



April 1, 2024

Legislative & Correctional Issues Branch
Office of General Counsel, Bureau of Prisons
320 First Street NW
Washington, DC 20534

Re: Inmate Discipline Program: Disciplinary Segregation and Prohibited Act Code Changes, 89 FR 6455

Office of General Counsel:

The National Association of Criminal Defense Lawyers (NACDL) has serious concerns with many of the changes in the above-referenced proposed rule. First, while limiting the duration of disciplinary segregation would be a positive first step, the proposed regulations provide no protections for people in administrative segregation and other forms of solitary confinement. Second, the creation and elevation of disciplinary violations, most of which are unwarranted, disproportionate, and overly broad, will lead to arbitrary and capricious enforcement and further erode public trust in the agency. Third, the proposed ban on social media accounts, without any criminal purpose, impedes a critical component of successful reentry, harms impacted family members, and infringes on fundamental rights.

NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for individuals accused of crimes. Founded as a professional bar association in 1958, NACDL has over 10,000 direct members in 28 countries—and 90 state, provincial and local affiliate organizations totaling approximately 40,000 attorneys. Our members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal legal system.

NACDL's concerns are as follows:

- (1) The changes related to disciplinary segregation are inadequate. The new rules apply to a small segment of those subject to segregation and are not sufficiently robust to accomplish their aims. NACDL urges the Bureau to adopt the provisions in the End Solitary Confinement Act (S. 3409, HR 4972), placing strict limits on the use and duration of solitary confinement, ensuring due process for those facing segregation, and establishing mechanisms for transparency.

- (2) The new and elevated disciplinary violations lack a sound basis and undermine the proportionality of the Bureau's disciplinary scheme. The proposed rules create new disciplinary violations that are unnecessary and, in some cases (e.g., "feigning illness") likely to produce unintended consequences. The proposed changes also elevate certain violations in a way that lumps together minor lapses with far more serious conduct (e.g., "escape" followed by voluntary return versus no return). In failing to distinguish between dissimilar conduct, the proposed changes will lead to unnecessarily severe discipline where leniency is warranted.
- (3) The proposed prohibition on "maintaining" or "directing" social media accounts is deeply misguided. It is well recognized that maintaining contact with family members on the outside is strongly correlated with successful reentry. Use of social media to maintain family ties is healthy and, given that social media is the predominant form of communication among some age groups, essential. Continued contact with family members has become increasingly important particularly when many institutions are on lockdown status. Social media may also be critical to vindicating certain rights, a fact that will undoubtedly subject the Bureau's proposed ban to heightened scrutiny and litigation.

NACDL is particularly concerned about the negative impact of these changes on PATTERN scoring, Earned Time Credits, post-conviction relief requests, and other discretionary programs and privileges. Implementation of the First Step Act is already frustrated by staffing shortages and credit calculation issues. Additionally, the discipline process under 28 CFR 541.5 is unforgivingly difficult for incarcerated persons to navigate. Deadlines are often missed due to lockdown status and/or missed communications. The result is unwarranted disciplinary actions that distort the person's prison record. Combined with the stringent disciplinary process, the increased disciplinary requirements and expanded scope of violations will trigger unwarranted discipline, adversely impact eligibility of various types of relief, and needlessly prolong incarceration.

NACDL urges the Bureau to adopt policies that directly eliminate solitary confinement, reconsider the proposed disciplinary changes, and abandon the ill-conceived ban on social media accounts.

Respectfully submitted,

National Association of Criminal Defense Lawyers