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

**Re: Comments on Docket No. BOP-2023-0001, RIN 1120-AB78,
“Inmate Financial Responsibility Program: Procedures”**

To Whom It May Concern:

On behalf of the Federal Public and Community Defenders, we submit this comment on the Bureau of Prisons’ (BOP) proposed rule regarding the Inmate Financial Responsibility Program (IFRP). At any given time, Federal Public and Community Defenders and other appointed counsel under the Criminal Justice Act represent 80 to 90 percent of all individuals in the federal criminal system because they cannot afford counsel.

A balanced approach to the IFRP should recognize basic facts of incarceration: people in federal prisons are overwhelmingly poor and from poor families; life behind bars can be expensive because everything in custody, from medical care to deodorant, costs money; and reentry success is advanced by incentivizing programming, encouraging connections to family in the free world, and allowing some amount of savings to aid in the individual’s community transition. Prioritizing achievable financial goals need not detract from risk reduction, economic stability, and humane conditions of incarceration.

After reviewing the proposed amendments, we encourage BOP to adopt reforms that make IFRP more accommodating and less punitive. At the same time, we strongly oppose measures that amount to a steep and regressive tax on the families

of individuals in custody, that remove necessary protections for outside communication, and that undermine important programming incentives.

I. Summary of Comments

The majority of people in federal prisons come from a background of financial insecurity. Indeed, “[i]ncarceration is both a predictor and a consequence of poverty.”¹ This is true not just for people imprisoned in BOP, but also for their families in the community, who are disproportionately poor and who face severe economic consequences when a family member is incarcerated. In this context, the IFRP seeks, with a heavy hand, to “encourage[]” people to meet their “legitimate financial obligations.”² That goal, though worthy, should not be met through means that sabotage other important aims of incarceration—health, safety, recidivism reduction, and reentry preparation. Nor should it come at the expense of impoverished families.

As set out below, we believe that several of the proposed amendments to the IFRP reflect sound policy, achieve the program’s purposes, and should be implemented immediately. These include the adoption of court-ordered payment plans and the reduction of adverse consequences for refusing to participate in IFRP.³

Other proposed amendments, however, advance exactly the opposite goals and should be rejected. In particular:

- The proposal to eliminate the \$75 phone allowance would do away with an important protection for maintaining family ties.⁴ The \$75 allowance should remain in place or even be expanded to account for other reasonable expenses in custody.

¹ Ella Baker Ctr., Forward Together, Rsch. Action Design, *Who Pays? The True Cost of Incarceration on Families* at 11 (2015), <https://bit.ly/co/Hcpa>.

² Fed. Bureau of Prisons, Program Statement 5380.08 at 1 (Aug. 15, 2005).

³ See Inmate Financial Responsibility Program: Procedures, 88 Fed. Reg. 1331, 1333, 1335 (proposed Jan. 10, 2023).

⁴ *Id.* at 1332–33.

- The flat-rate 75 percent allotment of community-provided funds is grossly disproportionate to any legitimate aim.⁵ It increases four-fold the financial burden on families who can ill afford it: to give their loved one \$100 of commissary or phone money, families will have to come up with \$400. Such an astronomical increase in IFRP contributions for individuals with limited resources will discourage participation, reducing restitution payments overall, and risks destabilizing the families who are essential to social and economic support upon reentry.
- Participation in the IFRP should not be made a condition for earning and applying time credits under the First Step Act. Congress conditioned earned time credits solely on participation in an “evidence-based recidivism reduction program” or a “productive activity.”⁶ The IFRP doesn’t fit the statutory definition of either. The amendment would also undermine the First Step Act’s incentive structure, negating the intended recidivism-reduction benefit. The existing consequences for IFRP non-participation, like limits on commissary spending, are sufficient.
- Lastly, the one-time payment clause should not be added to the regulation; it is unnecessary and confusing.

Fundamentally, none of the proposed increases to IFRP obligations appear empirically based. BOP has not published a comprehensive financial analysis of the financial resources and spending patterns of people in its custody. Thus, it is unclear to what extent the proposed IFRP changes would meaningfully address their financial obligations and equally unclear in what ways the increased financial burden would harm individuals in custody, their families in the communities, and the goal of successful reentry. The IFRP should not be substantially amended absent such an analysis.

⁵ *Id.* at 1333–34.

⁶ *See* 18 U.S.C. § 3635(3) & (5).

II. Several of the proposed IFRP amendments should be implemented immediately because they reflect good policy and achieve the program's objectives.

Two of the proposed amendments are commonsensical and should be implemented without delay.

First, BOP should immediately clarify that payment plans specifically set out in a person's judgment will be implemented as their financial plan under the IFRP.⁷ As noted in the proposal, this amendment is required as a matter of law; the authority to determine restitution payment plans lies with the courts and cannot be delegated.⁸ Moreover, the amendment makes good sense. District courts are often best situated to understand a person's ability to pay based on financial information received at sentencing and included in the presentence report.⁹

Second, BOP should also delete the superfluous penalties for declining to participate in IFRP—the housing-status penalty and the disqualification from community-based programming such as placement on home confinement or in a reentry center.¹⁰ Making IFRP less punitive is appropriate for a program that is intended to be voluntary, particularly because non-participation often reflects a lack of financial security rather than a lack of responsibility. As explained in the proposed amendment, “[a]n inmate’s refusal to participate in the IFRP should not be the sole determining factor in an inmate’s eligibility for placement in a community-based program[.]”¹¹

In fact, hand-in-hand with those changes, BOP should additionally consider removing ineligibility for early release upon completion of the residential abuse program (RDAP) from the listed consequences for IFRP non-participation.¹² RDAP is an intensive 9-to-12-month inpatient substance abuse program conducted in a

⁷ 88 Fed. Reg. at 1333.

⁸ *Id.*; see *Ward v. Chavez*, 678 F.3d 1042, 1046–51 (9th Cir. 2012).

⁹ See Fed. R. Crim. P. 32(d) (setting out information required to be included in the presentence report).

¹⁰ 88 Fed. Reg. at 1335.

¹¹ *Id.*

¹² See 18 U.S.C. § 3621(e).

separate treatment dorm where participants reside for the duration of their treatment.¹³ The program also requires follow-up outpatient treatment in the community after the participant is transferred to prerelease custody.¹⁴ Only those who volunteer for the program are eligible to be admitted.¹⁵ And RDAP is proven to be successful in reducing recidivism.¹⁶ Thus, graduating RDAP is a significant accomplishment that warrants the early-release incentive. Concomitantly, early release creates a strong incentive for individuals to participate in RDAP. Because RDAP and IFRP serve different purposes, declining to participate in IFRP should not automatically bar the RDAP incentive and benefit.

III. Other aspects of the proposed IFRP amendments should be rejected as overly burdensome and counterproductive to the fundamental aims of incarceration.

A. Incarceration should focus on reducing recidivism and promoting successful reentry so that people can return to productive work when they complete their sentences.

As Congress acknowledged when it passed the First Step Act, “the vast majority of federal prisoners will one day be released from BOP custody,” and it is in “the fiscal interest of the government to reduce recidivism [and] in the public safety interest as well.”¹⁷ Thus, the core focus of incarceration—aside from keeping individuals safe, secure, and healthy—should be on risk reduction and successful reentry. To be sure, the IFRP’s identified goals—encouraging incarcerated people to pay their financial obligations and supporting incarcerated individuals in developing financial

¹³ Fed. Bureau of Prisons, *Psychology Treatment Programs*, Program Statement 5330.11 ch. 2, at 2–8 (Mar. 16, 2009) (as amended by Fed. Bureau of Prisons, *Psychology Treatment Programs*, Program Statement 5330.11, CN–1 (Apr. 25, 2016)).

¹⁴ *Id.* ch. 2, at 8.

¹⁵ *Id.*

¹⁶ U.S. Sent’g Comm’n, *Recidivism and Federal Bureau of Prisons Programs: Drug Program Participants Released in 2010* at 5 (2022), <https://bitly.co/Herm> (“This study observed a significant reduction in the likelihood of recidivism for offenders who completed the Residential Drug Abuse Treatment Program or the Non-Residential Drug Abuse Treatment Program.”).

¹⁷ H.R. Rep. No. 115-699, at 22 (2018).

planning skills—can easily stand side-by-side with that broader focus, as financial competence and responsible repayment of debts undoubtedly facilitate reentry.

But that remains true only so long as IFRP's implementation accounts for the financial realities facing most individuals in custody. The proposed amendments fail that test. They make the IFRP so onerous for those in custody and their support network in the community that the program will be counterproductive not just to its own stated goals, but to incarceration's broader aims.

B. Most people incarcerated in the BOP and their families have insufficient financial resources to meet basic needs.

Setting aside a handful of high-profile exceptions, most people in custody have few financial resources. In fact, as stated above, 90 percent of people charged with federal crimes cannot afford to hire their own lawyers.¹⁸ Fewer than half of all incarcerated men nationally were employed in the three years prior to their incarceration, and, when employed, their median annual earnings were just \$6,250.¹⁹ Deficits in education provide one obvious cause of those low income levels. A 1997 Bureau of Justice Statistics survey found that only about one quarter of people in federal prison had completed high school, and only about a fifth reported passing the GED.²⁰ Cycles of substance abuse and racial inequality are also to blame.²¹ What is clear is that poverty and incarceration are inextricably linked; poverty “make[s] a person more susceptible to being arrested and more likely to be charged with a harsher crime and to receive a longer sentence.”²²

¹⁸ U.S. Courts, *Criminal Justice Act: At 50 Years, A Landmark in the Right to Counsel* (Aug. 20, 2014), <https://bitly.co/Hcs8>.

¹⁹ Tara O'Neill Hayes & Margaret Barnhorst, Am. Action F., *Incarceration and Poverty in the United States* at 3 (June 30, 2020), <https://bitly.co/HcsE>.

²⁰ Bureau of Just. Stats., *Special Report: Education and Correctional Populations* at 2 (Jan. 2003), <https://bitly.co/HcsF>.

²¹ Hayes & Barnhorst, *supra* note 19 at 3–5.

²² *Id.* at 3; *see id.* (“Adults in poverty are three times more likely to be arrested than those who aren’t, and people earning less than 150 percent of the federal poverty level are 15 times more likely to be charged with a felony—which, by definition, carries a longer sentence—than people earning above that threshold.”).

It is not just the people in prison but also their families in the community who are at financial risk. Again, the numbers speak clearly: “[A] family’s probability of being poor is 40 percent greater if the father is incarcerated.”²³ Two-thirds of families that have a member in jail or prison struggle to meet their basic needs, including food and housing.²⁴ And children are the vulnerable victims of this poverty problem. In 2016, almost a quarter of a million children (221,600), had a mother or father in federal prison.²⁵ Children who grow up in poverty are significantly more likely than their peers to experience incarceration themselves as adults.²⁶

1. Everything in BOP costs money, and it is often families who end up paying.

Unfortunately, poverty doesn’t get checked at the BOP’s door. Upon admission to federal prison, a person is provided with only the barest essentials: clothing, shoes, minimal hygiene items, and bedding.²⁷



Everything else costs money, and that does not mean just “extras,” but necessities. For instance, people in BOP custody:

²³ Michael D. Tanner, *Cato’s Project on Poverty and Inequality in California: Poverty and Criminal Justice Reform* at 1, <https://bitly.co/HcsX> (accessed Mar. 13, 2023).

²⁴ Timothy Williams, *Report Details Economic Hardships for Inmate Families*, N.Y. TIMES (Sept. 15, 2015), <https://bitly.co/Hcse>.

²⁵ Bureau of Just. Stats., *Parents in Prison and Their Minor Children* at 2 (Mar. 2021), <https://bitly.co/Hcsh>.

²⁶ Hayes & Barnhorst, *supra* note 19 at 3.

²⁷ Fed. Bureau of Prisons, *Entering Prison*, <https://bitly.co/Hcsl> (accessed Mar. 13, 2023).

- Must submit a \$2.00 copay for health care services for each requested sick call.²⁸
- Must purchase vitamins and over-the-counter medications like antacids, pain-relievers, and cough drops through the commissary, unless prescribed pursuant to BOP's national formulary.²⁹
- Must purchase their own hygiene products, including soap, shampoo, deodorant, toothpaste, mouthwash, toothbrushes, floss, and shaving supplies.³⁰
- Must purchase all clothing items beyond what is standard-issue, including shower shoes, socks, sneakers, underwear, pajamas, thermals, sweatpants, and sweatshirts.³¹
- Must purchase reading glasses if needed (although they will be provided prescription glasses—eventually).³²

Thus, people in prison have no choice but to turn to the commissary to maintain minimum levels of health, sanitation, and comfort. As one expert explained, the cost is significant:

[I]n today's Federal Bureau of Prisons, inmates are required to pay for virtually everything. And 'everything' is, of course, expensive. Soap at

²⁸ 28 C.F.R. § 549.70(b); Fed. Bureau of Prisons, *Inmate Copay Program*, Program Statement 6031.02 at 1 (Aug. 15, 2005) ("The Bureau will charge a copay fee for inmate requested visits to health care providers."). The copay is waived for "indigent" inmates, meaning those who have not had a trust fund account balance of \$6.00 for the past 30 days. Program Statement 6031.02 at 4.

²⁹ Fed. Bureau of Prisons, *Health Services: National Formulary Part I* at 38 (May 2, 2022), <https://bityl.co/Hcst>.

³⁰ See, e.g., Fed. Bureau of Prisons, *FCI/SCP Dublin Commissary List* (Apr. 7, 2022), <https://bityl.co/Hcsz>; Fed. Bureau of Prisons, *FDC SeaTac Commissary Shopping List* (Feb. 23, 2016), <https://bityl.co/Hct0>.

³¹ *Id.* Our clients report that standard-issue clothing is not warm enough for winter temperatures, and the standard-issue slip-on shoes will not serve for even minimal exercise, like walking the track.

³² *Id.*

a dollar a bar. Four dollars for toothpaste. Those who wish to exercise must buy sneakers at \$50.00 to \$80.00 a pair.³³

Food is also a universal commissary expense. Although BOP institutions are required to provide “nutritionally adequate meals, prepared and served in a manner that meets established Government health and safety codes,”³⁴ virtually everyone in custody supplements the provided meals with food from the commissary. There are a variety of reasons for this. For one, “nutritionally adequate meals” need not be healthy or filling, but can be loaded with starch, fats, and nutritional supplements that leave people feeling hungry.³⁵ Indeed, ramen purchased from the commissary is so pervasive that it has been described as “everybody’s staple in prison: No matter who you are, you’re cooking with ramen.”³⁶

Other individuals avoid the institution-provided food because of food quality-control issues, which were so numerous as to become the subject of a recent report by the Office of the Inspector General.³⁷ In one horrifying incident (which ultimately led to criminal convictions), 32 BOP institutions were provided adulterated beef that

³³ Christopher Zoukis, *Inmate Financial Responsibility Program: Shifting the Burden of Crime to the Families of Inmates* (Jul. 13, 2013), <https://bit.ly.co/Hct4>; see Justin Paperny, *What Should I Know About Food Services and Prison Commissary?* (Nov. 14, 2020), <https://bit.ly.co/Hct9> (“[T]ypically, a person needs about \$100 a month to get basic toiletries and so forth in prison.”).

³⁴ Fed. Bureau of Prisons, *Food Service Manual*, Program Statement 4700.06 at 2 (Sept. 13, 2011) (as amended by Fed. Bureau of Prisons, *Food Service Manual*, Program Statement 4700.06, CN–1 (June 8, 2022)).

³⁵ See, e.g., Amanda Chan & Anna Nathanson, “Not for Human Consumption”: Prison Food’s Absent Regulatory Regime, 29 WM. & MARY BILL OF RTS. J. 1009, 1020 (May 2021) (describing practices and providing examples).

³⁶ Maria Godoy, *Ramen Noodles Are Now the Prison Currency of Choice*, NPR (Aug. 26, 2016), <https://bit.ly.co/HctN>.

³⁷ See Office of Inspector Gen., U.S. Dep’t of Just., *Management Advisory Memorandum of Concerns Identified with the Federal Bureau of Prisons’ Procurement of Food Products* at 3–4 (June 2020), <https://bit.ly.co/HctY> (referring to “multiple” instances of BOP receiving “substandard” products) (“OIG Food Report”); see also *Hudson v. Kennedy*, 2013 WL 4778700, at *7–8 (W.D. Pa. Sept 5, 2013) (adopting magistrate report and recommendation denying summary judgment on claim that BOP officials knowingly permitted incarcerated people to be served insect-infested food for weeks).

included “whole cow hearts labeled as ‘ground beef.’”³⁸ Commissary-purchased food can be used to create much healthier diets, as one person reported:

I never eat off the mainline. . . . Since I’m going to be in prison for over two decades, I’m consciously taking every precaution to preserve my health. . . . I quit eating all meat and all fried foods. With support from family, I buy cans of tuna and mackerel from the commissary that I bring with me whenever I come to the chow hall. I grab a bowl of rice and beans from the hot bar, and vegetables from the salad bar. Then I mix in my canned fish, and that’s my meal.³⁹

Beyond commissary purchases, people in custody ordinarily must also pay for all outside communications by phone and email. These communications are critical, as numerous studies link strong family contact during incarceration to success on reentry.⁴⁰ BOP’s telephone system is set up with that very principle in mind: to “encourage . . . family ties.”⁴¹ BOP allows people in custody a maximum of 300 minutes per month, or approximately one 10-minute call per day.⁴² Emailing is also

³⁸ OIG Food Report, *supra* note 37 at 3.

³⁹ Paperny, *supra* note 33.

⁴⁰ Johanna B. Folk, et al., *Behind Bars but Connected to Family: Evidence for the Benefits of Family Contact During Incarceration*, 33 J. FAM. PSYCH. 453, 453 (2019), <https://bitly.co/Hcto> (“[T]hose who maintain contact with their families during incarceration tend to function more adaptively post-release.”); see U.S. Dep’t of Health & Hum. Servs., *Incarceration and the Family: A Review of Research and Promising Approaches for Serving Fathers and Families* at SP-1 (2008), <https://bitly.co/Hctq> (“Most men plan to live with their families upon release, and those who report positive family and parenting relationships during reentry are less likely to recidivate.”).

⁴¹ Fed. Bureau of Prisons, *Trust Fund/Deposit Fund Manual*, Program Statement 4500.12 ch. 6.4, at 57–58 (Mar. 14, 2018).

⁴² In 2020, as part of its response to the COVID-19 pandemic, BOP increased the monthly cap from 300 minutes to 500 minutes and made all calls free. See Video Visiting and Telephone Calls Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 85 Fed. Reg. 37335 (June 22, 2020). Those benefits are set to end when the CARES Act emergency declaration ends on May 11, 2023. When reinstituted, the phone rates should be capped at \$0.12 per minute. See Fed. Comm’n’s Comm’n, *FCC Lowers Interstate and International Prison Phone Rates* (May 20, 2021), <https://bitly.co/Hcu0>. However, BOP’s website still lists phone rates of \$0.21 per minute for long-distance calls. See Fed. Bureau of Prisons, *Long Distance Phone Rates Reduced*, <https://bitly.co/Hcu2>.

available through the TRULINCS system at a rate of \$0.05 per minute, adding to the costs for people who do not want to be isolated from the lives of their loved ones.

Paltry prison wages do little to offset these basic food, medicine, and communication costs. For people who are allowed to work in UNICOR, which offers the best wages, pay ranges from \$0.23 to \$1.15 per hour.⁴³ But that applies to only a very small component—8 percent—of the prison population (about 12,600), leaving twice that number (25,000) on the waiting list.⁴⁴ Anyone else who is given an institutional work assignment will be paid between \$0.12 to \$0.40 per hour.⁴⁵ By regulation, most of those institutional workers (55 percent) are paid at the low end of that range.⁴⁶ That baseline maintenance pay amounts to less than \$5 a week. Prison wages have not increased in at least 23 years, despite the fact that wages nationally have nearly doubled in the same time.⁴⁷

The result is inevitable: the financial strain of BOP incarceration is borne not only by people in custody through their miniscule wages, but by their families in the communities who already have little extra to spare. Research has shown that it is family members, usually women, who bear the primary financial burden of incarceration, including court fines and fees and the cost of traveling for prison visitation.⁴⁸ In many cases, the financial burden is heavy enough to push families

⁴³ Fed. Bureau of Prisons, *UNICOR Program Details*, <https://bityl.co/HcuA> (accessed Mar. 13, 2023).

⁴⁴ *Id.*; see also Fed. Bureau of Prisons, *Population Statistics*, <https://bityl.co/HcuC> (accessed Mar. 13, 2023) (reporting 158,259 total federal inmates as of March 9, 2023).

⁴⁵ Fed. Bureau of Prisons, *Work Programs*, <https://bityl.co/HcuF> (accessed Mar. 13, 2023).

⁴⁶ 28 C.F.R. § 545.26(b).

⁴⁷ Office of Inspector Gen., U.S. Dep't of Just., *The Federal Bureau of Prisons' Inmate Financial Responsibility Program* (Sept. 2000), <https://bityl.co/HcuG> (reporting the exact same pay rates in IFRP audit from 2000); Soc. Sec. Administration, *Average Wage Index* <https://bityl.co/HcuL> (accessed Mar. 13, 2023) (reporting an increase of the Average Wage Index from \$32,154.82 in 2000 to \$60,575.07 in 2021, the last year for which a statistic is reported).

⁴⁸ Ella Baker Ctr., *supra* note 1 at 13 (“In 63% of cases, family members on the outside were primarily responsible for court-related costs associated with conviction. Of the family members primarily responsible for these costs, 83% were women.”); see also Zoukis, *supra* note 33.

into debt.⁴⁹ In one survey of families of incarcerated people, more than 34 percent of the respondents reported going into debt just to pay for phone calls or visitation.⁵⁰

2. The proposal to make IFRP even more burdensome will be counterproductive.

The proposal to make IFRP more onerous ignores the forest for the trees. Prioritizing repayment of financial obligations while individuals are in custody, when their wages are almost nil, makes little sense. Instead, for whatever “extra” money may exist, the priority should be on saving for successful reentry. This is particularly true given the substantial economic barriers to reentry that already exist for people releasing from prison, including limited employment opportunities, depressed wages, loss of government housing benefits, and disqualifications from student grants and loans.⁵¹ Some groups aimed at improving reentry outcomes have even begun offering people cash during their first few months after release in recognition that financial instability during the critical first months contributes to reincarceration.⁵² Congress acknowledged the same point in the First Step Act by requiring people with higher-paying UNICOR jobs to have 15% of their wages set aside for reentry.⁵³ Helping individuals overcome reentry obstacles and achieve lasting economic stability will better ensure that they are able to pay off their financial obligations in the long run than increasing their payments while in custody.

For similar reasons, increasing the financial burden of incarceration on families and communities outside of BOP is also likely to thwart long-term repayment goals. The families of the formerly incarcerated are “the primary resource for housing,

⁴⁹ Williams, *supra* note 24.

⁵⁰ Ella Baker Ctr., *supra* note 1 at 30.

⁵¹ *see* Exec. Office of the President, Council of Econ. Advisers, *Economic Perspectives on Incarceration and the Criminal Justice System* at 45 (Apr. 2016), <https://bitly.co/Hcuf>; Tanner, *supra* note 23 at 1 (“Someone who has been incarcerated can expect to earn roughly 40 percent less than someone who has avoided detention.”); Williams, *supra* note 24.

⁵² Patricia Leigh Brown, *For People Just Leaving Prison, a Novel Kind of Support: Cash*, N.Y. TIMES (Jul. 7, 2022), <https://bitly.co/Hcuj>.

⁵³ *See* Pub. L. No. 115-391 § 605, 132 Stat. 5194, 5242–43 (2018). Notably, the First Step Act did not include any similar set-aside for lower-paying prison jobs.

employment, and health needs” for people released from prison.⁵⁴ In fact, two-thirds of people releasing from prison turn to their family members for support in housing, and more than one-third seek assistance from family members in finding employment.⁵⁵ Research has consistently shown that this type of material family support decreases recidivism.⁵⁶ Thus, requiring the families of people in BOP custody to contribute even more money while their loved ones are in custody will directly reduce the support that those families can provide upon release, leading to decreased stability and higher levels of recidivism.

Moreover, increasing IFRP payments to the breaking point will disincentivize participation by individuals whose families simply cannot afford the mandatory contributions. Less participation means an overall reduction of crime victim restitution payments—exactly opposite of the intended outcome. For those who do participate, many will likely have to make Hobson’s choices with the money that remains—paying for a needed sick-call or saving for a call home.

3. The \$75 phone allowance should not be eliminated; it should be increased to allow for responsible commissary spending that promotes health and well-being.

The proposed IFRP amendment suggests eliminating the \$75 phone allowance and claims that the allowance is unnecessary for two reasons: (1) there are already “safeguards” in place through 28 C.F.R. § 540.105 to ensure that people can maintain family contact; and (2) the IFRP already requires payment plans to take into account “any reasonable expenditures required by the inmate,” presumably including phone costs.⁵⁷ Neither reason is supported, and the proposed change should be rejected.

As to the first reason, it is overly generous to describe § 540.105 as a “safeguard” that ensures adequate family contact. That regulation requires only that people who

⁵⁴ Ella Baker Ctr., *supra* note 1 at 13.

⁵⁵ *Id.* at 26, 31.

⁵⁶ Thomas J. Mowen, et al., *Family Matters: Moving Beyond “If” Family Support Matters to “Why” Family Support Matters During Reentry from Prison*, 56 J. RSCH., CRIME & DELINQ. 483 (2019) (concluding that “instrumental” support, as distinct from emotional and instructional support, has the highest correlation with reduced recidivism).

⁵⁷ 88 Fed. Reg. at 1332–33.

are indigent (someone who has a trust account balance of less than \$6 for the past 30 days) be allowed a single collect call *per month*, and it permits phone costs to be waived in “compelling circumstances” like a family emergency.⁵⁸ But one call per month is plainly insufficient given the strong correlation between family ties and reentry success.⁵⁹ Indeed the correlation extends to the *frequency* of the family contact: more phone calls equals lower recidivism.⁶⁰ Even BOP’s own website touts the importance of regular phone contact to recidivism reduction: “Studies show that when inmates maintain relationships with friends and family, it greatly reduces the risk they will recidivate.”⁶¹ Congress echoed this point when it embedded family reunification as a priority in the First Step Act.⁶² Thus, § 540.105 in no way substitutes for the \$75 phone allowance.

The second proposed reason for eliminating the \$75 phone allowance—the assertion that “reasonable expenditures” will already be considered—should be rejected because it is more difficult to administer than the existing rule and it injects subjectivity and arbitrariness into the determination of IFRP payment plans. One administrator may deem \$50 of communication expenses to be exorbitant while another allows \$150 of phone and email time as a reasonable expense. The existing \$75 set-aside, by contrast, is objective and easy to administer. And it is equitable, because it will have the most beneficial impact on those who have the least resources. For example, someone who maintains an account balance of only \$100 over a six-month period can be certain that, at most, \$25 will be considered available for IFRP payments, leaving the majority of his limited sums untouched. But maintaining that \$75 floor also will not shield wealthy people from their

⁵⁸ 28 C.F.R. § 540.105(b), (d).

⁵⁹ See generally *supra* note 40 and accompanying text.

⁶⁰ Folk, et al., *supra* note 40 at 459 (“[H]aving more frequent contact with family during incarceration predicts increases in family connectedness, which in turn predicts better mental health during the first year post-release.”).

⁶¹ Fed. Bureau of Prisons, *Stay in Touch*, <https://bityl.co/HcvI> (accessed Mar. 13, 2023).

⁶² As amended by the First Step Act, 18 U.S.C. § 3621(b) mandates that BOP “shall [subject to various considerations] place the prisoner in a facility as close as practicable to the prisoner's primary residence,” and within 500 miles when practicable. Pub. L. No. 115-391 § 601.

financial obligations. Someone who maintains an account balance of \$10,000 will have the bulk of that balance—\$9,925—scrutinized for a reasonable IFRP payment.

Rather than eliminating the \$75 phone allowance, BOP should consider expanding the set-aside to account for reasonable commissary spending. As noted, commissary items are not mere “extras,” but are in many instances essential. An objectively determined allowance for those costs, set aside from IFRP consideration, would protect financially vulnerable incarcerated people and their families without infringing on IFRP’s primary objectives.

In any event, any decision to eliminate or expand the IFRP-exempt allowance should be made only after a full financial audit of the IFRP and inmate trust account balances and spending.⁶³

4. The 75 percent mandatory levy on community deposits ignores that, in most cases, community deposits are critical for incarcerated people to afford basic necessities.

The jaw-dropping new requirement that incarcerated people allot a minimum 75 percent of community deposits to their financial obligations should be rejected. We appreciate BOP’s recognition that this suggestion creates “concerns” and its promise to consider input before finalizing this new proposed structure.⁶⁴ Our concerns are many.

At base, the suggestion lacks any justification in the proposal itself, beyond asserting “the importance of satisfying financial obligations,” and noting that the change has the benefit of administrative ease: a “single, flat percentage” would apply to all community deposits, regardless of financial need.⁶⁵ But administrative ease is not the same thing as an affirmative justification for taking 75 percent of the money contributed by an individual’s family. And, as admitted in the proposal, the

⁶³ According to its website, the Office of the Inspector General is currently conducting an audit of the IFRP, but the results of that audit are not yet available. *See* Office of the Inspector Gen., U.S. Dep’t of Just., *Audit of the Federal Bureau of Prisons’ Inmate Financial Responsibility Program*, <https://bitly.co/HcvN> (accessed Mar. 13, 2023).

⁶⁴ 88 Fed. Reg. at 1334.

⁶⁵ *Id.*

suggestion is also inequitable: it is a regressive tax whose impact will be felt far more keenly by those with limited income than those with greater resources.⁶⁶

Seventy-five percent is also too steep a penalty. A standard court-imposed payment plan, for comparison, usually requires a person to pay only 10 percent of their gross income toward restitution. Here, the proposal offers no indication that lower percentages were ever even considered. Setting this high a rate can only signal the belief that community contributions are essentially “spare” money that is not really needed. But no evidence supports that conclusion. Prison wages are so meager that—far from having spare money to pay toward their financial obligations—incarcerated people must rely on their families to obtain basic necessities while incarcerated. Additionally, not all people in prison are able to work.

Diverting 75 percent of needed community contributions to IFRP would have devastating results. Families—already financially stretched by the absence of an incarcerated loved one and who committed no crime themselves—are faced with an inhumane and counterproductive choice: either deprive their family member of necessary financial support while they are in prison or come up with quadruple the money to care for them; \$100 in expenses becomes \$400 out of the family’s pocket.

Because it is so onerous, the proposal risks compromising IFRP’s goals. Some families will understandably withhold contributions in order to avoid the new levy, leaving people in custody without adequate resources and reducing overall contributions to court-ordered financial obligations. Other people will likely decline to participate in IFRP in order to protect the contributions sent by their families, again reducing overall financial contributions.

Further, the 75 percent mandatory, flat-rate allotment is not necessary to prevent the very few wealthy individuals in BOP custody from avoiding their financial obligations. Rather, as described in the proposed amendment, the existing IFRP system gives BOP staff flexibility to increase required IFRP payments when an individual’s deposits exceed any reasonable expenditures.⁶⁷

In sum, the 75 percent allotment should be firmly discarded as bad policy. If BOP adopts a percentage rate approach to community contributions, then the rate should be progressive, and all rates should be far lower than 75 percent. And, at a

⁶⁶ *Id.*

⁶⁷ *Id.* at 1332.

minimum, BOP should not implement a new, across-the-board toll on community deposits without first conducting a full financial audit of the IFRP, including inmate trust account balances and spending, to determine the potential impact of the change.

5. Making individuals who decline to participate in IFRP ineligible for earned time credits under the First Step Act is counterproductive to rehabilitation and likely unlawful.

The proposal to make individuals who decline to participate in IFRP also ineligible to earn or apply earned time credits under the First Step Act should be rejected. IFRP and the FSA time credit system are separate programs with separate goals. Linking the two advances the goals of neither.

Earned time credits were among the central reforms created by the First Step Act with the express goal of *reducing* recidivism and *enhancing* public safety. The basic premise is simple and smart: Congress incentivized participation in targeted recidivism reduction programming by offering individuals time off their sentences.⁶⁸ The amount of credits that can be earned, and thus the amount of early release, is based on the amount of successful programming. At baseline, 30 days of participation in evidence-based recidivism reduction programming or productive activities translates to 10 days of FSA credit.⁶⁹ When a person has credits equal to the time left on his or her sentence, then they become eligible for transfer to either prerelease custody (placement in a reentry center or on home confinement) or supervised release.⁷⁰ While the supervised release benefit—essentially a sentence reduction—is capped at 12 months, there is no maximum number of credits that can be used toward transfer to prerelease custody.⁷¹ Thus, people who commit to significant rehabilitative programming can receive a significant reduction of their time in custody.

While Congress left some aspects of the earned time credit program in BOP's discretion, Congress was precise in defining *who* can earn credits, *how* people earn

⁶⁸ 18 U.S.C. § 3632(d).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ 18 U.S.C. § 3624(g)(1)–(3).

credits, and *when* BOP must apply those credits to early release. As to *who*, Congress included a detailed list of 68 categories of offenses that disqualify anyone serving a sentence for those offenses from earning time credits.⁷² Regarding *how* to earn credits, Congress was equally specific: “[a] prisoner *shall earn*” credit for every 30 days of “successful participation in evidence-based recidivism reduction programming or productive activities.”⁷³ And as for *when* those credits will be applied, Congress directed that BOP “*shall transfer* eligible prisoners . . . into prelease custody or supervised release.”⁷⁴

Nowhere in the First Step Act did Congress condition earned time credits on participation in IFRP. Nor should it have. The financial goals advanced by IFRP are separate from the recidivism-reduction goals of the earned time credit system. The decision to decline IFRP participation often stems from financial insecurity, and it does not diminish the value of an individual’s recidivism-reduction programming like completing a drug treatment program, a parenting class, or a vocational training program. And just as BOP proposes that non-participation in IFRP “should not be the sole determining factor in an inmate’s eligibility for placement in a community-based program,”⁷⁵ it also should not automatically disqualify individuals from receiving the full benefit of their beneficial program participation.

BOP claims that IFRP is considered “an unstructured Productive Activity,” such that declining to participate in it constitutes a refusal to engage in programming. But “productive activity” is defined by statute to mean “either a group or individual activity that is designed to allow prisoners determined as having a minimum or low risk of recidivating to remain productive and thereby maintain a minimum or low risk of recidivating. . . .”⁷⁶ The IFRP doesn’t match any part of that definition: it is not an “activity,” it is not solely for “minimum or low risk” individuals, and it

⁷² 18 U.S.C. § 3632(d)(4)(D).

⁷³ *Id.* at § 3632(d)(4)(A)(i) (emphasis added).

⁷⁴ *Id.* at §3632(d)(4)(C) (emphasis added); *see also* 18 U.S.C. § 3624(g) (setting out the criteria to qualify as an “eligible prisoner”).

⁷⁵ 88 Fed. Reg. at 1335.

⁷⁶ 18 U.S.C. § 3635(5).

doesn't allow anyone to "remain productive."⁷⁷ It solely requires agreement to a financial payment plan.

IFRP also does not fall within the description of unstructured productive activities in BOP's Program Guide, which states that unstructured productive activities must be individually recommended to address an individual's needs.⁷⁸ IFRP is not assigned based on an assessed need; it is an across-the-board requirement for any inmate with an outstanding financial obligation. And the Program Guide refers to "a wide range of *activities* including work assignments, community service, individual led classes, and other unstructured but valuable ways *to spend time*."⁷⁹ But the IFRP is not an "activity" on which someone can "spend time."

Separately from earning time credits, the First Step Act also carefully delineates the criteria for applying time credits for transfer, and IFRP participation is not among them.⁸⁰ BOP therefore has no discretion to deny transfer to a person who has earned time credits equal to the remainder of their sentence on the grounds that the person is not enrolled in IFRP.

Non-participation in IFRP already carries serious consequences, and those consequences amply incentivize participation without adding yet another penalty. Conversely, making individuals ineligible to realize any benefit from their recidivism-reduction programming based on the financial decision to decline IFRP risks undermining the incentive structure that Congress intended. Thus, the separate programs should stay separate.

⁷⁷ Construing the IFRP as a "productive activity" is also inconsistent with other BOP regulations, which describe productive activities and evidence-based recidivism reduction programs as programs "recommended *based on the inmate's individualized risk and needs assessment*." 28 C.F.R. § 523.41(c)(4)(v) (emphasis added). That is different in kind from the IFRP.

⁷⁸ Fed. Bureau of Prisons, *First Step Act Approved Programs Guide* at 2 (Jan. 2023), <https://bit.ly.co/Hcvl>.

⁷⁹ *Id.* at 47 (emphases added).

⁸⁰ 18 U.S.C. § 3624(g)(1).

6. The one-time payment option should remain as it is in the Program Statement.

In its existing form, BOP's program statement directs that, during their initial designation, BOP staff should encourage individuals to make a one-time payment to satisfy their financial obligations, particularly when the total amount owed is \$100 or less and the individual has enough money to pay the obligation completely.⁸¹ That existing policy statement works, and it should be retained.

The proposal to codify and expand the one-time payment rule, to make it universally applicable regardless of how much money the individual owes in comparison to how little they have available, and to require notification to the United States Attorney's offices if the individual declines to pay off "a fine or restitution" that is theoretically within their means, would simply create needless work with little upside.

One problem is that the new regulation is ambiguous regarding individuals with multiple financial obligations. Would a defendant who owed three \$100 fee assessments and who has \$200 in their trust account be reported to the U.S. Attorney's office because they have enough money to pay off two of the three assessments in full, although they cannot pay the aggregate total? What if the total obligation is owed jointly and severally with another codefendant?

Further, there are good reasons that a person who comes into custody with enough money to pay off their financial obligations will decline to make a one-time payment. The beginning of a sentence of imprisonment is a time of uncertainty when the individual does not know what to expect. It is the most expensive time, too, as the individual has to cover all of their necessary expenses up front—shower shoes, toothpaste, soap, shampoo, underwear, over-the-counter medication, etc.—and they won't receive an institutional work assignment until sometime later. Often, family members save money for that very purpose. Mandating that every one of those cases be reported to the U.S. Attorney's Office makes busy work without commensurate purpose.

On the other hand, when an individual truly has ample financial resources yet refuses to make adequate payment, nothing in the existing policy statement

⁸¹ Program Statement 5380.08 at 9.

prohibits staff from forwarding that information to the appropriate Financial Litigation Unit for consideration. Therefore, no change is needed.

IV. Conclusion

In sum, IFRP should not be amended without taking full account of the financial reality that most people in custody struggle to make ends meet, and their incarceration imposes a heavy financial burden on the very families they will look to for support upon release. IFRP should prioritize achievable financial goals without detracting from risk reduction, economic stability, and humane conditions of incarceration. Unfortunately, many of the proposed amendments do not reflect that approach but instead make IFRP less accommodating and more financially punitive. Whatever increased payments might be gained in that manner come at the steep cost of increased recidivism and reduced public safety.

Thank you for your attention to these comments.

Very truly yours,

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