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## What the FIRST STEP Act Means for Federal Prisoners

**O**n Dec. 21, 2018, the FIRST STEP Act (“the Act”) was signed into law.<sup>1</sup> Although the full import of this federal reform legislation remains an open question, it directly impacts the accused and sentenced prisoners in myriad ways. This article addresses Bureau of Prisons-related aspects of the new law, including changes to the time credit calculus, avenues by which prisoners can earn both earlier pre-release (halfway house/home confinement) transfers and discharges to supervised release, as well as a clearer avenue to petition courts for reductions in sentence based on extraordinary and compelling reasons and an initiative for elderly and terminally ill prisoners that facilitates extended home confinement placements. Despite many encouraging aspects of the Act, which run counter to the Department of Justice’s retrograde practices the past two years, there is reason to doubt that some of its more progressive provisions will be timely realized.

### Good Time Credit — 15% Means 15%

When abolishing parole through the Sentencing Reform Act of 1984, Congress intended for federal prisoners to be eligible to earn good time credits

amounting to 15 percent of the sentence imposed, that is, with clear conduct a prisoner could reduce his sentence by 54 days per year and secure release from Bureau of Prisons’ (“BOP”) custody after serving 85 percent of the ordered term of imprisonment.<sup>2</sup> The BOP saw otherwise, however. In its estimation, prisoners only received time credit reductions for each year of time actually served. As a result of this “declining balance” approach, which the Supreme Court approved, federal prisoners have been eligible to earn up to 47 days’ good time credit annually, serving 87.1 percent of the sentence imposed.<sup>3</sup>

The Act amends 18 U.S.C. § 3621(b) to give effect to Congress’s original intent. Federal prisoners can now earn “up to 54 days for each year of the prisoner’s sentence imposed by the court” and that “credit for the last year of a term of imprisonment shall be credited on the first day of the last year of the term of imprisonment.” Two aspects of the amendment merit attention.

First, **it is retroactive**. All federal prisoners, except those serving life sentences, are eligible to receive an additional seven days’ credit for each year of their sentences (prorated for partial years). The amendment benefits more than 142,000 inmates for a total “savings of 27,126 ‘bed years’” over the next 20-plus years.<sup>4</sup> Because it costs over \$34,000 annually, on average, to incarcerate a federal prisoner, this amounts to more than \$922,284,000 in present dollar savings.<sup>5</sup>

Second, although BOP could accomplish the reduction by a simple change to its computerized time credit calculation program, in the Department of Justice (“DOJ”) and BOP’s reading of the Act, implementation of the amendment is subject to DOJ devising a risk assessment

BY TODD BUSSERT

system for the earned time credit portion of the Act (*infra*), a process for which the law allows 210 days from enactment.<sup>6</sup> Said differently, although the risk assessment has no bearing on eligibility for the good time credit reduction, the BOP has no apparent intention to update prisoners' projected release dates (as can be found at [www.bop.gov/inmateloc/](http://www.bop.gov/inmateloc/)) until at best July 19, 2019.<sup>7</sup>

Criminal justice advocates are working to convince Congress to address the error, but further action seems unlikely.<sup>8</sup> District of Oregon Chief Deputy Federal Defender Steve Sady has written a memorandum propounding litigation theories and strategies for challenging the DOJ-BOP approach, but most courts to take up the issue have affirmed the government's interpretation of the statute, even for inmates who would otherwise be eligible for immediate release.<sup>9</sup>

## Earned Time Credits

Among the more notable aspects of the FIRST STEP Act is the directive to expand and incentivize rehabilitative programming supported by tangible rewards. The earned time credits provision, in particular, establishes a mechanism for prisoners to obtain, *inter alia*, both earlier transfers to pre-release placement (halfway house and/or home confinement) and discharges to supervised release. However, where other programming incentives are available to all participants, the ability to apply earned time credits is limited to those deemed a less serious recidivism risk. Further, budgetary considerations and implementation horizons raise the question of how soon and how fully the benefits of this initiative will be realized.

## Risk Assessment

Central to the rehabilitation effort is determining "the recidivism risk of each prisoner" as well as each prisoner's "risk of violent or serious misconduct."<sup>10</sup> From that, Bureau staff is to "determine the type and amount of evidence-based recidivism reduction programming that is appropriate for each prisoner and assign each prisoner to such programming accordingly, and based on the prisoner's specific criminogenic needs [...]"<sup>11</sup> As noted, the Act allows 210 days for the creation and release of the risk and needs assessment system.

Within 30 days of the Act's passage, the National Institute of Justice ("NIJ") was to select the Independent Review Committee ("IRC") tasked with devising the system.<sup>12</sup> That deadline passed during the shutdown. On April 8, 2019, DOJ announced that the Hudson

Institute, "a conservative Washington, D.C.-based think tank whose leaders have espoused harsh views on incarceration," will "host" the IRC.<sup>13</sup> DOJ's announcement further provided that the Hudson Institute, not NIJ, is to appoint the IRC's members.<sup>14</sup> Thus far, the IRC includes "Pennsylvania Corrections Secretary John Wetzel; George Terwilliger III, the deputy to Attorney General William Barr during the Bush administration; Faye Taxman, a criminology professor at George Mason University; James Byrne, a criminology professor at the University of Massachusetts Lowell; and Patti Butterfield, a former senior deputy assistant director in the Bureau of Prisons re-entry services division."<sup>15</sup> The sixth member is Hudson Institute COO and former Bush drug czar John Walters.<sup>16</sup>

There has been no clear signal about the contours of the "risk and needs assessment tool" or whether it will be subject to notice and comment.<sup>17</sup> The statute provides that the tool is to be "an objective and statistically validated method through which information is collected and evaluated to determine (A) [...] the risk that a prisoner will recidivate upon release from prison; (B) the recidivism reduction programs that will best minimize the risk that the prisoner will recidivate upon release from prison; and (C) the periodic reassessment of risk that a prisoner will recidivate upon release from prison based on factors including indicators of progress and of regression, that are dynamic and that can reasonably be expected to change while in prison."<sup>18</sup> In this regard, the Act defines the risk categories into which assessed prisoners will fall: "minimum, low, medium, or high."<sup>19</sup> Although these categories mirror those of the BOP's offender classification program statement, that policy is meant "to place each inmate in the most appropriate security level institution," not to assess recidivism risk.<sup>20</sup>

Where the Act contemplates the potential use of "existing risk and needs assessment tools, as appropriate,"<sup>21</sup> the BOP is not known to currently employ such an instrument, specifically a "statistically validated" one. James Austin, president of the JFA Institute, submits that he "has designed similar recidivism risk assessment tools for state prisons in Maryland, Texas, Louisiana, and Arkansas" in a matter of three or four months.<sup>22</sup> However, in January, the Hudson Institute's Walters wrote that it "may take time — lots of time — to properly develop and implement" the risk assessment tool because it "will and

should involve an elaborate project of data collection, variable selection and weighting, predictive validity testing, and assessment and refinements of any proposed algorithms for their likely real-world results and general 'fairness.' Six months may not be enough. Congress should be prepared, if necessary, to grant the attorney general a measure of flexibility with his deadlines."<sup>23</sup>

In terms of reported steps, NIJ has "hosted 'listening sessions' to receive input from more than 25 stakeholders regarding the development" of the system and, separately, "contracting with outside [three] experts and leading researchers [...] for assistance and consultation."<sup>24</sup> Yet an administration official reportedly "said the Justice Department is using resources it has on hand to work on the risk assessment tool internally, in the absence of the committee, and expects to meet the July deadline."<sup>25</sup> There are legitimate concerns about the tool the IRC ultimately creates, from issues as simple as how it will define "recidivism" (e.g., the weight given to past arrests) to larger questions about racial and socioeconomic bias in such instruments.<sup>26</sup> As to the latter, the Act requires ongoing evaluation of unwarranted recidivism rate disparities among similarly classified prisoners "of different demographic groups."<sup>27</sup>

Assuming that the assessment tool is timely released, **the BOP has another 180 days, until Jan. 15, 2020, to "implement and complete the initial intake risk and needs assessment for each prisoner."**<sup>28</sup> More significantly, it then has another two years to "phase-in" programming. In other words, **the BOP has until January 2022 to provide "evidence-based recidivism reduction programs and productive activities for all prisoners,"** with priority given to those closest to release.<sup>29</sup>

## Programming

"Evidence-based" and "recidivism reduction" are oft-repeated concepts in the Act. The BOP is tasked with creating and evaluating those evidence-based programs that "are the most effective at reducing recidivism" and implementing them in "the type, amount, and intensity [...]" that most effectively reduces the risk of recidivism.<sup>30</sup> In this regard, the system must guide Bureau staff in tailoring "the programs to the specific criminogenic needs of each prisoner so as to most effectively lower each prisoner's risk of recidivism."<sup>31</sup>

The Act does not direct the use of any particular program, however. While federal prison programs already exist,<sup>32</sup>



the BOP must now evaluate them relative to their efficacy in reducing recidivism.<sup>33</sup> It must also look at programs within state departments of correction and at partnerships with outside organizations, including faith-based organizations.

The nature and extent of programs that the BOP may implement remains anyone's guess; again, it has until 2022 to get there. But, for a law as ambitious as the FIRST STEP Act — one that gives untold hope to countless thousand of prisoners and their families both in terms of programming and potential earlier placement in the community — such considerations are paramount, especially given the Bureau's perpetual budget constraints and directions in which the agency has moved under the current administration. For instance, where the Act authorizes the expenditure of \$75M annually (through 2023), there is, as yet, no such appropriation.<sup>34</sup> Further, over the last two years the BOP has significantly curtailed pre-release (halfway house and/or home confinement) placements through which prisoners traditionally receive re-entry services within their communities of release.<sup>35</sup> At present, there are legitimate concerns about BOP operations generally, including the capacity to safely and effectively manage medium- and high-security populations.<sup>36</sup>

In addition to recidivism reduction programming, the Act requires the Bureau to facilitate “productive activities,” a “group or individual activity that is designed to allow prisoners determined as having a minimum or low risk of recidivating to remain productive and thereby maintain a minimum or low risk of recidivating.”<sup>37</sup> There is a related goal that, by December 2023, “not less than 75 percent of eligible minimum- and low-risk offenders [will] have the opportunity to participate in a prison work program for not less than 20 hours per week.”<sup>38</sup>

“Priority for participation in recidivism reduction programs shall be given to medium-risk and high-risk prisoners, with access to productive activities given to minimum-risk and low-risk prisoners.”<sup>39</sup> Prisoners cannot earn credit for program/activity participation that pre-dates the law's enactment.

### Incentives

Like RDAP, the BOP's highly popular 500-hour residential drug program that provides for an up-to-one-year reduction in sentence to successful graduates, the Act seeks to induce rehabilitative programming participation through various incentives. The most significant of these are earned time credits that expand pris-

oners' access to the community at the back end of their sentences. Specifically, eligible prisoners are able to transition sooner both to pre-release custody (halfway house and home confinement) and to supervised release. As to the latter, “the Director of the Bureau of Prisons may transfer the prisoner to begin any such term of supervised release at an earlier date, not to exceed 12 months, based on the application of time credits under section 3632” — **this then is an up-to-one-year reduction in sentence.**<sup>40</sup>

For their participation in “evidence-based recidivism reduction programming or productive activities” (once available), **eligible** prisoners (see below) earn “10 days of time credits for every 30 days of successful participation.”<sup>41</sup> On top of that, those whom the system determines are “minimum or low risk for recidivating” over two consecutive re-assessment periods “shall earn an additional five days of time credits of successful participation.” In short, certain classes of inmates can earn up to 180 days' earned credit annually.

Importantly, to be able to apply these earned credits, a prisoner's most recent two re-assessments must show him “to be a minimum or low risk to recidivate” — the same requirement for the ability to earn the additional aforementioned five days per month.<sup>42</sup> Said differently, where otherwise eligible medium- and high-risk prisoners can earn time credits, they cannot apply them until deemed low- or minimum-risk. In the case of applying the credits toward pre-release, a prisoner must also obtain a warden's approval, which requires a finding that the prisoner poses no danger to society, made a good faith effort to participate in programs and activities, and is unlikely to recidivate.<sup>43</sup>

The effort to encourage program participation extends beyond earlier pre-release and supervised release opportunities. The Act directs that the BOP develop at least two additional incentives, including “[i]ncreased commissary spending limits and product offerings,” greater email access, and “transfer to preferred housing units (including transfer to different prison facilities).”<sup>44</sup> The Act further provides that those who are successfully participating in “an evidence-based recidivism reduction program” “shall” receive 30 minutes of telephone time (or videoconferencing, if available) daily, up to 510 minutes per month — an increase from the 300 minutes per month that the Bureau currently affords.<sup>45</sup> Similarly, such program participants “shall be considered by the Bureau of Prisons for placement in

a facility closer to the prisoner's release residence” subject to the warden's recommendation, bed availability and security level considerations.<sup>46</sup>

### Prisoners Excluded from Earned Time

Lawmakers chose to exclude removable aliens — non-U.S. citizens comprise more than 15 percent of the federal prison population — and some 70 categories of offenders (based on offense on current conviction) from the new “earned credit” eligibility **but not from the other rehabilitative programming incentives.**<sup>47</sup> The list of offense categories is analogous to, but distinct from, the “violent” offenses that serve to render RDAP participants ineligible for sentence reduction.<sup>48</sup> For instance, a defendant convicted of a 21 U.S.C. § 841(b)(1)(A) or (B) offense involving heroin and methamphetamine, whom the sentencing court found was an organizer, leader, manager or supervisor, is excluded. So, too, are § 841(b)(1)(A) or (B) fentanyl offenders, regardless of role, and those imprisoned under a § 841(b)(1)(A)-(C) conviction “for which death or serious bodily injury resulted from the use of such substance.”

Before advising clients of prospective earned credit eligibility, and in considering agreeing to particular counts in a plea, counsel should review the new 18 U.S.C. § 3632(d)(4)(D) closely. Also, beware that prosecutors in some districts are reportedly seeking to compel resolutions that involve excludable offenses so as to deny defendants future earned credit benefits.

### Beyond ‘Compassionate Release’

Most federal practitioners are familiar with “compassionate release.” It is the far too limiting term the BOP employs to describe applications for reduction in sentence under 18 U.S.C. § 3582(c)(1)(A), a statutory authority that permits courts to reduce sentences for “extraordinary and compelling reasons.” Federal practitioners are likely also familiar with how sparingly (to be kind) the Bureau has exercised that delegated authority.<sup>49</sup> Briefly, the way the process has been structured is that if institution staff determined a person qualified for a reduction in sentence, they prepared a package supporting that recommendation for the warden, who, in turn, submitted it to the Director of the Bureau of Prisons. If in agreement, the Director asked the U.S. Attorney for the district in

which the prisoner was sentenced to file a motion with the sentencing judge recommending a reduction in sentence (“RIS”).

Until passage of the Act, a court’s jurisdiction depended on the BOP initiating a RIS motion. The Act, in a stated effort to increase use of § 3582(c)(1)(A), materially changes prisoners’ access to the courts, allowing them to make applications to courts directly. Specifically, where the above, BOP-centric method remains, a prisoner may now directly move the sentencing court pursuant to § 3582(c)(1)(A) after 30 days have lapsed from the warden’s receipt of the prisoner’s request to bring such a motion on his behalf **or** following exhaustion of administrative remedies (i.e., Central Office denial of a prisoner’s appeal of warden’s denial).<sup>50</sup>

The former marks a sea change that does more than increase prisoners’ opportunities to seek relief. Under the new law, which separately provides an avenue for the elderly and terminally ill to pursue earlier transfers to home confinement (*see infra*), prisoners are no longer restricted by the BOP’s cabined view of what constitutes an “extraordinary and compelling” reason — an approach that has too often led the director to deny applications for § 3582(c)(1)(A) relief based on the agency’s belief (frequently informed by prosecutors’ perspectives) that the seriousness of the offense rendered a reduction in sentence unacceptable. Such an approach held even under the strictest view of § 3582(c)(1)(A), that is, when prisoners were literally on their death beds.

In removing BOP’s gatekeeper role, the amended statute directs courts to consult the Sentencing Commission’s

The Act also promotes transparency. On Jan. 17, 2019, the BOP promulgated a new Compassionate Release/Reduction in Sentence program statement (P.S. 5050.50). Consistent with what the law directs, the policy provides that where a prisoner is diagnosed with a terminal illness, generously defined as “a disease or condition with an end-of-life trajectory” (i.e., no imminence requirement), the BOP also “shall [...] not later than 72 hours after the diagnosis notify the defendant’s attorney, partner, and family members of the defendant’s condition and inform [them] that they may prepare and submit on the defendant’s behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);” assist those individuals with the request, if asked; and process the request within 14 days.

### Elderly and Terminally Ill Initiative

Through the Second Chance Act, Congress directed the BOP to conduct a two-year pilot program for elderly offenders intended to assess the efficacies of earlier transitions to community supervision by waiving the ordinary limitation on home confinement placements (up to 10 percent of the sentence, not to exceed six months).<sup>53</sup> The program “enabled BOP to transfer to home detention inmates who were at least 65 years old, had served at least 10 years and 75 percent of their non-life sentences, had no history of violence, sexual offenses, or escape or attempted escape from a BOP institution, and who BOP determined would be of no substantial risk of engag-

ity pool. “Elderly” is redefined from 65 years old to 60 years old, and the time-served requirement is two-thirds instead of 75 percent, with no 10-year minimum requirement. Also, the pool now includes “terminally ill offenders,” those that a BOP-approved doctor has found suffers from a “terminal illness” (*see* “end of life trajectory” definition, *supra*) and are “in need of care at a nursing home, intermediate care facility, or assisted living facility.” Unlike the limitations on the elderly, a life sentence does not disqualify a terminally ill prisoner, nor is there a time served threshold. Also, tracking the “compassionate release” provisions (*ante*), the Act authorizes eligible prisoners to make direct written requests.

On April 4, 2019, BOP issued an Operations Memorandum governing this program.<sup>57</sup> According to DOJ, as of April 8, 2019, 23 inmates are participating and others are being screened.<sup>58</sup>

### Miscellaneous

The foregoing are arguably the most significant components of the Act’s reforms for federal prisoners. However, they are far from the only ones. The Act touches upon many aspects of prisoners’ lives. Additional (but not all) changes include the items below.

#### Placement Location

The Act amends 18 U.S.C. § 3621(b) to require the BOP, when designating a prisoner, to place him within 500 driving miles of his primary residence “subject to bed availability, the prisoner’s security designation, the prisoner’s programmatic needs, the prisoner’s mental and medical health needs, any request made by the prisoner related to faith-based needs, recommendations of the sentencing court, and other security concerns of the Bureau of Prisons.” While the quoted language generally reflects factors for which the BOP already accounts when designating prisoners, the inclusion of the 500-mile rule codifies a formerly unenforceable historic practice, which was removed from the Bureau’s 2006 revision of its *Designation Manual* (PS 5100.08).

#### Home Confinement

As noted, through 18 U.S.C. § 3624(c)(2), Congress authorized the BOP to place inmates on home confinement for the final 10 percent of their sentences up to six months. Leaving aside the earned credit incen-

## The FIRST STEP Act gives hope that prisoners will have access to recidivism reduction programs and will obtain earlier release back into the community.

pertinent policy statement, Guideline Section 1B1.13. When weighing whether to bring a § 3582(c)(1)(A) motion, counsel should also consider this Commission policy, which contains the legally relevant grounds for sentence reduction, along with the public comments submitted in support of its 2016 amendment.<sup>51</sup> Other resources include a FAMM overview and an article by Margaret Love, both long on the forefront of § 3582(c)(1)(A) policy and advocacy, and local Federal and Community Defender Offices, many of which have handled such matters.<sup>52</sup>

ing in criminal conduct or endangering any person or the public if released and with respect to whom BOP had determined that release to home detention will result in a substantial net reduction of costs to the federal government.”<sup>54</sup> When the program expired, in September 2010, the BOP had found 71 of 885 applicants (8 percent) eligible, a denial rate that led the GAO to question BOP’s claim that the program achieved no cost savings.<sup>55</sup>

The First Step Act re-authorizes Section 231(g) of the Second Chance Act for fiscal years 2019-2023.<sup>56</sup> In so doing, it expands the potential eligibil-

tives and elderly initiative, *ante*, the Act amends this subsection by directing the Bureau, “to the extent practicable, [to] place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph.”<sup>59</sup>

It is unclear how much the BOP, under this administration, will effectuate this encouraging change. During the Obama administration, a recognition that lower security offenders, serving shorter sentences, did not require as much halfway house time to ensure successful community reintegration resulted in increased halfway house utilization for higher security prisoners and expansion of home confinement for lower security offenders.<sup>60</sup> The current administration has rejected such an approach, severely curtailing both halfway house and home confinement use.<sup>61</sup> It is difficult to reconcile this administration’s approach to community corrections/re-entry with its stated support for the Act.<sup>62</sup>

### Opioid Addiction Treatment

Within 90 days of enactment of the Act, that is, on or before March 21, 2019, the BOP was to submit a report to Congress “assessing the availability of and the capacity of the Bureau of Prisons to treat heroin and opioid abuse through evidence-based programs, including medication-assisted treatment where appropriate.” “The report [was also to] include a description of plans to expand access to evidence-based treatment for heroin and opioid abuse for prisoners, including access to medication-assisted treatment in appropriate cases. Following submission, the director shall take steps to implement these plans.”<sup>63</sup>

On April 8, 2019, DOJ announced not only that it had submitted the report, but also that “BOP has also screened more than 400 inmates to identify candidates for possible enrollment in [medication-assisted treatment] MAT programs.”<sup>64</sup>

Significantly, where the BOP field-tested MAT programs at three institutions approximately two years ago, it has reportedly yet to implement programs in response to the Act.<sup>65</sup> That the BOP may begin using opiate-based medications to treat prisoners, let alone to treat substance abuse, would represent a significant modification to historic policy and practice, which has strongly eschewed the use of any potential addiction causing medications. If nothing else, it speaks to the extent of the opioid crisis in the United States, and the reality of how many addicted prisoners the Bureau now houses. Indeed, in recent years, the BOP

has confronted a growing problem of inmates secreting drugs, many of them opiates, into the prison system.<sup>66</sup>

### No Restraints for Pregnant Prisoners

The Act prohibits the use of restraints on pregnant prisoners from the time pregnancy is confirmed until the end of postpartum recovery (at least 12 weeks after pregnancy). Exceptions are available where the prisoner is deemed a flight risk (presumably on a particularized basis), she presents a serious risk of harm to herself or others, or medical personnel deem it appropriate. Even then, the restraints used must be the least restrictive option and may not be placed around the ankles, legs or waist, or cause the prisoner’s hands to be restrained behind her back.<sup>67</sup>

### Conclusion

Implementation of the FIRST STEP Act’s expansive prisoner-related provisions is fluid and ongoing. Defense lawyers are encouraged to consult advocacy organizations and government sources to stay up to date with the continuing implementation of the Act.

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### Notes

1. The Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act, Public Law No. 115-391. Available at <https://congress.gov/bill/115th-congress/senate-bill/756>.

2. See Staff of S. Comm. on the Judiciary, 115 Cong., S.3649, *The First Step Act Section-by-Section* (Nov. 15. 2018) (summary of the act) (available at <https://www.judiciary.senate.gov/imo/media/doc/S.%203649%20-%20First%20Step%20Act%20Section-by-Section.pdf>).

3. *Barber v. Thomas*, 560 U.S. 474 (2010).

4. See [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January\\_2019\\_Impact\\_Analysis.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January_2019_Impact_Analysis.pdf)

5. See <https://www.federalregister.gov/documents/2018/04/30/2018-09062/annual-determination-of-average-cost-of-incarceration>; see also Steve Sady, *Over-Incarceration and the Bureau of Prisons* (Sept. 2016) (available at [https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2016/report\\_BOP.pdf](https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2016/report_BOP.pdf)) (highlighting cost savings associated with reform of BOP’s time credit calculus).

6. 18 U.S.C. § 3632(a).

7. Two hundred and ten days from the date of enactment, Dec. 21, 2018, is July 21,

2019. However, because July 21 is a Sunday, it appears that the system must be released the preceding Friday, July 19, 2019.

8. Sarah N. Lynch, *Error in U.S. Prisons Law Means Well-Behaved Inmates Wait Longer for Release*, Reuters (Jan. 19, 2019).

9. Stephen R. Sady & Elizabeth G. Daily, *Delayed Implementation of the First Step Act’s Good Time Credit Fix Violates the Rules of Statutory Construction and Due Process of Law* (Feb. 2019) (available at [http://or.fd.org/system/files/case\\_docs/Goodtimeblog\\_2019-02-13\\_final.pdf](http://or.fd.org/system/files/case_docs/Goodtimeblog_2019-02-13_final.pdf)).

10. 18 U.S.C. § 3632(a)(1)-(2).

11. 18 U.S.C. § 3632(a)(3). Of note, in terms of individualized accommodation, the law specifically directs that a determination be made as to “the appropriate use of audio technology for program course materials with an understanding of dyslexia.” 18 U.S.C. § 3632(a)(8); see also 18 U.S.C. §§ 3632(h), 3633(b), 3635(1)-(2). Senator William Cassidy (R-La.) advocated for this accommodation. See <https://www.cassidy.senate.gov/newsroom/press-releases/cassidy-announces-dyslexia-screening-provision-included-in-new-criminal-justice-reform-bill>.

12. Public Law No. 115-391 § 107.

13. Samantha Michaels, *Trump Keeps Celebrating Prison Reform. His Administration’s Latest Move Could Sabotage*



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It, Mother Jones (April 11, 2019).

14. See <https://www.justice.gov/opa/pr/department-justice-announces-first-step-act-implementation-progress>.

15. Michaels, note 13, *supra*.

16. *Id.*

17. See Samantha Michaels, *Trump Is Throwing a Party to Celebrate His Paltry Criminal Justice Reform Efforts*, Mother Jones (Apr. 1, 2019); Beryl Lipton, *The First Step Act's First Steps Are Stalled*, Muckrock (Jan. 22, 2019); cf. 5 U.S.C. § 553.

18. 18 U.S.C. § 3632(a).

19. 18 U.S.C. § 3632(a)(1).

20. See BOP Program Statement 5100.08.

21. 18 U.S.C. § 3635(6).

22. Michaels, *supra* note 13.

23. John P. Walters & David Tell, *Criminal Justice Reform and the First Step Act's Recidivism Reduction Provisions: Preliminary Issues for Policymakers*, Hudson Institute (Jan. 18, 2019).

24. See <https://www.justice.gov/opa/pr/department-justice-announces-first-step-act-implementation-progress>.

25. Ayesha Rascoe, *3 Months Into New Criminal Justice Law, Success for Some and Sanful for Others*, NPR (Apr. 1, 2019).

26. See, e.g., Gwen van Eijk, *Socioeconomic Marginality in Sentencing: The Built-in Bias in Risk Assessment Tools and the Reproduction of Social Inequality*, 19 *Punishment & Society* 4, 463 (Sept. 2016); Jennifer L. Skeem & Christopher T. Lowenkamp, *Risk, Race, and Recidivism: Predictive Bias and Disparate Impact*, 54 *Criminology* 4, 680 (Nov. 2016).

27. 18 U.S.C. § 3631(b)(4).

28. 18 U.S.C. § 3621(h)(1).

29. *Id.*-sub(2), (3).

30. 18 U.S.C. § 3631(b)(3)(C).

31. 18 U.S.C. § 3633(a)(1).

32. See, e.g., BOP, *Directory of National Programs* (Nov. 21, 2016) and BOP, *Inmate Occupational Training Directory* (Mar. 31, 2017) (both available at [https://www.bop.gov/resources/news/20140613\\_program.jsp](https://www.bop.gov/resources/news/20140613_program.jsp)).

33. 18 U.S.C. § 3632(b)(2).

34. See *3 Months Into New Criminal Justice Law, supra* ("Congress passed the law but has not appropriated funds for the initiative"); Justin George, *First Step Act Comes Up Short in Trump's 2020 Budget*, The Marshall Project (Mar. 12, 2019) (in the White House's 2020 budget priorities, only \$14M was "explicitly listed to finance the Act's programs"); Eric Boehm, *Spending Bill Ignores Promised Funding for Major Criminal Justice Reform Passed Last Year*, reason.com (Feb. 14, 2019).

35. See Justin George, *How Jeff Sessions Is Undermining Trump's Prison Reform Agenda*, The Marshall Project (Oct. 25, 2018).

36. See Glenn Thrush & Danielle Ivory,

*Turf War Between Kushner and Sessions Drove Federal Prisons Director to Quit*, NY Times (May 24, 2018); see also Danielle Ivory & Caitlin Dickerson, *Safety Concerns Grow as Inmates Are Guarded by Teachers and Secretaries*, NY Times (June 17, 2018).

37. 18 U.S.C. § 3635(5).

38. 18 U.S.C. § 3634(4)(B).

39. 18 U.S.C. § 3621(h)(6).

40. 18 U.S.C. § 3634(g)(3).

41. 18 U.S.C. § 3632(d)(4).

42. 18 U.S.C. § 3634(g)(1)(D).

43. 18 U.S.C. § 3634(g)(1)(D)(i)(II).

44. 18 U.S.C. § 3632(d)(3).

45. 18 U.S.C. § 3632(d)(1).

46. 18 U.S.C. § 3632(d)(2).

47. 18 U.S.C. § 3632(d)(4)(D)-(E).

48. 18 U.S.C. § 3621(e); 28 C.F.R. § 550.58.

49. Compare, e.g., BOP Program Statement 5050.49 with FAMM/HRW, *The Answer Is No: Too Little Compassionate Release in US Federal Prisons* (Nov. 30, 2012). See also U.S.S.G. § 1B1.13.

50. Public Law No. 115-391 § 603.

51. See <https://www.ussc.gov/policy-making/public-comment/public-comment-march-21-2016>.

52. FAMM, *Compassionate Release and the First Step Act: Then and Now* (available at <https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf>) and Margaret Love, *The Model Penal Code Goes to Congress: Sentence Reduction for Compelling Reasons*, *The ALI Advisor* (Apr. 5, 2019) (available at <http://www.thealiadviser.org/sentencing/the-model-penal-code-goes-to-congress-sentence-reduction-for-compelling-reasons/>).

53. 42 U.S.C. § 17541(g).

54. GAO, *Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison*, 28 (Feb. 7, 2012) (available at <https://www.gao.gov/products/GAO-12-320>).

55. See GAO, *Methods for Estimating Incarceration and Community Costs and Result of the Elderly Offender Pilot* (Jul. 27, 2012) (available at <https://www.gao.gov/products/GAO-12-807R>).

56. See Public Law No. 115-391 § 603; 34 U.S.C. § 60541(g).

57. Available at <https://www.bop.gov/policy/om/001-2019.pdf>.

58. See <https://www.justice.gov/opa/pr/department-justice-announces-first-step-act-implementation-progress>.

59. Public Law No. 115-391 § 602; see BOP Operations Memorandum 001-2019 (available at <https://www.bop.gov/policy/om/001-2019.pdf>).

60. See BOP Asst. Dir. of Correctional Programs D. Scott Dodrill, *Memorandum for Chief Executive Officers: Revised*

*Guidance for Residential Re-entry (RRC) Placements* at 4 (June 24, 2010) (available at <https://dc.fd.org/library/FPD%20Presentation%20Oct%202012%20-%20BOP%20ISSUES.pdf>).

61. See Justin George, *How Jeff Sessions Is Undermining Trump's Prison Reform Agenda*, The Marshall Project (Oct. 25, 2018).

62. The day he signed the bill, President Trump called it "a monumental bipartisan win for the American people." See <https://twitter.com/realdonaldtrump/status/1076197669968728065>; but see Edward Chung, *Trump Fails the First Test of the First Step Act*, The Hill (Jan. 10, 2019). Attorney General Barr subsequently confirmed a "commit[ment] to implementing the First Step Act." Jeff Mordock, *William Barr Reaffirms Commitment to First Step Act Criminal Justice Reform*, Washington Times (Mar. 4, 2019).

63. Public Law No. 115-391 § 607.

64. See <https://www.justice.gov/opa/pr/department-justice-announces-first-step-act-implementation-progress>.

65. See Michael Linden, et al., *Prisoners as Patients: The Opioid Epidemic, Medication-Assisted Treatment, and the Eighth Amendment*, *J. Law, Medicine, and Ethics* (July 17, 2018); see also <https://www.justice.gov/archives/prison-reform>.

66. See, e.g., Torsten Ove, *Feds Say They've Cracked Prison Drug Network: Drug-Soaked Paper Distributed to Inmates*, Pittsburgh Post-Gazette (Feb. 2, 2019).

67. 18 U.S.C. § 4322. ■

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