



## MAJOR CITIES CHIEFS ASSOCIATION

### Implementation of the First Step Act Comments and Recommendations April 12, 2019

Major Cities Chiefs offer these comments and recommendations for consideration by the National Institute of Justice and the Bureau of Prisons.

**(1) The BOP should use an individualized definition, rather than a categorical one, for “evidence-based recidivism reduction programs.”**

The First Step Act (FSA) requires that the risk and needs assessment system match inmates with “evidence-based recidivism reduction programs.” Successful participation in such programming allows inmates to earn incentives, including additional time credits that can be redeemed for earlier placement in prerelease custody. While the FSA includes a broad definition of “evidence-based recidivism reduction program” in its amended Sec. 3653(3) (on p.14 of the enrolled bill), BOP still must determine its application. The FSA defines “evidence-based recidivism reduction programs” to be programs that are either group or individual activities that:

- A) Have been shown by empirical evidence to reduce recidivism, or are based on research suggesting that they are likely to be shown to reduce recidivism;
- B) Are designed to help prisoners succeed in rejoining society after release; and
- C) May include one or more example types of programs (ethics classes, prison jobs, etc.) that are listed in the FSA.

The BOP will have to decide how to interpret the first part of that definition. What does it mean for a program to be “shown . . . to reduce recidivism”? One option is for the BOP to decide categorically whether a program reduces recidivism, adding each to a list of “approved” programs, participation in which would entitle an inmate to time credits. The other option is for the BOP to decide individually whether a program reduces recidivism based on the particular circumstances and situation of the inmate in question. In that scenario, a program would only be considered an “evidence-based recidivism reduction program” for an inmate if it has been shown to reduce recidivism for inmates with the specific characteristics of that inmate. The BOP should choose the individualized definition rather than the categorical one.

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Releasing inmates earlier without reducing their risk of recidivism will only lead to an increase in the total number of crimes committed, and therefore it jeopardizes public safety to do so. The individualized definition is preferable because it makes it more likely that the inmate's early release under the time credit program will actually be accompanied by a lower risk of recidivism.

For example, there is evidence suggesting that drug treatment programs can reduce an inmate's risk of recidivism. However, it is common sense that drug treatment will not reduce the risk of recidivism for an inmate who does not have a substance abuse problem. Under a categorical definition, drug treatment would merely be on a list of "programs shown to reduce recidivism," and any inmate who participates would be eligible for earlier release through time credits. Under an individualized definition, drug treatment would only be considered a "program shown to reduce recidivism" if the inmate actually has a substance abuse problem, if that problem is related to the inmate's criminal activity, and other factors tied to the evidence showing treatment is likely to reduce the risk of recidivism for that inmate. As a separate matter, the BOP will also need to determine whether an inmate "successfully participates" in programming in the context of whether the inmate's participation has changed some dynamic factor associated with his risk of recidivism.

Just as programming should be tied to individual inmate situations, programs should not be so broadly defined as to lose their predictive effect on recidivism risk reduction. For example, there is some evidence suggesting that earning a GED is correlated with reduced recidivism. However, there is far more tenuous evidence suggesting that "academic classes" generally are correlated with reduced recidivism. So, just as an inmate who has already earned a GED equivalent should not earn time credits for time spent in GED classes, inmates should not earn time credits based on other specific programs unless they are shown to reduce recidivism risks for their specific type of inmate.

For example, a white collar criminal with advanced degrees should not receive time credits for participation in something like an art class (although that is still an "academic class") unless there is empirical evidence showing that art classes reduce recidivism for white collar inmates with advanced degrees. And, again, a half-completed class of any sort should not count for any credit (because there was no "successful participation") unless half-completed classes have been shown to reduce the risk of recidivism.

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Following an individualized definition, rather than a categorical one, will necessarily decrease the total universe of available programming that will allow an inmate to earn credits for earlier release. This may result in a practical “cap” on the amount of time a given inmate can earn in early release credits. This is a feature, not a bug. It means that time credits and other incentives will be directly tied to actual reductions in recidivism risk, which is the purpose of such incentives in the first place. A categorical approach would allow inmates to earn more time credits and be released earlier, but without reducing their recidivism risk, which endangers the public and will cause more crime. Further, the categorical approach is likely to lead to overbooked programming that limits access for inmates who actually need a particular program to reduce their recidivism risk.

**(2) The BOP should use an individualized definition, rather than a categorical one, for “productive activities.”**

For minimum and low risk inmates under the FSA, time credits may be earned by participation in “productive activities.” The FSA defines “productive activities” as group or individual activities that are “designed to allow prisoners . . . to remain productive and thereby maintain a minimum or low risk of recidivating, and may include the delivery of [evidence based recidivism reduction programs] to other prisoners.” As with evidence-based recidivism reduction programming, the BOP should interpret the definition of productive activities in an individualized way, rather than a categorical one. This will allow the BOP to account for the fact that “activity” is not necessarily productive. The mere fact that something is on an inmate's schedule need not necessarily qualify that activity as a productive one. The activity must actually produce something of value, and also must be connected to “maintain[ing] a minimum or low risk of recidivating.”

Therefore, for such activity to be eligible for earning time credits, it has to produce something of value in a way that is connected to the dynamic risk and needs assessment factors under the risk and needs assessment system. As with the evidence-based recidivism reduction programs, productive activities also must be related to the low or minimum risk maintenance of the individual prisoner to be time credit eligible.

To implement individualized definitions rather than categorical ones, BOP should consider designating certain activities as related to the maintenance of a low or minimum risk of recidivating, and then only programs that are so designated will earn time credits, and even then only when that programming is assigned to that particular inmate as part of the risk and needs assessment system.

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### **(3) The BOP should incorporate cooperation with prosecutors and law enforcement as an element of or even prerequisite for earning time credits.**

The FSA's requirements relating to a risk and needs assessment system, and the resulting incentives such as time credits that inmates can earn, are ostensibly designed to help reduce recidivism so that inmates reenter society successfully, leaving lives of crime behind them and embracing a fresh start as law-abiding members of society. However, it is clear that criminals who continue to withhold relevant information related to their offense after they are found guilty, including information that could assist the government in prosecuting co-conspirators, is continuing to work against the enforcement of our nation's laws and shielding criminal activity from justice.

In recognition of the fact that criminals cannot become truly law-abiding citizens until they stop shielding criminal activity from the law, the BOP should consider inmates' cooperation as part of their risk assessment, and as part of their recidivism-reduction efforts. It is not necessary that inmates provide "substantial assistance" in the prosecution of another offender to meet this requirement—indeed, many inmates may commit their crimes without any co-conspirators. However, inmates should nonetheless be required to truthfully provide to the government all information or evidence they have regarding their crimes.

Many inmates already complete this requirement before they are even incarcerated, often earning a "substantial assistance" downward departure from the applicable sentencing guideline range. The potential to earn early release time credits (or to earn a larger number of them) is likely to provide a stronger incentive for inmates to cooperate. Even when inmates do not have sufficient information to provide substantial assistance in another prosecution, they should still be incentivized to share all information and evidence they have regarding their own criminal activity.

It is not impossible, nor even particularly difficult, to make objective determinations of whether an inmate has fully cooperated. Indeed, this requirement is built into the "safety valve" in 18 U.S.C. § 3553(f)(5). The fact that the FSA expanded the applicability of the safety valve—which allows inmates to be sentenced below mandatory minimum sentences—only underscores that Congress in the FSA recommitted itself to the idea that cooperation by criminals is a relevant consideration when allowing them to earn lesser penalties for their crimes.

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In the context of the risk and needs assessment system, there should be no requirement that the inmate cooperate “not later than the time of the sentencing hearing,” as in the safety valve. Instead, inmates who chose not to take that important step as of their sentencing hearings (or who would be ineligible for the safety valve in any case) should have some remaining incentive to begin their transformation even if it occurs well into their prison term. Truthful disclosure of all information related to their crimes should be considered as part of the risk assessment and be eligible for time credits, then, while additional cooperation (such as informing on criminal activity within the prison system or showing willingness to testify against co-conspirators during their incarceration) should carry the potential of earning additional time credits and other incentives.

### **(4) The BOP should measure participation time appropriately through a workday model.**

The FSA is clear that prisoners earn 10 days of time credits “for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities.” However, the FSA does not define what is meant by a “day of successful participation.” BOP should not award an entire “day” of such participation based only on a minimal amount of participation in a program on any given day in prison. Instead, the BOP should adopt an hourly approach that mirrors the workday model used by the law-abiding public: 8 hours of work is considered a “day.” This means an inmate would earn 10 days (or 15, depending on their risk level) of time credit for every 240 hours of programming they complete, not for every calendar month where the inmate had minimal participation each day.

This approach is preferable to a minimal participation model. First, it incentivizes sustained participation in multiple types of programming. If an inmate earns a full “day” of participation by merely attending a 30-minute therapy session on a Tuesday, then the inmate has no incentive to participate in any other programming on that day—he has already earned his “day” of participation. By using an hourly approach, inmates are incentivized to voluntarily go beyond the minimum. For example, an inmate could attend the minimum number of GED classes, but an inmate who is incentivized to participate will spend more time studying in-between classes and will become a better student as he spends additional time improving his chances of successful reentry.

Second, this approach is fairer to inmates by rewarding those who apply themselves to their programming. If Inmate A spends 4 hours per day attending a GED class, learning a trade as part of Federal Prison Industries, and attending an ethics class, while Inmate B spends only 1 hour per day attending a GED class, then Inmate A should earn time credit four times faster than Inmate B.

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The workday approach allows the system to recognize those variances. It avoids unfairness to an inmate who, through no fault of their own, has most of their programming concentrated on a few days per week (and with no programming on one or two days per week), compared with an inmate whose programming happens to be spread more evenly across the week. Scheduling luck should play as minimal a role as possible in earning time credits, or else inmates face unfair differences in their true sentence lengths.

Other models the BOP could consider could involve shorter or longer numbers of hours for each “day” of participation. For example, the BOP could use a “school day” model so that approximately six-and-one-half hours of programming is a “day.” The BOP could also utilize a “workweek” model where 40 hours of participation counts as seven “days” of participation—working out to a little less than 6 hours of participation per calendar day. Either of these models could work, because like the workday model they appropriately recognize variances between inmate participation levels and reward greater participation.

We hope that these suggestions will be helpful and look forward to ongoing participation in this process. Please know that we are grateful for this opportunity to provide input on behalf of the communities we are sworn to protect across the Nation.

Sincerely,

Art Acevedo  
Chief, Houston Police Department  
President, Major Cities Chiefs Association

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