

November 29, 2016

General Services Administration
Regulatory Secretariat Division (MVCB)
Attn: Ms. Flowers
1800 F St. N.W., 2nd Floor
Washington, DC 20405-0001

Re: Proposed Interim Rule, Federal Acquisition Regulation: Non-Retaliation for Disclosure of Compensation Information, FAC 2005-91, FAR Case 2016-007

Thank you for the opportunity to provide comments on the proposed interim rule amending the Federal Acquisition Regulation (“FAR”) to implement both Executive Order 13665, which requires that certain federal contractors allow employees and applicants to inquire about, discuss, and disclose compensation information without fear of retribution or penalty, and the final rule implementing that Executive Order subsequently issued by the Department of Labor’s Office of Federal Contract and Compliance Programs.¹ The National Women’s Law Center has worked for over 40 years to advance and protect women’s equality and opportunity—with a focus on women’s employment, education, income security, health, and reproductive rights—and has long worked to remove barriers to equal treatment of women in the workplace, including by ending pay discrimination against women. We join the undersigned organizations committed to workplace equality to express our support for the proposed interim rule, which will help prevent and remedy pay discrimination among millions of workers. We agree that urgent and compelling reasons exist to promulgate this interim rule, which will allow these important protections to be included in solicitations and contracts immediately.

I. The Proposed Interim Rule Is Necessary to Bring an End to Pay Secrecy Policies and Practices That Perpetuate Discrimination, a Crucial Factor in the Gender Wage Gap.

Women working full time, year round continue to confront a stark wage gap, typically making only 80 percent of the median annual wages made by men working full time, year round.² The wage gap is even worse when we look specifically at women of color: African American women typically are paid only 63 percent, Native American women only 58 percent, and Latinas only 54 percent of the wages typically paid to white, non-Hispanic men for full-time, year-round work.³ Although Asian American women overall make 85 percent of the median annual wages of white, non-Hispanic men, the wage gap is substantially wider for some

¹ Executive Order 13665, Non-Retaliation for Disclosure of Compensation Information, 79 Fed. Reg. 20749 (Apr. 11, 2014); U.S. Dep’t of Labor, Final Rule, Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 80 Fed. Reg. 54934 (Sept. 11, 2015).

² NAT’L WOMEN’S LAW CTR., THE WAGE GAP IS STAGNANT FOR NEARLY A DECADE (Sept. 2016), available at <http://nwlc.org/resources/wage-gap-stagnant-nearly-decade/> [THE WAGE GAP IS STAGNANT].

³ *Id.*

subgroups of Asian American women. For example, Vietnamese American women typically make just 62 percent of what white, non-Hispanic men make, and Indian American women only 73 percent.⁴ This wage gap has remained stagnant for nearly a decade.⁵ The result is that a woman working full time, year round stands to lose \$418,800 over a 40-year period due to the wage gap.⁶ To make up this lifetime wage gap, a woman would have to work ten years longer than her male counterpart.⁷

A range of factors contributes to the pay gap, including pay discrimination between employees of different genders who are doing the same job.⁸ Women are still paid less than men in nearly every occupation,⁹ and studies show that even controlling for race, region, unionization status, education, experience, occupation, and industry leaves 38 percent of the pay gap unexplained.¹⁰ Conscious and unconscious stereotypes about working women remain a driver of this unexplained gap.¹¹

Yet pay discrimination remains difficult to detect in the first instance. Because pay often is cloaked in secrecy, when a discriminatory salary decision is made, it is seldom as obvious to an affected employee as a demotion, a termination, or a denial of a promotion.¹² Pay secrecy policies and practices perpetuate pay discrimination by making it difficult for individuals to

⁴ NAT'L WOMEN'S LAW CTR., EQUAL PAY FOR ASIAN AMERICAN WOMEN (Mar. 2016), available at <https://nwlc.org/resources/equal-pay-asian-american-women/>.

⁵ THE WAGE GAP IS STAGNANT, *supra* note 2.

⁶ *Id.* Lifetime wage gaps for women of color are significantly larger: African American women lose \$840,040, Native American women \$934,240; and Latinas \$1,043,800. Jasmine Tucker, "The Wage Gap Isn't Just Sexist – It's Racist Too," NAT'L WOMEN'S LAW CTR., Oct. 6, 2016, available at <https://nwlc.org/blog/the-wage-gap-isnt-just-sexist-its-racist-too/>.

⁷ *Id.*

⁸ Blau, F. D. & Kahn, L.M., *The Gender Wage Gap: Extent, Trends and Explanations*, NAT'L BUREAU OF ECONOMIC RESEARCH (Jan. 2016), available at <http://www.nber.org/papers/w21913.pdf>; see NAT'L WOMEN'S LAW CTR., FIFTY YEARS AND COUNTING: THE UNFINISHED BUSINESS OF ACHIEVING FAIR PAY (2015), available at <http://nwlc.org/resources/50-years-counting-unfinished-business-achieving-fair-pay/>.

⁹ Hegewisch, A. & Matite, M., *The Gender Wage Gap by Occupation*, INST. FOR WOMEN'S POLICY RESEARCH (Apr. 2013), available at <http://www.iwpr.org/publications/pubs/the-gender-wage-gap-by-occupation-2>; Schieder, S. & Gould, E., "Women's work" and the gender pay gap 3, ECONOMIC POLICY INST. (July 2016), available at <http://www.epi.org/publication/womens-work-and-the-gender-pay-gap-how-discrimination-societal-norms-and-other-forces-affect-womens-occupational-choices-and-their-pay/>.

¹⁰ Blau & Kahn, *supra* note 8.

¹¹ See Moss-Racusin, C.A. et al., *Science faculty's subtle gender biases favor male students*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA (Aug. 2012), available at <http://www.pnas.org/content/109/41/16474.abstract#aff-1>.

¹² As Justice Ginsburg has noted:

Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves. Pay disparities are thus significantly different from adverse actions "such as termination, failure to promote, ... or refusal to hire," all involving fully communicated discrete acts, "easy to identify" as discriminatory.

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (Ginsburg, J. dissenting).

learn about unlawful pay disparities. In fact, about 60 percent of workers in the private sector nationally are either forbidden or strongly discouraged from discussing their pay with their colleagues.¹³ When employees face penalties or termination for merely inquiring about or discussing their pay, they face significant obstacles to gathering the information that reveals pay discrimination, which undermines their ability to challenge such discrimination. By making it nearly impossible for many women to detect pay disparities, pay secrecy policies and practices operate as a fundamental roadblock to the operation of both Title VII and Executive Order 11246. By eliminating the secrecy and fear surrounding inquiring about, discussing, or disclosing compensation information, the proposed interim rule will help employees discover unlawful wage disparities and take steps to address them.

The significantly narrower wage gap in the public sector – where pay secrecy rules are uncommon – is evidence of the difference that transparency makes. Approximately sixty percent of employees in the private sector report that discussing their wages is either prohibited or discouraged, compared to eleven to eighteen percent of public sector employees.¹⁴ And while the gender wage gap for full time workers, based on median earnings, is twenty percent, in the federal government, where pay rates and scales are transparent and publicly available, the gender wage gap is thirteen percent.¹⁵

II. The Proposed Interim Rule Will Benefit Businesses, Individual Workers and the Economy.

The proposed interim rule provides a uniform pay transparency policy for federal contractors that will promote efficient contracting, and help ensure that companies that have the privilege of doing business with the federal government also abide by its laws. Federal contractors who engage in pay discrimination, or employ policies and practices that penalize workers for discussing compensation, may be subject to enforcement actions and litigation by employees, increasing the risk of disruption, delay, and increased expense. The proposed interim rule will help federal contractors avoid discrimination by providing incentives to proactively identify, investigate, and remedy wage disparities within their workforces, reducing the need for costly litigation. And allowing workers to discuss their pay without fear will motivate employers to avoid perpetuating past discrimination in their pay-setting practices. Moreover, shareholders and potential investors increasingly see compliance with antidiscrimination laws — particularly with regard to equal pay — as an important factor impacting risk and profitability, and therefore relevant to investment decisions.¹⁶

¹³ INST. FOR WOMEN'S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION (Jan. 2014), *available at* http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1/at_download/file.

¹⁴ *Id.* Sixty-two percent of women and 60 percent of men working for private employers report that wage and salary information is secret, while 11 percent of men in the public sector and 18 percent of women in the public sector report that wage discussion is discouraged or prohibited.

¹⁵ U.S. OFFICE OF PERSONNEL MGMT, GOVERNMENTWIDE STRATEGY ON ADVANCING PAY EQUALITY IN THE FEDERAL GOVERNMENT 2, 12 (Apr. 2014), *available at* <https://www.opm.gov/policy-data-oversight/pay-leave/reference-materials/reports/governmentwide-strategy-on-advancing-pay-equality-in-the-federal-government.pdf> (gender wage gap was 13 percent for all “white collar” workers (all pay plans) and 11 percent for workers on the GS scale only).

Pay secrecy policies are bad for business not only because they give cover to discrimination, but also because they lead to poorer performance,¹⁷ employee dissatisfaction and lower motivation,¹⁸ mistrust of management,¹⁹ and an inefficient market.²⁰ Competitive — and fair — pay is critical for recruiting and retaining a diverse workforce and high performers, particularly for younger women workers.²¹ Studies have shown that increased pay transparency creates work environments where employees are more likely to believe they are paid fairly, and thus are more engaged and productive.²²

Furthermore, addressing discrimination and closing the gender wage gap would have a significant positive impact on the economy. A recent study found that if women received the same compensation as their comparable male co-workers, the poverty rate for all working women would be reduced by half, from 8.1 percent to 3.9 percent.²³ Moreover, nearly 60% of women would earn more if working women were paid the same as men of the same age with similar education and hours of work.²⁴ Increased wages would augment these workers’

¹⁶ Lamb, N. & Klein, W., *A Proactive Approach to Wage Equality is Good for Business*, EMPLOYMENT RELATIONS TODAY (Summer 2015), available at <http://arjuna-capital.com/news/a-proactive-approach-to-wage-equality-is-good-for-business/> [Proactive Approach]; Natasha Lamb, “Closing the pay gap: Silicon Valley’s gender problem,” *Ethical Boardroom*, June 7, 2016, available at <http://ethicalboardroom.com/leadership/diversity/close-the-pay-gap/>; Trillium Asset Mgm’t, *Letter to Citigroup Shareholders*, Apr. 16, 2016, available at <https://www.sec.gov/Archives/edgar/data/831001/000121465916010905/j415160px14a6g.htm>.

¹⁷ See Bamberger, P. & Belagolovsky, E., *The Impact of Pay Secrecy on Individual Task Performance*, 63 PERSONNEL PSYCHOLOGY 965, 988-90 (2010).

¹⁸ See Colella, A. et. al, *Exposing Pay Secrecy*, 32 ACAD. OF MGM’T REVIEW 55, 56 (2007); Edward Lawler III, “Pay Secrecy: Why Bother?,” *Forbes*, Sept. 12, 2002, available at <http://www.forbes.com/sites/edwardlawler/2012/09/12/pay-secrecy-why-bother/>.

¹⁹ See Gundars Kaupins, “Keeping Pay a Secret May Cause Problems for Companies,” *Idaho Statesman Bus. Insider*, May 30, 2012, available at <http://cobe.boisestate.edu/blog/2012/06/11/keeping-pay-a-secret-might-cause-problems-for-companies-by-gundy-kaupins/>.

²⁰ See Colella, *supra* note 18, at 60. Companies that fail to address gender wage disparities and discriminatory employment practices also could damage their reputation and brand among consumers, leading to a loss of profits and shareholder value. *Proactive Approach*, *supra* note 16.

²¹ A recent study found that “pay and financial benefits drive Millennials’ choice of organization more than anything else.” THE 2016 DELOITTE MILLENNIAL SURVEY: WINNING OVER THE NEXT GENERATION OF LEADERS 19 (2016), available at <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-millennial-survey-2016-exec-summary.pdf>; Noel, L. & Hunter Arscott, C., *Millennial Women: What Executives Need to Know About Millennial Women* 4, ICEDR (2015), available at http://www.icedr.org/research/documents/14_millennial_snapshot.pdf (Millennial women leave jobs primarily for more compensation).

²² See Rasch, R. & Szytko, M., *Perception is Reality: The Importance of Pay Fairness to Employees and Organizations*, WORLDATWORK J. 65 (2013); Courtney Seiter, “The Counterintuitive Science of Why Transparent Pay Works,” *Fastcompany.com*, Feb. 26, 2016, available at <http://www.fastcompany.com/3056975/the-future-of-work/the-transparent-pay-revolution-inside-the-science-and-psychology-of-open->

²³ Hartmann, H., Hayes, J. & Clark, J., *How Equal Pay for Working Women Would Reduce Poverty and Grow the American Economy* 1, INST. FOR WOMEN’S POLICY RESEARCH (2014), available at <http://www.iwpr.org/publications/pubs/how-equal-pay-for-working-women-would-reduce-poverty-and-grow-the-american-economy/>

²⁴ *Id.*

consumer spending power and benefit businesses and the economy.²⁵ Another recent study estimates that by closing the wage gap entirely, women's labor force participation would increase and \$4.3 trillion in additional gross domestic product could be added in 2025, about 19 percent more than would otherwise be generated in 2025.²⁶

The proposed interim rule will be an effective measure to combat pay discrimination and close the wage gap. It gives federal contractors the tools to self-correct and avoid discrimination, gives employees the ability to discover and address pay inequities, and improves the morale and productivity of the workplace. We urge the swift adoption of the rule without any unnecessary delay.

Please do not hesitate to contact Emily J. Martin (emartin@nwlc.org) or Maya Raghu (mraghu@nwlc.org) if we can provide further information.

Sincerely,

9to5, National Association of Working Women
AFL-CIO
American Association of University Women (AAUW)
American Civil Liberties Union
Catalyst
Equal Pay Today!
Equal Rights Advocates
Feminist Majority
Institute for Science and Human Values
Labor Council for Latin American Advancement
Make it Work
MomsRising
National Advocacy Center of the Sisters of the Good Shepherd
National Asian Pacific American Women's Forum
National Council of Jewish Women
National Employment Lawyers Association
National Organization for Women
National Partnership for Women & Families

²⁵ See *id.* (finding that the U.S. economy would have produced additional income of more than \$447 billion in 2012 if women received pay equal to their male counterparts).

²⁶ Ellingrud, K., et al., *The power of parity: Advancing women's equality in the United States* 1-2, MCKINSEY GLOBAL INST. (Apr. 2016), available at <http://www.mckinsey.com/global-themes/employment-and-growth/the-power-of-parity-advancing-womens-equality-in-the-united-states>. The same study estimates that even if the wage gap was only partially closed, \$2.1 trillion in additional GDP could be added in 2025.

National Women's Law Center
UltraViolet
Women Employed
Women's Law Project

With the law on your side, great things are possible.