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Counsel and Director of First Step Act Resource Center

On Behalf of the
National Association of Criminal Defense Lawyers

Department of Justice Listening Session on First Step Act Implementation
July 26, 2021

The National Association of Criminal Defense Lawyers (NACDL) appreciates this opportunity to comment on the sentencing and correction reform components of the First Step Act of 2018 and home confinement.[1] Two pillars of NACDL's mission are advocating for proportionality and fairness in sentencing and eliminating barriers to successful reintegration faced by formerly incarcerated persons. NACDL supported the passage of the First Step Act ("FSA") because it would reduce sentences for thousands of defendants and prisoners. In addition, NACDL supports systemic, evidence-based practices to reduce the nation's prison population and prepare incarcerated persons to reenter society.

[1] The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crimes or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries – and nearly 40,000 members of 90 affiliated state, provincial and local organizations – include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

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FIRST STEP ACT CORRECTIONS REFORMS

Earned Time Credit Rule

NACDL has previously submitted our Comment on the Proposed Federal Bureau of Prisons Earned Time Credits Rule, which we incorporate here.[2] In the Comment, NACDL urged the Bureau of Prisons ("BOP") not to enact the proposed rule because it is unduly parsimonious, at odds with the intent of the First Step Act and fails to ensure sufficient FSA credits for prison employment.

Risk and Needs Assessment: Transparency Concerns

NACDL has long advocated for greater transparency in the Department's development and implementation of the risk and needs assessment tool, PATTERN.[3] However, the Department has not yet sufficiently addressed these concerns. For example, despite our requests as well as requests from other stakeholders,[4] the Department has not released the data needed to fully assess long-standing concerns about PATTERN's potential for racial bias and disparity. Moreover, earlier this year, the National Institute of Justice ("NIJ") reported numerous

[2] *See* NACDL, FAMM and JAN Comment on Proposed Federal Bureau of Prisons FSA Earned Time Credits Rule, (August 26, 2019), attached as Addendum 1.
[3] *See* Statement of NACDL Exec. Dir. Norman Reimer before the H. Comm. on the Judiciary Subcomm. on Crime, Terrorism and Homeland Sec. (August 26, 2019), available at: https://docs.house.gov/meetings/JU/JU08/20191017/110089/HHRG-116-JU08-20191017-SD003.pdf
[4] *See* Nat'l Inst. Justice, *Stakeholder Statements Submitted in Response to NIJ's* First Step Act *Listening Sessions* (Jul. 2020), https:// https://www.ojp.gov/pdffiles1/nij/253115.pdf.

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"identified errors or inconsistencies" within PATTERN that would "require correction and reestimation of the regression models."[5] These errors exist to such a degree that the NIJ consultants could not revalidate PATTERN and deferred revalidation "until corrections to the risk tool are made." To date, there is no information suggesting that these corrections have been made or that PATTERN has been validated.

The lack of transparency regarding PATTERN has significantly impacted those individuals seeking CARES Act home confinement and compassionate release. Although PATTERN was not intended to be used in this manner, at the beginning of the COVID-19 pandemic, BOP began using PATTERN as one of the criteria to determine whether an individual is eligible for CARES Act home confinement.[6] For compassionate release, PATTERN scores have often been used by prosecutors to oppose motions and by federal judges to deny reduced sentences to sick and elderly prisoners vulnerable to COVID-19.[7]

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[5] *See* Nat'l Inst. Justice, *2020 Review and Revalidation of the First Step Act Risk Assessment Tool* at 7 (Jan. 2021), available at: https:// https://www.ojp.gov/library/publications/2020-review-and-revalidation-first-step-act-risk-assessment-tool ("NIJ Report") ("Due to the identified errors or inconsistencies found, the revalidation of the risk assessment tool will be deferred until corrections to the risk tool are made.").

[6] Memorandum from Andre Matevousian, Ass't Dir., Correctional Programs Division & Sonya D. Thompson, Ass't Dir. Reentry Servs. Division & M.D. Smith, Ass't Dir. Health Servs. Division to Chief Executive Officers, *Re: Home Confinement* (Apr. 13, 2021), https://www.fd.org/sites/default/files/news/2021.4.13_-_bop_home_confinement_cares_memo.pdf.

[7] *See, e.g., United States v. Wilson*, No. 4:14-CR-40032-SLD, 2021 WL 2301911, at *3 (C.D. Ill. June 4, 2021) (denying motion for compassionate release despite significant rehabilitative efforts in prison, citing, *inter alia,* defendants medium PATTERN score); *United States v. Johnson*, No. 2:16-CR-00163-01, 2021 WL

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Using PATTERN in this manner is incredibly problematic for two reasons. First, as noted above, the NIJ consultants could not even validate PATTERN due to errors and inconsistencies. Further, they have never fully explained what effect these errors have had on individuals' PATTERN scores or confirmed if any errors have been corrected. As such, it is unclear if individuals have been denied release under CARES Act and compassionate release based on erroneous PATTERN scores. Second, BOP typically will not provide federal prisoners with their official PATTERN scores or scoring sheets. While the government seems to have ready access to these documents and can use a medium or high PATTERN score against a defendant in a compassionate release response, the defendant is not permitted access to the underlying data to determine if this score was calculated correctly. Additionally, a defendant with a low or minimum score often receives no documentation to support this low score in his motion, thereby creating yet another obstacle to overcome when pursuing a sentence reduction or home confinement.

In light of these issues, and since PATTERN is still being used in life-or-death scenarios for federal prisoners, we request that the Department direct the BOP to make PATTERN scores and scoring sheets available to all federal prisoners. If the scores have changed, we request that the individual be given access to past scores and scoring sheets as well. Doing so would allow

297131, at *4 (S.D.W. Va. Jan. 28, 2021) (denying motion for reduced sentence under 18 U.S.C. § 3582(c)(1)(A), based in part on defendant's medium PATTERN score).

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the individual to use a low or minimum PATTERN score to support their sentence reduction motion or their request for CARES Act home confinement. Further, granting individuals access to their PATTERN scores and worksheets helps ensure that there are no errors with the PATTERN score that might unfairly prevent the individual from being released on compassionate release or CARES Act home confinement and ensures generally that PATTERN is being applied fairly to all individuals in federal prison.

SENTENCING REFORMS

Compassionate Release

NACDL has a longstanding commitment to decarceration through our clemency work and, most recently, through our efforts to maximize the relief available to federal prisoners through the First Step Act. While we have created and supported many First Step Act initiatives, our largest projects have focused on compassionate release. With our partners, we launched two pro bono compassionate release projects: the Federal Compassionate Release Clearinghouse COVID-19 Project, which focuses on those elderly and sick federal prisoners most vulnerable to COVID-19, and the Excessive Sentence Compassionate Release Project, which recruits and trains pro bono attorneys to file compassionate release motions on behalf of federal prisoners whose sentences are too long, either because they would receive a much lower

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sentences today due to intervening changes in the law or because their original sentence was simply unjust.

Since the launch of our Federal Compassionate Release COVID-19 Project in April 2020, nine out of ten Courts of Appeals have ruled that district courts have broad discretion to determine what are extraordinary and compelling reasons warranting compassionate release.[8] The majority of Courts of Appeals have also agreed that those serving extreme sentences that would not apply today due to intervening changes in the law are also deserving of compassionate release.[9] These holdings have given district courts the discretion to reduce the sentences of incredibly deserving individuals who now have the opportunity to rebuild their lives and reunite with their families.

Not everyone who files for compassionate release will receive a sentence reduction. There is no automatic vacatur and resentencing. According to the Sentencing Commission, 80%

[8] *Compare United States v. Brooker*, 976 F.3d 228, 231 (2d Cir. 2020); *United States v. McCoy*, 981F.3d 271, 276 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 392-393 (5th Cir. 2021); *United States v. Jones*, 9980 F.3d 1098, 1109-1111 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d1178, 1180 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. Long*, 997 F.3d 342 (D.C. Cir. 2021), *with United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021), *petition for cert. filed*, *Bryant v. United States*, No. 20-1732

[9] *Compare United States v. McCoy*, 981 F.3d 271, 287 (4th Cir. 2021); *United States v. Cooper*, 996 F.3d 283, 288-289 & n. 5 (5th Cir. 2021); *United States v. Owens*, 996 F.3d 755, 760 (6th Cir. 2021); ; *United States v. McGee*, 982 F.3d 1035, 1045-1048 (10th Cir. 2021), *with United States v. Thacker*,---F.4th---, No. 20-2943 (7th Cir. July 15, 2021); *United States v. Jarvis*, 999 F.3d 442 (6th Cir. 2021).

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of compassionate release motions have been denied since January 2020.[10] In determining every case, an Article III judge ensures that procedural guardrails are in place. Whether the defendant is sick and highly vulnerable to COVID or a 20-year-old given a de facto life sentence after trial based on stacked § 924(c)s—each case has a federal judge at the helm who makes an individualized determination as to whether a reduced sentence is warranted.[11]

Despite the health risks and the Administration's concerns about overly punitive sentences, government attorneys have vigorously opposed the vast majority of compassionate release motions—even in the most sympathetic cases.[12] The result of this constant opposition is that, as of May 2021, the government has jointly supported only 70 compassionate release motions.[13]

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[10] *See* USSC, 2020 Compassionate Release Data Report (2021) at Table 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210714-Compassionate-Release.pdf.

[11] *See McCoy*, 981 F.3d at 286 ("We emphasize, as did the district courts, that these judgments were the product of individualized assessments of each defendant's sentence . . ." which relied " not only on the defendants' § 924(c) sentences but on full consideration of the defendants' individual circumstances.")

[12] *See, e.g., United States v. Elias-Estrada*, 6:06CR96, ECF No. 208 (E.D. Ky. July 1, 2021 (government opposition to § 3582(c)(1)(A) motion for bedridden, terminally ill 90-year-old serving a life sentence for a non-violent marijuana conspiracy based on §851s, one of which would not qualify today); *United States v. Estrada*, 2:11CR20192, ECF No. 1546 (W.D. Tenn. Oct. 9, 2020) (government opposition to compassionate release motion for defendant serving a 20-year sentence for a non-violent marijuana conspiracy and suffering from end-stage organ failure due to kidney disease, chronic hypertension, diabetes, and coronary heart disease; Mr. Estrada subsequently contracted COVID and died two months later in prison; https://www.bop.gov/resources/news/pdfs/202012292_press_release_spg.pdf).

[13] *See* USSC, 2020 Compassionate Release Data Report (July 2021) at Table 4.

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To ensure that Congress' intent of increasing the use and transparency of compassionate release is followed, NACDL urges the Department to grant Assistant United States Attorneys greater discretion to join in defendant-filed compassionate release motions where the facts demonstrate that a sentence reduction is warranted. We also request that the Department no longer support a policy of blanket opposition to compassionate release motions based on non-retroactive changes in the law. To that end, we ask that the Department confess error in response to the petition for writ of certiorari in *United States v. Bryan*t and the petitions for rehearing *en banc* in United States v. Jarvis and *United States v. Thacker*.

Finally, when the Sentencing Commission obtains a quorum and seeks to write a new policy statement governing compassionate release, we ask that the Department encourage the Commission to develop a policy statement defining "extraordinary and compelling reasons" in a manner that preserves judicial discretion.

CARES Act Home Confinement

In light of the Office of Legal Counsel Memo ("OLC Memo") filed in the final days of the last administration, there now exists the very real and disturbing possibility that thousands of people will be sent back to prison even though the BOP has made individualized determinations that they are no longer a danger to society. These individuals have complied with their conditions of release, reintegrated into society, obtained jobs, signed leases, enrolled

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their children in schools but will be ripped from their lives and sent to prison unless action is taken.

We are profoundly disappointed by the Administration's decision thus far not to rescind the OLC memo, which we believe is in direct conflict with the text of the CARES Act. If the Administration is truly committed to reducing incarceration and helping people re-enter society, it is imperative that steps are immediately taken to ensure that individuals on home confinement –who have already demonstrated their commitment to rehabilitation—remain free.

Accordingly, we encourage the Administration to reconsider the OLC memo to allow thousands of rehabilitated, law-abiding individuals to remain out of prison, with their families, and working in their communities. Alternatively, there are the following options:

1) The President can use his clemency power to commute the sentences of the approximately 4000 individuals on CARES Act home confinement;

2) The Department can direct the BOP to file sentence reduction motions for those on CARES Act home confinement under 18 U.S.C. § 3582(c)1)(A). BOP, notably, is in the best position of knowing all individuals who are on home confinement, and there is a much greater likelihood that federal courts will follow the BOP's recommendations;

3) The Department can support defendant-filed compassionate release motions by those on CARES Act home confinement. For this endeavor to be successful, the Department must provide the names of those on CARES Act home confinement to

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Federal Defender offices as well as NACDL and FAMM—the organizations best able to train pro bono attorneys to file compassionate release motions when Federal Defenders cannot. Most importantly, we encourage the Department to direct U.S. Attorney's Offices to join in these compassionate release motions.

Retroactive Application of the Fair Sentencing Act of 2010

Since the passage of the First Step Act in 2018, Federal Defender offices have represented those individuals seeking reduced sentences under section 404 of the First Step Act. However, in the two districts without Defender offices, the Eastern District of Kentucky and the Southern District of Georgia, prisoners have been forced to proceed pro se. NACDL has endeavored to fill the gap for defendants in these districts by recruiting and training pro bono attorneys to file sentence reduction motions on their behalf. However, many prisoners are not aware that pro bono counsel might be available. It is also likely that some prisoners in those districts were never made aware of the fact they were entitled to such relief under the FSA and have not yet filed their sentence reduction motions. Accordingly, NACDL requests that the Department direct the Sentencing Commission to provide NACDL with a list of defendants in the EDKY and the SDGA potentially eligible for relief under section 404 of the First Step Act. In doing so, the Department can ensure that no eligible defendant is left behind in these two districts.

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Finally, while much of the litigation surrounding § 404 motions has resolved, at least one issue remains involving the interpretation of § 404(b) of the First Step Act. Specifically, a circuit split currently exists as to whether courts can reduce sentences under § 404(b) for defendants found to be eligible for relief under § 404(a) by "looking at the minimum drug quantity associated with the eligible defendant's offense of conviction," rather than being bound by the judge-found underlying conduct.[14] Based on the Department's position in *White*, it appears to agree that § 404(a) and § 404(b) should be applied according to the applicable statutory elements in the case, not underlying conduct. Accordingly, we request that the Department clearly announce its position, supported by the decisions in *White* and *Broadway*, that § 404(b) is based on the elements of the statutory offense rather than judge-found sentencing quantities.

Safety-Valve

Section 402 of the FSA expanded the federal drug safety valve, increasing eligibility for relief below mandatory minimum penalties. The amended safety valve statute provides that

[14] *See United States v. Broadway*, 1 F.4th 1206, 1211 (10th Cir. 2021) ("[T]he district court should look to the minimum quantity of drugs associated with an eligible defendant's offense of conviction, rather than his underlying conduct, to determine whether the Fair Sentencing Act would have affected his sentence had it been in effect at the time of the defendant's crime"); *see also United States v. White*, 984 F.3d 76 (D.C. Cir. 2020)("there is no additional 'availability' requirement in section 404 beyond the covered offense requirement in section 404(a) and the limitations set forth in section 404(c)"). *But see United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020) (finding that under § 404(b), the district court must calculate the sentencing range applicable to the reduction as if it were conducting the analysis at the time of the original sentencing).

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relief is available if an individual does not have (1) more than 4 criminal history points, (2) a 2-point violent offense, *and* (3) a 3-point offense. *See* 18 U.S.C. § 3553(f) (emphasis added). Consistent with the plain meaning and structure of the statute, the Ninth Circuit has interpreted the word "and" conjunctively.[15] We request that the Department of Justice adopt this plain language interpretation of the safety valve statute.

The First Step Act offers a meaningful opportunity to move away from a retributive model of punishment to a more humane model based on rehabilitation. To realize the promise of the First Step Act, NACDL encourages the Department of Justice to offer full transparency in the implementation of the First Step Act's corrections reforms and to support sentencing reform measures and policies that provide meaningful opportunities to reduce mass incarceration and promote fairness in the sentencing process. NACDL wishes to support the Department in this work and welcomes any future opportunities for feedback and discussion about First Step Act implementation.

[15] *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021) (affirming district court conclusion a single vandalism conviction for which an individual ultimately served more than 13 months' imprisonment did not disqualify individual from sentence below mandatory minimum). But see *United States v. Garcon*, 997 F.3d 1301, 1306 (11th Cir. 2021) (holding that the word "and" in the safety valve statute is disjunctive).

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ADDENDUM 1

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NACDL, FAMM and JAN Comment on Proposed Federal Bureau of Prisons FSA Earned Time Credits Rule

The National Association of Criminal Defense Lawyers (NACDL), FAMM, and Justice Action Network (JAN), write to comment on the rule proposed by the Bureau of Prisons (BOP) regarding time credits as authorized by the First Step Act of 2018 (FSA). *See* 85 C.F.R. 75268 (November 25, 2020). NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. NACDL believes that the First Step Act ("FSA") is a meaningful step away from our retributive model of punishment to one based on rehabilitation but that the law's full promise depends on faithful and robust implementation. FAMM is a non-profit, non-partisan criminal justice reform organization, uniting the voices of thousands of people incarcerated in the BOP and their loved ones on the outside. FAMM supported the FSA, and our members are keenly interested in ensuring the earned time credits rule fully and accurately advances the letter and spirit of the FSA. JAN is the largest bipartisan 501(c)(4) organization in the country advocating for criminal justice reform at the state and federal levels.

The proposed rule would define a "day" of participation in a qualifying Evidence-Based Recidivism Reduction Program (EBRRP) or Productive Activity (PA) as an eight-hour period of a program or activity, without regard for its nature or intensity, or for how many days of participation were required to reach the eight-hour threshold. The proposed rule, if applied in conjunction with the information in BOP's published list of EBRRPs and PAs, would appear to cap the credits awarded for UNICOR employment regardless of its duration. The proposed rule in conjunction with the BOP list also appears to award no FSA credit at all for routine prison employment outside UNICOR. The proposed rule would provide no time credits for individuals whose participation in a program is entirely successful but who are unable to complete the program through no fault of their own. Finally, the proposed rule also excludes time credits for individuals engaged in EBRRPs and PAs in a Residential Reentry Center (RRC) or on home confinement, contrary to the requirement that individuals in BOP custody be afforded programs, activities, and credits.

We urge BOP not to enact this proposed rule. For the reasons discussed below, the proposed rule is unduly parsimonious, at odds with the intent of the FSA, and fails to ensure sufficient FSA credits for prison employment. A better rule would provide that a day means a day, and that every day an individual successfully participates in a qualifying EBRRP or PA, including regularly required prison work assignments, is a day that should count for earning FSA time credits.

I. The First Step Act

Congress passed the FSA with one overarching intent – to incentivize prisoners to engage in recidivism-reducing activity. The chief incentive is the early release of some low-risk prisoners, which has the added benefit of reducing the federal prison population. The law accomplishes its intent in part by mandating the provision of time credits in terms that are not ambiguous. All eligible prisoners "shall" earn time credits as follows:

> (i) A prisoner shall earn 10 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities.
>
> (ii) A prisoner determined by the Bureau of Prisons to be at a minimum or low risk for recidivating, who, over two consecutive assessments, has not increased their risk of recidivism, shall earn an additional five days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities.

18 U.S.C. Section 3632(d)(4)(A). These credits are to be applied as time spent in prerelease custody or supervised release during what would otherwise be the end of the individual's imposed prison term.

II. The Proposed BOP Rule

BOP has published a proposed rule to address the procedures for earning, awarding, loss, and restoration of FSA time credits. Rather than track the language of the FSA and provide a day of credit for every day of successful participation in an EBRRP or PA, BOP proposes to define a day as "one eight-hour period" of participation. Thus, for an individual to earn ten "days" of credit under the proposed rule, one would be required to successfully complete 240 hours in an EBRRP or PA, regardless of how many actual days the individual is successful in their participation in such programs or activities.[1] Nothing in the FSA references "hours" of successful participation, and BOP offers no basis or rationale for its proposed "eight hour-per-day" time-credit calculation. In addition, the proposed rule provides that prisoners do not receive any credits for their successful participation in a program unless and until they have completed the program. BOP's proposed rule also creates a series of new rules allowing it to take away credits after they have been earned and erects steep barriers to the restoration of these credits.

We believe the proposed rule is unduly parsimonious and inconsistent with both the text and the intent of the FSA. Rather than realize the full potential of the FSA through the provision of a day of credit for every day an individual does everything they are supposed to do in a specifically designed and assigned EBRRP or PA, the proposed rule would largely eviscerate the effect of the FSA because most EBRRPs are conducted for only a few hours each day.

[1] 240 hours at eight hours per day would equate to 30 days of participation, which would earn all eligible inmates ten days of credits, and some minimal and low risk inmates 15 days of credits.

The goals of the FSA may be further and dramatically frustrated if regularly required prison work assignments are not considered a PA. The proposed rule does not appear to permit workers to earn ETCs for prison employment other than employment in UNICOR.

BOP has published a list of currently available EBRRPs and PAs. The list provides information regarding 21 EBRRPs and 50 PAs, including the frequency and duration of each program or activity. Significantly, the list includes a number of *hours* BOP intends to award upon successful completion of each program or activity. It is unclear how BOP intends its rule to interface with its list, but presumably, it means to award only the number of hours on its list in the application of its proposed rule.

Assuming BOP would award hours under its rule in accordance with its list, significant concerns arise. First, there does not appear to be any coherent principal that underlies the hours assigned to EBRRPs and PAs in the list. Many of the programs of short duration and infrequent sessions are awarded straight hour-for-hour credit. A program that lasts eight weeks and meets for one hour each week is awarded eight hours. But, no common principal underlies the hours to be awarded for longer programs. BOP proposes to award the same 500 hours of credit for successful completion of a 20-hour-per week EBRRP that lasts six months (the "BRAVE" program) as it will award for programs of the same frequency that last 18 months (*e.g.*, the "Life Connections" Programs). There is a lack of clarity about how the BOP list might interface with its proposed rule, but under any scenario, there should be a consistent principal underlying the awarding of FSA time credits.

A second concern is that the BOP list contains a 500-hour cap on EBRRPs of *indefinite* duration, including employment with Federal Prison Industries. No matter how many days an employee works at a UNICOR job, whether it be 63 eight-hour days or 63 months' worth of eight-hour days, the result would be the same – no more than 63 days of participation and thus no more than 30 days of time credits. No statutory authority is apparent for such a cap on FSA credits.

A third and related concern raised by the BOP list is what it does *not* include – any other prison employment outside UNICOR. Regularly required prison work assignments performed every day by individuals in every BOP facility are clearly activities that are productive. Indeed, these activities are essential to the functioning of every BOP facility. Nevertheless, prison employment outside of UNICOR is not included on BOP's list as either an EBRRP or a PA.[2] Thus, it would appear possible that BOP intends under its proposed rule to award no FSA time credits at all for prison employment outside UNICOR.

The FSA defines "productive activity" as activity designed to allow prisoners to remain productive and "thereby maintain a minimum or low risk of recidivating . . . ." 18 U.S.C. § 3635 (5). The BOP requires all prisoners who are physically and mentally able to participate in work programs as outlined in the program statement governing Inmate Work and Performance Pay

[2] BOP has not identified the organizing principle it used to distinguish EBRRPs from PAs in its list, but the FSA specifically included "a prison job" as an example of what might qualify as an EBRRP. 18 U.S.C. § 3636(3)(C)(xi).

("Inmate Work Program"). *See* BOP P.S. 5251.06 1.a. (2). The Inmate Work Program is designed to allow "the inmate to improve and/or develop useful job skills, work habits, and experiences that will assist in post-release employment . . . ." *Id*. at 1. a. (1).

The impact of having an income derived from employment on recidivism is evident. Employment has long been recognized as having a negative correlation with crime. *See, e.g.,* Tianyin Yu, Employment and Recidivism, Evidence-Based Community Society Blog on Continued Evidence-Based Education (January 30, 2018) (collecting studies).

The BOP's Inmate Work Program requires prisoners to hold down a job, unless they are engaged in other – equally recidivism-reducing – activities such as drug treatment, education or vocational training. P.S. 5251.06 1.a. (2). Wardens must ensure standardized work descriptions and grade levels. *Id*. at 7.a. Employed workers can expect pay scales, performance bonuses and even paid vacations. *Id*. at 1.b. and 3.b. The workday is seven hours and prisoners are paid monthly if work performance is satisfactory. *Id*. at 5.a. and 6.b.

Far from being make-work activity, the assignments meet day-to-day operating needs of the institutions, such as carpentry, plumbing, and food service. *Id*. at 2.b. The work of prisoners is thus not only productive with respect to their own development; it also provides "[n]ecessary institution operations and services [that] will be completed through the use of inmate work." *Id*. at 1. d. So essential is this productive activity of prisoner work that the BOP uses Performance Pay Coordinators who manage work details, job descriptions, performance standards, and budgeting for special and bonus pay. *Id*. at 3.b.

Limiting credits for an unlimited amount of UNICOR work to 30 days, while awarding zero credits for all other prison employment, would largely eviscerate the impact of the FSA and its provision of time credits. If this is indeed BOP's intent, it has offered no explanation or justification for this outcome, and it is contrary to the plain language of the FSA.

Fourth, the BOP's proposed requirement that incarcerated individuals complete programs before being awarded any credits for their successful participation in the program is unduly restrictive. There are many reasons one might not complete a program through no fault of their own. Moreover, even where an individual is at fault in failing to complete a program, FSA time credits should be awarded for every day of successful participation, especially for programs or activities of indefinite duration such as employment.

Fifth, the FSA requires the award of time credits for an eligible "prisoner," which is defined to include "a person in the custody of the Bureau of Prisons." 18 U.S.C. § 3635(4). Although persons in RRCs and on home confinement continue to be "in the custody of" the BOP,[3]

[3] Individuals sentenced to a term of imprisonment remain in the custody of the BOP "until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624." See 18 U.S.C. § 3621 (a). The referenced earlier release refers to the effect that statutory good time shortens the individual's sentence. *See* 18 U.S.C. § 3624 (b). Given that individuals in community confinement are required to seek and maintain employment, it would stand to reason that they should be awarded credit toward home confinement.

the proposed rule would deny time credits earned by them. This aspect of the rule is contrary to the text of the FSA, and BOP offers no basis for how it would further the purposes of the statute.[4]

Finally, the proposed rule provides for the loss of time credits even after they have been earned for literally any violation of a prison rule or the requirements or rules of a program or activity. Even the most minor infraction can result in the loss of credits that may have required months if not years of successful participation in programs or activities to earn. Moreover, the proposed rule would allow restoration of these lost credits only after "clear conduct for at least four consecutive risk and needs assessments." Given that the FSA does not require assessments more often that once a year, 18 U.S.C. § 3632(d)(5), the years required for a prisoner to restore lost credits may well exceed their sentence. The BOP has offered no rationale or justification for this harshly punitive regime of time credit losses.

III. A Better Rule

We urge the BOP to implement a rule that is consistent with the plain language of the FSA. Individuals should receive a day of FSA time credits for every day that they successfully participate in an EBRRP or PA. Simply stated, a day should mean a day. We can appreciate that there may be a need for greater nuance in the awarding of credits for especially intensive programs and that proper incentives are important to align individual participation with the most effective programming. But, the work of these finer calibrations can readily be accomplished in the context of a rule that begins with the proposition that, at a minimum, a day of successful participation should yield a day of credit. We urge BOP to consider all prison employment a PA, and respectfully submit that any cap on the credits to be awarded for qualifying prison employment would be contrary to the FSA's plain text. Finally, earned credits should only be lost for serious violations of rules, and prisoners should be able to restore lost credits if they are able to maintain clear conduct for one year rather than four.

Please contact Elizabeth Blackwood, Counsel and Director of NACDL's First Step Act Resource Center at eblackwood@nacdl.org or Mary Price, General Counsel at FAMM at MPrice@famm.org if we can be of any assistance.

Respectfully submitted,

FAMM

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[4]Additionally, the restriction in the proposed rule permitting credits only where the program or activity has been "assigned" based on their risk and needs assessments is problematic in light of the fact that BOP has yet to develop a true needs assessment system of the kind "Congress appears to have had in mind with FSA Title I." Report of the Independent Review Committee, https://firststepact-irc.org/wp-content/uploads/2020/12/IRC-FSA-Title-I-Section-107g-Report-12-21-20.pdf, at p.4.