

April 14, 2015

Debra A. Carr, Director  
Division of Policy and Program Development  
Office of Federal Contract Compliance Programs  
200 Constitution Ave. NW, Room C-3325  
Washington, DC 20210

*Via online submission*

**RE: RIN 1250-AA05 – Discrimination on the Basis of Sex**

Dear Ms. Carr:

Thank you for the opportunity to provide comments on the proposal to update OFCCP's Sex Discrimination Guidelines for federal contractors to align the standards with Executive Order 11246 and current law. We represent organizations committed to achieving fair pay for women in the workplace, and we write to express our strong support for the proposal. This rule will promote the critically important goal of reducing the instances of sex-based discrimination in the workforce. We also make suggestions for strengthening the implementation of the proposal.

**I. Sex Discrimination in the Workplace Remains a Serious and Pervasive Barrier to Equality and Career Advancement.**

More than fifty years after the Equal Pay Act became law and forty-five years since the Sex Discrimination Guidelines were promulgated, women are still paid less than men in nearly every occupation. One study found that out of 265 major occupations, men's median salaries exceeded women's in all but one.<sup>1</sup> This is true whether women work in predominately female occupations, predominantly male occupations, or occupations with a more even mix of men and women.<sup>2</sup> It is also true for women in jobs across the income spectrum.<sup>3</sup>

In 2013, women working full time, year round typically made only 78 percent of the wages made by men working full-time, year-round.<sup>4</sup> This pay gap has barely budged in a decade.<sup>5</sup> And the gap in wages is far worse for women of color—for example, African American women and Hispanic women typically made only 64 percent and 56 percent, respectively, of the wages made by white, non-Hispanic men for full-time, year-round work in 2013.<sup>6</sup> Yet women's paychecks are more critical to their families than ever, as women today are the primary breadwinners in more than 41

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<sup>1</sup> Frank Bass, *Shining Shoes Best Way Wall Street Women Outearn Men*, BLOOMBERG BUSINESSWEEK (Mar. 16, 2012), available at <http://www.businessweek.com/news/2012-03-16/the-gender-pay-disparity>.

<sup>2</sup> ARIANE HEGEWISCH & MAXWELL MATITE, INST. FOR WOMEN'S POLICY RESEARCH, *THE GENDER WAGE GAP BY OCCUPATION* (2013), available at <http://www.iwpr.org/publications/pubs/the-gender-wage-gap-by-occupation-2>.

<sup>3</sup> *Id.*

<sup>4</sup> NAT'L WOMEN'S LAW CTR., *THE WAGE GAP IS STAGNANT IN THE LAST DECADE* (2014), available at [http://www.nwlc.org/sites/default/files/pdfs/fact\\_sheet\\_wage\\_gap\\_is\\_stagnant\\_2013.pdf](http://www.nwlc.org/sites/default/files/pdfs/fact_sheet_wage_gap_is_stagnant_2013.pdf).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

percent of families with children, and they are co-breadwinners—bringing in between 25 percent and 50 percent of family earnings—in another 23 percent of families.<sup>7</sup> At a time when more families are relying on women’s income, it is critical that we break down barriers that keep women from succeeding and advancing in their career.

The wage gap typically translates into \$10,876 less in median annual earnings for women, leaving women and their families shortchanged.<sup>8</sup> A woman working full-time, year round typically loses \$435,049 over the course of her career, or a 40-year period, due to the wage gap.<sup>9</sup> To make up this gap, a woman would have to work more than eleven years longer.<sup>10</sup> The situation is worse for women of color: the gap translates to an annual loss of \$19,399 for African American women, and \$23,279 for Hispanic women.<sup>11</sup> Lesbian women also earn less than men, regardless of their sexual orientation.<sup>12</sup> Women in same-sex couples have an average household income of \$98,000, compared to \$128,000 for men in same-sex couples and \$101,000 for opposite-sex couples.<sup>13</sup>

Occupational segregation—the fact that women and men are concentrated in different occupations—also stands as a barrier to equal pay by keeping women in disproportionately low-paid jobs compared to men. Jobs that are predominantly done by women are often devalued precisely because they are “women’s work.”<sup>14</sup> For example, although job tasks for janitors and building cleaners are extremely similar to job tasks for maids and housekeeping cleaners,<sup>15</sup> the overall median weekly wage for a male-dominated janitor and building cleaner job is \$85 dollars, which is 21 percent higher than the median weekly wage for a female-dominated maid and housekeeping cleaner job.<sup>16</sup> In fact, four of the most common occupations for women pay less than 100 percent of the federal poverty guidelines for a family of four, and three times as many women as men work in occupations that pay below this poverty guideline for full time work.<sup>17</sup>

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<sup>7</sup> SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, *THE NEW BREADWINNERS: 2010 UPDATE: RATES OF WOMEN SUPPORTING THEIR FAMILIES ECONOMICALLY INCREASED SINCE 2007* 2 (Apr. 2012), available at <http://www.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/breadwinners.pdf>. Primary breadwinners earn as much or more than their partners, or they are their family’s sole earner.

<sup>8</sup> NAT’L WOMEN’S LAW CTR., *THE WAGE GAP IS STAGNANT FOR NEARLY A DECADE* (2014), available at [http://www.nwlc.org/sites/default/files/pdfs/fact\\_sheet\\_wage\\_gap\\_is\\_stagnant\\_2013.pdf](http://www.nwlc.org/sites/default/files/pdfs/fact_sheet_wage_gap_is_stagnant_2013.pdf).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> M.V. LEE BADGETT ET AL., *THE WILLIAMS INSTITUTE, BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION* 14 (2007) <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-L...>

<sup>13</sup> U.S. CENSUS BUREAU, *2013 AMERICAN COMMUNITY SURVEY 1-YEAR DATA FILE Tbl 1: Household Characteristics for Opposite-Sex and Same-Sex Couple Households: ACS 2013*, available at <http://www.census.gov/hhes/samesex/files/ssex-tables-2013.xlsx>.

<sup>14</sup> Philip N. Cohen, *Devaluing and Revaluing Women’s Work*, HUFFINGTON POST (Feb. 1, 2010, 9:38 AM), available at [http://www.huffingtonpost.com/philip-n-cohen/devaluing-and-revaluing-w\\_b\\_444215.html](http://www.huffingtonpost.com/philip-n-cohen/devaluing-and-revaluing-w_b_444215.html).

<sup>15</sup> *Compare Summary Report for: 37-2011.00 - Janitors and Cleaners, Except Maids and Housekeeping Cleaners*, O\*NET ONLINE, <http://www.onetonline.org/link/summary/37-2011.00> (last updated 2014) (describing duties of janitors and cleaners), with *Summary Report for: 37-2012.00 - Maids and Housekeeping Cleaners*, O\*NET ONLINE, <http://www.onetonline.org/link/summary/37-2012.00> (describing duties of maids and housekeeping cleaners) (last updated 2012).

<sup>16</sup> NAT’L WOMEN’S LAW CTR., *50 YEARS AND COUNTING: THE UNFINISHED BUSINESS OF ACHIEVING FAIR PAY* n. 65 (2014), available at [http://www.nwlc.org/sites/default/files/pdfs/final\\_nwlc\\_equal\\_pay\\_report.pdf](http://www.nwlc.org/sites/default/files/pdfs/final_nwlc_equal_pay_report.pdf).

<sup>17</sup> HEGEWISCH & MATITE, *supra* note 2.

Punitive pay secrecy policies and practices also act as a significant obstacle to achieving equal pay. Such policies perpetuate pay discrimination by making it difficult for individuals to learn about unlawful pay disparities. In fact, the majority of private sector employers have policies prohibiting employees from discussing their compensation or discouraging employees from doing so. According to a survey by the Institute for Women’s Policy Research, more than sixty percent of private sector workers reported that their employer either prohibits or discourages employees from discussing their wages.<sup>18</sup> Today, many of the women who uncover evidence of a discriminatory paycheck do so by accident.<sup>19</sup> And when employees have actively sought out compensation information, some have been fired as a result.<sup>20</sup> OFCCP proposed a rule implementing Executive Order 13665 to eliminate pay secrecy policies held by contractors. Additionally, however, to the extent that a pay secrecy policy interferes with enforcement of the proposed Sex Discrimination regulation by keeping workers from discovering pay disparities, it constitutes sex discrimination covered by Executive Order 11246—OFCCP should therefore clarify that these policies conflict with both Executive Orders 13665 and 11246.

For those women who are able to discover pay disparities and bring their cases to court, a loophole in the Equal Pay Act means that employers are often not held accountable for discrimination. For example, despite a Supreme Court ruling to the contrary,<sup>21</sup> employers have continued to argue, and some courts have continued to accept, a “market forces” theory to justify pay differentials,<sup>22</sup> even

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<sup>18</sup> ARIANE HEGEWISCH, CLAUDIA WILLIAMS, & ROBERT DRAGO, INST. FOR WOMEN’S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION (2014), available at [http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1/at\\_download/file](http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1/at_download/file) (revealing that 60 percent of male employees and 62 percent of female employees report that their employers either prohibit or discourage the discussion of wages) [hereinafter 2014 IWPR PAY SECRECY REPORT].

<sup>19</sup> See, e.g., *Morrow v. L & L Products, Inc.*, 945 F. Supp. 2d 835 (E.D. Mich. 2013) (in which female plaintiff saw male co-worker’s paycheck and noticed that he was paid more, even though he had worked fewer hours); *Hodge v. PNC Bank*, No. 11-CV-10597, 2013 WL 2456002 (E.D. Mich. June, 2013) (in which female plaintiff assumed many responsibilities of her male co-worker and took over his office, only to find a file on his computer showing that he was paid more than she); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (in which a female area manager discovered via an anonymous tip that she was earning significantly less money than her male coworkers).

<sup>20</sup> See, e.g., *NLRB v. Main Street Terrace Care*, 218 F.3d 531 (6th Cir. 2000) (in which plaintiff was fired when she discussed wages with co-workers to determine whether they were being paid fairly); *NLRB case No. 14-CA-26790* (in which plaintiff was fired for sharing wage information under a company policy that explicitly prohibited such activity); see also Mary Williams Walsh, *The Biggest Company Secret: Workers Challenge Employer Policies on Pay Confidentiality*, N.Y. Times, Jul. 28, 2000, available at <http://www.nytimes.com/2000/07/28/business/biggest-company-secret-workers-challenge-employer-policies-pay-confidentiality.html> (describing a female worker who, as the only woman on her team, discovered through overhearing a conversation that she was paid less than her male coworkers and was subsequently fired when she complained).

<sup>21</sup> In *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), the Supreme Court rejected the argument that “market forces” – that is, the value assigned by the market to men’s and women’s work, or the greater bargaining power that men have historically commanded – can constitute a “factor other than sex,” since sex is precisely what those forces have been based upon.

<sup>22</sup> See *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 697, 697 n.6 (7th Cir. 2006) (noting that the court has “held that an employer may take into account market forces when determining the salary of an employee,” although cautioning in a footnote against employers taking advantage of market forces to justify discrimination); *Tavernier v. Healthcare Management Associates, Inc.*, No. 0:10-01753-MBS, 2012 WL 1106751, at \*11 (D.S.C. Mar. 30, 2012) (noting that “courts have, in certain circumstances, found that market forces constitute ‘factors other than sex’” but granting summary judgment to defendant employer because plaintiff was unable to rebut employer’s articulated reasons for paying the male employee a higher salary, including that he holds a relevant Master’s Degree, his work history, and his salary at his previous employer); *Greer v. Univ. of South Carolina*, 2012 WL 405773, at \*8 (D.S.C. Jan. 20, 2012) (accepting employer’s market forces justification as one of several proffered legitimate reasons for a salary differential).

where other courts have cautioned against using a “market forces theory” to justify discrimination.<sup>23</sup> Other courts have authorized employers to pay male employees more than similarly situated female employees based on the higher prior salaries enjoyed by those male workers without any analysis as to whether the prior salary itself was inflated because of sex discrimination.<sup>24</sup> Some have abandoned any effort to determine whether the employer’s purported “factor other than sex” is related to the qualifications, skills, or experience needed to perform the job.<sup>25</sup> Still other courts have read the “factor other than sex” defense to literally mean any factor—legitimate or not—other than sex.<sup>26</sup> In fact, the Seventh Circuit has gone a step further to presume that a “factor other than sex” “need not be ‘related to the requirements of the particular position in question,’ nor must it even be business-related.”<sup>27</sup>

## **II. The Protections Proposed in the Rule are Critical for Narrowing the Pay Gap and Achieving Equal Pay for Women, but it could be Strengthened to Ensure Employer Accountability for Discrimination and Incentivize Employers to Self-Audit for Discrimination.**

We strongly support OFCCP’s proposed § 60-20.4, which clarifies the law and offers several ways to reduce the instances of pay discrimination, narrow the wage gap, and hold employers accountable for sex-based pay discrimination. In particular, OFCCP’s proposal to update the definition of “compensation” brings it in line with current understanding of compensation in other areas of OFCCP’s enforcement. The revised definition states:

payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances,

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that is not based on sex); *Schultz v. Department of Workforce Development*, 752 F.Supp.2d 1015, 1028 (W.D. Wis. 2010) (noting that “[a]n employer may take market forces into account when determining the salary of an employee, provided there is no evidence suggesting that the employer took advantage of any kind of market forces that would permit different pay for a male and female for the same position”).

<sup>23</sup> *See, e.g.*, *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567 (11th Cir. 1988) (rejecting employer’s “market forces” defense to pay discrimination that the plaintiffs previously earned lower salaries prior to promotion).

<sup>24</sup> *See, e.g.*, *Sparrock v. NYP Holdings, Inc.*, No. 06 Civ. 1776, 2008 WL 744733, at \*16 (S.D.N.Y. Mar. 4, 2008) (finding that “salary matching is permitted under the Equal Pay Act” because “it allows an employer to reward prior experience and to lure talented people from other settings.” The district court came to this conclusion despite the fact that the male and female employees had similar experience and qualifications for the position.); *Covington v. Southern Illinois University*, 816 F.2d 317, 322-23 (7th Cir. 1987) (holding that the University’s “salary retention policy” that kept employees’ same level of pay regardless of their position at the University, constituted a non-discriminatory “factor other than sex”). *But see*, *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567 (11th Cir. 1988) (holding, after reviewing legislative history of the Equal Pay Act, that prior salary alone cannot justify wage disparities).

<sup>25</sup> *See, e.g.*, *Glunt v. GES Exposition Servs., Inc.*, 123 F. Supp. 2d 847, 859 (D. Md. 2000) (*citing* *Mazzella v. RCA Global Commc’ns, Inc.*, 814 F.2d 653 (2d Cir. 1987); *Walter v. KFGO Radio*, 518 F. Supp. 1309 (D.N.D. 1981)) (stating that “[o]ffering a higher starting salary in order to induce a candidate to accept the employer’s offer over competing offers has been recognized as a valid factor other than sex justifying a wage disparity,” and that “[i]t is widely recognized that an employer may continue to pay a transferred or reassigned employee his or her previous higher wage without violating the EPA, *even though the current work may not justify the higher wage.*”) (emphasis added).

<sup>26</sup> *See, e.g.*, *Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989) (describing how the “factor other than sex” defense “embraces an almost limitless number of factors, so long as they do not involve sex”).

<sup>27</sup> *Id.* at 1211 (*citing* *Covington v. Southern Illinois University*, 816 F.2d 317, 321-22 (7th Cir. 1987)). *See also* *Markel v. Bd. of Regents of the Univ. of Wisconsin Sys.*, 276 F.3d 906, 913 (7th Cir. 2002).

insurance and other benefits, stock options and awards, profit sharing, and contributions to retirement.<sup>28</sup>

This definition is a more modern and accurate reflection of what employees receive in exchange for work than the term “wage schedules” that currently exists in the Guidelines. We also support OFCCP’s proposal to include examples of how pay discrimination may occur—for example, by contractors limiting career advancement opportunities based on sex—as these examples will help clarify for employers what pay discrimination looks like, making it easier for employers to self-correct discrimination. We further support the important clarification OFCCP proposes to include relevant factors in examining “similarly situated” employees for purposes of analyzing a compensation discrimination claim, as this will provide legal guidance and clarity to employers, lawyers, and judges.<sup>29</sup>

OFCCP’s proposal that it be able to conduct independent compliance reviews is critical for enforcement. This will ensure that even where employees may stay quiet for fear of retaliation by their employer, the employer will nonetheless be held accountable for pay discrimination.

There are three ways that the equal pay portion of the NPRM can be strengthened. First, we recommend explaining that factors other than sex must be job related and consistent with business necessity. The factor also must actually account for the entire difference in pay. As the EEOC has made clear, “a very slight difference in experience would not justify a significant compensation disparity.”<sup>30</sup> And even if the factor met this test, a higher salary would not be appropriate if the employer was unaware of the factor when setting pay or if the employer did not consistently rely on the factor.

In particular, we urge OFCCP to provide examples of factors that undermine the goals of the protections against wage discrimination. For example, policies that peg current salary to prior pay by default ignore that the prior salary earned by a male job applicant may itself be the product of sex discrimination or may reflect the residual effects of the traditionally enhanced value attached to the kind of work usually performed by men. Recognizing these facts, courts have cautioned employers that salary matching is frequently discriminatory. In *Futran v. Ring Radio Co.*, for example, a court held that “to give more than nominal consideration to [prior pay] would serve to perpetuate the historic employment discrimination in wages suffered by females in the work force.”<sup>31</sup> The EEOC has echoed that concern, stating that prior salary history should not be the sole explanation for a wage disparity. Quoting from court decisions, the EEOC stated:

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<sup>28</sup> Discrimination on the Basis of Sex, 80 Fed. Reg. 5246, 5255 (proposed Jan. 30, 2015) (to be codified at 41 C.F.R. pt 60-20).

<sup>29</sup> The NPRM states that while the determination of similarly situated employees is case specific, relevant factors “may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar in other factors.” Discrimination on the Basis of Sex, 80 Fed. Reg. 5246, at 5278.

<sup>30</sup> EQUAL EMP’T OPPORTUNITY COMM’N COMPLIANCE MANUAL, NO. 915.003, SEC. 10: COMPENSATION DISCRIMINATION (Dec. 5, 2000), available at <http://www.eeoc.gov/policy/docs/compensation.html>.

<sup>31</sup> 501 F. Supp. 734, 739 n.2 (N.D. Ga. 1980).

Prior salary cannot, by itself, justify a compensation disparity. This is because prior salaries of job candidates can reflect sex-based compensation discrimination. Thus, permitting prior salary alone as a justification for a compensation disparity “would swallow up the rule and inequality in compensation among genders would be perpetuated.”<sup>32</sup>

To ensure that past discrimination is not carried forward into an employee’s tenure with a new employer, OFCCP should advise that prior pay matching should be a rare occurrence.

Second, the NPRM should clarify that punitive pay secrecy policies that interfere with enforcement of wage discrimination protections violate antidiscrimination law. Lastly, OFCCP should also exercise its authority under Executive Order 11246 to encourage employers to take affirmative steps toward achieving equal pay by advising employers on developing more transparent pay practices and clear methodologies for setting pay.

### **III. The Proposed Rule Could Be Strengthened Through Technical Assistance and Training for Employers, Employees and OFCCP Investigators, and by Focusing Compliance Reviews on Worst Offenders.**

For these rules to be effective and efficiently incorporated into contractors’ compliance with the law, it is critical that OFCCP have a strong implementation plan. We support OFCCP’s plan to publish compliance assistance materials, including fact sheets and FAQs, along with hosting webinars for the contractor community and conducting listening sessions to identify challenges.

However, implementation of the proposed rule could be strengthened in several ways to ensure its efficacy. OFCCP should offer technical assistance for current and prospective contractors who will be covered by the proposed rule, as well as for employees. OFCCP should also invest in training its investigators on how to identify and examine cases alleging discrimination based on sex as described in the updated proposed rules. We additionally recommend that OFCCP focus its compliance reviews on contractors in industries with the widest gaps between the average wages of men and women, or in industries with the highest rate of EEOC charge filings. This prioritization will ensure a quick accountability for the worst offenders and that companies who have the privilege of doing business with the federal government are following the law.

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We urge OFCCP to adopt final regulations on the prohibition against discrimination on the basis of sex swiftly and without any unnecessary delay. The proposed rule, applied to federal contractors and intended to update the outdated sex discrimination guidelines so that it will be perfectly clear that employers cannot discriminate on the basis on sex, will be an effective measure to combat pay discrimination, shrink the wage gap, end occupational segregation and sex-based harassment, provide equal access to career opportunities, and keep pregnant workers at work.

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<sup>32</sup> *Id.* quoting *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995). *See also* *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988) (prior salary alone cannot justify a pay disparity); *Faust v. Hilton Hotels Corp.*, 1990 WL 120615, at \*5 (E.D. La. 1990) (reliance on prior salary as a factor other than sex would "allow employer to pay one employee more than an employee of the opposite sex because that employer or a previous employer discriminated against the lower paid employee").

Thank you for the opportunity to submit comments on this proposed rule.

Sincerely,

9to5, National Association of Working Women  
9to5 California  
9to5 Colorado  
9to5 Georgia  
9to5 Wisconsin  
African American Ministers in Action  
American Association of University Women (AAUW)  
American Civil Liberties Union  
Coalition of Labor Union Women  
Disciples Women, Christian Church (Disciples of Christ)  
Equal Rights Advocates  
Federally Employed Women (FEW)  
Feminist Majority  
Institute for Science and Human Values  
Kentucky Religious Coalition for Reproductive Choice  
Legal Aid Society-Employment Law Center  
Mississippi Center for Justice  
National Advocacy Center of the Sisters of the Good Shepherd  
National Asian Pacific American Women's Forum  
National Committee on Pay Equity  
National Council of Jewish Women  
National Employment Lawyers Association  
National Organization for Women  
National Organization for Women, Missouri  
National Organization for Women, New Jersey  
National Organization for Women, NJ-Middlesex County  
National Organization for Women, Northern NJ Chapter  
National Organization for Women, San Gabriel Valley/Whittier  
National Women's Health Network  
National Women's Law Center  
Planned Parenthood Federation of America  
Restaurant Opportunities Centers United  
Sargent Shriver National Center on Poverty Law  
The Make It Work Campaign  
UltraViolet  
Women's Law Project

