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Kiran Ahuja, Director  
Office of Personal Management  
1900 E Street, NW  
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*Submitted via [www.regulations.gov](http://www.regulations.gov)*

**Re: RIN 3206-AO39, “Advancing Pay Equity in Governmentwide Pay Systems”**

Dear Director Ahuja:

The National Women’s Law Center (“NWLC”) writes to express our views on the Office of Personnel Management’s (“OPM”) proposed rule, “Advancing Pay Equity in Governmentwide Pay Systems,” RIN 3206-AO39, issued on May 11, 2023 (“Proposed Rule”).<sup>1</sup> For over 50 years, NWLC has fought for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls, with a particular focus on removing systemic barriers to equality and economic security. NWLC has long advocated for policies that will raise wages, close racial and gender wage gaps, and improve job quality—and quality of life—for working women across the United States.

NWLC strongly supports the Proposed Rule’s prohibition on considering salary history to set pay for new civilian employees in the federal government. Such a rule will promote greater pay equity in the federal government by closing gender and racial pay gaps and ensuring that initial pay determinations are based on job-related skills, experience, and education, and not on past discrimination or other factors that are unrelated to the position being filled.

We also urge OPM to adopt the following recommendations to provide greater clarity, strengthen the Proposed Rule, and ensure transparency and accountability:

- Clarify that agencies cannot ask for, or otherwise seek, salary history information from candidates, and prohibit agencies from requesting salary expectations;
- Prohibit consideration of the terms of a competing job offer in setting pay;
- Apply the Proposed Rule to senior executive service, senior-level, and scientific professional positions;

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<sup>1</sup> 88 Fed. Reg. 30251 (proposed May 11, 2023).

- Require agencies to provide information on pay setting flexibilities in job announcements;
- Require agencies to provide greater transparency on pay setting for individuals with previous civilian service in the federal government; and
- Collect data on the factors used to support setting pay above the minimum rate.

Persistent pay inequities have shortchanged women for far too long, and reliance on salary history to set pay has forced women and people of color to carry pay disparities with them from job to job. We commend OPM for its Proposed Rule and detail below our suggestions to strengthen the final rule to ensure that the federal government is truly a model employer on pay equity.

## **I. The Proposed Rule’s Strict Prohibition on Considering Salary History in Pay Setting Promotes Pay Equity for Women and People of Color**

### **Reliance on Salary History to Set Pay Contributes to Gender and Racial Pay Gaps**

Despite longstanding federal protections against pay discrimination, gender and racial wage gaps continue to persist. In 2021, women working full-time, year-round in the U.S. were paid just 84 cents for every dollar paid to men, with women of color, who face overlapping gender and racial barriers, experiencing the largest gaps.<sup>2</sup> Black women working full-time, year-round, for example, were typically paid 67 cents for every dollar paid to a white, non-Hispanic man, while Latinas and Native American women were paid only 57 cents.<sup>3</sup> Asian American, Native Hawaiian, and Pacific Islander (AANHPI) women were paid 92 cents for every dollar paid to their white, non-Hispanic male counterparts, but the pay gap for AANHPI women varies widely by community, with some AANHPI women earning significantly less.<sup>4</sup> For example, women from the Thai community are paid 65 cents and women in the Bhutanese community are paid just 48 cents for every dollar paid to white, non-Hispanic men.<sup>5</sup>

Reliance on salary history to set pay is a driving factor for the persistence of the pay gap. Women are affected by the pay gap as soon as they enter the labor force, even when performing the same job with the same education and experience as men, and the gap worsens over time.<sup>6</sup> Because women are systemically paid less than men and are therefore more likely to have lower prior salaries, allowing employers to consider salary history to set pay allows discrimination and pay disparities to follow women from job to job. This reality was borne out in a 2019 survey conducted by the Harvard Business Review showing that nearly two-thirds of employers who

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<sup>2</sup> Brooke LePage and Jasmine Tucker, “A Window Into the Wage Gap: What’s Behind It and How to Close It,” *National Women’s Law Center*, January 10, 2023, available at <https://nwlc.org/resource/wage-gap-explainer/>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Jasmine Tucker and Sarah Javaid, “Some Asian American, Native Hawaiian, and Pacific Islander Women Lose Over \$1 Million Over a Lifetime to the Racist and Sexist Wage Gap,” *National Women’s Law Center*, March 2023, available at <https://nwlc.org/wp-content/uploads/2023/03/AANHPI-Wage-Gap-3.28.23.pdf>.

<sup>6</sup> LePage and Tucker, *supra* note 2; see also Christianne Corbett and Catherine Hill, “Graduating to a Pay Gap: The Earnings of Women and Men One Year after College Graduation,” *AAUW*, October 2012, available at <https://files.eric.ed.gov/fulltext/ED536572.pdf>.

conducted pay equity audits found that pay disparities in their workplaces stemmed from reliance on salary history to set pay.<sup>7</sup>

Prior salary is not an accurate measure of a job candidate’s qualifications, skills, or ability to perform a job. An individual’s salary history may reflect past pay discrimination or other factors with gender-based implications, including needing to take time off work or working fewer hours because of caregiving responsibilities, occupational segregation, or bias in salary negotiations.<sup>8</sup> Setting starting pay based on salary history can therefore compound the effects of discrimination and inequity, causing real harm to women and their families, especially since starting salary can affect subsequent salary increases from raises, bonuses, and promotions. The result is the loss of hundreds of thousands of dollars over the course of a lifetime. Based on today’s pay gap, women working full-time, year-round stand to lose nearly \$400,000 to the pay gap over the course of a 40-year career, with women of color facing lifetime losses that can reach or surpass a million dollars.<sup>9</sup>

### **Prohibiting Consideration of Salary History Promotes Pay Equity**

Faced with these very real inequities, a growing number of jurisdictions have prohibited employers from seeking or relying on a job applicant’s salary history to set pay.<sup>10</sup> As OPM notes in its NPRM, numerous research studies on the impact of these laws indicate that these bans promote more equitable pay by narrowing gender and race pay gaps.<sup>11</sup> Most of the reduction is driven by increased wages for women and workers of color,<sup>12</sup> and in one study, researchers concluded that increased wages closed most of the residual wage gap—the unexplained portion

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<sup>7</sup> “Navigating the Growing Pay Equity Movement: What Employers Need to Know About What to Do,” *Harvard Business Review & Trusaic*, 2019, available at <https://trusaic.com/resources/pay-equity-resources-hub/harvard-business-review-trusaic-pulse-survey>.

<sup>8</sup> Amy Dalrymple, “Equal Pay in the United States: Salary History Bans,” *U.S. Department of Labor: Women’s Bureau*, March 2023, available at [https://www.dol.gov/sites/dolgov/files/WB/equalpay/WB\\_Brief\\_Equal\\_Pay\\_Salary\\_History\\_Bans\\_03072023.pdf](https://www.dol.gov/sites/dolgov/files/WB/equalpay/WB_Brief_Equal_Pay_Salary_History_Bans_03072023.pdf) (“Relying on previous salaries to set current pay can perpetuate the systemic undervaluing of women’s work, especially for women of color who have faced historic discrimination and occupational segregation that has led to many inequities in the labor market, including lower wages . . . . Additionally, because caregiving responsibilities disproportionately fall to women, they are more likely than men to reduce their hours or leave the workforce to provide care, in turn, impacting their salary history. The pandemic exacerbated this pattern—caregiving responsibilities pulled women away from jobs as the care infrastructure retracted”); Jennifer E. Dannals, et al., “The Dynamics of Gender and Alternatives in Negotiation,” *Journal of Applied Psychology*, 106(11), 1655-1672, 2021, available at <https://psycnet.apa.org/record/2021-03654-001> (finding that women who participate in salary negotiations are likely to face backlash). See also, discussion, *infra*.

<sup>9</sup> Jasmine Tucker, “The Wage Gap Robs Women Working Full Time, Year Round of Hundreds of Thousands of Dollars Over a Lifetime,” *National Women’s Law Center*, March 7, 2023, available at <https://nwlrc.org/resource/the-wage-gap-robs-women-working-full-time-year-round-of-hundreds-of-thousands-of-dollars-over-a-lifetime/>.

<sup>10</sup> Twenty-one states and 22 localities have enacted laws banning employers from seeking or relying upon an applicant’s salary history to set pay. “Salary history bans: A running list of states and localities that have outlawed pay history questions,” *HR Drive*, updated on April 20, 2023, available at <https://www.hrdrive.com/news/salary-history-ban-states-list/516662/>.

<sup>11</sup> 88 Fed. Reg. at 30258.

<sup>12</sup> See “Equal Pay Policies and the Gender Wage Gap: A Compilation of Recent Research,” *Institute for Women’s Policy Research*, January 25, 2022, available at [https://iwpr.org/wp-content/uploads/2022/01/Equal-Pay-Policies-and-the-Gender-Wage-Gap\\_Compilation\\_20220125\\_FINAL.pdf](https://iwpr.org/wp-content/uploads/2022/01/Equal-Pay-Policies-and-the-Gender-Wage-Gap_Compilation_20220125_FINAL.pdf) (compiling studies on the impact of salary history bans).

of the wage gap that is most likely attributable to discrimination or other structural gender and racial disparities.<sup>13</sup> The researchers also concluded that salary history bans showed that women and workers of color have been paid less for reasons unrelated to their productivity and that the use of salary history in pay-setting can perpetuate discrimination.<sup>14</sup>

Research evidence also indicates that salary history bans may help close pay disparities tied to caregiving responsibilities—responsibilities that disproportionately fall on women. Mothers who work full-time, year-round typically have lower earnings than fathers: mothers are typically paid only 74 cents for every dollar paid to fathers.<sup>15</sup> This “motherhood wage penalty,” grows by an estimated 7 percent for each child,<sup>16</sup> and is larger for low-paid workers.<sup>17</sup> The high cost of childcare and, for too many, a lack of paid leave makes it more difficult for women with caregiving responsibilities to remain in the workforce, and time out of the workforce negatively impacts mothers’ wages when they return, resulting in lower salary histories. Bias and outright discrimination also play a role in lower salary histories. In one study asking participants to compare equally qualified women candidates, mothers were perceived as less competent and were recommended for significantly lower starting salaries than women without children.<sup>18</sup> Relying on caregivers’ salary history can exacerbate these inequities, but at least one study shows that in states that have banned consideration of salary history, the narrowing of the gender pay gap was driven by job changers and “an increase in the gender earnings ratio for households with all children over 5 years old [and] by workers over 35.”<sup>19</sup> Salary history bans were therefore successful in shrinking the motherhood wage gap, a gap driven by gender inequities, bias, and discrimination.

Removing consideration of salary history also helps to ensure that pay determinations are based on job-related skills, experience, and education, and not on past discrimination or other factors that are unrelated to the position being filled. Research shows that when employers are not able to rely on salary history to set pay, employers collect more information from applicants and ask more substantive and probing questions to evaluate an applicant for the job.<sup>20</sup> By removing salary history as a permissible factor to set pay, the Proposed Rule incentivizes agencies to

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<sup>13</sup> James E. Bessen, Chen Meng, and Erich Denk, “Perpetuating Inequality: What Salary History Bans Reveal About Wages,” *SSRN*, June 24, 2020, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3628729](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3628729).

<sup>14</sup> *Id.*

<sup>15</sup> Jasmine Tucker, “The Wage Gap Shortchanges Mothers,” *National Women’s Law Center*, August 31, 2022, available at <https://nwlc.org/resource/mothers-equal-pay-day/>.

<sup>16</sup> Michelle J. Budig and Paula England, “The Wage Penalty for Motherhood,” *American Sociological Review*, 66(2), April 2001, available at <http://www.wjthomasniu.org/class/781/Assigs/budig-wage.pdf>.

<sup>17</sup> Michelle Budig and Melissa J. Hodges, “Differences in Disadvantage: Variation in the Motherhood Penalty Across White Women’s Earnings Distribution,” *American Sociological Review*, 75(5), October 2010, available at [https://www.researchgate.net/publication/241644194\\_Differences\\_in\\_Disadvantage\\_Variation\\_in\\_the\\_Motherhood\\_Penalty\\_across\\_White\\_Women%27s\\_Earnings\\_Distribution](https://www.researchgate.net/publication/241644194_Differences_in_Disadvantage_Variation_in_the_Motherhood_Penalty_across_White_Women%27s_Earnings_Distribution).

<sup>18</sup> Shelley Correll, Stephen Benard, and In Paik, “Getting a Job: Is There a Motherhood Penalty,” *Gender Action Portal, Harvard Kennedy School Women and Public Policy Program*, March 2007, available at <https://gap.hks.harvard.edu/getting-job-there-motherhood-penalty>.

<sup>19</sup> Benjamin Hansen and Drew McNichols, “Information and the Persistence of the Gender Wage Gap: Early Evidence from California’s Salary History Ban,” *SSRN*, February 1, 2019, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3277664](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3277664).

<sup>20</sup> Moshe A. Barach and John J. Horton, “How Do Employers Use Compensation History?: Evidence From a Field Experiment,” *National Bureau of Economic Research*, January 2020, available at [https://www.nber.org/system/files/working\\_papers/w26627/w26627.pdf](https://www.nber.org/system/files/working_papers/w26627/w26627.pdf).

examine more closely the skills, education, and competencies of job candidates, a practice that will improve the hiring process more generally and help attract a more diverse set of candidates.<sup>21</sup> The Proposed Rule will also help ensure that the federal government is in compliance with the Equal Pay Act, which requires employers to pay women and men equally for substantially equal work. Given the documented ways that using salary history in pay setting can perpetuate lower pay for women without reflecting any difference in qualifications, productivity, or performance, banning its use will help protect agencies from litigation and help ensure the federal government is a model to other employers in its pay practices.

By preventing agencies from considering salary history to set pay for individuals receiving their first appointment as a civilian employee of the federal government, the Proposed Rule prevents disparities in the private sector from following employees into the federal public sector. Although women employed within the federal government experience a smaller pay gap—based on average wages for women and men—gender and racial pay gaps still exist, as noted in the NPRM.<sup>22</sup> These pay disparities have a substantial impact on women in the federal workforce, affecting their ability to provide for their families, save for retirement, or withstand financial emergencies.<sup>23</sup>

### **Voluntary Disclosures of Salary History Should Not be Considered in Setting Pay**

The Proposed Rule correctly prohibits federal agencies from relying on voluntary disclosures of one's salary history when setting pay for first-time, civilian employees in the federal government. As noted in the NPRM, current research suggests that men and individuals with higher salaries are more likely to disclose their salary history than women or individuals with lower salaries.<sup>24</sup> Reliance on voluntary disclosures of one's salary history is therefore likely to undermine the purpose of the Proposed Rule and perpetuate both gender and racial pay gaps. In addition, as noted above, prior salary history is not an accurate measure of a candidate's qualifications, skills, or ability to perform a job, and may reflect past discrimination or other factors with gender-based implications. Given the unreliability of salary history as a proxy for productivity or potential for success in a position, and the likelihood that one's salary history has been affected by gender and racial disparities, the goals of the Proposed Rule are best served by strictly prohibiting the use of salary history to set pay when individuals are entering the federal sector for the first time.

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<sup>21</sup> See *id.* (finding that when employers did not have access to applicants' salary history, they widened the pool of workers under consideration and interviewed, and ultimately hired, individuals who had made less money in the past).

<sup>22</sup> 88 Fed. Reg. at 30252-30253 (noting an overall 6 percent gender pay gap, with larger pay gaps for Black and Native American women as compared to white men). As the federal pay gap is calculated using average salaries instead of median salaries, the pay gap numbers cited by OPM are not entirely comparable to the pay gap figures calculated by NWLC or reported by the U.S. Census Bureau, which is based on median earnings. Median earnings describe the earnings of a worker at the 50th percentile—right in the middle—so the numbers are not unduly influenced by the highest and lowest earners.

<sup>23</sup> See "EEOC Women's Work Group Report," *U.S. Equal Employment Opportunity Commission*, available at <https://www.eeoc.gov/federal-sector/reports/eeoc-womens-work-group-report>.

<sup>24</sup> 88 Fed. Reg. at 30259.

We also agree with OPM that a strict prohibition on considering salary history allows for more effective administration of the regulations and avoids confusion. As noted in the NPRM, individual disputes could arise regarding whether information was voluntarily provided without prompting or coercion.<sup>25</sup> Further, agencies could have different understandings concerning the general circumstances under which a disclosure should be considered voluntary. A bright line rule therefore ensures consistency across the federal government.

An exception that would allow consideration of voluntarily provided salary history information could also swallow the general rule. Agencies may interpret such an exception as permission to proactively ask a candidate to provide their salary history, with the caveat that the candidate is not required to respond. Under this circumstance, an exception allowing for consideration of voluntarily provided salary history could perpetuate inequities. Not only are men—who benefit from the pay gap—more likely to disclose their salaries, but even when candidates decline to provide that information, research shows that women are penalized for that decision, whereas men are rewarded. One study found that women who decline to disclose earn 1.8 percent less than women who do disclose their salary histories, but men who decline to disclose earn 1.2 percent more than men who provide salary history information.<sup>26</sup> Even if prompting were not permitted, allowing reliance on voluntary disclosure would tend to benefit those who have sufficient awareness of federal hiring processes to know that this flexibility is potentially available, and is likely to harm those who have less extensive experience or networks, a group that likely disproportionately includes women, people of color, and other traditionally marginalized candidates. Given the likelihood that allowing consideration of voluntarily provided salary history information will reinforce gender disparities, NWLC strongly supports the approach taken by OPM to prohibit consideration of any salary history information.

A strict prohibition on considering salary history, even when disclosed voluntarily, also aligns with broad understandings of fairness in the workplace. A 2017 survey by Glassdoor found that a majority of workers, including 60 percent of women in the workforce, believe that employers should not seek salary history.<sup>27</sup> These findings strongly suggest that employees find it unfair for employers to set pay by reference to salary history. A rule that purports to promote fairness by banning use of salary history but then allows individual applicants to benefit from voluntarily disclosing their higher salary histories may therefore not only led to inequities but lower morale, which can negatively impact productivity. A strict ban, without any exceptions, more strongly promotes the values of equity, human dignity, and fairness expressed in Executive Order 13563. We commend OPM for not including an exception for voluntary disclosures of one's salary history.

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<sup>25</sup> *See id.*

<sup>26</sup> “Is Asking for Salary History...History?,” *Payscale*, available at <https://www.payscale.com/research-and-insights/salary-history/>.

<sup>27</sup> “Glassdoor Survey Finds the Majority of U.S. Workers Believe Employers Should Not Ask About Salary History,” *Glassdoor*, July 12, 2017, available at <https://www.glassdoor.com/about-us/glassdoor-survey-finds-majority-workers-employers-salary-history/>.

## II. Recommendations to Provide Greater Clarity, Strengthen the Rule, and Ensure Greater Transparency and Accountability

### **OPM Should Clarify that Agencies Cannot Request Salary History or Salary Expectations**

As discussed above, NWLC strongly supports the Proposed Rule's strict prohibition on considering salary history to set pay for first-time, civilian employees in the federal government. To ensure that this prohibition is complete, we recommend that OPM consider clarifying the Proposed Rule to explicitly state that an agency may not ask an applicant to provide information concerning their salary history or ask applicants for their salary expectations.

The Proposed Rule contains no explicit prohibition on requesting, or otherwise seeking out, information about an applicant's existing or prior salary. We understand, based on the explanation of the Proposed Rule, that this information would be irrelevant to a pay rate determination under the superior qualifications and special needs pay-setting authority. As a result, agencies should be expressly prohibited from seeking out this information to ensure that no prior or existing salary information has, in fact, been considered in setting pay. This approach would be consistent with the majority of state laws passed to ban consideration of salary history in pay-setting.<sup>28</sup>

NWLC also recommends that the Proposed Rule include a prohibition on requesting applicants' salary expectations. Given the systematic devaluation of women's labor that has led to women being paid less than men, often without their knowledge, even when working in the exact same job, there could exist gender and race-based disparities in applicants' salary expectations, with men expecting higher salaries than women. Recently released data from December 2022 collected by a tech job search platform is instructive. The data, based on platform users interaction with the platform, indicate that women of color, who experience the largest pay gaps in the workforce overall, are more likely to provide prospective employers with significantly lower minimum salary requirements than white men.<sup>29</sup> Specifically, the platform found that women of color entered 40 percent lower minimum salaries than white men, that men of color entered 30 percent lower minimum salaries, and that white women entered 25 percent lower minimums.<sup>30</sup> This data is consistent with research on negotiation behavior showing that women are often penalized for asking for higher compensation.<sup>31</sup> Salary expectations may therefore reflect an applicant's experience of bias or discrimination and is therefore not a reliable indicator of skills, qualifications, or competencies.

Salary expectations can also introduce new bias into pay-setting. Even if an employer is willing to pay an applicant significantly more than she previously made, the negotiation is likely to be affected by "anchoring," a cognitive tendency to heavily weight the first piece of information

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<sup>28</sup> "Asking for Salary History Perpetuates Pay Discrimination from Job to Job," *National Women's Law Center*, March 10, 2022, available at <https://nwlc.org/resource/asking-for-salary-history-perpetuates-pay-discrimination-from-job-to-job/>.

<sup>29</sup> Kim Elsesser, "Women Of Color Set Lower Salary Requirements Than White Men, According To Job Search Site," *Forbes*, February 6, 2023, available at <https://www.forbes.com/sites/kimelsesser/2023/02/06/women-of-color-set-lower-salary-requirements-than-white-men-according-to-job-search-site>.

<sup>30</sup> *Id.*

<sup>31</sup> *See infra.*

encountered during a decision-making process. Because of this cognitive bias, an applicant's disclosure of a low salary expectation may have an outsized effect on the salary negotiation and the employer's perception of a reasonable salary for the employee, depressing the resulting salary offer.<sup>32</sup> As women and people of color are more likely to offer lower salary expectations when asked, considering an applicant's salary expectations could perpetuate gender and racial pay inequities and should therefore be explicitly prohibited in the final rule.

### **The Final Rule Should Prohibit Consideration of the Terms of a Competing Job Offer**

NWLC also recommends that OPM amend the Proposed Rule to prohibit consideration of the terms of a competing offer in setting pay. In its justification of the Proposed Rule's strict prohibition on considering salary history to set pay, OPM correctly notes numerous studies showing that the use of salary history in pay-setting perpetuates gender and racial pay inequities. Yet, the Proposed Rule would continue to allow agencies to consider a competing job offer, which, as OPM acknowledges, may be based on a candidate's salary history,<sup>33</sup> or may otherwise be informed by discriminatory and irrelevant factors. Failing to prohibit reliance on a competing salary offer, in light of the evidence OPM offers to justify its rule, is arbitrary and counterproductive to the goals of the Proposed Rule.

The use of salary history to set pay outside of the federal sector is common. In a 2012 survey, about half of workers reported that their employers had learned their prior pay before making an offer.<sup>34</sup> Although many states and localities have since enacted laws to prohibit employers from seeking or relying on a job applicant's salary history to set pay, there is still not yet a federal salary history ban applicable to both the public and private sectors, meaning that some employers will continue to use an applicant's salary history to determine starting pay.<sup>35</sup> A competing offer could therefore be just another reflection of past pay discrimination, bias, or other factors with gender-based implications that are irrelevant to a candidate's skills, qualifications, or experience, a fact that OPM itself acknowledges.<sup>36</sup> OPM claims that a "competing job offer *could* be based on salaries for the skills and competencies required in the position to be filled,"<sup>37</sup> but the opposite is also true: a competing job offer *could* be based on things completely unrelated to a candidate's skills and competencies and instead may reflect any number of inequitable or unlawful considerations. Simply put, there is no way for an agency to know exactly how a different employer, completely outside of the federal government, determined the salary contained in a competing job offer.

A competing job offer—especially one from outside the federal sector where there is less pay transparency than within the federal government and no guidelines ensuring consistent pay-setting practices across employers—may also reflect the impact of negotiation bias, which

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<sup>32</sup> See "Asking for Salary History Perpetuates Pay Discrimination from Job to Job," *supra* note 28.

<sup>33</sup> 88 Fed. Reg. at 30255 (noting that a competing job offer "may have been based on the candidate's salary history").

<sup>34</sup> Robert E. Hall and Alan B. Krueger, "Evidence on the Incidence of Wage Posting, Wage Bargaining, and On-the-Job Search," *American Economic Association*, 4(4), October 2012, available at <https://www.aeaweb.org/articles?id=10.1257/mac.4.4.56>.

<sup>35</sup> See "Asking for Salary History Perpetuates Pay Discrimination from Job to Job," *supra* note 28.

<sup>36</sup> See 88 Fed. Reg. 30255.

<sup>37</sup> *Id.* (emphasis added).



disadvantages women workers. Women are more likely to be unsuccessful in negotiating their salaries upward than men,<sup>38</sup> and research indicates that women who attempt to negotiate often face backlash from employers based on gender stereotypes about appropriate behavior for women.<sup>39</sup> Women of color who face both gender and racial stereotypes may be more likely to avoid negotiation altogether,<sup>40</sup> and at least one study suggests that women of color who do negotiate ask for less money overall than white men to avoid backlash.<sup>41</sup> Using a competing job offer to set pay would have the effect of allowing these biases to transfer into the federal government's pay-setting, undermining the effectiveness of the Proposed Rule. Indeed, it is difficult to logically distinguish between setting pay based on a competing offer and setting pay based on, for example, an applicant's current salary with another employer. Both instances invite pay-setting based on discriminatory factors and in neither instance does the government's interest in attracting a desired candidate justify reliance on these possibly discriminatory factors.

The Proposed Rule attempts to alleviate the harm that would be caused by considering a competing job offer to set pay by requiring agencies that consider a competing offer to "consider at least one other factor specified [in the regulations]" along with "how pay has been set for other employees."<sup>42</sup> OPM then goes on to state that "a determination based on more than one factor provides a stronger justification [for a salary increase] and mitigates any potential pay inequity from considering a competing job offer that may have been based on the candidate's salary history."<sup>43</sup> We find this unpersuasive given the wide-ranging pay-setting flexibilities contained in the regulations, which already allow agencies to consider, among other things, existing labor market conditions, the availability of qualified candidates, how difficult it is to recruit candidates for the position, how critical it is to fill the position, and "other relevant factors," an unspecified category that the Proposed Rule does not attempt to cabin, except to prohibit the use of salary history.<sup>44</sup> OPM offers no research evidence that pay-setting based on a competing job offer, which it acknowledges can be based on salary history, would not perpetuate pay inequities, nor does the Proposed Rule provide any evidence that adding any one of these incredibly broad factors to the consideration of a competing job offer would actually mitigate pay inequity.

### **The Final Rule Should Include Senior Executive Service, Senior-Level, and Scientific Professional Positions**

In order to promote consistency throughout the federal civilian service, NWLC recommends that OPM revise the regulations on setting pay for Senior Executive Service (SES), Senior-Level (SL), or Scientific or Professional Positions (ST) to include a strict prohibition on considering a new appointee's salary history. OPM explains that it does not propose to revise the pay-setting

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<sup>38</sup> Kim Parker, "When Negotiating Starting Salaries, Most U.S. Women and Men Don't Ask for Higher Pay," *Pew Research Center*, April 5, 2023, available at <https://www.pewresearch.org/short-reads/2023/04/05/when-negotiating-starting-salaries-most-us-women-and-men-dont-ask-for-higher-pay/>.

<sup>39</sup> Dannels, *supra* note 8.

<sup>40</sup> Danielle Dickens and Mica Whitfield, "Pay Inequities among Black Women: The Role of Race and Gender in Salary Negotiation," *Urban Institute*, December 2022, available at <https://www.urban.org/research/publication/pay-inequities-among-black-women>.

<sup>41</sup> Elsesser, *supra* note 29.

<sup>42</sup> 88 Fed. Reg. at 30255.

<sup>43</sup> *Id.*

<sup>44</sup> See 5 CFR § 531.212; 88 Fed. Reg. at 30260.

practices for SES, SL, and ST positions because the governing regulations do not currently include consideration of salary history.<sup>45</sup> The regulations instead focus on the “nature and quality of an individual’s experience, qualifications, and accomplishments,” and for SL and ST positions, an individual’s “unique skills.”<sup>46</sup> On their face, however, the regulations do not provide an exhaustive list of factors that an agency must consider,<sup>47</sup> nor do the regulations speak to how an agency determines the monetary worth of those factors. Given that salary history has often been misused by employers as a proxy for skills, qualifications, and experience,<sup>48</sup> and OPM has provided no data to suggest that agencies are *not* considering salary history to set pay for these positions, exempting these positions from the strict prohibition on considering an applicant’s salary history appears arbitrary and would create unnecessary inconsistencies in the regulations.

OPM also argues that it need not revise the regulations for SES, SL, and ST positions because the pay gap for these positions is less than 1 percent.<sup>49</sup> While we applaud the federal government for achieving greater pay equity in these positions, the pay gap is still not zero. Further, the absence of a pay gap today does not override the very real equity concerns that arise when using salary history in pay-setting—concerns that OPM details in its NPRM. Absent evidence that prohibiting consideration of salary history for SES, SL, and ST positions would *increase* the pay gap for those positions, the fact that the pay gap is small does not provide an adequate justification for failing to apply rules designed to promote equity to these positions.

### **The Final Rule Should Require Agencies to Provide Information on Pay-Setting Flexibilities in Job Announcements**

OPM asks commenters to address what information agencies should provide to applicants or candidates on the pay-setting flexibilities used to set starting pay above the minimum rate and at what stage of the hiring process agencies should provide this information.<sup>50</sup> NWLC recommends that OPM require agencies to provide applicants with information on pay-setting flexibilities within job announcements, including an explanation of the factors outlined in the relevant regulations. OPM should also require agencies to include a notice in their job announcements informing applicants that for individuals who would be receiving their first appointment as a civilian employee, their salary history will not be asked about, relied upon, or otherwise used in setting pay above the minimum rate.

As discussed above, the federal government has long served as a model employer in promoting pay transparency, a policy that has helped to narrow gender and racial pay gaps in the numerous states that have passed pay range transparency laws.<sup>51</sup> One of the benefits of pay range transparency is that it helps to counteract negotiation bias. Pay negotiations are notoriously

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<sup>45</sup> 88 Fed. Reg. 30254-30255.

<sup>46</sup> *Id.*

<sup>47</sup> See 5 CFR §§ 534.404(a), 534.506(a).

<sup>48</sup> Robin Bleiweis, “Why Salary History Bans Matter To Securing Equal Pay,” *Center for American Progress*, March 24, 2021, available at <https://www.americanprogress.org/article/salary-history-bans-matter-securing-equal-pay/>.

<sup>49</sup> 88 Fed. Reg. at 30254-30255.

<sup>50</sup> *Id.* at 30259.

<sup>51</sup> See “Salary Range Transparency Reduces Gender Wage Gaps,” *National Women’s Law Center*, January 13, 2023, available at <https://nwlc.org/resource/salary-range-transparency-reduces-gender-wage-gaps/>.

unfavorable to women, but research shows that informing job applicants about the context for negotiations helps to reduce disparities.<sup>52</sup> To promote pay equity, then, federal agencies should inform all applicants—in the job announcement—not just about the General Schedule (GS) classification for a job, but the factors that the agency could use to adjust an individual’s pay above the minimum rate. In addition, agencies should provide information explaining the rate range within the applicable GS grade for the position and how the agency determines where an applicant falls along the 10 step rates within each grade, including the skills and experience expected at each step rate.

Providing more specific pay-setting information—including the prohibition on consideration of salary history—in job announcements will ensure that applicants are aware of the information that it is relevant to share for purposes of pay-setting, provide everyone applying to the federal government with access to the same information, and promote a fair hiring process.

### **The Final Rule Should Require Agencies to Provide Greater Transparency on Pay Setting for Individuals with Previous Civilian Service in the Federal Government**

With respect to employees who have previous civilian service in the federal government, the Proposed Rule requires agencies to have policies concerning how they will consider an individual’s previous salary within the federal government when making subsequent pay decisions, including for reemployment, promotions, and demotions.<sup>53</sup> Although OPM provides agencies with a degree of flexibility in creating these policies, the Proposed Rule would require that each policy include, as a factor to be considered, how pay was set for a employees performing similar work.<sup>54</sup> NWLC supports this proposal and recommends that OPM provide additional guidance, including examples, to agencies about what constitutes “similar work,” and how agencies should make determinations for employees doing “similar work” who have different levels of experience. We also recommend that OPM require agencies to provide current federal employees with more information on promotions, including the specific benchmarks that employees must achieve to move between pay levels.

### **The Final Rule Should Require Agencies to Provide OPM with Data on the Factors Used to Support Setting Pay Above the Minimum Rate for Each Employee by Sex, LGBTQI+ Status, Race and Ethnicity**

Federal agencies are required to retain documents containing “[a]n explanation of the factors and supporting documentation . . . used to justify the rate at which the employee’s pay is set.”<sup>55</sup> The documentation “must explain how the factors directly relate to the rate approved,” and must be sufficient to allow the agency to reconstruct the pay decision.<sup>56</sup> While this documentation acts as an important accountability tool for each individual agency, it is also important that OPM collect data on agencies’ use of the superior qualifications and special needs pay-setting authority, and

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<sup>52</sup> See Maria Recalde and Lise Vesterlund, “Gender Differences in Negotiation and Policy for Improvement,” *National Bureau of Economic Research*, December 2020, available at <https://www.nber.org/papers/w28183>

<sup>53</sup> 88 Fed. Reg. at 30255.

<sup>54</sup> *Id.*

<sup>55</sup> 5 CFR § 531.212(e)(2)(ii).

<sup>56</sup> *Id.* The Proposed Rule would add similar documentation requirements for hiring administrative appeals judges and administrative law judges. 88 Fed. Reg. at 30256.

other relevant regulations, in order to better understand how agencies across the federal government are using their pay-setting flexibilities, for which positions, and for which employees.

Currently, OPM has no data on which factors are used to justify the rate at which each new employee's pay is set under the superior qualifications and special needs authority.<sup>57</sup> It is therefore difficult for OPM to understand government-wide how the very broad pay setting flexibilities are being used to support pay-setting above the minimum rate and whether there are disparities in the use of specific factors by sex, LGBTQI+ status, race, or ethnicity. While the research on the negative impact of using salary history in pay-setting is well-known, other factors may also work to perpetuate pay inequity, especially given the wide discretion given to individual agencies. Notably, this data may be even more important to collect if OPM finalizes a rule that does not prohibit consideration of a competing job offer, since, as explained above, competing job offers may be based on an applicant's salary history and therefore reflect past discrimination, bias, or structural disparities. Use of a competing job offer, even together with other factors, may therefore perpetuate gender and racial pay disparities.

### III. Conclusion

Thank you for the opportunity to comment on this important Proposed Rule to advance pay equity for federal employees. NWLC strongly supports the Proposed Rule's prohibition on considering salary history to set pay and urges OPM to adopt our recommendations, detailed above, to provide greater clarity, strengthen the Proposed Rule, and ensure transparency and accountability. Please contact Gaylynn Burroughs, Director of Workplace Equality & Senior Counsel, at [gburroughs@nwlc.org](mailto:gburroughs@nwlc.org) with any questions.

Sincerely,



Emily Martin  
Vice President for Education & Workplace Justice



Gaylynn Burroughs  
Director of Workplace Equality & Senior Counsel

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<sup>57</sup> 88 Fed. Reg. at 30257-30258.