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September 13, 2021

The Honorable Lisa Monaco
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530-0001

Dear Deputy Attorney General Monaco:

Thank you for meeting with leaders of the National Association of Assistant United States Attorneys (NAAUSA) on August 16, 2021. As we mentioned during the meeting, NAAUSA's primary advocacy priority is pay equity between Assistant United States Attorneys (AUSAs) and Trial Attorneys in the Department's litigating divisions. AUSAs are compensated on the administratively determined (AD) pay system, while Trial Attorneys are on the General Schedule (GS).

It has always been difficult to make a direct comparison between AUSAs and Trial Attorneys, but the data are clear on the most important point: **AUSAs are dramatically underrepresented at the GS-15 pay level compared to trial attorneys.** Only 65% of AUSAs receive basic pay at or above the GS-15, Step 1 rate. Trial Attorneys in the litigating divisions are significantly more likely to be at or above the GS-15 level. In the Antitrust Division, 90% of attorneys are GS-15s or higher. Among Civil Division attorneys, 92% are at least GS-15s. In the Environmental and Natural Resources Division, 95% of attorneys are at or above the GS-15 level. The Criminal Division boasts the highest percentage of GS-15 attorneys: 97%. These statistics come from the Department's [Employment Fact Book](#).

The National Association of Assistant United States Attorneys has maintained for many years that the only way to bring equity to salaries is to move all AUSAs to the General Schedule (GS) pay system. For decades, AUSAs have been exempted from the GS system through 28 U.S.C. § 548, which grants the Attorney General authority to set pay rates for AUSAs. That discretion has not always been unfettered, as 28 U.S.C. § 508 previously stated that "each incumbent...assistant United States attorney shall be paid compensation at a rate equal to that of attorneys of comparable responsibility and professional qualifications, as determined by the Attorney General, whose compensation is prescribed in the general schedule." This language was enacted by Public Law 88-426 in 1964. That language was later replaced, and AUSA pay now lags well behind that of other Department litigators.

In January 2015, the Justice Management Division (JMD) convened a study group to defend the legitimacy of the AD pay system. As expected, the study concluded

that no pay disparity existed between AUSAs and other Department lawyers. This study, however, was deeply flawed. The report generated following the study acknowledged that the Department lacked the data needed to make direct comparisons between attorneys on the GS and AD pay systems. The missing piece is data on the length of total attorney experience, which is a critical factor in attorney pay setting. Without this important data, the study relied on inaccurate proxies for attorney experience.

Even EOUSA seemed to disregard the results of the purported study because on March 22, 2016, it announced a limited revision to the AD system. Before this revision, the AD pay system allowed United States Attorneys to recruit lawyers with 0-3 years' professional experience at rates below GS-11. Under the revised AD system, attorneys with 0-2 years' experience would be paid the equivalent of a GS-11 salary at a minimum. This shift also increased the minimum salaries for other attorneys with fewer than 9 years' experience by approximately \$5,500.

The 2016 revision, however, did not eliminate the pay disparity. The Department still routinely advertises attorney vacancies in the litigating divisions and represents that attorneys with one year of professional experience are eligible to be hired at the GS-12 level, those with 1.5 years' professional experience may be hired as GS-13s, those with 2.5 years' experience may be hired as GS-14s, and four or more years of attorney experience makes the applicant eligible for the GS-15 level. While experience alone does not entitle an attorney to be hired at a particular grade, evidence indicates that hiring supervisors nearly always hire attorneys at the grade level for which they are eligible and promote them when eligible.

In nearly any other litigation attorney role with the Department, a lawyer with a single year of professional experience can expect to be hired at the GS-12 level. Under the AD system, United States Attorneys are permitted to hire attorneys with up to five years' experience at pay below the GS-12 level. And while a Trial Attorney with four years' professional experience could be hired as a GS-15, step 1, with basic pay of \$110,460, the AD system would permit a basic pay rate of no more than \$91,358 (the top of the AD-23 "Recruiting Range") for an AUSA at the same experience level.

The problem extends beyond the pay set at hiring. In subsequent years, raises come from meager pools of money supplied by EOUSA for the Annual Pay Review (APR). In recent years, the APR pool has ranged from 1.25% to 2.5% of non-capped attorney salaries for each USAO. From this amount, each office must first fund the non-discretionary raises that are mandated by an AUSA's progression in the AD system, and only then may a United States Attorney grant additional salary increases to top performers. In reality, there is never enough money available for a USAO to effectively use the higher ends of the broad bands on the AD pay tables.

While supporters of the AD system tout its broad pay bands and wide flexibility

for supervisors in setting pay, policy limitations greatly limit the plan's usefulness. Per Department policy, United States Attorneys may not approve raises in excess of 10% of basic pay without the consent of the Director of EOUSA. An AUSA in the lower quartile within one grade would not be able to receive a raise that places him or her at the "midpoint" of the next pay grade without approval of the Director. Moreover, it is highly unlikely that an office could afford to give such a raise within their 1.5% - 2.5% allocation.

The egregious disparity in pay between AUSAs and their colleagues in the litigating divisions is a driver of low morale in USAOs. USAOs consistently rank at the bottom of rankings for pay satisfaction among government employees, according to the [Best Place to Work Survey](#). As government employees, AUSAs expect their employer to abide by the merit system principle that "[e]qual pay should be provided for work of equal value." See 5 U.S.C. § 2301(b)(3). **The AD system has been underfunded and misused for so long that there is no question it fails to achieve equality in pay.**

NAAUSA has long advocated for the Department to scrap the AD tables and shift all AUSAs to the GS system. We believe this is the best way for the Department to demonstrate its commitment to the principle of equal pay for work of equal value. The pay of all attorneys in the Department could be easily compared, and attorneys could feel free to move between offices without facing the prospect of losing tens of thousands of dollars when moving between systems.

NAAUSA asks that you form a pay reform task force charged with fixing the pay disparity. Our association will gladly join this task force to carefully study the issue and recommend a course of action to the Attorney General. We look forward to further discussion and action on this matter.

Respectfully,



Lawrence J. Leiser
President

CC: John Carlin, Principal Associate Deputy Attorney General;
Monty Wilkinson, Director, Executive Office for U.S. Attorneys
Norman Wong, Principal Deputy Director, Executive Office for U.S. Attorneys