Testimony of
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Committee on Education and Labor
Subcommittee on Health, Employment, Labor and Pensions

Hearing on H.R. 2015—The Employment Non-Discrimination Act of 2007

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Introduction

Chairman Andrews, Ranking Member Kline, members of the Committee, I am pleased to be invited to testify before you today on H.R. 2015, the Employment Non-Discrimination Act of 2007, "ENDA".

My own background may be relevant to my comments on this legislation. I have been a labor law practitioner for 35 years starting in the Solicitor's Office at the Department of Labor. I am a labor and employment partner in the Washington DC office of Proskauer Rose, LLP. In 1975 I was appointed by Secretary of Labor John Dunlop as a Deputy Assistant Secretary of Labor and Director of the Office of Federal Contract Compliance Programs, OFCCP, which enforces the various non-discrimination and affirmative action laws applicable to government contractors. In that capacity, the first regulations enforcing section 503 of the Rehabilitation Act were issued as well as the first comprehensive review of the E.O. 11246 regulations was undertaken. In private practice, I have represented and counseled employers on various issues relating to equal employment matters. In 1989 I was asked to represent various employer groups with respect to the consideration and ultimate passage of the Americans with Disabilities Act, and in 1991 I was counsel to the Business Roundtable during the consideration of the Civil Rights Act of 1991. In 1995 I was honored to be appointed as a Member of the first Board of Directors of the Office of Compliance, which enforces the Congressional Accountability Act, applying 11 employment and labor laws to the Congress. I have been management co-chair of the federal legislation committee of the Labor Section of the ABA and am chair of the EEO subcommittee of the US Chamber of Commerce. Over the years I have been asked to testify on various employment issues being considered by the Congress.

The Employment Non-Discrimination Act of 2007

My purpose here today is not to recommend whether this Committee or the Congress should ultimately decide to pass this legislation but rather to offer comments on the latest version, and highlight issues which may warrant the attention of this Committee as it examines the legislation. While I do bring extensive experience as an employment

law practitioner, I am not testifying today on behalf of my law firm, clients or other affiliations.

The 2007 version of ENDA represents a continuation of the examination of the issues involving the consideration of sexual orientation under our federal employment laws and potential legislative responses. However, as I will highlight, the 2007 version does contain several significant changes from prior versions which should be closely examined as they represent potentially far reaching changes in accepted employment law and may well have significant impact upon employers and employees. As a preliminary matter, it should be noted that without categorizing one or another of the laws as necessary or superfluous, there are probably more and different employment laws impacting upon the workplace, including federal, state and local than apply in other regulated areas. Some cover the same areas but have different administrative or enforcement procedures. Others include overlapping federal, state and local requirements but differ in scope, procedure or administration. And still others overlap within the same jurisdiction, so that one federal law implicates another. And it should be noted that the greatest single area of growth in federal civil litigation involves employment and labor law. Therefore the Congress should be cautious in adding to this growing and complex list of laws, and thereby the potential for increased litigation. And while section 15 of ENDA provides that nothing in this legislation, or law if it becomes enacted will invalidate or limit the rights under any other federal, State or local law, in fact there are some examples in the 2007 version of ENDA in which the plain meaning of the draft language will serve to circumvent or change other laws. Thus may I suggest that the Committee carefully weigh the impact of ENDA and its requirements on how the regulated community must adopt to its proscriptions and how the protected community will understand their rights.

Section 4(a)(1)(2)

The analysis of ENDA should begin with Section 4 (a)(1) and (2), the core description of unlawful employment practices. There is a major new issue raised in this section which the Committee may wish to focus on. For the first time, a new protected category, Gender Identity, has been introduced into the legislation. The term is defined in section 3 (a) (6) as "the gender related identity, appearance, or mannerisms or other gender-related characteristics of an individual, without regard to the individual's designated sex at birth." While gender identity may be viewed as a manifestation of an individual's sexual orientation as defined in section 3 (a)(9), gender-identity, as defined in the bill does not seem to relate to any discernable innate characteristic or sexual orientation. Rather, as used in section 4 (a) it appears to relate to actions or representations of an individual perhaps related to sexual orientation or perhaps not. Thus, it stands as an independent protected classification not grounded in any discernable characteristic or status which is the basis for all of the non-discrimination legislation. I would suggest that the Committee examine in more detail how an employer might deal with this issue and insure that it does not violate the law. While, for example, section 8 (a)(4) permits employers to establish neutral reasonable dress or grooming standards,

might not the requirement to accommodate an individual's gender identity, which may or may not have relationship to the individual's sexual orientation or gender transition, undermine the protection of section 8 (a)(4)? It is unclear why this new protected classification was added to ENDA when the protection for sexual orientation would seem to encompass activities and mannerisms related to orientation. And further, existing Title VII case law and statute would seem to adequately deal with the issue raised by the addition of gender identity into the proposed legislation. In *Price Waterhouse v Hopkins*, 490 US 228 (1989), the Supreme Court held in part that improper sexual stereotyping manifested by assumptions as to "proper behaviors" based upon sex could well form the basis for a Title VII action. The *Hopkins* decision was further clarified in Section 107 of the 1991 Civil Rights Act, see 42 USC §2000e-2(m) which codified the plurality holding in *Hopkins* regarding mixed motive cases.

Section 4(e)

I would note as well that section 4 (e) of the legislation which prohibits association discrimination also includes *gender identity*. Section 4 (e) is modeled after the ADA,42 USC sect 12112 (b)(4) and is understandable when applied to defined characteristics. It is less than clear, however, when applied to non- inherent characteristics which may be self-perceived by the individual but not apparent to the employer. This will seem to create the potential for difficult enforcement and even more potentially difficult litigation since the underlying issue may be ephemeral or not readily apparent to the employer. Again, understanding the law makes compliance with the law an acceptable undertaking.

Section 4(g), Section 8 (a)(5)), Section 8(a)(1)

Section 4 (g) appropriately provides that only disparate treatment and not disparate impact claims may be brought under this Act. I would suggest that direct reference be made to section 42 USC §2000e-2(k) which is the first statutory definition of disparate impact so that the concept of disparate impact is clearly understood.

However, I must note that while section 4 (g) seems clear and unambiguous, it is excepted by section 8 (a)(5), which seems to prohibit any employer action based upon the legal status of marriage and is expressly distinguished from section 4 (g). It is not clear at all what is meant by this section, particularly as section 8 (b) states that notwithstanding section 8 (a)(5), employee benefits conditioned on marriage are not affected by this Act. If this section is meant to clarify the concept of pretext under traditional disparate treatment analysis, then certainly there is no basis to exempt it from the prohibition against considering disparate impact claims under this statute. However, if section 8(a)(5) calls for some form of disparate impact analysis, then I think it is both inappropriate in the context of the legislation as drafted and subject to a great deal of confusion. I am not aware of any employer which requires employees to be married, nor would I believe such a requirement would stand analysis under existing employment law. So too section 8(a)(1) could be construed as incorporating concepts of disparate impact in

its treatment of employer rules and policies. In particular, the Committee might wish to add the word "intentionally" before "circumvent the purposes of this Act" to insure that this language is not used to attack neutral policies which may be perceived to violate the Act, which would directly import disparate impact into the Act.

Section 5

Section 5 prohibits retaliation against an individual who opposes any practice made unlawful by this Act, or who makes a charge or testifies pursuant to this Act. Prohibition against retaliation is well understood in the broad context of employment law and appropriate to be included in ENDA. However, since the concept of retaliation is well understood in employment law, the Committee might want to insure that the definition in section 5 is compatible with existing law rather than establish different concepts or use language not grounded in established precedent.

Section 6

Section 6 of ENDA deals with the application of the proposed statute to Religious Organizations. While I understand that this issue will be specifically addressed in this hearing, I do believe it important to note that religious organizations or religious affiliated organizations are employers and there seems to be a degree of uncertainty as to the precise meaning of section 6 particularly as it differs in structure from the analogous provision in Title VII. Therefore, it would seem appropriate for the Committee to undertake a careful examination of the exemption to assure that it is appropriately drafted to achieve its intended purpose.

Section 8(a)(3)

Section 8(a)(3) requires an employer to provide adequate shower or dressing facilities to employees undergoing transgender transition. The committee should address whether this section creates the requirement for the provision of additional facilities or the requirement that use of certain facilities be timed to insure employee comfort for all employees. In addition, section 8(a)(3) as drafted requires that facilities not only accommodate employees who have undergone or are undergoing gender transition, but to accommodate the employees self-perceived gender identity. This would seem to present an extremely difficult standard for employers to meet and in fact would seem to require an employee to register his or her gender identity with the employer at the time of employment which seems to be highly intrusive to both employer and employee.

Section 8(a)(4)

Section 8(a)(4) provides that an employer may apply reasonable dress code and grooming requirements. However, now that the concept of *gender identity* as a protected

classification has been added to the bill, there are now certain issues which must be addressed. It is simply unclear how a reasonable dress code can coexist with the added, indefinite classification of self-perceived gender identity. This exception seems to negate any meaning for the rule. This differs from the consideration for employees who have undergone or are undergoing gender transition. Again, the practical implications of this provision should be carefully examined.

Section 8(b)

Section 8 (b) of the 2007 version of ENDA contains a significant change from prior versions of ENDA and which creates a substantial issue. Section 8(b) specifically permits a State or a subdivision of a State to pass a law or establish a requirement impacting an employee benefit notwithstanding any other law. Simply put, this section will overturn, in the circumstances of this Act only, the long standing concept of ERISA preemption. Without getting into the nuances and particulars, ERISA preemption has received solid Supreme Court approval , *see e.g. Shaw v Delta Airlines,* 463 US 85 (1983) and has been universally deemed to be the bedrock of national benefits policy. It would therefore seem to be highly questionable to cavalierly overturn that 33 year old concept in the context of this Act and for an undefined reason. This section should be carefully reviewed as it appears to directly contradict ERISA, undermine established precedent and, I believe, would engender significant opposition to the legislation..

Conclusion

I believe that the issues I have raised are appropriate as this Committee works its way through this legislation. I would note that my own experience in dealing with employers is that the concern is to attract and retain the most competent, efficient and productive employees without regard to personal characteristics and which do not have anything to do with a person's sexual orientation It is hoped that the Committee will focus on this and work constructively with employer and interest groups to craft a statute consistent with sound employment policy and sound public policy.

Thank you.