

How the “First Step Act” and Other Sentencing Reforms Will Impact White Collar Defendants

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On December 21, 2018, President Trump signed into law one of the 115th Congress’s last pieces of legislation, the First Step Act (the Act). This bipartisan legislation is the next step in a series of small but successive reforms to the federal prison system and sentencing under the United States Sentencing Guidelines (USSG). The Act is not a sweeping reformation of either, but it does implement important provisions affecting sentencing and serving time, particularly for low-level and first-time offenders. By using time credits to reward participation in recidivism-reduction programs, implementing more community-based productive activities and codifying certain sentencing preferences, the Act aims to smooth incarcerated individuals’ transition back into society. In this sense, the Act represents a potentially significant development for persons convicted of white collar offenses, who tend to be non-violent offenders who are less likely to recidivate. Under this new law, some white collar inmates could serve shorter custodial sentences and have increased chances at supervised release or house arrest.

The Bureau of Prisons (BOP) estimates that approximately 106,000 federal inmates may be eligible for the varying types of relief offered under the Act. However, approximately 17 percent of those inmates, an estimated 18,000 individuals, are non-citizens and thus explicitly precluded from receiving time credits under the Act. Under the expanded compassionate release provisions of the Act, the BOP estimates that an additional 1,882 offenders could qualify for compassionate release over those qualified under existing federal law.

See [“Changes to Justice Manual on Individual Prosecutions Moderate but Preserve the Yates Memo”](#) (Jan. 23, 2019).

Recent Trends in Federal Sentencing

After the United States Supreme Court’s 2005 landmark decision in *Booker v. United States*, 543 U.S. 220 (2005), holding that federal district courts were not mandated to issue sentences within the USSG, Congress began making small but progressive changes to the Sentencing Guidelines. In 2010, Congress passed the Fair Sentencing Act, which eliminated the sentencing disparity between powder cocaine and crack-cocaine, among other such changes. In 2016, Congress made significant strides on a comprehensive criminal justice reform

bill, the Sentencing Reform and Corrections Act, but the measure ultimately died in Congress. In the years following the failure of the Sentencing Reform and Corrections Act, many of the provisions of the failed bill were re-drafted and ultimately incorporated into the Act.

See [“FCPA Prosecutions and the C-Suite”](#) (Jan. 9, 2019).

Emphasis on Evidence-Driven Programs and Developing Analysis Programs

The central reform in the Act is the creation of an earned time credit system, wherein inmates can earn a reduction in sentencing through participating in recidivism-reduction programs. Before such programs are implemented, the Act requires the U.S. Department of Justice to perform a data-driven analysis of currently-used recidivism programs to evaluate their effectiveness. The DOJ must also develop a recidivism risk analysis program, which will be used to classify prisoners’ level of risk for recidivism.

The recidivism risk analysis program will classify inmates as having a minimal, low, medium or high risk for recidivism. Based on this classification and individualized risk factors, the recidivism risk analysis program will determine the type and amount of recidivism reduction or productive activities appropriate for each prisoner. The aim of the program is to give each prisoner a meaningful opportunity to reduce their classification during the period of incarceration, to address the specific criminogenic needs of that prisoner and to ensure that each prisoner is able to successfully participate in such programs. To that end, Congress specifically allocated \$60 million per fiscal year, in each of the Fiscal Years 2019 through 2023, to develop and implement the recidivism-reduction and analysis system.

Within 180 days of the DOJ’s development of the recidivism-reduction and analysis system, the BOP must implement and complete the initial intake risk and needs assessment for each prisoner in its custody. Within the first two years after completing each prisoner’s initial risk and needs assessment, the BOP must begin providing recidivism-reduction programming. During this two-year phase-in period, priority access to recidivism-reduction programming will be available to inmates based on their proximity to release date.

From Theory to Practice – How it Will Work

Recidivism-reduction programs are only effective if inmates participate in them. Recognizing this, Congress included strong incentives for inmates to participate in such programming. An inmate who successfully completes recidivism-reduction programming shall earn 10 days of time credits per 30 days of programming completed. Inmates who are at low or minimum risk for recidivating may receive an additional five days in credit per 30 days of programming completed if their risk for recidivism has not increased over the course of two consecutive assessments. Recidivism-reduction programs that were completed “during official detention prior to the date that the prisoner’s sentence commences” do not qualify for time credits.

Inmates who participate in recidivism-reduction programs “shall receive,” in addition to time credits, phone privileges, or if available, video-conferencing privileges, for up to 30 minutes per day and 510 minutes per month, additional time for visitation, and, not less than two of the following: increased commissary spending limits and product offerings; extended opportunities to access email system; consideration of transfer to preferred housing; or other incentives solicited from prisoners. Furthermore, inmates who successfully participate in a recidivism-reduction program “shall” be considered for placement in a facility closer to the prisoner’s release residence upon request, subject to bed availability at the transfer facility, the prisoner’s security designation and the warden’s recommendation.

The BOP must conduct risk reassessments at least annually, and must conduct them more frequently for inmates at medium or high risk of recidivating who have less than five years until their projected release date. Any penalty resulting in a reduction in the amount of time credits earned under the risk assessment programs must operate retroactively. Reductions to time credits “shall be limited to time credits that a prisoner earned as of the date of the prisoner’s rule violation, and shall not include any future time credits that the prisoner may earn”.

Application of Time Credits to Pre-Release Custody/Supervised Custody

The Act states that time credits earned by successful participation in recidivism-reduction programs “shall be applied towards time in pre-release custody or supervised release.” “[BOP] shall transfer eligible prisoners, as determined under section 3624(g) into pre-release custody or supervised

release” if an inmate has earned time credits in an amount equal to the remainder of the prisoner’s imposed term of imprisonment, the inmate maintained minimum or low recidivism risk during incarceration, or has demonstrated reduction of recidivism risk, and certain other conditions are met.

In order to be transferred to pre-release custody (i.e., house arrest), the inmate must have been at minimum or low recidivism risk during the prisoner’s last two reassessments, or the warden must approve the prisoner’s pre-release transfer petition. The warden must find that: (1) the prisoner would not be a danger to society if transferred; (2) the prisoner has made a good-faith effort to lower recidivism risk through participation in such programs; and (3) the prisoner is unlikely to recidivate. If transferred to home confinement, the prisoner must remain in home confinement until serving not less than 85 percent of sentence imposed.

In order to be transferred to supervised release, the prisoner must have been determined to be a minimum or low risk to recidivate during their last assessment. If a prisoner is sentenced to a term of supervised release after imprisonment, that inmate may be transferred to begin their supervised release at an earlier date based upon earning time credits. That said, an inmate cannot begin supervised release earlier than one year prior to release.

Prisoners subject to a final order of removal (i.e., deportation) are not eligible to apply for time credits. Any inmate subject to removal who tries to apply for time credits shall be subject to expedited removal proceedings as soon as practicable pursuant to 8 USC 1228(a).

Recidivism-Reduction Partnerships

The Act authorizes the BOP to enter into a variety of recidivism-reduction partnerships with outside parties to provide recidivism-reduction programming, including nonprofit and other private organizations (including faith-based, art and community-based organizations) that will deliver recidivism-reduction programming, institutions of higher education that will deliver instruction, private entities that will deliver vocational training and certifications, provide equipment to facilitate vocational training, employ prisoners or assist in pre-release custody or supervised release in finding employment and with industry sponsored organizations that will deliver workforce development and training. The Act mandates that the BOP develop policies “to require” wardens to enter into recidivism-reduction partnerships with faith-

based and community-based nonprofits that are willing to provide mentoring or other programs that are demonstrated to reduce recidivism at no cost.

The key to these recidivism-reduction partnerships is that participation in any of these broad categories of programming, offered through a wide range of providers, qualifies for earned time credits under the Act. Furthermore, faith-based programming, treatment or regimens may qualify for earned time credit under the Act.

Placing Prisoners Closer to Home or At Home

The Act codifies a preference to place prisoners close to their primary residence. The BOP “shall designate the place of the prisoner’s imprisonment . . . [as the] facility as close as practicable to the prisoner’s primary residence, and to the extent practicable, in a facility within 500 driving miles of that residence,” subject to important limitations such as bed space, security, and other factors. Even if a prisoner is already within 500 miles of their primary residence, the BOP “shall” transfer prisoners closer to home subject to these considerations.

The Act also codifies a preference for home confinement for “lower risk levels and lower needs” prisoners “for the maximum amount of time permitted”. Under the current statute, that time period is “the shorter of 10 percent of the term of imprisonment . . . or 6 months.” 18 USC 3624(c)(2). This will likely affect white collar inmates, who typically are at a lower risk for recidivism and sometimes tend to be lower-level offenders. For older inmates, the Act decreases the age for compassionate release from 65 to 60, and decreases the mandatory minimum sentence which must be served prior to release from 75 percent to two-thirds.

The Act’s Potential Effect on White Collar Sentencing

The Act could have a significant longer-term impact on white-collar-crime sentencing. White collar offenders are often sentenced to shorter custodial sentences, as compared to other federal crimes, due in large part to the fact white collar crimes tend to be non-violent and white collar defendants are typically less susceptible to recidivism. Now, with the Act, white collar offenders can seek to “double down” on their low recidivism rate. In short, due to the First Step Act, in the near future white collar inmates could serve shorter custodial sentences, and have increased chances at supervised release or house arrest.

See [“An Enforcement Trend? The DOJ Pursues Individuals in Diverse Industries”](#) (Feb. 21, 2018).

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