I. LEGAL FRAMEWORK

A. Applicable Legal Framework

- Sex discrimination generally prohibited under federal and state laws, with each set of laws having its own requirements.
- The Civil Rights Act of 1964 is the key federal anti-discrimination law and Title II of that law prohibits discrimination in the provision of “goods, services, facilities, privileges, advantages and accommodations of any place of public accommodations” based on the person’s “race, color, religion or national origin.”
  - Title II does not apply to sex or gender discrimination.
- Rather, sex and gender discrimination in public accommodations is governed by state law, and the majority of states have laws prohibiting sex and gender discrimination in places of public accommodation.
- Distinction between whether an organization is public or private is important when determining whether state anti-discrimination laws apply to an organization’s conduct.
- Analysis depends on the activities of the organization. The activities of YWCA USA and Local Associations may make them public such that state anti-discrimination laws relating to sex and gender apply.
- Should YWCA and the Local Associations be considered private, their right to expressive association under the First Amendment may permit sex and gender discrimination that would otherwise be prohibited under state anti-discrimination laws.

B. Compensatory Purpose Doctrine Not Applicable

- Compensatory purpose doctrine provides that in limited circumstances, a gender-based classification can be legally justified if it intentionally and directly assists members of the gender that is disproportionately burdened.
- Doctrine is a defense to a single-gender classification that is challenged under the Equal Protection Clause of the Fourteenth Amendment, which provides in part that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”
- Doctrine has only been applied in cases where defendant is a state actor, meaning, an agent of a U.S. state.
- Scholarship on the doctrine is limited.
- Under that scholarship, it is not clear that:
  - YWCA USA would be deemed a state actor such that it could apply the doctrine;
  - if not deemed a state actor, whether a court would apply the doctrine outside the state actor context to an organization like YWCA USA; and
  - even if a court permitted YWCA USA to apply the doctrine as a non-state actor, whether it could satisfy all four requirements of the doctrine such that it could successfully use the doctrine to support a single-gender governance structure.
- Research has not revealed any cases where an organization that is not a state actor, like YWCA USA, successfully applied the doctrine to defend a single-gender classification.
II. LEGAL RISKS

• Increase in number of challenges to businesses and organizations that treat women and men unequally based on sex or gender under state anti-discrimination laws, perhaps as a reaction to “Me Too” movement.
• Three women-focused organizations that have been sued are The Wing, Chic CEO and Ladies Get Paid.
  o Lawsuits filed in various jurisdictions, including the District of Columbia, California and New York.
  o Some lawsuits are brought by men’s-rights groups, such as the National Coalition for Men.
  o The women-focused businesses and organizations tend to settle cases, rather than face expensive attorneys’ fees.
  o In response to lawsuits, some organizations modify their policies to make them more inclusive.
• “Federated” membership structure of YWCA USA may increase risk of challenges to single-gender governance policies because of ability to file lawsuits in various jurisdictions of Local Associations.
• Litigation risk may be moderated by fact that YWCA USA and Local Associations are mission-driven non-profit corporations focused on the empowerment of women, rather than profit-focused ventures.

III. REPUTATIONAL RISKS AND SOCIAL TRENDS

• In addition to litigation risk, YWCA USA and Local Associations may face reputational harm if active plaintiff’s groups allege that single-gender governance structure is discriminatory and non-inclusive.
• Anti-discrimination laws in some jurisdictions include broader definitions of gender than just female and male and extend protection to individuals who are transgender, gender non-conforming or gender non-binary.
• Single-gender governance structure does not conform to expanded definitions of gender in these anti-discrimination laws.
• YWCA USA and Local Associations could suffer reputational harm from perceived discrimination by failing to be inclusive of men and all gender identities.
• YWCA USA and Local Associations may be vulnerable to argument that they are not dedicated to the mission of “eliminating racism, empowering women and promoting peace, justice, freedom and dignity for all.”
• Trend in some settings toward more inclusive, gender non-specific classifications, particularly at universities.
  o Trend appears to be based primarily on a social movement, rather than prompted by litigation.

IV. PRACTICES OF OTHER ORGANIZATIONS

• Reviewed the bylaws and other governance documents of several organizations with missions focused on gender or race, including the National Organization for Women (NOW), YMCA, Boy Scouts, NAACP, and the women’s bar associations of New York and the District of Columbia.
• None of the organizations reviewed discriminate membership or governance based on gender or race.
• Certain organizations’ governance documents include provisions that give the national organization the ability to remove directors, officers or members at the national or local levels that do not support or promote the mission of the organization.