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VIA ELECTRONIC SUBMISSION

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

**Re: Comments on Docket No. BOP-1176P, RIN 1120-AB76, “FSA
Time Credits”**

To Whom It May Concern:

On behalf of the Federal Public and Community Defenders, we comment on the Bureau of Prisons’ (BOP) proposed rule regarding the time credits created by the First Step Act of 2018 (FSA).¹

Described by a co-sponsor as “once-in-a-generation criminal justice reform,”² the FSA combined front-end sentencing reforms with back-end prison reforms to combat overincarceration, reduce recidivism, and enhance public safety. Recognizing that “the vast majority of federal prisoners will one day be released from BOP custody” and that it is in “the fiscal interest of the government to reduce recidivism [and] in the public safety interest as well,”³ Congress focused its prison reform measures on recidivism reduction. Chief among these reforms is a newly created incentive

¹ See 85 Fed. Reg. 75,268-75,273 (Nov. 25, 2020), <https://bit.ly/2LJQi6D> (proposing to codify BOP procedures regarding time credits authorized by the First Step Act of 2018, Pub. L. No. 115-391, §§ 101-102, 132 Stat. 5194 (Dec. 21, 2018)).

² 164 Cong. Rec. S7838, 2018 WL 6693848 (daily ed. Dec. 19, 2018) (statement of Sen. Grassley).

³ H.R. Rep. No. 115-699, at 22 (2018).

structure intended to encourage individuals to participate in evidence-based recidivism reduction programming and productive activities.⁴

Rewards for individuals who successfully participate in programming and activities include increased phone and visitation privileges, transfers to institutions closer to home, and, as applicable here, “time credits.”⁵ Time credits earned “shall be applied toward time in prerelease custody or supervised release.”⁶ These credits neither necessarily nor substantially shorten a person’s sentence. Prerelease custody transfers a person to community corrections; he remains in BOP custody and his sentence is not changed.⁷ And while time credits can be applied to an early transfer to supervised release, the FSA caps early access to supervised release at twelve months.⁸

Contrary to the text of the FSA and inconsistent with its purpose, BOP’s proposed rule chips away at the FSA’s rewards program. *First*, the proposed rule impermissibly restricts an individual’s ability to earn time credits. *Second*, the rule makes it too easy to lose those credits. And *third*, the rule unduly excludes broad categories from the earned time credit system. These provisions effectively gut the FSA’s incentive structure and make it less likely individuals will participate in programs and activities to reduce recidivism and increase public safety.

BOP must revise the proposed rule to “give effect” to the “expressed intent of Congress.”⁹ Because Congress’s intent is clear, “that is the end of the matter.”¹⁰

⁴ See 18 U.S.C. § 3632(d).

⁵ See 18 U.S.C. § 3632(d)(1)-(4).

⁶ 18 U.S.C. § 3632(d)(4)(C).

⁷ See 18 U.S.C. § 3624(g)(2); 18 U.S.C. § 3621(a).

⁸ See 18 U.S.C. § 3624(g)(3). Further, those on supervised release are monitored by the Probation and Pretrial Services Office and are subject to the conditions imposed by a federal district court. See 18 U.S.C. § 3583.

⁹ *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

¹⁰ *Id.* As the Supreme Court recently recognized, in the absence of genuine ambiguity, there is no plausible reason for agency deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (June 26, 2019). Deferring to the agency’s position would “permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.” *Id.* (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000)). Here, the relevant provisions of the FSA are not

Even if parts of the FSA were ambiguous, the proposed rule is not a permissible construction of the statute.¹¹

I. Earning Time Credits

Under the proposed rule, time credits—the real prize in the FSA’s incentive structure—would be too difficult to earn. The proposed rule would impose limits on earning credits that contravene both the clear language of the FSA and congressional intent. Specifically, the proposed rule would improperly (A) define a day; (B) award time credits only for *completed* programs and activities; and (C) award credit only for assigned programs and activities, despite BOP not having a complete needs assessment tool.

A. A Day Means A Day.

The FSA plainly directs that an eligible person “shall earn 10 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities.”¹² A day of participation in programming or activities means just that: ***every calendar day on which a person successfully participates in an evidence-based recidivism reduction program or a productive activity.*** The length of time during the day—the requisite dosage—is

ambiguous. Just as an agency cannot promulgate a rule inconsistent with its regulations, BOP cannot promulgate a rule inconsistent with the plain meaning of the FSA.

Moreover, permitting BOP to promulgate binding policy statements that thwart the aims of the FSA would run afoul of the non-delegation doctrine. “The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides.” *Gundy v. United States*, 139 S. Ct. 2116, 2123 (June 20, 2019). Here, the statute only delegates to the BOP discretion to operate within the defined boundaries of the unambiguous earned time credit provisions. “[O]nce a court interprets the statute, it may find that the constitutional question all but answers itself.” *Id.*; see also *Chevron*, 467 U.S. at 843 n.9 (“If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”).

¹¹ See *Chevron*, 467 U.S. at 843.

¹² 18 U.S.C. § 3632(d)(4)(A)(i). A person deemed to be “at minimum or low risk for recidivating, who, over 2 consecutive risk assessment, has not increased their risk of recidivism, shall earn an additional 5 days of time credits for every 30 days.” 18 U.S.C. § 3632(d)(4)(A)(ii).

appropriately prescribed by the program or activity in which the person successfully participates.

Instead of defining a day as any calendar day on which a person successfully participates in programs or activities, BOP proposes: “a ‘day’ is defined as one eight-hour period of participation in an Evidence-Based Recidivism Reduction Program or Productive Activity.”¹³ But BOP “must presume that [the] legislature says in a statute what it means and means in a statute what it says there.”¹⁴ When Congress said a day, it did not mean 8 hours. And it did not mean 8 separate days of participating in a 1-hour a day program. The proposed definition is inconsistent with the statute and should not be codified.

BOP’s hourly approach to a day is inconsistent with its Sentencing Computation Manual. BOP calculates any part of a day in custody serving a sentence as a full day served on that sentence and calculates any part of a day in official detention as a full day for prior custody time credit purposes.¹⁵ The same rule should apply here.

Further, BOP’s proposed definition of “a day” is inconsistent with congressional intent. Considering BOP’s limited program offerings and the duration and frequency of each approved program, it would be virtually impossible for eligible individuals to earn enough time credits to meaningfully reduce their time in prison.

The math speaks for itself. Under BOP’s proposed definition of a day, an eligible individual would need to participate in 240 hours of programs and activities to earn 10 days of credit. In order to get 365 days of credit (the 1-year maximum provided for transfer to supervised release), an individual would need to participate for 8,760 hours. That means even assuming someone programmed 40 hours a week—an impossibility—it would take **219 weeks**, or over 4 years to earn a full year of credit

¹³ 85 Fed. Reg. at 75,272.

¹⁴ *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

¹⁵ See Fed. Bureau of Prisons, Program Statement 5880.28 at 1-12, CN-02 (July 29, 1994), https://www.bop.gov/policy/progstat/5880_030.pdf; *accord. id.* at 1-16 (“Any part of a day spent in official detention equals one day for credit purposes.”).

under the BOP's proposed rule. This is longer than the average federal prison sentence of 3.8 years.¹⁶

What's worse, accruing a year's worth of earned time credits would take far longer than 4 years. No one can participate in programs or activities for 40 hours a week. BOP offers neither the frequency nor capacity to allow people to participate in programs or activities for 8 hours a day. Most approved programs and activities occur only for 1 to 2 hours a week.¹⁷ For those activities that do permit greater participation—like UNICOR—BOP caps the amount of hours that can be earned.¹⁸ And other productive activities, like institutional work assignments, are not counted toward credit at all.¹⁹

Further, BOP provides few long programs: of the 71 programs and activities listed on the approved program list, only 14—or 19.7 percent—of the programs are 240 hours or more.²⁰ And only 4 of these 240-plus-hour programs are available at all BOP institutions.²¹ Indeed, even if a person took every approved program BOP offered (another impossibility), she would accrue only 8,143 hours of program time—over 600 hours short of what is necessary to obtain a year's worth of time credits.²²

¹⁶ See USSC, *2019 Annual Report and Sourcebook of Federal Sentencing Statistics* 64, tbl. 15 (2020), <https://bit.ly/2N4NkKp> (reporting an average length of imprisonment of 46 months for all types of crimes in Fiscal Year 2019).

¹⁷ See Fed. Bureau of Prisons, *Evidence-based Recidivism Reduction (EBRR) Programs and Productive Activities (PA)*, <https://bit.ly/3qGO6vH> (last accessed Jan. 21, 2021) (“Approved Program List”).

¹⁸ *Id.* at 1.

¹⁹ See Approved Program List.

²⁰ See *id.*; see also First Step Act Independent Review Comm., *Report of the Independent Review Committee Pursuant to the Requirements of Title I Section 107(g) of the First Step Act (FSA) of 2018 (P.L. 115-391)*, at 6. (Dec. 21, 2020), <https://bit.ly/3p0fcxD> (“IRC Report”). (“[W]e would urge DOJ, BOP, and others. . . to bear in mind that relatively few of the Bureau's currently designated EBRPs and PAs involve 240 or more hours of content.”).

²¹ See Approved Program List.

²² Moreover, BOP's program offerings may continuously grow and shrink. For example, in the Approved Program List linked in BOP's proposed rule, BOP lists 71 approved evidence-based recidivism reduction programs and productive activities. See 85 Fed. Reg. at 75,270 (citing Approved Program List as “current list” of approved programs). But in another

Congress expected the earned time credits to operate as an incentive to program participation.²³ But by redefining a “day” and doling out credits so stingily, BOP negates this incentive.²⁴ BOP must abandon its proposed definition and instead define a day of participation in programming or activities as what it is: every calendar day on which a person successfully participates in an evidence-based recidivism reduction program or a productive activity. The length of time during the day—the requisite dosage—is appropriately prescribed by the program or activity in which the person successfully participates.

B. Credits Should be Earned by Successful Participation.

Congress sought to encourage both the completion of and participation in programs and activities.²⁵ The proposed rule, however, requires that a person “successfully

document dated October 2020, BOP lists more programs and activities than what is provided in the Approved Program List. *See* Fed. Bureau of Prisons, *First Step Act Approved Programs Guide* (Oct. 2020), <https://bit.ly/3nMXITR> (“October 2020 List”). Further, the October 2020 List offers more hours for some of the same productive activities. For example, “A Healthier Me” is worth 5 hours in the Approved Program List but is worth 10 hours in the October 2020 List. *Compare* Approved Program List, at 3, *with* October 2020 List, at 33. “Money Smart for Older Adults” is worth 28 hours in the Approved Program List but is worth 32 hours in the October 2020 List. *Compare* Approved Program List, at 4, *with* October 2020 List, at 38.

It is not clear which list is the current list of BOP’s approved programs. However, even if the October 2020 List is the official list, a person would still need to complete over 95 percent of *all* programs offered on that list to accrue a year’s worth of earned time credits.

²³ *See, e.g.*, H.R. Rep. No. 115-699, at 28 (2018) (recognizing that the bill “[e]stablishes incentives and rewards for prisoners to participate in programming and activities”).

²⁴ *See generally* IRC Report, at 2 (reporting that “[p]rogram participation rates appear to be significantly higher for ETC-eligible inmates,” indicating “provisional evidence that Title I-established earned time credits do provide a program participation incentive” to incarcerated individuals).

²⁵ *See, e.g.*, 18 U.S.C. § 3632(d) (“The System shall provide incentives and rewards for prisoners to **participate** in and complete evidence-based recidivism reduction programs”); 18 U.S.C. § 3632(d)(4)(A)(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.”); 18 U.S.C. § 3632(d)(4)(C) (“Time credits earned under this paragraph by prisoners who successfully **participate** in recidivism reduction programs or productive activities shall be applied toward time in prerelease custody or supervised release.”); 18 U.S.C. § 3621(h)(4) (“The Bureau of Prisons may . . . offer to prisoners who

complete each Evidence-Based Recidivism Reduction program or Productive Activity” before the person may earn any time credits.²⁶ By focusing only on completion, BOP diminishes the value of participation and weakens the incentive structure Congress enacted.

Indeed, there are myriad situations where people would successfully participate in an approved program and—through no fault of their own—be prevented from, or delayed in, completing it. Transfers, program resource and staffing limitations, and facility movement restrictions all impact program completion, as do length of sentence, program availability, and waitlists.²⁷ Individuals have no control over completion if, for example, their facility is locked down,²⁸ or if programs are indefinitely suspended due to a pandemic.²⁹ Congress created the earned time credit system to encourage personal responsibility.³⁰ BOP’s all-or-nothing rule that fails to acknowledge participation is inconsistent with this intent. BOP should revise the

successfully **participate** in such programs and activities the incentives and rewards described in subchapter D.”).

²⁶ 85 Fed. Reg. at 75,272.

²⁷ See, e.g., IRC Report at 2-3 (“Based on our review of available data and discussions with staff at BOP, the IRC finds that even a full return to pre-COVID-19 programming levels will not be sufficient to make available evidence-based recidivism reduction programs and productive activities *for all eligible prisoners.*” (emphasis in original) (internal marks omitted)).

²⁸ See, e.g., Kevin Johnson, *Federal Prisons Under National Lockdown Amid George Floyd Protests, Most Severe Restrictions in 25 Years*, USA Today (June 2, 2020), <https://bit.ly/3iDfdF5>.

²⁹ See, e.g., Fed. Bureau of Prisons, *BOP Modified Operations* (updated Nov. 25, 2020), https://www.bop.gov/coronavirus/covid19_status.jsp (programming only offered “to the extent practicable” and suspending most volunteers and contractor visits); Off. of Att’y Gen. U.S. Dep’t of Justice, *The Attorney General’s First Step Act Section 3634 Annual Report 19* (2020), <https://bit.ly/2M3Mr4b> (“DOJ Annual Report”) (“COVID-19 has had a major impact on program delivery. . . . As a result, some programs were suspended and capacity in others reduced to allow for social distancing and to prevent spreading of the virus.”).

³⁰ See, e.g., 164 Cong. Rec. S7639-03, S7642, 2018 WL 6608401 (daily ed. Dec. 17, 2018) (Sen. Cornyn) (“This legislation allows prisons to help [individuals] transform their lives, if they are willing to take the steps and responsibility to do so. . . .”); 164 Cong. Rec. S7838-01, 2018 WL 6693848 (daily ed. Dec. 19, 2018) (Sen. Grassley) (“The bill rewards those who take personal responsibility for their mistakes and want to put in the time and will put in the time and effort to turn their lives around.”).

proposed rule to allow individuals who successfully participate in programming to earn time credits.

C. Credits Should be Earned for all BOP Evidence-Based Recidivism Reduction Programs and Productive Activities.

BOP's proposed rule states that a person may earn time credits only for an evidence-based recidivism reduction program or productive activity "that is assigned to the inmate based on the inmate's risk and needs assessment."³¹ This restriction does not appear in the FSA and BOP lacks the capacity to identify individuals' needs in the way the FSA expects.³² Because no tool exists to effectively measure individuals' needs, it is arbitrary and inappropriate to restrict the earning of credits to only the programs assigned based on the needs assessment.

This restriction would improperly limit an individual's ability to earn credits. Because the Department of Justice's (DOJ) "needs assessment" is incomplete and may fail to sufficiently identify the nature and extent of an individual's needs, current assessments may under-assign (or fail to assign) appropriate programs or activities, thereby preventing people from earning credits for all beneficial programs.³³ As the Independent Review Committee recently noted, PATTERN, the risk assessment instrument DOJ developed pursuant to the FSA, "is not a complete 'risk *and* needs assessment' tool" and BOP's needs assessment practices are "still

³¹ 85 Fed. Reg. at 75,272.

³² See, e.g., 18 U.S.C. § 3635(6) (defining "risk and needs assessment tool" as "an objective and statistically validated method through which information is collected and evaluated to determine," in part "the recidivism reduction programs that will best minimize the risk that the prisoner will recidivate upon release from prison"); see also 18 U.S.C. § 3632(a)(3) & (5) (directing that the risk and needs assessment system identify and address a person's "specific criminogenic needs").

³³ See Off. of the Att'y Gen., U.S. Dep't of Justice, *The First Step Act of 2018: Risk and Needs Assessment System* 64, n.3 (2019), <https://bit.ly/3bOUNaI> ("PATTERN does not currently include a needs assessment component."); Off. of the Att'y Gen., U.S. Dep't of Justice, *The First Step Act of 2018: Risk and Needs Assessment System – Update* 17, 23 (2020), <https://bit.ly/2KutYxy> ("PATTERN Update") (agreeing current needs tool "could be enhanced," new needs assessment is "forthcoming" and that "PATTERN, in its current form, does not contain a new needs tool"); DOJ Annual Report at 31-32 (confirming BOP is still using its pre-FSA needs tool and is "begin[ning]" to enhance its "needs assessment process").

evolving.”³⁴ While criminogenic needs can potentially be identified through a comprehensive needs screening (if BOP adopts one), “the information necessary to complete such a truly careful needs assessment is inconsistently available to frontline BOP personnel, and much of that information is not recorded in or accessible through the Bureau’s management information systems.”³⁵ We encourage BOP to revise its proposed rule to remove this restriction.

II. Losing Time Credits

The proposed rule would further undermine the FSA’s incentive structure by making it too easy to *lose* time credits and exceedingly difficult to restore credits that have been lost. Paired with the difficulty of earning time credits in the first place, the proposed rule regarding forfeiture and restoration would diminish the value of earned time credits, making it even less likely individuals would participate in programs and activities to reduce recidivism and increase public safety.³⁶

A. The Forfeiture Penalties for Already-Earned Time Credits Would Be Too Severe.

Under the proposed rule, an individual who violates “prison rules,” or the “requirements and/or rules” of programs and activities would be subject to unduly severe forfeiture of already-earned time credits.³⁷ The proposed forfeiture rates would be too harsh on their own, but even more punitive when combined with other negative consequences for violations, including limits on future earning and use of time credits.

The proposed forfeiture rates would be disproportionately severe across all levels of prohibited acts. For example, under the proposed rule, infractions like an “[u]nexcused absence from work or any program assignment,” or “[b]eing . . . untidy,” could result in the forfeiture of up to 30 days of already-earned time

³⁴ IRC Report at 4 (emphasis in original).

³⁵ *Id.* at 4.

³⁶ *See generally* IRC Report at 2 (acknowledging preliminary evidence that earned time credits provide a participation incentive to incarcerated individuals).

³⁷ 85 Fed. Reg. at 75,272.

credits.³⁸ As discussed above, earning 30 days of credits under the proposed rule is nearly impossible, requiring 720 hours of programs or activities. At 2 hours of participation per week, it could take 360 weeks or almost 7 years to reach 720 hours. At 20 hours per week, it would still require 36 weeks or 9 months to earn the 720 hours that could be forfeited for any moderate level prohibited act, such as being untidy.

Even for the least serious prohibited acts—including conduct such as “[u]sing . . . obscene language”—individuals could lose up to 7 days of time credits for 2 violations of the same prohibited act within 6 months.³⁹ This sanction would wipe out 168 hours of programming or activities which likely could have taken anywhere from 2 months (at 20 hours of participation per week) to 21 months (at 2 hours of participation per week) to accrue.⁴⁰

Moreover, forfeiture of earned time credits is not the only consequence an individual would suffer as the result of a prison infraction. An infraction could also negatively affect an individual’s ability to earn and use time credits in the future by raising his risk score under PATTERN.⁴¹ The forfeiture rates in the proposed rule do not reflect

³⁸ See 85 Fed. Reg. at 75,273; 28 C.F.R. § 541.3, tbl.1 (2020) (Moderate Severity Level Prohibited Act).

³⁹ See 85 Fed. Reg. at 75,273; 28 C.F.R. § 541.3, tbl.1 (Low Severity Level Prohibited Act).

⁴⁰ The loss rates are similarly disproportionate for “High Severity Level Prohibited Acts,” such as “[t]attooing.” 28 C.F.R. § 541.3, tbl. 1. The proposed rule calls for a loss of up to 60 days of time credits that would require completing programs and activities involving over 1,440 hours of participation (18 months of participation at 20-hours per week; 180 months—15 years—at 2-hours per week). See 85 Fed. Reg. 75,273.

⁴¹ PATTERN Update, App’x II at 37. Prison infractions are counted in 4 of PATTERN’s 11 dynamic factors, i.e., the factors that could change while someone is in prison. *Id.* at 10-11. Prison infractions can only increase an individual’s risk score (an individual without any infractions simply receives no points). *Id.* App. II at 37. An individual’s risk score determines which risk category he is assigned: minimum, low, medium, or high. U.S. Dept’t of Justice, *First Step Act Implementation Fiscal Year 2020 90-Day Report 2* (2020), <https://bit.ly/3paz11K>. The higher the risk score, the higher the risk category. *Id.* Only those with scores that place them in the minimum and low risk categories are eligible to earn time credits at a higher rate than those who fall in the two higher risk categories (15 rather than 10 days of credit for every 30 days of participation). See 18 U.S.C. § 3632(d)(4). Individuals with medium or high risk scores further face limitation on using their earned time credits for prerelease custody and supervised release. See 18 U.S.C. § 3624(g)(1).

that a single prison infraction may have these additional reverberations on an individual's ability to earn and use time credits and must be lowered.

The piling on of penalties could be even more severe depending on what the proposed rule means for individuals who fail to comply with the "requirements" of a program or activity.⁴² While the FSA does not refer to "requirements" in its penalty provision, BOP's proposed rule penalizes violations of "requirements and/or rules" of a program or activity.⁴³ It is unclear if adding the word "requirements" to the proposed rule would mean that an individual who does not complete a program, i.e., does not satisfy the requirements of the program or activity, would not only fail to *earn* credit (*supra*, Point I.B), but also *lose* credit she had already earned. If interpreted in this manner, including "requirements" in the proposed rule would add to the already disproportionate penalties, and further disrupt Congress's incentive structure. This is particularly true because the programs and activities lack standard requirements, and, under the proposed rule, may vary according to the program, the activity, and even "the inmate participating."⁴⁴

B. The Proposed Standard for Restoring Credit is Illogical and Arbitrarily High.

Finally, the proposed standard for restoring forfeited time credits is illogical and arbitrarily high. Congress directed BOP to provide "a procedure to restore time credits that a prisoner lost as a result of a rule violation, based on the prisoner's individual progress."⁴⁵ The proposed rule provides that to restore credits from prison rule violations, an individual must first have "[c]lear conduct for at least four consecutive risk and needs assessments."⁴⁶

⁴² See 85 Fed. Reg. at 75,272.

⁴³ *Id.*

⁴⁴ *Id.* at 75,271. In addition to losing earned time credits for a prison infraction and the potential limits on future earning and use of these credits, an individual sustaining a prison infraction could also suffer the loss of good conduct time and other potential sanctions, including loss of visitation or recreation privileges, disciplinary segregation, the loss of a job or the removal from a program. See 85 Fed. Reg. 75,272 (proposing to amend 28 C.F.R. § 541.3 to *add* loss of FSA time credits to the list of available sanctions); 28 C.F.R. § 541.3, tbl. 1 (listing available sanctions for prohibited acts).

⁴⁵ See 18 U.S.C. § 3632(e)(3).

⁴⁶ 85 Fed. Reg. at 75,272.

The problems with the proposed standard are two-fold. First, it makes no sense to tether “clear conduct” to risk and needs assessments. Risk and needs assessments do not measure conduct; they measure risks and needs. If the purpose of the tethering is to secure the passage of a certain amount of time, again, linking “clear conduct” to the risk and needs assessments is an odd choice. BOP’s current risk and needs assessments are not part of a single comprehensive tool and may be administered at different times.⁴⁷

Second, if this tethering would in fact require clear conduct for at least four risk assessments, the standard is arbitrarily high. It could take at least 4 years to complete “at least four consecutive risk and needs assessments.”⁴⁸ Yet BOP provides no justification for requiring clear conduct for this long. Indeed, requiring an individual to remain infraction-free for at least 4 years is inconsistent with PATTERN. Under PATTERN, individuals who are infraction-free for 12 months or more receive no points related to the *recency* of an infraction.⁴⁹ If PATTERN indicates those with infractions older than 12 months are no more risky than those with infractions older than 4 years, it is difficult to understand what justification BOP would have to require “clear conduct” for what could be at least 4 years.

III. Categorical Exclusions

The proposed rule inexplicably and unjustifiably excludes two broad categories from the earned time credit system: (1) all individuals in “a Residential Reentry Center [RRC] or on home confinement;” and (2) all programs and activities completed before January 15, 2020.⁵⁰ These exclusions are inconsistent with the FSA and should be removed from the proposed rule.

⁴⁷ See, e.g., DOJ Report at 33 (reporting that individuals’ “needs are reassessed and documented every six months, or every three months once the [individual] is within a year of release.” But risk assessments are not necessarily conducted as often. See 18 U.S.C. § 3632(d)(5).

⁴⁸ The FSA requires that risk assessments be conducted for those who participate in program and activities “not less often than annually,” and “more frequently” for individuals who fall into medium or high risk categories. 18 U.S.C. § 3632(d)(5). We are not aware of any commitment by BOP or DOJ to schedule risk assessments more frequently than what is required by statute.

⁴⁹ PATTERN Update, App’x II at 37. The *fact* of an infraction is scored separately. *Id.*

⁵⁰ 85 Fed. Reg. at 75,272.

A. Individuals in RRCs and on Home Confinement Should Not be Excluded from Earning Time Credits.

The FSA directs that “prisoner[s] shall earn” time credits for participation in programs and activities.⁵¹ Individuals serving sentences in RRCs or on home confinement are “prisoners” under the FSA.⁵² And the FSA does not deem any individuals ineligible based on where they are serving their sentence.⁵³ There is nothing in the FSA indicating Congress intended to exclude otherwise eligible individuals serving their sentences in RRCs or on home confinement from earning time credits. To the contrary, the text of the FSA shows Congress contemplated these individuals would be included in the incentive structure. For example, when an individual is placed on home confinement based on her earned time credits, one of the few reasons she is explicitly authorized by the FSA to leave her home is to “participate in evidence-based recidivism reduction programming or productive activities.”⁵⁴

BOP’s proposal to narrow the field of eligible individuals is inconsistent with Congress’s intent to incentivize participation in programs and activities to reduce recidivism and increase public safety. Early evidence indicates that Congress was right and “earned time credits do provide a program-participation incentive.”⁵⁵ During 2020, those eligible for time credits under the FSA participated in programming at a rate of 30.8%, compared with only 18.8% of those who were ineligible.⁵⁶ BOP should fully implement the FSA and allow all eligible individuals—including those in RRCs and on home confinement—to earn time credits.

⁵¹ 18 U.S.C. § 3632(d)(4).

⁵² The FSA defines “prisoner” to mean “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.” 18 U.S.C. § 3635(4). Those in RRCs or on home confinement remain in the custody of BOP. *See* 18 U.S.C. § 3624(g)(2); 18 U.S.C. § 3621(a).

⁵³ 18 U.S.C. § 3632(d)(4)(D) (establishing exclusions based on the statute of conviction and certain judge-found facts at sentencing, not on where a sentence is served).

⁵⁴ 18 U.S.C. § 3624(g)(2)(A)(i)(II)(bb).

⁵⁵ IRC Report at 2.

⁵⁶ *Id.*

B. Programs Completed Between December 21, 2018 and January 15, 2020 Should Qualify for Time Credits.

BOP proposes that time credits may only be earned for programs and activities “successfully complete[d] on or after January 15, 2020.”⁵⁷ But there is nothing in the FSA that excludes earned time credits from attaching to programs and activities completed between the FSA’s enactment and January 15, 2020.⁵⁸ The FSA prohibits credit for programs completed “prior to the date of enactment of this subchapter,” and “during official detention prior to the date that the prisoner’s sentence commenced under section 3585(a).”⁵⁹ That’s it. BOP must fully implement the FSA and award time credits for all programs completed after December 21, 2018. Arbitrarily excluding programs and activities completed between December 21, 2018 and January 15, 2020, will not instill confidence that BOP will be fair and equitable in its administration of the earned time credit system.

⁵⁷ 85 Fed. Reg. at 75,272.

⁵⁸ Indeed, the FSA puts no time limits on earning credits for productive activities at all. *See* 18 U.S.C. § 3632(d)(4)(B) (“A prisoner may not earn time credits under this paragraph **for an evidence-based recidivism reduction program** that the prisoner successfully completed—(i) prior to the date of enactment of this subchapter; or (ii) during official detention prior to the date that the prisoner’s sentence commences under Section 3583(a)” (emphasis added)).

⁵⁹ 18 U.S.C. § 3632(d)(4)(B).

When Congress enacted this “once-in-a-generation criminal justice reform,” it expected BOP to implement important back-end prison reforms to reduce recidivism and enhance public safety. The earned time credits—the heart of Congress’s incentive structure—are critical to the FSA’s success. Unfortunately, this proposed rule indicates BOP is unable or unwilling to do what Congress has asked. We urge BOP to revise the proposed rule in accordance with the text and intent of the FSA.

Very truly yours,

/s/ David Patton

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