

Rules Unit  
Office of the General Counsel  
Bureau of Prisons  
320 First Street NW  
Washington, D.C. 20534

[Revised Submission]

**RE: BOP Docket No. 1151-I  
Interim Rule Change**

To Whom It May Concern:

Please accept this letter as the American Bar Association's comment on the Bureau of Prisons' revised rules relating to community confinement at 28 C.F.R. part 570, subpart B, adopted to conform to the requirements of the Second Chance Act of 2007. *See* 73 Fed. Reg. 62,440, 62,441 (Oct. 21, 2008).

The ABA has consistently encouraged jurisdictions to develop appropriate alternatives to incarceration for criminal offenders, including community-based sanctions such as halfway houses and home confinement. We hope therefore that BOP will take maximum advantage of every tool Congress has provided or allowed to place offenders in community corrections facilities as opposed to higher security and more costly confinement space. The burgeoning cost of imprisonment alone underscores the wisdom and practicality of such an approach, one we believe is embodied in the Second Chance Act.

When measured against this standard, the interim rule falls well short of the mark, giving corrections officials little or no guidance as to when halfway house placement or home confinement may be appropriate in the pre-release context. The lack of specificity in the rule, and the lack of opportunity for comment by interested parties before the rule was issued, raise concerns about whether and to what extent BOP intends to modify its current designation practices. These concerns are underscored by public positions taken by BOP officials since passage of the Act. We therefore urge BOP to provide additional and more detailed policy guidance on community corrections placements, along the lines suggested below, in the very near future.

The Second Chance Act expands BOP's affirmative duty under 18 U.S.C. § 3624(c) to ensure that ("to the extent practicable") all prisoners receive pre-release community-based placements for a 12-month period, in a halfway house or home confinement, unlimited (except as to home confinement) by any percentage of the prisoner's sentence. *See* 18 U.S.C. § 3624(c)(1). The Act also reaffirms BOP's independent authority under 18 U.S.C. § 3621(b)

to make individualized front-end or direct placements to halfway houses, stating that “nothing in this subsection shall be construed to limit or restrict the authority of the Director of the Bureau of Prisons under section 3621.” See § 3624(c)(4). To implement these changes to § 3624(c), the Act directs BOP to “issue regulations pursuant to this subsection . . . which shall ensure that placement in a community correctional facility by the Bureau of Prisons is – (A) conducted in a manner consistent with section 3621(b) of this title; (B) determined on an individual basis; and (C) of sufficient duration to provide the greatest likelihood of successful reintegration into the community.” See § 3624(c)(6).

The interim rule states in general terms that BOP will comply with the requirements of the Second Chance Act with respect to pre-release community confinement. However, it does not adopt a presumption in favor of a full 12 months’ pre-release community placement, as we believe Congress intended in enacting the Second Chance Act, or otherwise specify the circumstances under which a prisoner will spend a full 12 months in a community placement.

The interim rule is disappointing in light of BOP’s past reticence about using its full authority to place eligible offenders in community corrections facilities as opposed to prison. Indeed, shortly after enactment of the Second Chance Act, BOP announced that the new law would not result in any change in its policy and practice regarding pre-release designations. See Memorandum from Joyce K. Conley, Assistant Director Correctional Programs Division, Bureau of Prisons, Regarding Pre-Release Residential Reentry Center Placement Following the Second Chance Act of 2007, to Chief Executive Officers at 4 (April 14, 2008) (any pre-release placement in community confinement for a period greater than the six months provided in existing policy requires special written concurrence by the Regional Director). Driving home the point, in July 2008 BOP Director Harley Lappin stated at the United States Sentencing Commission’s Symposium on Alternatives to Incarceration, that BOP would continue presumptively to limit placement in a halfway house to a maximum of six months, based on “research that [the Bureau has] done for many years reflect[ing] that many offenders who spend more than six months in a halfway house tend to do worse rather than better.” See USSC, *Proceedings from the Symposium on Alternatives to Incarceration* at 267 (July 14-15, 2008). Congress has directed otherwise, however,

In light of the clear directive in the Second Chance Act that pre-release community placements should be for a full 12 months, without limitation as to sentence length, and in light of the equally clear past indications from BOP’s top management that its six-month policy will remain in place, we urge BOP to be more specific in this interim regulation about how it proposes to come into compliance with the new law.

For example, in light of Director Lappin’s suggestion that at least some individuals gain maximum advantage from a six-month stay in a halfway house, as opposed to a longer period of time, it seems imperative that BOP should address in this rule how it intends to use its authority to place individuals in home confinement, as authorized by 18 U.S.C. § 3624(c). Assuming for argument’s sake that it is true that some prisoners will not benefit from the full 12 months in a halfway house prior to release, in such cases it would seem appropriate to consider an additional period of home confinement as part of a reentry strategy. Many individuals may benefit from a six-month period in a halfway house followed by an additional six-month period in home confinement (or 10% of the individual’s sentence, if that is less). There is no reason that the rule should not expressly direct full use of both halfway house and

home confinement options, and BOP would clearly experience a significant cost savings by making use of this congressionally-authorized form of custody. .

Accordingly, we urge BOP to state in this interim regulation that it will use both its authority to designate to halfway houses and its authority to designate to home confinement to the maximum extent permitted by law, in cases where no public safety considerations dictate to the contrary. We have heard BOP officials speak frequently in recent years of the strains on the agency's budget. The resulting cost savings would seem to provide an added economic incentive for BOP to use its home confinement authority to the fullest.

In addition to addressing the above-mentioned issues of pre-release community confinement, BOP should take the opportunity presented by revision of its community designation regulation to clarify its policy on so-called "front-end" community placements. Specifically, BOP should make clear that it will fully resume the practice of designating individuals to halfway houses in appropriate cases, without regard to the time-frames set forth in 28 C.F.R. § 570.21(a). BOP's reluctance since 2002 to make front-end community placements has deprived it of an important tool for providing alternatives to incarceration in appropriate federal cases. To the extent BOP may still have questions about its legal authority to make such placements, passage of the Second Chance Act should have given it some assurance.

Finally, we hope BOP will also clarify in this interim rule that a prisoner eligible for a sentence reduction under 18 U.S.C. § 3621(e) for successful completion of a residential substance abuse program is not precluded from receiving consideration for the maximum 12-month reentry community placement available to all prisoners.

Since 2002, the American Bar Association has on several occasions urged jurisdictions to make maximum use of alternatives to incarceration in appropriate cases, most recently in February 2007 when it approved several reports issued by the ABA Commission on Effective Criminal Sanctions. The ABA has also recommended that governmental officials take the necessary steps to ease the transition from prison to the community, including assistance in finding transitional housing, job placement, substance abuse treatment, and other reentry services that community corrections facilities are ideally equipped to provide. The ABA therefore strongly encourages the Bureau of Prisons to make maximum use of community-based placements as an alternative to confinement in a secure penal institution and to make changes in its rules to achieve this objective.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Susman", with a long, sweeping underline.

Thomas M. Susman  
Director