



TESTIMONY FOR DEPARTMENT OF INSURANCE, SECURITIES AND BANKING
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Good Evening, Members of the Department of Insurance, Securities and Banking,

My name is Luc Athayde-Rizarro and I am testifying today in my official role as Policy Counsel at the National Center for Transgender Equality (NCTE). Founded in 2003, the National Center for Transgender Equality is one of the nation's leading social justice organizations working for life-saving change for the over 1.5 million transgender Americans and their families, including in ensuring nondiscriminatory access to insurance. I also represent my organization as a consumer representative at the National Association of Insurance Commissioners (NAIC).

NCTE is testifying today to discuss how using sex or gender as a rating factor for auto insurance is discriminatory and should be prohibited. NCTE recommends that the Department take action clarify that it is unlawful to use sex or gender identity as factors in risk-assessment for determining auto insurance rates in the District of Columbia.

Using Sex As a Risk Factor in Auto Insurance Violates Principles of Sex Discrimination and Unfair Trade Practices

Historically, the insurance industry and regulators excepted insurance underwriting practices from civil rights principles. For example, until a few decades ago race was still taken into account in insurance underwriting.¹ Similarly, discrimination based on sex has historically been prevalent across the insurance industry and treated as an exception to civil rights law. Over the years, the insurance industry has modernized to ensure that insurers can no longer discriminate on the basis of race, and in recent years we have seen the same nondiscrimination prohibitions be applied to gender .

For example, nondiscrimination on the basis of sex is now enforced across the health insurance industry. The Patient Protection and Affordable Healthcare Act (PPACA) of 2010 prohibited sex discrimination in most insurance plans, including in the use of sex in risk-assessment and underwriting.² Under federal law, health insurance plans sold in the District and across the United States are prohibited from using sex when setting rates, and instead have to base rates on factors that more accurately contribute to risk, such as tobacco use and age. These same principles of nondiscrimination should be applied to auto insurance rates.

¹Professor Heen, PRESENTATION TO THE DEPARTMENT OF JUSTICE, 9 (May 26, 2016), <https://law.richmond.edu/docs/Heen-FACI-presentation.pdf>.

² Patient Protection and Affordable Care Act § 1557(a), 42 U.S.C. § 18116(a) (2010).

The DC Human Rights Act similarly protects people from discrimination on the basis of sex and gender identity in places of public accommodations, which include insurance companies. The Act specifically prohibits motor vehicle insurance sellers from discriminating on the basis of sex and gender identity in issuing, renewing or cancelling policies. Importantly, the Act does not allow for differences in underwriting based on sex or include exceptions for its sex discrimination protections in the insurance context.³

Using sex as a rating factor also goes against the principles of fair trade practices. DISB previously clarified that discrimination on the basis of gender identity or expression in health insurance violates the District’s Unfair Insurance Trade Practices Act,⁴ stating that no person shall refuse to insure, refuse to continue to insure, or limit the amount of coverage available to an individual based on gender identity.⁵ Discrimination on the basis of gender identity in auto insurance should similarly be considered a violation DC’s Unfair Insurance Trade Practices Act.

Using Sex as a Risk Factor has a Discriminatory Impact on Nonbinary People

As of June 2017, the DC Department of Motor Vehicles began issuing driver’s licenses with a gender designation of “X”, intended to give a more accurate identifier for people who do not identify as male or female and anyone who wants additional privacy around their gender. Six months later, the Department had issued 160 credentials with this gender-neutral identifier.⁶ Now at least eight states and the District of Columbia issue driver’s licenses with a gender neutral “X” designation.⁷

People with an “X” designation on their license also need auto insurance, but most auto insurance companies do not provide a gender neutral option and do not have appropriate rating factors for nonbinary people. This can result in nonbinary people being unfairly turned away from obtaining auto insurance or being charged exorbitant rates, and generally causes confusion and administrative hurdles for these consumers. For example, when prohibiting gender as a risk assessment category, California’s Insurance Commissioner stressed that this would promote fair treatment for nonbinary drivers by not allowing insurers to “to attempt to rate a small, non-homogenous group of nonbinary drivers based on gender.” DISB should likewise ensure that

³ Code of the District of Columbia, Chapter 14, § 2–1402.31 and § 2–1402.71.

⁴ DC Department of Insurance, Securities, and Banking, *Bulletin on Prohibition of Discrimination in Health Insurance Based on Gender Identity or Expression*, February 27, 2014.
<https://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Bulletin-ProhibitionDiscriminationBasedonGenderIdentityorExpressionv022714.pdf>.

⁵ D.C. Official Code § 31-2231.11

⁶ See Council of the District of Columbia Committee on Transportation and the Environment, *Committee Report: Bill 22-331, the “Nonbinary Identification Cards Amendment Act of 2018”*, July 2, 2016.

⁷ California, Minnesota, Oregon, Colorado, Maine, Indiana, Arkansas, Utah, and the District of Columbia. See NCTE’s ID Document Center, www.transequality.org/documents.

gender be removed as a rating factor to ensure that all people, including nonbinary people, do not experience discrimination based on their gender in purchasing auto insurance.

A Growing Number of US States Have Clarified That Using Sex as a Factor in Auto Insurance Ratings Is Discriminatory

A growing number of states and markets recognize that using sex as a factor in auto insurance underwriting unfairly discriminates. California, Hawaii, Massachusetts, Montana, Pennsylvania, North Carolina and Michigan recognize that basing auto insurance risk on sex or gender is discriminatory.⁸ In 1984, Pennsylvania's Supreme Court ruled that sex discrimination in auto insurance rates violated the state's Equal Rights Amendment.⁹ North Carolina does not allow direct or indirect classification based on gender. And since the late 1980's, Hawai'i, Montana, Massachusetts and Michigan explicitly made it unlawful to use sex as a risk classification in auto insurance underwriting.¹⁰

More recently, California's state insurance commissioner issued regulations banning underwriting based on gender, in response to increasing concerns over the use of gender as risk rating factor and state law's prohibition of unfair discrimination in insurance. In issuing this regulation, the Commissioner noted that "a regime in which auto insurance rates are based on personal characteristics over which a driver has no control such as gender, rather than on factors within a driver's control, is more likely to be unfairly discriminatory because it may not treat equally individuals who make the same risk-averse choices." Additionally, the Commissioner found that "gender's relationship to risk of loss no longer appears to be substantial,"¹¹ and stressed that removing gender from risk assessment "prevents systemic discrimination on the basis of gender." According to the Federal Insurance Office (FIO), states that have barred the use of sex as a rating factor for auto insurance underwriting and rating have done so to further policies that seek fair

⁸ Fredrick Kunkle. (2019). "Gender can no longer be used to calculate auto insurance rates in California and other states." *The Washington Post*. https://www.washingtonpost.com/transportation/2019/02/11/gender-can-no-longer-be-used-calculate-auto-insurance-rates-california-other-states/?utm_term=.11219e1a63f6

⁹ <https://www.nytimes.com/1984/10/23/us/equal-rights-ruling-for-auto-insurance-expected-to-spread.html>

¹⁰ See North Carolina Code, § 58-36-65; Hawaii Insurance Code § 431:10C-207; Massachusetts chap. 175E, § 4(d); Montana Code § 49-2-309; Michigan Code, § 500.2111.4

¹¹ <http://www.insurance.ca.gov/0400-news/0100-press-releases/2019/upload/nr003-18GenderNon-DiscriminatAutoRating01-03-18.pdf>

treatment of insurance consumers regardless of sex.¹² In 2015, FIO issued an annual report recommending states to assess whether sex is an appropriate factor for risk-classification.¹³

The District of Columbia should follow the example of other US states to eliminate discrimination in auto insurance pricing.

Auto Insurers Have Other More Viable and Accurate Methods of Determining Risk

The industry as a whole is moving towards analyzing risk based on more relevant factors, such as how many miles a consumer drives, how fast they drive, and tickets for distracted driving.¹⁴ In a 2018 hearing, the Department of Insurance, Securities, and Banking heard expert testimony suggesting that driving record and telematics are more accurate and adequate measures for risk-assessment than socio-economic factors, and give consumers greater control over the price of their premiums.¹⁵ Similarly, a 2017 study by the Consumer Federation of America found significant inter-company rating differences for women and men shopping for insurance in the same market, sometimes as great as 50%. The report concluded that this substantial variation suggests that sex is not an actuarially sound risk factor.¹⁶ Other studies have similarly found that measures like telematics data more accurately predicts risk and cancels out the predictive power of gender in determining the frequency of consumer claims.¹⁷

Recommendation

The Department of Securities, Insurance, and Banking should clarify that it is unlawful and unfair to use sex as a rating factor in auto insurance sold in the District of Columbia. Auto insurance underwriting that takes sex or gender identity into account should no longer be allowed, and

¹² Federal Insurance Office, U.S. DEP'T OF TREASURY, 47 (Sept. 2015), https://www.treasury.gov/initiatives/fio/reports-and-notices/Documents/2015%20FIO%20Annual%20Report_Final.pdf; Note, "Elimination of Gender Discrimination in Insurance Pricing: Does Automobile Insurance Rate Without Sex," 61 NOTRE DAME L. REV. 748, 751 (1986), available at <http://scholarship.law.nd.edu/ndlr/vol61/iss4/4/>.

¹³ Federal Insurance Office, U.S. DEP'T OF TREASURY, 47 (Sept. 2015), https://www.treasury.gov/initiatives/fio/reports-and-notices/Documents/2015%20FIO%20Annual%20Report_Final.pdf.

¹⁴ *Supra* note 12.

¹⁵ Department of Insurance, Securities and Banking. (2018). Expert testimony by Birny Birnbaum, Center for Economic Justice, "Department of Insurance, Securities and Banking (DSIB) Hearing 1/30/18." *Entertain_DC*. <https://www.youtube.com/watch?v=JMsCYKgYnvc&feature=youtu.be>

¹⁶ Consumer Federation of America. (2017). Most Large Auto Insurers Charge 40 and 60-Year-Old Women Higher Rates Than Men, Often More Than \$100 Per Year, https://consumerfed.org/press_release/large-auto-insurers-charge-40-60-year-old-women-higher-rates-men-often-100-per-year/

¹⁷ Roel Verbelen, Katrien Antonio, and Gerda Claeskens. (2018). "Unravelling the predictive power of telematics data in car insurance pricing" *Journal of the Royal Statistical Society: Series C (Applied Statistics)*. 67, No. 5: pp.1275-1304



companies employing such policies should update their practices, rate determination calculations, application forms, and policy documents ensure gender is not used in rate setting.

Thank you again for the opportunity to provide testimony on this important issue and I am happy to answer any questions.