

United States Senate
WASHINGTON, DC 20510

January 25, 2021

ATTN: Sarah Qureshi
Rules Unit
Office of General Counsel
Federal Bureau of Prisons
320 First Street NW
Washington, DC 20534

RE: RIN 1120–AB76, “FSA Time Credits”

To Whom It May Concern,

The First Step Act was a landmark, bipartisan effort to reform the federal prison system in order to reduce crime, lower prison costs, and ensure that people can successfully reenter society after their incarceration. As two of the original sponsors of the First Step Act—as well as its predecessor, the Recidivism Reduction and Public Safety Act¹—we believe the Federal Bureau of Prisons’ (BOP) proposed rule² falls short of that goal. We request that BOP substantially revise the new rule before it is finalized.

The linchpin of the First Step Act is a new policy that encourages incarcerated individuals to participate in evidence-based recidivism reduction programs (EBBRs) or productive activities (PAs) by allowing them to earn time credits towards their release.³ BOP accurately describes the earned time credit program as “Incentives for Success.”⁴ The intent of the policy was to “give people the opportunity, those who have the will and the determination to take advantage of the opportunity to turn their lives around, to deal with their addiction, to deal with their lack of skills and education.”⁵ Then-Attorney General William Barr similarly acknowledged that “what Congress intended with this bipartisan bill” was to create “greater incentive to participate in

¹ Recidivism Reduction and Public Safety Act of 2014, S. 1675 (113th Cong.).

² FSA Time Credits, 85 Fed. Reg. 75268 (proposed Nov. 25, 2020) (hereinafter “Proposed Rule”).

³ First Step Act of 2018, Pub. L. 115–391, § 101 (Dec. 21, 2018), 132 Stat. 5194, 5198 (hereinafter “First Step Act”). Ineligible individuals can earn other benefits, as prescribed by BOP.

⁴ Federal Bureau of Prisons, An Overview of the First Step Act,

<https://www.bop.gov/inmates/fsa/overview.jsp#:~:text=Incentives%20for%20Success,yar%20of%20their%20sented%20served.&text=Eligible%20inmates%20can%20earn%20time%20credits%20towards%20pre%2Drelease%20custody> (last visited Dec. 18, 2020).

⁵ Floor Remarks, Sen. John Cornyn, May 9, 2018, <https://www.congress.gov/congressional-record/2018/05/09/senate-section/article/S2565-2>.

evidence-based programs that prepare them for productive lives after incarceration.”⁶ In doing so, we believed the Act would also reduce both prison costs and recidivism rates for incarcerated individuals.

Unfortunately, the proposed rule makes it harder than Congress intended for incarcerated individuals to earn time credits by: 1) unnecessarily delaying the date when individuals may begin earning time credits; 2) denying individuals the ability to earn time credits while in residential reentry centers (RRCs); and 3) restrictively defining when someone has participated in a “day” of programming for the purpose of earning time credits.⁷ In doing so, it reduces individuals’ incentives to participate in EBRRs and PAs and limits the Act’s ability to achieve its other goals. BOP should revise these provisions before finalizing the proposed rule. In making those revisions, BOP should also ensure that people are assigned to categories of programs that meet their needs, rather than specific programs, in order to ensure maximum access to credit-earning EBRRs.

Effective Date

The proposed rule fails to give individuals credit for programs they completed after the First Step Act became law on December 21, 2018. The Act provides that “[a] prisoner may not earn time credits under this paragraph for an evidence-based recidivism reduction program that the prisoner successfully completed . . . prior to the date of enactment of this subchapter.”⁸ “Enactment” is “the action or process of making into law,”⁹ which occurred when the First Step Act was signed into law on December 21, 2018. The proposed rule, however, states that an individual may only earn time credits for programs “successfully completed on or after January 15, 2020”¹⁰—more than a year after the date of enactment. Nor does the proposed rule explain why individuals are not eligible to earn time credits for programs completed between December 21, 2018 and January 15, 2020.¹¹ Allowing eligible individuals to earn time credits for all programs completed after December 21, 2018 is consistent with the text of the statute. The rule as drafted is not.

⁶ Press Release, Department of Justice Announces Enhancements to the Risk Assessment System and Updates on First Step Act Implementation, Jan. 15, 2020, <https://www.justice.gov/opa/pr/departments-justice-announces-enhancements-risk-assessment-system-and-updates-first-step-act>

⁷ These provisions are the most glaring problems with the proposed rule. However, our failure to discuss other portions of the proposed rule does not indicate that we agree with those provisions.

⁸ 18 U.S.C. 3632(d)(4)(B).

⁹ “Enactment,” Black’s Law Dictionary (11th ed. 2019).

¹⁰ Proposed Rule, at 75269.

¹¹ The Department of Justice has argued elsewhere that BOP is not required to assess each individual using the new risk and needs assessment until January 15, 2020, and that “BOP is not obligated to offer any programs until two years after the BOP completes” that assessment. *Lufrio v. Johns*, No. 5:19-cv-122 (S.D. Ga. Aug. 13, 2020), available at 2020 WL 5248556. It is true that “implementation of the [risk and needs assessment] system and recommendations by [the] Bureau of Prisons” does not become effective until “the date that the Attorney General completes and releases the risk and needs assessment system.” First Step Act §102(b)(2). However, that subsection (Section 102) defines only when time credits can be applied toward release, not how individuals may earn time credits (Section 101). As noted above, Section 101 clearly states when individuals may begin earning time credits. 18 U.S.C. 3632(d)(4)(B).

Time Credits in RRCs

The proposed rule also provides that “FSA Time Credits can only be earned while an inmate is in a Bureau facility, and will not be earned if an inmate is in a Residential Reentry Center or on home confinement.”¹² The proposed rule does not cite to any authority for this restriction, and this interpretation is not consistent with the goals of the First Step Act.

Allowing individuals to earn time credits while in RRCs is authorized by the First Step Act. The Act provides that “[t]ime credits earned . . . by prisoners who successfully participate in recidivism reduction programs or productive activities shall be applied toward time in prerelease custody or supervised release.”¹³ It defines “prisoner” as “a person who has been sentenced to a term of imprisonment pursuant to a conviction for a Federal criminal offense, or a person in the custody of the Bureau of Prisons.”¹⁴ Because “[p]re-release inmates at an RRC remain in Federal custody while serving a sentence imposed by a U.S. District Court or DC Superior Court,”¹⁵ they are “prisoners” for the purposes of the First Step Act. Nor does the First Step Act distinguish between “prisoners” who are serving their sentence in a BOP institution, in an RRC, or on home confinement in describing the time credit program.¹⁶ By its own terms, the statute allows BOP to award time credits to individuals incarcerated in an RRC toward time in supervised release.

Allowing individuals incarcerated in an RRC to earn time credits by participating in EBRs would further the purposes of the First Step Act. RRCs offer substance abuse treatment¹⁷ and other programs similar to those offered in BOP institutions. There is no reason to believe that a program offered in an RRC will reduce recidivism any less than one offered to an individual in prison. In fact, such programs may be more effective, as individuals are close to release from custody and can begin putting lessons learned into practice as they transition home. BOP should revise the proposed rule to allow individuals to earn time credits while in an RRC.

Definition of a “Day”

The proposed rule’s definition of a “day” of program participation does not adequately reward engagement with EBRs and PAs consistent with the First Step Act. The Independent Review

¹² Proposed Rule, at 75269.

¹³ 18 U.S.C. § 3632(d)(4)(C).

¹⁴ 18 U.S.C. § 3635(4).

¹⁵ Federal Bureau of Prisons, Completing the transition. Reentry assistance reduces recidivism, https://www.bop.gov/about/facilities/residential_reentry_management_centers.jsp#:~:text=RRCs%20offer%20drug%20testing%20and,treatment%20by%20contracted%20treatment%20providers (last visited Jan. 6, 2020).

¹⁶ See 18 U.S.C. § 3632(d)(4)(B) (stating that individuals may not earn time credits for programs completed before the statute’s enactment date or before they are sentenced; 18 U.S.C. 3632(d)(4)(D) (defining “ineligible prisoners” based on charge, not place of incarceration).

¹⁷ Federal Bureau of Prisons, Completing the transition. Reentry assistance reduces recidivism, https://www.bop.gov/about/facilities/residential_reentry_management_centers.jsp#:~:text=RRCs%20offer%20drug%20testing%20and,treatment%20by%20contracted%20treatment%20providers (last visited Jan. 6, 2020).

Committee (IRC) created by the First Step Act has expressed similar concerns about this definition.¹⁸

The First Step Act provides that individuals “shall earn 10 days of Time Credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities.”¹⁹ The proposed rule defines “[a] ‘day’ . . . as one eight hour-period of a successfully completed Evidence-Based Recidivism Reduction program or Productive Activity.”²⁰ Because BOP programs do not run for eight hours per day, the proposed rule would require individuals to attend an EBRR or PA for several calendar days before they earned a full “day” of time credit.

It was not our intent as drafters of the legislation that BOP define a “day” in this way. Nor did Congress ever consider it.

As noted by the IRC, “[o]nly 14 of those 71 so-far-designated [EBRRs and productive activities] involve a sufficient number of programming hours, by themselves, for an inmate to reach the ‘30 days of participation’ benchmark necessary to obtain 10 days of [earned time credits]. Many of these 14 . . . are currently available at only a few BOP facilities and/or serve a very small number of inmates.”²¹ As shown in the chart below, participants may successfully participate in some programs for months only to earn a day of time credit under the proposed rule.

<i>Program</i> ²²	<i>Length of Program</i>	<i>Time Credit Based on Eight Hour “Days” Participated</i>
Non-Residential Substance Abuse Program	3-6 months (24 hours)	1 day
Basic Cognitive Skills	12 weeks (24 hours)	1 day
Resolve Program	40 weeks (40 hours)	1.67 days

The time credits awarded by the proposed rule are paltry compared to the sanctions it creates. For example, a single Moderate Severity act—which can include offenses like “being unsanitary or untidy”—cause individuals to forfeit up to 30 days of FSA Time Credits,²³ wiping out months of program participation.

The proposed rule’s narrow definition of a “day” does not adequately incentivize program participation and reduce recidivism as intended by the First Step Act. Coupled with lack of

¹⁸ Report of the Independent Review Committee Report Pursuant to the Requirements of Title I Section 107(g) of the First Step Act (FSA) of 2018 (P.L. 115-391), at 5-6 (Dec. 21, 2020), available at <https://firststepact-irc.org/wp-content/uploads/2020/12/IRC-FSA-Title-I-Section-107g-Report-12-21-20.pdf> (hereinafter “IRC Report”).

¹⁹ 18 U.S.C. 3632(d)(4)(A)(i).

²⁰ Proposed Rule, at 75269.

²¹ IRC Report at 5-6.

²² *Id.*

²³ U.S. Dep’t of Justice, Federal Bureau of Prisons, Policy No. 5270.09: Inmate Discipline Program (eff. Aug. 1, 2011), available at https://www.bop.gov/policy/progstat/5270_009.pdf.

access to the necessary EBRRs, some could interpret the rule as an indication that the system is unfair, which could increase their risk of recidivism.²⁴

We recommend that BOP institute an alternative method of calculating First Step Act time credits in order to create a stronger, more effective, and more equitable incentive for completion of programming and productive activities, a core goal of the legislation. We also recommend that BOP increase the number of facilities at which existing high-intensity programs are currently available.

Program Assignments

As BOP finalizes and implements its proposed rule, it should ensure that individuals are assigned to categories of programs that meet their needs, rather than specific programs, to allow for maximum participation in credit-earning EBRRs and PAs.

In order to increase access to programs in prisons, the First Step Act included provisions allowing BOP to expand its partnerships with external organizations, including faith-based groups. The Act also directs that “participation in a faith-based program, treatment, or regimen may qualify a prisoner for earned time credit.”²⁵ In doing so, Congress sought to recognize the value of job training, social, and family development programs offered by faith-based groups, and to increase the number of program offerings available to incarcerated individuals. In practice, a particular facility may offer two or more classes that meet particular needs, including faith-based options.

The proposed rule only allows incarcerated individuals to earn time credits following completion of an EBRR or PA “that is *assigned* to the inmate based on the inmate’s risk and needs assessment [emphasis added].”²⁶ As BOP finalizes and implements this rule, we encourage the Bureau to assign individuals to categories of programs that meet their needs (i.e., cognitive-behavioral therapy, substance use, job training, etc.) rather than specific programs. Each program at a facility should be appropriately categorized, including faith-based programs. Such flexibility will ensure that individuals can freely choose to participate or not participate in faith-based options. It is also critical to allow for greater program access as BOP expands its offerings, as some programs have limited capacity or may not be offered at particular facilities.

Conclusion

As currently drafted, the proposed rule unnecessarily limits incarcerated individuals’ ability to earn time credits, preventing the First Step Act from achieving its goals of reducing prison costs and incentivizing rehabilitation. These provisions are not mandated by the statute or its legislative history, and are contrary to the intent of Congress. In order to ensure that the First


²⁴ See, e.g., Tom Tyler, *Why People Obey the Law* (2006).

²⁵ First Step Act § 106.

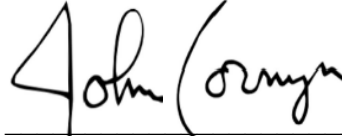
²⁶ Proposed Rule, at 75269, 75271-71.

Step Act can fulfill its promise of prison reform, BOP should revise these provisions before the rule is finalized.

Sincerely,



Sheldon Whitehouse
United States Senator



John Cornyn
United States Senator