



1350 I STREET NW
SUITE 700
WASHINGTON, DC 20005
202-588-5180
NWLC.ORG

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Christine J. Harada
Senior Advisor to the Deputy Director for Management,
Office of Federal Procurement Policy
Office of Management and Budget
Washington, DC 20503

Submitted via Federal Rulemaking Portal: www.regulations.gov

Re: FAR Case 2023–021, “Pay Equity and Transparency in Federal Contracting”

Dear Ms. Harada:

The National Women’s Law Center (“NWLC”) writes to express our views on FAR Case 2023-021, “Pay Equity and Transparency in Federal Contracting,” including the proposed policy of the Administrator for Federal Procurement Policy (“OFPP Administrator”) and the proposed amendments to the Federal Acquisition Regulation (“FAR”) (collectively referred to hereinafter as “Proposed Rule”), issued by the Federal Acquisition Regulatory Council (“FAR Council”) on January 30, 2024.¹ 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 to remove systemic barriers to equality and economic security. NWLC has long advocated for policies that promote pay equity, close racial and gender wage gaps, and improve job quality—and quality of life—for working women across the United States, with a particular focus on the experiences of women of color.

NWLC strongly supports the Proposed Rule’s prohibition on federal contractors² considering compensation history when making employment decisions, including pay setting decisions, related to personnel applying to work on federal contracts. We also strongly support the requirement that contractors disclose compensation information in job postings for positions involving work on federal contracts. By promoting pay transparency and ensuring that gender bias and pay discrimination do not follow workers from job to job, the Proposed Rule will increase pay equity and combat discrimination, which will in turn improve economy and efficiency in federal contracting. We urge the FAR Council to adopt the recommendations outlined in our comments below to provide greater clarity and increase transparency and accountability.

I. Comments on the Proposed Rule’s Expected Impact on Economy, Efficiency, and Effectiveness

On March 15, 2022, consistent with the Federal Property and Administrative Services Act (“FPASA”), President Biden issued Executive Order (E.O.) 14069, “Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency.”³ E.O. 14069 expressed a government-wide policy “to eliminate discriminatory pay practices that inhibit the economy, efficiency,

¹ 89 Fed. Reg. 5843 (proposed Jan. 30, 2024).

² In these comments, the term “contractor” refers to federal contractors and subcontractors.

³ Exec. Order No. 14069, Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency, 87 Fed. Reg. 15315 (Mar. 18, 2022).

and effectiveness of the Federal workforce and the procurement of property and services by the Federal Government.”⁴ It also instructed the FAR Council “to consider issuing proposed rules to promote economy, efficiency, and effectiveness in federal procurement by enhancing pay equity and transparency” for applicants and employees of federal contractors.⁵

The President has broad discretion under FPASA to issue policies that “provide the Federal Government with an economical and efficient system” for federal procurement,⁶ so long as there is a sufficient nexus between the policy and the objectives of economy and efficiency.⁷ In addition, the OFPP Administrator is charged with providing “overall direction of procurement policy”⁸ while also “promot[ing] economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the federal government.”⁹ Courts have interpreted the terms “economy” and “efficiency” expansively to include “factors like price, quality, suitability, and availability of goods or services”¹⁰ as well as “secondary policy views that deal with government contractors’ employment practices.”¹¹

In issuing the Proposed Rule,¹² the OFPP Administrator provides a comprehensive analysis of the Proposed Rule’s expected impact on economy, efficiency, and effectiveness. We strongly agree with the OFPP Administrator that the Proposed Rule accords with E.O. 14069 and promotes economy and efficiency in numerous ways.¹³ The Proposed Rule would ensure hiring and pay setting decisions are aligned with job-related skills and experience, reduce inefficient hiring practices, save federal contractors time and money in the hiring process, and help federal contractors attract and retain talent, all of which would improve efficiency in government contracting and result in more efficient and effective performance of government contracts.

This section first discusses the proposed ban on considering compensation history, followed by the proposed compensation disclosure requirement, outlining how each component of the Proposed Rule would promote economy and efficiency in federal contracting.

A. The Proposed Rule’s strict prohibition on considering compensation history in employment decisions, including pay setting, promotes economy and efficiency in federal procurement.

We strongly agree with the OFPP Administrator’s conclusion that the proposed ban on considering compensation history in employment decisions promotes economy and efficiency in federal procurement.

The Proposed Rule follows a growing movement away from the use of compensation history in the hiring process. Seventeen states and the District of Columbia, as well as numerous localities, have already

⁴ *Id.* at §1.

⁵ *Id.* at §2.

⁶ 40 U.S.C. § 101; 40 U.S.C. § 121(a).

⁷ 40 U.S.C. § 121(a); *Am. Fed’n of Lab. & Cong. Of Indus. Organizations v. Kahn*, 618 F.2d 784, 792 (D.C. Cir. 1979).

⁸ 41 U.S.C. 1121(b).

⁹ 41 U.S.C. § 1101(b)(2) (explaining the purpose of the Office of Federal Procurement Policy).

¹⁰ *Kahn*, 618 F.2d at 789.

¹¹ *Chamber of Com. Of U.S. v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996); *see also Mayes v. Biden*, 67 F.4th 921, 939 (9th Cir. 2023) (noting that “Presidents have used the Procurement Act to require federal contractors to commit to affirmative action programs when racial discrimination was threatening contractors’ efficiency; to adhere to wage and price guidelines to help combat inflation in the economy; to ensure compliance with immigration laws; and to attain sick leave parity with non-contracting employers because federal contractors were lagging behind and losing talent.”).

¹² The OFPP administrator issued the proposed policy pursuant to 41 U.S.C. § 1121(b). The FAR Council issued proposed implementing regulations pursuant to its authority outlined in 41 U.S.C. § 1303.

¹³ 89 Fed. Reg. at 5843-44.

adopted policies prohibiting employers from seeking salary history from job applicants.¹⁴ As the Proposed Rule correctly recognizes, research into the impacts of state salary history bans indicates that these laws are helping to narrow gender and racial wage gaps¹⁵ that undermine efficient and effective hiring and pay setting processes. Moreover, an increasing number of companies have also announced that they are no longer seeking salary histories from job applicants, including Amazon, American Express, Bank of America, Cisco Systems, Facebook, Google, GoDaddy, Progressive, Starbucks, and Wells Fargo.¹⁶ This trend away from relying on salary history reflects a growing recognition not only of its role in perpetuating pay inequity,¹⁷ but also that using salary history to set pay can be bad for business.¹⁸

As detailed in this sub-section, the experiences of states and businesses that have eliminated the use of salary history demonstrate how this practice can improve hiring processes and outcomes and reduce costs and liability for employers. By prohibiting federal contracts from considering compensation history in employment decisions, the Proposed Rule allows the federal government to benefit from these improved efficiencies.

i. Banning the use of compensation history corrects inefficient hiring practices that perpetuate unjustified pay disparities and ensures that decisions about hiring and pay are aligned with job-related skills and experiences.

Past compensation is not an accurate measure of a job candidate’s qualifications, skills, or ability to perform a job. Prior compensation may be the product of factors that are unrelated to, or have limited relationship to, job-related skills and experience, such as geographic location, job tenure, economic conditions, the size of past employers, the sector in which the individual was previously employed (e.g., for-profit versus public or non-profit employment), past discrimination and bias, and more. The use of compensation history as a proxy for the economic value of an applicant when setting pay can therefore

¹⁴ As of March 2024, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington, as well as Washington, D.C., New York City, San Francisco, Philadelphia, and several other localities, have adopted policies prohibiting employers from seeking applicants’ salary history. See NAT’L WOMEN’S LAW CTR, ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION FROM JOB TO JOB 3 (Mar. 2022), <https://nwlc.org/wp-content/uploads/2020/12/Asking-for-Salary-History-2022.pdf>; D.C. Act 25-367 (2024); Minn. Stat. 363A.08, Subd. 8 (2023). This list only includes policies that prohibit private employers from seeking and/or considering salary history, and it does not include policies that otherwise limit employers’ use of salary history, such as laws prohibiting retaliation against applicants who decline to disclose salary history information, or laws that only apply to state employers.

¹⁵ Benjamin Hansen & Drew McNichols, *Information and the Persistence of the Gender Wage Gap; Early Evidence from California’s Salary History Ban*, NAT’L BUREAU OF ECONOMIC RESEARCH (working paper no. 27054) (2019), <https://ssrn.com/abstract=3277664>; James Bessen et al., *Perpetuating Inequality: What Salary History Bans Reveal About Wages*, Boston University School of Law Public Law and Legal Theory Paper no. 20-19 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3628729.

¹⁶ Madison Alder, *Amazon, BofA Join Employers That Won’t Ask for Pay History*, BLOOMBERG LAW (Jan. 30, 2018), <https://news.bloomberglaw.com/employee-benefits/amazon-bofa-join-employers-that-wont-ask-for-pay-history-1>; Kate Tornone, *After Helping Overhaul GoDaddy’s Culture, Its VP of Inclusion Sets Out on her Own*, HRDIVE (Nov. 16, 2017), <https://www.hrdiver.com/news/after-helping-overhaul-godaddys-culture-its-vp-of-inclusion-sets-out-on-h/510923/>; Courtney Connelly, *Starbucks Has Closed Its Pay Gap in the US—Here are 4 Other Companies that Have Done the Same*, CNBC (Mar. 23, 2018), <https://www.cnbc.com/2018/03/23/5-companies-that-have-reached-100-percent-pay-equity-in-the-u-s.html>.

¹⁷ See, e.g., Robin Bleiweis, *Why Salary History Bans Matter to Securing Equal Pay*, CENTER FOR AMERICAN PROGRESS (Mar. 24, 2021), <https://www.americanprogress.org/article/salary-history-bans-matter-securing-equal-pay/> (noting that states and localities have enacted salary history bans to “combat...structural bias and help narrow the gender wage gap for their constituencies); Alder, *supra* note 16.

¹⁸ See, e.g., *Opinion: I’m a Small Business Owner, and I Don’t Ask Applicants for Their Salary History*, MARYLAND MATTERS (Mar. 2, 2020), <https://www.marylandmatters.org/2020/03/02/opinion-im-a-small-business-owner-and-i-dont-ask-applicants-for-their-salary-history/>.

result in inefficient pay outcomes, artificially inflating salaries for some workers while artificially depressing the wages of others without a basis in legitimate, job-related factors.¹⁹

In addition to using salary history to set pay, some employers also use it to screen out applicants, making assumptions about the applicant's qualifications for the position based on their past or current pay.²⁰ Because compensation history is an inaccurate proxy for experience or interest, this practice can result in the exclusion of qualified candidates from consideration.

Removing consideration of compensation history from decisions about hiring and pay setting can help ensure hiring and pay determinations are based on job-related skills, experience, and education. When employers are not able to rely on compensation history to set pay, employers collect more information from applicants and ask more substantive and probing questions to evaluate an applicant for the job.²¹ By incentivizing federal contractors to examine more closely the skills, education, and competencies of job candidates, the Proposed Rule can help ensure that federal contractors make hiring decisions that are more directly aligned with the skills and experience of applicants, rather than with the rough and inaccurate proxy of prior pay. The federal government has an interest in ensuring that workers who perform work on federal contracts are being paid fair wages that are not artificially inflated or deflated, and by better aligning hiring and pay setting decisions with job-related qualifications, the Proposed Rule will help ensure that the government is entering into contracts with a more qualified workforce at the most efficient price.

Precisely because salary history is a flawed proxy for employee skills, performance, or economic value, reliance on salary history to set pay is also a driving factor for the persistence of unjustified gender and racial pay gaps. Women in the United States who work full time, year-round are typically paid only 84 cents for every dollar paid to their male counterparts, and wage gaps are far wider for many women of color.²² The gender pay gap persists “even [when] controlling for race, region, unionization status, education, work experience, occupation, and industry”, and discrimination and other structural gender and racial disparities likely play an important role in this “unexplained” pay gap.²³ Because women, especially women of color, are systemically paid less than men and are therefore more likely to have lower prior salaries, allowing employers to consider salary history when setting pay allows gender bias and past discrimination to follow women from job to job.²⁴ In essence, it leads to employers paying women less because women have always been paid less and paying men more because men have always been paid more. As a result, this practice entrenches inefficient pay determinations that do not reflect candidates' economic value and perpetuates harmful gender- and race-based pay inequities. The Proposed Rule's prohibition on considering compensation history will help ensure that contractors are hiring and setting pay based on job-related criteria, rather than on past discrimination or other factors that are irrelevant to

¹⁹ NAT'L WOMEN'S LAW CTR, ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION, *supra* note 14, at 2.

²⁰ Jena McGregor, *The Worst Question You Could Ask Women in a Job Interview*, WASHINGTON POST (Apr. 14, 2015), <https://www.washingtonpost.com/news/on-leadership/wp/2015/04/14/the-worst-question-you-could-ask-women-in-a-job-interview/>.

²¹ Moshe A. Barach & John J. Horton, *How Do Employers Use Compensation History?: Evidence From a Field Experiment*, NAT'L BUREAU OF ECONOMIC RESEARCH (2020), https://www.nber.org/system/files/working_papers/w26627/w26627.pdf.

²² SARAH JAVOID, NAT'L WOMEN'S LAW CTR, A WINDOW INTO THE WAGE GAP: WHAT'S BEHIND IT AND HOW TO CLOSE IT 1 (2024), <https://nwlc.org/wp-content/uploads/2023/01/2023-Wage-Gap-Factsheet.pdf>.

²³ *Id.* at 4; Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends and Explanations*, NAT'L BUREAU OF ECONOMIC RESEARCH (working paper no. 21913) (2016), <http://www.nber.org/papers/w21913.pdf>.

²⁴ See NAT'L WOMEN'S LAW CTR, ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION, *supra* note 14, at 2.

the current job, which can create more efficient hiring while also helping to reduce unjustified gender and racial pay gaps.²⁵

ii. Prohibiting the use of compensation history can help federal contractors attract and consider a broader pool of candidates.

Ending reliance on compensation history can help federal contractors attract a larger and more diverse pool of qualified candidates, which will tend to result in more efficient hiring to fill open positions and more effective and efficient performance of work on federal contracts. A recent field experiment found that when employers did not have access to information about applicants' prior pay, they widened the pool of workers under consideration,²⁶ suggesting that employers who rely on compensation history may be artificially limiting their own applicant pools, inhibiting access to talent. For federal contractors, a limited applicant pool can ultimately undermine performance of government contracts, at a significant cost to the taxpayer. Eliminating the use of compensation history in the hiring process can help ensure that contractors consider a broader pool of talent and do not screen out potential matches based on criteria unrelated to skills, experience, and qualifications.

Eliminating the use of compensation history to make employment decisions may also help employers consider a more demographically diverse set of candidates. In one study, when employers did not have access to information about prior pay, they interviewed and ultimately hired more individuals who had made less money in the past.²⁷ Given that women are systemically paid less than men, and that a gender wage gap exists in almost every occupation,²⁸ expanding the candidate pool to include more workers with relatively lower past wages may also increase employment opportunities for women, and particularly for women of color.²⁹ The hiring of a diverse workforce can also have a broad range of benefits for federal contractors, including improved financial performance, recruitment advantages, increased innovation, and a positive public image,³⁰ all of which can help improve the delivery of services under federal contracts.

²⁵ See HARV. BUS. REV. ANALYTIC SERVICES, NAVIGATING THE GROWING PAY EQUITY MOVEMENT, WHAT EMPLOYERS NEED TO KNOW ABOUT WHAT TO DO 5 (2019), <https://trusaic.com/resources/pay-equity-downloads/harvard-business-review-trusaic-pulse-survey> (employers conducting pay equity audits found that relying on salary history was a driver of gender wage gaps within the organization).

²⁶ Barach & Horton, *supra* note 21, at 3.

²⁷ *Id.*

²⁸ See generally JAVOID, A WINDOW INTO THE WAGE GAP, *supra* note 22.

²⁹ To the extent these policies help create larger, more diverse applicant pools, compensation history bans are consistent with federal contractors' obligations under Executive Order 11246 to create equal employment opportunities. See Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, 79 Fed. Reg. 42971, (Jul. 23, 2014); *History of Executive Order 11246*, DEP'T OF LABOR, <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> (last visited Mar. 31, 2024)..

³⁰ See Vivian Hunt, Dennis Layton, & Sara Prince, *Why Diversity Matters*, MCKINSEY & Co. 3-7, 9-13 (Jan. 2015), <https://www.mckinsey.com/~media/mckinsey/business%20functions/people%20and%20organizational%20performance/our%20insights/why%20diversity%20matters/diversity%20matters.pdf> (analyzing data from 366 companies and noting that "companies in the top quartile for gender diversity were 15 percent more likely to have financial returns that were above their national industry median, and the companies in the top quartile for racial/ethnic diversity were 35 percent more likely to have financial returns above their national industry median"; discussing other positive impacts of diversity for organizations, including advantages in talent recruitment, improved innovation and decision making, and enhanced public image); Sylvia Ann Hewlitt, Melinda Marshall & Laura Sherbin, *How Diversity Can Drive Innovation*, HARV. BUS. REV. (Dec. 2013), <https://hbr.org/2013/12/how-diversity-can-drive-innovation> (describing research suggesting diversity "unlocks innovation and drives market growth").

iii. Banning the use of compensation history in employment decisions will help ensure contractors do not run afoul of the Equal Pay Act, Title VII, Executive Order 11246, and an array of state and local pay equity laws, reducing the risk of enforcement actions or litigation and the associated disruption and expense.

By prohibiting the consideration of compensation history in employment decisions, the Proposed Rule will help federal contractors comply with the Equal Pay Act,³¹ which requires employers to pay women and men equally for substantially equal work; Title VII of the Civil Rights Act of 1964, which prohibits pay discrimination on the basis of sex, race, color, religion, and national origin, as well as retaliation;³² Executive Order 11246, which establishes affirmative action and non-discrimination requirements for covered federal contractors;³³ and state and local pay equity laws.³⁴

Federal contractors who set pay based on compensation history are vulnerable to legal challenge pursuant to federal and, in many cases, state law. As previously discussed in Section I.A.i., reliance on compensation history to set pay can compound past discrimination and result in unjustified pay disparities.³⁵ Since 2000, the U.S. Equal Employment Opportunity Commission (“EEOC”) has instructed that reliance on salary history does not, by itself, legally justify paying women less.³⁶ Several federal courts of appeal have held that under the Equal Pay Act, employers may not rely on salary history alone as a defense for paying a woman less than a man for equal work.³⁷ Some state pay equity laws also specify that employers cannot use salary history as a defense to a pay discrimination action.³⁸

In addition, federal contractors whose pay practices lead to discrimination based on race and/or sex are vulnerable to Title VII lawsuits or could be found in violation of Executive Order 11246.³⁹ As reliance on salary history to set pay can lead to unjustified racial and gender pay disparities, banning consideration of compensation history in pay setting and employment decisions can help protect federal contractors from

³¹ 29 U.S.C. § 206(d).

³² 42 U.S.C. § 2000e et seq.

³³ Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, 79 Fed. Reg. 42971, (Jul. 23, 2014); *History of Executive Order 11246*, DEP’T OF LABOR, <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> (last visited Mar. 31, 2024).

³⁴ See generally, NAT’L WOMEN’S LAW CTR, PROGRESS IN THE STATES FOR EQUAL PAY (2023), https://nwlc.org/wp-content/uploads/2023/10/NWLC_Equal-Pay-Progress-2.13.24.pdf.

³⁵ See generally NAT’L WOMEN’S LAW CTR, ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION, *supra* note 14.

³⁶ EQUAL EMPLOYMENT OPPORTUNITY COMM’N, COMPLIANCE MANUAL No. 915.003, § 10-iv.F.2.g (Dec. 2000), <https://www.eeoc.gov/policy/docs/compensation.html>.

³⁷ The Ninth Circuit Court of Appeals has held that reliance on prior pay can never justify unequal pay. *Rizo v. Yovino*, 950 F.3d 1217, 1229 (9th Cir. 2020). Several other circuit courts have held that employers cannot rely on prior pay alone to justify unequal pay. *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015); *Balmer v. HCA, Inc.*, 423 F.3d 606, 612 (6th Cir. 2005), abrogated on other grounds by *Fox v. Vice*, 563 U.S. 826, 832 (2011); *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988); *Boyer v. United States*, No. 22-1822 at 15-16 (Fed. Cir. Mar. 26, 2024) (holding that employers cannot rely on prior pay alone to justify unequal pay unless the employer can demonstrate that the prior pay is not based on sex and does not reflect sex discrimination).

³⁸ NAT’L WOMEN’S LAW CTR, PROGRESS IN THE STATES FOR EQUAL PAY, *supra* note 34, at 10.

³⁹ The Office of Federal Contract Compliance Programs (OFCCP), which enforces E.O. 11246, has long interpreted the order's nondiscrimination provisions to align with well-established judicial interpretations of Title VII of the Civil Rights Act of 1964. See, e.g., *OFCCP v. Oracle America*, 17-OFC-6, 2020 WL 6779321 (Dept. of Labor Sept. 22, 2020) (“The anti-discrimination provisions of EO 11246 are interpreted through the legal analyses that have been applied to Title VII of the Civil Rights Act.”).

litigation and administrative investigations that can result in significant costs⁴⁰ and interfere with the efficient and effective performance of federal contracts.

B. The Proposed Rule’s requirement that federal contractors disclose compensation information in job advertisements promotes economy and efficiency.

A growing number of states are requiring employers to provide pay ranges during the hiring process. As of March 2024, 10 states and Washington, DC have enacted pay range transparency requirements, along with several localities, although the specific requirements of these laws vary.⁴¹ As of March 2023, nearly 44.8 million people in the labor force were covered by pay range transparency laws, and this number is continuing to grow as additional state laws are passed.⁴² Many federal contractors are likely already shifting their practices to align with the requirements of the Proposed Rule as a result of laws in the states where they operate. Moreover, employers are increasingly choosing to post pay ranges even when not required by law,⁴³ suggesting growing recognition among businesses that pay range transparency can improve their hiring processes with minimal burden.⁴⁴

Initial evidence suggests that businesses are complying with state pay range transparency laws at a high rate; the Colorado Department of Labor and Employment has reported that the majority of businesses are complying with the requirement to include compensation information in job postings,⁴⁵ and a recent NWLC analysis of Glassdoor data found that states with laws requiring pay ranges in job announcements have high rates of pay disclosure in all industries.⁴⁶ As discussed in more detail below, a growing body of research indicates that adopting pay range transparency can benefit employers economically by reducing costs in the hiring process and boosting employee morale and productivity, which can lead to improved delivery of services by contractors.

The comments in this section explain how requiring the disclosure of compensation information in job postings will confer economic benefits on federal contractors and promote economy and efficiency in federal contracting.

⁴⁰ See, e.g., *Discrimination Cases Completed*, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.dol.gov%2Fsites%2Fdolgov%2Ffiles%2Fofccp%2FBTN%2Fsheets%2FMonetaryReliefQ12024.xlsx&wdOrigin=BROWSELINK> (last visited Mar. 27, 2024) (reporting on discrimination cases completed OFCCP by year. In 2023, OFCCP resolved nine systemic pay discrimination cases, resulting in monetary relief of over \$17 million dollars for over 13,800 class members); see also *GE Aerospace Resolves Alleged Gender-Based Hiring Discrimination, Pays \$443K in Back Wages to Affected Job Applicants After Compliance Review*, U.S. DEP’T OF LABOR, <https://www.dol.gov/newsroom/releases/ofccp/ofccp20240209> (Feb. 9, 2024); *Pfizer Inc. Agrees to Pay \$2M to Resolve Alleged Compensation Discrimination at New York City Location*, U.S. DEP’T OF LABOR, <https://www.dol.gov/newsroom/releases/ofccp/ofccp20231016> (Oct. 16, 2023).

⁴¹ As of March 2024, Colorado, California, Hawaii, Illinois, New York, Washington, Connecticut, Maryland, Nevada, Rhode Island, as well as Washington, D.C., New York City, and several other localities, have enacted pay range transparency requirements. See NAT’L WOMEN’S LAW CTR, *PAY RANGE TRANSPARENCY IS CRITICAL FOR DRIVING PAY EQUITY 4-5* (Mar. 2024), <https://nwlc.org/wp-content/uploads/2024/03/Pay-Range-Transparency-2024v2.pdf>; D.C. Act 25-367 (2024).

⁴² BROOKE LE PAGE, NAT’L WOMEN’S LAW CTR, *NEARLY 21 MILLION WOMEN BENEFIT FROM PAY RANGE TRANSPARENCY LAWS. ANOTHER 18.5 MILLION COULD SOON* (Mar. 2023), <https://nwlc.org/resource/pay-range-transparency-laws-benefit>.

⁴³ SARAH JAVAID, NAT’L WOMEN’S LAW CTR & GLASSDOOR, *LEGISLATORS CAN EMPOWER WORKERS WITH PAY RANGE TRANSPARENCY LAWS* (2024), https://nwlc.org/wp-content/uploads/2024/03/NWLC_FactSheets_Glassdoor_PayTransparency_0306_ForReview_v2.pdf.

⁴⁴ As the Proposed Rule correctly notes, employers already need to go through processes to determine the budget for a position, so there should be no more than de minimis costs associated with including an estimate of compensation in job advertisements. Proposed Rule at 5848-49.

⁴⁵ COLORADO DEP’T OF LABOR AND EMPLOYMENT, *EQUAL PAY FOR EQUAL WORK*, https://cdle.colorado.gov/sites/cdle/files/Equal_Pay_for_Equal_Work_Fact_Sheet%20accessible.pdf (last visited Mar. 25, 2024).

⁴⁶ JAVAID, *LEGISLATORS CAN EMPOWER WORKERS WITH PAY RANGE TRANSPARENCY LAWS*, *supra* note 43.

i. Disclosing compensation information in job postings will improve the recruitment and hiring processes for federal contractors, which can facilitate economy and efficiency in federal contracting.

Providing compensation information, including pay ranges, in job postings will streamline the hiring process for federal contractors, saving both time and money. Businesses have reported that posting pay ranges in job announcements saves them time in the hiring process because they do not have to spend time reviewing applications and interviewing candidates whose salary expectations are not aligned with the position.⁴⁷ Requiring employers to disclose compensation information in job postings is a preferable approach to creating this alignment because it allows potential applicants to self-select based on the information provided. By contrast, other approaches, such as asking for applicants' salary expectations, can result in inefficient pay setting. Women, especially women of color, and men of color are more likely to provide prospective employers with lower salary expectations than white men.⁴⁸ Because salary expectations may reflect an applicant's past experience of bias and discrimination, it is not a reliable indicator of job-related qualifications, and it can result in the over- and under-payment of workers in the same way that reliance on salary history can.⁴⁹

Research indicates that providing pay ranges in job listings can also reduce the cost of online recruiting. For example, a 2022 analysis of online job advertisements found that mentioning pay information in job titles reduced the "cost-per-click" (the total number of clicks per job divided by the cost to promote it) by a quarter,⁵⁰ meaning that advertisements with pay information provided better value for employers. By making the hiring process faster and more cost-effective for contractors, pay range transparency can help facilitate more efficient performance of federal contracts.

Disclosing compensation information in job postings can also give federal contractors a recruiting advantage, which can ultimately improve the quality of services provided to the government under federal contracts.⁵¹ Recent polling by NWLC and Morning Consult found that 58% of workers prefer job postings that include pay ranges.⁵² In a survey by the Society for Human Resource Management, nearly 70% of organizations that include pay ranges in job postings reported that applications increased, and 66% of those organizations reported that the quality of applicants improved.⁵³ Younger workers and women of color are more likely to refrain from applying to a job posting because it does not include a pay

⁴⁷ Testimony of Aubrey Batten, Well-Paid Maids in Support of SB 217 – Labor and Employment – Wage History and Wage Range Before the Maryland Senate Finance Committee (Feb. 13, 2020), https://mgaleg.maryland.gov/cmtc_testimony/2020/fin/1520_02132020_10530-719.pdf; Sarah Kessler, *Who Benefits When Salary Info is Public?*, N.Y. TIMES (last updated Jan. 16, 2023), <https://www.nytimes.com/2023/01/14/business/pay-transparency-public-salary-information.html>.

⁴⁸ Kim Elsesser, *Women of Color Set Lower Salary Requirements Than White Men, According To Job Search Site*, FORBES (Feb. 6, 2023), <https://www.forbes.com/sites/kimelsesser/2023/02/06/women-of-color-set-lower-salary-requirements-than-white-men-according-to-job-search-site>.

⁴⁹ See *infra* Section I.A.i.

⁵⁰ Sam Kuhn, *It Pays to Be Transparent*, RECRUITONOMICS (Nov. 14, 2022), <https://recruitonomics.com/it-pays-to-be-transparent/>.

⁵¹ See, e.g., E.O. 13706, 80 Fed. Reg. 54697 (Sept. 7, 2015) (requiring federal contractors to allow employees working on federal contracts to earn paid sick leave, because access to paid sick leave would allow contractors to better compete for talent, which would result in savings and quality improvements and thereby promote economy and efficiency in federal procurement).

⁵² NAT'L WOMEN'S LAW CTR, NEW POLLING SHOWS THAT AMERICANS SUPPORT PAY RANGE TRANSPARENCY AND EMPLOYERS MAY BENEFIT TOO (Jan. 2024), <https://nwlc.org/wp-content/uploads/2024/01/PRT-national-fs.pdf>.

⁵³ *New SHRM Research Shows Pay Transparency Makes Organizations More Competitive, Leads to Increase in Qualified Applicants*, SHRM (Mar. 14, 2023), <https://www.shrm.org/about/press-room/new-shrm-research-shows-pay-transparency-makes-organizations-competitive-leads-to-increase-qualified-applicants>.

range.⁵⁴ Therefore, providing pay ranges in job postings may also help federal contractors attract a more diverse workforce, which, as previously discussed, can help improve financial performance, increase innovation, foster a positive public image, and provide further recruitment advantages.⁵⁵

ii. Disclosing compensation information in job postings can make pay negotiations more efficient and result in wages that are better aligned with job-related criteria.

Requiring federal contractors to include compensation information in job postings can correct information asymmetries in pay negotiations that result in inefficient wages.⁵⁶ In the absence of pay range transparency, negotiations often result in wages that are influenced by past salary information, bias, and other factors that do not reflect job-related skills and experience, meaning that employers will under- or over-pay workers for reasons unrelated to their qualifications for the position. Underpaying workers can negatively impact performance on federal contracts because when workers perceive that they are underpaid compared to their peers, they tend to be less productive and have lower attendance.⁵⁷

Pay negotiations are particularly unfavorable to women and workers of color. Employers tend to negatively perceive women who negotiate,⁵⁸ and a study of negotiation behavior and outcomes showed that women who negotiate pay tend to end up with less than men who negotiate, even when a variety of background influences are held constant,⁵⁹ likely resulting in pay disparities unrelated to candidates' job-related qualifications and economic value. When employers negotiate without giving salary range information to job applicants, applicants are also more likely to rely on their past pay as a negotiation reference point,⁶⁰ which, as discussed in Section I.A.i., perpetuates existing gender and racial pay gaps and pay inefficiencies.⁶¹

By contrast, research suggests that when both the employer and the applicant have access to sufficient information, pay negotiations tend to result in wages that are more closely aligned with the worker's economic value.⁶² Studies also show that when job applicants have more information about the conditions for negotiation, gender differences in negotiation outcomes diminish, which can help reduce wage gaps.⁶³

⁵⁴ *Better Job Descriptions and Pay Transparency: Top Priorities for Gen Z Identified in New Symplivity Student Survey*, SYMPPLICITY (May 24, 2023), <https://www.symplivity.com/news/2023-state-of-early-talent-recruiting-report>; *Q1 2023 United States Job Market Report*, JOBLIST (Apr. 13, 2023), <https://www.joblist.com/jobs-reports/q1-2023-united-states-job-market-report>; Vaishali Sabhahit, *Adobe's Future Workforce Study Reveals What Gen Z is Looking for In the Workplace*, ADOBE (Jan. 24, 2023), <https://blog.adobe.com/en/publish/2023/01/24/adobes-future-workforce-study-reveals-what-next-generation-workforce-looking-for-in-workplace>.

⁵⁵ See Hunt et. al, *supra* note 30; Hewlitt et. al, *supra* note 30.

⁵⁶ Deborah Thompson Eisenburg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. STATE L. J. 951, 988 (2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1845828.

⁵⁷ Emily Breza, Supreet Kaur, and Yogita Shamdassani, *The Morale Effects of Pay Inequality*, NAT'L BUREAU OF ECONOMIC RESEARCH (working paper no. 22491) 26 (2016), https://www.nber.org/system/files/working_papers/w22491/w22491.pdf.

⁵⁸ See Hannah Riley Bowles, Linda Babcock, and Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 84 (2007) <https://www.sciencedirect.com/science/article/abs/pii/S0749597806000884>.

⁵⁹ See Benjamin Artz, Amanda Goodall, and Andrew Oswald, *Do Women Ask?*, 57 INDUSTRIAL RELATIONS 611 (2018), <https://onlinelibrary.wiley.com/doi/abs/10.1111/irel.12214>.

⁶⁰ NAT'L WOMEN'S LAW CTR, PAY RANGE TRANSPARENCY IS CRITICAL FOR DRIVING PAY EQUITY, *supra* note 41, at 4-5.

⁶¹ Kim Elssesser, *Women of Color Set Lower Salary Requirements Than White Men, According to Job Search Site* (Feb. 6, 2023), FORBES, <https://www.forbes.com/sites/kimelssesser/2023/02/06/women-of-color-set-lower-salary-requirements-than-white-men-according-to-job-search-site/?sh=f508298454d0>.

⁶² Eisenberg, *supra* note 56, at 988-89.

⁶³ See Andreas Leibbrandt and John A. List, *Do Women Avoid Salary Negotiations? Evidence From A Large-Scale Natural Field Experiment*, NAT'L BUREAU OF ECONOMIC RESEARCH (working paper no. 18511) 11-12 (2012),

By providing a clearer starting point and parameters for negotiation, disclosure of compensation information in job postings can result in more equitable negotiation outcomes and increase the likelihood that federal contractors hire workers at the most efficient price.

iii. Requiring the disclosure of compensation information will create additional incentives for federal contractors to regularly evaluate their pay practices.

Requiring federal contractors to disclose pay ranges in job postings that will be available to current employees and new applicants creates an incentive for contractors to review and assess their pay practices⁶⁴ and create clear and consistent compensation schemes,⁶⁵ which will tend to result in wages that more accurately reflect the value of the work and that are therefore more economically efficient.

Unjustified and unaddressed pay disparities can have negative impacts on worker morale, productivity, and social cohesion in the workplace,⁶⁶ all of which can affect the quality of services provided under federal contracts. By creating additional incentives for federal contractors to proactively identify and address unjustified disparities, the Proposed Rule can help contractors avoid these negative effects. Moreover, promptly identifying and addressing unjustified disparities can help contractors reduce the risk of costly litigation. When pay disparities are allowed to compound over time, workers are more likely to feel hurt and betrayed when they eventually come to light, and they may be more likely to respond with litigation,⁶⁷ which can raise costs and interfere with the performance of contracts.

Third, and relatedly, providing pay ranges in job postings and regularly reviewing pay practices can signal to job applicants and current employees that the employer is committed to fair pay and pay transparency. Employee perceptions of fair pay are closely linked to retention and morale,⁶⁸ and when workers are confident that pay practices are fair and transparent, they feel more loyalty and trust in the employer, are more invested in the success of the business, and are more productive.⁶⁹ By contrast, when workers feel their employer's pay practices are not transparent, it can increase their intent to quit.⁷⁰ By giving applicants and workers confidence that pay is fair and transparent, the Proposed Rule's compensation

https://www.nber.org/system/files/working_papers/w18511/w18511.pdf; Maria Recalde and Lise Vesterlund, *Gender Differences in Negotiation and Policy for Improvement*, NAT'L BUREAU OF ECONOMIC RESEARCH (working paper no. 28183) (2020), <https://www.nber.org/papers/w28183>.

⁶⁴ As part of their affirmative action obligations under Executive Order 11246, covered federal contractors are required to perform annual audits of their employment processes and compensation systems, including conducting a compensation analysis to identify any pay disparities based on race, gender, or ethnicity. 41 C.F.R. 60-2.17(b)(3) (regarding contractors' analysis of their compensation systems), 60-2.1(c) (describing federal contractors' general obligations for an affirmative action program). These contractors are also subject to compliance evaluations by the OFCCP in which they must make available to OFCCP their compensation analyses. *Directive (DIR) 2022-01 Revision 1*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/ofccp/directives/2022-01-Revision1> (last visited Mar. 27, 2024). For these contractors, the requirements of proposed FAR Part 52 create an additional incentive to conduct these analyses at far less than a de minimus cost. See Proposed Rule at 5849.

⁶⁵ Eisenberg, *supra* note 56, at 1003-04, 1008-09 (noting that in the context of executive compensation, disclosure requirements have led to companies developing clearer compensation metrics, goals, and structures).

⁶⁶ Breza et. al, *supra* note 57, at 26-27 (finding that pay disparities can produce discontent and affect output, attendance, and social dynamics, and that these effects disappear when the reason for the disparity is transparent, such as where it is related to output.).

⁶⁷ Eisenberg, *supra* note 56, at 1018 ("Under opaque pay systems, large, unjustified pay disparities have been allowed to take root and multiply. Women who are surprised by inequities, after working hard for an employer for years or decades, are likely to feel betrayed and humiliated, and may be more likely to strike back with litigation.").

⁶⁸ THE GENDER PAY GAP: WHAT YOUR EMPLOYEES REALLY THINK, BEQOM 8 (2019), <https://www.beqom.com/hubfs/E-Guides%20And%20Reports/2019-Gender-Pay-Gap-Survey-Report.pdf>.

⁶⁹ Eisenberg, *supra* note 56, at 1017.

⁷⁰ RETENTION REPORT, Payscale (2023), <https://www.payscale.com/research-and-insights/retention-report/>.

disclosure requirement could improve worker productivity and retention, which would make the performance of federal contracts more efficient and effective.⁷¹

II. Comments in response to the questions regarding the proposed policy of the OFPP Administrator

This section outlines our comments in response to the questions posed by the OFPP Administrator regarding how states' experiences can inform regulatory action, and what factors the OFPP Administrator should consider for positions of high occupational segregation.

A. States' experiences with compensation history bans and pay range transparency requirements inform the need for a uniform rule for federal contractors.

The OFPP Administrator has requested comments on how states' experiences with salary history bans might inform future regulatory actions.⁷² As previously discussed, a growing number of states and localities have already adopted compensation history bans and pay range transparency requirements, and many businesses have adopted these practices voluntarily.⁷³ As detailed throughout Section I, the experiences of these states and businesses demonstrate how these practices can promote economy and efficiency by increasing pay equity, reducing wage gaps, streamlining the hiring process, and improving worker morale and productivity.

Importantly, as outlined in Section I, compensation history bans and compensation disclosure requirements address different practices and produce related but different benefits. Compensation history bans prevent reliance on prior pay in hiring and pay setting decisions, ensuring that these decisions are made on the basis of job-related qualifications rather than on irrelevant factors, including past discrimination and structural inequities. Compensation disclosure requirements combat pay secrecy practices that produce information asymmetry and allow unjustified pay disparities to go unidentified and unaddressed. Requiring federal contractors to adopt both policies in tandem is a comprehensive approach that ensures the full range of benefits stemming from these policies accrues to the federal government.

It is also critical that these requirements be applied uniformly to all federal contractors, regardless of which states they operate in. State and local laws vary with regard to which businesses are covered and the scope of the requirements they impose.⁷⁴ Uniform adoption of these practices by all federal contractors will create clear and predictable expectations for applicants for positions to perform work on or in connection with federal contracts. Moreover, adopting a uniform rule for all federal contractors maximizes the benefit of the rule to the federal government and improves the efficiency of entering into contracts. By requiring that all contractors comply with these practices regardless of where they operate, the Proposed Rule allows the government to avoid contracting with businesses whose pay setting practices perpetuate pay disparities and undermine economy and efficiency in the procurement process, without having to investigate the pay practices of each individual contractor before awarding a contract.

⁷¹ See, e.g., *UAW-Labor Employment and Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (upholding an executive order requiring federal contractors to post notices informing workers of their rights under labor laws on the grounds that informing workers of their rights enhances their productivity, and a more productive workforce facilitates the economical and efficient performance of government contracts).

⁷² Proposed Rule at 5849.

⁷³ See NAT'L WOMEN'S LAW CTR, ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION, *supra* note 14, at 3; NAT'L WOMEN'S LAW CTR, PAY RANGE TRANSPARENCY IS CRITICAL FOR DRIVING PAY EQUITY, *supra* note 41, at 4-5.

⁷⁴ See generally NAT'L WOMEN'S LAW CTR, PROGRESS IN THE STATES FOR EQUAL PAY, *supra* note 34.

B. The Office of Federal Procurement Policy should encourage contractors to review their compensation setting schemes to identify inequities resulting from occupational segregation.

The OFPP Administrator has asked for comments on what factors it should consider for positions of high occupational segregation.⁷⁵ Occupational segregation—or more specifically, the overrepresentation of women in lower-paid occupations, compared to occupations that are more integrated or predominantly held by men—is a major driver of the gender wage gap.⁷⁶ Jobs that are predominantly held by women tend to pay less than those predominantly held by men, even at the same level of skill and education.⁷⁷

Job evaluation schemes have often undervalued occupations predominantly held by women and occupations historically dominated by Black workers.⁷⁸ It is therefore important for contractors to examine their compensation setting schemes to ensure they provide a fair and consistent approach to setting pay relativities within the organization.⁷⁹ We urge the Office of Federal Procurement Policy (“OFPP”), together with the Department of Labor (“DOL”), to consider ways to encourage federal contractors to review and assess their practices for evaluating the relative pay of jobs within their organizations. Once the Final Rule is implemented, data should be collected on the rule’s impact on occupational segregation, which could inform future rulemaking.

Compensation reviews, already required of federal contractors, could be a starting point for identifying potential inequities resulting from occupational segregation.⁸⁰ Further, EEO-1 forms, which many federal contractors are required to submit to the EEOC,⁸¹ provide a tool for analyzing occupational segregation and developing occupational and industry benchmarks. This information can help guide OFPP, in conjunction with EEOC and DOL, in providing targeted assistance to federal contractors and subcontractors that will strengthen the effect of the proposed rule.

III. Comments on the proposed amendments to FAR Part 22 and FAR Part 52.

As previously stated, NWLC strongly supports the Proposed Rule’s prohibition on seeking and considering compensation history to set pay and its requirement that federal contractors and subcontractors disclose compensation information in job postings. The comments below express support for specific provisions of the proposed amendments to the FAR and provide recommendations to clarify and strengthen the Final Rule.

⁷⁵ 89 Fed. Reg. at 5849.

⁷⁶ See ARIANE HEGEWISCH & HEIDI HARTMANN, INST. FOR WOMEN’S POL’Y RESEARCH, OCCUPATIONAL SEGREGATION AND THE GENDER WAGE GAP: A JOB HALF DONE 11 (2014), <https://iwpr.org/wp-content/uploads/2020/08/C419.pdf>.

⁷⁷ *Id.* at 13.

⁷⁸ See DONALD TOMASKOVIC-DEVEY, GENDER AND RACIAL INEQUALITY AT WORK: THE SOURCES & CONSEQUENCES OF JOB SEGREGATION, 72 *Social Forces* 45, 61(1993), https://www.researchgate.net/publication/246291528_Gender_Racial_Inequality_at_Work_The_Sources_and_Consequences_of_Job_Segregation; SUE FAERMAN ET AL., CTR. FOR WOMEN IN GOV’T & CIVIL SOCIETY, UNIV. AT ALBANY, STATE UNIV. OF N.Y., PAY EQUITY STUDY IN NEW YORK STATE AND LOCAL GOVERNMENT: A RESEARCH REPORT 5 (last accessed Mar. 22, 2024), <https://www.cs.ny.gov/extdocs/pdf/WageEquityReport.pdf>; James N. Baron & Andrew E. Newman, *Pay the Man: Effects of Demographic Composition on Prescribed Wage Rates in the California Civil Service*, in PAY EQUITY: EMPIRICAL INQUIRIES 107, 125 (Robert T. Michael et al. eds., Nat. Acad. Press 1989); Paula England, *The Case for Comparable Worth*, 39 Q. REV. ECON. & FIN. 743, 745-46, 752 (1999), <https://www.sciencedirect.com/science/article/pii/S1062976999000265>.

⁷⁹ See *Performing Job Evaluations*, SHRM, <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/performingjobevaluations.aspx> (last visited Mar. 23, 2024).

⁸⁰ See *Directive (Dir) 2022-01 Revision 1*, DEP’T OF LABOR (2022), <https://www.dol.gov/agencies/ofcpcp/directives/2022-01-Revision1>.

⁸¹ See *EEOC Data Collections*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/data/eec-data-collections> (last visited Mar. 26, 2024).

A. NWLC supports the proposed definition of “compensation” and recommends additional clarity on what constitutes a good faith estimate of salary or wages.

We support the Proposed Rule’s approach to compensation in proposed FAR Part 22 and FAR Part 52, which will require employers to provide applicants with comprehensive information about the pay and benefits associated with the position. The Proposed Rule defines compensation to include “... salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement.”⁸² It requires contractors to disclose the salary or wages, or salary or wage range, that it believes in good faith it will pay for the position as well as a description of benefits and other applicable forms of compensation.⁸³

By requiring contractors and subcontractors to provide comprehensive information about compensation, including information about pay and other benefits, the Proposed Rule will allow applicants to better assess and compare job opportunities. Disclosing a fuller picture of the benefits the employer provides promotes efficiency by streamlining the hiring process and ensuring that employers do not spend time assessing and interviewing candidates who would not accept the position for the salary and benefits they can provide.⁸⁴ Because many job applicants value non-monetary benefits—including telework options, leave for caregiving, transportation benefits, and access to professional development opportunities—in addition to pay,⁸⁵ advertising the full range of benefits they offer can also help federal contractors attract candidates.

We appreciate that the Proposed Rule includes factors that may form the basis for the contractor’s good faith estimate of “salary or wages, or ranges thereof,” including “the Contractor’s pay scale for that position, the range of compensation for those currently working in similar jobs, or the amount budgeted for the position.”⁸⁶ To provide further clarity on what constitutes a good faith salary or wage range, we recommend that the Final Rule also state that the breadth of the range is one factor relevant to the analysis of whether the range has been set in good faith. This clarification will help ensure that this requirement results in the intended benefits--providing a range that is so wide as to render the compensation information meaningless not only indicates that the wage has not been set in good faith, but also undermines the impact of the compensation disclosure requirement.⁸⁷

B. NWLC supports the Proposed Rule’s broad prohibition on seeking and considering compensation history.

The Proposed Rule prohibits contractors from “seeking and considering” information about compensation history when making employment decisions—including indirectly seeking this information through a third party—and from relying on an applicant’s compensation history.⁸⁸ By expressly prohibiting

⁸² 89 Fed. Reg. at 5852-53 (Proposed 22.XX01, 52.222-ZZ(a)).

⁸³ *Id.* at 5853 (Proposed 52.222-ZZ(d)(2)).

⁸⁴ See Forbes Human Resources Council, *Creating an Attractive Employee Benefits Package: 11 Tips from HR Experts*, FORBES (Aug. 13, 2020), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2020/08/13/creating-an-attractive-employee-benefits-package-11-tips-from-hr-experts/?sh=3610afc85f4c> (noting that workers evaluate job offers based on the overall benefits package, not just pay).

⁸⁵ Roy Maurer, *Job Candidates' Expectations Have Changed. How Are Employers Responding?*, SHRM (Dec. 1, 2021), <https://www.shrm.org/topics-tools/news/hr-magazine/job-candidates-expectations-changed-how-employers-responding>.

⁸⁶ 89 Fed. Reg. at 5853 (Proposed 52.222-ZZ(d)(2)).

⁸⁷ See, e.g., Sarah Brady, *How Helpful Is New York City’s Pay Transparency Law For Job Seekers?*, FORBES (last updated Nov. 11, 2022), <https://www.forbes.com/advisor/personal-finance/nyc-pay-transparency-law/> (noting that some employers in New York City have responded to its pay range transparency requirement by posting “unrealistically broad salary ranges for some job postings, limiting the utility of the law.”).

⁸⁸ 89 Fed. Reg. at 5852-53 (Proposed 22.XX02(b), 52.222-ZZ(c)).

employers from seeking out information about compensation history, the Proposed Rule ensures that no prior or existing salary information is considered in setting pay. Prohibiting contractors from both seeking and considering compensation history is an efficient approach, as there is no need to obtain information about salary history if it cannot be used in the hiring process.⁸⁹ This approach is also consistent with existing compensation history bans. Most state laws passed to ban consideration of salary history in pay-setting similarly include a prohibition on “seeking” information about salary history.⁹⁰ In issuing its final rule prohibiting consideration of salary history in setting pay, the Office of Personnel Management also recognized that “agencies should not request a candidate’s salary history” and committed to issuing guidance that would make this clear.⁹¹

C. The Final Rule should apply to the recruitment and hiring for positions that the contractor reasonably believes could eventually involve work on or in connection with the federal contract.

The Proposed Rule defines “applicant” to include those “applying for a position to perform work on or in connection with the contract”⁹² and applies to recruitment and hiring for such positions.⁹³

We appreciate the inclusion of language in Proposed 52.222-ZZ(b) encouraging contractors to also apply the requirements of the Proposed Rule to “other positions, including to the recruitment and hiring for any position that the Contractor reasonably believes could eventually perform work on or in connection with the contract.”⁹⁴ We recommend, however, that the Final Rule explicitly extend the compensation history ban and the compensation disclosure requirement to the recruitment and hiring for all positions where the contractor reasonably believes that the successful applicant could eventually perform work on or in connection with the federal contract. This approach would ensure that the federal government receives the full benefit of the Proposed Rule when contractors are hiring for positions that they foresee working on federal contracts in short order.

Accordingly, the definition of applicant under Proposed 22.XX01 and 52.222-ZZ should be revised in the Final Rule to include not only “positions to perform work on or in connection with the contract” but also those “applying for a position that the Contractor reasonably believes could eventually perform work on or in connection with the contract.” The language on applicability in Proposed 52.222-ZZ(b) should also be updated to reflect that the rule applies to recruitment and hiring for “any position that the Contractor reasonably believes could eventually perform work on or in connection with the contract,” and to remove the language specifically encouraging contractors to extend the application of the rule to positions that the contractor reasonably believes could eventually perform work on or in connection with the contract. We recommend that Proposed 52.222-ZZ(b) still encourage contractors to apply the rule “to other positions.”⁹⁵

D. The Final Rule should define “advertisements for job openings.”

We strongly support the Proposed Rule’s requirement that federal contractors include compensation information in “all advertisements for job openings.”⁹⁶ To further clarify the scope of this requirement, we

⁸⁹ See 89 Fed. Reg. 5743, Advancing Pay Equity in Governmentwide Systems (Jan. 30, 2024).

⁹⁰ NAT’L WOMEN’S LAW CTR, ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION, *supra* note 14, at 3.

⁹¹ 89 Fed. Reg. 5743, Advancing Pay Equity in Governmentwide Systems (Jan. 30, 2024).

⁹² 89 Fed. Reg. at 5852-53 (Proposed 22.XX01, 52.222-ZZ(a)).

⁹³ *Id.* at 5853 (Proposed 52.222-ZZ(b)).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 5852-53 (Proposed 22.XX02(c), 52.222-ZZ(d)(1)).

recommend that the Final Rule include a definition of “advertisements,” which should include, but not be limited to, online advertisements and announcements of job openings, paper advertisements and announcements, signs or posters, broadcast advertisements and announcements, and any other job announcement, including internal job announcements. The Final Rule should make clear that compensation information must be included whenever the job is advertised—if a contractor advertises on multiple online platforms, for example, the compensation information must be included in each individual advertisement.

E. The Final Rule should clarify and strengthen the applicant complaint procedures.

It is important that contractors, applicants, and contracting agencies understand how the Final Rule will be enforced, what the complaint process will entail, and how complaints will be investigated and resolved. The Proposed Rule provides that an applicant can report a contractor’s noncompliance by filing a complaint with the contracting agency, which will review the complaint, consult with the applicant, and “take action as appropriate.”⁹⁷ The Final Rule should provide additional detail about the complaint process, including clarifying what information an applicant should include in their complaint, explaining what constitutes appropriate action to investigate and address a complaint of noncompliance, and providing a clear timeline for contracting agencies to respond to and resolve complaints. The FAR Council should also issue guidance for contracting agencies on how to respond to and resolve complaints.

The Final Rule should also require tracking and reporting of complaints and compliance through several mechanisms. First, the registration and renewal process through the System for Award Management (SAM.gov)⁹⁸ should require contractors to attest that they understand and commit to adhering to the requirements of the rule. Second, consistent with the OFPP Administrator’s responsibility to provide guidance to contracting agencies on consideration of past contract performance when awarding new federal contracts,⁹⁹ the Final Rule should require contracting agencies to report on federal contractors’ compliance with the rule as part of the performance evaluation process in the Contractor Performance Assessment Reporting System (CPARS),¹⁰⁰ so that it can be taken into account in future selection processes. Third, the Final Rule should require each contracting agency to publish a list of all complaints and how they were resolved on its website. Each contracting agency should also be required to submit this information to the Office for Management and Budget (OMB) in the form of an annual report. Annual reporting will help identify patterns of complaints and technical assistance needs. OMB would then be able to compile these reports, giving the agency a broader view of compliance across contracting agencies and contractors. In addition, we encourage the FAR Council to work with the DOL to produce technical assistance for contracting agencies on enforcement.

To facilitate the complaint process and reporting requirements, the Final Rule should require contractors to retain records related to compliance with this rule for a minimum of four years.¹⁰¹

Finally, in situations where an individual from a state with a law pertaining to the use of compensation information in pay-setting or disclosure of compensation information in job postings makes a complaint under Proposed FAR Part 52, the Final Rule should require the receiving contracting agency to inform the complaining party that they may have rights under their state laws. The Final Rule should also encourage

⁹⁷ *Id.* at 5852 (Proposed 22.XX03).

⁹⁸ SAM.GOV, <https://sam.gov/content/home> (last visited Mar. 26, 2024).

⁹⁹ 41 U.S.C. § 1126.

¹⁰⁰ CPARS, CONTRACTOR PERFORMANCE ASSESSMENT REPORTING SYSTEM, <https://www.cpars.gov/> (last visited Mar. 26, 2024).

¹⁰¹ Contractors are similarly required to retain records of salaries and wages paid to employees for a minimum of four years. FAR 4.705-2.

contracting agencies to develop processes that would allow them to forward complaints to the appropriate state agency in states with relevant laws, with proper notice to the complaining party.

IV. Conclusion

Thank you for the opportunity to comment on this important Proposed Rule to eliminate discriminatory pay practices that undermine economy and efficiency in federal contracting. NWLC strongly supports the Proposed Rule's prohibition on considering compensation history in employment decision and its requirement to disclose compensation information in job postings. We urge the FAR Council 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 (gburroughs@nwlc.org) or Katie Sandson, Senior Counsel for Education & Workplace Justice (ksandson@nwlc.org) with any questions.

Sincerely,



Emily Martin
Chief Program Officer



Gaylynn Burroughs
Director of Workplace Equality & Senior Counsel



Katie Sandson
Senior Counsel for Education & Workplace Justice