



March 10, 2023

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

Re: Proposed Rule – Inmate Financial Responsibility Program: Procedures

Dear General Counsel's Office:

The National Association of Criminal Defense Lawyers (NACDL) submits this comment in response to the Bureau of Prisons' Proposed rule that would significantly change the regulations regarding the Inmate Financial Responsibility Program (IFRP).¹ We oppose these proposed changes, which are harsh and inequitable and will harm not only people who are incarcerated, but their families and dependents.

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.

To begin, NACDL is concerned that the primary impetus for this rulemaking, and its timing, may have been in large part occasioned by recent media reports of just three persons in BOP custody paying relatively low amounts of the restitution they owe.² These individuals are

¹ 28 C.F.R. § 545.

² See Devlin Barrett, *Prison Officials Allowed Convicted Sex Abuser Larry Nassar to Pay Little to Victims while Spending Thousands on Himself*, Wash. Post (July 28, 2021), https://www.washingtonpost.com/national-security/larry-nassar-prison-bank-account/2021/07/28/abdf6560-ee14-11eb-bf80-e3877d9c5f06_story.html; Devlin Barrett, *Prosecutors Seek Money From Boston Marathon Bomber's Prison Bank Account*, Wash. Post

extreme outlier cases whose level of personal wealth and other characteristics are not remotely similar to the vast majority of persons in BOP custody.³ As we imagine the Bureau and Department of Justice would agree, sensationalistic media reports focusing on an exceedingly low number of extreme outlier cases are an unsound basis for sweeping new administrative rules that would affect hundreds of thousands of people.

The truth is that the vast majority of people in federal prisons are poor. This proposed rule will harm people who need commissary money for necessities such as food, personal hygiene products, laundry soap, telephone calls to family, medical appointments, and socks and underwear.

The median annual income for incarcerated people aged 27 to 42 before incarceration was \$19,185; this is 41 percent lower than non-incarcerated people in the same range.⁴ Once in BOP custody, people can earn only between 12 cents and 40 cents per hour for their work.⁵

Taking 25 percent to 50 percent of these meager earnings, as the proposed rule would do, deprives people of the money they need for these necessities. These percentages are also arbitrary, and the rulemaking provides scant justification of why taking these amounts, as opposed to some other amounts, is necessary or helps achieve the program's stated goals. We are also concerned and surprised that the Bureau has proposed a system of flat percentages due to its reduced administrative and technical burden despite openly conceding that a progressive system

(Jan. 5, 2022), https://www.washingtonpost.com/national-security/boston-bomber-tsarnaev-prison-money/2022/01/05/f06963ee-166d-11ec-b976-f4a43b740aeb_story.html; Devlin Barrett, *Judge Orders R. Kelly's Prison-Account Money be Turned Over to Court*, Wash. Post (Sept. 9, 2022), <https://www.washingtonpost.com/national-security/2022/09/09/r-kelly-prison-account/>.

³ In addition to their considerable wealth, the people highlighted in media reports, *see supra* n.2, are public figures whose conduct garnered significant public and media attention. Additionally, these three individuals are facing life or *de facto* life sentences. Therefore, their willingness to participate in the IFRP may be considerably less than the vast majority of people because they are not incentivized by one of the most severe consequences of nonparticipation in the program, the loss of First Step Act Time Credits.

⁴ Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned*, Prison Policy Initiative (July 2015), available at <https://www.prisonpolicy.org/reports/income.html>.

⁵ Federal Bureau of Prisons, Work Programs, available at https://www.bop.gov/inmates/custody_and_care/work_programs.jsp.

would be “more equitable.”⁶ We urge the Bureau to abandon this approach and to develop a proposal that is driven by seeking equity, not mere administrative ease.

Additionally, the proposed rule would do away with the existing floor of \$75, which currently ensures that people have sufficient minimal resources to maintain telephone contact with their families. Of course, this floor may also help ensure that people have at least a small amount of commissary money to purchase the necessities described earlier, such as soap and underwear. Without a minimum amount that is exempt from taking, people may find themselves without these necessities. They may also become increasingly reliant on non-institutional resources. This will harm people both inside and outside the prison walls. The rationale supporting the existing policy of maintaining an amount that is exempt from taking is sound. It acknowledges the needs of people who are imprisoned and reduces the burden on family and friends who are outside of prison. We urge the Bureau not to abandon it.

We also strongly oppose the proposal that 75 percent of non-institution resources be taken for the IFRP process. Many people depend on their families to supplement their income to purchase the essentials BOP does not provide. But families of incarcerated individuals often face their own financial struggles. In a survey of formerly incarcerated people and their families, 63 percent said that family members were primarily responsible for covering conviction-related costs.⁷ The survey also showed that nearly half of working families could not afford these costs.

The likelihood of having a family member incarcerated is 61 percent higher for adults from households earning less than \$25,000 per year than those earning \$100,000 or more per year.⁸ Those who financially support people who are incarcerated are primarily low-income individuals. Low-income Black women in particular bear a higher burden of supporting loved ones in prison than any other demographic group.⁹ Helping a family member in BOP custody

⁶ Inmate Financial Responsibility Program: Procedures, 88 Fed. Reg. 1331 (proposed Jan. 10, 2023).

⁷ Saneta deVuono-powell, Chris Schweidler, Alicia Walters & Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families* at 9, Ella Baker Center, Forward Together, Research Action Design (Sept. 2015), available at www.whopaysreport.org [hereinafter “deVuono-powell et al., *Who Pays?*”].

⁸ Equal Justice Initiative, *Half of Americans Have Family Members Who Have Been Incarcerated*, December 2018, available at <https://eji.org/news/half-of-americans-have-family-members-who-have-been-incarcerated/>.

⁹ deVuono-powell et al., *Who Pays?*, *supra* n.7, at 9; Alabama Appleseed et al., *Under Pressure: How fines and fees hurt people, undermine public safety, and drive Alabama’s racial wealth divide* at 23 (2018), <https://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf>.

can result in a significant financial burden for these families, who are often already struggling to make ends meet. Many families report being forced to take out loans to cover these costs.¹⁰

The Bureau's proposal to take 75 percent of outside contributions to an individual's commissary account penalizes innocent family members and friends in the community who are trying to help their loved ones survive incarceration. Families and children will bear the burden of that financial penalty. Under the proposed amendment, a parent or spouse who wants to help ensure that their loved one is able to meet their daily needs would need to come up with \$400 in order to see that the person gets just \$100 in their commissary account. The extremely harsh rule of taking 75 cents of every dollar is harmful to low-income families and communities. If this rule becomes final, the Bureau would be actively perpetuating the cycles of poverty that so many families struggle to escape.

We also oppose the proposed IFRP because it conflicts with the requirements of the First Step Act ("FSA").¹¹ Although participation in the IFRP is voluntary, refusal to participate results in ineligibility to earn or apply First Step Act Time Credits.¹² This penalty is improper for two reasons: the IFRP fails to meet the individualized needs of federal prisoners as required by the FSA and also does not meet the definition of Productive Activity.

The BOP claims that the IFRP is an "Unstructured Productive Activity" under the First Step Act's Earned Time Credit ("FTC") program.¹³ To qualify for the FTC program, the First Step Act requires the BOP to assess the prisoner in thirteen needs areas and then assign programming to reduce the individual's risk of recidivating.¹⁴ In other words, each incarcerated person should receive an individualized determination of needs and an individualized determination of programming. The BOP's own FTC rule also makes clear that successful participation in a Productive Activity "requires a determination by Bureau staff that an eligible inmate has participated in . . . PAs that the Bureau has recommended based on the inmate's

¹⁰ deVuono-powell et al., *Who Pays?*, *supra* n.7, at 13-14.

¹¹ First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194 (2018), *available at* <https://www.congress.gov/115/plaws/publ391/PLAW-115publ391.pdf>.

¹² *See* 88 Fed. Reg. 1335.

¹³ The FSA created two different categories of programs: Evidence-Based Recidivism Reduction ("EBRR") Programs and Productive Activities ("PAs"). *See* First Step Act of 2018, §101 (codified at 18 U.S.C. §3635(5)).

¹⁴ Federal Bureau of Prisons Program Statement 5410.01, 8, *available at* https://www.bop.gov/policy/progstat/5410_01.pdf.

individualized risk and needs assessment.”¹⁵ The proposed IFRP, however, is not individualized. It applies across the board regardless of the prisoner’s actual needs.

In fact, the BOP could determine that a person in prison has a Finance/Poverty need yet still require him to participate in the IFRP to earn time credits.¹⁶ However, even if a person is determined to have a Finance/Poverty need, to participate in the FTC program the individual must allow BOP to take up to 75 percent of their funds, effectively rendering this “need” meaningless. Certainly, this non-individualized proposed rule, which will disproportionately harm poor people, could not meaningfully be said to develop financial planning skills, as the BOP contends.¹⁷

Moreover, the IFRP does not meet the definition of Productive Activity. The term “Productive Activity means either a group or individual activity that is designed to allow prisoners . . . to remain productive and thereby maintain a minimum or low risk of recidivating.”¹⁸ Instead of an activity for the incarcerated person to participate in, the proposed IFRP merely takes funds from the individual’s account. The IFRP certainly does not correspond with any Productive Activities listed in the BOP’s Programs Guide, which includes Trauma Education, Cognitive Behavioral Therapy, and Narcotics Anonymous.¹⁹ These programs engage the individual and provide them with new skills to ensure their success when they are released. The IFRP does not do that. In fact, it is entirely unclear how the IFRP would make individuals

¹⁵ 28 C.F.R. § 523.41(c)(2) (emphasis added).

¹⁶ The Finance/Poverty need requires the BOP to determine whether the incarcerated person has: any history of bankruptcy; no bank account; no assets or liabilities noted in PSR; debts noted in credit report or other source; tax liabilities/back taxes; unpaid alimony/child support; other indication of lack of financial management skills. Federal Bureau of Prisons, *First Step Act: Initial Review of the SPARC-13 Needs Assessment System*, U.S. Department of Justice, 2022, 7, 27, available at https://www.bop.gov/inmates/fsa/docs/bop_fsa_needs_validation_report_2021.pdf.

If the answer to any of these questions is yes, “the inmate has a finance/poverty need” and qualifies for EBBRs and PAs to address that need. *Id.*

¹⁷ See 88 Fed. Reg. 1331.

¹⁸ See First Step Act of 2018, §101 (codified at 18 U.S.C. §3635(5)).

¹⁹ Federal Bureau of Prisons, *First Step Act Approved Programs Guide*, 47-57 (Jan. 2023), available at https://www.bop.gov/inmates/fsa/docs/fsa_guide_eng_2023.pdf.

less likely to recidivate. The BOP has provided no evidence that the IFRP does, in fact, reduce recidivism, which is an underlying principle of the FTC program.²⁰

The BOP has acknowledged elsewhere that “[t]here is a direct correlation between poverty and criminality.”²¹ Under that premise, if the BOP truly seeks to reduce recidivism, it would be better served to ensure that people in prison have sufficient funds to meet their basic needs. Instead, this proposed rule would further harm people who are poor, thereby increasing the likelihood of recidivism, which the BOP claims to be—and ought to be—seeking to prevent.

In sum, NACDL opposes these proposed changes to the IFRP. The reality is that the vast majority of people in federal prison are not wealthy public figures. They are far more likely to come from low-income backgrounds and they use their small amounts of commissary money on life essentials. The proposed rule’s changes are arbitrary and inequitable. They will be harmful both to people living in prison and their loved ones outside of prison. We ask the Bureau to reconsider this rulemaking.

Sincerely,



Nellie L. King
President, NACDL

²⁰ Ames C. Grawert & Patricia L. Richman, *The First Step Act’s Prison Reforms*, Brennan Center for Justice at 2 (Sept. 23, 2022), available at <https://www.brennancenter.org/our-work/research-reports/first-step-acts-prison-reforms> (“The [First Step Act] aimed to create a system that would encourage people in prison to participate in programming designed to reduce recidivism — that is, the risk that they would come in contact with the criminal justice system, through arrest or otherwise, after release.”).

²¹ Federal Bureau of Prisons, *Initial Review of SPARC-13*, 27.