



S. 697/H.R. 1893, the Next Step Act of 2019, is an important follow-up to the First Step Act criminal justice reform bill. Title VIII of the Next Step Act – entitled the Fair Chance Licensing Act (the Act) – aims to restrict the use of criminal conviction records by occupational licensing authorities, *occupational certification authorities*, and employers or others authorized to access criminal background checks. These “covered entities” would be prohibited from using criminal records to disqualify individuals from employment, occupational licensing, or occupational certification, unless the covered entity follows specific notice and consideration procedures and determines that the conviction directly relates to the job or profession. The bill also establishes a highly prescriptive notice requirement and appeals process if an individual is disqualified from employment/licensure/certification, solely or *in part because of* a criminal conviction that has a direct and negative bearing on the ability of the individual to perform the position or occupation sought.

It is unclear whether the bill is intended to only apply to governmental licensing or certification authorities, but the PCC urges Congress to amend the bill to ensure that the legislation does not intrude on private certification standards for competency and ethics/conduct and that the bill does not prevent licensing authorities from enforcing practice acts that require current certification, even if an applicant’s failure to hold current certification is linked to a criminal conviction.

### **Provisions of the Fair Chance Licensing Act That Affect Private Professional Certification**

The PCC supports the Act’s worthy objective of reducing recidivism by expanding opportunities for ex-offenders to earn a living. We believe, however, that Congress should not interfere with the well-established right of private certification organizations to determine what profession-specific certification requirements, both substantive and conduct-related, are necessary to qualify for the organization’s credentials.

The Act’s primary requirement is that states and localities may not use criminal conviction background checks unless they have enacted either: (1) a “qualifying background check law” or (2) “a law that is more favorable to an individual with a criminal history than a qualifying background check law.” The legislation states that a “qualifying background check law” must prohibit a “covered entity” from considering certain criminal history information – including a conviction that is not directly related to the position/occupation, deferred adjudication/diversion programs, sealed/dismissed/expunged convictions, juvenile adjudications, minor or older misdemeanor convictions, and felony convictions that are more than 5 years old – in determining whether to disqualify an individual from obtaining employment, licensure, or certification. The term “covered entity” includes “an occupational certification authority.” That term is not further defined in the bill.

With respect to convictions deemed “directly related” to a position/occupation, the legislation asserts that the covered entity must consider the nature/gravity of the conviction; the period of time that has elapsed since the conviction or the completion of the sentence; and the nature of employment/license/certification held or sought. The bill would also prohibit a covered entity from disqualifying an individual from employment, occupational licensure, or occupational certification “solely or in part because of” a directly related conviction if the individual can establish significant mitigation or rehabilitation and fitness to perform the duties of the position or occupation.

### **PCC’s Proposed Amendments to Fair Chance Licensing Act**

The Act’s provisions raise two significant concerns for PCC members:

- If an “occupational certification authority” includes private certification organizations, the Act represents an unprecedented intrusion into the prerogative of certification organizations to establish and enforce substantive and procedural provisions of ethics codes. Courts have long held that there is a “strong public policy against reviewing the substance of a private organization’s adjudication of a dispute regarding one of its members.” Because private credentialing organizations are subject matter experts regarding the expectations for their profession, courts are rightfully reluctant to dictate or second-guess the substance

of those expectations. Procedurally, private certification organizations must provide basic due process to applicants and credential holders, but the Act’s detailed and prescriptive procedural mandate trespass on the right of private certification organizations to establish their own procedures.

- Even if “covered entities” are defined only to cover employers and governmental licensing or certification agencies, requirements that are triggered if a decision is made “solely or in part because of a directly related conviction” can be interpreted to gut any regulatory or employer requirement that an applicant hold current certification, given that relevant criminal convictions may disqualify individuals from holding a private certification. Existing state licensure laws for healthcare and financial professionals require current private certification, as do licensure laws for safety-related roles, civil and professional engineers, and other professions in which significant expertise is needed to practice competently. These requirements serve to acknowledge both the importance of setting knowledge and conduct standards for the protection of the public and the value of having those standards defined by subject matter experts rather than by government officials.

Based on these considerations, the PCC requests the following amendments to the legislation to clarify that its requirements are not imposed on private certification organizations’ decisions and do not block enforcement of certification requirements in state professional practice acts:

1. **Insert the word “governmental” before all references to “occupational certification authority”, including in the definition of “covered entity.”**
2. **Change the phrase “solely or in part because of a directly related conviction” to “solely or expressly in part because of a directly related conviction.” This phrasing would still cover situations in which a licensing agency or employer disqualified an applicant based both on criminal conviction history and some other factor, but it would not cover disqualifications based on applicant’s lack of a required certification.**
3. **Insert a “safe harbor” provision to protect the substantive and conduct-related standards established by private certification organizations and to ensure that certification requirements are not removed from state professional practice acts.**

*Nothing in this chapter shall be construed to require a private certification organization to grant or deny private certification to any individual, nor alter or preempt any requirement in a federal, state, or local licensure statute or regulation for an individual to hold current private certification as a condition of licensure or renewal of licensure.*

The PCC looks forward to working with Congress to advance the important objectives of the Act without interfering with legitimate certification-related requirements in practice acts or dictating the substantive and procedural policies of private organizations.

### **About the Professional Certification Coalition**

The PCC is a nonprofit association founded to address legislative initiatives that affect professional certification programs and those who hold professional credentials. The PCC has well over 100 members, including non-governmental professional certification organizations, professional societies and service providers. The PCC’s members reflect a wide spectrum of professions, including health care, professional and civil engineering, human resources, financial services, and information technology, among many others. The PCC advances the best interests of those who use or rely on professional certification—such as employers, reimbursors, and the general public—as well as of individual certified professionals. Our founders – the American Society of Association Executives and the Institute for Credentialing Excellence – serve as the PCC’s Steering Committee.