



April 23, 2019

Submitted via www.regulations.gov

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Acting Director
U.S. Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Re: OPM-2019-0002 - Agency Information Collection Activities; Proposals, Submissions, and Approvals: Declaration for Federal Employment

On behalf of Americans for Prosperity (AFP) and Freedom Partners Chamber of Commerce (FP), we are writing in response to the U.S. Office of Personnel Management's (OPM) Notice of Proposed Rulemaking to revise Optional Form 306 (OF306) published in the Federal Register on February 22, 2019. Although the proposed changes to federal hiring may be well-intentioned, requiring disclosure of *any* contact with the criminal justice system, even if it did not result in a conviction, does little to make us safer. Such disclosure does, however, limit the ability of Americans with arrest records to find employment, contribute to their communities, and provide for their families. This change deters otherwise-qualified applicants, reduces the quality of the federal workforce applicant pool, and has implications for the economic opportunity for countless Americans. For these reasons, AFP and FP stand in opposition.

AFP recruits, educates, and mobilizes citizens to build a culture of mutual benefit where people succeed by helping others improve their lives. Along with our 35 state chapters and millions of grassroots activists, AFP works toward a criminal justice system that recognizes the potential of all people to transform their lives and contribute to society, ensuring rehabilitation accompanies punishment and providing second chances to those who are ready to improve their lives.¹

FP believes in breaking down barriers that prevent people — especially the least fortunate — from pursuing and achieving their dreams. FP supports common-sense criminal justice policies

¹ Americans for Prosperity, *Our Elected Officials Can Transform Countless Lives During Second Chance Month* (Apr. 8, 2019), <https://americansforprosperity.org/our-elected-officials-can-transform-countless-lives-during-second-chance-month/>; Mark v. Holden, *Why Koch Industries 'Banned the Box,'* WSJ (Aug. 17, 2016), <https://www.wsj.com/articles/why-koch-industries-banned-the-box-1471473505>.

that pursue justice equally for all, inspire a culture of respect for every individual, protect and enhance public safety, and foster personal and societal transformation.²

Because of our commitment to removing barriers to opportunity for all people, especially the least advantaged, we believe the revisions to OF306 are counterproductive.

I. Expanded inquiry into an applicant's justice-involvement is unnecessary to achieve the goal of hiring a qualified workforce.

Although the federal government should seek qualified individuals to fill open roles in agencies, the proposed changes to Question 9 on OF306 will create an unnecessary burden on applicants without enhancing the value of information for a hiring manager in a way that meaningfully improves public safety. The current version of OF306 asks applicants whether they have been convicted of “any crime” or offense.³ The proposed revision to this form asks applicants whether they have “Been subject to judge or court specified conditions requiring satisfactory completion before a criminal charge has been or will be dismissed.” This change is unnecessary for two reasons: (1) relevant information about criminal history is already captured by the current version of Question 9; and (2): such an inquiry would second-guess prosecutorial and judicial discretion about who must record a criminal offense.

A. OPM already collects relevant information about an applicant's criminal history in relation the job held or sought.

The current version of OF306 provides a thorough review of an applicant's crimes and offenses, including misdemeanors and felonies.⁴ Although the existence of a criminal conviction should never be a bar to employment overall, in some cases, the nature of the offense might prove relevant for public safety in making a hiring decision for a specific role.⁵ But this is not what the proposed revision would do. Instead of collecting information about serious crimes, expanding Question 9 would require disclosing information about *mere contact* with the criminal justice system, even for conduct that that *did not* lead to a charge or a conviction. This could mean that uncharged, dismissed, or diverted cases—those implicating the fewest safety concerns—would be subject to reporting.⁶ If the goal of criminal background checks is to “protect the integrity or

² Freedom Partners, *Criminal Justice Reform* (Accessed Apr. 22, 2019), <https://freedompartners.org/issue/criminal-justice-reform/>

³ Optional Form 306, page 2, question 9 (Revised February 2016).

⁴ Question 9 captures information about probation, parole, and all offenses, including: felonies, firearms or explosives violations, misdemeanors, and all other offenses. *Id.* at 2.

⁵ See Robert H. Shriver, III, Written Testimony of Robert H. Shriver, III, Senior Policy Counsel for the U.S. Office of Personnel Management, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, (Jul. 26, 2011), <http://www.eeoc.gov/eeoc/meetings/7-26-11/shriver.cfm> (stating that “with just a few exceptions, criminal convictions do not automatically disqualify an applicant from employment in the competitive civil service.”).

⁶ Lawyers' Committee for Civil Rights Under Law, Best Practice Standards: The Proper Use of Criminal Records in Hiring (May 21, 2013), <https://hirenetwork.org/sites/default/files/Best-Practices-Standards-The-Proper-Use-of->

promote the efficiency of the service,”⁷ then OPM should focus on past behavior that directly relates to the duties and functions of the job held or sought.

Even if the revised version OF306 is not submitted until very late in the hiring process when a conditional offer has been made, the information it seeks to capture has little bearing on the relationship between the job posting and uncharged conduct.⁸ If a court has already determined that past conduct did not rise to a level of seriousness warranting criminal punishment, then its helpfulness to a suitability determination by OPM is insignificant. Mandating an inquiry into diversionary outcomes would not yield relevant information to make an employment decision but instead introduce misleading and potentially prejudicial information about future applicants.

B. The sought information in the revision to Question 9 would undermine final decisions made by prosecutors and judges.

The proposed change in OF306 would second-guess prosecutors and judges who exercise discretion about what conduct must be prosecuted to secure a criminal conviction.⁹ There are more than 3,000 problem-solving or diversion courts that operate in the United States.¹⁰ Through these courts, judges and prosecutors may recommend a diversion from traditional prosecution for people who commit low-level, nonviolent offenses when prosecution would be “counterproductive, ineffective, or unwarranted.”¹¹ More importantly for OPM’s consideration, diversion programs allow flexibility for people whose offenses are deemed minor enough—providing an opportunity to avoid incurring a criminal record that can negatively impact them for years to come.¹² The mark

[Criminal-Records-in-Hiring.pdf](#) (noting EEOC guidance on use of unconvicted conduct in hiring: “The fact that someone has been charged with a crime should not disqualify them for a job if they were not convicted.”).

⁷ See 5 C.F.R. §§ 731.201.

⁸ See, e.g., *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232, 241 (1957) (“The mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.”); *Gregory v. Litton Sys. Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (“[I]nformation concerning a prospective employee’s record of arrests without convictions, is irrelevant to [an applicant’s] suitability or qualification for employment.”).

⁹ U.S. DEP’T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 1 (2013) <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf> (As part of the Smart on Crime initiative, the Department of Justice specifically endorsed the use of specialized criminal courts: “In appropriate instances involving non-violent offenses, prosecutors ought to consider alternatives to incarceration, such as drug courts, specialty courts, or other diversion programs.”).

¹⁰ Suzanne M. Strong, et al, *Census of Problem-Solving Courts, 2012*, BUREAU OF JUSTICE STATISTICS (Oct. 12, 2016), <https://www.bjs.gov/content/pub/pdf/cpsc12.pdf>.

¹¹ *State v. Fox*, 832 N.W.2d 55, 60–61, (S.D. 2013) (“pretrial diversion or deferred prosecution is defined as ‘any voluntary option that provides alternative criminal case processing for a defendant charged with a crime and ideally results in a dismissal of the charge(s).’ ... these diversion programs feature: ‘(1) uniform eligibility criteria; (2) structured delivery of services and supervision; and (3) dismissal—or its equivalent—of pending criminal charges upon successful completion of the required term and conditions of diversion.’ Unsuccessful participants are returned for prosecution.”).

¹² See, Richard C. Boldt, *Problem-Solving Courts*, in REFORMING CRIMINAL JUSTICE 281 (2017), http://academyforjustice.org/wp-content/uploads/2017/10/13_Reforming-Criminal-Justice_Vol_3_Problem-Solving-

of a criminal record is a serious matter and has lasting effects.¹³ For precisely that reason, diversion provides accountability for conduct deemed low-level enough not to warrant punishment or the burden of a lifetime of scrutiny.

If OPM were to require that all future applicants provide details about participation in a diversionary program, it would nullify the effectiveness of diversion by substituting careful judgement by prosecutors and judges for aimless speculation about past conduct.¹⁴ Imposing a rule to dig through uncharged or dismissed conduct runs directly counter to the purpose of having an alternative to prosecution in the first place. In sum, changing OF306 would not provide benefit to OPM, the federal agencies, nor the countless Americans who have experienced some connection to the criminal justice system.

II. Proposed changes would discourage potential applicants and limit economic opportunity for qualified individuals.

It is estimated that over 70 million Americans—or 1 in 3 adults—have a record of arrest or conviction.¹⁵ For a rule change implicating such a broad portion of our workforce, understanding its potential impacts is key. Asking applicants about mere interactions with the justice system beyond their actual convictions adds an extra level of scrutiny they would not face in over a dozen states or when applying to a growing movement of private sector companies.¹⁶ Learning about applicants' participation in diversion programs does little to promote safety. In fact, given the importance of employment to avoiding recidivism, the reduced opportunities the rule would create could make our communities more dangerous.¹⁷

Moreover, this change would reduce the quality of the federal workforce by deterring otherwise qualified applicants. We should trust our law enforcement and courts when they believe

[Courts.pdf](#) (“In drug-treatment courts and many other problem-solving courts, by contrast, the stabilizing influence of judicial neutrality and formal rules of procedure are diminished precisely because the interests of the defendant are now seen as consonant with those of the state.”).

¹³ See, e.g., *Menard v. Mitchell*, 430 F.2d 486, 490 (D.C. Cir. 1970) (Even if no direct economic loss is involved, the injury to an individual's reputation may be substantial. Economic losses themselves may be both direct and serious. Opportunities for schooling, employment, or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved.”).

¹⁴ *Smith v. United States*, 375 F.2d 243, 247 (5th Cir. 1967) (“The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute.”).

¹⁵ See Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1806 (2017); Megan Stevenson and Sandra Mayson, *Contributions: The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 746 n.81 (2018).

¹⁶ In a dozen states (CA, MA, MI, NV, NH, NJ, NY, PA, RI, UT, WV, WI) employers can only inquire about criminal convictions rather than arrest history, while private companies like Google, Walmart, and Koch Industries have abandoned asking about applicants' criminal histories in applications.

¹⁷ Jake Cronin, *The Path to Successful Reentry*, U. MO INST. PUB. POL'Y, Rep. 12 (2011), <https://munews.missouri.edu/news-releases/2011/1003-prison-education-programs-reduce-inmate-prison-return-rate-mu-study-shows/> (“Employment proves to be the strongest predictor of not returning to prison that we found.”).

a defendant's conduct is minor enough to be addressed without pursuing a criminal conviction. The point of diversion programs is to provide defendants an opportunity to avoid the harmful employment consequences that a conviction record creates and a second chance to realize their full potential. The proposed rule would nullify these programs' benefits for federal job-seekers.

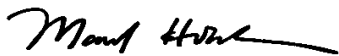
III. Conclusion

The Trump Administration has made admirable progress advancing criminal justice reform. If fully implemented, the historic First Step Act promises to give better opportunities to current and former prisoners to successfully re-enter society and contribute to their communities. The proposed change to OF306 would directly undermine the President's criminal justice reform agenda by stymieing re-entry efforts recently highlighted at the White House earlier this month.¹⁸

Unnecessarily expanding OF306 to ask about conduct not serious enough to warrant a criminal penalty is irrelevant to the safety concerns of the hiring process, unwisely second-guesses the more informed decisions of our justice system, and lowers the quality of the federal applicant pool by deterring applicants. In short, the proposed rule change provides almost no benefit at a heavy cost. For these reasons, Americans for Prosperity and Freedom Partners urges the Office of Personnel Management to avoid erecting an unnecessary barrier to opportunity to over a third of American adults in seeking federal employment.

Sincerely,

Mark Holden
Chairman | Freedom Partners Chamber of Commerce



Brent Gardner
Chief Government Officer | Americans for Prosperity



¹⁸ *President Donald J. Trump Is Committed to Building on the Successes of the First Step Act.* THE WHITE HOUSE. (Apr. 1, 2019). <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-committed-building-successes-first-step-act/>.

