

MARYLAND ALLIANCE FOR JUSTICE REFORM

Working to end unnecessary incarceration and build strong, safe communities



Policy Action Alert – April 16, 2019

This is an urgent note regarding a change in federal regulations. That change would require applicants for federal jobs to disclose whether they ever have been in a "diversion" program—whether or not any conviction resulted from the charges.

While not a part of Maryland law, this could have a significant impact on Marylanders for whom the federal government is one of the largest employers. It could create negative collateral consequences even for folks who successfully complete a diversion and who have no criminal convictions.

Please add your position to the [federal regulations comment form](#) by April 23rd. Below specifically are comments from Phil Caroom addressing the questions asked by the regulation form:

"As a former prosecutor, defense attorney and state judge, retired after many years of service in both criminal and juvenile courts, I am convinced this expanded disclosure requirement will waste federal investigators' time and, thus, taxpayers' funds without gaining significantly useful information. Responding to the specific questions raised by 44 U.S.C. 3506(c)(2) for evaluation of such regulations, here are more specific comments:

(i) Is the "information...necessary for the proper performance of the functions of the agency... [with] practical utility"?

The answer to this question is "no" for two reasons:

a) Information regarding pretrial diversions short of convictions has little value, since the courts and prosecutors approving such diversions already have evaluated the underlying charges as not serious enough to require further action.

b) Therefore, the federal agency resources needed to further pursue information about the underlying circumstances would be poorly allocated. Beyond this, U.S. government policy should encourage and not discourage criminal courts to resolve less serious charges without trial when this is acceptable to all parties. Such a policy will avoid our recent trend towards over-criminalization and reduce criminal

justice-related costs to taxpayers.

(ii) Has the agency's [correctly estimated] "the burden of the proposed collection of information"?

There might be little burden to collect the answers to the revised question, unless and until the agency was sued. But the real burden isn't tabulating the answers on a form, the real burden comes from the follow-up necessary to make intelligent use of the answers. Per comment (i), the effort necessarily would far exceed the value of charges already deemed not serious enough for prosecution by stakeholders who already have more knowledge.

(iii) Would the regulation "enhance the quality, utility, and clarity of the information to be collected?"

The answer to this question is "no" for the same reasons discussed above. The quality of the information would be minimal. Many times, court-imposed conditions may be as trivial as "pay the court costs" or "commit no new offenses within the next two years." Yet, federal investigators could be compelled to spend hours or days of follow-up to verify the years-old information then second-guess prosecutors, judges, and other stakeholders who, with more information, already decided it was not appropriate to pursue charges and to dispose of such matters without criminal convictions based on fuller and fresher information than was available to the federal investigators.

If a federal agency simply presumed that an individual probably was guilty of the underlying charges, or that he or she probably has an ongoing character defect that necessitated the diversion, this would violate the U.S. Constitution in more than one way (two examples being "presumption of innocence" and "due process"). Actual facts can differ greatly from allegations, and individuals often consent to diversion terms in order to avoid even a slight risk of criminal conviction."

Diversion programs have been used by the Maryland courts in sensitive and effective ways. The U.S. government policy should encourage, and not discourage, criminal courts to resolve less serious charges without trial when this is acceptable to all parties. Such a policy will avoid our recent trend towards over-criminalization and reduce criminal justice-related costs to taxpayers.

Please add you own comment to the [Federal Register form](#) by April 23rd.

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