



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 than 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 ebblackwood@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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⁴Additionally, 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.