June 12, 2023

Hon. Kiran Ahuja, Director
Office of Personnel Management
1900 E Street, NW
Washington, D.C. 20415

Submitted Electronically

Re: Comments in Response to Proposed Regulation Advancing Pay Equity in Governmentwide
Pay Systems - RIN 3206– AO39, 88 Federal Register 30251 (May 11, 2023).

On behalf of the DOJ Gender Equality Network ("DOJ GEN"),[1] an employee-run organization
advocating for gender equality and equity for all federal workers, we emphatically support the
proposed regulations prohibiting the use of salary history in setting pay for federal employment
offers.[2] We are particularly pleased to see that OPM is encouraging agencies to address this
issue with respect to current federal employees who move to another federal office. Along with
other employee affinity groups and organizations, DOJ GEN has long advocated for a salary
history ban. As DOJ GEN has consistently observed, even facially neutral policies that rely on
salary history can contribute to pay inequities.

Over the years, DOJ GEN members, as well as employees at other agencies, have alerted us to
the unjust impact of the use of salary history to set pay in their workplaces—the result being
circumstances where women earn less than equally qualified (or even less qualified) peers who
are men. Three members have allowed DOJ GEN to publicly disclose their examples, which
illustrate why OPM's proposed regulations are so important. For example, one of our members
is an attorney in the Department of Justice's Civil Division. She completed two federal
clerkships and took a pay cut to work for a prestigious public interest organization prior to
joining the federal government. Coincidentally, her counterpart, a man in the same section with
the same position, completed the identical two clerkships, but joined the Department
immediately after their completion. Even though the DOJ GEN member had two more years of
relevant legal experience, the Department only permitted her to start at a Grade 14, Step 1,
whereas it allowed the less experienced man in the same job to start at a Grade 14, Step 5. The

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[1] DOJ GEN is an employee advocacy group that does not speak for the federal government, any
government administration, the Department of Justice, or any component thereof. The views expressed in
this document are solely those of DOJ GEN and the signatories and do not necessarily reflect the views of
the Department of Justice.

[2] DOJ GEN has approximately 1,300 members from across the Department of Justice. Since our
founding in 2016, we have worked diligently to promote gender equity and equality at DOJ and
throughout the federal workforce. To that end, DOJ GEN strives to eradicate pay inequities and sexual
misconduct, while encouraging family-friendly policies and workplace flexibility. You can read more
about us at www.dojgen.org.

DOJ GEN member only learned of this by chance. When she questioned the pay disparity, a human resources official explained that the Department decided to pay her less due to her lower salary at the public interest organization, even though her public interest job was in the same substantive area as her position with the Department. Had she not successfully challenged this decision through the EEO process, the disparity would have continued with a compounding economic effect throughout her employment in the Department, and into her retirement.

Similarly, DOJ GEN is aware of three situations in a small (30-person) office where three women coming from lower-paying federal jobs earned $10,000-$15,000/year less than comparable men who started at the same time, even though the women had far more experience than the men. DOJ human resources or management told two of the women that they were earning less because their prior federal pay locked them into lower salaries (the third woman did not ask about her pay disparity, but she left DOJ nine months after she started). This was not only demoralizing to the women and their colleagues, it also resulted in one of the women filing a lawsuit under the Equal Pay Act and Title VII. We therefore applaud OPM for recognizing that federal employees starting new positions at other agencies should be paid comparably to existing employees of similar experience and skill.

Based on our members' experiences, borne out in the general public by academic studies, we write to comment on three main points:

1. **We support the ban on federal agencies using salary history to set pay, and we believe OPM should extend it to all jobs unless compelling reasons would justify their exclusion.**

As OPM has rightly observed, setting pay based on an individual's salary history may maintain or exacerbate the pay inequity a job applicant experienced in current or previous employment. The regulation's ban on both the solicitation and consideration of applicant salary history will not only help employees, it will also benefit the federal government. The salary history ban is a critical step towards shrinking unjust and inequitable salary gaps, which is why we encourage OPM to include all positions (including Senior Executive Service jobs) unless OPM can provide compelling reasons for their exclusion. Any pay gap, no matter how small, may conflict with 5 U.S.C. § 2301(b)(3) and anti-discrimination laws.[3] We believe that, in eliminating the use of salary history when setting pay, the government will emphasize its commitment to gender and racial equality while also reducing costly legal challenges to pay disparities.

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[3] See, e.g., The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (prohibiting sex-based wage disparities for equal work which involves "equal skill, effort, and responsibility, and which [is] performed under similar working conditions."); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (prohibiting "compensation" discrimination based on race, sex, religion, color, and national origin); and the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (prohibiting discrimination in compensation based on disability).

2. **We support OPM's suggested framework under 5 C.F.R. § 531.212(c)(1), and we encourage OPM to clarify potential ambiguous language and give examples of how agencies should implement the regulations.**

DOJ GEN agrees that it is prudent for agencies to consider the wages of existing comparable peers when setting a new employee's pay, as OPM proposes in revisions to § 531.212(c)(1). We encourage OPM to clarify that agencies should not look at the actual salary a comparable peer made when starting, but rather the grade and step the peer was originally given. We therefore suggest that the paragraph read:

> (1) ~~How pay~~ ~~has~~ **Which grade and step had** been ~~set for~~ **given to** employees who had similar qualifications (based on the level, type, or quality of the candidate's skills or competencies or other qualities and experiences) and who ~~have~~ **had** been newly appointed to positions that are similar to the candidate's position (based on the position's occupational series, grade level, organization, geographic location, or other job-relevant factors), if applicable.

DOJ GEN also suggests that OPM include concrete examples for agencies to use, similar to what OPM did with the implementing regulations for the Federal Employee Paid Leave Act (FEPLA).[4] Because OPM included clear examples in the FEPLA regulations, DOJ GEN members were able to informally appeal wrongful denials of leave after directing DOJ human resources to OPM's language. DOJ GEN believes that here, too, agencies and federal employees could benefit from OPM giving concrete examples of how agencies can, and cannot, implement the proposed regulations.

3. **We oppose allowing agencies to use competing job offers to determine federal employee pay.**

DOJ GEN enthusiastically supports the proposed regulations and salary ban, but we oppose the competing job offer exception.[5] OPM does not address the obvious problem with its proposal, which is that the competing job offer exception perpetuates the same problems currently caused by using salary history – that is, in most states, employers can still use an applicant's salary history to inform the salary for the competing pay offer.[6] The brilliance of OPM's salary history

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[4] Paid Parental Leave, 85 Federal Register 48075 (Aug. 10, 2020) (amending 5 C.F.R. § 630).

[5] Although OPM requires an agency to use a competitive job offer in conjunction with a second permissible reason, the competitive job offer would, by definition, help determine how much to pay the individual (or if it is not used, it is superfluous and thus unnecessary). To the extent an agency already has an independent basis to pay the candidate more, it should use that basis to offer increased pay and not introduce other elements that are already known to perpetuate inequities.

[6] Most states do not have any prohibitions on soliciting salary information, as reflected in this compilation of state and local laws: https://www.hrdive.com/news/salary-history-ban-states-list/516662/. Thus, as is evident from a recent report, the government risks that private employer competitive job offers may themselves be biased. *See* National Academies of Sciences, Engineering, and Medicine. Evaluation of Compensation Data Collected Through the EEO-1 Form, 19-20 (2023) (NAS Study) (recommending that the Equal Employment Opportunity Commission (EEOC) collect pay data from private employers to remedy pay discrimination) available at: https://nap.nationalacademies.org/catalog/26581/evaluation-of-compensation-data-collected-through-the-eeo-1-form; *and* What You Should Know: The National

ban is that it recognizes an applicant's salary is not an accurate proxy of the applicant's value. Instead of relying on a competing job offer to inform an applicant's worth, the government should base its pay on the applicant's experience and skill.

DOJ GEN's responses to OPM's questions

DOJ GEN also writes in response to questions four, seven, and eight. With respect to question four,[7] DOJ GEN categorically opposes the use of salary history when setting pay, even if a candidate volunteers the information. As the NPRM so aptly explains, using a person's prior salary perpetuates the privilege higher-earners already enjoy, while simultaneously prohibiting lower earners—often, women and people of color—from negotiating increased pay. In addition, as OPM notes, 5 U.S.C. § 2301(b)(3) requires that the federal government ensure "[e]qual pay...for work of equal value..." Thus, unless agencies increase pay when any new comparable colleague enters with a higher salary, agencies will perpetuate unequal pay and possibly cause unlawful pay disparities—the very problem OPM seeks to fix. For these reasons, OPM should continue with its prudent, equitable proposal to eliminate any use of salary history when setting federal employee pay.

In question seven,[8] OPM solicits, in part, evidence of how salary history advances equity. DOJ GEN suggests that OPM review pay discrimination litigation relating to federal employees. Similarly, OPM can review data regarding private sector pay discrimination—both from litigation, and from academic reports—since the proposed regulations permit candidates to use competing job offers from the private sector.[9]

As to question eight,[10] where OPM solicits ways in which the federal government can be a model employer, DOJ GEN suggests that OPM encourage agencies to conduct pay audits and raise the wages of individuals subject to inequitable pay disparities. This would not only help agencies comply with 5 U.S.C. § 2301(b)(3), it would satisfy agency obligations under federal anti-discrimination laws. Remedying these pay disparities will also improve morale and avoid costly litigation resulting from EEO complaints. Further, if OPM permits agencies to use competing

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Academies' Evaluation of Compensation Data Collected Through the EEO-1 Form, available at: https://www.eeoc.gov/wysk/what-you-should-know-national-academies-evaluation-compensation-data-collected-through-eeo-1.

[7] OPM requested the following, "[a]s explained in the Regulatory Alternatives section, OPM determined that it should prohibit Federal agencies from relying on prior salary history even if the candidate voluntarily provides it. What are the advantages and disadvantages to this position, and what are possible justifications for allowing an exception to the prior salary history prohibition? What information, if any, exists on whether such an exception would be consistent with the goals of this regulation?" 88 Fed. Reg. 30251, 30259 (May 11, 2023).

[8] OPM requested the following, "[i]s there any additional social science research or other evidence OPM should consider that suggests that limiting reliance on salary history (1) advances equity and/or has other workplace benefits or (2) has resulted in specific workforce or workplace costs?" 88 Fed.Reg. at 30259.

[9] For example, OPM can review the NAS Study referenced in footnote 6 where the authors recommended that the EEOC collect pay data from private employers to combat pay discrimination, and even gave examples of how the pay data NAS reviewed reflected significant pay disparities in the tech sector.

[10] OPM requested the following, "[a]re there additional ways that the Federal Government can be a model employer with respect to pay equity?" 88 Fed.Reg. at 30259.

job offers to negotiate a higher salary, it should require agencies to keep track of when it uses the competing job offers and the demographics of the individuals who take advantage of this option, so that OPM can later evaluate any discriminatory consequences of this policy.

DOJ GEN applauds OPM for its prudent, common-sense approach to eliminating the persistent and pernicious gender and race pay gap that exists within both the public and private sectors. We respectfully urge OPM to implement the regulation with DOJ GEN's suggested edits.

Sincerely,

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On behalf of DOJ GEN's Board and over 1,300 members