<sup>51</sup> See generally ADAM P. ROMERO, SHOSHANA K. GOLDBERG & LUIS A. VASQUEZ, WILLIAMS INST., LGBT PEOPLE AND HOUSING AFFORDABILITY, DISCRIMINATION, AND HOMELESSNESS 19–23 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 23.

<sup>54</sup> *Id.* at 11–13.

<sup>55</sup> SPENCER WATSON ET AL., CLEAR, THE ECONOMIC WELL-BEING OF LGBT ADULTS IN THE U.S. IN 2019 (2021), <https://lgbtq-economics.org/wp-content/uploads/2021/06/The-Economic-Well-Being-of-LGBT-Adults-in-2019-Final-1.pdf>.

<sup>56</sup> *Id.* at 20.

<sup>57</sup> *Id.* at 1.

<sup>58</sup> *Id.* at 20.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

to 20.1% of female non-LGBT households), with Black and Hispanic LGBT households reporting even higher rates (46.9% and 37.6%, respectively).<sup>61</sup>

Researchers have previously looked at homeownership as a metric for whether same-sex couples and LGBT people more broadly are able to access credit. For example, Institute scholars previously estimated homeownership among same-sex and different-sex couple-headed households in the United States, using nationally representative data on household composition and homeownership collected through the American Community Survey collected between 2015 and 2017, and found that “63.8% of same-sex couples reported owning their home (with an additional 0.5% under contract), compared with 75.1% of different-sex couples. Among those who owned their homes, same-sex couples were more likely than different-sex couples to be carrying a mortgage (77% vs. 68.2%, respectively).”<sup>62</sup> According to our separate analysis of representative data from 35 states, nearly half (49.8%) of LGBT adults own their homes, compared to 70.1% of non-LGBT adults.<sup>63</sup> Another study, analyzing data from a representative sample of adults aged 24–32 in 2008, found that among females, sexual minorities were less likely to be homeowners than heterosexual women, and that women who were sexual *and* racial minorities reported the lowest rates of homeownership.<sup>64</sup> Among males, sexual minorities were also less likely to be homeowners than their heterosexual counterparts.<sup>65</sup> Recent studies suggest that homeownership is particularly low among transgender people: one study analyzing the first nationally representative sample of transgender adults found that only a quarter (25%) reported being homeowners, compared to 58% of cisgender adults.<sup>66</sup>

Access to mortgage financing greatly impacts many people’s ability to purchase a home.<sup>67</sup> Research suggests that denials of access to financing based on one’s SOGI—in addition to related acts of discrimination and other factors, such as higher rates of poverty reported among LGBT people—<sup>68</sup> may partially explain why lower homeownership rates are being observed

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<sup>61</sup> *Id.* at 19.

<sup>62</sup> ROMERO, GOLDBERG & VASQUEZ, *supra* note 51, at 12.

<sup>63</sup> KERITH CONRON, WILLIAMS INST., FINANCIAL SERVICES AND THE LGBTQ+ COMMUNITY: A REVIEW OF DISCRIMINATION IN LENDING AND HOUSING. TESTIMONY BEFORE THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS 2 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-US-House-Financial-Services-Oct-2019.pdf>. Our findings reflect those of other studies’ from both population-based and non-representative samples. For example, according to a 2018 survey of LGBT adults (aged 22–72) conducted by Freddie Mac, 49% of respondents reported owning their home, compared to a 64% homeownership rate among the general U.S. population that year. FREDDIE MAC, THE LGBTQ+ COMMUNITY: BUYING AND RENTING HOMES 3 (2018), [http://www.freddiemac.com/fmac-resources/research/pdf/Freddie\\_Mac\\_LGBT\\_Survey\\_Results\\_FINAL.pdf](http://www.freddiemac.com/fmac-resources/research/pdf/Freddie_Mac_LGBT_Survey_Results_FINAL.pdf).

<sup>64</sup> Kerith J. Conron, Shoshana K. Goldberg & Carolyn T. Halpern, *Sexual Orientation and Sex Differences in Socioeconomic Status: A Population-Based Investigation in the National Longitudinal Study of Adolescent to Adult Health*, 72 J. EPIDEMIOLOGY & COMMUNITY HEALTH 1016, <https://pubmed.ncbi.nlm.nih.gov/30190439>.

<sup>65</sup> *Id.*

<sup>66</sup> ILAN H. MEYER ET AL., WILLIAMS INST. FINDINGS FROM A U.S. TRANSGENDER POPULATION STUDY, PRESENTATION AT THE UNITED STATES PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH CONFERENCE, WASHINGTON, D.C.

<sup>67</sup> JOINT CTR. FOR HOUSING STUDIES OF HARV. U., THE STATE OF THE NATION’S HOUSING 3 (2019), [https://www.jchs.harvard.edu/sites/default/files/Harvard\\_JCHS\\_State\\_of\\_the\\_Nations\\_Housing\\_2019.pdf](https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2019.pdf).

<sup>68</sup> See M. V. LEE BADGETT, SOON KYU CHOI & BIANCA D.M. WILSON, WILLIAMS INST., LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>; M. V. Lee Badgett, *Left Out? Lesbian, Gay, and Bisexual Poverty in the U.S. Population*, 37 POPULATION RESEARCH & POL’Y

among same-sex couples and LGBT people specifically.<sup>69</sup> Importantly, however, acts of SOGI discrimination do not have to actually occur to have an impact on LGBT people’s ability to access credit, as research has shown that even the expectation of discrimination can deter LGBT people from becoming homeowners.<sup>70</sup>

Two recent studies on mortgage lending have suggested that these lower rates of homeownership may be directly tied to discrimination. The first study<sup>71</sup>—analyzing data collected pursuant to the Home Mortgage Disclosure Act (“HMDA”) and from Fannie Mae—found that compared to different-sex borrowers of similar profiles, same-sex borrowers experienced a 3% to 8% lower approval rate.<sup>72</sup> Further, among the loans approved, same-sex borrowers were charged higher interest and/or fees, equivalent to between \$8.6 million and \$86 million more in interest and fees over time.<sup>73</sup> Such decisions were made by creditors despite a lack of statistical evidence that same-sex borrowers presented a greater level of risk than comparable different-sex borrowers.<sup>74</sup> Instead, both sets of borrowers were found to present similar risks of default, and same-sex borrowers in fact presented *lower* prepayment risk.<sup>75</sup> The second study<sup>76</sup>—analyzing over 5 million applications for mortgages backed by the Federal Housing Administration (“FHA”) utilizing data made available through the HMDA—found that same-sex male couples of every racial configuration were significantly less likely to have their applications accepted compared to White heterosexual couples,<sup>77</sup> even when the lender, county, loan amount, purpose of the loan, income of the applicants, and level of risk were all the same.<sup>78</sup> This occurred despite loans being FHA-insured and, therefore, carrying limited risk to lenders, regardless of any underlying characteristics of the applicants.<sup>79</sup> Same-sex female couples of every racial configuration were found to be either statistically indistinguishable from White heterosexual couples or in some cases were treated more favorably.<sup>80</sup> Race was found to play a role, as,

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REV. 667 (2018), <https://link.springer.com/article/10.1007/s11113-018-9457-5>; see also Christopher S. Carpenter et al., *Transgender Status, Gender Identity, and Socioeconomic Outcomes in the United States*, 73 INDUSTRIAL & LABOR RELATIONS REV. 573 (2020), <https://doi.org/10.1177%2F0019793920902776>; see generally BIANCA D.M. WILSON, M.V. LEE BADGETT & ALEXANDRA-GRISELLE H. GOMEZ, WILLIAMS INST., “WE’RE STILL HUNGRY”—LIVED EXPERIENCES WITH FOOD INSECURITY AND FOOD PROGRAMS AMONG LGBT PEOPLE (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-Food-Bank-Jun-2020.pdf>.

<sup>69</sup> ROMERO, GOLDBERG & VASQUEZ, *supra* note 51, at 11–13.

<sup>70</sup> See generally ROMERO, GOLDBERG & VASQUEZ, *supra* note 51, at 21; NAT’L ASS’N OF GAY & LESBIAN REAL ESTATE PROFS., LGBT REAL ESTATE REPORT 2019–20 (2019), <https://naglrep.com/wp-content/uploads/2019/03/2019-naglrep-lgbt-real-estate-report.pdf> (noting that, among members of the National Association of Gay and Lesbian Real Estate Professionals surveyed, 58% of respondents believed that their LGBT clients’ fear of experiencing discrimination during the buying process had an impact on LGBT homeownership levels).

<sup>71</sup> Hua Sun & Lei Gao, *Lending Practices to Same-Sex Borrowers*, 116 PROC. NAT’L ACAD. SCI. U.S.A. 9293, <https://www.pnas.org/content/pnas/116/19/9293.full.pdf>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 9294.

<sup>74</sup> *Id.* at 9300.

<sup>75</sup> *Id.* at 9301.

<sup>76</sup> J. Shahar Dillbary & Griffin Edwards, *An Empirical Analysis of Sexual Orientation Discrimination*, 86 U. CHI. L. REV. 1 (2019), <https://lawreview.uchicago.edu/publication/empirical-analysis-sexual-orientation-discrimination>.

<sup>77</sup> *Id.* at 53.

<sup>78</sup> *Id.* at 5.

<sup>79</sup> *Id.* at 35.

<sup>80</sup> *Id.* at 54.

black-male pairs [were] the least likely to be approved (-7.5 percentage points [than the White heterosexual baseline]), followed by the interracial pairs of black male/white male (-6.8), white male/black male (-4.3) and white male pair (-2.5). Interestingly, the exact same pattern holds for female pairs. From the least to most likely to be approved are black female pairs, followed by interracial black female/white female and white female/black female pairs, and white female pairs.<sup>81</sup>

Taken alone, this body of research itself suggests that LGBT-owned small businesses may face social and economic disadvantages when attempting to access credit related to their SOGI, though support for such lines of inquiry can also be found elsewhere. For example, LGBT people have long reported experiences with family rejection;<sup>82</sup> per its 2016 Annual Survey of Entrepreneurs, the Small Business Administration found that 64.4% of small businesses began using personal and family savings, and 8.7% used personal family assets rather than the principal owner's savings,<sup>83</sup> suggesting that LGBT people may face unique challenges in attempting to begin small businesses without access to that type of family support.<sup>84</sup>

### III. Existing Research Outlines Best Practices for Collecting SOGI Information

We commend the Department for requiring the collection of SOGI information through the Rule in light of research showing that LGBT people face social and economic disadvantage in the United States, as such data would aid participating jurisdictions in identifying and serving relevant businesses as required under the terms of the reauthorized SSBCI program. Below, we review existing research on how the Department might collect such information through this and future iterations of the Rule, consistent with our expertise on best practices for doing so in the context of population-based surveys<sup>85</sup> and the existing practices of other federal agencies.

As an initial matter, we note that research on federal implementations of SOGI measures suggests that respondents are unlikely to consider SOGI information to be particularly sensitive,

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<sup>81</sup> *Id.* at 53. As noted by the study authors, these findings suggest the existence of a statistically significant “primary applicant” effect when same-sex couples apply for FHA-backed mortgages, wherein an interracial same-sex couple appears more likely to have their application approved when the White partner is the primary applicant as opposed to the Black partner. *Id.*

<sup>82</sup> See, e.g., SOON KYU CHOI, BIANCA D.M. WILSON, JAMA SHELTON & GARY J. GATES, WILLIAMS INST. WITH TRUE COLORS FUND, *SERVING OUR YOUTH 2015: THE NEEDS AND EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH EXPERIENCING HOMELESSNESS* (2015) <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Serving-Our-Youth-Update-Jun-2015.pdf>.

<sup>83</sup> *Shining a Light on Small Business Lending*, CFPB, <https://www.consumerfinance.gov/about-us/small-business-lending/> (last visited Apr. 11, 2022).

<sup>84</sup> See generally *Nearly Eighty Percent of LGBTQ Small Business Owners Expect to Make a Full Recovery in 2022, According to LGBTQ Small Business Owner Financial Health Survey*, NGLCC (June 7, 2021), <https://www.nglcc.org/press-release/nearly-eighty-percent-lgbtq-small-business-owners-expect-make-full-recovery-2022> (noting that, among respondents to the first LGBTQ Small Business Owner Financial Health Survey—administered by CNBC, First in Business Worldwide, and Acorns—78% of LGBTQ small business owners do not have a business succession plan in place).

<sup>85</sup> WILLIAMS INSTITUTE SCHOLARS, *SEXUAL ORIENTATION AND GENDER IDENTITY (SOGI) ADULT MEASURES RECOMMENDATIONS FAQs* (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/SOGI-Measures-FAQ-Mar-2020.pdf>.

and would therefore provide such information if asked.<sup>86</sup> Similarly, studies suggest that sexual minority people are not a population that is difficult to survey.<sup>87</sup> Questions measuring sexual orientation have been included on federal surveys for over two decades,<sup>88</sup> including in large-scale, population-based surveys administered by the U.S. Census Bureau and other agencies.<sup>89</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 over the last decade.<sup>90</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>91</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>92</sup> The NASEM Panel recently released a consensus study report<sup>93</sup> 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—such as those contemplated under the Rule. 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>94</sup> Below, we provide a brief review of the NASEM Panel's recommendations for measuring SOGI and the research informing same.

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<sup>86</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>87</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>88</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>89</sup> For example, the CDC through both the BRFSS and YRBS as detailed *supra* asks that respondents report their sexual orientation; the BRFSS also includes a question asking whether respondents identify as transgender. See *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 | YBRBS*, CDC.GOV (Nov. 17, 2020), <https://www.cdc.gov/healthyyouth/data/yrbs/questionnaires.htm>.

<sup>90</sup> Williams Institute Scholars, *supra* note 16.

<sup>91</sup> See generally *Measuring Sexual Orientation and Gender Identity Research Group*, FED. COMM. STAT. METHODOLOGY (2018), <https://nces.ed.gov/FCSM/SOGL.asp>.

<sup>92</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 visited Apr. 6, 2022).

<sup>93</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> [hereinafter "NASEM PANEL REPORT"].

<sup>94</sup> *Id.* at S-4.

First, looking at sexual orientation, we note that the Rule is consistent with the recommendations of the NASEM Panel, which provide the following response options to measure sexual orientation identity:

**Which of the following best represents how you think of yourself? [Select ONE]:**

- Lesbian or gay
- Straight, that is, not gay or lesbian
- Bisexual
- [If respondent is AIAN:] Two-Spirit
- I use a different term [free-text]
- (Don't know)
- (Prefer not to answer)

These options are largely similar to those provided by the Rule, and to those utilized by the U.S. Census Bureau beginning with phase 3.2 of its Household Pulse Survey measuring the impact of the COVID-19 pandemic.<sup>95</sup> The Panel's recommended response options for sexual orientation allow for clear distinctions to be drawn between people with different sexual orientation identities, and broadly between sexual minority (LGB) and majority (non-LGB) populations, while also allowing for the enumeration of those who do not use a listed label to describe their sexual orientation. These options have undergone extensive testing, including among samples representative of the U.S. general population, populations that are racially diverse, samples of LGB and non-LGB people, and with respondents across a broad range of ages (12-85).<sup>96</sup>

Second, turning to gender identity, we note that the NASEM Panel's findings align with past research that sex, sexual orientation, and gender identity—though related—are ultimately intellectually distinct concepts, and so capturing information on all three should not be attempted through a singular question, i.e., one only asking about respondents' sex. While the Rule contemplates having respondents provide their gender and sexual orientation information through separated questions, we note here that the NASEM Panel recommends asking about gender *alongside* sex, often referred to as the “two-step” approach, unlike what the Rule would have participating jurisdictions do here in only asking one question about owners' gender.

The NASEM Panel's recommended approach is as follows:

**Q1: What sex were you assigned at birth, on your original birth certificate?**

- Female
- Male
- (Don't know)
- (Prefer not to answer)

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<sup>95</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>96</sup> NASEM PANEL REPORT, *supra* note 93, at 5-9.

**Q2: What is your current gender? [Mark only one]**

- Female
- Male
- Transgender
- [If respondent is AIAN:] Two-Spirit
- I use a different term: [free text]
- (Don't know)
- (Prefer not to answer)

A core strength of this two-step approach is that it allows for the identification of individuals with transgender experience, by allowing for comparisons between their sex assigned at birth and their current gender identity. Currently, the Rule would not have participating jurisdictions collect information that could then be used to identify principal owners with transgender experience—despite studies as detailed above indicating that transgender people disproportionately experience social and economic disadvantage when compared to their cisgender counterparts, and even at times when compared to non-transgender LGB people. Additionally, not all transgender people describe their gender identity using the same sets of terms, and so many in this population might not be identifiable through a singular question or option seeking to measure whether respondents have a transgender identity. Though not as extensively as the recommended measure for sexual orientation, this two-step approach to measuring gender identity has been tested in various contexts and been observed to improve the “overall measurement quality” of studies.<sup>97</sup> In turn, this approach to measuring sex and gender identity has seen increased adoption, including by agencies like the U.S. Census Bureau within the Household Pulse Survey.<sup>98</sup>

As scholars with experience in measurement development and testing, we recommend assessing the performance of the Rule’s SOGI measures, as well as all other demographic items, and making revisions as needed to ensure the quality of any resulting data.

#### **IV. Conclusion**

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>97</sup> *Id.* at S-6.

<sup>98</sup> File & Lee, *supra* note 95. Like with its sexual orientation measure, the Census Bureau’s two-step sex and gender identity measures here are largely similar to the recommended measures of the NASEM Panel, but without allowing for free-text responses and without the Two-Spirit option for Indigenous respondents. The NASEM Panel recommends including a Two-Spirit option in cases of “automated data collection where racial identity is collected and respondent endorses American Indian or Alaska Native (AIAN) identity,” consistent with federal mandates and the past recommendation of the National Congress of American Indians and the Indian Health Service 2020 Strategic Vision and Action Plan, but recommends against including this option in other settings, as previous studies have indicated a “high probability” of producing inaccurate data on this population when non-Indigenous populations are given this option. NASEM PANEL REPORT, *supra* note 93, at 5-12.

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