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Hon. Kiran A. Ahuja
Director
U.S. Office of Personnel Management
1900 E Street NW
Washington, DC 20415

Attention: Advancing Pay Equity in Governmentwide Pay Systems NPRM (RIN 3206–AO39, Docket ID 2023-09564).

Dear Director Ahuja:

I write to comment on the U.S. Office of Personnel Management's NPRM "Advancing Pay Equity in Governmentwide Pay Systems" (RIN 3206-AO39), pursuant to the notice-and-comment process outlined in and protected by 5 U.S.C. § 553(c). The proposed rule is arbitrary and capricious, and the Office cannot go through with it. The rule would run counter to OPM's statutory obligations with respect to market wages and fair pay, a major flaw of the proposal which the Office ignores. Likewise, the Office ignores the central cost of the proposal, namely, the cost of the raising of wages to close the alleged wage gap(s) that the Office has provisionally identified. This cost is massive: even a ten percent reduction of the most relevant gaps would cost upwards of $570 million, but the Office does not even attempt to address this cost qualitatively or quantitatively. Failing to account for what could be billions of dollars in annual costs violates the standards of administrative law, and no proposed rule leaving such costs without acknowledgement, explanation, estimation, or justification can stand. Finally, the rule unlawfully ignores the externalities that can result from ignoring granular market wage information, especially with respect to attracting the best candidates possible to fill Federal jobs. For these reasons, the Office should not and cannot go forward with this rule. My full comment follows. Thank you for your consideration of this pressing matter.

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I. The Proposal Ignores OPM's Statutory Obligations.

The Office claims that its authority to "prohibit agencies from setting pay based on an applicant's salary history" derives from 5 U.S.C. 2301(b)(2), namely, that Federal personnel management be "consistent" with the principle that:

> "All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights."[1, 2]

However, this principle does not absolve the agency of its primary duty with respect to pay, namely, that personnel pay be consistent with an overall "merit system" which includes as its first principle that:

> "Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and **selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills**, after fair and open competition which assures that all receive equal opportunity";

And which also includes that:

> "**Equal pay should be provided for work of equal value**, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance."[3]

The proposed rule is not consistent with these two principles. First, the determination of "relative ability, knowledge, and skills" in "fair and open competition" with others is, in a market economy, facilitated by the price system, with wages being the price of a worker's labor per unit time. Wage price history communicates the relative value of various workers' abilities, knowledge, and skills. Indeed, price often communicates information about skills and abilities which may not readily translate to a worker's résumé: in accounting for and signaling intangibles that might make up for weaknesses in matters of status and credentialization and other areas where underprivileged workers might be at a disadvantage. The Office has failed to consider this obvious potential downside to this rule, and thus has "entirely failed to consider an important aspect of the problem" and, likewise, has failed to demonstrate that it "pa[id] attention to the advantages *and* the disadvantages of agency decisions."[4] The obviousness of the price signal's ability to serve those who are excellent workers but who may lack prestigious credentials or

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[1] 88 FR 30257
[2] 5 U.S.C. 2301(b)(2).
[3] 5 U.S.C. 2301(b)(1), 5 U.S.C. 2301(b)(3).
[4] *Motor Vehicle Manufacturers Assoc. of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Michigan v. Envtl. Prot. Agency*, 576 U.S. 743, 753 (2015).

varied work experience should underscore the unreasonable and unlawful nature of the Office's failure to acknowledge and weigh this crucial factor.

There is no acknowledgment given that the obligations of 5 U.S.C. 2301(b)(1-3) might not be met on account of the proposed rule and how the Office expects federal personnel management and other hirers to compensate for this. It does not follow from the claim that "salary history […] could vary between equally qualified candidates" that federal hirers need to be precluded from using salary history to determine an applicant's pay. "Qualification," as we have said, is not merely what is confined to a résumé: it is not clear how it is possible to have "equal pay […] provided for work of equal value" without the information about the value of work contained in pay history. It is arbitrary of the Office to ignore this issue and not consider the downsides of losing out on such information in the determination of the quality of the work of an employee. Salary history provides invaluable and irreplaceable information about national and local private sector pay rates, and, above all, about the value of the work an agency hirer can expect from an employee. It is not reasonable to think that a hirer may not use salary history to determine the value of an employee's work, and it is certainly not reasonable to ban the use of salary history without any regard for the fact that salary history is an essential tool in determining the "value" in the "equal pay […] for equal value" requirement of the statute.[5]

II. The Office Fails to Account for the Central Cost of the Proposal.

The Office does not account for the central cost of the proposal, namely, the increased wages that it expects will be paid out as a result of the proposal. That is, the Office intends for the proposal to avoid "pay inequity" by refusing to allow salary history to be taken into account in setting the pay of new hires by the federal government. The proposed rule aims to "address any pay inequities and advance equal pay," specifically targeting the raw unadjusted "gender pay gap of six percent," the raw unadjusted "pay gap of 15.6 percent between Black/African American men and White men," and the gap of "15.2 percent between Black/African American women and White men."[6] The Office points out that these gaps persist at the national level in the private sector; therefore, it proposes that asking for pay history is perpetuating these disparities, which it sees as unfair. Irrespective of the merits of these claims, the Office must—in order for the rule to reasonably address these stated reasons, or, in the language of *Motor Vehicle Manufacturers Association v. State Farm*, in order for it to articulate a "rational connection between the facts found and the choice made"—intend that at least some individuals affected by national pay gaps will be given higher salaries by the government as a result of the

[5] 5 U.S.C. 2301(b)(3).
[6] 88 FR 30253

proposed rule's aforementioned prohibition.[7] That is, there is no rational way for the Office to deny that the rule is expected (or at least intended) to result in higher pay for these individuals (the Office might argue that it expects the salaries of men to be reduced toward the level women receive on average and likewise for Whites with respect to Blacks, but this assumes that these hires would accept wages lower than the ones they have received or are receiving currently, which is not likely to happen frequently and certainly has no economic evidence behind it). Thus the proposed rule will, by its own logic, pay some new hires more, resulting in an overall cost to the federal government.

But the Office's analysis of the costs of the rule contains no reference to this cost. The Office does not acknowledge or even attempt to weigh the cost of increased pay given out to hires. In doing so, the Office has not shown an attempt to "pay[] attention to the advantages *and* the disadvantages of agency decisions" and likewise has "entirely failed to consider an important aspect of the problem."[8] It is unreasonable for the Office to propose a rule designed to increase the pay of certain applicants to government jobs—the only reasonable way in which this rule could "close the pay gap"—without considering the cost of this pay increase.

This cost could be a huge amount. For example, 1.5 million Federal employees are under the General Schedule (GS) pay system according to OPM.[9] The average salary of all GS employees is $90,665 as of May 31, 2023.[10] Assuming that 50 percent of these employees are women, and that women under the General Schedule are subject to the average federal raw unadjusted gender pay gap of 6 percent, we are left with an average male salary of $93,469.07 and an average female salary of $87,860.93, or a monetary gap of $5,608.14.[11] In this case, if even just ten percent of female employees (that is, 75,000 of the 750,000 female GS employees under our assumption above) end up with salaries six percent higher on average as a result of the rule, the cost of the rule would be $420,610,500: well in excess of the $100 million necessary to call a rule "economically significant," this reasonably foreseeable cost is far too large for the Office to ignore.[12]

The sex-related difference in wages is simply one component of the issue; if we assume that, in line with American demographics, 13.6 percent of the Federal GS workforce are African-American and 59.3 percent are non-Hispanic White, then the cost of closing one-tenth of the 15.6

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[7] *Motor Vehicle Manufacturers Association v. State Farm*, 43.
[8] *Michigan v. EPA,* 752-53; *Motor Vehicle Manufacturers Association v. State Farm*, 43.
[9] Office of Personnel Management, "General Schedule Overview," OPM.gov, https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/.
[10] Office of Personnel Management FedScope, "GS—General Schedule Average Salary," https://www.fedscope.opm.gov/ibmcognos/bi/.
[11] The system of equations is $W = 0.94 * M$ and $\frac{W + M}{2} = \$90{,}665$ such that $M = \frac{2}{1.94} * \$90{,}665 = \$93{,}469.07$ and $W = 0.94 * \$93{,}469.07 = \$87{,}860.93$, rounded to the nearest cent.
[12] $\$5{,}608.14 * 75{,}000 = \$420{,}610{,}500$

percent pay gap between Black and White men would be $148.6 million, a total cost of $569.2 million.[13]

The gap between Black and White men and the gap between women and men is just one component of the overall alleged gap which the Office attempts to rectify. Further, GS employees are just one component of the overall workforce which would be affected by the proposed rule. Thus the proposed rule would likely result in a cost far in excess of the $569.2 million component, which, it bears repeating, represents only a ten percent reduction of the gaps mentioned. A full reduction of these gaps, which would still only be a component of the intended outcome of the rule, would cost over $5.7 billion.

It is not reasonable of the Office to have ignored these costs, given that they are the direct impact of the desired outcome of the proposed rule. If the Office claims that the proposed rule will not result in these outcomes, then it has abandoned any semblance of a reasonable aim for the actions it proposes. The Office may not simply attempt to account for these costs in a final rule by tacking on some form of cost analysis; given that the proposal would necessarily result in these costs, the Office should have taken these costs into account from the beginning. The fact that the Office ignored the cost of raised wages shows that the Office failed to consider cost throughout the rulemaking process. Even a cursory interest in the cost of the rule would have resulted in the consideration of the cost of raised wages. Thus, the regulation is shot through with a failure to weigh the advantages and disadvantages of the Office's actions, and no revision or amendment of this proposal can stand.

III. The Rule Does Not Consider the Cost of Ignoring Market Wages.

Ignoring market wages will hamper all federal agencies' ability to determine fair pay rates. The price information captured by wages is crucial to understanding what various kinds of work are actually worth. Lacking this information will, as we have said, unreasonably prevent the Office from meeting its statutory obligations under 5 U.S.C. 2301. But it will also have the

[13] Demographic data courtesy of the U.S. Census Bureau's V2022 QuickFacts, https://www.census.gov/quickfacts/fact/table/US/PST045222. This calculation follows the same methodology as above. Assuming men as a whole make the average wage of $90,665 (for the purposes of avoiding too many degrees of freedom we do not use our male salary estimate from above), and imputing the value of non-Black non-White salary with the mean, we arrive at the system of equations $B = 0.844 * W$ and $\frac{27.1 * 90{,}665 + 59.3 * W + 13.6 * B}{100} = 90{,}665$ which reduces to $W = \frac{90{,}665 * 100 - 27.1 * 90{,}665}{59.3 + 13.6 * 0.844} = \$93{,}382.71$ and $B = 0.844 * 93{,}382.71 = \$78{,}815.00$ such that the cost of closing this gap would be $0.136 * 750{,}000 * (93{,}382.71 - 78{,}815.00) = \$1{,}485{,}906{,}420$. Ten percent of this cost would be $148,590,642, it alone in excess of the $100,000 threshold of economic significance as defined by OMB.

effect of preventing agencies from accessing crucial market information, at great potential cost to the Federal government.

First, the Office has not sufficiently discussed the potential for this rule to prevent agencies from attracting top talent. Without knowing what qualified individuals are earning in their current position or what they earned in previous ones, agencies will not be able to offer such individuals competitive wages and will be left to guess at what salary would be acceptable to them. This could mean that agencies offer wages lower than what would have been offered had they known a candidate's pay history. While the Office attempts to cover for this by allowing candidates to supply agencies with the salary offered by a competing offer, this will not do for top talent who are either currently working or lack a competing offer. This could mean that agencies struggle more with getting candidates to accept their offers, prolonging the hiring process and increasing the cost per new hire.

Even worse, in an attempt to avoid the problem of failing to get the best talent, agencies might engage in overcorrection and pay far above what the market would offer a given candidate. This would exacerbate the problem described in Section II, raising the overall cost to the Federal government by increasing the amount paid in wages to Federal employees. Additionally, such a policy of overpayment would lead to market distortions, causing wages to inflate artificially and hampering the ability of private-sector employers to attract talent. The agencies have an enormous ability to place a thumb on the scale of their hiring power because they do not need to make profit and because they are largely insulated from markets, shareholders, and voters. OPM cannot reasonably ignore the potential for this proposal to allow that power to spiral out of control. The hiring market distortions that this proposal would cause would create major hiring costs for private-sector businesses (especially small entities), exacerbate national inflation, pay Federal employees more for their work than it is worth according to the market, and increase costs for taxpayers. The information provided by pay history ensures that agencies neither abuse their power nor fail to attract talent, keeping the Federal wage rates pegged to the market.

Nowhere did OPM acknowledge the potential costs of having agencies blinded to the information provided by a given candidate's market wage. The above represents only a cursory discussion of the potential market-related downsides and unintended consequences of the proposal. OPM has not shown that it has met the basic obligation of administrative law to acknowledge and weigh the advantages and disadvantages of regulation.[14] Indeed, OPM failed to substantively respond to agencies who protested such actions in the past:

> "Some agencies reported that their policies on the superior qualifications and special needs pay-setting authority required the use of a job candidate's existing salary, or that existing salary must be considered when setting pay of a new GS employee. In response, OPM revised its fact sheet on the superior qualifications and special needs pay-setting

[14] See *Motor Vehicle Manufacturers Association v. State Farm*, 43.

> authority to remind agencies that existing salary is only one factor an agency may use when setting pay under this authority and to clarify the regulatory criteria"[15]

This "reminder" does not change any of the facts at hand. While previous pay is just one consideration agencies could use, it may very well be a necessary one for agencies to hire effectively and efficiently. The Office's "reminder" neither acknowledges the possibility that consideration of previous pay is necessary to the superior-qualifications hiring process nor proposes any way to mitigate or justify the cost of depriving agencies of this consideration.

Indeed, OPM attempts to obscure these costs by claiming that it lacks sufficient information to comment on them, at 88 FR 30258:

> "Because this pay authority is delegated to agencies and agency written justifications for its use are not reported to EHRI, OPM does not have information regarding which factor or factors were used to justify the rate at which each new employee's pay is set under the superior qualifications and special needs pay-setting authority.
>
> Because we lack this data, we are not able to predict with specificity how proposed changes to the regulations could affect the rate at which pay is set for candidates based on their superior qualifications. The pay flexibilities the regulations cover are discretionary, and agencies may set pay at any rate within the specified rate range based on certain parameters."[16]

First, we note that it would be easy for OPM to obtain this kind of information: it would impose no burden on the private sector, cost the agencies very little, and could even focus only on hires made in the past year. This would provide at least some insight into the factors currently considered in setting the pay rates of individuals of superior qualifications.

Second, it is not clear how the Office can claim to have sufficiently weighed the potential costs and benefits of regulation given that they have developed no idea of "how proposed changes to the regulations could affect the rate at which pay is set for candidates based on their superior qualifications."[17] This would be a central aspect of the impact of the regulation, especially because salary-matching is a practice which would be expected in the efforts to attract hires of superior qualifications.

Finally, it is not enough for the Office to say that this section of the proposal has addressed or weighed this potential cost. There are ways to predict these effects without the data OPM currently lacks; OPM, however, has not given an indication that it has pursued or even considered these effects in the abstract. We have no indication, then, that the Office has even attempted to consider this essential disadvantage of regulation. This is not merely an oversight or calculative mistake by the Office. Rather, it signifies a persistent lack of consideration of cost throughout the proposal. The Office did not weigh the costs and benefits of action and come to a

[15] 88 FR 30252.
[16] 88 FR 30258.
[17] Ibid.

regulation that maximized benefits and minimized costs: it attempted to act in a manner arbitrary, capricious, and unlawful.

For all of the reasons detailed above, I urge the U.S. Office of Personnel Management not to go forward with the proposed rule.

Respectfully submitted,

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[18] Affiliation and titles provided for identification purposes only. I submit this comment in my personal capacity only and not as an employee of The Heritage Foundation.