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1900 E Street, NW

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Re: Comments on 5 CFR Parts 531, 532, 534, and 930, RIN 3206-AO39, Advancing Pay Equity in Governmentwide Pay Systems

Introduction

On behalf of the Equal Pay Today campaign, an innovative collaboration of national, regional, and state-based women's legal advocacy, worker justice groups, social justice organizations and researchers, Equal Pay Today member organizations – Equal Rights Advocates, the Institute for Women's Policy Research, the National Women's Law Center, and the National Partnership for Women & Families – and the undersigned groups, we thank you for allowing us to submit comments on this proposed rule. The 45 undersigned civil rights, gender justice, worker's rights, and research organizations submit this comment in response to the proposed rulemaking by the Office of Personnel Management ("OPM") addressing pay equity in governmentwide pay systems. As advocates for fair pay, we strongly support the proposed rule and commend the federal government for leading the way as a model employer in addressing an important civil rights issue impacting the pay of millions of federal workers.

I. Overview in Support of the Proposed Rule

The proposed rule seeks to ban the use of salary history during recruitment, hiring, and the setting of a starting wage for federal employees. Substantial research shows that banning reliance on prior salary history in pay setting can play a part in decreasing gender and race-based wage gaps, and can result in salary increases for women and people from historically marginalized communities.¹ Allowing employers to ask about an employee's prior salary history, and using their prior salary to determine an employee's base pay reinforces wage gaps. Women and people

¹ INSTITUTE FOR WOMEN'S POLICY RESEARCH, EQUAL PAY POLICIES AND THE GENDER WAGE GAP: A COMPILATION OF RECENT RESEARCH (2022), https://iwpr.org/wp-content/uploads/2022/01/Equal-Pay-Policies-and-the-Gender-Wage-Gap_Compilation_20220125_FINAL.pdf.

from historically marginalized communities often face discrimination in their jobs, reflected in lower salaries than non-Hispanic, white men. When employers base a new employee's salary off of their prior salary this results in pay discrimination and artificially depressed wages being carried forward from job to job.

As such, we, the undersigned organizations, support the proposed rule. Throughout this comment we will illustrate the harm perpetuated by using prior salary history to determine a new salary, and why prohibiting the consideration of salary history in pay setting promotes greater equity in pay. Furthermore, we support OPM's determination that pay determinations cannot be based on employees' voluntary disclosure of their salaries to government employers. We further urge that OPM make clear that pay can also not be set based on consideration of competing offers, as this could undermine efforts to create a pay system that does not perpetuate biased pay decisions from external employers.

We applaud OPM and the federal government for taking steps to promote equitable pay among federal employees. As a result of the federal government's pay practices, including documenting its pay gap data and providing transparency in pay, the gender wage gap is already consistently lower in the federal government than in the private sector.² The federal gender pay gap sits at 5.6%³ with a 6% pay gap for Executive Branch employees.⁴ Long before states such as California and Maryland passed laws requiring the private sector to provide salary ranges for job openings, the federal government listed salary ranges publicly. These transparent policies have helped lead the federal government to have a smaller wage gap than other sectors.

Yet the banning of prior salary history remains necessary to continue to eliminate bias in salary setting, especially as employees move from private for-profit and non-profit sectors and other sectors to enter federal government work. If the government were to use prior salaries to determine new pay, then their salaries would still reflect the inequities women and people from historically marginalized communities experienced in other sectors. As such, we appreciate the transparency in the government and commend the federal government's efforts to be a model employer. We hope that banning prior salary history will promote similar actions in other industries, especially ones in which gender and race-based wage gaps are wider.

II. Use of Prior Salary History Can Perpetuate Discrimination and Race and Gender Wage Gaps

As OPM indicates in its proposed rules, the practice of determining salary based on prior salary history contributes to the persistent gender wage gap. Sixty years after the passage of the Equal Pay Act, women are still paid less than men, and these gaps are particularly pronounced for

² U.S. Office of Personnel Management, *About Our Data (EHRI-SDM)*, https://www.fedscope.opm.gov/datadefn/aehri_sdm.asp.

³ Drew Friedman, *OPM Addresses Gender Pay Gap, Proposes Ban on Agencies' Use of Salary History for New Hires*, FEDERAL NEWS NETWORK, <https://federalnewsnetwork.com/pay/2023/05/opm-addresses-gender-pay-gap-proposes-ban-on-agencies-use-of-salary-history-for-new-hires/#:~:text=The%205.6%25%20average%20pay%20gap,the%20Office%20of%20Personnel%20Management>.

⁴ *Advancing Pay Equity in Governmentwide Pay Systems*, 88 C.F.R. 30,251, 30,252-53 (May 11, 2023) (to be codified at 5 C.F.R. pts. 531, 532, 534, and 930).

women of color.⁵ This wage gap begins early, as women frequently start their careers earning lower salaries than men, and tends to compound throughout their working lives. Research shows that women earn less than men starting just one year out of college, even when controlling for factors like major, occupation, and hours worked.⁶ These gaps are exacerbated over time in part because such initial underpayment grows in absolute terms every time a subsequent salary increase is set as a percentage increase of the prior salary. Occupational segregation also depresses women's salaries, as women are more likely to be impacted by lower salaries in predominantly female industries.⁷ Reliance on salary history in pay setting particularly harms women who shift from predominantly female fields to other industries, including shifts from the non-profit human services sector, where comparative salaries are substantially lower than for workers in both public and other private sector fields as a result of structural racism and the undervaluation of women's work.⁸

Over their lifetimes, women are also more likely to have to take time out of the workforce for care-related reasons, since societal norms still lead to women taking on the majority of this labor, and these gaps in employment tend to result in lower earnings when they return.⁹ Moreover, irrespective of time out of the labor market, women who are mothers face earnings and labor market penalties compared to others, factors that were exacerbated during the COVID-19 pandemic.¹⁰ When employers determine pay based on the prior salaries of candidates, a new female employee is likely to carry forward prior pay differentials with their male counterparts who already earn more than they do.¹¹ The practice of seeking salary history from job applicants and relying on it to set a new employee's pay rate perpetuates historical discrimination and wage inequalities across the occupational spectrum.

While there are many complex and interrelated factors that contribute to the pay gap, prior salary history is one of them.¹² In fact, research on employers' self-analysis of pay within their

⁵ Department of Labor Women's Bureau, *Earnings and Ratios*, <https://www.dol.gov/agencies/wb/data/earnings>.

⁶ CHRISTIANNE CORBETT & CATHERINE HILL, *GRADUATING TO A PAY GAP: THE EARNINGS OF WOMEN AND MEN ONE YEAR AFTER COLLEGE GRADUATION 2* (2012).

⁷ THOMAS B. FOSTER, MARTA MURRA-CLOSE, LIANA CHRISTIN LANDIVAR & MARK DEWOLF, *AN EVALUATION OF THE GENDER WAGE GAP USING LINKED SURVEY AND ADMINISTRATIVE DATA* (2020), <https://www.census.gov/library/working-papers/2020/adrm/CES-WP-20-34.html>.

⁸ See WAGE EQUITY STUDY TEAM, 2023, *WAGE EQUITY FOR NON-PROFIT HUMAN SERVICES WORKERS: A STUDY OF WORK AND PAY IN SEATTLE AND KING COUNTY*, (Univ. Wash.2023), https://socialwork.uw.edu/sites/default/files/WageEquityStudy_Summary_withAppendices_0.pdf. See also JAMES A. PARROTT & L.K. MOE, *THE CASE FOR ENDING POVERTY WAGES FOR NEW YORK CITY'S HUMAN SERVICES WORKERS*, (2023), <http://www.centernyc.org/reports-briefs/the-case-for-ending-poverty-wages-for-new-york-citys-human-services-workers>.

⁹ CLAUDIA GOLDIN, *CAREER & FAMILY: WOMEN'S CENTURY-LONG JOURNEY TOWARD EQUITY* (Princeton University Press 2021).

¹⁰ Felipe A. Dias, Joseph Chance & Arianna Buchanan, *The Motherhood Penalty and the Fatherhood Premium in Employment During Covid-19: Evidence from the United States*, 69 *RESEARCH IN SOCIAL STRATIFICATION & MOBILITY* (2020).

¹¹ See Todd J. Thorsteinson, *Initiating Salary Discussions With an Extreme Request: Anchoring Effects on Initial Salary Offers*, 41 *J. APPLIED SOC. PSYCHOL.* 1774, 1779-81 (2011); Hannah Riley Bowles, Linda Babcock & Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes it Does Hurt to Ask*, 103 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 84, 85 (2006).

¹² Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, *NAT'L BUREAU ECON. RES.*, Jan. 2016, <https://doi.org/10.3386/w21913>.

workforce has found the use of salary history to be a key driver of gender wage gaps.¹³ Prohibiting reliance on salary history in pay setting recognizes that an employee's salary history is not an objective measure of a worker's value.¹⁴ It is an inaccurate proxy. The use of prior salary to set pay reflects and perpetuates the flawed assumption that an applicant earning a lower salary is of lower quality than an applicant with a higher salary.¹⁵ It leads a new employer to make false assumptions about applicants that reaffirms previous discrimination.

In a survey of US workers, about half reported that employers had learned about their past pay before making the offer that led to their current job.¹⁶ Setting starting pay based on prior salary is not just a one-time decision: it affects a worker's subsequent raises, bonuses, promotions, and retirement savings, as well as any other factors that may be tied to their starting salary.¹⁷ Changing to a more equitable system, based on objective factors measuring the value of the job and the skill and experience of the applicant, can therefore produce long term benefits for women and people from marginalized communities.

III. Prohibiting Consideration of Salary History in Pay Setting Promotes Greater Equity in Pay

As of April 2023, 21 states and 22 localities have enacted laws to prohibit employers from seeking or relying on a job applicant's salary history to set pay.¹⁸ Numerous research studies on the impact of these laws show that they are already helping to narrow gender and racial wage gaps.

For example, an April 2020 study in California shows that when employers were prohibited from seeking or relying on a job candidate's prior salary, the overall gender wage gap narrowed as a result, primarily due to increased earnings for women.¹⁹ Another study analyzed the effects of recent state salary history bans and found that employers posted wages more often and increased pay for job changers, particularly for women (a 6.2% increase) and workers of color (a 5.9% increase).²⁰ For workers of color, this 5.9% increase in their wages accounted for a 68%

¹³ *Navigating the Growing Pay Equity Movement: What Employers Need to Know About What to Do*, HARV. BUS. REV. (2019), <https://resources.trusiac.com/pay-equity-downloads/harvard-business-review-trusiac-pulse-survey>; Laura Adler, *Information and Discrimination in Employer Responses to the Salary History Ban* (ACADEMY OF MANAGEMENT PROCEEDINGS 2023, forthcoming).

¹⁴ Robin Bleiweiss, *Why Salary History Bans Matter to Securing Equal Pay*, CAP (Mar. 24, 2021), <https://www.americanprogress.org/article/salary-history-bans-matter-securing-equal-pay/>.

¹⁵ Laura Adler, *What's a Job Candidate Worth? Explaining Variation in Pay-Setting Practices*, SOCARXIV (2020), <https://osf.io/preprints/socarxiv/ctu8m/>.

¹⁶ Robert E. Hall & Alan B. Krueger, *Evidence on the Incidence of Wage Posting, Wage Bargaining, and On-the-Job Search*, 4 AM. ECON. J.: MACROECONOMICS 56 (2012).

¹⁷ See Bleiweiss, *supra* note 14.

¹⁸ *Salary History Bans: A Running List of States and Localities that have Outlawed Pay History Questions*, INDUSTRYDIVE (Apr. 20, 2023), <https://www.hrdiver.com/news/salary-history-ban-states-list/516662/>.

¹⁹ Benjamin Hansen & Drew McNichols, *Information and the Persistence of the Gender Wage Gap: Early Evidence from California's Salary History Ban* (NBER Working Paper Series, No. 27054), <https://www.nber.org/papers/w27054>.

²⁰ James E. Bessen, Chen Meng & Erich Denk, *Perpetuating Inequality: What Salary History Bans Reveal About Wages*, Boston Univ. School of Law Research Paper No. 20-19 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3628729.

reduction in the pay gap between white workers and non-white workers who changed jobs.²¹ Additionally, the researchers concluded that these increases accounted for most of the residual, or unexplained, pay gap that is likely attributable to discrimination or other gender and racial disparities. The researchers concluded that the impact of salary history bans showed that women and workers of color had been paid less for reasons unrelated to their productivity²² and that the use of salary history in bargaining can perpetuate discrimination.²³

A salary history ban will also likely improve the hiring process for the federal government. Research shows that when employers are not able to rely on salary history to make pay determinations, they collect more information from applicants and ask more substantive and probing questions to evaluate the applicant for the job.²⁴ The proposed rule allows agencies ample flexibility to determine an employee's pay based on superior needs and special qualifications that are job-related. By removing salary history as a permissible factor to set pay, OPM incentivizes agencies to examine more closely a candidate's skills and experience, helping to ensure more equitable pay setting that is not based on discrimination, bias, or other factors irrelevant to the business of the federal government.

IV. Alternatives to Determine Pay Above Minimum Rate Should Not Rely on Similar Proxies for Prior Salary or Processes that Allow in Bias

The proposed rule ensures that government agencies will continue to have ample tools available to set pay in ways that are objective, consistent, and equitable. However, while the proposed rule ensures that the federal government has many mechanisms in place that can be used as alternative means to set pay above the minimum, we are concerned about the potentially discriminatory effect of some of the alternative measures proposed and urge that the final rule disallow reliance on those factors most likely to introduce bias. Flexibilities in setting salaries for new hires should be approached cautiously and implemented with an eye to ramifications for equity. Subjectivity in pay setting is typically where discrimination enters the process, because it is more prone to bias (including implicit or unconscious bias). Gender inequality can be curbed by providing more transparency and structure around the implementation of flexibility or setting starting pay above the minimum.

Under 5 CFR § 531.212(c), as set out in the notice, the government can set an employee's salary above the minimum rate of the highest applicable rate range for those with superior qualifications and special needs based on "the level, type, or quality of the candidate's skills or other competencies or other qualities and experiences" as well as rely on the position's occupational series and grade level and competencies required in the position to be filled, and factors such as disparities between federal and non-federal salaries for the skills, existing labor market conditions, including the availability and quality of candidates for the same or similar positions, recent turnover in the same or similar positions, the importance of the position being

²¹ *See id.*

²² *See id.* at 27.

²³ *See id.* at 2.

²⁴ Moshe A. Barach & John J. Horton, *How Do Employers Use Compensation History?: Evidence From a Field Experiment*, NBER WORKING PAPER SERIES (2020), https://www.nber.org/system/files/working_papers/w26627/w26627.pdf.

filled, the desirability of the geographic location, duties, and/or work environment, the agency workforce needs, and finally, “other relevant factors.”²⁵

We are concerned that some of these factors can introduce pay distortions and contribute to pay inequality in the longer run. First, we are concerned that the proposed regulations would continue to allow an agency to seek to match a competing job offer, even if this would not be the sole criteria for setting a higher starting salary. The potentially discriminatory impact on the gender pay gap is illustrated by the case of *Freyd v. University of Oregon*.²⁶ Professor Freyd was the most senior academic in her department, but was paid substantially less than more junior male colleagues with lower performance because the university had paid retention bonuses to faculty who pursued outside job offers.²⁷ *A priori* there is little difference between allowing the use of competing job offers while setting starting pay and using this as criteria for raising the pay of incumbent employees.

Second, when a new hire is provided with a higher than standard starting wage because of particular labor market shortages at the time of hire, unless there is a review and adjustment of compensation in all comparable positions (that is, of the remuneration of incumbents rather than solely of the new hire), the higher salary/starting grade will lead to unequal pay down the line, and, where one of the employees is in a protected class, may further entrench gender- and race-based pay gaps. Higher competing job offers, high turnover, or particularly high vacancy rates suggest that the underlying grading of the position no longer reflects market rates and needs to be revised for all in the position, not just for the new hire.

Third and similarly, we do not think candidates should be asked about their salary expectations. Asking a candidate about salary expectations can reinforce gender differences in negotiating behaviors,²⁸ perpetuate salary disparities, and stand as an inaccurate proxy for the employer’s valuation of the job itself.

V. Prohibiting Reliance on Voluntary Disclosure of Prior Salary History

OPM discussed the idea of agencies having the ability to set pay based on a candidate’s salary history if it is provided “voluntarily and without prompting.”²⁹ However, OPM ultimately decided against this exception because, ultimately, relying on any kind of prior salary history would negate the positive effects of a prior salary history ban. Men are more likely to disclose their salaries, as are high-wage earners.³⁰ Similarly, even relying on salary expectations instead of asking for prior salary results in lower offers.³¹ This is why some states and localities also ban reliance on voluntary disclosure of prior salary history in pay setting, including the state of

²⁵ See 5 CFR § 531.212(c).

²⁶ *Freyd v. Univ. Oregon*, 990 F.3d 1211 (9th Cir. 2021).

²⁷ Jennifer J. Freyd, *Freyd v. Univ. Oregon*, AAUW, <https://www.aauw.org/resources/legal/laf/past-cases/freyd-v-university-of-oregon/>.

²⁸ Bowles, Babcock & Lai, *supra* note 11.

²⁹ Advancing Pay Equity in Governmentwide Pay Systems, 88 C.F.R. at 30,259.

³⁰ Amanda Agan, Bo Cowgill & Laura Katherine Gee, *Do Workers Comply with Salary History Bans? A Survey on Voluntary Disclosure, Adverse Selection, and Unraveling*, 110 AM. ECON. ASS’N 215 (2020).

³¹ Bowles, Babcock & Lai, *supra* note 11.

California and Salt Lake City.³² Moreover, the federal government’s pay setting practices allow for consideration of a broad range of relevant factors in determining appropriate pay setting, making any reliance on prior salary, even when voluntarily disclosed, unnecessary as an unreliable mechanism for measuring skills, expertise, or value as an employee. We therefore concur with OPM’s recommendation and agree that the final rule should prohibit consideration of or reliance on voluntarily-submitted prior salary history. We further recommend that the final rule require that job notices include information that prior salary history will not be asked about, relied upon, or otherwise used in the setting of salaries above the minimum starting pay.

VI. Factors to Consider for Positions of High Occupational Segregation

Finally, OPM has asked what factors it should consider in setting pay in positions of high occupational segregation. Occupational segregation, or more specifically, the underpayment of workers in predominantly female occupations compared to more integrated or male dominated occupations, is one of the major contributing factors to the gender wage gap.³³ The gap in earnings between female dominated and male dominated occupations is particularly stark in occupations which require some training and post-secondary education, but not a full bachelor’s degree, and also include many of the areas of education highlighted in the notice, such as Engineering and Architecture, Medical, Hospital, Dental, and Public Health, and General Administrative, Clerical, and Office Services.³⁴

One such factor to consider in future pay equity rulemakings is the government’s job evaluation and pay setting process across occupations and agencies. Job evaluation schemes are set up to provide a fair and consistent approach to setting pay relativities within organizations.³⁵ However, historically, many job evaluation schemes have undervalued factors and components of jobs particularly associated with female-dominated occupations and occupations historically dominated by Black workers.³⁶ The systematic review and adjustment of salary relativities for gender bias in 14 states in the 1980s resulted in significant reductions of gender wage gaps for

³² *Salary History Bans*, *supra* note 18.

³³ See Blau & Kahn, *supra* note 12; Foster, et al., *supra* note 7; ARIANE HEGEWISCH & HEIDI HARTMANN, OCCUPATIONAL SEGREGATION AND THE GENDER WAGE GAP: A JOB HALF DONE (Institute for Women’s Policy Research 2014), <https://iwpr.org/wp-content/uploads/2020/08/C419.pdf>.

³⁴ ARIANE HEGEWISCH, MARC BENDICK, JR., BARBARA GAULT & HEIDI HARTMANN, PATHWAYS TO EQUITY: NARROWING THE WAGE GAP BY IMPROVING WOMEN’S ACCESS TO GOOD MIDDLE-SKILL JOBS, (Institute for Women’s Policy Research 2016), <https://iwpr.org/pathways-to-equity-narrowing-the-wage-gap-by-improving-womens-access-to-good-middle-skill-jobs/>.

³⁵ *Performing Job Evaluations*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/performingjobevaluations.aspx> (last visited June 5, 2023).

³⁶ DONALD TOMASKOVIC-DEVEY, GENDER AND RACIAL INEQUALITY AT WORK: THE SOURCES & CONSEQUENCES OF JOB SEGREGATION (ILR Press 1993); R.J. STEINBERG, L. HAIGNERE, C. POSSIN, C.H. CHERTOS & D.J. TREIMAN, THE NEW YORK STATE PAY EQUITY STUDY: A RESEARCH REPORT (Center for Women in Government, State University of New York Press 1986); J. BARON & A. NEWMAN, PAY THE MAN: EFFECTS OF DEMOGRAPHIC COMPOSITION ON PRESCRIBED WAGE RATES IN THE CALIFORNIA CIVIL SERVICE (Nat. Academy Press 1989); ROBERT T. MICHAEL, HEIDI I. HARTMANN & BRIGID O’FARRELL, PAY EQUITY: EMPIRICAL INQUIRIES 107–130 (Nat. Academy Press 1989); Paula England, *The Case for Comparable Worth*, 39 Q. REV. ECON. AND FIN. 743 (1999), [https://doi.org/10.1016/S1062-9769\(99\)00026-5](https://doi.org/10.1016/S1062-9769(99)00026-5).

public employees in those states.³⁷ A recent review of the Federal Government’s factor evaluation system, FES, highlights how this system may contribute to pay inequities by assigning lower values to factors more commonly found in female dominated occupations.³⁸ We recommend that the federal government conduct a systematic review of the FES to identify and remedy potential gender and racial bias in the scheme. In doing so, it can draw on models such as the United Kingdom’s National Joint Council Scheme (NJCS), developed by UK-wide local governments, unions, and leading job evaluation experts to ensure a job evaluation system free of gender and racial biases.³⁹

Conclusion

On behalf of the Equal Pay Today campaign and all the undersigned organizations committed to pay equity, thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact Deborah J. Vagins, National Campaign Director and Director of Equal Pay Today, at Equal Rights Advocates at dvagins@equalrights.org with any questions.

Sincerely,

Equal Pay Today
Equal Rights Advocates
Institute for Women’s Policy Research
National Women’s Law Center
National Partnership for Women & Families
A Better Balance
AFL-CIO
American Association of University Women
California Women’s Law Center
Caring Across Generations
Center for Law and Social Policy
Center for Worker Justice of Eastern Iowa
Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces
ERA Coalition
Futures Without Violence
Gender Equality Law Center
Justice for Migrant Women
KWH Law Center for Social Justice and Change
Labor Council for Latin American Advancement
LatinoJustice PRLDEF
The Leadership Conference on Civil and Human Rights
Legal Aid at Work
Legal Momentum, The Women’s Legal Defense and Education Fund

³⁷ Heidi I. Hartmann & Stephanie Aaronson, *Pay Equity and Women's Wage Increases: Success in the States, a Model for the Nation*, 1 DUKE J. GENDER L. & POLY 69 (1994).

³⁸ Rashmi Chordiya & Larry Hubbell, *Fostering Internal Pay Equity Through Gender Neutral Job Evaluations: A Case Study of the Federal Job Evaluation System*, 52 PUB. PERSONNEL MGMT. 25 (2022).

³⁹ See WAGE EQUITY STUDY TEAM, *supra* note 8.

Legal Voice
Methodist Federation for Social Action
Mississippi Black Women's Roundtable
MomsRising
National Advocacy Center of the Sisters of the Good Shepherd
National Center for Transgender Equality
National Council of Jewish Women
National Committee on Pay Equity
National Employment Law Project
National Organization for Women, Virginia Chapter
National Organization for Women
National Women's Political Caucus
Oxfam America
Philly CLUW
PowHer New York
ROC United
Shriver Center on Poverty Law
Supermajority
USOW
Women Employed
Women's Law Project
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