

Sunday, January 24, 2021

***VIA ELECTRONIC SUBMISSION***

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

**RE: Docket No. BOP-1176P; 85 FR 75268; FSA Time Credits.**

Thank you for the opportunity to comment on the Bureau of Prisons' proposed rules regarding earned time credits authorized by the First Step Act of 2018. It has been an honor to engage with the Department of Justice throughout the First Step Act implementation process and I look forward to continuing this conversation on behalf of the Americans for Prosperity team.<sup>1</sup>

In these comments I will elaborate on the following points in response to the proposed earned time credit rules:

1. **Awarding credits for program completion:** This proposed rule is prudent, but the Department should also provide partial credit for those whose lack of completion is outside of their control.
2. **Expanding program access:** Lack of program availability will severely limit the positive public safety benefit of the First Step Act's earned time credit program and there are steps the Bureau of Prison can take to remedy this in the face of Congressional inaction.
3. **Awarding earned time credits in transitional housing:** The Bureau of Prisons should not ban the awarding of time credits for individuals in Residential Reentry Center or on home confinement based on the plain language of the First Step Act.
4. **Defining a "day":** The task of defining a day is difficult and the Bureau of Prisons should consult with experts to ensure the final definition maximizes program participation.

Please see below for additional details and the research that motivates us to advocate for an evidence-based earned time credit program in our federal prison system.

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The First Step Act's earned time credits program is the first of its kind to be implemented in our federal corrections system. America's "cycle of recidivism drains taxpayer dollars, strains the limited resources at the Department of Justice, and undermines community safety."<sup>ii</sup> The establishment of this program in the federal system follows the model of similar state programs that have been found to reduce recidivism, correctional spending, and prison populations.<sup>iii</sup> The Bureau of Prisons (BOP) must ensure that this program is implemented properly if we hope to achieve similar results in our federal criminal justice system.

### **Awarding Credits for Program Completion**

The First Step Act states that any individual in federal prisons "who successfully **completes** evidence-based recidivism reduction programming or productive activities, shall earn time credits..."<sup>iv</sup> The BOP has adopted this completion requirement in its proposed rules to implement this earned time credit program.<sup>v</sup> While the body of research is not fully conclusive, we believe this was a prudent decision by both Congress and the BOP given the vast amount of research showing that mere participation fails to impact someone's risk of future crime in the same way as program completion.<sup>vi</sup> To provide the same level of benefit for individuals who merely participate in such programs would undermine the full public safety benefit of awarding these earned time credits.

One exception to this uniform standard that we would urge the BOP to consider is a procedure for individuals who are unable to complete a program for reasons outside of their control. This could include reasons such as being unexpectedly transferred to another facility, a lapse in program funding, or a facility being placed on lockdown for a substantial amount of time. In such cases, the BOP should provide a manner for individuals to appeal through the BOP's Admin Remedy Program. This process should allow individuals to petition for partial credit when they have fully complied with the program's rules up until that point, intended to complete the program, and had already completed more than half of the program goals.

Read as a whole in context, the First Step Act contemplates limited circumstances in which time credits should be awarded based on successful participation in recidivism reduction programs.<sup>vii</sup> The First Step Act requires the Bureau of Prisons to "provide incentives and rewards for prisoners to participate in and complete evidence-based recidivism reduction programs."<sup>viii</sup> These incentives include phone and visitation privileges, transfer to an institution closer to their release residence, increased commissary spending limits, and the provision of specified amounts of earned time credits.<sup>ix</sup> While the provisions related to the earning of the specified amounts of earned time credits required by Congress do utilize the phrase "successfully completes" rather than the phrase "successful participation" used in other incentive provisions, the language of the First Step Act shows that Congress wanted to incentivize *both* participation and completion of programming activities.<sup>x</sup> Congress also provided individuals who "successfully participate" in programs the ability to apply such credits

towards time in “prerelease custody or supervised released.”<sup>xi</sup> This shows that Congress did not intend for the *use* of such earned time credits to be restricted to those who completed such programs but simply wanted to ensure that individuals who completed programming received a minimum amount of credits as an effective incentive. If it were otherwise, Congress would not have included the phrase “successful participation” in the Act, which would be mere surplusage.<sup>xii</sup> Providing partial credit when someone is unable to complete a program for reasons outside of their control would both achieve the intent of Congress to maximizing participation through incentives and reaffirm the importance of full program completion.

### **Lack of Programming Cripples the Impact of Incentives**

Researchers, advocates, Congressional leaders, and even the Independent Review Committee have consistently raised concerns about the lack of programming that currently exist in our federal prison system and how this will cripple the potential impact of the First Step Act.<sup>xiii</sup> While the BOP has currently approved approximately 80 evidence-based recidivism reduction programs and productive activities, many of the more intensive and impactful programs are only available at a handful of the more than 120 institutions managed by the BOP.<sup>xiv</sup> This lack of programming is not the result of low demand. Many programs and even the federal UNICOR program have hundreds or thousands of individuals currently on their waitlist.<sup>xv</sup> Even if the BOP revises this proposed policy to increase the amount of credit individuals can earn for the completion of programming, this lack of program capacity presents a significant barrier to the promising recidivism mitigating effects of incentivizing completion of these important programs.

Americans for Prosperity will continue to urge that Congress provide full funding of the First Step Act’s implementation so that the BOP is not inhibited from expanding access to its current programming but there are steps that the BOP can take without future Congressional action to ensure maximum program participation among those in federal prisons.<sup>xvi</sup> First, the BOP should ensure that the First Step Act’s provisions requiring federal prisons to allow faith- and community-based organizations to provide programming in federal prisons are implemented to the fullest extent so programming capacity can significantly increase at little to no cost for taxpayers.<sup>xvii</sup> Second, the BOP should take steps to increase the transparency, efficiency, and awareness of the External Program Review process for faith- and community-based organizations to qualify as an evidence-based recidivism reduction program or a productive activity. This process was posted on the BOP’s website more than six months ago and at this time no external faith- or community-based organization has been approved to join the BOP’s Approved Programs Guide for the First Step Act’s earned time credit program.<sup>xviii</sup> By removing these barriers for innovation organizations funded by local communities, the BOP can ensure programming access is expanded in federal facilities even in the face of future inaction by Congress.

## Restricting Credits to Prisons

The BOP has determined that the text of the First Step Act restricts individuals from earning earned time credits when they are located “in a Residential Reentry Center or on home confinement.”<sup>xxix</sup> The BOP provides no explanation for this conclusion, which is not supported by the text of the legislation passed by Congress. The First Step Act clearly defines the term “prisoner” as an individual 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.”<sup>xx</sup> The use of “or” makes plain that *either* condition is sufficient for eligibility to earn time credits.<sup>xxi</sup> Nothing in the relevant definitions or statutory sections imposes a statutory restriction for individuals earning these credits for program completion during any time they may be housed in a Residential Reentry Center or on home confinement.<sup>xxii</sup> In fact, the First Step Act indicates that any person “sentenced to a term of imprisonment” who is not “an ineligible prisoner...**shall** earn time credits.”<sup>xxiii</sup> The statute clearly requires BOP to award time credits to those who have been sentenced to a term of imprisonment, regardless of whether they remain in the custody of the Bureau of Prisons.<sup>xxiv</sup>

The plain language of the statute shows that Congress intended to allow those who have been sentenced to a term of imprisonment but are located in a Residential Reentry Center or home confinement to earn time credits. But even if the statute were ambiguous on this point, application of the rule of lenity would counsel in favor of allowing those on home confinement or Residential Reentry Centers to earn time credits, as any ambiguities should be interpreted in their favor.<sup>xxv</sup> Simply put, the BOP does not have statutory authority to deny earned credits to those who are on home confinement or in Residential Reentry Centers.<sup>xxvi</sup>

The BOP’s current interpretation of these provisions punishes those who have already proven their restoration or achieved a low-risk status by receiving the ability to exit the prison walls. Barring them from the benefit of earned time credits for any programming they may complete while in a Residential Reentry Center or on home confinement is counterintuitive. While all such programming opportunities may or may not currently exist, these individuals should not be treated differently only because they have qualified for these less intense forms of supervision in the federal system. An individual who completes the exact or substantially similar programming in one of these environments should receive the same benefits as someone in a traditional federal prison.<sup>xxvii</sup> The fact that they may never return to prison and therefore never use these credits, should not prevent them from gaining such credits for potential future use. We urge the BOP to reconsider this conclusion and, at a minimum, provide justification for its current decision.<sup>xxviii</sup> To achieve the highest level of public safety we must do our best to ensure that every individual in the federal system is able to acquire the crucial skills, education, and character development he or she will need to be successful when they are no longer under the control or supervision of our federal justice system.

## Defining a Day

The First Step Act stated that individuals can “earn 10 days of time credits for every 30 days of successful participation” in programs that reduce their risk of recidivism.<sup>xxix</sup> It does not specifically define the term “day” in the context of what constitutes a day of programming. The BOP has chosen to define a day as a “one eight-hour period of participation.”<sup>xxx</sup> We agree with the many advocates who argue that this definition is an extremely high bar for any one individual to secure a meaningful sentence reduction – especially with the limited amount of programming currently provided in the federal system that will allow an individual to achieve the 30 days of participation threshold.<sup>xxxi</sup>

State correctional systems provide substantially more time credits than the federal system, but they all use various methods to calculate such credits that are distinct from the federal system.<sup>xxxii</sup> Most states provide a lump sum credit for each program completed or provide a set number of credits per calendar month of program participation.<sup>xxxiii</sup> The few states which do base their calculation directly on a “day” of program participation merge good (behavior-based) and earned (programs-based) time credits into one single calculation.<sup>xxxiv</sup> This complicates the use of states as a model for the federal system because Congress has explicitly provided a separate mechanism for the provision of good and earned time credits and did not make good behavior a requirement for the earning of time credits through the completion of programs.<sup>xxxv</sup>

Having surveyed the current body of research and the experience of state prison systems myself, I agree with the Independent Review Committee that I am unprepared to question the BOP’s specific interpretation of the correct definition of a “day” in this instance.<sup>xxxvi</sup> We urge the BOP to consider the recommendations of stakeholders on how to interpret this provision in an evidence-based manner consistent with the statute’s text, structure, and purpose, and ensure that the First Step Act’s goal of incentivizing maximum program participation is achieved.<sup>xxxvii</sup>

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- <sup>i</sup> Verbal Testimony of Jeremiah Mosteller from the Charles Koch Institute Submitted to the U.S. Department of Justice, Office of Justice Programs, National Institute for Justice Regarding the Department of Justice's implementation and development of PATTERN risk assessment (September 2019), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/254142.pdf>; Testimony of Vikrant Reddy and Jeremiah Mosteller of the Charles Koch Institute Submitted to the U.S. Department of Justice, Office of Justice Programs, National Institute for Justice Regarding the development and implementation of a risk and needs assessment system for the Federal Bureau of Prisons (April 2019), available at <https://www.ncjrs.gov/pdffiles1/nij/253115.pdf>.
- <sup>ii</sup> 162 Cong. Rec. H10362 (daily ed. December 20, 2018) (Comments of Representative Collins on the purpose of the First Step Act).
- <sup>iii</sup> Dora Schiro, *Is Good Time a Good Idea? A Practitioner's Perspective*, 21 Fed. Sentencing Rep. 179 (2009); North Carolina Sentencing and Policy Advisory Committee, *Prison Population Projections: Fiscal Year 2020 to Fiscal Year 2029*, North Carolina Courts (2020), <https://www.nccourts.gov/assets/documents/publications/Projection-2020.pdf?NsN4PfbMQMs2g4fWFluaOGOJIm4kq.k5>; Elizabeth Drake, et al., *Increased Earned Release From Prison: Impacts of a 2003 Law on Recidivism and Crime Costs, Revised*, Washington State Institute for Public Policy (2009), [https://www.wsipp.wa.gov/ReportFile/1039/Wsipp\\_Increased-Earned-Release-From-Prison-Impacts-of-a-2003-Law-on-Recidivism-and-Crime-Costs-Revised\\_Full-Report.pdf](https://www.wsipp.wa.gov/ReportFile/1039/Wsipp_Increased-Earned-Release-From-Prison-Impacts-of-a-2003-Law-on-Recidivism-and-Crime-Costs-Revised_Full-Report.pdf); Dan Bernstein & E. Michele Staley, *Merit Time Program Summary: October 1997 – December 2006*, Department of Correctional Services (2007), [https://doccs.ny.gov/system/files/documents/2019/09/Merit\\_Time\\_Through\\_2006.pdf](https://doccs.ny.gov/system/files/documents/2019/09/Merit_Time_Through_2006.pdf); See also Criminal Justice Commission, *The Effect of Changes to Earned Time Awards On Recidivism*, State of Oregon (2010), <https://www.oregon.gov/cjc/CJC%20Document%20Library/EarnedTimeAwardsEvaluation.pdf>; Sarah Johnson & Paul Stageberg, *An Analysis of the Effects of Earned time for Inmates Charged with Robbery*, Iowa Department of Human Rights (2014), [https://humanrights.iowa.gov/sites/default/files/media/CJJP\\_Analysis%20on%20the%20Effects%20of%20Earned%20time%20for%20Inmates%20Charged%20with%20Robbery.pdf](https://humanrights.iowa.gov/sites/default/files/media/CJJP_Analysis%20on%20the%20Effects%20of%20Earned%20time%20for%20Inmates%20Charged%20with%20Robbery.pdf).
- <sup>iv</sup> 18 U.S.C. § 3632(d)(3)(A) (2020); First Step Act of 2018, S. 756, 115<sup>th</sup> Cong. § 101(a) (2018).
- <sup>v</sup> Federal Bureau of Prisons, *FSA Time Credits Proposed Rules*, U.S. Department of Justice (November 25, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-11-25/pdf/2020-25597.pdf>
- <sup>vi</sup> Grant Duwe & Michelle King, *Can faith-based correctional programs work? An outcome evaluation of the innerchange freedom initiative in Minnesota*, 57 Int'l J. Offender Therapy Comp. Criminology 813 (2013) (finding a significant disparity in impact for completion versus participation across rearrest, reconviction, reincarceration, and revocation rates); Rosa Minhyo Cho & John H. Tyler, *Does Prison-Based Adult Basic Education Improve Postrelease Outcomes for Male Prisoners in Florida?*, 59 Crime Delinq. 975 (2010) (finding a higher positive impact on post-release employment and quarterly earnings for those who completed adult basic education class when compared to mere participation); Larry W. Bennett, et al., *Program Completion and Re-Arrest in a Batterer Intervention System*, 17 Res. Soc. Work Prac. 42 (2007) (finding significant disparity in rearrest rates between those who completed and only participated in a domestic violence prevention program); Nana Landenberger & Mark W. Lipsey, *The positive effects of cognitive-behavioral programs for offenders: A meta-analysis of factors associated with effective treatment*, 1 J. Exper. Crim. 451 (2005) (finding that the treatment effect for CBT programs is lower when the treatment group included dropouts); Harry K. Wexler, et al., *The Amity Prison TC Evaluation: Reincarceration Outcomes*, 26 Crim. Just. Behav. 147 (1999) (finding significant differences in recidivism at 12 and 24 months for those who completed a prison therapeutic community program when compared to dropouts); Jake Cronin, *The Path to Successful Reentry: The Relationship Between Correctional Education, Employment and Recidivism*, University of Missouri Institute of Public Policy (2011), [https://truman.missouri.edu/sites/default/files/publication/the\\_path\\_to\\_successful\\_reentry.pdf](https://truman.missouri.edu/sites/default/files/publication/the_path_to_successful_reentry.pdf) (showing a significant disparity in both recidivism and post-release employment for individuals who made progress towards a GED and those who earned their GED in prison); Eric Lichtenberger, *Measuring the effects of the level of participation in prison-based career and technical education programs on recidivism*, Academia.edu (2011), [https://www.academia.edu/5211184/Measuring\\_the\\_Effects\\_of\\_the\\_Level\\_of\\_Participation\\_in\\_Prison\\_Based\\_Career\\_and\\_Technical\\_Education\\_Programs\\_on\\_Recidivism](https://www.academia.edu/5211184/Measuring_the_Effects_of_the_Level_of_Participation_in_Prison_Based_Career_and_Technical_Education_Programs_on_Recidivism) (finding that the positive impact

on recidivism for career and technical education programs only applied to those who completed the program and not those who simply participated); Byron R. Johnson & David B. Larson, *The InnerChange Freedom Initiative: A Preliminary Evaluation of a Faith-Based Prison Program*, Baylor Institute for Studies of Religion (2008), <https://www.baylor.edu/content/services/document.php/25903> (finding a significant disparity in rearrest and reincarceration rates for program participants versus program graduates and finding limited to no impact for mere participation).

<sup>vii</sup> *K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988) (per Kennedy, J.) (“In ascertaining the plain meaning of the statute,” it is important to “look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”).

<sup>viii</sup> 18 U.S.C. § 3632(d) (2020); First Step Act of 2018, S. 756, 115<sup>th</sup> Cong. § 101(a) (2018).

<sup>ix</sup> 18 U.S.C. § 3632(d) (2020); First Step Act of 2018, S. 756, 115<sup>th</sup> Cong. § 101(a) (2018).

<sup>x</sup> 18 U.S.C. § 3632(d) (2020) (requiring the Bureau of Prisons to provide incentives and rewards when individuals “participate in *and* complete” programming); 18 U.S.C. § 3632(d)(3) (2020) (requiring the BOP to ); 18 U.S.C. § 3632(d)(4)(A)(i)-(ii) (2020) (allocating specified amounts of earned time credits for “successful *participation*”); 18 U.S.C. § 3632(d)(4)(D) (2020) (allowing the use of time credits “by prisoners who successfully *participate*” in programming); *But see* 18 U.S.C. § 3632(d)(4)(A) (2020) (requiring the provision of earned time credits for individuals “who successfully *completes* evidence-based recidivism reduction programming or productive activities”); 18 U.S.C. § 3634 (3) (requiring the Attorney General to provide recidivism report to Congress that specifies whether individuals “successfully *completed*” programming).

<sup>xi</sup> 18 U.S.C. § 3632(d)(4)(C) (2020).

<sup>xii</sup> *Corley v. United States*, 556 U.S. 303, 314 (2009) (“[O]ne of the most basic interpretive canons, [is that 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...’”); *United States v. Butler*, 297 U.S. 1, 65 (1936) (“These words cannot be meaningless, else they would not have been used.”)

<sup>xiii</sup> *See e.g.* 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)*, Independent Review Committee (December 2020), <https://firststepact-irc.org/wp-content/uploads/2020/12/IRC-FSA-Title-I-Section-107g-Report-12-21-20.pdf>; Ames Grawert, *What Is the First Step Act — And What’s Happening With It?*, Brennan Center for Justice (June 2020), <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it> (discussing funding problems and their impact on implementation); Prison Fellowship, *Implementing the First Step Act: Where are we now?*, Prison Fellowship (December 2019), <https://www.prisonfellowship.org/2019/12/implementing-the-first-step-act-where-are-we-now/> (noting “the implementation process for the FSA has also made clear the urgency of far more constructive programming and productive activities in federal prisons”); Office of Senator Dick Durbin, *Durbin To BOP Director: Why Is DOJ Undermining The First Step Act?*, Office of Senator Dick Durbin (November 2019), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-to-bop-director-why-is-doj-undermining-the-first-step-act>; Emily Tiry & Julie Samuels, *How Can the First Step Act’s Risk Assessment Tool Lead to Early Release from Federal Prison?*, Urban Institute (September 2019), <https://www.urban.org/urban-wire/how-can-first-step-acts-risk-assessment-tool-lead-early-release-federal-prison> (“about half of people exiting BOP institutions have not completed any programs, and only 5 percent have completed more than 10”).

<sup>xiv</sup> Federal Bureau of Prisons, *First Step Act: Approved Program Guide*, U.S. Department of Justice (2020), [https://www.bop.gov/inmates/fsa/docs/2020\\_fsa\\_program\\_guide.pdf](https://www.bop.gov/inmates/fsa/docs/2020_fsa_program_guide.pdf) (showing that only three of the programs providing 240 hours or more of program credit are available at all BOP facilities); *See also* Byrne, *supra* note xiii.

<sup>xv</sup> *See e.g.* Federal Bureau of Prisons, *UNICOR Program Details*, Federal Bureau of Prisons (2021), [https://www.bop.gov/inmates/custody\\_and\\_care/unicor\\_about.jsp](https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp) (25,000 person waiting list); Federal Bureau of Prisons, *FY 2019 Performance Budget: Congressional Submission Salaries and Expenses*, U.S. Department of Justice (February 2019), <https://www.justice.gov/doj/fy-2019-congressional-budget-submission> (showing a 16,000 person waiting list for BOP literacy programming); Office of the Inspector General, *Review of the Federal Bureau of Prisons’ Management of Its Female Inmate Population*, U.S. Department of Justice (September 2018), <https://oig.justice.gov/reports/2018/e1805.pdf> (finding that 6 BOP facilities have a waiting list of 150+ for the Trauma in Life program).

<sup>xvi</sup> Letter from American Civil Liberties Union, et al. to Senators Jerry Moran & Jeanne Shaheen (September 10, 2019), <https://famm.org/wp-content/uploads/Letter-in-Support-of-First-Step-Funds.pdf>.

<sup>xvii</sup> 18 U.S.C. § 3621(g), (h)(5) (2020); 3621 note (2020); 3633(a)(5) (2020); *See also* First Step Act of 2018, S. 756, 115<sup>th</sup> Cong. § 102(a) (2018); Office of the Attorney General, *The Attorney General's First Step Act Section 3634 Annual Report*, U.S. Department of Justice (December 2020), <https://www.bop.gov/inmates/fsa/docs/the-first-step-act-of-2018-risk-and-needs-assessment-system-updated.pdf> (noting that the BOP has issued guidance to wardens on partnerships but this guidance is not publicly available).

<sup>xviii</sup> Federal Bureau of Prisons, *supra* note xiv.

<sup>xix</sup> Federal Bureau of Prisons, *supra* note v.

<sup>xx</sup> 18 U.S.C. § 3635(4) (2020); First Step Act of 2018, S. 756, 115<sup>th</sup> Cong. § 101(a) (2018) (emphasis added by author); *See also* 18 U.S.C. § 4322(g)(2) (2020); First Step Act of 2018, S. 756, 115<sup>th</sup> Cong. § 301(a) (2018)

<sup>xxi</sup> *See, e.g., Horne v. Flores*, 557 U.S. 433, 454 (2009) (explaining in the course of interpreting Federal Rule of Civil Procedure 60(b) that “[u]se of the disjunctive ‘or’ makes it clear that each of the provision’s three grounds for relief is independently sufficient”).

<sup>xxii</sup> 18 U.S.C. § 3624(g) (2020) (listing requirements for use of earned time credits to be placed on prerelease custody or supervised release); 3632(d)(4)(A) (2020) (noting that a “prisoner, except for an ineligible prisoner under subparagraph (D), who successfully completes evidence-based recidivism reduction programming or productive activities, shall earn time credits”); 3632(d)(4)(D) (2020) (noting that a “prisoner is ineligible to receive time credits” if they have been convicted of a list of specific offenses); First Step Act of 2018, S. 756, 115<sup>th</sup> Cong. § 101(a) (2018).

<sup>xxiii</sup> *See* notes xx-xxii.

<sup>xxiv</sup> *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) (“The first sign that the statute imposed an obligation is its mandatory language: ‘shall.’”).

<sup>xxv</sup> The rule of lenity “applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.” *See Bifulco v. United States*, 447 U.S. 381, 387 (1980), superseded by statute. Accordingly, the rule of lenity has been applied to the First Step Act to interpret it in favor of defendants. *See United States v. Day*, No. 1:05-cr-460-AJT-1, 2020 U.S. Dist. LEXIS 133586, at \*19 n.20 (E.D. Va. July 23, 2020).

<sup>xxvi</sup> The BOP is a creature of statute, which possesses only those powers that Congress chooses to confer upon it. *See La. Pub. Serv. Com v. FCC*, 476 U.S. 355, 374 (1986); *Lyng v. Payne*, 476 U.S. 926, 937 (1986).

<sup>xxvii</sup> An example of a program that exist in Residential Reentry Centers and has been approved for earned time credits is Alcoholics Anonymous (AA). *See* Federal Bureau of Prisons, *supra* note xiv; U.S. Department of Justice, *Bureau of Prisons Residential Reentry Centers Assessment*, U.S. Department of Justice (2016), <https://www.justice.gov/archives/dag/page/file/914006/download>.

<sup>xxviii</sup> “[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>xxix</sup> 18 U.S.C. § 3632(d)(4)(A) (2020); First Step Act of 2018, S. 756, 115<sup>th</sup> Cong. § 101(g) (2018).

<sup>xxx</sup> Federal Bureau of Prisons, *supra* note v.

<sup>xxxi</sup> Federal Bureau of Prisons, *supra* note xiv (identifying only 17 programs that provide the number of program hours to exceed the 240 hour threshold for 10 days of earned time credits to be awarded); *See* Byrne, *supra* note xiii (noting the limitation imposed by lack of programming on the proposed earned time credit program).

<sup>xxxii</sup> *See e.g.* Prison Fellowship, *Earned and Good Time Policies: Comparing Maximum Reductions Available*, Prison Fellowship (April 2018), [https://www.prisonfellowship.org/wp-content/uploads/2018/04/GoodTimeChartUS\\_Apr27\\_v7.pdf](https://www.prisonfellowship.org/wp-content/uploads/2018/04/GoodTimeChartUS_Apr27_v7.pdf); Alison Lawrence, *Cutting Corrections Costs: Earned Time Policies for State Prisoners*, National Conference of State Legislatures (July 2009), [https://www.ncsl.org/documents/cj/earned\\_time\\_report.pdf](https://www.ncsl.org/documents/cj/earned_time_report.pdf).

<sup>xxxiii</sup> A.R.S. § 41-1604.06 (2020); 41-1604.07 (2020) (creating a “earned release credits” program even though it is provided based upon good behavior with a bonus for certain individuals who complete a drug treatment program); Ark. Code § 12-29-201 (2020) (provides for a good time credit program and authorizes credits for “involvement in rehabilitative activities” but the state’s Board of Corrections has failed to do this in DOC Administrative Rule 826); Cal. Pen. Code § 2931 (2020); 2933.05 (2020); Cal. Code Regs. Tit. 15 § 3043.3 (2020); 3043.4 (2020); 3043.5 (2020) (providing established weeks of credit



for most program completion); Colo. Rev. Stat. § 17-22.5-405 (2020) (providing 10 days per calendar month of “progress” in certain programming); Conn. Gen. Stat. § 18-98e (2020) (providing 5 days per month of program participation and good conduct); Del. Code tit. 11 § 4381 (2020) (providing 5 days per calendar month of program participation and 60 additional days for completion by certain individuals); Fla. Stat. § 944.271 (providing various “incentive gain-time” amounts for each month of programming based on offense and a lump sum for vocational certificates and GED diploma); 730 Ill. Comp. Stat. 5/3-6-3 (2020) (providing a 90 days credit for completing GED or college degree); Ind. Code § 35-50-6-3.3 (2020) (providing various amounts of credits for completing educational degrees or other programs); Kan. Stat. Ann. § 21-6821 (2020) (providing 120 days of credit for the completion of certain programs); Ky. Rev. Stat. § 197.045 (2020) (providing 90 days of credit for completing certain programs); La. Stat. Ann. § 571.3 (2020); 828 (2020) (providing up to 360 days of credit for program completion and 180 days for work release program); Me. Stat. tit. 17-A § 2309 (2020) (providing for the discretionary granting of 3 days of credit for each month of programming completed); Md. Code, Corr. Serv. § 705 (2020); 706 (2020) (providing 5 days of credit for each month of successful program participation and completion of work tasks); Miss. Code Ann. § 47-5-138.1; 47-5-142 (2020) (providing 180 days credit for participation in some work or education programs and 30 days for every 30 calendar days of participation in other work or education programs and good behavior); N.R.S. § 209.448 (2020); 209.449 (2020) (providing 60 days of credit for completion of substance use treatment, vocational education, and other programs); N.H. Rev. Stat. Ann. § 651-A:22-a (2020) (providing various credit amounts for the completion of certain programs upon previous approval by a judge at sentencing); N.J. Rev. Stat. § 30:4-92a (providing for the provision of discretionary credits upon education or work program completion); N.M. Stat. § 33-2-34 (2020) (providing various amounts of days per month of active participation in programming and lump sums for educational and treatment programs); N.Y. Corr. Law § 24-803 (2020) (providing for discretionary credits upon completion of educational or treatment programs); N.C. Gen. Stat. § 15A-1340.13 (2020); 15A-1340.20 (2020) (allowing for the issuance of earned time credits; N.C. Department of Public Safety Policy B.0100 provides that three days of credit is awarded per month of programming or work completed at a minimum of 4 hours per day); Ohio Rev. Code § 2967.193 (providing 90 days credit for completion of certain educational programs and additional days of credit for each month of participation in programs); Okla. Stat. tit. 57, § 57-138 (providing various credit amounts for the completion of certain programs); Or. Rev. Stat. § 421.121 (providing for a reduction up to 20% of sentencing for completing educational programming); R.I. Gen. Laws § 42-56-24 (providing 30 days of credit for program completion and an additional 5 days per month for program participation); S.C. Code Ann. § 24-13-230 (2020) (providing for six days of credit for each month employed or engaged in programming); Tenn. Code Ann. § 41-21-236 (authorizing one to sixteen days of credit for each month participating in a program and 60 days of credit for completing certain educational and treatment programs); Utah Code § 77-27-5.4 (providing for a minimum of four months credit for the completion of up to two programs); Vt. Stat. Ann. tit. 28 § 811 (providing for 30 days of credit for each month of consistent performance at a work camp); Tex. Gov. Code § 498.003(d) (providing for 15 days of credit for each 30 days participating in certain work and educational programs with good behavior); Va. Code Ann. § 53.1-202.3 (providing 4.5 days of credit for each 30 days participating in programs).

<sup>xxxiv</sup> States that provide combined programs based on a “day” require good behavior for credits to be initially earned, whereas the rules proposed by the Bureau of Prisons allow an individual to earn credits solely for program completion and then allows their loss upon a violation of prison rules. These federal earned time credits can always be restored through a successful appeal, four consecutive risk and needs assessments with clear conduct, or complete of the program. *See* O.C.G.A. § 42-5-101 (2020) (providing for one day of credit for each day of program participation and good behavior); 730 Ill. Comp. Stat. 5/3-6-3 (2020) (accelerating the accumulation of good time credits for program participation after achieving good behavior); Iowa Code § 903A.2 (2020) (providing either 1.2 days for each day in certain types of programming and good conduct); S.C. Code Ann. § 24-13-230 (2020) (providing up to one day of credit for every two days employed in work program or participating in program given no violations of prison rules); Federal Bureau of Prisons, *supra* note v.

<sup>xxxv</sup> 18 U.S.C. § 3624(b) (2020); 3632 (2020); First Step Act of 2018, S. 756, 115<sup>th</sup> Cong. § 101(a) (2018).

<sup>xxxvi</sup> Byrne, *supra* note xiii.

<sup>xxxvii</sup> *See Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.