

**U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE FOR CIVIL RIGHTS
HEADQUARTERS**

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**U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE FOR CIVIL RIGHTS
REGION IV**

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Sam Nunn Atlanta Federal Center, Suite 16T70
61 Forsyth Street, S.W.
Atlanta, GA 30303-8909

ADMINISTRATIVE COMPLAINT

COMPLAINANT

National Women's Law Center
11 Dupont Circle, NW, Suite 800
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(202) 588-5180

The National Women's Law Center ("NWLC") is a non-profit organization that has been working since 1972 to expand the possibilities for women and their families in education, employment, family economic security, health, and other critical areas. The NWLC has a particular focus on addressing women's equal access to health care, which includes its work to ensure compliance with Section 1557 of the Affordable Care Act.

RECIPIENTS AND EXECUTIVE AGENCY ADMINISTERING COVERED PROGRAM

Transamerica Life Insurance Company

4333 Edgewood Road NE
Cedar Rapids, IA 52499

Centers for Medicare and Medicaid Services

7500 Security Boulevard
Baltimore, MD 21244

Centers for Medicare and Medicaid Services, Region 4

Sam Nunn Atlanta Federal Center (SNAFC)
61 Forsyth Street, SW
Atlanta, GA 30303-8909

Kentucky Department of Medicaid Services

275 E Main St.

PRELIMINARY STATEMENT

1. This Complaint is filed by the NWLC pursuant to Section 1557 of the Patient Protection and Affordable Care Act, § 1557, codified at 42 U.S.C. § 18116 (2012) (“Section 1557”). Section 1557 prohibits discrimination on the basis of sex in health programs or activities any part of which receives federal financial assistance or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the Affordable Act or its amendments.
2. Transamerica Life Insurance Company (“Transamerica”) has announced that, as of 2013, it adopted gender-based pricing for its long-term care insurance policies. Gender-based pricing of long-term care insurance policies results in higher rates for women than for men and violates the sex discrimination prohibition of Section 1557. Transamerica is subject to Section 1557 because it receives federal financial assistance, including through its participation in the federally-supported Long-Term Care Partnership Program in Kentucky (“Partnership” or “Partnership Program”).
3. By assisting Transamerica through the Partnership Program, CMS administers the Medicaid program in a manner that discriminates on the basis of sex. The Medicaid program is subject to Section 1557 because it is a program administered by CMS, an Executive Agency.
4. Kentucky’s Department of Medicaid Services (“DMS”) discriminates on the basis of sex by permitting Transamerica to participate in the Partnership Program and assisting Transamerica through the Partnership Program. Through the Partnership, the Kentucky DMS promotes Transamerica’s discriminatory products and provides special eligibility for Medicaid for individuals who purchase and use benefits under Transamerica policies. The Kentucky DMS is subject to Section 1557 because they receive federal financial assistance, including funds from the U.S. Department of Health and Human Services (“HHS”) to administer health programs such as the Medicaid program.
5. NWLC requests that the U.S. Department of Health and Human Services Office for Civil Rights (“OCR”) investigate Transamerica and require that it end the discriminatory practice of basing premium rates on gender and provide the relief requested in ¶ 22. NWLC also requests that OCR require CMS and the Kentucky DMS to stop permitting Transamerica to participate in the Partnership Program or to sell its gender-rated long-term care insurance policies through the Partnership Program.

JURISDICTION

6. HHS is the agency with primary responsibility for implementing Section 1557 and OCR is responsible for ensuring compliance with Section 1557, including in HHS-conducted activities and by HHS funding recipients, and for receiving information about, investigating, and remedying violations of Section 1557, including in HHS-conducted

activities and by HHS funding recipients. The Region IV OCR is responsible for these activities in Kentucky.

7. The NWLC has not filed this complaint with any other agency or institution.
8. Given the current and ongoing nature of the problems documented, this complaint is timely.

FACTUAL ALLEGATIONS

9. Long-term care insurance, including the plans offered by Transamerica, covers the costs of managing and maintaining the condition of an individual who has a cognitive impairment or needs assistance with the daily activities of life. U.S. Dep't of Health & Human Servs., "Receiving Long-Term Care Insurance Benefits," <http://longtermcare.gov/costs-how-to-pay/what-is-long-term-care-insurance/when-your-coverage-begins> (last visited Jan. 9, 2014).
10. According to Transamerica, it introduced gender-rated long-term care insurance policies in Kentucky on September 10, 2013. Transamerica, Transcare III Individual Long Term Care Insurance, 2-3, *available at* http://image.s4.exct.net/lib/fe9c15707062047d72/m/1/TCIII+Launch_email.pdf; Transamerica, Transcare II/Transcare III Comparison Chart, *available at* http://image.s4.exct.net/lib/fe9c15707062047d72/m/1/TCII_TCIII+Comparison+Chart.pdf. Transamerica also stated that the gender-rated product would be Partnership qualified in Kentucky. Transamerica, TransCare III Launched in 36 States (Sept. 13, 2013), <https://www.taltc.com/ARC/viewannouncement.jsf>.
11. Gender-rating of insurance policies, by definition, results in premiums for men and women being based on their sex rather than on a range of permissible, individual characteristics. Under this gender-rated pricing scheme, women pay more than men for the same long-term care insurance policies. *See* Michelle Andrews, *Key Long-Term-Care Insurer To Raise Women's Premiums*, Kaiser Health News (Feb. 26, 2013), <http://www.kaiserhealthnews.org/Features/Insuring-Your-Health/2013/022613-Michelle-Andrews-on-long-term-care-insurance-premiums.aspx>. It is estimated that as a result of this gender-rated pricing scheme, single women pay 20 to 40 percent more than single men for these long-term care insurance policies. *Id.*
12. The Kentucky DMS administers the State's Long-Term Care Partnership with the Department of Insurance. Ky. Rev. Stat. § 304.14-642(1) (2012). The Partnership was "established to: (a) Provide incentives for an individual to insure against the cost of providing for his or her long-term care needs; (b) Increase utilization of long-term care insurance policies; (c) Assist in alleviating the financial burden of Kentucky's Medicaid program by encouraging the use of private insurance; and (d) Provide a mechanism for individuals to qualify for Medicaid services for costs of long-term care without exhausting all of their assets and resources." *Id.* Specifically, the Partnership links private long-term care insurance policies with special eligibility for Medicaid that allows

individuals “to protect some or all of their assets by providing exemptions from the Medicaid spend down requirements.” Ky. Dep’t of Insur., Long-Term Care Insurance: 2014-2015, 7, *available at* <http://insurance.ky.gov/Documents/ltcguide.pdf>.

13. To establish its Partnership Program, the Kentucky Cabinet for Family and Health Services—of which the DMS is a program agency—submitted a Medicaid State Plan Amendment (“SPA”) to CMS to make required changes to its Medicaid program and then implement the Partnership Program. CMS approved the Kentucky SPA on October 20, 2008. Ctrs. for Medicare & Medicaid Servs., U.S. Dep’t of Health & Human Servs., Kentucky State Plan Amendment (Oct. 20, 2008), *available at* <http://chfs.ky.gov/NR/rdonlyres/1E585358-572B-40B5-AF0D-5F687353B676/0/KY08009ApprovalLetter179andPlanPages.pdf>. The CMS-approved SPA empowered Kentucky to develop its Partnership Program. The SPA provides that, for every dollar that a Partnership long term care insurance policy pays out in benefits, a dollar of assets can be excluded when determining eligibility for Medicaid. *Id.* at 1 of Supp. 8c, Att. 2.6-A.
14. Transamerica is approved by the Kentucky Department of Insurance to participate in the Partnership Program and sell Partnership policies. Ky. Dep’t of Insur., Long-Term Care Insurance: 2014-2015, 107-10, *available at* <http://insurance.ky.gov/Documents/ltcguide.pdf>. The Department of Insurance specifically indicates that gender-rated policies Transamerica policies are available for sale. *Id.* at 108, 110.
15. Through the Partnership Program, CMS and the Kentucky DMS incentivize the purchase of Transamerica’s long-term care insurance policies. The Partnership incentivizes individuals to purchase Transamerica’s Partnership-approved long-term care insurance policies by giving individuals special access to Medicaid if they buy and use the benefits under a Partnership-approved policy. Only individuals who purchase Partnership-approved policies from participating private insurers are granted this special eligibility. This special access means that after purchasing and using the benefits under a Partnership policy, individuals can protect some or all of their assets and still qualify for Medicaid. They can also protect their assets from estate recovery after they die. Ky. Rev. Stat. § 304.14-642(1) (2012). *See also* Ky. Dep’t of Insur., Long-Term Care Insurance Partnership Program: Frequently Asked Questions, 2, *available at* <http://insurance.ky.gov/Documents/LTCCPartFAQ102413.pdf> (last visited Jan. 14, 2014).
16. The Kentucky DMS, together with the Kentucky Department of Insurance, promotes the purchase of approved long-term care policies through the Partnership Program. For example, they explain that while Partnership policies do not guarantee eligibility for Medicaid, “if you purchase a LTC partnership policy and later apply and are declared eligible for Medicaid benefits, you can keep assets equal to the amount of benefits you have received through the insurance coverage. In addition, these assets would not be subject to estate recovery after your death, allowing you to leave a portion of your assets to your heirs.” Ky. Dep’t of Insur., Long-Term Care Insurance Partnership Program:

Frequently Asked Questions, 2, *available at* <http://insurance.ky.gov/Documents/LTCPartFAQ102413.pdf> (last visited Jan. 14, 2014).

LEGAL ALLEGATIONS

17. Section 1557 provides, in relevant part that:

[A]n individual shall not, on the ground prohibited under... title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.)..., be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments).

Patient Protection and Affordable Care Act § 1557(a), 42 U.S.C. § 18116(a) (2012).

18. The Medicaid program is a joint federal-state program that provides health care coverage for low-income people. It is administered by CMS, and, in Kentucky, by the Kentucky DMS. CMS, as an executive agency, must ensure programs administered by it do not discriminate on the basis of sex in violation of Section 1557. This includes ensuring that it does not provide assistance to discriminatory entities and does not facilitate participation in discriminatory programs. Section 1557 prohibits discrimination against any individual on the basis of sex under “any program or activity that is administered by an Executive Agency.” Patient Protection and Affordable Care Act, § 1557, 42 U.S.C. § 18116(a) (2012). Section 1557 requires that CMS, as the administrator of the Medicaid program, operate the program in a nondiscriminatory manner, which includes not providing assistance to discriminatory entities or facilitating individuals’ participation in discriminatory programs or activities. *Cf.* 45 C.F.R. §§, 85.21(b)(1)(vi); 85.21(b)(3)(i) (2012) (Section 504 regulations); 34 C.F.R. § 106.31(b)(6) (Title IX regulations); *Iron Arrow Honor Society v. Heckler*, 702 F.2d 549, 561 (5th Cir. 1983) *vacated for mootness* by 464 U.S. 67 (1983)) (upholding these Title IX regulations); *see also* 34 C.F.R. § 106.31(d) (2012) (Title IX regulations).

19. The Kentucky DMS and Transamerica are recipients of federal financial assistance and are thus prohibited by Section 1557 from discriminating based on sex, including by providing assistance to or facilitating access to discriminatory entities.

- a. The Kentucky DMS receives and distributes federal funds including from the U.S. Department of Health and Human Services, to administer State programs, such as the jointly-administered federal-state Medicaid program, among others.
- b. Transamerica receives federal financial assistance through its participation in the Partnership Program. At no cost to Transamerica, the Partnership Program promotes Transamerica’s products and provides its customers with special access to Medicaid. These promotions and incentives are federal financial assistance:

they come from the Partnership, a federally-supported approved and supported program.

- c. Section 1557 provides that any health program or activity receiving federal financial assistance, including in the forms of “credits, subsidies, or contracts of insurance” cannot discriminate on the basis of sex. Patient Protection and Affordable Care Act § 1557(a), 42 U.S.C. § 18116(a) (2012). At the very least under this definition (which is broader than the definition of federal financial assistance in other Spending Clause nondiscrimination statutes), an entity receives federal financial assistance when the benefits provided to the recipient are designed to assist—rather than compensate. *Jacobson v. Delta Airlines*, 742 F.2d 1202, 1210 (1984) (stating that determination must be made as to “whether the government intend[s] to provide assistance or merely to compensate”). “Federal financial assistance” is not limited to the direct provision of funds. *U.S. Dep’t of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597, 607 n.11 (1986). An entity receives federal financial assistance, including non-monetary assistance, when it “benefit[s] in its dealings with the government to a greater extent than if it were dealing with another party.” *Jacobson*, 742 F.2d at 1209 (describing a “recipient” under Section 504 of the Rehabilitation Act regulations).
 - d. By participating in the Partnership Program, Transamerica receives the benefit of CMS and the Kentucky DMS targeting customers for it, promoting its products, and incentivizing the purchase of its products. First, the CMS-approved SPA allowed Kentucky to develop its Partnership Program through which the purchase of Transamerica policies are promoted and incentivized. Specifically, the Partnership—a collective enterprise of CMS and the Kentucky DMS—encourages the purchase of Partnership policies including those sold by Transamerica by promoting it as an approved issuer and marketing its policies to potential customers. Moreover, CMS’s waiver of otherwise applicable Medicaid rules provides individuals incentives in the form of special eligibility for Medicaid to choose one of the Partnership-approved policies sold by participating issuers, including Transamerica.
 - e. The special eligibility for Medicaid that CMS provides for Partnership-approved policies and the promotion of Transamerica policies through the Partnership Program constitutes a valuable benefit to Transamerica—and specifically to Transamerica’s long-term care insurance program—that is not designed to compensate. As a result, these benefits are federal financial assistance.
20. Transamerica’s long-term care insurance and the Kentucky DMS are health programs or activities subject to Section 1557.
- a. Transamerica’s long-term care insurance is a health program or activity subject to Section 1557. To effectuate Section 1557’s nondiscrimination principle, the determination of whether a program is a “health” program or activity should be consistent with existing interpretations of the term “health” offered by the World

Health Organization (“WHO”). WHO defines health to include not just the absence of disease but also “physical, mental, and social well-being.”¹ Based on this widely-accepted definition of health, a health program or activity includes any program or activity that is designed to promote, maintain, or prevent the decline of the health of the physical, mental, or social well-being of an individual or population’s health. Long-term care insurance clearly meets this definition.

- b. Specifically, Transamerica’s long-term care insurance is a Section 1557 “health” program or activity because it covers the costs of managing and maintaining the condition of an individual who has a cognitive impairment or needs assistance with the daily activities of life. U.S. Dep’t of Health & Human Servs., “Receiving Long-Term Care Insurance Benefits,” <http://longtermcare.gov/costs-how-to-pay/what-is-long-term-care-insurance/when-your-coverage-begins> (last visited Jan. 9, 2014). Long-term care includes home health care, nursing home care, or care in an assisted living facility to maintain, manage or prevent the decline of an individual’s health, as well as assistance with activities of daily living.² Nat’l Assoc. of Ins. Comm’rs, “Consumer Alert: Long Term Care Insurance: What You Should Know,” http://www.naic.org/documents/consumer_alert_ltc.htm (last visited Jan. 9, 2014). Indeed, by connecting Medicaid and long-term care through the Partnership Program, both the federal and Kentucky governments acknowledge the importance of long-term care as part of health care.
- c. Because Transamerica’s long-term care insurance is a health program or activity receiving federal financial assistance, Transamerica is prohibited from discrimination on the basis of sex in the operation or terms of its long-term care insurance.³
- d. The Kentucky DMS is a “health program or activity” within the meaning of Section 1557, which defines “program or activity” as those terms are defined in the Civil Rights Restoration Act of 1987. The Kentucky DMS is an entity of the State of Kentucky that administers the state’s health programs. *Cf.* Civil Rights

¹ Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and entered into force on 7 April 1948.

² Partnership policies are specifically required by state law to cover long-term care services that “(A) are required by a chronically ill individual, and (B) are provided pursuant to a plan of care prescribed by a licensed health care practitioner.” 26 U.S.C. § 7702B(c)(1) (2012) (defining “tax-qualified” long-term care services); Ky. Rev. Stat. Ann. § 304.14-642(2)(B) (2012) (requiring that Kentucky Long-Term Care Partnership policies meet the IRS definition of “tax-qualified”). Covered long-term care services must include “necessary diagnostic, preventive, therapeutic, curing, treating, mitigating, and rehabilitative services, and maintenance or personal care services,” for an “chronically ill individual,” defined as being unable to perform at least two activities of daily living or “requiring substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment.” 26 U.S.C. § 7702B(c)(1)-(2) (2012). *See also* I.R.S., Dep’t of the Treasury, Taxable and Nontaxable Income, Publication No. 525, 18 (2013), available at <http://www.irs.gov/pub/irs-pdf/p525.pdf>.

³ Indeed, all of the operations of Transamerica, and not only those like the long-term care insurance program that directly receive federal funds, are subject to Section 1557’s nondiscrimination rule, because Transamerica is principally engaged in the business of providing health care. *See* Civil Rights Restoration Act of 1987 § 3 (codified as amended at 20 U.S.C. 1687(3)(A)(ii)).

Restoration Act of 1987, § 3 (codified as amended at 20 U.S.C. 1687(1)(A)-(B) (defining “program or activity” in a closely analogous context as “all the operations of” “a department, agency, special purpose district, or other instrumentality of a State or of a local government; or the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government”). The Kentucky DMS operates State health programs, including the state’s Medicaid program, which provides health coverage to low-income individuals and aims to maintain, promote, or prevent the decline of the health of individuals in Kentucky. All of the activities of the Kentucky DMS, including the operation of the Partnership Program, are thus subject to Section 1557’s prohibition of discrimination on the basis of sex.

21. Gender-rating of insurance policies means that premiums for men and women are based on their sex rather than on a range of permissible characteristics. Because it treats women as a class based on their sex, rather than treating them as individuals, gender-rating is sex discrimination. This principle has been applied in circumstances where—as in this instance—women have been required to pay more for a benefit simply because they are women, even when an actuarial justification is offered for the difference in treatment. For example, an employer violates Title VII’s prohibition against sex discrimination when it requires its female employees to make larger contributions to its pension fund than its male employees based on the justification that women, as a class, live longer than men. *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 708 (1978) (stating Title VII requires employer to treat employees as individuals, not “simply as components of a racial, religious, sexual or national class” and that “even a true generalization about a class is an insufficient reason for disqualifying an individual to whom the generalization does not apply”). Similarly, an employer discriminates on the basis of sex when it offers its employees the option of receiving retirement benefits from companies selected by the employer, all of which pay women lower monthly benefits than men who make the same contributions. *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1083-84 (1983) (reiterating *Manhart* reasoning and stating that “[t]he use of sex-segregated actuarial tables to calculate retirement benefits violates Title VII whether or not the tables reflect an accurate prediction of the longevity of women as a class” because such generalizations “cannot justify class-based treatment.”).
- a. Section 1557 protects “an individual” from “be[ing] excluded from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination under” a covered program because of the individual’s sex. Women who purchase long-term care policies from Transamerica are “individuals” participating in a covered health program or activity and are being subjected to discrimination—higher prices—based on their sex. Transamerica’s gender-rating policy thus unlawfully discriminates based on sex in violation of Section 1557.

- b. CMS is also unlawfully discriminating on the basis of sex. Section 1557 prohibits CMS, an Executive Agency, from administering the Medicaid program in a manner that discriminates on the basis of sex. This includes a prohibition on aiding or perpetuating discrimination by providing assistance to entities that discriminate on the basis of sex or facilitating individuals' participation in a discriminatory program. *Cf.* 45 C.F.R. §§ 85.21(b)(3)(i) (2012), 85.21(b)(1)(vi) (Section 504 regulations); 34 C.F.R. § 106.31(b)(6) (2012) (Title IX regulations); *Iron Arrow Honor Society v. Heckler*, 702 F.2d 549, 561 (5th Cir. 1983), *vacated for mootness* by 464 U.S. 67 (1983) (upholding these Title IX regulations); *see also* 34 C.F.R. § 106.31(d) (2012) (Title IX regulations). CMS, however, provides such assistance and/or facilitates individuals' participation in Transamerica's discriminatory, gender-rated long-term care insurance by providing special eligibility for Medicaid for individuals that purchase the Partnership-approved discriminatory Transamerica policies through the federally-supported and CMS-approved Partnership Program.

- c. And, Section 1557 prohibits the Kentucky DMS, a recipient of federal financial assistance, from discriminating on the basis of sex in their health programs or activities, including a prohibition on aiding or perpetuating discrimination by providing assistance to entities that discriminate on the basis of sex or facilitating individuals' participation in a discriminatory program. The Kentucky DMS however, has essentially adopted Transamerica's discriminatory gender-rating policy as its own, promoting its discriminatory products, and providing special eligibility for individuals that purchase and use the benefits under Transamerica policies. These actions aid Transamerica in its discrimination and facilitate individuals' participation in Transamerica's discriminatory long-term care insurance, in violation of Section 1557.

RELIEF REQUESTED

22. The NWLC requests that:

- a. OCR investigate whether Transamerica sells long-term care insurance policies that base premium rates on gender, whether through the Partnership or otherwise.

- b. OCR take all necessary steps to remedy all unlawful conduct identified in its investigation, including ending the charging of premium rates based on sex and compensating women for increased charges, as required by Section 1557.

- c. OCR take all necessary steps to ensure that CMS and the Kentucky DMS cease providing Transamerica federal financial assistance by permitting Transamerica to participate in the Partnership Program or otherwise.

- d. OCR monitor any resulting agreements with CMS, Kentucky DMS, and Transamerica to ensure that compliance with Section 1557 is achieved.

Respectfully submitted,

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