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The Office of Federal Procurement Policy
1600 Pennsylvania Ave. NW
Washington, DC 20500

**RE: Pay Equity and Transparency in Federal Contracting, FAR Case 2023-021**

Dear Ms. Uddowla:

HR Policy Association ("HR Policy" or "Association") welcomes the opportunity to submit the following comments for consideration by the Office of Federal Procurement Policy ("OFPP") in response to the published Notice of Proposed Rulemaking ("NPRM," "Proposed Rule," or "Rule") and Request for Comments regarding pay equity and pay transparency requirements for federal contractors.[1]

HR Policy is a public policy advocacy organization that represents the most senior human resources officers in more than 350 of the largest corporations doing business in the United States and globally. Collectively, these companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. Roughly two-thirds of Association members are federal contractors. The Association's member companies are committed to ensuring that laws and policies affecting the workplace are sound, practical, and responsive to the needs of the modern economy, and accordingly, the Association submits the following comments for review by the OFPP.

[1] 89 Fed. Reg. 5843.

**EXECUTIVE SUMMARY**

HR Policy Association member companies are committed to providing fair and competitive pay to their employees free from any discrimination. Our member companies are similarly committed to closing any improper gender or racial pay gaps within their workforces, and indeed, many of our member companies have publicly disclosed quantitative and qualitative aspirational goals to this effect. Further, many of our member companies regularly conduct internal pay audits to discern whether pay gaps exist, and, to the extent that they do, provide solutions for closing them.[2] Accordingly, the Association generally endorses policies aimed at achieving pay equity and has actively collaborated with Members of Congress on numerous occasions to advocate for legislation in support of this objective.[3]

The Association could potentially support federal legislation addressing pay transparency and pay equity, particularly if such legislation provides a standard national approach to these issues that alleviates the current disparate patchwork of state laws in this area. Unfortunately, the OFPP's Proposed Rule does not provide such a solution to compensation equity issues in the workplace and only contributes to the growing labyrinth of pay transparency and pay equity laws that large, multi-jurisdictional employers must navigate. Further, the Proposed Rule is overly broad and vague, providing little clarity for employers and unnecessarily adding to an already complex compliance burden in this area. For these reasons and others detailed below, the Association strongly urges the OFPP to rescind or significantly revise the Proposed Rule.

[2] A Syndio study found that almost 90% of organizations conduct pay equity analyses at least annually, if not more frequently.

[3] *See, e.g.*, Gregory Hoff, *House Passes Gender Pay Equity Legislation*, HR Policy Association (April 16, 2021), https://www.hrpolicy.org/insight-and-research/resources/2021/hrpa/04-2021/house-passes-gender-pay-equity-legislation/.

- **The Proposed Rule unnecessarily adds to the increasingly disparate and byzantine patchwork of pay transparency and pay equity laws across the United States.**

Employers must currently comply with a dizzying array of pay transparency and pay equity laws across the United States. A federal solution for pay transparency and pay equity that provides a uniform standard is therefore vital. Rather than building bipartisan, bicameral legislation through Congress that could have this effect, the Biden administration has instead, through this Proposed Rule, merely thrown another hat in the pay transparency and pay equity ring – and one that is yet again different from all of the other hats.

At present, there are 10 states and 6 local jurisdictions (including New York City) that have pay transparency laws requiring some level of compensation disclosure in job postings or at some point in the application process. At least 12 other states and the District of Columbia currently have legislation to the same effect pending, with more statutes and regulations likely on the way. Another 22 states and 22 localities have laws that prohibit employers from requesting salary history (salary history bans). Altogether, 32 states and 28 local jurisdictions have pay transparency and pay equity laws, with more laws coming soon.[4]

This growing patchwork presents significantly complex compliance issues for large multi-jurisdictional employers,[5] with adverse consequences for effective and competitive compensation policy design. This is particularly the case given that there is little uniformity with requirements across different jurisdictions. State and local laws differ in significant ways: the definition of "reasonable pay range," whether only salary or the full range of benefits must be disclosed, whether the law applies to remote workers, at what time in the hiring process

[4] *See, e.g.*, Christina Marfice, *Pay Transparency laws: A state-by-state guide*, Rippling (last accessed March 25, 2024), https://www.rippling.com/blog/pay-transparency-laws-state-by-state-guide.
[5] All Association members operate in multiple jurisdictions.

disclosure is required, and whether disclosure is required only at the request of the applicant, among other differences. Simply put, most of these laws are at odds with each other, forcing companies to adopt different compensation policies for a variety of different jurisdictions in which they do business. The time and expense required to do so is an unnecessary burden, particularly given the inconclusive evidence that such laws produce positive compensation outcomes for employees.[6]

The OFPP's Proposed Rule only increases this burden rather than alleviating it. As detailed further below, the Rule adds more requirements that, while impractical on their own, are also at odds with many of the current laws in this area. The Rule merely adds one more layer to the compliance puzzle employers currently face.

- **The Proposed Rule's definition of "compensation" is overly broad, and what is required in disclosures is unclear at best.**

The Proposed Rule requires covered employers to "disclose the compensation to be offered to the hired applicant" in "all advertisements for job openings."[7] The Rule further prescribes that such disclosures "must indicate the salary or wages, or range thereof...[and] must also include a general description of the benefits and other forms of compensation applicable to the job opportunity."[8] The 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," [9]

[6] *See, e.g.*, Tomasz Obloj & Todd Zenger, *The Complicated Effects of Pay Transparency*, Harvard Business Review (Feb. 8, 2023). While there is some evidence that these pay transparency laws can help close wage gaps, there is concurrent evidence suggesting that the cumulative effect is to deflate wages across the board, among other negative effects.
[7] 89 Fed. Reg. 5843.
[8] *Id*.
[9] 89 Fed. Reg. 5852.

As a threshold matter, the OFPP should provide clarification of exactly what is required in such disclosures. On the one hand, as spelled out above, Section (d)(1) requires that covered employers "disclose the compensation to be offered" in job postings.[10] Under the Proposed Rule's definition of compensation, as outlined above, this means everything from salary to bonuses to vacation pay, stock options, et al. Section (d) (3), however, states that covered employers, in addition to specific salary ranges, need only "include a general description of the benefits and other forms of compensation applicable to the job opportunity."[11]

The obvious question, then, is whether covered employers must provide specific figures or estimates for non-salary compensation (*e.g.*, the amount of equity grants, bonuses in dollar amounts, amount of PTO and level of pay for same), or may merely provide a general description of the same (*e.g.*, general indication that compensation will also include equity, bonuses, and paid leave). The latter part of Section (d)(3) indicates that covered employers must provide specific amounts where commissions, bonuses, and/or overtime make up more than half of total compensation. However, this does not clarify whether (1) other forms of compensation or benefits included in the Rule's definition must be disclosed as specified amounts or (2) in general, the discrepancy between (d)(1) and (d)(3) as outlined above. Accordingly, at minimum, the Final Rule should clarify in what form disclosures beyond salary ranges must take.

The Association submits, however, that in either case, the Proposed Rule's definition of compensation is exceedingly and unnecessarily broad and in practice extremely difficult for companies to comply with. Disclosing ranges of base rates of pay alone already becomes difficult when attempting to account for differences in potential applicant experience, skills, education, and regional cost of living, to name only a few variables. These variances are

[10] *Id*. at 5853.
[11] *Id*.

significantly compounded when it comes to other forms of compensation such as bonuses and equity grants (which are often performance-based, not guaranteed, and differ greatly from year to year) commission rates, and shift differentials. It will therefore be exceedingly difficult – if not impossible – for employers to provide specific figures or ranges of figures for these other forms of compensation in job postings – even for just one single position in one single region.

To attempt to do this in any sort of uniform, repeatable manner across the whole of a compensation design or policy will almost certainly be impossible. At best, employers will be incurring unnecessarily burdensome time and expense costs in order to comply; at worst, for covered jobs, in an attempt at some form of standardization, companies will increasingly flatten out compensation in both amount and form, or simply withdraw from offering alternative forms of compensation such as equity (which are often the most lucrative parts of a compensation package). Such a result – depressed compensation and increased compliance costs – would be a net loss for all stakeholders, even if pay gaps are also concurrently reduced.

It is perhaps in light of these considerations that even the most stringent of current state pay transparency laws requires only a general description of benefits and/or compensation beyond base pay. The Association submits that at most only base pay ranges need be disclosed; however, at minimum, any final rule should follow state law[12] in this area and require, at most, general descriptions for non-salary compensation to be offered rather than specific figures or ranges of figures.

- **The extensive compensation disclosures required by the Proposed Rule could create competitive disadvantages and violate existing restrictive covenants.**

[12] *e.g.*, Washington.

Compensation structures, particularly for higher-level or executive positions, are confidential and proprietary information as they are an integral part of a company's talent strategy and part of its competitive advantage. Thus, required disclosure of this information could, at best, reduce a company's competitive advantage and at worst, compel the loss of trade secrets protected under federal law and/or existing restrictive covenants between current employees and their employer.

In particular, the bonus and equity grant opportunities for higher-level roles are generally performance-based, not guaranteed and specific to the individual in the role. Additionally, the higher-level roles will have fewer people occupying them, and in many cases, there may only be one such role in the company. If companies are required to post detailed bonus and equity grant information for those roles, it could lead to the equivalent of individual compensation levels being shared without the employee's consent.

- **The scope of which jobs are covered under the Proposed Rule is impractically vague.**

The Rule's requirements apply to positions that will "perform work on or in connection with the contract."[13] The Rule defines "work on or in connection with the contract" as "work called for by the contract or work activities necessary to the performance of the contract but not specifically called for by the contract."[14] This vague and broad definition provides little clarity for covered employers. There are many jobs that may have functions that could in theory be "in connection with a contract" or "necessary" to its performance. IT employees, for example, are a vital support function for any business, but are unlikely to be directly involved with work specifically called for by most federal contracts – does that mean all IT positions would be covered by the rule?

[13] 89 Fed. Register 5853.
[14] *Id*.

Without clearer guardrails on the scope of which jobs are covered under the rule, potentially any job could be swept into such scope; that is, perhaps, the object of the Rule's vague design here – to use procurement authority in an end run around the legislative branch to reach as many private sector jobs as possible in a de facto national law. Such an object would, of course, be an impermissible use of executive branch procurement authority. Indeed, the last sentence of Section (b) *encourages* (rather than explicitly requiring) contractors to apply the requirements to all jobs, even as the scope of the required application is kept vaguely broad merely one sentence before.

Any final rule should provide much clearer parameters as to which jobs are explicitly covered by the rule. The Final Rule should limit the scope to jobs and/or functions specifically called for by the contract. Alternatively, at minimum, any final rule should mirror EO 14026 (federal contractor minimum wage rule) and exclude workers performing work "in connection with" a government contract that spend less than 20 percent of their workweek on such work. Doing so would limit the existing ambiguity while ensuring that the scope of the rule remains within the bounds of the executive branch's procurement authority.

- **The Proposed Rule's restrictions on considering employees' compensation information are overly broad and, in some cases, unworkable.**

The Proposed Rule has several provisions regarding current and prior compensation for employees that are problematic because they would prevent an employee from negotiating and an employer from constructing an attractive offer.

1. Prohibition for Current Employees Unworkable. The Proposed Rule prohibits employers from seeking an applicant's prior compensation history and/or using an applicant's

compensation history in consideration of job offers and/or compensation offers, *even if the applicant is a current employee*.[15]

Extending this prohibition to current employees is nonsensical and in practice impossible. It is no secret that employers have knowledge of (or access to) their current employees' compensation; having to pretend otherwise would be an unnecessary legal fiction, and proving that such knowledge had no impact on future compensation decisions will be in practice impossible as a result. It is for these reasons that no current state laws extend salary history bans to current employers or prevent them from relying on current employee compensation information in determining future compensation. At minimum, any final rule should follow proven state laws in this area and limit salary history bans only to prospective employees.

2. Voluntarily Offered Compensation. The Proposed Rule seeks to prevent employers from relying on prospective employees' compensation history even when it is voluntarily offered by the applicant. As employers are prohibited from in any way seeking this information themselves, in theory, an applicant would only disclose such information to negotiate a higher salary. If employers are prohibited from taking that information into account, the Proposed Rule would then prevent applicants from leveraging their current compensation, arguably their most crucial bargaining chip, to negotiate higher pay. Therefore, the rule should allow employers to consider compensation information voluntarily offered by the applicant.
3. Bonus and Equity Forfeitures. Inquiries regarding bonus or equity payments being forfeited by an applicant (or any other type of compensation being forfeited) should not

[15] *Id*.

be included in the salary history ban. Often, job applicants may be forced to forfeit certain compensation arrangements such as unvested equity or unpaid bonuses if they leave their current job for a new job. Understandably, such applicants will want compensation offers from a prospective employer to reflect this loss and will therefore voluntarily inform prospective employers about equity or bonus forfeitures in the application process. Typically, the prospective employer will then verify this information with the current employer to ensure this representation is accurate. The prospective employer may then offer compensation that reflects what the applicant would stand to forfeit from their current job (often called a make-whole award, inducement award or buy-out award). The Proposed Rule should preserve this necessary fact-checking process and, at minimum, exempt equity and bonus arrangements from the salary history ban portion of the Rule.

In sum, employers should not be prohibited from using compensation information they clearly already have for current employees, nor from using information voluntarily provided by an applicant. Further, employers should not in any case be prohibited from requesting, verifying, or using non-salary compensation information such as bonus and equity forfeitures.

- **The notice requirements should not include the soliciting agency.**

As discussed above, under the Proposed Rule, for jobs that do not involve work specifically called for by a federal contract, employers will have difficulty determining whether they are covered under the Rule. In general, our member companies have indicated that in nearly all cases they do not staff jobs based on specific federal contracts that the job may work on. Thus, in most cases, even for those jobs that may involve work that is specifically called for by a federal contract, the employer will have no predetermined knowledge of whether the job will be attached

to a federal contract. Accordingly, in few if any cases will the employer be able to proactively identify the solicitating agency such that they can include it in a job posting.

For example, when recruiting college graduates, jobs are generally posted at least 6 months and potentially up to a year in advance (while the candidates are still in school). In nearly every case there will be no telling at that point whether such jobs will involve work on a federal contract, let alone which specific contract it would be. Further, many jobs (such as the IT support functions mentioned above) may end up working in connection with several different federal contracts; having to potentially include each specific agency in the notice will be similarly unworkable. In general, with rare exceptions, teams perform work on multiple contracts, with staffing on such contracts fluid across the team. One employee may work on multiple different contracts with days, weeks, or months in between. As work volume ebbs and flows, contract assignments will be redistributed across teams – the idea of one role, one agency contract is simply not a practical reality.

Any final rule should not require employers to provide the solicitating agency in each notice portion of each job posting. Instead, the notice should merely provide covered applicants with a standardized, central location for submitting complaints under the Rule. Further, any final rule should clarify that employers are not barred by the Rule from assigning an employee to a contract not referenced in a job posting.

- **The Proposed Rule requires disclosure of privately negotiated employment terms and conditions in collective bargaining agreements.**

The Proposed Rule does not exempt union jobs from its coverage. As a result, in requiring employers to disclose compensation information in job postings (including for union jobs), the Proposed Rule is requiring employers to disclose terms and conditions of employment in

collective bargaining agreements that were privately negotiated with union representation. As a rule, such agreements are often not widely disseminated and in some instances are kept confidential between employers, union representatives, and employees. Requiring wide disclosure of every detail of a collective bargaining agreement with respect to wages and benefits may have negative ramifications for labor relations by undermining current relationships between all three parties. Accordingly, any final rule should at minimum reconsider disclosure requirements of compensation terms in collective bargaining agreements.

- **The Rule should provide a safe harbor from third party job posters.**

The Proposed Rule requires compensation disclosures in "all advertisements for job openings placed by *on or on behalf of*" the covered employer. Any final rule should clarify that covered employers are not liable under the Rule for postings made by third parties (*e.g.* Indeed, LinkedIn). Our member companies have indicated that such third party posters often scrape information from the company's own job posting site to repurpose for their own platforms, but selectively edit or otherwise unintentionally misrepresent the information originally provided by the company. Employers should clearly not be liable for such misrepresentations, and any final rule should clarify that covered employers are not liable for third party postings.

- **The Rule should preempt existing state pay transparency and pay equity laws.**

As outlined extensively in the first section, employers are already facing myriad state pay transparency and pay equity laws, each with their own requirements. If the federal government is to also regulate or legislate in this area, it should preempt these differing laws in favor of a uniform national standard to ensure less burdensome compliance for employers.

Sincerely,

/s/ Gregory Hoff

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