



November 17, 2021

VIA REGULATIONS.GOV

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

Re: FSA Time Credits, RIN 1120-AB76, BOP-1176R

Dear Ms. Qureshi:

DC Justice Lab, Democracy Forward Foundation, FAMM, Justice Action Network, National Association of Criminal Defense Lawyers, and Washington Lawyers' Committee for Civil Rights and Urban Affairs appreciate the opportunity to provide this comment in response to the Bureau of Prison's proposed rule entitled "FSA Time Credits," 85 Fed. Reg. 75,268 (Nov. 25, 2020). On October 18, BOP reopened its comment period, seeking comments specifically relating to the applicability of the First Step Act time credits to "D.C. Code offenders" in BOP custody. 86 Fed. Reg. 57,612 (Oct. 18, 2021). As set forth below, we strongly encourage BOP to revise its proposed rule to make clear that people convicted under the D.C. Code who are serving their sentence in federal custody would receive the full benefit of FSA time credits.

I. Background

The First Step Act, enacted on December 21, 2018, required the Attorney General to develop a risk and needs assessment system that would categorize people in prison by risk of recidivism, and assign each person to "appropriate evidence-based recidivism reduction programs."¹ That system was required to "provide incentives and rewards for prisoners to participate in and complete evidence-based recidivism reduction programs"; those incentives include phone and visitation privileges, transfer to a facility closer to the person's permanent residence, and additional opportunities to purchase goods from the commissary.² Relevant here, the Attorney General was also directed to provide an incentive for a person "who successfully completes evidence-based recidivism reduction programming or productive activities"

¹ See 18 U.S.C. § 3632(a)(5).

² *Id.* § 3632(d).

to “earn time credits” that can “be applied toward time in prerelease custody or supervised release.”³ BOP must then “transfer eligible prisoners . . . into prerelease custody or supervised release” when their earned time credits are “equal to the remainder of the prisoner’s imposed term of imprisonment,” and other criteria are met.⁴

Nearly two years after the First Step Act was enacted, BOP issued a proposed rule setting forth procedures for “eligible inmates” to earn FSA time credits.⁵ As relevant here, the proposed rule defines “eligible inmates” to include “any inmate who is sentenced under the U.S. Code and in the custody of the Bureau who is not serving a term of imprisonment for a conviction specified in 18 U.S.C. 3632(d)(4)(D).”⁶ The proposed rule further clarifies that “[a]n inmate who is in the custody of the Bureau, but is serving a term of imprisonment pursuant to only a conviction for an offense under the law of one of the fifty (50) states, the District of Columbia, Guam, Puerto Rico, the U.S. Virgin Islands, the Commonwealth of the Mariana Islands, American Samoa, or any other territory or possession of the United States is not an ‘eligible inmate.’”⁷

BOP has not yet enacted that proposed rule. Rather, this October, BOP reopened the comment period, noting that “it is unclear to the Bureau whether commenters had fully considered the issue of whether D.C. Code offenders in Bureau of Prisons custody are eligible for time credits under 18 U.S.C. 3632(d)(4), as added by the FSA.”⁸ Noting that the First Step Act is “ambiguous as to whether those with convictions under the D.C. Code are eligible to apply toward prerelease custody FSA time credits earned through their participation in evidence-based recidivism reduction programs or productive activities,” BOP solicited comments limited to that question.⁹

II. A Plain Reading of the Statutory Text Indicates that the FSA’s Time Credits Provision Applies to People Convicted Under the D.C. Code

The text of the First Step Act makes clear that its time credit provisions apply to people convicted under the D.C. Code who are in BOP custody.

We “begin[] where all such inquiries must begin: with the language of the statute itself.”¹⁰ The FSA provides for time credits for “[a] prisoner, except an ineligible prisoner under subparagraph (D)” of the relevant section.¹¹ The exception

³ *Id.* § 3632(d)(4).

⁴ *Id.* § 3632(d)(4)(C); *see also id.* § 3624(g)(1).

⁵ *FSA Time Credits*, 85 Fed. Reg. 75,268 (Nov. 25, 2020).

⁶ 28 C.F.R. § 523.41(d)(1); *see also* 85 Fed. Reg. at 75,271–72.

⁷ *Id.*

⁸ *FSA Time Credits*, 86 Fed. Reg. 57,612, 57,613 (Oct. 18, 2021).

⁹ *Id.*

¹⁰ *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

¹¹ 18 U.S.C. § 3632(d)(4)(A).

for “ineligible prisoner[s] under subparagraph (D)” refers only to people serving a sentence for conviction under certain enumerated federal statutes—those are thus immaterial to this analysis.¹² The operative text, then, is simply “prisoner.”

Handily, the First Step Act contains a set of definitions that apply to the subchapter containing Section 3632.¹³ And that section defines “prisoner” as “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.”¹⁴ As the Supreme Court has explained, the “ordinary use” of “or” is “almost always disjunctive, that is, the words it connects are to be given separate meanings.”¹⁵ Thus, simply being in the custody of BOP is sufficient to qualify as a “prisoner” under this subsection, regardless of the origin of the underlying conviction. This “plain meaning of legislation should be conclusive.”¹⁶

III. No Other Statutory Provisions Counsel Against this Interpretation

BOP suggests that other statutory provisions may point to a different conclusion—but none undermine the clear meaning of the relevant text. To be sure, the First Step Act includes a rule of construction stating that nothing in the Act “may be construed to provide authority to place a prisoner in prerelease custody or supervised release who is serving a term of imprisonment pursuant to a conviction for an offense under the laws of one of the 50 States, or of a territory or possession of the United States.”¹⁷ But that rule of construction does not disturb our analysis.

First, it is by no means clear that the rule of construction even applies to people who are “serving a term of imprisonment pursuant to a conviction for an offense under the laws of” the District of Columbia. The District of Columbia is certainly not “one of the 50 States.” And within the meaning of Title 18, the District does not seem to be a “territory” or “possession” either. Although Title 18 does not provide precise definitions for those terms, other, proximate definitions are revealing. For example, Title 18 defines “interstate commerce” as “commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia.”¹⁸ If the District were encompassed within the meaning of “territory” or “possession,” there would be no need to list it separately. Similarly, in discussing the laws of states adopted for areas within federal jurisdiction, Title 18 describes offenses that “would be punishable if committed . . . within the jurisdiction

¹² *Id.* § 3632(d)(4)(D).

¹³ *See id.* § 3635.

¹⁴ *Id.* § 3635(4) (emphasis added).

¹⁵ *Loughrin v. United States*, 573 U.S. 351, 357 (2014).

¹⁶ *Ron Pair*, 489 U.S. at 242 (internal quotation marks, alteration, and citation omitted).

¹⁷ 18 U.S.C. § 3621 note; Pub. L. No. 115-391, § 105, 132 Stat. 5214.

¹⁸ 18 U.S.C. § 10.

of the State, Territory, Possession, or District in which such place is situated.”¹⁹ Again, if a “District” were a “State,” “Territory,” or “Possession,” the inclusion of the specific term would violate the canon against surplusage. As the Supreme Court has explained, “a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”²⁰ Under that rule, the District of Columbia must mean something different from state, territory, or possession—and so it does not fall within the ambit of the FSA’s rule of construction at all.

Second, even if the rule of construction did apply, it does not affirmatively prohibit an interpretation of the First Step Act that promotes prerelease custody or supervised release for people convicted under the D.C. Code. Rather, it states only that the First Step Act does not, in and of itself, constitute “authority” for such a placement. But there is no need for the First Step Act to provide such authority as to people convicted under the D.C. Code—because other federal statutory provisions have already made clear that those people should be treated like people convicted of federal offenses. The National Capital Revitalization and Self-Government Improvement Act of 1997²¹ states that “any person who has been sentenced to incarceration pursuant to the District of Columbia Official Code” (after October 1, 2001) “shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed.”²² Similarly, people who were previously residing at the Lorton Correction Complex were transferred to BOP custody, and “[s]uch persons shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed, and the Bureau of Prisons shall be responsible for the custody, care, subsistence, education, treatment and training of such persons.”²³

Under the Revitalization Act, then, BOP is authorized to apply to people convicted under the D.C. Code the same laws—such as the First Step Act—that it applies to others in federal custody. “The Revitalization Act was, by its plain terms, not a contractual provision for confinement, but the full vesting of all aspects of custody in the BOP over D.C. offenders.”²⁴ As such, the BOP’s decision to apply the time credits provision to people convicted under the D.C. Code would be “consistent with the sentence imposed.” If, for example, a person was convicted of a federal drug crime and sentenced to five years of incarceration, it would not be “inconsistent” with

¹⁹ *Id.* § 13. See also, e.g., 5 U.S.C. § 500 (defining “State” for administrative practice as “a State, a territory or possession of the United States including a Commonwealth, or the District of Columbia” (emphasis added)).

²⁰ *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal quotation marks, alteration, and citation omitted).

²¹ Pub. L. No. 105-33, 111 Stat. 712, 745 (codified as D.C. Code § 24-101).

²² D.C. Code § 24-101(a).

²³ *Id.* § 24-101(b).

²⁴ *United States v. Savage*, 737 F.3d 304, 309 (4th Cir. 2013).

that sentence for BOP to calculate earned time credits in determining the date that person could be moved to supervised release. The same must follow for a person convicted of a drug crime under the D.C. Code who receives an identical sentence.²⁵ Similarly, BOP has the authority to place people in BOP custody in a halfway house for the final portion of their sentence, regardless of the jurisdiction of their conviction.²⁶ If BOP has the authority to make such a placement for less restrictive terms of custody, the same principle should apply to placements on home confinement or supervised release under the FSA.²⁷

Indeed, this interpretation is consistent with the contemporaneous understanding of the Members of Congress who passed the First Step Act. The Delegate for the District of Columbia made clear—the day the law passed—that the First Step Act “will apply to District of Columbia Code felons, who are the only local offenders housed by the” BOP.²⁸ In a contemporaneous press release, the Delegate noted that she “got language changed to clarify that the bill applies to all inmates under BOP’s jurisdiction, not just those convicted under federal law,” and that “[u]nder the bill, all BOP prisoners, including D.C. Code offenders, can . . . secure earlier release by participating in recidivism reduction programs.”²⁹

IV. Applying the FSA Time Credits Provision to People Convicted Under the D.C. Code Would Not Lead to an Absurd Result

As BOP correctly notes, “[m]aking D.C. Code offenders ineligible would prevent some nonviolent offenders from benefiting from that program when those with convictions for similar offenses under federal law would be eligible.”³⁰ This result would lead to absurdity. Take, for instance, the statutory requirement that the

²⁵ This conclusion is supported by courts’ interpretation of BOP authority in similar contexts. Courts have found, for instance, that the Revitalization Act grants BOP the authority to revoke good time credits afforded to people convicted under the D.C. Code as a sanction for disciplinary violations, just as they would for people convicted under Title 18. *See, e.g., Thompson v. Wilson*, Case No. 15-148, 2015 WL 5682856, at *6 (E.D. Va. Sept. 25, 2015); *Jones v. Williamson*, Case No. 07-885, 2007 WL 2028890, at *3 (M.D. Pa. July 11, 2007).

²⁶ *See* 18 U.S.C. § 3624(c)(1); *see also* Federal Bureau of Prisons, *About Our Facilities* (last visited Nov. 16, 2021), https://www.bop.gov/about/facilities/residential_reentry_management_centers.jsp (noting that “[p]re-release inmates at an RRC remain in Federal custody while serving a sentence imposed by a U.S. District Court or DC Superior Court”).

²⁷ In its request for comment, BOP noted the D.C. Code provision stating that certain people sentenced pursuant to the D.C. Code “may receive good time credit toward service of the sentence only as provided in 18 U.S.C. § 3624(b).” *See* D.C. Code § 24-403.01(d). We respectfully submit that this provision is largely immaterial to the analysis here, as the earned time credits at issue are separate and distinct from traditional good time credit.

²⁸ Press Release, *Norton Gets D.C. Code Felons New Benefits in First Step Act, Headed to President’s Desk*, Congresswoman Eleanor Holmes Norton (Dec. 20, 2018), *available at* <https://norton.house.gov/media-center/press-releases/norton-gets-dc-code-felons-new-benefits-in-first-step-act-headed-to>.

²⁹ *Id.*

³⁰ 86 Fed. Reg. at 57,613.

Attorney General develop a risk and needs assessment system that, among other things, “shall be used to . . . determine when a prisoner is ready to transfer into prerelease custody or supervised release in accordance with section 3624.”³¹ The rule of construction is inapplicable here, as this provision does not relate to placement. But it would be absurd for the Attorney General to be asked to implement a system preparing “prisoners”—defined to include those convicted under the D.C. Code—for placement in prerelease custody or supervised release, but then be precluded from taking that action for which he has prepared.

The absurdity of precluding people who are convicted under the D.C. Code from receiving the benefits of time credits is particularly stark as to people who were charged with and convicted of D.C. crimes in federal court. Under the District of Columbia Court Reorganization Act of 1970, the United States District Court for the District of Columbia has jurisdiction over any criminal offense under the D.C. Code that is “joined in the same information or indictment with any Federal offense.”³² As some people either plead guilty to or are convicted of only the D.C. Code offense in that indictment or information,³³ they end up “serving a term of imprisonment pursuant to a conviction for an offense under the laws of” the District of Columbia, but their entire case, conviction, judgment, and custody are handled at the federal level. Courts have previously rejected efforts by the government to treat such people differently than those convicted of federal offenses. Last year, for instance, a court in the D.D.C. rejected the government’s argument that the federal compassionate release statute did not apply to a person who was serving the D.C. Code portion of his sentence in BOP custody.³⁴ The Court construed a BOP regulation that prohibited the Bureau from initiating compassionate release requests on behalf of people convicted under the D.C. Code but housed in federal custody as inapplicable to people who had been charged with D.C. offenses in federal court.³⁵ The D.C. Circuit has similarly concluded that it would be inappropriate to apply D.C. Code bail provisions in federal court, because it would result in certain defendants in the D.C. federal courts being “treated more harshly than defendants in any other federal court.”³⁶ The same reasoning applies here.

BOP notes that “[m]aking D.C. Code offenders eligible to apply time credits would enable some persons with convictions for violent offenses to benefit from the FSA time-credit program when those convicted for similar offenses under federal law would be ineligible.”³⁷ Although this is true, BOP correctly acknowledges that either

³¹ 18 U.S.C. § 3632(a)(7).

³² D.C. Code § 11-502(3).

³³ See, e.g., *United States v. Malenya*, 736 F.3d 554, 556 (D.C. Cir. 2013).

³⁴ See *United States v. Hammond*, Case No. 02-294, 2020 WL 1891980, at *5–6 (D.D.C. Apr. 16, 2020).

³⁵ *Id.* at *6 (explaining that the regulatory language “may be nothing more than a direction to BOP wardens not to accept requests for . . . release . . . from prisoners convicted and sentenced in state courts or Superior Court”).

³⁶ *United States v. Brown*, 483 F.2d 1314, 1317 (D.C. Cir. 1973).

³⁷ 86 Fed. Reg. at 57,613.

interpretation of the statute would result in an asymmetry. Given the purpose of the First Step Act—the principle that if a person in prison “works hard to make themselves ready to be productive citizens and community leaders or members, then they ought to reap the rewards of that work”³⁸—when confronted with such an asymmetry, BOP should adopt the interpretation that benefits people who are making the effort to earn time credits. BOP also notes that people convicted of violent offenses under federal law were originally excluded from the time-credit program out of concern that they would pose a higher risk should they be released from incarceration early. But because the FSA already incorporate a risk and needs assessment before transferring a person to prerelease custody or supervised release, excluding people convicted under the D.C. Code from eligibility simply because some members of that group were convicted of violent offenses would do nothing to promote public safety.³⁹

V. Even if the First Step Act Is Ambiguous, the Rule of Lenity Should Govern

For the reasons above, the First Step Act clearly includes those who were convicted under the D.C. Code within its time-credit program. But even if BOP is correct that the First Step Act is “ambiguous” on that point, that conclusion would militate for the same result. Under the rule of lenity, “ambiguities about the breadth of a criminal statute should be resolved in the defendant’s favor.”⁴⁰ The rule of lenity is a “canon of strict construction of criminal statutes,”⁴¹ and applies to both substantive criminal law and its penalties.⁴² Although the law is not settled as to the rule’s application to time credit,⁴³ the better view is that BOP should exercise lenity

³⁸ 164 Cong. Rec. S7780 (daily ed. Dec. 18, 2018) (statement of Sen. Chuck Grassley).

³⁹ See 18 U.S.C. § 3624(g); see also James M. Byrne, et al., *Report of the Independent Review Committee Report Pursuant to the Requirements of Title I Section 107(g) of the First Step Act (FSA) of 2018 (P.L. 115-391)* 2 (Dec. 22, 2020), <https://firststepact-irc.org/wp-content/uploads/2020/12/IRC-FSA-Title-I-Section-107g-Report-12-21-20.pdf> (“There appears to be no significant difference in the collective recidivism-risk profiles of BOP’s [earned time-credit]-eligible and [earned time-credit]-ineligible inmate populations.”).

⁴⁰ *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019).

⁴¹ *United States v. Lanier*, 520 U.S. 259, 266 (1997).

⁴² *United States v. Granderson*, 511 U.S. 39, 54 (1994); see also *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (“We do not think any ambiguity survives. If any did, however, we would choose the construction yielding the shorter sentence by resting on the venerable rule of lenity.”); *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (“This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.” (internal quotation marks and citation omitted)).

⁴³ See *Barber v. Thomas*, 560 U.S. 474, 488 (2010) (assuming, without deciding, that Section 3624 (providing for good-time credit) “can be construed as imposing a criminal penalty”). Compare *Davis v. Crabtree*, 109 F.3d 566, 568, 570 (9th Cir. 1997) (rejecting BOP’s argument that the rule of lenity does not apply to a statute providing for reduction of time in custody after completing a treatment program), with *Sash v. Zenk*, 439 F.3d 61, 63 (2d Cir. 2006) (holding that the rule of lenity does not apply to Section 3624(b)).

consistent with the rule’s goal of “minimiz[ing] the risk of selective or arbitrary enforcement.”⁴⁴ If there is any ambiguity as to whether the First Step Act’s time credits program applies to people convicted under the D.C. Code—and BOP has admitted as much⁴⁵—the rule of lenity would require that people in custody receive the benefit of that ambiguity.

Accordingly, we encourage BOP to revise its proposed rule and implement final regulations that provide the full benefit of FSA time credits to people who were convicted under the D.C. Code and are serving their sentence in federal custody. And although this comment is necessarily limited to people convicted under the D.C. Code, we strongly urge BOP to consider that the rule of lenity applies equally to people convicted under the laws of other U.S. states and territories who are serving their sentence in federal custody. If you have any questions or would like to discuss the information in this comment, please contact Jessica Morton at 202-843-1642 or jmorton@democracyforward.org. Thank you for your consideration.

Respectfully submitted,

DC Justice Lab
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and Urban Affairs

⁴⁴ *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

⁴⁵ *See* 86 Fed. Reg. at 57,613.