



May 17, 2012

The Honorable Michael J. Astrue
Commissioner
Social Security Administration
6401 Security Boulevard
Baltimore, MD 21235

Re: SSA Policies Regarding Transgender People

Dear Commissioner Astrue,

The undersigned organizations write to express our concern about the lack of action from SSA on three policy matters of critical importance to transgender people and their families. We hope you will ensure these matters are given prompt attention and appropriate action is taken to resolve them. Our recommendations are restated here as follows:

First, the SSA should adopt an updated policy for changing gender in SSA records that mirrors policies adopted in recent years by other federal agencies. Recommended language for an updated gender change policy is included here as Attachment A.

Second, SSA should revise the POMS guidance regarding marriages involving transgender spouses to accurately reflect state and federal law. Recommended language for updated marriage guidance is included as Attachment B.

Third, SSA should work swiftly to eliminate gender from EVS and other matching programs where the use of gender does not serve a clear and important programmatic purpose.

In May of 2010, representatives of the National Center for Transgender Equality (NCTE) and the National Gay and Lesbian Task Force met with officials from SSA to discuss these recommendations. In January 2011, NCTE submitted written recommendations on the issue of changing gender in SSA records. In February 2011, SSA resolved a matter regarding the Medicare eligibility of a transgender woman represented by the National Center for Lesbian Rights (NCLR), in the course of which SSA had the opportunity to consider legal analysis submitted by NCLR regarding the marriage issue. Since 2010, several other federal agencies have taken positive action to address these issues within their own areas of operation. In September 2011, SSA announced the removal of gender from the Social Security Number Verification System (SSNVS)—an important step forward—but gender still remains a part of other SSA matching programs. While we appreciate the major stride represented by removing gender from SSNVS, we are concerned that no action has been taken by the agency to remove gender from other systems or to address our other recommendations.

I. Gender Change in SSA Records

It is vitally important that transgender people have identifying documents and records that accurately and consistently reflect their lived gender. Having identification and records that misrepresent one's lived gender "outs" a transgender person in any situation where he or she needs to rely on these records, whether for purposes of employment or conducting business with state and local government offices. This violates the privacy of transgender people, puts them at risk for discrimination, and according to the World Professional Association for Transgender Health (WPATH), "may have a deleterious impact on a person's social integration and personal safety."¹ WPATH has therefore urged that "[n]o person should have to undergo surgery or accept sterilization as a condition of identity recognition" in official records and documents.² In a national survey, transgender people reported frequently experiencing harassment (40%), being asked to leave a place of business (15%), and even physical violence (3%) as a result of showing documentation that did not match their lived gender.³ Transgender people who have been unable to update the gender on government identification experience job and housing discrimination at higher rates than those who have updated their information.⁴ Gender information in SSA records is important because it is shared and used in numerous ways, including through several SSA computer matching programs and on Medicare insurance cards.

At present, the POMS requires that, in order to change the gender listed in an SSA record, the applicant "must submit a letter from his or her surgeon or the attending physician verifying that the sex change surgery was completed."⁵ The current POMS section impedes, rather than assists, the goal of simply and accurately identifying all account holders. Results from a national survey show that 51% of transgender people have been unable to change their SSA record to reflect their gender transition.⁶ SSA records with old gender data frequently conflict with an individual's passport, state-issued identification (such as a driver license), employer records, appearance, and everyday social role. This unnecessarily complicates the task of verifying identity, and may lead to wasteful inefficiency, delay, and unnecessary stress for account-holders in a wide variety of interactions with SSA. Because there is no such thing as a single "sex change surgery," agency personnel frequently must make ad-hoc determinations about medical documentation submitted by account holders, and often request unnecessary and intrusive details regarding an account holder's medical history. Additionally, due to the use of gender in SSA matching systems when verifying an accountholder's identity for an employer or state agency, individuals frequently fear being "outed" as transgender when they interact with state government offices.

¹ World Professional Association for Transgender Health, *WPATH Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the USA*, at 2 (June 17, 2008), available at <http://www.wpath.org/documents/Med%20Nec%20on%202008%20Letterhead.pdf>.

² World Professional Association for Transgender Health, *Identity Recognition Statement* (Jun. 16, 2010), available at <http://www.wpath.org/documents/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf>.

³ J.M. GRANT, L.A. MOTTET, J. TANIS, J. HARRISON, J.L. HERMAN, M. KEISLING, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY*, 153-54 (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

⁴ *Id.*

⁵ POMS Section RM 00203.215 Changing Numident Data for Reasons other than Name Change.

⁶ *Injustice at Every Turn*, *supra* note 3, at 79.

Since we first discussed this issue with SSA in 2010, four other federal agencies have implemented policies regarding gender change on official documents and records that are similar to the approach we recommended SSA adopt:

- On June 10, 2010, the **U.S. Department of State (DOS)** adopted a new policy for updating gender on U.S. passports and Consular Reports of Birth Abroad. Under the new policy, an applicant need only provide certification from a licensed physician who has treated the applicant or reviewed and evaluated the medical history of the applicant, that the applicant has undergone appropriate clinical treatment for gender transition. The policy explicitly states that proof of surgery or other detailed medical information is not required and should not be requested.⁷
- On May 27, 2011, the **Office of Personnel Management (OPM)** issued guidance to the heads of all executive agencies and departments regarding gender transition in the workplace, including new procedures for updating gender designations in official federal personnel records. This procedure provides for updating the designation based on submission of an updated passport, updated state driver's license or identification card, or a physician's certification that the employee has had appropriate clinical treatment for gender transition. As with the DOS policy, OPM's policy makes clear that additional medical information is not required and should not be requested.⁸
- On June 9, 2011, the **Veterans Health Administration (VHA)** issued a directive on serving transgender veterans, which provided for updating the gender designation in patient records. The directive stated that "The documented sex in the Computerized Patient Record System (CPRS) should be consistent with the patient's self-identified gender." VHA procedures implementing this policy mirror DOS's passport policy, so that either an updated passport or a physician's certification of appropriate clinical treatment for gender transition is sufficient to update the designation.⁹
- On April 10, 2012, **U.S. Citizenship and Immigration Services (USCIS)** issued a policy memorandum regarding adjudication of immigration benefits for transgender individuals, which provided for updating the gender designation on various immigration documents. This procedure provides for updating the designation based on submission of an updated passport, birth certificate, court order, or a physician's certification that the employee has had appropriate clinical treatment for gender transition. As with the DOS policy, USCIS's policy states that "Proof of sex reassignment surgery is not required to issue the requested document in the new gender and evidence of such surgery will not be requested."¹⁰

These policies represent the best practices at the federal level for updating gender designations on official records and documents. The magazine of the American Association of Motor Vehicle

⁷ US Department of State Foreign Affairs Manual, 7 FAM 1300 APPENDIX M, available at <http://www.state.gov/documents/organization/143160.pdf>.

⁸ The Guide to Personnel Recordkeeping, Office of Personnel Management, June 1, 2011 available at http://www.opm.gov/feddata/Ch4_ReconstructPersonnelFolder.pdf.

⁹ Veterans Health Administration Directive 2011-02, Providing Healthcare for Transgender and Intersex Veterans, (Jun. 9 2011), available at http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2416.

¹⁰ U.S. Citizenship and Immigration Services, Policy Memorandum on Adjudication of Immigration Benefits for Transgender Individuals; Addition of Adjudicator's Field Manual (AFM) Subchapter 10.22 and Revisions to AFM Subchapter 21.3 (AFM Update AD12-02) (April 10, 2012), available at http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/Transgender_FINAL.pdf.

Administrators recently noted a similar trend in policies regarding driver's licenses and state identification cards.¹¹ SSA would benefit from adopting a clear and readily administrable policy that is in line with other government agencies.

II. Marriages Involving a Transgender Spouse

The current POMS guidance regarding marriages of transgender people applies both to situations involving a "Gender Change Prior to Marriage" and to situations involving a "Gender Change After Marriage." In both types of situations, current guidance requires the SSA to request an opinion from Regional Chief Counsel (RCC) regarding the validity of the marriage in every single case involving a transgender spouse. That extraordinary position has no basis in law and departs dramatically from the SSA's past practices with regard to marriages involving transgender persons, which (to the best of our knowledge) have treated such marriages as presumptively valid unless there was a specific reason to question the validity of the marriage based on the facts in a particular case. It also imposes an enormous administrative burden on the SSA, causes serious hardship due to the inevitable delay entailed by requiring an RCC opinion in every case, and invites arbitrary and inconsistent results by implying—erroneously—that gender transition is not generally considered legitimate and that few states permit transgender persons to marry. In fact, every state permits transgender persons to marry and nearly every state recognizes gender transition for purposes for marriage. The current POMS guidance also wrongly suggests that a previously valid marriage could become invalid or lose federal recognition after one of the spouses undergoes a gender transition. In fact, there is no legal precedent for retroactively invalidating a marriage that was valid at the time it was entered into.

Other federal agencies have taken recent actions to clarify the administration of benefits for transgender people and their spouses:

- On May 27 2011, the **U.S. Office of Personnel Management (OPM)** issued guidance regarding employee benefits in situations where a spouse transitions following a valid marriage. In this guidance, OPM states that "If the employees in transition are validly married at the time of the transition, the transition does not affect the validity of that marriage, and spousal coverage should be extended or continued even though the employee in transition has a new name and gender."¹²
- On April 10, 2012, **U.S. Citizenship and Immigration Services (USCIS)** issued a policy memorandum regarding adjudication of immigration benefits for transgender individuals, which addressed the situation where an individual marries following gender transition. In the memorandum, USCIS states that it will recognize gender change for purposes of a subsequent marriage based upon an amended birth certificate, court order, or other official documentation; or, alternatively, based on a certification from a licensed physician regarding the individual's gender transition.¹³

These developments reinforce the need to revise the guidance provided in the POMS to ensure that it is accurate, complete, and results in fair dispositions consistent with state and federal law.

¹¹ Tom Manuel, "Transgender Drivers: New Norms in Customer Service," *MOVE Magazine*, pp. 29-32 (Spring/Summer 2011), available at: <http://www.aamva.org/Publications/Move/Archives.htm>.

¹² Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, U.S. Office of Personnel Management, available at <http://www.opm.gov/diversity/Transgender/Guidance.asp>.

¹³ U.S. Citizenship and Immigration Services, *supra* note 10.

III. Eliminating Gender in SSA Matching Programs

We commend SSA for eliminating gender from the SSNVS system, a move that protects the privacy of tens of thousands of transgender workers and eliminates wasteful and confusing notifications. However, we are concerned that gender continues to be used in other SSA matching programs, such as the Enumeration Verification System (EVS). We have continued to hear from individuals who have been the subject of notices related to gender discrepancies through these systems, and we are particularly concerned about a number of reports we have received from state government employees who have encountered workplace difficulties as a result, as well as individuals who have encountered difficulties in accessing housing and social services. A 2011 FOIA request revealed that the EVS system generated more than 1,520,000 verification responses where gender was the only non-matching field. We believe that the continued use of gender in these systems is unnecessary, wasteful, and has serious and unintended consequences for transgender people.

The use of gender in these systems also implicates transgender people's rights under the federal Constitution and the Privacy Act. The courts have repeatedly recognized that "[t]he excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate," and that individuals have a constitutional right to privacy regarding this information.¹⁴ This right is infringed when a government agency needlessly discloses information about a person's transgender status to a third party. An Alaska court recently held that the right to privacy is infringed when a transgender individual is unable to change the gender designation on his or her driver's license to correspond to his or her lived gender. The court reasoned that because license-holders are routinely obliged to share this document with third parties to verify identity, the licensing agency is in effect disclosing the individual's transgender status to third parties.¹⁵ This reasoning applies even more strongly to SSA's matching programs, which directly notify third parties of non-matching gender data and thereby "out" transgender individuals to participating entities.

The policy changes regarding gender in official records and documents discussed above indicate the growing recognition that federal programs must protect individuals' legitimate right to privacy concerning their transgender status. Because the continued use of gender data in SSA matching programs does not serve program goals, has unintended consequences for individuals, and presents serious legal questions, we urge you to work swiftly to eliminate gender from EVS and other matching programs where there is not a clear programmatic need to use this data.

IV. Conclusion

These recommendations are consistent with applicable federal and state law and would bring SSA procedures into alignment with other federal agencies. They would also reduce inconsistencies in benefit administration and ensure equity for transgender individuals and their families.

¹⁴ *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999).

¹⁵ *K.L. v. State of Alaska*, Department of Administration, Division of Motor Vehicles, Case No. 3AN-11-05431 CI (Alaska Sup. Ct., Anchorage, Mar. 12, 2012). The Alaska DMV was ordered to develop new procedures for gender changes, taking into consideration the constitutional issues raised by the court.

We urge you to take prompt action on each of these matters. Please feel free to contact Mara Keisling, Executive Director of the National Center for Transgender Equality, at (202) 903-0112 or mkeisling@transequality.org to discuss these matters.

Sincerely,

National Center for Transgender Equality
American Civil Liberties Union
Family Equality Council
Gay and Lesbian Advocates and Defenders
Human Rights Campaign
Lambda Legal
National Center for Lesbian Rights
National Gay and Lesbian Task Force
Transgender Law Center

Cc:

Kojuan Almond
Associate Commissioner, Office of External Affairs
Social Security Administration

David F. Black
General Counsel
Social Security Administration

Karen R. Martin
Deputy Commissioner, Office of Earnings, Enumeration and Administrative Systems
Social Security Administration

Gautam Raghavan
Office of Public Engagement
The White House

Attachment A

Recommended Policy for Documentation of Gender Change/Correction

To change gender data in the Numident, the applicant must provide either:

(1) Official documentation of gender change from a federal or state agency or court, such as an amended passport, driver's license or state identification card, or court order, or;*

(2) A signed original statement, on office letterhead, from a licensed physician or mental health care provider. The statement must include the following information:

- (a) Provider's full name;
- (b) Professional license or certificate number;
- (c) Issuing state or other jurisdiction of professional license/certificate;
- (d) Address and telephone number of the provider;
- (e) Language stating that he/she has a clinical/patient relationship with the applicant;
- (f) Language stating either:
 - (i) that the applicant has had appropriate clinical treatment for gender transition to the new gender (male or female); **OR**
 - (ii) that the applicant has an intersex condition or disorder of sex development, and that the correct gender designation should be (male or female);
- (g) Language stating "I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct."

Other medical records are not to be requested. Surgical treatment is not a prerequisite for gender change and such documentation must not be requested.

* **Note:** The original recommendation submitted by NCTE did not include this method of documentation as an alternative to a physician certification. However, policies subsequently adopted by the U.S. Office of Personnel Management (OPM) and U.S. Citizenship and Immigration Services (USCIS) do provide for such alternative documentation. We believe this is a sensible approach and recommend that SSA adopt it.

Attachment B

Recommended Guidance on Marriages Involving a Transgender Spouse

The following guidance applies to claims in which information (e.g., from an amended birth certificate, the Numident, volunteered information) indicates that a party to a marriage has changed his or her gender since birth. The gender transition may or may not impact the validity of a marriage and the status of a claimant as the wife, husband, or widow(er) of the NH. Similarly, the status of a claimant as the child of the NH may depend upon whether the child's parents (the NH and another person) were married. The relationship of the claimant to the NH is largely dependent on the validity of the marriage in question or the right of the claimant to inherit by intestate succession from the NH under State Law. Most States recognize gender changes in certain circumstances and, therefore, may recognize a marriage (or inheritance rights) where a transgender individual is involved, provided the new gender is opposite the gender of the other party at the time of the alleged marriage.

a. Gender Transition Prior to Marriage

If a gender transition occurred *prior* to marriage, it will typically be recognized for purposes of marriage in most states. Sufficient documentation of gender change for this purpose shall ordinarily include official documents indicative of recognition by a state or a foreign government, including any of the following:

- (a) An amended birth certificate;
- (b) A court order; or,
- (c) Medical documentation, such as a letter from a physician confirming that the individual has had sufficient medical treatment to satisfy applicable state requirements for recognition of gender change. For some states, this will require proof of surgical treatment. For others such as California, Washington and Vermont, a doctor's statement that the individual has had treatment appropriate for the individual for gender transition will suffice.

If an amended birth certificate or court order reflecting a gender transition is available, do not gather additional documentation. If the applicable state law standard or the documentation supplied is unclear, send the claim to the RCC responsible for the laws of the appropriate domiciliary State and request an opinion about whether the marriage in question is valid or whether the claimant may inherit from the NH by intestate succession under applicable state law.

b. Gender Transition After Marriage - No Divorce or Annulment

If a gender transition occurred *subsequent* to a marriage, a valid marriage entered into between a man and woman remains valid for its duration in all jurisdictions. A subsequent gender transition by a spouse does not invalidate the marriage.

In **all** claims involving a transgender spouse, do not use the sex data shown on the Numident to determine whether a valid marital relationship exists in a claims situation. Numident data is for identification purposes only.