BEYOND "DON'T ASK, DON'T TELL" REPEAL: 5 STEPS FOR CONGRESSIONAL ACTION

"Don't Ask, Don't Tell" (DADT), the law prohibiting lesbian and gay individuals from serving openly in the military, will become history on September 20, 2011. However, following repeal, Congress must continue to provide oversight of the military's treatment of lesbian, gay, bisexual and transgender (LGBT) service members. This memorandum addresses several of the issues that will remain post-DADT repeal that affect LGBT individuals in the military. While we have much to celebrate with the end of DADT, our march on the path to equality in the military is not complete. Below are 5 ways Members of Congress can help us continue down this path.

I. OPPOSE DISCRIMINATORY LEGISLATIVE ACTIONS

DADT may be legislatively repealed, but anti-LGBT legislators have continued to recklessly use sexual orientation as a wedge issue when debating the Defense Authorization and Defense Appropriations bills.

The House Armed Services Committee marked-up the Defense Authorization bill on May 11, 2011. During the markup, three hostile amendments were adopted by the Committee:

- Rep. Todd Akin (R-MO) offered an amendment prohibiting the use of Department of Defense (DOD) facilities for marriages between same-sex couples, even where state law permits such marriages. The amendment also prohibits military chaplains or civilian DOD employees from officiating at such marriage ceremonies.

- Rep. Vicky Hartzler (R-MO) offered an amendment making sure DOD understands it is bound by the Defense of Marriage Act ("DOMA"), which prohibits the federal government from recognizing same-sex marriages. Prior to this amendment being offered and accepted, DOD had already publicly stated that it was bound by DOMA.

- Rep. Duncan Hunter (R-CA) offered an amendment requiring the service chiefs to formally approve DADT repeal — even though each of the service chiefs had assured Congress that no such amendment was necessary. The substance of this amendment became moot upon certification of repeal on July 22, 2011.

The Defense Appropriations bill also proved to be fertile ground for hostile amendments. Four hostile amendments were filed when the Defense Appropriations bill went to the House floor in July. Two amendments were offered and adopted:

- Rep. Virginia Foxx (R-NC) offered an amendment prohibiting the use of DOD appropriations in contravention of DOMA. Once again, this amendment was offered even though DOD had publicly stated that it is bound by DOMA.

- Rep. Tim Huelskamp (R-KS) offered an amendment barring the use of funds to implement training on the repeal of the DADT law for chaplains — even though Rep. Huelskamp admitted during floor debate that he had not even seen the DADT repeal curriculum that he was asking to be defunded.

While these anti-LGBT amendments were opposed by many equality-minded Members, they became part of the Defense Authorization and Defense Appropriations bills in the House. Equality-minded Senators must work to ensure that these anti-LGBT amendments are not included in the Senate versions of these bills.

With foes of equality diligently working to continue discrimination in the military, it is imperative to remain vigilant. Anti-LGBT legislators in the House may hold hearings post-DADT repeal to distract and derail the pursuit of equality. HRC will continue to work closely with our allies in opposition to such needless and discriminatory actions.

II. SUPPORT THE RESPECT FOR MARRIAGE ACT

Married LGBT military families are subject to discrimination because of the Defense of Marriage Act (DOMA), which prohibits the federal government from recognizing legally married same-sex couples. DOMA virtually requires the military — in

addition to the rest of the federal government — to ignore the same-sex spouses of service members. Consequently, a married service member in a same-sex relationship is denied access to statutorily defined employment benefits that are contingent upon marriage.

DOMA specifically harms service members who are lawfully wed to their same-sex spouse in jurisdictions that provide for marriage equality. As of today, same-sex couples can legally marry in the District of Columbia and six states — Connecticut, Iowa, Massachusetts, New Hampshire, New York and Vermont. In addition, California recognizes the over 18,000 same-sex marriage licenses that were issued during a brief period in 2008. Moreover, marriage equality is currently being debated in states across the country, including Maryland, a jurisdiction that recognizes marriages of same-sex couples performed in other jurisdiction but does not issue marriage licenses to same-sex couples within the state.

Lawfully married same-sex couples are denied a host of employment benefits because of DOMA. The same-sex spouse of a married service member is denied access to dependant medical coverage, dependent-rate basic allowance for housing, and dependant-based travel and transportation allowance. For example, while an opposite-sex spouse of a service member is eligible for travel assistance to attend the burial ceremony of their spouse, should their spouse die while on duty, DOMA excludes married same-sex couples from this benefit. Other spousal benefits, such as spousal employment assistance, spousal education and training, spousal family separation allowance, certain surviving spousal benefits, and access to family advocacy services and spousal abuse services, are also unavailable to same-sex spouses because of DOMA.

Dependent step children and parents-in-law of a married service member in a same-sex relationship are also denied access to certain dependent employment benefits because DOMA prevents the federal government from recognizing a step parent or parent-in-law relationship created by the marriage of a same-sex couple. The benefits denied include dependant medical coverage and dependent-rate basic allowance for housing. Moreover, step children of a service member in a same-sex marriage are not recognized for dependant-based travel and transportation allowance.

Passage of the Respect for Marriage Act (RMA) is essential to provide equal treatment for LGBT service members. RMA would repeal DOMA and provide married LGBT military families, as well as all other married same-sex couples, equal access to federal employment benefits. RMA was introduced in the 112th Congress in the House by Rep. Jerry Nadler (D-NY) and introduced in the Senate by Sen. Dianne Feinstein (D-CA) on March 16, 2011. Cosponsorship and passage of RMA are crucial steps towards full equality for LGBT military families.

III. PROVIDE OVERSIGHT OF MILITARY PERSONNEL DECISIONS RELATED TO DADT REPEAL

Congress must continue to provide oversight over military personnel decisions related to DADT repeal. By providing oversight, Congress can encourage regulatory review and revisions to DOD policies, as well as focus attention on issues related to open service that will remain following repeal.

a. Support Extension of Benefits to Lesbian and Gay Military Families

While the military is precluded from providing certain statutorily defined employment benefits to Married LGBT military families because of DOMA, non-statutorily defined benefits can be extended to service members in same-sex relationships by revising regulations to be more inclusive. Regulations using the terms “spouse”, “marriage”, “dependent”, and “family member” can be revised to include a relationship status that recognizes same-sex couples and dependant step children and parent-in-laws. By making such revisions, the military can extend benefits to service members that are part of same-sex couples without running afoul of DOMA. Unfortunately, at this time, the military has declined to revise such regulations.

Regulations related to joint duty assignments, access to legal services, military family housing, access to commissaries and exchanges, spousal relocation support, and overseas “command-sponsored” status exclude same-sex spouses or partners because of regulatory definitions that exclude them from coverage. In addition, the current Manual for Courts-Martial forces same-sex spouses to testify against their love ones and disclose confidential information shared during the marriage relationship, unlike opposite-sex spouses that are protected by “privilege”. Moreover, revisable definitions in regulations exclude dependent step children and parents-in-law from certain benefits, including access to commissaries and exchanges.

On June 17, 2009, President Obama issued a memorandum to all federal agencies to conduct a review of all employee benefits and take steps to extend such benefits equally to federal employees with same-sex partners, where permitted by law. DOD should revise the necessary regulations to ensure that equal employment benefits are provided to service members in same-sex relationships.

b. Ensure Harassment and Discrimination Complaints are Effectively Addressed

Civilian employees of DOD are already protected from discrimination based on sexual orientation; service members should be afforded that same protection. An explicit non-discrimination policy would provide clarity to all. The military has not amended the Military Equal Opportunity (“MEO”) program to prohibit discrimination on the basis of sexual orientation. Although we agree

that accession, promotion, or other personnel decision-making should not be based on an individual's sexual orientation, the history of discrimination against lesbian and gay service members, only partially a result of DADT, necessitates an explicit prohibition of discrimination on the basis of sexual orientation. Such a prohibition would not place lesbian and gay service members at an elevated status. Instead, it would ensure that discrimination against lesbian and gay service members would not be tolerated.

Of equal import and necessity is ensuring that lesbian and gay service members have access to a system in which they can initiate complaints of discrimination and harassment outside the chain-of-command. The MEO program provides such a system and has been an essential component of successful equal opportunity policies for other types of discrimination. However, current regulations do not include sexual orientation in the MEO program; the only avenue for initiating complaints outside the chain-of-command will be filing a complaint with an Inspector General — a move that may intimidate and dissuade some service members from reporting discriminatory behavior. DOD should ensure that service members who face discrimination based on sexual orientation have access to a less intimidating complaint system that is outside the chain-of-command.

c. Assess Success of Re-Entry Program and Documentation Updates

Approximately 14,000 service members were discharged under DADT because of their sexual orientation. In addition, countless other lesbian and gay service members were discharged from the military because of their sexual orientation prior to the enactment of DADT. Following final repeal, service members previously separated because of their sexual orientation will be considered for re-entry to the military, assuming they qualify in all other respects. In addition, service members discharged because of their sexual orientation will be able to request that remnants of discrimination be removed from their discharge documentation.

Congress can play an important oversight role in monitoring the efficiency of DOD's re-entry program and document update system. It is likely that many service members discharged under DADT will seek re-entry. It is also likely that a great number of former service members will want to "clean-up" their employment records — not only because of the discriminatory way in which they were discharged — but because of the workplace discrimination they may face because their sexual orientation is listed on their discharge papers (29 states allow employers to fire lesbian and gay individuals because of their sexual orientation).

IV. REVIEW THE BARRIERS TO TRANSGENDER INDIVIDUALS SERVING IN THE MILITARY

Unlike the prohibition on open service by lesbian and gay service members under DADT, transgender military service is not prohibited by statute. Instead, the military's approach to transgender service is contained in policies that bar transgender individuals from serving openly in the military. Military directives, instructions, policies, orders, rules, and case law assert that transgender individuals have a psychiatric condition and/or suffer from physical limitations which make them ineligible to serve. This blanket policy must be replaced with a more nuanced policy that does not automatically disqualify a transgender individual from serving if he or she meets all other requirements of service.

Other countries are ahead of the U.S. when it comes to allowing transgender individuals to serve openly in the military. In 2009, the United Kingdom issued a "Policy for the Recruitment and Management of Transsexual Personnel in the Armed Forces." This detailed policy statement prohibits discrimination against transgender individuals in the military and allows open service by transgender individuals that meet the "general fitness" standards of their acquired gender. Moreover, countries such as Israel, Australia, Spain, Uruguay, and Thailand also have policies in place that provide transgender individuals the opportunity to serve openly.

Allowing open service for transgender individuals will require in-depth review and modification of current discriminatory policies at DOD. To begin with, DOD Directive 6.140, which serves as the primary prohibition on transgender service, must be rescinded. In addition, each branch of the military must review and revise its various policies that bar transgender individuals from serving. Congress can play a pivotal role by encouraging DOD to move forward with reviewing and revising their policies that discriminate based on gender identity.

V. REPEAL ARTICLE 125 OF THE UCMJ

Article 125 of the Uniform Code of Military Justice criminalizes intimacy between same-sex couples. State statutes criminalizing such behavior were found unconstitutional in the Supreme Court's decision in Lawrence v. Texas (2003). Despite the Lawrence decision, the Court of Appeals for the Armed Forces ruled in United States v. Marcum (2004) that the military could prosecute consensual intimate conduct that either falls outside the protective scope of the Lawrence decision or is prohibited because of additional factors relevant only to the military.

Since 2001, non-partisan organizations like the National Institute of Military Justice and the American Bar Association have urged Congress to repeal Article 125. Their positions are informed by (1) the unnecessary nature of a prohibition, (2) the Lawrence decision and (3) the discriminatory impact of the provision.

The Senate version of the Defense Authorization bill includes a provision to repeal Article 125. It has yet to be approved by the full Senate. The House version of the Defense Authorization bill has been approved by the full House, but does not contain a similar provision. Equality-minded Members of Congress should ensure that this provision remains in the Senate version of the bill and that it is included in the final bill produced by the Conference Committee.