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U.S. Office of Personnel Management
1900 E Street, NW
Washington, D.C. 20415
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RE: Proposed Rule Changes to Implement the Fair Chance to Compete for Jobs Act of 2019 (Docket No. OPM-2022-0004) (RIN: 3206-A000)

To whom it may concern:

Thank you for the opportunity to submit comments on the proposed rules issued by the Office of Personnel Management (OPM) on April 27, 2022 to implement the Fair Chance to Compete for Jobs Act of 2019 (Fair Chance Act).

We strongly supported the 2016 adoption by OPM of rules to delay when hiring agencies may collect criminal history information from job applicants (81 Fed. Reg. 86555). We now support the addition of provisions to the regulations that clearly and accurately incorporate the requirements and restrictions of the Fair Chance Act, which became law in 2019 as part of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92). We also recommend several improvements to the proposed rules that will clarify certain aspects of the new statute and assist with its implementation.

Founded in 1969, the nonprofit National Employment Law Project (NELP) is an advocacy organization with a mission to build a just and inclusive economy where all workers have expansive rights and thrive in good jobs. Together with local, state, and national partners, NELP advances its mission through transformative legal and policy solutions, research, capacity-building, and communications. Our primary goals are to build worker power, dismantle structural and institutional racism, and to ensure economic security for all. In conjunction with allies across the country, NELP works to eliminate the barriers to employment that people with records face and to examine connections between the labor market and criminal legal system.

NELP submits this letter on behalf of itself and the following organizations (listed alphabetically): A Better Balance, American Association of People with Disabilities, Brooklyn Defender Services, Collateral Consequences Resource Center, Color of Change, Drug Policy Alliance, Economic Policy Institute, Hispanic Federation, Justice & Accountability Center of Louisiana, Legal Action Center & National H.I.R.E. Network, National Urban League, North Carolina Justice Center, TechEquity Collaborative, William E. Morris Institute for Justice, and Workplace Fairness.

* * *

We commend OPM for taking steps to implement strong regulations. Importantly, OPM’s proposed regulations include the following key protections and clarifications, which we urge OPM to retain in the final rule:

- Section 920.102(a) of the draft rules¹ accurately clarifies that the Fair Chance Act regulations cover “all positions in the competitive service, excepted service, and Senior Executive Service.”
- Section 920.102(b) of the draft rules² correctly describes general exemptions as limited to those situations where a true conflict with another federal law exists. Section 920.102(b) states that a hiring agency is exempt from the Fair Chance Act’s requirement to delay criminal history inquiries until after a conditional offer of employment is extended to the applicant *only* when existing law requires that such inquiries must be posed *before* a conditional offer of employment—*not* any time federal law requires a background check or prohibits agencies from hiring individuals with certain conviction histories. We anticipate that such general exemptions will be extremely limited or possibly nonexistent.
- Section 754.102 of the draft rules³ details a complaint and investigation process as required by the Fair Chance Act.

In addition to the strengths of the proposed regulations described above, we urge OPM to incorporate the following additional protections and clarifications into the final rule:

- A. Ensure that exceptions to delaying record-related inquiries are narrowly tailored as required by the Fair Chance Act, by both consistently defining “exempt” positions and removing unspecified “case-by-case” exceptions.
- B. Provide additional instruction to hiring agencies about what actions must be delayed until after a conditional offer—including background checks, requesting consent for a background check, and internet searches—and how to respond if record information is disclosed sooner.
- C. Avoid confusion related to conditional offers by requiring hiring agencies to extend such offers in writing and making clear that background checks must be isolated from other candidate screening.
- D. Provide clarity to hiring agencies regarding their legal responsibility to conduct individualized assessments and otherwise fairly consider applicants with records in accordance with Federal civil rights law and guidance.
- E. Ensure the complaint processes implemented by hiring agencies are fair and transparent, including by providing ample time for complainants to respond to requests for information and by communicating OPM’s ultimate findings to the complainant.
- F. Improve transparency, accountability, and accuracy by requiring data collection and reporting, including demographic information about applicants with conviction records.
- G. Recognize that statistical discrimination arguments are misleading and insufficient reasons to limit ban-the-box policies.
- H. Consider other suggestions for how the Federal Government can be a model employer with respect to individuals with criminal history records.

¹ Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24902 (proposed Apr. 27, 2022) (to be codified at 5 C.F.R. pt. 920.102(a)).

² Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24903 (proposed Apr. 27, 2022) (to be codified at 5 C.F.R. pt. 920.102(b)).

³ Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24900 (proposed Apr. 27, 2022) (to be codified at 5 C.F.R. pt. 754.102).

Each of the above-listed recommendations related to the regulatory text is explained below. In making these suggestions, we draw upon research that has documented the many challenges faced by workers with arrest and conviction records.⁴ Our experience advising advocates and policymakers on combatting employment discrimination, developing strong ban-the-box policies, and ensuring effective enforcement of fair hiring laws⁵ also informs our recommendations.

* * *

A. Ensure that exceptions to delaying record-related inquiries are narrowly tailored. (Sections 731.103(d)(1), 920.102(b), and 920.201(b))

The text of the Fair Chance Act makes exceedingly clear that exceptions to the law’s requirement for hiring agencies to delay requests for criminal history record information must be extremely narrow. The regulations issued by OPM should underscore and further clarify the extent of that narrowness, not expand opportunities for unnecessary exceptions.

1. Ensure that exempt positions are defined narrowly (Sections 731.103(d)(1), 920.102(b) & 920.201(b))

As noted above, Section 920.102(b) correctly underscores the narrowness of general exemptions to the requirement that federal hiring agencies delay requests for criminal history record information until after extending a conditional offer to the job applicant. The text of the Fair Chance Act states that the prohibition against requesting criminal history information before a conditional offer of employment “shall not apply with respect to an applicant for a position in the civil service if consideration of criminal history information *prior to a conditional offer* with respect to the position is otherwise required by law.”⁶

Although Section 920.102(b) makes clear that the legal requirement leading to the exemption must include mandating that the consideration of criminal history information occur prior to a conditional offer, elsewhere in the draft rules the language is less clear. For example, Section 731.103(d)(1) provides only that “*Except where required by law*, a hiring agency may not make specific inquiries concerning an applicant’s criminal . . . background . . . unless the hiring agency has made a conditional offer of employment to the applicant.”⁷ Some hiring agencies might misconstrue that language as allowing for exemptions any time consideration of criminal history information is required by law as a part of their hiring process, even if the timing is not mandated by law. To avoid confusion, Section 731.103(d)(1) should make clear that exceptions are limited to situations in which the law requires that the timing of the criminal record inquiries be before the conditional offer.

⁴ See Nat’l Emp’t L. Project, “Research Supports Fair Chance Policies” (2016), <http://www.nelp.org/publication/research-supports-fair-chance-policies/>.

⁵ See Nat’l Emp’t L. Project, “Best Practices in Fair-Chance Enforcement: Ensuring Work Opportunity for People with Convictions” (2015), <http://www.nelp.org/publication/best-practices-in-fair-chance-enforcement/>.

⁶ Fair Chance Act, 5 U.S.C. § 9202(b) (emphasis added).

⁷ Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24900 (proposed Apr. 27, 2022) (to be codified at 5 C.F.R. pt. 731.103(d)(1)) (emphasis added).

2. *Remove the open-ended possibility for additional “case-by-case” exceptions, which undermines the broad applicability of the Fair Chance Act and contradicts the text of the law. (Sections 920.201(b)(3) & 731.103(d)(1))*

Beyond the general exemptions specifically required by law that are discussed above (and very limited exceptions specified in the text of the Fair Chance Act⁸), the Fair Chance Act provides that additional positions may be excepted if they are “identified by the Director of the Office of Personnel Management in the regulations issued [pursuant to this law].”⁹ The statute further provides that “The Director of the Office of Personnel Management shall issue regulations identifying additional positions with respect to which the prohibition under subsection (a) shall not apply.”¹⁰ Thus, the Fair Chance Act clearly requires OPM to list any additional exceptions within these regulations.

Instead of listing specific positions that are excepted from the requirement that criminal history inquiries be delayed, the proposed regulations vaguely allow for agencies to “request[] an exception from [OPM]”¹¹ and for OPM to “grant additional exceptions on a case-by-case basis” when certain criteria are satisfied.¹² Even worse, the supplementary information section of the proposed rules states that the agency will grandfather in previously granted exceptions without identifying them in the regulations,¹³ contrary to the requirements of the Fair Chance Act. While vague, unspecified case-by-case exceptions may have been allowed under the previous regulations, the text of the Fair Chance Act does not allow for them.

Two and a half years have passed since the Fair Chance Act was signed into law. That significant delay provided OPM with ample time to consider whether additional, specific positions should be excepted from the requirement to delay record-related inquiries. At the very least, OPM can and should list specific exceptions for positions that it has already approved and intends to grandfather under the Fair Chance Act and new regulations.

In addition to the fact that unspecified case-by-case exceptions are not permitted by the text of the Fair Chance Act, including such vague language in the regulations also threatens to undermine the impact and authority of the law and regulations. There are several reasons to eliminate the open-ended possibility of case-by-case exceptions from the regulations.

First, we question the necessity of *any* exception to the prohibition against collecting arrest and conviction information before a conditional offer of employment. No threat to safety or security exists—even for the

⁸ Fair Chance Act, 5 U.S.C. § 9202(c)(1)(B) (excepting positions “as a Federal Law enforcement officer”); Fair Chance Act, 5 U.S.C. § 9202(c)(1)(A) (excepting a position “that requires a determination of eligibility described in clause (i), (ii), or (iii) of section 9101(b)(1)(A)”).

⁹ Fair Chance Act, 5 U.S.C. § 9202(c)(1)(C).

¹⁰ Fair Chance Act, 5 U.S.C. § 9202(c)(2)(A).

¹¹ Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24900 (proposed Apr. 27, 2022) (to be codified at 5 C.F.R. pt. 731.103(d)(1)).

¹² Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24903 (proposed Apr. 27, 2022) (to be codified at 5 C.F.R. pt. 920.201(b)(3)).

¹³ Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24886 (supplementary information under heading “Explanation of OPM’s Proposed Rule Under the Fair Chance Act,” subheading “Restrictions on Preemployment Criminal Inquiries”) (Apr. 27, 2022) (“Exceptions previously granted to agencies by OPM pursuant to 5 CFR part 330 subpart M (*i.e.*, the Ban the Box provisions) continue to be valid.”).

most “sensitive” positions—when a comprehensive background check will be conducted at the end of the hiring process.

Second, the need for additional, unspecified, case-by-case exceptions is questionable given that the Fair Chance Act and regulations already specify several exceptions. In addition to the general exemption in the Fair Chance Act described above, the proposed regulations provide that the prohibition against requesting criminal history record information before a conditional offer shall not apply to a position “[t]hat requires a determination of eligibility for access to classified information”; “[h]as been designated as a sensitive position under the Position Designation System issued by OPM and the Office of Director of National Intelligence”; “[i]s a dual-status military technician position”; or “[i]s a Federal law enforcement officer position”; or “with respect to an applicant for political appointment.” When taken together, these exceptions cover many positions and many reasons for which a case-by-case exception might be granted, thereby rendering additional case-by-case exceptions unnecessary.

Third, given the breadth of factors that the proposed regulations state OPM will consider related to a possible case-by-case exception,¹⁴ the proposed process could result in many requests from federal agencies seeking the exclusion of numerous additional positions. A high volume of requests could significantly drain OPM’s limited resources—both now and under future administrations—and undermine the intended broad applicability of the Fair Chance Act. Such potential to undermine the purpose of the Fair Chance Act and drain OPM resources far outweighs the very slight possibility that an additional position, not already covered by the numerous exceptions specified in the bill, might somehow necessitate asking about criminal history record information at the start of the hiring process.

At a minimum, if OPM moves forward with regulatory language allowing for a case-by-case exception (contrary to the text of the Fair Chance Act), the possible exceptions should be far more narrowly tailored and hiring agencies should be required to overcome a presumption that a later background check is sufficient. While the proposed regulations correctly place the burden on the hiring agency to “demonstrate[] specific job-related reasons why the agency needs to evaluate an applicant’s criminal history for a position prior to making a conditional offer,” the regulations should be more specific in detailing what a hiring agency must demonstrate. For example, the hiring agency should be required to produce compelling evidence that the collection of criminal history record information at the end of the hiring process for the specific position is clearly inadequate to address specific, overriding security concerns of the agency. In other words, the burden should be on the requesting agency to establish not just that criminal history record information should be collected earlier in the hiring process, but that earlier collection will provide additional credible information over and above what is generated by the comprehensive background check later in the hiring process. The regulations should make clear that the hiring agency bears the burden of overcoming the *presumption* that a background check later in the hiring process is sufficient to protect the interests of the hiring agency, its staff, and the Federal government in general.

¹⁴ Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24903 (proposed Apr. 27, 2022) (to be codified at 5 C.F.R. pt. 920.201(b)(3)) (stating that OPM will “giv[e] due consideration to positions that involve transactions with minors, access to sensitive information, or managing financial transactions” and that “OPM will consider such factors as, but not limited to, the nature of the position being filled and whether a clean criminal history record would be essential to the ability to perform one of the duties of the position effectively”).

Transparency represents one important reason for the Fair Chance Act's requirement that OPM identify exceptions in the regulations. Retaining a provision in the regulations for further case-by-case exceptions creates gray area and uncertainty for applicants about whether certain positions are or are not covered by the Fair Chance Act's requirement to delay record-related inquiries. It also deprives the public of an opportunity to push back against hiring agencies that erroneously claim that additional positions require an exception.

One common complaint by individuals with records and their advocates is uncertainty around whether the job to which they (or their client) applied is exempted from compliance with a fair chance law. Such uncertainty impacts enforcement of any fair chance policy. If an applicant is asked about their criminal history record information before a conditional offer, it is difficult for the applicant to know whether the position for which they are applying is excepted or if the inquiry violated the law. Sometimes applicants are incorrectly informed by the prospective employer that the position to which they are applying is excepted. In such cases, the applicant would not know to report a violation even if they were familiar with the Fair Chance Act and these regulations.

Again, while we urge OPM to eliminate the option for further case-by-case exceptions from the regulations as required by the Fair Chance Act, if OPM adopts the proposed case-by-case exception into the final regulations, OPM must also ensure that the process of obtaining such an exception is transparent and includes a meaningful opportunity for public input. OPM should post federal agency requests for exceptions on its website in a section of the website devoted to the issue. The public should then be provided at least 90 days to respond to the agency's petition. The full criteria for granting an exception should also be posted online, along with OPM's final decision, which should include a written statement explaining the agency's decision.

B. Provide additional instruction to hiring agencies about what actions must be delayed until after a conditional offer and how to respond if criminal history information is disclosed before then. (Sections 920.101, .201 & .202)

- 1. Make clear that hiring agencies must delay not only inquiries to applicants about their criminal history record but also any criminal history background check or request for consent to conduct a criminal history background check. (Sections 920.201 & .202)*

The text of the Fair Chance Act includes language broadly prohibiting a hiring agency from requesting criminal history record information before extending a conditional offer to the applicant. Specifically, Section 9202(a) of the law states that "an employee of an agency may not request, in oral or written form (including through the Declaration for Federal Employment (Office of Personnel Management Optional Form 306) or any similar successor form, the USAJOBS internet website, or any other electronic means) that an applicant for an appointment to a position in the civil service disclose criminal history record information regarding the applicant" before a conditional offer. Thus, the text of the Fair Chance Act makes clear that a hiring agency may not seek to obtain criminal history record information until after extending a conditional offer to the applicant.¹⁵

¹⁵ The proposed rules repeat the above language from the Fair Chance Act and further specifies that the prohibition applies to at least three points in the hiring process: (i) recruitment and initial applications; (ii) following receipt of the initial application, and (iii) prior to, during, or after a job interview. The regulations thus attempt to make clear that criminal history record information may not be sought until after

The regulations could further clarify the extent of this prohibition and avoid an unintended loophole by specifically stating that hiring agencies and their employees may not inquire into or consider the criminal history record information of an applicant that is obtained through any means until after extending a conditional offer. The regulations should specify that this prohibition means that all criminal history background checks must be delayed until after a conditional offer. Furthermore, the regulations should similarly make clear that the hiring agency may not request consent from the applicant to conduct a criminal history background check until after a conditional offer. Even if the hiring agency does not consider such information until after a conditional offer, merely asking for consent to conduct a background check can discourage applicants with records, leading them to assume that their criminal history will prevent them from getting the job and drop out of the hiring process.

2. *Clarify that informal attempts to obtain criminal history record information about an applicant, such as internet searches, must also be delayed until after a conditional offer of employment. (Sections 920.201 & .202)*

As urged above, the regulations should make plain that criminal history record information of an applicant may not be sought through any means until after a conditional offer. Hiring agencies and their employees may not immediately realize, however, that obtaining and considering arrest or conviction history record information through less formal means would also violate the Fair Chance Act. Therefore, we urge the agency to insert regulatory language clarifying that informal inquiries, such as internet searches performed to uncover online evidence of conviction or arrest history, are unlawful if performed before a conditional offer of employment. Such clarification is important given the abundance of record-related information available online through simple internet searches.¹⁶

Clarification on this point would assist with clearly advising hiring agencies as to their responsibilities. Some confusion related to internet searches has emerged in states that have adopted fair chance laws. For example, the New Jersey agency tasked with implementing rules pursuant to New Jersey's ban-the-box law received and rejected a request from a large law firm to clarify that the law did not bar internet and other public record searches concerning an applicant's record at the start of the hiring process. Instead, the agency clarified that the law in fact barred such internet and other public records searches concerning an applicant's record because allowing them would "render the law meaningless."¹⁷

Similarly, state regulations implementing the California Fair Chance Act specify that internet searches are impermissible under the law: "Employers are prohibited from inquiring about criminal history on employment applications or from seeking such information through other means, *such as a background check*

a conditional offer. *See* Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24903 (proposed Apr. 27, 2022) (to be codified at 5 C.F.R. pt. 920.201(a)(1)).

¹⁶ *See, e.g.,* Olivia Solon, *Haunted by a Mugshot: How Predatory Websites Exploit the Shame of Arrest*, *The Guardian*, Jun. 12, 2018, <https://www.theguardian.com/technology/2018/jun/12/mugshot-exploitation-websites-arrests-shame>.

¹⁷ N.J. Labor & Workforce Development, Div. of Wage & Hour Compliance, *The Opportunity to Compete Act Rules*, 47 N.J.R. 3034(a) (Dec. 7, 2015), http://services.statescape.com/ssu/Regs/ss_8587520069162890957.htm (addressing internet searches in the agency response to comments 3 and 4).

or internet searches directed at discovering criminal history, until after a conditional employment offer has been made to the applicant.”¹⁸

Because confusion on this specific issue is possible and even likely, OPM should specify in the regulations that even informal internet searches aimed at revealing criminal history record information are prohibited by the Fair Chance Act until after a conditional offer.

3. *Instruct hiring agencies on how their staff should respond if criminal history record information is disclosed before a conditional offer. (Sections 920.201 & .202)*

We also urge OPM to specify in the regulations how hiring personnel should respond if an applicant inadvertently discloses information about her arrest or conviction record during an interview or chooses to discuss it because her conviction history is an integral part of her personal story. First, the regulations should prohibit hiring personnel from asking probing follow-up questions about the applicant’s past offense or conviction history. Instead, hiring personnel should remind the applicant that they are not required to disclose information about their conviction history. Second, the regulations should direct hiring personnel not to consider any criminal history record information until after a conditional offer.

Some existing fair chance laws provide examples for what to require of hiring personnel. For example, if an applicant discloses their record to an employer in Portland, Oregon, the employer “must disregard that information and must take reasonable steps to prevent further disclosure or dissemination of the [a]pplicant’s [c]riminal [h]istory.”¹⁹ Similarly, after inadvertent self-disclosure, a New York City employer “should continue its hiring process and must not examine the applicant’s conviction history information until after deciding whether or not to make a conditional offer of employment. If the applicant raises their criminal record voluntarily, the employer should not use that as an opportunity to explore an applicant’s criminal history further.”²⁰

C. Avoid confusion related to conditional offers by requiring hiring agencies to extend such offers in writing and making clear that background checks must be isolated from other candidate screening. (Sections 920.101, .201 & .202)

1. *Require hiring agencies to extend the conditional offer to the applicant in writing, making clear upon what information the offer is conditioned. (Sections 920.101 & 920.201)*

We urge OPM to clarify in the regulations that a hiring agency must extend a conditional offer to the applicant *in writing* before inquiring about criminal history record information. While not expressly required by the text of the Fair Chance Act, a written record will be crucial to investigating complaints and facilitating enforcement of the law’s requirements. In addition, this requirement will reduce the possibility of confusion on the part of applicants about whether a conditional offer was in fact extended before the applicant was

¹⁸ Cal. Code Regs. tit. 2, Section 11017.1(a) (emphasis added).

¹⁹ City of Portland, Oregon, “ADM-21.01 – Removing Barriers to Employment Administrative Rules” at RBE 2.02(3), <https://www.portland.gov/sites/default/files/2020-06/exhibit-a-amended-admin-rules-06-01-16.pdf> (last visited Oct. 13, 2021).

²⁰ N.Y.C. Comm’n on Human Rights, *Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History* 12 (2021), <https://www1.nyc.gov/assets/cchr/downloads/pdf/fca-guidance-july-15-2021.pdf>.

asked about their criminal history. OPM should further promote a transparent hiring process by encouraging hiring agencies to clarify in writing the expected timeline for the background check process, whom to contact with questions, and on the basis of what further screening information the conditional offer might be rescinded.

2. *Instruct hiring agencies to isolate consideration of criminal history record information from other potential bases for screening out a candidate or rescinding a conditional offer. (Sections 920.101, .201 & .202)*

The regulations should also require that assessments of criminal history record information and the ability to rescind a conditional job offer on the basis of an applicant's criminal history record must be isolated from assessments of other candidate information. The Fair Chance Act and draft OPM regulations define a "conditional offer" as an offer of employment "that is conditioned upon the results of a criminal history inquiry." The definition does not provide that the offer can be revoked for other reasons following a criminal history background check. Therefore, the regulations should further clarify that the criminal background check should be isolated from consideration of other necessary pre- and post-conditional offer screening.²¹

The New York City legal enforcement guidance on the city's fair chance act requires employers to separate their post-offer screening in order to isolate decisions about applicants' conviction records and ensure that applicants are notified when their record is the reason for losing a job opportunity. If conducted, resume verification, reference checks, credit checks, and other aspects of pre-employment screening must occur before a criminal background check. After a criminal background check is conducted, the employer may revoke the conditional job offer based on criminal history or two other narrow categories of information: (i) the results of a medical exam as permitted by the Americans with Disabilities Act, or (ii) other information that is material to job performance that the employer could not have reasonably known before the conditional offer.²² Following the New York City model may help limit the potential for knowledge of a candidate's criminal history record to influence the opinions that hiring staff form about other aspects of the applicant's background.

D. Provide clarity to hiring agencies regarding their legal responsibility to conduct individualized assessments and otherwise fairly consider applicants with records even after a conditional offer. (Part 920)

1. *Make clear that, after asking about an applicant's criminal history record or conducting a background check, all hiring agencies must fairly consider an applicant's record pursuant to Federal civil rights law and EEOC guidance. (Required by Section 9202(c)(2)(B) of the Fair Chance Act)*

²¹ The draft regulations get part of the way there, making clear that "[a]gencies may make inquiries into an applicant's Selective Service registration, military service, citizenship status, where applicable, or previous work history, prior to making a conditional offer of employment to the applicant." Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24899 (proposed Apr. 27, 2022) (to be codified at 5 C.F.R. pt. 330.1300(a)). But the regulations do not clarify that hiring decisions based on these pieces of information should be isolated from consideration of criminal history.

²² N.Y.C. Comm'n on Human Rights, *Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History* (2022), <https://www1.nyc.gov/assets/cchr/downloads/pdf/fca-guidance-july-15-2021.pdf>.

The proposed regulations correctly prohibit hiring agencies from considering applicants' conviction histories before a conditional offer of employment, but we are concerned that the proposed rules do not address civil rights protections relevant after a conditional offer of employment, as required by Section 9202(c)(2)(B) of the Fair Chance Act. We strongly urge OPM to include language in the rules requiring all agencies to comply with Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment based on race, color, religion, sex, and national origin,²³ as well as with the 2012 EEOC guidance concerning the consideration of arrest and conviction records by employers.²⁴

The text of the Fair Chance Act requires OPM to address "compliance with civil rights laws" in these regulations.²⁵ In the section of the statute addressing regulations issued by OPM, the Fair Chance Act states that "[t]he regulations issued [by OPM] shall . . . ensure that all hiring activities conducted pursuant to the regulation are conducted in a manner consistent with relevant Federal civil rights laws."²⁶

The EEOC guidance states that an employer can disqualify an applicant based on a past criminal conviction only if it is "job related and consistent with business necessity."²⁷ That job-related analysis should include, at the very least, consideration of the age of the offense, the nature of the offense, and whether the offense is directly related to the specific job.²⁸ The guidance further provides that employers should conduct an "individualized assessment" of an applicant with a conviction history.²⁹ The EEOC guidance explains that an individualized assessment should offer the applicant an opportunity to verify the accuracy of the record,³⁰ present evidence of rehabilitation or mitigating circumstances, and explain why the conviction history should not be considered in relation to the job.³¹

At its crux, an individualized assessment is a matter of hiring process. Therefore, we urge OPM at least to require hiring agencies to engage in the process described by the EEOC by mandating via these regulations that hiring agencies clearly notify the job applicant in writing that they have been screened out because of criminal conviction history, provide a reasonable opportunity to respond (including sufficient time and

²³ 42 U.S.C. § 2000e-2 et seq.

²⁴ U.S. Equal Emp't Opportunity Comm'n, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act (Apr. 25, 2012), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions> [hereinafter EEOC Guidance] (explaining that federal agency officials should be directed to take into account the age of the offense, the nature of the offense, and whether the offense is directly related to the job; and to conduct an "individualized assessment" providing the candidate an opportunity to present evidence of rehabilitation and verify the accuracy of the record).

²⁵ Fair Chance Act, 5 U.S.C. § 9202(c)(2)(B).

²⁶ *Id.*

²⁷ EEOC Guidance, *supra*, note 23.

²⁸ *Id.*

²⁹ *Id.*

³⁰ FBI background checks, while generally more reliable than commercial background checks, are nevertheless frequently inaccurate. Madeline Neighly & Maurice Emsellem, Nat'l Emp't L. Project, *Wanted: Accurate FBI Background Checks for Employment* (2013), <https://s27147.pcdn.co/wp-content/uploads/2015/02/Report-Wanted-Accurate-FBI-Background-Checks-Employment-1.pdf> (finding that nearly half of records in the FBI database were incomplete).

³¹ EEOC Guidance, *supra*, note 23 ("Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity.").

instructions on how to respond), and consider any response or additional information timely submitted by the applicant and then notify the applicant of its final decision.³²

2. *Clarify that an exemption from the requirement to delay criminal history inquiries and background checks does not exempt a hiring agency from the legal responsibility to fairly consider an applicant's record pursuant to Title VII and the EEOC Guidance. (Required by Section 9202(c)(2)(B) of the Fair Chance Act)*

We also encourage OPM to clarify a common point of confusion among employers that are exempted from a legal requirement to delay background checks or criminal record-related inquiries. Such employers may not immediately realize that permission to inquire about criminal history record information earlier in the hiring process does not exempt them from following other procedural requirements, such as conducting a job-relatedness assessment and an individualized inquiry.

Federal hiring agencies that are exempted from delaying criminal history record inquiries for some or all of their positions will likely face this same confusion. Therefore, the OPM regulations should make clear that these agencies must nevertheless abide by civil rights-related requirements to assess job relatedness and conduct an individualized inquiry, as described in the EEOC Guidance.

E. Ensure the complaint processes implemented by hiring agencies are fair and transparent. (Section 754.102)

1. *In addition to individual agency processes for receiving complaints, OPM should develop a centralized means for receiving complaints and forwarding them to the appropriate agency for an agency investigation. (Section 754.102(a))*

Section 754.102 of the proposed rules requires each hiring agency to establish and publicize systems for receiving complaints from applicants regarding violations of the Fair Chance Act.³³ Some job applicants will likely remain confused about to whom to submit such a complaint or may feel more comfortable submitting a complaint directly to OPM instead of to the hiring agency that likely just rejected them for a job based on their criminal history record. In the very least, even if OPM does not implement a centralized means for receiving Fair Chance Act complaints, the regulations should provide that any complaint related to a violation of the Fair Chance Act that is submitted directly to OPM shall be forwarded to the appropriate agency for investigation and will be considered timely if it was submitted to OPM within the time period described in the regulations.³⁴

2. *Ensure sufficient time for a complainant to respond to a hiring agency's request for information. (Section 754.102(b))*

Section 754.102 of the proposed rules details certain requirements relevant to hiring agencies receiving and investigating complaints from job applicants for violations of the Fair Chance Act. The rules appropriately

³² *Id.*

³³ Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24900 (proposed Apr. 27, 2022) (to be codified at 5 C.F.R. pt. 754.102(a)).

³⁴ Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24900 (proposed Apr. 27, 2022) (to be codified at 5 C.F.R. pt. 754.102(a)(2) & (3)).

include a time limit for an agency to complete its investigation so that investigations do not drag on indefinitely.³⁵

The supplementary information makes clear that part of this investigation may include the agency requiring additional information from the complainant.³⁶ It further states that, “[i]f an agency notifies POM that an applicant has refused to produce documentary or testimonial evidence sought during the investigation, OPM may direct the agency to suspend the investigation; or, if the investigation continues despite an applicant’s failure to participate, OPM may make an adverse inference or, in appropriate circumstances, dismiss the complaint.”³⁷ OPM must also ensure that agencies do not use a complainant’s failure to quickly respond as an excuse for abandoning an investigation. In some cases, additional information beyond the initial complaint may not truly be needed from the complainant, and the investigation should therefore not be suspended even if the complainant fails to respond.

Furthermore, the regulations must require hiring agencies to provide complainants with a reasonable amount of time to respond to any such requests for information. The supplementary information assumes that “applicants have an incentive to cooperate” with the investigation,³⁸ but unlike agency personnel, it is not a complainant’s job to follow up on the complaint. In fact, complainants will likely have been denied a job opportunity by the agency and either be employed elsewhere or still be in search of employment while the investigation proceeds. In addition, they may be living under stresses related to unemployment, which could impact their ability to respond quickly.

For these reasons, the regulations should ensure that complainants are provided ample time to respond to agency requests for more information. Complainants should receive thirty days to respond to such requests. OPM may wish to also provide in the regulations that the 60-day investigative period may be extended an agency may receive additional time if the complainant takes unusually long to respond.

3. *Require that the hiring agency and/or OPM inform the complainant of the results of an investigation and the ultimate findings. (Section 754.102(c))*

When describing the adjudication process, the Section 754.102(c)(2) of the proposed regulations specifies that, after OPM’s review of the investigative report prepared by the agency, “OPM shall notify the agency and the subject(s) of the complaint in writing of its findings regarding the complaint, including any decision to initiate adverse action proceedings.”³⁹ “The subject of the complaint” appears to refer to the agency employee who allegedly inquired about an applicant’s criminal history record before a conditional offer.

The regulations are silent regarding when, how, and by whom the complainant will be notified of the result of OPM’s adjudication. A complainant is another interested party who should be timely informed of the

³⁵ Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24900 (proposed Apr. 27, 2022) (to be codified at 5 C.F.R. pt. 754.102(b)(4)) (allowing 60 days for an agency to complete its investigation).

³⁶ Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24888 (Apr. 27, 2022) (supplementary information under heading “Explanation of OPM’s Proposed Rule Under the Fair Chance Act”, subheading “Section-by Section Analysis” “Section 745.102 Agency Complaint Process.”)

³⁷ *Id.*

³⁸ *Id.*

³⁹ Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24901 (proposed Apr. 27, 2022) (to be codified at 5 C.F.R. pt. 754.102(c)(2)).

outcome. Therefore, we urge OPM to supplement Section 754.102(c)(2) to specify that OPM will simultaneously notify the complainant in writing of its findings and decision.

F. Improve transparency, accountability, and accuracy by requiring data collection and reporting.

The supplementary information included with the proposed regulations makes clear that the Federal government does not already collect and report data regarding fair chance hiring policies. Because such information is important to ensuring transparency and accountability for the policies, and to detecting any gaps in implementation, the OPM regulations should be amended to implement a centralized means of collecting data on the impact of OPM's fair chance hiring policies.

When OPM proposed and adopted its original ban-the-box regulations in 2016, we urged the agency to mandate data collection and reporting.⁴⁰ That recommendation was not implemented by OPM, which did not provide a reason for rejecting the recommendation.⁴¹ As a result, OPM now lacks any data regarding the impact or effectiveness of those rules, as made clear in the supplementary information provided with the current proposed rules.

The supplementary information to the currently proposed rules provides that "OPM does not currently have any data to show whether the revised regulations affected agency hiring processes or were instead, as OPM anticipated, a codification of existing practices."⁴² The supplemental information further states that "OPM currently does not have and is not aware of any data to show what impact, if any, OPM's existing 'Ban the Box' rules have had on agency hiring processes. Therefore, OPM invites comments regarding any hiring data agencies may have that demonstrate the effect of either OPM's prior regulations or the potential impact of these proposed rules."⁴³

A continued lack of data will inhibit efforts to ensure that the requirements of the Fair Chance Act are adequately implemented and enforced and that the regulations expand access to Federal government jobs by people with arrest and conviction records. We urge OPM to amend the draft rules to mandate the collection and reporting of hiring data by individual hiring agencies going forward.

At a minimum, hiring agencies and OPM should collect information on the number of conditional offers made by the individual federal agencies and the final hiring decisions involving persons with a conviction history record. More specifically, the collecting the following information would be helpful to ensure effective implementation of the Fair Chance Act and any impact on racial equity:

- Number of applicants provided a conditional offer (and number of those with a conviction record);

⁴⁰ See Recruitment, Selection, and Placement (General) and Suitability, 81 Fed. Reg. 86555, 86559 (Dec. 1, 2016) (to be codified at 5 C.F.R. pts. 330, 731) ("A coalition representing criminal justice reform groups and civil and human rights advocates recommended that OPM implement a centralized means of collecting data on the impact of the proposed rule by documenting the number of conditional offers and final hiring decisions of persons with prior convictions.")

⁴¹ *Id.* ("OPM is not adopting this suggestion as part of the rulemaking but will oversee agencies' compliance with the rule")

⁴² Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24886 (supplementary information under heading "The Existing 'Ban the Box' Rule") (Apr. 27, 2022).

⁴³ Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24895 (supplementary information under heading "Expected Impact of This Proposed Rule," subheading "Impact") (Apr. 27, 2022).

- Number of applicants with a conviction record whose conditional offers were rescinded by the hiring agency;
- The convictions (offense and years elapsed) based upon which conditional offers were rescinded;
- Number of applicants with a conviction record who were hired and the positions into which they were hired; and
- Demographic information for all of these categories.

In particular, data related to racial equity should be collected to ensure that outcomes align with equity goals and to allow OPM to further adjust its regulations and policies if changes are needed to achieve those goals. Because of massive investments in a legal system that criminalizes and incarcerates people of color, Black, Latinx, and Indigenous people are much more likely to have a record than white people.⁴⁴ On average in state prisons, Black people are incarcerated at over five times the rate of white people; in five states, at over 10 times the rate.⁴⁵ Nearly one-third of adult Black men have a felony record, as compared with 8 percent of the overall adult population.⁴⁶ These race disparities cannot be attributed to significantly different rates of offending.⁴⁷ Furthermore, while someone who has been incarcerated is much more likely to be jobless, it is especially likely for Black men and women with records.⁴⁸ White men and women face unemployment rates 14 percent and 18 percent higher, respectively, if they have been incarcerated.⁴⁹ Black men and women see much greater prison penalties: formerly incarcerated Black men and women see unemployment rates 27 percent and 37 percent higher, respectively, than their counterparts who have not been incarcerated.⁵⁰

G. Recognize that statistical discrimination arguments are misleading and insufficient reasons to limit ban-the-box policies. (Supplementary Information page 24898)

In the supplementary information accompanying the proposed rules, OPM requests comment on studies that purport to suggest that “implementation of Ban the Box results in lower employment for certain groups.”⁵¹

Some critics of ban-the-box policies cite the common—but often misleading—economic concept of “statistical discrimination” as a reason to abandon these policies. When an employer lacks access to criminal record

⁴⁴ Ashley Nellis, The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>; Leah Wang, Prison Pol’y Initiative, *The U.S. Criminal Justice System Disproportionately Hurts Native People* (Oct. 8, 2021), <https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday/>.

⁴⁵ The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

⁴⁶ 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 (2017) (using 2010 data).

⁴⁷ Studies demonstrate that, for example, while rates of drug usage are essentially equal among white and Black populations, arrests and convictions for drug offenses are much higher in the Black community. The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>. See also The Hamilton Project, “Chart: Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race” (2016), https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24898 (supplementary information under heading “Expected Impact of This Proposed Rule,” subheading “Request for Comment and Data”) (Apr. 27, 2022).

information, they say, the employer will use race as a proxy for a criminal record and decline to interview or hire Black and Latino applicants, who are statistically more likely to have a record.⁵² It remains unclear, however, whether this discrimination occurs; other studies observe very different trends.⁵³ Moreover, the same studies that purport to show statistical discrimination actually report increased hiring of most Black workers after the adoption of ban-the-box policies.⁵⁴ And even the loudest critics of banning the box support employers voluntarily removing “the box” and delaying background checks.⁵⁵

Even if “ban the box” critics are to be believed, what their studies reveal is employer racism that exists regardless of any ban-the-box policy. As explained by economist Bill Spriggs, “‘statistical discrimination’ is a constant micro-aggression”—a “polite” way of excusing racism in hiring.⁵⁶ Using race as a proxy for criminal history is illegal racial profiling.⁵⁷ Instead of avoiding a policy that helps ensure job opportunities for people with records in case it could result in racist hiring behaviors, employers should commit to educating hiring staff about racial bias and ensuring they understand fair chance hiring so that employees don’t experiment with racial profiling as a way to exclude applicants with records.

Seven notable researchers and economists submitted a letter to the House Committee on Oversight and Reform while the Fair Chance Act was being considered by that committee. The letter pushed back against arguments that ban-the-box policies result in overall negative outcomes for workers of color and cited research countering those arguments. The letter included many of the counter-arguments summarized above and can be referenced as OPM seeks to learn more about these arguments and counter-arguments.⁵⁸

⁵² Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 191-235 133 Q. J. of Econ. 191 (2018), <https://academic.oup.com/qje/article-abstract/133/1/191/4060073?redirectedFrom=fulltext>; Jennifer Doleac & Benjamin Hansen, *The Unintended Consequences of “Ban the Box”: Statistical Discrimination and Employment Outcomes When Criminal Histories are Hidden*, 38 J. Lab. Econ. 321 (2020), <https://www.journals.uchicago.edu/doi/full/10.1086/705880?af=R&mobileUi=0>.

⁵³ Terry-Ann Craigie, *Ban the Box, Convictions, and Public Employment*, 58 Econ. Inquiry 425 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3596435; see also Daniel Shoag & Stan Veuger, *No Woman No Crime: Ban the Box, Employment, and Upskilling*, (Harv. Kennedy Sch., Working Paper No. 16-015 No. 16-015, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2782599.

⁵⁴ Maurice Emsellem & Beth Avery, Nat’l Emp’t L. Project, *Racial Profiling in Hiring: A Critique of New “Ban the Box” Studies* 5-6 (2016), <https://www.nelp.org/publication/racial-profiling-in-hiring-a-critique-of-new-ban-the-box-studies/> (discussing the Agan, Doleac, and Shoag studies).

⁵⁵ For example, Jennifer Doleac has asserted “there’s no reason to expect that employers that voluntarily stop asking about applicants’ criminal records would begin discriminating based on race. . . . [W]e should encourage further employer education and action on this front.” Jennifer Doleac, Comment to “Policy Debates: How Can We Improve Ban the Box Policies?,” Urban Inst., <https://www.urban.org/debates/how-can-we-improve-ban-box-policies> (last visited Aug. 6, 2021).

⁵⁶ William Spriggs, *Is now a teachable moment for economists? An open letter to economists from Bill Spriggs*, Howard University Department of Economics, June 9, 2020, https://www.minneapolisfed.org/~media/assets/people/william-spriggs/spriggs-letter_0609_b.pdf.

⁵⁷ Such racial profiling in hiring violates Title VII of the Civil Rights Act of 1964, among other civil rights laws.

⁵⁸ Letter from Terry-Ann Craigie, Associate Professor of Economics, Connecticut College, et al., to the Honorable Elijah E. Cummings, Chairman, & Jim Jordan, Ranking Member, House Committee on Oversight & Reform (Mar. 25, 2019), available at <https://s27147.pcdn.co/wp-content/uploads/FairChanceAct-ResearcherLetter.3.5.2019-FINAL.pdf>.

H. Consider other suggestions for how the Federal Government can be a model employer with respect to individuals with criminal history records. (Supplementary Information page 24898)

In the supplementary information accompanying the proposed rules, OPM requests comment as to whether there are “additional ways that the Federal Government can be a model employer with respect to individuals with criminal history records.”⁵⁹ Throughout this comment letter, we have made numerous suggestions for improving these regulations in ways that will help the Federal Government become such a model employer. For example, we urged the Federal Government to collect from the hiring agencies data regarding the demographics and other information about who is being denied employment because of their criminal history record or hired despite it. The Federal Government should then analyze this data to ensure that the hiring policies are resulting in racially equitable outcomes and adjust the policies to further achieve those goals.

There are numerous other changes that the Federal Government can make to become a model employer. For example, even after a conditional offer, job applicants should not be asked to self-disclose their record. Individuals with records frequently and unintentionally make mistakes when asked to self-disclose their records. Moreover, responding to such requests causes a high level of anxiety for job applicants with records. A better way to determine the content of the candidate’s record is to skip asking them to self-disclose and instead simply conduct the required background check at the appropriate point in the hiring process and then confirm its content with the applicant. Therefore, OPM should revise Office of Personnel Management Optional Form 306 so that it does not ask job applicants to self-report their conviction or arrest history. Specifically, questions 9 and 11 should be removed from the form.⁶⁰ The misguided expectation of self-disclosure undermines fair chance hiring by distracting from what matters most—competence, qualifications, and experience. Far from ensuring trustworthiness or integrity, self-disclosure more often tests whether the job applicant understands and has memorized rap sheet details, many of which confuse even attorneys.

Another change the Federal Government can make is to eliminate inquiries about criminal history and criminal background checks altogether when the nature of the position does not necessitate a background check. While some positions may be sensitive in nature or provide access to classified information, not all positions with the Federal Government necessitate a thorough background check.

People with records not only deserve to be hired, they deserve to have stable employment and the ability to advance. After an individual with a record is hired, the Federal Government should also ensure individuals with records receive adequate support and have access to advancement opportunities. Anonymously tracking data related to tenure and advancement can help ensure people with records are supported within the agencies at which they work.

⁵⁹ Fair Chance to Compete for Jobs Act, 87 Fed. Reg. 24885, 24898 (supplementary information under heading “Expected Impact of This Proposed Rule,” subheading “Request for Comment and Data”) (Apr. 27, 2022).

⁶⁰ Office of Personnel Management Optional Form 306 (Oct. 2019), https://www.opm.gov/forms/pdf_fill/of0306.pdf. Question 9 asks candidates if “[d]uring the last 7 years, [they have] been convicted, been imprisoned, been on probation, or been on parole,” specifically including felonies, misdemeanors, and all other offenses. Question 11 asks candidates if they are “currently under charges for any violation of law,” meaning that the candidate must even list arrests and pre-conviction charges. Both questions also request additional details about the convictions and/or charges. *Id.*

Overall, each agency must promote internal commitment to hiring people with records and foster a workplace culture that embraces diversity and fosters the talent of Black, Latinx, and Indigenous workers. Hiring, screening, and human resources staff must receive thorough and repeated internal education about the Federal Government's commitment to fair chance hiring and to both allay fears sparked by stereotypes about people with records and counteract unconscious biases. Fair chance hiring reforms should be explained as part of the Federal Government's diversity, equity, and inclusion goals because bias against workers with records is inseparable from anti-Black racism.

* * *

As described above, we support the adoption of final regulations that provide additional clarity to both hiring agencies and the public, allow for effective enforcement of the new law, and reinforce the clear language and intent of the Fair Chance Act. Thank you for considering our comments and suggestions and for your commitment to effectively implementing the Fair Chance Act.

Sincerely,



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Submitted on behalf of NELP and the following organizations (listed alphabetically by organization):

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