

## Summary: H.R. 5682, FIRST STEP Act (115th Congress, 2018)

**Sponsors:** Representatives Doug Collins (R-GA) and Hakeem Jeffries (D-NY)

**FAMM's position on H.R. 5682:** FAMM supports the FIRST STEP Act but also believes there are parts of the bill that need improvement before final passage by Congress. FAMM of course supports sentencing reform, but we are also supportive of prison reform, and there are many reforms in the FIRST STEP Act that FAMM has advocated for years. We are grateful for the hard work of the bill sponsors, who have carefully listened to our feedback and incorporated some of our suggestions.

**What the bill would do:** The FIRST STEP Act would require the BOP to adopt a risk assessment tool, assess all federal prisoners for their risk of recidivism, and categorize them as minimum, low, medium, or high risk. Some federal prisoners would be able to earn time credits for completing rehabilitative programs, which minimum- and low-risk prisoners would be allowed to redeem for more time in a halfway house or home confinement at the end of a person's sentence, so long as their warden does not object in writing. Medium- and high-risk prisoners would have to petition to redeem the time credits they earn, but would only redeem credits with approval of the warden and a determination that they are not likely to reoffend and not a public safety threat. Prisoners who cash in their time credits for time on home confinement or a halfway house would be sent back to prison for violating the conditions of their release.

The bill makes numerous other reforms to federal prisons, including the following:

### Positive reforms:

1. **Adjusts good time credit calculation** so that prisoners receive 54 days of good time credit per year, not 47 days, for following prison rules. This change to good time credit would be retroactive;
2. **Requires BOP to put lower-risk, lower-needs people in home confinement** for the full amount of time permitted under current law (10 percent of the person's sentence or 6 months, whichever is less);
3. **Requires the BOP to place prisoners within 500 driving miles, not air miles, of home**, if security classification and bed space allow it;
4. **Reforms the BOP's compassionate release process** for prisoners facing "extraordinary and compelling" circumstances, including
  - Allowing prisoners to appeal denials of compassionate release to federal courts after all other BOP remedies have been exhausted or at least 30 days have passed since the request was submitted;
  - Requiring annual data reporting on BOP's use of compassionate release;
  - Creating an expedited timeline for BOP consideration of compassionate release requests of terminally ill prisoners;
  - Permitting family members, lawyers, and BOP staff to help prisoners file compassionate release requests;

- Requiring better notice to BOP staff and prisoners of when compassionate release is available and how to ask for it;
- 5. **Authorizes \$50 million in funding per year for 5 years** for rehabilitative programs in federal prisoners;
- 6. **Gives incentives to prisoners who cannot earn time credits for completing rehabilitative programs**, including:
  - Up to 510 phone minutes per month (which prisoners must pay for);
  - Additional time for visits, determined by the warden;
  - Additional time using the BOP's email system (which prisoners must pay for);
  - Transfer to a prison closer to the person's home, if the warden approves;
  - Increased commissary spending limits and product offerings;
  - Consideration for transfer to preferred housing units;
- 7. **Requires BOP to help people get government identification** cards and birth certificates before they leave prison;
- 8. **Reauthorizes an elderly prisoner early release pilot program** from the Second Chance Act of 2007, allowing elderly and elderly terminally ill prisoners to be released from prison early if they are at least 60 years old, have served 2/3 of their sentences, and meet all of the other requirements;
- 9. **Bans shackling of pregnant women** in federal prisons and jails;
- 10. **Expands Federal Prison Industries**;
- 11. **Requires BOP to expand programs more quickly**, putting them in place for all eligible prisoners within three years of the bill's passage. Previous versions of the bill had a longer phase-in of up to 6 years. During this phase-in period, prisoners closest to release get priority for being placed in programs. After the phase-in period, medium- and higher-risk prisoners are given priority to be placed in programs, while jobs are prioritized for minimum- and low-risk prisoners.

#### **Needs improvement:**

1. **Focuses time credit incentives on lower-risk prisoners who are unlikely to reoffend:**
  - a. Minimum- and low-risk prisoners earn 15 days of credits for each 30 days of programming or jobs completed and can "cash in" these credits if they have maintained their risk level for two assessment periods (i.e., 2 years) and the warden does not object in writing to the redemption of their credits;
  - b. Medium- and high-risk prisoners earn 10 days of credits for each 30 days of programming or jobs completed, and cannot "cash in" these credits unless they first reduce their risk levels to minimum or low. Medium- and high-risk prisoners may also petition to redeem their credits, and those petitions can be granted if the warden approves and finds that the prisoner is not likely to reoffend and is not danger to public safety. It may be difficult or impossible for some higher-risk people to ever reduce their risk levels so that they can "cash in" the credits they earn, and they may not participate in programs if that is true. This bill may not actually reduce recidivism, and that could be blamed on prisoners, not the bill's mistaken incentives structure;
2. **Earned time credits are not real time off the person's sentence.** Credits may be cashed in only for more time in a halfway house or on home confinement. Once a person is in a halfway house or on home confinement, they can be sent back to prison if they

violate the conditions of their confinement. The BOP's model recidivism-reducing program is the residential drug abuse program (RDAP), which awards completing prisoners a one-year sentence reduction. That's the model Congress should be following;

3. **Excludes many prisoners from earning time credits**, including
  - Manufacturing or distributing drugs, with death or serious bodily injury resulting from the use of those drugs (21 U.S.C. § 841(b)(1)(A), (B), or (C))
  - Armed Career Criminal Act (18 U.S.C. § 924(e))
  - Assault with intent to commit murder (18 U.S.C. § 113(a)(1))
  - Influencing, impeding, retaliating against a federal officer by injuring a family member, except for a threat (18 U.S.C. § 115)
  - Biological weapons (18 U.S.C., chapter 10)
  - Chemical weapons (18 U.S.C., chapter 11B)
  - Assassination, kidnaping, or assault of a congressional, cabinet, or Supreme Court member (18 U.S.C. § 351)
  - Gathering, transmitting, losing defense information (18 U.S.C. § 793)
  - Gathering or delivering defense information to aid a foreign government (18 U.S.C. § 794)
  - Explosives or dangerous articles (chapter 39, U.S. Code, except for § 836 offenses involving transportation of fireworks into a state that prohibits their sale or use)
  - Distribution of information relating to weapons of mass destruction (18 U.S.C. § 842(p))
  - Use of fire or explosive (18 U.S.C. § 844(f)(3), (h), or (i))
  - Computer fraud (18 U.S.C. § 1030(a)(1))
  - Murder under 18 U.S.C., chapter 51, except for manslaughter (18 U.S.C. § 1112), attempt to commit manslaughter (18 U.S.C. § 1113), misconduct or neglect of ship officers (18 U.S.C. § 1115), protection against HIV (18 U.S.C. § 1122)
  - Kidnaping (18 U.S.C., chapter 55)
  - Human trafficking and slavery (18 U.S.C., chapter 77), except for sections 1592 through 1596
  - Assault, kidnaping, or assassination of president or presidential staff (18 U.S.C. § 1751)
  - Intentionally killing or attempting to kill an unborn child (18 U.S.C. § 1841(a)(2)(C))
  - Terrorist attacks against railways or mass transportation systems (18 U.S.C. § 1992)
  - Bank robbery resulting in death (18 U.S.C. § 2113(e))
  - Robberies or burglaries involving drugs, which result in death (18 U.S.C. § 2118(c)(2))
  - Carjacking that results in death (18 U.S.C. § 2119(3))
  - Sabotage (18 U.S.C., chapter 105, except for § 2152)
  - Sexual abuse (18 U.S.C., chapter 109A, except for those convicted under any provision of § 2244 other than subsection (c))
  - Sexual exploitation of children (18 U.S.C. § 2251)
  - Selling or buying children (18 U.S.C. § 2251A)
  - Receipt or distribution of child pornography (18 U.S.C. § 2252(a)(1), (2), or (3))

- Second or subsequent conviction for possession, distribution, or sale of child pornography (18 U.S.C. § 2252A(a)(1) through (6))
- Producing child pornography for importation (18 U.S.C. § 2260)
- Transportation of explosive, biological, radioactive, chemical, or nuclear materials (18 U.S.C. § 2283)
- Transportation of terrorists (18 U.S.C. § 2284)
- Destroying a vessel or port, if it involved substantial risk of death or serious bodily injury (18 U.S.C. § 2291)
- Terrorism (18 U.S.C. chapter 113B)
- Torture (18 U.S.C. § 2340A)
- Treason (18 U.S.C. § 2381)
- Recruiting or using child soldiers (18 U.S.C. § 2442)
- Developing or producing nuclear material (42 U.S.C. § 2077(b))
- Atomic weapons offenses (42 U.S.C. § 2122)
- Atomic energy license violations (42 U.S.C. § 2131)
- Communication or receipt of restricted atomic data (42 U.S.C. § 2274, 2275)
- Sabotage of nuclear facilities or fuel (42 U.S.C. § 2284)
- Damaging or destroying a pipeline facility, if the conduct involved a substantial risk of death or serious bodily injury (49 U.S.C. § 60123(b))
- Illegal reentry of certain removed aliens listed in 8 U.S.C. § 1326(b)(1) or (2) (e.g., the person has a prior conviction for a felony, an aggravated felony, or 3 or more misdemeanor drug or person crimes)
- Export violations (50 U.S.C. App. 2401 et seq.)
- International Emergency Economic Powers Act (50 U.S.C. § 1705)
- Disclosing identities of undercover agents, informants, sources (50 U.S.C. § 3121)
- A conviction for
  - a. An offense listed in 18 U.S.C. § 3559(c)(2)(F) (murder, manslaughter, voluntary manslaughter, assault with intent to commit murder, assault with intent to commit rape, aggravated sexual abuse, sexual abuse, abusive sexual contact, kidnaping, aircraft piracy, robbery, carjacking, extortion, arson, firearm use, firearm possession during a drug offense or crime of violence, and attempt, conspiracy, or solicitation to commit any of these offenses) AND
  - b. The person was sentenced to a year or more in prison for this conviction, AND
  - c. The person has a prior state or federal conviction for murder, voluntary manslaughter, assault with intent to commit murder, aggravated sexual abuse, sexual abuse, abusive sexual contact, kidnaping, carjacking, arson, or terrorism, for which the person served a year or more in prison.
- District of Columbia offenders housed in federal prisons
- State offenders housed in federal prisons
- People serving life sentences
- Noncitizens facing deportation or removal from the U.S.

Even though these offenders would not be eligible to earn time credits or be released onto prerelease custody, they would be eligible to receive other incentives for completing

programming, such as increased visiting time with families, more minutes for phone calls, more commissary privileges, or transfer to a different prison.

**Concerns about passing current bill:** While the bill makes important reforms to federal prisons, it should be improved before final passage by Congress because

1. **It is unlikely to reduce recidivism** because it gives time credit incentives for completing rehabilitative programs to minimum and low-risk prisoners who are least likely to reoffend, not to medium- and higher-risk who are more likely to reoffend and more in need of incentives to complete programs. Only minimum- and low-risk prisoners are likely to be able to “cash in” and actually enjoy the time credit incentives they earn, and these prisoners would also be able to earn more time credits than medium- and high-risk prisoners. This approach is not evidence-based. It is unclear from the bill whether the risk assessment tool the Bureau of Prisons (BOP) would adopt would actually allow people with higher risk levels to move into a lower risk category in which they can “cash in” the time credits they would earn, or whether wardens would ever let medium- and higher-risk prisoners cash in the credits they worked hard to earn.
2. **The bill’s time credit incentives are not real time off the person’s sentence.** Even those prisoners who would be able to cash in their credits would be unlikely to have a place to go to spend them, because of lack of halfway houses and limited use of home confinement. The most successful BOP rehabilitation program is the residential drug abuse program (RDAP) – and it works and has a 5,000-person waiting list because it gives a one-year sentence reduction to those who complete it. Congress should be following that model in doing prison reform and give people real time off their sentences, not a promise of more of something they already cannot get.
3. **The bill excludes many people from earning and using time credits.** Any person who will return to our communities from prison someday should get time credit incentives for completing rehabilitative programs. The bill excludes many people from earning time credits and excludes many others from redeeming the credits they can earn.